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September 8, 2000

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

Re: High-Tech Warranty Project -- Comment, P994413

Dear Secretary:

I am writing in response to questions the Commission has asked regarding licensing computer software and other digital products.

By a separate cover, I have provided commentary concerning the role of licenses in the economy and the legal and other justifications for licensing computer information and articles relevant to the questions asked.

In reviewing the questions the Commission has asked, one topic for consideration concerns the Uniform Computer Information Transactions Act. The attached statement deals generally with the policies and approach of that Act. I hope that this submission will assist the Commission in its deliberations.

This is a complex and vitally important area of commerce. If I can be of any further assistance, please contact me.

Yours Truly,

Raymond T. Nimmer
Leonard Childs Professor of Law

STATEMENT OF RAYMOND T. NIMMER
Leonard Childs Professor of Law
University of Houston

Regarding:
High-Tech Warranty Project -- Comment, P994413

UCITA: A commercial contract code

CONTENTS

I. INTRODUCTION

Scope of the FTC Inquiry.

Let me begin by stating a few fundamental concerns about the nature of the issues engaged by the FTC proceedings concerning warranties in high technology contexts and their possible implications.

The basis for this proceeding is the Magnuson-Moss Warranty Act. That Act deals in a narrow manner with disclosure and descriptive rules in cases where a seller of tangible products makes an express warranty. The Act applies only to tangible consumer products. Whether some computer information should be treated as a tangible product for purpose of this federal law is a reasonable question to address from the perspective of federal policy. Yet, the scope of the present inquiry goes far beyond questions of dealing with these difference and that issue. It contemplates, instead, a wide-ranging inquiry into contractual practices in the computer information industries.

One question asked is whether licenses are "warranties" for purposes of the Act. As I have described in other submission, licenses of digital information deal with a wide range of issues. While they may include warranties, licenses are not warranties under the Magnuson-Moss Warranty Act. But again, the narrow question of how far the Act does or should extend into this sector is reasonably addressed at the federal level.

I am not comfortable with, nor do I understand, however, why the FTC, a federal agency, is targeting for inquiry a broad area of state contract law questions that have traditionally involved state concerns under our federal system. In fact, I have not seen or heard an explanation for why broad federal reconsideration of state contract law might be appropriate. If any explanation were given, it should also include a reason for why federal focus on regulation in the information industries is appropriate in a manner that has never been undertaken in reference to contract law regarding sales of goods, leases and provision of services. Either the Commission should elect to take over *all* contract law or it should recognize that, except for narrow areas of established federal concern, contract law is a state law concern. If it seeks to cover all contract law, then the Commission must realize that it is undertaking a fundamental revision of the relationship between states and the federal government.

Nor do I understand the breadth of the inquiry in an area of commerce that has generated unprecedented economic growth that benefits consumers in an manner that far exceeds any previous commercial context **and** that has **not** resulted in any significant number of reported consumer law cases about warranty issues. The modern information economy emerged from a free market. The questions raised by the Commission appear to assume a need for regulation. I hope that this is not the assumption being followed because there is no reason for it. When the Magnuson-Moss Warranty Act was promulgated, there were visible abuses and widely reported judicial concern about warranties in the consumer goods context. There were numerous decisions dealing with abuse in to consumer purchases of defective goods. In the computer information industries, that pattern is entirely lacking. Instead, there are statements by some academics and some administrators alleging without empirical support that practices in this industry create consumer confusion and over-reaching by publishers These undocumented statements cannot be an adequate basis for revising state law and for changing the entire basis of federal-state law relationships in commercial law.

UCITA and State Law.

This being said, one issue on the Commission's agenda concerns the Uniform Computer Information Transactions Act (UCITA). In a two-day forum, the Commission apparently hopes to generate information and make decisions about a subject matter that has occupied bar association committees, hundreds of lawyers, and several drafting committees of the National Conference of Commissioners on Uniform State Laws (NCCUSL) for over ten years.

That is not realistically possible.

Yet, to the extent possible, the Commission should receive the benefit of the insights from those ten years of discussion relating to state law which led NCCUSL to approve UCITA and recommend it for adoption by the states by an over-whelming vote and that led to enactment of UCITA in Virginia and Maryland, the first states to consider it. UCITA is supported by trade groups representing thousands of companies and by individual companies in the information industries, as well as by various companies not in the information industries and who are primarily licensees of computer software. No information industry sector, including the entertainment industries, cable, and broadcast industries, opposes UCITA.

As the depth and breadth of this support indicates, UCITA makes important improvements and provides significant guidance in contract law for the computer information age, including for electronic commerce in information. The support has grown despite vocal opposition that often contains distortions that portray UCITA as something other than what it is - a commercial contract code for the information age ***based on the premise of freedom of contract***.

II. UCITA POLICIES: GENERAL

Our economy has experienced fundamental change: the information revolution. Information and information services are the center. Among the changes that this causes is a diverse array of methods of distributing and tailoring digital information to form information products and resources that fit the modern marketplace. Many of these rely on contract terms to fit the product to the market. UCITA responds to the fact that fundamental economic change demands reconsideration of commercial contract law to tailor it to this new subject matter and this new market. Article 2 works well for sales of manufactured goods, but was developed fifty years ago for goods, not for commerce in computer information. The NCCUSL, Virginia and Maryland votes strongly endorse the purpose of UCITA which is to develop contract law sensitive to computer information as subject matter and how that purpose is implemented in UCITA.

Sales of goods are different from transactions in computer information. There are different expectations, different industry practices, different substantive policies, and different commercial background. Transactions as different as these should not be governed by contract law based on the images and patterns of one type of transaction to the exclusion of the other. UCITA is the first general state contract law to address the subject matter of the information economy.

A core policy of UCITA is that the purpose of commercial contract law is to facilitate and support commerce. A competing policy, rejected in the UCC and UCITA, is to have contract law regulate and restrain commerce. Many opponents of UCITA from which the Commission will hear essentially distrust contracts and markets. Yet, comprehensive regulation serves no one. Faced with the options, the flow and the dynamism of the information economy, a contract law that attempts to regulate contracts cannot succeed. Even if it could, the effect would hinder, rather than support commerce in this vibrant new economy.

How can commercial contract law facilitate commerce? In UCITA, the basic approach is that:

- contract *choices* should determine contract rights;
- contract rules which apply in the absence of contrary agreement must be *relevant* to their context; and
- contract law should aim for *clarity and uniformity*

Contract choice.

Contract choice means that terms and effect of a contract are determined by the agreement, rather than by regulation. This is stated in Section 113(a): "[with listed exceptions, the] effect of any provision of this [Act], including an allocation of risk or imposition of a burden, may be varied by agreement of the parties." UCC Article 2 has the identical rule.

In a world where agreements control, statutes and other law do not regulate relationships. Contract law gives background rules that govern *only* if the agreement does not otherwise provide. Thus, UCITA rules, as with other commercial contract law, fill gaps, but do not mandate outcomes. This is long-standing contract law policy and also generally applies in copyright law.

But some rules of law do restrict the enforceability of agreed terms. UCITA does not eliminate these rules:

- It adopts the doctrine of unconscionability.
- It does not alter consumer protection law.
- It provides that common law on fraud, duress and the like remain effective.
- It does not alter competition and antitrust law.
- It does not alter intellectual property law.
- It does not alter trade secret law.
- It does not alter federal law.

UCITA deals only with contracts and adopts rules that, in the most part, follow the results of the better reasoned court decisions and business practices relating to computer information transactions.

Relevance.

UCITA follows a principle set out by Llewellyn and Gilmore: commercial contract law for the major parts of our economy should be tailored and relevant to the type of transactions to which it relates. A body of law based on images about the sale of horses was not relevant to transactions in manufactured goods. A body of law based on images about sales of manufactured goods is not relevant to transactions in computer information.

Wrongly tailored rules may not always yield wrong results in litigation, but they do not give coherent guidance to courts or transacting parties because they reflect the wrong view of the particular transactional world. They hurt commerce and the economy, rather that supporting it.

UCC Articles 2 and 2A assume that the focus of a contract is a physical item tendered and received. For computer information transactions, however, the focus is not the tangible disk, but the information. Rules of contract law focused on the wrong "thing" are not well-designed to be relevant to commercial activity. Indeed, even the fact that Article 2 might apply to software at all is an artifact of a case law trend that gives Article 2 an effect that contradicts Llewellyn's idea for Article 2 as tailored rules

for ***sales*** of manufactured ***goods***. UCITA sets that aright with respect to the central commercial subject matter of the information economy: computer information.

Many computer information transactions deal with informational content. This is the information we read, listen to, and see. Contracts relating to content entail contract issues that may implicate first amendment and information policy concerns. Reconciling these policies is important. Article 2 does not even acknowledge the issue. UCITA acknowledges the issue and provides rules that set a basis for reconciling the fact that information is both speech and commercial subject matter.

UCITA establishes rules relevant to the type of transactions that occur in computer information. Article 2 presumes that the focus centers on sale and delivery of a tangible product, title to which passes on delivery along with unrestricted rights to use it. In contrast, most computer information transactions are licenses or online access contracts. In a license, the transferee's rights are conditional, rather than unrestricted. Access contracts do not involve any delivery of anything tangible. Both often involve an on-going relationship, at least in that the transferee's use of the computer information over time remains subject to the license.

Despite the fact that software licenses involve trillions of dollars of commerce, some continue to cite old copyright case law to argue that one cannot license software, but only sell copies. Modern courts have had no trouble with rejecting this claim; they routinely recognize that licensing computer information is a legitimate way to allocate rights in it (expanding or reducing permitted uses as compared to a "first sale"). For example, the Court of Appeals for the Federal Circuit was asked to determine whether a software licensee was the owner of a copy of the program. The answer is easy under Article 2, were it to apply: delivery transfers title. The Federal Circuit rejected that rule and held that the deal did not transfer ownership of the copy since the license contained use restrictions that were materially inconsistent with ownership of a copy.

The models of Article 2 are often not relevant to computer information transactions. No one can seriously doubt that a contract giving me online access to your database is a license and not a sale of goods. Consider a contract for on-line access to the Wall Street Journal database of articles over a one-year period, a contract to provide data processing, or a contract for a multimedia encyclopedia that is automatically updated electronically. Do these resemble a sale of a toaster or a chair? Of course not.

Commerce in computer information involves transactions that differ in substance and expectation from those in the world of sales of goods. UCITA adopts default rules tailored to transactions in computer information.

Clarity and Uniformity of Law.

The law applicable to computer information transactions without UCITA is an unclear mixture of various forms of inconsistent state common law, UCC Article 2 and UCC Article 2A. That situation creates costs and risks in an industry whose ordinary business practice spans state and national boundaries. One purpose of UCITA is to clarify and make certain the applicable law in order to reduce those costs and facilitate commerce.

Some academics allege that software is within and expected to be within Article 2 on sales of goods. But this is the political positioning of persons who have agendas other than those centered on facilitating an economy that benefits all, including consumers.

UCITA clarifies contract law applicable to computer information transactions. A complex mix of common law and Article 2 governs computer information transactions. It fails to give clarity for many of the most important legal issues: What law applies? How is assent obtained? What warranty obligations exist? How are implied obligations disclaimed or limited? What is the applicable standard of performance? What is the obligation of an access contract provider? What, if any, assurances are implied with respect to infringement? Does title to a copy pass to the licensee in a license? What standards apply to the transferability of a license? Is exceeding a license a breach of contract? What limits apply to electronic remedies for breach? etc.…..

If Article 2 were governing law, which it often is not, a party could answer *some* of these questions. But Article 2 does not apply to many computer information transactions; when it does apply, it does not give appropriate answers to many questions. Common law varies widely among states. A *Restatement* of contract law exists, but is not consistently followed. Different legal traditions in different converging areas of information practice yield unpredictable results.

The cost of uncertainty is large. UCITA reduces that cost.

The need for clarity is vivid in electronic commerce. Online systems have changed how transactions occur and many information transactions are performed. Yet, many issues in contracting online are unanswered. A modern contract law must provide guidance on those issues and many others; failure to do so does not foster, but impedes commerce in computer information.

Furthermore, there is a need for a *uniform* approach to issues pertaining to commerce in computer information, which need UCITA addresses. The risk of inconsistent and conflicting approaches sometimes adopted in a haphazard manner is not only a threat, it is already occurring. The European Union is developing contract rules for electronic commerce that in many respects conflict with U.S. Over forty states have enacted some electronic commerce legislation, whose terms are often inconsistent and difficult to find. Left without uniform guidance, state laws are often not parallel or attuned to the multistate nature of information commerce.

Contract law pertaining to electronic commerce and to commerce in computer information will be recast during the next several years. UCITA offers the potential that this will be done in a coherent and uniform manner, rather than in idiosyncratic legislation the cost of discovering and complying with which will be huge.

III. CONTRACT RULES: SELECTED ISSUES

Scope of UCITA.

UCITA applies to computer information transactions.

This includes software transactions, but also other types of transactions where the subject matter includes information that is in, or is to be provided or created in, a form directly capable of being processed in or received from a computer. UCITA thus applies to licenses or sales of software, licenses or sales of computer games, contracts for multimedia products, contracts for online database and information systems, and other forms of computer information transactions. UCITA applies to the core of the modern digital information economy.

Because UCITA is the first uniform commercial code applicable to its subject matter, the scope of the Act is carefully crafted to a narrow focus. For purposes of UCITA, then, the form of the information

is important. UCITA does not apply to print books, magazines, or newspapers or to transactions creating traditional records or motion pictures. UCITA does not apply to goods, such as television sets, cars, desks, or computers. If a computer program is embedded in goods, UCITA does not apply to the program unless the goods are a computer or peripheral, or obtaining the computer program is a *material* purpose of the transaction. The Act focuses on computer information.

Electronic Commerce.

Electronic commerce is a growing part of the economy with business-business transactions projected to reach over a trillion dollars annually within a few years. UCITA provides a balanced, clear structure for contracting electronically. That structure is consistent with recent federal legislation and with other uniform state law proposals which in fact originated in UCITA.

The goal in UCITA is to facilitate electronic commerce. There are a large number of issues involved in implementing that goal. UCITA deals with many that are not resolved elsewhere: choice of law, liability for informational content, treatment of standard electronic forms, defining what electronic terms are conspicuous, and describing the obligations of a provider in an access contract. UCITA also deals with basic contract issues for electronic commerce, including:

Technology of contracting. Are electronic records and signatures as effective as their written counterparts? UCITA answers this in the affirmative by making the electronic form equivalent to written forms.

Formation of contract: general. How are contracts formed electronically? UCITA makes it clear that a contract can be formed in any manner, including by conduct, sufficient to indicate assent. This follows Article 2. It is especially important to restate this principle for electronic commerce where indicia of assent can involve diverse means not previously used in commerce. Under Section 112, however, conduct by an individual indicates assent only if the individual had reason to know that the other person would view the conduct as manifesting assent.

Formation of contract: electronic agents. Parties in electronic commerce are increasingly using computer programs to create and perform contracts. This is a potentially significant breakthrough for consumers because it allows them to combine the scope of the Internet with the search power of computer programs to shop worldwide for terms and price.[1] UCITA describes these programs as electronic agents. UCITA provides basic clarifying rules that validate use of electronic agents and indicate under what limitations, the operations of electronic agents create binding obligations. These include:

- A person is responsible for its E-agent, subject to concepts of mistake and fraud.
- Operations of two E-agents may establish a contract.
- Interaction of an individual and an E-agent may create a contract, but the terms do not include terms given by the individual with reason to know that the E-agent could not react to them.
- E-agents assent to terms if they engage in operations that in the circumstances indicate acceptance.
- An E-agent has an opportunity to review a record only if the record is available in manner that would enable a reasonably configured E-agent to react to it.
- A term is conspicuous only if a reasonably configured E-agent could react to it.

[1] Lorin Brennan, *The Public Policy of Information Licensing*, 36 Houston L. Rev. 61 (1999).

Terms of a contract. The fact that a contract exists does not, in itself, indicate what are the terms of that contract. UCITA provides standards for when proposed terms are or are not adopted as part of the contract. The standards in UCITA give guidance to the party proposing terms and also set requirements that prevent the other party from being unfairly bound by hidden terms.

The basic rule is that, for assent to occur, a person must have an opportunity to review the terms and, after having had that opportunity, must engage in conduct that the person has reason to know will be treated as assent to terms by the other party. A person has an opportunity to review a record only if it is made available in a manner that ought to call it to the attention of a reasonable person and permit review. In essence, the terms must be available and their existence made apparent to a reasonable person. A person manifests assent to the terms by signing the record or by engaging in other conduct that indicates assent. On this issue, UCITA generally follows the Restatement (Second) of Contracts. Under current case law and UCITA, clicking on a button clearly indicated as showing agreement to the terms suffices. UCITA also provides rules that give guidance on how online availability of terms and proof of assent can be established.

Attribution. Who is responsible in a contract created electronically? UCITA gives the obvious answer: contract obligations are attributed to the person who individually or through an agent (including an E-agent) assented to the contract. UCITA makes clear that the burden of establishing attribution is on the person seeking to rely on it.

Choice of Law.

Determining which jurisdiction's law governs is important in all commercial transactions. Its importance increases for commerce on the Internet which routinely spans state and national borders and involves many small companies or individuals. UCITA provides a uniform, coherent and understandable framework for determining applicable law that provides needed clarity, especially in Internet transactions.

In many cases, the agreement specifies what law governs. In UCITA, as in current law and the *Restatement*, the agreement ordinarily controls. The ability to designate applicable law is one method of avoiding uncertainty and cost. There are limits on that ability. For example, in UCITA, a term that is unconscionable is not enforceable. A term that violates fundamental public policy of a state is not enforceable. ***In addition***, a choice of law term in a consumer contract cannot vary a rule that may not be varied by agreement under the jurisdiction's law that would otherwise apply.

Under current law, if a contract does not specify what law governs, choice of law rules are chaotic. There are two currently used *Restatements* whose rules conflict. There are different approaches among and within the states. The rules are often based on considerations appropriate to litigation, rather than to planning a transaction. The cost of uncertainty, especially in Internet, is huge.

UCITA has three rules that govern in the absence of agreement:

- In an Internet transaction for electronic transfer of information, the transaction is governed by the law where the licensor is located. This provides clarity. Any other rule would force Internet services to comply with law of all states and all countries - a literal and costly impossibility.
- In a transaction for physical delivery of a tangible copy to a ***consumer***, the governing law is the law of the state where the delivery was to be made. This reflects the most likely

expectation of the consumer and deals with cases where a licensor knows which jurisdictions it deals with because it sends a tangible copy into that jurisdiction.

- In all other cases, UCITA adopts the rule of *Restatement (Second) of Conflict of Law*: a transaction is governed by the law of the state with the most significant relationship to it. This rule adopted as a uniform approach in UCITA, while inexact, will eliminate the chaotic diversity that exists today.

Choice of Forum.

Many commercial agreements designate the forum in which lawsuits can be commenced. These contract terms serve an important purpose, especially in transactions that span multiple jurisdictions. UCITA follows modern case law and the approach of the Restatement choice of forum agreements are enforceable unless unreasonable and unjust. ***UCITA does not deal with the enforcement of terms that designate arbitration as the exclusive place of resolving consumer disputes.***

In the absence of a contract term, whether a party can be sued in any particular forum under U.S. law depends on the existence of contacts with the forum sufficient for purposes of due process and applicable state law. *In the few years in which the Internet has been a significant part of the culture, there have been over one hundred reported decisions dealing with jurisdiction on the Internet.*

In the face of the uncertainty indicated by this case law, contract choices have great importance. UCITA codifies the approach adopted by the U.S. Supreme Court and followed in subsequent state and federal decisions. An agreed choice of forum is not enforceable if it is unreasonable and unjust. This means that courts should invalidate choice of forum clauses if there is no valid commercial reason for the particular choice and the operation of the choice unjustly disenfranchises a party.

Warranties and Informational Content.

As a commercial subject matter, computer information differs from goods in many ways. Among these are the fact that many commercially valuable forms of computer information also call into play political and social values associated with free speech interests. An important task in law will be to establish an appropriate balance of first amendment policy and commercial practice for commerce in computer information. UCITA provides a carefully crafted structure within which the interests can be addressed in a flexible manner.

The issues fall into two categories.

The first deals with liability risk under warranty law. Here, UCITA distinguishes between computer programs and "informational content." Informational content refers to information intended in its ordinary use to be perceived by or communicated to a human being, the electronic equivalent of books, magazines, art, and the like. On questions of warranty, UCITA treats computer programs like Article 2 treats goods. Informational content, however, receives special treatment because it is here that First Amendment policy interests are the strongest. The basic approach is to avoid creating liability risk that might seriously hinder incentives to make this type of information available.

- ***Express Warranties:*** For computer programs, UCITA adopts the same rules as exist under Article 2 for goods. For informational content, under UCITA, express warranties are created (or not) under the same standards as apply today.
- ***Implied Warranty:*** For computer programs, UCITA follows Article 2 and creates an implied warranty of merchantability. It applies that rule even in cases in which under current

law no such warranty exists. For informational content, implied warranties in UCITA are tailored to protect the public interest in not having a chilling effect on speech by imposing too much liability risk. There is no implied warranty of accuracy or aesthetic merit for *published* informational content. For published information, the scales balance in favor of not creating implied liability because a rule creating liability without fault creates a significant chilling effect. UCITA thus clarifies that computer information publications are treated the same as their paper and celluloid counterparts for purposes of warranty and related liability. However, when information content is provided in a relationship of reliance on the part of a client, UCITA creates a new implied warranty that there are no inaccuracies in the information that were caused by the lack of reasonable care on the part of the information provider. In this, UCITA draws on and expands rules established for business consultants in the Restatement (Second) of Torts § 552.

This creates the correct balance. While there may be some difficult cases involving the need to draw lines between the two types of cases, this structure gives guidance to allow courts to achieve appropriate results.

Warranties for Computer Programs.

The UCITA warranty structure is tailored to the distinction between informational content and computer programs. For transactions in informational content, what I have said earlier about liability risk and information content applies. For computer programs, UCITA creates a warranty structure that parallels Article 2, but expands protection for licensees by creating a new warranty. The UCITA warranty structure for computer programs has three elements, all of which will be familiar to any commercial lawyer.

Express warranties. Under UCITA, express warranties are created by any statement or promise that becomes part of the basis of the bargain of the parties. This is the same rule in Article 2 and courts applying this standard will be able to use the rich case law background of under what circumstances an express warranty does, or does not, arise. UCITA, however, makes clear that express warranties can be created in advertising. That is not today a uniformly followed rule in the states, but UCITA's drafters believed, it is the better rule.

Implied and other warranties. UCITA warranties parallel Article 2, but *add additional* warranties. They expand, rather than reduce the licensee protections as compared to law under Article 2. They include:

- *Warranty of non-infringement:* This warranty follows the basic rules in Article 2 that there is an implied warranty that the program as delivered is free of any claims of infringement. The rules, however, provide better protection for a licensee who supplies specifications that the licensor follows in creating the product.
- *Warranty of non-interference:* Article 2 does not give this warranty, expressly rejecting what it describes as a warranty of quiet enjoyment. Article 2A does, however, use this warranty for leases. The warranty in UCITA, like that in Article 2A, is that there will be nothing caused by the licensor that interferes with
- *Implied warranty of merchantability:* UCITA creates an implied warranty of merchantability for all transactions involving a computer program transferred by a merchant. This is equivalent to the Article 2 merchantability warranty. The language of the warranty, however, has been tailored to reflect ordinary business expectations in computer program contexts.

- *Implied warranty of fitness:* UCITA establishes an implied warranty that the computer information will be fit for the licensee's particular purpose in circumstances that parallel those to which Article 2 might have applied. However, it recognizes that in transactions more analogous to services contracts, current law does not create a warranty of fitness. While, under current law, in such cases, there seems to be no warranty at all, UCITA expands licensee protection by creating a services-oriented obligation of a good faith effort to fulfill the licensee's purpose.
- *Implied warranty of system integration:* This warranty does not exist in Article 2 or in any other law. It is created in UCITA to reflect that in some cases, the implied obligation of a party is to put together a system that works together as a system.

UCITA follows traditional commercial law that implied warranties can be disclaimed but that express warranties generally cannot. The rules parallel Article 2 and Article 2A. They reflect the same policy. Implied warranties are a form of implied risk allocation and, when done in an appropriate manner, that allocation can be changed by agreement. Approximately eighteen states have modified the Article 2 rule allowing disclaimers; most changes relate to consumer cases.[2] Some states altered only a small part of the disclaimer rules, while others such as Maryland prohibit disclaimers in consumer cases. It can be expected that the policies reflected in these non-uniform laws will, if appropriate, be considered in reference to UCITA. The uniform law, however, follows the majority approach and there is a strong need to retain uniformity among states if possible. This same approach has been generally followed in both the proposed revisions of Article 2 and proposed revisions of Article 2A.

There has been some confusion about the relationship between disclaimers and situations where a product contains flaws that the licensor knows about. UCITA does not alter law on this issue. Indeed, in many cases, flaws in a program are not equivalent to there being a breach of the warranty of merchantability even when not disclaimed. Merchantability (in UCITA and in Article 2) merely requires that the program correspond in quality to ordinary programs of its type. The complexity of software makes creation of error free programs impossible under current practice. If the defects are more serious than are ordinary for the programs of the type, merchantability is breached if not disclaimed. If there is a disclaimer, failure to disclose a known, material defect may be fraud or may breach an express warranty.

Electronic Self-help

UCITA limits the licensor's electronic self-help.

It ***precludes*** electronic self-help in all mass-market transactions, including all consumer transactions. That is not the case in current law, where various state laws allow self-help, including electronically in consumer transactions.

In non-consumer transactions, UCITA establishes licensee protections that go beyond any current law. Most importantly, it provides that there is no right to electronic self-help unless the parties have specifically agreed a contract term that permits it. In other words, the capability to use electronic self-help hinges on agreement; under UCITA, it is not present in general law for licenses.

UCITA is the first statute to deal expressly with the issue. It chose to do so in order to restrict the ability to exercise a technological capability that might be abused.

Contract, Copyright and Fundamental Public Policy.

[2] *Quinn on Commercial Law* ¶ 2-316.

The second group of issues concerns defining the relationship between contract terms and the public interest in dissemination and use of information. This has been controversial and is complex. It involves a balance between two fundamental public policy interests. The need to deal with the balance of these interests will be a central theme in the digital information age, not likely to be fully resolved for a long time. Recognizing the importance of the issues, UCITA creates a flexible framework for dealing with them in particular cases. The framework rejects the idea that it is possible or even desirable to approach the question by attempting to create a list of prohibited and permitted terms.

The UCITA approach consists of three elements in addition to general contract law concepts associated with unconscionability and other doctrines.

1) UCITA expressly provides that the basic legal supports for evaluating issues associated with information policy remain in force. Section 114 states that UCITA does not supplant other law, including specifically the law of trade secrets and unfair competition, the sources of reverse engineering doctrine. Thus, for example, UCITA does not change the effect of a contract term that is made unenforceable by trade secret law; the term remains unenforceable under UCITA.
2) Section 105(a) provides that UCITA is subject to preemptive federal law, including the right of free speech or any copyright or patent law rule that cannot be altered by an agreement of the parties. If federal law precludes a particular contract term, that term is unenforceable. If federal copyright law mandates that certain rights cannot be changed by a contract between two parties, that mandate is not altered by UCITA.
3) UCITA creates a new rule, not found in any other contract law statute, that: "If a term of a contract violates a fundamental public policy, the court may refuse to enforce [it] 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." The official comments make clear that this is to strike a balance between fundamental interests in contract freedom and fundamental public policies such as those regarding innovation, competition, and free expression. The use of these general principles will enable courts to react to changing practices and technology, while specific prohibitions would lack flexibility and would inevitably fail to cover all relevant contingencies.

This framework accommodates the fact that contract terms relating to use of information come in many forms and arise in many different contexts. The context matters in evaluation of the contract term juxtaposed to fundamental public policy. For example, a term that prohibits any comment about a particular technology might be entirely appropriate in a one commercial context, but entirely inappropriate and unenforceable in another. The flexible approach in UCITA Section 105(b) allows courts to recognize and react to the differences.

The most visible impact of the digital information world is an explosive diversity of information resources that transcends anything society previously experienced. Yet, some fear that the digital economy will ultimately restrict the availability of information and they argue that contract should defer entirely to the copyright law. The basic premise is that as a matter of contract law, the rule should be that a policy choice made in copyright law cannot be altered by a contract term. If copyright law mandates that result, which it does not, UCITA as state law recognizes the preemptive effect.

The flaw in the argument is that copyright law and policy is built on an assumption that contracts will be used to disseminate information and to tailor transactions to fit the relevant market demand.

Contractual relationships associated with copyrighted and non-copyrighted information have been an accepted part of commerce for generations and frequently create or deny contractual rights in ways that are not identical to the property law rules of copyright or patent law.

There are several variations on the "property-dominant" theme, including:

- *Some* argue that contracts should be prohibited from establishing any rights or obligations that do not track copyright law. *But* copyright is property law and contracts here as elsewhere are one way in which property is used. At all levels of information distribution, contracts play an important role and very often entail contract obligations and restrictions that differ from the terms of copyright law.
- *Some* seek a rule that contracts cannot limit fair use of information. *But* fair use is a multi-factor defense in litigation to a claim of infringement of a property right. For generations, contracts have frequently established restrictions on use of information that differ from what copyright law would dictate. Examples *include:* contracts with respect to non-copyrighted technical, business and personal data (e.g., trade secret licenses, Dun & Bradstreet reports, mailing lists, privacy protection agreements) and contracts that reflect my right to not allow you access to my online computer system only if you agree to terms of access.
- *Some* argue that all transfers of copies of computer information should be treated as first sales of a copy, just as sales of books are treated. *But* even in the pre-digital world, Blockbuster Video routinely transferred copies without selling them. More to the point, no court considering the issue for computer information products has ever held that sales, rather than licenses, are required by federal copyright law. In this diverse marketplace, any such ruling would be to ignore the new economy.

These arguments propose a radical and regressive treatment of the market for information even when that market is burgeoning in ways that greatly expand the availability and richness of published information.

At a recent public hearing, a leading advocate of restricting the effect of information contracts stated that his clients' concerns were based on a desire to return to the patterns of the pre-digital world for distributing information. That was the world of books and newspapers sold in hard copies. But that world has been altered by the digital world and cannot be recaptured by law. A new and wondrously diverse market for digital information exists; the world is better for it because it creates so many new ways of acquiring, distributing and enjoying information that we can hardly keep up with the diversity. The desire to recapture or recreate the older world is understandable and predictable, but it is an impossibility and an undesirable goal.

IV. Standard Forms and Mass-Market Licenses.

Most commercial contracts and *all* online contracts are standard forms. UCITA generally treats a standard form contract as enforceable if a party assents to it. In UCITA, a party adopts the terms of the record (whether a standard form or not) as the terms of the agreement *only* if, having had an opportunity to review the record, the party manifests assent to it. The concept of "manifesting assent" comes from the Restatement, but its requirements are more fully spelled out in UCITA. It requires voluntary conduct undertaken with reason to know that the conduct will communicate an inference of assent to the other party. This theory distills decades of case law regarding assent to contract terms. By stating it in UCITA, planners can understand what needs to occur in contracting and courts can draw on that case law and develop a uniform standard, rather than relying on separately described doctrines in individual states.

Often, terms of a contract are established at the outset of the deal, before any performance occurs, but that is not always the case. All transactional lawyers have participated in deals where parties begin to perform before terms are agreed. The validity of this practice is acknowledged in Article 2 and in UCITA.

In the computer information industries, one form of this occurs in use of so-called shrink wrap licenses. These are situations where the terms of a license are contained either in the package or appear on screen when the software is loaded into the user's computer. In each case, the licensee is asked to assent to the terms of the license either by opening a package, clicking on a screen, or taking other action. Quite obviously, these contracts are used in numerous transactions throughout the software industry. Often, the contract is not between the retailer and purchaser, but between the publisher and the end user. The contract terms deal with warranties, remedies and various issues associated with use of the software. Often, the license gives the licensee a greater right to use the software than it would have received under a first sale of the program. Case law generally enforces such contracts. Similar contract practices also occur in other industries.

Under UCITA, these contracts are enforceable *only* if the method of their creation conforms to UCITA requirements. With respect to the general effectiveness of the contract, UCITA places three general preconditions and *also* sets out additional requirements for the mass market.

- A license is not enforceable unless the party had an opportunity to review the terms before assenting to them. There can be no opportunity to review the terms unless the party's attention is called to them and the party has a right to a refund if it refuses the terms. In a mass-market license, the right to a cost-free refund is a statutory right under UCITA.
- A license is not enforceable unless the party manifests assent to it. This requires conduct that occurs with reason to know that it will be viewed as assent to the contract terms.
- A shrinkwrap license provided after an initial agreement is not enforceable unless the parties ***had reason to know*** at the outset that terms were to be proposed later for assent. This is to ensure that the existence of a contract is not itself a surprise.

For those academics who prefer to ban this form of contracting, these procedural steps are not sufficient. They do, however, establish a context in which the idea of assent is meaningful in a manner consistent with general contract law.

In mass-market transactions (retail transactions), which include all consumer transactions and also business-to-business transactions in a retail market, under UCITA, license contracts are enforceable *only* if they meet the foregoing procedural rules and several additional rules consistent with current case law:

- The terms must be presented before or at the time of the licensee's first use of the computer information.
- If presented after an initial contact, the licensee must have had reason to know that terms would be proposed later.
- If the licensee refuses the license, it has a right to return the information for a refund.
- If the licensee refuses the license, the costs of return must be paid by the licensor.
- If the licensee refuses the license, it is entitled to any actual damages caused by installing the information for purposes of reviewing the license.

In addition, UCITA provides that the terms of the mass-market license ***cannot alter*** terms that have been expressly agreed to by the parties. In effect, the express agreement cannot be changed by the standard form.

Licensing in the mass market is an important commercial activity in reference to computer information transactions, and is increasingly important with the continued expansion of online information systems. Courts today enforce such contracts, subject to review under standards such as unconscionability, and subject to consumer protection law. UCITA follows this approach and creates a procedural overlay involving timing and a right to a refund designed to ensure uniform procedural fairness.

V. Consumer Protections

UCITA is a commercial code, not a consumer protection statute, but consumers are better off under UCITA than under current Article 2 or the proposed revisions of Article 2. UCITA retains existing consumer protection law, adopts the consumer rules from Article 2, and ***adds*** limited additional protections appropriate for issues associated with computer information transactions.

Because UCITA takes a moderate approach, however, it has been criticized both by those who desire broader consumer protection *and* by those who believe that all consumer protection issues should be left entirely to law outside a general commercial contract statute.

Whether one describes a particular rule as a consumer protection rule or not depends on one's image of what that term means. Many rules in UCITA and in general law benefit consumers. Consumer protection could be seen as an important element of the doctrines of unconscionability, good faith, and fundamental public policy. But these rules affect more than consumer transactions and respond to broader policies. So too the rule in UCITA and Article 2 that disclaimer of implied warranties in a record must be conspicuous, or 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. All of these and other rules benefit consumers but are not typically denominated as "consumer protection" rules. Yet, they contribute to the fact that UCITA creates a world in which consumers are better off than under current law.

While these rules protect consumers, a consumer protection rule is typically understood as a contract law rule that benefits a subgroup of all transferees and is expressly (1) limited to consumer transactions or (2) limited to transactions that include consumer transactions, but exclude a significant number of non-consumer contracts. In UCITA, this includes rules focused solely on consumers and rules for mass-market contracts, which include all consumer contracts.

The consumer protection rules in UCITA follow three rules:

- ***First, UCITA retains existing substantive consumer protection law in each state.*** This is made explicit in several places in UCITA, including Section 105 which provides that, except for stated rules on electronic commerce, if there is a conflict between UCITA and a consumer protection statute, the consumer protection law governs. The Magnuson-Moss Warranty Act is not affected by UCITA. The scope of that term is a federal law question. If the Act applies to software today, it applies to software after UCITA is enacted.

- ***Second, UCITA applies the consumer rules of Article 2 to transactions in computer information even though that is not true under current law.*** This applies to the implied warranties for computer programs under UCITA and the rules for disclaimer of warranty. Other rules include:

- Section 303: a 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 803: consequential damages for personal injury cannot be disclaimed for a computer program contained in consumer goods

- ***Third, UCITA establishes several consumer protection rules that do not exist under current law.*** These include:

  - **Section 816 (self-help):** electronic self-help cannot be used against a consumer or other mass-market transaction.
  - **Section 209 (mass-market license):** a mass-market license cannot alter terms expressly agreed between the parties and, if presented after delivery, licensee has cost-free right of return if it refuses terms.
  - **Section 109 (choice of law term):** contract term selecting applicable law cannot alter a consumer protection rule that would otherwise apply and that cannot be altered by agreement, nor can it alter application of a fundamental public policy.
  - **Section 214 (mistake):** a consumer has a right to avoid the effect of its mistake in an online contract if it acts promptly to avoid the effect of an electronic mistake.
  - **Section 304 (changes in terms):** a contract term for changing terms in a continuing contract requires that the consumer be given notice and a right to terminate when change is made.
  - **Section 409(b) (warranty coverage):** 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 805 (limitations):** the statute of limitations cannot be reduced by agreement
  - **Section 104 (scope terms):** a term changing the application of UCITA to the transaction must be conspicuous
  - **Section 503 (transfer of contract):** a term that prohibits transfer of a contract right must be conspicuous

IV. Summary

There is more to be said about UCITA and more that should be said to dispel the distortions that have become part of the political rhetoric. Yet, the text of the Act must and will speak for itself if actually read and applied. UCITA is a commercial statute. It expressly supports the idea that contract freedom is a basic tenet of contract law. It provides a solid, needed basis for information commerce.