VIRGINIA ACTS OF ASSEMBLY — CHAPTER

An Act to amend the Code of Virginia by adding in Title 59.1 a chapter numbered 43, consisting of sections numbered 59.1-501.1 through 59.1-509.2, creating the Uniform Computer Information Transactions Act.

[H 561]

Approved

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Title 59.1 a chapter numbered 43, consisting of sections numbered 59.1-501.1 through 59.1-509.2, as follows:

CHAPTER 43.

UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT.

PART 1. GENERAL PROVISIONS.

§ 59.1-501.1. Title.

This chapter may be cited as the Uniform Computer Information Transactions Act.

§ 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 which 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 which is obtained from or through the use of a computer or which 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 by a person 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 8.9. 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) "Knowledge," with respect to a fact, means actual knowledge of the fact.

(40) "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 8.9.

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

(44) "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 and in a quantity 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) "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) "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) "Notice" of a fact means knowledge of the fact, receipt of notification of the fact, or reason to know the fact exists.

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

(50) "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) "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) "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) "Receive" means to take receipt.

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

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

(63) "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) "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) "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.

The following definitions in other titles apply to this chapter:

(1) "Burden of establishing" § 8.1-201.

(2) "Document of title" § 8.1-201.

(3) "Financial asset" § 8.8A-102.

(4) "Funds transfer" § 8.4A-104.

(5) "Identification" to the contract § 8.2-501.

(6) "Instrument" § 8.9-105.

(7) "Investment property" § 8.9-115.

(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, 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) 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 pictures 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 8.9, Title 8.9 governs.

(d) This chapter does not apply to:

(1) a financial services transaction;

(2) 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) audio or visual programming that is provided by broadcast, satellite, or cable as defined or used in the Federal Communications Act and related regulations as they existed on July 1, 1999, or by similar methods of delivering that programming;

(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; or

(C) a motion picture, other than in a mass-market transaction or 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.

(3) a compulsory license; or

(4) 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) 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; or

(6) subject matter within the scope of Titles 8.3, 8.4, 8.4A, 8.5A, 8.6A, 8.7, or Title 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 "motion picture" as defined in Title 17 of the United States Code as of July 1, 1999, or 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.

§ 59.1-501.4. Mixed transactions; agreement to opt-in or opt-out.

The parties may agree that this chapter, including contract-formation rules, governs the transaction, in whole or part, or that other law governs the transaction and this chapter does not apply, if a material part of the subject matter to which the agreement applies is computer information or informational rights in it that are within the scope of this chapter, or is subject matter within this chapter under § 59.1-501.3 (b), or is subject matter excluded by § 59.1—501.3 (d) (1) or § 59.1-501.3 (d) (2). However, any agreement to do so is subject to the following rules:

(1) An agreement that this chapter governs a transaction does not alter the applicability of any rule or procedure that may not be varied by agreement of the parties or that may be varied only in a manner specified by the rule or procedure, including the Virginia Consumer Protection Act of 1977 (§ 59.1-196 et seq.). In addition, in a mass-market transaction, the agreement does not alter the applicability of a law applicable to a copy of information in printed form.

(2) An agreement that this chapter does not govern a transaction:

(A) does not alter the applicability of § 59.1-502.14 or § 59.1-508.16; and

(B) in a mass-market transaction, does not alter the applicability under this chapter of the doctrine of unconscionability or fundamental public policy or the obligation of good faith.

(3) In a mass-market transaction, any term under this section which changes the extent to which this chapter governs the transaction must be conspicuous.

(4) A copy of a computer program contained in and sold or leased as part of goods and which is excluded from this chapter by § 59.1-501.3 (b) (1) cannot provide the basis for an agreement under this section that this chapter governs the transaction.

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

(a) A provision of this chapter which 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 or a term of a contract under this chapter conflicts with the Virginia Consumer Protection Act of 1977 (§ 59.1-196 et seq.), the Virginia Consumer Protection Act governs.

(d) If a law of this 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.

(e) If this chapter conflicts with Chapter 39 (§ 59.1-469 et seq.) of Title 59.1, Chapter 39 governs.

§ 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), 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.

§ 59.1-501.7. Legal recognition of electronic record and authentication; use of electronic agents.

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

(b) This chapter does not require that a record or authentication be generated, stored, sent, received, or otherwise processed by electronic means or in electronic form.

(c) In any transaction, a person may establish requirements regarding the type of authentication or record acceptable to it.

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

§ 59.1-501.8. Proof and effect of authentication.

(a) Authentication may be proven in any manner, including a showing that a party made use of information or access that could have been available only if it engaged in conduct or operations that

authenticated the record or term.

(b) Compliance with a commercially reasonable attribution procedure agreed to or adopted by the parties or established by law for authenticating a record authenticates the record as a matter of law.

§ 59.1-501.9. Choice of law.

(a) The parties in their agreement may choose the applicable law. However, the choice is not enforceable in a consumer contract to the extent it would vary a rule that may not be varied by agreement under the law of Virginia.

(b) In the absence of an enforceable agreement on choice of law, the contract is governed by the law of Virginia.

§ 59.1-501.10. Contractual choice of forum.

(a) The parties in their agreement may choose an exclusive judicial forum unless the choice is unreasonable and unjust.

(b) A judicial forum specified in an agreement is not exclusive unless the agreement expressly so provides.

§ 59.1-501.11. Unconscionable contract or term.

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

(b) If a court as a matter of law finds a contract or a term thereof has been induced by unconscionable conduct or that unconcsionable conduct has occurred in the collection of a claim arising from the contract, the court may grant appropriate relief.

(c) If it is claimed or appears to the court that a contract or term thereof may be unconscionable, the parties must be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.

§ 59.1-501.12. Manifesting assent; opportunity to review.

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

§ 59.1-501.13. 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. However, the following rules apply:

(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.

(3) Limitations on enforceability of, or agreement to, a contract, term, or right expressly stated in the sections listed in the following subparagraphs 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 and opportunity for review in § 59.1-501.12;

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

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

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

(b) Any usage of trade 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.

§ 59.1-501.14. Supplemental principles; good faith; decision for court; reasonable time; reason to know.

(a) Unless displaced by this chapter, principles of law and equity, including the merchant law and the common law of this 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.

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

(c) 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.

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

(e) Whenever this chapter requires any action to be taken within a reasonable time, the following rules apply:

(1) What is a reasonable time for taking the action depends on the nature, purpose, and circumstances of the action.

(2) Any time that is not manifestly unreasonable may be fixed by agreement.

(f) 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.

PART 2. FORMATION AND TERMS.

§ 59.1-502.1. Formal requirements.

(a) Except as otherwise provided in this section, a contract requiring payment of a contract fee of $5,000 or more is not enforceable by way of action or defense unless:

(1) the party against which enforcement is sought authenticated a record sufficient to indicate that a contract has been formed and which reasonably identifies the copy or subject matter to which the contract refers; or

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

(b) A record is sufficient under subsection (a) even if it omits or incorrectly states a term, but the contract is not enforceable under that subsection beyond the number of copies or subject matter shown in the record.

(c) A contract that does not satisfy the requirements of subsection (a) is nevertheless enforceable under that subsection if:

(1) a performance was tendered or the information was made available by one party and the tender was accepted or the information accessed by the other; or

(2) the party against which enforcement is sought admits in court, by pleading or by testimony or

otherwise under oath, facts sufficient to indicate a contract has been made, but the agreement is not enforceable under this paragraph beyond the number of copies or the subject matter admitted.

(d) Between merchants, if, within a reasonable time, a record in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, the record satisfies subsection (a) against the party receiving it unless notice of objection to its contents is given in a record within a reasonable time after the confirming record is received.

(e) An agreement that the requirements of this section need not be satisfied as to future transactions is effective if evidenced in a record authenticated by the person against which enforcement is sought.

(f) A transaction within the scope of this chapter is not subject to a statute of frauds contained in another law of this Commonwealth.

§ 59.1-502.2. Formation in general.

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

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

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

(d) In the absence of conduct or performance by both parties to the contrary, a contract is not formed if there is a material disagreement about a material term, including a term concerning scope.

(e) If a term is to be adopted by later agreement and the parties intend not to be bound unless the term is so adopted, a contract is not formed if the parties do not agree to the term. In that case, each party shall deliver to the other party, or with the consent of the other party destroy, all copies of information, access materials, and other materials received or made, and each party is entitled to a return with respect to any contract fee paid for which performance has not been received, has not been accepted, or has been redelivered without any benefit being retained. The parties remain bound by any contractual use term only with respect to information or copies received or made from copies received pursuant to the agreement, but the contractual use term does not apply to information or copies properly received or obtained from another source.

§ 59.1-502.3. Offer and acceptance in general.

Unless otherwise unambiguously indicated by the language or the circumstances:

(1) An offer to make a contract invites acceptance in any manner and by any medium reasonable under the circumstances.

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

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

(4) If an offer in an electronic message evokes an electronic message accepting the offer, a contract is formed:

(A) when an electronic acceptance is received; or

(B) if the response consists of beginning performance, full performance, or giving access to information, when the performance is received or the access is enabled and necessary access materials are received.

§ 59.1-502.4. Acceptance with varying terms.

(a) In this section, an acceptance materially alters an offer if it contains a term that materially conflicts with or varies a term of the offer or that adds a material term not contained in the offer.

(b) Except as otherwise provided in § 59.1-502.5, a definite and seasonable expression of acceptance operates as an acceptance, even if the acceptance contains terms that vary from the terms of the offer, unless the acceptance materially alters the offer.

(c) If an acceptance materially alters the offer, the following rules apply:

(1) A contract is not formed unless (A) a party agrees, such as by manifesting assent, to the other party's offer or acceptance or (B) all the other circumstances, including the conduct of the parties, establish a contract.

(2) If a contract is formed by the conduct of both parties, the terms of the contract are determined under § 59.1-502.10.

(d) If an acceptance varies from but does not materially alter the offer, a contract is formed based

on the terms of the offer. In addition, the following rules apply:

(1) Terms in the acceptance which conflict with terms in the offer are not part of the contract.

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

§ 59.1-502.5. Conditional offer or acceptance.

(a) In this section, an offer or acceptance is conditional if it is conditioned on agreement by the other party to all the terms of the offer or acceptance.

(b) Except as otherwise provided in subsection (c), a conditional offer or acceptance precludes formation of a contract unless the other party agrees to its terms, such as by manifesting assent.

(c) If an offer and acceptance are in standard forms and at least one form is conditional, the following rules apply:

(1) Conditional language in a standard term precludes formation of a contract only if the actions of the party proposing the form are consistent with the conditional language, such as by refusing to perform, refusing to permit performance, or refusing to accept the benefits of the agreement, until its proposed terms are accepted.

(2) A party that agrees, such as by manifesting assent, to a conditional offer that is effective under paragraph (1) adopts the terms of the offer under § 59.1-502.8 or § 59.1-502.9, except a term that conflicts with an expressly agreed term regarding price or quantity.

§ 59.1-502.6. Offer and acceptance: electronic agents.

(a) A contract may be formed by the interaction of electronic agents. If the interaction results in the electronic agents' engaging in operations that under the circumstances indicate acceptance of an offer, a contract is formed, but a court may grant appropriate relief if the operations resulted from fraud, electronic mistake, or the like.

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

(1) cause the electronic agent to perform, provide benefits, or allow the use or access that is the subject of the contract, or send instructions to do so; or

(2) indicate acceptance, regardless of other expressions or actions by the individual to which the individual has reason to know the electronic agent cannot react.

(c) The terms of a contract formed under subsection (b) are determined under § 59.1-502.8 or § 59.1-502.9 but do not include a term provided by the individual if the individual had reason to know that the electronic agent could not react to the term.

§ 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.

§ 59.1-502.8. Adopting terms of records.

Except as otherwise provided in § 59.1-502.9, the following rules apply:

(1) A party adopts the terms of a record, including a standard form, as the terms of the contract if the party agrees to the record, such as by manifesting assent.

(2) The terms of a record may be adopted pursuant to paragraph (1) after beginning performance or use if the parties had reason to know that their agreement would be represented in whole or part by a later record to be agreed on and there would not be an opportunity to review the record or a copy of it before performance or use begins. If the parties fail to agree to the later terms and did not intend to form a contract unless they so agreed, § 59.1-502.2 (e) applies.

(3) If a party adopts the terms of a record, the terms become part of the contract without regard to the party's knowledge or understanding of individual terms in the record, except for a term that is unenforceable because it fails to satisfy another requirement of this chapter.

§ 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); or

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

(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 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.

§ 59.1-502.10. Terms of contract formed by conduct.

(a) Except as otherwise provided in subsection (b) and subject to § 59.1-503.1, if a contract is formed by conduct of the parties, the terms of the contract are determined by consideration of the terms and conditions to which the parties expressly agreed, course of performance, course of dealing, usage of trade, the nature of the parties' conduct, the records exchanged, the information or informational rights involved, and all other relevant circumstances. If a court cannot determine the terms of the contract from the foregoing factors, the supplementary principles of this chapter apply.

(b) This section does not apply if the parties authenticate a record of the contract or a party agrees, such as by manifesting assent, to the record containing the terms of the other party.

§ 59.1-502.11. 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 § 59.1-501.12 (e) with respect to a licensee that acquires the information from that site, if the licensor:

(1) makes the standard terms of the license readily available for review by the licensee 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.

§ 59.1-502.12. Efficacy and commercial reasonableness of attribution procedure.

The efficacy, including the commercial reasonableness, of an attribution procedure is determined by the court. In making this determination, the following rules apply:

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

(2) Except as otherwise provided in paragraph (1), commercial reasonableness and effectiveness is determined in light of the purposes of the procedure and the commercial circumstances at the time the parties agreed to or adopted the procedure.

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

§ 59.1-502.13. Determining attribution.

(a) An electronic authentication, display, message, record, or performance is attributed to a person if it was the act of the person or its electronic agent, or if the person is bound by it under agency or other law. The party relying on attribution of an electronic authentication, display, message, record, or performance to another person has the burden of establishing attribution.

(b) The act of a person may be shown in any manner, including a showing of the efficacy of an attribution procedure that was agreed to or adopted by the parties or established by law.

(c) The effect of an electronic act attributed to a person under subsection (a) is determined from the

context at the time of its creation, execution, or adoption, including the parties' agreement, if any, or otherwise as provided by law.

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

§ 59.1-502.14. Electronic error: consumer defenses.

(a) In this section, "electronic error" means an error in an electronic message created by a consumer using an information processing system if a reasonable method to detect and correct or avoid the error was not provided.

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

(1) promptly on learning of the error:

(A) notifies the other party of the error; and

(B) causes delivery to the other party or, pursuant to reasonable instructions received from the other party, delivers to another person or destroys all copies of the information; and

(2) has not used, or received any benefit or value from, the information or caused the information or benefit to be made available to a third party.

(c) If subsection (b) does not apply, the effect of an electronic error is determined by other law.

§ 59.1-502.15. Electronic message: when effective; effect of acknowledgment.

(a) Receipt of an electronic message is effective when properly addressed and received.

(b) Receipt of an electronic acknowledgment of an electronic message establishes that the message was received but by itself does not establish that the content sent corresponds to the content received.

§ 59.1-502.16. Idea or information submission.

(a) The following rules apply to a submission of an idea or information for the creation, development, or enhancement of computer information which is not made pursuant to an existing agreement requiring the submission:

(1) A contract is not formed and is not implied from the mere receipt of an unsolicited submission.

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

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

(A) the submission is made and accepted pursuant to that procedure; or

(B) the recipient expressly agrees to terms concerning the submission.

(b) An agreement to disclose an idea creates a contract enforceable against the receiving party only if the idea as disclosed is confidential, concrete, and novel to the business, trade, or industry or the party receiving the disclosure otherwise expressly agreed.

PART 3. CONSTRUCTION.

§ 59.1-503.1. Parol or extrinsic evidence.

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

(1) course of performance, course of dealing, or usage of trade; and

(2) evidence of consistent additional terms, unless the court finds the record to have been intended as a complete and exclusive statement of the terms of the agreement.

§ 59.1-503.2. Practical construction.

(a) The express terms of an agreement and any course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other. However, if that construction is unreasonable:

(1) express terms prevail over course of performance, course of dealing, and usage of trade;

(2) course of performance prevails over course of dealing and usage of trade; and

(3) course of dealing prevails over usage of trade.

(b) An applicable usage of trade in the place where any part of performance is to occur must be used in interpreting the agreement as to that part of the performance.

(c) Evidence of a relevant course of performance, course of dealing, or usage of trade offered by one party in a proceeding is not admissible unless and until the party offering the evidence has given the other party notice that the court finds sufficient to prevent unfair surprise.

(d) The existence and scope of a usage of trade must be proved as facts.

§ 59.1-503.3. Modification and rescission.

(a) An agreement modifying a contract subject to this chapter needs no consideration to be binding.

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

(c) A modification of a contract and the contract as modified must satisfy the requirements of §§ 59.1-502.1 (a) and 59.1-503.7 (g) if the contract as modified is within those provisions.

(d) An attempt at modification or rescission which does not satisfy subsection (b) or (c) may operate as a waiver if § 59.1-507.2 is satisfied.

§ 59.1-503.4. Continuing contractual terms.

(a) Terms of an agreement involving successive performances apply to all performances, even if the terms are not displayed or otherwise brought to the attention of a party with respect to each successive performance, unless the terms are modified in accordance with this chapter or the contract.

(b) If a contract provides that terms may be changed as to future performances by compliance with a described procedure, a change proposed in good faith pursuant to that procedure becomes part of the contract if the procedure:

(1) reasonably notifies the other party of the change; and

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

(c) The parties by agreement may determine the standards for reasonable notice unless the agreed standards are manifestly unreasonable in light of the commercial circumstances.

(d) The enforceability of changes made pursuant to a procedure that does not comply with subsection (b) is determined by the other provisions of this chapter or other law.

§ 59.1-503.5. Terms to be specified.

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

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

(2) If a specification materially affects the other party's performance but is not seasonably made, the other party:

(A) is excused for any resulting delay in its performance; and

(B) may perform, suspend performance, or treat the failure to specify as a breach of contract.

§ 59.1-503.6. Performance under open terms.

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

§ 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 is:

(1) authenticated by the party against which 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.

§ 59.1-503.8. Duration of contract.

If an agreement does not specify its duration, to the extent allowed by other law, the following rules apply:

(1) Except as otherwise provided in paragraph (2), the agreement is enforceable for a time reasonable in light of the licensed subject matter and commercial circumstances but may be terminated as to future performances after a reasonable time duration at will by either party during that time on giving seasonable notice to the other party.

(2) The duration of contractual rights to use licensed subject matter is a time reasonable in light of the licensed informational rights and the commercial circumstances. However, subject to cancellation for breach of contract, the duration of the license is perpetual as to the contractual rights and contractual use terms if:

(A) the license is of a computer program that does not include source code and the license (i) transfers ownership of a copy or (ii) delivers a copy for a contract fee the total amount of which is fixed at or before the time of delivery of the copy; or

(B) the license expressly grants the right to incorporate or use the licensed information or informational rights with information or informational rights from other sources in a combined work for public distribution or public performance.

§ 59.1-503.9. Agreement for performance to party's satisfaction.

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

(b) Performance must be to the subjective satisfaction of the other party if:

(1) the agreement expressly so provides, such as by stating that approval is in the "sole discretion" of the party, or words of similar import; or

(2) the agreement is for informational content to be evaluated in reference to subjective characteristics such as aesthetics, appeal, suitability to taste, or subjective quality.

PART 4. WARRANTIES.

§ 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. In an automated transaction, language is sufficient if it is conspicuous. Otherwise, language in a record is sufficient if it states, "There is no warranty against interference with your enjoyment of the information or against infringement," 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.

§ 59.1-504.2. Express warranty.

(a) Subject to subsection (c), an express warranty by a licensor is created as follows:

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

(2) Any description of the information which is made part of the basis of the bargain creates an express warranty that the information will conform to the description.

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

(b) It is not necessary to the creation of an express warranty that the licensor use formal words, such as "warranty" or "guaranty", or state a specific intention to make a warranty. However, an express warranty is not created by:

(1) an affirmation or prediction merely of the value of the information or informational rights;

(2) a display or description of a portion of the information to illustrate the aesthetics, appeal, suitability to taste, subjective quality, or the like of informational content; or

(3) a statement purporting to be merely opinion or commendation of the information or informational rights.

(c) An express warranty or similar express contractual obligation, if any, exists with respect to published informational content covered by this chapter to the same extent that it would exist if the published informational content had been published in a form that placed it outside this chapter. However, if the warranty or similar express contractual obligation is breached, the remedies of the aggrieved party are those under this chapter and the agreement.

§ 59.1-504.3. Implied warranty: merchantability of computer program.

(a) Unless the warranty is disclaimed or modified, a licensor that is a merchant with respect to computer programs of the kind warrants:

(1) to the end user that the computer program is fit for the ordinary purposes for which such computer programs are used;

(2) to the distributor that:

(A) the program is adequately packaged and labeled as the agreement requires; and

(B) in the case of multiple copies, the copies are within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved; and

(3) that the program conforms to any promises or affirmations of fact made on the container or label.

(b) Unless disclaimed or modified, other implied warranties with respect to computer programs may arise from course of dealing or usage of trade.

(c) No warranty is created under this section with respect to informational content, but an implied warranty may arise under § 59.1-504.4.

§ 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) published informational content; or

(2) 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) on disclaiming diligence, reasonableness, or care.

§ 59.1-504.6. Disclaimer or modification of warranty.

(a) Words or conduct relevant to the creation of an express warranty and words or conduct tending to disclaim or modify an express warranty must be construed wherever reasonable as consistent with each other. Subject to § 59.1-503.1 with regard to parol or extrinsic evidence, the disclaimer or modification is inoperative to the extent that such construction is unreasonable.

(b) Except as otherwise provided in subsections (c), (d), and (e), to disclaim or modify an implied warranty or any part of it, but not the warranty in § 59.1-504.1, the following rules apply:

(1) Except as otherwise provided in this subsection:

(A) To disclaim or modify the implied warranty arising under § 59.1-504.3, language must mention "merchantability" or "quality" or use words of similar import and, if in a record, must be conspicuous.

(B) To disclaim or modify the implied warranty arising under § 59.1-504.4, language in a record must mention "accuracy" or use words of similar import.

(2) Language to disclaim or modify the implied warranty arising under § 59.1-504.5 must be in a record and be conspicuous. It is sufficient to state, "There is no warranty that this information, our efforts, or the system will fulfill any of your particular purposes or needs," or words of similar import.

(3) Language in a record is sufficient to disclaim all implied warranties if it individually disclaims each implied warranty or, except for the warranty in § 59.1-504.1, if it is conspicuous and states, "Except for express warranties stated in this contract, if any, this information, computer program is provided with all faults, and the entire risk as to satisfactory quality, performance, accuracy, and effort is with the user," or words of similar import.

(4) A disclaimer or modification sufficient under Title 8.2 or Title 8.2A to disclaim or modify an implied warranty of merchantability is sufficient to disclaim or modify the warranties under §§ 59.1-504.3 and 59.1-504.4. A disclaimer or modification sufficient under Title 8.2 or Title 8.2A to disclaim or modify an implied warranty of fitness for a particular purpose is sufficient to disclaim or modify the warranties under § 59.1-504.5.

(c) Unless the circumstances indicate otherwise, all implied warranties, but not the warranty under § 59.1-504.1, are disclaimed by expressions like "as is" or "with all faults" or other language that in

common understanding calls the licensee's attention to the disclaimer of warranties and makes plain that there are no implied warranties.

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

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

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

(g) Remedies for breach of warranty may be limited in accordance with this chapter with respect to liquidation or limitation of damages and contractual modification of remedy.

§ 59.1-504.7. Modification of computer program.

A licensee that modifies a computer program, other than by using a capability of the program intended for that purpose in the ordinary course, does not invalidate any warranty regarding performance of an unmodified copy but does invalidate any warranties, express or implied, regarding performance of the modified copy. A modification occurs if a licensee alters code in, deletes code from, or adds code to the computer program.

§ 59.1-504.8. Cumulation and conflict of warranties.

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

(1) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(2) A sample displaces inconsistent general language of description.

(3) Express warranties displace inconsistent implied warranties other than an implied warranty under § 59.1-504.5 (a).

§ 59.1-504.9. Third-party beneficiaries of warranty.

(a) Except for published informational content, a warranty to a licensee extends to persons for whose benefit the licensor intends to supply the information or informational rights and which rightfully use the information in a transaction or application of a kind in which the licensor intends the information to be used.

(b) A warranty to a consumer extends to each individual consumer in the licensee's immediate family or household if the individual's use would have been reasonably expected by the licensor.

(c) A contractual term that excludes or limits the persons to which a warranty extends is effective except as to individuals described in subsection (b).

(d) A disclaimer or modification of a warranty or remedy which is effective against the licensee is also effective against third persons to which a warranty extends under this section.

PART 5. TRANSFER OF INTERESTS AND RIGHTS.

§ 59.1-505.1. Ownership of informational rights.

(a) If an agreement provides for conveyance of ownership of informational rights in a computer program, ownership passes at the time and place specified by the agreement but does not pass until the program is in existence and identified to the contract. If the agreement does not specify a different time, ownership passes when the program and the informational rights are in existence and identified to the contract.

(b) Transfer of a copy does not transfer ownership of informational rights.

§ 59.1-505.2. Title to copy.

(a) In a license:

(1) title to a copy is determined by the license;

(2) a licensee's right under the license to possession or control of a copy is governed by the license and does not depend solely on title to the copy; and

(3) if a licensor reserves title to a copy, the licensor retains title to that copy and any copies made of it, unless the license grants the licensee a right to make and sell copies to others, in which case the reservation of title applies only to copies delivered to the licensee by the licensor.

(b) If an agreement provides for transfer of title to a copy, title passes:

(1) at the time and place specified in the agreement; or

(2) if the agreement does not specify a time and place:

(A) with respect to delivery of a copy on a tangible medium, at the time and place the licensor completed its obligations with respect to tender of the copy; or

(B) with respect to electronic delivery of a copy, if a first sale occurs under federal copyright law, at the time and place at which the licensor completed its obligations with respect to tender of the copy.

(c) If the party to which title passes under the contract refuses delivery of the copy or rejects the terms of the agreement, title revests in the licensor.

§ 59.1-505.3. Transfer of contractual interest.

The following rules apply to a transfer of a contractual interest:

(1) A party's contractual interest may be transferred unless the transfer:

(A) is prohibited by other law; or

(B) except as otherwise provided in paragraph (3), would materially change the duty of the other party, materially increase the burden or risk imposed on the other party, or materially impair the other party's property or its likelihood or expectation of obtaining return performance.

(2) Except as otherwise provided in paragraph (3) and § 59.1-508 (a) (1) (B), a term prohibiting transfer of a party's contractual interest is enforceable, and a transfer made in violation of that term is a breach of contract and is ineffective to create contractual rights in the transferee against the nontransferring party, except to the extent that:

(A) the contract is a license for incorporation or use of the licensed information or informational rights with information or informational rights from other sources in a combined work for public distribution or public performance and the transfer is of the completed, combined work; or

(B) the transfer is of a right to payment arising out of the transferor's due performance of less than its entire obligation and the transfer would be enforceable under paragraph (1) in the absence of the term prohibiting transfer.

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

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

§ 59.1-505.4. Effect of transfer of contractual interest.

(a) A transfer of "the contract" or of "all my rights under the contract," or a transfer in similar general terms, is a transfer of all contractual interests under the contract. Whether the transfer is effective is determined by §§ 59.1-505.3 and 59.1-505.8 (a) (1) (B).

(b) The following rules apply to a transfer of a party's contractual interests:

(1) The transferee is subject to all contractual use terms.

(2) Unless the language or circumstances otherwise indicate, as in a transfer as security, the transfer delegates the duties of the transferor and transfers its rights.

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

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

(c) A party to the original contract, other than the transferor, may treat a transfer that conveys a right or duty of performance without its consent as creating reasonable grounds for insecurity and, without prejudice to the party's rights against the transferor, may demand assurances from the transferee under § 59.1-507.8.

§ 59.1-505.5. Performance by delegate; subcontract.

(a) A party may perform its contractual duties or exercise its contractual rights through a delegate or a subcontract unless:

(1) the contract prohibits delegation or subcontracting; or

(2) the other party has a substantial interest in having the original promisor perform or control the performance.

(b) Delegating or subcontracting performance does not relieve the delegating party of a duty to perform or of liability for breach.

(c) An attempted delegation that violates a term prohibiting delegation is not effective.

§ 59.1-505.6. Transfer by licensee.

(a) If all or any part of a licensee's interest in a license is transferred, voluntarily or involuntarily, the transferee does not acquire an interest in information, copies, or the contractual or informational rights of the licensee unless the transfer is effective under § 59.1-505.3 or § 59.1-505.8 (a) (1) (B). If the transfer is effective, the transferee takes subject to the terms of the license.

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

§ 59.1-505.7. Financing if financier does not become licensee.

If a financier does not become a licensee in connection with its financial accommodation contract, the following rules apply:

(1) The financier does not receive the benefits or burdens of the license.

(2) The licensee's rights and obligations with respect to the information and informational rights are

governed by:

(A) the license;

(B) any rights of the licensor under other law; and

(C) to the extent not inconsistent with subparagraphs (A) and (B), any financial accommodation contract between the financier and the licensee, which may add additional conditions to the licensee's right to use the licensed information or informational rights.

§ 59.1-505.8. Finance licenses.

(a) If a financier becomes a licensee in connection with its financial accommodation contract and then transfers its contractual interest under the license, or sublicenses the licensed computer information or informational rights, to a licensee receiving the financial accommodation, the following rules apply:

(1) The transfer or sublicense to the accommodated licensee is not effective unless:

(A) the transfer or sublicense is effective under § 59.1-505.3; or

(B) the following conditions are fulfilled:

(i) before the licensor delivered the information or granted the license to the financier, the licensor received notice in a record from the financier giving the name and location of the accommodated licensee and clearly indicating that the license was being obtained in order to transfer the contractual interest or sublicense the licensed information or informational rights to the accommodated licensee;

(ii) the financier became a licensee solely to make the financial accommodation; and

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

(2) A financier that makes a transfer that is effective under paragraph (1) (B) may make only the single transfer or sublicense contemplated by the notice unless the licensor consents to a later transfer.

(b) If a financier makes an effective transfer of its contractual interest in a license, or an effective sublicense of the licensed information or informational rights, to an accommodated licensee, the following rules apply:

(1) The accommodated licensee's rights and obligations are governed by:

(A) the license;

(B) any rights of the licensor under other law; and

(C) to the extent not inconsistent with subparagraphs (A) and (B), the financial accommodation contract, which may impose additional conditions to the licensee's right to use the licensed information or informational rights.

(2) The financier does not make warranties to the accommodated licensee other than the warranty under § 59.1-504.1 (b) (1) and any express warranties in the financial accommodation contract.

§ 59.1-505.9. Financing arrangements: obligations irrevocable.

Unless the accommodated licensee is a consumer, a term in a financial accommodation contract providing that the accommodated licensee's obligations to the financier are irrevocable and independent is enforceable. The obligations become irrevocable and independent upon the licensee's acceptance of the license or the financier's giving of value, whichever occurs first.

§ 59.1-505.10. Financing arrangements: remedies or enforcement.

(a) Except as otherwise provided in subsection (b), on material breach of a financial accommodation contract by the accommodated licensee, the following rules apply:

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

(2) Subject to paragraphs (3) and (4), the financier may pursue its remedies against the accommodated licensee under the financial accommodation contract.

(3) If the financier became a licensee and made a transfer or sublicense that was effective under § 59.1-505.8, it may exercise the remedies of a licensor for breach, including the rights of an aggrieved party under § 59.1-508.15, subject to the limitations of § 59.1-508.16.

(4) If the financier did not become a licensee or did not make a transfer that was effective under § 59.1-505.8, it may enforce a contractual right contained in the financial accommodation contract to preclude the licensee's further use of the information. However, the following rules apply:

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

(B) If the accommodated licensee agreed to transfer possession of copies to the financier in the event of material breach of the financial accommodation contract, the financier may enforce that contractual right only if permitted to do so under subsection (b) (1) and § 59.1-505.3.

(b) The following additional limitations apply to a financier's remedies under subsection (a):

(1) A financier described in subsection (a) (3) which is entitled under the financial accommodation contract to take possession or prevent use of information, copies, or related materials may do so only if the licensor consents or if doing so would not result in a material adverse change of the duty of the licensor, materially increase the burden or risk imposed on the licensor, disclose or threaten to disclose

trade secrets or confidential material of the licensor, or materially impair the licensor's likelihood or expectation of obtaining return performance.

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

(A) the licensee owns the licensed copy, the license does not preclude transfer of the licensee's contractual rights, and the transfer complies with federal copyright law for the owner of a copy to make the transfer; or

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

(3) The financier's remedies under the financial accommodation contract are subject to the licensor's rights and the terms of the license.

§ 59.1-505.11. Financing arrangements: effect on licensor's rights.

(a) The creation of a financier's interest does not place any obligations on or alter the rights of a licensor.

(b) A financier's interest does not attach to any intellectual property rights of the licensor unless the licensor expressly consents to such attachment in a license or another record.

PART 6. PERFORMANCE.

§ 59.1-506.1. Performance of contract in general.

(a) A party shall perform in a manner that conforms to the contract.

(b) If an uncured material breach of contract by one party precedes the aggrieved party's performance, the aggrieved party need not perform except with respect to contractual use terms, but the contractual use terms do not apply to information or copies properly received or obtained from another source. In addition, the following rules apply:

(1) The aggrieved party may refuse a performance that is a material breach as to that performance or a performance that may be refused under § 59.1-507.4 (b).

(2) The aggrieved party may cancel the contract only if the breach is a material breach of the whole contract or the agreement so provides.

(c) Except as otherwise provided in subsection (b), tender of performance by a party entitles the party to acceptance of that performance. In addition, the following rules apply:

(1) A tender of performance occurs when the party, with manifest present ability and willingness to perform, offers to complete the performance.

(2) If a performance by the other party is due at the time of the tendered performance, tender of the other party's performance is a condition to the tendering party's obligation to complete the tendered performance.

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

(d) Except as otherwise provided in §§ 59.1-506.3 and 59.1-506.4, in the case of a performance with respect to a copy, this section is subject to §§ 59.1-506.6 through 59.1-506.10 and 59.1-507.4 through 59.1-507.7.

§ 59.1-506.2. Licensor's obligations to enable use.

(a) In this section, "enable use" means to grant a contractual right or permission with respect to information or informational rights and to complete the acts, if any, required under the agreement to make the information available to the licensee.

(b) A licensor shall enable use by the licensee pursuant to the contract. The following rules apply to enabling use:

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

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

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

(4) In an access contract, enabling use requires tendering all access material necessary to enable the agreed access.

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

§ 59.1-506.3. Submissions of information to satisfaction of party.

If an agreement requires that submitted information be to the satisfaction of the recipient, the following rules apply:

(1) §§ 59.1-506.6 through 59.1-506.10 and 59.1-507.4 through 59.1-507.7 do not apply to the submission.

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

(3) Except as otherwise provided in paragraph (4), neither refusal nor acceptance occurs unless the recipient expressly refuses or accepts the submitted information, but the recipient may not use the submitted information before acceptance.

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

§ 59.1-506.4. Immediately completed performance.

If a performance involves delivery of information or services which, because of their nature, may provide a licensee, immediately on performance or delivery, with substantially all the benefit of the performance or with other significant benefit that cannot be returned, the following rules apply:

(1) Sections 59.1-506.7 through 59.1-506.10 and 59.1-507.4 through 59.1-507.7 do not apply.

(2) The rights of the parties are determined under § 59.1-506.1 and the ordinary standards of the business, trade, or industry.

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

§ 59.1-506.5. Electronic regulation of performance.

(a) In this section, "automatic restraint" means a program, code, device, or similar electronic or physical limitation the intended purpose of which is to restrict use of information.

(b) A party entitled to enforce a limitation on use of information may include an automatic restraint in the information or a copy of it and use that restraint if:

(1) a term of the agreement authorizes use of the restraint;

(2) the restraint prevents a use that is inconsistent with the agreement;

(3) the restraint prevents use after expiration of the stated duration of the contract or a stated number of uses; or

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

(c) This section does not authorize an automatic restraint that affirmatively prevents or makes impracticable a licensee's access to its own information or information of a third party, other than the licensor, if that information is in the possession of the licensee or a third party and accessed without use of the licensor's information or informational rights.

(d) A party that includes or uses an automatic restraint consistent with subsection (b) or (c) is not liable for any loss caused by the use of the restraint.

(e) This section does not preclude electronic replacement or disabling of an earlier copy of information by the licensor in connection with delivery of a new copy or version under an agreement to replace or disable the earlier copy by electronic means with an upgrade or other new information.

(f) This section does not authorize use of an automatic restraint to enforce remedies in the event of breach of contract or of cancellation for breach.

§ 59.1-506.6. Copy: delivery; tender of delivery.

(a) Delivery of a copy must be at the location designated by agreement. In the absence of a designation, the following rules apply:

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

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

(3) Documents of title may be delivered through customary banking channels.

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

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

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

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

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

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

§ 59.1-506.7. Copy: performance related to delivery; payment.

(a) If performance requires delivery of a copy, the following rules apply:

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

(2) Tender of delivery is a condition of the other party's duty to accept the copy and entitles the tendering party to acceptance of the copy.

(b) If payment is due on delivery of a copy, the following rules apply:

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

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

(c) If the circumstances give either party the right to make or demand delivery in lots, the contract fee, if it can be apportioned, may be demanded for each lot.

(d) If payment is due and demanded on delivery of a copy or on delivery of a document of title, the right of the party receiving tender to retain or dispose of the copy or document, as against the tendering party, is conditioned on making the payment due.

§ 59.1-506.8. Copy: right to inspect; payment before inspection.

(a) Except as otherwise provided in §§ 59.1-506.3 and 59.1-506.4, if performance requires delivery of a copy, the following rules apply:

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

(2) The party making the inspection shall bear the expenses of inspection.

(3) A place or method of inspection or an acceptance standard fixed by the parties is presumed to be exclusive. However, the fixing of a place, method, or standard does not postpone identification to the contract or shift the place for delivery, passage of title, or risk of loss. If compliance with the place or method becomes impossible, inspection must be made as provided in this section unless the place or method fixed by the parties was an indispensable condition the failure of which voids the contract.

(4) A party's right to inspect is subject to existing obligations of confidentiality.

(b) If a right to inspect exists under subsection (a) but the agreement is inconsistent with an opportunity to inspect before payment, the party does not have a right to inspect before payment.

(c) If a contract requires payment before inspection of a copy, nonconformity in the tender does not excuse the party receiving the tender from making payment unless:

(1) the nonconformity appears without inspection and would justify refusal under § 59.1-507.4; or

(2) despite tender of the required documents, the circumstances would justify an injunction against honor of a letter of credit under Title 8.5A.

(d) Payment made under circumstances described in subsection (b) or (c) is not an acceptance of the copy and does not impair a party's right to inspect or preclude any of the party's remedies.

§ 59.1-506.9. Copy: when acceptance occurs.

(a) Acceptance of a copy occurs when the party to which the copy is tendered:

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

(2) does not make an effective refusal;

(3) commingles the copy or the information in a manner that makes compliance with the party's duties after refusal impossible;

(4) obtains a substantial benefit from the copy and cannot return that benefit; or

(5) acts in a manner inconsistent with the licensor's ownership, but the act is an acceptance only if the licensor elects to treat it as an acceptance and ratifies the act to the extent it was within contractual use terms.

(b) Except in cases governed by subsection (a) (3) or (4), if there is a right to inspect under § 59.1-506.8 or the agreement, acceptance of a copy occurs only after the party has had a reasonable opportunity to inspect the copy.

(c) If an agreement requires delivery in stages involving separate portions that taken together comprise the whole of the information, acceptance of any stage is conditional until acceptance of the whole.

§ 59.1-506.10. Copy: effect of acceptance; burden of establishing; notice of claims.

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

(b) A party accepting a copy has the burden of establishing a breach of contract with respect to the copy.

(c) If a copy has been accepted, the accepting party shall:

(1) except with respect to claims of a type described in § 59.1-508.5 (d) (1), within a reasonable time after it discovers or should have discovered a breach of contract, notify the other party of the breach or be barred from any remedy for the breach; and

(2) if the claim is for breach of a warranty regarding noninfringement and the accepting party is sued by a third party because of the breach, notify the warrantor within a reasonable time after receiving notice of the litigation or be precluded from any remedy for the liability established by the litigation.

§ 59.1-506.11. Access contracts.

(a) If an access contract provides for access over a period of time, the following rules apply:

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

(2) A change in the content of the information is a breach of contract only if the change conflicts with an express term of the agreement.

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

(4) Access must be available:

(A) at times and in a manner conforming to the express terms of the agreement; and

(B) to the extent not expressly stated in the agreement, at times and in a manner reasonable for the particular type of contract in light of the ordinary standards of the business, trade, or industry.

(b) In an access contract that gives the licensee a right of access at times substantially of its own choosing during agreed periods, an occasional failure to have access available during those times is not a breach of contract if it is:

(1) consistent with ordinary standards of the business, trade, or industry for the particular type of contract; or

(2) caused by:

(A) scheduled downtime;

(B) reasonable needs for maintenance;

(C) reasonable periods of failure of equipment, computer programs, or communications; or

(D) events reasonably beyond the licensor's control, and the licensor exercises such commercially reasonable efforts as the circumstances require.

§ 59.1-506.12. Correction and support contracts.

(a) If a person agrees to provide services regarding the correction of performance problems in computer information, other than an agreement to cure its own existing breach of contract, the following rules apply:

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

(2) In all other cases, the person:

(A) shall perform at a time and place and in a manner consistent with the express terms of the agreement and, to the extent not stated in the express terms, at a time and place and in a manner that is reasonable in light of ordinary standards of the business, trade, or industry; and

(B) does not undertake that its services will correct performance problems unless the agreement

expressly so provides.

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

§ 59.1-506.13. Contracts involving publishers, dealers, and end users.

(a) In this section:

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

(2) "End user" means a licensee that acquires a copy of the information from a dealer by delivery on a tangible medium for the licensee's own use and not for sale, license, transmission to third persons, or public display or performance for a fee.

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

(b) In a contract between a dealer and an end user, if the end user's right to use the information or informational rights is subject to a license by the publisher and there was no opportunity to review the license before the end user became obligated to pay the dealer, the following rules apply:

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

(2) If the end user does not agree, such as by manifesting assent, to the terms of the publisher's license, the end user has a right to a return from the dealer. A right under this paragraph is a return for purposes of §§ 59.1-501.12, 59.1-502.8, and 59.1-502.9.

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

(c) If an agreement provides for distribution of copies on a tangible medium or in packaging provided by the publisher or an authorized third party, a dealer may distribute those copies and documentation only:

(1) in the form as received; and

(2) subject to the terms of any license that the publisher provides to the dealer to be furnished to end users.

(d) A dealer that enters into an agreement with an end user is a licensor with respect to the end user under this chapter.

§ 59.1-506.14. Risk of loss of copy.

(a) Except as otherwise provided in this section, the risk of loss as to a copy that is to be delivered to a licensee, including a copy delivered by electronic means, passes to the licensee upon its receipt of the copy.

(b) If an agreement requires or authorizes a licensor to send a copy on a tangible medium by carrier, the following rules apply:

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

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

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

(c) If a copy is held by a third party to be delivered or reproduced without being moved or a copy is to be delivered by making access available to a third party resource containing a copy, the risk of loss passes to the licensee upon:

(1) the licensee's receipt of a negotiable document of title or other access materials covering the copy;

(2) acknowledgment by the third party to the licensee of the licensee's right to possession of or access to the copy; or

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

§ 59.1-506.15. Excuse by failure of presupposed conditions.

(a) Unless a party has assumed a different obligation, delay in performance by a party, or nonperformance in whole or part by a party, other than of an obligation to make payments or to conform to contractual use terms, is not a breach of contract if the delay or nonperformance is of a

performance that has been made impracticable by:

(1) the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made; or

(2) compliance in good faith with any foreign or domestic statute, governmental rule, regulation, or order, whether or not it later proves to be invalid.

(b) A party claiming excuse under subsection (a) shall seasonably notify the other party that there will be delay or nonperformance.

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

(d) A party that receives notice pursuant to subsection (b) of a material or indefinite delay in delivery of copies or of an allocation under subsection (c), by notice in a record, may:

(1) terminate and thereby discharge any executory portion of the contract; or

(2) modify the contract by agreeing to take the available allocation in substitution.

(e) If, after receipt of notice under subsection (b), a party does not modify the contract within a reasonable time not exceeding thirty days, the contract lapses with respect to any performance affected.

§ 59.1-506.16. Termination: survival of obligations.

(a) Except as otherwise provided in subsection (b), on termination all obligations that are still executory on both sides are discharged.

(b) The following survive termination:

(1) a right based on previous breach or performance of the contract;

(2) an obligation of confidentiality, nondisclosure, or noncompetition to the extent enforceable under other law;

(3) a contractual use term applicable to any licensed copy or information received from the other party, or copies made of it, which are not returned or returnable to the other party;

(4) an obligation to deliver, or dispose of information, materials, documentation, copies, records, or the like to the other party, an obligation to destroy copies, or a right to obtain information from an escrow agent;

(5) a choice of law or forum;

(6) an obligation to arbitrate or otherwise resolve disputes by alternative dispute resolution procedures;

(7) a term limiting the time for commencing an action or for giving notice;

(8) an indemnity term or a right related to a claim of a type described in § 59.1-508.5 (d) (1);

(9) a limitation of remedy or modification or disclaimer of warranty;

(10) an obligation to provide an accounting and make any payment due under the accounting; and

(11) any term that the agreement provides will survive.

§ 59.1-506.17. Notice of termination.

(a) Except as otherwise provided in subsection (b), a party may not terminate a contract except on the happening of an agreed event, such as the expiration of the stated duration, unless the party gives reasonable notice of termination to the other party.

(b) An access contract may be terminated without giving notice. However, except on the happening of an agreed event, termination requires giving reasonable notice to the licensee if the access contract pertains to information owned and provided by the licensee to the licensor.

(c) A term dispensing with a notice required under this section is invalid if its operation would be unconscionable. However, a term specifying standards for giving notice is enforceable if the standards are not manifestly unreasonable.

§ 59.1-506.18. Termination: enforcement.

(a) On termination of a license, a party in possession or control of information, copies, or other materials that are the property of the other party, or are subject to a contractual obligation to be delivered to that party on termination, shall use commercially reasonable efforts to deliver or hold them for disposal on instructions of that party. If any materials are jointly owned, the party in possession or control shall make them available to the joint owners.

(b) Termination of a license ends all right under the license for the licensee to use or access the licensed information, informational rights, or copies. Continued use of the licensed copies or exercise of terminated rights is a breach of contract unless authorized by a term that survives termination.

(c) Each party may enforce its rights under subsections (a) and (b) by acting pursuant to § 59.1-506.5 or by judicial process, including obtaining an order that the party or an officer of the court take the following actions with respect to any licensed information, documentation, copies, or other materials to be delivered:

(1) deliver or take possession of them;

(2) without removal, render unusable or eliminate the capability to exercise contractual rights in or use of them;

(3) destroy or prevent access to them; and

(4) require that the party or any other person in possession or control of them make them available to the other party at a place designated by that party which is reasonably convenient to both parties.

(d) In an appropriate case, a court of competent jurisdiction may grant injunctive relief to enforce the parties' rights under this section.

PART 7. BREACH OF CONTRACT.

§ 59.1-507.1. Breach of contract; material breach.

(a) Whether a party is in breach of contract is determined by the agreement or, in the absence of agreement, this chapter. A breach occurs if a party without legal excuse fails to perform an obligation in a timely manner, repudiates a contract, or exceeds a contractual use term, or otherwise is not in compliance with an obligation placed on it by this chapter or the agreement. A breach, whether or not material, entitles the aggrieved party to its remedies. Whether a breach of a contractual use term is an infringement or a misappropriation is determined by applicable informational property rights law.

(b) A breach of contract is material if:

(1) the contract so provides;

(2) the breach is a substantial failure to perform a term that is an essential element of the agreement; or

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

(A) the breach caused or is likely to cause substantial harm to the aggrieved party; or

(B) the breach substantially deprived or is likely substantially to deprive the aggrieved party of a significant benefit it reasonably expected under the contract.

(c) The cumulative effect of nonmaterial breaches may be material.

§ 59.1-507.2. Waiver of remedy for breach of contract.

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

(b) A party that accepts a performance with knowledge that the performance constitutes a breach of contract and, within a reasonable time after acceptance, does not notify the other party of the breach waives all remedies for the breach, unless acceptance was made on the reasonable assumption that the breach would be cured and it has not been seasonably cured. However, a party that seasonably notifies the other party of a reservation of rights does not waive the rights reserved.

(c) A party that refuses a performance and fails to identify a particular defect that is ascertainable by reasonable inspection waives the right to rely on that defect to justify refusal only if:

(1) the other party could have cured the defect if it were identified seasonably; or

(2) between merchants, the other party after refusal made a request in a record for a full and final statement of all defects on which the refusing party relied.

(d) Waiver of a remedy for breach of contract in one performance does not waive any remedy for the same or a similar breach in future performances unless the party making the waiver expressly so states.

(e) A waiver may not be retracted as to the performance to which the waiver applies.

(f) Except for a waiver in accordance with subsection (a) or a waiver supported by consideration, a waiver affecting an executory portion of a contract may be retracted by seasonable notice received by the other party that strict performance will be required in the future, unless the retraction would be unjust in view of a material change of position in reliance on the waiver by that party.

§ 59.1-507.3. Cure of breach of contract.

(a) A party in breach of contract may cure the breach at its own expense if:

(1) the time for performance has not expired and the party in breach seasonably notifies the aggrieved party of its intent to cure and, within the time for performance, makes a conforming performance;

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

(3) in a case not governed by paragraph (1) or (2), the party in breach seasonably notifies the aggrieved party of its intent to cure and promptly provides a conforming performance before cancellation by the aggrieved party.

(b) In a license other than in a mass-market transaction, if the agreement required a single delivery of a copy and the party receiving tender of delivery was required to accept a nonconforming copy because the nonconformity was not a material breach of contract, the party in breach shall promptly and in good faith make an effort to cure if:

(1) the party in breach receives seasonable notice of the specific nonconformity and a demand for cure of it; and

(2) the cost of the effort to cure does not disproportionately exceed the direct damages caused by the nonconformity to the aggrieved party.

(c) A party may not cancel a contract or refuse a performance because of a breach of contract that has been seasonably cured under subsection (a). However, notice of intent to cure does not preclude refusal or cancellation for the uncured breach.

§ 59.1-507.4. Copy: refusal of defective tender.

(a) Subject to subsection (b) and § 59.1-507.5, tender of a copy that is a material breach of contract permits the party to which tender is made to:

(1) refuse the tender;

(2) accept the tender; or

(3) accept any commercially reasonable units and refuse the rest.

(b) In a mass-market transaction that calls for only a single tender of a copy, a licensee may refuse the tender if the tender does not conform to the contract.

(c) Refusal of a tender is ineffective unless:

(1) it is made before acceptance;

(2) it is made within a reasonable time after tender or completion of any permitted effort to cure; and

(3) the refusing party seasonably notifies the tendering party of the refusal.

(d) Except in a case governed by subsection (b), a party that rightfully refuses tender of a copy may cancel the contract only if the tender was a material breach of the whole contract or the agreement so provides.

§ 59.1-507.5. Copy: contract with previous vested grant of rights.

If an agreement grants a right in or permission to use informational rights which precedes or is otherwise independent of the delivery of a copy, the following rules apply:

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

(2) In a case governed by paragraph (1), the tendering party may cure the breach by seasonably providing a conforming copy before the breach becomes material as to the whole contract.

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

§ 59.1-507.6. Copy: duties upon rightful refusal.

(a) Except as otherwise provided in this section, after rightful refusal or revocation of acceptance of a copy, the following rules apply:

(1) If the refusing party rightfully cancels the contract, § 59.1-508.2 applies and all contractual use terms continue.

(2) If the contract is not canceled, the parties remain bound by all contractual obligations.

(b) On rightful refusal or revocation of acceptance of a copy, the following rules apply to the extent consistent with § 59.1-508.2:

(1) Any use, sale, display, performance, or transfer of the copy or information it contains, or any failure to comply with a contractual use term, is a breach of contract. The licensee shall pay the licensor the reasonable value of any use. However, use for a limited time within contractual use terms is not a breach, and is not an acceptance under § 59.1-506.9 (a) (5), if it:

(A) occurs after the tendering party is seasonably notified of refusal;

(B) is not for distribution and is solely part of measures reasonable under the circumstances to avoid or reduce loss; and

(C) is not contrary to instructions concerning disposition of the copy received from the party in breach.

(2) A party that refuses a copy shall:

(A) deliver the copy and all copies made of it, all access materials, and documentation pertaining to the refused information to the tendering party or hold them with reasonable care for a reasonable time for disposal at that party's instructions; and

(B) follow reasonable instructions of the tendering party for returning or delivering copies, access material, and documentation, but instructions are not reasonable if the tendering party does not arrange for payment of or reimbursement for reasonable expenses of complying with the instructions.

(3) If the tendering party does not give instructions within a reasonable time after being notified of

refusal, the refusing party, in a reasonable manner to reduce or avoid loss, may store the copies, access material, and documentation for the tendering party's account or ship them to the tendering party and is entitled to reimbursement for reasonable costs of storage and shipment.

(4) Both parties remain bound by all contractual use terms that would have been enforceable had the performance not been refused.

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

§ 59.1-507.7. Copy: revocation of acceptance.

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

(1) on the reasonable assumption that the nonconformity would be cured, and the nonconformity was not seasonably cured;

(2) during a continuing effort by the party in breach at adjustment and cure, and the breach was not seasonably cured; or

(3) without discovery of the nonconformity, if acceptance was reasonably induced either by the other party's assurances or by the difficulty of discovery before acceptance.

(b) Revocation of acceptance is not effective until the revoking party notifies the other party of the revocation.

(c) Revocation of acceptance of a copy is precluded if:

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

(2) it occurs after a substantial change in condition not caused by defects in the information, such as after the party commingles the information in a manner that makes its return impossible; or

(3) the party attempting to revoke received a substantial benefit or value from the information, and the benefit or value cannot be returned.

(d) A party that rightfully revokes has the same duties and is under the same restrictions as if the party had refused tender of the copy.

§ 59.1-507.8. Adequate assurance of performance.

(a) A contract imposes an obligation on each party not to impair the other's expectation of receiving due performance. If reasonable grounds for insecurity arise with respect to the performance of either party, the aggrieved party may:

(1) demand in a record adequate assurance of due performance; and

(2) until that assurance is received, if commercially reasonable, suspend any performance, other than with respect to contractual use terms, for which the agreed return performance has not been received.

(b) Between merchants, the reasonableness of grounds for insecurity and the adequacy of any assurance offered is determined according to commercial standards.

(c) Acceptance of any improper delivery or payment does not impair an aggrieved party's right to demand adequate assurance of future performance.

(d) After receipt of a justified demand under subsection (a), failure, within a reasonable time not exceeding thirty days, to provide assurance of due performance which is adequate under the circumstances of the particular case is a repudiation of the contract under § 59.1-507.9.

§ 59.1-507.9. Anticipatory repudiation.

(a) If a party to a contract repudiates a performance not yet due and the loss of performance will substantially impair the value of the contract to the other party, the aggrieved party may:

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

(2) in either case, suspend its own performance or proceed in accordance with § 59.1-508.12 or § 59.1-508.13, as applicable.

(b) Repudiation includes language that one party will not or cannot make a performance still due under the contract or voluntary, affirmative conduct that reasonably appears to the other party to make a future performance impossible.

§ 59.1-507.10. Retraction of anticipatory repudiation.

(a) A repudiating party may retract its repudiation until its next performance is due unless the aggrieved party, after the repudiation, has canceled the contract, materially changed its position, or otherwise indicated that it considers the repudiation final.

(b) A retraction may be by any method that clearly indicates to the aggrieved party that the repudiating party intends to perform the contract. However, a retraction must contain any assurance justifiably demanded under § 59.1-507.8.

(c) Retraction restores a repudiating party's rights under the contract with due excuse and allowance

to the aggrieved party for any delay caused by the repudiation.

PART 8. REMEDIES.

§ 59.1-508.1. Remedies in general.

(a) The remedies provided in this chapter are cumulative, but a party may not recover more than once for the same loss.

(b) Except as otherwise provided in §§ 59.1-508.3 and 59.1-508.4, if a party is in breach of contract, whether or not the breach is material, the aggrieved party has the remedies provided in the agreement or this chapter, but the aggrieved party shall continue to comply with any contractual use terms with respect to information or copies received from the other party, but the contractual use terms do not apply to information or copies properly received or obtained from another source.

(c) Rescission or a claim for rescission of the contract, or refusal of the information, does not preclude and is not inconsistent with a claim for damages or other remedy.

§ 59.1-508.2. Cancellation.

(a) An aggrieved party may cancel a contract if there is a material breach that has not been cured or waived or the agreement allows cancellation for the breach.

(b) Cancellation is not effective until the canceling party gives notice of cancellation to the party in breach, unless a delay required to notify the party would cause or threaten material harm or loss to the aggrieved party. The notification may be in any form reasonable under the circumstances. However, in an access contract, a party may cancel rights of access without notice.

(c) On cancellation, the following rules apply:

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

(A) A party that has rightfully refused a copy shall comply with § 59.1-507.6 (b) as to the refused copy.

(B) A party in breach of contract which would be subject to an obligation to deliver under § 59.1-506.18, shall deliver all information, documentation, materials, and copies to the other party or hold them with reasonable care for a reasonable time for disposal at that party's instructions. The party in breach of contract shall follow any reasonable instructions received from the other party.

(C) Except as otherwise provided in subparagraphs (A) and (B), the party shall comply with § 59.1-506.18.

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

(A) any right based on previous breach or performance; and

(B) the rights, duties, and remedies described in § 59.1-506.16 (b).

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

(4) Cancellation of a license by the licensee ends any contractual right to use the information, informational rights, copies, or other materials, but the licensee may use the information for a limited time after the license has been canceled if the use:

(A) is within contractual use terms;

(B) is not for distribution and is solely part of measures reasonable under the circumstances to avoid or reduce loss; and

(C) is not contrary to instructions received from the party in breach concerning disposition of them.

(5) The licensee shall pay the licensor the reasonable value of any use after cancellation permitted under paragraph (4).

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

(d) A term providing that a contract may not be canceled precludes cancellation but does not limit other remedies.

(e) Unless a contrary intention clearly appears, an expression such as "cancellation," "rescission," or the like may not be construed as a renunciation or discharge of a claim in damages for an antecedent breach.

§ 59.1-508.3. Contractual modification of remedy.

(a) Except as otherwise provided in this section and in § 59.1-508.4:

(1) an agreement may provide for remedies in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter or a party's other remedies under this chapter, such as by precluding a party's right to cancel for breach of contract, limiting remedies to returning or delivering copies and repayment of the contract fee, or limiting remedies to repair or replacement of the nonconforming copies; and

(2) resort to a contractual remedy is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

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

(c) Failure or unconscionability of an agreed exclusive or limited remedy makes a term disclaiming or limiting consequential or incidental damages unenforceable unless the agreement expressly makes the disclaimer or limitation independent of the agreed remedy.

(d) Consequential damages and incidental damages may be excluded or limited by agreement unless the exclusion or limitation is unconscionable. Exclusion or limitation of consequential damages for personal injury in a consumer contract for a computer program that is subject to this chapter and is contained in consumer goods is prima facie unconscionable, but exclusion or limitation of damages for a commercial loss is not unconscionable.

§ 59.1-508.4. Liquidation of damages.

(a) Damages for breach of contract by either party may be liquidated by agreement in an amount that is reasonable in light of:

(1) the loss anticipated at the time of contracting;

(2) the actual loss; or

(3) the actual or anticipated difficulties of proving loss in the event of breach.

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

(c) If a party justifiably withholds delivery of copies because of the other party's breach of contract, the party in breach is entitled to restitution for any amount by which the sum of the payments it made for the copies exceeds the amount of the liquidated damages payable to the aggrieved party in accordance with subsection (a). The right to restitution is subject to offset to the extent that the aggrieved party establishes:

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

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

(d) A term that does not liquidate damages, but that limits damages available to the aggrieved party, must be evaluated under § 59.1-508.3.

§ 59.1-508.5. Limitation of actions.

(a) Except as otherwise provided in subsection (b), an action for breach of contract must be commenced within the later of four years after the right of action accrues or one year after the breach was or should have been discovered, but not later than five years after the right of action accrues.

(b) If the original agreement of the parties alters the period of limitations, the following rules apply:

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

(2) In a consumer contract, the period of limitation may not be reduced.

(c) Except as otherwise provided in subsection (d), a right of action accrues when the act or omission constituting a breach of contract occurs, even if the aggrieved party did not know of the breach. A right of action for breach of warranty accrues when tender of delivery of a copy pursuant to § 59.1-506.6, or access to the information, occurs. However, if the warranty expressly extends to future performance of the information or a copy, the right of action accrues when the performance fails to conform to the warranty, but not later than the date the warranty expires.

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

(1) a breach of warranty against third-party claims for:

(A) infringement or misappropriation; or

(B) libel, slander, or the like;

(2) a breach of contract involving a party's disclosure or misuse of confidential information; or

(3) a failure to provide an indemnity or to perform another obligation to protect or defend against a third-party claim.

(e) If an action commenced within the period of limitation is so concluded as to leave available a remedy by another action for the same breach of contract, the other action may be commenced after expiration of the period of limitation if the action is commenced within six months after conclusion of the first action, unless the action was concluded as a result of voluntary discontinuance or dismissal for failure or neglect to prosecute.

(f) This section does not alter the law on tolling of the statute of limitations and does not apply to a right of action that accrued before the effective date of this chapter.

§ 59.1-508.6. Remedies for fraud.

Remedies for material misrepresentation or fraud include all remedies available under this chapter

for nonfraudulent breach of contract.

§ 59.1-508.7. Measurement of damages in general.

(a) Except as otherwise provided in the contract, an aggrieved party may not recover compensation for that part of a loss which could have been avoided by taking measures reasonable under the circumstances to avoid or reduce loss. The burden of establishing a failure of the aggrieved party to take measures reasonable under the circumstances is on the party in breach of contract.

(b) A party may not recover:

(1) consequential damages for losses resulting from the content of published informational content unless the agreement expressly so provides; or

(2) damages that are speculative.

(c) The remedy for breach of contract for disclosure or misuse of information that is a trade secret or in which the aggrieved party has a right of confidentiality includes as consequential damages compensation for the benefit obtained as a result of the breach.

(d) For purposes of this chapter, market value is determined as of the date of breach of contract and the place for performance.

(e) Damages or expenses that relate to events after the date of entry of judgment must be reduced to their present value as of that date. In this subsection, "present value" means the amount, as of a date certain, of one or more sums payable in the future or the value of one or more performances due in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties in their agreement unless that rate was manifestly unreasonable when the agreement was entered into. Otherwise, the discount is determined by a commercially reasonable rate that takes into account the circumstances of each case when the agreement was entered into.

§ 59.1-508.8. Licensor's damages.

(a) In this section, "substitute transaction" means a transaction by the licensor which would not have been possible except for the licensee's breach and which transaction is for the same information or informational rights with the same contractual use terms as the transaction to which the licensee's breach applies.

(b) Except as otherwise provided in § 59.1-508.7, a breach of contract by a licensee entitles the licensor to recover the following compensation for losses resulting in the ordinary course from the breach, less expenses avoided as a result of the breach, to the extent not otherwise accounted for under this subsection:

(1) damages measured in any combination of the following ways but not to exceed the contract fee and the market value of other consideration required under the contract for the performance that was the subject of the breach:

(A) the amount of accrued and unpaid contract fees and the market value of other consideration earned but not received for:

(i) any performance accepted by the licensee; and

(ii) any performance to which § 59.1-506.4 applies;

(B) for performances not governed by subparagraph (A), if the licensee repudiated or wrongfully refused the performance or the licensor rightfully canceled and the breach makes possible a substitute transaction, the amount of loss as determined by contract fees and the market value of other consideration required under the contract for the performance less:

(i) the contract fees and market value of other consideration received from an actual and commercially reasonable substitute transaction entered into by the licensor in good faith and without unreasonable delay; or

(ii) the market value of a commercially reasonable hypothetical substitute transaction;

(C) for performances not governed by subparagraph (A), if the breach does not make possible a substitute transaction, lost profit, including reasonable overhead, that the licensor would have realized on acceptance and full payment for performance that was not delivered to the licensee because of the licensee's breach; or

(D) damages calculated in any reasonable manner; and

(2) consequential and incidental damages.

§ 59.1-508.9. Licensee's damages.

(a) Subject to subsection (b) and except as otherwise provided in § 59.1-508.7, a breach of contract by a licensor entitles the licensee to recover the following compensation for losses resulting in the ordinary course from the breach or, if appropriate, as to the whole contract, less expenses avoided as a result of the breach to the extent not otherwise accounted for under this section:

(1) damages measured in any combination of the following ways, but not to exceed the market value of the performance that was the subject of the breach plus restitution of any amounts paid for performance not received and not accounted for within the indicated recovery:

(A) with respect to performance that has been accepted and the acceptance not rightfully revoked,

the value of the performance required less the value of the performance accepted as of the time and place of acceptance;

(B) with respect to performance that has not been rendered or that was rightfully refused or acceptance of which was rightfully revoked:

(i) the amount of any payments made and the value of other consideration given to the licensor with respect to that performance and not previously returned to the licensee;

(ii) the market value of the performance less the contract fee for that performance; or

(iii) the cost of a commercially reasonable substitute transaction less the contract fee under the breached contract, if the substitute transaction was entered into by the licensee in good faith and without unreasonable delay for substantially similar information with the same contractual use terms; or

(C) damages calculated in any reasonable manner; and

(2) incidental and consequential damages.

(b) The amount of damages must be reduced by any unpaid contract fees for performance by the licensor which has been accepted by the licensee and as to which the acceptance has not been rightfully revoked.

§ 59.1-508.10. Recoupment.

(a) Except as otherwise provided in subsection (b), an aggrieved party, upon notifying the party in breach of contract of its intention to do so, may deduct all or any part of the damages resulting from the breach from any payments still due under the same contract.

(b) If a breach of contract is not material with reference to the particular performance, an aggrieved party may exercise its rights under subsection (a) only if the agreement does not require further affirmative performance by the other party and the amount of damages deducted can be readily liquidated under the agreement.

§ 59.1-508.11. Specific performance.

(a) Specific performance may be ordered:

(1) if the agreement provides for that remedy, other than an obligation for the payment of money;

(2) if the contract was not for personal services and the agreed performance is unique; or

(3) in other proper circumstances.

(b) An order for specific performance may contain any conditions considered just and must provide adequate safeguards consistent with the contract to protect the confidentiality of information, information, and informational rights of both parties.

§ 59.1-508.12. Completing performance.

(a) On breach of contract by a licensee, the licensor may:

(1) identify to the contract any conforming copy not already identified if, at the time the licensor learned of the breach, the copy was in its possession;

(2) in the exercise of reasonable commercial judgment for purposes of avoiding loss and effective realization on effort or investment, complete the information and identify it to the contract, cease work on it, relicense or dispose of it, or proceed in any other commercially reasonable manner; and

(3) pursue any remedy for breach that has not been waived.

(b) On breach by a licensee, both parties remain bound by all contractual use terms, but the contractual use terms do not apply to information or copies properly received or obtained from another source.

§ 59.1-508.13. Continuing use.

On breach of contract by a licensor, the following rules apply:

(1) A licensee that has not canceled the contract may continue to use the information and informational rights under the contract. If the licensee continues to use the information or informational rights, the licensee is bound by all terms of the contract, including contractual use terms, obligations not to compete, and obligations to pay contract fees.

(2) The licensee may pursue any remedy for breach which has not been waived.

(3) The licensor's rights remain in effect but are subject to the licensee's remedy for breach, including any right of recoupment or setoff.

§ 59.1-508.14. Discontinuing access.

On material breach of an access contract or if the agreement so provides, a party may discontinue all contractual rights of access of the party in breach and direct any person that is assisting the performance of the contract to discontinue its performance.

§ 59.1-508.15. Right to possession and to prevent use.

(a) On cancellation of a license, the licensor has the right:

(1) to possession of all copies of the licensed information in the possession or control of the licensee and any other materials pertaining to that information which by contract are to be returned or delivered by the licensee to the licensor; and

(2) to prevent the continued exercise of contractual and informational rights in the licensed

information under the license.

(b) Except as otherwise provided in § 59.1-508.14, a licensor may exercise its rights under subsection (a) without judicial process only if this can be done:

(1) without a breach of the peace;

(2) without a foreseeable risk of personal injury or significant physical damage to information or property other than the licensed information; and

(3) in accordance with § 59.1-508.16.

(c) In a judicial proceeding, the court may enjoin a licensee in breach of contract from continued use of the information and informational rights and may order the licensor or a judicial officer to take the steps described in § 59.1-506.18.

(d) A party has a right to an expedited judicial hearing on a request for prejudgment relief to enforce or protect its rights under this section.

(e) The right to possession under this section is not available to the extent that the information, before breach of the license and in the ordinary course of performance under the license, was so altered or commingled that the information is no longer identifiable or separable.

(f) A licensee that provides information to a licensor subject to contractual use terms has the rights and is subject to the limitations of a licensor under this section with respect to the information it provides.

§ 59.1-508.16. Limitations on electronic self-help.

(a) In this section, "electronic self-help" means the use of electronic means to exercise a licensor's rights under § 59.1-508.15 (b).

(b) On cancellation of a license, electronic self-help is not permitted, except as provided in this section.

(c) A licensee shall separately manifest assent to a term authorizing use of electronic self-help. The term must:

(1) provide for notice of exercise as provided in subsection (d);

(2) state the name of the person designated by the licensee to which notice of exercise must be given and the manner in which notice must be given and place to which notice must be sent to that person; and

(3) provide a simple procedure for the licensee to change the designated person or place.

(d) Before resorting to electronic self-help authorized by a term of the license, the licensor shall give notice in a record to the person designated by the licensee stating:

(1) that the licensor intends to resort to electronic self-help as a remedy on or after forty-five days following receipt by the licensee of the notice;

(2) the nature of the claimed breach that entitles the licensor to resort to self-help; and

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

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

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

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

(3) the licensor does not provide the notice required in subsection (d).

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

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

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

(2) irreparable harm or threat of irreparable harm to the licensee or licensor;

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

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

(5) that the party that may be adversely affected is adequately protected against loss, including a

loss because of misappropriation or misuse of computer information, that it may suffer because the relief is granted under this chapter.

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

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

PART 9. MISCELLANEOUS PROVISIONS.

§ 59.1-509.1. Serverability.

If any provision of this chapter or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

§ 59.1-509.2. Previous rights and transactions.

Contracts that are enforceable and rights of action that accrue before the effective date of this chapter are governed by the law then in effect unless the parties agree to be governed by this chapter.

2. That the Joint Commission on Technology and Science (JCOTS) shall study the impact of this act on Virginia businesses, libraries and consumers. JCOTS shall appoint a technical advisory committee to advise the Commission on its work. The members of the technical advisory committee shall include, but not be limited to, the following: two members of the Senate, two members of the House of Delegates, a representative of the Northern Virginia Technology Council, a representative of the Virginia Manufacturers Association, a representative of the insurance industry, a representative of the Virginia Library Association, and a representative of the Richmond Technology Council. JCOTS shall report its findings to the Governor and the General Assembly on or before December 1, 2000.

3. That the provisions of this act creating Chapter 43 (§ 59.1-501.1 et seq.) of Title 59.1 shall become effective on July 1, 2001.