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Uniform Computer Information Transactions Act: Bringing Commercial Law into the 21st Century

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TABLE OF CONTENTS

I. Introduction

{1}The e-commerce revolution has redefined the way business is transacted everywhere. Meanwhile, the body of commercial law lags behind the fast pace of technological changes and has yet to effectively address the numerous issues presented by radical changes in the world of commerce such as electronic contracts, electronic signatures, shrinkwrap agreements, and click-wrap agreements. In an effort to establish the Commonwealth of Virginia as a national leader on this subject, in 2000 the Virginia General Assembly passed the Uniform Computer Information Transactions Act ("UCITA"). UCITA legislation has been introduced in a handful of other states but the only other state that has passed UCITA is Maryland. By all accounts it is too early to tell whether these laws will meet the needs of the business community in this era of high technology and whether they will be effective if only passed by a limited number of states.

Technology Terms

{2}Electronic Contracts -- An electronic contract is an agreement that has its cornerstone in the Internet or another electronic network. The contract may be for electronic delivery of a product or service or the contract may be for a physical good or physical delivery of a service where the delivery and/or payment was arranged on-line.

{3}Computer Information -- Computer information is information in electronic form that is obtained from or through the use of a computer or that is in a form capable of being processed in a computer.

{4}Software License -- A software license is an agreement in which a party (the licensor) agrees to let another party (the licensee) use the software program owned by the licensor for a specified period of time and for certain stated uses. A license is similar to a rental agreement. In essence, the licensee pays rent to the licensor for use of the licensor's intangible property. The licensor does not transfer ownership of the software.

{5}Mass Marketing License -- A mass marketing license is a license transacted with the general public in a retail setting that uses a standard form contract. While some commentators assert that transactions with a company should be included in the concept of a mass marketing license, most courts and commentators limit the concept to transactions with consumers.

{6}Shrinkwrap License -- A shrinkwrap license is an unsigned agreement affixed to the packaging in which software is shipped. A shrinkwrap license may be written on the package containing the software, on the

wrapping of the package or on a sheet of paper placed inside the package. In effect, breaking the wrapping and opening the box constitutes acceptance of the terms of the license. Large software manufacturers in retail transactions often use shrinkwrap licenses.

{7}Clickwrap License -- A Click Wrap License is an electronic variant of the shrinkwrap agreement. The purchaser will insert a disk or CD-ROM to load the software he has purchased. As the purchaser installs the software a message will pop up on the computer screen listing license terms or referring the purchaser to printed material contained in the software package. The purchaser must click on a button that states "I agree" or "Accept" or similar words in order to finish installing the software. If the purchaser refuses to accept the clickwrap agreement's terms, the purchaser can return the software to the store where the purchase was made. In effect, installation of the software constitutes acceptance of the clickwrap terms.

Background

Uniform Commercial Code Article 2

{8}The Uniform Commercial Code ("UCC") is a body of law governing a broad range of commercial transactions. It is in effect in all states. Article 2 of the UCC covers the sale of tangible goods. However, the material transferred in a computer information transaction does not necessarily meet the definition of a "good." Information is not a tangible object but rather the product of someone's mental processes that can be stored in a tangible medium.

{9}Additionally, software and computer information is typically not sold to consumers. Rather, the owner licenses it to a user for specific purposes. Nevertheless, Article 2 has often been applied by default to software transactions. For example, some courts have treated mass marketing licenses as sales in order to provide consumers with some protection from software vendors.

Uniform Computer Information Act (UCITA)

{10}In 2000, the Virginia General Assembly adopted the model Uniform Computer Information Transactions Act with minimal modifications. The Act becomes effective July 1, 2001, after a period of review during which the legislature may further amend it. The 2001 Session of the Virginia General Assembly will make last modifications in UCITA before it becomes effective. UCITA, which governs software licenses and other computer information agreements, is the product of the National Conference of Commissioners on Uniform State Laws and the American Law Institute.

UCITA and Article 2 -- Potential Overlap?

{11}UCITA and Article 2 of the Uniform Commercial Code seem to overlap in certain areas. Although UCITA's drafters intended to clarify the law governing "computer information" transactions, UCITA's self-defined scope is such that ambiguity remains. UCITA applies to computer information transactions and defines computer information as "information in electronic form that is obtained from or through the use of a computer." But when mixed transactions involving both goods and computer information are at issue, UCITA may apply to all, part or none of the contract. Many commentators suggest that only after years of litigation will we be able to say definitively which law governs which type of transaction.

II. Scope

{12}A. In general, UCITA covers computer information transactions. It does not speak in terms of goods versus services. Instead, whether UCITA governs a contract depends on whether the subject of the contract is computer information. In general, if a transaction involves both goods and computer information, UCITA governs the part involving computer information. If the computer information is a copy of a program that is

contained in a good (such as on a hard drive) and sold or leased as part of the good, UCITA only applies to the information if the goods are a computer or a computer peripheral and if access to the information is a material purpose of the transaction.

1. Computer information is "information in electronic form which is obtained from or through the use of a computer or which is in a form capable of being processed by a computer."

2. A computer information transaction is "an agreement or the performance of it to create, modify, transfer, or license computer information or informational rights in computer information."

{13}B. UCITA makes certain very important exclusions. It does not cover:

1. financial services transactions and instruments,[1]

2. broadcast audio or visual programming,

3. motion pictures,

4. sound recordings, musical recordings and phonorecords

5. compulsory licenses,[2] and

6. contracts of employment with individuals other than on an independent contractor basis.

{14}C. If computer information is the primary subject of the transaction, UCITA governs the entire transaction.

{15}D. If computer information is only part of the transaction, UCITA, where it applies, governs only the part of the transaction related to computer information.

III. Formation of Contract

{16}A. Generally, there are two types of electronic contracts.

1. The first type is a contract for tangible goods delivered by tangible means that are ordered through, and/or paid for through electronic means.

2. The second type is a contract for products or services to be delivered by means of an electronic transfer.

{17}B. Depending on the type of offer, a party may accept an offer by a prompt promise to ship, a shipment, an electronic message indicating acceptance, or otherwise beginning performance.

{18}C. A valid contract under UCITA requires the parties to manifest assent. A party cannot manifest assent without the opportunity to review the record or terms of the contract. A person has the opportunity to review a record or term if the record or term is made available so that it would be called to the attention of a reasonable person and made available for review. If electronic agents are used, the party has an opportunity to review if the material is made available so that a reasonably configured electronic agent can react to it. Assent to a record or term can be manifested by:

1. authenticating ("e-signing") the record or term,

2. making statements or engaging in conduct that is intended to manifest assent or that the person engaging in the conduct knows or has reason to know the other party will infer assent from the conduct, or

3. in the case of an electronic agent, engaging in operations that clearly indicate assent under the circumstances.

{19}D. UCITA provides that an electronic event is attributed to a person through attribution procedures that are to be established by law, administrative rule or adopted by the parties. Attribution is distinct from authentication in that a person's authentication requires an act with legal intent, whereas attribution merely associates a person with an act. The party relying on attribution has the burden of establishing it.

{20}E. UCITA also addresses the situation commonly known as the "battle of the forms." The battle of the forms occurs where the seller provides one form for the proposed contract and the purchaser uses a different form. UCITA's treatment of the battle of the forms is similar to Article 2 of the Uniform Commercial Code.

1. If an acceptance materially alters the terms of an offer, a contract is not formed unless other circumstances, such as a prior course of dealing, indicate otherwise. If a court finds that a contract was formed despite the fact that the acceptance materially altered the offer terms, the modifying terms contained in the acceptance are not part of the contract.

2. If the acceptance does not contain terms that are materially different from those of the offer, then a contract is formed based on the terms of the offer.

3. If both of the parties are merchants, then any additional terms that are included in the acceptance become part of the contract unless the offeror objects within a reasonable time of receiving the proposed additional terms.

{21}F. To enforce a contract for over $5,000, UCITA requires a record authenticated by the party against whom enforcement is sought.

{22}G. A contract is formed when there is evidence of an agreement, whether the evidence is by conduct of the parties or by the operation of electronic agents.

1. A contract does not fail for indefiniteness if it is shown that the parties intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

2. A contract is not formed, however, if the parties did not agree on any essential term. Parties can form a contract even where some of the terms are missing or were not agreed upon, however, the essential terms must be present.

3. If the parties intend to fix a term in a later agreement and do not intend to be bound until the term is fixed, the contract is not formed if the parties do not subsequently fix the missing term.

{23}H. UCITA has special rules for mass marketing licenses.

1. A party adopts the terms of a mass marketing license only by assenting before or during the party's initial performance or use of or access to the information. Terms of a mass marketing license cannot be added or revealed to the licensee several weeks or months after the licensee first uses the information. If the licensor has not informed the licensee of a term by the end of the first use by the licensee, the term is not part of the bargain and cannot be enforced.

2. A term is not part of the license if it is unconscionable, conflicts with terms to which the parties expressly agreed, or is expressly unenforceable under a section of UCITA.

3. If a licensee is not given an opportunity to review a mass marketing license before the licensee becomes

obligated to pay, and does not assent to the license after having an opportunity to review, then the licensee may return the information and is entitled to reimbursement for the reasonable expenses for the return along with compensation for reasonable and foreseeable costs of restoring information processing systems. Compensation for system restoration after removal of the information can be obtained only if the licensee had to install the information in order to review it and the installation altered the system in a fashion that removal of the information would not automatically restore the system to its original condition.

{24}I. Electronic Agents

1. UCITA permits a contract to be accepted according to general contract law. UCITA also permits a contract to be formed by the interaction of electronic agents or the interaction of an electronic agent and an individual acting on his own behalf or as an agent for another person.

2. Under UCITA, a contract is formed if the electronic agent acts in a manner that, under the circumstances, would operate as an acceptance. Of course, a court will grant appropriate relief if the electronic agent's actions were a result of fraud, mistake or other similar circumstances.

IV. Interpretation of Contracts

{25}A. A license grants the rights expressly described in the license and any incidental rights that are necessary to use the express rights.

{26}B. Use of information in any manner other than that expressly granted in a license (and any incidental necessary uses) is a breach of the license. However, other laws may permit the differing use.

{27}C. If a license does not specify the number of permitted users, then the number of permitted users is a reasonable number given the commercial circumstances existing at the time in which the license was entered and the rights provided in the license.

{28}D. Unless expressly provided for in the agreement, neither party is entitled to receive source code, object code, master copy, schematics, design material or other information used by the other party.

{29}E. Unless expressly provided for in the agreement, neither party is entitled to any rights in modifications or improvements developed by the other party after the license contract is formed.

{30}F. A grant of "all possible media" or "all possible rights" includes all rights in existence or created by law in the future. This type of grant also includes all media, methods of distribution and uses in existence or developed in the future.

{31}G. An "exclusive license" or similar wording gives the licensee exclusive rights in the information and prevents the licensor from granting rights in the same material to another person.

{32}H. A provision addressing duration of the contract controls. If there is not a provision governing duration, then the following principles control:

1. In general, an agreement is enforceable for a reasonable time in light of the circumstances. Either party may terminate the contract at will.

2. If the contract is a software license that transfers ownership of a copy, provides for the delivery of a copy for a fee that is set at the time of or just prior to delivery, or grants the licensee the right to use the licensed material in a combined work, then the contractual rights are perpetual.

V. Performance

{33}A. The general rule is that a party's performance must conform to the contract.

{34}B. Tender of performance occurs when a party offers to perform with a present ability and willingness to do so. If performance by another party is due at the time of the tender of performance, then the other party's performance is a condition to the completion of performance by the tendering party. If a party accepts performance, the party must pay the consideration owed for that performance. If a party commits a material breach and fails to cure the breach before the time performance is due from the other party, the innocent party does not have to perform.

{35}C. Some contracts require information delivered under the contract to be satisfactory to the receiving party before the receiving party is obligated to pay. In such a case, if the information delivered is not satisfactory and the parties work together to correct the insufficiency in a manner consistent with industry norms, then the extra time and efforts of the parties constitutes neither a refusal nor an acceptance. A party may not use received information until the party has expressed an acceptance of the information. Acceptance and refusal must be expressly stated.

{36}D. For information access contracts (for example, internet access contracts), access must be available according to the contract terms or in a commercially reasonable manner, if the contract does not address when access is available. Occasional failures are not a breach of the contract if the failure is consistent with the contract terms and ordinary standards of the industry and if the party granting access exercises reasonable efforts under the circumstances.

{37}E. There are special rules for support agreements and corrections performed by a party other than as a cure for that party's breach. Such performance must be consistent with the contract and industry standards. By acting to correct a problem, a party does not promise that its correction services will correct all problems unless the contract expressly contains such a promise. There is no general obligation to provide support services. The parties must specifically provide for support services if they intend for these services to be part of the contract.

{38}F. In a transaction involving a publisher, a dealer and an end user, if the end user rights are subject to a license by the publisher which the end user has not had the opportunity to review before the end user became obligated to pay for the product then: (1) the contract between the end user and the dealer is subject to the end user's agreement to the publisher's license terms; (2) the end user may return the product; and, (3) the dealer is not bound by and cannot benefit from an agreement between a publisher and an end user unless the contract between the dealer and end user so provides.

VI. Breach

{39}A. Parties may determine what constitutes a breach or default by setting forth such terms in their contract. If the parties fail to designate such provisions, the default rules of UCITA apply.

{40}B. A material breach under the default rules of UCITA is one that:

1. the contract states is material,

2. constitutes a substantial failure to perform an agreed term that is an essential element of the contract, or

3. is likely to cause substantial harm to the other party or one that substantially deprives or is likely to substantially deprive the other party of a significant benefit expected under the contract.

Whether a breach causes substantial harm or deprivation of a benefit is determined by the circumstances. These circumstances include the reasonable expectations of the parties, the practice of the trade or industry and the language of the contract.

{41}C. A breach can be waived without consideration, but waiver of a breach does not waive the same or similar breaches that later occur. A party who accepts defective performance and does not notify the breaching party of the defect within a reasonable time waives all of the available remedies. However, remedy rights are not waived if the aggrieved party accepts the defect on a reasonable assumption that the breach will be cured and the breach was not cured seasonably. A party who refuses performance but fails to specify any defects that can be ascertained by a reasonable inspection waives his right to rely on those defects to justify refusal if the defect could have been cured or, if the parties are both merchants, if the party tendering performance requests a full and final record of all defects upon which the party refusing performance intends to rely.

{42}D. A breaching party may cure its breach by giving notice of intent to cure and promptly curing. The breaching party bears the expense of curing its breach.

VII. Warranties

{43}A. Contracts can contain express warranties. The word "warranty" or "guarantee" does not need to appear in an express warranty. However, words that affirm the value of the information or a statement of opinion do not constitute an express warranty. Parties must be careful to distinguish between language creating a warranty and sales puffery. An express warranty can be disclaimed but words tending to disclaim an express warranty will be construed as consistent with the warranty whenever possible.

{44}B. A licensor is bound by the implied warranty of quiet enjoyment and noninfringement contained in UCITA.

1. A licensor who is a merchant regularly dealing in computer information of the kind being licensed warrants that the licensee receives the information free of the rightful claim by a third person for infringement or misappropriation. But, a licensee holds a licensor harmless against any infringement or misappropriation claim if the licensee furnished the licensor with detailed specifications for the information and a method required to meet the specifications.

2. Any licensor, whether or not a merchant, warrants, for the duration of the contract, that no person has a claim to interest in the information based on an act or omission of the licensor that would interfere with the licensee's enjoyment, except for a claim of infringement or misappropriation. In the case of an exclusive license, the licensor warrants that the informational rights are valid and the license is exclusive for the information as a whole. For an exclusive patent license, the licensor warrants that, to the knowledge of the licensor, the patent rights are valid and the license is exclusive.

3. There are certain limits on the warranty of quiet enjoyment and noninfringement.

a. The warranty applies only to claims arising under United States law, whether state or federal. The contract may specify that the warranty applies to claims arising under foreign law.

b. The warranty does not apply to a license that only permits the use of rights under a patent.

c. Information rights are always subject to rights of public use, collective administration or compulsory licensing regardless of the wording of a warranty.

4. The warranty of quiet enjoyment and noninfringement can be disclaimed only by specific language or by

circumstances that provide the licensee with reason to know that the licensor is not warranting that other claims do not exist or that the licensor is granting only the rights that the licensor possesses. If the parties are merchants, however, the warranty can be disclaimed by the use of a "quitclaim" grant or similar words.

{45}C. The implied warranty of merchantability of a computer program varies in scope depending on whether the person receiving the information is a consumer or a business. This warranty does not address the content of the information. Only a merchant licensor provides this warranty.

1. A distributor receives a warranty that the program is adequately packaged and labeled under the circumstances, and if receiving multiple copies, that the copies are of even kind, quantity and quality within any variations permitted by the contract.

2. An end user receives a warranty that the program is reasonably fit for its ordinary purpose.

3. Any licensee receives a warranty that the program matches any affirmations of fact or promises made on the packaging or label.

{46}D. UCITA creates a new implied warranty that addresses informational content. The warranty states that "[a] merchant that, in a special relationship of reliance with a licensee collects, compiles, processes, provides or transmits informational content warrants to its licensee that there is no inaccuracy caused by failure of [the licensor] to exercise reasonable care in its performance."

1. Note that this warranty only addresses inaccuracies caused by the neglect of the licensor.

2. The warranty does not bind a person who acts as a conduit or supplies collection, compilation or distribution services for information identified as information of a third party.

{47}E. UCITA also contains an implied warranty regarding the licensee's purpose and system integration. This warranty is analogous to the implied warranty of fitness for a particular purpose contained in the Uniform Commercial Code. The warranty arises when the licensor knows or has reason to know that the licensee is obtaining the license for a particular purpose and the licensee is relying on the licensor's expertise. Under the warranty, the information must be fit for the licensee's particular purpose unless the circumstances indicate that the licensor was to be paid based on his time and effort regardless of the fitness of the information.

1. If the contract requires the licensor to choose components to act together as a system, the licensor warrants that the components will work together as an integrated system.

2. This warranty does not cover market appeal, aesthetics or subjective quality of the information. The warranty also does not cover published informational content.

{48}F. All warranties, other than an express warranty or the warranty of quiet enjoyment and noninfringement can be disclaimed by the use of phrases such as "as is" and "with all faults." Implied warranties also can be disclaimed by usage of trade or course of performance. But all disclaimers must be conspicuous in mass marketing transactions.

{49}G. If the licensee examines a sample or model of the information or examines the information itself, then there is no warranty for any defects that the licensee should have discovered upon a reasonable inspection.

{50}H. Warranties extend to third party beneficiaries except in the case of published informational content. A third party beneficiary is a person for whose benefit the licensor supplies the information to the licensee. Third party beneficiaries include members of the licensee's household.

VIII. Remedies

{51}A. UCITA's remedies are intended to put the injured party in the position that the party would have been in had the other party not breached the contract. The remedies are cumulative but a party may not recover multiple times for the same loss. A court has discretion to deny a remedy if the remedy would place the injured party in a better position than if the breach had not occurred.

{52}B. Even after a breach, a breaching party must continue to comply with the contract with respect to information that has not been returned or is not returnable.

{53}C. There are different remedies for material and non-material breaches. Unless the contract provides otherwise, the following remedies are only available for a material breach:

1. cancellation of the contract,

2. recoupment of certain losses,

3. right to repossess and prevent further use,

4. right to discontinue access, and

5. electronic self-help.

Cancellation is not effective until the injured party notifies the breaching party of the cancellation, unless the delay caused by the notification would cause or threaten material harm or loss. Upon cancellation the breaching party must return the information or comply with the injured party's instructions for disposal of the information.

{54}D. An injured party has a duty to mitigate damages arising from a breach. A party that fails to mitigate damages is unable to recover for losses that could have been avoided by timely mitigation action. Parties cannot recover speculative damages.

{55}E. Consequential damages are available for injury related to misuse or revelation of a trade secret or arising from information in which the injured party had a right of confidentiality.

{56}F. A licensor's damages are measured according to the following formulae or combination thereof:

1. The amount of accrued but unpaid contract fees and the value of other consideration earned.

2. If the licensor rightfully cancelled the contract and the breach made possible a substitute transaction by the licensor, then the licensor's damages are the amount of the contract fees and other consideration under the contract less any consideration received in a reasonable substitute transaction or the market value of a reasonable hypothetical substitute transaction.

3. If no substitute transaction is available, then lost profits may be recoverable.

4. In addition, damages may be calculated in any reasonable manner, plus

5. any incidental and allowable consequential damages.

{57}G. A licensee's damages are calculated according to the following formulae or combination thereof:

1. If licensee has accepted performance, then the licensee may receive the value of the performance still due

under the contract minus the value of the performance accepted as of the time and place of acceptance.

2. If the performance has not been rendered, or has been rightfully refused or the acceptance rightfully revoked, then the licensee is entitled to (1) the market value of the performance due minus the contract fee for that performance, (2) the value of any consideration given to the licensor for the performance, or (3) the difference between (a) the cost of a commercially reasonable substitute transaction actually entered into by the licensee and (b) the contract fee under the breached contract.

3. Damages may also be calculated in any reasonable manner.

4. The licensee may also receive incidental and consequential damages.

{58}H. The licensor has the right to complete performance and sue for breach. The decision to complete must be made "in exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization on effort or investment."

{59}I. The licensor has the right to discontinue access if the licensee commits a material breach of an information access contract or if any contract so provides.

{60}J. The licensor has the right to possession of all copies of the information in possession of the licensee upon the cancellation of the license. But, a licensor may only use self-help if he can do so without breaching the peace, without a foreseeable risk of personal injury or significant damage to the information and in compliance specific guidelines. Otherwise, the licensor must resort to the judicial process to effect his rights.

{61}K. UCITA sets forth the parameters of using self-help methods.

1. First, the licensee must have assented to the possible use of self-help in the contract which must include certain terms.

2. Specific notice of intent to exercise self-help must be given prior to exercising self-help. The notice must state that the licensor intends to exercise electronic self-help on or after 45 days following the receipt of the notice. The notice must also detail the claimed breach, and provide the name, address, telephone number, facsimile number and email address of a person with whom the licensee may communicate about the claimed breach.

3. Note that a licensee may recover direct, incidental and consequential damages for a wrongful exercise of self-help. Consequential damages may be recovered even if the contract excludes such damages so long as either the licensee gives the licensor, within the 45 day notice period, a notice describing in good faith the general nature and magnitude of the damages or the licensor already has reason to know that the proposed self-help will cause substantial harm or injury to the public health or safety or grave harm to the public interest substantially affecting a third party not involved in the dispute. A licensee is also entitled to injunctive relief to prevent harm arising from a proposed exercise of self-help.

4. A licensor may not exercise self-help methods if the licensor has reason to know that the proposed self-help will cause substantial harm or injury to the public health or safety or grave harm to the public interest substantially affecting a third party not involved in the dispute.

5. Rights under the self-help provision of UCITA may not be waived or modified by an agreement prior to a breach except that the parties may provide a method, manner and timing of the required notice unless such provisions are unreasonable.

IX. Choice of Law and Forum

{62}A. In absence of an enforceable choice of law clause, Virginia law will apply. However, to the extent that a party's choice of law varies a rule that may not be varied under Virginia law, the choice of law is ineffective. This is the area where the Virginia UCITA varies most from the model UCITA. The model UCITA provides various default rules that the Virginia UCITA omits.

X. Miscellaneous

{63}A. UCITA requires that an action for breach be commenced within the later of four years after the action accrues or one year after the breach was or should have been discovered, but not later than five years after the action accrues.

1. A contract may reduce the time frame for the Statute of Limitations to bring an action but may not extend it.

2. Generally a cause of action accrues when the conduct constituting the breach occurs, but in some specific circumstances the cause may accrue on the date on which it was, or should have been discovered.

{64}B. UCITA does not affect any other electronic or digital signature law existing on the date UCITA becomes effective.

{65}C. Parties can vary provisions of UCITA by contract except:

1. procedures to manifest assent and opportunity to review,

2. protection from electronic errors given to consumers,

3. protections for mass marketing licenses,

4. requirements for an enforceable contract term,

5. limits on choice of law and choice of forum,

6. restrictions on the statute of limitations,

7. the right to relief from an unconscionable term or contract, and

8. limitations on the use of self-help as a remedy.

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ENDNOTES

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[1]. A financial services transaction is a transaction or agreement that involves a deposit, payment order, loan, letter of credit, debit or credit card transaction, document of title, investments, financial assets, or other assets held in a fiduciary capacity. The phrase also encompasses identifying, verifying, enabling or monitoring information related to such a transaction.

[2]. A compulsory license is a license created by the United States Copyright Act that allows certain persons to use copyrighted material for specified uses without the explicit permission of the copyright owner. The user must pay a specified royalty.

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