

# VIRGINIA ACTS OF ASSEMBLY -- 2001 SESSION

## CHAPTER 763

*An Act to amend and reenact §§ 59.1-501.2 through 59.1-501.5, 59.1-501.9, 59.1-501.10, 59.1-501.12, 59.1-502.9, 59.1-502.12, 59.1-505.3, 59.1-506.5, and 59.1-508.16 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 59.1-503.10, relating to the Uniform Computer Information Transactions Act.*

[H 2412]

Approved March 26, 2001

### **Be it enacted by the General Assembly of Virginia:**

**1. That §§ 59.1-501.2 through 59.1-501.5, 59.1-501.9, 59.1-501.10, 59.1-501.12, 59.1-502.9, 59.1-502.12, 59.1-505.3, 59.1-506.5, and 59.1-508.16 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 59.1-503.10 as follows:**

§ 59.1-501.2. Definitions.

(a) As used in this chapter:

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

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

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

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

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

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

(7) "Automated transaction" means a transaction in which a contract is formed in whole or part by electronic actions of one or both parties 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 § 508.8 (b) (1) or § 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 *independently* to initiate an action, or to respond to electronic messages or performances, on the person's behalf without review or action by an individual at the time of the action or response to the message or performance.

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

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

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

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

(B) an instrument or other item;

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

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

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

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

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

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

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

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

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

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

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

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

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

(39) "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 8.9A.

(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.

(b) 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~~ § 8.9A-102.

(7) "Investment property" ~~§ 8.9-115~~ § 8.9A-102.

(8) "Item" § 8.4-104.

(9) "Letter of credit" § 8.5A-102.

(10) "Payment order" § 8.4A-103.

(11) "Sale" § 8.2-106.

§ 59.1-501.3. Scope; exclusions.

(a) This chapter applies to computer information transactions.

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

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

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

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

(2) *Subject to subsection (d) (2) (A)*, if a transaction includes an agreement for creating or for obtaining rights to create computer information and a motion picture, this chapter does not apply to the agreement if the dominant character of the agreement is for creating or obtaining rights to create a motion picture. In all other such agreements, this chapter does not apply to the part of the agreement that involves a motion picture excluded under subsection (d)(2), but does apply to the computer information.

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

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

(d) This chapter does not apply to:

- (1) a financial services transaction;
- (2) an agreement to create, perform or perform in, include information in, acquire, use, distribute, modify, reproduce, have access to, adapt, make available, transmit, license, or display:

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

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

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

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

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

~~(6) (7) subject matter within the scope of Titles 8.3, 8.4, 8.4A, 8.5A, 8.6A, 8.7, or 8.8A.~~

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

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

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

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

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

§ 59.1-501.4. 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 *statute, rule, regulation* or procedure that may not be varied by agreement of the parties or that may be varied only in a manner specified by the *statute, rule, regulation* or procedure, including *but not limited to* the Virginia Consumer Protection Act of 1977 (§ 59.1-196 et seq.) *and other consumer protection statutes, rules or regulations*. 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 *a consumer protection statute, rule or regulation, including but not limited to the Virginia Consumer Protection Act of 1977 (§ 59.1-196 et seq.), the Virginia Consumer Protection Act consumer protection statute, rule or regulation* governs.

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

(1) A requirement that a term, waiver, notice, or disclaimer be in a writing is satisfied by a record.

(2) A requirement that a record, writing, or term be signed is satisfied by an authentication.

(3) A requirement that a term be conspicuous, or the like, is satisfied by a term that is conspicuous under this chapter.

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

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

§ 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 *statute, rule or regulation* 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~~ or unjust.

(b) A judicial forum specified in an agreement is not exclusive unless the agreement expressly so provides *and, in a mass-market transaction, expressly and conspicuously so provides.*

§ 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 a manner that would enable a reasonably configured electronic agent to react to the record or term.

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

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

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

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

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

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

§ 59.1-502.9. 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; or

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

(A) *in a printed license; or*

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

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

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

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

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

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

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

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

§ 59.1-502.12. 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 or regulation.~~

(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.

§ 59.1-503.10. Licenses to nonprofit libraries, archives or educational institutions.

(a) *To the extent that the conduct is not otherwise unlawful or restricted under the Copyright Act, 17 U.S.C. § 101 et seq., or other law, in a standard form contract for the use of a tangible copy of informational content to a licensee that is a nonprofit library or archive or a nonprofit educational institution, the licensee may, without any purpose of direct or indirect commercial advantage:*

(1) *make the tangible copy available to library or archive users, including but not limited to reserving the copy for a course and lending that copy to users in accordance with ordinary practices of nonprofit libraries or archives;*

(2) *make a copy of the tangible copy for archival or preservation purposes;*

(3) *engage in inter-library lending of tangible copies of the copy; and*

- (4) *make classroom and instructional use of the tangible copy.*
- (b) *The provisions of subsection (a) may be varied by a term in a standard form contract only if:*
  - (1) *the term varying the provision is conspicuous;*
  - (2) *the nonprofit library, archive or educational institution specifically manifests assent to the term pursuant to subsection (c) of § 59.1-501.12; and*
  - (3) *where the term is not made available to the nonprofit library, archive or educational institution before it orders the tangible copy of the computer information:*
    - (i) *the nonprofit library, archive or educational institution knew or had reason to know that terms would follow when it ordered the copy; and*
    - (ii) *the nonprofit library, archive or educational institution is given the right to return the copy in the event that it refuses the contract and the right to be reimbursed for any reasonable expenses incurred in complying with the licensor's instructions for returning or destroying the computer information, or in the absence of such instructions, the reimbursement of expenses incurred for return postage or similar reasonable expense in returning the computer information.*
- (c) *Nothing in this section shall be construed to:*
  - (1) *alter the burden of proof in an infringement, contract or other action;*
  - (2) *authorize making the informational content available on a computer network server or other system for simultaneous access and use by multiple users; or*
  - (3) *limit any defense that a term of a contract violates a fundamental public policy pursuant to § 59.1-501.5 including any such policy under the federal copyright law.*
- (d) *For purposes of this section, the terms "nonprofit library, archive or educational institution" have the same meaning as used in sections 108, 109 and 110 of the Copyright Act, 17 U.S.C. §§ 108, 109, and 110.*

§ 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~~ § 59.1-505.8 (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; or
  - (C) *the transfer is in connection with a merger or the acquisition or sale of a subsidiary or affiliate involving the licensee and another person and is made (i) to preserve the integrity of information and information processing systems used by the licensee, or (ii) to ensure compatibility of information and information processing systems among the parties involved in the merger, acquisition, or sale.*
- (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.

§ 59.1-506.5. 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~~ prevent use of information contrary to the contract or applicable law.
- (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~~ *because of breach of contract or of for cancellation for breach. If a right to cancel for breach of contract and a right to exercise restraint under subdivision (b) (4) exist simultaneously, affirmative acts constituting electronic self-help must be taken pursuant to § 59.1-508.16, including its prohibition on mass-market transactions, instead of this section. Affirmative acts under this subsection do not include (i) use of a program, code, device, or similar electronic or physical limitation that operates automatically without regard to breach or (ii) a refusal to prevent the operation of a restraint authorized by this section or to reverse its effect.*

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

(a) In this section,

(1) "electronic self-help" means the use of electronic means to exercise a licensor's rights under § 59.1-508.15 (b); and

(2) "wrongful use of electronic self-help" means use of electronic self-help other than in compliance with this section.

(b) On cancellation of a license, electronic self-help is not permitted, except as provided in this section. *Notwithstanding any provision to the contrary, electronic self-help is prohibited in mass-market transactions.*

(c) *If the parties agree to permit electronic self-help, a licensee shall separately manifest assent to a term authorizing use of electronic self-help. In accordance with subsection (c) of § 59.1-501.12, a general assent to a license containing a term authorizing use of electronic self-help is not sufficient to manifest assent to the 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 the 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 his claim when it is finally adjudicated;

(4) that all of the conditions to entitle a person to the relief under the laws of the 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 he 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 may prohibit use of electronic self-help*, and 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 *physical* possession of a copy without a breach of the peace and ~~the electronic self-help is used solely with respect to that copy~~ *without the use of electronic self-help; in which case, a lawfully obtained copy may be erased or disabled by electronic means.*