**Final Examination**

**Contracts, Fall 2016**

Prof. Warner

December 12, 2016

The exam is 3 hours long.

The exam is open book; you may use material on your computers, as well as commercial or personal printed materials.

Steve Sowle is the founder and CEO of SowleGuide, a company that designs, manufactures, and sells autopilots for cars. He is negotiating with John Donne, the CEO of Programming Donne to create software for his latest design, the SowlePilot. Sowle exclaims, “I wonder what we did until we met!” Donne replies, “We played like children, together we are big time.” Then Donne says, “One thing. I don’t just want to get paid a fee. I want a cut of the profits. Can we agree now on a royalty of 5% of the yearly net revenues?” Sowle says, “OK with me. It’s a deal.” Donne says, “Done!” Donne continues, “You know, the programming project you need is quite ambitious, quite difficult.” Sowle says, “Yes, I know” Donne replies, “Don’t worry. I will figure it out. When you have Donne, you have done!” Sowle replies, “You are the best. I know that. I am just worried. If you are late with your software, I will lose $1,000,000 in sales. I have to have it ready by June 13 to get Mack Truck to agree to use my software in their new driverless models.” Donne replies, “I realize that. But don’t worry. With Donne, it’s done.” Sowle responds, “Great. One more thing. Google’s self-driving program can’t distinguish between a plastic bag blowing around on the road and an animal like a deer. I told Mack the SowlePilot would be able to tell the difference. They will not deal with me unless you make the SowlePilot tell the difference. I have to have software that does that. I can’t accept anything else.” Donne says, “Got it. Will do!”

Donne sends Sowle an unsigned written agreement—the software agreement—that describes all pertinent details of the software deal between Sowle and Donne—including the June 13 delivery date, and the promise that the software will be able to distinguish a plastic bag from a deer or other small animal. It also contains these clauses:

*Entire agreement clause*: This agreement represents the complete and final statement of the parties’ obligations. Neither party is relying on any oral or written representations not contained in this agreement.

*Compensation*: Donne’s compensation shall consist entirely of a payment of $100,000.

The agreement does not mention anything about royalties. Donne sends the agreement with a note that says, “Look it over. Change something if you do not like it, and send the signed agreement back to me. I will look it over again, make sure that I am OK with it all, and sign it myself. When I am done, you have Donne.” Sowle notices the lack of mention of royalties and calls Donne to discuss it before he signs the agreement. He says, “I see you left out the 5% royalty. Just a mistake?” Donne says, “No, I changed my mind about that. I asked for more in compensation instead.” Sowle replies, “So no royalties then? If we want that, we should put it in the agreement.” Donne says, “Indeed, we should write it in if we want it, but I am happy with the agreement as it. It’s OK with me to have it represent everything we have agreed to.” Sowle says, “Likewise.” Donne continues, “What marketing do you plan for this thing? Why not try my older friend, Thomasina Wyatt? She is great, and could use the business right now. For some reason, now they flee from her that sometime did her seek.” Sowle says, “If you think she is good, that is recommendation enough for me. Have her contact me.” After they hang up, Sowle signs the agreement and adds a page attached to the back of the agreement that reads, “The parties agree to submit all disputes arising out of this agreement to binding arbitration.” Sowle sends the agreement plus attached page to Donne with a cover letter that reads in part, “Here you go, for your consideration and acceptance. Great dealing with you.” When Donne receives the agreement he signs it and also inserts the following clause in the body of the agreement: “The parties agree to resolve all disputes arising out of this agreement in courts of competent jurisdiction in Illinois, applying Illinois law. The parties do not agree to resolve disputes by binding arbitration.” Donne sends the document back to Sowle with a note that says, “Here is my acceptance. Glad our deal is done. You now have Donne!” Sowle and Donne have no further communications about the exchange of documents.

Sowle and Wyatt meet face to face. Wyatt gives him a copy the standard agreement she uses for marketing services. Sowle reads it and says that it all looks fine. “Just one thing,” he says, “I would like to increase the number of online banner ads you will design from 5 to 10. How much more will that cost me?” They discuss the issue, and Sowle ends up thinking they agreed on an increase of $40,000, but Wyatt thinks they agreed on $50,000. Wyatt sends Sowle a revised version of the standard agreement specifying that Wyatt will design 10 banner ads instead of 5 at an additional cost of $50,000. When he receives the agreement, Sowle calls Wyatt and says, “I know banner ads come in four varieties: standard, rectangular, leaderboard, and skyscraper. What about an equal distribution of both?” Wyatt says, “That is often what we do, but we let our computer algorithm decide that issue. The agreement specifies that the algorithm decides. Take a look at paragraph 84.” Sowle says, “Ok then.” Sowle thinks that they agreed that “banner ad” in the contract means an equal distribution of the four types of banner ad. Wyatt thinks that Sowle understands that the algorithm determines the distribution. Sowle then says, “One more thing. I thought we had agreed on an increase of $40,000. Maybe I got it wrong. Anyway, $50,000 is OK, and I am accepting that, but I will add a note to the agreement that says the increase is $40,000 not $50,000. Just think that over when you get it, and let me know if you change your mind. If so, we can amend the agreement.” When Wyatt gets the agreement, she responds, “Just to be clear, you accepted at $50,000 and $50,000 it is.”

Wyatt uses the cloud computing services of The Nile, a provider of such services to businesses. Wyatt uses it to maintain all of her business operations and her entire Internet presence. On March 31, The Nile’s entire cloud computing services go down for six days, and Wyatt it is impossible for Wyatt to begin marketing until April 7. The contractual date for the beginning of marketing was April 1. Neither Sowle nor Wyatt had any reason to think that The Nile’s services would go down. When Wyatt signed up with The Nile, it offered her its “cyber disruption insurance” policy at a very reasonable rate. The Nile’s website explains in detail why such insurance is a very reasonable option for businesses that depend on cloud services. Wyatt read through the website material, but she was unfamiliar with the insurance and technical issues, and decided to think about it later, but she never got around to the issue again.

Donne delivers software on June 13, but it is not software that fully meets the contractual specifications. In particular, the software cannot reliably tell the difference between a plastic bag and a deer or other small animal. Donne tells Sowle he is cutting 25% off the price. Sowle nonetheless refuses to accept the software even with the price reduction, and Donne seasonably announces his intention to cure. On June 30, Donne delivers properly working software that can tell the difference between a plastic bag and a small animal. Sowle accepts the software and pays the full contract price for it, but by that time, Mack Truck has contracted with Google, not Sowle, for its driverless trucks, and Sowle has lost $1,000,000 as a result.

**Questions (1) – (7)**

(1) Does the agreement between Sowle and Donne contain a clause requiring binding arbitration? Begin your analysis with the unsigned written agreement that Donne sends to Sowle. Be sure to discuss all relevant communications.

**TREAT SOFTWARE AS A GOOD.** Assume that Sowle and Donne are merchants. You may assume that any expression of acceptance is definite and seasonable.

(2) Does the parol evidence rule make the oral agreement concerning royalties unenforceable?

**NOTE: USE THE PAROL EVIDENCE RULE AS STATED IN CLASS, AND USE ONLY THE NORMAL INCLUSION TEST FOR SCOPE.** You may assume the oral agreement satisfies the requirements of offer, acceptance, and consideration, and you may that the written agreement between Sowle and Donne is a legally enforceable agreement.

(3) Assume that the revised written agreement from Wyatt is an offer to Sowle. When Sowle returns the agreement and includes the note, does he succeed in accepting Wyatt’s offer?

(4) Did Wyatt breach the marketing agreement when she was unable to begin marketing until April 7?

(5) Did Donne breach the software agreement on June 13? Did he have a right to cure the breach?

(6) Does Donne owe Sowle $1,000,000 in consequential damages?

**TREAT SOFTWARE AS A GOOD. TREAT THE JUNE 30 ACCEPTANCE OF THE SOFTWARE BY SOWLE AS A COVER PURCHASE.**

(7) Sowle thinks “banner ad” in the means an equal distribution of the four types of banner ad. Wyatt thinks that Sowle understands that the algorithm determines the distribution. Does this difference mean that under Restatement 201(3) “neither party is bound by the meaning attached by the other, even though the result may be a failure of mutual assent”?

**Some possibly relevant UCC Sections (you may need more than these sections for some questions)**

§ 2-207. Additional Terms in Acceptance or Confirmation.

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

§2-508. Cure by Seller of Improper Tender or Delivery; Replacement

(1) Where any tender or delivery by the seller is rejected because nonconforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

(2) Where the buyer rejects a nonconforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

2-715. Buyer's Incidental and Consequential Damages.

(1) Incidental damages resulting from the [seller's](http://www.law.cornell.edu/ucc/2/article2.htm#Seller) breach include expenses reasonably incurred in inspection, [receipt](http://www.law.cornell.edu/ucc/2/article2.htm#Receipt), transportation and care and custody of [goods](http://www.law.cornell.edu/ucc/2/article2.htm#Goods) rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the [seller's](http://www.law.cornell.edu/ucc/2/article2.htm#Seller) breach include

(a) any loss resulting from general or particular requirements and needs of which the [seller](http://www.law.cornell.edu/ucc/2/article2.htm#Seller) at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise;  and

(b) injury to person or property proximately resulting from any breach of warranty.

**Restatement Section**

Restatement (Second) Contracts § 201

201. WHOSE MEANING PREVAILS

(1) Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.

(2) Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made

(a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.

(3) Except as stated in this Section, neither party is bound by the meaning attached by the other, even though the result may be a failure of mutual assent.