National Conference of Commissioners on Uniform State Laws
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September 1, 2000

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

Re: High-Tech Warranty Project - Comment P994413
"software-comments@ftc.gov

Dear Secretary:

On behalf of the National Conference of Commissioners on Uniform State Laws ("NCCUSL"),I am submitting these comments in my capacity as the Executive Director. The Conference is 109 years old and composed of Commissioners appointed by all 50 states, for the most part by the Governors. Uniform laws have been widely adopted by the states including topics from child custody and family support to the Uniform Commercial Code. UCITA is one of the Uniform Acts promulgated by the Conference.

UCITA is a project that was developed over a 10-year period and began at the urging and based on a study by the American Bar Association. All interested groups that made their interest known to NCCUSL after extensive publicity were invited to participate in the discussion. Eighteen drafting committee meetings were held, each time from Friday morning until Sunday noon. The attendance was as many as 125, with average attendance of 80. Of the interested groups that came to participate, there were representatives of software developers (large and small), computer manufacturers, entertainment industries (movies, sound recording, cable TV, broadcasting), newspapers, magazines, stock and commodity exchanges, large and small companies using information services, consumers, libraries, insurance companies, bar associations, law professors teaching in the area, and others. All issues were extensively and repeatedly discussed at length by all participants.

One of your questions in the Public Notice is:

> "7 a. How would the proposed Uniform Computer Information Transactions Act (UCITA) affect consumers?"

This letter responds to that question and several related topics in your list of questions.

A. **UCITA and State Consumer Protection Laws**

Section 105(c) of UCITA clearly and explicitly provides:

> '. . .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."

The official draft (2000) contains a legislative note as follows:

> "Legislative Note: The purpose of subsection (c) is to make clear that this Act does not alter the application to computer information transactions of the substantive provisions of a State's consumer protection statutes or rules (including rules about the timing and content of required disclosure) or alter application of the State's statutes giving regulatory authority to a state agency such as the Office of the Attorney General. It may be appropriate, for purposes of clarity, in subsection (c) to cross reference particular statutes such as the State's Unfair and Deceptive Practices Act by inserting 'including [cite the statute.]' Subject to the federal Electronic Signatures Global and National Commerce Act, if certain consumer protection laws might be appropriately excepted from the electronic commerce rules in subsection (d), those laws should be excluded from the operation of subsection (d)."

In the Maryland UCITA, effective October 1, 2000, an explicit reference to the Maryland Unfair and Deceptive Practices Act with regulatory rule making authority is as follows: ". . .if this title or a term of a contract under this title conflicts with a consumer protection statute or regulation, including Title 13 of this Article, the consumer protection statute or regulation governs" (emphasis added). In short, UCITA essentially does not disturb whatever consumer protections applicable to the subject matter of UCITA that a state has deemed appropriate or those that it may deem appropriate in the future.

Consistent with this theme, UCITA enacts rules preserving existing consumer law even if that result would not necessarily occur under other state law, such as:

- Section 104: an agreement to opt into or out of UCITA cannot change a mandatory consumer protection law that would otherwise apply

- Section 109(a): an agreed choice of law cannot alter an otherwise applicable consumer protection rule that cannot be varied by agreement

1. **E-Sign and E-Commerce**.

The "Electronic Signatures in Global and National Commerce Act" (E-Sign") recently enacted by Congress and signed by the President, preempts state law with respect to e-signatures, and e-records. The language of E-Sign and UCITA are virtually identical for signatures (authentication) and records ". . .may not be denied legal effect, [validity] or enforceability solely because it is in electronic form" (E-Sign, Section 101(a); UCITA Section 107(a)).

UCITA Section 105(d)(1) and (2) implement the federal preemption. Subsection (d) sets forth rules that enable e-commerce by allowing an electronic record, authentication, and conspicuousness. The Official Comments clearly state that "timing, manner and content" of disclosures are unmodified by those e-commerce rules. However, to the extent a state provides for a "writing" and does not wish an electronic message to be authorized, a legislative note instructs the state to except such statutory provisions. See the discussion on the previous page.

2. **UCITA adds further protections**.

As noted, UCITA's policy is to have all consumer protections specified in other state law extend to computer information transactions. If amendments to existing state laws are needed, they may be made to accomplish application of appropriate consumer protections to transactions subject to UCITA, regardless of whether paper or electronic, or the subject matter of the particular transaction.

UCITA goes beyond retaining existing consumer protection laws, however, and adopts limited additional protections appropriate for issues associated with computer information transactions that benefit users of information, including consumers.

Thus, many contract law rules in UCITA benefit consumers. The doctrines of unconscionability (Section111), good faith (Section 114(b)), and fundamental public policy (Section 105(b)) provide important protections. Of course, these rules also affect more than consumer transactions and respond to commercial concerns as well. There are rules in UCITA (like those in Article 2) that require disclaimers of implied warranties in a record to be conspicuous.

UCITA retains rules protective of consumers contained in UCC Article 2 including:

- Section 303: a contract term requiring that modifications of contract be in writing is not enforceable in a consumer contract unless the consumer manifests assent to the term

- Section 704: licensee has a right to refuse tender of a copy that does not perfectly conform to the contract

- Section 803: consequential damages for personal injury cannot be disclaimed for a computer program contained in consumer goods

But UCITA even goes further as illustrated by the rule in UCITA that a contractual choice of forum is unenforceable if it is unreasonable and unjust, or the rule in UCITA that assent is not effective unless there was an opportunity to review terms prior to giving assent.

UCITA further establishes various consumer protection rules that do not exist under current law focused on computer information transactions. These include:

- Section 104: a term changing the application of UCITA to the transaction must be conspicuous in a mass market transaction

- Section 209: a license cannot alter terms expressly agreed between the parties and, if presented after delivery, a licensee has a cost-free right of return if it refuses the terms

- Section 214: a consumer has a right to avoid an online contract if he or she acts promptly to avoid the effect of an electronic mistake

- Section 304: a safe harbor rule for changing terms in a continuing contract requires that the licensee that is a consumer be given a right to terminate when change is made

- Section 409(b): a warranty to a consumer extends to all individual consumers in the family or household if use should have been expected by the licensor

- Section 503: a term that prohibits transfer of a contract right must be conspicuous for a mass market transaction

- Section 805: the statute of limitations for consumers cannot be reduced by agreement.

All of these and other rules benefit consumers but often are not explicitly denominated as "consumer protection" rules. They contribute to the fact that UCITA creates a world in which consumers are better off than under current law.

3. **Post-Payment Terms**.

Question 12 raises issues with respect to shrinkwrap licenses. The strong trend in the case law validates such licenses (see attachment listing the cases). To the extent a state consumer protection law addresses these issues, UCITA provides that state consumer protection law governs. In addition, UCITA provides significant protective rules as follows which are not present in current law:

- The license is **not enforceable** unless the consumer had reason to know while online that proposed license terms would follow. (Section 208(2))

- The license is **not enforceable** unless the consumer is given an opportunity to review the license at or before the consumer's first use of the software. (Sections 112 and 209)

- The license is **not enforceable** unless the consumer manifests assent to it after having had an opportunity to review it. (Sections 112 and 209)

- The consumer has a right to a **cost-free refund** if it refuses the later contract terms. This right pertains to cases where the consumer refuses contract terms and exists until the consumer assents or declines assent. (Section 209) The right to a refund here does not affect the consumer's **right to refuse the software and obtain a refund** if the software is defective.

- The consumer has a right to recover costs, if any, that result from having to restore its system after having refused contract terms. (Section 209)

- The license is **not effective** to alter any terms previously agreed to between the parties to the license. (Section 209)

- The terms of the license are **not enforceable** if unconscionable or if they conflict with a state's fundamental public policy. (Sections 209 and 111; and Section 105)

- Even if the consumer agrees to the license, local consumer law continues to apply as before UCITA. (Section 105(c))

4. **Implied warranties**.

Questions 1, 3 and 6 involve warranties. Implied warranties under common law in this context are not developed. UCITA provides statutory implied warranties of merchantability and fitness in a similar manner to UCC Article 2. For example, if a licensor has reason to know of any particular purpose for which the information is required and that the licensee is relying on the licensor for experience, there is an implied warranty that the information will be fit for that purpose unless, from all the circumstances, it appears that licensor was to be paid for the amount

of its time or effort regardless of the suitability of the information, in which case, the implied warranty is that there is no failure to achieve the licensee's particular purpose caused by the licensor's lack of reasonable case and workmanlike effort to achieve that purpose.

In addition, UCITA provides additional implied warranties such as a new implied warranty which focuses on the accuracy of data provided under a contract. The basic warranty states: ". . .a merchant that, in a special relationship of reliance with a licensee, collects, compiles, processes, provides or transmits informational content warrants to its licensee that there is no inaccuracy in the informational content caused by the merchant's failure to perform with reasonable care." Note that this warranty does not guarantee that there will be no inaccuracies; rather it gives protection by assuring that there will be no inaccuracies caused by a failure to use reasonable care. UCITA also provides a new implied warranty of system integration. Section 405(c).

As provided in UCC Article 2 for goods, implied warranties can be disclaimed. However, in a consumer contract, the disclaimer must be conspicuous. This is a similar rule to that under Article 2 for goods.

Again, UCITA does not alter existing consumer law. If conduct allowed by UCITA might constitute deceptive practice under state law, the deceptive practice law governs.

B. Federal Preemption

Section 105(a) of UCITA explicitly provides:

> "(a) A provision of this [Act] which is preempted by federal law is unenforceable to the extent of the preemption."

Thus, federal preemption by copyright law, E-Sign or unfair practices law (including regulations) override UCITA and govern contracts under it. To the extent the FTC undertakes to exercise its regulatory authority or to enforce its statutory prerogatives, the action or rules would be preemptive of state laws that conflict.

C. Conclusion

In conclusion, we believe there is little role for the federal government to play at this juncture (Question 7b). The area is undergoing development, and default legislative rules rather than mandatory legal rules seem appropriate. UCITA is such a statute, while still providing guidance and thus some certainty to facilitate continued development. UCITA may not be the ultimate product; it is undergoing debate, and development, in the states, as the experience in Maryland and Virginia demonstrates. That process should be allowed to continue; a firm mandated federal rule at this point would not necessarily represent a consensus, and could inhibit

development. We believe the Commission should study the area, as it is doing, and monitor development, but that present action by rule, or recommendation to amend Magnuson-Moss, or otherwise, would be unwise. We, of course, would consider any views of the Commission, developed after study and hearing from all interested groups.

I have responded separately to your item 14 on UCC Article 2; that Article still is in the process of formulation.

If I can provide further information, please let me know.

Sincerely,

Fred H. Miller
Executive Director, National Conference of
Commissioners on Uniform State Laws

c.c. John McClaugherty
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Letter to Secretary FTC by C Ring.wpd

CASES UPHOLDING SHRINKWRAP AND CLICK-WRAP LICENSES

- ***4 Federal Circuit Court Cases*** ***(Supreme Court did not grant certiorari)***
- ***10 Federal District Court or State Appellate Court Cases*** ***(New York, Washington, New Jersey, North Dakota, Massachusetts, Florida, Arizona, Rhode Island)***
- ***ZERO*** ***cases since 1993 to the contrary.***

- ❒ ***ProCD, Inc. v. Zeidenberg,*** 86 F.3d 1447 (7th Cir. 1996) (contract enforceable; limits use of database to consumer purposes only)
- ❒ ***Compuserve Inc. v. Patteron,*** 89 F.3d 1257 (6th Cir. 1996) (contract treated as valid without discussion; enforces choice of forum terms in online license)
- ❒ ***Hill vs. Gateway 2000 Inc.,*** 105 F.3d 1147 (7th Cir. 1997) (contract requiring arbitration enforceable based on use of computer without objecting to contract terms)
- ❒ ***Brower v. Gateway*** **2000, Inc.,** 676 N.Y.S.2d 569 (NY AD 1998) (contract enforceable based on use of computer without objecting to terms; part of particular arbitration clause unconscionable)
- ❒ ***M.A. Mortenson Co., Inc. v. Timberline Software Corp.***, 970 P.2d 803 (Wash. App. 1999) (license enforced when it followed purchase order; "Reasonable minds could not differ concerning a corporation's understanding that use of software is governed by licenses containing multiple terms.")
- ❒ ***Caspi v. The Microsoft Network, L.L.C. et. al.,*** 323 NJ Super. 118, 732 A2d 528 (N.J. Super. A.D. 1999) (click agreement enforced; choice of exclusive forum in on-line contract governs)
- ❒ ***Hotmail Corp. v. Van$ Money Pie, Inc.,*** 47 U.S.P.Q.2d 1020 (N.D. Cal. 1998) (online terms of service enforceable)
- ❒ ***Rudder v. Microsoft Corp.***, Ontario Superior Ct., (Oct. 8, 1999) (click agreement enforced; choice of exclusive forum in on-line contract governs based on click acceptance)
- ❒ ***Green Book Int'l Corp. v. Inunity Corp.,*** 2 F. Supp. 112 (D. Mass. 1998) (enforceable shrink wrap gave greater rights of distribution)
- ❒ ***Micro Star v. Formgen, Inc.***, 942 F. Supp. 1312, aff'd 154 F.3d 1107 (9th Cir. 1998) (lower court enforced online license; appellate court held that either the license barred the conduct or there was no license to prevent claim of infringement).
- ❒ ***Management Computer Controls, Inc. v. Charles Perry Const., Inc.***, 39 UCC Rep Serv 2d 1162 (Fla. App. 1999) (forum selection clause in shrink wrap license enforced)
- ❒ ***Arizona Retail Sys., Inc. v. Software Link, Inc.,*** 831 F.Supp. 759 (D. Ariz. 1993) (one contract not enforced; but other shrink wrap enforceable where conditional nature of deal clear)
- ❒ ***Storm Impact, Inc. v. Software of the Month Club,*** **1998 WL 456572 (ND Ill. 1998)** (fair use not present where online terms limited use to non-commercial uses)
- ❒ ***Groff v. America Online, Inc.,*** 1998 WL 307001 (R.I. 1998) (user bound by contract selection of law in online license)
- ❒ ***Rinaldi v. Iomega Corporation***, 1999 WL 1442014 (Del. Super.) (A disclaimer of implied warranty for Zip drive contained inside the packaging is effective)

- ❒ ***Levy v. Gateway 2000, Inc.***, 33 UCC Rep. Serv. 2d 1060, 1997 WL 823611 (N.Y. Sup.) (With respect to an arbitration clause, had an opportunity to accept the accompanying terms by returning the product)

There are several cases cited as contrary, but that can be distinguished:

Step-Saver Data Sys., Inc. v. Wyse Technology, 939 F.2d 91 (3d Cir. 1991) (shrink wrap not enforceable in a "battle of forms", i.e., offer and counter- offer, context)

Arizona Retail Sys., Inc. v. Software Link, Inc., 831 F.Supp. 759 (D. Ariz. 1993) (follows Wyse as to one shrink wrap agreement, but enforces other where prior agreement conditional)

Vault Corp. v. Quaid Software, Ltd., 847 F.2d 255, 260 (5th Cir. 1988) (lower court held license invalid as contract of adhesion; Fifth Circuit does not review that issue, but focuses on preemption in the absence of a contract); *Klocek v. Gateway, Inc. 2000* WL 967459 (D. Kan.) ("battle of forms" case under 2-207; no notice of additional terms, and no express consent to the additional terms)