

# Uniform Computer Information Transactions Act ("UCITA")

## Report of the Law of Commerce in Cyberspace Committee, of the Business Law Section, of the Washington State Bar Association

June 28, 2000

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Re: Uniform Computer Information Transactions Act ("UCITA")

Report of Law of Commerce in Cyberspace Committee

Dear Jan:

As Chair of the Business Law Section of the Washington State Bar Association, I am pleased to inform you that, at its meeting on Wednesday, July 12, 2000, the Executive Committee of the Business Law Section approved the Report of the Law of Commerce in Cyberspace Committee on UCITA. Accordingly, it is the recommendation of the Business Law Section that UCITA be adopted in Washington State. By copy of this letter, we commend the Committee for its thorough and thoughtful report.

Very truly yours,

RANDALL & DANSKIN, P.S.

Donald K. Querna  
Chair  
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**UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT (“UCITA”)**

\* \* \* \* \*

**REPORT  
OF  
LAW OF COMMERCE IN CYBERSPACE COMMITTEE  
BUSINESS LAW SECTION  
WASHINGTON STATE BAR ASSOCIATION**

**June 28, 2000**

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### *A. Recommendation*

The Law of Commerce in Cyberspace Committee (“Committee”) is a committee of the Business Law Section of the Washington State Bar Association (the “Section”). The Committee recommends to the Executive Committee of the Section:

**That the Executive Committee recommend enactment of the Uniform Computer Information Transactions Act (UCITA) in Washington and the other suggestions made in this Report. In the view of the Committee, UCITA creates a balanced and much-needed commercial code for computer information transactions and electronic commerce.**

**That the Executive Committee recommend that the Official Comments to UCITA be printed with the text of the statute instead of in a separate volume, if Washington law allows that publication format.**

We make these recommendations with knowledge of controversial claims made about UCITA. We examine illustrative samples of these claims in Appendix B to this Report and consider those claims in light of existing law and UCITA’s actual provisions. In doing so, we also analyze the merits of counter-arguments for each claim. Our conclusion is that many of the claims are either inaccurate or without merit. Some of the claims have at their base, a legitimate concern, but in many if not most cases, those concerns are already addressed in the proposed statutory language or commentary. The Committee finds that none of the claims considered in Appendix B warrants amendments to UCITA.

We also make these recommendations with knowledge that some of the controversy over the adoption of UCITA involves objections by consumer groups. These groups have demanded that more specific protections and new rights for consumers be included in the statute. However, counter-arguments have been made that UCITA is overly protective of consumers and would make significant changes to Washington existing commercial law. We note that some of the rights advocated by certain groups would either change existing law and commercial practice or conflict with federal laws governing intellectual property rights. The Committee concluded that wholesale revisions of existing commercial practice or aggressive stances on the scope of federal law were inappropriate for UCITA. We also note that some of the new protections sought by consumers have been added for all state law by the federal Electronic Signatures in Global and National Commerce Act, and thus issues addressed there have become moot in all existing and future Washington laws, including UCITA .

Some of the controversy over UCITA thus reflects a basic disagreement over the direction and scope of commercial codes. For example, commercial codes, including the entire Uniform Commercial Code, have traditionally provided the framework for transactions involving both consumers and businesses. Separate consumer protection statutes, addressing specific commercial practices and providing specific consumer protections, have been separately enacted as to particular subject matter and as an overlay for commercial codes. The debate over whether such separate codes should be abandoned and blended into commercial codes, or whether the separate codes should be maintained while additionally inserting more consumer protections into commercial codes, cannot be resolved in a code concerned only with transactions in computer information. Indeed, significant changes to the purpose and detail of commercial codes would require an overhaul of all Washington commercial law, including U.C.C. Article 2 and Washington’s common law. In our view, no such overhaul is needed or warranted at this time.

While both licensors and licensees have objected to certain sections of UCITA, we believe that UCITA, taken as a whole, adopts numerous interconnected and beneficial policy balances that are

consistent with appropriate treatment of all parties, including consumers. These policy balances are also consistent with long-standing principles of commercial law in Washington and with Washington's desire to support electronic commerce and national and global trade.

We have also been asked to comment on whether it is necessary to enact the Uniform Electronic Transactions Act (UETA) in order to give full effect to UCITA. The answer is no. UCITA is a stand-alone statute that enables electronic commerce as to its subject matter.

We previously recommended against adoption of UETA in Washington absent uniform amendment of it by NCCUSL to resolve problems discussed in our UETA report (see <<http://www.wsba.org/businesslaw/lccc/report/1999.htm>>). With enactment of the federal Electronic Signatures in Global and National Commerce Act, there would appear to be even less reason to enact UETA. There is reason to examine the impact of the federal act on Washington Electronic Authentication Act. The impact of the federal act on UCITA would appear to be nil given that UCITA is consistent with Section 101 of that act and is technologically neutral. The consumer consent provisions of the federal act likely constitute an exception to this conclusion: they contain details not found in UCITA, Washington's Electronic Authentication Act or UETA, and thus would appear to act as an overlay to the first two acts. States that adopt UETA may displace those consent procedures, but before doing that, Washington would want to consider the advisability of adopting UETA at all and the policy ramifications of displacing the federal consumer consent provisions.

### ***B. What is UCITA, Why Is It Needed and What Does It Say?***

**1. What is UCITA?** The Uniform Computer Information Transactions Act (UCITA) is a proposed uniform act adopted in July, 1999 by the National Conference of Commissioners on Uniform State Laws. A copy of the text of UCITA and of the official comments can be obtained at <http://www.law.upenn.edu/bll/ulc/ulc.htm#ucita>. UCITA is intended to create a uniform commercial code for computer information transactions and for online access contracts. Currently, the only codified commercial code in Washington is Article 2 of the Uniform Commercial Code. However, that code was written over 50 years ago to cover transactions in goods -- computer information did not then exist. All information, including computer information, is fundamentally different from goods and rules written for goods do not create a legal infrastructure that facilitates a knowledge economy.

We believe UCITA will be an important statute in the 21<sup>st</sup> century. As explained by a local company,<sup>1</sup> UCITA would provide the following benefits to Washington:

- ◆ Creates definitive rules on the formation of contracts and contract terms established in Internet transactions.
- ◆ Creates rational choice-of-law rules.
- ◆ Establishes the equivalence of electronic records and signatures and their traditional paper counterparts.
- ◆ Makes "shrink-wrap" licenses unenforceable unless the licensee (a) had a reason to know terms would be presented after payment, (b) had a chance to review them, (c) assents to them, and (d) had a right to a refund if it refused to assent.
- ◆ Applies warranty of merchantability to computer programs.
- ◆ Creates a presumption that many software licenses are for a perpetual term.

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<sup>1</sup> See letter dated July 12, 1999 from The Boeing Airplane Company to NCCUSL (edited for currency with final text of UCITA).

There are additional benefits as well. UCITA creates a uniform commercial code for computer information transactions by adapting, preserving, and creating principles of: commercial law; Article 2 sales of goods law; common laws related to software, contracting, published informational content and services; U.C.C. consumer law and consumer protection statutes; intellectual property law; secured transaction and lease-financing law; and electronic commerce. This is not an easy task and UCITA, formerly known as “Article 2B,” took approximately 10 years of effort and sifting of input from hundreds of affected groups:

Justice Brandeis stated that, '[s]unlight is the best of disinfectants.' Article 2B has been the most open codification project in Anglo-American history. Electronic democracy makes it possible for Internet users to participate in the codification process. The Reporter has met with hundreds of interested industry groups, bar associations and consumer groups. The evolving path of Article 2B reflects an attempt to balance competing concerns. It is not possible to draft an Article 2B that will satisfy everyone.

Michael L. Rustad, *Commercial Law Infrastructure For The Age Of Information*, 16 JOHN MARSHALL COMPUTER & INFO. L. 255, 313 (1998).

**2. Why Is UCITA Needed?** Because computer information transactions are a relatively new phenomena in the law, courts have been struggling with the question of what is the appropriate contract law to apply to such transactions. There are only two choices: the common law, which is not uniform, or Article 2 of the Uniform Commercial Code. In Washington, courts have not determined which law applies to computer information transactions. See *M.A. Mortenson Co. v. Timberline Software Corp.*, 93 Wash.App. 819, 970 P.2d 803 (1999) (footnote 3 and surrounding text quoted in Endnote 15, Appendix B), *affirmed*, at 998 P.2d 305 (Wash. 2000) (court again does not decide whether Article 2 covers computer information and notes that UCITA will moot the issue). Article 2 is generally uniform but does not work well for computer information transactions. One commentator has explained the problem with applying Article 2 this way:

The Courts apply Article 2 by analogy to the licensing of information because no suitable alternative paradigms exist. The concepts of Article 2 are adapted to information contracts though “legal fictions.” Judges must ‘pretend’ that a law constructed for the sale of tangibles also accommodates the licensing of information. . . . The courts’ strained efforts of applying the law of sales to the licensing of intangibles is like the television commercial in which two mechanics are trying to fit an oversized automobile battery into a car too small to accommodate it. The car owner looks on with horror as the mechanics hit the battery with mallets, trying to drive it into place. The owner objects and the mechanics say, ‘we’ll make it fit!’ The owner says, ‘I’m not comfortable with make it fit.’

Similarly, judges are applying a sales law that does not fit with the commercial realities of licensing software. Judges must treat software ‘as if’ it fits a sale of goods because no specialized commercial law for licensing information commodities exists. Doing nothing only exacerbates the problem by proliferating ‘legal fictions’ rather than applying a rationally constructed information law.<sup>2</sup>

A more subtle problem is created by application of Article 2 to computer information transactions. Anyone brought up in a world of goods thinks in “images” of *goods* instead of images of contract *rights* or *information*, and this can lead to wrong results. The same wrong results were the reason that Article 2

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<sup>2</sup> Rustad, Michael L., “Commercial Law Infrastructure For The Age of Information,” JOHN MARSHALL COMPUTER & INFO. L. 255 at 270 (1997).

was written 50 years ago: the economy had then shifted from an agrarian economy to one based on manufactured goods, but judges were still using agrarian images to deal with sales of manufactured goods—and this was leading to wrong results. The law needed to catch up and Article 2 was the answer. Today the economy has shifted (or is shifting) from manufactured goods to information and services. Again, the law needs to catch up, but this time because thinking in terms of “goods” leads to wrong results for information:

The early courts that dealt with manufactured goods referred for guidance, in part, to the law of horses and, more accurately, to contract decisions dealing with horses. However, the practice regarding horses required the buyer to inspect and take the risk, while in Llewellyn’s [the author of Article 2] mind, the commercial expectations for manufactured wares [goods] were (and should have been) different. . . .

Courts and legislatures categorize issues based upon their own experiences and the images that these experiences establish. This is always true. Yet, especially after a paradigmatic change, the images of past experiences often lead to waging or continuing the wars of a prior era with tools developed from that era, while the world of commerce has already been transformed. . . . Llewellyn described this situation as one that presents a question about whether courts and others have been given suitable “intellectual equipment” (analytical structures) to approach the issues. . . .

What, for example, is the role of a “right to inspect” before payment (presumed under Article 2) in a contract to view a motion picture at a theater? What is the relevance of a “resale” [presumed in Article 2] that fixes damages for breach in a non-exclusive license of a patent which, by definition, could be re-licensed by the licensor with or without breach by the licensee? . . . The answer to these and other similar questions is simple: a creative judge might be able to bend, fold, and staple sale of goods concepts to avoid incorrect results in the different commercial contexts of information and services, but this mode of analysis is wrong and not conducive to consistently correct results in litigation. It does not yield a reasonably adequate fit between contract law and commercial practice.<sup>3</sup>

Thus the need for UCITA: it is the need to supply suitable intellectual background laws for parties that contract for computer information and for judges who interpret those contracts. Such suitable background laws are not supplied by U.C.C. Article 2.

**3. What Does UCITA Say?** The provisions of UCITA constitute a comprehensive commercial code. It is beyond the scope of this Report to summarize each provision, but at the end of this Report we provide a chart to provide a glimpse of UCITA’s subject matter.

### *C. Selected Items Re Washington Law*

UCITA will be more or less familiar to practitioners depending upon their range of experience with the many areas of law that UCITA blends to create a coherent commercial code. We list below a few items that may be of particular interest. See also Appendices A and B.

**Definition of Consumer** (Section 102). UCITA follows Washington’s existing law in defining a consumer as an individual who at the time of contracting intended the information to be used for “personal, family, or household purposes.” However, it expands consumer protection in Washington by also including persons who are licensees for management of family investments. Under Washington’s

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<sup>3</sup> Nimmer, Raymond T, *Images and Contract Law—What Law Applies to Transactions In Information,* 36 HOUSTON L.REV.1 at 8 and 21(1999).

usury statute, RCW 19.52.080, a transaction primarily for investment purposes is not considered to be a consumer transaction. UCITA would not appear to conflict with the policy of RCW 19.52.080 because UCITA applies only to the “management” of an investment, as opposed to the investment itself. The Committee's view is that the benefits to consumers and of a uniform statute outweigh any need to amend UCITA to clarify a nonexistent or minimal variation.

**Definition of Mass Market License** (Section 102). Like most state and federal law, Washington law traditionally draws a bright dividing line between consumer and business transactions. UCITA eliminates that line in “mass market transactions” by providing certain consumer protections to businesses, large or small. This is done through UCITA’s definition of mass market license and provisions affecting mass market licenses or mass market transactions. While the effect of this structure is to extend some consumer protections to businesses, its purpose stems from market and practical factors that can reasonably be viewed as pertaining to the class of mass market transactions as defined. The Committee believes that this change in Washington law is supportable given the need to maintain uniformity, the market-purpose distinction sought to be drawn in UCITA, the narrow scope of transactions to which UCITA applies, and the benefits of this new concept, particularly to small businesses. The Committee recommends against any broad use of the concept or extension of it in UCITA or into other areas of Washington commerce.

**Choice of Forum Rule** (Section 110). The UCITA choice-of-forum rule has been criticized by some groups, but it mirrors Washington law which in turn follows a line of U.S. Supreme Court cases. See *Voicelink Data v. Datapulse*, 86 Wn. App 613, 937 P.2d 1158 (1997) (Nevada, like Washington, requires enforcement of forum selection clauses unless they are ‘unreasonable and unjust.’ . . . This is consistent with the test set forth by the U.S. Supreme Court. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14; *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S.1, 10, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972)”).

**Shrinkwrap Licenses.** UCITA Section 209 acknowledges that modern commerce includes “pay now, terms later” contracts. The Washington Attorney General has questioned whether parties should be able to make contracts before all terms are seen. However, requiring prior review of all contract terms as a condition of contract formation would effect a sea change in commercial law. Numerous industries already depend on “pay now, terms later” contracts, including the airline industry, the insurance industry, the mail and telephone industries, the cruise line industry, and the software industry. Washington courts also recognize such contracts. See *M.A. Mortenson Co. v. Timberline Software Corp.*, 93 Wash.App. 819, 970 P.2d 803 (1999) *affirmed*, 998 P.2d 305 (Wash. 2000). UCITA provides a clear statutory right of refund for most contracts formed without prior opportunity to review terms. This right of refund must be cost free. The vendor cannot alter this right by contract. Further, UCITA provides additional protections for mass-market licenses (see Section 209) and codifies concepts designed to prevent procedural unconscionability in the UCITA concepts of manifestation of assent to terms after an opportunity to review. See Section 112. For a response to claims made about “shrinkwrap” contracts, see Appendix B.

**Disclaimer of Implied Warranty of Merchantability.** Article 2-316 of the Uniform Commercial Code allows implied warranties to be disclaimed. UCITA does the same, although at the request of consumer representatives, it encourages use of more extensive language that will be more informative to consumers: “Except for express warranties stated in this contract, if any, this [information] [computer program] is provided with all faults, and the entire risk as to satisfactory quality, performance, accuracy, and effort is with the user.” In contrast, a typical Article 2 disclaimer would read to this effect: “We hereby disclaim any implied warranty of merchantability or of fitness for a particular purpose.”



Washington has a non-uniform version of Article 2-316: the non-uniform Washington version requires disclaimers with "particularity" in consumer contracts. The Committee recommends against adoption of a non-uniform version in UCITA. First, uniformity is more important in today's national and global economy than it was when Washington's version of Article 2 was adopted. Second, the UCITA language already includes a more particularized description. Third, no meaningful "particularized" disclaimer could be made, given the complexity of computer information and the variety of hardware and software configurations. One commentator describes the problem as follows:

"In the late 1990's, a popular program for small computers used by both consumers and commercial licensees contained over ten million lines of code or instructions. In the computer these instructions interact with each other and with other programs. This contrasts with a popular commercial airliner that contained approximately six million parts, many of which had no interactive function. Typical consumer goods contain fewer than one hundred parts."

**Contractual Modification of Remedy.** UCITA Section 803(d) parallels the uniform version of Article 2-719 instead of the non-uniform version found in RCW 62A.2-719. Washington's non-uniform version requires sellers of consumer goods to maintain or provide within Washington, facilities to repair or replace goods. For several reasons, the Committee recommends against adoption in UCITA of Washington's non-uniform version of Article 2-719. First, from the perspective of a licensee of computer information in the age of the Internet, geographic locations are essentially irrelevant. Software code and computer information can often be as easily replaced from Maine as Washington. To the extent that software can be "repaired," it may be that such cannot be done at all and clearly cannot be done at multiple locations throughout the country – any "repair" would have to be done by the publisher's programmers who typically will be located at a location that may or may not be in Washington. Second, from the perspective of Washington's businesses, if Washington's rule were adopted by other states Washington's Internet and computer software business would suffer. Third, adopting the uniform version of UCITA will make it consistent with (a) Washington's version of Article 2A-503 (leases of goods), where Washington did not follow its non-uniform version of RCW 62A.2-719, and (b) the uniform version of Article 2 (1998, Official Text). We also note that UCITA Section 803 provides a new protection for all licensees that is relevant to, but is not contained in, Washington's version of Article 2-719. Under UCITA, failure of an agreed remedy also causes a failure of an exclusion of consequential damages *unless* the agreement expressly provides otherwise. That is not the case under the majority interpretation of U.C.C. Article 2 or the common law. See Appendix B.

**Electronic Self-Help.** Section 816 sets forth the electronic self-help sections of UCITA and is quite controversial. The Committee carefully reviewed this section and the viewpoints of all affected persons. The interests of those who will be benefited by electronic self-help and the interests of those who will be adversely affected by it are so divergent that reaching a standard that will satisfy all parties is not possible. However, the consensus of the Committee is that the section makes a reasonable compromise of the conflicting interests that must be considered. Nothing else would appear to be appropriate, including amendment or deletion of the section or a ban on self-help -- each of these alternatives would create serious harms that are not created by the compromise reflected in Section 816. Uniformity is also an important objective.

It should also be noted that the Washington legislature recently enacted a revision of U.C.C. Article 9. That revision does not impose any special restrictions on the use of electronic self-help by secured parties similar to those imposed on licensors in UCITA. Under Article 9, and revised Article 9, a secured party can use electronic self-help to render "equipment" such as a computer unusable or can use electronic self-help to render computer information unusable that is taken as collateral. However, a licensor under UCITA cannot use electronic self-help for the same computer information without

complying with all of the UCITA restrictions. This difference in treatment does not necessarily signal an inconsistency in the approaches taken by Article 9 and UCITA since the difference in interests may warrant a difference in treatment. However, it does illustrate that reasonable minds differ on the need for restrictions on electronic self-help. For a more detailed discussion of self-help, see Appendix B.

#### *D. Suggestions for Uniform Version of UCITA*

The NCCUSL Executive Committee adopted several amendments to UCITA after its initial passage in July, 1999; if the procedures used to amend revised U.C.C. Article 9 are illustrative of the NCCUSL process, further amendments may be added at the 2000 annual meeting of NCCUSL. The executive committee amendments eased concerns of several industries regarding the application of UCITA to their particular customs and practices and also clarified some sections. Consistent with the action of the NCCUSL Executive Committee and consistent with the bracketed language that appears in the uniform act, we recommend adoption of the following uniform amendments to UCITA. Items 1-3 are amendments suggested by the NCCUSL Executive Committee; items 4 through 8 are suggestions by this WSBA Committee pursuant to uniform options offered in UCITA. If further uniform amendments are recommended by NCCUSL before the introduction of UCITA in Washington, we will undertake a review of any such proposed amendments and supplement this Report. Specific comments about the various amendments are indicated with the introductory text of “*Committee Comment.*”

#### 1. AMEND SECTION 103. SCOPE; EXCLUSIONS, AS FOLLOWS.

(a) .....

(b) Except for subject matter excluded in subsection (d) and as otherwise provided in Section 104, if a computer information transaction includes subject matter other than computer information, the following rules apply:

.....

(2) If a transaction includes an agreement for creating or for obtaining rights to create computer information and a motion picture, this [Act] does not apply to the agreement if the dominant character of the agreement is for creating or obtaining rights to create a motion picture. In all other such agreements, this [Act] does not apply to the part of the agreement that involves a motion picture excluded under subsection (d)(2), but does apply to the computer information.

(3) In all other cases, this [Act] applies to the entire transaction if the computer information and informational rights, or access to them, is the primary subject matter, but otherwise applies only to the part of the transaction involving computer information, informational rights in it, and creation or modification of it.

.....

(d) This [Act] does not apply to:

....

(2) an agreement to create, perform or perform in, include information in, acquire, use, distribute, modify, reproduce, have access to, adapt, make available, transmit, license, or display:

(A) a motion picture or audio or visual programming, other than in (i) a mass-market transaction or (ii) a submission of an idea or information or release of informational rights that may result in making a motion picture or a similar information product that is provided by broadcast, satellite, or cable as defined or used in the Federal Communications Act and related

~~regulations as they existed on July 1, 1999, or by similar methods of delivering that programming;~~  
or

(B) ~~a motion picture, sound recording, musical work, or phonorecord as defined or used in Title 17 of the United States Code as of July 1, 1999, or an enhanced sound recording;~~  
.....

(f) In this section, "motion picture" means:

(1) "motion picture" as defined in Title 17 of the United States Code as of July 1, 1999; or

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

(g) In this section, "audio or visual programming" means audio or visual programming that is provided by broadcast, satellite, or cable as defined or used in the Communications Act of 1934 and related regulations as they existed on July 1, 1999, or by similar methods of delivery.

2. AMEND SECTION 201 AS FOLLOWS:

.....  
(d) Between merchants, if, within a reasonable time, a record in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, the record satisfies subsection (a) against the party receiving it unless notice of objection to its contents is given in a record within a reasonable time ~~40 days~~ after the confirming record is received.

3. ADD THE FOLLOWING AS A NEW PART AND SECTION:

D. Idea or Information Submissions

SECTION 216. IDEA OR INFORMATION SUBMISSION.

(a) The following rules apply to a submission of an idea or information for the creation, development, or enhancement of computer information which is not made pursuant to an existing agreement requiring the submission:

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

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

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

(A) the submission is made and a contract accepted pursuant to that procedure; or

(B) the recipient expressly agrees to terms concerning the submission.

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

*Committee Comment:* Portions of Section 216 track existing Washington law (see e.g., *Machen, Inc. v. Aircraft Design, Inc.*, 65 Wn.App. 319, 329, 828 P.2d 73 (1992)(dismissal of trade secret claim affirmed in the absence of evidence establishing the confidentiality of the information disclosed). Subsection (b) addresses an issue that has not been addressed by Washington courts but which is in conflict in other states; the subsection adopts the majority rule which is most developed in New York State. Washington businesses and customers will benefit from guidance in this area.

4. SECTION 104(1): DELETE THE BRACKETED PHRASE "ADMINISTRATIVE RULE" SO THAT SECTION 104(1) WILL READ AS FOLLOW:

(1) An agreement that this [Act] governs a transaction does not alter the applicability of any rule or procedure that may not be varied by agreement of the parties or that may be varied only in a manner specified by the rule or procedure, including a consumer protection statute ~~[or administrative rule]~~. In addition, in a mass-market transaction, the agreement does not alter the applicability of a law applicable to a copy of information in printed form.

*Committee Comment:* In Washington, administrative rules only follow from and are used to interpret statutes. Because the relevant statutes are preserved, there would appear to be no need to reference the administrative rules. This same format is used in RCW 62A.2-102 (Washington's U.C.C. Article 2): Washington retains "statutes" regulating sales to consumers, but does not reference administrative rules.

5. SECTION 105(c): REMOVE BRACKETS AND REVISE AS FOLLOWS:

(c) Except as otherwise provided in subsection (d), if this [Act] or a term of a contract under this [Act] conflicts with a consumer protection statute ~~[or administrative rule]~~, the consumer protection statute ~~[or rule]~~ governs.

6. SECTION 105 (e): REMOVE THE BRACKETS AND INSERT CHAPTER, 19.34, RCW (WASHINGTON ELECTRONIC AUTHENTICATION ACT) SO THAT SECTION 105(e) WILL READ AS FOLLOWS:

{(e) The following laws govern in the case of a conflict between this [Act] and the other law: Chapter 19.34, RCW. ~~{List laws establishing a digital signature and similar form of attribution procedure.}}~~

7. SECTION 902: REMOVE BRACKETS AND COMPLETE AS FOLLOWS:

SECTION 902. EFFECTIVE DATE. This [Act] takes effect \_\_\_\_\_  
{\_\_\_\_\_}.

*Committee Comment:* We recommend that UCITA take effect on the date that is 90 days after the end of the legislative session in which it is adopted. It does not appear that an emergency date or a delayed date is necessary.

8. SECTION 903: REVISE TO READ AS FOLLOWS:

SECTION 903. REPEALS. The following acts and parts of acts are repealed: \_\_\_\_\_.

*Committee Comment:* The Committee is not aware of Washington statutes that should be repealed, but will work with the Code Reviser if such is not the case.

### *E. Suggestions for Non-Uniform Amendments to UCITA*

One of the chief values of uniform acts is their uniformity. Accordingly, the Committee is reluctant to suggest any “non-uniform” amendment to UCITA. Notwithstanding this general approach, the Committee recommends that the following non-uniform amendments be made:

1. AMEND SECTION 201(F) TO READ AS FOLLOWS:

(f) A transaction within the scope of this Act is not subject to a statute of frauds contained in another law of this state, including RCW 19.36.010.

*Committee Comment:* This amendment will not affect the substantive uniformity of UCITA but will aid Washington practitioners in locating at least some of the Washington statutes of frauds. The amendment may also address constitutional concerns that can arise in Washington when one statute makes a change that might render another statute erroneous, without mentioning the other statute. In fact, that concern likely is not present with UCITA because as a comprehensive code, the scope of rights and duties as to computer information transactions can be determined without reference to other Washington statutes. See e.g., *Washington Education Association v. The State of WA*, 97 Wn.2d. 899, 652 P.2d.1347 (1982). Nevertheless, practitioners, licensors and licensees will welcome the amendment.

2. AMEND SECTION 212 AS FOLLOWS:

**SECTION 212. EFFICACY—AND COMMERCIAL REASONABLENESS OF ATTRIBUTION PROCEDURE.** ~~The efficacy, including the commercial reasonableness or efficacy,~~ of an attribution procedure is determined by the court. In making this determination, the following rules apply:

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

(2) Except as otherwise provided in paragraph (1), commercial reasonableness and effectiveness is determined in light of the purposes of the procedure and the commercial circumstances at the time the parties agreed to or adopted the procedure.

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

*Committee Comment:* The recommended changes to Section 212 are intended to reflect the change recommended to Section 213. The change recommended for Section 213 creates certain presumptions about effectiveness, but requires at a minimum a commercially reasonable attribution procedure. Consequentially, we recommend amendment of Section 212 to reflect these changes. In some states attribution procedures are judged in terms of “efficacy” and thus it is important to clarify that in Washington the factors that should be considered to determine whether an attribution procedure is commercially reasonable under UCITA Section 213(b)(2) are set forth in Section 212. The suggested amendment preserves both concepts but shifts the emphasis to the concept of commercial reasonableness in order to match the change recommended for Section 213. Effective attribution procedures include commercially reasonable procedures; a procedure can be commercially reasonable even if not actually effective.

3. AMEND SECTION 213 BY REPLACING IT WITH THE FOLLOWING:

**SECTION 213. DETERMINING ATTRIBUTION OF ELECTRONIC EVENT TO PERSON.**

(a) An electronic event, including an electronic message, display, record, authentication or performance, is attributed to a person if:

- (1) it was the act of that person or its electronic agent;
- (2) the person is otherwise bound by it under the law of agency or other law; or
- (3) attribution is verified pursuant to an attribution procedure as provided in subsection (b).

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

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

(2) In all other cases and subject to paragraphs (b) (3), (4) and (5), if the person relying on the electronic event and the person to whom the electronic event is attributed agreed to use or knowingly adopted an attribution procedure, the electronic event is attributable to the person identified by the procedure, if the person relying on that attribution satisfies the burden of establishing that:

(A) the attribution procedure was commercially reasonable;

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

(C) the attribution procedure indicated that the electronic event was that of the person to which attribution is sought.

(3) Attribution under the provisions of paragraph (b)(2), (4) and (5) shall not apply to a consumer. This limitation is intended to leave to existing law and the courts the determination of when an electronic event should be attributed to a consumer. The court may not infer from this limitation the nature of existing law or the proper rule for attributing an electronic event to a consumer.

(4) By agreement evidenced by an authenticated record, a person who could otherwise attribute an electronic event to another person pursuant to paragraph (b)(2) may limit the extent to which such person is entitled to do so.

(5) If an electronic event is attributed to a person under paragraph (b) (2), that person may prevent such attribution by satisfying the burden of establishing that the electronic event was not caused directly or indirectly by another person:

(A) entrusted at any time with the right or duty to act for the person to whom the electronic event is attributed (the “attributed person”) with respect to such event or the attribution procedure; or

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

In order to avoid attribution under this subsection (5), this burden must be satisfied with respect to both (A) and (B).

(c) The rights and obligations arising under this section may not be varied by agreement except that nothing in this section prohibits an agreement with a consumer for an attribution procedure that includes different rights and obligations if such an agreement could be made under a statute or law other than this [Act].

(d) As used in this section, “burden of establishing” a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence.

*Committee Comment:* The source of the foregoing rule is RCW 62A.4A-202 and 4A-203, Washington’s rules for attribution of wire transfers under the Uniform Commercial Code. Article 4A does not contain an express exclusion for consumer transactions because it tends not to apply to consumers by its nature. The exclusion here added for consumers is based upon the approach taken in revised U.C.C. Article 9 which leaves resolution of the issue to existing law.

The “Article 4A” approach was reflected in UCITA until July 1999, when NCCUSL sought to harmonize UCITA with a model act also then adopted by the conference, the Uniform Electronic Transactions Act (“UETA”). This Committee has reviewed UETA and recommended against its adoption in Washington. Please see the report at <http://www.wsba.org/businesslaw/lccc/report/1999.htm>. NCCUSL’s harmonization of UCITA with UETA resulted in a final version of UCITA that is inferior to the originally proposed version of UCITA. That other states may reach a similar conclusion is reflected in legislation of the States of Pennsylvania and Ohio, each of which enacted legislation that attempts to follow the U.C.C. Article 4A approach instead of the UETA approach as to commercial parties. See e.g., Section 701 of Senate Bill No. 555, Session of 1999, The General Assembly of Pennsylvania.

We agree with the conclusion of Pennsylvania and Ohio that the “Article 4A” approach is the most appropriate and the wording of Section 213(b)(2), (4) and (5) is intended to be consistent with that approach. However, in order to avoid unintended changes from the Article 4A approach, we have suggested wording that more closely parallels Article 4A than does the wording of the version adopted in those other states. If additional states adopt the “Article 4A” approach, NCCUSL may at some point wish to develop uniform wording for adoption by all states.

4. AMEND SECTION 611 TO READ AS FOLLOWS:

**SECTION 611. ACCESS CONTRACTS.**

(a) If an access contract provides for access over a period of time, the following rules apply:

(1) 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.

(2) 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~~ of the parties.

(3) Unless it is subject to a contractual use term, 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 law.

(34) Access must be available:

(A) at times and in a manner conforming to the express terms of the agreement;  
and

(B) to the extent not expressly stated in the agreement, at times and in a manner 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 reasonable downtime;

(B) reasonable needs for maintenance;

(C) reasonable periods of failure of equipment, computer programs, or communications; or

(D) events reasonably beyond the licensor's control, and the licensor exercises such commercially reasonable efforts as the circumstances require.

*Committee Comment:* With respect to the amendment suggested in subsection (a)(2), the uniform version of Section 611 honors the agreement of the parties but requires an agreement prohibiting a change in content to be reflected by an express term (e.g., a clause in the contract or a specific statement, if the contract can be oral). Our suggested amendment honors the concept that the parties' agreement should be respected, but broadens the methods by which the agreement may be created, such as creation through trade usage or course of dealing. In essence, the revised provision would permit a court to determine from all of the facts and circumstances whether the parties had agreed that provision of particular content was an essential element of the contract.

#### ***F. Suggested Amendments For Related Washington Statutes or Judicial Rules***

1. AMEND RCW 62A.2-102 AND RCW 62A.2A-102 TO READ AS FOLLOWS:

**62. 2-102 Scope; certain security, computer information and other transactions excluded from this Article.** Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security



transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers. This Article and Article 1 of Title 62A, RCW, do not apply to a transaction that is covered by Title \_\_\_\_\_, RCW [UCITA] as provided in RCW \_\_\_\_\_ [Section 103 of UCITA] or RCW \_\_\_\_\_ [Section 104 of UCITA].

**62A. 2A-102 Scope; certain computer information excluded from this Article.**

This Article applies to any transaction, regardless of form, that creates a lease. This Article and Article 1 of Title 62A, RCW, do not apply to a transaction that is covered by Title \_\_\_\_\_, RCW [UCITA] as provided in RCW \_\_\_\_\_ [Section 103 of UCITA] or RCW \_\_\_\_\_ [Section 104 of UCITA].

*Committee Comment:* If UCITA is adopted in Washington, it is advisable to clarify that when UCITA applies to a transaction in computer information, other Washington commercial codes do not also apply. The above amendments are recommended for that purpose. The cited sections of UCITA explain the interaction of UCITA with Washington's other commercial codes, U.C.C. Articles 2 (sales of goods) and 2A (leases of goods), both of which codes incorporate U.C.C. Article 1 (UCITA does not incorporate Article 1 because it builds into UCITA, the relevant sections of Article 1). By its terms, UCITA does not cover goods nor does it cover certain computer programs that are "embedded" in goods. Accordingly, the above amendment leaves coverage of such programs to existing law. It is not clear what that existing law is, i.e., it is not clear whether Article 2, Article 2A or the common law would apply to such computer programs that are not covered by UCITA. This amendment does not try to answer that question. However, even if Article 2 or 2A were viewed as applying to such computer programs, courts considering them would be free to recognize their unique characteristics even in the context of Article 2 or 2A, just as courts currently recognize the unique characteristics of other intangible subject matter that is "embedded" in goods and which is not necessarily treated under rules designed for goods. *See e.g., Winter v. G.P. Putnam's Sons*, 938 F.2d 1033 (9th Cir. 1991); *Gilmer v Buena Vista Home Video, Inc.*, 939 F Supp. 665 (W.D. Ark. 1996); *Cardozo v. True*, 342 So.2d 1053 (Fla. Dist.Ct.App.1977).

2. AMEND RCW 62A.2-105 AND RCW 62A.2A-1-3(H) TO READ AS FOLLOWS:

**62A. 2-105 Definition: Transferability; "goods"; "future" goods; "lot"; "commercial unit".**

(1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Good" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (RCW 62A.2-107). For purposes of this Article, the term does not include computer information as defined in RCW \_\_\_\_\_ [UCITA], money, the subject matter of foreign exchange transactions, documents, letters of credit, letter-of-credit rights, instruments, investment property, accounts, chattel paper, deposit accounts, or general intangibles.

**62A. 2A-103(h)** "Goods" means all things that are movable at the time of identification to the lease contract, or are fixtures (RCW 62A.2A-309), but the term does not include money, documents, instruments, accounts, chattel paper, general intangibles, computer information as defined in RCW \_\_\_\_\_ [UCITA] or minerals or the like; including oil and gas; before extraction. The terms also includes the unborn young of animals.

*Committee Comment:* The suggested amendment adds a new sentence to the Article 2 definition of goods, which sentence is the same as the last sentence of the definition of goods in UCITA. In addition to harmonizing UCITA and Article 2, the sentence also updates the Article 2 definition along the lines already implemented in Washington's Article 2A (regarding leasing). The Article 2A definition is also

updated as to the terminology used in UCITA. If such updating is not desired, then the new sentence could be confined to referencing computer information and the relevant citation to UCITA.

### 3. U.C.C. ARTICLES 2, 2A AND ARTICLE 1: ENABLING ELECTRONIC COMMERCE.

The Committee recommends that U.C.C. Articles 2, 2A and 1 be minimally amended to enable electronic commerce, to wit the words “writing” and “written” should be replaced with the word “record;” “signed” should be replaced with the word “authenticated;” and “sign” or “signs” should be replaced with the word “authenticate” or “authenticates.” The UCITA (and revised U.C.C. Article 9) definitions of “record” should be inserted into each article, and the UCITA definition of “authenticate” should also be inserted into each Article. We recommend against insertion of the Article 9 definition of “authenticate” because it is intentionally limited to purposes peculiar to security interests; only the UCITA definition includes traditional contract law usages. Uniform amendments of these articles is currently under consideration by NCCUSL so further amendments should await the results of that process. However, the basic policy decision regarding this terminology change has already been made in Article 9 of Washington’s U.C.C. and in UCITA, so there is no reason to condition the enablement of electronic commerce in Washington as to goods upon the end of the NCCUSL process. The Committee stands ready to work with the State to identify all wording that should be changed pursuant to this recommendation.

### 4. JUDICIAL RULES.

Judicial rules will need to be developed to accommodate the requirement in Section 815(d) for an expedited hearing regarding prejudgment judicial relief upon cancellation of a license. UCITA Section 815 sets forth the rights of the parties that courts are to enforce, but it appropriately does not state exactly what kind of hearing is contemplated because judicial procedures vary from state to state. A related section, Section 816(g), contemplates an injunction. Until the judicial branch develops appropriate rules, it may be appropriate to use existing rules that apply to preliminary injunctions, except that, the factors parties must meet to qualify for injunctive relief should be those that are set forth in Section 815 or 816, as opposed to the grounds required for traditional injunctions. The other rules for obtaining preliminary injunctions, such as rules regarding notice and the like, would appear to be appropriate for Sections 815 and 816.

## ***G. The Law of Cyberspace Committee and its Work***

A list of the Committee’s general membership is attached. While all members were furnished minutes of each meeting of the Committee, not all members were able to participate in the actual review of UCITA. To review UCITA, the Committee invited participation by all of its members. In addition, a letter inviting participation was sent to all members of the U.C.C. Committee of the Business Law Section. Invitations were also sent to members of the following WSBA sections by invitation to the chairperson of each section: Consumer Protection, Antitrust & Unfair Business Practices, Corporate Law, Creditor-Debtor, International Practice Law, Intellectual Property, Real Property Probate & Trust, and Taxation Law. An invitation was also extended to members of the Law and Technology Section of the King County Bar Association by invitation to that section’s chair. An invitation was also directed to and contact made with the Washington State Office of the Attorney General, and minutes of each meeting have been circulated within that office. Each of the Act’s parts or sections was assigned to a Committee member(s), who reviewed the assigned provisions and prepared a report for the full Committee. To discuss the reports, the Committee held eleven (11) half-day meetings beginning October 6, 1999, and minutes were taken, circulated and approved with respect to each meeting. In addition, selected provisions were the subject of lengthy email debates and proposals, which discussions included

solicitation of input from members who had not attended meetings but who were known to have expertise in particular areas. This Report is the product of that study.

Among the guiding principles used by the Committee were the following:

1. UCITA is intended to promote commerce by being the same in each state. Accordingly, the Committee's bias was for uniformity.

2. The role of the bar is to serve as an educational vehicle for the legislature and to review proposed legislation from all perspectives, including small and large parties to consumer and business transactions or contracts. Committee members endeavored to leave any client hats at the door.

3. The Committee adopted the premise that extra burdens should not be placed on electronic transactions simply because they are electronic. Absent clear justification to the contrary, "paper" and "electronic" transactions should be treated equally.

4. The Committee also assumed that UCITA should not disturb or displace Washington's Electronic Authentication Act, Chapter 19.34, RCW, or disturb or displace, except as warranted by the differences between information and goods, traditional principles of commercial law as found in U.C.C. Article 2 or Washington's common law.

Generally, the Committee members who participated in at least one or more meetings appear below.

Joanna Allen

Andrea Blander

Scott David

Helen Donigan

Brad Englund

Cassondra Joseph

Brian Kennan

Tom Melling

Kathryn Milam

Alex Modelski

Peter Schalestock

Paul Swanson

William Taylor

Holly Towle

Mark Wittow

## The Uniform Information Transactions Act at a Glance

### Part 1: General Provisions

<p><b>101 (Short Title) &amp; 102 (Definitions):</b> title and definitions</p>
<p><b>103 (Scope and Exclusions)-- Scope:</b> governs computer information transactions, including multi-media, and Internet and other access contracts.</p> <ul style="list-style-type: none"> <li>• <b>Excludes</b> movies, print books, television, cable and records; money and traditional banking activities. A proposed uniform amendment would include mass-market transactions in some of the entertainment products.</li> </ul>
<p><b>104 (Mixed Transactions: Agreement to Opt-in or Opt-out)–Mixed goods/information transactions:</b> Article 2 controls the good; UCITA controls the information.</p> <ul style="list-style-type: none"> <li>• <b>Computer information included in goods:</b> when computer information is contained in and sold as part of a good, UCITA controls the information when the good is a computer or computer peripheral or if using the software itself (as opposed to the good generally) is a material purpose of the transaction. Otherwise, Article 2 applies as it would to goods containing intangibles (e.g., a book with information in it).</li> <li>• <b>Opt-In/Out:</b> UCITA covers converged industries but its narrow scope splits some of them and their products. To allow contracting between covered and "uncovered" industries, UCITA allows the excluded industry to opt in, or the included industry to opt out. Restrictions apply, including unalterable rules.</li> </ul>
<p><b>105 (Relation to Federal Law; Fundamental Public Policy; Transactions Subject to Other State Law)</b>—explains relationship of UCITA to other law: federal law, fundamental public policies, and substantive consumer protection statutes override UCITA.</p>
<p><b>106 (Rules of Construction)</b>—lists rules of statutory construction</p>
<p><b>107 (Legal Recognition of Electronic Record and Authentication; Use of Electronic Agents)</b>—enables electronic records (instead of paper) and electronic agents</p>
<p><b>108 (Proof and Effect of Authentication)</b>—explains how to prove an electronic signature (authentication).</p>
<p><b>109 (Choice of Law)</b>—makes the parties choice of law enforceable except for unalterable consumer rules. Sets default choice of law for silent contracts.</p>
<p><b>110 (Contractual Choice of Forum)</b>—adopts U.S. Supreme Court and Washington State rule re exclusive choice of forum: the choice is enforceable unless it is unreasonable and unjust.</p>
<p><b>111 (Unconscionable Contract or Term)</b>—repeats existing Article 2 rule re unconscionability</p>
<p><b>112 (Manifesting Assent; Opportunity to Review)</b>—defines manifestation of assent and opportunity to review.</p> <ul style="list-style-type: none"> <li>• <b>Manifesting assent:</b> adopts Section 19 of Restatement (Second) of Contracts rule that manifest assent must be an intentional act made with reason to know that the other party will infer assent from the act.</li> <li>• <b>Opportunity to Review:</b> new rule based on principles of procedural unconscionability: there is no opportunity to review unless a reasonable chance to review a term or record is offered. If opportunity is delayed until after payment, refund must be offered in mass market and certain other transactions.</li> </ul>
<p><b>113 (Variation by Agreement; Commercial Practice)</b>—Unalterable rules: states traditional principle that UCITA rules are largely default rules. Lists which rules cannot be altered by agreement.</p>

**114 (Supplemental Principles; Good Faith; Decision for Court; Reasonable Time; Reason to Know)**—Supplementary principles: lists principles that supplement UCITA (e.g., trade usage, fraud, estoppel) and other general rules (e.g., of good faith). Expands Washington definition of good faith to match revised U.C.C. Article 9.

**Part 2: Formation and Terms**  
Subpart A—Formation of Contract

**201 (Formal Requirements)**—Statute of Frauds, adapted to information industries

**202 (Formation in General)**—basic formation of contract rules. Generally parallels existing Article 2, but acknowledges lack of contract when parties disagree on what their transaction is for.

**203 (Offer and Acceptance in General)**—offer and acceptance rules. Generally parallels existing Article 2. Rejects "mailbox" rule for electronic contracts (uses time of receipt instead of time of sending).

**204 (Acceptance with Varying Terms)**—explains what happens if terms of acceptance vary from the offer terms (if material alteration, no contract unless it's formed by conduct or one party later agrees to the other's terms).

**205 (Conditional Offer or Acceptance)**—allows parties to condition their offer or acceptance, but requires material consistent behavior to avoid waiver.

**206 (Offer and Acceptance: Electronic Agents)**—allows electronic agents to form contracts (makes it clear that traditional "meeting of the minds" requirement doesn't require human minds). Also sets rule for contracts between one e-agent and one human (human can't trick the e-agent by making a "counteroffer" that the agent can't comprehend).

Subpart B—Terms of Records

**207 (Formation: Release of Information Rights)**—Releases: sets uniform rule for releases of informational rights

**208 (Adopting Terms of Records)**—terms of a record are adopted by agreeing to it, including agreement after performance begins if the adopter had reason to know that more terms would be coming.

**209 (Mass-Marketing License)**—mass market license terms aren't adopted unless the licensee agrees to them. Terms must not be unconscionable or violate a fundamental public policy and they can't conflict with expressly agreed terms. If terms aren't available for review before purchase, they're not enforceable unless the licensee had reason to know terms would follow and can obtain a cost-free refund and costs of system restoration (if it was altered to see the terms).

**210 (Terms of Contract Formed by Conduct)**—explains how terms of a contract are determined when a record isn't agreed and the contract is formed by conduct (common law rule: court looks to all the circumstances).

**211 (Pretransaction Disclosures in Internet-Type Transactions)**—safe harbor to encourage pre-transaction disclosures of contract terms

Subpart C—Electronic Contracts: Generally

**212 (Efficacy and Commercial Reasonableness of Attribution Procedure)**—explains how the efficacy of an attribution procedure is determined. A WA non-uniform amendment is suggested for this section.

**213 (Determining Attribution)**—determines when an electronic act is attributed to a person. A WA non-uniform amendment is suggested for this section to base the rule on the UCC Article 4A rule as to non-consumers; existing law is not disturbed as to consumers.

<b>214 (Electronic Error: Consumer Defenses)</b> —creates a new defense for consumers to avoid electronic errors without litigation.
<b>215 (Electronic Message: When Effective; Effect of Acknowledgment)</b> —rejects the mailbox rule for electronic messages (they're effective upon receipt)
<b>216 (Submissions of information):</b> correlates common law to set a uniform rule for who owns information that is volunteered (e.g., chat room participant suggests a great idea for an improved product: who may use the idea?). This section is proposed as a uniform amendment.

### Part 3: Construction

#### Subpart A—General

<b>301 (Parol or Extrinsic Evidence)</b> —parol evidence rule (follows existing Article 2)
<b>302 (Practical Construction)</b> —contract construction rules (follows existing Article 2)
<b>303 (Modification and Rescission)</b> —rules for modifying contracts (generally follows existing Article 2 and clarifies application of statute of frauds)
<b>304 (Continuing Contractual Terms)</b> —creates safe harbor rule for ongoing contracts with affirmative continuing performances, including amendments and allowing termination by mass market licensees; protects that licensee by requiring notice and right to withdraw
<b>305 (Terms to be Specified)</b> —allows contract formation notwithstanding open terms (follows existing Article 2)
<b>306 (Performance Under Open Terms)</b> —sets default rule for performance under open terms (follows existing Article 2)
<b>Subpart B—Interpretation</b>
<b>307 (Interpretation and Requirements for Grant)</b> —sets default rules for what the language of a license grant means and what rights the parties have
<b>308 (Duration of Contract)</b> —sets default rules for the duration of a contract. Largely adopts common law but also creates perpetual licenses.
<b>309 (Agreement for Performance to Party's Satisfaction)</b> —sets default rule for interpreting performance that is subject to one party's satisfaction

### Part 4: Warranties

<b>401 (Warranty and Obligations Concerning Noninterference and Noninfringement)</b> —imposes a warranty of quiet enjoyment and non-infringement. Re infringement, generally follows existing Article 2 but grants more protection for licensees who provide specifications and also honors patent practice. Settles conflict re meaning of "exclusivity."
<b>402 (Express Warranty)</b> —sets rules for express warranty (follows existing Article 2) but includes an advertising warranty, adds "demonstration" to sample rules and adopts common law rule for public informational content.
<b>403 (Implied Warranty: Merchantability of Computer)</b> —imposes an implied warranty of merchantability for computer programs (adapted to remove focus of Article 2 on broad range of products)

<b>404 (Implied Warranty: Informational Content)</b> —imposes an implied warranty for informational content (includes common law services rule and retains common law protection for published informational content)
<b>405 (Implied Warranty: Licensee’s Purpose; System Integration)</b> —imposes an implied warranty of fitness for particular purposes (includes adaptation of existing Article 2 “results” rule and a common law services “efforts” rule) - creates a new implied warranty for systems integration (no Article 2 counterpart)
<b>406 (Disclaimer or Modification of Warranty)</b> —rules for disclaiming an implied warranty (follows existing Article 2 but uses more detailed and consumer oriented language for disclaimers)
<b>407 (Modification of Computer Program)</b> —preserves warranty for original unmodified computer program but allows unauthorized modification to make it inapplicable to the altered copy
<b>408 (Cumulation and Conflict of Warranties)</b> — sets rules for harmonizing conflicting warranties (follows existing Article 2)
<b>409 (Third-Party Beneficiaries of Warranty)</b> —extends warranties to persons not in privity in certain circumstances (follows and expands majority rule under existing Article 2)

## Part 5: Transfer of Interest and Rights

### Subpart A—Ownership and Transfers

<b>501 (Ownership of Informational Rights)</b> —establishes default rule for transfers of ownership of information
<b>502 (Title to Copy)</b> —establishes default rules for title transfer to copies of information
<b>503 (Transfer of Contractual Interest)</b> —establishes default rules for transfer of contract rights
<b>504 (Effect of Transfer of Contractual Interest)</b> —states the consequences of transferring contractual rights and the meaning of common language
<b>505 (Performance by a Delegate; Subcontract)</b> —sets default rules for performance by a subcontractor
<b>506 (Transfer by Licensee)</b> —sets default rule for transfer by licensee
<b>Subpart B—Financing Arrangements</b>
<b>507 (Financing if Financier Does Not Become Licensee)</b> —establishes default rules for "non-security interest" financing by a lender who is not itself a licensee (and thus has no rights to sublicense)
<b>508 (Finance Licenses)</b> —establishes default rules for "non-security interest" financing by lender who is a licensee and may sublicense rights
<b>509 (Financing Arrangements: Obligations Irrevocable)</b> —follows Article 2A by giving effect to a “hell or high water” clause in a non-consumer loan agreement, but (unlike Article 2A) requires the clause to be set forth in the agreement
<b>510 (Financing Arrangements: Remedies or Enforcement)</b> —explains effect of cancellation of the loan agreement on the licensor and the licensee and their various rights
<b>511 (Financing Arrangements: Effect on Licensor’s Rights)</b> —clarifies relationship of licensee's lender and licensor

## Part 6: Performance

### Subpart A—General

<b>601 (Performance of Contract in General)</b> —establishes general default rules for performance of a contract
<b>602 (Licensor's Obligations to Enable Use)</b> —requires licensor to enable use of the information (adaptation of tender)
<b>603 (Submissions of Information to Satisfaction of Party)</b> —establishes default rule for meaning of contract requiring that information be to a party's "satisfaction" and adapts "tender" rules to accommodate information differences and practices
<b>604 (Immediately Completed Performance)</b> —sets a rule for delivery of information that can't be inspected before payment without effecting full performance
<b>605 (Electronic Regulation of Performance)</b> —sets rules for restraints that restrict information use (akin to expiration of laundromat washer period)
Subpart B—Performance in Delivery of Copies
<b>606 (Copy: Delivery; Tender of Delivery)</b> —establishes default rules for delivery of or access to copies (e.g., place)
<b>607 (Copy: Performance Related to Delivery; Payment)</b> —sets rules for interplay of delivery and payment
<b>608 (Copy: Right to Inspect; Payment Before Inspection)</b> —sets inspections rights (follows and adapts existing Article 2)
<b>609 (Copy: When Acceptance Occurs)</b> —sets acceptance rules (follows and adapts existing Article 2)
<b>610 (Copy: Effect of Acceptance; Burden of Establishing; Notice of Claims)</b> —explains consequences of acceptance (follows and adapts existing Article 2)
Subpart C—Special Types of Contracts
<b>611 (Access Contracts)</b> —Access contracts: establishes default rules for contracts for access to another's information or web site
<b>612 (Correction and Support Contracts)</b> —Correction and support contracts: sets basic rules for such contracts (service contracts)
<b>613 (Contracts Involving Publishers, Dealers, and End Users)</b> —deals with relationship between retailer, information publisher (typically the manufacturer and intellectual property rights owner) and the customer (licensee): conditions retailer-customer contract on customer's acceptance of customer/manufacturer license. Changes existing law to allow customer to avoid retailer's contract if customer doesn't accept the "manufacturer's" contract.
Subpart D—Loss and Impossibility
<b>614 (Risk of Loss of Copy)</b> —sets risk of loss rules for copies
<b>615 (Excuse by Failure of Presupposed Conditions)</b> —explains when excuse is a defense because of a failure of assumed conditions (follows existing Article 2)
Subpart E—Termination (ending contract other than for breach)



<b>616 (Termination: Survival of Obligations)</b> —sets a list of default clauses that survive upon termination.
<b>617 (Notice of Termination)</b> —sets rules for giving notice of termination
<b>618 (Termination: Enforcement)</b> —sets default rules for party's obligations or rights upon termination of a license

### **Part 7: Breach of Contract**

<b>701 (Breach of Contract; Material Breach)</b> —sets default rules for what is a breach and what is a material breach
<b>702 (Waiver of Remedy for Breach of Contract)</b> —explains rules for what constitutes a waiver and the consequences of waiver
<b>703 (Cure of Breach of Contract)</b> —sets rules for cure of contract breach. Requires licensor to attempt cure if licensee was required to accept tender with an immaterial breach
Subpart B—Defective Copies
<b>704 (Copy: Refusal of Defective Tender)</b> —explains rights of the nontendering party upon a defective tender of a copy (adopts existing Article 2 conforming tender rule for mass market licensees; adopts common law substantial performance rule for other contracts)
<b>705 (Copy: Contract with Previous Vested Grant of Rights)</b> —sets default rules for when informational rights are independent of copy -- if there's a defective tender of a copy, licensee may still vest rights while obtaining a replacement copy (instead of having to reject the entire contract)
<b>706 (Copy: Duties Upon Rightful Refusal)</b> —explains rights and obligations once a tender is rightfully rejected
<b>707 (Copy: Revocation of Acceptance)</b> —revocation of acceptance rules (follows existing Article 2)
Subpart C—Repudiation and Assurances
<b>708 (Adequate Assurance of Performance)</b> —adopts existing Article 2 re right to adequate assurance of performance
<b>709 (Anticipatory Repudiation)</b> —adopts existing Article 2 re anticipatory repudiation of a contract
<b>710 (Retraction of Anticipatory Repudiation)</b> —adopts existing Article 2 re retracting an anticipatory repudiation

### **Part 8: Remedies**

#### Subpart A—General

<b>801 (Remedies in General)</b> —states general remedy principles and related obligations
<b>802 (Cancellation)</b> —sets default rules for cancellation and notice (ending a license for breach)
<b>803 (Contractual Modification of Remedy)</b> —sets rules for modifying remedies by contract (follows existing Article 2)
<b>804 (Liquidation of Damages)</b> —sets rules for liquidation of remedies
<b>805 (Limitation of Actions)</b> —statute of limitations (follows existing Article 2 but also adds detail and adopts a modified discovery rule)

<b>806 (Remedies for Fraud)</b> —supplies remedies for fraud (follows existing Article 2)
Subpart B—Damages
<b>807 (Measurement of Damages in General)</b> —states general rules for damages such as duty to mitigate damages
<b>808 (Licensor’s Damages)</b> —lists the damages for a licensor
<b>809 (Licensee’s Damages)</b> —lists the damages for a licensee
<b>810 (Recoupment)</b> —explains recoupment right of aggrieved party
Subpart C—Performance Remedies
<b>811 (Specific Performance)</b> —explains rules for specific performance contract clauses
<b>812 (Completing Performance)</b> —details right of licensor to complete information upon breach by licensee
<b>813 (Continuing Use)</b> — details right of licensee who hasn't cancelled the license, to continue use of information upon breach by licensor
<b>814 (Discontinuing Access)</b> —explains right of access licensor to cease performing upon breach by licensee
<b>815 (Right to Possession and to Prevent Use)</b> —explains rights and restrictions regarding licensor's ability to obtain possession of information or to prevent use by licensee upon cancellation
<b>816 (Limitations on Electronic Self-Help)</b> —restricts licensor's ability to contract for and exercise right of electronic self-help

**Part 9: Miscellaneous**

<b>901 (Severability)</b> —maintains validity of remaining act if a particular section is held invalid
<b>902 (Effective Date)</b> -- effective date of act
<b>903 (Repeals)</b> —allows states to list statutes repealed by UCITA
<b>904 (Previous Rights And Transactions)</b> —transition rule for coverage under the act

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# WASHINGTON COMMENTS

## APPENDIX A TO

### REPORT OF LAW OF COMMERCE IN CYBERSPACE COMMITTEE BUSINESS LAW SECTION WASHINGTON STATE BAR ASSOCIATION regarding UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT

June 28, 2000

*Disclaimer: This report has been approved by the Executive Committee of the Business Law Section of the Washington State Bar Association and represents the view of the Business Law Section. However, the report has not been reviewed by the Legislative Committee of the Washington State Bar Association or by the Board of Governors, and therefore does not represent an official position of the Washington State Bar Association.*

This appendix is an attachment to the Report of the Law of Commerce in Cyberspace Committee of the Washington State Bar Association regarding the Uniform Computer Information Transactions Act (“UCITA”) (“Report”). This appendix contains text for suggested Washington comments. As in the Uniform Commercial Code, the Washington comments are intended to highlight for Washington practitioners selected items of the uniform statute that may vary from previous Washington law or that may be a source of confusion. The Washington comments are not intended to be all-inclusive.

If possible, this Committee recommends that the Washington Code Reviser print the Official Comments to UCITA that are prepared by NCCUSL, with the text of the statute. As in Article 2 of the U.C.C., the Official Comments are critical to understanding the statutory text, and this is particularly the case for UCITA which blends many areas of law with which practitioners typically are not familiar. This Committee submitted suggestions for the Official Comments, some of which were included in the final product. Those Official Comments, as well as these Washington comments, should be made easily accessible to Washington practitioners and courts by printing them with the statute.

#### Washington Comments

Section 108. “Authentication,” as used in UCITA, is defined in Section 102 essentially to mean “signature,” including electronic equivalents. The term is technologically neutral. “Authentication” is also used in the Washington’s Electronic Authentication Act, Chapter 19.34, RCW, to define a different function, that of verifying the authenticity of a record meeting the requirements of that Act, which Act largely contemplates particular signature technologies. The two terms are not synonymous: in UCITA and U.C.C. Article 9, any qualifying electronic signature may be an “authentication” (i.e. signature) even if it does not utilize the technology contemplated by Chapter 19.34, RCW or qualify for the full scope of protection afforded by that Act to qualifying digital signatures. Of course, a signature that does qualify under Chapter 19.34, RCW also qualifies as an “authentication” (signature) under UCITA.

Section 201: Section 201 (f) resolves a question regarding the interaction of Washington statutes providing for a specific statute of frauds and RCW 19.36. 010(1), which concerns contracts not to be

performed in one year. The UCITA statute of frauds and RCW 19.36.010(1) (as well as any other statute of frauds displaced by UCITA) are not co-applicable: the UCITA statute of frauds controls.

[For insertion in the Washington Comments if the non-uniform version of Section 213 that is recommended by the Law of Commerce in Cyberspace Committee is adopted in Washington]  
Section 213:

1. *Scope of the Section.* This section addresses when an electronic event (e.g., authentication, message, record or performance) is attributed to a particular person. Attribution to a person means that the electronic event is treated in law as having come from that person. The section enables electronic commerce in an open environment, while stating reasonable standards to allocate risk. The section does not apply to funds transfers, bank accounts, credit card liability, or other subject matter outside the scope of this Act. It deals with an issue independent of whether the record has been authenticated. Authentication requires an act and an appropriate intent. Attribution deals with determining to whom the act is charged.

2. The reference to “other law” in subsection (a) covers circumstances in which a person is bound by the act of another even though the acting person might not qualify as an agent. For example, if a woman gives her on-line account password to her brother so that he may use the account, his acts will be attributed to her even though he is not necessarily her agent. If he steals the password, she is not bound by his actions unless this Act binds her or other law binds her (e.g., under the Washington Electronic Authentication Act, Chapter 19.34, RCW, if access to the account is controlled by digital certificates and her brother steals her private key, her contract with the account holder might allocate liability to her; alternatively, she could also be bound by the actions of her brother if she did not use reasonable care to protect her private key or if she failed to revoke her certificate once she became aware that her private key had been stolen).

3. Subsection (b) deals with the effect of attribution procedures. Under Section 102, an “attribution procedure” is a procedure established by law or adopted or agreed by the parties. The basic rule for commercial parties is that, unless the procedure used is “commercially reasonable”, subsection (a) governs. Subsection (b), however, allows a party that relies on attribution procedure to establish attribution to the other party if, and only if, the relying party carries the burden of establishing that:

- The procedure used was *commercially reasonable*
- The procedure was relied on in good faith
- The procedure indicated that the party attributed with the record was the responsible person.

“Burden of establishing” means “the burden of persuading the trier of fact that the existence of a fact (e.g., attribution) is more probable than its non-existence.” The net effect of this is that the party seeking to establish attribution has the burden and risk of establishing actual attribution or the foregoing characteristics with respect to the procedure used. Under Section 212, an “attribution procedure” is a procedure established by law or adopted or agreed by the parties.

The standard of commercial reasonableness has two functions and is essential to the basic theme of developing rules that are “technology neutral.” The first function is that it establishes a standard for courts to develop case law and for parties to develop standards for the development of effective procedures. The second function is equally important. Regardless of the agreement of the parties, an attribution procedure has the designated effects only if it is commercially reasonable – the procedure can, in fact, be ineffective, but it nevertheless must be commercially reasonable. This gives courts a basis to monitor transactions in order to prevent abuse.

Even if a relying party (e.g., a vendor) establishes the three elements required under subsection (b)(2), it does not succeed if the other party (the “attributed person”) can establish, essentially, that the message was caused by a person:

- who was not entrusted at any time with the right or duty to act for the attributed person with respect to such electronic events or attribution procedure; or
- who obtained, from a source controlled by the attributed person, information facilitating breach of the attribution procedure.

Details regarding these concepts are set forth in subsection (b)(5) and are based on similar concepts in U.C.C. Article 4A. An example of the second point would be a situation in which a hacker obtains from the computers controlled by the attributed person, the attributed person’s password. The net effect of these rules is that the burden of establishing attribution is primarily on the party seeking to rely on the attribution. It must establish either that the party actually was the sender or someone authorized by the sender or that a commercially reasonable procedure, actually applied, indicated that this was true. Even then, the other party succeeds if it establishes the criteria under (b)(5).

Section 213(b)((2), (4)and (5) do not apply to consumers. Those subsections may or may not be appropriate for consumers – as made clear in subsection (b)(3), Section 213 simply takes no position on the issue and courts are free to look to existing and future law to develop appropriate rules. Subsection (c) makes it clear that consumers may participate in electronic transactions and may adopt or agree to attribution procedures that will be judged other than under subsection (b)((2), (4)and (5), such as, for example, the common law of contracts or Washington’s Electronic Authentication Act.

Section 303. Section 303(b) effects a change in the common law by requiring a consumer to manifest assent to a term preventing oral modification of a contract. Under the common law no such assent to the term (other than assent to the entire contract) is necessary. Unlike the common law, however, in UCITA and in U.C.C. Articles 2 and 2A, “no oral modification” terms are enforceable if appropriate consent is obtained. *Cf. Pacific Northwest Group A v. Pizza Blends*, 90 Wn. App. 273, 951 P.2d 826 (1998) (a paradox of the common law is that a contract clause prohibiting oral modification is essentially unenforceable because the clause itself is subject to oral modification; WA legislature abrogated the common law rule in limited circumstances such as in contracts involving the sale and lease of goods [U.C.C. Articles] 2-209(2) and 2A-208(2); other states have gone further. For example, New York and California have abrogated the common-law rule for all executory agreements [citations to NY and CA statutes omitted]).

Section 405. Section 405(c) creates an implied warranty regarding integrated systems: no parallel warranty exists under U.C.C. Article 2 or the common law. See Official Comments for details.

Section 409. Section 409 increases licensor (vendor or other provider) exposure under Washington law. Washington adopted the majority version of Article 2-318, which largely honors privity of contract and provides that warranties only extend to persons not in privity if they are members of a consumer’s household who suffer personal injury. UCITA expands the class of protected persons by including third party beneficiaries. This class may be controlled by contract. UCITA also expands the type of damages that may be awarded to consumers who are not in privity because the limitation to damages for personal injury is not included. However, disclaimers or modifications of warranties and remedies that are effective against the consumer are also effective against the expanded beneficiaries. See Section 409(d). In short, Section 409 increases the importance of contracting for appropriate disclaimers and modifications.

Section 509. Section 509 is more protective of licensees than is U.C.C. Article 2A (leasing of goods). Unlike Article 2A, UCITA requires a “hell or high water” clause (i.e., a clause requiring the customer to pay its lender, regardless of disputes between the customer and the provider of the item financed by the lender and regardless of defects in that item) to be in the financial accommodation contract; under Article 2A the result effected by such a clause is accomplished by statute, not contract.

Section 613. Section 613 contains a significant change in Washington law. Under current law, if a car dealer sells a car, there is binding contract between the customer and the dealer (Contract #1). The car manufacturer is not a party to that contract and if it were also to make a contract with the customer (such as a manufacturer’s warranty contract, Contract #2), the dealer’s contract would not be affected by that second contract. Section 613 deals with similar situations in the computer information industries: under existing law, if a customer acquires computer information from Computer Store, that acquisition contract (Contract #1) is binding. The customer might find a second contract (Contract #2) from the publisher (manufacturer) in the box. Typically, Contract #2 is required for the customer to avoid infringement (because under federal law the publisher, not the Computer Store, is the copyright owner). Section 613 changes Washington law to condition Contract #1 on the customer’s acceptance of Contract #2: if the customer rejects Contract #2 under Section 209 of UCITA, then the customer can also terminate Contract #1. See the Official Comments for a discussion of the policy issues involved.

Section 803. Section 803(c) changes the common law to advantage licensees: failure of an agreed remedy also causes a failure of an exclusion of consequential damages *unless* the agreement expressly provides otherwise. Practitioners should take this into account when drafting contracts.

Section 805. Section 805 adds to the contractual statute of limitation, a modified discovery rule and prohibits reducing the statute of limitations in a consumer contract. This is a new consumer protection to which practitioners should be alert. This protection does not exist, for example, in Article 2 (RCW 62A.2-725(1)) (2000).

Sections 807. Section 807(b)(1) promotes the public policy of protecting published informational content by creating a default rule that excludes consequential damages unless the contract otherwise provides. This change should be noted by practitioners.



**Discussion of Controversial Issues**

**APPENDIX B TO**

**REPORT  
OF  
LAW OF COMMERCE IN CYBERSPACE COMMITTEE  
BUSINESS LAW SECTION  
WASHINGTON STATE BAR ASSOCIATION  
regarding  
UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT**

June 28, 2000

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## I. Introduction

This appendix is an attachment to the Report of the Law of Commerce in Cyberspace Committee of the Washington State Bar Association regarding the Uniform Computer Information Transactions Act (“UCITA”) (“Report”). It discusses several issues that have been repeatedly raised by critics of UCITA (“controversial issues”), in order to provide a brief evaluation of them. These controversial issues are drawn from several detailed sets of comments on or articles about UCITA that have been published or circulated widely. Those comments and articles are provided in full as attachments to this appendix.

Controversy is endemic to groundbreaking legislation. UCITA shifts legal thinking to match the shift from a goods-based economy to one based on information and services. The same shift occurred when Article 2 of the Uniform Commercial Code was drafted to address movement from an agrarian to a manufactured goods economy -- that code provided the legal infrastructure for the 20<sup>th</sup> Century.

Article 2 was first proposed in 1949,<sup>1</sup> but was not widely adopted until the 1960s,<sup>2</sup> more than ten years later. It was very controversial and the final product was neither perfect nor satisfactory to all. A member of the drafting committee described the struggle to deal with that reality by Professor Karl Llewellyn, the author of Article 2:

I have come to feel that Karl saw more clearly than his critics and that the Code as he initially conceived it might better have served the purposes of the next fifty years. Yet Karl never lost sight of the fact that his job was to produce, not the best Code which could ideally be put together by a band of scholarly angels, but the best Code which stood a chance of passage in the imperfect world of man.

Grant Gilmore, *In Memoriam: Karl Llewellyn*, 71 YALE L.J. 813, 814-15 (1962). Karl Llewellyn himself said:

[a] wide body of opinion has worked the law into some sort of compromise after debate and after exhaustive work. However, when you compare it with anything that there is, it is an infinite improvement.<sup>3</sup>

So it is with UCITA. It is as an impressive blend of commercial, informational and services law as is possible to create in an open process involving conflicting needs and views, but it does not fully satisfy anyone. However, it is the product of almost 10 years of exhaustive debate, input from all affected groups and hundreds of commentators, and is an infinite improvement over anything that there is.

When examined in light of existing commercial contract law, including the common law that governs most of the UCITA industries and Article 2 of the Uniform Commercial Code, virtually all of the claims made by critics of UCITA tend not to provide a complete story, tend to be inaccurate as to UCITA or existing law, or do not justify non-uniform amendments of UCITA. It is also important to keep in mind that like all proposed legislation, UCITA reflects numerous compromises which cannot be recast without damage to the whole. On the whole, our review indicates that UCITA fairly addresses and balances the competing concerns.

## II. Discussion of Controversial Issues

### A. Electronic Self-Help

One common critique of UCITA<sup>4</sup> states that it would:

Allow vendors to threaten disruption of licensee's critical systems through electronic "self-help" if its demands were not met. Under current law, a contract provision barring all use of electronic self-help is enforceable, and many business licensees consider it one of the most important negotiable license provisions.

*[Hypothetical Scenario re "Self help" shutdown]:*

You have a desktop application suite running throughout your organization's enterprise. Your application suite provider believes that you have breached your agreement. They notify an individual (who happens to be on vacation) of the perceived violation. When no response is received they revoke your company's right to use the software and execute an electronic key to make the product unusable. As a licensee your only recourse would be through court systems. At an average \$50/hour/user, the impact on productivity not to mention your business would be staggering.

There is no doubt that self-help presents difficult policy issues. However, this criticism is over-broad. It does not acknowledge significant new restrictions on self-help imposed by UCITA, the competing needs of licensors, or the state of existing law for both transactions covered by UCITA and those governed by other commercial law. Further, UCITA Section 816 allows parties to bar self-help entirely and adds significant protections for licensees that are not provided by current law. For example, contract provisions barring electronic self-help are fully enforceable under UCITA Section 816(h):

Before breach of contract, rights or obligations under [Section 816] may not be waived or varied by an agreement, *but the parties may prohibit use of electronic self-help*, and the parties, in the term referred to in subsection (c)[a term allowing self-help to which the licensee must expressly consent], may specify additional provisions more favorable to the licensee.<sup>5</sup>

Thus, vendors may exercise self-help under Section 816, but they must also comply with the significant new restrictions imposed by UCITA. Most licensees could not obtain in contract negotiations the non-variable restrictions imposed by UCITA. In contrast, under current law, vendors largely may exercise such self-help *without* these restrictions. In fact, for lenders, lessors and sellers who retain title to goods sold, other commercial law expressly allows self-help with only a few of the UCITA restrictions. A recent news article concerned borrowers who do not pay their car loans: to the borrowers' surprise, their cars did not start after breach because of software required by the *lender*. Such a remedy is expressly allowed by Article 9 of the U.C.C., including revised Article 9 that was adopted by the Washington legislature in 1999. A software *licensor* under UCITA could not engage in such practices.<sup>6</sup>

The hypothetical set forth above ignores important protections created in and mandated by UCITA: (1) the organization must be in material breach of contract such that the licensor is entitled to cancel the license -- if the licensor is wrong it will be liable for all damages suggested plus more, notwithstanding any contrary contract (§ 816(b) and (e)); (2) the organization must first expressly agree that the licensor would have a self-help right if the organization's breach allows cancellation; (3) that contract term must be the subject of a separate assent (§ 816(c)), which means that the organization cannot be surprised by the existence of the term; (4) the organization must designate the person to be contacted, the manner and place to which notice must be sent, and have the right to change that designation. Any reasonable organization consenting to the express self-help remedy will designate an office which is attended while particular employees are on vacation (§ 816(c)).

While a "no self-help" provision would likely benefit licensees, a commercial code dealing with licensing rights must balance the needs of both licensees and licensors. An organization may as often be a licensor as a licensee and even consumers can be licensors. Therefore, it is also important to consider

the needs and viewpoints of licensors. In Washington a typical software company may only have 1 to 15 employees (even in Washington, the home of Microsoft, the average software company is a small business).<sup>7</sup> By way of example, assume that the licensor earns \$10,000 per month from the license described in the above hypothetical, which income is critical to the licensor's ability to meet its payroll and borrowing obligations. Also assume that the licensee organization has materially breached the contract but is nevertheless ignoring the licensor's requests for payment: it knows that the licensor cannot afford to litigate and or stay in business long enough (without license payments) to last the time necessary to sustain litigation. In fact, the organization in breach routinely pays its vendors late in order to more profitably manage its cash flows. Because of factors such as these, arguments have been made that UCITA is currently too favorable to licensees and should be changed to provide more protection for licensors.

Self-help is also important for a separate area covered by UCITA relating to financing. UCITA for the first time will provide statutory guidance for a form of financing for purchase of software by licensees (here, the organization in the hypothetical above). That particular form of financing is not clearly supported by other existing law such as U.C.C. Article 9, but is becoming more and more commonplace. Licensees may obtain money from specialty financiers who take no security interest or collateral in return (often because the licensee has already pledged all of its assets to other secured lenders, who will not advance more funds to purchase software). Instead, these software financiers only demand a right to require the licensee to cease using the funded software if the licensee fails to make its loan payments. Under UCITA, these software financiers may exercise electronic self-help upon default by their borrower (the licensee), but their exercise of self-help is vastly more restricted than it is under Article 9 (secured financing; Article 9 also covers the interests of sellers who retain title to goods sold) or Article 2A (lease financing). If the UCITA self-help right were removed or amended to be even more favorable to licensees, this form of financing might not be available to licensees.

Section 816 may balance the rights of licensees and licensors in a way that satisfies no one but still represents a reasonable compromise of their competing positions and concerns. Unlike existing law, the section requires vendors to contract conspicuously for self-help: the customer must assent to the actual self-help *term* (§ 816(c)); the vendor must provide advance notice to a person designated by the *customer* of intended exercise of self-help (§ 816(c)(2) and (d)); the customer can require involvement by a *court* (§ 816(g)); and the vendor *may not avoid payment of consequential damages*, even if its contract purports to exclude them (§ 816(e)). Effectively, these and other restrictions preclude self-help for computer information licensors and are some of the reasons some licensors view § 816 as going too far to protect licensees.

## **B. “Shrinkwrap” Licenses**

Another common criticism of UCITA is that it will “validate” shrink-wrapped (standard) licenses, and would support “non-negotiable” contracts, even with the largest of users.<sup>8</sup> Although this is a common comment, “shrinkwrap” licenses and other forms of “pay now, terms later” contracts are already valid in Washington and are used by many industries; “non-negotiated” contracts are also routine. See *Mortenson Co. v. Timberline Software Corp.*, 93 Wn. App. 819 (1999), *affirmed* 998 P.2d 305 (Wash. 2000) (pay now, terms later contracts are enforceable). For example, insurance, airline tickets, and drugs with inserts describing interactions and contraindications are often paid for prior to receiving the “terms,” as are some mail order and telephone order items. In fact, the mail order and telephone order retail business, and the distribution of increasingly sophisticated products, depend upon the “pay now, terms later” distribution channel. See examples of “pay now, terms later” form contracts identified by the 7<sup>th</sup> Circuit Court of Appeals in Endnote 9. Most companies routinely use and depend on non-negotiated standard form

contracts, including “shrinkwrap” contracts.<sup>9</sup> Neither the common law nor U.C.C. Article 2 prohibits “pay now, terms later” contracts or the use of non-negotiated contracts.

UCITA does place new restrictions on “pay now, terms later” contracts, however: customers in mass-market transactions, including both consumers and businesses, must have reason to know that additional terms will follow payment, must be shown the terms in a reasonable time frame, must have an opportunity to review the terms before consenting to them, must indicate consent to the terms if they are acceptable, must have a chance to reject the terms and obtain a cost-free refund, and must be paid costs of restoring their computers (e.g., if terms cannot be seen without an online review that causes damage). Current law does not provide all of these protections. UCITA also protects all customers from terms that are unconscionable (existing Washington law also provides this protection), and from terms that conflict with any expressly agreed terms or that violate a fundamental public policy. While some do not view these protections as going far enough, others view them as going too far. However, the UCITA rules appear to establish a reasonable compromise between customer and vendor needs and cost considerations.

For a discussion of what terms are enforceable in contracts,<sup>10</sup> see Section K (“Product Criticism & Benchmark Testing”) of this Part.

It is the view of the Committee that a law requiring contracts to be negotiated face-to-face with legislated bargaining leverage, or requiring all contract terms and/or the product itself to be examined before payment is made, would not be beneficial to either consumers or businesses. Such a restriction does not comport with existing law. In addition, it might serve to stunt the development and sale of many consumer products. Such a policy choice has not been applied to all industries, including the airline, insurance and mail and telephone order industries, and application to UCITA-covered transactions would place uneven burdens on similar transactions involving computer information. Placing such an extra burden on emerging information age commerce might do great harm to the economy, product innovation, customer choice and pricing.

### **C. Duration of Licenses**

The provisions of UCITA concerning the rules for license duration that will apply if no license term is specified, have been subject to this criticism:

[UCITA will] impose new uncertainty regarding the duration of licensee's right to use licensed software. Under UCITA, agreements which do not specify a perpetual license term will be limited to a “time reasonable,” giving the vendor the opportunity to bring the licensee's operations to a standstill, at its discretion.

*[Hypothetical Scenario re Site license usage and duration:]*

Your company would like to purchase a “perpetual site license” from a vendor for a mission critical application. Due to the importance of the application you require the source code to be escrowed. Under UCITA, the number of users and the duration of the license must be explicitly stated for this type of arrangement. You would be faced with a more complicated negotiation and the prospect of paying for additional licenses if you guessed wrong.<sup>11</sup>

However, the conclusion for the above hypothetical is incorrect. It incorrectly implies that existing law provides certainty or creates perpetual licenses when such has not been agreed.

UCITA does not impose “new uncertainty” because existing law is not certain regarding the duration of a license (or other contract) for which no duration has been agreed (expressly or by trade

usage etc.). It is not clear under existing Washington law whether U.C.C. Article 2 or the common law of contracts would apply to software licensing arrangements. However, under either U.C.C. Article 2 or state common law, a license that is indefinite as to duration may be terminated at will upon notice by either party.<sup>12</sup> Thus the outcome posited under UCITA in the above hypothetical would be no different than the result under existing law. In either case a license may be terminated at the licensor's discretion if the license does not state that it is for a particular duration or that it is "perpetual" (absent a duration set by trade usage or the like).

In fact, UCITA's default rule is more *favorable* to licensees than current law. UCITA § 308(1) follows existing state law by allowing termination of indefinite-term contracts, but it *also* sets a default rule that is beneficial to licensees by establishing a basic duration of a "time reasonable in light of the licensed subject matter and commercial circumstances." In addition, UCITA § 308(2) goes significantly beyond current law to benefit customers by adding a new default rule that makes some licenses perpetual: if the license is of a computer program (other than source code) in which a copy is delivered for a fixed price set up-front, then the duration is perpetual. *Id.* at (2)(A)(ii). Under existing law, the same license would be terminable at will. UCITA also acknowledges that trade usage or the like can form an agreement, including agreements that could state a duration. UCITA § 113(b) provides that any usage of trade of which the parties are or should be aware and any course of dealing or course of performance between the parties are relevant to determining the existence or meaning of an agreement.

If for some reason the contract posited in the hypothetical were viewed as "silent" regarding duration, UCITA (§ 308 (1)(a)(ii)) creates a perpetual license for the object code if one up-front fee was paid. If, on the other hand, the parties contract for a "perpetual license," then that is what they will get: UCITA § 308 only applies when the parties *fail* to agree on duration. As under current law, agreements can be formed in many ways, including by usage of trade (§ 102(a)(4) and 113(b)).

UCITA has no default rule for source code so the parties must agree on the duration of a source code license – given that source code can be critical to both parties, this is an appropriate outcome. A concern was expressed by a local company about the interplay of the UCITA default rule for perpetual licenses for object code when the license also provides for a source code escrow. The company appeared to be concerned that the § 308(2) default rule might not apply if software licenses not otherwise involving source code contained a source code escrow provision. However, in response to that concern, the official comments to § 308 now clarify that inclusion of a source code escrow does not vitiate a perpetual license for the object code that is created by the UCITA default rule.

#### **D. Number of Users**

Another common claim made about UCITA is that it will "Change commercial practice through new default rules regarding the number of permitted users under license".<sup>13</sup> In the hypothetical quoted in section C above, the claim is also made that UCITA will require the number of users to be explicitly stated in a "perpetual site license."

This claim is not true as to existing law. As to future practices and as to every provision of UCITA, parties governed by it will conform their practices to achieve the result they want to achieve in light of its rules.

Current commercial practice is difficult to codify because such practices are so variable, particularly in the many common law industries covered by UCITA. For mass-market licenses, the commercial practice tends to permit only a single-user on one machine and the initial drafts of UCITA reflected that most common rule. However, other types of licenses are commonly used by all employees at a business's premises (e.g., a "site" license), or by all branches of the business (e.g., an "enterprise"

license), or, as for mass-market licenses, by only a single user or on a single machine. The UCITA default rule (§ 307(c)), therefore, provides a flexible rule for the number of users, and applies only when the contract is *silent* regarding the number of users. That rule is as follows:

An agreement that does not specify the number of permitted users permits a number of users which is reasonable in light of the informational rights involved and the commercial circumstances existing at the time of the agreement.

The final rule reflects requests made by large commercial licensees to flexibly accommodate all commercial practices. Such a rule best meets the needs and reasonable expectations of *both* parties to a license of computer information, particularly where commercial and mass-market practices can vary so widely from license to license. Extreme rules making every license usable by all persons in the world would have the same flaw as a “single user” rule: neither rule would be grounded in existing commercial practices and would not reflect the reasonable expectations of parties that neglect to agree on a specific license term

#### **E. Discovery of Defects and Warranties**

Another criticism of UCITA is that it places an “unreasonable burden on licensee to discover defects during a trial period or be held to the contract terms, even if a significant to operation defect is later uncovered.”<sup>14</sup> This statement is inaccurate both as to UCITA and current law.

The relevant provisions of UCITA § 406(d) and § 608 parallel and adapt U.C.C. Article 2-316(3)(b) and Official Comment No. 8 (RCW 62A.2-316(3)(b)); 2-512 (RCW 62A.2-512) and 2-513 (RCW 62A.2-513). The rule is explained in the draft official comments to UCITA § 406 and § 608 (emphasis added):

Section 406:

*Inspection. Subsection (d) follows Uniform Commercial Code Article 2 (1998 Official Text). Implied warranties may be excluded or modified where the licensee examines the information or a sample or model of it before entering into the contract. . . . If the buyer discovers a defect and goes ahead to make the contract, or if it unreasonably fails to examine the information before making the contract, there is no basis to imply a warranty on a subject which examination did reveal or should have revealed.*

For a transaction to be within subsection (d), it is not sufficient that the information merely be available for inspection. There must be a demand or offer by the licensor that the licensee examine it. This puts the licensee on notice that it is assuming the risk of defects which examination ought to reveal. On the other hand, if the offer of examination is accompanied by words giving assurance about their merchantability or about specific attributes and the licensee indicates clearly that it is relying on those words rather than on an examination, the words may create an express warranty.

The licensee's skill and the normal method of examining information in the circumstances determine what defects are excluded. *A failure to notice obvious defects cannot excuse the licensee. However, an examination made under circumstances which do not permit extensive testing would not exclude defects that could be ascertained only by such testing. Nor can latent defects be excluded by a simple examination. A merchant licensee examining a product in its own field is held to have assumed the risk for all defects which a merchant in the field ought to observe, while a non-merchant licensee is held to have assumed the risk only for such defects as an ordinary person might be expected to observe.*

Section 608:

*Type of Inspection.* The type of inspection permitted depends on the commercial context, including the agreement of the parties. *This follows Article 2 and cases decided under Article 2 are applicable in interpreting this section.* If the parties agree to an extended or extensive procedure of pre-acceptance testing, that agreement supplants the general standard of this section. In the absence of agreement, the standard is that inspection must be in a reasonable time and manner.

...

*Defects Not Discovered.* *As in Article 2, a failure to inspect or a failure to discover all defects during an inspection does not necessarily alter the party's remedies for the undiscovered defect. If a latent defect exists which was not known to the accepting party, acceptance of the copy does not alter that party's right to a remedy for the defect when eventually discovered. . . .*

The U.C.C. Article 2 rules, which have been in place for about 50 years, have proven both reasonable and workable. Given this experience with Article 2 rules relating to discovery of defects and implied warranties, there is no reason to believe that the UCITA rules patterned after U.C.C. Article 2 would be unreasonable or unworkable for computer information transactions. Further, these rules appear to coincide with the existing commercial practice for delivery of computer information.

UCITA also has been criticized for requiring that software users discover any defects in the software during the evaluation period, by not preventing software providers from disclaiming warranties (see the Prudential Letter in Attachment B-2). However, Washington contract law does not currently require vendors of any product (including software) to warrant that the product is error free. The warranty of merchantability implied under Article 2 and under UCITA does not require perfection – they require fitness for ordinary uses. Further, every statutory or implied warranty in the uniform and Washington version of U.C.C. Article 2 is disclaimable, as are the statutory and implied warranties in UCITA. There appears to be no reason to impose a higher standard on vendors of computer information than on vendors of goods, and reasonable arguments can be made that, given the inherent nature of software, that lesser standards should be applied.

Finally, inspection rules for acceptance of a product are not the same as, and should be distinguished from, breach of warranty rules for accepted product. The UCITA and Article 2 rules regarding this distinction are and should be the same. See Article 2-316, 2-513, Comment 9 and above-quoted UCITA draft Official Comments No. 5 to § 406 and No. 5 to § 608.

#### **F. Warranty of Non-Infringement**

Critics of UCITA sometimes argue that it will limit a software vendor's implied warranty that it has not infringed another company's patent, copyright, trade secret, trademark or other intellectual property rights. Particularly, these critics claim that if a globally deployed product is later found to have been the intellectual property of a non-U.S. firm, the U.S. licensor would not be held liable, nor would the licensee have any leverage with the owner of the intellectual property, if even allowed to use it.<sup>15</sup>

These criticisms assume first that transactions in computer information are currently subject to Article 2-312 (concerning sales of goods), and second that Article 2-312 pertains to all intellectual property laws throughout the world. Neither of these assumptions is necessarily correct.

As noted, it is unclear whether contracts involving computer information are governed by the common law of contracts or by U.C.C. Article 2. Washington courts have withheld judgment on the



issue.<sup>16</sup> However, contracts for intellectual property transfers that are normally subject only to the common law come with no statutory or common law warranty against infringement. Under the common law, then, parties to a software license would need to independently bargain for and agree on such non-infringement warranties.

On the other hand, U.C.C. Article 2-312 is silent on whether its warranty extends to all countries of the world. None of the Committee members could locate a case that indicates whether Article 2-312 can be so broadly construed. Article 2 was written over 50 years ago for transactions in goods. Contracts for the sale of goods generally do not involve as many complex intellectual property concerns as do transactions in computer information. Further U.C.C. Article 2 was written at a time when interstate commerce, and not global commerce, was the major concern. With most transactions in computer information, on the other hand, global commerce is an every day reality and global intellectual property rights and policies related to computer information are very much in flux.

Thus, for UCITA to adapt the provisions of U.C.C. Article 2 with aspects of the common law is not an unreasonable course of action: even though not all computer information transactions are subject to U.C.C. Article 2, UCITA § 401 departs from the common law and imposes a statutory warranty against infringement. This warranty parallels U.C.C. Article 2-312, but also confines it to rights arising under state or U.S. law. In addition, the UCITA warranty expands protections for licensees who provide specifications to the licensor (see § 401(a)).

It is important to emphasize that parties are free to contract for worldwide protection against infringement. When they do, the UCITA default warranty interprets this worldwide protection as extending beyond the U.S. to all countries that are in treaty with the U.S. Section 401(c)(2) provides (emphasis added):

The obligations under subsections (a) and (b)(2) apply solely to informational rights arising under the laws of the United States or a State, *unless* the contract expressly provides that the warranty obligations extend to rights under the laws of other countries. Language is sufficient for this purpose if it states “The licensor warrants ‘exclusivity’ ‘noninfringement’ ‘in specified countries’ ‘worldwide’ or words of similar import. *In that case, the warranty extends* to the specified country or, in the case of a reference to “worldwide” or the like, *to all countries within the description, but only to the extent the rights are recognized under a treaty or international convention to which the country and the United States are signatories.*

This UCITA non-infringement warranty is confined, as a default rule, to the states and countries which parties should reasonably expect from a U.S. vendor. Customers who desire greater protection may contract for it. Default rules typically do not impose the highest possible protection and the highest possible liability or costs (e.g., searches by U.S. vendors in every country) on either party. Further the UCITA rule partially acknowledges the practical concern that intellectual property right searches are not even possible in some countries.

Finally, default rules should not favor large licensors by forcing small licensors from the market. Small licensors are unlikely to be able to bear the burden of research and due diligence created by a “universal” statutory warranty of non-infringement and would not necessarily have the bargaining power to disclaim it.<sup>17</sup> While these small licensors may still need to bear those risks in a negotiated license because of a lack of bargaining power, a default rule should not drive the transaction to that conclusion.

## **G. Perfect Tender Rule**

Some critics have charged that UCITA would abandon the seller's obligation to deliver a "working product," arguing that, under UCITA, if the software fails to conform to the contract, only a "mass-market" customer (narrowly defined) might refuse to accept it, while a commercial user could refuse the tender only if it constituted a material breach.<sup>18</sup>

UCITA Section 704 blends common law and U.C.C. Article 2 rules regarding tender of a copy of computer information. If a party tenders an item that *substantially or materially complies* with the contract, under the common law the tender is good. U.C.C. Article 2-601 creates a different rule in a narrow circumstance: the buyer may reject a tender if the delivery fails to conform in any respect to the contract. If the buyer exercises this right, it must either accept or reject the whole or accept any commercial units and reject the rest. This all-or-nothing rule is known as the "perfect tender" rule and is unique to Article 2. Even in Article 2, however, the rule does not apply to installment contracts and is so restricted by exceptions and case law that authoritative commentators have concluded that "*the law would be little changed if Article 2-601 gave the right to reject only upon "substantial" non-conformity,*"<sup>19</sup> (i.e., if Article 2 were revised to use the UCITA rule). In fact, changes to that effect are being suggested: revisions to Article 2 would appear to be moving towards the UCITA rule.<sup>20</sup>

It is important to avoid confusion between obligations to deliver a "working" product and the perfect tender rule. The perfect tender rule looks to whether the product conforms to the contract. The rule is irrelevant to whether a vendor has an obligation to deliver a "working" product. Any such obligation depends on whether the vendor made any express or implied warranties. For software, those provisions of UCITA parallel U.C.C. Article 2 even though software may yet be covered by the common law and the common law does not create any implied warranties. With respect to UCITA software warranties, see Section 402 (UCITA express warranty rule is same as Article 2's rule except that UCITA adds advertising warranties); Section 403 (UCITA imposes an implied warranty of merchantability on computer programs); Section 405(a) (UCITA imposes an implied warranty regarding fitness for the licensee's purpose which blends the Article 2 implied warranty of fitness for purpose with the common law of services); and Section 405(c) (UCITA creates a new system integration warranty that does not exist in Article 2).

In short, the perfect tender rule is already more myth than reality for the sale of goods covered by U.C.C. Article 2. For transactions covered by the common law, the rule does not even exist. Nevertheless, UCITA does adopt the perfect tender rule for mass-market transactions<sup>21</sup> and thus protects consumers and businesses in such transactions.

It is critical to note that customers who must accept an "imperfect" tender are not required to forfeit their right to be made whole. UCITA's conforming tender rule simply means that the parties have done enough to have a contract: but if the customer has been damaged by an imperfect tender, it still is entitled to its damages for the nonconformities. UCITA also adds a new right: a non-mass-market customer may demand that the licensor attempt to cure the nonconformity. Section 703(b).

## **H. Consumer Protection and Conspicuousness**

1. Change of Terms. Consumer advocates have criticized UCITA for validating post-payment presentation of material terms, and for permitting licensors to put in a form contract a term that allows them to keep changing terms.<sup>22</sup> However, "pay now-terms later" terms are already permitted under Washington law. The same is true for terms that allow one party to change terms. Consider the typical bank deposit contract, telephone subscription, cable subscription or online subscription: such contracts evidence a long-term relationship in which change is inherent and parties routinely contract to allow one party to make changes to terms from time to time.

An example of a contract term allowing one party (the online service provider) to change terms is found in Consumer Union's online membership contract:

Modifications.

(a) To the Agreement.

CU has the right to modify this Agreement and any policies affecting the Site, including without limitation the No-Commercialization Policy. Any modification is effective immediately upon posting to the Site or distribution via electronic mail or conventional mail. Your continued use of the Site following notice of any modification to this Agreement shall be conclusively deemed an acceptance of all such modification(s). Your only right with respect to any dissatisfaction with any modifications made pursuant to this provision, or any policies or practices of CU in providing the Site, including without limitation

(i) any change in the Content, or

(ii) any change in the amount or type of fees associated with the Fee-Based Services,

is to cancel your subscription in accordance with the Customer Service Instructions.

(b) To the Site.

CU has the right to modify, suspend or discontinue the Site or any portion thereof at any time, including the availability of any area of the Site, including without limitation the Fee-Based Services. CU may also impose limits on certain features and services or restrict your access to parts or all of the CU Site without notice or liability.<sup>23</sup>

Consumers Union depends upon the common law for enforcement of the above clause. UCITA does not change that law but, in Section 304, does add a safe harbor for vendors who desire more certainty than is afforded by the common law. The certainty comes with a price, however, and new burdens, some of which would appear to go beyond common law requirements: a party permitted to change contract terms must follow a procedure described in the contract, must provide reasonable notice of the change to the other party, and, in a mass-market transaction, permit the other party to terminate the contract as to future performance if the change modifies a material term of the contract. UCITA also provides rules regarding invalidation of terms that are unconscionable or violate a fundamental public policy and rules requiring good faith dealing between the parties that will apply equally well to terms changed unilaterally by one party pursuant to the contract.

2. Limitation of Damages. Consumer advocates also criticize UCITA because licensors can exclude incidental and consequential damages even when an agreed remedy fails of its essential purpose.<sup>24</sup> However, UCITA actually increases customer protections in this area.

Existing U.C.C. Article 2-719 and the common law each allows parties to exclude incidental and consequential damages. This is true even when a contracted remedy fails of its essential purpose: according to respected commentators, the majority rule is that there is no interdependency between the damage exclusion and the remedy clause, and that the damage exclusion continues to apply even after failure of the remedy.<sup>25</sup> Nonetheless, to provide greater protection to customers, UCITA Section 803 adopts a version of the minority rule: the damage exclusion clause fails *unless* it is stated to be independent. This is a significant new protection provided for *all* licensees, not just consumers.

Consumer advocates have argued that customers should be able to recover damages caused by defects that were known to the licensor but not documented or disclosed to the licensee, because software products are allegedly sold in the mass market with hundreds or thousands of known defects. There is no provision in UCITA *authorizing* software publisher to sell products with hundreds or thousands of known defects. Under UCITA, licensors are thus subject to the same principles as vendors of other products (e.g., goods).

It should be noted that commercial law does not require any industry to sell perfect products. Such a law would be impossible to meet by most industries, but clearly cannot be met by the software industry given the complexity of computer code. If “thousands of known defects” were all deemed material defects and conditions of delivery, nearly all software products would qualify as non-conforming and there would likely not be a vibrant software industry. Many of these “defects” are considered immaterial (and thus even if known, were not considered to be defects at the time of release). The ability of developers to publish software for commercial and consumer use before all of the “defects” are discovered or cured has undoubtedly contributed to the rapid innovation in this field, generally without disastrous consequences. A rule requiring “perfect” products would surely have inhibited such progress and the benefits of it, even if it were possible to satisfy such a rule.

UCITA parallels U.C.C. Article 2 by imposing an implied warranty of merchantability on computer programs: UCITA assumes that a computer program will meet the mid-range of quality just as a lawn mower is assumed to be of mid-range quality. However, the mower need not be perfect. Market forces, not law, create “perfection,” if it can be achieved at all. It should be noted that the implied warranty of merchantability is disclaimable in Article 2 and UCITA, and does not even exist under the common law. Thus, UCITA does not create a different regime for software than for other products. UCITA does impose an implied warranty on many computer information transactions that would *not* be imposed on those transactions currently if governed by the common law. UCITA therefore may provide a warranty not available for software under current law.

3. Conspicuousness. Article 2 and UCITA require certain contract terms, such as a written warranty disclaimer, to be “conspicuous.” For over 50 years, Article 2 and contracts made under the common law have been bound by a definition of conspicuous located in Article 1 of the U.C.C. The UCITA definition follows the Article 1 definition but updates it for electronic commerce.<sup>26</sup> UCITA also preserves all substantive consumer protections statutes.<sup>27</sup> However it displaces selected procedural aspects of those statutes to enable electronic commerce, e.g., it allows an electronic record to meet a “writing” requirement and it allows the UCITA definition of “conspicuousness” to be used when the consumer statute does not have a definition.

Some consumer representatives expressed concern about displacing definitions of conspicuousness in a consumer statute that contains a definition of conspicuous.<sup>28</sup> As explained by NCCUSL, that concern has already been addressed in UCITA:

As in the current UCC, UCITA provides a definition of “conspicuous.” “Conspicuous” in e-commerce extends to the contrast for **notice** of the term and not to the time, manner and content of disclosures required by your state’s law. In the sale of goods (UCC Article 2), “conspicuous” is defined by Article 1 (1-201(10)) in a similar way with safe harbors. I know of no case in which your state’s consumer protection laws have conflicted with the Article 1 definition operative for the sale of goods. There is no reason to believe that a similar safe harbor definition of “conspicuous” for computer information would have any different result.

It is very probable that your current state rule on “conspicuous” notice is paper focused and may thus be inapt in e-commerce. Also, if your state has a digital signature act, there may already be uncertainty as to the application of the concept “conspicuous” notice to e-commerce.<sup>29</sup>

The draft comments to UCITA buttress the point by making it clear that UCITA’s rule is limited (emphasis added):

Subsection (d)(3) updates the concept of conspicuousness when used, but not otherwise defined, in other law. The update reflects the electronic commerce themes adopted in this Act. *This rule does not affect other disclosure rules. For example, a consumer rule which requires disclosure of particular information before a transaction occurs is not affected. Similarly unaffected is any rule that regulates the content of a required disclosure or the specific timing, form, location, language, or manner in which it must be made. This subsection does not alter statutes that relate to advertising or the like. Such statutes are not within the scope of this Act and are preserved.*<sup>30</sup>

It appears that some consumer advocates would prefer a more “contextual” definition of “conspicuousness” of the type used in consumer protection statutes. That type of definition, however, creates a policy issue that would effect a fundamental change in commercial law. This suggestion has been roundly criticized even for consumer contracts.<sup>31</sup> At present neither UCITA, U.C.C. Article 1 nor U.C.C. Article 2 are designed to be consumer protection statutes although both UCITA and Article 2 contain some consumer protections.<sup>32</sup> Commercial codes provide a general legal framework for the conduct of sales, leases, financing and similar transactions. As a general legal framework they should be flexible enough to allow for and preserve separate consumer protection statutes, but should focus on their principal purpose, the reasonable facilitation of commerce.

The need to refrain from detailed “contextual” rules is particularly important for definitions of “conspicuousness.” Whether a particular term, provision or notice is conspicuous to an average consumer will likely depend on the form, media or other details of a particular transaction. Therefore an overly detailed definition will likely severely hamstring the development of new business methods or media (such as the Internet) on the one hand, and may miss important protections required for consumers in transactions of type not envisioned when the code is adopted. The better approach then is to permit consumer protection statutes to deal with specific problems and allow greater flexibility in a commercial code such as UCITA that provides the underlying framework for commercial transactions.

4. General Consumer Benefits. UCITA clearly provides benefits to consumers. Several years ago, the Reporter for UCITA prepared a chart comparing the provisions of UCITA to existing U.C.C. Article 2 and other law and indicating whether UCITA preserved consumer protections, increased them or decreased them.<sup>33</sup> Overwhelmingly, UCITA preserved or presented a net gain for consumers. The treatment of consumers also was examined in a law review article written by the American Bar Association advisers to UCITA. They concluded:

As much as any other group, consumers have been represented in the Article 2B drafting process. . . . These submissions have contained requests for dozens of changes to Article 2B, some major, some minor. All have, in the authors’ observation, been taken seriously by the Drafting Committee. It is not surprising that not all of their proposals have been adopted; however, many valuable upgrades to Article 2B have resulted from their input. It is also important to remember that members of the Drafting Committee and other interested observers have proposed changes to Article 2B that favor consumer interests. Many of these proposed changes have also been adopted. . . .

The current draft of Article 2B affords more protections for consumers than any existing commercial statute. The ABA Subcommittee, attempted to answer the following policy question posed by the Reporter in his Issues Paper: Should Article 2B adopt new consumer protections or retain a posture of leaving current consumer law largely intact while providing some additional protections?

We concluded that Article 2B should retain a posture of leaving consumer law essentially intact, while adding some enhanced protection where the subject matter or

specific industry practices indicate that additional protection is needed, and where doing so would not violate the fundamental themes of the Draft as a commercial code . . . .<sup>34</sup>

## I. Transferability of Software

UCITA has been criticized for curtailing the ability of a software user to transfer her software to another user:

Should [UCITA] pass, the very concept of “used software” (video games, etc.) will disappear, since that can and will be prohibited by licensing terms.<sup>35</sup>

With respect to “used software,” the comment illustrates a difference between goods and information, including computer information. Most computer information and copies of it are not sold -- they are licensed. A discussion of the role that licensing plays in the production and distribution of information for licensors and licensees can be found at <http://www.publishers.org/home/abouta/copy/licensing.htm>; see “Contractual Licensing, Technological Measures and Copyright Law (Association of American Publishers, Inc., visited 1/27/2000).

As for the above statement, the video game example is an unfortunate one because “video” games are not computer information and are thus not within the scope of UCITA. In general, video games are sold as goods and would continue to be so treated after adoption of UCITA. In contrast, most copies of software are licensed and the right to use is a contractual right rather than a sale. Rules for transferability of goods have little relevance to transfers of contract rights. See *Restatement (Second) of Contracts* § 322 cmt. a (1981). By way of example, nonrefundable airline tickets are not transferable even though the airline does not care who sits in the seat --- this is because the airline granted a contract right to use the seat, it did not sell the seat itself. There is a legal difference even though customers are not accustomed to or may prefer a different result.

Federal law is also important here. For example, federal copyright law acknowledges the right of the copyright owner (licensor) to restrict transfers of a license, including further transfers by a licensee. See e.g., *In re Patient Educ. Media, Inc.* 210 B.R. 237, 1997 Bankr. LEXIS 953, 958, 31 Bankr. Ct. Dec. (LRP) 49 (Bankr. S.D.N.Y. 1997) and *Everex Sys., Inc v. Cadtrak Corp.* (In re CFLC, Inc.), 89 F.3d 673 (1996) and *SQL Solutions, Inc. v. Oracle Corp.*, 1991 U.S. Dist. LEXIS 21097 at 8 (N.D. Cal. Dec. 18, 1991). Some claim that these rules do not or should not apply to mass-market software. Yet the need there exists as for other software.<sup>36</sup> The comments to UCITA provide an example of the publisher of tax software. Some of those publishers warrant to the licensee that the software will calculate an accurate return. Those publishers of tax software must restrict further transfers in order to ensure a sufficient volume of sales to make workable their pricing structure (they cannot provide product at a low price if they get only one fee for a single copy that is transferred from taxpayer to taxpayer).

Section 503 of UCITA sets a default rule that favors the customer: computer information *is* transferable unless the license says otherwise. Given federal law and traditional law regarding contract rights, the opposite default rule would have been just as appropriate or more appropriate.

There is no doubt that this is a difficult issue, especially in a world accustomed to the free transferability of goods. It should be noted that this area is informed by the “first sale” doctrine under federal law, which holds that if a copy of a copyrighted work is sold, then the copy may be transferred. UCITA goes out of its way to give primacy to all federal rules, including the first sale doctrine. See Section 105 and comments. If federal law actually does provide that computer information may not be licensed, then that federal law will control and UCITA acknowledges that federal supremacy.

Last, it is important to note that not all computer software is subject to these licensing rules. For example, certain “embedded” software is excluded from UCITA (see § 103(b)(1)). Thus the software that controls the brakes of a car will not be covered by UCITA and will be covered by either by Article 2. Article 2A, the common law or some combination. For such “embedded” computer information, as for video games, markets in “used goods” will not be affected by UCITA. Further, many licenses expressly permit computer information to be transferred (e.g., license agreements that permit use by any transferee as long as he or she complies with the license and as long as the transferor does not retain a copy).

## **J. Reverse Engineering**

UCITA critics have argued that UCITA makes contractual use restrictions, such as a “no-reverse-engineering” term, prima facie enforceable and that although individual courts might rule that such a restriction is invalid under federal law or against public policy, that it will take several expensive court cases before software developers will know whether they can lawfully reverse engineer mass-market software in the face of a shrink-wrapped contract term that states that they cannot.<sup>37</sup>

UCITA does not make any term “prima facie” enforceable (although Section 803 does make certain exclusions of consequential damages for personal injury prima facie unconscionable). UCITA enforces contract terms under the same and additional restrictions as current law, e.g., terms must be conscionable and may not violate a fundamental public policy. In addition, “contractual use terms” must be enforceable under UCITA as well as other law. Comment No. 16 to § 102 explains:

The contractual term must be enforceable to be within the definition [of contractual use term]. Thus, if trade secret or competition law precludes enforcement of a particular term dealing with non-competition, that term is not a contractual use term under this Act to the extent it is unenforceable.

Reverse engineering (which is essentially the act of taking finished software and “reverse engineering” it to find out how it works) is the subject of a hot debate that even divides the software industry. Some argue, as does the author of the cited claim, that current law does not allow contracts to restrict reverse engineering in the mass market and that UCITA ought to ban such contracts. Others argue the opposite: that applicable law does not prohibit such contracts in the mass market (or otherwise) and that UCITA cannot and should not ban them. All commentators seem to agree that state trade secret law informs reverse engineering, as do various federal laws.

Courts should and will need to look to federal policy for guidance in this area. As explained in draft Official Comment 3 to § 105:

This Act does not address these issues of national policy, but how they are resolved may be instructive to courts in applying this subsection. A recent national statement of policy on the relationship between reverse engineering, security testing, and copyright in digital information can be found at 17 U.S.C. § 1201 (1999). It expressly addresses reverse engineering and security testing in connection with circumvention of technological measures that limit access to copyrighted works. It recognizes a policy to not prohibit some reverse engineering where it is needed to obtain interoperability of computer programs. 17 U.S.C. § 1201 (f) (1999) (“a person who has lawfully obtained the right to use a copy of a computer program may circumvent a technological measure ... for the sole purpose of identifying and analyzing those elements of the program that are necessary to achieve interoperability of an independently created computer program with other programs, and that have not previously been readily available to the person engaging in the circumvention, to the extent any such acts of identification and analysis do not constitute infringement under this title.”). It further recognizes a policy to not

prohibit security testing where it is needed to protect the integrity and security of computers, computer systems or computer networks. 17 U.S.C. § 1201(j)(1999) . . . . This policy may outweigh a contract term to the contrary.

#### **K. Product Criticism and Benchmark Testing.**

A criticism of UCITA states that:

Current provisions of many products include a provision prohibiting the public discussion of the performance of the software. If an employee complains at a general technology meeting about a product, that licensor would have recourse. Direct impact: a review and interpretation of EVERY shrink-wrapped license. Indirect costs include renegotiations of contracts.

See SIM Statement, Attachment B-1. However, the hypothetical above actually illustrates a benefit of UCITA -- the posited term would either be unenforceable or would pass muster before a court uniformly directed to consider and judge the term's impact under applicable fundamental public policies.

Assuming for purposes of discussion that "many" products do actually include a provision prohibiting public discussion (in the experience of Committee members, this would appear to be the case for some beta-testing contracts but not the case as a general matter), UCITA § 209 expressly provides that a term is not part of a mass market license if it is unconscionable or is unenforceable under Section 105(a) or (b). Section 105(a) reminds parties that federal law, such as the First Amendment, can preempt state law when applicable. Section 105 (b) also empowers courts to refuse to enforce a term that violates a fundamental public policy and alerts courts to the need to consider policies affecting information, such as rights of free speech, if applicable. The draft comments to UCITA expressly alert courts to the importance of striking an appropriate balance between competing public policies (emphasis added):

In practice, enforcing private contracts is most often consistent with these policies, largely because contracts reflect a purchased allocation of risks and benefits and define the commercial marketplace in which much information is disseminated and acquired. Thus, a wide variety of contract terms restricting the use of information by one of the contracting parties present no significant concerns. For example, contract restrictions on libelous or obscene language in an on-line chat room promote interests in free expression and association and such restrictions are enforced to a much broader degree arising out of contractual arrangements than if imposed by governmental regulation. *However, there remains the possibility that contractual terms, particularly those arising from a context without negotiation, may be impermissible if they violate fundamental public policy.*

Contracting parties may have greater freedom contractually to restrict the use of confidential information than information that is otherwise publicly available. *While a term that prohibits a person from criticizing the quality of software may raise public policy concerns if included in a shrink-wrap license for software distributed in the mass-market, a similar provision included in an agreement between a developer and a company applicable to experimental or early version software not yet perfected for the marketplace would not raise similar concerns.* Trade secret law allows information to be transferred subject to considerable contractual limitations on disclosure which facilitates the exploitation and commercial application of new technology. On the other hand, trade secret law does not prohibit reverse engineering of lawfully acquired goods available on the open market. *Striking the appropriate balance depends on a variety of contextual factors that can only be assessed on a case-by-case basis with an eye to national policies.*



UCITA does not draw bright lines where none can be drawn, but it does establish appropriate policy parameters. If the clause is unconscionable, preempted by federal law or violates a fundamental public policy, then UCITA says that it may be excluded from the contract.

UCITA critics have also argued that its provisions may keep vital information from the marketplace, noting, as an example, the following restrictions, downloaded from [www.mcafee.com](http://www.mcafee.com), the website for VirusScan, a mass-market software product, on July 20, 1999:

“The customer shall not disclose the results of any benchmark test to any third party without McAfee’s prior written approval.”

“The customers will not publish reviews of the product without prior consent from McAfee.”<sup>38</sup>

These critics claim that the legal result under existing law varies depending upon whether the contract is negotiated but does not so vary under UCITA. As explained above, Section 105 of UCITA makes unenforceable a term that violates a fundamental public policy, including those involving the First Amendment. If the clause is conscionable, we are not aware of any existing law that would cause a court to consider rendering the same clause unenforceable in a non-negotiated contract, *except for* UCITA (see draft Official Comment 3 to Section 105) (see second paragraph of above-quoted comment to § 105). The point is that UCITA codifies concepts of fundamental public policy and encourages courts to keep competing policies in mind when examining contract terms. UCC Article 2 does not do that.

As for the McAfee clause, Network Associates, the publisher of the referenced software, wrote NCCUSL to explain the reason for including clauses of this type.<sup>39</sup> Similarly, the fact that Consumers Union, the publisher of Consumers Reports, contractually prohibits its business readers from stating the fact of a Consumers Union product rating, or quoting it, or using Consumer Union’s name, is not without rationale.<sup>40</sup> In each case, UCITA directs the court to consider the impact of the contract on fundamental public policies. And in each case, federal law will control. No bright lines are possible and UCITA appropriately does not attempt to draw one.

## **L. ALI and Opponents of UCITA**

The National Conference of Commissioners on Uniform State Laws (NCCUSL) first conceived of what is now UCITA as a uniform act (which is what UCITA is now). Later, NCCUSL made the project “Article 2B” in a revision project for Article 2 of the U.C.C.; all U.C.C. projects are joint projects between the American Law Institute (ALI) and NCCUSL. Ultimately, ALI and NCCUSL agreed that UCITA could best be implemented as a uniform act and it returned to its origin, i.e., a free-standing uniform act. Critics refer to a disagreement between these two bodies over the adoption of UCITA claiming that the ALI called for “fundamental revision” of the draft in May, 1998 (1) and that by withdrawing from the project in April, 1999, ALI effectively killed Article 2B as a UCC project. (See Attachment B-3).

Many members of ALI support UCITA. However, there have been disagreements between some members of the ALI and NCCUSL over the direction that development and revision of commercial codes should take, including UCITA and U.C.C. Article 2. For about 10 years, NCCUSL has been drafting revisions to Article 2 of the U.C.C. with the ALI. In 1998 the Chamber of Commerce of the United States of America said this about a draft of Article 2 that was supported by The American Law Institute:

[T]he U.S. Chamber continues to conclude that the adoption of revised Article 2 would have a detrimental impact not only on buyers and sellers of goods but on the economy as

a whole due to economic inefficiencies and incremental costs which would result from the enactment of the proposed revisions.

...  
The Partial Redraft proposes new, sweeping fact-based rules which will, if enacted:

- (i) destroy the sanctity of written contracts;
- (ii) substantially interfere with the freedom of contract; and
- (iii) create new, non-contractual and unjustifiable seller liability.

The same objection was repeated by the Chamber and numerous other businesses in 1999. Despite these concerns, ALI approved the draft of U.C.C. Article 2 in the spring of 1999 and the draft revisions were submitted for final approval by NCCUSL in July, 1999 at its annual meeting. Of the letters made available at the July meeting, the only letter supporting the draft came from the Consumers Union -- no letter of support was received from any industry. Many letters of opposition were submitted, including one from the U.C.C. Committee of the Business Section of the Washington State Bar Association. NCCUSL withdrew the draft from its scheduled reading and reconstituted the drafting committee.

Clearly, and likely intentionally, NCCUSL and ALI have different views of the appropriate role that commercial contract law should play in our society. As a result, UCITA (as well as revised U.C.C. Article 2) has become the battleground for a larger debate that can only be resolved when larger issues regarding the direction for commercial codes are resolved for all of commercial law. Some opposition to UCITA is nonetheless colored by this larger dispute. Despite the movement to change the nature and scope of commercial codes, this Committee has attempted to analyze the impact of UCITA on existing Washington law and existing commercial practice. As such, it has assumed that long standing models of commercial law such as U.C.C. Article 2 and Article 2A provide the best reference for an acceptable and workable legal framework. This appears to be the approach adopted by NCCUSL in promulgating UCITA, despite calls by some to more dramatically change existing law.

It should be pointed out that UCITA has continued to evolve since it was recast as a uniform law project and removed from consideration as an additional article under the U.C.C. Not all of UCITA's critics have maintained their opposition as the bill has evolved. As of this writing, The Motion Picture Association of America, the National Association of Broadcasters, and the Newspaper Association of America, as well as the Magazine Publishers of America, each have withdrawn their opposition to UCITA. Any debate will have both opponents and proponents. See Attachment B-4 for a list of referenced supporters.

### **III. Conclusion**

There is more support and criticism regarding UCITA than is discussed in this Appendix. The Committee's goal is to illustrate that it has attempted to consider and analyze such criticism. Any analysis short of a treatise cannot hope to treat all possible issues and nuances. The Committee's goal was not to provide a treatise but to couple an examination of existing law with traditional principles of commercial law to assess the need for and viability of a *uniform* law to govern transactions in computer information. Our conclusion is that UCITA does an impressive and commendable job of reflecting and adapting existing statutory and common law to create a balanced commercial code for computer information transactions. Given the expanding role in Washington and in the national economy of these types of commercial transactions, the Committee feels that such a uniform legal framework is both timely and necessary. UCITA provides the best available basis for that commercial code that likely can be crafted in the foreseeable future.

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<sup>1</sup> See GRANT GILMORE, *THE AGES OF AMERICAN LAW* at 140 n.38 (1977); Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True, the Beautiful in Commercial Law*, 73 *GEO. L.J.* 1141, 1142 n.7 (1985).

<sup>2</sup> See *id.* (stating that the Code was officially introduced in 1949; Pennsylvania was the first to adopt it in 1954 and Massachusetts followed in 1958, while the remaining states delayed adoption until the 1960s).

<sup>3</sup> Karl Llewellyn, *Why a Commercial Code?*, 22 *TENN. L. REV.* 779, 784.

<sup>4</sup> This statement about UCITA and the others that immediately follow are taken from a comment on UCITA that appeared on the Society for Information Management (SIM) web site (copy included as Attachment B-1). SIM is an organization primarily composed of officers and staff of information service divisions of commercial licensees, e.g., employees who acquire computer information for corporations. SIM opposes UCITA and provides form letters and information for its members. Statements made by SIM members do not necessarily reflect the position of the businesses for which the member works. For example, in Washington, a SIM member who works at The Boeing Company wrote a letter in opposition to UCITA, Letter to NCCUSL Commissioner Marlin Appelwick dated June 10, 1999 from Brain Bygland. Yet The Boeing Company itself wrote a letter to NCCUSL supporting UCITA. See Letter dated July 12, 1999 to NCCUSL written by T.V. Milholland on behalf of The Boeing Company.

<sup>5</sup> The quoted version was recommended after the SIM statement was written. The previous version provided the same result, however. It read as follows:

Before breach of contract, rights or obligations under [Section 816] may not be waived or varied by an agreement, *but* the parties, in the term referred to in subsection (c)[a term allowing self-help to which the licensee must expressly consent], may specify additional provisions *more favorable to the licensee*.

The draft comments to UCITA also made the point: “A contractual provision precluding use of electronic self-help in all cases is more favorable to the licensee and is enforceable (subject to the limitations of this Act on enforceability of terms, such as unconscionability).”

<sup>6</sup> In contrast to UCITA Section 816, the traditional uniform version of U.C.C. Article 9-503 reads as follows (emphasis added):

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9-504.

Revised Article 9-609 appears largely to make stylistic changes, although the revisions also broaden the right to act without judicial process by applying that right *both* to taking possession of collateral and to rendering equipment unusable. See Official Comment No. 3 to Revised Article 9-609. Under Article 9, computers used in business or by a non-profit organization or government (as opposed to computers held for sale or lease) are “equipment.” See U.C.C. Article 9-109(2) and revised Article 9-102(33) and Official Comment No. 4(a). Thus under Article 9, a secured party should be entitled, without removal and without an express contract therefor, to render equipment unusable. The most effective way to render computers unusable is for the secured party to require the use of software that turns the equipment off after breach – the secured party, not the software licensor, will impose that requirement and utilize self-help.

With respect to Article 2A, existing U.C.C. Article 2A-525 provides similar or broader rights to a lessor of goods (emphasis added):

After a default by the lessee under the lease contract of the type described in Section 2A-523(1) or (3)(a) or, if agreed, after other default by the lessee, the lessor has the right to take possession of the goods. If the lease contract so provides, the lessor may require the lessee to assemble the goods and make them available to the lessor at a place to be designated by the lessor which is reasonably convenient to both parties. Without removal, the lessor may render unusable any goods employed in trade or business, and may dispose of goods on the lessee's premises (Section 2A-527).

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(3) The lessor may proceed under subsection (2) without judicial process if it can be done without breach of the peace or the lessor may proceed by action.

<sup>7</sup> See, e.g., WASHINGTON SOFTWARE ALLIANCE, 1998-99 INDUSTRY OVERVIEW (1998) (describing that in Washington, 64.5% of software companies have only 1 to 15 employees, with 22% of that percentage being companies comprised of 1 to 2 employees).

<sup>8</sup> See, for example Society for Information Management (SIM) Statement at Attachment B-1; Letter from Prudential Life Insurance Company at Attachment B-2.

<sup>9</sup> For a discussion of the distribution channels in which additional contract terms follow payment, see e.g., *ProCD v. Zeidenberg*, 86 F.3d 1447 (7<sup>th</sup> Cir. 1996) at 10-12:

[Customer's] position therefore must be that the printed terms on the outside of a box are the parties contract – except for printed terms that refer to or incorporate other terms. But why would Wisconsin fetter the parties' choice in this way? Vendors can put the entire terms of a contract on the outside of a box only by using microscopic type, removing other information that buyers might find more useful (such as what the software does, and on which computers it works), or both. . . . Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable (a right that the license expressly extends), may be a means of doing business valuable to buyers and sellers alike. . . .

Transactions in which the exchange of money precedes the communication of detailed terms are common. Consider the purchase of insurance. The buyer goes to an agent, who explains the essentials (amount of coverage, number of years) and remits the premium to the home office, which sends back a policy. On the district judge's understanding, the terms of the policy are irrelevant because the insured paid before receiving them. Yet the device of payment, often with a "binder" (so that the insurance takes effect immediately even though the home office reserves the right to withdraw coverage later), in advance of the policy, serves buyers' interests by accelerating effectiveness and reducing transactions costs. Or consider the purchase of an airline ticket. The traveler calls the carrier or an agent, is quoted a price, reserves a seat, pays, and gets a ticket, in that order. The ticket contains elaborate terms, which the traveler can reject by canceling the reservation. To use the ticket is to accept the terms, even terms that in retrospect are disadvantageous. [citations omitted] Just so with a ticket to a concert. The back of the ticket states that the patron promises not to record the concert; to attend is to agree. A theater that detects a violation will confiscate the tape . . . . One could arrange things so that every concertgoer signs this promise before forking over the money, but that cumbersome way of doing things not only would lengthen queues and raise prices but also would scotch the sale of tickets by phone or electronic data service.

Contrary cases are discussed in *ProCD*. The *ProCD* approach represents the majority view which is to enforce contracts whose terms are not fully seen before payment is made. See e.g., *M.A. Mortenson Company, Inc. v. Timberline Software Corporation*, 93 Wn. App. 819, 970 P.2d 803 (1999)(standard form software license delivered with the product consistent with trade usage was enforceable, notwithstanding assertion by customer that only the customer's purchase order could be the contract) *affirmed* 998 P.2d 305 (Wash. 2000). For a listing of current cases and UCITA's treatment of contracts in which terms are not seen until after payment, see e.g., Questions and Answers About UCITA at No. 11 (copy available at <http://www.nccusl.org/pressrel/UCITAQA.HTM>).

<sup>10</sup> Various library associations objected to UCITA in a July 12, 1999 letter to NCCUSL (copy included as Attachment B-5). It is important to note that special protections are afforded libraries under federal law that cannot be altered by state law unless federal law so allows. Those protections expressly contemplate that libraries will both make and be subject to contracts: that is how libraries obtain and distribute their collections. One commentator has written a letter discussing the relationship of UCITA to libraries. He concludes, as do we, that the concerns raised by the libraries about UCITA cannot or should not be resolved in UCITA. Please see Attachment B-6.

<sup>11</sup> See SIM Statement, Attachment B-1.

<sup>12</sup> See e.g., U.C.C. Article 2-309(2): a contract that provides for successive performances but that is for an indefinite duration, is valid for a reasonable time but unless otherwise agreed may be terminated at any time by

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either party. *See also*, Article 5.8 of the UNIDROIT Principles of International Commercial Contracts (1994) (copy available at <http://www.jus.uio.no/lm/unidroit.contract.principles.1994/Article2.18.html>): “A contract for an indefinite period may be ended by either party by giving notice a reasonable time in advance.” SIM may in reality be expressing a belief that some licenses are perpetual even if they do not say so: if that is what the parties actually agreed or if such would be the case under trade usage or course of dealing etc., then SIM might be correct that some licenses are perpetual, but it would still be incorrect in asserting that UCITA creates uncertainty regarding that result or in implying that existing law dictates that result. That result is dictated by the *agreement* of the parties (the contract), which under existing law and UCITA includes course of dealing, trade usage and the like. Section 308 deals with the situation in which there is no agreement of the parties.

<sup>13</sup> See SIM Statement, Attachment B-1.

<sup>14</sup> See SIM Statement, Attachment B-1.

<sup>15</sup> See SIM Statement, Attachment B-1; Prudential Life Insurance Company Letter, Attachment B-2.

<sup>16</sup> See *Mortenson Co. v. Timberline Software, supra* (“The parties apparently agree that Article II of the Uniform Commercial Code (“UCC”) applies to the licensing of computer software. We accept, without deciding, this proposition. [Fn.3—UCC Article 2B is currently being drafted to address software licenses and, more broadly, transactions in the digital age]”). In its decision affirming the *Mortenson* decision, the Washington Supreme court noted that it was not deciding the question of whether Article 2 applies to computer information and that UCITA will moot the issue.

<sup>17</sup> It is important to keep in mind that in the information industry, the licensor or vendor is more often than not smaller than the licensee or buyer such as a SIM company. *See e.g.*, WA Software Alliance 1998-99 Industry Overview (in Washington, notwithstanding that it is the home of Microsoft, 64.5% of software companies have only 1 to 15 employees, with 22% of that percentage being 1 to 2 employees).

<sup>18</sup> See SIM Statement, Attachment B-1; Prudential Life Insurance Company Letter, Attachment B-2.

<sup>19</sup> White, James and Summers, Robert, Uniform Commercial Code (Fourth Edition) at 441 (West Publishing Co., 1995). White and Summers explain the actual perfect tender rule:

Section 2-601, the only section applicable to one-shot contracts, states a “perfect-tender” rule . . . . We are skeptical of the real importance of the perfect tender rule. Even before enactment of the Code, the perfect tender rule was in decline, and the Code erodes the rule. First of all, Section 2-601 renders the perfect tender rule inapplicable to installment contracts, and 2-612 permits rejection only if ‘the non-conformity substantially impairs the value of that installment . . . .’ The seller’s right to cure a defective tender, in 2-508 . . . is a further restriction upon . . . 2-601. Additional restrictions . . . may be found in 2-504 (an improper shipment contract which causes a late delivery is grounds for rejection only if ‘material delay or loss ensues’) and in the Code’s general invitations to use trade usage, course of dealing, and course of performance in the interpretation of contracts. If trade usage states that nineteen or twenty-one items are the equivalent of twenty items, a buyer who receives nineteen on a contract calling for twenty has received a perfect tender . . . .

The courts may also deny rejection for what they regard as insubstantial defects by manipulating the procedural requirements for rejection. That is, if the court concludes that a buyer ought to be denied its right to reject because it has suffered no or only minor damage, the court might arrive at that conclusion by finding that the buyer failed to make an effective rejection . . . .

We conclude, and the cases decided to date suggest, that the Code changes and the courts’ manipulation have so eroded the perfect tender rule that the law would be little changed if 2-601 gave the right to reject only upon “substantial” non-conformity. Of the reported Code cases on rejection, none that we have found actually grants rejection on what could fairly be called an insubstantial nonconformity, despite language in some cases allowing such rejection.

*Id.* at 440-441.

<sup>20</sup> See December, 1999 Draft of revised Article 2 at § 2-508.

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<sup>21</sup> UCITA Section 703(b) adopts the “perfect tender” rule for mass-market transactions. Most such transactions involve a single delivery of a copy so UCITA’s application of the rule is similar to its application under Article 2 (the Article 2 rule does not apply to installment contracts). A mass-market licensee may refuse the tender if it does not conform to the contract. If the refusal is rightful (i.e., if the tender does not conform to the contract), then the mass market licensee may also cancel the contract even if the breach is immaterial. *Id.* at (d).

<sup>22</sup> See Slashdot.org Article, Attachment B-3.

<sup>23</sup> See clause #20 at <http://www.consumerreports.org/Functions/Join/tos.html> (visited 1/25/00).

<sup>24</sup> See Slashdot.org Article at Attachment B-3.

<sup>25</sup> See White, James and Summers, Robert, Uniform Commercial Code (Fourth Edition) at 667 (West Publishing Co., 1995) (majority rule is that damage exclusion still applies; Messrs. White & Summers note that this is the appropriate rule in both commercial and consumer contracts).

<sup>26</sup> The UCITA definition is set forth in Section 102(a)(14):

“Conspicuous”, with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. A term in an electronic record intended to evoke a response by an electronic agent is conspicuous if it is presented in a form that would enable a reasonably configured electronic agent to take it into account or react to it without review of the record by an individual. Conspicuous terms include the following:

(A) with respect to a person:

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

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

(iii) a term prominently referenced in an electronic record or display which is readily accessible or reviewable from the record or display; and

(B) with respect to a person or an electronic agent, a term or reference to a term that is so placed in a record or display that the person or electronic agent cannot proceed without taking action with respect to the particular term or reference.

Article 1-201(10) provides: “‘Conspicuous.’ A term or clause is conspicuous when it is so written that a reasonable person against which it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is conspicuous if it is in larger or other contrasting type or color. But in a telegram any stated term is “conspicuous”. Whether a term or clause is ‘conspicuous’ or not is for decision by the court.”

<sup>27</sup> Section 105 provides:

(c) Except as otherwise provided in subsection (d), if this [Act] or a term of a contract under this [Act] conflicts with a consumer protection statute [or administrative rule], the consumer protection statute [or rule] governs.

<sup>28</sup> See FTC staff letter dated July 9, 1999, to Mr. John L. McClaugherty, Chair, Executive Committee, National Conference of Commissioners on Uniform State Laws, available at (accessed on March 22, 2000) at n. 6.

<sup>29</sup> See letter from Carlyle Ring, Jr. to W. A. Drew Edmondson, Attorney General of Oklahoma at 5 (August 27, 1999) <http://www.2bguide.com/docs/crag899.doc>.

<sup>30</sup> See draft official Comment to Section 105 at No. 5.

<sup>31</sup> See e.g., FTC request for public comment on its proposed interpretation of Rules and Guides to Electronic Media at 63 F.R. 24996 (5/6/98) and the numerous problems with the FTC’s proposed treatment of “conspicuous,” many of which concepts (and consequent problems) are reflected in the attorneys general letter. A sample explanation of

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some of the problems created by the FTC/attorneys general approach can be found at <http://www.ftc.gov/bcp/rulemaking/elecmedia/comments/comment054.htm>.

<sup>32</sup> Article 1-201(2) declares the purposes and policies of the Uniform Commercial Code as being:

- (a) to simplify, clarify and modernize the law governing commercial transactions;
- (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
- (c) to make uniform the law among the various jurisdictions.

UCITA's purposes are similar:

- (1) support and facilitate the realization of the full potential of computer information transactions;
- (2) clarify the law governing computer information transactions;
- (3) enable expanding commercial practice in computer information transactions by commercial usage and agreement of the parties; and
- (4) promote uniformity of the law with respect to the subject matter of this [Act] among States that enact it.

See Section 106(a).

<sup>33</sup> See e.g., Preface to April 15, 1998 Draft of UCITA, Table A ("Consumer Issues, Comparison Of Existing Article 2 and Other Law With Proposed Article 2B).

<sup>34</sup> Dively, Mary Jo Howard and Cohn, Donald, *Treatment of Consumer under Proposed U.C.C. Article 2B Licenses*, 16 J. Marshall J. Computer & Info. L. 315, 319-320, and 334 (1997), corrected version available from [www.2Bguide.com](http://www.2Bguide.com). For further discussion of the treatment of consumers in the U.C.C. or UCITA, see Miller, Fred H., *Consumers And The Code: The Search For The Proper Formula*, 75 WA Univ. L. Quart. 187 (1997); cf. Hillebrand, Gail, *The Uniform Commercial Code Drafting Process: Will Articles 2, 2B and 9 Be Fair to Consumers?*, 75 Wash. U.L.Q. 69 (1997). For a debate regarding requests made by a representative of some consumers, see Hillebrand, Gail and Towle, Holly, 32 UCC Bulletin 1-8 (September, 1997, Part One); and 33 UCC Bulletin 1-8 (October, 1997, Part Two).

<sup>35</sup> Slashdot.org article (copy included as Attachment B-3). The article consists largely of comments written by Cem Kaner responding to an article published by NCCUSL representatives (copy included as Attachment B-4).

<sup>36</sup> In Attachment B-4 Kaner cites cases from the early 1900s for the proposition that it is impossible to license a mass market product: if he is correct, then the 20-year licensing structure used by the computer information industries, as well as the even older structure used by other information industries, is illegal. He does not appear to be correct, however. See e.g., *Tasini v. The New York Times Co.*, 192 F.3d 356 (2d Cir. 1999) (in determining a copyright issue, court noted that the Copyright Act is a system of default rules that may be altered by contract); and see *DSC Communications Corp. v. Pulse Communications, Inc.*, 170 F.3d 1354 (5th Cir. 1996) (when contract for copy of software imposed restrictions inconsistent with ownership of a copy, federal first sale doctrine did not apply).

<sup>37</sup> See Slashdot.org Article at Attachment B-3.

<sup>38</sup> See Slashdot.org Article at Attachment B-3.

<sup>39</sup> See letter dated July 14, 1998 from Network Associates to NCCUSL, which reads in part as follows:

This policy is communicated to customers in two ways: It is printed on our CDs, and it is printed on our web-based download page. **This clause is not included in any of our end user license agreements, including retail or "shrink wrap" license agreements.**

Rationale for the Policy

Network Associates developed this clause and included it on our CDs and download page in response to an incident several years ago. At that time, one of our major competitors conducted

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a benchmark test of one of our anti-virus products using biased test parameters. The result was an advertising campaign based on the biased test results that was misleading to consumers of anti-virus software. Following that incident, Network Associates developed the policy of requiring prior notice of publication of benchmark test results and product reviews so that we can ensure that such tests and reviews are conducted under reasonable and competitive conditions. We are not alone in the adoption of such a policy; other software companies have done the same in response to similar experiences.

If Network Associates is informed in advance of publication of benchmark test results or product reviews, we can be prepared with a response, providing our consumers any additional information necessary to make an accurately informed choice.

It is very important to note that Network Associates has never refused anyone the right to conduct benchmark tests and product reviews or to publish the findings of such tests or reviews. In every case where permission has been sought, it has been granted. We are very proud of our vast product line, and we are confident that our products can meet the challenge of any objective tests and reviews. We ask for notification and consent because our company wants to be as informed and as prepared as possible to respond to what is being said about us.

In no way do we intend for this clause to be disadvantageous to consumers. In fact, we believe that the clause actually benefits our consumers by ensuring that they are offered accurate and complete information about our products and those of our competitors.

<sup>40</sup> See clause #3 at <http://www.consumerreports.org/Functions/Join/tos.html> (visited 1/25/00) (“Neither the Ratings nor the reports nor any other information, nor the name of Consumers Union or any of its publications, may be used in advertising or for any other commercial purpose, including any use on the Internet. Consumers Union will take all steps open to it to prevent commercial use of its materials, its name, or the name of CONSUMER REPORTS”).



**ATTACHMENT B-1**  
(The Current SIM Statement)

The following statement about UCITA was posted on the web site for The Society of Information Management at <http://www.simnet.org/> (visited 12/31/99):

**What is UCITA, Why Should I Care and What Should I Do????**

The Uniform Computer Information Transactions Act (UCITA) was adopted as a proposed uniform act by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in July 1999. It is being introduced as legislation in a few states in late 1999 and many other states in early 2000. The goal of UCITA is to establish a new commercial law for licensing of information based products. Enactment of UCITA would dramatically alter transactions between vendors and practitioners and adversely impact businesses by shifting significant economic risks onto them as the licensees of computer technologies. This, in turn, will lead to an increase in the cost of doing business and would negatively impact the competitiveness of a licensee's products.

Opposition to this proposed law is significant and includes numerous consumer groups, many large and small businesses (licensees) and the American Law Institute (ALI). In addition, twenty-four (24) state attorney generals have voiced opposition to the proposed law and have stated that the UCITA "almost invariably favor(s) a relatively small number of vendors to the detriment of millions of businesses and consumers who purchase computer software and subscribe to Internet services."

**Why Should I Care?**

The proposed UCITA legislation provides significant loopholes and potentially enormous financial exposure for companies and has the potential to impact e-commerce negatively across industries.

**UCITA would:**

1. Allow vendors to threaten disruption of licensee's critical systems through electronic "self-help" if its demands were not met. Under current law, a contract provision barring all use of electronic self-help is enforceable, and many of business licensees consider it one of the most important negotiable license provisions.
2. Validate shrink-wrapped (standard) licenses, and would support "non-negotiable" contracts, even with the largest of users.
3. Impose new uncertainty regarding the duration of licensee's right to use licensed software. Under UCITA, agreements which do not specify a perpetual license term will be limited to a "time reasonable," giving the vendor the opportunity to bring the licensee's operations to a standstill, at its discretion.
4. Change commercial practice through new default rules regarding the number of permitted users under license.
5. Place unreasonable burden on licensee to discover defects during a trial period or be held to the contract terms, even if a significant to operation defect is later uncovered.
6. Limit vendor's implied warranty that it has not infringed another company's patent, copyright, trade secret, trademark or other intellectual property rights to rights under United States law, even for worldwide licenses.
7. Restrict "perfect tender" rule to narrowly defined "mass market" transactions

Consider the following scenarios:

- *"Self help" shutdown*, You have a desktop application suite running throughout your organization's enterprise. Your application suite provider believes that you have breached your agreement. They notify an individual (who happens to be on vacation) of the perceived violation. When no response is received they revoke your company's right to use the software and execute an electronic key to make the product unusable. As a licensee your only recourse would be through court systems. At an average \$50/hour/user, the impact on productivity not to mention your business would be staggering.
- *Enforcement of individual shrinkwrap licenses*. Current provisions of many products include a provision prohibiting the public discussion of the performance of the software. If an employee complains at a general

technology meeting about a product, that licensor would have recourse. Direct impact: a review and interpretation of EVERY shrink-wrapped license. Indirect costs include renegotiations of contracts.

- *Site license usage and duration.* Your company would like to purchase a “perpetual site license” from a vendor for a mission critical application. Due to the importance of the application you require the source code to be escrowed. Under UCITA, the number of users and the duration of the license must be explicitly stated for this type of arrangement. You would be faced with a more complicated negotiation and the prospect of paying for additional licenses if you guessed wrong.

- *Non-infringement warranties limited to the United States.* If a globally deployed product is later found to have been the intellectual property of a non-U.S. firm, the U.S. licensor would not be held liable, nor would the licensee have any leverage with the owner of the intellectual property, if even allowed to use it.

#### **What should I or My Company Do about UCITA?**

**1) Bring this issue to your (state) Government Affairs Department as soon as possible.** UCITA should have high priority as many proponents with strong lobbies are poised in each state already. These bills are expected to be up for consideration in early 2000.

**2) Your company should contact other lobbying groups in your state that would also oppose UCITA and your state attorney general to express concern and voice opposition. Virginia is the first state poised to consider UCITA.**

**3) Contact SIM International with any new information that becomes available for your state or industry, i.e., status of bill, other opponents, and actions of pro-UCITA faction.**

**4) Check regularly with [www.simnet.org](http://www.simnet.org) – issue advocacy section on the web site for updates and watch for email on the subject.**

#### **Who Else is Opposed to UCITA?**

There are many associations that are strong opponents of UCITA – but they are not “tax-paying” entities nor do they have strong presence in each state legislature.

Federal Trade Commission

Consumers Union

American Library Association

National Writers Union

Ass’n for Computing Machinery

Software Engineering Institute

Industry Groups particularly opposed: Insurance; Entertainment; Publishing; Library; Data Processing Service Providers; Online Database Providers

Attorneys General from the following states: AR, AZ, CA, CT, FL, ID, IN, IA, KS, MD, MN, MS, MO, NV, NJ, NM, ND, OK, PA, TN, VT, WA, WV, WI

**ATTACHMENT B-2**  
(The Prudential Life Insurance Company Letter)

Letter dated November 15, 1999, to Mr. Albert Burstein, Chairman, New Jersey Law Revision Commission, from Riva F. Kinstlick, Prudential Life Insurance Company, the text of which is set forth below:

Dear Mr. Burstein:

In anticipation of the New Jersey Law Revision Commission meeting on Thursday, November 18, 1999 at which the Uniform Computer Information Transactions Act (UCITA) will be discussed, I am writing to set forth some concerns of Prudential Insurance Company of America with this uniform act.

As you may know, Prudential is the largest life insurance company in North America and one of the largest diversified financial service companies in the world, as well as one of the largest employers in New Jersey. As a very great user of computer software, we believe that enactment of UCITA would adversely impact our major financial and insurance operations by shifting significant economic risks onto us as the licensee of computer technologies. This, in turn, would dramatically increase our cost of doing business, impacting employment, tax revenue and the competitiveness of our products.

Prudential's operations depend on computer technologies. These technologies control, among other things, our calculation and disbursement of insurance payments, implementation of our clients' investment instructions, management of our payroll processing, compliance with our tax obligations, and payment to our suppliers. The following are just a few aspects of UCITA which concern us as users dependent on computer technologies:

Electronic Self Help

UCITA's electronic "self help" remedy would allow a vendor to threaten disruption of our critical systems if its demands were not met. Such a remedy is unfair and unnecessary given the availability of monetary damages and injunctive relief under current law, both of which are more than sufficient to protect vendors in the event licensees do not pay contracted amounts or violate use restrictions. UCITA's proponents say electronic self-help would give licensees added protections. On the contrary, this provision would legitimize and set forth a blueprint for an unnecessary Draconian remedy for licensors.

Duration of License

UCITA would impose a new uncertainty regarding the duration of a licensee's right to use licensed software. We typically pay for a perpetual license in order to be assured that our operations, such as claims paying, will not be disrupted. Under UCITA, agreements which do not specify a license term would be limited to a "time reasonable," giving the vendor the opportunity to bring our operations to a standstill, at its discretion.

Number of Users

UCITA would permit a vendor to restrict the number of users under a site or enterprise-wide license to what it deems "reasonable in light of the...commercial circumstances" when the license became effective, even though software licenses have traditionally permitted an unlimited number of users, a flexibility which is increasingly important in today's dynamic marketplace.

Warranties

UCITA would place an unreasonable burden on us to discover defects during an evaluation. Vendors assert that, even with all their resources and intimate knowledge of their products, they are unable to test them adequately in order to warrant them as being error-free. Notwithstanding this, UCITA assumes we would be able to discover any and all defects during a short trial period. We would have the Hobson's choice of either discovering defects during a brief inspection period (and by doing so, becoming subject to the licensor's contract terms) or refusing to even try to meet this burden. With either "choice", we would lose the warranty protections we have under current law. Additionally, UCITA would reduce our current warranty protections by limiting the vendor's

implied warranty of noninfringement to usage in the United States, even if the license were granted worldwide.

Perfect Tender

UCITA would abandon the seller's obligation to deliver a working product. If the software failed to conform to the contract, only a "mass-market" customer (narrowly defined) might refuse to accept it. A commercial licensee such as Prudential, or even a small business or professional corporation, might refuse the tender only if it constituted a material breach.

As troublesome as the foregoing concerns are, however, our overriding objection to UCITA is its validation of "shrink wrapped" licenses - agreements which accompany products such as software programs, and which are enclosed with the product in a shrink wrapped cellophane wrapping. Such licenses are seen by licensees for the first time when they unwrap the package, after they have made the purchase. (A relative of shrink wrapped licenses are "click-on" licenses which are seen for the first time on a computer screen when a licensee downloads a software program.)

We have begun to see a shift in the contract negotiating postures taken by large software manufacturers. Many of the vendors with which we deal tell us they want to move to a business paradigm under which all licenses will be shrink wrapped, negating their need to customize agreements for users. UCITA will enable them to achieve this goal. If shrink wrapped licenses become the norm, we will have great difficulty negotiating software agreements. It is this admixture of UCITA's onerous provisions with its validation of shrink wrapped licenses which is of greatest concern.

UCITA proponents have responded to this concern by stating that insurers should be the last to complain since they issue contracts of adhesion - and without a customer's first having had an opportunity to read the contract terms. I would point out that a) insurers must furnish applicants for many different kinds of insurance with outlines of coverage before a sale may take place; b) a right of return with a complete refund of money is required to be offered in the sale of most insurance contracts; and c) insurance contracts, while admittedly contracts of adhesion, have mandated provisions, prohibited provisions and may not be sold without the prior review and approval of the insurance commissioner of each state in which the contract will be offered. In contrast, there is no regulatory oversight of the contracts of adhesion increasingly offered by software vendors.

We look forward to the New Jersey Law Revision Commission's upcoming discussions on UCITA and will be happy to answer any questions you may have.

Very truly yours,  
Riva F. Kinstlick

**ATTACHMENT B-3**  
(Slashdot.org Article)

“Software Licensing, 2001” Posted at <http://www.slashdot.org> by [michael](#) on Friday January 14, @12:32AM from the tightening-the-screws dept.

We were going to run this even before Ledge Kindred submitted it. [Cem Kaner](#) of [Badsoftware.com](#) has written a nice piece detailing the problems with UCITA, the new law which is being proposed across the United States and which will have terrible effects on the rights of software consumers.

A bit of background for readers unfamiliar with the process: The [Uniform Commercial Code](#) is a body of law which is enacted, pretty much identically, in all 50 states. The object is to have a similar business environment for the basics of commerce, so that neither buyers or sellers are blindsided. If the law is fair, both buyers and sellers benefit from uniform expectations about basic commercial transactions.

But of course, laws evolve. The Uniform Computer Information Transactions Act began its life as an amendment to the UCC, but it was so unbalanced in favor of software companies that one of the initial sponsoring organizations dropped out, and it could no longer be considered a UCC amendment. Yet it lives on.

UCITA legitimizes heinous license restrictions in software, actively promoting the worst software practices. Should it pass, the very concept of “used software” (video games, etc.) will disappear, since that can and will be prohibited by licensing terms. Better sell your [Funcoland](#) stock. [Badsoftware.com](#) has many more examples of how UCITA legitimizes things that big software companies only dream of today, such as prohibiting reverse engineering or even criticism of their products.

As you read this, UCITA is being pressed in states across the country, starting with those where the software industry giants have the most highly-paid lobbyists. Virginia appears to be one of the lead states, and is considering the bill right now in committee. By this time next year, UCITA is likely to be the law of the land. This may seem to be somewhat dry reading, but if you ever use non-GPL software or purchase a computer in the future, this is what you can look forward to. -- *Michael Sims, michael @ slashdot.org*

Cem Kaner writes:

The August 30th, 1999 issue of the National Law Journal carried an article favoring the Uniform Computer Information Transactions Act. I protested to the Journal about the bias of the article and was invited to write a response, but the inviting Editor left the Journal shortly thereafter, and my response was never published. The claims made in that article, which was written by the Chairman of the UCITA drafting committee and two of his colleagues, are being (and will continue to be) repeated to legislators who are considering the Act. Perhaps your readers will find this rebuttal of interest.

*[Editor's note: the pro-UCITA article referenced above is available at [http://test01.ljextra.com/na.archive.html/99/08/1999\\_0822\\_61.html](http://test01.ljextra.com/na.archive.html/99/08/1999_0822_61.html).]*

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**THE UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT**

In the August 30th, 1999 issue of the National Law Journal, Carlyle C. Ring, H. Lane Kneedler and Gail D. Jaspens presented the proposed Uniform Computer Information Transactions Act (“Uniform law for computer info transactions is offered”). Mr. Ring chaired the drafting committee that wrote UCITA.

UCITA is a proposed law that will govern all transactions involving computer software, electronic databases (such as WestLaw), downloaded books, and some entertainment products. It can also apply to computers and some other goods if their manufacturers put an appropriate notice in the product packaging.

Although the Ring et al. article reported years of work on UCITA as a proposed Article 2B addition to the UCC, it failed to mention that the UCC is a joint project between the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL). It failed to mention that the ALI called for “fundamental revision” of the draft in May, 1998 (1) and withdrew from the project in April, 1999, effectively killing 2B as a UCC project. Thereafter, NCCUSL renamed the project as UCITA and went forward alone. The ALI members of the Article 2B drafting committee refused to join the UCITA drafting committee. (2)

Although authors Ring, Kneeder, and Jaspen acknowledged that UCITA is a controversial proposal, they listed only its supporters and not such opponents as the Attorneys-General of 24 states, the Bureaus of Competition, Consumer Protection, and Policy Planning of the United States Federal Trade Commission, the leading software developers' professional societies (such as the Association for Computing Machinery, the Institute of Electrical and Electronics Engineers, and the American Society for Quality, Software Division), software trade groups representing small developers (the Independent Computer Consultants Association, the Free software Foundation), the five main library associations, leading intellectual property experts (including the American Intellectual Property Law Association, Committee of Copyright and Literary Property of the Association of the Bar of the City of New York, and fifty intellectual property law professors), other copyright industry associations (such as the Motion Picture Association of America, the National Association of Broadcasters, and the Newspaper Association of America), and every consumer advocacy group that has looked at the bill. (3)

UCITA will have profound effects on intellectual property rights and the quality and security of computer software.

### **INTELLECTUAL PROPERTY**

Under UCITA, almost all software-related transactions will be licensing transactions. When a consumer buys a copy of Microsoft Word and a copy of a book about the program, the software transaction would be a license while the book transaction is a sale, even if the two items were side by side, the customer bought them both from the same cashier, and the software license was not available to the customer until after she paid for the product and took it away. Under UCITA 102(a)(42) a transaction can be a license even if the licensee is given title to the transferred copy.

This is a shift from long-established treatment of intellectual property in the mass market. To see the history of this issue in copyright law, shepardize *Jewelers' Mercantile Agency v. Jewelers' Pub. Co.*, 155 N.Y. 241 (1898) (rejected the fiction of a lease offered to all comers that restricted transfer of the book and use of information in it); *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908) (rejected a restrictive notice on a book that prohibited the buyer from reselling the book for less than a minimum price. Under the first sale doctrine, publisher lost its property interest in an individual copy of a book once it sold that copy. The restrictive notice could not transform a sale into a license); *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86 (2d Cir. 1940) (Licensing language on record albums could not convert a mass-market sale into a license.) For patent law, look at the doctrine of exhaustion, starting with *Motion Picture Patents Co. v. Universal Film Manufacturing Co.* 243 U.S. 502 (1917).

According to authors Ring, Kneeder, and Jaspen, "UCITA is intended neither to avoid nor to contradict the large body of existing federal intellectual property law." Others vigorously disagree. For example, the American Intellectual Property Law Association (4) protested to NCCUSL that UCITA "eliminates the 'first sale' doctrine" (which allows the owner of a copy to sell it or give it away). Under UCITA 503(2), "a term prohibiting transfer of a party's interest is enforceable, and a transfer made in violation of that term is a breach of contract and is ineffective." A vendor who puts a no-transfer clause in the license achieves a market-wide restriction -- equivalent to elimination of the first sale doctrine. By allowing vendors to enforce such restrictions in the mass-market, UCITA allows them to evade the federal balancing of private and public rights in intellectual property.(5)

Reverse engineering is another example of the intellectual property reach of UCITA. Reverse engineering is a normal engineering practice.(6) Clauses barring reverse engineering have been enforced in negotiated licenses, but not in mass market cases.(7) Some software publishers want to ban reverse engineering in the mass market. Despite authors Ring, Kneeder, and Jaspen's claim of UCITA's neutrality on this issue, UCITA makes contractual use restrictions (no-reverse-engineering is a use restriction) prima facie enforceable. Individual courts might rule that such a restriction is invalid under federal law or against public policy, but it will take several expensive court cases before software developers will know whether they can still lawfully reverse engineer mass-market software in the face of a shrink-wrapped contract term that claims that they cannot.

The AIPLA letter noted that "The President of . . . [NCCUSL], Gene Lebrun, wrote . . . that it is 'expressly stated in Section 2B-105 [that] Article 2B does not displace or change intellectual property law.' . . . We are extremely concerned that the proposed UCITA draft is not consistent with . . . the assurance of President Lebrun." UCITA Reporter Ray Nimmer complained of "distortions" in the debate on UCITA, identifying as a "misrepresentation" "that UCITA allows licensors to prevent licensees from commenting

about the products. This allegation makes nice copy and superficial impact, but is simply untrue. You can scroll through the UCITA draft and will not find any such provision.” (8) Opponents quickly point to UCITA section 102(a) (20), which defines “contractual use restriction” as “an enforceable restriction created by contract which concerns the use or disclosure of, or access to licensed information or informational rights, including a limitation on scope or manner of use.” Section 307(b) states that “If a license expressly limits use of the information or informational rights, use in any other manner is a breach of contract.” Under the statute’s own definition, a nondisclosure clause is a contractual use restriction. Under Section 307(b), such a restriction is enforceable.

These provisions may keep vital information from the marketplace. Consider the following restrictions, downloaded (July 20, 1999) from [www.mcafee.com](http://www.mcafee.com), the website for VirusScan, a mass-market software product, on July 20, 1999.

“The customer shall not disclose the results of any benchmark test to any third party without McAfee’s prior written approval.”

“The customers will not publish reviews of the product without prior consent from McAfee.”

Clauses like these are enforceable in traditional, negotiated licenses, and they are used to block magazine reviews.(9) UCITA arguably extends the enforceability of such clauses even in mass market products. Perhaps they will eventually be found to conflict with public policy but until then, the plain language of UCITA will have a chilling effect on criticism of mass-market products.

### **SOFTWARE SECURITY**

UCITA section 816 allows software vendors to place disabling codes in software and to activate them remotely (such as by sending an e-mail) to shut down a customer’s use of the product.

Such disabling codes create a hole in the customer’s system security. UCITA section 816 remedies for wrongful use of such codes are probably not triggered if the software is shut down accidentally or by a third party (such as a cracker who learns the code or a disgruntled former employee of the vendor).

Self-help was portrayed in the UCITA meetings as something essential to protect the interests of small licensors. However, the only group attending the UCITA meetings that represents only small licensors, the Independent Computer Consultants Association, urged NCCUSL to reject self-help. It recommended that licensors be protected without creating the disabling code security risk to customers by statutory authorization for recovery of attorney fees by licensors who obtain an injunction to terminate misuse of the software. This proposal was repeatedly rejected.

### **CONSUMER PROTECTION**

UCITA is hostile to customers of all sizes. It validates post-payment presentation of material terms and permits licensors to put in a form contract a term that allows them to keep changing terms. Licensors can exclude incidental and consequential damages even when an agreed remedy fails of its essential purpose. The drafters rejected proposals from the software engineering professional societies (ACM, IEEE, and ICCA) to allow customers to recover damages caused by defects that were known to the licensor but not documented or disclosed to the licensee. Instead, the standard form exclusion of incidental damages allows the licensor to charge a support fee (such as \$5 per minute on the telephone) when a consumer calls to complain about a defect that was known by the licensor when it licensed the software. Software products are often sold in the mass market with hundreds or thousands of known defects. (10) For additional detailed notes on consumer impact of UCITA, see the articles in the note. (11)

Authors Ring, Kneedler, and Jaspen say that “UCITA alters no state laws relating to the applicability of consumer protection to databases, consumer services or software.” In contrast, 24 Attorneys General and the Administrator of the Georgia Fair Business Practices Act said that UCITA’s “rules deviate substantially from long established norms of consumer expectations. We are concerned that these deviations will invite overreaching that will ultimately interfere with the full realization of the potential of e-commerce in our states.” (12)

The Attorneys General also said that UCITA’s “prefatory note and reporter’s comments incorrectly present the proposed statute as balanced and as leaving ‘in place basic consumer protection laws’ and ‘adding new consumer and licensee protections that extend current law.’ . . . [I]n instances in which provisions are described as new consumer protections, such as the contract formation and modification provisions discussed below, consumers actually have fewer rights than they do under present law. . . . NCCUSL . . . should revise the explanatory materials accompanying the statute to scrupulously identify the instances in

which the policy choices embodied in the statute either extend or resolve controversies in current law and to clearly explain whether such extension or resolution favors sellers/licensors or buyers/licensees.”

#### **NOTES**

- (1) Jean Braucher, “Why UCITA, Like UCC Article 2B, is Premature and Unsound”, UCC Bulletin, July 1999, [www.2BGuide.com/docs/0499jb.html](http://www.2BGuide.com/docs/0499jb.html).
- (2) ([www.2BGuide.com/docs/50799dad.html](http://www.2BGuide.com/docs/50799dad.html)).
- (3) See [www.badsoftware.com/oppose.htm](http://www.badsoftware.com/oppose.htm) and [www.2bguide.com](http://www.2bguide.com).
- (4) Letter to NCCUSL, July 16, 1999.
- (5) Robert P. Merges, “Intellectual Property and the Costs of Commercial Exchange: A Review Essay,” 93 Mich. L. Rev. 1570, 1613, 1995; Mark A. Lemley, “Beyond Preemption: The Law and Policy of Intellectual Property Licensing,” 87 Cal. L. Rev. 111, 1999, [http://papers.ssrn.com/paper.taf?abstract\\_id=3D98655](http://papers.ssrn.com/paper.taf?abstract_id=3D98655).
- (6) Cem Kaner, Article 2B and Reverse Engineering, UCC Bulletin, November, 1998, 1, [www.badsoftware.com/reverse.htm](http://www.badsoftware.com/reverse.htm).
- (7) Sega Enterprises Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992); Vault Corp. v. Quaid Software Ltd., 847 F.2d 255 (5th Cir. 1988). “Correcting Some Myths About UCITA”, <http://www.2bguide.com/docs/rne.html>
- (8) “The Test That Wasn’t” August 1999 PC Magazine 29. According to that article, Oracle “formally declined to let us [PC Magazine] publish any benchmark test results.”
- (9) Cem Kaner & David Pels, Bad Software: What To Do When Software Fails.
- (10) Federal Trade Commission letter [www.ftc.gov/be/v990010.htm](http://www.ftc.gov/be/v990010.htm); Steven Chow (a member of the UCITA drafting committee) “Proposed Uniform Computer Information Transactions Act: Bad For Commerce And Innovation” [www.2bguide.com/docs/citopp.html](http://www.2bguide.com/docs/citopp.html); Cem Kaner, “Comments on Article 2B” (section-by-section analysis) October 1998, [www.badsoftware.com/kanerncc.htm](http://www.badsoftware.com/kanerncc.htm); “Bad Software: Who is Liable” (analyzes software economics and UCC 2B) May 1998, [www.badsoftware.com/asqcirc.htm](http://www.badsoftware.com/asqcirc.htm); and
- (11) “Article 2B - Report from the November 13-15, 1998 Meeting”, [www.badsoftware.com/uccnov98.htm](http://www.badsoftware.com/uccnov98.htm).
- (12) Letter to NCCUSL, [www.badsoftware.com/aglet1.htm](http://www.badsoftware.com/aglet1.htm) and [www.badsoftware.com/aglet2.htm](http://www.badsoftware.com/aglet2.htm).



**ATTACHMENT B-4**  
(NCCUSL Article)

**Uniform law for computer info transactions is offered.**

After a decade of consideration, NCCUSL has proposed UCITA, a controversial model state law to govern high-tech commerce.

BY CARLYLE C. RING, H. LANE KNEEDLER AND GAIL D. JASPEN  
SPECIAL TO THE NATIONAL LAW JOURNAL  
[The National Law Journal](#) (p. B07)  
Monday, August 30, 1999

Information technology accounts for more than one-third of the nation's economic growth and is the most rapidly expanding component of the U.S. economy. According to the Department of Commerce, by 2006, almost half the U.S. work force will be employed by industries that are either major producers or intensive users of information technology products and services.<sup>1</sup> Until now, however, there has been no law providing clear, consistent and uniform rules governing the intangibles of transactions involving computer information.

On July 29, after more than a decade of consideration and years of input from high-tech industries, state bar groups and others, and after more than 15 hours of debate at its annual meeting, the National Conference of Commissioners on Uniform State Laws (NCCUSL) adopted the Uniform Computer Information Transactions Act (UCITA) by a 43-6 vote, with two jurisdictions abstaining and two not voting. The NCCUSL is a national organization of more than 350 lawyers, judges and academics--mostly gubernatorial appointees--from the 50 states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands, that drafts proposed uniform laws for state adoption on issues of nationwide interest.

Like the Uniform Commercial Code (U.C.C.)--another NCCUSL uniform act that for 40 years has been the primary state law governing traditional commercial transactions involving goods and services--UCITA is designed to become each state's primary law governing "computer information transactions." These include "commercial agreements to create, modify, transfer or distribute computer software, multimedia interactive products, computer data and databases [and] Internet and online information."<sup>2</sup> UCITA is intended to clarify and make uniform the state laws governing those transactions, and to encourage and facilitate commercial use of such transactions through agreement of the parties, thereby helping to realize the full potential of computer information transactions in this age of cyberspace.

UCITA is based on five fundamental principles:

- \* Computer information transactions involve primarily licenses, not sales. Restrictions often are placed on the use of the computer information being licensed. Traditional contract law, based on sales of goods and services, must be modified to reflect the reality of these new transactions.
- \* Small companies play a large role in computer information transactions. Most software and database companies are small, averaging fewer than 12 employees, but they often develop computer information products of significant commercial value to large companies. Thus, the traditional model of a large manufacturer or seller dealing with small buyers frequently is inverted in computer information transactions. Contract law must be modified to reflect these nontraditional relationships.
- \* Computer information transactions implicate fundamental free speech issues. Thus, the law should encourage and facilitate transactions that expand the distribution of computer information.
- \* Parties to computer information transactions should be free to contract as they wish. Rather than detailing what must be contained in a computer information contract, the law should provide default rules for transactions in which particular issues have not been addressed by the parties' agreement. To the extent possible, these default rules should reflect commercial practice.
- \* The law must be technology-neutral. To maximize the expansion of electronic commerce in computer information transactions, the law must not favor any particular technology.

## **Points of contention**

A number of controversial issues emerged during the development of and deliberations on UCITA. Although carefully compromised, and thus seemingly resolved, in the uniform law approved by the NCCUSL, these issues may generate renewed debate when UCITA is presented to state legislatures for enactment. Such issues include the scope of UCITA; parties' ability to choose whether to have UCITA apply to their agreement; the effect of federal preemption and the viability of policies favoring "fair use," "reverse engineering" and copyright protection; and UCITA's implications for consumers.

\* Scope of UCITA. With the determined support of some and to the regret of others, UCITA's scope is deliberately narrow. It applies only to computer information transactions and, in mixed transactions that include both computer information and other matters (such as services), to the entire transaction only if computer information is the primary subject matter. It applies to contracts to license or buy software, contracts to create computer programs or computer games, contracts for online access to databases and contracts to distribute information over the Internet.

UCITA does not apply, however, to goods such as television sets, stereo equipment, airplanes or traditional books and publications, although it would apply to a diskette containing a computer program. Goods generally remain subject to U.C.C. Art. 2 (sales) or Art. 2A (leases).

Furthermore, traditional movies, television broadcasts, records and cable television, which are governed by established industry customs and practices, are specifically excluded from UCITA. If contracting parties in these industries wish to have the benefits of UCITA apply to a mixed transaction involving both computer information and their separate products, they may elect to do so by agreement.

\* UCITA applicability. Unless they fail to satisfy certain public policy requirements, such as the obligation to act in good faith, parties traditionally may contract to sell, buy, lease or license according to any mutually acceptable terms and conditions. Like other contract laws, UCITA preserves this tradition by offering parties a choice of law to apply to their transactions.

UCITA will apply to a transaction that involves only computer information unless the parties expressly opt out. If they do, except for certain nonvariable UCITA provisions, such as its consumer protection provisions, the common law will apply to the extent that the agreement does not cover a particular matter.

UCITA will apply to a mixed transaction only if computer information is the primary subject matter, unless the parties expressly opt out. The parties may also choose to have UCITA apply to the entire mixed transaction even if computer information is not the primary subject matter by expressly opting in, as long as the consumer is given notice of the opt-in. Nonvariable provisions of otherwise applicable law, such as the requirement to record a land transaction, still apply.

Choosing to have UCITA apply to a transaction, however, affects only contract law. By opting in, sellers and licensors do not free themselves from legal restrictions imposed by antitrust, consumer protection, advertising, tax, regulatory and other laws applicable to commercial transactions. UCITA, moreover, does not alter any applicable products liability laws, which are grounded in tort rather than contract law.

\* Preemption, fair use and copyright. UCITA specifically provides that it is pre-empted by applicable federal law. It does so to allay concerns and to clarify that it is not the sole or final word on contracts relating to computer information transactions.

Indeed, UCITA is intended neither to avoid nor to contradict the large body of existing federal intellectual property law. UCITA also includes a unique provision expressly recognizing that fundamental public policies, such as those favoring quotation and fair comment, control if their benefit outweighs the value of enforcing contract restrictions on the use of information. Similarly, the protection afforded to end-users under the fair-use doctrine, which allows limited copying of copyrighted material, is unaltered by UCITA.

\* Consumer protection. UCITA preserves existing state consumer protection statutes. In general, it preserves or extends to computer information transactions those protections that apply under U.C.C. Art. 2 for sales of goods, and adds some new protections. Nonetheless, some consumer advocates have criticized UCITA for failing to outlaw particular contract terms or practices. However, the basic philosophy underlying UCITA--indeed, the entire U.C.C.--is that such restrictions are better left to state consumer protection laws.

Thus, UCITA alters no state laws relating to the applicability of consumer protection to databases, consumer services or software, nor does it affect any law governing consumers' right to reject goods. UCITA does, however, preserve the right of consumers--and of anyone else who acquires computer information in the mass market--to inspect goods before acceptance, and it extends to covered transactions the implied warranties of merchantability and fitness for goods set forth in U.C.C. Art. 2.

Finally, UCITA adds implied warranties that software and components will function together and that, as to informational content, there is no inaccuracy due to lack of reasonable care. Consumers also have a good-faith defense of "electronic error" if they inadvertently click "I agree" in adopting contract terms.

### **UCITA's genesis and history**

Work on UCITA began more than 10 years ago with a study by an American Bar Association subcommittee, which concluded that there was a compelling need for clarity and certainty in licensing transactions involving computer information, and which recommended that a uniform act be drafted. After study, the NCCUSL agreed, and a committee was appointed in the early '90s to draft a free-standing uniform act. That committee later was merged with a committee considering changes to U.C.C. Art. 2. In 1995, the committee was separated as an independent U.C.C. drafting effort, and last year it became a drafting effort for a free-standing uniform act again.

Since 1995, the drafting committee, comprising 10 members and two ex officio members, has had 16 drafting meetings of 2 1/2 days each. Between 60 and 125 people attended each meeting. Participants included small and large licensees and licensors of computer information. Representatives of the software, banking, securities and entertainment industries, as well as stock exchanges, computer manufacturers, libraries, computer information users and consumer interests, attended and engaged in the discussions.

The 16 drafts of UCITA have been posted on Web sites, and thousands of e-mails have been sent to the drafting committee. Hundreds of seminars and presentations have been held for bar associations and industry groups. The process has been open and the input substantial.

As with any new, complex topic, there is a diversity of perspectives. UCITA enjoys a breadth of support from licensees and licensors of all sizes, including the banking industry (Citibank and the Federal Reserve Bank of New York); Daimler Chrysler; the Equipment Leasing Association; the Small Business Survival Committee; stock exchanges (NYSE, Nasdaq and Amex) and computer manufacturers that are primarily licensees of software critical to their operations; the Information Technology Association of America; the Software Information Industry Association; the Business Software Alliance; the Silicon Valley Software Industry Coalition; and the Computer Software Industry Association, whose members include both licensors and licensees; a number of bar associations; and the principal ABA advisers to the NCCUSL drafting committee.

Others, however, have expressed concerns about UCITA. Certain industries are satisfied with the application of current common law. UCITA, therefore, excludes from its coverage traditional businesses of these industries--newspapers, magazines, cable television, sound recording, broadcasting and motion pictures.

The Music Publishers' Association and the Recording Industry Association of America have indicated that they are satisfied with these exclusions and will not oppose state enactment of UCITA. Others remain concerned that courts may apply UCITA's default rules by analogy to their traditional businesses, and some would rather have the default rules now applicable to their traditional businesses apply as well to computer information products they may develop to compete with online and software companies.

In addition, although UCITA maintains all consumer protections of current and future state laws and adds new ones, many consumer advocates desire even more stringent protection.

Finally, even though UCITA takes a neutral stance on intellectual property issues in contention in Congress and internationally, some urge that UCITA take a position in the raging debate over such issues as reverse engineering and the scope of fair use. UCITA addresses these issues by providing that certain terms of a computer information agreement are unenforceable: "unconscionable" terms; terms that violate fundamental public policy; terms that are pre-empted by federal law; and terms that are unenforceable under supplemental principles of law and equity not displaced by UCITA. Moreover, the performance or enforcement of terms in other than good faith, including the principle of "fair dealing," is prohibited.

### **State-by-state enactment**

Now that it has been adopted by the NCCUSL, UCITA likely will be introduced for enactment in the next session of a number of state legislatures. Many state bar groups and other professional organizations will be reviewing UCITA this fall. Counsel who represent businesses that provide hardware, software and other high-tech services, or that are engaged in, or may in the future engage in, e-commerce, should become familiar with UCITA. Copies of UCITA are available at [www.law.upenn.edu/bll/ulc/ulc\\_frame.htm](http://www.law.upenn.edu/bll/ulc/ulc_frame.htm) and [www.2Bguide.com](http://www.2Bguide.com).

### **Footnotes**

(1) *U.S. Department of Commerce, The Emerging Digital Economy II, Executive Summary (June 1999)*.

(2) *UCITA, Prefatory Note, at 1*.

[Mr. Ring](#), counsel to Washington, D.C.'s Ober/Kaler, is a 30-year member and former president of the NCCUSL, and chairs the UCITA drafting committee. [Mr. Kneedler](#), an owner in the Richmond, Va. office of Falls Church, Va.'s Hazel & Thomas P.C., is a former professor at the University of Virginia School of Law, a former Virginia chief deputy attorney general and a 12-year member of the NCCUSL. [Ms. Jaspen](#), counsel in that same Hazel & Thomas office, is a former Virginia senior assistant attorney general.

National Law Journal at B07 (Monday, August 30, 1999) (copy available at [http://test01.ljextra.com/na.archive.html/99/08/1999\\_0822\\_61.html](http://test01.ljextra.com/na.archive.html/99/08/1999_0822_61.html)).

ATTACHMENT B-5  
(Library Association Letter)

July 12, 1999  
Gene N. Lebrun, President  
National Conference of Commissioners on Uniform State Laws  
211 E. Ontario Street, Suite 1300  
Chicago, Illinois 60611

Dear Mr. Lebrun:

The five undersigned library associations wrote to you on October 8, 1998 to convey our continued concerns regarding the then-titled Article 2B. We are again writing to you to convey our serious concerns with what is now referred to as the proposed Uniform Computer Information Transactions Act (UCITA). Despite a status change, a new name, and some minor modifications to the content of the draft, UCITA poses significant challenges to libraries and to the key role they play in our Nation. Should NCCUSL approve UCITA, we find we must oppose its enactment.

In our October 8, 1998 letter, we noted three broad concerns about Article 2B and submitted several section-specific questions and concerns. Our primary concerns related to (1) the scope of Article 2B including its application to printed materials; (2) the lack of guidance related to federal preemption; and (3) the implementation of the Perlman motion from last year's NCCUSL meeting. We appreciate that in the new drafts developed over the past eight months, some of our concerns have been addressed in part, but many of our fundamental concerns still remain.

Rather than present a section-by-section analysis, we are writing to convey our general concerns about UCITA and our rationale for requesting that the draft not be accepted by NCCUSL at its July meeting. However, if we were to present a section-by-section review, we would focus upon the following provisions that raise issues for libraries:

- Many of the definitions in Section 102, including "Access Contract;" "Computer Information;" "Computer Information Transaction;" "Conspicuous;" "Consumer;" "Consumer Contract;" "Contractual Use Restriction;" "Electronic Agent;" "Information;" "Informational Rights;" "License;" "Mass-Market Transaction;" "Merchant;" "Published Informational Content;" and "Return;"
- Section 103 [Scope] (particularly the special interest carve-outs and the "opt-in" provision);
- Section 105 [Relation to Other Law];
- Section 107 [Electronic Agents];
- Section 109 [Choice of Law];
- Section 110 [Choice of Forum];
- Section 112 [Manifesting Assent];
- Section 205 [Conditional Offer or Acceptance];
- Sections 210 & 211 [Mass-Market Licenses]
- Section 213 [Internet Transactions];
- Sections 214 & 215 [Attribution Procedures];
- Section 308 [Duration];
- Sections 502, 503 & 506 [Title to a Copy and Transfers of Interests];
- Section 605 [Technical Restraints];
- Section 611 [Access Contracts]; and
- Section 613 [Dealer Contracts].

**The UCITA Framework and Libraries**

Libraries are a crucial component of the intellectual and social fabric of this country. Libraries throughout the Nation, acquire, maintain, preserve, and provide access to a vast array of resources in multiple formats to serve diverse constituencies. Many types of libraries serve these different communities. For example, there are 16,000 publicly supported community libraries, 4,700 college and university libraries, 98,000 school library media centers, approximately 2,500 health sciences libraries in community-based hospitals, 150 academic health center science libraries, 1,800 law libraries, 122 research libraries, 172 VA hospitals, and special libraries in corporate and other settings throughout the Nation. Individually and collectively,

these institutions support the open exchange of information on behalf of users in local, state, and regional communities, special libraries, college and university settings, medical and legal institutions, and more. Given their key role in serving the public, libraries are often seen as representing the interests of the public on a host of issues including intellectual property and copyright issues. Thus on issues such as UCITA, representatives of libraries of all types believe that a balance between the interests of users and owners of information is essential to both the success of our information economy and to the effective delivery of library services throughout the Nation.

As a player in the information economy, we believe that despite its complexity, the drafters of UCITA present an overly simplistic view of the marketplace for information. This view we believe, would undermine the ability of librarians to meet the needs of our diverse user communities. For example, with UCITA, one is either a licensee of information (a consumer) or a licensor (an information merchant). Although this simple commercial model may seem natural because UCITA is a commercial statute, the regulation of the information economy cannot be approached in such elementary terms. This model fails to incorporate important features of the market for intangibles and the ongoing roles of players in that market who are neither consumers nor merchants.

Libraries do not fit into the binary system of UCITA nor do educational institutions nor many commercial entities. Libraries play publicly and privately supported intermediary roles. A primary goal of many libraries is to provide information to people of all ages and backgrounds, in part to raise the education level of and provide important resources to the broader community. To successfully achieve this goal, libraries need to be able to purchase materials and contract for access to information on behalf of their patrons; to make the materials available on a non-discriminatory basis to patrons; and to ensure that there are adequate and appropriate terms and conditions for access on the use of the materials.

Another important role played by libraries is the preservation of our cultural and historical heritage. Licenses that restrict a library's ability to preserve and provide permanent access to digital information significantly hinder, indeed could make impossible, the ability of current and future generations to build upon prior research and benefit from our Nation's rich cultural heritage. Libraries also serve a key function in providing access to public domain resources. Ensuring a rich and robust public domain is a central concern of all libraries.

Finally, libraries spend over \$2 billion each year acquiring information resources in all formats. Yet if enacted, UCITA will create new layers of costly procedures for libraries. It is not clear how these institutions will be able to support such new measures. For example, under the terms of UCITA, increased licensing means that more time will be needed to educate library staff, to negotiate licenses, to track use of materials, and to investigate the status of materials donated to libraries.

The approach and terms of UCITA challenge the very core of these fundamental activities of libraries.

#### **UCITA Displaces Copyright Law**

Although UCITA appears to be narrower in scope than earlier proposals, it will still sweep in many kinds of information products and services. It casts a wide net over the muddy waters of "computer information" and, in some sections, "information" as such, enabling new constraints to be imposed on public domain information and information products including ones currently protected by intellectual property law. Libraries support the full and open exchange of information and have actively promoted intellectual property regimes that encourage the exchange of knowledge. As noted earlier, libraries believe that, in general, copyright law strikes an appropriate balance between the interests of users and owners of information. On the other hand, UCITA creates a new form of intellectual property by legitimizing shrink wrap or click on licenses which may include terms that inappropriately restrict use by the purchaser or user. Although the non-negotiated contracts which UCITA legitimizes or make enforceable are not intellectual property laws as such, they would have such general force that they would effectively displace some underlying policies of federal intellectual property, undermining the balance so crucial to the success of our information economy. Thus the balanced set of principles and privileges, developed over many years of legal precedent, under which we currently operate such as fair use, preservation, and more would be weakened under a regime such as UCITA.

Finally, it is worth noting that another effect of UCITA is to provide extensive protection for many information compilations and databases without full resolution of the ongoing Congressional deliberations regarding the appropriate level of new protections for databases. This is in effect an end run around Congress' role in setting national information policy. More generally, the breadth of UCITA guarantees that were it adopted, significant new questions of preemption would arise under federal law. The uncertainty

generated by such protracted litigation would complicate the work of information providers and consumers alike. But this result might be avoided if the present version of UCITA were withdrawn for reconsideration.

**UCITA Should be Tabled and Reconsidered**

We submit this letter in an effort to raise the awareness of the Commissioners to our opposition to UCITA as a whole. UCITA interferes with existing intellectual property law and commercial law; it will jeopardize the public domain; it will require new burdensome procedures in our institutions; it is rife with confusing and inconsistent terminology; and it is anti-consumer. As a result, and perhaps of most importance to our members, UCITA would undermine current and widely accepted functions of libraries.

We believe that sending UCITA out to the States at this juncture would be a critical mistake. It is the view of our member organizations, on behalf of the thousands of libraries and librarians that we represent, that UCITA should be tabled. Furthermore, once tabled, UCITA should not be resurrected until it is properly positioned to deal with codification of tested and accepted legal practices and rules.

We appreciate your attention to these concerns as you deliberate the future of UCITA during your upcoming meeting.

Sincerely,

Duane E. Webster  
Executive Director  
Association of Research Libraries for  
Roger H. Parent, Executive Director  
American Association of Law Libraries  
David Bender, Executive Director  
Special Libraries Association  
Carol Henderson, Executive Director  
Washington Office  
American Library Association  
Carla Funk, Executive Director  
Medical Library Association

ATTACHMENT B-6  
(Letter Re Library Association Concerns)

**LORIN BRENNAN**  
Attorney at Law  
January 27, 2000

Thomas J. McCracken, Jr.  
NCCUSL Commissioner, Illinois  
McCracken & Walsh  
134 N. LaSalle St., Room 600  
Chicago, Ill. 60602

Re: UCITA and Public Libraries

Dear Tom:

I understand that you have heard some concerns about the potential impact of the Uniform Computer Information Act (UCITA) on public libraries. The Copyright Act gives nonprofit public libraries certain privileges to make and distribute copies of copyrighted works. Evidently, the fear is that UCITA will allow parties to circumvent the Copyright Act by private contract. I believe this concern is based on a misunderstanding of current law and UCITA. Let me explain why.

**1. The Library Privilege**

Libraries serve an important public purpose, acting as information repositories and making their collections available to their patrons. Much of the material they collect, of course, is copyrighted. Therefore, in Section 108 of the Copyright Act (17 U.S.C. § 108) Congress said that certain conduct by nonprofit libraries would not infringe the rights of a copyright owner. Section 108 is complex and I will not describe it in detail. Suffice to say it was an important compromise in the eventual adoption of the current Copyright Act. For a detailed analysis *see* 2 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT § 8.03 (1999 ed.); for a history *see* William F. Patry, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW, chpt. 13 (2<sup>nd</sup> ed. 1995) [“PATRY”].

Section 108 has two basic components. One part allows nonprofit libraries and their employees to make and distribute copies for preservation, security or research. (Section 108(a)&(b).) Another component allows a library to accommodate a user’s request for copies. (Section 108(d)&(e).) As originally enacted, Section 108 only allowed nonprofit libraries to make reproductions in “facsimile” - not digital - form. In the Digital Millennium Copyright Act of 1998, Congress extended Section 108 to cover digital reproductions. Thus, under Section 108 nonprofit libraries may now make and distribute copies of computer programs under prescribed conditions without infringing the copyright in the programs. The question is whether can a private contract alter these privileges?

**2. Contractual Modification Of The Library Privilege**

The answer is: it can. Congress said so in Section 108(f)(4):

“Nothing in this section [108] in any way affects . . . any contractual obligation assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its permanent collections.”

Libraries often acquire manuscripts and other works under conditions that restrict their access and use, such as private letters made available for on-site research only. Congress added Section 108(f)(4) to prevent this valuable resource from drying up. The Committee Reports makes this quite clear:

“Clause (4) [of Section 108(f)] provides that the right of reproduction granted by this section does not override any contractual arrangements assumed by a library or archives when it obtained a work for its collections. For example, if there is an express contractual prohibition against reproduction for any purpose, this legislation shall not be construed as justifying a violation of the contract. This clause is intended to encompass the situation where an individual makes papers, manuscripts or other works available to a library with the understanding that they will not be reproduced.”



House Rep. No. 1476, 94<sup>th</sup> Cong. 2d Sess., p. 77 (1976)

Section 108 also allows libraries to make photocopies of their collections available to their patrons. Obviously, the administrative cost of obtaining individual permission from each author for each photocopy would be enormous. Therefore, in enacting the current Copyright Act, Congress encouraged the creation of the Copyright Clearance Center (“CCC”). It is a non-profit central clearing house established by publishers, authors and photocopy users which grants blanket licenses to photocopy copyrighted material, significantly reducing costs for all concerned. For further discussion, *see American Geophysical Union v. Texaco, Inc.*, 802 F.Supp. 1, 7 (S.D.N.Y. 1992) *aff’d*. 37 F.3d. 881 (2<sup>nd</sup> Cir. 1994).

In short, while federal copyright law grants libraries important privileges for copying and disseminating computer information, it also allows authors, libraries and their patrons to adjust these privileges by contracts tailored to specific situations.

#### **4. Fair Use**

Section 107 of the Copyright Act has another important privilege, “fair use.” It says that certain uses of copyrighted material are not infringing, for example, quoting portions of a copyrighted work for purposes of scholarship or criticism. Section 108(f)(4) says that nothing in Section 108 affects the fair use privilege. The basic idea is that Section 108 is a safe harbor that authorizes certain conduct that might not otherwise qualify as fair use. Similarly, conduct that does not qualify under Section 108 may still be fair use. For further discussion, *see* PATRY, *supra* p. 369-371; *also* Paul Goldstein, COPYRIGHT § 5.2.2(c) (2<sup>nd</sup> ed. 1996).

The issue here is the extent to which a private contract might affect fair use. Two cases, *Salinger v. Random House, Inc.*, 650 F.Supp. 413, 427 (S.D.N.Y. 1986), *rev’d. on other grounds* 811 F.2d. 90 *petition for reh’g denied* 818 F.2d. 252, *cert. denied* 484 U.S. 890 (1987), and *Wright v. Warner Books, Inc.* 748 F.Supp. 105, 114 (S.D.N.Y. 199) *aff’d*. 953 F.2d 731, 741 (2<sup>nd</sup> Cir. 1991) have considered the question. Each one included a claim that a biographer had breached a contract with a library that prohibited the patron from “quoting” or “publishing any excerpt” from private papers on deposit with the library. In both cases, the courts held that the contracts did not impair fair use. As the *Salinger* court said: “[The contract] should be understood as applying only to quotations and excerpts *that infringe copyright*. To read them as absolutely forbidding any quotation, no matter how limited or appropriate, would severely inhibit proper, lawful, scholarly use ...” (At 650 F.Supp. 427 (emphasis in original).) The interplay between fair use and contract often depends on the particular facts of each case. Nonetheless, courts such as those in *Salinger* and *Wright* have shown great care in reading contracts in ways that do not inhibit fair use.

UCITA will continue this trend. UCITA § 105(a) specifically defers to preemptive provisions of federal law. It confirms that, where federal law prohibits contract terms that restrict fair use, UCITA will not enforce them either. Moreover, UCITA § 105(b) directs a court to consider fundamental public policies, such as those involved in fair use, when reviewing computer information contracts. This is something no other commercial code does. Given that fair use is a complex issue that involves federal policies, I believe that this is the most balanced and appropriate approach for a state contracting statute.

#### **5. Impact of UCITA on Library Contracts**

UCITA deals with contracts for computer information. It is a modern statute that accommodates state commercial law to intellectual property law, especially the Copyright Act. It is a commercial code, not a regulatory one. It seeks to facilitate customary commercial practice by setting up “default rules” that supply necessary contract terms where parties have not done so adequately. Use of the UCITA defaults is not required. Except for bedrock obligations like good faith, reasonableness and certain consumer protections, parties may vary UCITA rules by agreement. In looking at UCITA, therefore, we need to ask how state commercial law should deal with contracts involving public libraries.

Of course, federal law places constraints on what state law can do. A state contracting statute cannot alter preemptive federal rules. (*See, e.g., Association of Medical Colleges v. Carey*, 728 F.Supp. 873, 889 (N.D.N.Y. 1990) *appeal denied* 913 F.2d. 55, *rev’d. on other grounds* 928 F.2d. 519, *cert. denied* 502 U.S. 882 (1991) (state law compelling copyright owner to deposit answers to standardized tests with state archives against its will not authorized under Section 108 and preempted).) Since Congress has already directed the use of contracts in this area, we must be sensitive to that mandate.

Therefore, what UCITA does it establish procedures to ensure informed consent in making contracts, letting the parties decide what terms they will or will not accept in their particular circumstances. Under UCITA, to become bound to the terms of any contract a party must sign or otherwise agree

(including by “manifest assent”) after having an “opportunity to review.” (UCITA § 208.) For a “mass market” license, this must occur before or during the party’s initial use of or access to the information. (UCITA § 209(a).) Manifesting assent means engaging in intentional conduct with reason to know it will be taken as an assent, such as signing or clicking an “I Agree” icon. (UCITA § 112.) “Opportunity to review” means a reasonable chance to review the license and a statutory right to return for a refund if the license is rejected. (UCITA § 112(e).) In a mass market license, if the license is not available before payment, the refund must also include reasonable costs of uninstallation and postage. (UCITA § 209(b).) “Mass market” means more than “consumers.” It is a new and expanded category created in UCITA which can include libraries as well as other business organizations, large or small. These rules will apply both when acquiring computer information and when using form contracts with patrons regarding access to such information in a library’s collection.

**7. Summary**

Section 108 of the Copyright Act gives nonprofit libraries specific privileges to reproduce and distribute copies of computer information. Congress provided, however, that parties could alter these privileges by contract to fit their individual needs. This allows the Copyright Clearance Center to operate a blanket licensing system that greatly reduces the cost of administering the library photocopying privilege. It also enables libraries to acquire private papers and other works under conditions that restrict reproduction or limit access, and allows them to use their own form contracts for dealing with their patrons and other libraries in honoring these restrictions. The Copyright Act also allows fair use, and courts have been sensitive to the need to interpret contracts in ways that do not impair fair use. UCITA will maintain and even improve this situation by providing modern commercial contract rules attuned to federal intellectual property law, by directing courts to consider fundamental public policies in their application, and by providing clear guidelines to ensure informed consent in acquiring computer information and in making it available to others.

We are living in an age of accelerating change. UCITA is a visionary statute, crafted to handle the novel and complex legal issues whirling from the e-commerce dynamo. It can be hard to appreciate at a casual glance what UCITA really does. But if we take a quiet moment to look at the facts, I believe we can appreciate how necessary and profound UCITA really is.

Best regards.

Sincerely,

Lorin Brennan