

VIRGINIA ACTS OF ASSEMBLY -- 2004 SESSION

CHAPTER 794

An Act to amend and reenact §§ 59.1-501.2, 59.1-501.3, 59.1-501.5, 59.1-501.6, 59.1-501.12, 59.1-502.7, 59.1-502.9, 59.1-503.7, 59.1-504.1, 59.1-504.4 and 59.1-504.5 of the Code of Virginia, to amend the Code of Virginia by adding sections numbered 59.1-501.4:1, 59.1-501.13:1, 59.1-501.14:1, 59.1-501.15, 59.1-501.16, 59.1-501.17 and 59.1-504.10, and to repeal §§ 59.1-501.4, 59.1-501.13, 59.1-501.14, 59.1-502.11, and 59.1-503.8 of the Code of Virginia, relating to the Uniform Computer Information Transactions Act.

[H 548]

Approved April 14, 2004

Be it enacted by the General Assembly of Virginia:

1. That §§ 59.1-501.2, 59.1-501.3, 59.1-501.5, 59.1-501.6, 59.1-501.12, 59.1-502.7, 59.1-502.9, 59.1-503.7, 59.1-504.1, 59.1-504.4 and 59.1-504.5 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding sections numbered 59.1-501.4:1, 59.1-501.13:1, 59.1-501.14:1, 59.1-501.15, 59.1-501.16, 59.1-501.17 and 59.1-504.10 as follows:

§ 59.1-501.2. Definitions.

(a) As used in this chapter:

(1) "Access contract" means a contract to obtain by electronic means access to, or information from, an information processing system of another person, or the equivalent of such access.

(2) "Access material" means any information or material, such as a document, address, or access code, that is necessary to obtain authorized access to information or control or possession of a copy.

(3) "Aggrieved party" means a party entitled to a remedy for breach of contract.

(4) "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances, including course of performance, course of dealing, and usage of trade as provided in this chapter.

(5) "Attribution procedure" means a procedure to verify that an electronic authentication, display, message, record, or performance is that of a particular person or to detect changes or errors in information. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment.

(6) "Authenticate" means (i) to sign or (ii) with the intent to sign a record, to execute or adopt an electronic symbol, sound, message, or process referring to, attached to, included in, or logically associated or linked with, that record.

(7) "Automated transaction" means a transaction in which a contract is formed in whole or part by electronic actions of one or both parties that are not previously reviewed by an individual in the ordinary course.

(8) "Cancellation" means the ending of a contract by a party because of breach of contract by another party.

(9) "Computer" means an electronic device that accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions.

(10) "Computer information" means information in electronic form that is obtained from or through the use of a computer or that is in a form capable of being processed by a computer. The term includes a copy of the information and any documentation or packaging associated with the copy.

(11) "Computer information transaction" means an agreement or the performance of it to create, modify, transfer, or license computer information or informational rights in computer information. The term includes a support contract under § 59.1-506.12. The term does not include a transaction merely because the parties' agreement provides that their communications about the transaction will be in the form of computer information.

(12) "Computer program" means a set of statements or instructions to be used directly or indirectly in a computer to bring about a certain result. The term does not include separately identifiable informational content.

(13) "Consequential damages" resulting from breach of contract includes (i) any loss resulting from general or particular requirements and needs of which the breaching party at the time of contracting had reason to know and which could not reasonably be prevented, and (ii) any injury to an individual or damage to property other than the subject matter of the transaction proximately resulting from breach of warranty. The term does not include direct damages or incidental damages.

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

review of the record by an individual. With respect to a person, conspicuous terms include (i) a heading in capitals in a size equal to or greater than, or in contrasting type, font, or color to, the surrounding text, (ii) language in the body of a record or display in larger or other contrasting type, font, or color or set off from the surrounding text by symbols or other marks that draw attention to the language, and (iii) a term prominently referenced in an electronic record or display which is readily accessible or reviewable from the record or display. With respect to a person or an electronic agent, conspicuous terms include a term, or reference to a term, that is so placed in a record or display that the person or electronic agent cannot proceed without taking action with respect to the particular term or reference.

(15) "Consumer" means an individual who is a licensee of information or informational rights that the individual at the time of contracting intended to be used primarily for personal, family, or household purposes. The term does not include an individual who is a licensee primarily for professional or commercial purposes, including agriculture, business management, and investment management other than management of the individual's personal or family investments.

(16) "Consumer contract" means a contract between a merchant licensor and a consumer.

(17) "Contract" means the total legal obligation resulting from the parties' agreement as affected by this chapter and other applicable law.

(18) "Contract fee" means the price, fee, rent, or royalty payable in a contract under this chapter or any part of the amount payable.

(19) "Contractual use term" means an enforceable term that defines or limits the use, disclosure of, or access to licensed information or informational rights, including a term that defines the scope of a license.

(20) "Copy" means the medium on which information is fixed on a temporary or permanent basis and from which it can be perceived, reproduced, used, or communicated, either directly or with the aid of a machine or device.

(21) "Course of dealing" means a sequence of previous conduct between the parties to a particular transaction which establishes a common basis of understanding for interpreting their expressions and other conduct.

(22) "Course of performance" means repeated performances, under a contract that involves repeated occasions for performance, which are accepted or acquiesced in without objection by a party having knowledge of the nature of the performance and an opportunity to object to it.

(23) "Court" includes an arbitration or other dispute-resolution forum if the parties have agreed to use of that forum or its use is required by law.

(24) "Delivery," with respect to a copy, means the voluntary physical or electronic transfer of possession or control.

(25) "Direct damages" means compensation for losses measured by § 59.1-508.8 (b) (1) or § 59.1-508.9 (a) (1). The term does not include consequential damages or incidental damages.

(26) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(27) "Electronic agent" means a computer program, or electronic or other automated means, used independently to initiate an action, or to respond to electronic messages or performances, on the person's behalf without review or action by an individual at the time of the action or response to the message or performance.

(28) "Electronic message" means a record or display that is stored, generated, or transmitted by electronic means for the purpose of communication to another person or electronic agent.

(29) "Financial accommodation contract" means an agreement under which a person extends a financial accommodation to a licensee and which does not create a security interest governed by Title 8.9A. The agreement may be in any form, including a license or lease.

(30) "Financial services transaction" means an agreement that provides for, or a transaction that is, or entails access to, use, transfer, clearance, settlement, or processing of:

(A) a deposit, loan, funds, or monetary value represented in electronic form and stored or capable of storage by electronic means and retrievable and transferable by electronic means, or other right to payment to or from a person;

(B) an instrument or other item;

(C) a payment order, credit card transaction, debit card transaction, funds transfer, automated clearing house transfer, or similar wholesale or retail transfer of funds;

(D) a letter of credit, document of title, financial asset, investment property, or similar asset held in a fiduciary or agency capacity; or

(E) related identifying, verifying, access-enabling, authorizing, or monitoring information.

(31) "Financier" means a person that provides a financial accommodation to a licensee under a financial accommodation contract and either (i) becomes a licensee for the purpose of transferring or sublicensing the license to the party to which the financial accommodation is provided or (ii) obtains a contractual right under the financial accommodation contract to preclude the licensee's use of the information or informational rights under a license in the event of breach of the financial accommodation contract. The term does not include a person that selects, creates, or supplies the

information that is the subject of the license, owns the informational rights in the information, or provides support for, modifications to, or maintenance of the information.

(32) "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(33) "Goods" means all things that are movable at the time relevant to the computer information transaction. The term includes the unborn young of animals, growing crops, and other identified things to be severed from realty which are covered by § 8.2-107. The term does not include computer information, money, the subject matter of foreign exchange transactions, documents, letters of credit, letter-of-credit rights, instruments, investment property, accounts, chattel paper, deposit accounts, or general intangibles.

(34) "Incidental damages" resulting from breach of contract:

(A) means compensation for any commercially reasonable charges, expenses, or commissions reasonably incurred by an aggrieved party with respect to (i) inspection, receipt, transmission, transportation, care, or custody of identified copies or information that is the subject of the breach; (ii) stopping delivery, shipment, or transmission; (iii) effecting cover or retransfer of copies or information after the breach; (iv) other efforts after the breach to minimize or avoid loss resulting from the breach; and (v) matters otherwise incident to the breach; and

(B) does not include consequential damages or direct damages.

(35) "Information" means data, text, images, sounds, mask works, or computer programs, including collections and compilations of them.

(36) "Information processing system" means an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information.

(37) "Informational content" means information that is intended to be communicated to or perceived by an individual in the ordinary use of the information, or the equivalent of that information.

(38) "Informational rights" include all rights in information created under laws governing patents, copyrights, mask works, trade secrets, trademarks, publicity rights, or any other law that gives a person, independently of contract, a right to control or preclude another person's use of or access to the information on the basis of the rights holder's interest in the information.

(39) *"Insurance services transaction" means an agreement between an insurer and an insured that provides for, or a transaction that is or entails access to, use, transfer, clearance, settlement, or processing of:*

(A) an insurance policy, contract, or certificate; or

(B) a right to payment under an insurance policy, contract or certificate.

(39 40) "Knowledge," with respect to a fact, means actual knowledge of the fact.

(40 41) "License" means a contract that authorizes access to, or use, distribution, performance, modification, or reproduction of, information or informational rights, but expressly limits the access or uses authorized or expressly grants fewer than all rights in the information, whether or not the transferee has title to a licensed copy. The term includes an access contract, a lease of a computer program, and a consignment of a copy. The term does not include a reservation or creation of a security interest to the extent the interest is governed by Title 8.9A.

(41 42) "Licensee" means a person entitled by agreement to acquire or exercise rights in, or to have access to or use of, computer information under an agreement to which this chapter applies. A licensor is not a licensee with respect to rights reserved to it under the agreement.

(42 43) "Licensor" means a person obligated by agreement to transfer or create rights in, or to give access to or use of, computer information or informational rights in it under an agreement to which this chapter applies. Between the provider of access and a provider of the informational content to be accessed, the provider of content is the licensor. In an exchange of information or informational rights, each party is a licensor with respect to the information, informational rights, or access it gives.

(43 44) "Mass-market license" means a standard form used in a mass-market transaction.

(44 45) "Mass-market transaction" means a transaction that is:

(A) a consumer contract; or

(B) any other transaction with an end-user licensee if:

(i) the transaction is for information or informational rights directed to the general public as a whole, including consumers, under substantially the same terms for the same information;

(ii) the licensee acquires the information or informational rights in a retail transaction under terms consistent with an ordinary transaction in a retail market; and

(iii) the transaction is not (a) a contract for redistribution or for public performance or public display of a copyrighted work; (b) a transaction in which the information is customized or otherwise specially prepared by the licensor for the licensee, other than minor customization using a capability of the information intended for that purpose; (c) a site license; or (d) an access contract.

(45 46) "Merchant" means a person:

(A) who deals in information or informational rights of the kind involved in the transaction;

(B) who by the person's occupation holds himself out as having knowledge or skill peculiar to the relevant aspect of the business practices or information involved in the transaction; or

(C) to whom the knowledge or skill peculiar to the practices or information involved in the transaction may be attributed by the person's employment of an agent or broker or other intermediary who by his occupation holds himself out as having the knowledge or skill.

(46 47) "Nonexclusive license" means a license that does not preclude the licensor from transferring to other licensees the same information, informational rights, or contractual rights within the same scope. The term includes a consignment of a copy.

(47 48) "Notice" of a fact means knowledge of the fact, receipt of notification of the fact, or reason to know the fact exists.

(48 49) "Notify" or "give notice" means to take such steps as may be reasonably required to inform the other person in the ordinary course, whether or not the other person actually comes to know of it.

(49 50) "Party" means a person that engages in a transaction or makes an agreement under this chapter.

(50 51) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental subdivision, instrumentality, or agency, public corporation, or any other legal or commercial entity.

(51 52) "Published informational content" means informational content prepared for or made available to recipients generally, or to a class of recipients, in substantially the same form. The term does not include informational content that is (i) customized for a particular recipient by one or more individuals acting as or on behalf of the licensor, using judgment or expertise or (ii) provided in a special relationship of reliance between the provider and the recipient.

(52 53) "Receipt" means:

(A) with respect to a copy, taking delivery; or

(B) with respect to a notice:

(i) coming to a person's attention; or

(ii) being delivered to and available at a location or system designated by agreement for that purpose or, in the absence of an agreed location or system: (a) being delivered at the person's residence, or the person's place of business through which the contract was made, or at any other place held out by the person as a place for receipt of communications of the kind; or (b) in the case of an electronic notice, coming into existence in an information processing system or at an address in that system in a form capable of being processed by or perceived from a system of that type by a recipient, if the recipient uses, or otherwise has designated or holds out, that place or system for receipt of notices of the kind to be given and the sender does not know that the notice cannot be accessed from that place.

(53 54) "Receive" means to take receipt.

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

(55 56) "Release" means an agreement by a party not to object to, or exercise any rights or pursue any remedies to limit, the use of information or informational rights which agreement does not require an affirmative act by the party to enable or support the other party's use of the information or informational rights. The term includes a waiver of informational rights.

(56 57) "Return," with respect to a record containing contractual terms that were rejected, refers only to the computer information and means:

(A) in the case of a licensee that rejects a record regarding a single information product transferred for a single contract fee, a right to reimbursement of the contract fee paid from the person to which it was paid or from another person that offers to reimburse that fee, on (i) submission of proof of purchase and (ii) proper redelivery of the computer information and all copies within a reasonable time after initial delivery of the information to the licensee;

(B) in the case of a licensee that rejects a record regarding an information product provided as part of multiple information products integrated into and transferred as a bundled whole but retaining their separate identity:

1. a right to reimbursement of any portion of the aggregate contract fee identified by the licensor in the initial transaction as charged to the licensee for all bundled information products which was actually paid, on (i) rejection of the record before or during the initial use of the bundled product; (ii) proper redelivery of all computer information products in the bundled whole and all copies of them within a reasonable time after initial delivery of the information to the licensee; and (iii) submission of proof of purchase; or

2. a right to reimbursement of any separate contract fee identified by the licensor in the initial transaction as charged to the licensee for the separate information product to which the rejected record applies, on (i) submission of proof of purchase and (ii) proper redelivery of that computer information product and all copies within a reasonable time after initial delivery of the information to the licensee; or

(C) in the case of a licensor that rejects a record proposed by the licensee, a right to proper redelivery of the computer information and all copies from the licensee, to stop delivery or access to the information by the licensee, and to reimbursement from the licensee of amounts paid by the licensor with respect to the rejected record, on reimbursement to the licensee of contract fees that it paid with

respect to the rejected record, subject to recoupment and setoff.

(57 58) "Scope," with respect to terms of a license, means:

- (A) the licensed copies, information, or informational rights involved;
- (B) the use or access authorized, prohibited, or controlled;
- (C) the geographic area, market, or location; or
- (D) the duration of the license.

(58 59) "Seasonable," with respect to an act, means taken within the time agreed or, if no time is agreed, within a reasonable time.

(59 60) "Send" means, with any costs provided for and properly addressed or directed as reasonable under the circumstances or as otherwise agreed, to deposit a record in the mail or with a commercially reasonable carrier, to deliver a record for transmission to or re-creation in another location or information processing system, or to take the steps necessary to initiate transmission to or re-creation of a record in another location or information processing system. In addition, with respect to an electronic message, the message must be in a form capable of being processed by or perceived from a system of the type the recipient uses or otherwise has designated or held out as a place for the receipt of communications of the kind sent. Receipt within the time in which it would have arrived if properly sent, has the effect of a proper sending.

(60 61) "Standard form" means a record or a group of related records containing terms prepared for repeated use in transactions and so used in a transaction in which there was no negotiated change of terms by individuals except to set the price, quantity, method of payment, selection among standard options, or time or method of delivery.

(61 62) "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(62 63) "Term," with respect to an agreement, means that portion of the agreement ~~which~~ *that* relates to a particular matter.

(63 64) "Termination" means the ending of a contract by a party pursuant to a power created by agreement or law otherwise than because of breach of contract.

(64 65) "Transfer":

(A) with respect to a contractual interest, includes an assignment of the contract, but does not include an agreement merely to perform a contractual obligation or to exercise contractual rights through a delegate or sublicensee; and

(B) with respect to computer information, includes a sale, license, or lease of a copy of the computer information and a license or assignment of informational rights in computer information.

(65 66) "Usage of trade" means any practice or method of dealing that has such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question.

(b) The following definitions in other titles apply to this chapter:

- (1) "Burden of establishing" § 8.1A-201.
- (2) "Document of title" § 8.1A-201.
- (3) "Financial asset" § 8.8A-102.
- (4) "Funds transfer" § 8.4A-104.
- (5) "Identification" to the contract § 8.2-501.
- (6) "Instrument" § 8.9A-102.
- (7) "Investment property" § 8.9A-102.
- (8) "Item" § 8.4-104.
- (9) "Letter of credit" § 8.5A-102.
- (10) "Payment order" § 8.4A-103.
- (11) "Sale" § 8.2-106.

§ 59.1-501.3. Scope; exclusions.

(a) This chapter applies to computer information transactions.

(b) Except for subject matter excluded in subsection (d) ~~and as otherwise provided in § 59.1-501.4~~, if a computer information transaction includes subject matter other than computer information or subject matter excluded under subsection (d), the following rules apply:

(1) If a transaction includes computer information and goods, this chapter applies to the part of the transaction involving computer information, informational rights in it, and creation or modification of it. However, if a copy of a computer program is contained in and sold or leased as part of goods, this chapter applies to the copy and the computer program only if:

(A) the goods are a computer or computer peripheral; or

(B) giving the buyer or lessee of the goods access to or use of the program is ordinarily a material purpose of transactions in goods of the type sold or leased.

(2) Subject to subsection (d) (2) (A), if a transaction includes an agreement for creating or for obtaining rights to create computer information and a motion picture, this chapter does not apply to the agreement if the dominant character of the agreement is for creating or obtaining rights to create a

motion picture. In all other such agreements, this chapter does not apply to the part of the agreement that involves a motion picture excluded under subsection (d) (2), but does apply to the computer information.

(3) In all other cases, this chapter applies to the entire transaction if the computer information and informational rights, or access to them, is the primary subject matter, but otherwise applies only to the part of the transaction involving computer information, informational rights in it, and creation or modification of it.

(c) To the extent of a conflict between this chapter and Title 8.9A, Title 8.9A governs.

(d) This chapter does not apply to:

(1) a financial services transaction;

(2) *an insurance services transaction*;

(2 3) an agreement to create, perform or perform in, include information in, acquire, use, distribute, modify, reproduce, have access to, adapt, make available, transmit, license, or display:

(A) a motion picture or audio or visual programming other than in (i) a mass-market transaction or (ii) a submission of an idea or information or release of informational rights that may result in making a motion picture or a similar information product; or

(B) sound recording, musical work, or phonorecord as defined or used in Title 17 of the United States Code as of July 1, 1999, or an enhanced sound recording, other than in the submission of an idea or information or release of informational rights that may result in the creation of such material or a similar information product.

(3 4) a compulsory license; ~~or~~

(4 5) a contract of employment of an individual, other than an individual hired as an independent contractor, unless such independent contractor is a freelancer in the news reporting industry as that term is commonly understood in that industry;

(5 6) a contract that does not require that information be furnished as computer information or in which under the agreement the form of the information as computer information is otherwise insignificant with respect to the primary subject matter of the part of the transaction pertaining to the information;

(6 7) unless otherwise agreed in a record between the parties:

(A) telecommunications products or services provided pursuant to federal or state tariffs; or

(B) telecommunications products or services provided pursuant to agreements required or permitted to be filed by the service provider with a federal or state authority regulating these services or under pricing subject to approval by a federal or state regulatory authority; or

(7 8) subject matter within the scope of Titles 8.3, 8.4, 8.4A, 8.5A, 8.6A, 8.7, or 8.8A.

(e) As used in subsection (d) (2) (B), "enhanced sound recording" means a separately identifiable product or service the dominant character of which consists of recorded sounds but which includes (i) statements or instructions whose purpose is to allow or control the perception, reproduction, or communication of those sounds or (ii) other information so long as recorded sounds constitute the dominant character of the product or service despite the inclusion of the other information.

(f) As used in this section, "motion picture" means:

(1) "motion picture" as defined in Title 17 of the United States Code as of July 1, 1999; or

(2) a separately identifiable product or service the dominant character of which consists of a linear motion picture, but which includes (i) statements or instructions whose purpose is to allow or control the perception, reproduction, or communication of the motion picture or (ii) other information so long as the motion picture constitutes the dominant character of the product or service despite the inclusion of the other information.

(g) As used in this section, "audio or visual programming" means audio or visual programming that is provided by broadcast, satellite, or cable as defined or used in the federal Communications Act of 1934 (47 U.S.C. § 151 et seq.) and related regulations as they existed on July 1, 1999, or by similar methods of delivery.

§ 59.1-501.4:1. Consumer protection law governs.

(a) In this section, "consumer protection law" means a consumer protection statute, rule, or regulation, or other state executive or legislative action that has the effect of law and any applicable judicial or administrative decisions interpreting those statutes, rules, regulations or actions.

(b) Except as otherwise provided in this section, this chapter does not limit, modify or supersede a consumer protection statute, administrative rule, regulation or procedure.

(c) If a consumer protection law requires a term to be conspicuous, the standard of conspicuousness under the consumer protection law applies. However, a provision in the consumer protection law requiring a term to be conspicuous does not preclude that term from being presented electronically.

(d) If a consumer protection law requires a writing or a signature, a record or authentication suffices.

(e) If a consumer protection law addresses assent, consent, or manifestation of assent, the standard of assent, consent, or manifestation of assent under the consumer protection law applies and may be accomplished electronically.

(f) The applicability of a consumer protection law is determined by that law as it would have applied in the absence of this chapter.

§ 59.1-501.5. Relation to federal law; fundamental public policy; transactions subject to other state law.

(a) A provision of this chapter ~~which~~ *that* is preempted by federal law is unenforceable to the extent of the preemption.

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

~~(c) Except as otherwise provided in subsection (d), if this chapter, including but not limited to Part 4 of this chapter, or a term of a contract under this chapter conflicts with a consumer protection statute, administrative rule or regulation, including but not limited to the Virginia Consumer Protection Act of 1977 (§ 59.1-196 et seq.), the consumer protection statute, administrative rule or regulation governs.~~

(c) In a transaction in which a copy of computer information in its final form is made generally available, a term of a contract is unenforceable to the extent that the term prohibits an end-user licensee from engaging in otherwise lawful public discussion relating to the computer information. However, this subsection does not preclude enforcement of a term that establishes or enforces rights under trade secret, trademark, defamation, commercial disparagement, or other laws. This subsection does not alter the applicability of subsection (b) to any term not rendered unenforceable under this subsection.

(d) This chapter does not apply to an intellectual property notice that is based solely on intellectual property rights and is not part of a contract. The effect of such a notice is determined by law other than this chapter.

~~(d e)~~ If a law of the Commonwealth in effect on the effective date of this chapter applies to a transaction governed by this chapter, the following rules apply:

- (1) A requirement that a term, waiver, notice, or disclaimer be in a writing is satisfied by a record.
- (2) A requirement that a record, writing, or term be signed is satisfied by an authentication.
- (3) A requirement that a term be conspicuous, or the like, is satisfied by a term that is conspicuous under this chapter.

(4) A requirement of consent or agreement to a term is satisfied by a manifestation of assent to the term in accordance with this chapter.

§ 59.1-501.6. Rule of construction.

(a) This chapter must be liberally construed and applied to promote its underlying purposes and policies to:

- (1) support and facilitate the realization of the full potential of computer information transactions;
- (2) clarify the law governing computer information transactions;
- (3) enable expanding commercial practice in computer information transactions by commercial usage and agreement of the parties;
- (4) promote uniformity of the law with respect to the subject matter of this chapter among States that enact it; and

(5) permit the continued expansion of commercial practices in the excluded transactions through custom, usage and agreement of the parties.

~~(b) Except as otherwise provided in § 59.1-501.13 (a) 59.1-501.15,~~ the use of mandatory language or the absence of a phrase such as "unless otherwise agreed" in a provision of this chapter does not preclude the parties from varying the effect of the provision by agreement.

(c) The fact that a provision of this chapter imposes a condition for a result does not by itself mean that the absence of that condition yields a different result.

(d) To be enforceable, a term need not be conspicuous, negotiated, or expressly assented or agreed to, unless this chapter expressly so requires.

§ 59.1-501.12. Manifesting assent.

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

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

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

- (1) authenticates the record or term; or
 - (2) engages in operations that in the circumstances indicate acceptance of the record or term.
- (c) If this chapter or other law requires assent to a specific term, a manifestation of assent must relate specifically to the term.

(d) Conduct or operations manifesting assent may be proved in any manner, including showing that a

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

(e) With respect to an opportunity to review, the following rules apply:

(1) A person has an opportunity to review a record or term only if it is made available in a manner that ought to call it to the attention of a reasonable person and permit review.

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

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

(A) the record proposes a modification of contract or provides particulars of performance under § 59.1-503.5; or

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

(4) The right to a return under paragraph (3) may arise by law or by agreement.

(f e) The effect of provisions of this section may be modified by an agreement setting out standards applicable to future transactions between the parties.

(g f) Providers of online services, network access, and telecommunications services, or the operators of facilities thereof, do not manifest assent to a contractual relationship simply by their provision of these services to other parties, including but not limited to transmission, routing, or providing connections, linking, caching, hosting, information location tools, or storage of materials at the request or initiation of a person other than the service provider.

§ 59.1-501.13:1. *Opportunity to review.*

(a) A person has an opportunity to review a record or term only if it is made available in a manner that ought to call it to the attention of a reasonable person and permit review.

(b) An electronic agent has an opportunity to review a record or term only if it is made available in a manner that would enable a reasonably configured electronic agent to react to the record or term.

(c) If a record or term is available for review only after a person becomes obligated to pay or begins its performance, the person has an opportunity to review only if he has a right to a return if he rejects the record. However, a right to a return is not required if:

(1) the record proposes a modification of contract or provides particulars of performance under § 59.1-503.5; or

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

(d) The right to a return under this section may arise by law or by agreement.

(e) The effect of this section may be modified by an agreement setting out standards applicable to future transactions between the parties.

§ 59.1-501.14:1. *Pretransaction disclosures in Internet-type transactions.*

This section applies to a licensor that makes its computer information available to a licensee by electronic means from its Internet or similar electronic site. In such a case, the licensor affords an opportunity to review the terms of a standard form license, which opportunity satisfies § 59.1-501.13:1 with respect to a licensee that acquires the information from that site, if the licensor:

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

(A) displaying prominently and in close proximity to a description of the computer information, or to instructions or steps for acquiring it, the standard terms or a reference to an electronic location from which they can be readily obtained; or

(B) disclosing the availability of the standard terms in a prominent place on the site from which the computer information is offered and promptly furnishing a copy of the standard terms on request before the transfer of the computer information; and

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

(C) failure to provide an opportunity to review under this section does not preclude a person from providing a person an opportunity to review by other means pursuant to § 59.1-501.13:1 or law other than this chapter.

§ 59.1-501.15. *Variation by agreement; commercial practice.*

(a) The effect of any provision of this chapter, including an allocation of risk or imposition of a burden, may be varied by agreement of the parties.

(b) The following rules are not variable by agreement:

(1) Obligations of good faith, diligence, reasonableness, and care imposed by this chapter may not

be disclaimed by agreement, but the parties by agreement may determine the standards by which the performance of the obligation is to be measured if the standards are not manifestly unreasonable;

(2) The limitations on enforceability imposed by unconscionability under § 59.1-501.11 and fundamental public policy under § 59.1-501.5 (b) may not be varied by agreement; and

(3) Limitations on enforceability of, or agreement to, a contract, term, or right expressly stated in the sections listed in the following subsections may not be varied by agreement except to the extent provided in each section:

(A) the limitations on agreed choice of law in § 59.1-501.9 (a);

(B) the limitations on agreed choice of forum in § 59.1-501.10;

(C) the requirements for manifesting assent in § 59.1-501.12 and opportunity for review in § 59.1-501.13:1;

(D) the limitations on enforceability in § 59.1-502.1;

(E) the limitations on a mass-market license in § 59.1-502.9;

(F) the consumer defense arising from an electronic error in § 59.1-502.14;

(G) the requirements for an enforceable term in §§ 59.1-503.3 (b), 59.1-503.7 (g), 59.1-504.6 (b) and (c), and 59.1-508.4 (a);

(H) the requirements of § 59.1-503.4 (b) (2);

(I) the limitations on a financier in §§ 59.1-505.7 through 59.1-505.11;

(J) the restrictions on altering the period of limitations in § 59.1-508.5 (a) and (b); and

(K) the limitations on self-help repossession in §§ 59.1-508.15 (b) and 59.1-508.16.

§ 59.1-501.16. Supplemental principles; good faith; commercial practice.

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

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

(c) Any usage of trade in the vocation or trade in which the parties are engaged or of which the parties are or should be aware and any course of dealing or course of performance between the parties are relevant to determining the existence or meaning of an agreement.

§ 59.1-501.17. Decision for court; legal consequences; reasonable time; reason to know.

(a) Whether a term is conspicuous or is unenforceable under §§ 59.1-501.5 (a) or (b), 59.1-501.11, or § 59.1-502.9 (a) and whether an attribution procedure is commercially reasonable or effective under §§ 59.1-501.8, 59.1-502.12, or § 59.1-502.13 are questions to be determined by the court.

(b) Whether an agreement has legal consequences is determined by this chapter.

(c) Whenever this chapter requires any action to be taken within a reasonable time, what is a reasonable time for taking the action depends on the nature, purpose, and circumstances of the action. Any time that is not manifestly unreasonable may be fixed by agreement.

(d) A person has reason to know a fact if the person has knowledge of the fact or, from all the facts and circumstances known to the person without investigation, the person should be aware that the fact exists.

§ 59.1-502.7. Formation; releases of informational rights.

(a) A release is effective without consideration if it is:

(1) in a record to which the releasing party agrees, such as by manifesting assent, and which identifies the informational rights released; or

(2) enforceable under estoppel, implied license, or other law.

(b) A release continues for the duration of the informational rights released if the release does not specify its duration and does not require affirmative performance after the grant of the release by:

(1) the party granting the release; or

(2) the party receiving the release, except for relatively insignificant acts.

(c) In cases not governed by subsection (b), the duration of a release is governed by § 59.1-503.8.

§ 59.1-502.9. Mass-market license.

(a) A party adopts the terms of a mass-market license for purposes of § 59.1-502.8 only if the party agrees to the license, such as by manifesting assent, before or during the party's initial performance or use of or access to the information. A term is not part of the license if:

(1) the term is unconscionable or is unenforceable under § 59.1-501.5 (a) or (b);

(2) subject to § 59.1-503.1, the term conflicts with a term to which the parties to the license have expressly agreed; or

(3) under § 59.1-501.13:1, the licensee does not have an opportunity to review the term before agreeing to it; or

(4) the term is not available for viewing before and after assent:

(A) in a printed license; or

(B) in electronic form that (i) can be printed or stored for archival and review purposes by the licensee or (ii) is made available by a licensor to a licensee, at no cost to the licensee, in a printed form on the request of a licensee who is unable to print or store the license for archival and review purposes.

(b) If a mass-market license or a copy of the license is not available in a manner permitting an opportunity to review by the licensee before the licensee becomes obligated to pay and the licensee does not agree, such as by manifesting assent, to the license after having an opportunity to review, the licensee is entitled to a return under § 59.1-501.12 or § 59.1-501.13:1 and, in addition, to:

(1) reimbursement of any reasonable expenses incurred in complying with the licensor's instructions for returning or destroying the computer information or, in the absence of instructions, expenses incurred for return postage or similar reasonable expense in returning the computer information; and

(2) compensation for any reasonable and foreseeable costs of restoring the licensee's information processing system to reverse changes in the system caused by the installation, if:

(A) the installation occurs because information must be installed to enable review of the license; and

(B) the installation alters the system or information in it but does not restore the system or information after removal of the installed information because the licensee rejected the license.

(c) In a mass-market transaction, if the licensor does not have an opportunity to review a record containing proposed terms from the licensee before the licensor delivers or becomes obligated to deliver the information, and if the licensor does not agree, such as by manifesting assent, to those terms after having that opportunity, the licensor is entitled to a return.

~~(d) In a mass-market transaction, a term that has the effect of forbidding or restricting the rights or abilities of licensees of computer information to engage in public disclosure of a description, criticism, comparison, or evaluation of the computer information or its license terms is unenforceable to the extent these rights or abilities are not prohibited by other law.~~

§ 59.1-503.7. Interpretation and requirements for grant.

(a) A license grants:

(1) the contractual rights that are expressly described; and

(2) a contractual right to use any informational rights within the licensor's control at the time of contracting which are necessary in the ordinary course to exercise the expressly described rights.

(b) If a license expressly limits use of the information or informational rights, use in any other manner is a breach of contract. In all other cases, a license contains an implied limitation that the licensee will not use the information or informational rights otherwise than as described in subsection (a). However, use inconsistent with this implied limitation is not a breach if it is permitted under applicable law in the absence of the implied limitation.

~~(c) An agreement that does not specify the number of permitted users permits a number of users which is reasonable in light of the informational rights involved and the commercial circumstances existing at the time of the agreement.~~

(d) A party is not entitled to any rights in new versions of, or improvements or modifications to, information made by the other party. A licensor's agreement to provide new versions, improvements, or modifications requires that the licensor provide them as developed and made generally commercially available from time to time by the licensor.

(e) Neither party is entitled to receive copies of source code, schematics, master copy, design material, or other information used by the other party in creating, developing, or implementing the information.

(f) Terms concerning scope must be construed under ordinary principles of contract interpretation in light of the informational rights and the commercial context. In addition, the following rules apply:

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

(2) A grant of an "exclusive license," or a grant in similar terms, means that:

(A) for the duration of the license, the licensor will not exercise, and will not grant to any other person, rights in the same information or informational rights within the scope of the exclusive grant; and

(B) the licensor affirms that it has not previously granted those rights in a contract in effect when the licensee's rights may be exercised.

(g) The rules in this section may be varied only by a record that is sufficient to indicate that a contract has been made and ~~which~~ that is:

(1) authenticated by the party against ~~which~~ whom enforcement is sought; or

(2) prepared and delivered by one party and adopted by the other under § 59.1-502.8 or § 59.1-502.9. § 59.1-504.1. Warranty and obligations concerning noninterference and noninfringement.

(a) A licensor of information that is a merchant regularly dealing in information of the kind warrants that the information will be delivered free of the rightful claim of any third person by way of infringement or misappropriation, but a licensee that furnishes detailed specifications to the licensor and the method required for meeting the specifications holds the licensor harmless against any such claim

that arises out of compliance with either the required specification or the required method except for a claim that results from the failure of the licensor to adopt, or notify the licensee of, a noninfringing alternative of which the licensor had reason to know.

(b) A licensor warrants:

(1) for the duration of the license, that no person holds a rightful claim to, or interest in, the information which arose from an act or omission of the licensor, other than a claim by way of infringement or misappropriation, which will interfere with the licensee's enjoyment of its interest; and

(2) as to rights granted exclusively to the licensee, that within the scope of the license:

(A) to the knowledge of the licensor, any licensed patent rights are valid and exclusive to the extent exclusivity and validity are recognized by the law under which the patent rights were created; and

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

(c) The warranties in this section are subject to the following rules:

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

(2) The obligations under subsections (a) and (b) (2) apply solely to informational rights arising under the laws of the United States or a state, unless the contract expressly provides that the warranty obligations extend to rights under the laws of other countries. Language is sufficient for this purpose if it states, "The licensor warrants exclusivity, noninfringement, in specified countries, worldwide," or words of similar import. In that case, the warranty extends to the specified country or, in the case of a reference to "worldwide" or the like, to all countries within the description, but only to the extent the rights are recognized under a treaty or international convention to which the country and the United States are signatories.

(3) The warranties under subsections (a) and (b) (2) are not made by a license that merely permits use, or covenants not to claim infringement because of the use, of rights under a licensed patent.

(d) Except as otherwise provided in subsection (e), a warranty under this section may be disclaimed or modified only by specific language or by circumstances that give the licensee reason to know that the licensor does not warrant that competing claims do not exist or that the licensor purports to grant only the rights it may have. *An obligation to hold harmless under subsection (a) may be disclaimed or modified only by specific language or by circumstances giving the licensor reason to know that the licensee does not provide a hold-harmless obligation to the licensor.* In an automated transaction, language is sufficient if it is conspicuous. Otherwise, language in a record is sufficient if it states:

(1) *as to the licensor's obligation, "There is no warranty against interference with your enjoyment of the information or against infringement," or words of similar import; or*

(2) *as to the licensee's obligation, "There is no obligation to hold you harmless from any actions taken in compliance with the specifications or methods furnished to me under this contract," or words of similar import.*

(e) Between merchants, a grant of a "quitclaim," or a grant in similar terms, grants the information or informational rights without an implied warranty as to infringement or misappropriation or as to the rights actually possessed or transferred by the licensor.

§ 59.1-504.4. Implied warranty; informational content.

(a) Unless the warranty is disclaimed or modified, a merchant that, in a special relationship of reliance with a licensee, collects, compiles, processes, provides, or transmits informational content warrants to that licensee that there is no inaccuracy in the informational content caused by the merchant's failure to perform with reasonable care.

(b) A warranty does not arise under subsection (a) with respect to:

(1) *subjective characteristics of the informational content, such as the aesthetics, appeal, and suitability to taste;*

(2) published informational content; or

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

(c) The warranty under this section is not subject to the preclusion in § 59.1-501.13 (a) (1) on disclaiming obligations of diligence, reasonableness, or care.

§ 59.1-504.5. Implied warranty; licensee's purpose; system integration.

(a) Unless the warranty is disclaimed or modified, if a licensor at the time of contracting has reason to know any particular purpose for which the computer information is required and that the licensee is relying on the licensor's skill or judgment to select, develop, or furnish suitable information, the following rules apply:

(1) Except as otherwise provided in paragraph (2), there is an implied warranty that the information is fit for that purpose.

(2) If from all the circumstances it appears that the licensor was to be paid for the amount of its time or effort regardless of the fitness of the resulting information, the warranty under paragraph (1) is that

the information will not fail to achieve the licensee's particular purpose as a result of the licensor's lack of reasonable effort.

(b) There is no warranty under subsection (a) with regard to:

(1) the aesthetics, appeal, suitability to taste, or subjective quality of informational content; or

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

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

(d) The warranty under this section is not subject to the preclusion in § ~~59.1-501.13(a)~~ ~~(1)~~ 59.1-501.15 (b) (1) on disclaiming diligence, reasonableness, or care.

§ 59.1-504.10. *No implied warranties for free software.*

(a) *In this section, "free software" means a computer program with respect to which the licensor does not intend to make a profit from the distribution of the copy of the program and does not act generally for commercial gain derived from controlling use of the program or making, modifying, or redistributing copies of the program.*

(b) *The warranties under §§ 59.1-504.1 and 59.1-504.3 do not apply to free software.*

2. That §§ 59.1-501.4, 59.1-501.13, 59.1-501.14, 59.1-502.11, and 59.1-503.8 of the Code of Virginia are repealed.