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SENATE BILL 6226

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State of Washington 57th Legislature 2001 Third Special Session

By Senators Prentice and Winsley

Read first time . Referred to Committee on .

1 AN ACT Relating to uniform laws regulating commercial transactions;  
2 amending RCW 62A.1-107, 62A.1-201, 62A.1-205, 62A.1-206, 62A.2-102,  
3 62A.2-105, 62A.2-201, 62A.2-202, 62A.2-203, 62A.2-205, 62A.2-207,  
4 62A.2-209, 62A.2-316, 62A.2-503, 62A.2-509, 62A.2-605, 62A.2-606,  
5 62A.2-607, 62A.2-609, 62A.2-616, 62A.2-702, 62A.2A-102, 62A.2A-103,  
6 62A.2A-107, 62A.2A-201, 62A.2A-202, 62A.2A-203, 62A.2A-205, 62A.2A-208,  
7 62A.2A-214, 62A.2A-303, 62A.2A-309, 62A.2A-310, 62A.2A-401, 62A.2A-406,  
8 62A.2A-514, and 62A.2A-516; adding a new section to Article 62A.1 RCW;  
9 adding a new chapter to Title 63 RCW; and creating a new section.

10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

11 **PART 1**

12 **GENERAL PROVISIONS**

13 **SUBPART A. SHORT TITLE AND DEFINITIONS**

14 NEW SECTION. **Sec. 101.** SHORT TITLE. This chapter may be cited as  
15 the Uniform Computer Information Transactions Act.

16 NEW SECTION. **Sec. 102.** DEFINITIONS. (1) In this chapter:

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

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

7 (c) "Aggrieved party" means a party entitled to a remedy for breach  
8 of contract.

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

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

19 (f) "Authenticate" means:

20 (i) To sign; or

21 (ii) With the intent to sign a record, otherwise to execute or  
22 adopt an electronic symbol, sound, message, or process referring to,  
23 attached to, included in, or logically associated or linked with, that  
24 record.

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

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

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

34 (j) "Computer information" means information in electronic form  
35 which is obtained from or through the use of a computer or which is in  
36 a form capable of being processed by a computer. The term includes a  
37 copy of the information and any documentation or packaging associated  
38 with the copy.

1 (k) "Computer information transaction" means an agreement or the  
2 performance of it to create, modify, transfer, or license computer  
3 information or informational rights in computer information. The term  
4 includes a support contract under section 612 of this act. The term  
5 does not include a transaction merely because the parties' agreement  
6 provides that their communications about the transaction will be in the  
7 form of computer information.

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

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

20 (n) "Conspicuous," with reference to a term, means so written,  
21 displayed, or presented that a reasonable person against which it is to  
22 operate ought to have noticed it. A term in an electronic record  
23 intended to evoke a response by an electronic agent is conspicuous if  
24 it is presented in a form that would enable a reasonably configured  
25 electronic agent to take it into account or react to it without review  
26 of the record by an individual. Conspicuous terms include the  
27 following:

28 (i) With respect to a person:

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

31 (B) Language in the body of a record or display in larger or other  
32 contrasting type, font, or color or set off from the surrounding text  
33 by symbols or other marks that draw attention to the language; and

34 (C) A term prominently referenced in an electronic record or  
35 display which is readily accessible or reviewable from the record or  
36 display; and

37 (ii) With respect to a person or an electronic agent, a term or  
38 reference to a term that is so placed in a record or display that the

1 person or electronic agent cannot proceed without taking action with  
2 respect to the particular term or reference.

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

10 (p) "Consumer contract" means a contract between a merchant  
11 licensor and a consumer.

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

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

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

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

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

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

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

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

1 (y) "Direct damages" means compensation for losses measured by  
2 section 808(2)(a) or 809(1)(a) of this act. The term does not include  
3 consequential damages or incidental damages.

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

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

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

15 (cc) "Financial accommodation contract" means an agreement under  
16 which a person extends a financial accommodation to a licensee and  
17 which does not create a security interest governed by Article 62A.9A  
18 RCW. The agreement may be in any form, including a license or lease.

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

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

26 (ii) An instrument or other item;

27 (iii) A payment order, credit card transaction, debit card  
28 transaction, funds transfer, automated clearing house transfer, or  
29 similar wholesale or retail transfer of funds;

30 (iv) A letter of credit, document of title, financial asset,  
31 investment property, or similar asset held in a fiduciary or agency  
32 capacity; or

33 (v) Related identifying, verifying, access-enabling, authorizing,  
34 or monitoring information.

35 (ee) "Financier" means a person that provides a financial  
36 accommodation to a licensee under a financial accommodation contract  
37 and either (i) becomes a licensee for the purpose of transferring or  
38 sublicensing the license to the party to which the financial  
39 accommodation is provided or (ii) obtains a contractual right under the

1 financial accommodation contract to preclude the licensee's use of the  
2 information or informational rights under a license in the event of  
3 breach of the financial accommodation contract. The term does not  
4 include a person that selects, creates, or supplies the information  
5 that is the subject of the license, owns the informational rights in  
6 the information, or provides support for, modifications to, or  
7 maintenance of the information.

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

10 (gg) "Goods" means all things that are movable at the time relevant  
11 to the computer information transaction. The term includes the unborn  
12 young of animals, growing crops, and other identified things to be  
13 severed from realty which are covered by RCW 62A.2-107. The term does  
14 not include computer information, money, the subject matter of foreign  
15 exchange transactions, documents, letters of credit, letter-of-credit  
16 rights, instruments, investment property, accounts, chattel paper,  
17 deposit accounts, or general intangibles.

18 (hh) "Incidental damages" resulting from breach of contract:

19 (i) Means compensation for any commercially reasonable charges,  
20 expenses, or commissions reasonably incurred by an aggrieved party with  
21 respect to:

22 (A) Inspection, receipt, transmission, transportation, care, or  
23 custody of identified copies or information that is the subject of the  
24 breach;

25 (B) Stopping delivery, shipment, or transmission;

26 (C) Effecting cover or retransfer of copies or information after  
27 the breach;

28 (D) Other efforts after the breach to minimize or avoid loss  
29 resulting from the breach; and

30 (E) Matters otherwise incident to the breach; and

31 (ii) Does not include consequential damages or direct damages.

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

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

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

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

7 (mm) "Insurance services transaction" means an agreement between  
8 the insurer and the insured that provides for, or a transaction that  
9 is, or entails access to, use, transfer, clearance, settlement, or  
10 processing of:

11 (i) An insurance policy, contract, or certificate; or

12 (ii) A right to payment under an insurance policy, contract, or  
13 certificate.

14 (nn) "Knowledge," with respect to a fact, means actual knowledge of  
15 the fact.

16 (oo) "License" means a contract that authorizes access to, or use,  
17 distribution, performance, modification, or reproduction of,  
18 information or informational rights, but expressly limits the access or  
19 uses authorized or expressly grants fewer than all rights in the  
20 information, whether or not the transferee has title to a licensed  
21 copy. The term includes an access contract, a lease of a computer  
22 program, and a consignment of a copy. The term does not include a  
23 reservation or creation of a security interest to the extent the  
24 interest is governed by Article 62A.9A RCW.

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

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

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

1 (ss) "Mass-market transaction" means a transaction that is:  
2 (i) A consumer contract; or  
3 (ii) Any other transaction with an end-user licensee if:  
4 (A) The transaction is for information or informational rights  
5 directed to the general public as a whole, including consumers, under  
6 substantially the same terms for the same information;  
7 (B) The licensee acquires the information or informational rights  
8 in a retail transaction under terms and in a quantity consistent with  
9 an ordinary transaction in a retail market; and  
10 (C) The transaction is not:  
11 (I) A contract for redistribution or for public performance or  
12 public display of a copyrighted work;  
13 (II) A transaction in which the information is customized or  
14 otherwise specially prepared by the licensor for the licensee, other  
15 than minor customization using a capability of the information intended  
16 for that purpose;  
17 (III) A site license; or  
18 (IV) An access contract.  
19 (tt) "Merchant" means a person:  
20 (i) That deals in information or informational rights of the kind  
21 involved in the transaction;  
22 (ii) That by the person's occupation holds itself out as having  
23 knowledge or skill peculiar to the relevant aspect of the business  
24 practices or information involved in the transaction; or  
25 (iii) To which the knowledge or skill peculiar to the practices or  
26 information involved in the transaction may be attributed by the  
27 person's employment of an agent or broker or other intermediary that by  
28 its occupation holds itself out as having the knowledge or skill.  
29 (uu) "Nonexclusive license" means a license that does not preclude  
30 the licensor from transferring to other licensees the same information,  
31 informational rights, or contractual rights within the same scope. The  
32 term includes a consignment of a copy.  
33 (vv) "Notice" of a fact means knowledge of the fact, receipt of  
34 notification of the fact, or reason to know the fact exists.  
35 (ww) "Notify" or "give notice" means to take such steps as may be  
36 reasonably required to inform the other person in the ordinary course,  
37 whether or not the other person actually comes to know of it.  
38 (xx) "Party" means a person that engages in a transaction or makes  
39 an agreement under this chapter.



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

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

9 (i) Customized for a particular recipient by one or more  
10 individuals acting as or on behalf of the licensor, using judgment or  
11 expertise; or

12 (ii) Provided in a special relationship of reliance between the  
13 provider and the recipient.

14 (aaa) "Receipt" means:

15 (i) With respect to a copy, taking delivery; or

16 (ii) With respect to a notice:

17 (A) Coming to a person's attention; or

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

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

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

32 (bbb) "Receive" means to take receipt.

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

36 (ddd) "Release" means an agreement by a party not to object to, or  
37 exercise any rights or pursue any remedies to limit, the use of  
38 information or informational rights which agreement does not require an  
39 affirmative act by the party to enable or support the other party's use

1 of the information or informational rights. The term includes a waiver  
2 of informational rights.

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

6 (i) In the case of a licensee that rejects a record regarding a  
7 single information product transferred for a single contract fee, a  
8 right to reimbursement of the contract fee paid from the person to  
9 which it was paid or from another person that offers to reimburse that  
10 fee, on:

11 (A) Submission of proof of purchase; and

12 (B) Proper redelivery of the computer information and all copies  
13 within a reasonable time after initial delivery of the information to  
14 the licensee;

15 (ii) In the case of a licensee that rejects a record regarding an  
16 information product provided as part of multiple information products  
17 integrated into and transferred as a bundled whole but retaining their  
18 separate identity:

19 (A) A right to reimbursement of any portion of the aggregate  
20 contract fee identified by the licensor in the initial transaction as  
21 charged to the licensee for all bundled information products which was  
22 actually paid, on:

23 (I) Rejection of the record before or during the initial use of the  
24 bundled product;

25 (II) Proper redelivery of all computer information products in the  
26 bundled whole and all copies of them within a reasonable time after  
27 initial delivery of the information to the licensee; and

28 (III) Submission of proof of purchase; or

29 (B) A right to reimbursement of any separate contract fee  
30 identified by the licensor in the initial transaction as charged to the  
31 licensee for the separate information product to which the rejected  
32 record applies, on:

33 (I) Submission of proof of purchase; and

34 (II) Proper redelivery of that computer information product and all  
35 copies within a reasonable time after initial delivery of the  
36 information to the licensee; or

37 (iii) In the case of a licensor that rejects a record proposed by  
38 the licensee, a right to proper redelivery of the computer information  
39 and all copies from the licensee, to stop delivery or access to the

1 information by the licensee, and to reimbursement from the licensee of  
2 amounts paid by the licensor with respect to the rejected record, on  
3 reimbursement to the licensee of contract fees that it paid with  
4 respect to the rejected record, subject to recoupment and setoff.

5 (fff) "Scope," with respect to terms of a license, means:

6 (i) The licensed copies, information, or informational rights  
7 involved;

8 (ii) The use or access authorized, prohibited, or controlled;

9 (iii) The geographic area, market, or location; or

10 (iv) The duration of the license.

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

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

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

31 (jjj) "State" means a state of the United States, the District of  
32 Columbia, Puerto Rico, the United States Virgin Islands, or any  
33 territory or insular possession subject to the jurisdiction of the  
34 United States.

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

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

1 (mmm) "Transfer":

2 (i) With respect to a contractual interest, includes an assignment  
3 of the contract, but does not include an agreement merely to perform a  
4 contractual obligation or to exercise contractual rights through a  
5 delegate or sublicensee; and

6 (ii) With respect to computer information, includes a sale,  
7 license, or lease of a copy of the computer information and a license  
8 or assignment of informational rights in computer information.

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

13 (2) The following definitions in Title 62A RCW apply to this  
14 chapter:

- |   |                 |
|---|-----------------|
| 15 (a) "Burden of establishing"         | RCW 62A.1-201.  |
| 16 (b) "Document of title"              | RCW 62A.1-201.  |
| 17 (c) "Financial asset"                | RCW 62A.8-102.  |
| 18 (d) "Funds transfer"                 | RCW 62A.4A-104. |
| 19 (e) "Identification" to the contract | RCW 62A.2-501.  |
| 20 (f) "Instrument"                     | RCW 62A.9A-102. |
| 21 (g) "Investment property"            | RCW 62A.9A-102. |
| 22 (h) "Item"                           | RCW 62A.4-104.  |
| 23 (i) "Letter of credit"               | RCW 62A.5-102.  |
| 24 (j) "Payment order"                  | RCW 62A.4A-103. |
| 25 (k) "Sale"                           | RCW 62A.2-106.  |

26 **SUBPART B. GENERAL SCOPE AND TERMS**

27 NEW SECTION. **Sec. 103.** SCOPE; EXCLUSIONS. (1) This chapter  
28 applies to computer information transactions.

29 (2) Except for subject matter excluded in subsection (4) of this  
30 section and as otherwise provided in section 104 of this act, if a  
31 computer information transaction includes subject matter other than  
32 computer information or subject matter excluded under subsection (4) of  
33 this section, the following rules apply:

34 (a) If a transaction includes computer information and goods, this  
35 Article applies to the part of the transaction involving computer  
36 information, informational rights in it, and creation or modification  
37 of it. However, if a copy of a computer program is contained in and

1 sold or leased as part of goods, this chapter applies to the copy and  
2 the computer program only if:

3 (i) The goods are a computer or computer peripheral; or

4 (ii) Giving the buyer or lessee of the goods access to or use of  
5 the program is ordinarily a material purpose of transactions in goods  
6 of the type sold or leased.

7 (b) Subject to subsection (4)(c)(i) of this section, if a  
8 transaction includes an agreement for creating or for obtaining rights  
9 to create computer information and a motion picture, this chapter does  
10 not apply to the agreement if the dominant character of the agreement  
11 is for creating or obtaining rights to create a motion picture. In all  
12 other such agreements, this chapter does not apply to the part of the  
13 agreement that involves a motion picture excluded under subsection  
14 (4)(c) of this section, but does apply to the computer information.

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

20 (3) To the extent of a conflict between this Article and Article  
21 62A.9A RCW, Article 62A.9A RCW governs.

22 (4) This chapter does not apply to:

23 (a) A financial services transaction;

24 (b) An insurance services transaction;

25 (c) An agreement to create, perform or perform in, include  
26 information in, acquire, use, distribute, modify, reproduce, have  
27 access to, adapt, make available, transmit, license, or display:

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

32 (ii) Sound recording, musical work, or phonorecord as defined or  
33 used in Title 17 U.S.C. as of July 1, 1999, or an enhanced sound  
34 recording, other than in the submission of an idea or information or  
35 release of informational rights that may result in the creation of such  
36 material or a similar information product;

37 (d) A compulsory license;

38 (e) A contract of employment of an individual, other than an  
39 individual hired as an independent contractor to create or modify

1 computer information, unless the independent contractor is a freelancer  
2 in the news reporting industry as that term is commonly understood in  
3 that industry;

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

9 (g) Unless otherwise agreed in a record between the parties:

10 (i) Telecommunications products or services provided pursuant to  
11 federal or state tariffs; or

12 (ii) Telecommunications products or services provided pursuant to  
13 agreements required or permitted to be filed by the service provider  
14 with a federal or state authority regulating these services or under  
15 pricing subject to approval by a federal or state regulatory authority;  
16 or

17 (h) Subject matter within the scope of Article 62A.3, 62A.4,  
18 62A.4A, 62A.5, 62A.7, or 62A.8 RCW.

19 (5) As used in subsection (4)(c)(ii) of this section, "enhanced  
20 sound recording" means a separately identifiable product or service the  
21 dominant character of which consists of recorded sounds but which  
22 includes (a) statements or instructions whose purpose is to allow or  
23 control the perception, reproduction, or communication of those sounds  
24 or (b) other information so long as recorded sounds constitute the  
25 dominant character of the product or service despite the inclusion of  
26 the other information.

27 (6) In this section, "motion picture" means:

28 (a) "Motion picture" as defined in Title 17 U.S.C. as of July 1,  
29 1999; or

30 (b) A separately identifiable product or service the dominant  
31 character of which consists of a linear motion picture, but which  
32 includes (i) statements or instructions whose purpose is to allow or  
33 control the perception, reproduction, or communication of the motion  
34 picture or (ii) other information as long as the motion picture  
35 constitutes the dominant character of the product or service despite  
36 the inclusion of the other information.

37 (7) In this section, "audio or visual programming" means audio or  
38 visual programming that is provided by broadcast, satellite, or cable  
39 as defined or used in the Communications Act of 1934 and related

1 regulations as they existed on July 1, 1999, or by similar methods of  
2 delivery.

3 NEW SECTION. **Sec. 104.** MIXED TRANSACTIONS: AGREEMENT TO OPT-IN  
4 OR OPT-OUT. The parties may agree that this chapter, including  
5 contract-formation rules, governs the transaction, in whole or part, or  
6 that other law governs the transaction and this chapter does not apply,  
7 if a material part of the subject matter to which the agreement applies  
8 is computer information or informational rights in it that are within  
9 the scope of this chapter, or is subject matter within this chapter  
10 under section 103(2) of this act, or is subject matter excluded by  
11 section 103(4)(a) or (c) of this act. However, any agreement to do so  
12 is subject to the following rules:

13 (1) An agreement that this chapter governs a transaction does not  
14 alter the applicability of any statute, rule, or procedure that may not  
15 be varied by agreement of the parties or that may be varied only in a  
16 manner specified by the rule or procedure, including a consumer  
17 protection statute. In addition, in a mass-market transaction, the  
18 agreement does not alter the applicability of a law applicable to a  
19 copy of information in printed form.

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

21 (a) Does not alter the applicability of section 214 or 816 of this  
22 act; and

23 (b) In a mass-market transaction, does not alter the applicability  
24 under this chapter of the doctrine of unconscionability or fundamental  
25 public policy or the obligation of good faith.

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

29 (4) A copy of a computer program contained in and sold or leased as  
30 part of goods and which is excluded from this Article by section  
31 103(2)(a) of this act cannot provide the basis for an agreement under  
32 this section that this Article governs the transaction.

33 NEW SECTION. **Sec. 105.** RELATION TO FEDERAL LAW; FUNDAMENTAL  
34 PUBLIC POLICY; TRANSACTIONS SUBJECT TO OTHER STATE LAW. (1) A  
35 provision of this chapter which is preempted by federal law is  
36 unenforceable to the extent of the preemption.

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

7 (3) Except as otherwise provided in subsection (4) of this section,  
8 if this chapter or a term of a contract under this chapter conflicts  
9 with a consumer protection statute, the consumer protection statute  
10 governs.

11 (4) If a law of this state in effect on the effective date of this  
12 act applies to a transaction governed by this chapter, the following  
13 rules apply:

14 (a) A requirement that a term, waiver, notice, or disclaimer be in  
15 a writing is satisfied by a record;

16 (b) A requirement that a record, writing, or term be signed is  
17 satisfied by an authentication;

18 (c) A requirement that a term be conspicuous, or the like, is  
19 satisfied by a term that is conspicuous under this chapter;

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

22 (5) The following laws govern in the case of a conflict between  
23 this Article and the other law: Chapter 19.34 RCW.

24 NEW SECTION. **Sec. 106.** RULES OF CONSTRUCTION. (1) This chapter  
25 must be liberally construed and applied to promote its underlying  
26 purposes and policies to:

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

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

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

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

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

37 (2) Except as otherwise provided in section 113(1) of this act, the  
38 use of mandatory language or the absence of a phrase such as "unless



1 otherwise agreed" in a provision of this chapter does not preclude the  
2 parties from varying the effect of the provision by agreement.

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

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

9 NEW SECTION. **Sec. 107.** LEGAL RECOGNITION OF ELECTRONIC RECORD AND  
10 AUTHENTICATION; USE OF ELECTRONIC AGENTS. (1) A record or  
11 authentication may not be denied legal effect or enforceability solely  
12 because it is in electronic form.

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

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

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

23 NEW SECTION. **Sec. 108.** PROOF AND EFFECT OF AUTHENTICATION. (1)  
24 Authentication may be proven in any manner, including a showing that a  
25 party made use of information or access that could have been available  
26 only if it engaged in conduct or operations that authenticated the  
27 record or term.

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

31 NEW SECTION. **Sec. 109.** CHOICE OF LAW. (1) The parties in their  
32 agreement may choose the applicable law. However, the choice is not  
33 enforceable in a consumer contract to the extent it would vary a rule  
34 that may not be varied by agreement under the law of the jurisdiction  
35 whose law would apply under subsections (2) and (3) of this section in  
36 the absence of the agreement.

1 (2) In the absence of an enforceable agreement on choice of law,  
2 the following rules determine which jurisdiction's law governs in all  
3 respects for purposes of contract law:

4 (a) An access contract or a contract providing for electronic  
5 delivery of a copy is governed by the law of the jurisdiction in which  
6 the licensor was located when the agreement was entered into;

7 (b) A consumer contract that requires delivery of a copy on a  
8 tangible medium is governed by the law of the jurisdiction in which the  
9 copy is or should have been delivered to the consumer;

10 (c) In all other cases, the contract is governed by the law of the  
11 jurisdiction having the most significant relationship to the  
12 transaction.

13 (3) In cases governed by subsection (2) of this section, if the  
14 jurisdiction whose law governs is outside the United States, the law of  
15 that jurisdiction governs only if it provides substantially similar  
16 protections and rights to a party not located in that jurisdiction as  
17 are provided under this chapter. Otherwise, the law of the state that  
18 has the most significant relationship to the transaction governs.

19 (4) For purposes of this section, a party is located at its place  
20 of business if it has one place of business, at its chief executive  
21 office if it has more than one place of business, or at its place of  
22 incorporation or primary registration if it does not have a physical  
23 place of business. Otherwise, a party is located at its primary  
24 residence.

25 NEW SECTION. **Sec. 110.** CONTRACTUAL CHOICE OF FORUM. (1) The  
26 parties in their agreement may choose an exclusive judicial forum  
27 unless the choice is unreasonable and unjust.

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

30 NEW SECTION. **Sec. 111.** UNCONSCIONABLE CONTRACT OR TERM. (1) If  
31 a court as a matter of law finds a contract or a term thereof to have  
32 been unconscionable at the time it was made, the court may refuse to  
33 enforce the contract, enforce the remainder of the contract without the  
34 unconscionable term, or limit the application of the unconscionable  
35 term so as to avoid an unconscionable result.

36 (2) If it is claimed or appears to the court that a contract or  
37 term thereof may be unconscionable, the parties must be afforded a

1 reasonable opportunity to present evidence as to its commercial  
2 setting, purpose, and effect to aid the court in making the  
3 determination.

4 NEW SECTION. **Sec. 112.** MANIFESTING ASSENT; OPPORTUNITY TO REVIEW.

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

8 (a) Authenticates the record or term with intent to adopt or accept  
9 it; or

10 (b) Intentionally engages in conduct or makes statements with  
11 reason to know that the other party or its electronic agent may infer  
12 from the conduct or statement that the person assents to the record or  
13 term.

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

16 (a) Authenticates the record or term; or

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

19 (3) If this chapter or other law requires assent to a specific  
20 term, a manifestation of assent must relate specifically to the term.

21 (4) Conduct or operations manifesting assent may be proved in any  
22 manner, including a showing that a person or an electronic agent  
23 obtained or used the information or informational rights and that a  
24 procedure existed by which a person or an electronic agent must have  
25 engaged in the conduct or operations in order to do so. Proof of  
26 compliance with subsection (1)(b) of this section is sufficient if  
27 there is conduct that assents and subsequent conduct that reaffirms  
28 assent by electronic means.

29 (5) With respect to an opportunity to review, the following rules  
30 apply:

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

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

37 (c) If a record or term is available for review only after a person  
38 becomes obligated to pay or begins its performance, the person has an

1 opportunity to review only if it has a right to a return if it rejects  
2 the record. However, a right to a return is not required if:

3 (i) The record proposes a modification of contract or provides  
4 particulars of performance under section 305 of this act; or

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

10 (d) The right to a return under (c) of this subsection may arise by  
11 law or by agreement.

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

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

22 NEW SECTION. **Sec. 113.** VARIATION BY AGREEMENT; COMMERCIAL  
23 PRACTICE. (1) The effect of any provision of this chapter, including  
24 an allocation of risk or imposition of a burden, may be varied by  
25 agreement of the parties. However, the following rules apply:

26 (a) Obligations of good faith, diligence, reasonableness, and care  
27 imposed by this chapter may not be disclaimed by agreement, but the  
28 parties by agreement may determine the standards by which the  
29 performance of the obligation is to be measured if the standards are  
30 not manifestly unreasonable.

31 (b) The limitations on enforceability imposed by unconscionability  
32 under section 111 of this act and fundamental public policy under  
33 section 105(2) of this act may not be varied by agreement.

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

1 (i) The limitations on agreed choice of law in section 109(1) of  
2 this act;

3 (ii) The limitations on agreed choice of forum in section 110 of  
4 this act;

5 (iii) The requirements for manifesting assent and opportunity for  
6 review in section 112 of this act;

7 (iv) The limitations on enforceability in section 201 of this act;

8 (v) The limitations on a mass-market license in section 209 of this  
9 act;

10 (vi) The consumer defense arising from an electronic error in  
11 section 214 of this act;

12 (vii) The requirements for an enforceable term in sections 303(2),  
13 307(7), 406 (2) and (3), and 804(1) of this act;

14 (viii) The limitations on a financier in sections 507 through 511  
15 of this act;

16 (ix) The restrictions on altering the period of limitations in  
17 section 805 (1) and (2) of this act; and

18 (x) The limitations on self-help repossession in sections 815(2)  
19 and 816 of this act.

20 (2) Any usage of trade of which the parties are or should be aware  
21 and any course of dealing or course of performance between the parties  
22 are relevant to determining the existence or meaning of an agreement.

23 NEW SECTION. **Sec. 114.** SUPPLEMENTAL PRINCIPLES; GOOD FAITH;  
24 DECISION FOR COURT; REASONABLE TIME; REASON TO KNOW. (1) Unless  
25 displaced by this chapter, principles of law and equity, including the  
26 law merchant and the common law of this state relative to capacity to  
27 contract, principal and agent, estoppel, fraud, misrepresentation,  
28 duress, coercion, mistake, and other validating or invalidating cause,  
29 supplement this chapter. Among the laws supplementing and not  
30 displaced by this chapter are trade secret laws and unfair competition  
31 laws.

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

34 (3) Whether a term is conspicuous or is unenforceable under section  
35 105 (1) or (2), 111, or 209(1) of this act and whether an attribution  
36 procedure is commercially reasonable or effective under section 108,  
37 212, or 213 of this act are questions to be determined by the court.

1 (4) Whether an agreement has legal consequences is determined by  
2 this chapter.

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

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

7 (b) Any time that is not manifestly unreasonable may be fixed by  
8 agreement.

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

13 **PART 2**

14 **FORMATION AND TERMS**

15 **SUBPART A. FORMATION OF CONTRACT**

16 NEW SECTION. **Sec. 201.** FORMAL REQUIREMENTS. (1) Except as  
17 otherwise provided in this section, a contract requiring payment of a  
18 contract fee of five thousand dollars or more is not enforceable by way  
19 of action or defense unless:

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

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

27 (2) A record is sufficient under subsection (1) of this section  
28 even if it omits or incorrectly states a term, but the contract is not  
29 enforceable under that subsection beyond the number of copies or  
30 subject matter shown in the record.

31 (3) A contract that does not satisfy the requirements of subsection  
32 (1) of this section is nevertheless enforceable under that subsection  
33 if:

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

1 (b) The party against which enforcement is sought admits in court,  
2 by pleading or by testimony or otherwise under oath, facts sufficient  
3 to indicate a contract has been made, but the agreement is not  
4 enforceable under this subsection (3)(b) beyond the number of copies or  
5 the subject matter admitted.

6 (4) Between merchants, if, within a reasonable time, a record in  
7 confirmation of the contract and sufficient against the sender is  
8 received and the party receiving it has reason to know its contents,  
9 the record satisfies subsection (1) of this section against the party  
10 receiving it unless notice of objection to its contents is given in a  
11 record within a reasonable time after the confirming record is  
12 received.

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

16 (6) A transaction within the scope of this chapter is not subject  
17 to a statute of frauds contained in another law of this state including  
18 RCW 19.36.010.

19 NEW SECTION. **Sec. 202.** FORMATION IN GENERAL. (1) A contract may  
20 be formed in any manner sufficient to show agreement, including offer  
21 and acceptance or conduct of both parties or operations of electronic  
22 agents which recognize the existence of a contract.

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

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

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

35 (5) If a term is to be adopted by later agreement and the parties  
36 intend not to be bound unless the term is so adopted, a contract is not  
37 formed if the parties do not agree to the term. In that case, each  
38 party shall deliver to the other party, or with the consent of the

1 other party destroy, all copies of information, access materials, and  
2 other materials received or made, and each party is entitled to a  
3 return with respect to any contract fee paid for which performance has  
4 not been received, has not been accepted, or has been redelivered  
5 without any benefit being retained. The parties remain bound by any  
6 restriction in a contractual use term with respect to information or  
7 copies received or made from copies received pursuant to the agreement,  
8 but the contractual use term does not apply to information or copies  
9 properly received or obtained from another source.

10 NEW SECTION. **Sec. 203.** OFFER AND ACCEPTANCE IN GENERAL. Unless  
11 otherwise unambiguously indicated by the language or the circumstances:

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

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

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

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

26 (a) When an electronic acceptance is received; or

27 (b) If the response consists of beginning performance, full  
28 performance, or giving access to information, when the performance is  
29 received or the access is enabled and necessary access materials are  
30 received.

31 NEW SECTION. **Sec. 204.** ACCEPTANCE WITH VARYING TERMS. (1) In  
32 this section, an acceptance materially alters an offer if it contains  
33 a term that materially conflicts with or varies a term of the offer or  
34 that adds a material term not contained in the offer.

35 (2) Except as otherwise provided in section 205 of this act, a  
36 definite and seasonable expression of acceptance operates as an



1 acceptance, even if the acceptance contains terms that vary from the  
2 terms of the offer, unless the acceptance materially alters the offer.

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

5 (a) A contract is not formed unless:

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

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

10 (b) If a contract is formed by the conduct of both parties, the  
11 terms of the contract are determined under section 210 of this act.

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

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

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

22 NEW SECTION. **Sec. 205.** **CONDITIONAL OFFER OR ACCEPTANCE.** (1) In  
23 this section, an offer or acceptance is conditional if it is  
24 conditioned on agreement by the other party to all the terms of the  
25 offer or acceptance.

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

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

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

37 (b) A party that agrees, such as by manifesting assent, to a  
38 conditional offer that is effective under (a) of this subsection adopts

1 the terms of the offer under section 208 or 209 of this act, except a  
2 term that conflicts with an expressly agreed term regarding price or  
3 quantity.

4 NEW SECTION. **Sec. 206.** OFFER AND ACCEPTANCE: ELECTRONIC AGENTS.

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

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

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

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

21 (3) The terms of a contract formed under subsection (2) of this  
22 section are determined under section 208 or 209 of this act but do not  
23 include a term provided by the individual if the individual had reason  
24 to know that the electronic agent could not react to the term.

25 NEW SECTION. **Sec. 207.** FORMATION: RELEASES OF INFORMATIONAL  
26 RIGHTS. (1) A release is effective without consideration if it is:

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

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

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

34 (a) The party granting the release; or

35 (b) The party receiving the release, except for relatively  
36 insignificant acts.

1 (3) In cases not governed by subsection (2) of this section, the  
2 duration of a release is governed by section 308 of this act.

3 **SUBPART B. TERMS OF RECORDS**

4 NEW SECTION. **Sec. 208.** ADOPTING TERMS OF RECORDS. Except as  
5 otherwise provided in section 209 of this act, the following rules  
6 apply:

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

10 (2) The terms of a record may be adopted pursuant to subsection (1)  
11 of this section after beginning performance or use if the parties had  
12 reason to know that their agreement would be represented in whole or  
13 part by a later record to be agreed on and there would not be an  
14 opportunity to review the record or a copy of it before performance or  
15 use begins. If the parties fail to agree to the later terms and did  
16 not intend to form a contract unless they so agreed, section 202(5) of  
17 this act applies.

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

23 NEW SECTION. **Sec. 209.** MASS-MARKET LICENSE. (1) A party adopts  
24 the terms of a mass-market license for purposes of section 208 of this  
25 act only if the party agrees to the license, such as by manifesting  
26 assent, before or during the party's initial performance or use of or  
27 access to the information. A term is not part of the license if:

28 (a) The term is unconscionable or is unenforceable under section  
29 105 (1) or (2) of this act; or

30 (b) Subject to section 301 of this act, the term conflicts with a  
31 term to which the parties to the license have expressly agreed.

32 (2) If a mass-market license or a copy of the license is not  
33 available in a manner permitting an opportunity to review by the  
34 licensee before the licensee becomes obligated to pay and the licensee  
35 does not agree, such as by manifesting assent, to the license after

1 having an opportunity to review, the licensee is entitled to a return  
2 under section 112 of this act and, in addition, to:

3 (a) Reimbursement of any reasonable expenses incurred in complying  
4 with the licensor's instructions for returning or destroying the  
5 computer information or, in the absence of instructions, expenses  
6 incurred for return postage or similar reasonable expense in returning  
7 the computer information; and

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

11 (i) The installation occurs because information must be installed  
12 to enable review of the license; and

13 (ii) The installation alters the system or information in it but  
14 does not restore the system or information after removal of the  
15 installed information because the licensee rejected the license.

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

22 NEW SECTION. **Sec. 210.** TERMS OF CONTRACT FORMED BY CONDUCT. (1)  
23 Except as otherwise provided in subsection (2) of this section and  
24 subject to section 301 of this act, if a contract is formed by conduct  
25 of the parties, the terms of the contract are determined by  
26 consideration of the terms and conditions to which the parties  
27 expressly agreed, course of performance, course of dealing, usage of  
28 trade, the nature of the parties' conduct, the records exchanged, the  
29 information or informational rights involved, and all other relevant  
30 circumstances. If a court cannot determine the terms of the contract  
31 from the foregoing factors, the supplementary principles of this  
32 chapter apply.

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

36 NEW SECTION. **Sec. 211.** PRETRANSACTION DISCLOSURES IN INTERNET-  
37 TYPE TRANSACTIONS. This section applies to a licensor that makes its

1 computer information available to a licensee by electronic means from  
2 its Internet or similar electronic site. In such a case, the licensor  
3 affords an opportunity to review the terms of a standard form license  
4 which opportunity satisfies section 112(5) of this act with respect to  
5 a licensee that acquires the information from that site, if the  
6 licensor:

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

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

14 (b) Disclosing the availability of the standard terms in a  
15 prominent place on the site from which the computer information is  
16 offered and promptly furnishing a copy of the standard terms on request  
17 before the transfer of the computer information; and

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

20 **SUBPART C. ELECTRONIC CONTRACTS: GENERALLY**

21 NEW SECTION. **Sec. 212.** COMMERCIAL REASONABLENESS OF ATTRIBUTION  
22 PROCEDURE. The commercial reasonableness or efficacy of an attribution  
23 procedure is determined by the court. In making this determination,  
24 the following rules apply:

25 (1) An attribution procedure established by law is commercially  
26 reasonable and effective for transactions within the coverage of the  
27 statute or rule.

28 (2) Except as otherwise provided in subsection (1) of this section,  
29 commercial reasonableness and effectiveness is determined in light of  
30 the purposes of the procedure and the commercial circumstances at the  
31 time the parties agreed to or adopted the procedure.

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

35 NEW SECTION. **Sec. 213.** DETERMINING ATTRIBUTION OF ELECTRONIC  
36 EVENT TO PERSON. (1) An electronic event, including an electronic

1 message, display, record, authentication, or performance, is attributed  
2 to a person if:

3 (a) It was the act of that person or its electronic agent;

4 (b) The person is otherwise bound by it under the law of agency or  
5 other law; or

6 (c) Attribution is verified pursuant to an attribution procedure as  
7 provided in subsection (2) of this section.

8 (2) If there is an attribution procedure between the parties with  
9 respect to the electronic event, the following rules apply:

10 (a) The effect of compliance with an attribution procedure  
11 established by other law or administrative rule is determined by that  
12 law or rule.

13 (b) In all other cases and subject to (c), (d), and (e) of this  
14 subsection, if the person relying on the electronic event and the  
15 person to whom the electronic event is attributed agreed to use or  
16 knowingly adopted an attribution procedure, the electronic event is  
17 attributable to the person identified by the procedure, if the person  
18 relying on that attribution satisfies the burden of establishing that:

19 (i) The attribution procedure was commercially reasonable;

20 (ii) The person so relying accepted or relied on the electronic  
21 event in good faith and in compliance with the attribution procedure  
22 and any additional agreement with or separate instructions of, the  
23 other party; provided that the party relying on the electronic event is  
24 not required to follow an instruction that violates an agreement  
25 evidenced by a record authenticated by the parties or an instruction  
26 which is not received at a time and in a manner affording the person  
27 relying on the electronic act a reasonable opportunity to verify its  
28 attribution and act on the notice; and

29 (iii) The attribution procedure indicated that the electronic event  
30 was that of the person to which attribution is sought.

31 (c) Attribution under the provisions of (b), (d), and (e) of this  
32 subsection shall not apply to a consumer. This limitation is intended  
33 to leave to existing law and the courts the determination of when an  
34 electronic event should be attributed to a consumer. The court may not  
35 infer from this limitation the nature of existing law or the proper  
36 rule for attributing an electronic event to a consumer.

37 (d) By agreement evidenced by an authenticated record, a person who  
38 could otherwise attribute an electronic event to another person

1 pursuant to (b) of this subsection may limit the extent to which such  
2 person is entitled to do so.

3 (e) If an electronic event is attributed to a person under (b) of  
4 this subsection, that person may prevent such attribution by satisfying  
5 the burden of establishing that the electronic event was not caused  
6 directly or indirectly by another person:

7 (i) Entrusted at any time with the right or duty to act for the  
8 person to whom the electronic event is attributed (the "attributed  
9 person") with respect to such event or the attribution procedure; or

10 (ii) Who obtained, from a source controlled by the attributed  
11 person and without authority of the person relying on the electronic  
12 event, information facilitating breach of the attribution procedure,  
13 regardless of how the information was obtained or whether the  
14 attributed person was at fault. Information includes any access  
15 device, computer information, or the like.

16 In order to avoid attribution under this subsection (2)(e), this  
17 burden must be satisfied with respect to both (e)(i) and (ii) of this  
18 subsection.

19 (3) The rights and obligations arising under this section may not  
20 be varied by agreement except that nothing in this section prohibits an  
21 agreement with a consumer for an attribution procedure that includes  
22 different rights and obligations if such an agreement could be made  
23 under a statute or law other than this chapter.

24 (4) As used in this section, "burden of establishing" a fact means  
25 the burden of persuading the triers of fact that the existence of the  
26 fact is more probable than its nonexistence.

27 NEW SECTION. Sec. 214. ELECTRONIC ERROR: CONSUMER DEFENSES. (1)  
28 In this section, "electronic error" means an error in an electronic  
29 message created by a consumer using an information processing system if  
30 a reasonable method to detect and correct or avoid the error was not  
31 provided.

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

35 (a) Promptly on learning of the error:

36 (i) Notifies the other party of the error; and

1 (ii) Causes delivery to the other party or, pursuant to reasonable  
2 instructions received from the other party, delivers to another person  
3 or destroys all copies of the information; and

4 (b) Has not used, or received any benefit or value from, the  
5 information or caused the information or benefit to be made available  
6 to a third party.

7 (3) If subsection (2) of this section does not apply, the effect of  
8 an electronic error is determined by other law.

9 NEW SECTION. **Sec. 215.** ELECTRONIC MESSAGE: WHEN EFFECTIVE;  
10 EFFECT OF ACKNOWLEDGMENT. (1) Receipt of an electronic message is  
11 effective when received even if no individual is aware of its receipt.

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

16 **SUBPART D. IDEA OR INFORMATION SUBMISSIONS**

17 NEW SECTION. **Sec. 216.** IDEA OR INFORMATION SUBMISSION. (1) The  
18 following rules apply to a submission of an idea or information for the  
19 creation, development, or enhancement of computer information which is  
20 not made pursuant to an existing agreement requiring the submission:

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

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

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

29 (i) The submission is made and a contract accepted pursuant to that  
30 procedure; or

31 (ii) The recipient expressly agrees to terms concerning the  
32 submission.

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





1        NEW SECTION.    **Sec. 303.**    MODIFICATION AND RESCISSION.    (1) An  
2 agreement modifying a contract subject to this chapter needs no  
3 consideration to be binding.

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

10       (3) A modification of a contract and the contract as modified must  
11 satisfy the requirements of sections 201(1) and 307(7) of this act if  
12 the contract as modified is within those provisions.

13       (4) An attempt at modification or rescission which does not satisfy  
14 subsection (2) or (3) of this section may operate as a waiver if  
15 section 702 of this act is satisfied.

16       NEW SECTION.    **Sec. 304.**    CONTINUING CONTRACTUAL TERMS.    (1) Terms  
17 of an agreement involving successive performances apply to all  
18 performances, even if the terms are not displayed or otherwise brought  
19 to the attention of a party with respect to each successive  
20 performance, unless the terms are modified in accordance with this  
21 chapter or the contract.

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

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

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

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

34       (4) The enforceability of changes made pursuant to a procedure that  
35 does not comply with subsection (2) of this section is determined by  
36 the other provisions of this Article or other law.



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

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

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

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

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

23 (i) For the duration of the license, the licensor will not  
24 exercise, and will not grant to any other person, rights in the same  
25 information or informational rights within the scope of the exclusive  
26 grant; and

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

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

32 (a) Authenticated by the party against which enforcement is sought;  
33 or

34 (b) Prepared and delivered by one party and adopted by the other  
35 under section 208 or 209 of this act.

36 NEW SECTION. **Sec. 308.** DURATION OF CONTRACT. If an agreement  
37 does not specify its duration, to the extent allowed by other law, the  
38 following rules apply:

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

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

11 (a) The license is of a computer program that does not include  
12 source code and the license:

13 (i) Transfers ownership of a copy; or

14 (ii) Delivers a copy for a contract fee the total amount of which  
15 is fixed at or before the time of delivery of the copy; or

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

20 NEW SECTION. **Sec. 309.** AGREEMENT FOR PERFORMANCE TO PARTY'S  
21 SATISFACTION. (1) Except as otherwise provided in subsection (2) of  
22 this section, an agreement that provides that the performance of one  
23 party is to be to the satisfaction or approval of the other party  
24 requires performance sufficient to satisfy a reasonable person in the  
25 position of the party that must be satisfied.

26 (2) Performance must be to the subjective satisfaction of the other  
27 party if:

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

31 (b) The agreement is for informational content to be evaluated in  
32 reference to subjective characteristics such as aesthetics, appeal,  
33 suitability to taste, or subjective quality.

34 **PART 4**  
35 **WARRANTIES**

1        NEW SECTION.        **Sec. 401.**        WARRANTY AND OBLIGATIONS CONCERNING

2 NONINTERFERENCE AND NONINFRINGEMENT.        (1) A licensor of information  
3 that is a merchant regularly dealing in information of the kind  
4 warrants that the information will be delivered free of the rightful  
5 claim of any third person by way of infringement or misappropriation,  
6 but a licensee that furnishes detailed specifications to the licensor  
7 and the method required for meeting the specifications holds the  
8 licensor harmless against any such claim that arises out of compliance  
9 with either the required specification or the required method except  
10 for a claim that results from the failure of the licensor to adopt, or  
11 notify the licensee of, a noninfringing alternative of which the  
12 licensor had reason to know.

13        (2) A licensor warrants:

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

19        (b) As to rights granted exclusively to the licensee, that within  
20 the scope of the license:

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

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

28        (3) The warranties in this section are subject to the following  
29 rules:

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

33        (b) The obligations under subsections (1) and (2)(b) of this  
34 section apply solely to informational rights arising under the laws of  
35 the United States or a state, unless the contract expressly provides  
36 that the warranty obligations extend to rights under the laws of other  
37 countries. Language is sufficient for this purpose if it states "The  
38 licensor warrants 'exclusivity' 'noninfringement' 'in specified  
39 countries' 'worldwide'," or words of similar import. In that case, the

1 warranty extends to the specified country or, in the case of a  
2 reference to "worldwide" or the like, to all countries within the  
3 description, but only to the extent the rights are recognized under a  
4 treaty or international convention to which the country and the United  
5 States are signatories.

6 (c) The warranties under subsections (1) and (2)(b) of this section  
7 are not made by a license that merely permits use, or covenants not to  
8 claim infringement because of the use, of rights under a licensed  
9 patent.

10 (4) Except as otherwise provided in subsection (5) of this section,  
11 a warranty under this section may be disclaimed or modified only by  
12 specific language or by circumstances that give the licensee reason to  
13 know that the licensor does not warrant that competing claims do not  
14 exist or that the licensor purports to grant only the rights it may  
15 have. In an automated transaction, language is sufficient if it is  
16 conspicuous. Otherwise, language in a record is sufficient if it  
17 states "There is no warranty against interference with your enjoyment  
18 of the information or against infringement," or words of similar  
19 import.

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

24 NEW SECTION. **Sec. 402.** EXPRESS WARRANTY. (1) Subject to  
25 subsection (3) of this section, an express warranty by a licensor is  
26 created as follows:

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

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

35 (c) Any sample, model, or demonstration of a final product which is  
36 made part of the basis of the bargain creates an express warranty that  
37 the performance of the information will reasonably conform to the  
38 performance of the sample, model, or demonstration, taking into account

1 differences that would appear to a reasonable person in the position of  
2 the licensee between the sample, model, or demonstration and the  
3 information as it will be used.

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

8 (a) An affirmation or prediction merely of the value of the  
9 information or informational rights;

10 (b) A display or description of a portion of the information to  
11 illustrate the aesthetics, appeal, suitability to taste, subjective  
12 quality, or the like of informational content; or

13 (c) A statement purporting to be merely opinion or commendation of  
14 the information or informational rights.

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

22 NEW SECTION. **Sec. 403.** IMPLIED WARRANTY: MERCHANTABILITY OF  
23 COMPUTER PROGRAM. (1) Unless the warranty is disclaimed or modified,  
24 a licensor that is a merchant with respect to computer programs of the  
25 kind warrants:

26 (a) To the end user that the computer program is fit for the  
27 ordinary purposes for which such computer programs are used;

28 (b) To the distributor that:

29 (i) The program is adequately packaged and labeled as the agreement  
30 requires;

31 (ii) In the case of multiple copies, the copies are within the  
32 variations permitted by the agreement, of even kind, quality, and  
33 quantity within each unit and among all units involved; and

34 (iii) That the program conforms to any promises or affirmations of  
35 fact made on the container or label.

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



1 (3) No warranty is created under this section with respect to  
2 informational content, but an implied warranty may arise under section  
3 404 of this act.

4 NEW SECTION. **Sec. 404.** IMPLIED WARRANTY: INFORMATIONAL CONTENT.

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

10 (2) A warranty does not arise under subsection (1) of this section  
11 with respect to:

12 (a) Published informational content; or

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

17 (3) The warranty under this section is not subject to the  
18 preclusion in section 113(1)(a) of this act on disclaiming obligations  
19 of diligence, reasonableness, or care.

20 NEW SECTION. **Sec. 405.** IMPLIED WARRANTY: LICENSEE'S PURPOSE;  
21 SYSTEM INTEGRATION.

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

28 (a) Except as otherwise provided in (b) of this subsection, there  
29 is an implied warranty that the information is fit for that purpose.

30 (b) If from all the circumstances it appears that the licensor was  
31 to be paid for the amount of its time or effort regardless of the  
32 fitness of the resulting information, the warranty under (a) of this  
33 subsection is that the information will not fail to achieve the  
34 licensee's particular purpose as a result of the licensor's lack of  
35 reasonable effort.

36 (2) There is no warranty under subsection (1) of this section with  
regard to:

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

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

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

13 (4) The warranty under this section is not subject to the  
14 preclusion in section 113(1)(a) of this act on disclaiming diligence,  
15 reasonableness, or care.

16 NEW SECTION. **Sec. 406.** DISCLAIMER OR MODIFICATION OF WARRANTY.

17 (1) Words or conduct relevant to the creation of an express warranty  
18 and words or conduct tending to disclaim or modify an express warranty  
19 must be construed wherever reasonable as consistent with each other.  
20 Subject to section 301 of this act with regard to parol or extrinsic  
21 evidence, the disclaimer or modification is inoperative to the extent  
22 that such construction is unreasonable.

23 (2) Except as otherwise provided in subsections (3), (4), and (5)  
24 of this section, to disclaim or modify an implied warranty or any part  
25 of it, but not the warranty in section 401 of this act, the following  
26 rules apply:

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

28 (i) To disclaim or modify the implied warranty arising under  
29 section 403 of this act, language must mention "merchantability" or  
30 "quality" or use words of similar import and, if in a record, must be  
31 conspicuous.

32 (ii) To disclaim or modify the implied warranty arising under  
33 section 404 of this act, language in a record must mention "accuracy"  
34 or use words of similar import.

35 (b) Language to disclaim or modify the implied warranty arising  
36 under section 405 of this act must be in a record and be conspicuous.  
37 It is sufficient to state "There is no warranty that this information,

1 our efforts, or the system will fulfill any of your particular purposes  
2 or needs," or words of similar import.

3 (c) Language in a record is sufficient to disclaim all implied  
4 warranties if it individually disclaims each implied warranty or,  
5 except for the warranty in section 401 of this act, if it is  
6 conspicuous and states "Except for express warranties stated in this  
7 contract, if any, this 'information' 'computer program' is provided  
8 with all faults, and the entire risk as to satisfactory quality,  
9 performance, accuracy, and effort is with the user," or words of  
10 similar import.

11 (d) A disclaimer or modification sufficient under Article 62A.2 or  
12 62A.2A RCW to disclaim or modify an implied warranty of merchantability  
13 is sufficient to disclaim or modify the warranties under sections 403  
14 and 404 of this act. A disclaimer or modification sufficient under  
15 Article 62A.2 or 62A.2A RCW to disclaim or modify an implied warranty  
16 of fitness for a particular purpose is sufficient to disclaim or modify  
17 the warranties under section 405 of this act.

18 (3) Unless the circumstances indicate otherwise, all implied  
19 warranties, but not the warranty under section 401 of this act, are  
20 disclaimed by expressions like "as is" or "with all faults" or other  
21 language that in common understanding calls the licensee's attention to  
22 the disclaimer of warranties and makes plain that there are no implied  
23 warranties.

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

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

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

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

1        NEW SECTION.    **Sec. 407.**    MODIFICATION OF COMPUTER PROGRAM.    A  
2 licensee that modifies a computer program, other than by using a  
3 capability of the program intended for that purpose in the ordinary  
4 course, does not invalidate any warranty regarding performance of an  
5 unmodified copy but does invalidate any warranties, express or implied,  
6 regarding performance of the modified copy. A modification occurs if  
7 a licensee alters code in, deletes code from, or adds code to the  
8 computer program.

9        NEW SECTION.    **Sec. 408.**    CUMULATION AND CONFLICT OF WARRANTIES.  
10 Warranties, whether express or implied, must be construed as consistent  
11 with each other and as cumulative, but if that construction is  
12 unreasonable, the intention of the parties determines which warranty is  
13 dominant. In ascertaining that intention, the following rules apply:

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

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

18        (3) Express warranties displace inconsistent implied warranties  
19 other than an implied warranty under section 405(1) of this act.

20        NEW SECTION.    **Sec. 409.**    THIRD-PARTY BENEFICIARIES OF WARRANTY.

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

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

29        (3) A contractual term that excludes or limits the persons to which  
30 a warranty extends is effective except as to individuals described in  
31 subsection (2) of this section.

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

35

## PART 5

36

## TRANSFER OF INTERESTS AND RIGHTS



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

3 (a) Is prohibited by other law; or

4 (b) Except as otherwise provided in subsection (3) of this section,  
5 would materially change the duty of the other party, materially  
6 increase the burden or risk imposed on the other party, or materially  
7 impair the other party's property or its likelihood or expectation of  
8 obtaining return performance.

9 (2) Except as otherwise provided in subsection (3) of this section  
10 and section 508(1)(a)(ii) of this act, a term prohibiting transfer of  
11 a party's contractual interest is enforceable, and a transfer made in  
12 violation of that term is a breach of contract and is ineffective to  
13 create contractual rights in the transferee against the nontransferring  
14 party, except to the extent that:

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

20 (b) The transfer is of a right to payment arising out of the  
21 transferor's due performance of less than its entire obligation and the  
22 transfer would be enforceable under subsection (1) of this section in  
23 the absence of the term prohibiting transfer.

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

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

30 NEW SECTION. **Sec. 504.** EFFECT OF TRANSFER OF CONTRACTUAL  
31 INTEREST. (1) A transfer of "the contract" or of "all my rights under  
32 the contract," or a transfer in similar general terms, is a transfer of  
33 all contractual interests under the contract. Whether the transfer is  
34 effective is determined by sections 503 and 508(1)(a)(ii) of this act.

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

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

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

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

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

10 (3) A party to the original contract, other than the transferor,  
11 may treat a transfer that conveys a right or duty of performance  
12 without its consent as creating reasonable grounds for insecurity and,  
13 without prejudice to the party's rights against the transferor, may  
14 demand assurances from the transferee under section 708 of this act.

15 NEW SECTION. **Sec. 505.** PERFORMANCE BY A DELEGATE; SUBCONTRACT.

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

18 (a) The contract prohibits delegation or subcontracting; or

19 (b) The other party has a substantial interest in having the  
20 original promisor perform or control the performance.

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

23 (3) An attempted delegation that violates a term prohibiting  
24 delegation is not effective.

25 NEW SECTION. **Sec. 506.** TRANSFER BY LICENSEE. (1) If all or any

26 part of a licensee's interest in a license is transferred, voluntarily  
27 or involuntarily, the transferee does not acquire an interest in  
28 information, copies, or the contractual or informational rights of the  
29 licensee unless the transfer is effective under section 503 or  
30 508(1)(a)(ii) of this act. If the transfer is effective, the  
31 transferee takes subject to the terms of the license.

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

35 **SUBPART B. FINANCING ARRANGEMENTS**

1        NEW SECTION.    **Sec. 507.**    FINANCING IF FINANCIER DOES NOT BECOME  
2 LICENSEE. If a financier does not become a licensee in connection with  
3 its financial accommodation contract, the following rules apply:

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

6        (2) The licensee's rights and obligations with respect to the  
7 information and informational rights are governed by:

8            (a) The license;

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

10          (c) To the extent not inconsistent with (a) and (b) of this  
11 subsection, any financial accommodation contract between the financier  
12 and the licensee, which may add additional conditions to the licensee's  
13 right to use the licensed information or informational rights.

14        NEW SECTION.    **Sec. 508.**    FINANCE LICENSES. (1) If a financier  
15 becomes a licensee in connection with its financial accommodation  
16 contract and then transfers its contractual interest under the license,  
17 or sublicenses the licensed computer information or informational  
18 rights, to a licensee receiving the financial accommodation, the  
19 following rules apply:

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

22            (i) The transfer or sublicense is effective under section 503 of  
23 this act; or

24            (ii) The following conditions are fulfilled:

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

31            (B) The financier became a licensee solely to make the financial  
32 accommodation; and

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



1 (b) A financier that makes a transfer that is effective under  
2 (a)(ii) of this subsection may make only the single transfer or  
3 sublicense contemplated by the notice unless the licensor consents to  
4 a later transfer.

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

9 (a) The accommodated licensee's rights and obligations are governed  
10 by:

11 (i) The license;

12 (ii) Any rights of the licensor under other law; and

13 (iii) To the extent not inconsistent with (a)(i) and (ii) of this  
14 subsection, the financial accommodation contract, which may impose  
15 additional conditions to the licensee's right to use the licensed  
16 information or informational rights.

17 (b) The financier does not make warranties to the accommodated  
18 licensee other than the warranty under section 401(2)(a) of this act  
19 and any express warranties in the financial accommodation contract.

20 NEW SECTION. **Sec. 509.** FINANCING ARRANGEMENTS: OBLIGATIONS  
21 IRREVOCABLE. Unless the accommodated licensee is a consumer, a term in  
22 a financial accommodation contract providing that the accommodated  
23 licensee's obligations to the financier are irrevocable and independent  
24 is enforceable. The obligations become irrevocable and independent  
25 upon the licensee's acceptance of the license or the financier's giving  
26 of value, whichever occurs first.

27 NEW SECTION. **Sec. 510.** FINANCING ARRANGEMENTS: REMEDIES OR  
28 ENFORCEMENT. (1) Except as otherwise provided in subsection (2) of  
29 this section, on material breach of a financial accommodation contract  
30 by the accommodated licensee, the following rules apply:

31 (a) The financier may cancel the financial accommodation contract.

32 (b) Subject to (c) and (d) of this subsection, the financier may  
33 pursue its remedies against the accommodated licensee under the  
34 financial accommodation contract.

35 (c) If the financier became a licensee and made a transfer or  
36 sublicense that was effective under section 508 of this act, it may  
37 exercise the remedies of a licensor for breach, including the rights of

1 an aggrieved party under section 815 of this act, subject to the  
2 limitations of section 816 of this act.

3 (d) If the financier did not become a licensee or did not make a  
4 transfer that was effective under section 508 of this act, it may  
5 enforce a contractual right contained in the financial accommodation  
6 contract to preclude the licensee's further use of the information.  
7 However, the following rules apply:

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

11 (ii) If the accommodated licensee agreed to transfer possession of  
12 copies to the financier in the event of material breach of the  
13 financial accommodation contract, the financier may enforce that  
14 contractual right only if permitted to do so under subsection (2)(a) of  
15 this section and section 503 of this act.

16 (2) The following additional limitations apply to a financier's  
17 remedies under subsection (1) of this section:

18 (a) A financier described in subsection (1)(c) of this section  
19 which is entitled under the financial accommodation contract to take  
20 possession or prevent use of information, copies, or related materials  
21 may do so only if the licensor consents or if doing so would not result  
22 in a material adverse change of the duty of the licensor, materially  
23 increase the burden or risk imposed on the licensor, disclose or  
24 threaten to disclose trade secrets or confidential material of the  
25 licensor, or materially impair the licensor's likelihood or expectation  
26 of obtaining return performance.

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

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

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

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

4 NEW SECTION. **Sec. 511.** FINANCING ARRANGEMENTS: EFFECT ON  
5 LICENSOR'S RIGHTS. (1) The creation of a financier's interest does not  
6 place any obligations on or alter the rights of a licensor.

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

10 **PART 6**  
11 **PERFORMANCE**

12 **SUBPART A. GENERAL**

13 NEW SECTION. **Sec. 601.** PERFORMANCE OF CONTRACT IN GENERAL. (1)  
14 A party shall perform in a manner that conforms to the contract.

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

21 (a) The aggrieved party may refuse a performance that is a material  
22 breach as to that performance or a performance that may be refused  
23 under section 704(2) of this act.

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

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

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

33 (b) If a performance by the other party is due at the time of the  
34 tendered performance, tender of the other party's performance is a

1 condition to the tendering party's obligation to complete the tendered  
2 performance.

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

7 (4) Except as otherwise provided in sections 603 and 604 of this  
8 act, in the case of a performance with respect to a copy, this section  
9 is subject to sections 606 through 610 and 704 through 707 of this act.

10 NEW SECTION. Sec. 602. LICENSOR'S OBLIGATIONS TO ENABLE USE. (1)  
11 In this section, "enable use" means to grant a contractual right or  
12 permission with respect to information or informational rights and to  
13 complete the acts, if any, required under the agreement to make the  
14 information available to the licensee.

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

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

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

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

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

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

32 NEW SECTION. Sec. 603. SUBMISSIONS OF INFORMATION TO SATISFACTION  
33 OF PARTY. If an agreement requires that submitted information be to  
34 the satisfaction of the recipient, the following rules apply:

35 (1) Sections 606 through 610 and 704 through 707 of this act do not  
36 apply to the submission.

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

7 (3) Except as otherwise provided in subsection (4) of this section,  
8 neither refusal nor acceptance occurs unless the recipient expressly  
9 refuses or accepts the submitted information, but the recipient may not  
10 use the submitted information before acceptance.

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

17 NEW SECTION. **Sec. 604.** IMMEDIATELY COMPLETED PERFORMANCE. If a  
18 performance involves delivery of information or services which, because  
19 of their nature, may provide a licensee, immediately on performance or  
20 delivery, with substantially all the benefit of the performance or with  
21 other significant benefit that cannot be returned, the following rules  
22 apply:

23 (1) Sections 607 through 610 and 704 through 707 of this act do not  
24 apply.

25 (2) The rights of the parties are determined under section 601 of  
26 this act and the ordinary standards of the business, trade, or  
27 industry.

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

32 NEW SECTION. **Sec. 605.** ELECTRONIC REGULATION OF PERFORMANCE. (1)  
33 In this section, "automatic restraint" means a program, code, device,  
34 or similar electronic or physical limitation the intended purpose of  
35 which is to restrict use of information.

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

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

5 (b) The restraint prevents a use that is inconsistent with the  
6 agreement;

7 (c) The restraint prevents use after expiration of the stated  
8 duration of the contract or a stated number of uses; or

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

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

19 (4) A party that includes or uses an automatic restraint consistent  
20 with subsection (2) or (3) of this section is not liable for any loss  
21 caused by the use of the restraint.

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

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

30 **SUBPART B. PERFORMANCE IN DELIVERY OF COPIES**

31 NEW SECTION. **Sec. 606.** COPY: DELIVERY; TENDER OF DELIVERY. (1)  
32 Delivery of a copy must be at the location designated by agreement. In  
33 the absence of a designation, the following rules apply:

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

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

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

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

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

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

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

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

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

34 NEW SECTION. **Sec. 607.** COPY: PERFORMANCE RELATED TO DELIVERY;  
35 PAYMENT. (1) If performance requires delivery of a copy, the following  
36 rules apply:

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

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

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

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

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

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

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

18 NEW SECTION. Sec. 608. COPY: RIGHT TO INSPECT; PAYMENT BEFORE  
19 INSPECTION. (1) Except as otherwise provided in sections 603 and 604  
20 of this act, if performance requires delivery of a copy, the following  
21 rules apply:

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

26 (b) The party making the inspection shall bear the expenses of  
27 inspection.

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

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



1 (2) If a right to inspect exists under subsection (1) of this  
2 section but the agreement is inconsistent with an opportunity to  
3 inspect before payment, the party does not have a right to inspect  
4 before payment.

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

8 (a) The nonconformity appears without inspection and would justify  
9 refusal under section 704 of this act; or

10 (b) Despite tender of the required documents, the circumstances  
11 would justify an injunction against honor of a letter of credit under  
12 Article 62A.5 RCW.

13 (4) Payment made under circumstances described in subsection (2) or  
14 (3) of this section is not an acceptance of the copy and does not  
15 impair a party's right to inspect or preclude any of the party's  
16 remedies.

17 NEW SECTION. **Sec. 609.** COPY: WHEN ACCEPTANCE OCCURS. (1)  
18 Acceptance of a copy occurs when the party to which the copy is  
19 tendered:

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

23 (b) Does not make an effective refusal;

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

26 (d) Obtains a substantial benefit from the copy and cannot return  
27 that benefit; or

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

32 (2) Except in cases governed by subsection (1)(c) or (d) of this  
33 section, if there is a right to inspect under section 608 of this act  
34 or the agreement, acceptance of a copy occurs only after the party has  
35 had a reasonable opportunity to inspect the copy.

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



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

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

8 (a) Consistent with ordinary standards of the business, trade, or  
9 industry for the particular type of contract; or

10 (b) Caused by:

11 (i) Scheduled reasonable downtime;

12 (ii) Reasonable needs for maintenance;

13 (iii) Reasonable periods of failure of equipment, computer  
14 programs, or communications; or

15 (iv) Events reasonably beyond the licensor's control, and the  
16 licensor exercises such commercially reasonable efforts as the  
17 circumstances require.

18 NEW SECTION. **Sec. 612.** CORRECTION AND SUPPORT CONTRACTS. (1) If  
19 a person agrees to provide services regarding the correction of  
20 performance problems in computer information, other than an agreement  
21 to cure its own existing breach of contract, the following rules apply:

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

26 (b) In all other cases, the person:

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

32 (ii) Does not undertake that its services will correct performance  
33 problems unless the agreement expressly so provides.

34 (2) Unless required to do so by an express or implied warranty, a  
35 licensor is not required to provide instruction or other support for  
36 the licensee's use of information or access. A person that agrees to  
37 provide support shall make the support available in a manner and with  
38 a quality consistent with express terms of the support agreement and,

1 to the extent not stated in the express terms, at a time and place and  
2 in a manner that is reasonable in light of ordinary standards of the  
3 business, trade, or industry.

4 NEW SECTION. **Sec. 613.** CONTRACTS INVOLVING PUBLISHERS, DEALERS,  
5 AND END USERS. (1) In this section:

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

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

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

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

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

23 (b) If the end user does not agree, such as by manifesting assent,  
24 to the terms of the publisher's license, the end user has a right to a  
25 return from the dealer. A right under this subsection (2)(b) is a  
26 return for purposes of sections 112, 208, and 209 of this act.

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

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

34 (a) In the form as received; and

35 (b) Subject to the terms of any license of the publisher that the  
36 publisher provides to the dealer to be furnished to end users.

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



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

4 (2) A party claiming excuse under subsection (1) of this section  
5 shall seasonably notify the other party that there will be delay or  
6 nonperformance.

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

14 (4) A party that receives notice pursuant to subsection (2) of this  
15 section of a material or indefinite delay in delivery of copies or of  
16 an allocation under subsection (3) of this section, by notice in a  
17 record, may:

18 (a) Terminate and thereby discharge any executory portion of the  
19 contract; or

20 (b) Modify the contract by agreeing to take the available  
21 allocation in substitution.

22 (5) If, after receipt of notice under subsection (2) of this  
23 section, a party does not modify the contract within a reasonable time  
24 not exceeding thirty days, the contract lapses with respect to any  
25 performance affected.

## 26 **SUBPART E. TERMINATION**

### 27 NEW SECTION. **Sec. 616.** TERMINATION: SURVIVAL OF OBLIGATIONS.

28 (1) Except as otherwise provided in subsection (2) of this section, on  
29 termination all obligations that are still executory on both sides are  
30 discharged.

31 (2) The following survive termination:

32 (a) A right based on previous breach or performance of the  
33 contract;

34 (b) An obligation of confidentiality, nondisclosure, or  
35 noncompetition to the extent enforceable under other law;

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

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

8 (e) A choice of law or forum;

9 (f) An obligation to arbitrate or otherwise resolve disputes by  
10 alternative dispute resolution procedures;

11 (g) A term limiting the time for commencing an action or for giving  
12 notice;

13 (h) An indemnity term or a right related to a claim of a type  
14 described in section 805(4)(a) of this act;

15 (i) A limitation of remedy or modification or disclaimer of  
16 warranty;

17 (j) An obligation to provide an accounting and make any payment due  
18 under the accounting; and

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

20 NEW SECTION. **Sec. 617.** NOTICE OF TERMINATION. (1) Except as  
21 otherwise provided in subsection (2) of this section, a party may not  
22 terminate a contract except on the happening of an agreed event, such  
23 as the expiration of the stated duration, unless the party gives  
24 reasonable notice of termination to the other party.

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

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

34 NEW SECTION. **Sec. 618.** TERMINATION: ENFORCEMENT. (1) On  
35 termination of a license, a party in possession or control of  
36 information, copies, or other materials that are the property of the  
37 other party, or are subject to a contractual obligation to be delivered

1 to that party on termination, shall use commercially reasonable efforts  
2 to deliver or hold them for disposal on instructions of that party. If  
3 any materials are jointly owned, the party in possession or control  
4 shall make them available to the joint owners.

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

10 (3) Each party may enforce its rights under subsections (1) and (2)  
11 of this section by acting pursuant to section 605 of this act or by  
12 judicial process, including obtaining an order that the party or an  
13 officer of the court take the following actions with respect to any  
14 licensed information, documentation, copies, or other materials to be  
15 delivered:

16 (a) Deliver or take possession of them;

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

19 (c) Destroy or prevent access to them; and

20 (d) Require that the party or any other person in possession or  
21 control of them make them available to the other party at a place  
22 designated by that party which is reasonably convenient to both  
23 parties.

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

27 **PART 7**

28 **BREACH OF CONTRACT**

29 **SUBPART A. GENERAL**

30 NEW SECTION. **Sec. 701.** BREACH OF CONTRACT; MATERIAL BREACH. (1)  
31 Whether a party is in breach of contract is determined by the agreement  
32 or, in the absence of agreement, this chapter. A breach occurs if a  
33 party without legal excuse fails to perform an obligation in a timely  
34 manner, repudiates a contract, or exceeds a contractual use term, or  
35 otherwise is not in compliance with an obligation placed on it by this  
36 chapter or the agreement. A breach, whether or not material, entitles



1 the aggrieved party to its remedies. Whether a breach of a contractual  
2 use term is an infringement or a misappropriation is determined by  
3 applicable informational property rights law.

4 (2) A breach of contract is material if:

5 (a) The contract so provides;

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

8 (c) The circumstances, including the language of the agreement, the  
9 reasonable expectations of the parties, the standards and practices of  
10 the business, trade, or industry, and the character of the breach,  
11 indicate that:

12 (i) The breach caused or is likely to cause substantial harm to the  
13 aggrieved party; or

14 (ii) The breach substantially deprived or is likely substantially  
15 to deprive the aggrieved party of a significant benefit it reasonably  
16 expected under the contract.

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

18 NEW SECTION. **Sec. 702.** WAIVER OF REMEDY FOR BREACH OF CONTRACT.

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

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

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

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

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

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

7 (5) A waiver may not be retracted as to the performance to which  
8 the waiver applies.

9 (6) Except for a waiver in accordance with subsection (1) of this  
10 section or a waiver supported by consideration, a waiver affecting an  
11 executory portion of a contract may be retracted by reasonable notice  
12 received by the other party that strict performance will be required in  
13 the future, unless the retraction would be unjust in view of a material  
14 change of position in reliance on the waiver by that party.

15 NEW SECTION. **Sec. 703.** CURE OF BREACH OF CONTRACT. (1) A party  
16 in breach of contract may cure the breach at its own expense if:

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

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

25 (c) In a case not governed by (a) or (b) of this subsection, the  
26 party in breach seasonably notifies the aggrieved party of its intent  
27 to cure and promptly provides a conforming performance before  
28 cancellation by the aggrieved party.

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

34 (a) The party in breach receives reasonable notice of the specific  
35 nonconformity and a demand for cure of it; and

36 (b) The cost of the effort to cure does not disproportionately  
37 exceed the direct damages caused by the nonconformity to the aggrieved  
38 party.

1 (3) A party may not cancel a contract or refuse a performance  
2 because of a breach of contract that has been seasonably cured under  
3 subsection (1) of this section. However, notice of intent to cure does  
4 not preclude refusal or cancellation for the uncured breach.

5 **SUBPART B. DEFECTIVE COPIES**

6 NEW SECTION. **Sec. 704.** COPY: REFUSAL OF DEFECTIVE TENDER. (1)  
7 Subject to subsection (2) of this section and section 705 of this act,  
8 tender of a copy that is a material breach of contract permits the  
9 party to which tender is made to:

- 10 (a) Refuse the tender;
- 11 (b) Accept the tender; or
- 12 (c) Accept any commercially reasonable units and refuse the rest.
- 13 (2) In a mass-market transaction that calls for only a single  
14 tender of a copy, a licensee may refuse the tender if the tender does  
15 not conform to the contract.
- 16 (3) Refusal of a tender is ineffective unless:
- 17 (a) It is made before acceptance;
- 18 (b) It is made within a reasonable time after tender or completion  
19 of any permitted effort to cure; and
- 20 (c) The refusing party seasonably notifies the tendering party of  
21 the refusal.
- 22 (4) Except in a case governed by subsection (2) of this section, a  
23 party that rightfully refuses tender of a copy may cancel the contract  
24 only if the tender was a material breach of the whole contract or the  
25 agreement so provides.

26 NEW SECTION. **Sec. 705.** COPY: CONTRACT WITH PREVIOUS VESTED GRANT  
27 OF RIGHTS. If an agreement grants a right in or permission to use  
28 informational rights which precedes or is otherwise independent of the  
29 delivery of a copy, the following rules apply:

- 30 (1) A party may refuse a tender of a copy which is a material  
31 breach as to that copy, but refusal of that tender does not cancel the  
32 contract.
- 33 (2) In a case governed by subsection (1) of this section, the  
34 tendering party may cure the breach by seasonably providing a  
35 conforming copy before the breach becomes material as to the whole  
36 contract.

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

4 NEW SECTION. **Sec. 706.** COPY: DUTIES UPON RIGHTFUL REFUSAL. (1)  
5 Except as otherwise provided in this section, after rightful refusal or  
6 revocation of acceptance of a copy, the following rules apply:

7 (a) If the refusing party rightfully cancels the contract, section  
8 802 of this act applies and all restrictions in contractual use terms  
9 continue.

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

12 (2) On rightful refusal or revocation of acceptance of a copy, the  
13 following rules apply to the extent consistent with section 802 of this  
14 act:

15 (a) Any use, sale, display, performance, or transfer of the copy or  
16 information it contains, or any failure to comply with a contractual  
17 use term, is a breach of contract. The licensee shall pay the licensor  
18 the reasonable value of any use. However, use for a limited time  
19 within contractual use terms is not a breach, and is not an acceptance  
20 under section 609(1)(e) of this act, if it:

21 (i) Occurs after the tendering party is seasonably notified of  
22 refusal;

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

25 (iii) Is not contrary to instructions concerning disposition of the  
26 copy received from the party in breach.

27 (b) A party that refuses a copy shall:

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

32 (ii) Follow reasonable instructions of the tendering party for  
33 returning or delivering copies, access material, and documentation, but  
34 instructions are not reasonable if the tendering party does not arrange  
35 for payment of or reimbursement for reasonable expenses of complying  
36 with the instructions.

37 (c) If the tendering party does not give instructions within a  
38 reasonable time after being notified of refusal, the refusing party, in

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

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

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

11 NEW SECTION. **Sec. 707.** COPY: REVOCATION OF ACCEPTANCE. (1) A  
12 party that accepts a nonconforming tender of a copy may revoke  
13 acceptance only if the nonconformity is a material breach of contract  
14 and the party accepted it:

15 (a) On the reasonable assumption that the nonconformity would be  
16 cured, and the nonconformity was not seasonably cured;

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

19 (c) Without discovery of the nonconformity, if acceptance was  
20 reasonably induced either by the other party's assurances or by the  
21 difficulty of discovery before acceptance.

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

24 (3) Revocation of acceptance of a copy is precluded if:

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

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

31 (c) The party attempting to revoke received a substantial benefit  
32 or value from the information, and the benefit or value cannot be  
33 returned.

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

37 **SUBPART C. REPUDIATION AND ASSURANCES**

1        NEW SECTION.    **Sec. 708.**    ADEQUATE ASSURANCE OF PERFORMANCE.    (1) A  
2 contract imposes an obligation on each party not to impair the other's  
3 expectation of receiving due performance.    If reasonable grounds for  
4 insecurity arise with respect to the performance of either party, the  
5 aggrieved party may:

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

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

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

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

17        (4) After receipt of a justified demand under subsection (1) of  
18 this section, failure, within a reasonable time not exceeding thirty  
19 days, to provide assurance of due performance which is adequate under  
20 the circumstances of the particular case is a repudiation of the  
21 contract under section 709 of this act.

22        NEW SECTION.    **Sec. 709.**    ANTICIPATORY REPUDIATION.    (1) If a party  
23 to a contract repudiates a performance not yet due and the loss of  
24 performance will substantially impair the value of the contract to the  
25 other party, the aggrieved party may:

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

30        (b) In either case, suspend its own performance or proceed in  
31 accordance with section 812 or 813 of this act, as applicable.

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

36        NEW SECTION.    **Sec. 710.**    RETRACTION OF ANTICIPATORY REPUDIATION.

37        (1) A repudiating party may retract its repudiation until its next

1 performance is due unless the aggrieved party, after the repudiation,  
2 has canceled the contract, materially changed its position, or  
3 otherwise indicated that it considers the repudiation final.

4 (2) A retraction may be by any method that clearly indicates to the  
5 aggrieved party that the repudiating party intends to perform the  
6 contract. However, a retraction must contain any assurance justifiably  
7 demanded under section 708 of this act.

8 (3) Retraction restores a repudiating party's rights under the  
9 contract with due excuse and allowance to the aggrieved party for any  
10 delay caused by the repudiation.

11 **PART 8**  
12 **REMEDIES**

13 **SUBPART A. GENERAL**

14 NEW SECTION. **Sec. 801.** REMEDIES IN GENERAL. (1) The remedies  
15 provided in this chapter are cumulative, but a party may not recover  
16 more than once for the same loss.

17 (2) Except as otherwise provided in sections 803 and 804 of this  
18 act, if a party is in breach of contract, whether or not the breach is  
19 material, the aggrieved party has the remedies provided in the  
20 agreement or this chapter, but the aggrieved party shall continue to  
21 comply with any restrictions in contractual use terms with respect to  
22 information or copies received from the other party and the contractual  
23 use terms do not apply to information or copies properly received or  
24 obtained from another source.

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

28 NEW SECTION. **Sec. 802.** CANCELLATION. (1) An aggrieved party may  
29 cancel a contract if there is a material breach that has not been cured  
30 or waived or the agreement allows cancellation for the breach.

31 (2) Cancellation is not effective until the canceling party gives  
32 notice of cancellation to the party in breach, unless a delay required  
33 to notify the party would cause or threaten material harm or loss to  
34 the aggrieved party. The notification may be in any form reasonable

1 under the circumstances. However, in an access contract, a party may  
2 cancel rights of access without notice.

3 (3) On cancellation, the following rules apply:

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

7 (i) A party that has rightfully refused a copy shall comply with  
8 section 706(2) of this act as to the refused copy.

9 (ii) A party in breach of contract which would be subject to an  
10 obligation to deliver under section 618 of this act, shall deliver all  
11 information, documentation, materials, and copies to the other party or  
12 hold them with reasonable care for a reasonable time for disposal at  
13 that party's instructions. The party in breach of contract shall  
14 follow any reasonable instructions received from the other party.

15 (iii) Except as otherwise provided in (a)(i) and (ii) of this  
16 subsection, the party shall comply with section 618 of this act.

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

19 (i) Any right based on previous breach or performance; and

20 (ii) The rights, duties, and remedies described in section 616(2)  
21 of this act.

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

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

29 (i) Is within contractual use terms;

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

32 (iii) Is not contrary to instructions received from the party in  
33 breach concerning disposition of them.

34 (e) The licensee shall pay the licensor the reasonable value of any  
35 use after cancellation permitted under (d) of this subsection.

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



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

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

7 NEW SECTION. **Sec. 803.** CONTRACTUAL MODIFICATION OF REMEDY. (1)  
8 Except as otherwise provided in this section and in section 804 of this  
9 act:

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

17 (b) Resort to a contractual remedy is optional unless the remedy is  
18 expressly agreed to be exclusive, in which case it is the sole remedy.

19 (2) Subject to subsection (3) of this section, if performance of an  
20 exclusive or limited remedy causes the remedy to fail of its essential  
21 purpose, the aggrieved party may pursue other remedies under this  
22 chapter.

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

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

34 NEW SECTION. **Sec. 804.** LIQUIDATION OF DAMAGES. (1) Damages for  
35 breach of contract by either party may be liquidated by agreement in an  
36 amount that is reasonable in light of:

37 (a) The loss anticipated at the time of contracting;

1 (b) The actual loss; or  
2 (c) The actual or anticipated difficulties of proving loss in the  
3 event of breach.

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

7 (3) If a party justifiably withholds delivery of copies because of  
8 the other party's breach of contract, the party in breach is entitled  
9 to restitution for any amount by which the sum of the payments it made  
10 for the copies exceeds the amount of the liquidated damages payable to  
11 the aggrieved party in accordance with subsection (1) of this section.  
12 The right to restitution is subject to offset to the extent that the  
13 aggrieved party establishes:

14 (a) A right to recover damages other than under subsection (1) of  
15 this section; and

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

18 (4) A term that does not liquidate damages, but that limits damages  
19 available to the aggrieved party, must be evaluated under section 803  
20 of this act.

21 NEW SECTION. **Sec. 805.** LIMITATION OF ACTIONS. (1) Except as  
22 otherwise provided in subsection (2) of this section, an action for  
23 breach of contract must be commenced within the later of four years  
24 after the right of action accrues or one year after the breach was or  
25 should have been discovered, but not later than five years after the  
26 right of action accrues.

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

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

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

33 (3) Except as otherwise provided in subsection (4) of this section,  
34 a right of action accrues when the act or omission constituting a  
35 breach of contract occurs, even if the aggrieved party did not know of  
36 the breach. A right of action for breach of warranty accrues when  
37 tender of delivery of a copy pursuant to section 606 of this act, or  
38 access to the information, occurs. However, if the warranty expressly

1 extends to future performance of the information or a copy, the right  
2 of action accrues when the performance fails to conform to the  
3 warranty, but not later than the date the warranty expires.

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

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

10 (i) Infringement or misappropriation; or

11 (ii) Libel, slander, or the like;

12 (b) A breach of contract involving a party's disclosure or misuse  
13 of confidential information; or

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

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

23 (6) This section does not alter the law on tolling of the statute  
24 of limitations and does not apply to a right of action that accrued  
25 before the effective date of this act.

26 NEW SECTION. **Sec. 806.** REMEDIES FOR FRAUD. Remedies for material  
27 misrepresentation or fraud include all remedies available under this  
28 chapter for nonfraudulent breach of contract.

29 **SUBPART B. DAMAGES**

30 NEW SECTION. **Sec. 807.** MEASUREMENT OF DAMAGES IN GENERAL. (1)  
31 Except as otherwise provided in the contract, an aggrieved party may  
32 not recover compensation for that part of a loss which could have been  
33 avoided by taking measures reasonable under the circumstances to avoid  
34 or reduce loss. The burden of establishing a failure of the aggrieved  
35 party to take measures reasonable under the circumstances is on the  
36 party in breach of contract.

1 (2) A party may not recover:

2 (a) Consequential damages for losses resulting from the content of  
3 published informational content unless the agreement expressly so  
4 provides; or

5 (b) Damages that are speculative.

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

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

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

23 NEW SECTION. **Sec. 808.** LICENSOR'S DAMAGES. (1) In this section,  
24 "substitute transaction" means a transaction by the licensor which  
25 would not have been possible except for the licensee's breach and which  
26 transaction is for the same information or informational rights with  
27 the same contractual use terms as the transaction to which the  
28 licensee's breach applies.

29 (2) Except as otherwise provided in section 807 of this act, a  
30 breach of contract by a licensee entitles the licensor to recover the  
31 following compensation for losses resulting in the ordinary course from  
32 the breach, less expenses avoided as a result of the breach, to the  
33 extent not otherwise accounted for under this subsection:

34 (a) Damages measured in any combination of the following ways but  
35 not to exceed the contract fee and the market value of other  
36 consideration required under the contract for the performance that was  
37 the subject of the breach:

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

3 (A) Any performance accepted by the licensee; and

4 (B) Any performance to which section 604 of this act applies;

5 (ii) For performances not governed by (a)(i) of this subsection, if  
6 the licensee repudiated or wrongfully refused the performance or the  
7 licensor rightfully canceled and the breach makes possible a substitute  
8 transaction, the amount of loss as determined by contract fees and the  
9 market value of other consideration required under the contract for the  
10 performance less:

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

15 (B) The market value of a commercially reasonable hypothetical  
16 substitute transaction;

17 (iii) For performances not governed by (a)(i) of this subsection,  
18 if the breach does not make possible a substitute transaction, lost  
19 profit, including reasonable overhead, that the licensor would have  
20 realized on acceptance and full payment for performance that was not  
21 delivered to the licensee because of the licensee's breach; or

22 (iv) Damages calculated in any reasonable manner; and

23 (b) Consequential and incidental damages.

24 NEW SECTION. **Sec. 809.** LICENSEE'S DAMAGES. (1) Subject to  
25 subsection (2) of this section and except as otherwise provided in  
26 section 807 of this act, a breach of contract by a licensor entitles  
27 the licensee to recover the following compensation for losses resulting  
28 in the ordinary course from the breach or, if appropriate, as to the  
29 whole contract, less expenses avoided as a result of the breach to the  
30 extent not otherwise accounted for under this section:

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

35 (i) With respect to performance that has been accepted and the  
36 acceptance not rightfully revoked, the value of the performance  
37 required less the value of the performance accepted as of the time and  
38 place of acceptance;

1 (ii) With respect to performance that has not been rendered or that  
2 was rightfully refused or acceptance of which was rightfully revoked:

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

6 (B) The market value of the performance less the contract fee for  
7 that performance; or

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

13 (iii) Damages calculated in any reasonable manner; and

14 (b) Incidental and consequential damages.

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

19 NEW SECTION. **Sec. 810.** RECOUPMENT. (1) Except as otherwise  
20 provided in subsection (2) of this section, an aggrieved party, upon  
21 notifying the party in breach of contract of its intention to do so,  
22 may deduct all or any part of the damages resulting from the breach  
23 from any payments still due under the same contract.

24 (2) If a breach of contract is not material with reference to the  
25 particular performance, an aggrieved party may exercise its rights  
26 under subsection (1) of this section only if the agreement does not  
27 require further affirmative performance by the other party and the  
28 amount of damages deducted can be readily liquidated under the  
29 agreement.

### 30 **SUBPART C. REMEDIES RELATED TO PERFORMANCE**

31 NEW SECTION. **Sec. 811.** SPECIFIC PERFORMANCE. (1) Specific  
32 performance may be ordered:

33 (a) If the agreement provides for that remedy, other than an  
34 obligation for the payment of money;

35 (b) If the contract was not for personal services and the agreed  
36 performance is unique; or

1 (c) In other proper circumstances.

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

6 NEW SECTION. Sec. 812. COMPLETING PERFORMANCE. (1) On breach of  
7 contract by a licensee, the licensor may:

8 (a) Identify to the contract any conforming copy not already  
9 identified if, at the time the licensor learned of the breach, the copy  
10 was in its possession;

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

16 (c) Pursue any remedy for breach that has not been waived.

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

21 NEW SECTION. Sec. 813. CONTINUING USE. On breach of contract by  
22 a licensor, the following rules apply:

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

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

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

34 NEW SECTION. Sec. 814. DISCONTINUING ACCESS. On material breach  
35 of an access contract or if the agreement so provides, a party may  
36 discontinue all contractual rights of access of the party in breach and

1 direct any person that is assisting the performance of the contract to  
2 discontinue its performance.

3 NEW SECTION. **Sec. 815.** RIGHT TO POSSESSION AND TO PREVENT USE.

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

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

9 (b) To prevent the continued exercise of contractual and  
10 informational rights in the licensed information under the license.

11 (2) Except as otherwise provided in section 814 of this act, a  
12 licensor may exercise its rights under subsection (1) of this section  
13 without judicial process only if this can be done:

14 (a) Without a breach of the peace;

15 (b) Without a foreseeable risk of personal injury or significant  
16 physical damage to information or property other than the licensed  
17 information; and

18 (c) In accordance with section 816 of this act.

19 (3) In a judicial proceeding, the court may enjoin a licensee in  
20 breach of contract from continued use of the information and  
21 informational rights and may order the licensor or a judicial officer  
22 to take the steps described in section 618 of this act.

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

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

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

34 NEW SECTION. **Sec. 816.** LIMITATIONS ON ELECTRONIC SELF-HELP. (1)

35 In this section, "electronic self-help" means the use of electronic  
36 means to exercise a licensor's rights under section 815(2) of this act.



1 (2) On cancellation of a license, electronic self-help is not  
2 permitted, except as provided in this section. Electronic self-help is  
3 prohibited in mass-market transactions.

4 (3) If the parties agree to permit electronic self-help, a licensee  
5 shall separately manifest assent to a term authorizing use of  
6 electronic self-help. The term must:

7 (a) Provide for notice of exercise as provided in subsection (4) of  
8 this section;

9 (b) State the name of the person designated by the licensee to  
10 which notice of exercise must be given and the manner in which notice  
11 must be given and place to which notice must be sent to that person;  
12 and

13 (c) Provide a simple procedure for the licensee to change the  
14 designated person or place.

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

18 (a) That the licensor intends to resort to electronic self-help as  
19 a remedy on or after fifteen days following receipt by the licensee of  
20 the notice;

21 (b) The nature of the claimed breach that entitles the licensor to  
22 resort to self-help; and

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

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

30 (a) Within the period specified in subsection (4)(a) of this  
31 section, the licensee gives notice to the licensor's designated person  
32 describing in good faith the general nature and magnitude of damages;

33 (b) The licensor has reason to know the damages of the type  
34 described in subsection (6) of this section may result from the  
35 wrongful use of electronic self-help; or

36 (c) The licensor does not provide the notice required in subsection  
37 (4) of this section.

38 (6) Even if the licensor complies with subsections (3) and (4) of  
39 this section, electronic self-help may not be used if the licensor has

1 reason to know that its use will result in substantial injury or harm  
2 to the public health or safety or grave harm to the public interest  
3 substantially affecting third persons not involved in the dispute.

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

10 (a) Grave harm of the kinds stated in subsection (6) of this  
11 section, or the threat thereof, whether or not the licensor has reason  
12 to know of those circumstances;

13 (b) Irreparable harm or threat of irreparable harm to the licensee  
14 or licensor;

15 (c) That the party seeking the relief is more likely than not to  
16 succeed under its claim when it is finally adjudicated;

17 (d) That all of the conditions to entitle a person to the relief  
18 under the laws of this state have been fulfilled; and

19 (e) That the party that may be adversely affected is adequately  
20 protected against loss, including a loss because of misappropriation or  
21 misuse of computer information, that it may suffer because the relief  
22 is granted under this chapter.

23 (8) Before breach of contract, rights or obligations under this  
24 section may not be waived or varied by an agreement, but the parties  
25 may prohibit use of electronic self-help, and the parties, in the term  
26 referred to in subsection (3) of this section, may specify additional  
27 provisions more favorable to the licensee.

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

31 **PART 9**

32 **MISCELLANEOUS PROVISIONS**

33 NEW SECTION. **Sec. 901.** SEVERABILITY. If any provision of this  
34 chapter or its application to any person or circumstances is held  
35 invalid, the invalidity does not affect other provisions or  
36 applications of this chapter which can be given effect without the

1 invalid provision or application, and to this end the provisions of  
2 this chapter are severable.

3 NEW SECTION. **Sec. 902.** PREVIOUS RIGHTS AND TRANSACTIONS.  
4 Contracts that are enforceable and rights of action that accrue before  
5 the effective date of this act are governed by the law then in effect  
6 unless the parties agree to be governed by this chapter.

7 **PART 10**

8 **UNIFORM COMMERCIAL CODE REVISIONS**

9 NEW SECTION. **Sec. 1001.** A new section is added to Article 62A.1  
10 RCW to read as follows:

11 CERTAIN COMPUTER INFORMATION TRANSACTIONS EXCLUDED FROM THIS  
12 ARTICLE. This Article does not apply to a transaction that is covered  
13 by chapter 63.-- RCW (sections 101 through 902 of this act) as provided  
14 in section 103 or 104 of this act.

15 **Sec. 1002.** RCW 62A.1-107 and 1965 ex.s. c 157 s 1-107 are each  
16 amended to read as follows:

17 WAIVER OR RENUNCIATION OF CLAIM OR RIGHT AFTER BREACH. Any claim  
18 or right arising out of an alleged breach can be discharged in whole or  
19 in part without consideration by a ((written)) waiver or renunciation  
20 ((signed)) authenticated and delivered by the aggrieved party in a  
21 record.

22 **Sec. 1003.** RCW 62A.1-201 and 2001 c 32 s 9 are each amended to  
23 read as follows:

24 GENERAL DEFINITIONS. Subject to additional definitions contained  
25 in the subsequent Articles of this Title which are applicable to  
26 specific Articles or Parts thereof, and unless the context otherwise  
27 requires, in this Title:

28 (1) "Action" in the sense of a judicial proceeding includes  
29 recoupment, counterclaim, set-off, suit in equity and any other  
30 proceedings in which rights are determined.

31 (2) "Aggrieved party" means a party entitled to resort to a remedy.

32 (3) "Agreement" means the bargain of the parties in fact as found  
33 in their language or by implication from other circumstances including  
34 course of dealing or usage of trade or course of performance as

1 provided in this Title (RCW 62A.1-205, RCW 62A.2-208, and RCW  
2 62A.2A-207). Whether an agreement has legal consequences is determined  
3 by the provisions of this Title, if applicable; otherwise by the law of  
4 contracts (RCW 62A.1-103). (Compare "Contract".)

5 (4) "Authenticate" means:

6 (a) To sign; or

7 (b) With the intent to sign a record, otherwise to execute or adopt  
8 an electronic symbol, sound, message, or process referring to, attached  
9 to, included in, or logically associated or linked with, that record.

10 (5) "Bank" means any person engaged in the business of banking.

11 ((+5)) (6) "Bearer" means the person in possession of an  
12 instrument, document of title, or certificated security payable to  
13 bearer or indorsed in blank.

14 ((+6)) (7) "Bill of lading" means a document evidencing the  
15 receipt of goods for shipment issued by a person engaged in the  
16 business of transporting or forwarding goods, and includes an airbill.  
17 "Airbill" means a document serving for air transportation as a bill of  
18 lading does for marine or rail transportation, and includes an air  
19 consignment note or air waybill.

20 ((+7)) (8) "Branch" includes a separately incorporated foreign  
21 branch of a bank.

22 ((+8)) (9) "Burden of establishing" a fact means the burden of  
23 persuading the triers of fact that the existence of the fact is more  
24 probable than its non-existence.

25 ((+9)) (10) "Buyer in ordinary course of business" means a person  
26 that buys goods in good faith, without knowledge that the sale violates  
27 the rights of another person in the goods, and in the ordinary course  
28 from a person, other than a pawnbroker, in the business of selling  
29 goods of that kind. A person buys goods in the ordinary course if the  
30 sale to the person comports with the usual or customary practices in  
31 the kind of business in which the seller is engaged or with the  
32 seller's own usual or customary practices. A person that sells oil,  
33 gas, or other minerals at the wellhead or minehead is a person in the  
34 business of selling goods of that kind. A buyer in ordinary course of  
35 business may buy for cash, by exchange of other property, or on secured  
36 or unsecured credit, and may acquire goods or documents of title under  
37 a pre-existing contract for sale. Only a buyer that takes possession  
38 of the goods or has a right to recover the goods from the seller under  
39 Article 62A.2 RCW may be a buyer in ordinary course of business. A

1 person that acquires goods in a transfer in bulk or as security for or  
2 in total or partial satisfaction of a money debt is not a buyer in  
3 ordinary course of business.

4 ~~((10))~~ (11) "Conspicuous": A term or clause is conspicuous when  
5 it is so written that a reasonable person against whom it is to operate  
6 ought to have noticed it. A printed heading in capitals (as: NON-  
7 NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a  
8 form is "conspicuous" if it is in larger or other contrasting type or  
9 color. But in a telegram any stated term is "conspicuous". Whether a  
10 term or clause is "conspicuous" or not is for decision by the court.

11 ~~((11))~~ (12) "Contract" means the total legal obligation which  
12 results from the parties' agreement as affected by this Title and any  
13 other applicable rules of law. (Compare "Agreement".)

14 ~~((12))~~ (13) "Creditor" includes a general creditor, a secured  
15 creditor, a lien creditor and any representative of creditors,  
16 including an assignee for the benefit of creditors, a trustee in  
17 bankruptcy, a receiver in equity and an executor or administrator of an  
18 insolvent debtor's or assignor's estate.

19 ~~((13))~~ (14) "Defendant" includes a person in the position of  
20 defendant in a cross-action or counterclaim.

21 ~~((14))~~ (15) "Delivery" with respect to instruments, documents of  
22 title, chattel paper, or certificated securities means voluntary  
23 transfer of possession.

24 ~~((15))~~ (16) "Document of title" includes bill of lading, dock  
25 warrant, dock receipt, warehouse receipt or order for the delivery of  
26 goods, and also any other document which in the regular course of  
27 business or financing is treated as adequately evidencing that the  
28 person in possession of it is entitled to receive, hold and dispose of  
29 the document and the goods it covers. To be a document of title a  
30 document must purport to be issued by or addressed to a bailee and  
31 purport to cover goods in the bailee's possession which are either  
32 identified or are fungible portions of an identified mass.

33 ~~((16))~~ (17) "Fault" means wrongful act, omission or breach.

34 ~~((17))~~ (18) "Fungible" with respect to goods or securities means  
35 goods or securities of which any unit is, by nature or usage of trade,  
36 the equivalent of any other like unit. Goods which are not fungible  
37 shall be deemed fungible for the purposes of this Title to the extent  
38 that under a particular agreement or document unlike units are treated  
39 as equivalents.

1       (~~(18)~~) (19) "Genuine" means free of forgery or counterfeiting.

2       (~~(19)~~) (20) "Good faith" means honesty in fact in the conduct or  
3 transaction concerned.

4       (~~(20)~~) (21) "Holder" with respect to a negotiable instrument,  
5 means the person in possession if the instrument is payable to bearer  
6 or, in the case of an instrument payable to an identified person, if  
7 the identified person is in possession. "Holder" with respect to a  
8 document of title means the person in possession if the goods are  
9 deliverable to bearer or to the order of the person in possession.

10       (~~(21)~~) (22) To "honor" is to pay or to accept and pay, or where  
11 a credit so engages to purchase or discount a draft complying with the  
12 terms of the credit.

13       (~~(22)~~) (23) "Insolvency proceedings" includes any assignment for  
14 the benefit of creditors or other proceedings intended to liquidate or  
15 rehabilitate the estate of the person involved.

16       (~~(23)~~) (24) A person is "insolvent" who either has ceased to pay  
17 his or her debts in the ordinary course of business or cannot pay his  
18 or her debts as they become due or is insolvent within the meaning of  
19 the federal bankruptcy law.

20       (~~(24)~~) (25) "Money" means a medium of exchange authorized or  
21 adopted by a domestic or foreign government and includes a monetary  
22 unit of account established by an intergovernmental organization or by  
23 agreement between two or more nations.

24       (~~(25)~~) (26) A person has "notice" of a fact when

25       (a) he or she has actual knowledge of it; or

26       (b) he or she has received a notice or notification of it; or

27       (c) from all the facts and circumstances known to him or her at the  
28 time in question he or she has reason to know that it exists.

29 A person "knows" or has "knowledge" of a fact when he or she has actual  
30 knowledge of it. "Discover" or "learn" or a word or phrase of similar  
31 import refers to knowledge rather than to reason to know. The time and  
32 circumstances under which a notice or notification may cease to be  
33 effective are not determined by this Title.

34       (~~(26)~~) (27) A person "notifies" or "gives" a notice or  
35 notification to another by taking such steps as may be reasonably  
36 required to inform the other in ordinary course whether or not such  
37 other actually comes to know of it. A person "receives" a notice or  
38 notification when

39       (a) it comes to his or her attention; or

1 (b) it is duly delivered at the place of business through which the  
2 contract was made or at any other place held out by him or her as the  
3 place for receipt of such communications.

4 (~~(27)~~) (28) Notice, knowledge or a notice or notification  
5 received by an organization is effective for a particular transaction  
6 from the time when it is brought to the attention of the individual  
7 conducting that transaction, and in any event from the time when it  
8 would have been brought to his or her attention if the organization had  
9 exercised due diligence. An organization exercises due diligence if it  
10 maintains reasonable routines for communicating significant information  
11 to the person conducting the transaction and there is reasonable  
12 compliance with the routines. Due diligence does not require an  
13 individual acting for the organization to communicate information  
14 unless such communication is part of his or her regular duties or  
15 unless he or she has reason to know of the transaction and that the  
16 transaction would be materially affected by the information.

17 (~~(28)~~) (29) "Organization" includes a corporation, government or  
18 governmental subdivision or agency, business trust, estate, trust,  
19 partnership or association, two or more persons having a joint or  
20 common interest, or any other legal or commercial entity.

21 (~~(29)~~) (30) "Party", as distinct from "third party", means a  
22 person who has engaged in a transaction or made an agreement within  
23 this Title.

24 (~~(30)~~) (31) "Person" includes an individual or an organization  
25 (See RCW 62A.1-102).

26 (~~(31)~~) (32) "Presumption" or "presumed" means that the trier of  
27 fact must find the existence of the fact presumed unless and until  
28 evidence is introduced which would support a finding of its  
29 nonexistence.

30 (~~(32)~~) (33) "Purchase" includes taking by sale, discount,  
31 negotiation, mortgage, pledge, lien, security interest, issue or re-  
32 issue, gift or any other voluntary transaction creating an interest in  
33 property.

34 (~~(33)~~) (34) "Purchaser" means a person who takes by purchase.

35 (~~(34)~~) (35) "Record" means information that is inscribed on a  
36 tangible medium or that is stored in an electronic or other medium and  
37 is retrievable in perceivable form.

38 (36) "Remedy" means any remedial right to which an aggrieved party  
39 is entitled with or without resort to a tribunal.

1       (~~(35)~~) (37) "Representative" includes an agent, an officer of a  
2 corporation or association, and a trustee, executor or administrator of  
3 an estate, or any other person empowered to act for another.

4       (~~(36)~~) (38) "Rights" includes remedies.

5       (~~(37)~~) (39) "Security interest" means an interest in personal  
6 property or fixtures which secures payment or performance of an  
7 obligation, except for lease-purchase agreements under chapter 63.19  
8 RCW. The term also includes any interest of a consignor and a buyer of  
9 accounts, chattel paper, a payment intangible, or a promissory note in  
10 a transaction that is subject to Article 9A. The special property  
11 interest of a buyer of goods on identification of such goods to a  
12 contract for sale under RCW 62A.2-401 is not a "security interest", but  
13 a buyer may also acquire a "security interest" by complying with  
14 Article 9A. Except as otherwise provided in RCW 62A.2-505, the right  
15 of a seller or lessor of goods under Article 2 or 2A to retain or  
16 acquire possession of the goods is not a "security interest," but a  
17 seller or lessor may also acquire a "security interest" by complying  
18 with Article 9A. The retention or reservation of title by a seller of  
19 goods notwithstanding shipment or delivery to the buyer (RCW 62A.2-401)  
20 is limited in effect to a reservation of a "security interest."

21       Whether a transaction creates a lease or security interest is  
22 determined by the facts of each case. However, a transaction creates  
23 a security interest if the consideration the lessee is to pay the  
24 lessor for the right to possession and use of the goods is an  
25 obligation for the term of the lease not subject to termination by the  
26 lessee, and:

27       (a) The original term of the lease is equal to or greater than the  
28 remaining economic life of the goods;

29       (b) The lessee is bound to renew the lease for the remaining  
30 economic life of the goods or is bound to become the owner of the  
31 goods;

32       (c) The lessee has an option to renew the lease for the remaining  
33 economic life of the goods for no additional consideration or nominal  
34 additional consideration upon compliance with the lease agreement; or

35       (d) The lessee has an option to become the owner of the goods for  
36 no additional consideration or nominal additional consideration upon  
37 compliance with the lease agreement.

38       A transaction does not create a security interest merely because it  
39 provides that:



1 (a) The present value of the consideration the lessee is obligated  
2 to pay the lessor for the right to possession and use of the goods is  
3 substantially equal to or is greater than the fair market value of the  
4 goods at the time the lease is entered into;

5 (b) The lessee assumes risk of loss of the goods, or agrees to pay  
6 taxes, insurance, filing, recording, or registration fees, or service  
7 or maintenance costs with respect to the goods;

8 (c) The lessee has an option to renew the lease or to become the  
9 owner of the goods;

10 (d) The lessee has an option to renew the lease for a fixed rent  
11 that is equal to or greater than the reasonably predictable fair market  
12 rent for the use of the goods for the term of the renewal at the time  
13 the option is to be performed;

14 (e) The lessee has an option to become the owner of the goods for  
15 a fixed price that is equal to or greater than the reasonably  
16 predictable fair market value of the goods at the time the option is to  
17 be performed; or

18 (f) The amount of rental payments may or will be increased or  
19 decreased by reference to the amount realized by the lessor upon sale  
20 or disposition of the goods.

21 For purposes of this subsection (~~(+37)~~) (39):

22 (a) Additional consideration is not nominal if (i) when the option  
23 to renew the lease is granted to the lessee the rent is stated to be  
24 the fair market rent for the use of the goods for the term of the  
25 renewal determined at the time the option is to be performed, or (ii)  
26 when the option to become the owner of the goods is granted to the  
27 lessee the price is stated to be the fair market value of the goods  
28 determined at the time the option is to be performed. Additional  
29 consideration is nominal if it is less than the lessee's reasonably  
30 predictable cost of performing under the lease agreement if the option  
31 is not exercised;

32 (b) "Reasonably predictable" and "remaining economic life of the  
33 goods" are to be determined with reference to the facts and  
34 circumstances at the time the transaction is entered into; and

35 (c) "Present value" means the amount as of a date certain of one or  
36 more sums payable in the future, discounted to the date certain. The  
37 discount is determined by the interest rate specified by the parties if  
38 the rate is not manifestly unreasonable at the time the transaction is  
39 entered into; otherwise, the discount is determined by a commercially

1 reasonable rate that takes into account the facts and circumstances of  
2 each case at the time the transaction was entered into.

3 ~~((+38+))~~ (40) "Send" in connection with any ~~((writing))~~ record or  
4 notice means to deposit in the mail or deliver for transmission by any  
5 other usual means of communication with postage or cost of transmission  
6 provided for and properly addressed and in the case of an instrument to  
7 an address specified thereon or otherwise agreed, or if there be none  
8 to any address reasonable under the circumstances. The receipt of any  
9 ~~((writing))~~ record or notice within the time at which it would have  
10 arrived if properly sent has the effect of a proper sending.

11 ~~((+39+))~~ (41) "Signed" includes any symbol executed or adopted by  
12 a party with present intention to authenticate a ~~((writing))~~ record.

13 ~~((+40+))~~ (42) "Surety" includes guarantor.

14 ~~((+41+))~~ (43) "Telegram" includes a message transmitted by radio,  
15 teletype, cable, any mechanical method of transmission, or the like.

16 ~~((+42+))~~ (44) "Term" means that portion of an agreement which  
17 relates to a particular matter.

18 ~~((+43+))~~ (45) "Unauthorized" signature means one made without  
19 actual, implied or apparent authority and includes a forgery.

20 ~~((+44+))~~ (46) "Value". Except as otherwise provided with respect  
21 to negotiable instruments and bank collections (RCW 62A.3-303, RCW  
22 62A.4-210, and RCW 62A.4-211) a person gives "value" for rights if he  
23 or she acquires them

24 (a) in return for a binding commitment to extend credit or for the  
25 extension of immediately available credit whether or not drawn upon and  
26 whether or not a charge-back is provided for in the event of  
27 difficulties in collection; or

28 (b) as security for or in total or partial satisfaction of a  
29 preexisting claim; or

30 (c) by accepting delivery pursuant to a pre-existing contract for  
31 purchase; or

32 (d) generally, in return for any consideration sufficient to  
33 support a simple contract.

34 ~~((+45+))~~ (47) "Warehouse receipt" means a receipt issued by a  
35 person engaged in the business of storing goods for hire.

36 ~~((+46+))~~ (48) "Written" or "writing" includes printing, typewriting  
37 or any other intentional reduction to tangible form.

1       **Sec. 1004.** RCW 62A.1-205 and 1965 ex.s. c 157 s 1-205 are each  
2 amended to read as follows:

3       COURSE OF DEALING AND USAGE OF TRADE. (1) A course of dealing is  
4 a sequence of previous conduct between the parties to a particular  
5 transaction which is fairly to be regarded as establishing a common  
6 basis of understanding for interpreting their expressions and other  
7 conduct.

8       (2) A usage of trade is any practice or method of dealing having  
9 such regularity of observance in a place, vocation or trade as to  
10 justify an expectation that it will be observed with respect to the  
11 transaction in question. The existence and scope of such a usage are  
12 to be proved as facts. If it is established that such a usage is  
13 embodied in a ((written)) trade code or similar ((writing)) record the  
14 interpretation of the ((writing)) record is for the court.

15       (3) A course of dealing between parties and any usage of trade in  
16 the vocation or trade in which they are engaged or of which they are or  
17 should be aware give particular meaning to and supplement or qualify  
18 terms of an agreement.

19       (4) The express terms of an agreement and an applicable course of  
20 dealing or usage of trade shall be construed wherever reasonable as  
21 consistent with each other; but when such construction is unreasonable  
22 express terms control both course of dealing and usage of trade and  
23 course of dealing controls usage of trade.

24       (5) An applicable usage of trade in the place where any part of  
25 performance is to occur shall be used in interpreting the agreement as  
26 to that part of the performance.

27       (6) Evidence of a relevant usage of trade offered by one party is  
28 not admissible unless and until he or she has given the other party  
29 such notice as the court finds sufficient to prevent unfair surprise to  
30 the latter.

31       **Sec. 1005.** RCW 62A.1-206 and 1995 c 48 s 55 are each amended to  
32 read as follows:

33       STATUTE OF FRAUDS FOR KINDS OF PERSONAL PROPERTY NOT OTHERWISE  
34 COVERED. (1) Except in the cases described in subsection (2) of this  
35 section a contract for the sale of personal property is not enforceable  
36 by way of action or defense beyond five thousand dollars in amount or  
37 value of remedy unless there is some ((writing)) record which indicates  
38 that a contract for sale has been made between the parties at a defined

1 or stated price, reasonably identifies the subject matter, and is  
2 (~~signed~~) authenticated by the party against whom enforcement is  
3 sought or by his or her authorized agent.

4 (2) Subsection (1) of this section does not apply to contracts for  
5 the sale of goods (RCW 62A.2-201) nor of securities (RCW 62A.8-113) nor  
6 to security agreements (RCW (~~62A.9-203~~) 62A.9A-203).

7 **Sec. 1006.** RCW 62A.2-102 and 1965 ex.s. c 157 s 2-102 are each  
8 amended to read as follows:

9 SCOPE; CERTAIN SECURITY, COMPUTER INFORMATION, AND OTHER  
10 TRANSACTIONS EXCLUDED FROM THIS ARTICLE. Unless the context otherwise  
11 requires, this Article applies to transactions in goods; it does not  
12 apply to any transaction which although in the form of an unconditional  
13 contract to sell or present sale is intended to operate only as a  
14 security transaction nor does this Article impair or repeal any statute  
15 regulating sales to consumers, farmers or other specified classes of  
16 buyers. This Article does not apply to a transaction that is covered  
17 by chapter 63.-- RCW (sections 101 through 902 of this act) as provided  
18 in section 103 or 104 of this act.

19 **Sec. 1007.** RCW 62A.2-105 and 1965 ex.s. c 157 s 2-105 are each  
20 amended to read as follows:

21 DEFINITIONS: TRANSFERABILITY; "GOODS"; "FUTURE" GOODS; "LOT";  
22 "COMMERCIAL UNIT". (1) "Goods" means all things (including specially  
23 manufactured goods) which are movable at the time of identification to  
24 the contract for sale other than the money in which the price is to be  
25 paid, investment securities (Article 8) and things in action. "Goods"  
26 also includes the unborn young of animals and growing crops and other  
27 identified things attached to realty as described in the section on  
28 goods to be severed from realty (RCW 62A.2-107). For purposes of this  
29 Article, the term does not include computer information as defined in  
30 chapter 63.-- RCW (sections 101 through 902 of this act), money, the  
31 subject matter of foreign exchange transactions, documents, letters of  
32 credit, letter-of-credit rights, instruments, investment property,  
33 accounts, chattel paper, deposit accounts, or general intangibles.

34 (2) Goods must be both existing and identified before any interest  
35 in them can pass. Goods which are not both existing and identified are  
36 "future" goods. A purported present sale of future goods or of any  
37 interest therein operates as a contract to sell.

1 (3) There may be a sale of a part interest in existing identified  
2 goods.

3 (4) An undivided share in an identified bulk of fungible goods is  
4 sufficiently identified to be sold although the quantity of the bulk is  
5 not determined. Any agreed proportion of such a bulk or any quantity  
6 thereof agreed upon by number, weight or other measure may to the  
7 extent of the seller's interest in the bulk be sold to the buyer who  
8 then becomes an owner in common.

9 (5) "Lot" means a parcel or a single article which is the subject  
10 matter of a separate sale or delivery, whether or not it is sufficient  
11 to perform the contract.

12 (6) "Commercial unit" means such a unit of goods as by commercial  
13 usage is a single whole for purposes of sale and division of which  
14 materially impairs its character or value on the market or in use. A  
15 commercial unit may be a single article (as a machine) or a set of  
16 articles (as a suite of furniture or an assortment of sizes) or a  
17 quantity (as a bale, gross, or carload) or any other unit treated in  
18 use or in the relevant market as a single whole.

19 **Sec. 1008.** RCW 62A.2-201 and 1965 ex.s c 157 s 2-201 are each  
20 amended to read as follows:

21 FORMAL REQUIREMENTS; STATUTE OF FRAUDS. (1) Except as otherwise  
22 provided in this section a contract for the sale of goods for the price  
23 of five hundred dollars or more is not enforceable by way of action or  
24 defense unless there is some ((writing)) record sufficient to indicate  
25 that a contract for sale has been made between the parties and  
26 ((signed)) authenticated by the party against whom enforcement is  
27 sought or by his or her authorized agent or broker. A ((writing))  
28 record is not insufficient because it omits or incorrectly states a  
29 term agreed upon but the contract is not enforceable under this  
30 paragraph beyond the quantity of goods shown in such ((writing))  
31 record.

32 (2) Between merchants if within a reasonable time a ((writing))  
33 record in confirmation of the contract and sufficient against the  
34 sender is received and the party receiving it has reason to know its  
35 contents, it satisfies the requirements of subsection (1) against such  
36 party unless ((written)) notice of objection to its contents is given  
37 in a record within ten days after it is received.

1 (3) A contract which does not satisfy the requirements of  
2 subsection (1) but which is valid in other respects is enforceable

3 (a) if the goods are to be specially manufactured for the buyer and  
4 are not suitable for sale to others in the ordinary course of the  
5 seller's business and the seller, before notice of repudiation is  
6 received and under circumstances which reasonably indicate that the  
7 goods are for the buyer, has made either a substantial beginning of  
8 their manufacture or commitments for their procurement; or

9 (b) if the party against whom enforcement is sought admits in his  
10 or her pleading, testimony or otherwise in court that a contract for  
11 sale was made, but the contract is not enforceable under this provision  
12 beyond the quantity of goods admitted; or

13 (c) with respect to goods for which payment has been made and  
14 accepted or which have been received and accepted (RCW 62A.2-606).

15 **Sec. 1009.** RCW 62A.2-202 and 1965 ex.s. c 157 s 2-202 are each  
16 amended to read as follows:

17 FINAL ((WRITTEN)) EXPRESSION IN A RECORD: PAROL OR EXTRINSIC  
18 EVIDENCE. Terms with respect to which the confirmatory ((memoranda))  
19 records of the parties agree or which are otherwise set forth in a  
20 ((writing)) record intended by the parties as a final expression of  
21 their agreement with respect to such terms as are included therein may  
22 not be contradicted by evidence of any prior agreement or of a  
23 contemporaneous oral agreement but may be explained or supplemented

24 (a) by course of dealing or usage of trade (RCW 62A.1-205) or by  
25 course of performance (RCW 62A.2-208); and

26 (b) by evidence of consistent additional terms unless the court  
27 finds the ((writing)) record to have been intended also as a complete  
28 and exclusive statement of the terms of the agreement.

29 **Sec. 1010.** RCW 62A.2-203 and 1965 ex.s. c 157 s 2-203 are each  
30 amended to read as follows:

31 SEALS INOPERATIVE. The affixing of a seal to a ((writing)) record  
32 evidencing a contract for sale or an offer to buy or sell goods does  
33 not constitute the ((writing)) record a sealed instrument and the law  
34 with respect to sealed instruments does not apply to such contract or  
35 offer.

1       **Sec. 1011.** RCW 62A.2-205 and 1965 ex.s. c 157 s 2-205 are each  
2 amended to read as follows:

3       FIRM OFFERS. An offer by a merchant to buy or sell goods in ((a  
4 ~~signed writing~~)) an authenticated record which by its terms gives  
5 assurance that it will be held open is not revocable, for lack of  
6 consideration, during the time stated or if no time is stated for a  
7 reasonable time, but in no event may such period of irrevocability  
8 exceed three months; but any such term of assurance on a form supplied  
9 by the offeree must be separately ((signed)) authenticated by the  
10 offeror.

11       **Sec. 1012.** RCW 62A.2-207 and 1965 ex.s. c 157 s 2-207 are each  
12 amended to read as follows:

13       ADDITIONAL TERMS IN ACCEPTANCE OR CONFIRMATION. (1) A definite and  
14 seasonable expression of acceptance or a ((written)) confirmation by a  
15 record which is sent within a reasonable time operates as an acceptance  
16 even though it states terms additional to or different from those  
17 offered or agreed upon, unless acceptance is expressly made conditional  
18 on assent to the additional or different terms.

19       (2) The additional terms are to be construed as proposals for  
20 addition to the contract. Between merchants such terms become part of  
21 the contract unless:

22       (a) the offer expressly limits acceptance to the terms of the  
23 offer;

24       (b) they materially alter it; or

25       (c) notification of objection to them has already been given or is  
26 given within a reasonable time after notice of them is received.

27       (3) Conduct by both parties which recognizes the existence of a  
28 contract is sufficient to establish a contract for sale although the  
29 ((writings)) records of the parties do not otherwise establish a  
30 contract. In such case the terms of the particular contract consist of  
31 those terms on which the ((writings)) records of the parties agree,  
32 together with any supplementary terms incorporated under any other  
33 provisions of this Title.

34       **Sec. 1013.** RCW 62A.2-209 and 1965 ex.s. c 157 s 2-209 are each  
35 amended to read as follows:

36       MODIFICATION, RESCISSION AND WAIVER. (1) An agreement modifying a  
37 contract within this Article needs no consideration to be binding.

1       (2) (~~(A signed)~~) An authenticated agreement which excludes  
2 modification or rescission except by (~~(a signed writing)~~) an  
3 authenticated record cannot be otherwise modified or rescinded, but  
4 except as between merchants such a requirement on a form supplied by  
5 the merchant must be separately (~~(signed)~~) authenticated by the other  
6 party.

7       (3) The requirements of the statute of frauds section of this  
8 Article (RCW 62A.2-201) must be satisfied if the contract as modified  
9 is within its provisions.

10       (4) Although an attempt at modification or rescission does not  
11 satisfy the requirements of subsection (2) or (3) it can operate as a  
12 waiver.

13       (5) A party who has made a waiver affecting an executory portion of  
14 the contract may retract the waiver by reasonable notification received  
15 by the other party that strict performance will be required of any term  
16 waived, unless the retraction would be unjust in view of a material  
17 change of position in reliance on the waiver.

18       **Sec. 1014.** RCW 62A.2-316 and 1982 c 199 s 1 are each amended to  
19 read as follows:

20       EXCLUSION OR MODIFICATION OF WARRANTIES. (1) Words or conduct  
21 relevant to the creation of an express warranty and words or conduct  
22 tending to negate or limit warranty shall be construed wherever  
23 reasonable as consistent with each other; but subject to the provisions  
24 of this Article on parol or extrinsic evidence (RCW 62A.2-202) negation  
25 or limitation is inoperative to the extent that such construction is  
26 unreasonable.

27       (2) Subject to subsection (3), to exclude or modify the implied  
28 warranty of merchantability or any part of it the language must mention  
29 merchantability and in case of a (~~(writing)~~) record must be  
30 conspicuous, and to exclude or modify any implied warranty of fitness  
31 the exclusion must be by a (~~(writing)~~) record and conspicuous.  
32 Language to exclude all implied warranties of fitness is sufficient if  
33 it states, for example, that "There are no warranties which extend  
34 beyond the description on the face hereof."

35       (3) Notwithstanding subsection (2)

36       (a) unless the circumstances indicate otherwise, all implied  
37 warranties are excluded by expressions like "as is", "with all faults"  
38 or other language which in common understanding calls the buyer's



1 attention to the exclusion of warranties and makes plain that there is  
2 no implied warranty; and

3 (b) when the buyer before entering into the contract has examined  
4 the goods or the sample or model as fully as he or she desired or has  
5 refused to examine the goods there is no implied warranty with regard  
6 to defects which an examination ought in the circumstances to have  
7 revealed to him or her;

8 (c) an implied warranty can also be excluded or modified by course  
9 of dealing or course of performance or usage of trade; and

10 (d) in sales of livestock, including but not limited to, horses,  
11 mules, cattle, sheep, swine, goats, poultry, and rabbits, there are no  
12 implied warranties as defined in this article that the livestock are  
13 free from sickness or disease: PROVIDED, That the seller has complied  
14 with all state and federal laws and regulations that apply to animal  
15 health and disease, and the seller is not guilty of fraud, deceit or  
16 misrepresentation.

17 (4) Notwithstanding the provisions of subsections (2) and (3) of  
18 this section and the provisions of RCW 62A.2-719, (~~as now or hereafter~~  
19 ~~amended,~~) in any case where goods are purchased primarily for  
20 personal, family or household use and not for commercial or business  
21 use, disclaimers of the warranty of merchantability or fitness for  
22 particular purpose shall not be effective to limit the liability of  
23 merchant sellers except insofar as the disclaimer sets forth with  
24 particularity the qualities and characteristics which are not being  
25 warranted. Remedies for breach of warranty can be limited in  
26 accordance with the provisions of this Article on liquidation or  
27 limitation of damages and on contractual modification of remedy (RCW  
28 62A.2-718 and RCW 62A.2-719).

29 **Sec. 1015.** RCW 62A.2-503 and 1965 ex.s. c 157 s 2-503 are each  
30 amended to read as follows:

31 MANNER OF SELLER'S TENDER OF DELIVERY. (1) Tender of delivery  
32 requires that the seller put and hold conforming goods at the buyer's  
33 disposition and give the buyer any notification reasonably necessary to  
34 enable him or her to take delivery. The manner, time and place for  
35 tender are determined by the agreement and this Article, and in  
36 particular

1 (a) tender must be at a reasonable hour, and if it is of goods they  
2 must be kept available for the period reasonably necessary to enable  
3 the buyer to take possession; but

4 (b) unless otherwise agreed the buyer must furnish facilities  
5 reasonably suited to the receipt of the goods.

6 (2) Where the case is within the next section respecting shipment  
7 tender requires that the seller comply with its provisions.

8 (3) Where the seller is required to deliver at a particular  
9 destination tender requires that he or she comply with subsection (1)  
10 and also in any appropriate case tender documents as described in  
11 subsections (4) and (5) of this section.

12 (4) Where goods are in the possession of a bailee and are to be  
13 delivered without being moved

14 (a) tender requires that the seller either tender a negotiable  
15 document of title covering such goods or procure acknowledgment by the  
16 bailee of the buyer's right to possession of the goods; but

17 (b) tender to the buyer of a non-negotiable document of title or of  
18 a (~~written direction to~~) record directing the bailee to deliver is  
19 sufficient tender unless the buyer seasonably objects, and receipt by  
20 the bailee of notification of the buyer's rights fixes those rights as  
21 against the bailee and all third persons; but risk of loss of the goods  
22 and of any failure by the bailee to honor the non-negotiable document  
23 of title or to obey the direction remains on the seller until the buyer  
24 has had a reasonable time to present the document or direction, and a  
25 refusal by the bailee to honor the document or to obey the direction  
26 defeats the tender.

27 (5) Where the contract requires the seller to deliver documents

28 (a) he or she must tender all such documents in correct form,  
29 except as provided in this Article with respect to bills of lading in  
30 a set (subsection (2) of RCW 62A.2-323); and

31 (b) tender through customary banking channels is sufficient and  
32 dishonor of a draft accompanying the documents constitutes non-  
33 acceptance or rejection.

34 **Sec. 1016.** RCW 62A.2-509 and 1965 ex.s. c 157 s 2-509 are each  
35 amended to read as follows:

36 RISK OF LOSS IN THE ABSENCE OF BREACH. (1) Where the contract  
37 requires or authorizes the seller to ship the goods by carrier

1 (a) if it does not require him or her to deliver them at a  
2 particular destination, the risk of loss passes to the buyer when the  
3 goods are duly delivered to the carrier even though the shipment is  
4 under reservation (RCW 62A.2-505); but

5 (b) if it does require him or her to deliver them at a particular  
6 destination and the goods are there duly tendered while in the  
7 possession of the carrier, the risk of loss passes to the buyer when  
8 the goods are there duly so tendered as to enable the buyer to take  
9 delivery.

10 (2) Where the goods are held by a bailee to be delivered without  
11 being moved, the risk of loss passes to the buyer

12 (a) on his or her receipt of a negotiable document of title  
13 covering the goods; or

14 (b) on acknowledgment by the bailee of the buyer's right to  
15 possession of the goods; or

16 (c) after his or her receipt of a non-negotiable document of title  
17 or other (~~written~~) direction by record to deliver, as provided in  
18 subsection (4)(b) of RCW 62A.2-503.

19 (3) In any case not within subsection (1) or (2), the risk of loss  
20 passes to the buyer on his or her receipt of the goods if the seller is  
21 a merchant; otherwise the risk passes to the buyer on tender of  
22 delivery.

23 (4) The provisions of this section are subject to contrary  
24 agreement of the parties and to the provisions of this Article on sale  
25 on approval (RCW 62A.2-327) and on effect of breach on risk of loss  
26 (RCW 62A.2-510).

27 **Sec. 1017.** RCW 62A.2-605 and 1965 ex.s. c 157 s 2-605 are each  
28 amended to read as follows:

29 WAIVER OF BUYER'S OBJECTIONS BY FAILURE TO PARTICULARIZE. (1) The  
30 buyer's failure to state in connection with rejection a particular  
31 defect which is ascertainable by reasonable inspection precludes him or  
32 her from relying on the unstated defect to justify rejection or to  
33 establish breach

34 (a) where the seller could have cured it if stated seasonably; or

35 (b) between merchants when the seller has after rejection made a  
36 request in (~~writing~~) a record for a full and final (~~written~~)  
37 statement in a record of all defects on which the buyer proposes to  
38 rely.

1 (2) Payment against documents made without reservation of rights  
2 precludes recovery of the payment for defects apparent on the face of  
3 the documents.

4 **Sec. 1018.** RCW 62A.2-606 and 1965 ex.s. c 157 s 2-606 are each  
5 amended to read as follows:

6 WHAT CONSTITUTES ACCEPTANCE OF GOODS. (1) Acceptance of goods  
7 occurs when the buyer

8 (a) after a reasonable opportunity to inspect the goods signifies  
9 to the seller that the goods are conforming or that he or she will take  
10 or retain them in spite of their non-conformity; or

11 (b) fails to make an effective rejection (subsection (1) of RCW  
12 62A.2-602), but such acceptance does not occur until the buyer has had  
13 a reasonable opportunity to inspect them; or

14 (c) does any act inconsistent with the seller's ownership; but if  
15 such act is wrongful as against the seller it is an acceptance only if  
16 ratified by him or her.

17 (2) Acceptance of a part of any commercial unit is acceptance of  
18 that entire unit.

19 **Sec. 1019.** RCW 62A.2-607 and 1965 ex.s. c 157 s 2-607 are each  
20 amended to read as follows:

21 EFFECT OF ACCEPTANCE; NOTICE OF BREACH; BURDEN OF ESTABLISHING  
22 BREACH AFTER ACCEPTANCE; NOTICE OF CLAIM OR LITIGATION TO PERSON  
23 ANSWERABLE OVER. (1) The buyer must pay at the contract rate for any  
24 goods accepted.

25 (2) Acceptance of goods by the buyer precludes rejection of the  
26 goods accepted and if made with knowledge of a non-conformity cannot be  
27 revoked because of it unless the acceptance was on the reasonable  
28 assumption that the non-conformity would be seasonably cured but  
29 acceptance does not of itself impair any other remedy provided by this  
30 Article for non-conformity.

31 (3) Where a tender has been accepted

32 (a) the buyer must within a reasonable time after he or she  
33 discovers or should have discovered any breach notify the seller of  
34 breach or be barred from any remedy; and

35 (b) if the claim is one for infringement or the like (subsection  
36 (3) of RCW 62A.2-312) and the buyer is sued as a result of such a  
37 breach he or she must so notify the seller within a reasonable time

1 after he or she receives notice of the litigation or be barred from any  
2 remedy over for liability established by the litigation.

3 (4) The burden is on the buyer to establish any breach with respect  
4 to the goods accepted.

5 (5) Where the buyer is sued for breach of a warranty or other  
6 obligation for which his or her seller is answerable over

7 (a) he or she may give his or her seller (~~written~~) notice of the  
8 litigation in a record. If the notice states that the seller may come  
9 in and defend and that if the seller does not do so he or she will be  
10 bound in any action against him or her by his or her buyer by any  
11 determination of fact common to the two litigations, then unless the  
12 seller after seasonable receipt of the notice does come in and defend  
13 he or she is so bound.

14 (b) if the claim is one for infringement or the like (subsection  
15 (3) of RCW 62A.2-312) the original seller may demand in (~~writing~~) a  
16 record that his or her buyer turn over to him or her control of the  
17 litigation including settlement or else be barred from any remedy over  
18 and if he or she also agrees to bear all expense and to satisfy any  
19 adverse judgment, then unless the buyer after seasonable receipt of the  
20 demand does turn over control the buyer is so barred.

21 (6) The provisions of subsections (3), (4) and (5) apply to any  
22 obligation of a buyer to hold the seller harmless against infringement  
23 or the like (subsection (3) of RCW 62A.2-312).

24 **Sec. 1020.** RCW 62A.2-609 and 1965 ex.s. c 157 s 2-609 are each  
25 amended to read as follows:

26 RIGHT TO ADEQUATE ASSURANCE OF PERFORMANCE. (1) A contract for  
27 sale imposes an obligation on each party that the other's expectation  
28 of receiving due performance will not be impaired. When reasonable  
29 grounds for insecurity arise with respect to the performance of either  
30 party the other may in (~~writing~~) a record demand adequate assurance  
31 of due performance and until he or she receives such assurance may if  
32 commercially reasonable suspend any performance for which he or she has  
33 not already received the agreed return.

34 (2) Between merchants the reasonableness of grounds for insecurity  
35 and the adequacy of any assurance offered shall be determined according  
36 to commercial standards.

1 (3) Acceptance of any improper delivery or payment does not  
2 prejudice the aggrieved party's right to demand adequate assurance of  
3 future performance.

4 (4) After receipt of a justified demand failure to provide within  
5 a reasonable time not exceeding thirty days such assurance of due  
6 performance as is adequate under the circumstances of the particular  
7 case is a repudiation of the contract.

8 **Sec. 1021.** RCW 62A.2-616 and 1965 ex.s. c 157 s 2-616 are each  
9 amended to read as follows:

10 PROCEDURE ON NOTICE CLAIMING EXCUSE. (1) Where the buyer receives  
11 notification of a material or indefinite delay or an allocation  
12 justified under the preceding section he or she may by (~~written~~)  
13 notification in a record to the seller as to any delivery concerned,  
14 and where the prospective deficiency substantially impairs the value of  
15 the whole contract under the provisions of this Article relating to  
16 breach of installment contracts (RCW 62A.2-612), then also as to the  
17 whole,

18 (a) terminate and thereby discharge any unexecuted portion of the  
19 contract; or

20 (b) modify the contract by agreeing to take his or her available  
21 quota in substitution.

22 (2) If after receipt of such notification from the seller the buyer  
23 fails so to modify the contract within a reasonable time not exceeding  
24 thirty days the contract lapses with respect to any deliveries  
25 affected.

26 **Sec. 1022.** RCW 62A.2-702 and 1981 c 41 s 4 are each amended to  
27 read as follows:

28 SELLER'S REMEDIES ON DISCOVERY OF BUYER'S INSOLVENCY. (1) Where  
29 the seller discovers the buyer to be insolvent he or she may refuse  
30 delivery except for cash including payment for all goods theretofore  
31 delivered under the contract, and stop delivery under this Article (RCW  
32 62A.2-705).

33 (2) Where the seller discovers that the buyer has received goods on  
34 credit while insolvent he or she may reclaim the goods upon demand made  
35 within ten days after the receipt, but if misrepresentation of solvency  
36 has been made to the particular seller in (~~writing~~) a record within  
37 three months before delivery the ten day limitation does not apply.

1 Except as provided in this subsection the seller may not base a right  
2 to reclaim goods on the buyer's fraudulent or innocent  
3 misrepresentation of solvency or of intent to pay.

4 (3) The seller's right to reclaim under subsection (2) is subject  
5 to the rights of a buyer in ordinary course or other good faith  
6 purchaser under this Article (RCW 62A.2-403). Successful reclamation  
7 of goods excludes all other remedies with respect to them.

8 **Sec. 1023.** RCW 62A.2A-102 and 1993 c 230 s 2A-102 are each amended  
9 to read as follows:

10 SCOPE; CERTAIN COMPUTER INFORMATION TRANSACTIONS EXCLUDED FROM THIS  
11 ARTICLE. This Article applies to any transaction, regardless of form,  
12 that creates a lease. This Article does not apply to a transaction  
13 that is covered by chapter 63.-- RCW (sections 101 through 902 of this  
14 act) as provided in section 103 or 104 of this act.

15 **Sec. 1024.** RCW 62A.2A-103 and 2000 c 250 s 9A-808 are each amended  
16 to read as follows:

17 DEFINITIONS AND INDEX OF DEFINITIONS. (1) In this Article unless  
18 the context otherwise requires:

19 (a) "Buyer in ordinary course of business" means a person who in  
20 good faith and without knowledge that the sale to him or her is in  
21 violation of the ownership rights or security interest or leasehold  
22 interest of a third party in the goods buys in ordinary course from a  
23 person in the business of selling goods of that kind but does not  
24 include a pawnbroker. "Buying" may be for cash, or by exchange of  
25 other property, or on secured or unsecured credit, and includes  
26 receiving goods or documents of title under a preexisting contract for  
27 sale but does not include a transfer in bulk or as security for or in  
28 total or partial satisfaction of a money debt.

29 (b) "Cancellation" occurs when either party puts an end to the  
30 lease contract for default by the other party.

31 (c) "Commercial unit" means such a unit of goods as by commercial  
32 usage is a single whole for purposes of lease and division of which  
33 materially impairs its character or value on the market or in use. A  
34 commercial unit may be a single article, as a machine, or a set of  
35 articles, as a suite of furniture or a line of machinery, or a  
36 quantity, as a gross or carload, or any other unit treated in use or in  
37 the relevant market as a single whole.

1 (d) "Conforming" goods or performance under a lease contract means  
2 goods or performance that are in accordance with the obligations under  
3 the lease contract.

4 (e) "Consumer lease" means a lease that a lessor regularly engaged  
5 in the business of leasing or selling makes to a lessee who is an  
6 individual who takes under the lease primarily for a personal, family,  
7 or household purpose, if the total payments to be made under the lease  
8 contract, excluding payments for options to renew or buy, do not exceed  
9 twenty-five thousand dollars.

10 (f) "Fault" means wrongful act, omission, breach, or default.

11 (g) "Finance lease" means a lease with respect to which:

12 (i) The lessor does not select, manufacture, or supply the goods;

13 (ii) The lessor acquires the goods or the right to possession and  
14 use of the goods in connection with the lease; and

15 (iii) Only in the case of a consumer lease, either:

16 (A) The lessee receives a copy of the contract by which the lessor  
17 acquired the goods or the right to possession and use of the goods  
18 before ((~~signing~~)) authenticating the lease contract;

19 (B) The lessee's approval of the contract by which the lessor  
20 acquired the goods or the right to possession and use of the goods is  
21 a condition to effectiveness of the lease contract; or

22 (C) The lessee, before ((~~signing~~)) authenticating the lease  
23 contract, receives an accurate and complete statement designating the  
24 promises and warranties, and any disclaimers of warranties, limitations  
25 or modifications of remedies, or liquidated damages, including those of  
26 a third party, such as the manufacturer of the goods, provided to the  
27 lessor by the person supplying the goods in connection with or as part  
28 of the contract by which the lessor acquired the goods or the right to  
29 possession and use of the goods.

30 (h) "Goods" means all things that are movable at the time of  
31 identification to the lease contract, or are fixtures (RCW 62A.2A-309),  
32 but the term does not include money, documents, instruments, accounts,  
33 chattel paper, general intangibles, computer information as defined in  
34 chapter 63.-- RCW (sections 101 through 902 of this act), or minerals  
35 or the like, including oil and gas, before extraction. The term also  
36 includes the unborn young of animals.

37 (i) "Installment lease contract" means a lease contract that  
38 authorizes or requires the delivery of goods in separate lots to be



1 separately accepted, even though the lease contract contains a clause  
2 "each delivery is a separate lease" or its equivalent.

3 (j) "Lease" means a transfer of the right to possession and use of  
4 goods for a term in return for consideration, but a sale, including a  
5 sale on approval or a sale or return, or retention or creation of a  
6 security interest is not a lease. Unless the context clearly indicates  
7 otherwise, the term includes a sublease.

8 (k) "Lease agreement" means the bargain, with respect to the lease,  
9 of the lessor and the lessee in fact as found in their language or by  
10 implication from other circumstances including course of dealing or  
11 usage of trade or course of performance as provided in this Article.  
12 Unless the context clearly indicates otherwise, the term includes a  
13 sublease agreement.

14 (l) "Lease contract" means the total legal obligation that results  
15 from the lease agreement as affected by this Article and any other  
16 applicable rules of law. Unless the context clearly indicates  
17 otherwise, the term includes a sublease contract.

18 (m) "Leasehold interest" means the interest of the lessor or the  
19 lessee under a lease contract.

20 (n) "Lessee" means a person who acquires the right to possession  
21 and use of goods under a lease. Unless the context clearly indicates  
22 otherwise, the term includes a sublessee.

23 (o) "Lessee in ordinary course of business" means a person who in  
24 good faith and without knowledge that the lease to him or her is in  
25 violation of the ownership rights or security interest or leasehold  
26 interest of a third party in the goods, leases in ordinary course from  
27 a person in the business of selling or leasing goods of that kind, but  
28 does not include a pawnbroker. "Leasing" may be for cash, or by  
29 exchange of other property, or on secured or unsecured credit and  
30 includes receiving goods or documents of title under a preexisting  
31 lease contract but does not include a transfer in bulk or as security  
32 for or in total or partial satisfaction of a money debt.

33 (p) "Lessor" means a person who transfers the right to possession  
34 and use of goods under a lease. Unless the context clearly indicates  
35 otherwise, the term includes a sublessor.

36 (q) "Lessor's residual interest" means the lessor's interest in the  
37 goods after expiration, termination, or cancellation of the lease  
38 contract.

1 (r) "Lien" means a charge against or interest in goods to secure  
2 payment of a debt or performance of an obligation, but the term does  
3 not include a security interest.

4 (s) "Lot" means a parcel or a single article that is the subject  
5 matter of a separate lease or delivery, whether or not it is sufficient  
6 to perform the lease contract.

7 (t) "Merchant lessee" means a lessee that is a merchant with  
8 respect to goods of the kind subject to the lease.

9 (u) "Present value" means the amount as of a date certain of one or  
10 more sums payable in the future, discounted to the date certain. The  
11 discount is determined by the interest rate specified by the parties if  
12 the rate was not manifestly unreasonable at the time the transaction  
13 was entered into; otherwise, the discount is determined by a  
14 commercially reasonable rate that takes into account the facts and  
15 circumstances of each case at the time the transaction was entered  
16 into.

17 (v) "Purchase" includes taking by sale, lease, mortgage, security  
18 interest, pledge, gift, or any other voluntary transaction creating an  
19 interest in goods.

20 (w) "Sublease" means a lease of goods the right to possession and  
21 use of which was acquired by the lessor as a lessee under an existing  
22 lease.

23 (x) "Supplier" means a person from whom a lessor buys or leases  
24 goods to be leased under a finance lease.

25 (y) "Supply contract" means a contract under which a lessor buys or  
26 leases goods to be leased.

27 (z) "Termination" occurs when either party pursuant to a power  
28 created by agreement or law puts an end to the lease contract otherwise  
29 than for default.

30 (2) Other definitions applying to this Article or to specified  
31 Parts thereof, and the sections in which they appear are:

32 "Accessions."	RCW 62A.2A-310(1).
33 "Construction mortgage."	RCW 62A.2A-309(1)(d).
34 "Encumbrance."	RCW 62A.2A-309(1)(e).
35 "Fixtures."	RCW 62A.2A-309(1)(a).
36 "Fixture filing."	RCW 62A.2A-309(1)(b).
37 "Purchase money lease."	RCW 62A.2A-309(1)(c).

38 (3) The following definitions in other Articles apply to this  
39 Article:

1	"Account."	RCW 62A.9A-102(a)(2).
2	"Between merchants."	RCW 62A.2-104(3).
3	"Buyer."	RCW 62A.2-103(1)(a).
4	"Chattel paper."	RCW 62A.9A-102(a)(11).
5	"Consumer goods."	RCW 62A.9A-102(a)(23).
6	"Document."	RCW 62A.9A-102(a)(30).
7	"Entrusting."	RCW 62A.2-403(3).
8	"General intangible."	RCW 62A.9A-102(a)(42).
9	"Good faith."	RCW 62A.2-103(1)(b).
10	"Instrument."	RCW 62A.9A-102(a)(47).
11	"Merchant."	RCW 62A.2-104(1).
12	"Mortgage."	RCW 62A.9A-102(a)(55).
13	"Pursuant to commitment."	RCW 62A.9A-102(a)(68).
14	"Receipt."	RCW 62A.2-103(1)(c).
15	"Sale."	RCW 62A.2-106(1).
16	"Sale on approval."	RCW 62A.2-326.
17	"Sale or return."	RCW 62A.2-326.
18	"Seller."	RCW 62A.2-103(1)(d).

19 (4) In addition, Article 62A.1 RCW contains general definitions and  
20 principles of construction and interpretation applicable throughout  
21 this Article.

22 **Sec. 1025.** RCW 62A.2A-107 and 1993 c 230 s 2A-107 are each amended  
23 to read as follows:

24 WAIVER OR RENUNCIATION OF CLAIM OR RIGHT AFTER DEFAULT. Any claim  
25 or right arising out of an alleged default or breach of warranty may be  
26 discharged in whole or in part without consideration by a (~~written~~)  
27 waiver or renunciation (~~signed~~) in a record authenticated and  
28 delivered by the aggrieved party.

29 **Sec. 1026.** RCW 62A.2A-201 and 1993 c 230 s 2A-201 are each amended  
30 to read as follows:

31 STATUTE OF FRAUDS. (1) A lease contract is not enforceable by way  
32 of action or defense unless:

33 (a) The total payments to be made under the lease contract,  
34 excluding payments for options to renew or buy, are less than one  
35 thousand dollars; or

36 (b) There is a (~~writing~~) record, (~~signed~~) authenticated by the  
37 party against whom enforcement is sought or by that party's authorized

1 agent, sufficient to indicate that a lease contract has been made  
2 between the parties and to describe the goods leased and the lease  
3 term.

4 (2) Any description of leased goods or of the lease term is  
5 sufficient and satisfies subsection (1)(b) of this section, whether or  
6 not it is specific, if it reasonably identifies what is described.

7 (3) A (~~writing~~) record is not insufficient because it omits or  
8 incorrectly states a term agreed upon, but the lease contract is not  
9 enforceable under subsection (1)(b) of this section beyond the lease  
10 term and the quantity of goods shown in the (~~writing~~) record.

11 (4) A lease contract that does not satisfy the requirements of  
12 subsection (1) of this section, but which is valid in other respects,  
13 is enforceable:

14 (a) If the goods are to be specially manufactured or obtained for  
15 the lessee and are not suitable for lease or sale to others in the  
16 ordinary course of the lessor's business, and the lessor, before notice  
17 of repudiation is received and under circumstances that reasonably  
18 indicate that the goods are for the lessee, has made either a  
19 substantial beginning of their manufacture or commitments for their  
20 procurement;

21 (b) If the party against whom enforcement is sought admits in that  
22 party's pleading, testimony, or otherwise in court that a lease  
23 contract was made, but the lease contract is not enforceable under this  
24 provision beyond the quantity of goods admitted; or

25 (c) With respect to goods that have been received and accepted by  
26 the lessee.

27 (5) The lease term under a lease contract referred to in subsection  
28 (4) of this section is:

29 (a) If there is a (~~writing signed~~) record authenticated by the  
30 party against whom enforcement is sought or by that party's authorized  
31 agent specifying the lease term, the term so specified;

32 (b) If the party against whom enforcement is sought admits in that  
33 party's pleading, testimony, or otherwise in court a lease term, the  
34 term so admitted; or

35 (c) A reasonable lease term.

36 **Sec. 1027.** RCW 62A.2A-202 and 1993 c 230 s 2A-202 are each amended  
37 to read as follows:

1 FINAL ((WRITTEN)) EXPRESSION IN A RECORD: PAROL OR EXTRINSIC  
2 EVIDENCE. Terms with respect to which the confirmatory ((memoranda))  
3 records of the parties agree or which are otherwise set forth in a  
4 ((writing)) record intended by the parties as a final expression of  
5 their agreement with respect to such terms as are included therein may  
6 not be contradicted by evidence of any prior agreement or of a  
7 contemporaneous oral agreement but may be explained or supplemented:

8 (1) By course of dealing or usage of trade or by course of  
9 performance; and

10 (2) By evidence of consistent additional terms unless the court  
11 finds the ((writing)) record to have been intended also as a complete  
12 and exclusive statement of the terms of the agreement.

13 **Sec. 1028.** RCW 62A.2A-203 and 1993 c 230 s 2A-203 are each amended  
14 to read as follows:

15 SEALS INOPERATIVE. The affixing of a seal to a ((writing)) record  
16 evidencing a lease contract or an offer to enter into a lease contract  
17 does not render the ((writing)) record a sealed instrument and the law  
18 with respect to sealed instruments does not apply to the lease contract  
19 or offer.

20 **Sec. 1029.** RCW 62A.2A-205 and 1993 c 230 s 2A-205 are each amended  
21 to read as follows:

22 FIRM OFFERS. An offer by a merchant to lease goods to or from  
23 another person in ((a signed writing)) an authenticated record that by  
24 its terms gives assurance it will be held open is not revocable, for  
25 lack of consideration, during the time stated or, if no time is stated,  
26 for a reasonable time, but in no event may the period of irrevocability  
27 exceed three months. Any such term of assurance on a form supplied by  
28 the offeree must be separately ((signed)) authenticated by the offeror.

29 **Sec. 1030.** RCW 62A.2A-208 and 1993 c 230 s 2A-208 are each amended  
30 to read as follows:

31 MODIFICATION, RESCISSION, AND WAIVER. (1) An agreement modifying  
32 a lease contract needs no consideration to be binding.

33 (2) ((A signed)) An authenticated lease agreement that excludes  
34 modification or rescission except by ((a signed writing)) an  
35 authenticated record may not be otherwise modified or rescinded, but,  
36 except as between merchants, such a requirement on a form supplied by

1 a merchant must be separately (~~signed~~) authenticated by the other  
2 party.

3 (3) Although an attempt at modification or rescission does not  
4 satisfy the requirements of subsection (2) of this section, it may  
5 operate as a waiver.

6 (4) A party who has made a waiver affecting an executory portion of  
7 a lease contract may retract the waiver by reasonable notification  
8 received by the other party that strict performance will be required of  
9 any term waived, unless the retraction would be unjust in view of a  
10 material change of position in reliance on the waiver.

11 **Sec. 1031.** RCW 62A.2A-214 and 1993 c 230 s 2A-214 are each amended  
12 to read as follows:

13 EXCLUSION OR MODIFICATION OF WARRANTIES. (1) Words or conduct  
14 relevant to the creation of an express warranty and words or conduct  
15 tending to negate or limit a warranty must be construed wherever  
16 reasonable as consistent with each other; but, subject to the  
17 provisions of RCW 62A.2A-202 on parol or extrinsic evidence, negation  
18 or limitation is inoperative to the extent that the construction is  
19 unreasonable.

20 (2) Subject to subsection (3) of this section, to exclude or modify  
21 the implied warranty of merchantability or any part of it the language  
22 must mention "merchantability," be by a (~~writing~~) record, and be  
23 conspicuous. Subject to subsection (3) of this section, to exclude or  
24 modify any implied warranty of fitness the exclusion must be by a  
25 (~~writing~~) record and be conspicuous. Language to exclude all implied  
26 warranties of fitness is sufficient if it is in (~~writing~~) a record,  
27 is conspicuous and states, for example, "There is no warranty that the  
28 goods will be fit for a particular purpose."

29 (3) Notwithstanding subsection (2) of this section, but subject to  
30 subsection (4) of this section:

31 (a) Unless the circumstances indicate otherwise, all implied  
32 warranties are excluded by expressions like "as is," or "with all  
33 faults," or by other language that in common understanding calls the  
34 lessee's attention to the exclusion of warranties and makes plain that  
35 there is no implied warranty, if in (~~writing~~) a record and  
36 conspicuous;

37 (b) If the lessee before entering into the lease contract has  
38 examined the goods or the sample or model as fully as desired or has

1 refused to examine the goods, there is no implied warranty with regard  
2 to defects that an examination ought in the circumstances to have  
3 revealed; and

4 (c) An implied warranty may also be excluded or modified by course  
5 of dealing, course of performance, or usage of trade.

6 (4) To exclude or modify a warranty against interference or against  
7 infringement (RCW 62A.2A-211) or any part of it, the language must be  
8 specific, be by a (~~writing~~) record, and be conspicuous, unless the  
9 circumstances, including course of performance, course of dealing, or  
10 usage of trade, give the lessee reason to know that the goods are being  
11 leased subject to a claim or interest of any person.

12 **Sec. 1032.** RCW 62A.2A-303 and 2001 c 32 s 10 are each amended to  
13 read as follows:

14 ALIENABILITY OF PARTY'S INTEREST UNDER LEASE CONTRACT OR OF  
15 LESSOR'S RESIDUAL INTEREST IN GOODS; DELEGATION OF PERFORMANCE;  
16 TRANSFER OF RIGHTS. (1) As used in this section, "creation of a  
17 security interest" includes the sale of a lease contract that is  
18 subject to Article 9A, Secured Transactions, by reason of RCW  
19 62A.9A-109(a)(3).

20 (2) Except as provided in subsection (3) of this section and RCW  
21 62A.9A-407, a provision in a lease agreement which (a) prohibits the  
22 voluntary or involuntary transfer, including a transfer by sale,  
23 sublease, creation or enforcement of a security interest, or  
24 attachment, levy, or other judicial process, of an interest of a party  
25 under the lease contract or of the lessor's residual interest in the  
26 goods, or (b) makes such a transfer an event of default, gives rise to  
27 the rights and remedies provided in subsection (4) of this section, but  
28 a transfer that is prohibited or is an event of default under the lease  
29 agreement is otherwise effective.

30 (3) A provision in a lease agreement which (a) prohibits a transfer  
31 of a right to damages for default with respect to the whole lease  
32 contract or of a right to payment arising out of the transferor's due  
33 performance of the transferor's entire obligation, or (b) makes such a  
34 transfer an event of default, is not enforceable, and such a transfer  
35 is not a transfer that materially impairs the prospect of obtaining  
36 return performance by, materially changes the duty of, or materially  
37 increases the burden or risk imposed on, the other party to the lease  
38 contract within the purview of subsection (4) of this section.

1 (4) Subject to subsection (3) of this section and RCW 62A.9A-407:

2 (a) If a transfer is made which is made an event of default under  
3 a lease agreement, the party to the lease contract not making the  
4 transfer, unless that party waives the default or otherwise agrees, has  
5 the rights and remedies described in RCW 62A.2A-501(2);

6 (b) If subsection (4)(a) of this section is not applicable and if  
7 a transfer is made that (i) is prohibited under a lease agreement or  
8 (ii) materially impairs the prospect of obtaining return performance  
9 by, materially changes the duty of, or materially increases the burden  
10 or risk imposed on, the other party to the lease contract, unless the  
11 party not making the transfer agrees at any time to the transfer in the  
12 lease contract or otherwise, then, except as limited by contract, (A)  
13 the transferor is liable to the party not making the transfer for  
14 damages caused by the transfer to the extent that the damages could not  
15 reasonably be prevented by the party not making the transfer and (B) a  
16 court having jurisdiction may grant other appropriate relief, including  
17 cancellation of the lease contract or an injunction against the  
18 transfer.

19 (5) A transfer of "the lease" or of "all my rights under the  
20 lease," or a transfer in similar general terms, is a transfer of rights  
21 and, unless the language or the circumstances, as in a transfer for  
22 security, indicate the contrary, the transfer is a delegation of duties  
23 by the transferor to the transferee. Acceptance by the transferee  
24 constitutes a promise by the transferee to perform those duties. The  
25 promise is enforceable by either the transferor or the other party to  
26 the lease contract.

27 (6) Unless otherwise agreed by the lessor and the lessee, a  
28 delegation of performance does not relieve the transferor as against  
29 the other party of any duty to perform or of any liability for default.

30 (7) In a consumer lease, to prohibit the transfer of an interest of  
31 a party under the lease contract or to make a transfer an event of  
32 default, the language must be specific, by a ~~((writing))~~ record, and  
33 conspicuous.

34 **Sec. 1033.** RCW 62A.2A-309 and 2000 c 250 s 9A-811 are each amended  
35 to read as follows:

36 LESSOR'S AND LESSEE'S RIGHTS WHEN GOODS BECOME FIXTURES. (1) In  
37 this section:



1 (a) Goods are "fixtures" when they become so related to particular  
2 real estate that an interest in them arises under real estate law;

3 (b) A "fixture filing" is the filing, in the office where a record  
4 of a mortgage on the real estate would be filed or recorded, of a  
5 financing statement covering goods that are or are to become fixtures  
6 and conforming to the requirements of RCW 62A.9A-502 (a) and (b);

7 (c) A lease is a "purchase money lease" unless the lessee has  
8 possession or use of the goods or the right to possession or use of the  
9 goods before the lease agreement is enforceable;

10 (d) A mortgage is a "construction mortgage" to the extent it  
11 secures an obligation incurred for the construction of an improvement  
12 on land including the acquisition cost of the land, if the recorded  
13 (~~writing~~) record so indicates; and

14 (e) "Encumbrance" includes real estate mortgages and other liens on  
15 real estate and all other rights in real estate that are not ownership  
16 interests.

17 (2) Under this Article a lease may be of goods that are fixtures or  
18 may continue in goods that become fixtures, but no lease exists under  
19 this Article of ordinary building materials incorporated into an  
20 improvement on land.

21 (3) This Article does not prevent creation of a lease of fixtures  
22 pursuant to real estate law.

23 (4) The perfected interest of a lessor of fixtures has priority  
24 over a conflicting interest of an encumbrancer or owner of the real  
25 estate if:

26 (a) The lease is a purchase money lease, the conflicting interest  
27 of the encumbrancer or owner arises before the goods become fixtures,  
28 the interest of the lessor is perfected by a fixture filing before the  
29 goods become fixtures or within twenty days thereafter, and the lessee  
30 has an interest of record in the real estate or is in possession of the  
31 real estate; or

32 (b) The interest of the lessor is perfected by a fixture filing  
33 before the interest of the encumbrancer or owner is of record, the  
34 lessor's interest has priority over any conflicting interest of a  
35 predecessor in title of the encumbrancer or owner, and the lessee has  
36 an interest of record in the real estate or is in possession of the  
37 real estate.

1 (5) The interest of a lessor of fixtures, whether or not perfected,  
2 has priority over the conflicting interest of an encumbrancer or owner  
3 of the real estate if:

4 (a) The fixtures are readily removable factory or office machines,  
5 readily removable equipment that is not primarily used or leased for  
6 use in the operation of the real estate, or readily removable  
7 replacements of domestic appliances that are goods subject to a  
8 consumer lease, and before the goods become fixtures the lease contract  
9 is enforceable; or

10 (b) The conflicting interest is a lien on the real estate obtained  
11 by legal or equitable proceedings after the lease contract is  
12 enforceable; or

13 (c) The encumbrancer or owner has consented in (~~writing~~) a record  
14 to the lease or has disclaimed an interest in the goods as fixtures; or

15 (d) The lessee has a right to remove the goods as against the  
16 encumbrancer or owner. If the lessee's right to remove terminates, the  
17 priority of the interest of the lessor continues for a reasonable time.

18 (6) Notwithstanding subsection (4)(a) of this section but otherwise  
19 subject to subsections (4) and (5) of this section, the interest of a  
20 lessor of fixtures, including the lessor's residual interest, is  
21 subordinate to the conflicting interest of an encumbrancer of the real  
22 estate under a construction mortgage recorded before the goods become  
23 fixtures if the goods become fixtures before the completion of the  
24 construction. To the extent given to refinance a construction  
25 mortgage, the conflicting interest of an encumbrancer of the real  
26 estate under a mortgage has this priority to the same extent as the  
27 encumbrancer of the real estate under the construction mortgage.

28 (7) In cases not within the preceding subsections, priority between  
29 the interest of a lessor of fixtures, including the lessor's residual  
30 interest, and the conflicting interest of an encumbrancer or owner of  
31 the real estate who is not the lessee is determined by the priority  
32 rules governing conflicting interests in real estate.

33 (8) If the interest of a lessor of fixtures, including the lessor's  
34 residual interest, has priority over all conflicting interests of all  
35 owners and encumbrancers of the real estate, the lessor or the lessee  
36 may (a) on default, expiration, termination, or cancellation of the  
37 lease agreement but subject to the lease agreement and this Article, or  
38 (b) if necessary to enforce other rights and remedies of the lessor or  
39 lessee under this Article, remove the goods from the real estate, free

1 and clear of all conflicting interests of all owners and encumbrancers  
2 of the real estate, but the lessor or lessee must reimburse any  
3 encumbrancer or owner of the real estate who is not the lessee and who  
4 has not otherwise agreed for the cost of repair of any physical injury,  
5 but not for any diminution in value of the real estate caused by the  
6 absence of the goods removed or by any necessity of replacing them. A  
7 person entitled to reimbursement may refuse permission to remove until  
8 the party seeking removal gives adequate security for the performance  
9 of this obligation.

10 (9) Even though the lease agreement does not create a security  
11 interest, the interest of a lessor of fixtures, including the lessor's  
12 residual interest, is perfected by filing a financing statement as a  
13 fixture filing for leased goods that are or are to become fixtures in  
14 accordance with the relevant provisions of the Article on Secured  
15 Transactions, Article 62A.9A RCW.

16 **Sec. 1034.** RCW 62A.2A-310 and 2000 c 250 s 9A-812 are each amended  
17 to read as follows:

18 LESSOR'S AND LESSEE'S RIGHTS WHEN GOODS BECOME ACCESSIONS. (1)  
19 Goods are "accessions" when they are installed in or affixed to other  
20 goods.

21 (2) The interest of a lessor or a lessee under a lease contract  
22 entered into before the goods became accessions is superior to all  
23 interests in the whole except as stated in subsection (4) of this  
24 section.

25 (3) The interest of a lessor or a lessee under a lease contract  
26 entered into at the time or after the goods became accessions is  
27 superior to all subsequently acquired interests in the whole except as  
28 stated in subsection (4) of this section but is subordinate to  
29 interests in the whole existing at the time the lease contract was made  
30 unless the holders of such interests in the whole have in (~~writing~~)  
31 a record consented to the lease, or disclaimed an interest in the goods  
32 as part of the whole, or the accession is leased under tariff No. 74  
33 for residential conversion burners leased by a natural gas utility.

34 (4) Unless the accession is leased under tariff No. 74 for  
35 residential conversion burners leased by a natural gas utility, the  
36 interest of a lessor or a lessee under a lease contract described in  
37 subsection (2) or (3) of this section is subordinate to the interest  
38 of:

1 (a) A buyer in the ordinary course of business or a lessee in the  
2 ordinary course of business of any interest in the whole acquired after  
3 the goods became accessions;

4 (b) A creditor with a security interest in the whole perfected  
5 before the lease contract was made to the extent that the creditor  
6 makes subsequent advances without knowledge of the lease contract; or

7 (c) A creditor with a security interest in the whole which is  
8 perfected by compliance with the requirements of a certificate-of-title  
9 statute under RCW 62A.9A-311(b).

10 (5) When under subsections (2) or (3) and (4) of this section a  
11 lessor or a lessee of accessions holds an interest that is superior to  
12 all interests in the whole, the lessor or the lessee may (a) on  
13 default, expiration, termination, or cancellation of the lease contract  
14 by the other party but subject to the provisions of the lease contract  
15 and this Article, or (b) if necessary to enforce his or her other  
16 rights and remedies under this Article, remove the goods from the  
17 whole, free and clear of all interests in the whole, but he or she must  
18 reimburse any holder of an interest in the whole who is not the lessee  
19 and who has not otherwise agreed for the cost of repair of any physical  
20 injury but not for any diminution in value of the whole caused by the  
21 absence of the goods removed or by any necessity for replacing them.  
22 A person entitled to reimbursement may refuse permission to remove  
23 until the party seeking removal gives adequate security for the  
24 performance of this obligation.

25 **Sec. 1035.** RCW 62A.2A-401 and 1993 c 230 s 2A-401 are each amended  
26 to read as follows:

27 **INSECURITY: ADEQUATE ASSURANCE OF PERFORMANCE.** (1) A lease  
28 contract imposes an obligation on each party that the other's  
29 expectation of receiving due performance will not be impaired.

30 (2) If reasonable grounds for insecurity arise with respect to the  
31 performance of either party, the insecure party may demand in  
32 (~~writing~~) a record adequate assurance of due performance. Until the  
33 insecure party receives that assurance, if commercially reasonable the  
34 insecure party may suspend any performance for which he or she has not  
35 already received the agreed return.

36 (3) A repudiation of the lease contract occurs if assurance of due  
37 performance adequate under the circumstances of the particular case is

1 not provided to the insecure party within a reasonable time, not to  
2 exceed thirty days after receipt of a demand by the other party.

3 (4) Between merchants, the reasonableness of grounds for insecurity  
4 and the adequacy of any assurance offered must be determined according  
5 to commercial standards.

6 (5) Acceptance of any nonconforming delivery or payment does not  
7 prejudice the aggrieved party's right to demand adequate assurance of  
8 future performance.

9 **Sec. 1036.** RCW 62A.2A-406 and 1993 c 230 s 2A-406 are each amended  
10 to read as follows:

11 PROCEDURE ON EXCUSED PERFORMANCE. (1) If the lessee receives  
12 notification of a material or indefinite delay or an allocation  
13 justified under RCW 62A.2A-405, the lessee may by ~~((written))~~  
14 notification in a record to the lessor as to any goods involved, and  
15 with respect to all of the goods if under an installment lease contract  
16 the value of the whole lease contract is substantially impaired (RCW  
17 62A.2A-510):

18 (a) Terminate the lease contract (RCW 62A.2A-505(2)); or

19 (b) Except in a finance lease, modify the lease contract by  
20 accepting the available quota in substitution, with due allowance from  
21 the rent payable for the balance of the lease term for the deficiency  
22 but without further right against the lessor.

23 (2) If, after receipt of a notification from the lessor under RCW  
24 62A.2A-405, the lessee fails so to modify the lease agreement within a  
25 reasonable time not exceeding thirty days, the lease contract lapses  
26 with respect to any deliveries affected.

27 **Sec. 1037.** RCW 62A.2A-514 and 1993 c 230 s 2A-514 are each amended  
28 to read as follows:

29 WAIVER OF LESSEE'S OBJECTIONS. (1) In rejecting goods, a lessee's  
30 failure to state a particular defect that is ascertainable by  
31 reasonable inspection precludes the lessee from relying on the defect  
32 to justify rejection or to establish default:

33 (a) If, stated seasonably, the lessor or the supplier could have  
34 cured it (RCW 62A.2A-513); or

35 (b) Between merchants if the lessor or the supplier after rejection  
36 has made a request in ~~((writing))~~ a record for a full and final

1 ((written)) statement in a record of all defects on which the lessee  
2 proposes to rely.

3 (2) A lessee's failure to reserve rights when paying rent or other  
4 consideration against documents precludes recovery of the payment for  
5 defects apparent on the face of the documents.

6 **Sec. 1038.** RCW 62A.2A-516 and 1993 c 230 s 2A-516 are each amended  
7 to read as follows:

8 EFFECT OF ACCEPTANCE OF GOODS; NOTICE OF DEFAULT; BURDEN OF  
9 ESTABLISHING DEFAULT AFTER ACCEPTANCE; NOTICE OF CLAIM OR LITIGATION TO  
10 PERSON ANSWERABLE OVER. (1) A lessee must pay rent for any goods  
11 accepted in accordance with the lease contract, with due allowance for  
12 goods rightfully rejected or not delivered.

13 (2) A lessee's acceptance of goods precludes rejection of the goods  
14 accepted. In the case of a finance lease, if made with knowledge of a  
15 nonconformity, acceptance cannot be revoked because of it. In any  
16 other case, if made with knowledge of a nonconformity, acceptance  
17 cannot be revoked because of it unless the acceptance was on the  
18 reasonable assumption that the nonconformity would be seasonably cured.  
19 Acceptance does not of itself impair any other remedy provided by this  
20 Article or the lease agreement for nonconformity.

21 (3) If a tender has been accepted:

22 (a) Within a reasonable time after the lessee discovers or should  
23 have discovered any default, the lessee shall notify the lessor and the  
24 supplier, if any, or be barred from any remedy against the party not  
25 notified;

26 (b) Except in the case of a consumer lease, within a reasonable  
27 time after the lessee receives notice of litigation for infringement or  
28 the like (RCW 62A.2A-211) the lessee shall notify the lessor or be  
29 barred from any remedy over for liability established by the  
30 litigation; and

31 (c) The burden is on the lessee to establish any default.

32 (4) If a lessee is sued for breach of a warranty or other  
33 obligation for which a lessor or a supplier is answerable over the  
34 following apply:

35 (a) The lessee may give the lessor or the supplier, or both,  
36 ((written)) notice in a record of the litigation. If the notice states  
37 that the person notified may come in and defend and that if the person  
38 notified does not do so that person will be bound in any action against

1 that person by the lessee by any determination of fact common to the  
2 two litigations, then unless the person notified after reasonable  
3 receipt of the notice does come in and defend that person is so bound.

4 (b) The lessor or the supplier may demand in (~~writing~~) a record  
5 that the lessee turn over control of the litigation including  
6 settlement if the claim is one for infringement or the like (RCW  
7 62A.2A-211) or else be barred from any remedy over. If the demand  
8 states that the lessor or the supplier agrees to bear all expense and  
9 to satisfy any adverse judgment, then unless the lessee after  
10 reasonable receipt of the demand does turn over control the lessee is  
11 so barred.

12 (5) Subsections (3) and (4) of this section apply to any obligation  
13 of a lessee to hold the lessor or the supplier harmless against  
14 infringement or the like (RCW 62A.2A-211).

15 **PART 11**

16 **CODIFICATION DIRECTIVE**

17 NEW SECTION. **Sec. 1101.** Sections 101 through 902 of this act  
18 constitute a new chapter in Title 63 RCW.

19 NEW SECTION. **Sec. 1102.** Captions used in sections 101 through 902  
20 of this act and part headings and subpart headings used in this act are  
21 not any part of the law.

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