

Formation of Click Wrap Agreements Under Virginia's Uniform Computer Information Transactions Act

By Adam Ruttenberg and Jack Kerrigan

Introduction

This article provides a general analysis of the degree to which the Uniform Computer Information Transactions Act (UCITA)¹ impacts on the formation of click wrap agreements under Virginia law. Specifically, this article discusses the UCITA provisions and provides those businesses that licence computer information in Virginia (each a Licensor), guidelines for drafting and executing click wrap agreements².

Scope of UCITA

UCITA sets forth default provisions which, unless disclaimed³, govern 'computer information transactions.'⁴ UCITA defines 'computer information transactions'⁵ as including agreements or the performance of agreements to

create, modify, transfer, or licence computer information⁶ or informational

¹ VA CODE ANN 59-1-501.2 *et seq* (Supp. 2000).

² This article focuses on the UCITA provisions that govern the procedural manner in which a click wrap agreement may be formed under Virginia law. This article does not, however, set forth an analysis of UCITA provisions governing the enforceability of substantive terms within a click wrap agreement or within other agreements. For example, UCITA provisions relating to unconscionable contract terms or to terms that violate public policy are not discussed in this article.

³ Section 59.1-501.13 of UCITA provides a list of numerous UCITA provisions that may not be varied by agreement. Significantly, numerous provisions that may impact on the enforceability of click wrap agreements may not be varied by agreement. See VA. CODE. ANN. Section 59.1-501.13. For example, the parties to an agreement may not disclaim the obligation of good faith imposed on contracting parties, UCITA's public policy unconscionability provisions, certain consumer defenses, or limitations on mass market licenses. *Ibid*.

⁴ VA CODE ANN, Section 59.1-501

⁵ VA CODE ANN, Section 59.1.-501.2(11).

⁶ Section 59.1-501.2(10) of UCITA defines 'computer information' as:

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 and any documentation or packaging associated with the copy.

rights⁷ in computer information. In short, UCITA applies where the subject matter of a transaction involves computer information,⁸ but specifically excludes transactions involving certain subjects.⁹ To the extent an agreement is controlled by UCITA, it may be formed online. Section 59.1-501.7 of the UCITA specifically acknowledges that an agreement may not be denied legal effect because it is in electronic form.¹⁰ Furthermore, UCITA establishes several new terms of art to describe traditional contractual concepts in an online setting. For example, UCITA makes frequent use of two new definitions: ‘authenticate’ and ‘record.’ Under UCITA, the term ‘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.¹¹ The Official Comments to UCITA (the ‘Comments’) clarify that the term ‘authenticate’ is used in place of the word ‘signature’ and that an

⁷ Section 59.1-501.2(38) of UCITA defines ‘informational rights’ as:

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, independent of contract, a right to control or preclude another person’s use of or access to the information on the basis of the right holder’s interest in the information.

⁸ This article focuses on UCITA’s provisions relevant to the formation of click wrap agreements. However, it is important to note that UCITA also governs off-line agreements involving computer information. In contrast, the Uniform Electronic Transactions Act (UETA), VA CODE ANN Section 59.1-479 *et seq*, also governs transactions conducted by electronic means but generally applies to such transactions regardless of the subject matter involved. The analysis in this article focuses only on UCITA’s application to electronic contracting. Accordingly, it is important for the reader to note that numerous online transactions that are not controlled by UCITA may be governed by UETA and that contracts governed by UCITA may still be governed partially by UETA.

⁹ Transactions involving the following subjects not governed by UCITA: 1) sales or leases of goods, 2) personal services contracts (except computer information development and support agreements), 3) casual exchanges of information, 4) contracts where computer information is not required, 5) employment contracts, 6) contracts where computer information is insignificant, 7) computers, televisions, VCRs, DVD players, or similar goods, 8) financial services transactions, 9) contracts for print books, magazines, or newspapers, 10) contracts for sound recordings and musical works, 11) certain contracts for motion pictures, broadcast or cable programming outside the mass market, or 12) certain telecommunications products or services. See VA CODE ANN, Section 59.1-501.3.

¹⁰ See also VA CODE ANN, Section 59.1-485 (affirming that, under UETA, a record or signature may not be denied legal effect solely because it is in electronic form and recognising the legal equivalency of writings and electronic records and of signatures and electronic signatures).

¹¹ See VA CODE ANN Section 59.1-501.2(6).

authentication may be achieved by a signature permitted under any other law or use of personal identification numbers, typed signatures, encryption, voice and other 'technologically enabled acts if done with proper intent.'¹² Relatedly, UCITA defines 'record' as 'information that is inscribed on a tangible medium or that is stored in an electric or other medium and is retrievable in perceivable form.'¹³

Factors Impacting the Enforceability of Click Wrap Agreements under UCITA

Manifestation of Assent

The threshold inquiry in evaluating whether a click wrap agreement will be enforced against a party under UCITA is whether the party manifested assent to the record containing the agreement. UCITA recognises that either a party or a party's electronic agent¹⁴ may manifest assent to a record or term.¹⁵ Section 59.1-501.12 of UCITA provides that a person or his electronic agent may manifest assent by authenticating a record or term or by engaging in conduct which indicates that the person or agent has accepted the record or term:

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;

¹² See VA CODE ANN Section 59.1-501.2 (cmt. 4).

¹³ See VA CODE ANN Section 59.1-501.2(23).

¹⁴ Section 59.1-501.2(27) of UCITA defines 'electronic agent' as 'a computer program, or electronic or other automated means, used independently to initiate an action or to respond to electronic messages or performances, on the person's behalf without review or action by an individual at the time of the action or response to the message or performance.'

¹⁵ VA CODE ANN Section 59.1-501.12. UETA sets forth attribution provisions, electronic error provisions, and provisions governing the formation of contracts by electronic agents that are largely analogous to parallel UCITA provisions. A few variations distinguish the UETA electronic error provisions from similar UCITA provisions. For example, unlike UCITA, the UETA electronic error defense is not limited to consumers. However, in contrast with UCITA, the UETA electronic error defense is limited to errors involving transactions with electronic agents. See generally VA CODE ANN Section 59.1-487; 59.1-488; 59.1-492.

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.

- a) 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 to the term.¹⁶ Although the standard for proving the assent of a person and of an electronic agent is largely the same, UCITA only requires proof of intent in establishing that a person has assented to a record or term. The Comments clarify that this burden of proof may be satisfied by establishing objective conduct indicative of such intent.¹⁷ Furthermore, UCITA sets forth specific ‘double assent’ procedures which, if used by a party to an agreement, will establish that the party has manifested its assent to the agreement:

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.¹⁸

Opportunity to Review

Under UCITA, a person or electronic agent may only manifest assent to a record or term after the person or agent has had an ‘opportunity to review’

¹⁶ VA CODE ANN Section 59.1-501.12.

¹⁷ VA CODE ANN Section 59.1-501.12 (cmt. 3).

¹⁸ VA CODE ANN, Section 501.12(d).

the record or term.¹⁹ UCITA sets forth two distinct standards for determining whether a person or electronic agent has had a sufficient ‘opportunity to review’ a record or term within the meaning of Section 59.1-501.12. First, in cases where a record or term is made available for review before a person becomes obligated to pay or begins its performance, UCITA provides that:

- 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.²⁰

Although Section 59.1-501.12 does not establish mandatory procedures for providing end users with an opportunity to review a record or term, Comment 8 to Section 59.1-501.12 specifies that use of promptly accessible electronic links will likely satisfy the requirements of UCITA:

... In [electronic and paper records], a record is not available for review if access to it is so time-consuming or cumbersome, or if its presentation is so obscure or oblique, as to effectively preclude review. It must be presented in a way as to reasonably permit review. In an electronic system, a record promptly accessible through an electronic link ordinarily qualifies. Actions that comply with federal or other applicable consumer laws that require making contract terms or disclosure available, or that provide standards for doing so, satisfy this requirement.²¹

¹⁹ See VA CODE ANN Section 501.12.

²⁰ VA CODE ANN Section 59.1-501.12(e).

²¹ VA CODE ANN Section 59.1-501.12 (cmt. 8).

Similarly, Section 59.1.-502.11 specifies, that in cases where a licensor makes its computer information available to a licensee by electronic means from its Internet or similar electronic site, the licensor affords such a licensee an ‘opportunity to review’ the applicable licence if the licensor:

- a) makes the standard terms of the licence readily available for review by the licensee before the information is delivered or the licensee becomes obligate to pay, whichever occurs first, by:
 - 1) 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
 - 2) 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

b) The comments to Section 59.1-502.11 clarify that UCITA creates an incentive, but does not require, applicable licensors to adopt the following procedures: This section provides guidance for Internet commerce and an incentive for use of particular types of disclosures of terms and acts as an incentive-creating, safe harbor rule. This section does not foreclose use of other procedures. Failure to use this section does not bear on whether a license is enforceable or whether the procedures used adequately establish an opportunity to review. Whether an opportunity to review has occurred should be viewed under the general standards in Section 112 [Section 59.1 – 501.12 under Virginia law]... It is sufficient [to comply with the disclosure rules of this section] that standard terms be available on request. _Thus terms might be available by hyperlinke on the particular site or through providing a potential licensee with an address (electronic or otherwise) from which the terms can be obtained ... Supplying those terms can meet the requirements for providing an opportunity to review if the provisions of this section are met.²²

²² VA CODE ANN Section 59.1-502.11 (cmt. 2-3).

Second, if a record or terms are available for review only after a party becomes obligated to pay or begins its performance,²³ the party is generally deemed to have had a sufficient ‘opportunity to review’ the record or term only if the party has a right to a cost-free return²⁴ if it rejects the record.²⁵ The Comments further clarify that failure to provide a right to return when records are presented after an initial commitment to a transaction does not invalidate the transaction but rather ‘creates the risk that the terms will not be assented to by the party to which they were presented.’²⁶

Limitations on UCITA’s Manifestation of Assent Provisions

Although UCITA Section 59.1-501.12 sets forth detailed provisions for evaluating whether a party has manifested assent to a record or term, it is imperative to note that the provisions of this section ‘may be modified by an agreement setting out standards applicable to future transactions between the parties.’²⁷ Consequently, where multiple transactions occur pursuant to a prior agreement, UCITA permits the prior agreement to define the standards for determining assent in the subsequent transactions.²⁸ Therefore, the parties may enter into master agreements electronically and specify in those agreements the manner of future assent.

Attribution

²³ It is imperative to note that most cases governed by this Section will also be subject to the provisions set forth in UCITA Section 59.1-502.8(2), which Section generally permits a term to be adopted after the formation of, and as part of, an original agreement if the parties had reason to know that an original agreement would be represented in whole or in part by a later record to be agreed upon and that there would be no opportunity to review the record before the commencement of performance of the applicable agreement. cf Section II.B5(a).

²⁴ See Section 59.1-501.2(56).

²⁵ A party’s right to return computer information if it rejects a record is in addition to its general right to have a reasonable opportunity to review the record. See VA CODE ANN Section 59.1-501.2. This provision is inapplicable in certain cases involving contract modifications, a party’s exercise of its right to specify performance particulars, and a party’s adoption of anticipated additional terms to a customised contract.

²⁶ Section 59.1-501.12 (cmt. 8c). Additionally, Comment 4 to UCITA Section 59.1-501.12 provides three examples that provide guidance regarding the types of click wrap agreements that will be enforced under UCITA.

²⁷ VA CODE ANN Section 59.1-501.2(F).

²⁸ VA CODE ANN Section 59.1-501.12 (cmt. 10).

Under UCITA, a record or term may only be enforced against a party if a manifestation of assent to the record or term is ‘attributable’ in the law to the party.²⁹ Generally, agency law and Sections 59.1-502.12-13 of UCITA provide the standards for evaluating whether or not a specific attribution procedure used by parties to an agreement is sufficient to attribute certain actions to a party.³⁰ Although UCITA does not provide a ‘narrow statutory mandate describing what type of [attribution] procedure is appropriate,’ it does provide standards to be considered by a court in evaluating the efficacy or commercial reasonableness of an attribution procedure:

The general idea of efficacy or commercial reasonableness is that the procedure be a reasonably effective method in the commercial context reasonably suited to the task for which it is used. This does not require that the procedure was state of the art, the most reasonable procedure, or an infallible procedure. The decision must take into account the choices of the parties as well as the effectiveness and cost relative to the value of the transactions. How one gauges efficacy or commercial reasonableness depends on a variety of factors, including the agreement, the choices of the parties, technology, the types of transactions affected by the procedure, sophistication of the parties, volume of similar transactions engaged in, availability of feasible alternatives, cost and difficulty of utilizing alternative procedures, and procedures in general use for similar types of transactions. . . . If two parties generally aware of the risks of a particular procedure agree to use the procedure for a particular transaction, they have in effect concluded that the procedure is sufficiently effective or commercially

²⁹ See VA CODE ANN Section 59.1-501.12 (cmt. 2).

³⁰ *Ibid.*

reasonable in their context to accept the risks.³¹

In contrast with its general reluctance to specify acceptable attribution procedures, UCITA sets forth one bright line rule governing the efficacy of such procedures: ‘An attribution procedure established by law is effective for transactions within the coverage of the statute or rule.’³²

If an attribution procedure is considered effective or commercially reasonable within the meaning of Section 59.1-501.12, Section 59.1-502.13³³ provides that such a finding will increase the degree to which an act will be attributed to a person bound by the procedure. The Comments to Section 59.1-502.13 further emphasize the importance adopting an effective attribution procedure has in attributing an act to a person under the law: Subsection (b) states the principle that the efficacy and other characteristics of an attribution procedure used by the parties are part of proof of attribution. . . Compliance with a commercially reasonable attribution procedure that has a level of effectiveness suitable to that context may be treated by the court as carrying the burden of establishing attribution³⁴

Although the UCITA generally does not provide bright line rules regarding when certain acts will be attributable to a party, the Comments to Section 59.1-502.13 emphasize that parties are free to bargain for more definitive attribution rules. Specifically, UCITA permits contracting parties to override the general standards set forth in Section 59.1-502.13 by agreeing upon

³¹ VA CODE ANN Section 59.1-502.12 (cmt. 4).

³² VA CODE ANN Section 59.1-502.12(1).

³³ See Section 59.1-502.13.

³⁴ VA. CODE ANN. Section 59.1-502.13 (cmt. 13).

contract provisions which govern the effects of an adopted attribution procedure.³⁵

Electronic Error

In a UCITA transaction in which a party has manifested assent to a record or term by an electronic message after having had a reasonable opportunity to review the record or term, and such actions are attributable to the party, the party nonetheless may not be bound to the electronic message if the party in question is a consumer and the electronic message was not intended by the consumer. UCITA Section 59.1-502.14 provides:

- 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

³⁵ The Official Comments provide the following example to illustrate this point:

...an agreement between a law firm and West Publishing may provide that the law firm is responsible for the costs associated with any use for database access of the identification code issued to it. The identification code is an attribution procedure. Absent agreement on its effect, the effect of its use would be controlled under this section. In the hypothetical case, however, the agreement itself specifies the effect of use of the code and that agreement controls. No special language is necessary to achieve this result: the agreement is enforceable under the same standards as any other term of an agreement. Thus, it must not be unconscionable or violate a fundamental public policy. See Section 105.

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.³⁶

Accordingly, under the definition set forth in Section 59.1-502.14, an ‘electronic error’ cannot occur and, therefore, the electronic error defense is not likely to exist in cases where a consumer has been provided a reasonable method to detect the error. Although UCITA does not specify any reasonable error correction procedure *per se*, it does provide some guidance on the subject:

What is a reasonable procedure for correcting errors depends on the commercial context, including the extent to which the transaction entails immediate reactions. For example, in a transaction which occurs over a several day period, it may be reasonable to require a verification of a bid or order before it is placed, while in an on-line, real time auction, reconfirmation may not be possible. A reasonable procedure may entail no more than requiring two separate indications confirming that the bid should be entered.³⁷

Terms Adopted After Formation of an Initial Contract

a) The General Rule

UCITA recognises that parties often form a contract and agree to additional terms to the contract at two separate times. In such cases, the additional terms may become part of the original contract if adopted by a party to the contract.³⁸ UCITA Section 59.1-502.8 generally provides that:

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

- 3) 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.

³⁶ VA CODE ANN Section 59.1-502.14.

³⁷ VA CODE ANN Section 59.1-502.14 (cmt. 2).

³⁸ See generally VA DOE ANN Section 59.1-502.8.

- 4) 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. In cases governed by Subsection (2) of Section 59.1-502.8, if assent to a term is sought after performance has commenced or a party has become obligated to make payment and the party receiving the term assents to it, in many cases such assent will not result in an enforceable adoption of the term unless the party proposing the term afforded the receiving party a right to return the applicable computer information upon rejection of the proposed language.³⁹ Consistently, subsection (2) of Section 59.1-502.8 does not permit a party to adopt, as part of an original contract, additional contract terms proposed after the beginning of performance unless the parties, at the time the contract was originally formed, had reason to know the additional terms would be proposed.⁴⁰ The Comments to Section 59.1-502.8 further clarify that, in cases where unanticipated additional terms are proposed to a contract after the commencement of performance under the contract, such terms may become part of the contract as a modification but not as an original contract term.⁴¹

³⁹ See VA CODE ANN Section 59.1-502.8 (cmt. 5); see also VA CODE ANN Section 501.12, 502.9.

⁴⁰ The Comments to Section 59.1-502.8 set forth standards for determining if a party had reason to know that additional terms would follow the original formation of a contract.

⁴¹ See VA CODE ANN Section 59.1-502.8 (cmt. 3).

Additional Provisions Governing Mass Market Licences

The general UCITA provisions set forth in Section 59.1-502.8 relating to the adoption of additional contract terms apply to mass-market⁴² licence agreements.⁴³ However, in addition to the general rules governing the adoption of additional contract terms, UCITA Section 59.502.9 places numerous additional restrictions on the adoption of additional terms in a record that is a mass-market licence. First, Section 59.502.9(a) imposes a time limit within which additional mass-market licence agreement terms must be adopted. Specifically, Section 59.502.9(a) provides that a party may only adopt the terms of a mass-market licence as part of an originally formed contract 'before or during the party's initial performance or use of or access to the information.' Second, under Section 59.502.9(a)(2) an adopted term is not part of a mass-market licence if the term 'conflicts' with a term to which the parties to the licence had expressly agreed. Third, under Section 59.502.9(a)(1), a term is not part of a mass-market licence if the term is either unconscionable or in violation of public policy.⁴⁴ Fourth, under Section

⁴² Section 59.1-501.2(43) defines a 'mass-market transaction' as a transaction that is:

(A) a consumer contract; or

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

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

(ii) the licensee acquires the information or informational rights in a retail transaction under terms consistent with an ordinary transaction in a retail market; and 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 customised or otherwise specifically prepared by the licensor for the licensee, other than minor customisation using a capability of the information intended for that purpose; (c) a site licence; or (d) an access contract.

⁴³ See VA CODE ANN Section 59.1-502.8 (cmt. 4).

⁴⁴ See VA CODE ANN Section 59.1-502.9 (cmt. 2b).

59.502(a)(3), a term is not part of a mass-market licence if the term is not available for viewing before and after the licensee's assent to the term in a printed licence or in an electronic form that can be printed or stored for archival and review purposes by a licensee or that is made available by a licensor to the licensee, at no cost to the licensee, in a printed form on request by a licensee who is unable to print or store the license. Fifth, under Section 59.502.9(b), if mass-market licence terms are not available to a licensee in a manner permitting an opportunity for review by the licensee before the licensee becomes obligated to pay and the licensee does not agree to the licence after having had an opportunity to review the licence,⁴⁵ the licensee is entitled to a return and to recover the reasonable and foreseeable costs it incurs in returning the computer information at issue.⁴⁶ Sixth, under Section 59.1-502.9(c), if a licensor in a mass-market licence transaction does not have an opportunity to review a record containing proposed terms from a licensee before the licensor delivers or is obligated to deliver computer information, and, if the licensor does not agree to such terms, the licensor is entitled to a return.

Limitation on the General Rule and Additional Provisions Governing Mass Market Licences

UCITA Section 59.1-502.8 and Section 59.1-502.9 both impose limitations upon the degree to which a party to an agreement will be deemed to have 'adopted' additional terms as part of the original agreement. However, the Comments to both sections clarify that neither section limits the right of parties to an agreement to give one party the right to specify the terms of future

⁴⁵ It is imperative to note that most cases governed by this Section will also be subject to the provisions set forth in UCITA Section 59.1-502.8(2), which Section generally permits a term to be adopted after the formation of, and as part of, an original agreement if the parties had reason to know that an original agreement would be represented in whole or in part by a later record to be agreed upon and that there would be no opportunity to review the record before the commencement of performance of the applicable agreement. cf Section 111.B2(e)(i).

⁴⁶ See VA CODE ANN Section 59.1-502.9 (cmt. 5b).

performance.⁴⁷ Under UCITA Section 59.1-503.5, the parties to an agreement may agree to grant one party to the agreement the right to specify 'the particulars of performance' after the formation of the initial agreement:

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:

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

If a specification materially affects the other party's performance but is not reasonably made, the other party:

is excused for any resulting delay in its performance; and

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

The Comments to Section 59.1-503.5 further clarify that where a party to a contract has a right to specify the particulars of performance, the specifying party is not required to obtain the other party's consent to the terms specified: The agreement which permits one party to specify terms may be found in a course of dealing, usage of trade, implication from the circumstances or in explicit language used by the parties. Thus, acquisition of information through a telephone order where there is reason to know that terms to be provided by the other party will indicate details of the contractual arrangement may fall within this section. Under this section, the details supplied are bounded by trade use and commercial expectations (as well as by the terms actually agreed by the parties). They do not, however, require that the other party agree to the terms since [sic], by definition, the original

⁴⁷ See VA CODE ANN Section 59.1-502.8 (cmt.3) (stating that Section 59.1-502.8 does not deal with agreements that give one party or its designate the right to specify terms of the future performance); VA CODE ANN Section 59.1-502.9 (cmt. 2) ('There are various ways in which the terms of consumer contracts or other contracts may be established. An oral agreement suffices, as does an agreement to terms presented in a record. In other cases, the parties may agree that the terms of performance may be specified later by one party, its designate or a third party, [Section 59.1-503.5] governs these cases').

agreement constitutes assent to the later terms under the limitations described here.⁴⁸

Formal Requirements

Section 59.1-502.1(a), which preempts any statute of frauds contained in other Virginia laws, provides that, subject to stated exceptions,⁴⁹ a contract requiring the payment of a fee of \$5,000.00 or more is not enforceable unless (i) the party against whom enforcement is sought has authenticated the record in a manner sufficient to indicate that a contract has been formed and which reasonably describes the subject matter or copy involved; or (ii) the contract is a licence for an agreed duration of one year or less or may be terminated at will by the party against whom enforcement is sought.

Although the formality requirements of Section 59.1-502.1 require a record to describe the subject matter or copy involved in a transaction, this section neither requires a record to be retained nor mandates that a record contain all material terms: all that is required is that the writing affords a basis for reasonably believing that the offered oral evidence rests on a real agreement. Would a memorandum that fulfils the condition suffice?⁵⁰

Guidelines for Drafting and Enforcing Click Wrap Agreements

Generally, a court will not enforce a click wrap agreement against a Licensor end user if (i) the user has not manifested its assent to the agreement, (ii) after having had an opportunity to review the agreement, or (iii) if such assent is not legally attributable to the user. Similarly, a court will not enforce a Licensor clip wrap agreement that does not comply with statutorily required formalities, and a court may not enforce a Licensor clip wrap that contains unconscionable terms or terms that violate public policy. Moreover, a court may likely refuse to recognise the accuracy of Licensor click wrap

⁴⁸ VA CODE ANN Section 59.1-503.5 (cmt. 2).

⁴⁹ See VA CODE ANN Section 59.1-502.1.

⁵⁰ VA CODE ANN Section 59.1-502.1 (cmt. 3b). As discussed above, Licensor should note that, under UCITA Section 59.502(a)(3), terms may not become part of a mass-market licence if they are not available for viewing both before and after a licensee manifests its assent to an agreement. Similarly, as discussed above, if a licensor takes affirmative acts to prevent printing and storage of a record, it will likely lose any safe harbour benefits that it would otherwise be entitled to under UCITA Section 59.1-502.11.

agreements if the Licensor neglects to maintain retained copies of such agreements. The procedures set forth below provide a Licensor with general guidelines for drafting and enforcing click wrap agreements in light of the above standards.

General Guidelines for Consideration

Opportunity to Review

In order for a Licensor end user to assent to an agreement, the Licensor must provide the user an ‘opportunity to review’ the agreement. Accordingly, a Licensor should call attention to its click wrap agreement in prominently displayed language on an initial screen viewed by an end user and in a manner that asks the user to react to the agreement. Furthermore, the language calling attention to a Licensor’s click wrap agreement should, at minimum, provide a hypertext link to the agreement. More specifically, in cases of Internet agreements where a Licensor will deliver computer information electronically, the Licensor should:

- a) Make the terms of the applicable licence available for review by the end user before the information is delivered to the user or before the user is obligated to pay, whichever occurs first, by (1) displaying prominently and in close proximity to a description of the computer information, or to instructions for acquiring it, the standard licence terms or a reference to an electronic location from which they can be readily obtained; or (2) disclosing such terms on the site from which computer information is offered and promptly furnishing a copy of the standard terms on request before the transfer of such information;
- b) Not take affirmative acts to prevent printing or storage of the standard licence terms for archival or review purposes by the end user;

- c) Inform the end user how to read and/or print a copy of the applicable click wrap agreement.

Manifestation of Assent

In addition to providing its end users a clear opportunity to review applicable click wrap agreements, the Licensor should also establish a clear process for end users to assent to such agreements. Accordingly, Licensor click wrap agreements should contain prominently labelled 'I agree' and 'I decline' buttons at the end of the agreement. Such agreements should also contain a notice which states 'Please read this licence. It contains important terms about your use and our obligations. If you agree to the licence, indicate this by clicking the "I agree" button. If you do not agree click the 'I decline' button.

If the 'I agree' button in a Licensor's click wrap agreement is selected, this conduct should either transmit the user to a subsequent screen that allows the end user to reaffirm his assent to the agreement or to a secondary procedure on the same screen that allows the user to reaffirm its assent. This double assent procedure will likely establish that the user has assented to the agreement and will impede a consumer's ability to avoid the agreement under the electronic error defense. It should be again emphasized that this procedure may take place on the same page as the initial assent page and also may be effectuated through a 'check box' mechanism. Additionally, if a Licensor click wrap agreement will control numerous subsequent transactions between the Licensor and an end user, the click wrap agreement should establish less stringent procedures for evaluating the user's assent to future terms.

In the absence of business reasons to the contrary, a Licensor should only permit an end user to download its software after the user has assented and confirmed its assent to the terms of the Licensor's click wrap agreement.

Attribution

Even if an end user has manifested its assent to a Licensor click wrap agreement after reviewing the agreement, the agreement can only be enforced against the user if it is ‘attributable’ in law to the user. Accordingly, Licensor click wrap agreements should use commercially reasonable attribution procedures. For example, after an end user displays his assent to a click wrap agreement, Licensor should consider requiring each such user to fill out a user registration field which may require the disclosure of a previously agreed upon user name and address. Other types of attribution procedures range from a simple ‘check of a box’ from an anonymous user (not a very trustworthy mechanism), to a ‘check of a box’ from a verified user (through a variety of means ranging from cookies to email), to digital signatures and PKI and/or PKI with biometrics. All of these attribution procedures utilize a range of factors from single factor attribution all the way to three-factor attribution (ie, something you have, something you know, and something you are).

Formalities, Policy, Practical Considerations

An otherwise valid Licensor click wrap agreement may not be legally enforceable, under UCITA’s statute of frauds provisions, if Licensor does not comply with statutorily required formalities and may not be practically enforceable if the Licensor does not adopt a system for identifying and monitoring such agreements. Accordingly, if a Licensor click wrap agreement with an end user provides for the payment of a fee of \$5,000 or greater and the duration of the agreement is over a year and may not be terminated at will by the end user, the agreement should require the end user to ‘electronically sign’ the agreement by use of a personal identification number, typed name or other similar procedure. Moreover, any such ‘electronically signed’ record should be retained in a manner which accurately reflects the information set forth in the agreement after it was first generated in its final electronic form and shall remain accessible for later reference. Moreover, to the extent practicable, the Licensor should similarly retain all executed click wrap agreements as evidence for use in future business transactions and enforcement proceedings.

Specific Guidelines When Terms to an Agreement are Formed on Separate Occasions

In addition to considering the general guidelines set forth above, a Licensor should note that numerous fact-specific UCITA provisions regulate the manner in which parties may form the terms of an agreement over time and on separate occasions. If a Licensor plans to propose the terms of a click wrap software licence agreement to an end user after the Licensor enters into an initial agreement with the end user, the Licensor should adopt one of the two general policies set forth below:

a) Preferably, in its initial agreement with the end user, either over the phone or by an express contractual provision, the Licensor should reserve the right to specify the particular details of performance to the user at a later date. If such an arrangement is agreed to in an initial agreement between the Licensor and the end user, the Licensor will not be required to obtain the user's assent when it, in good faith, seasonably discloses the additional 'particulars of performance' in a commercially reasonable manner; or

b) In its initial dealings with the end user, the Licensor should notify the end user that it will propose additional software licence terms at a future date. In such a case, if the user assents to the additional terms, even after it has commenced use of the software, the additional terms will become part of the original contract unless the contract involves a mass-market licence. However, in cases where the terms of a click wrap agreement are proposed to an end user after the user has paid for, or commenced use of, the Licensor software, in many cases, the user will only be deemed to have had an 'opportunity to review' the agreement and to, therefore, be able to assent to the terms, if the user is afforded a right to return the applicable software upon rejection of the proposed language. Accordingly, in such cases, the applicable click wrap agreement should notify the user that it has a right to return and receive a refund for the software if it rejects the click wrap agreement.

In cases involving mass-market licences where the Licensor plans to propose the terms of the licence to an end user after the Licensor has entered into an initial agreement with the user, the Licensor should notify the end user during their initial dealings that Licensor will propose additional licence terms at a later date. In such a case, if the user *assents* to the additional terms, the additional terms will become part of the original contract only if: (i) such assent occurs before or during the user's initial use of the software; (ii) the additional terms do not violate public policy and are not unconscionable, (iii) the additional terms do not conflict with a term previously agreed to between the parties, and (iv) such terms are available for viewing to the end user before and after assent. Moreover, if the additional terms are disclosed to the end user after the user is obligated to pay for the software and the user rejects the terms, UCITA affords the user the right to return and receive a refund for the software and to recover the reasonable and foreseeable costs that it incurs in returning the software.

Adam Ruttenberg and Jack Kerrigan