Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue
Washington, D.C. 20580

**Re: High-Tech Warranty Project**
**Comment P99413**
**"software-comments@ftc.gov"**

Dear Secretary:

America Online, Inc. ("AOL") appreciates the opportunity to submit the following comments to the Federal Trade Commission in response to the Initial Notice Requesting Academic Papers and Public Comment regarding Warranty Protection for High-Tech Products and Services.

Because other industry groups, including the Digital Commerce Coalition, have filed broad comments which respond to all of the questions set forth in the Public Notice, we have chosen not to reiterate those points, but instead to respond specifically to Question No. 7a of the Public Notice: "How would the proposed Uniform Computer Information Transactions Act (UCITA) affect consumers?"

## I. About AOL

To place our comments in context, we think it would be helpful to describe our company and share with you our vision of the Internet's future.[1] Founded in 1985, AOL, based in Dulles, Virginia, is the world's leader in interactive services, Web brands, Internet technologies, and e-commerce services. AOL operates: America Online with more than 24 million members, and CompuServe, with more than 2.8 million members, the company's two worldwide Internet services; several leading Internet brands including ICQ, AOL Instant Messenger and Digital City, Inc. and MapQuest; the Netscape Netcenter and AOL.COM portals, the Netscape Navigator and Communicator browsers; AOL MovieFone, the nation's #1 movie listing guide and ticketing service; and Spinner.com and NullSoft's Winamp, leaders in Internet music. Soon, through the "AOL Anywhere" strategy, AOL's members, online consumers of its other Web brands, and millions of other consumers will be able to access popular AOL features whenever and wherever they want them - from the Web, and when using their televisions, Internet-ready phones, handheld computers, and other personal wireless devices. AOL Features that have been particularly embraced by consumers include AOL E-Mail, AOL Instant Messenger(sm), as well customized news; financial information and stock quotes; movie

[1] A fuller discussion can be found at our website: www.aol.com

information; driving directions; localized entertainment information and more. AOLTV - the first interactive television service for mass market consumers - is the latest service available through the AOL Anywhere initiative. AOLTV enables consumers to enhance their television experience using AOL's hallmark interactive content and convenient, easy-to-use features - including familiar AOL tools like e-mail, instant messaging and chat.

AOL International operates the AOL and CompuServe branded Internet online services in 14 countries and in seven languages. Their non-U.S. membership has surpassed 4.4 million, making AOL the #1 global Internet online service. In addition, AOL International has launched Netscape Online as subscription-free service to meet the needs of the "value" market segment in the United Kingdom. ICQ, the world's #1 and fastest-growing communications portal, is America Online's biggest international brand. More than two-thirds of ICQ's 62.4 million registrants live outside the United States.

**Exploring Internet Public Policy**

Every day, thousands of people "go online" for the first time to explore the Internet. At America Online we believe this interactive medium is fundamentally changing the way citizens communicate and educate themselves—and the way consumers buy goods and services—both in this country and around the world. But the development of this dynamic new environment has only just begun. There is still a world of exciting possibilities ahead, and as the Internet continues to grow, we at AOL want to play our part in ensuring that it grows successfully, efficiently, and fairly—into a medium that we can all be proud of.

**Public Policy Principles**

America Online believes, therefore, that a few basic principles should guide the development of a public policy environment designed to make the Internet accessible, affordable and valuable to all members of the global community. We believe that adherence to these principles will deliver the economic and social benefits promised by this new Internet medium:

1. Internet policy should foster individual choice and empowerment in the economic and social dimensions and rely on individual decision-making for determining the products, services and content available on the Internet. Practices developed in the crucible of the private sector and the marketplace can best direct the development of the interactive medium.

2. Public policies should be market-driven and industry-led. Policies should be developed collaboratively, with input from industry leaders, government officials and, *perhaps most importantly*, consumers and other stakeholders.

3. Where government involvement is determined to be necessary, policies should be technologically neutral and non-discriminatory, to ensure that the Internet enjoys the same potential for growth as any other medium and that the value of the unique, interactive nature of this new medium can be fully realized.

4. Policies should be designed to assure that all segments of society and all countries of the world have access to the potential economic and social benefits of this new medium—

and that the medium becomes as essential to our daily lives as the television and the telephone, and more valuable.

In sum, we seek to maximize the economic and social benefits of the Internet with industry-led, market-driven policies that allow this dynamic medium to reach its full potential.

**The Internet's Astounding Growth**

In the few short years since it became a part of people's everyday lives, the Internet has managed to link communities together in an unparalleled fashion. The medium's growth rate has been nothing less than phenomenal. In 1990 only a small cadre of researchers knew what the Internet was. By mid-1999, worldwide, 150 million individuals were connected to the Internet. Some estimates suggest that worldwide there soon will be as many as one billion people online. Closer to home, more than 50 million American households and millions of businesses, schools, libraries and other institutions have access to the Internet, and that number is growing rapidly. Network traffic continues to double every 100 days, and Jupiter Communications, a leading Internet analyst firm, has projected that almost 55 percent of the U.S. population will be online by 2002. According to a Roper Starch study that AOL recently commissioned, nearly two-thirds of Internet consumers who have been online three or more years now view the interactive medium as a necessity in their lives.

**Fueling the Economy**

Because of its unique structure, the Internet is bringing a new dynamic to the world economy. In fact, the low cost of opening an Internet "store" and of marketing and distributing goods and services is bringing more products and services to more people at lower costs. Key technology—and even non-technology—companies and innovators will see large percentages of their business move online. Automotive industry analyst J.D. Power estimates that half of all auto sales will soon involve the Internet. Banking, advertising, real estate, insurance—all of these industries, and many more, now take advantage of the immediacy, interactivity and convenience offered by the Internet and online services, which provide new ways of reaching customers at a fraction of the costs of traditional media.

**A Consumer Revolution**

Even the most powerful brands are experiencing a tremendous shift in power in favor of the consumer. In fact, the Internet is helping to usher in a new business era in which the well-informed consumer rules the marketplace. We believe there are three important principles that govern this highly consumer-centric era—principles that will ultimately change the face of business.

**More than ever, consumers are seeking value**. For some, this might mean lower prices; for others it's convenience, product quality, excellent service, or some combination. The Internet provides consumers with all the information they need to comparison shop until they find what they regard as the best value. If their traditional brand doesn't give it to them, they'll find someone else who does.

**Online consumers are active, not passive**. They search the Web for the information they need to make their buying decisions, they read reviews and information bulletin boards, and they share insights with others in online communities. The more these customers learn, the more control they demand.

**Nothing is as precious as time, and consumers have ever less of it to spend**. Computers are among the most powerful laborsaving devices ever invented, and the Internet has expanded that convenience by orders of magnitude. E-commerce offers customers the triple pleasures of speed, convenience and efficiency. They can buy what they want, when they want it, without leaving the comfort of their homes. There are no closing hours, no holidays, no battles for a parking spot in cyberspace. They can check their bank statement, pay their bills, or buy an anniversary gift for their spouse in the middle of the night, if necessary.

In short, we believe the Internet is ushering in a world of digital information and personalization that has the capability to change how we exchange funds, contract for services, and purchase or sell products.

## II. The Breadth of Computer Information Transactions; "One-Size" Solution does Not Fit All.

A common misunderstanding is that, like sales of goods, all transactions for computer information are fundamentally alike. In fact, the opposite is true. It would be a mistake to conclude that simply because *some* computer information happens to be distributed on a disc in a box, *all* transactions in computer information can be categorized so one-dimensionally. Every day, new models of distribution are created and used. Most of these bear little resemblance to the quintessential consumer goods transactions, the "sale of a toaster in a box". Thus, the goods rules that were developed to fit the sale of a toaster in a box will not fit most computer information transactions.

For example, AOL distributes a variety of products that mix software with technical services and informational content. Although AOL's free software is necessary for the implementation of its services, the software is *secondary* to the primary feature of AOL's services, which include online connectivity and complex networking functionality that ties AOL's users to a world of content in the form of text, audio and images.

Users can enhance their online experience by taking advantage of online calendars, mortgage calculators, customized weather forecasts and other content features, which are provided often at no additional charge and without requiring the user to add software to their personal computers. Additionally, users can download supplemental software, often at no charge, to expand multimedia features tied to the Internet. For example, AOL offers Spinner.com, which enables customers to turn their personal computer into a radio and to have access via the Internet to a greater variety of music than they may find in their local radio market.

These products are available to tens of millions of users. AOL and the information industry are perfecting processes that efficiently distribute information services so heavily

demanded by consumers. These processes include the ability for consumers to download software and other information rapidly and on demand, or the ability for information services to provide data processing hosted by an Internet site (such as AOL's calendar) that forgo the need for a consumer to add new software to their personal computers and yet provides such consumers with robust services.

As part of AOL's distribution process described above, an efficient system likewise is necessary to allocate the rights and responsibilities of the parties. A simple sales model would not work. AOL services are truly interactive and evolving products. Users can send emails, post messages on message boards, engage in real-time live chats, view streaming videos from content licensed from third parties, and share their own creations with other users. Given this interactive environment, AOL must be able to implement rules to enable an orderly discourse of discussion and information in an interactive environment, to allocate copyrights and use of information in such an environment (i.e., a user gives AOL permission to host and post the users' expressions), and to prevent conduct that is harmful to others. For example, AOL's terms of service provide that its members may not:

- Post, transmit, promote, or distribute content that is illegal.
- Post, transmit, promote, distribute or facilitate distribution of content intended to victimize, harass, degrade or intimidate an individual or group of individuals on the basis of age, disability, ethnicity, gender, race, religion or sexual orientation.
- Hate speech is unacceptable anywhere on the service.
- Disrupt the flow of chat in chat rooms with vulgar language, abusiveness, hitting the return key repeatedly or inputting large images so the screen goes by too fast to read, etc. This is online vandalism, and it ruins the experience for others.
- Attempt to get a password, other account information, or other private information from a member.

These rules help create a positive experience for AOL members. The allocation of such responsibilities can be promulgated efficiently and effectively to AOL's more than 24 million members only through the use of mass market agreements. Face to face negotiations in this situation are neither effective nor efficient. These examples make clear that the ongoing relationship between AOL and its users, which are government by AOL's Terms of Service, cannot be forced into the same contractual paradigm that might govern the purchase of a toaster.

Similarly, the application of mass market licenses is instrumental as a tool for innovation. The open source movement has encouraged developers from around the world to work collectively to innovate new software. For example, at "mozilla.org," developers have open access, at no cost, to the source code of the Mozilla Internet browser and can make individual contributions to the further advancement of the browser. Again, the use of a mass market agreement enables such a communal group to allocate rights and responsibilities, including the use of intellectual property rights in the Mozilla source code and in the contributions made by each developer. The imposition of "goods"- like warranties on such open source products, which are free of charge and the result of a collective effort, would impose disproportionate and inequitable economic risk on developers who are contributing for the sake of innovation.

## III. Developing the Legal Infrastructure

We point all of this out because we know of no better way to demonstrate to you that we have been involved in the development of the commercial Internet since its beginning, and have thought seriously about its total impact on consumers. We believe that no consideration of laws and regulations, such as those on which you are seeking comment, can be held in a vacuum, but instead must be assessed comprehensively in light of their potential effect on the continuing development of the Internet and the information economy.

Given our position as the leading consumer online service, AOL is, and has been for many years, keenly interested in the effects of the developing law in this area on consumers. We have actively participated in several efforts to clarify and improve federal and state law for consumers, including the recently enacted federal statute on electronic signatures, the Uniform Electronic Transactions Act, the Uniform Computer Information Transactions Act, the Child Online Privacy Protection Act and anti-spamming legislation now under consideration in Congress.

Every legislative effort that deals with the developing information economy must, at some point, ask the following two questions:

1. To what extent do consumers require protection from new risks presented by online commerce?

2. To what extent might the imposition of new mandatory consumer protection rules slow the expansion of the information economy?

The tension between the answers to these two questions must be resolved in the crucible of the legislative process. **For the past six years, with respect to the development of contracting rules for computer information and online transactions, the UCITA project has been that crucible**. We believe that UCITA has exhaustively and properly addressed these concerns, and has struck the right balance. UCITA recognizes that information transactions take on a variety of forms, many of which cannot fit into a simple sale-of-goods model. UCITA is consistent with the public policy objectives described above and will maximize the economic and social benefits of the Internet and allow it to reach its full potential. Prompt enactment of UCITA throughout the states will provide appropriate and necessary consumer protection while supporting the continued expansion of the information economy and thus, we respectfully suggest, may obviate the need for any action by the FTC. We take this opportunity to provide detailed discussion on why we have reached that conclusion, and also to respond specific comments made by FTC staff on an earlier version of UCITA.

## IV. The UCITA Process

The UCITA project began over ten years ago following the recommendation of an American Bar Association ("ABA") Study Committee which concluded that computer software was not properly covered by Article 2 of the Uniform Commercial Code (the "Code" or the

"UCC") and recommended that it be given separate treatment in the Code.[2] Essentially, the Study Committee concluded that sales of goods were different from licenses of software in a number of fundamental ways, making it impossible to achieve consistent, predictable and fair results from the application of Article 2 to software. Indeed, at the time there already were several inconsistent decisions resulting from courts' attempts to apply or not apply Article 2 in software transactions.[3] Following the recommendation of the Study Committee, the National Conference of Commissioners on Uniform State Laws ("NCCUSL" or the "Conference") and the American Law Institute ("ALI"), who jointly sponsor the UCC, charged the drafting committee for the then ongoing revision of UCC Article 2 with the development of discrete rules for software transactions that could be included within Article 2. However, as the Article 2 Drafting Committee wrestled with the many issues regarding updating the law of the sale of goods, along with developing new rules for software contracting, it became clear that a separate article was needed to deal with the latter. In 1994, a separate drafting committee was constituted to develop a new Article to the U.C.C., which effort eventually turned into a freestanding uniform act, the Uniform Computer Information Transactions Act.

The UCITA Drafting Committee met eighteen times over six years. Each meeting lasted for at least two and one-half days—with the aggregate meeting time approaching five hundred hours. The chair of the Committee, Carlyle C. Ring, was quite generous in granting all interested groups ample time to present their views, which they did, both orally at the meetings and in writing in between meetings. Although the points of view expressed differed widely, the process itself was marked by civility and cooperation.

As noted in a letter from the Co-Chairs and Vice-Chairs of the ABA Subcommittee on Information Contracting to NCCUSL:

> Drafting meetings also were attended by an unprecedented number of observers, many of whom also brought counsel with them. The observers included representatives of industry trade groups, consumer groups, the motion picture, publishing and recording industries, banks and other financing groups, automobile and insurance companies and Fortune 500 licensees. Representatives of entities outside the software industry equaled or outnumbered industry representatives. The typical manner of proceeding at those meetings was for the draft to be reviewed, section by section, with the Chair going around the room on each section, taking comments from any observer who wished to offer them. This made it impossible for the individual meetings or the process as a whole to be dominated by any one group. In addition, for several years, UCITA has had its own website on which comments are posted from all contributors, regardless of their views. In our judgment, all of this has resulted in a process which has been extraordinarily open. (Possibly, at times, to its

[2] See Mary Jo Howard Dively and Donald A. Cohn, *Treatment of Consumers under Proposed U.C.C. Article 2B-Licenses* 16 John Marshall Journal of Computer and Information Law (315-335)

[3] See e.g. *RRX Industries, Inc. v. Lab-con, Inc.*, 772 F 2d 543 (9th Cir. 1985); *Triangle Underwriters, Inc. v. Honeywell, Inc.* 604 F2d 737 (2d Cir. 1979) (both applying Article 2) *and Data Processing Services, Inc. v. LH Smith Oil Corp.*, 492 N.E.2d 1329 (Ind. Ct. App. 1986); *Micro-Managers, Inc. v. Gregory*, 147 Wis.2d 500, 434 N.W.2d 97 (Wis.Ct.App.1988) (excluding software from Article 2)

> detriment. As we all have learned, the comments of one person, or a handful, can seem like those of a crowd when repeated over and over on the Internet, particularly without the editing that most of us take for granted when reading legal commentary.)[4]

As noted by Ms. Dively and Mr. Cohn (who served as American Bar Association Advisors to the UCITA Drafting Committee):

> As much as any other group, consumers have been represented in the Article 2B drafting process. A representative of the Consumer Project on Technology has attended almost all of the Drafting Committee meetings and has been one of the most frequent observer speakers at the meetings. The Consumers Union also has sent a representative to many of the Drafting Committee meetings and has presented at least six written submissions since June 1996, more than any other single group that the authors have seen. These submissions have contained requests for dozens of changes to Article 2B, some major, some minor. All have, in the authors' observations, 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 many members of the Drafting Committee and other interested observers have proposed changes to Article 2B that favor consumer interests. Many of these proposed changes also have been adopted.[5]

## V. The Result: Improved Treatment of Consumers under UCITA

UCITA significantly improves the law for consumers. We take this opportunity to discuss the improvements and also to comment on certain concerns previously expressed by the Federal Trade Commission staff about an earlier version of UCITA.[6]

UCITA's improvements to existing law can be summarized as follows:

1. **UCITA expressly defers to consumer protection statutes**, thus preserving all existing consumer protection and the ability of state legislatures to add to it without being overridden by UCITA;

2. **UCITA resolves concerns about shrinkwrap and clickwrap contracts** in a manner that protects both consumers and licensors.

3. **UCITA creates specific new protections for mass market and other licensees** which benefit consumers as well.

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[4] See letter dated July 8, 1999 from Co-Chairs and Vice-Chairs of ABA Subcommittee on Information Contracting, which can be found at www.ucitaonline.com

[5] See Dively and Cohn, at 321

[6] See letter to the UCITA Drafting Committee dated October 30, 1998 and commenting on a prior version of UCITA (the "FTC Letter")

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4. **UCITA creates a number of specific new consumer protections** which improve existing law for consumers.

## A. Preservation of and Deference to other Consumer Protection Law

Section 105(c) of UCITA states:

> 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.[7]

The only limitations on the broad coverage of Section 105(c) are found in Section 105(d) of UCITA (the purpose of which is to provide for electronic transactions) and Section 105(a), which expressly states that a provision of UCITA which is preempted by federal law is unenforceable to the extent of the preemption.

Section 105(d) of UCITA states:

> (d) If a law of this State in effect on the effective date of this [Act] applies to a transaction governed by this [Act], the following rules apply:
>
> (1) A requirement that a term, waiver, notice or disclaimer be in writing is satisfied by a record.
> (2) A requirement that a record, writing, or term be signed is satisfied by an authentication.
> (3) A requirement that a term be conspicuous, or the like, is satisfied by a term that is conspicuous under this [Act].
> (4) A requirement of consent or agreement to a term is satisfied by a manifestation of assent to the term in accordance with this [Act][8]

The Legislative Note to Section 105 states*: "If there are any consumer protection laws that should be excepted from the electronic commerce rules in subsection (d), those laws should be excluded from the operation of that subsection."*

The Drafting Committee placed this Legislative Note at the end of Section 105 because it wanted to be sure that state legislatures would review their existing consumer protection statutes and not unintentionally overrule any of them by enacting Section 105(d). To the extent that a legislature decides that it does not want any particular consumer protection law to be affected by Section 105(d), it may simply list that law as an exception to the operation of Section 105(d).

[7] UCITA, Section 105(c)
[8] UCITA, Section 105(d)

A representative of the Consumers Union (writing about an earlier draft of UCITA) criticized UCITA's approach as follows:

> UCITA has a general savings clause for consumer protection law, but contains major exceptions that eviscerate the rule. First, it omits case law from its list of what is preserved when it conflicts with UCITA. Second, subsection 105(d) wipes out all existing state consumer protection statutes requiring writing, signature, conspicuousness, consent or agreement.[9]

Let's examine these two objections by asking a few questions:

**Should UCITA expressly state that in the event a single case conflicts with it, the single case should control over a statute enacted by a state's legislature after lengthy public debate?**

This would be highly unusual—one of the chief functions of statutory law is to provide clear guidance to courts and contracting parties. Indeed, that is one of the principal reasons that the UCITA project was undertaken, and it is important to understand that UCITA, consistent with its beginnings as a commercial code, reflects the existing common law of information contracting. An exception of the type suggested by the Consumers Union would be a step backwards, and would create significant uncertainty in the law. It is easy to imagine the difficulties created by such a scheme: What is the meaning of a single case, and to what extent are the facts thereof distinguishable? What about jurisdictions where the case law is split (a common occurrence)? Which case should one follow?

Typically, legislatures codify common law when there is a critical mass of cases with similar holdings. This is what UCITA has done for the existing common law of information contracting. To the extent that a single case (or body of law) in a specific jurisdiction is clear and capable of near-universal application, and differs from UCITA, it is likely that that position case will be codified by the legislature in that jurisdiction.[10] The imprimatur of such codification is essential: companies must make decisions based upon the legal requirements of the jurisdictions in which they conduct business. Those decisions often have significant financial consequences. It is right that, to the extent possible, the law should be made clear enough for those decisions to be made with confidence.

[9] See Letter from Gail Hillebrand, Consumers Union, to the National Conference of Commissioners on Uniform State Laws, dated June 21, 1999, a copy of which can be found at www.ucitaonline.com.

[10] See, for example, the amendment to UCITA in Maryland which codified Maryland's particular requirement that warranties for consumer products are not disclaimable. This position is not held by the majority of states, and thus it would have been inappropriate to include it as the default position in UCITA.

**Does subsection (d) wipe out all existing state consumer protection statutes requiring writing, signature, conspicuousness, consent or agreement?**

These concerns were debated at length during the meetings of the UCITA Drafting meetings. Answering them requires breaking the question into components. Let's take them in order:

**Does subsection (d) wipe out all existing state consumer protection statutes requiring writing and a signature?**

It does not. Of note with respect to this concern is the recently enacted federal Electronic Signatures in Global and National Commerce Act, ("E-Sign"), which essentially preempts this area. E-Sign states that a signature (authentication) or record may not be denied legal effect, [validity] or enforceability solely because it is in electronic form.[11] Clearly, subsections 105 (d)(1) and (d)(2) of UCITA merely implement the underlying philosophy of E-Sign; they provide that IF a writing or signature is required by a consumer protection law, that writing or signature can be in the form of an electronic record or signature. This hardly "eviscerates" the savings clause; rather, it modernizes the law and brings it into harmony with the federal requirements. Without these subsections, there would be confusion as to whether consumer protection statutes which required a writing or a signature could in fact be satisfied by an electronic record or electronic signature. Furthermore, even if the UCITA Drafting Committee had concluded that it was appropriate to delete Subsections (d)(1) and (d)(2), E-Sign would substantively preempt the area. With the passage of E-Sign, Congress effectively ended this debate.

We note also that in the FTC Letter, staff indicated its concern about Section 116 of what was then Article 2B. Specifically, the letter stated that:

> Section 2B-116 provides that if parties use a commercially reasonable identification and verification procedure, an electronic record is presumed to be accurate and to have originated from the sending party. Although a consumer may rebut this presumption, if the receiving party establishes that the consumer was negligent, the consumer would remain civilly liable for the criminal acts of a third party committing on-line identity theft. NCCUSL and ALI may want to evaluate further the extent to which consumers should be liable for such unauthorized electronic transactions.[12]

In fact, the UCITA Drafting Committee did reconsider these provisions and, in accordance with the approach taken by both the Uniform Electronic Transactions Act and E-Sign, deleted them. Although AOL believes that these provisions would be valuable additions to the law of electronic commerce in the long run, we are comfortable with the deletion and trust that similar provisions will develop over time as people become more comfortable with the Internet. Finally, we note that aside from its concerns about Section 116, the staff appeared to express its

[11] E-Sign, Section 101(a); UCITA, Section 107(a)
[12] See FTC Letter.

satisfaction with the electronic commerce approach taken by then Article 2B, an approach that carries over to UCITA.

**Should traditional ("paper") conspicuousness requirements be reexamined for electronic contracts?** Certainly, the answer is "yes" or else the law will have little application in the electronic arena. How does UCITA do this? It defines "conspicuous" as follows:

> "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.[13]

This approach to "conspicuousness" was adopted by the UCITA Drafting Committee after significant input and debate.[14] Further evidence of the extent to which

[13] UCITA, Section 102(a)(14)

[14] We note that in the FTC Letter, the staff expressed concerns about then Article 2B's approach to conspicuousness. Specifically, the staff indicated that they believed that the term "conspicuous" depends on the individual facts and circumstances of a given transaction, and that it cannot be precisely defined. In fact, UCITA's definition of conspicuousness is taken largely from Article 1 of the UCC, which has been in use for many years without problem, and has been updated to reflect the needs of electronic commerce. We also note that some of the language of that section which the staff deemed "confusing" in its letter has been clarified for the final version of UCITA and that the Official Comments underscore that it is the court's role to determine whether a term is conspicuous. To the extent that a court were faced with one of the hypothetical situations posed in the FTC letter (a disclosure buried amid boilerplate license text, or printed on one of many different leaflets enclosed within a software box) it is likely that the court would find that the disclosure had not satisfied the final version of the conspicuousness requirement.

they seriously thought about this issue is contained in the Official Comments to UCITA, which state, in pertinent part:

> Whether a term is conspicuous is determined by the court. *The definition of "conspicuous" does not change requirements of other law that specifies the content, timing or location of disclosures or warnings*. If other law requires specific content, location, or timing of disclosure, those requirements apply under Section 105 and Section 114. . . . As in UCC Section 1-201(10)(1998 Official Text), this Act sets out several methods of making a term conspicuous. Requiring that a term be conspicuous blends a notice function (the term ought to be noticed) and a planning function (giving guidance to the party relying on the term regarding how that result can be achieved). The statutory illustrations reduce uncertainty and litigation. The illustrations are not exclusive. For cases outside their terms, the general standard governs.. . . Paragraph (A)(iii) deals with hyperlinks and related Internet technologies. It contemplates a case in which a computer screen displays an image or term or a summary or reference to it, and the party using the screen, by taking an action with reference to it, is promptly transferred to a different display or location wherein the contract term is available. To be conspicuous, the image, term, summary or reference must be prominent and its use must readily enable review of the actual term. The access must be <u>from</u> the display and not be taking other actions such as a telephone call or driving to a store. When the term is accessed, it must be readily reviewable. The fact that an entire contract is prominently referenced does not automatically mean that a particular <u>term</u> in it is conspicuous. (emphasis added)[15]

The Official Comments to Section 105 underscore this position. They state:

> 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 of 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.[16]

**Should traditional ("paper") requirements of consent or agreement be reexamined for electronic contracts?** Again, certainly the answer is "yes." Online and computer information contracting practices, many of which have been in effect for over a decade, require

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[15] See Official Comments to UCITA, which can be found at www.law.upenn.edu/bll/ulc/ucita/ucitacom300htm.
[16] See Official Comments to Section 105 of UCITA.

that the law be modernized. How does UCITA accomplish this? It permits consumers to manifest assent to a term or record (including an electronic term or record), *only after they have had the opportunity to review the term or record.* What conditions must be met before a consumer would be deemed to have "manifested assent" to a term or record? Section 112 provides:

> (a) A person manifests assent to a record or term if the person, acting with knowledge or, or after having an opportunity to review the record or term or a copy of it:
>
> (1) authenticates the record or term with intent to adopt or accept it; or
>
> (2) intentionally engages in conduct or makes statements with reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term.

Section 112 also provides that if UCITA or other law requires assent to a specific term, *a manifestation of assent must relate specifically to the term.*[17] In its use of manifestation of assent, UCITA does not break new legal ground, but instead is consistent with the Restatement (Second) of Contracts, which states that "The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act."[18] The Official Comments to UCITA explain the concept further, and highlight several important consumer protections:

> In this Act, to manifest assent to a record or term requires meeting three conditions:
> First, the person must have knowledge of the record or term or an opportunity to review it before assenting. An opportunity to review requires that the record be made available in a manner that ought to call it to the attention of a reasonable person and in a form that readily permits review. Subsection (e) may also require a right of return if the opportunity to review does not occur before initial performance.
> Second, having had an opportunity to review, the person must manifest assent. The person may authenticate the record or term, express assent verbally, or intentionally engage in conduct with reason to know that the conduct indicates assent. As in the Restatement, this can include inaction if the circumstances so indicate.
> Third, the conduct, statement, or authentication must be attributable in law to the person. General agency law and Section 213 provide standards for attribution.[19]
>
> Assent does not require that a party be able to negotiate or modify terms, but the assenting behavior must be intentional (voluntary). That is the same rule that prevails in all other contract law. . . conduct is not assent if

[17] UCITA, Section 112(c)
[18] See Restatement (Second) of Contracts, § 19(1).
[19] See Official Comments to Section 112 of UCITA.

> it is conduct which the assenting party cannot avoid doing, such as blinking one's eyes. Common law courts have used common sense in applying this same standard and they will do so under this Act. . . . The "reason to know" standard is not met if the computer information is sent to a recipient unsolicited under terms that purport to create a binding contract by failure to object to the unsolicited sending. In such cases, it is not reasonable for the sending party to infer assent from silence; the threshold for manifesting assent is not met.[20]

In summary, UCITA preserves and defers to consumer protection law in all areas, with the limited exception of narrowly defined areas which require modernization due to the realities of electronic contracting. In its careful crafting of rules for those excepted areas, the UCITA Drafting Committee followed the approaches of Congress, the UCC and the Restatement (Second) of Contracts. These rules are reasonable, and properly protect consumers while providing necessary certainty to the millions who conduct business electronically. Finally, recognizing that states, understandably, would be interested in these provisions, the Drafting Committee took the unusual step of specifically calling these provisions to the attention of state legislatures in the aforementioned Legislative Note, and advising them to except out any consumer protection law that they do not wish to be covered by the electronic commerce exceptions. This is not the action of a Committee wishing to "eviscerate" consumer protection law. It is, instead, the action of a reasonable group who have done their best to evaluate the concerns of all and strike the proper balance after years of debate, but who realize that, in this important area, it is appropriate that their decisions be scrutinized by every state for consistency with their own internal laws and policy choices.[21]

### B. Resolution of Shrinkwrap and Clickwrap concerns.

The shrinkwrap contract model was of significant concern to both consumer advocates and large business licensees, though for different reasons. As a result, it was one of the most heavily discussed subjects of the UCITA debate. Any discussion of this contracting model must begin with the realization that it has been used in millions of transactions for over fifteen years, and has been enforced in most cases, and in all cases since the decision of ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996). Although some may not like it, it is the primary contracting method by which computer information is distributed and on which the bulk of the information industry relies, and to argue otherwise simply would be unrealistic.

The Co-Chairs and Vice-Chairs of ABA Subcommittee on Information Contracting framed the shrinkwrap debate as follows:

> The stated objection to shrinkwrap licenses was that customers, particularly in mass market transactions, often do not have an opportunity

[20] See Official Comments to Section 112 of UCITA.

[21] This also responds directly to the concern expressed by Gail Hillebrand, in her letter dated June 21, 1999 that if a state defines conspicuousness more effectively for consumers than UCITA does, or if a state requires actual consent or agreement to particular types of contracts or terms, those requirements should not automatically be overturned.

> to review the license until after payment, and if the customer is unhappy with the license terms, obtaining a refund depends upon the policy of the vendor. The response was that from the vendor's standpoint, the license is essential to protect its commercial interests while assuring that the customer can use the licensed software or information as both parties intend and expect. The UCITA Drafting Committee's practical response to the conflict was to preserve the integrity of the legal framework by confirming that such licenses are enforceable, while affording necessary protections to shrinkwrap licensees.[22]

While there was little disagreement among the observers as to the Drafting Committee's response, there was significant debate about what the necessary licensee protections should be. One commentator summarized the various choices that were presented and discussed as follows:

> The UCITA Drafting Committee was faced with a difficult decision: Ban these types of contracts altogether, or place some reasonable limitations on them. Given that shrinkwraps have been the paradigm contract form in this industry for twenty years, with relatively few problems or lawsuits, banning them outright would have been irresponsible. Still, the Drafting Committee recognized that protection was indicated in situations where parties, particularly consumers and retail purchasers, are not able to review the terms of the contract in advance. They considered many alternatives, from prescribing required terms for shrinkwrap licenses (which was rejected because, among other things, it was thought to be too technologically inflexible and regulatory for a commercial statute), to requiring that material terms be stated on the outside of the software package (which was rejected because, among other things, the materiality of many terms also would change with technology, and there was a concern that unless the specific laundry list of terms was stated in the Act, interpretation would be problematic for the courts). Ultimately, they adopted an approach that was developed out of a suggestion by the American Bar Association Information Licensing Subcommittee. That approach, simply stated, puts the shrinkwrap licensee in the same position he would have been in had he seen the terms of the contract before he made his decision to purchase. The reasoning of the ABA Subcommittee was that since the basic objection of many of the opponents was that shrinkwrap licensees did not have the chance to review the terms prior to payment, and since they might have decided not to purchase if they had seen the terms, then the statute should try to put them in that position legally, even if it could not do so practically.[23]

[22] See letter dated July 8, 1999 from Co-Chairs and Vice-Chairs of ABA Subcommittee on Information Contracting.
[23] See Mary Jo Howard Dively, The New Laws that will Enable Electronic Contracting: A Survey of the Electronic Contracting Rules in the Uniform Electronic Transactions Act and the Uniform Computer Information Transactions Act, ___Duquesne Law Review (Spring 2000)

The protections developed by the UCITA Drafting Committee are found in Sections 105, 112 and 209. Taken together, they resolve the major concerns of licensees, while permitting the continued use of this contracting model. It is important to review them and see how they work together. First, as noted above, UCITA does not make shrinkwrap contracts enforceable; in fact, it makes them unenforceable unless they meet certain standards, all of which are improvements on current commercial practice. The first of these improvements is the refund right, which is developed by Sections 112 and 209. Boiled down, UCITA says that if a consumer is not able to review the terms of a contract before paying for a product, then the consumer must have the right to return the product for a full refund, together with the costs of return, and incidental damages if the consumer's computer is damaged by installation of the product. UCITA does not require that there be any flaw in the product itself, merely that the consumer object to a term in the license. The reasoning of the Drafting Committee was that if the terms are so objectionable that a consumer would not have purchased the product had he seen them in advance, then the consumer should have the right to a cost-free return of the product.

Additional improvements to existing law are found in Section 105, which limits the ability of licensors to include certain types of provisions in their standard form contracts. It states:

> If a term of a contract violates a fundamental public policy, the court may refuse to enforce the contract, enforce the remainder of the contract without the impermissible term, or limit the application of the impermissible term so as to avoid a result contrary to public policy, in each case to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of the term.[24]

Section 105(b) is unprecedented in statutory American contract law. It affords courts, for the first time by statute, the basis to invalidate terms of private contracts because they are deemed to violate a fundamental public policy. It was developed over a two year period, with substantial input from a member of the Conference and law school dean who was particularly concerned about these matters. Although we are aware that the FTC in 1998 was not entirely satisfied with the substance of Section 105(b)[25], we invite you to consider the final version, which went through many upgrades, together with the Official Comments which explain its effect in more detail. We recognize that it still may not go as far as the FTC would like, but respectfully suggest that this should not diminish the fact that it goes farther than any current statute.[26]

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[24] UCITA Section 105(b)

[25] See FTC Letter, which acknowledges that although [then] Section 2B-105(b) was an "important first step towards protecting consumers", that its limitation to "fundamental" public policies -- as opposed to providing a broader categorical public policy restriction -- might limit its usefulness in protecting consumers from restrictive mass market license terms.

[26] See Lorin Brennan, The Public Policy of Information Licensing, 36 Houston Law Review No. 1 (Spring 1999) for an excellent and thoughtful discussion of the role of public policy in the development of information licensing law.

Finally, another commentator has summarized UCITA's treatment of standard form contracts as follows:

> The allegation that UCITA will enable computer information providers to enforce "outrageous" or even "inappropriate" terms is also without foundation. UCITA requires computer information transactions to meet the time-tested, common law standards applicable to contracts by expressly providing that contract terms which are "unconscionable" or against public policy are unenforceable. A term which is "outrageous" is more formally described as a term which "shocks the conscience of the court", i.e., is unconscionable. A term which is "inappropriate" is, under basic principles of common law, unenforceable if it is inappropriate for society as a whole, that is, contrary to public policy. Thus, contentions that providers of computer software and other computer information will somehow be able to enforce outrageous or inappropriate terms are unsupported and unsupportable.[27]

AOL submits that UCITA strikes the right balance with respect to shrinkwrap and clickwrap contracts; however, AOL also acknowledges the FTC's interest in whether it would be appropriate to require pre-transaction disclosures in certain cases. On the one hand, an over-simplistic, one dimensional approach to mandating pre-transaction disclosures would not work given the variety of transactions and methods used to distribute computer information, as was concluded by the UCITA Drafting Committee after years of debate. On the other hand, AOL believes that for purposes of offering its mass market products online, pre-transaction disclosure of terms could be a workable solution, provided we had adequate time for transition of our contracting models for each product (which are varied, as described above in Section II).

We point out, however, consistent with our discussion in Section II, that this is not a "one-size-fits-all" industry, and what works for AOL may not necessarily work for every product or every distribution model in the industry. Furthermore, it is our belief that technology ultimately will provide the solution for this problem more than will the law. As discussed above, numerous technological solutions have evolved in recent years to allow for efficient and inexpensive distribution of computer information to consumers, and we believe that this trend will continue unless artificially constrained by prematurely enacted regulations.

### C. Benefits for all licensees and for and mass market licensees that also increase protection for consumers

**UCITA provides many benefits for licensees (including mass market licensees) which redound to the benefit of consumers.** Although a discussion of all licensee benefits is beyond the scope of these comments, it is appropriate to note those that are of most interest to consumers:

[27] Micalyn S. Harris, Is UCITA Worthy of Active Support? **The Metropolitan Corporate Counsel** 40, October 1999.

**Section 704(b): Perfect Tender for Mass Market Licenses**

Section 704(b) states that in a mass market transaction that calls for only a single tender of a copy, the licensee may refuse the tender if the tender does not conform to the contract. This retention of the perfect tender rule for mass market licensees also benefits consumers, since consumer contracts are subsumed within the definition of mass-market transactions.[28]

**Section 104: Protection for mass-market licensees from opting into UCITA**

Consumer advocates have been concerned that consumers may unwittingly be forced into UCITA by the so-called "opt-in" provisions. Although we do not agree that opting into UCITA would disadvantage consumers, we point out that Section 104 contains several provisions which protect consumers from unfair, or unwitting, opt-in. First, parties are not permitted to opt into UCITA unless the subject matter of their agreement meets certain tests.[29] Second, opting into UCITA does not alter the applicability of any rule or procedure that may not be varied by agreement of the parties. Third, in a mass market transaction, the agreement to opt in does not alter the applicability of a law applicable to a copy of information in printed form. Finally, in a mass market transaction, any term in Section 104 which changes the extent to which UCITA governs the transaction must be conspicuous. Each of these protections responds to a specific concern raised during the drafting process.

**Section 304: Protection from changes to online contracts**

Section 304 provides that if a contract provides that terms may be changed as to future performance by compliance with a described procedure, a change proposed in good faith pursuant to that procedure becomes part of the contract if the procedure meets certain conditions. One of those conditions is that if it relates to a mass market transaction, the licensee must be permitted to terminate the contract as to future performance if the change alters a material term and the licensee in good faith determines that the change is unacceptable.

**Section 503: Term prohibiting transfer of a mass market license must be conspicuous**

UCITA's default rule is that contractual interests may be transferred unless the transfer is prohibited by other law or the transfer would materially change the duty or risk of the other party. Parties are permitted to provide in their contracts that they may not be

[28] UCITA Section 102(a)(44)(A) includes consumer contracts within the definition of mass-market transaction. Thus, all benefits to mass market licensees under UCITA also flow to consumer licensees.

[29] A material part of such subject matter must be computer information or informational rights in it that are within the scope of UCITA, or subject matter within UCITA under Section 103(b) or subject matter excluded by Section 103(d)(1) or (2).

transferred, but a term that prohibits transfer of a mass market license by the licensee must be conspicuous.

**Part 4: Statutory Warranties**

Sections 401, 403, 404 and 405 provide, for the first time, statutory implied warranties for computer information transactions. This is important particularly where courts find that UCC Article 2 does not apply to computer information transactions. Unless UCC Article 2 applies, there is no statutory source of warranties in these transactions and they are not reliably provided by the common law. Under UCITA, a licensor provides implied warranties as to (i) noninterference and noninfringement; (ii) merchantability; (iii) fitness for licensee's purpose; (iii) informational content; and (iv) system integration. These warranties have their roots in Article 2, but blend the separate warranty approaches in goods and services transactions. In goods transactions, the focus traditionally has been on results; in services transactions, the focus traditionally has been on effort. UCITA's subject matter has elements of both goods and services, hence the warranties' structure reflects the combined influence of both traditions.

In the FTC letter, staff were particularly concerned about the express warranty provisions of UCITA, to wit:

> We also are concerned about Article 2B's default provision that a manufacturer does not create a warranty when it "illustrates the aesthetics, market appeal or the like" and makes statements "purporting to be merely the licensor's opinion or commendation of the information." We would hope that licensors be held to their promises and, further, that they not be permitted to override promises expressly made or implied by the licensor's words or deeds in a boilerplate post-sale warranty disclaimer.

Section 402 continues to contain the language about which the staff was concerned. We note that both current UCC Article 2 and the current Proposed Revisions to UCC Article 2 contain similar exceptions to the creation of an express warranty.[30] These concepts have evolved carefully over decades, through the application of Article 2 and interpretation thereof by the courts. Many of the same issues which courts have faced in applying these rules to sales of goods apply almost equally to computer information transactions and, for that reason, it is

[30] Section 2-313(c) of Article 2 states: "It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that the seller have a specific intention to make a warranty, *but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty*." (emphasis added) With respect to the exception contained in UCITA Section (b)(2) –"a display or description of a portion of the information to illustrate the aesthetics, appeal, suitability to taste, subjective quality, or the like of informational content", note that this exception relates only to informational content. Informational content is defined in Section 102(a) 37) of UCITA as follows: ""information that is intended to be communicated to or perceived by an individual in the ordinary use of the information, or the equivalent of that information".

appropriate that similar rules apply, in this area, to sales of goods and computer information transactions.

In particular, with respect to the exception contained in UCITA Section (b)(2) –"a display or description of a portion of the information to illustrate the aesthetics, appeal, suitability to taste, subjective quality, or the like of informational content", the Official Comments would perhaps illuminate the thinking of the Drafting Committee:

> Subsection (b) makes it clear that puffing or mere statements of opinion do not form an express warranty. The law distinguishing between an actionable representation and puffing is extensive and well-developed. The distinction requires a determination based on the circumstances of the particular transaction. The policy that requires this distinction to be made is that in common experience some statements and predictions cannot fairly be viewed as entering into the bargain. To hold each party to every statement made would contradict common experience and stifle discourse about products and proposals. Of course, whether or not a statement is an express warranty does not affect whether the statement established a cause of action under the law of fraud or misrepresentation. Paragraph (b)(2) identifies a common setting where the issue about how to treat a statement arises. It refers to statements or demonstrations pertaining to aesthetics and the appeal (including market appeal) of information content as a form of puffing or opinion that does not create an express warranty. "Aesthetics," as used here, refers to questions of the artistic character, tastefulness or beauty of informational content, not to statements pertaining to how a person uses the informational content or its essential nature. For example, a statement that a clip art program contains useable images of "working people" may create an express warranty that the subject matter of the program includes working people and that the images are usable. Neither the statement, nor a selected display of part of the program creates an express warranty that they are tasteful or artistically pleasing.[31]

While we appreciate that staff might prefer the law to go further in these cases, we respectfully suggest that neither Article 2 nor the common law has yet gone to the point suggested by staff in the FTC letter. In fact, the case law in this area recognizes the types of concerns raised by staff—that parties be held to their promises and not be permitted to override promises expressly made. The trick is in deciding when a promise has been made. The common law recognizes the gray areas, and comes down on the side of conservatism.

**Section 406: Disclaimers of Warranty**

Like Article 2, UCITA provides that implied warranties may be disclaimed. The disclaimer rules follow Article 2 and have worked well for years. Generally, unless the circumstances indicate otherwise, all-purpose disclaimers such as using words like "as is" or "with all faults" (which are

[31] UCITA Official Comments to Section 402

commonly understood to mean that no warranties attach) are a sufficient disclaimer. Otherwise, if a specific disclaimer of merchantability, fitness or system integration is in a record, it must be conspicuous.

Staff indicated in the FTC letter that they would be concerned if express warranties could be overruled by a "boilerplate post-sale disclaimer"[32] In fact, it is extremely difficult to disclaim an express warranty under UCITA. The Official Comments to Section 402 point out the essential difference between express warranties and implied warranties:

> "Express" warranties rest on "dickered" aspects of the individual bargain, and go to the essence of that bargain. "Implied" warranties, on the other hand, rest on inferences from a common factual situation or set of conditions so that no particular language is necessary to create them. They exist unless disclaimed.[33]

The Official Comments to Section 407 demonstrate the difficulty of disclaiming or excluding express warranties:

> General language of disclaimer cannot exclude express warranties. While courts should construe contract terms of disclaimer and language of express warranty as consistent whenever reasonable, in cases of inconsistency, express warranty language controls. An express warranty cannot be disclaimed, but a representation that might otherwise be an express warranty can be excluded from the bargain by agreement. Language of the agreement, including a disclaimer, may indicate that a purported warranty did not in fact become part of the bargain and is not, therefore, an express warranty. This may occur when the language of the agreement contradicts the alleged express warranty, or where the agreement expressly precludes reliance on representations outside the record.[34]

**Section 816: Exclusion of Electronic Self Help in Mass Market Licenses**

In the FTC letter, staff expressed concern about the use of electronic self help against mass market licensees and consumers. Section 816 has been substantially improved for licensees since that time, and we invite your attention to the final version. In particular, the staff was concerned that consumers receive adequate warning of the exercise of electronic self help. We note, in that regard, that **Section 816 now expressly prohibits the use of electronic self help against mass market licensees in any circumstances**. **Since mass market transactions include consumer contracts, this also prohibits the use of electronic self help against consumers.**

[32] See FTC Letter.
[33] UCITA Official Comments to Section 402
[34] UCITA Official Comments to Section 407

## D. UCITA provides many new specific consumer protections.

UCITA is a commercial law, not a consumer protection law. However, in addition to expressly deferring to other consumer protection law, and providing new benefits for licensees and mass market licensees, UCITA establishes many new specific consumer protections in computer information transactions. As pointed out by two commentators familiar with the process:

> …great importance has been given to the process of drafting Article 2B to examine how the provisions applicable to licensees would affect not just commercial licensees, but also consumer licensees, and to determine whether there are circumstances in which special protection to consumer licensees is warranted. One must also remember that this process is not intended to rewrite the law for commercial parties, the fundamental tenets of which have been in place since the creation of the U.C.C.[35]

Following is a list of the specific new consumer protections contained in UCITA:

### Section 214: Protecting Consumers from Electronic Error

As millions of consumers go online for the first time and learn how to make purchases and contracts electronically, there are bound to be some errors made. The UCITA Drafting Committee recognized this, and specifically included protection for consumers in this regard with the inclusion of Section 214. It provides that a consumer is not bound by an electronic message that the consumer did not intend and which was caused by electronic error if the consumer notifies the other party of the error and either returns or destroys any received computer information prior to using it. This section is typical of the balance found in UCITA. On the one hand, the members of the Drafting Committee recognized that online companies would need to be able to hold parties to their contracts; on the other, they realized that consumers would need special protection when they made mistakes online. Section 214 protects both the consumer and the company.

### Section 109: Protecting Consumers from unfair choices of law

UCITA generally supports choices of law by parties to a contract. However, where consumers are concerned, UCITA recognizes the need for special protection. Section 109 of UCITA expressly provides that a choice of law is not enforceable in a consumer contract to the extent it would vary a rule that may not be varied by agreement under the law of the jurisdiction whose law otherwise would apply in the absence of

[35] See Dively and Cohn, supra, at 316. In their article, Dively and Cohn also note that the ABA Subcommittee on Information Licensing considered the question (which was then being debated by the UCITA Drafting Committee) of whether Article 2B should adopt new consumer protections or retain a posture of leaving current consumer law largely intact while providing some additional protections. The Subcommittee 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.

agreement. Further, where consumers acquire computer information on diskette or other tangible medium, then UCITA provides that the law of the jurisdiction in which the diskette is delivered to the consumer shall apply. This is consistent with consumers' expectations.

**Section 303: Protecting consumers from "no oral modification" clauses in standard forms**

Terms which bar modification or recission of an agreement except in an authenticated record are common in standard forms. Following the position of UCC Article 2, Section 303 provides that such a term is not enforceable against a consumer unless the consumer manifests assent to it.

**Section 803: Protecting consumers from exclusion of limitation of consequential damages**

UCITA generally permits parties to exclude or limit consequential damages in their contracts. Section 803(d), however, provides that exclusion or limitation of consequential damages for personal injury in a consumer contract for a computer program that is contained in consumer goods is prima facie unconscionable.

**Section 409: Extending consumer warranties to members of the family and household**

As discussed above, UCITA provides for the first time statutory warranties for computer information transactions. Section 409 expressly provides that these warranties, when made to a consumer, extend to the members of the consumer's immediate family and household.

**Section 508: Protecting consumers from irrevocable obligations in financial accommodation contracts**

UCITA recognizes that "hell or highwater" clauses in financial accommodation contracts are not appropriate for consumers, and in Section 508 expressly excludes consumer contracts from operation of such irrevocable terms.

**Section 805: Protecting consumers from changes in the statute of limitations**

Like Article 2, UCITA generally permits parties to agree that the statute of limitations applicable to their transactions may be reduced. However, Section 805(b)(2) provides that the period of limitations in a consumer contract may not be reduced.

## V. Conclusion

In its innovative role in providing interactive services, Internet technologies and e-commerce services, AOL has long been interested in the developing law of computer

information transactions. We believe that UCITA strikes the proper balance between protecting consumers from the new risks posed by the information economy and supporting the continuing expansion of the information economy. We respect the process by which UCITA was created: a process which sought unprecedented input from all interested parties and then thoughtfully addressed their concerns over a six-year period and almost five hundred hours of debate. We appreciate the many hours of uncompensated time put into the effort by the members of the UCITA Drafting Committee and the members of the Conference, none of whom came to the effort with a bias in favor of any group. We believe that the result is a balanced Act that comprehensively addresses the variety of transactions involving computer information. UCITA is consistent with AOL's stated public policy principles to make the Internet accessible, affordable and valuable to all members of the global community.

As stated above, we recognize the FTC's interest in whether it would be appropriate to require pre-transaction disclosures in certain cases. While the method of distribution and type of transaction may not lend itself to such disclosures (as was concluded by the UCITA Drafting Committee after years of debate), AOL submits that for purposes in offering its products online, pre-transaction disclosure of terms could be a workable solution, provided we had adequate time for transition of our contracting models for each product. Finally, we wish to reiterate our belief that, ultimately, technology is more likely to provide the right answer to this question than will the law, and we urge the FTC to act cautiously so as not to constrain the continued development of the very technology that has so benefited consumers in the past decade.

Very truly yours,
A. Brian Dengler
Vice President and Associate General Counsel
America Online, Inc.