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Commercial Access Contracts and the Internet: Does the Uniform Computer Information Transactions Act Clear the Air with Regard to Liabilities when an On-Line Access System Fails?

I. INTRODUCTION

The Internet is developing at a rate never before seen by modern technology, drawing approximately 71,000 new users per day in 1997.1 As a result of this tremendous growth, businesses ranging from newspapers to toys and groceries to books, airplane parts, and auction houses have gone on-line to sell their products.2 As more businesses see the possibilities of commercialization that the Internet holds, there will undoubtedly be issues that arise in the Internet context that have never been considered in the traditional business forum. The result of these new issues is that many problems will arise that have never before been contemplated or litigated.3 Assuredly, one issue that will arise is how traditional business issues will be handled when applied to the Internet. For example, an on-line business which is unable to operate because of the negligence of another party can experience damages not only in the hundreds, or thousands, but possibly in the millions of dollars.4 The time frame on these losses is not limited to extended periods, but can occur in as little as a day or even an hour.5

For example, take individual Jones who, stimulated by others' success in e-commerce, decides to start a site that sells first editions of books. Jones approaches

1. See Hoag Levins, 71,000 New Net Users Every Day: New International Study, EDITOR & PUBLISHER, Oct. 18, 1997, at 41 (discussing the fact that roughly 3,000 new Internet users sign on per hour); see also Alf Nucifora, The Internet has the Ability to Deliver Solid Marketing Punch, SAN ANTONIO BUS. J., Apr. 18, 1997, available in 1997 WL 7604156 (“By 2000, an estimated 39 percent of U.S. households will be connected to the Net.”).

2. For businesses that are offering these products on the Internet, see the following World Wide Web sites: latimes.com (newspaper), etoys.com (toys), peapod.com (groceries), boeing.com (airplane parts), and ebay.com (auction houses).


4. See infra notes 7-11 and accompanying text.

5. See infra notes 7-11 and accompanying text.
a web page designer who develops an interactive web site. Jones then approaches a Web presence provider ("WPP") or Internet Service Provider ("ISP") and pays a set fee to place and register his new web page on the site. Jones registers the new domain name of his web site with InterNIC, a registry of domain names. Jones also contacts the larger search engines, providing them with his domain name and a description of the products that he is selling. Jones acquires as many first run editions of books that he is able to and stores them in a warehouse that he has rented. Soon afterwards Jones is selling books over the Internet to consumers worldwide.

However, what happens when the customers are unable to connect to Jones' web site because of something that the WPP has done? Many ISP's and WPP's will have expressly limited all remedies and especially consequential damages in the contract. This article will address those cases in which the concept of limited remedies is not addressed in the contract or there is no contract to rely upon. Businesses that are utilizing the Internet are acquiring tremendous profits, akin to a large, established chain of retail establishments nationwide. If you were to take the profits for one successful business, the loss of single day's business could potentially result in a loss of over three million dollars. It is not at all unusual to find stories discussing the prevalence of ISPs shutting down for a day or more. The above figure of one site generating revenue over one million dollars is based on

6. For common Web presence providers or Web hosting providers, see the following World Wide Web sites: hostpro.net, hostway.com, and webhosting.com. These Web presence provider's offer a variety of services for the individual or corporation wishing to place a web site for informational service or for commerce on the World Wide Web.


10. See id.

11. See Kurt A. Wimmer, E-Litigation: Clicks and Contracts, 14 No. 4 Corp. Couns. 1, 1 (1999) ("One company alone racks up $1 billion per month in computer chip sales over the Internet; another, Amazon.com, sells $3.5 million worth of books daily without a single brick-and-mortar store.").

on the on-line business, Amazon.com. Amazon.com exemplifies the success that one business can have on-line. However, it also underscores the necessity of having guidelines for contracting between a business and an ISP or WPP due to the special nature of the Internet.

The success of any Internet business depends, like any traditional business, solely on a continuous supply of customers. Unlike any other traditional businesses, there is one sole entity that controls the supply of customers on the Internet to a particular business: the WPP. There are no comparable entities that hold the same power to completely sever all contact with customers in a regular retail format. The only comparable single entity that can control a traditional business would be the telephone company, but even then, the business can rely on those customers who walk into the store. For the Internet business there is no tangible locale where the customers can purchase products. Therefore, there should be laws geared toward the special nature of contracting for a business on the Internet which weigh both sides: the WPP and the business entity. This Comment examines who should bear the risk of liability for a breach of service, whether the breach is due to negligence, overloading of the server, or simply failure to provide continued service in a Web Presence Provider-business customer relationship. It will proceed to discuss whether an Internet Service Provider should be able to disclaim liability for consequential damages when the risk of monetary loss on the Internet is so great. Part II initially discusses why commerce on the Internet is preferable and should not be rejected merely because there is the possibility of interruption of connection to consumers. Additionally, it will discuss the relevant background of both the contractual framework in

13. See supra note 11 and accompanying text.
14. This is intended to be a hypothetical and not actually based on the real situation of Amazon.com or any other Internet business. It is simply used to show that unlike traditional business there are special issues facing on-line businesses.
15. In one case, the telephone company cut the phone lines to a floral business, which did a majority of its business on the phone. See Seagroatt Floral Co., Inc., v. New York Tel. Co., 429 N.Y.S. 309 (N.Y. App. Div. 1980). The court held that the New York Telephone Company’s actions, amounted to gross negligence and awarded the florist its lost profits measured during the period that the phone lines were out. See id. at 311; see also Ronald A. Case, Annotation, Liability of Telephone Company to Subscriber for Failure or Interruption of Service, 67 A.L.R. 3d 76 (1998) (discussing the general liabilities of a telephone company to subscribers where the service fails).
17. See infra Part III for a discussion and suggested resolution to the difficulty of finding applicable law.
18. See infra notes 25-131 and accompanying text.
addressing Internet Service Providers and commercial businesses as well as the
difficulty of the Internet as a growing medium and the specialization business
entities face. Part III analyzes the relevant law, and after searching for an
applicable framework, explores the idea that the proposed Uniform Commercial
Information Transactions Act ("UCITA"), may apply to this particular situation.
Part III also discusses why the UCITA may not apply due to the express language
of the proposed code section. Part IV analyzes the possible remedies that may be
implemented in the case of breach by either party. Part V explores the possible
impact that the UCITA would have on the relevant parties when it is enacted.
The comment then concludes with a brief discussion of the relevant issues in Part
VI.

II. BACKGROUND: THE COMMERCIAL UNDERPINNINGS OF THE INTERNET,
AND THE HISTORICAL ORIGINS OF THE INTERNET, CONTRACTS AND THE
LIMITATIONS OF LIABILITY

"Suddenly, the Internet has become a dominant force in education, business,
government, and entertainment in the United States and throughout the world." The
Internet was in the past merely used by "research scientists and computer
aficionados." It is of interest to understand not only the importance of the
Internet in everyday life, but even more so as the phenomenal business mechanism
it has become. As more businesses go on-line, not just to set up informational web
sites, but to set up commercial sites where consumers can purchase products, the
importance of the Internet is reaffirmed as a vital, everyday tool of commerce.

This is not just conjecture; businesses are moving on-line at a record pace. As a result, Internet traffic in commerce, at the present rate of thirty billion web site
hits per year, is expected to more than double in less than a year. If that were not
astounding in itself, the present figure is expected to escalate to 350 billion hits per
year in only four years. This section traces the background of the Internet to the
commercial entity it has become, as well as how contractual issues have come to
bear upon this special medium.

19. See infra notes 64-131 and accompanying text.
20. See infra notes 132-231 and accompanying text.
21. See infra notes 224-31 and accompanying text.
22. See infra notes 232-54 and accompanying text.
23. See infra notes 255-79 and accompanying text.
24. See infra Part VI.
26. See id.
27. See supra note 1.
28. See Nucifora, supra note 1 ("Internet commerce is estimated to grow from an annual $30 billion to
$80 billion by 2000.").
There are numerous reasons why businesses seek out the Internet as a viable way of doing business, and their consumers seem to be largely following along. Consumers who usually worry about doing business on the Internet may be placated by advances in encryption technology, making consumer transactions safer and easier. One particular form of encryption technology that is prevalent and likely to convince more consumers that it is safer to shop on the Internet is Secure Sockets Layer protocol. One on-line business has argued that Secure Sockets Layer protocol is statistically safer than using a credit card at a department store or restaurant. In addition to the argument that web buying is becoming safer, consumers are now inundated with advertising on almost any web page they visit. However, unlike traditional advertising forms utilized in television, radio, magazines, or billboards, the advertising medium on the Internet allows for instant gratification. When a consumer sees an advertisement on the Internet that he or she is interested in, they can be linked directly to the site and utilize their credit card to purchase that item instantly. Thus, with the combination of encryption technology and advertising on the Internet, consumers will be driven to place their trust in the Internet. Additionally, it is postulated that consumers will see reduced costs from

30. See infra notes 37-60 and accompanying text.
31. See supra note 29, at 8 (stating that the large numbers posted on the Internet would only be possible if customers are willing to place their trust in conducting business over the Internet, with an entity that they can not see).
32. It can be argued that customers who do worry over using a credit card over an entity such as the Internet are sometimes justified in their concern. See Robert F. Stankey, Internet Payment Systems: Legal Issues Facing Businesses, Consumers and Payment Service Providers, COMMLAW CONSPECTUS 11 (1998) (discussing the prevalence of credit card fraud on the Internet).
33. Transactions have become easier because in the past, many Internet businesses would allow you to browse on-line, but to actually purchase any items you would have to leave the Internet and call the business directly, placing orders by phone. Some common businesses using encryption technology on the Internet are Etoys (visited Dec. 8, 1998) <http://www.etoys.com>, Yahoo Shopping (visited Dec. 8, 1998) <http://shopping.yahoo.com>, and Barnes and Noble (visited Dec. 8, 1998) <http://www.barnesandnoble.com>.
34. See American Bar Association, Tutorial, Information Security Committee, Section of Science and Technology, 38 JURIMETRICS J. 243, 256 (1998). Secure Sockets Layers allow a consumer to "establish a secure communication channel with another machine (server) such that once it is established, the confidentiality and integrity of the communication channel is assured." Id. Additionally, the secure socket authenticates both the web browser and the web server that they are communicating with to assure the consumer that he is communicating with the correct web site. See id.
36. See Nucifora, supra note 1 ("Internet advertising is expected to grow from the current annual $300 million to more than $5 billion by the end of the decade.").
purchasing products on-line.\textsuperscript{37} The utilization of the Internet as a business locale is a logical choice for modern consumers who, in a search to maximize their time, see the Internet as a time saving device.\textsuperscript{38}

Yet customers would be without recourse to shop on the Internet if commercial businesses did not recognize the many advantages to doing business on the Internet.\textsuperscript{39} Because of the unique nature of the Internet, it offers businesses the opportunity to lower their employment costs as well as their commercial rental costs.\textsuperscript{40} Additionally, commercial businesses can utilize the Internet for its ease of ordering and shipping.\textsuperscript{41} Not only is ordering easier for the consumer, but because of the instant input of consumer information, the speed of shipping will be faster for most products.\textsuperscript{42} That, of course, does not compare to a retail store where a consumer may walk in and carry the device out, but with modern shipping companies most items could arrive on an individual's doorstep within one day.\textsuperscript{43} Depending on the type of operation, the Internet can prove to be very lucrative as well, resulting in increased marginal profit for the marketer\textsuperscript{44} due to the reduction of middleman retailers.\textsuperscript{45}

But foremost among the lucrative features that the Internet offers to businesses is its worldwide forum in which to market their products.\textsuperscript{46} This makes it far easier for a smaller company, that may have no retail outlets, to compete with the large

\begin{thebibliography}{99}
\bibitem{37} See Nucifora, supra note 1 (postulating that both the marketer and the consumer benefit from Internet-marketing processes); see also Internetperks: Push Takes a Back Seat to Incentives When it Comes to Consumers, M2 PRESSWIRE, July 11, 1997, available in 1997 WL 11939141 ("It is clear that the Web enables a company to get their products in front of a consumer in a much more cost effective manner than has ever been available before.").
\bibitem{38} See sources cited supra note 1.
\bibitem{39} See infra notes 40-47 and accompanying text.
\bibitem{40} By not having retail branches a business that utilizes the Internet as its sole forum for selling its products has the ability to reduce its workforce to the number necessary to take orders, handle complaints, and ship out the products. This in turn can only mean that the number of employees necessary to work in the retail stores will be reduced, thereby reducing the amount that is charged to consumers or increasing the marginal amount for the business.
\bibitem{41} See Nuicifora, supra note 1 (stating that both marketer and consumer benefit from the process of Internet-marketing processes).
\bibitem{42} See id.
\bibitem{43} For example, Federal Express provides one-day delivery on packages. See, e.g., Fedex.com (visited Jan. 27, 1999) <http://www. fedex.com>.
\bibitem{44} See id.
\bibitem{45} See Malaysia: Comm. Opps./ Multimedia Super Corridor Market (2), INDUS. SECTOR ANALYSIS, Mar. 19, 1998, available in 1998 WL 11163264. Middleman retailers can be considered not only resellers of a particular product, but also the retail shopping centers that levy high rental fees to occupy leased space in the shopping center.
\bibitem{46} See Cate, supra note 25, at 567 ("For example, the Internet is inherently global. No other medium crosses not only every state boundary, but also the national boundaries of the majority of countries of the world."); see also Martin C. Loesch & David M. Brenner, Coverage on the Technology Frontier, ANDREWS COMPUTER & ON-LINE INDUS. LITIG. REP., Feb. 17, 1998, at 9 ("An Internet merchant automatically markets around the world, exposing itself to laws and regulations of an equally broad nature.").
\end{thebibliography}
nationwide retail outlets. For example, Amazon.com would find it hard to start a business by trying to grow out of one retail store. This is especially true when the market is flooded with national chains such as Bookstar and Barnes & Noble. However, the Internet has leveled the playing field for a business such as Amazon.com by allowing them equivalent access to close to thirty-nine percent of America.47

One of the disadvantages that the Internet does provide, however, is the disparity between large businesses, which have the capital to invest in interactive, easy to interface web sites, and small businesses, which do not.48 One author described this dynamic by comparing “sophisticated marketers like the Coca-Cola Company and the average marketing Joe, who presents the data in a passive, uninvolving, uninspiring, and unchanging fashion.”49 The problem is, of course, that commercial entities with little capital have to overcome start-up costs and the inherent difficulty and confusion that can be present in developing a site that is user friendly to the average consumer.50

With the present difficulty of start-up costs for the average business, it is necessary in some circumstances for a business to rely on an Internet or On-line Service Provider for access to the Internet and thus access to the consumers that are using their home computers in search of items to purchase on-line.51 On-line Service Providers serve a unique function with respect to the World Wide Web.52 They provide access not only for individuals, which include consumers seeking to purchase products, but also for commercial businesses the means with which to set up a domain with an interactive web site through which consumers can purchase

47. See Nucifora, supra note 1 (“By 2000, an estimated 39 percent of U.S. households will be connected to the net.”).
48. See id. (commenting that the relatively new Internet technology has led to a “canyon-like gap” between large business who have the money to develop an interactive web site and those that do not have the money or the market power).
49. Id.
50. See id. This would be a particular problem for smaller companies without the ability and resources to hire a development company.
51. See ACLU v. Reno, 929 F. Supp. 824, 837 (E.D. Penn. 1996) (“Many Web publishers choose ... to lease disk storage space from someone ... who has the necessary computer facilities, eliminating the need for actually owning any equipment oneself.”).
52. There are numerous types of Internet access providers. By the terms “On-line Service Provider” or “Internet access Service Provider” I mean to convey any network system that allows individuals and businesses access to the Internet. As well, I mean that these access providers allow their users for free or for a fee to set up a web site. There are additionally sites labeled as either Web hosting providers or Web presence providers that provide specific disk storage space for electronic businesses, informational sites, or individuals. See sources cited supra note 6.
products.53 On-line Service Providers, in return for the service of providing access to the Internet, charge fees to their customers based on the amount of hours the consumer has used, or, alternatively, a flat fee.54 At present count there are more than 4,000 On-line Service Providers supplying access to both individuals and commercial entities.55

Individuals, as well as businesses, rely on ISPs.56 Smaller businesses need the service that ISPs provide in order to gain web site access to better sell their products.57 Recently, courts recognized that litigation could be expected to increase as larger companies develop commercial web sites58 and as more consumers seek goods from those web sites.59 Yet, without these ISPs, many businesses would not have the technological know-how or monetary capital to develop a commercial web site.60 At this pivotal point that it becomes necessary to understand the background of the component features of the Internet as well as the historical ramifications of contracts law that might come to bear on this issue.61

A. Internet Development

What makes the Internet unique is its worldwide format, ease of use, accessibility, and its interactive nature.62 The interactive nature of the Internet sets it apart from other modern day devices, such as radios or televisions, that are passive in nature. Radios and televisions are only able to receive signals, offer the consumer nothing more than the reception of several different channels, and are unable to send any outgoing signals. This is one feature that makes the Internet a superb medium with which to set up a commercial business.63

The Internet is made up of one giant network which connects to smaller independent networks.64 The separate networks are connected to others, facilitating communication and allowing the access of information on separate databases on computers.65 This makes it possible for an individual in a foreign country

53. See ACLU, 929 F. Supp. at 837 ("Many Web publishers choose . . . to lease disk storage space from someone . . . who has the necessary computer facilities, eliminating the need for actually owning any equipment oneself.").

54. Evidence of this fact can be seen in the terms of service of any large ISP, such as America Online, CompuServe or The Microsoft Network.

55. See Loesch, supra note 46 at 9.

56. See ACLU, 929 F. Supp. at 837.

57. See id.

58. See id.

59. See sources cited supra note 1.

60. See ACLU, 929 F. Supp. at 837.

61. See infra notes 62-131 and accompanying text.

62. See infra notes 63-64 and accompanying text.

63. As a result of this many businesses are flocking to the Internet to set up on-line businesses. See Nucifora, supra note 1 ("Internet commerce is estimated to grow from an annual $30 billion to $80 billion by 2000.").

64. See ACLU, 929 F. Supp. at 830-31.

65. See id. at 831.
accessing through one network to access a commercial web site that is based on a completely different network in a completely different country. In 1996 an estimated 9.4 million host computers contained information accessible through this world-wide network. When one of these host computers shuts down, it does not interfere with the network as a whole, but merely makes the information on that particular computer unavailable. In fact, the Internet is designed so that if a communications line is busy, the system will automatically reroute the line to make sure that it gets to the intended destination. The computer systems that generally provide the framework of the Internet are made up of computers at governmental, public, non-profit, and private institutions. As an international system, the Internet has the ability to go beyond other mediums and transcend language barriers. There is no single controlling entity of the Internet; it exists because millions of computers use the same language and store relevant information on their own mainframes, which is accessible by others using the Internet.

The World Wide Web is one of many ways to operate on the vast medium of the Internet. Most businesses operate on the Internet using the world wide web because of the ease of using documents that contain text, images, sound, animation, and moving video. The World Wide Web allows “information to become part of a single body of knowledge” even though the actual information is stored in individual computers across the world.

Businesses, therefore, often choose the World Wide Web as the primary means of placing their products into the consumer stream of commerce. The difficulty arises for business owners in developing a user-friendly site and the corresponding monetary expense of developing the technology. That is why “[m]any Web publishers choose . . . to lease disk storage space from someone . . . who has the necessary computer facilities, eliminating the need for actually owning any equipment [itself].” ISPs, therefore, make it possible for smaller or developing businesses to forge a site on the Internet when they otherwise could not do so on their own. Because businesses lease space from a sole service provider, if the

66. See id.
67. See id. at 831-32 (explaining that the Internet is built so that a communication sent over it can travel by several different means to arrive at its destination, thereby precluding shutdown if one host-computer is inoperative).
68. See id. The system therefore was designed so that if one portion is damaged the intended transmission will still reach its intended destination. See id.
69. See ACLU, 929 F. Supp. at 831. This article focuses mainly on private institutions because these are the computer services most likely to profit by providing web access to a business.
70. See id.
71. See id. at 832.
72. See id. at 836.
73. Id. at 837.
server holding business information fails, businesses lose access to consumers and hence the revenue. While the Internet may be an excellent medium in which to sell products, it is severely limited in its ability to cover if the business site cannot be reached. It would be difficult for a business that is interrupted to pull its site from one server and place it on another server without severe penalties, in terms of lost profits as well as direct costs.

B. Contract Implications

An undisputable fact of any contract negotiation is that each party should know its representative needs and liabilities prior to committing to any agreement. For the seller, in this case the ISP, it is likely that the bonus of selling web access to a commercial business will be contrasted with the lower costs of individual access. For the buyer, in this case a business entity, the ISP offers the opportunity to place a site on the Internet with relatively little technological knowledge and at a relatively low cost. At the same time, the business will want some sort of guarantee that the service will be maintained with a minimum of interruptions. If the service is interrupted it is desirable for the business to have some recourse to recover lost profits. It is likely that direct damages will not be a significant negotiation issue in this particular instance. However, if direct damages are significant, if it is an established commercial business, direct damages are likely to be dwarfed in comparison to lost profits. Lost profits for an established business in this case can run into the millions because of the worldwide exposure and twenty-four hour a day access that the Internet provides.

There are three types of judicial remedies available to parties if one party to a contract breaches. These three remedies address the non-breaching party’s expectation interest, reliance interest, and restitution interest. In this case, the most important for the customer of an ISP is the expectation interest, which puts the victim of the breach in the position that he would have been in had the contract been fully performed. In the case of an interruption of service for a business, the business’s expectation interest will be those profits that the business loses during the period of interruption. Expectation damages are intended to serve both parties’

74. See supra notes 72-73 and accompanying text.
75. See Providers Seek Assurances on Internet Reliability, HEALTH DATA MGMT., Feb. 19, 1997, available in 1997 WL 8747857 (opining that for guaranteed continuous service to the Internet, a business entity will likely have to pay more).
76. See id. (revealing that in contract negotiations with a network provider, a business will want the inclusion of consequential damages in the contract).
77. Direct damages in this case would be the contracted price to place the relevant information on the services database. See infra note 247-48 and accompanying text.
78. See supra Part I.
80. See id.
81. See id.; see also U.C.C. § 1-106 (1978).
interests equally. Under the expectation measure, if the parties bargain freely, the buyer will pay the cost to guarantee the service and the seller will do everything to guarantee that the service is maintained through preventative measures. With expectation damages looming in the background, both parties will an incentive to ensure that no breach occurs wherein they will be forced to put the other party in the position as if the contract were fully performed. The theory of expectation damages is that a seller fearing losses such as lost profits will take all measures possible to maintain the contract. In addition, when the seller breaches under the Uniform Commercial Code ("U.C.C."), the buyer can select from either cover, or market formula damages. Under the cover theory, the buyer will have to go to the market and obtain goods through a substitute transaction and will recover the difference in price. The inherent problem in cover for the interrupted on-line business is the difficulty in obtaining a substitute transaction. If for example, a server goes down, the business will have to obtain the information from the Web Presence Provider, find another On-line Service Provider and place the information on their server. In terms of time and expense, this will be more difficult than actually waiting for the original service provider to repair their system. The second means of recovery for a buyer to recover in the case of breach by the seller is market formula. Under the market formula, the proper measure of damages is the difference between the contract price and the market price at the time the buyer learns of the breach. Market formula means little, if anything because the business is concerned about lost profits, and the difference between the contract price and market price of the Internet service is minimal in comparison.

Of particular interest to a business in this situation, will be the concept of consequential damages. Usually the term consequential damage is interpreted to mean primarily lost profits. For business owner, the primary motivation is profits.

83. See id. at 575.
84. See id. at 573-74.
85. See id. at 574-75.
87. See id. § 2-712.
88. See id. § 2-711.
89. See id. § 2-713.
90. Consequential damages include lost profits resulting from that lost opportunity, damages to reputation, lost royalties expected from a licensee's proper performance, lost value of a trade secret from wrongful disclosure or use, wrongful gains for the other party from misuse of confidential information, loss of privacy, and loss or damage to data or property caused by a breach. See U.C.C. § 2B -102(8) (Tentative Draft 1998) available in Uniform Commercial Code Article 2B: Software Contracts and Licenses of Information (last modified Aug. 1, 1998)<http://www.law.upenn.edu/library/ulc/ulc.htm>.
91. See Eisenberg, supra note 82, at 565.
and when they are cut off from their consumers the first interest is to recover any profits they may have gained from customers during that down period. Thus, consequential damages are of primary concern when a business contracts for service from an Web Presence Provider.

It has been recognized that "[m]any commercial contracts contain both a limited remedy provision and a consequential damage exclusion." This article will examine those cases in which a contract is silent on the issue of consequential damages. The Uniform Commercial Code states that consequential damages are limited to those situations in which they are foreseeable by the seller and cannot be prevented by cover. Cover in this situation will be difficult to secure because of the developing technology, and difficulty in finding a substitute transaction.

The case of Hadley v. Baxendale, is a perfect contractual fit to the issue at hand. As well, it addresses the issue of foreseeability that the U.C.C. requires as a necessary prerequisite to the recovery of consequential damages. The second rule of Hadley v. Baxendale has traditionally been conceptualized to mean that consequential damages can be recovered only if, at the time the contract was made, the seller had reason to foresee that the consequential damages were the probable result of the breach.

The hypothetical in the introduction to this Comment is based loosely on the case of Hadley v. Baxendale. In Hadley, the plaintiffs were owners of a mill, which was in the business of grinding flour. When the crankshaft that drove the grinding wheel broke, the mill was unable to operate. The plaintiffs approached the defendants, who were deliverymen, in order to have the crankshaft delivered to the maker to have a duplicate made. What is important in this particular instance is that the plaintiffs communicated to the defendants, the necessity of the crankshaft. Even though the necessity of the crankshaft was communicated to the defendants, the delivery of the shaft was

94. See supra note 87 and accompanying text.
96. See supra note 90 and accompanying text.
97. Eisenberg, supra note 82, at 565-66 (citing RESTATEMENT (SECOND) OF CONTRACTS § 351 (1979)).
98. See hypothetical discussion supra Part I.
100. See id. at 146.
101. See id.
102. See id. at 147.
103. See id.
delayed for several days due to "some neglect." As a consequence of the delay, the mill was unable to operate for five days and as a result lost the resulting profits from the sale of their grain.

This is facially different from the hypothetical posed in the introduction to this comment, but in theory the fact patterns are closely similar. The hypothetical had to be modernized to fit into a world dominated by the Internet. In the hypothetical an Internet business communicated its need for continuous service, whereas Hadley dealt with a mill that communicated its need for immediate return of the crankshaft. In both cases however, the result is the same. Both businesses are unable to service their customers and as a result lose profits.

The plaintiff in Hadley sued for lost profits because that was the bulk of its losses; it is likely that the direct damages, the price of shipping the crankshaft, would have been minimal in comparison. This is also what would concern an Internet business in the case of service interruption or failure of the ISP's server in the hypothetical above. In Hadley the jury found for the plaintiffs and awarded lost profits, though the Exchequer Chamber reversed the verdict. The court in reversing the verdict stated that damages could only be recovered as those that "aris[e] naturally, i.e., according to the usual course of things" or those that might "reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." The court decided that plaintiff's claim had failed to satisfy both rules. These rules have become commonly known as the foreseeability doctrine of Hadley v. Baxendale.

Even though the court did not find the tests of Hadley applicable in that case, a court would undoubtedly find them applicable to the issue at hand. When contracting for Internet service, a business would have to disclose that they intended to run an Internet based business using the ISP's server. Thus, both parties would clearly know of the probable loss of profits if customers were unable

104. See id.
105. See id. at 146.
106. See hypothetical discussion supra Part I.
107. See hypothetical discussion supra Part I.
108. Compare hypothetical discussion supra Part I with notes 98-105 and accompanying text.
110. See supra notes 90-94 and accompanying text for the rationale on why it would be appropriate for the Internet business to seek lost profits rather than direct damages.
111. See Hadley, 156 Eng. Rep. at 147, 150.
112. Id. at 151.
113. See id.
114. See Eisenberg, supra note 82, at 566.
115. See hypothetical discussion supra Part I.
to reach the business's web site. Therefore, the loss of profits would be foreseeable. It seems likely that as a result of the difficulty in obtaining cover, and the inescapable foreseeability of lost profits, that consequential damages are recoverable.

The principles set forth in Hadley are default rules, meant only to apply where the contract does not address the limitation of consequential damages. In that instance, it limits the sellers' liability. The Hadley requirements require "not only that the damage could have been foreseen, and that the prospect it would occur was more than marginal, or not insignificant, but that viewed ex ante it was probable or highly probable that the damage would result." As applied to this loss of Internet service Hadley appears to be a perfect fit. The possible breach of the On-line Service Provider, cutting off a business from its only consumers, makes lost profits seem not only foreseeable, but probable. This becomes apparent if the business communicates to the On-line Service Provider that it intends to set up a business web site through which it plans to sell goods or services. Therefore, not only does it appear that cover is infeasible, but also that the Hadley standard can be overcome.

The final historical difficulty that must be surmounted in a contractual relationship is the apparent difficulty of measuring damages in a new business. Unlike established businesses which can easily demonstrate profit margins for a specific period of time using exact figures, a new business has to estimate the lost profits. Historically, "[i]nder the so-called new business 'rule, the courts made it difficult if not impossible for a new business enterprise to recover any lost profits caused by a breach of contract." There is also an implicit requirement of certainty, which requires that damages be ascertainable; otherwise they are not recoverable. However, existing case law has allowed some flexibility in the requirements imposed on new businesses. These cover both the ability of businesses being able to recover as well as the requirement of certainty. For instance, in Fera v. Village Plaza, Inc. plaintiffs wanted to lease space in a retail

117. See U.C.C. § 2-715(2)(a) (1978). The U.C.C. sets forth a two part test in section 2-715 requiring both that damages are foreseeable and that cover is unattainable. See id.
118. See Eisenberg, supra note 82, at 566.
119. See id.
120. See id. at 567.
122. See, e.g., Seagroatt Floral Co. Inc. v. New York Tel. Co., 429 N.Y.S.2d 309 (1980) (explaining that damages were easily ascertainable in the case of a floral store whose telephone service was negligently cut off by looking at the specific time period for which the phone was out and using comparable profits).
123. See Eisenberg, supra note 82, at 569 (citing Cramer v. Grand Rapids Show Case Co., 119 N.E. 227, 228-29 (N.Y. 1918)).
center for a bookstore. Prior to taking hold of the space, the defendant breached the lease by leasing to another tenant.\textsuperscript{126} The plaintiffs sued for their anticipated lost profits in the bookstore.\textsuperscript{127} In concluding that a new business could recover lost profits, the court required “the plaintiff must lay a basis for a reasonable estimate of the extent of his harm, measured in money.”\textsuperscript{128}

This difficulty exists to a greater extent on the Internet, as it pertains to a new businesses. It is difficult to determine how many people will visit the site per day and how many of those people would purchase something from those stores. This, coupled with the worldwide presence makes it even more difficult to gauge lost profits.\textsuperscript{129} Though, as comparable businesses establish a presence, on the Internet, it will likely become easier to establish a reasonable estimate of the extent of the harm.

The Internet is only commencing in terms of modern devices, however, it has already exploded to the point where it is in the “homes of tens of millions of Americans.”\textsuperscript{130} The fact that the Internet is interactive makes it lucrative for businesses.\textsuperscript{131} Additionally, where contracting issues meet the Internet, the contention that there needs to be a uniform set of rules appears even stronger.

III. THE APPLICABLE LAW

The Internet has become a dominant force in “education, business, government, and entertainment.”\textsuperscript{132} It has been difficult with such a developing medium to ascertain the correct law to apply to the Internet, when all previous laws have applied to the tangible world.\textsuperscript{133} While courts have begun to address copyright issues,\textsuperscript{134} defamation,\textsuperscript{135} and trademark issues,\textsuperscript{136} none have specifically tested the extent of liability between a contracting ISP and a commercial business. In this instance no legislature has specifically addressed the realm of the Internet because

\textsuperscript{126} See id. at 641. 
\textsuperscript{127} See id. at 642. 
\textsuperscript{128} See id. at 643 (citing 5 CORBIN ON CONTRACTS § 1020 at 124 (1985)). 
\textsuperscript{129} See Cate, supra note 25, at 565. 
\textsuperscript{130} See Loesch, supra note 46, at 9. 
\textsuperscript{131} See supra notes 50-58 and accompanying text for the benefits and detriments that doing business on the Internet provides for a commercial entity. 
\textsuperscript{132} See Cate, supra note 25, at 565. 
\textsuperscript{133} See id. 
\textsuperscript{136} See e.g., MTV Networks v. Curry, 867 F. Supp. 202 (S.D.N.Y. 1994).
of its unique nature. "No other medium crosses not only every state boundary, but also the national boundaries of the majority of countries in the world." It would, therefore, take a special law to cover the realm of the Internet. Existing statutes likely would not cover the special technology of the Internet.

A. The Uniform Commercial Code Article 2

Usually the default rule in an issue like the one at hand is to turn to the U.C.C. Article 2. The U.C.C. is tailored to cover contractual issues between commercial entities. This would appear to apply to this particular issue because, clearly, both the ISP and the commercial business are commercial entities. However, the U.C.C. traditionally has not covered the sales of services. It has historically been limited to coverage only of the sales of goods. In a situation where contracts mixture of both goods and services, then it would be subject to Article 2 of the UCC. In this situation, the Uniform Commercial Code would be inapplicable because the contract between the ISP and the business entity is in essence a contract for the service of using the Web Presence Provider's server.

B. Tort Liability

In absence of an applicable U.C.C. section, the next statutory law that courts may turn to for a solution is tort liability. The difficulty in attempting to apply tort liability to the present issue is that, historically, tort liability requires some sort of actual injury to recover. In essence, "[t]ort liability theories do not allow for recovery of purely economic damages, because such damages should be covered by contract." There are, however, exceptions to the requirement of an actual injury requirement in tort theories. First, in cases where there are "a limited type of plaintiffs, for a particular type of economic loss, then defendants will be liable for that economic loss regardless of the absence of physical damage." Secondly, in cases involving malpractice courts provide an exception to the pure economic requirement in tort. Finally, the rule against allowing recovery for purely

137. Cate, supra note 25, at 567 (citing Fred H. Cate, Global Information Policymaking and Domestic Law, 1 IND. J. GLOBAL LEGAL STUD. 467 (1994)).
139. See id.
140. See id. § 16.4.
141. See Loesch, supra note 46, at 9.
142. See LEGAL RESEARCH NETWORK, INC., supra note 138, § 16.4(1) (citing Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974); People Express Airlines, Inc. v. Consolidated Rail Corp., 495 A.2d 107 (1985)).
143. See id. (citing Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974)).
economic harm may erode as an increasing portion of our lives become ethereal."\(^{144}\)
The last exception may apply in the instant case because the Internet may be seen as ethereal because it exists in an intangible form. However, because the actual damage requirement has existed historically, tort liability would most likely not lie in a contractual relationship between an Internet Service Provider and a commercial entity. This is because the damage will almost always be solely economic when the ISP breaches the contract.\(^{145}\)

**C. The Solution Maybe?: The Uniform Computer Information Transactions Act**\(^{146}\)

In response to the need for a uniform body of law that cover, contracting of intangibles, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") drafted the Uniform Computer Information Transactions Act to regulate "computer information transactions...including commercial agreements to create, modify, transfer or distribute: computer software, multimedia interactive products, computer data and databases, [and] Internet and online information."\(^{147}\)
The drafters recognized that Article 2 of the U.C.C. is limited to the sales of goods, and therefore it is not applicable to the medium of the Internet.\(^{148}\)

With that basic framework, the NCCUSL and the American Law Institute drafted a companion U.C.C. to specifically address the intangible world of drafting in the computer world.\(^{149}\) That draft, called Uniform Commercial Code Article 2B, gave way to the present Act, the Uniform Commercial Information Transactions Act ("UCITA" or "Act").\(^{150}\) The NCCUSL stated that they decided to supersede the proposed U.C.C. with the UCITA when it "[became] apparent that this area

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144. See id. (citing Note, Purely Economic Loss: A Standard of Recovery, 73 IOWA L. REV. 1181 (1988)).
145. However, actual damage may be found if the Internet Service Provider is the conduit for a medical business which relies on the Internet for accurate medical information about a particular patient.
147. See id. prefatory note.
148. See generally **LEGAL RESEARCH NETWORK**, supra note 142 for a discussion of the traditional areas covered by the U.C.C..
[did] not presently allow the sort of codification that is represented by the Uniform Commercial Code." Once the draft was revised and taken out of the U.C.C. framework, the NCCUSL promulgated it as a completely separate entity. The draft of the UCITA for approval was then voted upon during the NCCUSL's annual meeting in Denver, Colorado. On July 29, 1999, NCCUSL adopted UCITA in its entirety.

"UCITA thus applies to many of the most significant transactions in the information age that are for the most part intangibles and currently subject to diverse common law and miscellaneous state statutes." The UCITA takes what arguably are contract-based principles and extends them to what is a specialized and diverse way of contracting at the unique juncture of commercial transactions and computer information. The UCITA is partially premised on the principle that there is no clear law to cover the expanding world of computer transactions. The drafters looked to other laws that governed commercial contracts, such as Article 2 of the U.C.C. and ruled out any cross over between the rules. However, the drafters do note their reliance upon the goods manufacturing industry as the basis of many of the contracting principles used in the UCITA. The NCCUSL analogizes between the development of the U.C.C. and that of the UCITA, stating simply that "[neither] the subject matter nor the type of transactions in computer information are similar to sales or leases of goods." The NCCUSL predicates the necessity of this act on the fact that the computer industry economically outpaces the goods manufacturing industries in the United States. The UCITA, therefore, is recognizably grounded in the litigation costs that are inherent in uncertain and developing commercial mediums.
1. The Scope of the Act

Section 103 of the Act contains the general scope and terms of the Act as well as delineates what the Act excludes. The Act differentiates the On-line or Internet industry from other service industries such as the motion picture, broadcast, cable, digital musical recording, and financial services transaction industries. The Act differentiates the two types of service industries by drawing a line between the concept of access and broadcast. More importantly though, the UCITA enumerates an expansive list of what items are included and excluded under the Act.

The reporters to the Act first touch upon those transactions that deal with computer information. The notes to section 103 of the Act state that these transactions are agreements which entail the "creation, modification or distribution of computer information." At first glance this Act appears to apply to the hypothetical situation at hand, that of a commercial business who makes an agreement with an On-line Service Provider to place information on their server for access by that business’ consumers. A more detailed inspection of the UCITA confirms this initial presumption. The reporter’s notes state that “[t]ransactions in computer information focus on the computer information, rather than tangible media that contains the information [goods].” In the case at discussion in this comment, the information would be the intangible computer information that consumers go on-line to browse and ultimately purchase from.

In the hypothetical case of businessman Jones, the books are the tangible goods, but they are not the subject of the agreement with the ISP. Rather, the agreement involves the right to place Jones’ web page, which consists of merely data, onto the server of his service provider. The “computer information transaction” has little to nothing to do with the tangible goods that the commercial business sells to the consumer. The reporters additionally state that “[f]or a transaction to be included, acquiring the computer information, access to it, or its use must be a focus of the transaction and not a mere incident of another transaction.” The books in this case are a transaction, but the contract between the ISP

163. See UCITA §§ 103-112.
164. See id. § 103(d)(1)-(4).
165. See id. § 103 reporter’s notes (2)(c).
166. See id.
167. See id. § 103 reporter’s notes (2).
168. See id.
169. See id.
170. See discussion supra Part I.
171. See UCITA § 103 reporter’s notes (2).
and the individual business could never be termed as a mere incident of the transaction in goods. In both the hypothetical case and in the UCITA "the contract is for the creation, use, or distribution of the computer information itself."172 The reporters also discuss the situation where computer information and goods become a mixed transaction.173 However, they conclude that when they overlap, each transaction will be placed in its proper subject matter area.174 For instance, the representative goods would be treated under Article 2 of the U.C.C. and the computer information transaction would be treated under the UCITA.175 This eliminates any conflicts between choice of law and allows for the goods or information to be treated according to the law specifically developed for it. The proposed situation developed in this article therefore appears to be a perfect marriage to the UCITA. It sets forth default rules for transactions involving computer information systems,176 it recognizes that conflicts may arise in mixed transactions,177 and in fact even contains a particular section addressing the type of contracts that are undertaken between an ISP and one of its users.178

2. Access Contracts179

"This Act covers transactions involving access to or information from a computer system. This covers Internet and similar systems for access to or use of computer information."180 An access contract typifies the contractual relationship between an ISP and a commercial entity.181 The reporters define an access contract by its requirement that one person place information onto the server of another.182 The Act states that an access contract means "a contract to obtain electronically, access to, or information from, an information processing system of another person, or the equivalent of such access."183 This is a new term that was developed for what was then the proposed Article 2B of the U.C.C.184

The UCITA also provides that the access provider may have control over the licensed information and therefore may be able to contractually bind a third

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172. See id.

173. See id. § 103 reporter’s notes (4)(a).

174. See id.

175. See id.

176. See id.

177. See id.

178. See id. § 611.

179. See id.

180. See id. § 103 reporter’s notes (2)(c).

181. See id. § 102 reporter’s notes (1).

182. See id. The reporter’s give an example of the information accessed being controlled by the access provider. See id. The topic discussed in this article, however, presumes that the commercial entity controls the information.

183. See id. § 102.

party. In the hypothetical case at hand, the access provider would not be able to bind the consumer beyond the extent that they facilitated the taking of orders online. Additionally, the access rights concern both the right to control the information on the server and the right to access the information. Therefore under an access contract, the "access provider can establish contractual terms of access that bind the other party even though the licensee could, if it chose, obtain identical information from other sources or its own research." This reinforces the idea that on its face, the UCITA applies to the issue at hand. The following section of the comment describes how the part of the Act concerning access contracts would govern the contractual relationship between an ISP and its users. While looking at the facial language of the draft as approved, this comment will dissect the language and consider whether the section really applies to the issue at hand.

3. The Text of the Act: Access Contracts

The drafted rule regarding access contracts is stated in the Uniform Computer Information Transactions Act section 611. It reads in full:

(a) If an access contract provides for access over time, the licensee's rights of access are to the information as modified and made commercially available by the licensor from time to time during that period. In addition, the following rules apply: (1) A change in the content of the information is a breach of contract only if the change conflicts with an express term of the agreement. (2) Unless it is subject to a contractual use restriction, information obtained by the licensee is free of any use restriction other than a restriction resulting from the informational rights of another person or other applicable law. (3) Access must be available at times and in a manner: (A) conforming to the express terms of the contract; and (B) to the extent not expressly stated in the agreement, at times and in a manner that is reasonable for the particular type of contract in light of the ordinary standards of the business, trade, or industry. (b) In an access contract that gives the licensee a right of access at times substantially of its own choosing during agreed periods, an occasional failure to have access available during those times is not a breach of contract if it is: (1) consistent with ordinary standards of the business, trade, or industry for the particular type of contract; or (2) caused by: (A) scheduled downtime; (B) reasonable needs for maintenance; (C) reasonable periods of equipment, software,

185. See UCITA § 102 reporter's notes (1).
186. See id.
187. See id.
188. See infra notes 190-219 and accompanying text.
189. See infra notes 220-31 and accompanying text.
190. See UCITA § 611.
or communications failure; or (D) events reasonably beyond the licensor’s control, and the licensor exercises such commercially reasonable efforts as the circumstances require.\footnote{Id.}

The Act is essentially a limitation on the licensee’s recourse in the event of a system shutdown.\footnote{See id.} First, the article covers three contractual issues relating to the express terms of the contract if a contract does in fact exist.\footnote{See id. § 611(a)(1)-(3).} The first point discussed is how to treat a change in the content of the information on the service.\footnote{See id. § 611(a)(1).} This is not an important issue for the purposes of this discussion because a commercial business would not want the ISP to go into its web site and change the information on the server.\footnote{See id.} However, it is unlikely that an ISP would be inclined to do so without express permission, and this can be provided for in the service contract. Additionally, as the rule provides, if the licensor or commercial entity has such an express term in the contract then it would be a breach of the contract to alter the information.\footnote{See id.}

The second point discussed under general contractual limitations is that of use of information obtained from the system.\footnote{See supra notes 185-87 and accompanying text.} Again, for the purposes of this discussion, this particular point seems unimportant.\footnote{See id. § 611 (a)(2).} The purpose of the business is to put information onto the server of the ISP, not to obtain information from that particular service.\footnote{See discussion Part I.} The only information that the business would likely gain from the server is information from the customers utilizing the server. Clearly the point of the entire exercise is to obtain that information, so it is inconsistent to deny access to that information. In fact, it just reaffirms the entire rationale of this Comment.

The third and final contractual issue discussed is one that discusses both contract issues and the default rule.\footnote{See supra notes 185-87 and accompanying text.} The first application of this reads, “Access must be available at times and in a manner conforming to the express terms of the contract.”\footnote{See supra notes 185-87 and accompanying text.} This reinforces the idea that the Uniform Computer Information Transactions Act is a default rule and the express terms of the contract control.\footnote{See id. § 611 (a)(3).} However, the third rule links the above statement with a clause that reads: “and to the extent not expressly stated in the agreement, at times and in a manner that is reasonable for the particular type of contract in light of the ordinary standards of

191. Id.
192. See id.
193. See id. § 611(a)(1)-(3).
194. See id. § 611(a)(1).
195. See id.
196. See id.
197. See id. § 611(a)(2).
198. See supra notes 185-87 and accompanying text.
199. See discussion Part I.
200. See UCITA § 611 (a)(3).
201. See id. § 611 (a)(3)(A).
202. See id. § 103 reporter's notes (4)(a).
the business, trade, or industry.\textsuperscript{203} This clause appears to more directly impact the issue at hand. The question will inherently arise as to what is "reasonable for the particular type of contract in light of the ordinary standards of the business, trade, or industry."\textsuperscript{204} In terms of the Internet, there are really no established "ordinary standards," because the nature of the medium is still relatively new and is still being tested in commercial terms.\textsuperscript{205} Also, this clause states that the contract will be analyzed in terms of standards "for the particular type of contract."\textsuperscript{206} Courts could compare Internet contracts between an ISP and a commercial business to contracts between a commercial business and another entity such as a cable or telephone service provider. The inherent difficulty in this sort of hypothesis is something that the reporters recognized in the creation of the UCITA: the Internet is a new medium completely unlike anything previously developed.\textsuperscript{207} Therefore, this clause is seemingly superfluous when it provides no clear recourse in terms of interruption of service.

However, the most questionable portion of the Act comes from the latter half of the text relating to access contracts.\textsuperscript{208} The introduction to this portion states, "[I]n an access contract that gives the licensee a right of access at times substantially of its own choosing during agreed periods, an occasional failure to have access available during those times is not a breach of contract . . . ."\textsuperscript{209} As with the previous section this language is vague, to say the least. The term "occasional failure" leaves much to speculation regarding how long, short, or frequent a breach of this article might have to be to result in a violation.\textsuperscript{210} The Act then sets out two provisions that are not a breach, if the violation is consistent with them.\textsuperscript{211} The first provision allows for a breach if the interruption is "consistent with ordinary standards of the business, trade, or industry for the particular type of contract."\textsuperscript{212} The same objections that were applicable to the first half of UCITA section 611 are appropriate when applied to this section, which contains the exact same language.\textsuperscript{213} The Internet is such a new medium for commercial entities that there are really no established standards of business.\textsuperscript{214}

\textsuperscript{203} See UCITA § 611 (a)(3)(B).
\textsuperscript{204} See id.
\textsuperscript{205} See infra note 260, and accompanying text.
\textsuperscript{206} See UCITA § 611 (a)(3)(B).
\textsuperscript{207} See id.
\textsuperscript{208} See id. § 611(b)(1)-(3).
\textsuperscript{209} See id. § 611(b).
\textsuperscript{210} See id.
\textsuperscript{211} See id. § 611(b)(1)-(2).
\textsuperscript{212} See id. § 611(b)(1).
\textsuperscript{213} See supra notes 203-06 and accompanying text.
\textsuperscript{214} See UCITA prefatory note.
The last section provides for several different probabilities that might occur, and essentially limits all liability for an ISP who provides an Internet platform for a commercial business.\textsuperscript{215} The provision states that an interruption of service is not a breach of this article if it is "caused by (A) scheduled downtime; (B) reasonable needs for maintenance; (C) reasonable periods of equipment, software, or communications failure; or (D) events reasonably beyond the licensor's control, and the licensor exercises such commercially reasonable efforts as the circumstances require."\textsuperscript{216} This all-encompassing provision essentially precludes recovery for any type of network interruption.\textsuperscript{217} An ISP suffering from an unexplained interruption for an "intermittent" period of time and thus does not have to provide any explanation to its business customers for this.\textsuperscript{218} The ISP can even go as far as to merely say that the problem was a "communications failure", avoiding any liability.\textsuperscript{219}

While the express provisions of this article seemingly protect the ISP to a large extent, it also appears to open up the monetary floodgates for the commercial entity. When focused on commercial business, the concern is what are "reasonable periods of downtime" for businesses that depend on continual access to its products for its consumers? The consumer is the lifeblood of the business, and it is apparent that when a business is cut off from a customer even for only a moment, it cuts into profits and causes additional expenses.

4. The Application of the Uniform Computer Information Transactions Act

On a global scale, the UCITA appears to apply to the present issue.\textsuperscript{220} The implications of a contract between an ISP and a commercial entity require a computer information transaction which places information on the access provider's server. Therefore, the subject matter of this article is undeniably covered by the UCITA in some manner.\textsuperscript{221} Additionally, by narrowing the field to just access contracts, the facial language of the definition appears to bring with in its purview the factual situation as stated in this article as well.\textsuperscript{222}

In fact, the reporter's notes specifically emphasize the type of continuous

\textsuperscript{215}. See id. § 611(b)(2)(A)-(D).
\textsuperscript{216}. See id.
\textsuperscript{217}. See id.
\textsuperscript{218}. See id. § 611(b)(2).
\textsuperscript{219}. See id.
\textsuperscript{220}. See supra notes 167-69 and accompanying text.
\textsuperscript{221}. See supra notes 182-83 and accompanying text.
\textsuperscript{222}. See supra notes 180-84, 193-207 and accompanying text.

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relationship that are ongoing between an ISP and a commercial entity. However, while the larger ideal of the “access contracts” rule applies to the present issue, it is unclear from the express language of the rule whether it applies based on its specific subparts. The rule specifically addresses both the licensor’s and the licensee’s obligations. For the purposes of this comment, these parties can be seen as the On-line Service Provider and the commercial business respectively.

What is conspicuously absent is the obligation to make the service open and accessible to a third party in this case a consumer. The express and important triggering language of UCITA reads: “In an access contract that gives the licensee a right of access at times substantially of its own choosing.” This is one of only two references to the contract contained in the rule. The rule thus focuses the concern not on possible third parties, but limits it to the two parties to the contract. Additionally, this is at odds with the express rule because the Act allows the server to go down for apparently any reason. Even the reporter’s notes state that there is a basic obligation under an access contract to “make and keep the system available in a manner consistent with contract terms or industry.”

In the end, the UCITA seems to be a cursory answer to the question of what law would apply to the hypothetical case. However, there are still a lot of questions that the UCITA leaves unanswered.

IV. REMEDIES AND SPECIAL CONCERNS

Because this is a contract issue, drafting an ISP contract with an eye towards the possible and almost likely prospect that one day the service will go down will save the later difficulty of resorting to an unclear rule such as the UCITA. In fact, it is recognized that “[v]irtually every sales contract between commercial

223. See UCITA § 611 reporter’s notes (2) (“This relationship is illustrated by on-line services that operate on a subscription or membership basis. The agreement is not only that the transferee receives the access or the information, but that information resource be accessible on a continuing basis.”).
224. See id. § 611.
225. See id.
226. In fact, the Act states that a licensor or licensee is not to be construed as a strict term applicable only to licensees. See id. § 102 reporter’s notes (27) (“These definitions refer to the transferee and transferor in any contract covered by this Act, whether or not the contract is a license.”).
227. See id. § 611.
228. Id. § 611(b).
229. See id. § 611(b)(1)-(2).
230. Id. § 611 reporter’s notes (3).
231. See supra notes 204-19 and accompanying text.
232. See discussion supra Part III.C.3.
parties contains a clause limiting the seller’s liability.”

So while the rules discussed in the UCITA are default rules, they should be rules of last resort, referred to only where the parties have not discussed rights and liabilities. A problem that may occur when the parties contract regarding their rights and liabilities is the unequal bargaining power of the business entity. For example, the On-line Service Provider has the power to decide whether to allow the business access its server or not, and can, in essence, set the terms of the contract. What this may come down to is that if a business wants guaranteed twenty-four hour service, it may have to contract for it by paying higher prices to cover a consequential damage clause.

Measurement of damages under the UCITA are the same or similar to existing U.C.C. Article 2 damages. “Contract remedies aim to put an aggrieved party in the position that would result if performance had occurred as agreed.” Therefore, damages for lost profits are the obvious resolution of an action for a breach of service which severs customers from the commercial business.

Prior to recovery, however, there are other hurdles that must be overcome. First, the parties to a contract can always limit their remedy, which is why the Act is a default rule. Additionally, the proposed draft states that “[t]he losses must be an ordinary and predictable result of the breach.” In the case of an ISP shutting down and closing off access to consumers, it would unlikely that any individual would conceivably argue that loss of profits were not the ordinary and predictable result of that breach. Additionally, the article provides for an exclusion for damages which are not foreseeable. “The particular needs and circumstances [of the parties] must be made known at [the] time [of contracting].” It is likely or probable that a commercial entity would communicate their intention to use the ISP’s web server to support a commercial entity. Additionally, there is an argument that an ISP should always have knowledge, or be imputed with constructive knowledge, of what items are residing on their server. In communicating to the ISP, the commercial business would also impart to the ISP the necessity of a continuous connection to consumers. This would satisfy the requirement that lost profits from a breach should be foreseeable.

234. See UCITA prefatory note.
235. See id. §§ 808-809 reporter’s notes (observing that the source of remedies for licensor and licensee damages is drawn from article 2 of the U.C.C.).
236. Id. § 801 reporter’s notes (2).
237. See id. prefatory note.
238. Id. § 102 reporter’s notes (9).
239. See id. (“The losses must be an ordinary and predictable result of the breach. In the case of economic and similar losses, they must be foreseeable. This means that, for the injured party to recover compensation for losses resulting from its special circumstances, the party in breach must have had notice of those circumstances at the time of contracting.”).
240. Id.
241. See supra notes 170-72 and accompanying text.
Additionally, the Act states that damages must not be speculative.\(^{242}\) However, the rule also provides that the damages do not have to be measured with precision or certainty.\(^{243}\) Courts have also made it clear that they will look to similar businesses to calculate damages for new business ventures.\(^{244}\) The Act further imposes a requirement of mitigation.\(^{245}\) This requirement seems impossible to fulfill in the Internet context because of the technical difficulty of moving the information from the downed server to another service. For instance, if the server utilized by a commercial business goes down, the business has few choices. It can wait out the interruption, essentially losing all profits until the system comes back up. Or in the alternative, it can go to the expense of taking its information off the down server and placing it on a working server. Either choice is unsound for a business that is seeking to gain profits from its venture. Thus, there is no opportunity for mitigation for the commercial business. The only possible recourse is for the business to seek lost profits as damages.

However, it is possible for a business to seek incidental\(^{246}\) and direct damages\(^{247}\) under the terms of the contract. Direct damages in this case would be the difference between the value promised and the received value.\(^{248}\) This would depend on the price of the contract to have access, and would most likely be calculated as the price paid by the business for access to the server during the time it was down. It is more likely that the price to access will be much lower than the cost of lost profits to a business.

What is obviously the most important remedy for a business entity is consequential damages.\(^{249}\) "In particular, consequential damages typically consist of the difference between the profits the buyer actually made in transactions with third persons and the profits he would have made if the seller had performed."\(^{250}\) In this case, the damages are those profits that would have been gained if the service were working without any interruption. For a successful business, lost

\(\text{\textsuperscript{242}}\) See UCITA § 102 reporter’s notes (9).
\(\text{\textsuperscript{243}}\) See id. § 807 reporter’s notes (4); see also RESTATEMENT (SECOND) OF CONTRACTS § 352 (1995) ("Damages are not recoverable for loss beyond the amount that the evidence permits to be established with reasonable certainty.").
\(\text{\textsuperscript{244}}\) See 5 CORBIN ON CONTRACTS § 1020 at 124 (1985).
\(\text{\textsuperscript{245}}\) See UCITA § 807(a).
\(\text{\textsuperscript{246}}\) See id. § 102 reporter’s notes (21) ("[Incidental damages] includes the cost of seeking or arranging for mitigation, but not the actual expenditure for the mitigation itself.").
\(\text{\textsuperscript{247}}\) See id. § 102 reporter’s notes (16) ("Direct damages are compensation for losses associated with the value of the contracted for performance itself as contrasted to loss of a benefit expected from intended use of the performance or its results.").
\(\text{\textsuperscript{248}}\) See id. § 808 reporter’s notes (2).
\(\text{\textsuperscript{249}}\) See id. § 102 reporter’s notes (9) ("Consequential loss deals with loss of benefits anticipated as a result not being able to exploit the expected contracted performance.").
\(\text{\textsuperscript{250}}\) Eisenberg, supra note 82, at 565.
profits can run into the millions.\textsuperscript{251} Thus, it is easy to see why consequential damages would be preferable over direct damages. Yet commercial businesses are often left without the option of choosing to recover consequential damages.\textsuperscript{252} This is because many commercial contracts will have an express exclusion limiting the recovery of consequential damages.\textsuperscript{253} However, a consequential damage exclusion can be invalidated if it is deemed unconscionable.\textsuperscript{254} Additionally, the commercial business may be able to contract over any consequential damage limitation if it is willing to pay for the extra coverage. In the end though, are what a businesses will seek consequential damages because these provide the most lucrative remedy.

V. IMPACT

In the future, "[l]itigation concerning on-line matters will occur with greater frequency as the industry continues to expand."\textsuperscript{255} Therefore the issue explored in this Comment will likely arise eventually, if it has not already done so.\textsuperscript{256} No cases have yet been litigated which specifically address this or similarly related subjects. The possible reasons for this are two-fold alluded to already in this Comment.

First, because the Internet is an evolving technology, cases discussing the rights and liabilities of ISPs, as well as publishers,\textsuperscript{257} have been slow to rise to the court level.\textsuperscript{258} Furthermore, while the Internet is developing at an incredible rate of speed\textsuperscript{259} it is still in its infancy. As a result, the Internet is only now being recognized as a viable way of doing business.\textsuperscript{260} It is likely that as companies succeed on the Internet, others will be induced to engage in the on-line business domain.\textsuperscript{261} The Internet remains an excellent way to have worldwide coverage with a minimal amount of expense. Additionally, many businesses have not had to confront this issue because they have developed their own server to publish their business information. For these businesses, there is no recourse against another

\textsuperscript{251} See hypothetical discussion supra Part I.

\textsuperscript{252} See Murtagh, supra note 8, and accompanying text.

\textsuperscript{253} See id.

\textsuperscript{254} See UCITA § 803(d).


\textsuperscript{256} By this issue may have "already" been raised, I am implying that the issue could have been raised outside of court and settled quietly without involving courts.

\textsuperscript{257} Publishers as used in this comment refers to those businesses who put information on the Internet. See e.g., Gwenn M. Kalow, Note, From the Internet to Court: Exercising Jurisdiction over World Wide Web Communications, 65 FORDHAM L. REV. 2241, 2244 (1997) ("Information made available on the Web is said to be published.").

\textsuperscript{258} See discussion supra Part II.A.

\textsuperscript{259} See Timothy L. Skelton, Comment, Internet Copyright Infringement and Service Providers: The Case for a Negotiated Rulemaking Alternative, 35 SAN DIEGO L. REV. 219, 219 (1998) (stating that "the Internet was not opened to the public until 1990.").

\textsuperscript{260} See discussion supra Part II.

\textsuperscript{261} See Amazon.com Announces Financial Results for First Quarter 1998, supra note 9 (discussing the success one company has had selling books on-line).
party if they are unable to communicate with their customers.

Second, cases dealing with this subject have likely not been litigated because no explicitly recognized cause of action existed prior to the Uniform Computer Information Transactions Act. The possibility of a tort recovery has been limited by the requirement of proving actual damages. Furthermore, courts have not recognized any remedy in contract because the present issue is currently unrecognized in the U.C.C. as currently constituted. And the UCITA was only recently enacted.

Immediate impacts are unclear. If this issue were to arise now, the courts would be left without a clear avenue by which to resolve it. Even though the NCCUSL has approved the UCITA states may not accept and approve it. Therefore, it is still likely that many businesses have contracted away their rights to consequential damages and therefore are left without recourse if their services fail.

The overall question though is whether the UCITA applies to this issue at all? It addresses the licensee's right of access to the information and usage of the server, however, it does not address the consequences of when a third party, in this case a consumer, is unable to utilize that licensor's site. If the Act does apply to such a situation, then by the express rules of the Act, almost all forms of liability would be excluded. Furthermore, the Act essentially allows the service to go down as long as it is consistent with the ordinary standards of the industry. Because the Internet is developing rapidly, what is ordinary or commonplace one day may be outdated the next. A business' only means of selling products may be over the Internet, and to allow even a minimal shutdown would limit the

262. See discussion supra Part III.
263. See discussion supra Part III.B.
264. See discussion supra Part III.B.
266. See discussion supra Part III.C.
267. See id.; see also UCITA § 611(a) ("If an access contract provides for access over time the licensee's rights of access are to the information as modified and made commercially available by the licensor from time to time during that period.").
268. See id. § 611.
269. A similar analogy can be seen in the exclusion of liability for telephone companies if their services fail. See Rendi L. Mann-Stadt, Limitation of Liability for Interruption of Service for Regulated Telephone Companies: An Outmoded Protection, 1993 U. ILL. L. REV. 629 (1993). This theory was based on the FCC's regulation of telephone companies. See id. at 632. However, one author concludes that this limitation on liability is outdated and proposes a version of risk sharing wherein the phone company would be exposed to moderate liability for service outages. See id. at 649.
270. See UCITA § 611(b)(1).
271. See id. § 611(3)(B).
business' ability to make profits and survive. If the service goes down, it would be
similar to slamming the doors on a business' only brick-and-mortar store.

On the other hand, if there were liability to a server, to what extent would it
apply? First the existence of liability would mean that the rules in the Act would
not apply at all. This leaves the law unclear on a resolution of the issues. As stated
in Part III of this comment, the normal channels of legal recourse afford no
resolution for this issue or many of the other issues facing the users of the
Internet. That is indeed why the UCITA was enacted; to provide a substantial
background for the laws pertaining to the digital world. However, what is to
become of the issue at bar when the proposed solution fails in its essential purpose?

Critics of the UCITA argue that the Act as developed is fundamentally
unfair. The statute in many respects protects software publishers at the expense
of the public. It will therefore be of interest to see the amount of support that the
various state legislatures give the Act as written. If it is not accepted parties are left
unsure of what cause of action is applicable. One critic, referring to the UCITA
in its previous incarnation, stated it succinctly, "I would like to see a successful
result in Article 2B. The current state of software contracting law makes it difficult
to counsel clients and difficult to determine when a cause of action exists." However
the statute as drafted, seems fundamentally unfair, especially UCITA
section 611. In the end, business organizations may have to contract carefully to
receive the desired result. In this case, they may have to pay an increased amount
to "guarantee 24-hour, seven-day-a-week operation for all Internet traffic." Also,
the commercial entity will want to make sure that the contract with the ISP does not
limit liability in the form of consequential damages. These two options appear
to be the only clear way for a commercial business to maintain a constant
connection to their customers, or to recover damages, in the event that a commer-
cial businesses digital lifeline breaks down.

272. See supra Part III.C.
273. See UCITA prefatory note.
274. See Software Standards Reborn. (The Uniform Computer Information Transactions Act), SAN
JOSE MERCURY NEWS, May 31, 1999, at E1; see also Cem Kaner, In My Opinion: Objections to the
Proposed Uniform Computer Information Transactions Act, 4 CYBERSPACE LAW. 14 (1999); Ed Foster,
Mad as Hell and not Going to Take it Anymore? Sign our Anti-UCITA Petition, INFOWORLD, May 31,
1999, available in 1999 WL 16660956; Dan Gilmor, Commentary; Proposed Curbs Software Buyers'
275. For instance, UCITA would treat the sale of a good, such as software, not as a sale at all, but
rather as the licensing of an intangible. See id. By labeling a good to be a license, the article essentially
takes away many of the consumer protections governed under the sales of goods. See id.
276. See id.
277. See Providers Seek Assurances on Internet Reliability, HEALTH DATA MGMT., Feb. 19, 1997,
available in 1997 WL 3747857.
278. See id.
VI. CONCLUSION

In summation, a law should be developed that addresses the needs of both parties. This means a fair split of the risks and liabilities in an Internet business. The UCITA does not result in a fair and even division of the risks and liabilities created by business access to Internet service. UCITA seems heavily slanted towards protecting the On-line Service Provider rather than the individual or the commercial entity. Additionally, its express language appears not to address the exact situation postulated in this comment, though courts may nevertheless look beyond the express language and apply it as if it did. This would essentially close off all but the most egregious offenses by the On-line Service Provider. Essentially the ISP can shut down their system for a period of time, and if the commercial entity complains, the ISP could call the shutdown ordinary and reasonable, thus abrogating liability. Thus, the only possible way for a business to protect itself is to contractually guarantee service. Otherwise a business will be threatening their profits and their very survival by falling back on this Act.

Morgan Stewart