

SENATE BILL NO. 463—COMMITTEE ON JUDICIARY

MARCH 24, 2003

Referred to Committee on Judiciary

SUMMARY—Adopts Uniform Computer Information Transactions Act. (BDR 8-1028)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

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EXPLANATION – Matter in *bolded italics* is new; matter between brackets [omitted-material] is material to be omitted.

AN ACT relating to computer information transactions; adopting the Uniform Computer Information Transactions Act; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 **Section 1.** Title 8 of NRS is hereby amended by adding
2 thereto a new chapter to consist of the provisions set forth as
3 sections 2 to 186, inclusive, of this act.

4 **Sec. 2.** *This chapter may be cited as the Uniform Computer*
5 *Information Transactions Act.*

6 **Sec. 3.** *As used in this chapter, unless the context otherwise*
7 *requires, the words and terms defined in sections 4 to 80,*
8 *inclusive, of this act have the meanings ascribed to them in those*
9 *sections.*

10 **Sec. 4.** *“Access contract” means a contract to obtain by*
11 *electronic means access to, or information from, an information*
12 *processing system of another person, or the equivalent of such*
13 *access.*

14 **Sec. 5.** *“Access material” means any information or*
15 *material, such as a document, address or access code, that is*
16 *necessary to obtain authorized access to information or control or*
17 *possession of a copy.*

18 **Sec. 6.** *“Aggrieved party” means a party entitled to a remedy*
19 *for breach of contract.*



1 **Sec. 7.** *“Agreement” means the bargain of the parties in fact*
2 *as found in their language or by implication from other*
3 *circumstances, including course of performance, course of*
4 *dealing and usage of trade, as provided in this chapter.*

5 **Sec. 8.** *“Attribution procedure” means a procedure to verify*
6 *that an electronic authentication, display, message, record or*
7 *performance is that of a particular person or to detect changes or*
8 *errors in information. The term includes a procedure that requires*
9 *the use of algorithms or other codes, identifying words or*
10 *numbers, encryption, or callback or other acknowledgment.*

11 **Sec. 9.** *“Authenticate” means:*

- 12 1. *To sign; or*
13 2. *With the intent to sign a record, otherwise to execute or*
14 *adopt an electronic symbol, sound, message or process referring*
15 *to, attached to, included in, or logically associated or linked with,*
16 *that record.*

17 **Sec. 10.** *“Automated transaction” means a transaction in*
18 *which a contract is formed in whole or part by electronic actions*
19 *of one or both parties which are not previously reviewed by an*
20 *individual in the ordinary course.*

21 **Sec. 11.** *“Burden of establishing” a fact means the burden of*
22 *persuading the triers of fact that the existence of the fact is more*
23 *probable than its nonexistence.*

24 **Sec. 12.** *“Cancellation” means the ending of a contract by a*
25 *party because of breach of contract by another party.*

26 **Sec. 13.** *“Computer” means an electronic device that accepts*
27 *information in digital or similar form and manipulates it for a*
28 *result based on a sequence of instructions.*

29 **Sec. 14.** *“Computer information” means information in*
30 *electronic form which is obtained from or through the use of a*
31 *computer or which is in a form capable of being processed by a*
32 *computer. The term includes a copy of the information and any*
33 *documentation or packaging associated with the copy.*

34 **Sec. 15.** *“Computer information transaction” means an*
35 *agreement or the performance of it to create, modify, transfer or*
36 *license computer information or informational rights in computer*
37 *information. The term includes a support contract under section*
38 *152 of this act. The term does not include a transaction merely*
39 *because the parties’ agreement provides that their*
40 *communications about the transaction will be in the form of*
41 *computer information.*

42 **Sec. 16.** *“Computer program” means a set of statements or*
43 *instructions to be used directly or indirectly in a computer to bring*
44 *about a certain result. The term does not include separately*
45 *identifiable informational content.*



1 **Sec. 17. 1. “Consequential damages”** resulting from
2 *breach of contract includes:*

3 (a) *Any loss resulting from general or particular requirements*
4 *and needs of which the breaching party at the time of contracting*
5 *had reason to know and which could not reasonably be prevented;*
6 *and*

7 (b) *Any injury to an individual or damage to property other*
8 *than the subject matter of the transaction proximately resulting*
9 *from breach of warranty.*

10 2. *The term does not include direct damages or incidental*
11 *damages.*

12 **Sec. 18. “Conspicuous,”** with reference to a term, means so
13 *written, displayed or presented that a reasonable person against*
14 *which it is to operate ought to have noticed it. A term in an*
15 *electronic record intended to evoke a response by an electronic*
16 *agent is conspicuous if it is presented in a form that would enable*
17 *a reasonably configured electronic agent to take it into account or*
18 *react to it without review of the record by an individual.*
19 *Conspicuous terms include the following:*

20 1. *With respect to a person:*

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

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

27 (c) *A term prominently referenced in an electronic record or*
28 *display which is readily accessible or reviewable from the record*
29 *or display; and*

30 2. *With respect to a person or an electronic agent, a term or*
31 *reference to a term that is so placed in a record or display that the*
32 *person or electronic agent cannot proceed without taking action*
33 *with respect to the particular term or reference.*

34 **Sec. 19. “Consumer”** means an individual who is a licensee
35 *of information or informational rights that the individual at the*
36 *time of contracting intended to be used primarily for personal,*
37 *family or household purposes. The term does not include an*
38 *individual who is a licensee primarily for professional or*
39 *commercial purposes, including agriculture, business*
40 *management, and investment management other than*
41 *management of the individual’s personal or family investments.*

42 **Sec. 20. “Consumer contract”** means a contract between a
43 *merchant licensor and a consumer.*



1 **Sec. 21.** *“Contract” means the total legal obligation resulting*
2 *from the parties’ agreement as affected by this chapter and other*
3 *applicable law.*

4 **Sec. 22.** *“Contract fee” means the price, fee, rent or royalty*
5 *payable in a contract under this chapter or any part of the amount*
6 *payable.*

7 **Sec. 23.** *“Contractual use term” means an enforceable term*
8 *that defines or limits the use, disclosure of, or access to licensed*
9 *information or informational rights, including a term that defines*
10 *the scope of a license.*

11 **Sec. 24.** *“Copy” means the medium on which information is*
12 *fixed on a temporary or permanent basis and from which it can be*
13 *perceived, reproduced, used or communicated, either directly or*
14 *with the aid of a machine or device.*

15 **Sec. 25.** *“Course of dealing” means a sequence of previous*
16 *conduct between the parties to a particular transaction which*
17 *establishes a common basis of understanding for interpreting their*
18 *expressions and other conduct.*

19 **Sec. 26.** *“Course of performance” means repeated*
20 *performances, under a contract that involves repeated occasions*
21 *for performance, which are accepted or acquiesced in without*
22 *objection by a party having knowledge of the nature of the*
23 *performance and an opportunity to object to it.*

24 **Sec. 27.** *“Court” includes an arbitration or other dispute-*
25 *resolution forum if the parties have agreed to the use of that*
26 *forum or its use is required by law.*

27 **Sec. 28.** *“Delivery,” with respect to a copy, means the*
28 *voluntary physical or electronic transfer of possession or control.*

29 **Sec. 29.** *“Direct damages” means compensation for losses*
30 *measured by paragraph (a) of subsection 2 of section 176 of this*
31 *act or paragraph (a) of subsection 1 of section 177 of this act. The*
32 *term does not include consequential damages or incidental*
33 *damages.*

34 **Sec. 30.** *“Document of title” includes bill of lading, dock*
35 *warrant, dock receipt, warehouse receipt or order for the delivery*
36 *of goods, and also any other document which in the regular*
37 *course of business or financing is treated as adequately evidencing*
38 *that the person in possession of it is entitled to receive, hold and*
39 *dispose of the document and the goods it covers. To be a document*
40 *of title a document must purport to be issued by or addressed to a*
41 *bailee and purport to cover goods in the bailee’s possession which*
42 *are either identified or are fungible portions of an identified mass.*

43 **Sec. 31.** *“Electronic” means relating to technology having*
44 *electrical, digital, magnetic, wireless, optical, electromagnetic or*
45 *similar capabilities.*



1 **Sec. 32.** *“Electronic agent” means a computer program, or*
2 *electronic or other automated means, used independently to*
3 *initiate an action, or to respond to electronic messages or*
4 *performances, on the person’s behalf without review or action by*
5 *an individual at the time of the action or response to the message*
6 *or performance.*

7 **Sec. 33.** *“Electronic message” means a record or display that*
8 *is stored, generated or transmitted by electronic means for the*
9 *purpose of communication to another person or electronic agent.*

10 **Sec. 34.** *“Financial accommodation contract” means an*
11 *agreement under which a person extends a financial*
12 *accommodation to a licensee and which does not create a security*
13 *interest governed by NRS 104.9101 to 104.9709, inclusive. The*
14 *agreement may be in any form, including a license or lease.*

15 **Sec. 35.** 1. *“Financial asset,” except as otherwise provided*
16 *in NRS 104.8103, means:*

17 (a) *A security;*

18 (b) *An obligation of a person or a share, participation or other*
19 *interest in a person or in property or an enterprise of a person,*
20 *which is, or is of a type, dealt in or traded on financial markets, or*
21 *which is recognized in any area in which it is issued or dealt in as*
22 *a medium for investment; or*

23 (c) *Any property that is held by a securities intermediary for*
24 *another person in a securities account if the securities*
25 *intermediary has expressly agreed with the other person that the*
26 *property is to be treated as a financial asset pursuant to the*
27 *provisions of NRS 104.8101 to 104.8511, inclusive.*

28 2. *As context requires, the term means the interest itself or*
29 *the means by which a person’s claim to it is evidenced, including a*
30 *certificated or uncertificated security, a security certificate or a*
31 *security entitlement.*

32 **Sec. 36.** *“Financial services transaction” means an*
33 *agreement that provides for, or a transaction that is, or entails*
34 *access to, use, transfer, clearance, settlement or processing of:*

35 1. *A deposit, loan, funds or monetary value represented in*
36 *electronic form and stored or capable of storage by electronic*
37 *means and retrievable and transferable by electronic means, or*
38 *other right to payment to or from a person;*

39 2. *An instrument or other item;*

40 3. *A payment order, credit card transaction, debit card*
41 *transaction, funds transfer, automated clearinghouse transfer, or*
42 *similar wholesale or retail transfer of funds;*

43 4. *A letter of credit, document of title, financial asset,*
44 *investment property, or similar asset held in a fiduciary or agency*
45 *capacity; or*



1 5. *Related identifying, verifying, access-enabling, authorizing*
2 *or monitoring information.*

3 Sec. 37. 1. *"Financier" means a person that provides a*
4 *financial accommodation to a licensee under a financial*
5 *accommodation contract and either:*

6 (a) *Becomes a licensee for the purpose of transferring or*
7 *sublicensing the license to the party to which the financial*
8 *accommodation is provided; or*

9 (b) *Obtains a contractual right under the financial*
10 *accommodation contract to preclude the licensee's use of the*
11 *information or informational rights under a license in the event of*
12 *breach of the financial accommodation contract.*

13 2. *The term does not include a person that selects, creates or*
14 *supplies the information that is the subject of the license, owns the*
15 *informational rights in the information, or provides support for,*
16 *modifications to, or maintenance of the information.*

17 Sec. 38. *"Funds transfer" means the series of transactions,*
18 *beginning with the originator's payment order, made for the*
19 *purpose of making payment to the beneficiary of the order. The*
20 *term includes any payment order issued by the originator's bank*
21 *or an intermediary bank intended to carry out the originator's*
22 *payment order. A funds transfer is completed by acceptance by the*
23 *beneficiary's bank of a payment order for the benefit of the*
24 *beneficiary of the originator's payment order.*

25 Sec. 39. *"Good faith" means honesty in fact and the*
26 *observance of reasonable commercial standards of fair dealing.*

27 Sec. 40. *"Goods" means all things that are movable at the*
28 *time relevant to the computer information transaction. The term*
29 *includes the unborn young of animals, growing crops, and other*
30 *identified things to be severed from realty which are covered by*
31 *NRS 104.2107. The term does not include computer information,*
32 *money, the subject matter of foreign exchange transactions,*
33 *documents, letters of credit, letter-of-credit rights, instruments,*
34 *investment property, accounts, chattel paper, deposit accounts or*
35 *general intangibles.*

36 Sec. 41. *"Identification" has the meaning ascribed to it in*
37 *NRS 104.2501.*

38 Sec. 42. *"Incidental damages" resulting from breach of*
39 *contract:*

40 1. *Means compensation for any commercially reasonable*
41 *charges, expenses or commissions reasonably incurred by an*
42 *aggrieved party with respect to:*

43 (a) *Inspection, receipt, transmission, transportation, care or*
44 *custody of identified copies or information that is the subject of*
45 *the breach;*



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1 (b) Stopping delivery, shipment or transmission;
2 (c) Effecting cover or retransfer of copies or information after
3 the breach;

4 (d) Other efforts after the breach to minimize or avoid loss
5 resulting from the breach; and

6 (e) Matters otherwise incident to the breach; and

7 2. Does not include consequential damages or direct
8 damages.

9 Sec. 43. "Information" means data, text, images, sounds,
10 mask works or computer programs, including collections and
11 compilations of them.

12 Sec. 44. "Information processing system" means an
13 electronic system for creating, generating, sending, receiving,
14 storing, displaying or processing information.

15 Sec. 45. "Informational content" means information that is
16 intended to be communicated to or perceived by an individual in
17 the ordinary use of the information, or the equivalent of that
18 information.

19 Sec. 46. "Informational rights" include all rights in
20 information created under laws governing patents, copyrights,
21 mask works, trade secrets, trademarks, publicity rights, or any
22 other law that gives a person, independently of contract, a right to
23 control or preclude another person's use of or access to the
24 information on the basis of the rights holder's interest in the
25 information.

26 Sec. 47. "Instrument" means a negotiable instrument or any
27 other writing that evidences a right to the payment of a monetary
28 obligation, is not itself a security agreement or lease, and is of a
29 type that in ordinary course of business is transferred by delivery
30 with any necessary endorsement or assignment. The term does not
31 include investment property, letters of credit or writings that
32 evidence a right to payment arising out of the use of a credit or
33 charge card or information contained on or for use with the card.

34 Sec. 48. "Insurance services transaction" means an
35 agreement between an insurer and an insured which provides for,
36 or a transaction that is, or entails access to, use, transfer,
37 clearance, settlement or processing of:

38 1. An insurance policy, contract or certificate; or

39 2. A right to payment under an insurance policy, contract or
40 certificate.

41 Sec. 49. "Investment property" means a security, whether
42 certificated or uncertificated, security entitlement, securities
43 account, commodity contract or commodity account.

44 Sec. 50. "Item" means an instrument or a promise or order
45 to pay money handled by a bank for collection or payment. The



1 *term does not include a payment order governed by NRS*
2 *104A.4101 to 104A.4507, inclusive, or a credit or debit card slip.*

3 **Sec. 51.** *“Knowledge,” with respect to a fact, means actual*
4 *knowledge of the fact.*

5 **Sec. 52.** *“Letter of credit” means a definite undertaking that*
6 *satisfies the requirements of NRS 104.5104 by an issuer to a*
7 *beneficiary at the request or for the account of an applicant or, in*
8 *the case of a financial institution, to itself or for its own account,*
9 *to honor a documentary presentation by payment or delivery of an*
10 *item of value.*

11 **Sec. 53.** *“License” means a contract that authorizes access*
12 *to, or use, distribution, performance, modification or reproduction*
13 *of, information or informational rights, but expressly limits the*
14 *access or uses authorized or expressly grants fewer than all rights*
15 *in the information, whether or not the transferee has title to a*
16 *licensed copy. The term includes an access contract, a lease of a*
17 *computer program, and a consignment of a copy. The term does*
18 *not include a reservation or creation of a security interest to the*
19 *extent the interest is governed by NRS 104.9101 to 104.9709,*
20 *inclusive.*

21 **Sec. 54.** *“Licensee” means a person entitled by agreement to*
22 *acquire or exercise rights in, or to have access to or use of,*
23 *computer information under an agreement to which this chapter*
24 *applies. A licensor is not a licensee with respect to rights reserved*
25 *to it under the agreement.*

26 **Sec. 55.** *“Licensor” means a person obligated by agreement*
27 *to transfer or create rights in, or to give access to or use of,*
28 *computer information or informational rights in it under an*
29 *agreement to which this chapter applies. Between the provider of*
30 *access and a provider of the informational content to be accessed,*
31 *the provider of content is the licensor. In an exchange of*
32 *information or informational rights, each party is a licensor with*
33 *respect to the information, informational rights, or access it gives.*

34 **Sec. 56.** *“Mass-market license” means a standard form used*
35 *in a mass-market transaction.*

36 **Sec. 57.** *“Mass-market transaction” means a transaction that*
37 *is:*

- 38 1. *A consumer contract; or*
39 2. *Any other transaction with an end-user licensee if:*
40 (a) *The transaction is for information or informational rights*
41 *directed to the general public as a whole, including consumers,*
42 *under substantially the same terms for the same information;*
43 (b) *The licensee acquires the information or informational*
44 *rights in a retail transaction under terms and in a quantity*
45 *consistent with an ordinary transaction in a retail market; and*



1 (c) *The transaction is not:*

2 (1) *A contract for redistribution or for public performance*
3 *or public display of a copyrighted work;*

4 (2) *A transaction in which the information is customized or*
5 *otherwise specially prepared by the licensor for the licensee, other*
6 *than minor customization using a capability of the information*
7 *intended for that purpose;*

8 (3) *A site license; or*

9 (4) *An access contract.*

10 **Sec. 58.** *“Merchant” means a person:*

11 1. *That deals in information or informational rights of the*
12 *kind involved in the transaction;*

13 2. *That by the person’s occupation holds itself out as having*
14 *knowledge or skill peculiar to the relevant aspect of the business*
15 *practices or information involved in the transaction; or*

16 3. *To which the knowledge or skill peculiar to the practices or*
17 *information involved in the transaction may be attributed by the*
18 *person’s employment of an agent or broker or other intermediary*
19 *that by its occupation holds itself out as having the knowledge or*
20 *skill.*

21 **Sec. 59.** *“Nonexclusive license” means a license that does*
22 *not preclude the licensor from transferring to other licensees the*
23 *same information, informational rights or contractual rights*
24 *within the same scope. The term includes a consignment of a copy.*

25 **Sec. 60.** *“Notice” of a fact means knowledge of the fact,*
26 *receipt of notification of the fact, or reason to know the fact exists.*

27 **Sec. 61.** *“Notify” or “give notice” means to take such steps*
28 *as may be reasonably required to inform the other person in the*
29 *ordinary course, whether or not the other person actually comes to*
30 *know of it.*

31 **Sec. 62.** *“Party” means a person that engages in a*
32 *transaction or makes an agreement under this chapter.*

33 **Sec. 63.** *“Payment order” means an instruction of a sender*
34 *to a receiving bank, transmitted orally, electronically or in writing,*
35 *to pay, or to cause another bank to pay, a fixed or determinable*
36 *amount of money to a beneficiary if:*

37 1. *The instruction does not state a condition to payment to the*
38 *beneficiary other than time of payment;*

39 2. *The receiving bank is to be reimbursed by debiting an*
40 *account of, or otherwise receiving payment from, the sender; and*

41 3. *The instruction is transmitted by the sender directly to the*
42 *receiving bank or to an agent, funds-transfer system, or*
43 *communication system for transmittal to the receiving bank.*

44 **Sec. 64.** *“Person” means an individual, corporation,*
45 *business trust, estate, trust, partnership, limited-liability company,*



1 association, joint venture, governmental subdivision,
2 instrumentality, or agency, public corporation, or any other legal
3 or commercial entity.

4 **Sec. 65.** *"Published informational content" means*
5 *informational content prepared for or made available to recipients*
6 *generally, or to a class of recipients, in substantially the same*
7 *form. The term does not include informational content that is:*

8 1. *Customized for a particular recipient by one or more*
9 *individuals acting as or on behalf of the licensor, using judgment*
10 *or expertise; or*

11 2. *Provided in a special relationship of reliance between the*
12 *provider and the recipient.*

13 **Sec. 66.** *"Receipt" means:*

14 1. *With respect to a copy, taking delivery; or*

15 2. *With respect to a notice:*

16 (a) *Coming to a person's attention; or*

17 (b) *Being delivered to and available at a location or system*
18 *designated by agreement for that purpose or, in the absence of an*
19 *agreed location or system:*

20 (1) *Being delivered at the person's residence, or the*
21 *person's place of business through which the contract was made,*
22 *or at any other place held out by the person as a place for receipt*
23 *of communications of the kind; or*

24 (2) *In the case of an electronic notice, coming into*
25 *existence in an information processing system or at an address in*
26 *that system in a form capable of being processed by or perceived*
27 *from a system of that type by a recipient, if the recipient uses, or*
28 *otherwise has designated or holds out, that place or system for*
29 *receipt of notices of the kind to be given and the sender does not*
30 *know that the notice cannot be accessed from that place.*

31 **Sec. 67.** *"Receive" means to take receipt.*

32 **Sec. 68.** *"Record" means information that is inscribed on a*
33 *tangible medium or that is stored in an electronic or other medium*
34 *and is retrievable in perceivable form.*

35 **Sec. 69.** *"Release" means an agreement by a party not to*
36 *object to, or exercise any rights or pursue any remedies to limit,*
37 *the use of information or informational rights which agreement*
38 *does not require an affirmative act by the party to enable or*
39 *support the other party's use of the information or informational*
40 *rights. The term includes a waiver of informational rights.*

41 **Sec. 70.** *"Return," with respect to a record containing*
42 *contractual terms that were rejected, refers only to the computer*
43 *information and means:*

44 1. *In the case of a licensee that rejects a record regarding a*
45 *single information product transferred for a single contract fee, a*



1 *right to reimbursement of the contract fee paid from the person to*
2 *which it was paid or from another person that offers to reimburse*
3 *that fee, on:*

4 *(a) Submission of proof of purchase; and*

5 *(b) Proper redelivery of the computer information and all*
6 *copies within a reasonable time after initial delivery of the*
7 *information to the licensee;*

8 *2. In the case of a licensee that rejects a record regarding an*
9 *information product provided as part of multiple information*
10 *products integrated into and transferred as a bundled whole but*
11 *retaining their separate identity:*

12 *(a) A right to reimbursement of any portion of the aggregate*
13 *contract fee identified by the licensor in the initial transaction as*
14 *charged to the licensee for all bundled information products*
15 *which was actually paid, on:*

16 *(1) Rejection of the record before or during the initial use*
17 *of the bundled product;*

18 *(2) Proper redelivery of all computer information products*
19 *in the bundled whole and all copies of them within a reasonable*
20 *time after initial delivery of the information to the licensee; and*

21 *(3) Submission of proof of purchase; or*

22 *(b) A right to reimbursement of any separate contract fee*
23 *identified by the licensor in the initial transaction as charged to*
24 *the licensee for the separate information product to which the*
25 *rejected record applies, on:*

26 *(1) Submission of proof of purchase; and*

27 *(2) Proper redelivery of that computer information product*
28 *and all copies within a reasonable time after initial delivery of the*
29 *information to the licensee; or*

30 *3. In the case of a licensor that rejects a record proposed by*
31 *the licensee, a right to proper redelivery of the computer*
32 *information and all copies from the licensee, to stop delivery or*
33 *access to the information by the licensee, and to reimbursement*
34 *from the licensee of amounts paid by the licensor with respect to*
35 *the rejected record, on reimbursement to the licensee of contract*
36 *fees that it paid with respect to the rejected record, subject to*
37 *recoupment and setoff.*

38 **Sec. 71.** *“Sale” consists in the passing of title from the seller*
39 *to the buyer for a price.*

40 **Sec. 72.** *“Scope” means the terms of a license describing the:*
41 *1. Licensed copies, information or informational rights*
42 *involved;*

43 *2. Use or access authorized, prohibited or controlled;*

44 *3. Geographic area, market or location; or*

45 *4. Duration of the license.*



1 **Sec. 73.** *“Seasonable,” with respect to an act, means taken*
2 *within the time agreed or, if no time is agreed, within a reasonable*
3 *time.*

4 **Sec. 74.** *“Send” means, with any costs provided for and*
5 *properly addressed or directed as reasonable under the*
6 *circumstances or as otherwise agreed, to deposit a record in the*
7 *mail or with a commercially reasonable carrier, to deliver a record*
8 *for transmission to or re-creation in another location or*
9 *information processing system, or to take the steps necessary to*
10 *initiate transmission to or re-creation of a record in another*
11 *location or information processing system. In addition, with*
12 *respect to an electronic message, the message must be in a form*
13 *capable of being processed by or perceived from a system of the*
14 *type the recipient uses or otherwise has designated or held out as a*
15 *place for the receipt of communications of the kind sent. Receipt*
16 *within the time in which it would have arrived if properly sent has*
17 *the effect of a proper sending.*

18 **Sec. 75.** *“Standard form” means a record or a group of*
19 *related records containing terms prepared for repeated use in*
20 *transactions and so used in a transaction in which there was no*
21 *negotiated change of terms by individuals except to set the price,*
22 *quantity, method of payment, selection among standard options, or*
23 *time or method of delivery.*

24 **Sec. 76.** *“State” means a state of the United States, the*
25 *District of Columbia, Puerto Rico, the United States Virgin*
26 *Islands, or any territory or insular possession subject to the*
27 *jurisdiction of the United States.*

28 **Sec. 77.** *“Term,” with respect to an agreement, means that*
29 *portion of the agreement which relates to a particular matter.*

30 **Sec. 78.** *“Termination” means the ending of a contract by a*
31 *party pursuant to a power created by agreement or law otherwise*
32 *than because of breach of contract.*

33 **Sec. 79.** *“Transfer”:*

34 1. *With respect to a contractual interest, includes an*
35 *assignment of the contract, but does not include an agreement*
36 *merely to perform a contractual obligation or to exercise*
37 *contractual rights through a delegate or sublicensee; and*

38 2. *With respect to computer information, includes a sale,*
39 *license, or lease of a copy of the computer information and a*
40 *license or assignment of informational rights in computer*
41 *information.*

42 **Sec. 80.** *“Usage of trade” means any practice or method of*
43 *dealing that has such regularity of observance in a place, vocation*
44 *or trade as to justify an expectation that it will be observed with*
45 *respect to the transaction in question.*



1 **Sec. 81. 1.** *The provisions of this chapter apply to computer*
2 *information transactions.*

3 2. *Except for subject matter excluded in subsection 4, if a*
4 *computer information transaction includes subject matter other*
5 *than computer information or subject matter excluded under*
6 *subsection 4, the following rules apply:*

7 (a) *If a transaction includes computer information and goods,*
8 *the provisions of this chapter apply to the part of the transaction*
9 *involving computer information, informational rights in it, and*
10 *creation or modification of it. However, if a copy of a computer*
11 *program is contained in and sold or leased as part of goods, the*
12 *provisions of this chapter apply to the copy and the computer*
13 *program only if:*

14 (1) *The goods are a computer or computer peripheral; or*

15 (2) *Giving the buyer or lessee of the goods access to or use*
16 *of the program is ordinarily a material purpose of transactions in*
17 *goods of the type sold or leased.*

18 (b) *Subject to subparagraph (1) of paragraph (c) of subsection*
19 *4, if a transaction includes an agreement for creating, or for*
20 *obtaining rights to create, computer information and a motion*
21 *picture, the provisions of this chapter do not apply to the*
22 *agreement if the dominant character of the agreement is to create*
23 *or obtain rights to create a motion picture. In all other such*
24 *agreements, the provisions of this chapter do not apply to the part*
25 *of the agreement that involves a motion picture excluded under*
26 *paragraph (c) of subsection 4, but does apply to the computer*
27 *information.*

28 (c) *In all other cases, the provisions of this chapter apply to the*
29 *entire transaction if the computer information and informational*
30 *rights, or access to them, is the primary subject matter, but*
31 *otherwise applies only to the part of the transaction involving*
32 *computer information, informational rights in it, and creation or*
33 *modification of it.*

34 3. *To the extent of a conflict between the provisions of this*
35 *chapter and the provisions of NRS 104.9101 to 104.9709,*
36 *inclusive, the provisions of NRS 104.9101 to 104.9709, inclusive,*
37 *govern.*

38 4. *The provisions of this chapter do not apply to:*

39 (a) *A financial services transaction;*

40 (b) *An insurance services transaction;*

41 (c) *An agreement to create, perform or perform in, include*
42 *information in, acquire, use, distribute, modify, reproduce, have*
43 *access to, adapt, make available, transmit, license or display:*

44 (1) *A motion picture or audio or visual programming, other*
45 *than in:*



- 1 (I) A mass-market transaction; or
2 (II) A submission of an idea or information or release of
3 informational rights that may result in making a motion picture or
4 similar information product; or
5 (2) A sound recording, musical work, or phonorecord as
6 defined or used in Title 17 of the United States Code as of July 1,
7 1999, or an enhanced sound recording, other than in the
8 submission of an idea or information or release of informational
9 rights that may result in the creation of such material or a similar
10 information product;
11 (d) A compulsory license;
12 (e) A contract of employment of an individual, other than an
13 individual hired as an independent contractor to create or modify
14 computer information, unless the independent contractor is a
15 freelancer in the news reporting industry as that term is commonly
16 understood in that industry;
17 (f) A contract that does not require that information be
18 furnished as computer information or a contract in which, under
19 the agreement, the form of the information as computer
20 information is otherwise insignificant with respect to the primary
21 subject matter of the part of the transaction pertaining to the
22 information;
23 (g) Unless otherwise agreed between the parties in a record:
24 (1) Telecommunications products or services provided
25 pursuant to federal or state tariffs; or
26 (2) Telecommunications products or services provided
27 pursuant to agreements required or permitted to be filed by the
28 service provider with a federal or state authority regulating those
29 services or under pricing subject to approval by a federal or state
30 regulatory authority; or
31 (h) Subject matter within the scope of NRS 104.3101 to
32 104.3605, inclusive, 104.4101 to 104.4504, inclusive, 104.5101
33 to 104.5118, inclusive, 104.7101 to 104.7603, inclusive, 104.8101
34 to 104.8511, inclusive, or 104A.4101 to 104A.4507, inclusive.
35 5. As used in this section:
36 (a) "Audio or visual programming" means audio or visual
37 programming that is provided by broadcast, satellite or cable, as
38 defined or used in the Communications Act of 1934 and related
39 regulations as they existed on July 1, 1999, or by similar methods
40 of delivery.
41 (b) "Enhanced sound recording" means a separately
42 identifiable product or service the dominant character of which
43 consists of recorded sounds, but which includes:



1 (1) *Statements or instructions whose purpose is to allow or*
2 *control the perception, reproduction or communication of those*
3 *sounds; or*

4 (2) *Other information, as long as recorded sounds*
5 *constitute the dominant character of the product or service.*

6 (c) *“Motion picture” means:*

7 (1) *“Motion picture” as defined in Title 17 of the United*
8 *States Code as of July 1, 1999; or*

9 (2) *A separately identifiable product or service the*
10 *dominant character of which consists of a linear motion picture,*
11 *but which includes:*

12 (I) *Statements or instructions whose purpose is to allow*
13 *or control the perception, reproduction or communication of the*
14 *motion picture; or*

15 (II) *Other information, as long as the motion picture*
16 *constitutes the dominant character of the product or service.*

17 **Sec. 82. 1.** *As used in this section, “consumer protection*
18 *law” means a consumer protection statute, rule or regulation, or*
19 *other state executive or legislative action that has the effect of law*
20 *and any applicable judicial or administrative decisions*
21 *interpreting those statutes, rules, regulations or actions.*

22 2. *Except as otherwise provided in this section, the provisions*
23 *of this chapter do not limit, modify or supersede a consumer*
24 *protection law.*

25 3. *If a consumer protection law requires a term to be*
26 *conspicuous, the standard of conspicuousness under the consumer*
27 *protection law applies. However, a provision in the consumer*
28 *protection law requiring a term to be conspicuous does not*
29 *preclude the term from being presented electronically.*

30 4. *Subject to section 186 of this act, if a consumer protection*
31 *law requires a writing or a signature, a record or an*
32 *authentication suffices.*

33 5. *If a consumer protection law addresses assent, consent or*
34 *manifestation of assent, the standard of assent, consent or*
35 *manifestation of assent under the consumer protection law applies*
36 *and, subject to section 186 of this act, may be accomplished*
37 *electronically.*

38 6. *The applicability of a consumer protection law is*
39 *determined by that law as it would have applied in the absence of*
40 *this chapter.*

41 7. *Among the consumer protection laws of this state which*
42 *apply to the subject matter of this chapter are NRS 598.0903 to*
43 *598.0999, inclusive.*

44 **Sec. 83. 1.** *A provision of this chapter which is preempted*
45 *by federal law is unenforceable to the extent of the preemption.*



1 2. If a term of a contract violates a fundamental public
2 policy, the court may refuse to enforce the contract, enforce the
3 remainder of the contract without the impermissible term, or limit
4 the application of the impermissible term so as to avoid a result
5 contrary to public policy, in each case to the extent that the
6 interest in enforcement is clearly outweighed by a public policy
7 against enforcement of the term.

8 3. In a transaction in which a copy of computer information
9 in its final form is made generally available, a term of a contract is
10 unenforceable to the extent that the term prohibits an end-user
11 licensee from engaging in otherwise lawful public discussion
12 relating to the computer information. However, this subsection
13 does not preclude enforcement of a term that establishes or
14 enforces rights under trade secret, trademark, defamation,
15 commercial disparagement or other laws. This subsection does not
16 alter the applicability of subsection 2 to any term not rendered
17 unenforceable under this subsection.

18 4. The provisions of this chapter do not apply to an
19 intellectual property notice that is based solely on intellectual
20 property rights and is not part of a contract. The effect of such a
21 notice is determined by law other than those in this chapter.

22 5. The provisions of chapter 720 of NRS govern in the case of
23 a conflict between this chapter and the other law.

24 **Sec. 84. 1.** This chapter must be liberally construed and
25 applied to promote its underlying purposes and policies to:

26 (a) Support and facilitate the realization of the full potential of
27 computer information transactions;

28 (b) Clarify the law governing computer information
29 transactions;

30 (c) Enable expanding commercial practice in computer
31 information transactions by commercial usage and agreement of
32 the parties;

33 (d) Promote uniformity of the law with respect to the subject
34 matter of this chapter among states that enact it; and

35 (e) Permit the continued expansion of commercial practices in
36 the excluded transactions through custom, usage and agreement
37 of the parties.

38 2. Except as otherwise provided in subsection 1 of section 91
39 of this act, the use of mandatory language or the absence of a
40 phrase such as "unless otherwise agreed" in a provision of this
41 chapter does not preclude the parties from varying the effect of the
42 provision by agreement.

43 3. The fact that a provision of this chapter imposes a
44 condition for a result does not by itself mean that the absence of
45 that condition yields a different result.



1 4. To be enforceable, a term need not be conspicuous,
2 negotiated, or expressly assented or agreed to, unless this chapter
3 expressly so requires.

4 5. Section headings are part of this chapter, but subsection
5 headings and paragraph headings are not.

6 Sec. 85. 1. A record or authentication may not be denied
7 legal effect or enforceability solely because it is in electronic form.

8 2. The provisions of this chapter do not require that a record
9 or authentication be generated, stored, sent, received, or otherwise
10 processed by electronic means or in electronic form.

11 3. In any transaction, a person may establish requirements
12 regarding the type of authentication or record acceptable to it.

13 4. A person that uses an electronic agent that it has selected
14 for making an authentication, performance or agreement,
15 including manifestation of assent, is bound by the operations of
16 the electronic agent, even if no individual was aware of or
17 reviewed the agent's operations or the results of the operations.

18 Sec. 86. 1. Authentication may be proven in any manner,
19 including a showing that a party made use of information or
20 access that could have been available only if it engaged in conduct
21 or operations that authenticated the record or term.

22 2. Compliance with a commercially reasonable attribution
23 procedure agreed to or adopted by the parties or established by law
24 for authenticating a record authenticates the record as a matter of
25 law.

26 Sec. 87. 1. The parties in their agreement may choose the
27 applicable law. However, the choice is not enforceable in a
28 consumer contract to the extent it would vary a rule that may not
29 be varied by agreement under the law of the jurisdiction whose
30 law would apply under subsections 2 and 3 in the absence of the
31 agreement.

32 2. In the absence of an enforceable agreement on choice of
33 law, the following rules determine which jurisdiction's law
34 governs in all respects for purposes of contract law:

35 (a) An access contract or a contract providing for electronic
36 delivery of a copy is governed by the law of the jurisdiction in
37 which the licensor was located when the agreement was entered
38 into.

39 (b) A consumer contract that requires delivery of a copy on a
40 tangible medium is governed by the law of the jurisdiction in
41 which the copy is or should have been delivered to the consumer.

42 (c) In all other cases, the contract is governed by the law of the
43 jurisdiction having the most significant relationship to the
44 transaction.



1 3. *In cases governed by subsection 2, if the jurisdiction whose*
2 *law governs is outside the United States, the law of that*
3 *jurisdiction governs only if it provides substantially similar*
4 *protections and rights to a party not located in that jurisdiction as*
5 *are provided under this chapter. Otherwise, the law of the state*
6 *that has the most significant relationship to the transaction*
7 *governs.*

8 4. *For purposes of this section, a party is located at its place*
9 *of business if it has one place of business, at its chief executive*
10 *office if it has more than one place of business, or at its place of*
11 *incorporation or primary registration if it does not have a physical*
12 *place of business. Otherwise, a party is located at its primary*
13 *residence.*

14 **Sec. 88.** 1. *The parties in their agreement may choose an*
15 *exclusive judicial or arbitral forum unless the choice is*
16 *unreasonable or unjust.*

17 2. *A judicial forum specified in an agreement is not exclusive*
18 *unless the agreement expressly so provides.*

19 3. *The enforceability of an agreed choice of exclusive forum*
20 *is a question for determination by a court of competent*
21 *jurisdiction in the state in which the action is brought.*

22 **Sec. 89.** 1. *If a court as a matter of law finds a contract or*
23 *a term thereof to have been unconscionable at the time it was*
24 *made, the court may refuse to enforce the contract, enforce the*
25 *remainder of the contract without the unconscionable term, or*
26 *limit the application of the unconscionable term so as to avoid an*
27 *unconscionable result.*

28 2. *If it is claimed or appears to the court that a contract or*
29 *term thereof may be unconscionable, the parties must be afforded*
30 *a reasonable opportunity to present evidence as to its commercial*
31 *setting, purpose and effect to aid the court in making the*
32 *determination.*

33 **Sec. 90.** 1. *A person manifests assent to a record or term if*
34 *the person, acting with knowledge of, or after having an*
35 *opportunity to review the record or term, or a copy of it:*

36 (a) *Authenticates the record or term with intent to adopt or*
37 *accept it; or*

38 (b) *Intentionally engages in conduct or makes statements with*
39 *reason to know that the other party or its electronic agent may*
40 *infer from the conduct or statement that the person assents to the*
41 *record or term.*

42 2. *An electronic agent manifests assent to a record or term if,*
43 *after having an opportunity to review it, the electronic agent:*

44 (a) *Authenticates the record or term; or*



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1 (b) Engages in operations that in the circumstances indicate
2 acceptance of the record or term.

3 3. If the provisions of this chapter or other law requires
4 assent to a specific term, a manifestation of assent must relate
5 specifically to the term.

6 4. Conduct or operations manifesting assent may be proved in
7 any manner, including a showing that a person or an electronic
8 agent obtained or used the information or informational rights
9 and that a procedure existed by which a person or an electronic
10 agent must have engaged in the conduct or operations in order to
11 do so. Proof of compliance with paragraph (b) of subsection 1 is
12 sufficient if there is conduct that assents and subsequent conduct
13 that reaffirms assent by electronic means.

14 5. The effect of this section may be modified by an agreement
15 setting out standards applicable to future transactions between the
16 parties.

17 6. Providers of online services, network access, and
18 telecommunications services, or the operators of facilities thereof,
19 do not manifest assent to a contractual relationship simply by their
20 provision of those services to other parties, including, without
21 limitation, transmission, routing or providing connections,
22 linking, caching, hosting, information location tools, and storage
23 of materials, at the request or initiation of a person other than the
24 service provider.

25 **Sec. 91.** 1. A person has an opportunity to review a record
26 or term only if it is made available in a manner that ought to call it
27 to the attention of a reasonable person and permit review.

28 2. An electronic agent has an opportunity to review a record
29 or term only if it is made available in a manner that would enable
30 a reasonably configured electronic agent to react to the record or
31 term.

32 3. If a record or term is available for review only after a
33 person becomes obligated to pay or begins its performance, the
34 person has an opportunity to review only if it has a right to a
35 return if it rejects the record. However, a right to a return is not
36 required if:

37 (a) The record proposes a modification of contract or provides
38 particulars of performance under section 116 of this act; or

39 (b) The primary performance is other than delivery or
40 acceptance of a copy, the agreement is not a mass-market
41 transaction, and the parties at the time of contracting had reason
42 to know that a record or term would be presented after
43 performance, use or access to the information began.

44 4. The right to a return under this section may arise by law or
45 agreement.



1 5. *The effect of this section may be modified by an agreement*
2 *setting out standards applicable to future transactions between the*
3 *parties.*

4 **Sec. 92.** 1. *This section applies to a licensor that makes its*
5 *computer information available to a licensee by electronic means*
6 *from its Internet or similar electronic site.*

7 2. *In such a case, the licensor affords an opportunity to*
8 *review the terms of a standard form license which opportunity*
9 *satisfies section 91 of this act with respect to a licensee that*
10 *acquires the information from that site, if the licensor:*

11 (a) *Makes the standard terms of the license readily available*
12 *for review by the licensee before the information is delivered or*
13 *the licensee becomes obligated to pay, whichever occurs first, by:*

14 (1) *Displaying prominently and in close proximity to a*
15 *description of the computer information, or to instructions or steps*
16 *for acquiring it, the standard terms or a reference to an electronic*
17 *location from which they can be readily obtained; or*

18 (2) *Disclosing the availability of the standard terms in a*
19 *prominent place on the site from which the computer information*
20 *is offered and promptly furnishing a copy of the standard terms on*
21 *request before the transfer of the computer information; and*

22 (b) *Does not take affirmative acts to prevent printing or*
23 *storage of the standard terms for archival or review purposes by*
24 *the licensee.*

25 3. *Failure to provide an opportunity to review under this*
26 *section does not preclude a person from providing a person an*
27 *opportunity to review by other means pursuant to section 91 of this*
28 *act or law other than this chapter.*

29 **Sec. 93.** 1. *Except as otherwise provided in subsection 2,*
30 *the effect of any provision of this chapter, including an allocation*
31 *of risk or imposition of a burden, may be varied by agreement of*
32 *the parties.*

33 2. *The following rules are not variable by agreement:*

34 (a) *Obligations of good faith, diligence, reasonableness and*
35 *care imposed by this chapter may not be disclaimed by agreement,*
36 *but the parties by agreement may determine the standards by*
37 *which the performance of the obligation is to be measured if the*
38 *standards are not manifestly unreasonable.*

39 (b) *The limitations on enforceability imposed by*
40 *unconscionability under section 89 of this act and fundamental*
41 *public policy under subsection 2 of section 83 of this act may not*
42 *be varied by agreement.*

43 (c) *Limitations on enforceability of, or agreement to, a*
44 *contract, term or right expressly stated in the sections listed in the*



1 following subparagraphs may not be varied by agreement except
2 to the extent provided in each section:

3 (1) The limitations on agreed choice of law in subsection 1
4 of section 87 of this act;

5 (2) The limitations on agreed choice of forum in section 88
6 of this act;

7 (3) The requirements for manifesting assent and
8 opportunity for review in section 90 of this act;

9 (4) The limitations on enforceability in section 97 of this
10 act;

11 (5) The limitations on a mass-market license in section 105
12 of this act;

13 (6) The consumer defense arising from an electronic error
14 in section 109 of this act;

15 (7) The requirements for an enforceable term in subsection
16 2 of section 114 of this act, subsection 6 of section 118 of this act,
17 subsections 2 and 3 of section 125 of this act and subsection 1 of
18 section 172 of this act;

19 (8) The requirements of paragraph (b) of subsection 2 of
20 section 115 of this act;

21 (9) The limitations on a financier in sections 136 to 140,
22 inclusive, of this act;

23 (10) The restrictions on altering the period of limitations in
24 subsections 1 and 2 of section 173 of this act; and

25 (11) The limitations on self-help repossession in subsection
26 2 of section 183 of this act and section 184 of this act.

27 **Sec. 94.** 1. Unless displaced by this chapter, principles of
28 law and equity, including the law merchant and the common law
29 of this state relative to capacity to contract, principal and agent,
30 estoppel, duress, coercion, mistake, and other validating or
31 invalidating cause, supplement this chapter. Among the laws
32 supplementing and not displaced by this chapter are trade secret
33 laws, unfair competition laws, and the law of fraud,
34 misrepresentation, and unfair and deceptive practices, including
35 application of such laws as they may deal with failure to disclose
36 defects.

37 2. Every contract or duty within the scope of this chapter
38 imposes an obligation of good faith in its performance or
39 enforcement.

40 3. Any usage of trade in the vocation or trade in which the
41 parties are engaged or of which the parties are or should be aware
42 and any course of dealing or course of performance between the
43 parties are relevant to determining the existence or meaning of an
44 agreement.

45 **Sec. 95.** 1. Questions to be determined by the court include:



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- 1 (a) Whether a term is conspicuous;
2 (b) Whether a term is enforceable under subsection 1, 2 or 3 of
3 section 83 of this act, section 88 or 89 of this act or subsection 1 of
4 section 105 of this act; and
5 (c) Whether an attribution procedure is commercially
6 reasonable or effective under section 86, 108 or 109 of this act.
7 2. Whether an agreement has legal consequences is
8 determined by the provisions of this chapter.
9 3. Whenever the provisions of this chapter require any action
10 to be taken within a reasonable time, the following rules apply:
11 (a) What is a reasonable time for taking the action depends on
12 the nature, purpose and circumstances of the action.
13 (b) Any time that is not manifestly unreasonable may be fixed
14 by agreement.
15 4. A person has reason to know a fact if the person has
16 knowledge of the fact or, from all the facts and circumstances
17 known to the person without investigation, the person should be
18 aware that the fact exists.
19 **Sec. 96.** 1. As used in this section, “interoperability” means
20 the ability of computer programs to exchange information and of
21 such programs mutually to use the information that has been
22 exchanged.
23 2. Notwithstanding the terms of a contract subject to this
24 chapter, a licensee that lawfully obtained the right to use a copy of
25 a computer program may identify, analyze and use those elements
26 of the program necessary to achieve interoperability of an
27 independently created computer program with other programs,
28 including adapting or modifying the licensee’s computer program,
29 if:
30 (a) The elements have not previously been readily available to
31 the licensee;
32 (b) The identification, analysis or use is performed solely for
33 the purpose of enabling such interoperability; and
34 (c) The identification, analysis or use is not prohibited by law
35 other than this chapter.
36 3. Identification, analysis or use of elements of a computer
37 program for a purpose other than described in this section is
38 governed by subsection 2 of section 83 of this act, if applicable.
39 **Sec. 97.** 1. Except as otherwise provided in this section, a
40 contract requiring payment of a contract fee of \$5,000 or more is
41 not enforceable by way of action or defense unless:
42 (a) The party against which enforcement is sought
43 authenticated a record sufficient to indicate that a contract has
44 been formed and which reasonably identifies the copy or subject
45 matter to which the contract refers; or



1 (b) *The agreement is a license for an agreed duration of 1 year*
2 *or less or which may be terminated at will by the party against*
3 *which the contract is asserted.*

4 2. *A record is sufficient under subsection 1 even if it omits or*
5 *incorrectly states a term, but the contract is not enforceable under*
6 *that subsection beyond the number of copies or subject matter*
7 *shown in the record.*

8 3. *A contract that does not satisfy the requirements of*
9 *subsection 1 is nevertheless enforceable under that subsection if:*

10 (a) *A performance was tendered or the information was made*
11 *available by one party and the tender was accepted or the*
12 *information accessed by the other; or*

13 (b) *The party against which enforcement is sought admits in*
14 *court, by pleading or by testimony or otherwise under oath, facts*
15 *sufficient to indicate a contract has been made, but the agreement*
16 *is not enforceable under this paragraph beyond the number of*
17 *copies or the subject matter admitted.*

18 4. *Between merchants, if, within a reasonable time, a record*
19 *in confirmation of the contract and sufficient against the sender is*
20 *received and the party receiving it has reason to know its contents,*
21 *the record satisfies subsection 1 against the party receiving it*
22 *unless notice of objection to its contents is given in a record within*
23 *a reasonable time after the confirming record is received.*

24 5. *An agreement that the requirements of this section need*
25 *not be satisfied as to future transactions is effective if evidenced in*
26 *a record authenticated by the person against which enforcement is*
27 *sought.*

28 6. *A transaction within the scope of this chapter is not subject*
29 *to a statute of frauds contained in another law of this state.*

30 **Sec. 98.** 1. *A contract may be formed in any manner*
31 *sufficient to show agreement, including offer and acceptance or*
32 *conduct of both parties or operations of electronic agents which*
33 *recognize the existence of a contract.*

34 2. *If the parties so intend, an agreement sufficient to*
35 *constitute a contract may be found even if the time of its making is*
36 *undetermined, one or more terms are left open or to be agreed on,*
37 *the records of the parties do not otherwise establish a contract, or*
38 *one party reserves the right to modify terms.*

39 3. *Even if one or more terms are left open or to be agreed*
40 *upon, a contract does not fail for indefiniteness if the parties*
41 *intended to make a contract and there is a reasonably certain basis*
42 *for giving an appropriate remedy.*

43 4. *In the absence of conduct or performance by both parties*
44 *to the contrary, a contract is not formed if there is a material*
45 *disagreement about a material term, including a term concerning*



1 *scope. For purposes of this subsection, the material disagreement*
2 *must exist at the time of attempted contracting and may not*
3 *involve a later dispute about the meaning of agreed terms.*

4 *5. If a term is to be adopted by later agreement and the*
5 *parties intend not to be bound unless the term is so adopted, a*
6 *contract is not formed if the parties do not agree to the term. In*
7 *that case, each party shall deliver to the other party, or with the*
8 *consent of the other party destroy, all copies of information, access*
9 *materials, and other materials received or made, and each party is*
10 *entitled to a return with respect to any contract fee paid for which*
11 *performance has not been received, has not been accepted, or has*
12 *been redelivered without any benefit being retained. The parties*
13 *remain bound by any restriction in a contractual use term with*
14 *respect to information or copies received or made from copies*
15 *received pursuant to the agreement, but the contractual use term*
16 *does not apply to information or copies properly received or*
17 *obtained from another source.*

18 **Sec. 99. 1.** *An offer to make a contract invites acceptance*
19 *in any manner and by any medium reasonable under the*
20 *circumstances.*

21 *2. An order or other offer to acquire a copy for prompt or*
22 *current delivery invites acceptance by either a prompt promise to*
23 *ship or a prompt or current shipment of a conforming or*
24 *nonconforming copy. However, a shipment of a nonconforming*
25 *copy is not an acceptance if the licensor seasonably notifies the*
26 *licensee that the shipment is offered only as an accommodation to*
27 *the licensee.*

28 *3. If the beginning of a requested performance is a*
29 *reasonable mode of acceptance, an offeror that is not notified of*
30 *acceptance or performance within a reasonable time may treat the*
31 *offer as having lapsed before acceptance.*

32 *4. If an offer in an electronic message evokes an electronic*
33 *message accepting the offer, a contract is formed:*

34 *(a) When an electronic acceptance is received; or*

35 *(b) If the response consists of beginning performance, full*
36 *performance, or giving access to information, when the*
37 *performance is received or the access is enabled and necessary*
38 *access materials are received.*

39 **Sec. 100. 1.** *An acceptance materially alters an offer if it*
40 *contains a term that materially conflicts with or varies a term of*
41 *the offer or that adds a material term not contained in the offer.*

42 *2. Except as otherwise provided in section 101 of this act, a*
43 *definite and seasonable expression of acceptance operates as an*
44 *acceptance, even if the acceptance contains terms that vary from*



1 *the terms of the offer, unless the acceptance materially alters the*
2 *offer.*

3 *3. If an acceptance materially alters the offer, the following*
4 *rules apply:*

5 *(a) A contract is not formed unless:*

6 *(1) A party agrees, such as by manifesting assent, to the*
7 *other party's offer or acceptance; or*

8 *(2) All the other circumstances, including the conduct of*
9 *the parties, establish a contract.*

10 *(b) If a contract is formed by the conduct of both parties, the*
11 *terms of the contract are determined under section 106 of this act.*

12 *4. If an acceptance varies from but does not materially alter*
13 *the offer, a contract is formed based on the terms of the offer. In*
14 *addition, the following rules apply:*

15 *(a) Terms in the acceptance which conflict with terms in the*
16 *offer are not part of the contract.*

17 *(b) An additional nonmaterial term in the acceptance is a*
18 *proposal for an additional term. Between merchants, the proposed*
19 *additional term becomes part of the contract unless the offeror*
20 *gives notice of objection before, or within a reasonable time after,*
21 *it receives the proposed terms.*

22 **Sec. 101. 1.** *An offer or acceptance is conditional if it is*
23 *conditioned on agreement by the other party to all the terms of the*
24 *offer or acceptance.*

25 *2. Except as otherwise provided in subsection 3, a conditional*
26 *offer or acceptance precludes formation of a contract unless the*
27 *other party agrees to its terms, such as by manifesting assent.*

28 *3. If the offer and acceptance are in standard forms and at*
29 *least one form is conditional, the following rules apply:*

30 *(a) Conditional language in a standard term precludes*
31 *formation of a contract based on the offer or acceptance if the*
32 *actions of the party proposing the form are consistent with the*
33 *conditional language, such as by refusing to perform, refusing to*
34 *permit performance, or refusing to accept the benefits of the*
35 *agreement, until its proposed terms are accepted.*

36 *(b) A party that agrees, such as by manifesting assent, to a*
37 *conditional offer that is effective under paragraph (a) adopts the*
38 *terms of the offer under section 104 or 105 of this act, except for a*
39 *term that conflicts with an expressly agreed term regarding price*
40 *or quantity.*

41 **Sec. 102. 1.** *A contract may be formed by the interaction of*
42 *electronic agents. If the interaction results in the electronic*
43 *agents' engaging in operations that under the circumstances*
44 *indicate acceptance of an offer, a contract is formed, but a court*



1 *may grant appropriate relief if the operations resulted from fraud,*
2 *electronic mistake, or the like.*

3 2. A contract may be formed by the interaction of an
4 electronic agent and an individual acting on the individual's own
5 behalf or for another person. A contract is formed if the individual
6 takes an action or makes a statement that the individual can
7 refuse to take or say and that the individual has reason to know
8 will:

9 (a) Cause the electronic agent to perform, provide benefits, or
10 allow the use or access that is the subject of the contract, or send
11 instructions to do so; or

12 (b) Indicate acceptance, regardless of other expressions or
13 actions by the individual to which the individual has reason to
14 know the electronic agent cannot react.

15 3. The terms of a contract formed under subsection 2 are
16 determined under section 104 or 105 of this act but do not include
17 a term provided by the individual if the individual had reason to
18 know that the electronic agent could not react to the term.

19 **Sec. 103.** 1. A release is effective without consideration if it
20 is:

21 (a) In a record to which the releasing party agrees, such as by
22 manifesting assent, and which identifies the informational rights
23 released; or

24 (b) Enforceable under estoppel, implied license or other law.

25 2. A release continues for the duration of the informational
26 rights released if the release does not specify its duration and does
27 not require affirmative performance after the grant of the release
28 by:

29 (a) The party granting the release; or

30 (b) The party receiving the release, except for relatively
31 insignificant acts.

32 **Sec. 104.** 1. A party adopts the terms of a record, including
33 a standard form, as the terms of the contract if the party agrees to
34 the record, such as by manifesting assent.

35 2. The terms of a record may be adopted after beginning
36 performance or use if the parties had reason to know that their
37 agreement would be represented in whole or part by a later record
38 to be agreed on and there would not be an opportunity to review
39 the record or a copy of it before performance or use begins. If the
40 parties fail to agree to the later terms and did not intend to form a
41 contract unless they so agreed, subsection 5 of section 98 of this
42 act applies.

43 3. If a party adopts the terms of a record, the terms become
44 part of the contract without regard to the party's knowledge or
45 understanding of individual terms in the record, except for a term



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1 *that is unenforceable because it fails to satisfy another*
2 *requirement of this chapter.*

3 **Sec. 105. 1.** *Adoption of the terms of a mass-market license*
4 *under section 104 of this act is effective only if the party agrees to*
5 *the license, such as by manifesting assent, before or during the*
6 *party's initial performance or use of or access to the information.*
7 *A term is not part of the license if:*

8 *(a) The term is unconscionable or is unenforceable under*
9 *subsection 1 or 2 of section 83 of this act;*

10 *(b) Subject to section 112 of this act, the term conflicts with a*
11 *term to which the parties to the license have expressly agreed;*

12 *(c) Under section 91 of this act, the licensee does not have an*
13 *opportunity to review the term before agreeing to it; or*

14 *(d) The term is not available to the licensee after assent to the*
15 *license in one or more of the following forms:*

16 *(1) An immediately available nonelectronic record that the*
17 *licensee may keep;*

18 *(2) An immediately available electronic record that can be*
19 *printed or stored by the licensee for archival and review purposes;*
20 *or*

21 *(3) In a copy available at no additional cost on a reasonable*
22 *request in a record by a licensee that was unable to print or store*
23 *the license for archival and review purposes.*

24 **2.** *If a mass-market license or a copy of the license is not*
25 *available in a manner permitting an opportunity to review by the*
26 *licensee before the licensee becomes obligated to pay and*
27 *the licensee does not agree, such as by manifesting assent, to the*
28 *license after having an opportunity to review, the licensee is*
29 *entitled to a return under section 91 of this act and, in addition, to:*

30 *(a) Reimbursement of any reasonable expenses incurred in*
31 *complying with the licensor's instructions for returning or*
32 *destroying the computer information or, in the absence of*
33 *instructions, expenses incurred for return postage or similar*
34 *reasonable expense in returning the computer information; and*

35 *(b) Compensation for any reasonable and foreseeable costs of*
36 *restoring the licensee's information processing system to reverse*
37 *changes in the system caused by the installation, if:*

38 *(1) The installation occurs because information must be*
39 *installed to enable review of the license; and*

40 *(2) The installation alters the system or information in it*
41 *but does not restore the system or information after removal of the*
42 *installed information because the licensee rejected the license.*

43 **3.** *In a mass-market transaction, if the licensor does not have*
44 *an opportunity to review a record containing proposed terms from*
45 *the licensee before the licensor delivers or becomes obligated to*



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1 *deliver the information, and if the licensor does not agree, such as*
2 *by manifesting assent, to those terms after having that*
3 *opportunity, the licensor is entitled to a return.*

4 *4. In a case governed by subsection 2, notice must be given in*
5 *the license or otherwise that a refund may be obtained from the*
6 *person to which the payment was made or other person designated*
7 *in the notice if the licensee refuses the terms.*

8 **Sec. 106.** *1. Except as otherwise provided in subsection 2*
9 *and subject to section 112 of this act, if a contract is formed by*
10 *conduct of the parties, the terms of the contract are determined by*
11 *consideration of the terms and conditions to which the parties*
12 *expressly agreed, course of performance, course of dealing, usage*
13 *of trade, the nature of the parties' conduct, the records exchanged,*
14 *the information or informational rights involved and all other*
15 *relevant circumstances. If a court cannot determine the terms of*
16 *the contract from the foregoing factors, the supplementary*
17 *principles of this chapter apply.*

18 *2. This section does not apply if the parties authenticate a*
19 *record of the contract or a party agrees, such as by manifesting*
20 *assent, to the record containing the terms of the other party.*

21 **Sec. 107.** *1. The efficacy, including the commercial*
22 *reasonableness, of an attribution procedure is determined by the*
23 *court.*

24 *2. In making the determination under subsection 1, the*
25 *following rules apply:*

26 *(a) An attribution procedure established by law is effective for*
27 *transactions within the coverage of the statute or rule.*

28 *(b) Except as otherwise provided in paragraph (a), commercial*
29 *reasonableness and effectiveness is determined in light of the*
30 *purposes of the procedure and the commercial circumstances at*
31 *the time the parties agreed to or adopted the procedure.*

32 *(c) An attribution procedure may use any security device or*
33 *method that is commercially reasonable under the circumstances.*

34 **Sec. 108.** *1. An electronic authentication, display, message,*
35 *record or performance is attributed to a person if it was the act of*
36 *the person or its electronic agent, or if the person is bound by it*
37 *under agency or other law. The party relying on attribution of an*
38 *electronic authentication, display, message, record or performance*
39 *to another person has the burden of establishing attribution.*

40 *2. The act of a person may be shown in any manner,*
41 *including a showing of the efficacy of an attribution procedure*
42 *that was agreed to or adopted by the parties or established by law.*

43 *3. The effect of an electronic act attributed to a person under*
44 *subsection 1 is determined from the context at the time of its*



1 *creation, execution or adoption, including the parties' agreement,*
2 *if any, or otherwise as provided by law.*

3 *4. If an attribution procedure exists to detect errors or*
4 *changes in an electronic authentication, display, message, record*
5 *or performance, and was agreed to or adopted by the parties or*
6 *established by law, and one party conformed to the procedure but*
7 *the other party did not, and the nonconforming party would have*
8 *detected the change or error had that party also conformed, the*
9 *effect of noncompliance is determined by the agreement but, in the*
10 *absence of agreement, the conforming party may avoid the effect*
11 *of the error or change.*

12 **Sec. 109.** *1. As used in this section, "electronic error"*
13 *means an error in an electronic message created by a consumer*
14 *using an information processing system if a reasonable method to*
15 *detect and correct or avoid the error was not provided.*

16 *2. In an automated transaction, a consumer is not bound by*
17 *an electronic message that the consumer did not intend and which*
18 *was caused by an electronic error, if the consumer:*

19 *(a) Promptly, on learning of the error:*

20 *(1) Notifies the other party of the error; and*

21 *(2) Causes delivery to the other party or, pursuant to*
22 *reasonable instructions received from the other party, delivers to*
23 *another person or destroys all copies of the information; and*

24 *(b) Has not used, or received any benefit or value from, the*
25 *information or caused the information or benefit to be made*
26 *available to a third party.*

27 *3. If subsection 2 does not apply, the effect of an electronic*
28 *error is determined by other law.*

29 **Sec. 110.** *1. Receipt of an electronic message is effective*
30 *when received even if no individual is aware of its receipt.*

31 *2. Receipt of an electronic acknowledgment of an electronic*
32 *message establishes that the message was received but by itself*
33 *does not establish that the content sent corresponds to the content*
34 *received.*

35 **Sec. 111.** *1. The following rules apply to a submission of*
36 *an idea or information for the creation, development or*
37 *enhancement of computer information which is not made*
38 *pursuant to an existing agreement requiring the submission:*

39 *(a) A contract is not formed and is not implied from the mere*
40 *receipt of an unsolicited submission.*

41 *(b) Engaging in a business, trade or industry that by custom or*
42 *practice regularly acquires ideas is not in itself an express or*
43 *implied solicitation of the information.*



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1 (c) *If the recipient seasonably notifies the person making the*
2 *submission that the recipient maintains a procedure to receive and*
3 *review submissions, a contract is formed only if:*

4 (1) *The submission is made and a contract accepted*
5 *pursuant to that procedure; or*

6 (2) *The recipient expressly agrees to terms concerning the*
7 *submission.*

8 2. *An agreement to disclose an idea creates a contract*
9 *enforceable against the receiving party only if the idea as disclosed*
10 *is confidential, concrete and novel to the business, trade or*
11 *industry or the party receiving the disclosure otherwise expressly*
12 *agreed.*

13 **Sec. 112.** *Terms with respect to which confirmatory records*
14 *of the parties agree or which are otherwise set forth in a record*
15 *intended by the parties as a final expression of their agreement*
16 *with respect to terms included therein may not be contradicted by*
17 *evidence of any previous agreement or of a contemporaneous oral*
18 *agreement but may be explained or supplemented by:*

19 1. *Course of performance, course of dealing or usage of*
20 *trade; and*

21 2. *Evidence of consistent additional terms, unless the court*
22 *finds the record to have been intended as a complete and exclusive*
23 *statement of the terms of the agreement.*

24 **Sec. 113.** 1. *The express terms of an agreement and any*
25 *course of performance, course of dealing or usage of trade must*
26 *be construed whenever reasonable as consistent with each other.*
27 *However, if that construction is unreasonable:*

28 (a) *Express terms prevail over course of performance, course*
29 *of dealing and usage of trade;*

30 (b) *Course of performance prevails over course of dealing and*
31 *usage of trade; and*

32 (c) *Course of dealing prevails over usage of trade.*

33 2. *An applicable usage of trade in the place where any part of*
34 *performance is to occur must be used in interpreting the*
35 *agreement as to that part of the performance.*

36 3. *Evidence of a relevant course of performance, course of*
37 *dealing or usage of trade offered by one party in a proceeding is*
38 *not admissible unless and until the party offering the evidence has*
39 *given the other party notice that the court finds sufficient to*
40 *prevent unfair surprise.*

41 4. *The existence and scope of a usage of trade must be proved*
42 *as a question of fact.*

43 **Sec. 114.** 1. *An agreement modifying a contract subject to*
44 *this chapter needs no consideration to be binding.*



1 2. An authenticated record that precludes modification or
2 rescission except by an authenticated record may not otherwise be
3 modified or rescinded. In a standard form supplied by a merchant
4 to a consumer, a term requiring an authenticated record for
5 modification of the contract is not enforceable unless the
6 consumer manifests assent to the term.

7 3. A modification of a contract and the contract as modified
8 must satisfy the requirements of subsection 1 of section 97 and
9 subsection 6 of section 118 of this act if the contract as modified is
10 within those provisions.

11 4. Subject to section 160 of this act, an attempt at
12 modification or rescission which does not satisfy subsection 2 or 3
13 may operate as a waiver.

14 **Sec. 115.** 1. Terms of an agreement involving successive
15 performances apply to all performances, even if the terms are not
16 displayed or otherwise brought to the attention of a party with
17 respect to each successive performance, unless the terms are
18 modified in accordance with this chapter or the contract.

19 2. If a contract provides that terms may be changed as to
20 future performances by compliance with a described procedure, a
21 change proposed in good faith pursuant to that procedure
22 becomes part of the contract if the procedure:

23 (a) Reasonably notifies the other party of the change; and

24 (b) In a mass-market transaction, permits the other party to
25 terminate the contract as to future performance if the change
26 alters a material term and the party in good faith determines that
27 the modification is unacceptable.

28 3. The parties by agreement may determine the standards for
29 reasonable notice unless the agreed standards are manifestly
30 unreasonable in light of the commercial circumstances.

31 4. The enforceability of changes made pursuant to a
32 procedure that does not comply with subsection 2 is determined by
33 the other provisions of this chapter or other law.

34 **Sec. 116.** An agreement that is otherwise sufficiently definite
35 to be a contract is not invalid because it leaves particulars of
36 performance to be specified by one of the parties. If particulars of
37 performance are to be specified by a party, the following rules
38 apply:

39 1. Specification must be made in good faith and within limits
40 set by commercial reasonableness.

41 2. If a specification materially affects the other party's
42 performance but is not seasonably made, the other party:

43 (a) Is excused for any resulting delay in its performance; and

44 (b) May perform, suspend performance, or treat the failure to
45 specify as a breach of contract.



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1 **Sec. 117.** *A performance obligation of a party that cannot be*
2 *determined from the agreement or from other provisions of this*
3 *chapter requires the party to perform in a manner and in a time*
4 *that is reasonable in light of the commercial circumstances*
5 *existing at the time of agreement.*

6 **Sec. 118. 1.** *A license grants:*

7 *(a) The contractual rights that are expressly described; and*

8 *(b) A contractual right to use any informational rights within*
9 *the licensor's control at the time of contracting which are*
10 *necessary in the ordinary course to exercise the expressly*
11 *described rights.*

12 2. *If a license expressly limits use of the information or*
13 *informational rights, use in any other manner is a breach of*
14 *contract. In all other cases, a license contains an implied*
15 *limitation that the licensee will not use the information or*
16 *informational rights otherwise than as described in subsection 1.*
17 *However, use inconsistent with this implied limitation is not a*
18 *breach if it is permitted under applicable law in the absence of the*
19 *implied limitation.*

20 3. *A party is not entitled to any rights in new versions of, or*
21 *improvements or modifications to, information made by the other*
22 *party. A licensor's agreement to provide new versions,*
23 *improvements or modifications requires that the licensor provide*
24 *them as developed and made generally commercially available*
25 *from time to time by the licensor.*

26 4. *Neither party is entitled to receive copies of source code,*
27 *schematics, master copy, design material or other information*
28 *used by the other party in creating, developing or implementing*
29 *the information.*

30 5. *Terms concerning scope must be construed under ordinary*
31 *principles of contract interpretation in light of the informational*
32 *rights and the commercial context. In addition, the following rules*
33 *apply:*

34 *(a) A grant of "all possible rights and for all media" or "all*
35 *rights and for all media now known or later developed," or a grant*
36 *in similar terms, includes all rights then existing or later created*
37 *by law and all uses, media and methods of distribution or*
38 *exhibition, whether then existing or developed in the future and*
39 *whether or not anticipated at the time of the grant.*

40 *(b) A grant of an "exclusive license," or a grant in similar*
41 *terms, means that:*

42 *(1) For the duration of the license, the licensor will not*
43 *exercise, and will not grant to any other person, rights in the same*
44 *information or informational rights within the scope of the*
45 *exclusive grant; and*



1 (2) *The licensor affirms that it has not previously granted*
2 *those rights in a contract in effect when the licensee’s rights may*
3 *be exercised.*

4 6. *The rules in this section may be varied only by a record*
5 *that is sufficient to indicate that a contract has been made and*
6 *which is:*

7 (a) *Authenticated by the party against which enforcement is*
8 *sought; or*

9 (b) *Prepared and delivered by one party and adopted by the*
10 *other under section 104 or 105 of this act.*

11 **Sec. 119.** 1. *Except as otherwise provided in subsection 2,*
12 *an agreement that provides that the performance of one party is to*
13 *be to the satisfaction or approval of the other party requires*
14 *performance sufficient to satisfy a reasonable person in the*
15 *position of the party that must be satisfied.*

16 2. *Performance must be to the subjective satisfaction of the*
17 *other party if:*

18 (a) *The agreement expressly so provides, such as by stating*
19 *that approval is in the “sole discretion” of the party, or words of*
20 *similar import; or*

21 (b) *The agreement is for informational content to be evaluated*
22 *in reference to subjective characteristics such as aesthetics, appeal*
23 *or suitability to taste.*

24 **Sec. 120.** 1. *A licensor of information that is a merchant*
25 *regularly dealing in information of the kind warrants that the*
26 *information will be delivered free of the rightful claim of any third*
27 *person by way of infringement or misappropriation, but a licensee*
28 *that furnishes detailed specifications to the licensor and the*
29 *method required for meeting the specifications holds the licensor*
30 *harmless against any such claim that arises out of compliance*
31 *with either the required specification or the required method*
32 *except for a claim that results from the failure of the licensor to*
33 *adopt, or notify the licensee of, a noninfringing alternative of*
34 *which the licensor had reason to know.*

35 2. *A licensor warrants:*

36 (a) *For the duration of the license, that no person holds a*
37 *rightful claim to, or interest in, the information which arose from*
38 *an act or omission of the licensor, other than a claim by way of*
39 *infringement or misappropriation, which will interfere with the*
40 *licensee’s enjoyment of its interest; and*

41 (b) *As to rights granted exclusively to the licensee, that within*
42 *the scope of the license:*

43 (1) *To the knowledge of the licensor, any licensed patent*
44 *rights are valid and exclusive to the extent exclusivity and validity*



1 *are recognized by the law under which the patent rights were*
2 *created; and*

3 *(2) In all other cases, the licensed informational rights are*
4 *valid and exclusive for the information as a whole to the extent*
5 *exclusivity and validity are recognized by the law applicable to the*
6 *licensed rights in a jurisdiction to which the license applies.*

7 *3. The warranties in this section are subject to the following*
8 *rules:*

9 *(a) If the licensed informational rights are subject to a right of*
10 *privileged use, collective administration or compulsory licensing,*
11 *the warranty is not made with respect to those rights.*

12 *(b) The obligations under subsection 1 and paragraph (b) of*
13 *subsection 2 apply solely to informational rights arising under the*
14 *laws of the United States or a state, unless the contract expressly*
15 *provides that the warranty obligations extend to rights under the*
16 *laws of other countries. Language is sufficient for this purpose if*
17 *it states, “The licensor warrants ‘exclusivity,’ ‘noninfringement,’*
18 *‘in specified countries,’ ‘worldwide,’” or words of similar import.*
19 *In that case, the warranty extends to the specified country or, in*
20 *the case of a reference to “worldwide” or the like, to all countries*
21 *within the description, but only to the extent the rights are*
22 *recognized under a treaty or international convention to which the*
23 *country and the United States are signatories.*

24 *(c) The warranties under subsection 1 and paragraph (b) of*
25 *subsection 2 are not made by a license that merely permits use, or*
26 *covenants not to claim infringement because of the use, of rights*
27 *under a licensed patent.*

28 *4. Except as otherwise provided in subsection 5, a warranty*
29 *under this section may be disclaimed or modified only by specific*
30 *language or by circumstances that give the licensee reason to*
31 *know that the licensor does not warrant that competing claims do*
32 *not exist or that the licensor purports to grant only the rights it*
33 *may have. An obligation to hold harmless under subsection 1 may*
34 *be disclaimed or modified only by specific language or by*
35 *circumstances giving the licensor reason to know that the licensee*
36 *does not provide a hold-harmless obligation to the licensor. In an*
37 *automated transaction, language is sufficient if it is conspicuous.*
38 *Otherwise, language in a record is sufficient if it states:*

39 *(a) As to a licensor’s obligation, “There is no warranty against*
40 *interference with your enjoyment of the information or against*
41 *infringement,” or words of similar import; or*

42 *(b) As to a licensee’s obligation, “There is no obligation to*
43 *hold you harmless from any actions taken in compliance with the*
44 *specifications or methods furnished by me under this contract,” or*
45 *words of similar import.*



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1 5. *Between merchants, a grant of a “quitclaim,” or a grant in*
2 *similar terms, grants the information or informational rights*
3 *without an implied warranty as to infringement or*
4 *misappropriation or as to the rights actually possessed or*
5 *transferred by the licensor.*

6 **Sec. 121. 1.** *Except as otherwise provided in subsection 3,*
7 *an express warranty by a licensor is created as follows:*

8 (a) *An affirmation of fact or promise made by the licensor to*
9 *its licensee, including by advertising, which relates to the*
10 *information and becomes part of the basis of the bargain creates*
11 *an express warranty that the information to be furnished under*
12 *the agreement will conform to the affirmation or promise.*

13 (b) *Any description of the information which is made part of*
14 *the basis of the bargain creates an express warranty that the*
15 *information will conform to the description.*

16 (c) *Any sample, model, or demonstration of a final product*
17 *which is made part of the basis of the bargain creates an express*
18 *warranty that the performance of the information will conform to*
19 *the performance of the sample, model or demonstration, taking*
20 *into account differences that would appear to a reasonable person*
21 *in the position of the licensee between the sample, model, or*
22 *demonstration and the information as it will be used.*

23 2. *It is not necessary to the creation of an express warranty*
24 *that the licensor use formal words, such as “warranty” or*
25 *“guaranty,” or state a specific intention to make a warranty.*
26 *However, an express warranty is not created by:*

27 (a) *An affirmation or prediction merely of the value of the*
28 *information or informational rights;*

29 (b) *A display or description of a portion of the information to*
30 *illustrate the aesthetics, appeal, suitability to taste, subjective*
31 *quality, or the like of informational content; or*

32 (c) *A statement purporting to be merely opinion or*
33 *commendation of the information or informational rights.*

34 3. *An express warranty or similar express contractual*
35 *obligation, if any, exists with respect to published informational*
36 *content covered by the provisions of this chapter to the same*
37 *extent that it would exist if the published informational content*
38 *had been published in a form that placed it outside this chapter.*
39 *However, if the warranty or similar express contractual obligation*
40 *is breached, the remedies of the aggrieved party are those under*
41 *this chapter and the agreement.*

42 **Sec. 122. 1.** *Unless the warranty is disclaimed or modified,*
43 *a licensor that is a merchant with respect to computer programs of*
44 *the kind warrants:*



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1 (a) *To its end user licensee that the computer program is fit for*
2 *the ordinary purposes for which such computer programs are*
3 *used;*

4 (b) *To its distributor that:*

5 (1) *The program is adequately packaged and labeled as the*
6 *agreement requires; and*

7 (2) *In the case of multiple copies, the copies are within the*
8 *variations permitted by the agreement, of even kind, quality and*
9 *quantity within each unit and among all units involved; and*

10 (c) *To the parties described in paragraphs (a) and (b), that the*
11 *program conforms to any promises or affirmations of fact made*
12 *on the container or label.*

13 2. *Unless disclaimed or modified, other implied warranties*
14 *with respect to computer programs may arise from course of*
15 *dealing or usage of trade.*

16 3. *No warranty is created under this section with respect to*
17 *informational content, but an implied warranty may arise under*
18 *section 123 of this act.*

19 **Sec. 123.** 1. *Unless the warranty is disclaimed or modified,*
20 *a merchant that, in a special relationship of reliance with a*
21 *licensee, collects, compiles, processes, provides or transmits*
22 *informational content warrants to that licensee that there is no*
23 *inaccuracy in the informational content caused by the merchant's*
24 *failure to perform with reasonable care.*

25 2. *There is no warranty under subsection 1 with respect to:*

26 (a) *Subjective characteristics of the informational content,*
27 *such as the aesthetics, appeal, and suitability to taste;*

28 (b) *Published informational content; or*

29 (c) *A person that acts as a conduit or provides no more than*
30 *editorial services in collecting, compiling, distributing, processing,*
31 *providing, or transmitting informational content that under the*
32 *circumstances can be identified as that of a third person.*

33 3. *The warranty under this section is not subject to the*
34 *preclusion in paragraph (a) of subsection 2 of section 93 of this*
35 *act on disclaiming obligations of diligence, reasonableness or*
36 *care.*

37 **Sec. 124.** 1. *Unless the warranty is disclaimed or modified,*
38 *if a licensor at the time of contracting has reason to know any*
39 *particular purpose for which the computer information is required*
40 *and that the licensee is relying on the licensor's skill or judgment*
41 *to select, develop or furnish suitable information, the following*
42 *rules apply:*

43 (a) *Except as otherwise provided in paragraph (b), there is an*
44 *implied warranty that the information is fit for that purpose.*



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1 (b) If from all the circumstances it appears that the licensor
2 was to be paid for the amount of its time or effort regardless of the
3 fitness of the resulting information, the warranty under paragraph
4 (a) is that the information will not fail to achieve the licensee's
5 particular purpose as a result of the licensor's lack of reasonable
6 effort.

7 2. There is no warranty under subsection 1 with regard to:

8 (a) The aesthetics, appeal, suitability to taste, or subjective
9 quality of informational content; or

10 (b) Published informational content, but there may be a
11 warranty with regard to the licensor's selection among published
12 informational content from different providers if the selection is
13 made by an individual acting as or on behalf of the licensor.

14 3. If an agreement requires a licensor to provide or select a
15 system consisting of computer programs and goods, and the
16 licensor has reason to know that the licensee is relying on the skill
17 or judgment of the licensor to select the components of the system,
18 there is an implied warranty that the components provided or
19 selected will function together as a system.

20 4. The warranty under this section is not subject to the
21 preclusion in paragraph (a) of subsection 2 of section 93 of this
22 act on disclaiming diligence, reasonableness or care.

23 **Sec. 125. 1.** Words or conduct relevant to the creation of an
24 express warranty and words or conduct tending to disclaim or
25 modify an express warranty must be construed wherever
26 reasonable as consistent with each other. Subject to section 112 of
27 this act with regard to parol or extrinsic evidence, the disclaimer
28 or modification is inoperative to the extent that such construction
29 is unreasonable.

30 2. Except as otherwise provided in subsections 3, 4 and 5, to
31 disclaim or modify an implied warranty or any part of it, but not
32 the warranty in section 120 of this act, the following rules apply:

33 (a) Except as otherwise provided in this subsection:

34 (1) To disclaim or modify the implied warranty arising
35 under section 122 of this act, language must mention
36 "merchantability" or "quality" or use words of similar import and,
37 if in a record, must be conspicuous.

38 (2) To disclaim or modify the implied warranty arising
39 under section 123 of this act, language in a record must mention
40 "accuracy" or use words of similar import.

41 (b) Language to disclaim or modify the implied warranty
42 arising under section 124 of this act must be in a record and be
43 conspicuous. It is sufficient to state, "There is no warranty that
44 this information, our efforts, or the system will fulfill any of your
45 particular purposes or needs," or words of similar import.



1 (c) *Language in a record is sufficient to disclaim all implied*
2 *warranties if it individually disclaims each implied warranty or,*
3 *except for the warranty in section 120 of this act, if it is*
4 *conspicuous and states “Except for express warranties stated in*
5 *this contract, if any, this ‘information’ ‘computer program’ is*
6 *provided with all faults, and the entire risk as to satisfactory*
7 *quality, performance, accuracy, and effort is with the user,” or*
8 *words of similar import.*

9 (d) *A disclaimer or modification sufficient under NRS*
10 *104.2101 to 104.2725, inclusive, or 104A.2101 to 104A.2532,*
11 *inclusive, to disclaim or modify an implied warranty of*
12 *merchantability is sufficient to disclaim or modify the warranties*
13 *under sections 122 and 123 of this act. A disclaimer or*
14 *modification sufficient under NRS 104.2101 to 104.2725,*
15 *inclusive, or 104A.2101 to 104A.2532, inclusive, to disclaim or*
16 *modify an implied warranty of fitness for a particular purpose is*
17 *sufficient to disclaim or modify the warranties under section 124*
18 *of this act.*

19 3. *Unless the circumstances indicate otherwise, all implied*
20 *warranties, but not the warranty under section 120 of this act, are*
21 *disclaimed by expressions like “as is” or “with all faults” or other*
22 *language that in common understanding calls the licensee’s*
23 *attention to the disclaimer of warranties and makes plain that*
24 *there are no implied warranties.*

25 4. *If a licensee before entering into a contract has examined*
26 *the information or the sample or model as fully as it desired or has*
27 *refused to examine the information, there is no implied warranty*
28 *with regard to defects that an examination ought in the*
29 *circumstances to have revealed to the licensee.*

30 5. *An implied warranty may also be disclaimed or modified by*
31 *course of performance, course of dealing or usage of trade.*

32 6. *If a contract requires ongoing performance or a series of*
33 *performances by the licensor, language of disclaimer or*
34 *modification which complies with this section is effective with*
35 *respect to all performances under the contract.*

36 7. *Remedies for breach of warranty may be limited in*
37 *accordance with the provisions of this chapter with respect to*
38 *liquidation or limitation of damages and contractual modification*
39 *of remedy.*

40 **Sec. 126.** *A licensee that modifies a computer program, other*
41 *than by using a capability of the program intended for that*
42 *purpose in the ordinary course, does not invalidate any warranty*
43 *regarding performance of an unmodified copy but does invalidate*
44 *any warranties, express or implied, regarding performance of the*



1 *modified copy. A modification occurs if a licensee alters code in,*
2 *deletes code from, or adds code to the computer program.*

3 **Sec. 127.** *Warranties, whether express or implied, must be*
4 *construed as consistent with each other and as cumulative, but if*
5 *that construction is unreasonable, the intention of the parties*
6 *determines which warranty is dominant. In ascertaining that*
7 *intention, the following rules apply:*

8 1. *Exact or technical specifications displace an inconsistent*
9 *sample or model or general language of description.*

10 2. *A sample displaces inconsistent general language of*
11 *description.*

12 3. *Express warranties displace inconsistent implied*
13 *warranties other than an implied warranty under subsection 1 of*
14 *section 124 of this act.*

15 **Sec. 128.** 1. *Except for published informational content, a*
16 *warranty to a licensee extends to persons for whose benefit the*
17 *licensor intends to supply the information or informational rights*
18 *and which rightfully use the information in a transaction or*
19 *application of a kind in which the licensor intends the information*
20 *to be used.*

21 2. *A warranty to a consumer extends to each individual*
22 *consumer in the licensee's immediate family or household if the*
23 *individual's use would have been reasonably expected by the*
24 *licensor.*

25 3. *A contractual term that excludes or limits the persons to*
26 *which a warranty extends is effective except as to individuals*
27 *described in subsection 2.*

28 4. *A disclaimer or modification of a warranty or remedy*
29 *which is effective against the licensee is also effective against third*
30 *persons to which a warranty extends under this section.*

31 **Sec. 129.** 1. *As used in this section, "free software" means*
32 *a computer program with respect to which the licensor does not*
33 *intend to make a profit from the distribution of the copy of the*
34 *program and does not act generally for commercial gain derived*
35 *from controlling use of the program or making, modifying, or*
36 *redistributing copies of the program.*

37 2. *The warranties under sections 120 and 122 of this act do*
38 *not apply to free software.*

39 **Sec. 130.** 1. *If an agreement provides for conveyance of*
40 *ownership of informational rights in a computer program,*
41 *ownership passes at the time and place specified by the agreement*
42 *but does not pass until the program is in existence and identified*
43 *to the contract. If the agreement does not specify a different time,*
44 *ownership passes when the program and the informational rights*
45 *are in existence and identified to the contract.*



1 2. *Transfer of a copy does not transfer ownership of*
2 *informational rights.*

3 **Sec. 131.** *1. In a license:*

4 (a) *Title to a copy is determined by the license;*

5 (b) *A licensee's right under the license to possession or control*
6 *of a copy is governed by the license and does not depend solely on*
7 *title to the copy; and*

8 (c) *If a licensor reserves title to a copy, the licensor retains title*
9 *to that copy and any copies made of it, unless the license grants*
10 *the licensee a right to make and sell copies to others, in which case*
11 *the reservation of title applies only to copies delivered to the*
12 *licensee by the licensor.*

13 2. *If an agreement provides for transfer of title to a copy, title*
14 *passes:*

15 (a) *At the time and place specified in the agreement; or*

16 (b) *If the agreement does not specify a time and place:*

17 (1) *With respect to delivery of a copy on a tangible medium,*
18 *at the time and place the licensor completed its obligations with*
19 *respect to tender of the copy; or*

20 (2) *With respect to electronic delivery of a copy, if a first*
21 *sale occurs under federal copyright law, at the time and place at*
22 *which the licensor completed its obligations with respect to tender*
23 *of the copy.*

24 3. *If the party to which title passes under the contract refuses*
25 *delivery of the copy or rejects the terms of the agreement, title*
26 *reverts in the licensor.*

27 **Sec. 132.** *The following rules apply to a transfer of a*
28 *contractual interest:*

29 1. *A party's contractual interest may be transferred unless the*
30 *transfer:*

31 (a) *Is prohibited by other law; or*

32 (b) *Except as otherwise provided in subsection 3, would*
33 *materially change the duty of the other party, materially increase*
34 *the burden or risk imposed on the other party, or materially impair*
35 *the other party's property or its likelihood or expectation of*
36 *obtaining return performance.*

37 2. *Except as otherwise provided in subsection 3 and*
38 *subparagraph (2) of paragraph (a) of subsection 1 of section 137*
39 *of this act, a term prohibiting transfer of a party's contractual*
40 *interest is enforceable, and a transfer made in violation of that*
41 *term is a breach of contract and is ineffective to create contractual*
42 *rights in the transferee against the nontransferring party, except*
43 *to the extent that:*

44 (a) *The contract is a license for incorporation or use of the*
45 *licensed information or informational rights with information or*



1 *informational rights from other sources in a combined work for*
2 *public distribution or public performance and the transfer is of the*
3 *completed, combined work;*

4 *(b) The transfer is of a right to payment arising out of the*
5 *transferor's due performance of less than its entire obligation and*
6 *the transfer would be enforceable under subsection 1 in the*
7 *absence of the term prohibiting transfer; or*

8 *(c) The term is in a mass-market license and the transfer*
9 *complies with 17 U.S.C. § 117, is made with the computer*
10 *containing the authorized copy, and is a gift or donation:*

11 *(1) To a public elementary or secondary school;*

12 *(2) To a public library; or*

13 *(3) From a consumer to another consumer.*

14 *3. A right to damages for breach of the whole contract or a*
15 *right to payment arising out of the transferor's due performance*
16 *of its entire obligation may be transferred notwithstanding an*
17 *agreement otherwise.*

18 *4. A term that prohibits transfer of a contractual interest*
19 *under a mass-market license by the licensee must be conspicuous.*

20 **Sec. 133.** *1. A transfer of "the contract" or of "all my*
21 *rights under the contract," or a transfer in similar general terms,*
22 *is a transfer of all contractual interests under the contract.*
23 *Whether the transfer is effective is determined by section 132 of*
24 *this act and subparagraph (2) of paragraph (a) of subsection 1 of*
25 *section 137 of this act.*

26 *2. The following rules apply to a transfer of a party's*
27 *contractual interests:*

28 *(a) The transferee is subject to all contractual use terms.*

29 *(b) Unless the language or circumstances otherwise indicate,*
30 *as in a transfer as security under NRS 104.9101 to 104.9709,*
31 *inclusive, the transfer delegates the duties of the transferor and*
32 *transfers its rights.*

33 *(c) Acceptance of the transfer is a promise by the transferee to*
34 *perform the delegated duties. The promise is enforceable by the*
35 *transferor and any other party to the original contract.*

36 *(d) The transfer does not relieve the transferor of any duty to*
37 *perform, or of liability for breach of contract, unless the other*
38 *party to the original contract agrees that the transfer has that*
39 *effect.*

40 *3. A party to the original contract, other than the transferor,*
41 *may treat a transfer that conveys a right or duty of performance*
42 *without its consent as creating reasonable grounds for insecurity*
43 *and, without prejudice to the party's rights against the transferor,*
44 *may demand assurances from the transferee under section 166 of*
45 *this act.*



1 **Sec. 134.** 1. A party may perform its contractual duties or
2 exercise its contractual rights through a delegate or a subcontract
3 unless:

4 (a) The contract prohibits delegation or subcontracting; or
5 (b) The other party has a substantial interest in having the
6 original promisor perform or control the performance.

7 2. Delegating or subcontracting performance does not relieve
8 the delegating party of a duty to perform or of liability for breach.

9 3. An attempted delegation that violates a term prohibiting
10 delegation is not effective.

11 **Sec. 135.** 1. If all or any part of a licensee's interest in a
12 license is transferred, voluntarily or involuntarily, the transferee
13 does not acquire an interest in information, copies, or the
14 contractual or informational rights of the licensee unless the
15 transfer is effective under section 132 of this act or subparagraph
16 (2) of paragraph (a) of subsection 1 of section 137 of this act. If
17 the transfer is effective, the transferee takes subject to the terms of
18 the license.

19 2. Except as otherwise provided under trade secret law, a
20 transferee acquires no more than the contractual interest or other
21 rights that the transferor was authorized to transfer.

22 **Sec. 136.** If a financier does not become a licensee in
23 connection with its financial accommodation contract, the
24 following rules apply:

25 1. The financier does not receive the benefits or burdens of
26 the license.

27 2. The licensee's rights and obligations with respect to the
28 information and informational rights are governed by:

29 (a) The license;

30 (b) Any rights of the licensor under other law; and

31 (c) To the extent not inconsistent with paragraphs (a) and (b),
32 any financial accommodation contract between the financier and
33 the licensee, which may add additional conditions to the licensee's
34 right to use the licensed information or informational rights.

35 **Sec. 137.** 1. If a financier becomes a licensee in connection
36 with its financial accommodation contract and then transfers its
37 contractual interest under the license, or sublicenses the licensed
38 computer information or informational rights, to a licensee
39 receiving the financial accommodation, the following rules apply:

40 (a) The transfer or sublicense to the accommodated licensee is
41 not effective unless:

42 (1) The transfer or sublicense is effective under section 132
43 of this act; or

44 (2) The following conditions are fulfilled:



1 (I) Before the licensor delivered the information or
2 granted the license to the financier, the licensor received notice in
3 a record from the financier giving the name and location of the
4 accommodated licensee and clearly indicating that the license was
5 being obtained in order to transfer the contractual interest or
6 sublicense the licensed information or informational rights to the
7 accommodated licensee;

8 (II) The financier became a licensee solely to make the
9 financial accommodation; and

10 (III) The accommodated licensee adopts the terms of the
11 license, which terms may be supplemented by the financial
12 accommodation contract, to the extent the terms of the financial
13 accommodation contract are not inconsistent with the license and
14 any rights of the licensor under other law.

15 (b) A financier that makes a transfer that is effective under
16 subparagraph (2) of paragraph (a) may make only the single
17 transfer or sublicense contemplated by the notice unless the
18 licensor consents to a later transfer.

19 2. If a financier makes an effective transfer of its contractual
20 interest in a license, or an effective sublicense of the licensed
21 information or informational rights, to an accommodated licensee,
22 the following rules apply:

23 (a) The accommodated licensee's rights and obligations are
24 governed by:

25 (1) The license;

26 (2) Any rights of the licensor under other law; and

27 (3) To the extent not inconsistent with subparagraphs (1)
28 and (2), the financial accommodation contract, which may impose
29 additional conditions to the licensee's right to use the licensed
30 information or informational rights.

31 (b) The financier does not make warranties to the
32 accommodated licensee other than the warranty under paragraph
33 (a) of subsection 2 of section 120 of this act and any express
34 warranties in the financial accommodation contract.

35 **Sec. 138.** Unless the accommodated licensee is a consumer, a
36 term in a financial accommodation contract providing that the
37 accommodated licensee's obligations to the financier are
38 irrevocable and independent is enforceable. The obligations
39 become irrevocable and independent upon the licensee's
40 acceptance of the license or the financier's giving of value,
41 whichever occurs first.

42 **Sec. 139.** 1. Except as otherwise provided in subsection 2,
43 on material breach of a financial accommodation contract by the
44 accommodated licensee, the following rules apply:



1 (a) *The financier may cancel the financial accommodation*
2 *contract.*

3 (b) *Subject to paragraphs (c) and (d), the financier may pursue*
4 *its remedies against the accommodated licensee under the*
5 *financial accommodation contract.*

6 (c) *If the financier became a licensee and made a transfer or*
7 *sublicense that was effective under section 137 of this act, it may*
8 *exercise the remedies of a licensor for breach, including the rights*
9 *of an aggrieved party under section 183 of this act, subject to the*
10 *limitations of section 184 of this act.*

11 (d) *If the financier did not become a licensee or did not make a*
12 *transfer that was effective under section 137 of this act, it may*
13 *enforce a contractual right contained in the financial*
14 *accommodation contract to preclude the licensee's further use of*
15 *the information. However, the following rules apply:*

16 (1) *The financier has no right to take possession of copies,*
17 *use the information or informational rights, or transfer any*
18 *contractual interest in the license.*

19 (2) *If the accommodated licensee agreed to transfer*
20 *possession of copies to the financier in the event of material*
21 *breach of the financial accommodation contract, the financier*
22 *may enforce that contractual right only if permitted to do so under*
23 *paragraph (a) of subsection 2 and section 132 of this act.*

24 2. *The following additional limitations apply to a financier's*
25 *remedies under subsection 1:*

26 (a) *A financier described in paragraph (c) of subsection 1*
27 *which is entitled under the financial accommodation contract to*
28 *take possession or prevent use of information, copies, or related*
29 *materials may do so only if the licensor consents or if doing so*
30 *would not result in a material adverse change of the duty of the*
31 *licensor, materially increase the burden or risk imposed on the*
32 *licensor, disclose or threaten to disclose trade secrets or*
33 *confidential material of the licensor, or materially impair the*
34 *licensor's likelihood or expectation of obtaining return*
35 *performance.*

36 (b) *The financier may not otherwise exercise control over,*
37 *have access to, or sell, transfer, or otherwise use the information*
38 *or copies without the consent of the licensor unless the financier*
39 *or transferee is subject to the terms of the license and:*

40 (1) *The licensee owns the licensed copy, the license does*
41 *not preclude transfer of the licensee's contractual rights, and the*
42 *transfer complies with federal copyright law for the owner of a*
43 *copy to make the transfer; or*



1 (2) *The license is transferable by its express terms and the*
2 *financier fulfills any conditions to, or complies with any*
3 *restrictions on, transfer.*

4 (c) *The financier's remedies under the financial*
5 *accommodation contract are subject to the licensor's rights and*
6 *the terms of the license.*

7 **Sec. 140.** 1. *The creation of a financier's interest does not*
8 *place any obligations on or alter the rights of a licensor.*

9 2. *A financier's interest does not attach to any intellectual*
10 *property rights of the licensor unless the licensor expressly*
11 *consents to such attachment in a license or another record.*

12 **Sec. 141.** 1. *A party shall perform in a manner that*
13 *conforms to the contract.*

14 2. *If an uncured material breach of contract by one party*
15 *precedes the aggrieved party's performance, the aggrieved party*
16 *need not perform except with respect to restrictions in contractual*
17 *use terms. In addition, the following rules apply:*

18 (a) *The aggrieved party may refuse a performance that is a*
19 *material breach as to that performance or a performance that may*
20 *be refused under subsection 2 of section 162 of this act.*

21 (b) *The aggrieved party may cancel the contract only if the*
22 *requirements of section 170 of this act are satisfied.*

23 (c) *The contractual use terms do not apply to information or*
24 *copies properly received or obtained from another source not*
25 *covered by the agreement.*

26 3. *Except as otherwise provided in subsection 2, tender of*
27 *performance by a party entitles the party to acceptance of that*
28 *performance. In addition, the following rules apply:*

29 (a) *A tender of performance occurs when the party, with*
30 *manifest present ability and willingness to perform, offers to*
31 *complete the performance.*

32 (b) *If a performance by the other party is due at the time of the*
33 *tendered performance, tender of the other party's performance is a*
34 *condition to the tendering party's obligation to complete the*
35 *tendered performance.*

36 (c) *A party shall pay or render the consideration required by*
37 *the agreement for a performance it accepts. A party that accepts a*
38 *performance has the burden of establishing a breach of contract*
39 *with respect to the accepted performance.*

40 4. *Except as otherwise provided in sections 143 and 144 of*
41 *this act, in the case of a performance with respect to a copy, this*
42 *section is subject to sections 146 to 150, inclusive, and 162 to 165,*
43 *inclusive, of this act.*

44 **Sec. 142.** 1. *As used in this section, "enable use" means to*
45 *grant a contractual right or permission with respect to information*



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1 *or informational rights and to complete the acts, if any, required*
2 *under the agreement to make the information available to the*
3 *licensee.*

4 *2. A licensor shall enable use by the licensee pursuant to the*
5 *contract. The following rules apply to enabling use:*

6 *(a) If nothing other than the grant of a contractual right or*
7 *permission is required to enable use, the licensor enables use*
8 *when the contract becomes enforceable.*

9 *(b) If the agreement requires delivery of a copy, enabling use*
10 *occurs when the copy is tendered to the licensee.*

11 *(c) If the agreement requires delivery of a copy and steps*
12 *authorizing the licensee's use, enabling use occurs when the last*
13 *of those acts occurs.*

14 *(d) In an access contract, enabling use requires tendering all*
15 *access material necessary to enable the agreed access.*

16 *(e) If the agreement requires a transfer of ownership of*
17 *informational rights and a filing or recording is allowed by law to*
18 *establish priority of the transferred ownership, on request by the*
19 *licensee, the licensor shall execute and tender a record*
20 *appropriate for that purpose.*

21 **Sec. 143.** *If an agreement requires that submitted*
22 *information be to the satisfaction of the recipient, the following*
23 *rules apply:*

24 *1. Sections 146 to 150, inclusive, and 162 to 165, inclusive, of*
25 *this act do not apply to the submission.*

26 *2. If the information is not satisfactory to the recipient and*
27 *the parties engage in efforts to correct the deficiencies in a*
28 *manner and over a time consistent with the ordinary standards of*
29 *the business, trade or industry, neither the efforts nor the passage*
30 *of time required for the efforts is an acceptance or a refusal of the*
31 *submission.*

32 *3. Except as otherwise provided in subsection 4, neither*
33 *refusal nor acceptance occurs unless the recipient expressly*
34 *refuses or accepts the submitted information, but the recipient may*
35 *not use the submitted information before acceptance.*

36 *4. Silence and a failure to act in reference to a submission*
37 *beyond a commercially reasonable time to respond entitle the*
38 *submitting party to demand, in a record delivered to the recipient,*
39 *a decision on the submission. If the recipient fails to respond*
40 *within a reasonable time after receipt of the demand, the*
41 *submission is deemed to have been refused.*

42 **Sec. 144.** *If a performance involves delivery of information*
43 *or services which, because of their nature, may provide a licensee,*
44 *immediately on performance or delivery, with substantially all the*



1 *benefit of the performance or with other significant benefit that*
2 *cannot be returned, the following rules apply:*

3 1. *Sections 147 to 150, inclusive, and 162 to 165, inclusive, of*
4 *this act do not apply.*

5 2. *The rights of the parties are determined under the other*
6 *provisions of this chapter, including section 141 of this act, and*
7 *the ordinary standards of the business, trade or industry.*

8 3. *Before tender of the performance, a party entitled to*
9 *receive the tender may inspect the media, labels or packaging but*
10 *may not view the information or otherwise receive the*
11 *performance before completing any performance of its own that is*
12 *then due.*

13 **Sec. 145.** 1. *As used in this section, “automatic restraint”*
14 *means a program, code, device, or similar electronic or physical*
15 *limitation the intended purpose of which is to prevent use of*
16 *information contrary to the contract or applicable law.*

17 2. *A party entitled to enforce a limitation on use of*
18 *information may include an automatic restraint in the information*
19 *or a copy of it and use that restraint if:*

20 (a) *A term of the agreement authorizes use of the restraint;*

21 (b) *The restraint prevents a use that is inconsistent with the*
22 *agreement;*

23 (c) *The restraint prevents use after expiration of the stated*
24 *duration of the contract or a stated number of uses; or*

25 (d) *The restraint prevents use after the contract terminates,*
26 *other than on expiration of a stated duration or number of uses,*
27 *and the licensor gives reasonable notice to the licensee before*
28 *further use is prevented.*

29 3. *This section does not authorize an automatic restraint that*
30 *affirmatively prevents or makes impracticable a licensee’s access*
31 *to its own information or information of a third party, other than*
32 *the licensor, if that information is in the possession of the licensee*
33 *or a third party and accessed without use of the licensor’s*
34 *information or informational rights.*

35 4. *A party that includes or uses an automatic restraint in*
36 *accordance with subsection 2 or 3 is not liable for any loss caused*
37 *by the use of the restraint to prevent use of information contrary to*
38 *the contract or applicable law. This subsection does not alter the*
39 *effect or enforceability of contractual terms such as warranties or*
40 *of other laws.*

41 5. *This section does not preclude electronic replacement or*
42 *disabling of an earlier copy of information by the licensor in*
43 *connection with delivery of a new copy or version under an*
44 *agreement to replace or disable the earlier copy by electronic*
45 *means with an upgrade or other new information.*



1 6. *This section does not authorize use of an automatic*
2 *restraint to enforce remedies because of breach of contract or for*
3 *cancellation for breach. If a right to cancel for breach of contract*
4 *and a right to exercise a restraint under paragraph (d) of*
5 *subsection 2 exist simultaneously, any affirmative acts constituting*
6 *self-help may only be taken subject to the limitations in subsection*
7 *2 of section 183 of this act and section 184 of this act instead of*
8 *this section. Affirmative acts under this subsection do not include:*

9 (a) *Use of a program, code, device or similar electronic or*
10 *physical limitation that operates automatically without regard to*
11 *breach; or*

12 (b) *A refusal to prevent the operation of a restraint authorized*
13 *by this section or to reverse its effect.*

14 **Sec. 146.** *1. Delivery of a copy must be at the location*
15 *designated by agreement. In the absence of a designation, the*
16 *following rules apply:*

17 (a) *The place for delivery of a copy on a tangible medium is*
18 *the tendering party's place of business or, if it has none, its*
19 *residence. However, if the parties know at the time of contracting*
20 *that the copy is located in some other place, that place is the place*
21 *for delivery.*

22 (b) *The place for electronic delivery of a copy is an*
23 *information processing system designated or used by the licensor.*

24 (c) *Documents of title may be delivered through customary*
25 *banking channels.*

26 2. *Tender of delivery of a copy requires the tendering party to*
27 *put and hold a conforming copy at the other party's disposition*
28 *and give the other party any notice reasonably necessary to enable*
29 *it to obtain access to, control or possession of the copy. Tender*
30 *must be at a reasonable hour and, if applicable, requires tender of*
31 *access material and other documents required by the agreement.*
32 *The party receiving tender shall furnish facilities reasonably*
33 *suited to receive tender. In addition, the following rules apply:*

34 (a) *If the contract requires delivery of a copy held by a third*
35 *person without being moved, the tendering party shall tender*
36 *access material or documents required by the agreement.*

37 (b) *If the tendering party is required or authorized to send a*
38 *copy to the other party and the contract does not require the*
39 *tendering party to deliver the copy at a particular destination, the*
40 *following rules apply:*

41 (1) *In tendering delivery of a copy on a tangible medium,*
42 *the tendering party shall put the copy in the possession of a carrier*
43 *and make a contract for its transportation that is reasonable in*
44 *light of the nature of the information and other circumstances,*
45 *with expenses of transportation to be borne by the receiving party.*



1 (2) *In tendering electronic delivery of a copy, the tendering*
2 *party shall initiate or cause to have initiated a transmission that is*
3 *reasonable in light of the nature of the information and other*
4 *circumstances, with expenses of transmission to be borne by the*
5 *receiving party.*

6 (c) *If the tendering party is required to deliver a copy at a*
7 *particular destination, the tendering party shall make a copy*
8 *available at that destination and bear the expenses of*
9 *transportation or transmission.*

10 **Sec. 147.** 1. *If performance requires delivery of a copy, the*
11 *following rules apply:*

12 (a) *The party required to deliver need not complete a tendered*
13 *delivery until the receiving party tenders any performance then*
14 *due.*

15 (b) *Tender of delivery is a condition of the other party's duty to*
16 *accept the copy and entitles the tendering party to acceptance of*
17 *the copy.*

18 2. *If payment is due on delivery of a copy, the following rules*
19 *apply:*

20 (a) *Tender of delivery is a condition of the receiving party's*
21 *duty to pay and entitles the tendering party to payment according*
22 *to the contract.*

23 (b) *All copies required by the contract must be tendered in a*
24 *single delivery, and payment is due only on tender.*

25 3. *If the circumstances give either party the right to make or*
26 *demand delivery in lots, the contract fee, if it can be apportioned,*
27 *may be demanded for each lot.*

28 4. *If payment is due and demanded on delivery of a copy or*
29 *on delivery of a document of title, the right of the party receiving*
30 *tender to retain or dispose of the copy or document, as against the*
31 *tendering party, is conditioned on making the payment due.*

32 **Sec. 148.** 1. *Except as otherwise provided in sections 143*
33 *and 144 of this act, if performance requires delivery of a copy, the*
34 *following rules apply:*

35 (a) *Except as otherwise provided in this section, the party*
36 *receiving the copy has a right before payment or acceptance to*
37 *inspect the copy at a reasonable place and time and in a*
38 *reasonable manner to determine conformance to the contract.*

39 (b) *The party making the inspection shall bear the expenses of*
40 *inspection.*

41 (c) *A place or method of inspection or an acceptance standard*
42 *fixed by the parties is presumed to be exclusive. However, the*
43 *fixing of a place, method or standard does not postpone*
44 *identification to the contract or shift the place for delivery,*
45 *passage of title or risk of loss. If compliance with the place or*



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1 *method becomes impossible, inspection must be made as provided*
2 *in this section unless the place or method fixed by the parties was*
3 *an indispensable condition the failure of which avoids the*
4 *contract.*

5 *(d) A party's right to inspect is subject to existing obligations*
6 *of confidentiality.*

7 *2. If a right to inspect exists under subsection 1 but the*
8 *agreement is inconsistent with an opportunity to inspect before*
9 *payment, the party does not have a right to inspect before*
10 *payment.*

11 *3. If a contract requires payment before inspection of a copy,*
12 *nonconformity in the tender does not excuse the party receiving*
13 *the tender from making payment unless:*

14 *(a) The nonconformity appears without inspection and would*
15 *justify refusal under section 162 of this act; or*

16 *(b) Despite tender of the required documents, the*
17 *circumstances would justify an injunction against honor of a letter*
18 *of credit under NRS 104.5101 to 104.5118, inclusive.*

19 *4. Payment made under circumstances described in*
20 *subsection 2 or 3 is not an acceptance of the copy and does not*
21 *impair a party's right to inspect or preclude any of the party's*
22 *remedies.*

23 **Sec. 149. 1. Acceptance of a copy occurs when the party to**
24 **which the copy is tendered:**

25 *(a) Signifies, or acts with respect to the copy in a manner that*
26 *signifies, that the tender was conforming or that the party will take*
27 *or retain the copy despite the nonconformity;*

28 *(b) Does not make an effective refusal;*

29 *(c) Commingles the copy or the information in a manner that*
30 *makes compliance with the party's duties after refusal impossible;*

31 *(d) Obtains a substantial benefit from the copy and cannot*
32 *return that benefit; or*

33 *(e) Acts in a manner inconsistent with the licensor's*
34 *ownership, but the act is an acceptance only if the licensor elects*
35 *to treat it as an acceptance and ratifies the act to the extent it was*
36 *within contractual use terms.*

37 *2. Except in cases governed by paragraph (c) or (d) of*
38 *subsection 1, if there is a right to inspect under section 148 of this*
39 *act or the agreement, acceptance of a copy occurs only after the*
40 *party has had a reasonable opportunity to inspect the copy.*

41 *3. If an agreement requires delivery in stages involving*
42 *separate portions that taken together comprise the whole of the*
43 *information, acceptance of any stage is conditional until*
44 *acceptance of the whole.*



1 **Sec. 150. 1.** *A party accepting a copy shall pay or render*
2 *the consideration required by the agreement for the copy it*
3 *accepts. Acceptance of a copy precludes refusal and, if made with*
4 *knowledge of a nonconformity in a tender, may not be revoked*
5 *because of the nonconformity unless acceptance was on the*
6 *reasonable assumption that the nonconformity would be*
7 *seasonably cured. Acceptance by itself does not impair any other*
8 *remedy for nonconformity.*

9 2. *A party accepting a copy has the burden of establishing a*
10 *breach of contract with respect to the copy.*

11 3. *If a copy has been accepted and a breach of contract or a*
12 *breach of warranty is claimed, the following rules apply:*

13 (a) *If the claim is of a type other than a claim alleging a*
14 *breach of a warranty of noninfringement or breach of an express*
15 *warranty about misappropriation or for libel, slander, or the like,*
16 *the accepting party shall notify the other party of the breach*
17 *within a reasonable time after it discovers or should have*
18 *discovered a breach of contract or be precluded from any remedy*
19 *for the breach.*

20 (b) *If the claim is for breach of warranty of noninfringement*
21 *or breach of an express warranty about misappropriation or for*
22 *libel, slander, or the like and the accepting party is sued by a third*
23 *party for such claim, the accepting party shall notify the other*
24 *party within a reasonable time after receiving notice of the*
25 *litigation or be precluded from any remedy over for the liability*
26 *established by the litigation.*

27 **Sec. 151. 1.** *If an access contract provides for access over a*
28 *period of time, the following rules apply:*

29 (a) *The licensee's rights of access are to the information as*
30 *modified and made commercially available by the licensor from*
31 *time to time during that period.*

32 (b) *A change in the content of the information is a breach of*
33 *contract only if the change conflicts with an express term of the*
34 *agreement.*

35 (c) *Unless it is subject to a contractual use term, information*
36 *obtained by the licensee is free of any use restriction other than a*
37 *restriction resulting from the informational rights of another*
38 *person or other law.*

39 (d) *Access must be available:*

40 (1) *At times and in a manner conforming to the express*
41 *terms of the agreement; and*

42 (2) *To the extent not expressly stated in the agreement, at*
43 *times and in a manner reasonable for the particular type of*
44 *contract in light of the ordinary standards of the business, trade or*
45 *industry.*



1 2. *In an access contract that gives the licensee a right of*
2 *access at times substantially of its own choosing during agreed*
3 *periods, an occasional failure to have access available during*
4 *those times is not a breach of contract if it is:*

5 (a) *Consistent with ordinary standards of the business, trade or*
6 *industry for the particular type of contract; or*

7 (b) *Caused by:*

8 (1) *Scheduled downtime;*

9 (2) *Reasonable needs for maintenance;*

10 (3) *Reasonable periods of failure of equipment, computer*
11 *programs, or communications; or*

12 (4) *Events reasonably beyond the licensor's control, and*
13 *the licensor exercises such commercially reasonable efforts as the*
14 *circumstances require.*

15 **Sec. 152.** 1. *If a person agrees to provide services*
16 *regarding the correction of performance problems in computer*
17 *information, other than an agreement to cure its own existing*
18 *breach of contract, the following rules apply:*

19 (a) *If the services are provided by a licensor of the information*
20 *as part of a limited remedy, the licensor undertakes that its*
21 *performance will provide the licensee with information that*
22 *conforms to the agreement to which the limited remedy applies.*

23 (b) *In all other cases, the person:*

24 (1) *Shall perform at a time and place and in a manner*
25 *consistent with the express terms of the agreement and, to the*
26 *extent not stated in the express terms, at a time and place and in a*
27 *manner that is reasonable in light of ordinary standards of the*
28 *business, trade or industry; and*

29 (2) *Does not undertake that its services will correct*
30 *performance problems unless the agreement expressly so provides.*

31 2. *Unless required to do so by an express or implied warranty,*
32 *a licensor is not required to provide instruction or other support*
33 *for the licensee's use of information or access. A person that*
34 *agrees to provide support shall make the support available in a*
35 *manner and with a quality consistent with express terms of the*
36 *support agreement and, to the extent not stated in the express*
37 *terms, at a time and place and in a manner that is reasonable in*
38 *light of ordinary standards of the business, trade or industry.*

39 **Sec. 153.** 1. *As used in this section:*

40 (a) *"Dealer" means a merchant licensee that receives*
41 *information directly or indirectly from a licensor for sale or*
42 *license to end users.*

43 (b) *"End user" means a licensee that acquires a copy of the*
44 *information from a dealer by delivery on a tangible medium for*



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1 *the licensee's own use and not for sale, license, transmission to*
2 *third persons, or public display or performance for a fee.*

3 (c) *"Publisher" means a licensor, other than a dealer, that*
4 *offers a license to an end user with respect to information*
5 *distributed by a dealer to the end user.*

6 2. *In a contract between a dealer and an end user, if the end*
7 *user's right to use the information or informational rights is*
8 *subject to a license by the publisher and there was no opportunity*
9 *to review the license before the end user became obligated to pay*
10 *the dealer, the following rules apply:*

11 (a) *The contract between the end user and the dealer is*
12 *conditioned on the end user's agreement to the publisher's license.*

13 (b) *Unless the end user agrees, such as by manifesting assent,*
14 *to the terms of the publisher's license, the end user has a right to a*
15 *return from the dealer. A right under this paragraph is a return*
16 *for the purposes of sections 90, 104 and 105 of this act.*

17 (c) *The dealer is not bound by the terms, and does not receive*
18 *the benefits, of an agreement between the publisher and the end*
19 *user unless the dealer and end user adopt those terms as part of*
20 *the agreement.*

21 3. *If an agreement provides for distribution of copies on a*
22 *tangible medium or in packaging provided by the publisher or an*
23 *authorized third party, a dealer may distribute those copies and*
24 *documentation only:*

25 (a) *In the form as received; and*

26 (b) *Subject to the terms of any license that the publisher*
27 *provides to the dealer to be furnished to end users.*

28 4. *A dealer that enters into an agreement with an end user is*
29 *a licensor with respect to the end user under this chapter.*

30 **Sec. 154.** 1. *Except as otherwise provided in this section,*
31 *the risk of loss as to a copy that is to be delivered to a licensee,*
32 *including a copy delivered by electronic means, passes to the*
33 *licensee upon its receipt of the copy.*

34 2. *If an agreement requires or authorizes a licensor to send a*
35 *copy on a tangible medium by carrier, the following rules apply:*

36 (a) *If the agreement does not require the licensor to deliver the*
37 *copy at a particular destination, the risk of loss passes to the*
38 *licensee when the copy is duly delivered to the carrier, even if*
39 *the shipment is under reservation.*

40 (b) *If the agreement requires the licensor to deliver the copy at*
41 *a particular destination and the copy is duly tendered there in the*
42 *possession of the carrier, the risk of loss passes to the licensee*
43 *when the copy is tendered at that destination.*



1 (c) *If a tender of delivery of a copy or a shipping document*
2 *fails to conform to the contract, the risk of loss remains with the*
3 *licensor until cure or acceptance.*

4 3. *If a copy is held by a third party to be delivered or*
5 *reproduced without being moved or a copy is to be delivered by*
6 *making access available to a third party resource containing a*
7 *copy, the risk of loss passes to the licensee upon:*

8 (a) *The licensee's receipt of a negotiable document of title or*
9 *other access materials covering the copy;*

10 (b) *Acknowledgment by the third party to the licensee of the*
11 *licensee's right to possession of or access to the copy; or*

12 (c) *The licensee's receipt of a record directing the third party,*
13 *pursuant to an agreement between the licensor and the third party,*
14 *to make delivery or authorizing the third party to allow access.*

15 **Sec. 155.** 1. *Unless a party has assumed a different*
16 *obligation, delay in performance by a party, or nonperformance in*
17 *whole or part by a party, other than of an obligation to make*
18 *payments or to conform to contractual use terms, is not a breach*
19 *of contract if the delay or nonperformance is of a performance*
20 *that has been made impracticable by:*

21 (a) *The occurrence of a contingency the nonoccurrence of*
22 *which was a basic assumption on which the contract was made; or*

23 (b) *Compliance in good faith with any foreign or domestic*
24 *statute, governmental rule, regulation, or order, whether or not it*
25 *later proves to be invalid.*

26 2. *A party claiming excuse under subsection 1 shall*
27 *seasonably notify the other party that there will be delay or*
28 *nonperformance.*

29 3. *If an excuse affects only a part of a party's capacity to*
30 *perform an obligation for delivery of copies, the party claiming*
31 *excuse shall allocate performance among its customers in any*
32 *manner that is fair and reasonable and notify the other party of*
33 *the estimated quota to be made available. In making the*
34 *allocation, the party claiming excuse may include the*
35 *requirements of regular customers not then under contract and its*
36 *own requirements.*

37 4. *A party that receives notice pursuant to subsection 2 of a*
38 *material or indefinite delay in delivery of copies or of an*
39 *allocation under subsection 3, by notice in a record, may:*

40 (a) *Terminate and thereby discharge any executory portion of*
41 *the contract; or*

42 (b) *Modify the contract by agreeing to take the available*
43 *allocation in substitution.*



1 5. *If, after receipt of notice under subsection 2, a party does*
2 *not modify the contract within a reasonable time not exceeding 30*
3 *days, the contract lapses with respect to any performance affected.*

4 **Sec. 156.** *1. Except as otherwise provided in subsection 2,*
5 *on termination all obligations that are still executory on both sides*
6 *are discharged.*

7 2. *The following survive termination:*

8 (a) *A right based on previous breach or performance of the*
9 *contract;*

10 (b) *An obligation of confidentiality, nondisclosure or*
11 *noncompetition to the extent enforceable under other law;*

12 (c) *A contractual use term applicable to any licensed copy or*
13 *information received from the other party, or copies made of it,*
14 *which are not returned or returnable to the other party;*

15 (d) *An obligation to deliver, or dispose of information,*
16 *materials, documentation, copies, records, or the like to the other*
17 *party, an obligation to destroy copies, or a right to obtain*
18 *information from an escrow agent;*

19 (e) *A choice of law or forum;*

20 (f) *An obligation to arbitrate or otherwise resolve disputes by*
21 *alternative dispute resolution procedures;*

22 (g) *A term limiting the time for commencing an action or for*
23 *giving notice;*

24 (h) *An indemnity term or a right related to a claim of a type*
25 *described in paragraph (a) of subsection 4 of section 173 of this*
26 *act;*

27 (i) *A limitation of remedy or modification or disclaimer of*
28 *warranty;*

29 (j) *An obligation to provide an accounting and make any*
30 *payment due under the accounting; and*

31 (k) *Any term that the agreement provides will survive.*

32 **Sec. 157.** *1. Except as otherwise provided in subsection 2, a*
33 *party may not terminate a contract except on the happening of an*
34 *agreed event, such as the expiration of the stated duration, unless*
35 *the party gives reasonable notice of termination to the other party.*

36 2. *An access contract may be terminated without giving*
37 *notice. However, except on the happening of an agreed event,*
38 *termination requires giving reasonable notice to the licensee if the*
39 *access contract pertains to information owned and provided by the*
40 *licensee to the licensor.*

41 3. *A term dispensing with a notice required under this section*
42 *is invalid if its operation would be unconscionable. However, a*
43 *term specifying standards for giving notice is enforceable if the*
44 *standards are not manifestly unreasonable.*



1 **Sec. 158.** *1. On termination of a license, a party in*
2 *possession or control of information, copies, or other materials*
3 *that are the property of the other party, or are subject to a*
4 *contractual obligation to be delivered to that party on termination,*
5 *shall use commercially reasonable efforts to deliver or hold them*
6 *for disposal on instructions of that party. If any materials are*
7 *jointly owned, the party in possession or control shall make them*
8 *available to the joint owners.*

9 *2. Termination of a license ends all right under the license*
10 *for the licensee to use or access the licensed information,*
11 *informational rights, or copies. Continued use of the licensed*
12 *copies or exercise of terminated rights is a breach of contract*
13 *unless authorized by a term that survives termination.*

14 *3. Each party may enforce its rights under subsections 1 and*
15 *2 by acting pursuant to section 145 of this act or by judicial*
16 *process, including obtaining an order that the party or an officer*
17 *of the court take the following actions with respect to any licensed*
18 *information, documentation, copies or other materials to be*
19 *delivered:*

20 *(a) Deliver or take possession of them;*

21 *(b) Without removal, render unusable or eliminate the*
22 *capability to exercise contractual rights in or use of them;*

23 *(c) Destroy or prevent access to them; and*

24 *(d) Require that the party or any other person in possession or*
25 *control of them make them available to the other party at a place*
26 *designated by that party which is reasonably convenient to both*
27 *parties.*

28 *4. In an appropriate case, a court of competent jurisdiction*
29 *may grant injunctive relief to enforce the parties' rights under this*
30 *section.*

31 **Sec. 159.** *1. Whether a party is in breach of contract is*
32 *determined by the agreement and the provisions of this chapter. A*
33 *breach occurs if a party without legal excuse fails to perform an*
34 *obligation in a timely manner, repudiates a contract, or exceeds a*
35 *contractual use term, or otherwise is not in compliance with an*
36 *obligation placed on it by the provisions of this chapter or the*
37 *agreement.*

38 *2. A breach of contract, whether or not material, entitles the*
39 *aggrieved party to its remedies. Whether a breach of a contractual*
40 *use term is an infringement or a misappropriation is determined*
41 *by applicable informational property rights law.*

42 *3. A breach of contract is material if:*

43 *(a) The contract so provides;*

44 *(b) The breach is a substantial failure to perform a term that is*
45 *an essential element of the agreement; or*



1 (c) *The circumstances, including the language of the*
2 *agreement, the reasonable expectations of the parties, the*
3 *standards and practices of the business, trade or industry, and*
4 *the character of the breach, indicate that:*

5 (1) *The breach caused or is likely to cause substantial harm*
6 *to the aggrieved party; or*

7 (2) *The breach substantially deprived or is likely*
8 *substantially to deprive the aggrieved party of a significant benefit*
9 *it reasonably expected under the contract.*

10 4. *The cumulative effect of nonmaterial breaches may be*
11 *material.*

12 **Sec. 160.** 1. *Except for a waiver in accordance with*
13 *subsection 2 or a waiver supported by consideration, a waiver*
14 *affecting an executory portion of a contract may be retracted by*
15 *seasonable notice received by the other party that strict*
16 *performance will be required in the future, unless the retraction*
17 *would be unjust in view of a material change of position in*
18 *reliance on the waiver by that party.*

19 2. *A claim or right arising out of a breach of contract may be*
20 *discharged in whole or part without consideration by a waiver in a*
21 *record to which the party making the waiver agrees after breach,*
22 *such as by manifesting assent, or which the party making the*
23 *waiver authenticates and delivers to the other party after breach.*

24 3. *A party that accepts a performance with knowledge that*
25 *the performance constitutes a breach of contract and, within a*
26 *reasonable time after acceptance, does not notify the other party of*
27 *the breach waives all remedies for the breach, unless acceptance*
28 *was made on the reasonable assumption that the breach would be*
29 *cured and it has not been seasonably cured. However, a party that*
30 *seasonably notifies the other party of a reservation of rights does*
31 *not waive the rights reserved.*

32 4. *A party that refuses a performance and fails to identify a*
33 *particular defect that is ascertainable by reasonable inspection*
34 *waives the right to rely on that defect to justify refusal only if:*

35 (a) *The other party could have cured the defect if it were stated*
36 *seasonably; or*

37 (b) *Between merchants, the other party after refusal made a*
38 *request in a record for a full and final statement of all defects on*
39 *which the refusing party relied.*

40 5. *Waiver of a remedy for breach of contract in one*
41 *performance does not waive any remedy for the same or a similar*
42 *breach in future performances unless the party making the waiver*
43 *expressly so states.*

44 6. *A waiver may not be retracted as to the performance to*
45 *which the waiver applies.*



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1 **Sec. 161. 1.** *A party in breach of contract may cure the*
2 *breach at its own expense if:*

3 (a) *The time for performance has not expired and the party in*
4 *breach seasonably notifies the aggrieved party of its intent to cure*
5 *and, within the time for performance, makes a conforming*
6 *performance;*

7 (b) *The party in breach had reasonable grounds to believe the*
8 *performance would be acceptable with or without monetary*
9 *allowance, seasonably notifies the aggrieved party of its intent to*
10 *cure, and provides a conforming performance within a further*
11 *reasonable time after performance was due; or*

12 (c) *In a case not governed by paragraph (a) or (b), the party in*
13 *breach seasonably notifies the aggrieved party of its intent to cure*
14 *and promptly provides a conforming performance before*
15 *cancellation by the aggrieved party.*

16 2. *In a license other than in a mass-market transaction, if the*
17 *agreement required a single delivery of a copy and the party*
18 *receiving tender of delivery was required to accept a*
19 *nonconforming copy because the nonconformity was not a*
20 *material breach of contract, the party in breach shall promptly*
21 *and in good faith make an effort to cure if:*

22 (a) *The party in breach receives seasonable notice of the*
23 *specific nonconformity and a demand for cure of it; and*

24 (b) *The cost of the effort to cure does not disproportionately*
25 *exceed the direct damages caused by the nonconformity to the*
26 *aggrieved party.*

27 3. *A party may not cancel a contract or refuse a performance*
28 *because of a breach of contract that has been seasonably cured*
29 *under subsection 1. However, notice of intent to cure does not*
30 *preclude refusal or cancellation for the uncured breach.*

31 **Sec. 162. 1.** *Subject to subsection 2 and section 163 of this*
32 *act, tender of a copy that is a material breach of contract permits*
33 *the party to which tender is made to:*

34 (a) *Refuse the tender;*

35 (b) *Accept the tender; or*

36 (c) *Accept any commercially reasonable units and refuse the*
37 *rest.*

38 2. *In a mass-market transaction that calls for only a single*
39 *tender of a copy, a licensee may refuse the tender if the tender*
40 *does not conform to the contract.*

41 3. *Refusal of a tender is ineffective unless:*

42 (a) *It is made before acceptance;*

43 (b) *It is made within a reasonable time after tender or*
44 *completion of any permitted effort to cure; and*



1 (c) *The refusing party seasonably notifies the tendering party*
2 *of the refusal.*

3 4. *Except in a case governed by subsection 2, a party that*
4 *rightfully refuses tender of a copy may cancel the contract only if*
5 *the tender was a material breach of the whole contract or the*
6 *agreement so provides.*

7 **Sec. 163.** *If an agreement grants a right in or permission to*
8 *use informational rights which precedes or is otherwise*
9 *independent of the delivery of a copy, the following rules apply:*

10 1. *A party may refuse a tender of a copy which is a material*
11 *breach as to that copy, but refusal of that tender does not cancel*
12 *the contract.*

13 2. *In a case governed by subsection 1, the tendering party*
14 *may cure the breach by seasonably providing a conforming copy*
15 *before the breach becomes material as to the whole contract.*

16 3. *A breach that is material with respect to a copy allows*
17 *cancellation of the contract only if the breach cannot be*
18 *seasonably cured and is a material breach of the whole contract.*

19 **Sec. 164.** 1. *Except as otherwise provided in this section,*
20 *after rightful refusal or revocation of acceptance of a copy, the*
21 *following rules apply:*

22 (a) *If the refusing party rightfully cancels the contract, section*
23 *170 of this act applies and all restrictions in contractual use terms*
24 *continue.*

25 (b) *If the contract is not cancelled, the parties remain bound*
26 *by all contractual obligations.*

27 2. *On rightful refusal or revocation of acceptance of a copy,*
28 *the following rules apply to the extent consistent with section 170*
29 *of this act:*

30 (a) *Any use, sale, display, performance or transfer of the copy*
31 *or information it contains, or any failure to comply with a*
32 *contractual use term, is a breach of contract. The licensee shall*
33 *pay the licensor the reasonable value of any use. However, use for*
34 *a limited time within contractual use terms is not a breach, and is*
35 *not an acceptance under paragraph (e) of subsection 1 of section*
36 *149 of this act, if it:*

37 (1) *Occurs after the tendering party is seasonably notified*
38 *of refusal;*

39 (2) *Is not for distribution and is solely part of measures*
40 *reasonable under the circumstances to avoid or reduce loss; and*

41 (3) *Is not contrary to instructions concerning disposition of*
42 *the copy received from the party in breach.*

43 (b) *A party that refuses a copy shall:*

44 (1) *Deliver the copy and all copies made of it, all access*
45 *materials, and documentation pertaining to the refused*



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1 *information to the tendering party or hold them with reasonable*
2 *care for a reasonable time for disposal at that party's instructions;*
3 *and*

4 (2) *Follow reasonable instructions of the tendering party*
5 *for returning or delivering copies, access material, and*
6 *documentation, but instructions are not reasonable if the*
7 *tendering party does not arrange for payment of or reimbursement*
8 *for reasonable expenses of complying with the instructions.*

9 (c) *If the tendering party does not give instructions within a*
10 *reasonable time after being notified of refusal, the refusing party,*
11 *in a reasonable manner to reduce or avoid loss, may store the*
12 *copies, access material, and documentation for the tendering*
13 *party's account or ship them to the tendering party and is entitled*
14 *to reimbursement for reasonable costs of storage and shipment.*

15 (d) *Both parties remain bound by all contractual use terms*
16 *that would have been enforceable had the performance not been*
17 *refused.*

18 (e) *In complying with this section, the refusing party shall act*
19 *in good faith. Conduct in good faith under this section is not*
20 *acceptance or conversion and may not be a ground for an action*
21 *for damages under the contract.*

22 **Sec. 165. 1.** *A party that accepts a nonconforming tender*
23 *of a copy may revoke acceptance only if the nonconformity is a*
24 *material breach of contract and the party accepted it:*

25 (a) *On the reasonable assumption that the nonconformity*
26 *would be cured, and the nonconformity was not seasonably cured;*

27 (b) *During a continuing effort by the party in breach at*
28 *adjustment and cure, and the breach was not seasonably cured; or*

29 (c) *Without discovery of the nonconformity, if acceptance was*
30 *reasonably induced either by the other party's assurances or by*
31 *the difficulty of discovery before acceptance.*

32 2. *Revocation of acceptance is not effective until the revoking*
33 *party notifies the other party of the revocation.*

34 3. *Revocation of acceptance of a copy is precluded if:*

35 (a) *It does not occur within a reasonable time after the party*
36 *attempting to revoke discovers or should have discovered the*
37 *ground for it;*

38 (b) *It occurs after a substantial change in condition not caused*
39 *by defects in the information, such as after the party commingles*
40 *the information in a manner that makes its return impossible; or*

41 (c) *The party attempting to revoke received a substantial*
42 *benefit or value from the information, and the benefit or value*
43 *cannot be returned.*



1 4. A party that rightfully revokes has the same duties and is
2 under the same restrictions as if the party had refused tender of
3 the copy.

4 **Sec. 166.** 1. A contract imposes an obligation on each party
5 not to impair the other's expectation of receiving due
6 performance. If reasonable grounds for insecurity arise with
7 respect to the performance of either party, the aggrieved party
8 may:

9 (a) Demand in a record adequate assurance of due
10 performance; and

11 (b) Until that assurance is received, if commercially
12 reasonable, suspend any performance, other than with respect to
13 restrictions in contractual use terms, for which the agreed return
14 performance has not been received.

15 2. Between merchants, the reasonableness of grounds for
16 insecurity and the adequacy of any assurance offered is
17 determined according to commercial standards.

18 3. Acceptance of any improper delivery or payment does not
19 impair an aggrieved party's right to demand adequate assurance
20 of future performance.

21 4. After receipt of a justified demand under subsection 1,
22 failure, within a reasonable time not exceeding 30 days, to provide
23 assurance of due performance which is adequate under the
24 circumstances of the particular case is a repudiation of the
25 contract under section 167 of this act.

26 **Sec. 167.** 1. If a party to a contract repudiates a
27 performance not yet due and the loss of performance will
28 substantially impair the value of the contract to the other party,
29 the aggrieved party may:

30 (a) Await performance by the repudiating party for a
31 commercially reasonable time or resort to any remedy for breach
32 of contract, even if it has urged the repudiating party to retract the
33 repudiation or has notified the repudiating party that it would
34 await its performance; and

35 (b) In either case, suspend its own performance or proceed in
36 accordance with section 180 or 181 of this act, as applicable.

37 2. Repudiation includes language that one party will not or
38 cannot make a performance still due under the contract or
39 voluntary, affirmative conduct that reasonably appears to the
40 other party to make a future performance impossible.

41 **Sec. 168.** 1. A repudiating party may retract its repudiation
42 until its next performance is due unless the aggrieved party, after
43 the repudiation, has cancelled the contract, materially changed its
44 position, or otherwise indicated that it considers the repudiation
45 final.



1 2. A retraction may be by any method that clearly indicates to
2 the aggrieved party that the repudiating party intends to perform
3 the contract. However, a retraction must contain any assurance
4 justifiably demanded under section 166 of this act.

5 3. Retraction restores a repudiating party's rights under the
6 contract with due excuse and allowance to the aggrieved party for
7 any delay caused by the repudiation.

8 **Sec. 169.** 1. The remedies provided in this chapter are
9 cumulative, but a party may not recover more than once for the
10 same loss.

11 2. Except as otherwise provided in sections 171 and 172 of
12 this act, if a party is in breach of contract, whether or not the
13 breach is material, the aggrieved party has the remedies provided
14 in the agreement or this chapter, but the aggrieved party shall
15 continue to comply with any restrictions in contractual use terms
16 with respect to information or copies received from the other party
17 and the contractual use terms do not apply to information or
18 copies properly received or obtained from another source.

19 3. Rescission or a claim for rescission of the contract, or
20 refusal of the information, does not preclude and is not
21 inconsistent with a claim for damages or other remedy.

22 **Sec. 170.** 1. An aggrieved party may cancel a contract for
23 breach if the breach is a material breach of the whole contract
24 which has not been cured or waived or the agreement allows
25 cancellation for the breach.

26 2. Cancellation is not effective until the cancelling party gives
27 notice of cancellation to the party in breach, unless a delay
28 required to notify the party would cause or threaten material harm
29 or loss to the aggrieved party. The notification may be in any form
30 reasonable under the circumstances. However, in an access
31 contract, a party may cancel rights of access without notice.

32 3. On cancellation, the following rules apply:

33 (a) If a party is in possession or control of licensed
34 information, documentation, materials or copies of licensed
35 information, the following rules apply:

36 (1) A party that has rightfully refused a copy shall comply
37 with subsection 2 of section 164 of this act as to the refused copy.

38 (2) A party in breach of contract which would be subject to
39 an obligation to deliver under section 158 of this act, shall deliver
40 all information, documentation, materials and copies to the other
41 party or hold them with reasonable care for a reasonable time for
42 disposal at that party's instructions. The party in breach of
43 contract shall follow any reasonable instructions received from the
44 other party.



1 (3) *Except as otherwise provided in subparagraphs (1) and*
2 *(2), the party shall comply with section 158 of this act.*

3 (b) *All obligations that are executory on both sides at the time*
4 *of cancellation are discharged, but the following survive:*

5 (1) *Any right based on previous breach or performance;*
6 *and*

7 (2) *The rights, duties and remedies described in subsection*
8 *2 of section 156 of this act.*

9 (c) *Cancellation of a license by the licensor ends any*
10 *contractual right of the licensee to use the information,*
11 *informational rights, copies or other materials.*

12 (d) *Cancellation of a license by the licensee ends any*
13 *contractual right to use the information, informational rights,*
14 *copies or other materials, but the licensee may use the information*
15 *for a limited time after the license has been cancelled if the use:*

16 (1) *Is within contractual use terms;*

17 (2) *Is not for distribution and is solely part of measures*
18 *reasonable under the circumstances to avoid or reduce loss; and*

19 (3) *Is not contrary to instructions received from the party in*
20 *breach concerning disposition of them.*

21 (e) *The licensee shall pay the licensor the reasonable value of*
22 *any use after cancellation permitted under paragraph (d).*

23 (f) *The obligations under this subsection apply to all*
24 *information, informational rights, documentation, materials and*
25 *copies received by the party and any copies made therefrom.*

26 4. *A term providing that a contract may not be cancelled*
27 *precludes cancellation but does not limit other remedies.*

28 5. *Unless a contrary intention clearly appears, an expression*
29 *such as “cancellation,” “rescission,” or the like may not be*
30 *construed as a renunciation or discharge of a claim in damages*
31 *for an antecedent breach.*

32 **Sec. 171. 1.** *Except as otherwise provided in this section*
33 *and in section 172 of this act:*

34 (a) *An agreement may provide for remedies in addition to or in*
35 *substitution for those provided in this chapter and may limit or*
36 *alter the measure of damages recoverable under this chapter or a*
37 *party’s other remedies under this chapter, such as by precluding a*
38 *party’s right to cancel for breach of contract, limiting remedies to*
39 *returning or delivering copies and repayment of the contract fee,*
40 *or limiting remedies to repair or replacement of the*
41 *nonconforming copies; and*

42 (b) *Resort to a contractual remedy is optional unless the*
43 *remedy is expressly agreed to be exclusive, in which case it is the*
44 *sole remedy.*



1 2. Subject to subsection 3, if performance of an exclusive or
2 limited remedy causes the remedy to fail of its essential purpose,
3 the aggrieved party may pursue other remedies under this chapter.

4 3. Failure or unconscionability of an agreed exclusive or
5 limited remedy makes a term disclaiming or limiting consequential
6 or incidental damages unenforceable unless the agreement
7 expressly makes the disclaimer or limitation independent of the
8 agreed remedy.

9 4. Consequential damages and incidental damages may be
10 excluded or limited by agreement unless the exclusion or
11 limitation is unconscionable. Exclusion or limitation of
12 consequential damages for personal injury in a consumer contract
13 for a computer program that is subject to the provisions of this
14 chapter and is contained in consumer goods is prima facie
15 unconscionable, but exclusion or limitation of damages for a
16 commercial loss is not unconscionable.

17 **Sec. 172.** 1. Damages for breach of contract by either party
18 may be liquidated by agreement in an amount that is reasonable in
19 light of:

- 20 (a) The loss anticipated at the time of contracting;
21 (b) The actual loss; or
22 (c) The actual or anticipated difficulties of proving loss in the
23 event of breach.

24 2. If a term liquidating damages is unenforceable under this
25 subsection, the aggrieved party may pursue the remedies provided
26 in this chapter, except as limited by other terms of the contract.

27 3. If a party justifiably withholds delivery of copies because of
28 the other party's breach of contract, the party in breach is entitled
29 to restitution for any amount by which the sum of the payments it
30 made for the copies exceeds the amount of the liquidated damages
31 payable to the aggrieved party in accordance with subsection 1.
32 The right to restitution is subject to offset to the extent that the
33 aggrieved party establishes:

34 (a) A right to recover damages other than under subsection 1;
35 and

36 (b) The amount or value of any benefits received by the party
37 in breach, directly or indirectly, by reason of the contract.

38 4. A term that does not liquidate damages, but that limits
39 damages available to the aggrieved party, must be evaluated under
40 section 171 of this act.

41 **Sec. 173.** 1. Except as otherwise provided in subsection 2,
42 an action for breach of contract must be commenced within the
43 later of 4 years after the right of action accrues or 1 year after the
44 breach was or should have been discovered, but not later than 5
45 years after the right of action accrues.



1 2. *If the original agreement of the parties alters the period of*
2 *limitations, the following rules apply:*

3 (a) *The parties may reduce the period of limitation to not less*
4 *than 1 year after the right of action accrues but may not extend it.*

5 (b) *In a consumer contract, the period of limitation may not be*
6 *reduced.*

7 3. *Except as otherwise provided in subsection 4, a right of*
8 *action accrues when the act or omission constituting a breach of*
9 *contract occurs, even if the aggrieved party did not know of the*
10 *breach. A right of action for breach of warranty accrues when*
11 *tender of delivery of a copy pursuant to section 146 of this act, or*
12 *access to the information, occurs. However, if the warranty*
13 *expressly extends to future performance of the information or a*
14 *copy, the right of action accrues when the performance fails to*
15 *conform to the warranty, but not later than the date the warranty*
16 *expires.*

17 4. *In the following cases, a right of action accrues on the*
18 *later of the date the act or omission constituting the breach of*
19 *contract occurred or the date on which it was or should have been*
20 *discovered by the aggrieved party, but not earlier than the date for*
21 *delivery of a copy if the claim relates to information in the copy:*

22 (a) *A breach of warranty against third-party claims for:*

23 (1) *Infringement or misappropriation; or*

24 (2) *Libel, slander, or the like;*

25 (b) *A breach of contract involving a party's disclosure or*
26 *misuse of confidential information; or*

27 (c) *A failure to provide an indemnity or to perform another*
28 *obligation to protect or defend against a third-party claim.*

29 5. *If an action commenced within the period of limitation is*
30 *so concluded as to leave available a remedy by another action for*
31 *the same breach of contract, the other action may be commenced*
32 *after expiration of the period of limitation if the action is*
33 *commenced within six months after conclusion of the first action,*
34 *unless the action was concluded as a result of voluntary*
35 *discontinuance or dismissal for failure or neglect to prosecute.*

36 6. *This section does not alter the law on tolling of the statute*
37 *of limitations and does not apply to a right of action that accrued*
38 *before October 1, 2003.*

39 **Sec. 174.** *Remedies for material misrepresentation or fraud*
40 *include all remedies available under this chapter for*
41 *nonfraudulent breach of contract.*

42 **Sec. 175.** 1. *Except as otherwise provided in the contract,*
43 *an aggrieved party may not recover compensation for that part of*
44 *a loss which could have been avoided by taking measures*
45 *reasonable under the circumstances to avoid or reduce loss. The*



1 *burden of establishing a failure of the aggrieved party to take*
2 *measures reasonable under the circumstances is on the party in*
3 *breach of contract.*

4 *2. A party may not recover:*

5 *(a) Consequential damages for losses resulting from the*
6 *content of published informational content unless the agreement*
7 *expressly so provides; or*

8 *(b) Damages that are speculative.*

9 *3. The remedy for breach of contract for disclosure or misuse*
10 *of information that is a trade secret or in which the aggrieved*
11 *party has a right of confidentiality includes as consequential*
12 *damages compensation for the benefit obtained as a result of the*
13 *breach.*

14 *4. For purposes of this chapter, market value is determined as*
15 *of the date of breach of contract and the place for performance.*

16 *5. Damages or expenses that relate to events after the date of*
17 *entry of judgment must be reduced to their present value as of that*
18 *date. In this subsection, “present value” means the amount, as of*
19 *a date certain, of one or more sums payable in the future or the*
20 *value of one or more performances due in the future, discounted*
21 *to the date certain. The discount is determined by the interest rate*
22 *specified by the parties in their agreement unless that rate was*
23 *manifestly unreasonable when the agreement was entered into.*
24 *Otherwise, the discount is determined by a commercially*
25 *reasonable rate that takes into account the circumstances of each*
26 *case when the agreement was entered into.*

27 **Sec. 176.** *1. As used in this section, “substitute*
28 *transaction” means a transaction by the licensor which would not*
29 *have been possible except for the licensee’s breach and which*
30 *transaction is for the same information or informational rights*
31 *with the same contractual use terms as the transaction to which*
32 *the licensee’s breach applies.*

33 *2. Except as otherwise provided in section 175 of this act, a*
34 *breach of contract by a licensee entitles the licensor to recover the*
35 *following compensation for losses resulting in the ordinary course*
36 *from the breach, less expenses avoided as a result of the breach, to*
37 *the extent not otherwise accounted for under this subsection:*

38 *(a) Damages measured in any combination of the following*
39 *ways but not to exceed the contract fee and the market value of*
40 *other consideration required under the contract for the*
41 *performance that was the subject of the breach:*

42 *(1) The amount of accrued and unpaid contract fees and*
43 *the market value of other consideration earned but not received*
44 *for:*

45 *(I) Any performance accepted by the licensee; and*



1 (II) Any performance to which section 144 of this act
2 applies;

3 (2) For performances not governed by subparagraph (1), if
4 the licensee repudiated or wrongfully refused the performance or
5 the licensor rightfully cancelled and the breach makes possible a
6 substitute transaction, the amount of loss as determined by
7 contract fees and the market value of other consideration required
8 under the contract for the performance less:

9 (I) The contract fees and market value of other
10 consideration received from an actual and commercially
11 reasonable substitute transaction entered into by the licensor in
12 good faith and without unreasonable delay; or

13 (II) The market value of a commercially reasonable
14 hypothetical substitute transaction;

15 (3) For performances not governed by subparagraph (1), if
16 the breach does not make possible a substitute transaction, lost
17 profit, including reasonable overhead, that the licensor would
18 have realized on acceptance and full payment for performance
19 that was not delivered to the licensee because of the licensee's
20 breach; or

21 (4) Damages calculated in any reasonable manner; and

22 (b) Consequential and incidental damages.

23 **Sec. 177. 1.** Subject to subsection 2 and except as otherwise
24 provided in section 175 of this act, a breach of contract by a
25 licensor entitles the licensee to recover the following compensation
26 for losses resulting in the ordinary course from the breach or, if
27 appropriate, as to the whole contract, less expenses avoided as a
28 result of the breach to the extent not otherwise accounted for
29 under this section:

30 (a) Damages measured in any combination of the following
31 ways, but not to exceed the market value of the performance that
32 was the subject of the breach plus restitution of any amounts paid
33 for performance not received and not accounted for within the
34 indicated recovery:

35 (1) With respect to performance that has been accepted and
36 the acceptance not rightfully revoked, the value of the
37 performance required less the value of the performance accepted
38 as of the time and place of acceptance;

39 (2) With respect to performance that has not been rendered
40 or that was rightfully refused or acceptance of which was
41 rightfully revoked:

42 (I) The amount of any payments made and the value of
43 other consideration given to the licensor with respect to that
44 performance and not previously returned to the licensee;



1 (II) *The market value of the performance less the*
2 *contract fee for that performance; or*

3 (III) *The cost of a commercially reasonable substitute*
4 *transaction less the contract fee under the breached contract, if*
5 *the substitute transaction was entered into by the licensee in good*
6 *faith and without unreasonable delay for substantially similar*
7 *information with the same contractual use terms; or*

8 (3) *Damages calculated in any reasonable manner; and*
9 (b) *Incidental and consequential damages.*

10 2. *The amount of damages must be reduced by any unpaid*
11 *contract fees for performance by the licensor which has been*
12 *accepted by the licensee and as to which the acceptance has not*
13 *been rightfully revoked.*

14 **Sec. 178.** 1. *Except as otherwise provided in subsection 2,*
15 *an aggrieved party, upon notifying the party in breach of contract*
16 *of its intention to do so, may deduct all or any part of the damages*
17 *resulting from the breach from any payments still due under the*
18 *same contract.*

19 2. *If a breach of contract is not material with reference to the*
20 *particular performance, an aggrieved party may exercise its rights*
21 *under subsection 1 only if the agreement does not require further*
22 *affirmative performance by the other party and the amount of*
23 *damages deducted can be readily liquidated under the agreement.*

24 **Sec. 179.** 1. *Specific performance may be ordered:*

25 (a) *If the agreement provides for that remedy, other than an*
26 *obligation for the payment of money;*

27 (b) *If the contract was not for personal services and the agreed*
28 *performance is unique; or*

29 (c) *In other proper circumstances.*

30 2. *An order for specific performance may contain any*
31 *conditions considered just and must provide adequate safeguards*
32 *consistent with the contract to protect the confidentiality of*
33 *information, information, and informational rights of both parties.*

34 **Sec. 180.** 1. *On breach of contract by a licensee, the*
35 *licensor may:*

36 (a) *Identify to the contract any conforming copy not already*
37 *identified if, at the time the licensor learned of the breach, the*
38 *copy was in its possession;*

39 (b) *In the exercise of reasonable commercial judgment for*
40 *purposes of avoiding loss and effective realization on effort or*
41 *investment, complete the information and identify it to the*
42 *contract, cease work on it, relicense or dispose of it, or proceed in*
43 *any other commercially reasonable manner; and*

44 (c) *Pursue any remedy for breach that has not been waived.*



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1 2. *On breach by a licensee, both parties remain bound by all*
2 *restrictions in contractual use terms, but the contractual use terms*
3 *do not apply to information or copies properly received or obtained*
4 *from another source.*

5 **Sec. 181.** *On breach of contract by a licensor, the following*
6 *rules apply:*

7 1. *A licensee that has not cancelled the contract may*
8 *continue to use the information and informational rights under*
9 *the contract. If the licensee continues to use the information or*
10 *informational rights, the licensee is bound by all terms of the*
11 *contract, including contractual use terms, obligations not to*
12 *compete, and obligations to pay contract fees.*

13 2. *The licensee may pursue any remedy for breach which has*
14 *not been waived.*

15 3. *The licensor's rights remain in effect but are subject to the*
16 *licensee's remedy for breach, including any right of recoupment*
17 *or setoff.*

18 **Sec. 182.** *On material breach of an access contract or if the*
19 *agreement so provides, a party may discontinue all contractual*
20 *rights of access of the party in breach and direct any person that is*
21 *assisting the performance of the contract to discontinue its*
22 *performance.*

23 **Sec. 183.** 1. *On cancellation of a license, the licensor has*
24 *the right:*

25 (a) *To possession of all copies of the licensed information in*
26 *the possession or control of the licensee and any other materials*
27 *pertaining to that information which by contract are to be*
28 *returned or delivered by the licensee to the licensor; and*

29 (b) *To prevent the continued exercise of contractual and*
30 *informational rights in the licensed information under the license.*

31 2. *Except as otherwise provided in sections 182 and 184 of*
32 *this act, a licensor may exercise its rights under subsection 1*
33 *without judicial process only if this can be done by taking*
34 *possession of a tangible copy without a breach of the peace. In*
35 *that event, the licensor may take further steps with respect to the*
36 *copy, including erasing the copy by electronic means, subject to*
37 *the same obligations that arise under subsection 1 of section 158*
38 *of this act relating to return of the licensee's information and a*
39 *licensor shall exercise reasonable care in the custody and*
40 *preservation of the licensee's property in the licensor's possession.*

41 3. *In a judicial proceeding, the court may enjoin a licensee in*
42 *breach of contract from continued use of the information and*
43 *informational rights and may order the licensor or a judicial*
44 *officer to take the steps described in section 158 of this act.*



1 4. A party has a right to an expedited judicial hearing on a
2 request for prejudgment relief to enforce or protect its rights under
3 this section.

4 5. The right to possession under this section is not available
5 to the extent that the information, before breach of the license and
6 in the ordinary course of performance under the license, was so
7 altered or commingled that the information is no longer
8 identifiable or separable.

9 6. A licensee that provides information to a licensor subject to
10 contractual use terms has the rights and is subject to the
11 limitations of a licensor under this section with respect to the
12 information it provides.

13 **Sec. 184.** 1. As used in this section, “electronic self-help”
14 means the electronic exercise without court order of a licensor’s
15 rights in the event of cancellation of a license because of a the
16 licensee’s breach of contract, but does not include actions
17 expressly permitted under section 182 and subsection 2 of section
18 183 of this act.

19 2. Electronic self-help is prohibited.

20 3. In an application by a licensor in which the licensor seeks
21 prejudgment relief pursuant to contractual rights to prevent
22 continued use of the information by a licensee, a court may award
23 the prevailing party in that proceeding reasonable attorneys fees
24 with respect to the proceeding notwithstanding any term of a
25 license.

26 4. The limitations under this section may not be waived or
27 varied by an agreement before breach of contract.

28 5. This section does not affect rights or obligations under
29 laws other than those in this chapter, including Title 17 of the
30 United States Code.

31 **Sec. 185.** Contracts that are enforceable and rights of action
32 that accrue before October 1, 2003, are governed by the law then
33 in effect unless the parties agree to be governed by the provisions
34 of this chapter.

35 **Sec. 186.** The provisions of this chapter modify, limit and
36 supersede the federal Electronic Signatures in Global and
37 National Commerce Act, 15 U.S.C. §§ 7001 et seq., but do not
38 modify, limit or supersede section 101(c) of that act, 15 U.S.C. §
39 7001(c), or authorize electronic delivery of any of the notices
40 described in section 103(b) of that act, 15 U.S.C. § 7003(b).

