

January 30, 2002

Dear President Hirshon:

At the 2001 Annual Meeting of the Association, the Board of Governors authorized the creation of a working group of ABA members to review the Uniform Computer Information Transactions Act (UCITA). After the Working Group was appointed in September 2001, the members worked very diligently to review and prepare an analysis of UCITA.

Attached is a report of the Working Group's activities, its analysis, and conclusions for the Board's consideration. Also, I have included a minority report and an addendum to the minority report from one of the Working Group's members.

The Working Group has worked very hard in a short period of time to accomplish its task. The Association should express its appreciation to the Group's members for its performance and professionalism. The majority and minority reports provide the Board with valuable insight into this important and developing area of the law. The Working Group members represent the best of the Association, and it has been a privilege for me to work with them.

Finally, I want to thank Alexa Giacomini of the ABA staff for her outstanding support during the past few months. She has made our job a lot easier to accomplish. She responded quickly to our requests and demonstrated initiative and a professional attitude at all times. Ms. Giacomini is a real asset to the Association.

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While the Working Group has submitted its report, if the Board desires the Working Group to perform additional assignments with respect to UCITA, we would be willing to aid the Association in any manner.

Respectfully submitted,

John M. Vittone

AMERICAN BAR ASSOCIATION WORKING GROUP REPORT ON THE
UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT (“UCITA”)

January 31, 2002

The following is the Report on UCITA, more formally known as the Uniform Computer Information Transactions Act, of the Working Group of the American Bar Association. This Report sets forth a general background discussion of UCITA and the role of the Working Group, a summary of the activities of the Working Group, a summary of the Working Group’s evaluation of UCITA, and a discussion of some of the Working Group’s specific areas of concern about the provisions of UCITA.

A. Background

UCITA is a proposed uniform state law governing transactions involving “computer information” (such as the licensing of computer software or data bases)¹ that was promulgated in the summer of 1999 by the National Conference of Commissioners of Uniform State Laws (“NCCUSL”).

Simply stated, UCITA is an enactment similar to Article 2 of the Uniform Commercial Code (the “UCC”). However, whereas Article 2 governs sales of goods, UCITA applies to licenses of computer software and other computer information transactions. A codification of the law governing computer information transactions was thought necessary since computer information transactions had become a significant factor in the national and even international economy. Moreover, publishers of computer software and

¹ The terms “computer information” and “computer information transactions” are new terms that are introduced by UCITA.

providers of information databases in electronic form usually “license” their products or access to their information, rather than selling or leasing the products or information outright. In many cases the distribution of the licensed products is through retail outlets that may sell or lease goods as well.

Initially, NCCUSL and the American Law Institute (“ALI”), the co-sponsors of the UCC, attempted to address computer information transactions by revising the UCC. That effort, which started in the 1980’s and developed into a draft Article 2B, encountered a number of difficulties, not the least of which was the challenge of reconciling the expressed needs of the software publishers and others in the computer information industry with objections by end-users to certain practices being engaged in by that industry. In the mid 1990’s, the dynamics of the negotiations between the two sides changed as a result of several court decisions favorable to the industry, including *ProCD, Inc. v. Zeidenberg*, 26 F.3d 1447 (7th Cir. 1996). That case upheld the validity of a so-called “shrink wrap” license, *i.e.*, a license agreement that is inside a retail software package and becomes binding on the customer as soon as the customer tears open the plastic or cellophane “shrink wrap” of the package.

In 1999, the ALI stepped away from the project. (The Working Group has been told that the ALI was concerned about the proposed act’s scope and its overall coherence and clarity.) NCCUSL then elected to continue on its own and to complete the proposed act as a free-standing uniform law - - UCITA - - not encompassed in the UCC.

During the drafting process and since UCITA’s promulgation in July, 1999, UCITA has been controversial. UCITA has been enacted, with some non-uniform variations, in two states, Virginia and Maryland. Similar legislation has been proposed, but not adopted, in a number of other states. However, several states have enacted so-called “bomb shelter” legislation that

declares choice of law and choice of forum provisions of a contract purporting to be governed by UCITA to be void and unenforceable, as contrary to the state's public policy, if one of the parties to the contract is a resident of the state. In addition, the merits of the statute have been debated among industry members, user and consumer groups, among academicians and within the practicing bar. Members of the National Association of Attorney Generals have also expressed concerns.²

NCCUSL has not yet sought "approval" of UCITA by the House of Delegates, even though the Working Group understands that an existing agreement between the ABA and NCCUSL provides that uniform acts promulgated by NCCUSL are to be submitted to the ABA House of Delegates "as soon as practicable." Consequently, the ABA has not yet taken a position on UCITA. This is the case despite the fact that four Sections of the ABA were represented by advisors appointed to the drafting committee.

In the summer of 2001, the Tort and Insurance Practice Section (TIPS) submitted to the House of Delegates a recommendation that the ABA issue a resolution opposing the enactment of UCITA by the various states. In its accompanying report, TIPS listed a number of the provisions of UCITA with which critics of UCITA have taken issue. The recommendation and report evoked such controversy that the Board of Governors created the Working Group to evaluate UCITA and to submit this report to the Board of Governors.

B. The Activities Of The Working Group

The Working Group consisted of Judge John Vittone, as Chair; Scott Atlas (Houston), Donald Cohn (Wilmington), George Graff (New York City), Michele Kane (Los Angeles), Marvin Karp (Cleveland), Riva Kinstlick (Newark), Susan Barbieri Montgomery (Boston) and Edwin Smith (Boston). Several of these individuals were already extremely familiar with UCITA and

² Indeed, thirty-three state attorney generals have signed a letter expressing opposition to UCITA.

the details of the controversies that UCITA had evoked. The remaining members of the Group had only limited knowledge of UCITA.

The Working Group began its work by holding a series of three-hour telephonic tutorials, in which those members who were knowledgeable about UCITA guided the other members through UCITA's provisions, section by section, while explaining their understanding of what the numerous sections mean or were trying to say. (Devoting such a lengthy amount of time to being led by "tutors" through the provisions of a proposed statute may seem to some to have been an extraordinary exercise for a group of mature and experienced lawyers. However, the necessity for doing so points up one of the principal problems with UCITA which will be described more fully below: its complexity and lack of clarity.)

On November 15, 2001, the Working Group met for a full day in Washington, D.C., to discuss certain of the more controversial provisions of UCITA. The Working Group then attended, for the next two and a half days, a large meeting convened in Washington, D.C., by the NCCUSL UCITA Standby Committee. That meeting consisted of oral presentations and debate with respect to more than eighty proposed amendments to UCITA that had been offered by a large number of groups, organizations, companies and individuals. The members of the Working Group attended strictly as observers.

In December, 2001, the NCCUSL Standby Committee issued a report detailing the recommendations that it planned to make to NCCUSL with respect to the proposed amendments. Those amendments, the Working Group understands, will be presented to NCCUSL for approval at its annual meeting in the summer of 2002.

On January 12 and 13, 2002, the Working Group met again in Washington, D.C., to evaluate provisions of UCITA further. That meeting was followed by an additional three-hour conference call.

This Report is the result of that effort.

C. The Working Group's Evaluation of UCITA

The Working Group concurs with the proponents of UCITA that it is desirable to have a uniform law, with uniform enactment in the various states, that would set forth legal rules governing the licensing of and other transactions in computer software and other computer information. The Working Group also agrees with proponents of UCITA that UCITA presently contains a number of provisions that will be beneficial to many parties that deal in software and other computer information. The Working Group further appreciates the hard work, good will and desire to achieve consensus shown by the drafting committee and by NCUSL. These efforts are reflected in the several additional modifications to UCITA that were proposed by the Standing Committee in November. Nevertheless, the Working Group has concluded that, even with these modifications, UCITA raises a number of critical concerns that should be addressed by NCCUSL.

D. Specific Areas of Concern

The areas of greatest concern to the Working Group are discussed below. In each instance, we have attempted to give general background, a description of UCITA's approach to the issue involved, a summary of the Working Group's concerns, and the Working Group's suggestions as to how the particular concern might be addressed. We conclude with some miscellaneous additional suggestions which, given the limited time available to the Working Group, is not intended to be an exhaustive list. It should further be noted that the following discussion assumes that all of the changes to UCITA recommended by the Standing Committee in December will be adopted. If that assumption proves to be incorrect, the Working Group would have still other areas of concern.

1. Clarity and Ease of Use

Background. The Working Group's principal concern with UCITA, as presently drafted, is that it is extremely difficult to understand. One underlying reason for this is that computer information transactions impact on several areas of the law, such as intellectual property law, commercial law as embodied in the UCC, consumer protection laws and the like, as well as on the practices of numerous industries. Moreover, the transactions themselves are constantly changing as technology and industry practices evolve. These factors all contribute to differing expectations among parties to those transactions, especially when industry practices have developed more rapidly than the expectations of consumers or the general public.

UCITA Approach. UCITA attempts to address this area of the law audaciously by trying to cover virtually every issue of concern, whether raised by industry or consumer groups, while not cutting back on scope. In areas of controversy, UCITA offers some novel solutions, often moving beyond codification of existing law and practices. In addition, UCITA has attempted to reach consensus by using general language that might support differing positions. At times the general language differs from similar language used elsewhere in UCITA, raising the question as to whether a different meaning is intended (e.g., "general public as a whole" versus "general public including consumers"). In areas where consensus with a particular industry was not reached, that industry was excluded from the statute. However, the definition of the "excluded" industry adds to the complexity of UCITA, especially with regard to scope. The "Comments" try to amplify the "black letter" rules, but in several instances the "Comments" go beyond, or are inconsistent with, what the "black letter" rule provides (e.g., Comment 3 to UCITA § 501 states that a program "identified to the contract" should be interpreted in the light of UCC Article 2's use of the term, but then provides

examples where the result would differ from UCC Article 2 with respect to work in process).

Working Group Concerns. The result of this approach is a very complex statute that is daunting for even knowledgeable lawyers to understand and apply. The text, which consists of “black letter” rules (or “sections”), together with the extended “Comments”, is lengthy and filled with terminology that is largely unfamiliar to the average reader, necessitating lengthy definitions of those terms. These initial hurdles are then exacerbated by the general organizational structure of the statute and the manner of presentation. For example, in far too many instances it is impossible to understand a “rule” simply by reading the section that supposedly sets forth that rule. Instead, the reader must wend his or her way not only through some intricate prose, but also through a number of other sections that are cross-referenced in the rule. In addition, the text frequently suggests that there are other sections that may affect a particular rule (and which therefore should be considered), but which are not specifically referenced (e.g., “pursuant to the applicable sections of this [Act], including Section 209, 211 and 102(a)(57)”). Consequently, many of the “black letter” rules come across as convoluted and, at times, inscrutable. Time and again, when the Working Group attempted to consider the substantive merits of a UCITA concept or provision, the Group had first to parse through the language word by word and clause by clause, only to realize, in the end, that the individual members of the Group could not agree on what the particular section said or meant.

Accordingly, the Working Group is concerned that UCITA, as presently drafted, would not achieve the principal objective that a uniform law is expected to achieve, namely, the establishment of a high level of clarity and certainty in a particular area of the law. To the contrary, the Working Group is concerned that if UCITA, in its present form, goes forward, there would be

considerable controversy and litigation over what its various “rules” really mean.

Working Group Suggestions. Bearing in mind the desirability for a coherent uniform body of law in this area and for predictability in the legal rules that govern the affected transactions - - while, at the same time, being appreciative of the enormous amount of well-intentioned effort and thought that has gone into developing UCITA to this point - - the Working Group believes that UCITA should be redrafted to make it easier to understand and use. The redrafting effort should include reducing intuitive definitions, eliminating ambiguities and inconsistencies, and seeking more organizational and stylistic clarity in the way in which the rules are written. The easier use resulting from such an effort would also facilitate the likelihood of wider enactment on a uniform basis.

2. Scope: Goods with Integrated Software.

Background. It is important for users of UCITA to know whether UCITA applies or does not apply to a particular transaction. One of the most difficult and challenging questions raised by UCITA is the extent to which UCITA should apply to software that is integrated into goods. For example, to what extent should UCITA apply to a home electronics device, such as a microwave oven or a VCR which contains built-in software?

UCITA Approach. UCITA addresses this issue by asking two questions: (1) whether the goods are a “computer” (which is defined as “an electronic device that accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions”) or a “computer peripheral” (which term is not defined), and (2) whether access to or use of the software contained in and sold or leased as part of the goods is “ordinarily a material purpose of transactions in goods of the type sold or leased.” UCITA §§ 102(a)(9) and 103(b)(1)(B). If either the “computer or computer peripheral” test or the “material purpose” test is met, then UCITA

applies to the software, and other law, presumably UCC Article 2 (sales of goods) or 2A (leases of goods), applies to the goods. If, on the other hand, either test is not met, the transaction is not governed at all by UCITA, but is instead governed by other law, presumably, once again, Article 2 or 2A.

Working Group Concerns. Members of the Working Group felt that this approach created uncertainties and was difficult to apply. The word “computer” is so broadly defined that any goods containing a computer chip might be construed to be a “computer”, raising the possibility that all transactions for consumer electronics devices and most transactions for commercial equipment would fall within the scope of UCITA. With respect to the second test, the word “purpose” suggests a subjective intent of one of the parties to the transaction. However, UCITA does not indicate which party’s subjective intent is relevant. Did the seller or lessor enter into the transaction with a “material purpose” of providing access to or use of the software to the buyer or lessee, or did the buyer or lessee enter into the transaction with a “material purpose” of gaining access to or use of the software from the seller or lessor? Moreover, for UCITA to apply, it is not necessary to show that the “material purpose” was the dominant purpose of the transaction, only that it was “ordinarily” a material purpose. If a consumer purchases a particular model of video cassette recorder (VCR) because of a function provided by a software program embedded in the VCR, is gaining access to or use of the software a “material purpose” of the transaction? If so, and if a number of consumers do likewise, is it “ordinarily” a material purpose of the transaction?

Although the Comments to UCITA attempt to explain how the “material purpose” test should be applied to particular transactions, the Working Group is not confident that the Comments are consistent with the text in their conclusions. For example, Comment 3 to UCITA § 103 states that transactions in VCR’s are outside of the scope of UCITA. However, the

Working Group believes that the analysis mandated by the scope provisions of UCITA, together with a fair reading of the UCITA definitions, allows for the possibility of VCR's being within the scope of UCITA.

The Working Group recognizes that there may be no bright line to decide when goods with integrated software should be governed, even in part, by UCITA and that any formulation of a resolution will not be perfect.

However, it is the view of the Working Group that the line drawn by UCITA could be better formulated to meet normal and reasonable expectations of the parties. In particular, a buyer or lessee would be unfairly surprised by the application of UCITA to what would normally be viewed to be a sale or lease of goods. The surprise may arise, for example, if the purchase or lease contract contained a restriction on transfer that applied to the software governed by UCITA when that same restriction, when applied to the goods, would be void, as a matter of public policy, as an improper restraint on alienation.

Similarly, a better formulation would minimize, for transactions involving the sale or lease of goods with integrated software, the possibility of two different bodies of law -- UCITA and typically UCC Article 2 or 2A -- applying to a sale or lease transaction of a single product. Application of dual legal rules for a single product transaction would be especially problematic, given, among other things, the differing contract formation provisions and third party rights afforded by each set of rules.

Working Group Suggestions. The Working Group believes that a better approach, more consistent with buyer or lessee expectations, would be a formulation based on how the goods were marketed. When software is embedded in and marketed as an integral part of goods, many, if not most, people would consider the software to be part of the goods. UCITA therefore should not apply to the sale or lease of the goods. Rather, the sale or lease of

a microwave or VCR with embedded software should be governed by UCC Article 2 or 2A.

It would necessarily follow under this formulation that software could still be marketed with goods, so that UCITA would apply to the software but other law would apply to the goods. For example, software loaded onto a general purpose computer and licensed with the computer would be such a mixed transaction, with UCITA applying to the license of the software and other law applying to the sale of the computer. General purpose computers are designed to work with a variety of software configurations, none of which is “integral” to the computer and which are usually available for purchase without the software loaded on to the computer. Similarly, the license of software loaded onto an appliance after sale would be governed by UCITA, with other law governing the purchase of the appliance. Likewise, where software is marketed separately from an appliance but intended to be used with the appliance, the software license would be governed by UCITA while the transaction involving the acquisition of the appliance would be governed by other law. In most cases involving the sale or lease of the goods themselves, in contrast to the license of the software, the other law would be UCC Article 2 or 2A, which would apply to the transactions in the goods themselves.

Indeed, this approach is closer to what is suggested in Comment (4)(b)(3) to UCITA Section 103, which states: “This Act excludes a copy of the computer program if the copy is embedded in, inseparable from, and sold or leased as an indistinguishable part of goods.”

3. Scope: Professional Services

Background. Lawyers, accountants and doctors and other professionals may from time to time contract with a client or other party to provide professional advice in electronic form that may be accessed by the

client or other party. Certain of these professionals, in delivering their services, are held to standards mandated by law or by self-regulatory bodies.

UCITA Approach. UCITA applies to computer information transactions. “Computer information transactions,” as defined in UCITA §102, could include rendering professional advice in electronic form where delivery in that form is required by agreement. The term also includes support agreements, that are referred to in the Comment 4 to UCITA § 612 as “advice or consulting services relating to [computer] information.” UCITA § 103(d) excludes certain industries subject to other regulation, such as banking and insurance. Lawyers, accountants and doctors are not listed as being expressly excluded.

Working Group Concerns. The Working Group is concerned about the impact of UCITA on the existing regulatory standards for these professions, especially the impact of UCITA rules dealing with implied warranties. Some of the parties to transactions in these professional areas may not have been fully represented during the drafting process and would be surprised to find UCITA’s rules applying to their transactions.

Working Group Suggestions. The Working Group believes that the extent of UCITA’s application to the rendering of professional services should be clarified.

4. Scope: Opt-in

Background. Parties are generally free to agree to contractual terms unless the agreement is contrary to a statute or rule of law. Where a commercial law codification statute sets forth provisions, these provisions may typically be varied by contract between the parties unless the statute provides otherwise. That variation by agreement, however, may not normally affect the rights of a third party under the statute unless the third party consents.

UCITA Approach. UCITA § 104 allows for parties to a transaction not within the scope of UCITA to elect that their transaction be governed by UCITA, except for provisions that cannot be varied by contract under the law otherwise governing the transaction. The parties may also elect that the UCITA contract formation rules apply in lieu of the contract formation rules that would otherwise govern the transaction.

Working Group Concerns. The Working Group has two general concerns with UCITA § 104. The first concern is whether UCITA § 104 suggests a reach beyond mere freedom of contract between the parties. Consider a transaction involving the sale of widgets that have no built-in software. The transaction would normally be governed by UCC Article 2. Even in the absence of UCITA § 104, the buyer and the seller could agree that UCITA governed the transaction. Specifically, the parties could incorporate a reference to UCITA in their contract and provide that the contract should be interpreted in accordance with UCITA. Their agreement, of course, could not change any provision of UCC Article 2 not variable by agreement and could not change the rights of third parties, such as rights of creditors of sellers in possession of the widgets (UCC § 2-402) or of good faith purchasers of the widgets (UCC § 2-403). However, by providing such an elaborate “opt-in” provision in UCITA § 104 (where freedom of contract is in any event applicable), UCITA implies that the parties may by agreement change the characterization of the transaction itself from a transaction for the sale of goods to a transaction for the licensing of computer information. The further implication is that the characterization chosen by the parties would be binding on third parties, including creditors of the seller and good faith purchasers.

The second concern is UCITA § 104’s statement that the parties to a transaction not governed by UCITA may elect to have their contract formation rules governed by UCITA. The Working Group does not

understand how parties may agree to be bound by UCITA's contract formation rules without first forming an agreement under the contract formation rules otherwise governing the transaction. Consider once again the transaction involving the sale of widgets. If the buyer and the seller agree that their contract formation rules will be governed by UCITA, they must have reached that agreement under UCC Article 2's contract formation rules applicable to transactions in goods. The need for a further agreement that UCITA's contract formation rules are applicable would appear to be either irrelevant or superfluous.

Working Group Suggestions. UCITA § 113 already contains rules for variation by agreement between the parties. The Working Group believes that UCITA § 104 should be deleted.

5. Relation to Other Law: Tort Law and Unfair and Deceptive Acts and Practices.

Background. UCITA's provisions need generally to be coordinated with other laws to determine the extent to which other laws are displaced by UCITA. As a general matter, a commercial contract statute does not affect tort law or state statutes designed to protect the public from specified abuses in commerce.

UCITA Approach. UCITA contains a number of provisions designed to coordinate UCITA with other laws. One of those provisions is UCITA § 114(a), which follows UCC § 1-103. UCITA § 114(a), like UCC § 1-103, provides that, unless displaced by specific provisions, the law of fraud is not affected. However, UCITA §114(a) (as recommended by the UCITA Standby Committee in Recommendation 6) contains an additional provision that states that UCITA does not displace the law of fraud or unfair and deceptive acts or practices as they relate to *intentional* failure to disclose defects that are *known* to be *material*.

Working Group Concerns. The Working Group is concerned that the added language implies that UCITA displaces tort law dealing with negligent misrepresentation or state unfair and deceptive act or practices acts that are not framed in terms of intent, knowledge or materiality. Working Group members believe that the more appropriate approach (and possibly the intent of the drafters) is that UCITA not displace the law of fraud or other tort law or statutes addressing unfair or deceptive acts or practices.

Working Group Suggestions. The Working Group believes that the additional sentence in UCITA § 114(a) should be deleted, and that it should be made clear in the text that UCITA does not displace tort law or unfair or deceptive acts or practices statutes or rules or law, including laws dealing with the failure to disclose defects.

6. Relation to Other Law: Consumer Law.

Background. A commercial law statute generally needs to address how its provisions impact on laws dealing with consumer protection. Most consumer protection statutes, however, address transactions for the sale of goods but not computer information transactions that are characterized as licenses. Even so, courts often have applied these statutes to some computer information transactions much in the same way that courts apply UCC Article 2 to some computer information transactions. This is often because currently no codified body of commercial law specifically covers the area of computer information transactions. Consumer advocates have a concern that, if the law of “computer information transactions” is codified, courts will hold that consumer protection statutes, applying as they do to sales and leases of goods, are not applicable to consumer information transactions.

UCITA Approach. UCITA § 105 make clear that consumer protection statutes are superior to any provisions of UCITA. In addition to containing general language subordinating UCITA to consumer protection law, the

section encourages states that enact UCITA to provide expressly what consumer protection statutes are not overridden by UCITA.

Working Group Concerns. Despite the broad subordination to consumer law in UCITA § 105, the Working Group is concerned that a court should not infer that by treating computer information transactions as other than the sales of goods, UCITA may limit the application of consumer protection statutes or rules of law that would have been applied by the court in the absence of UCITA.

Working Group Suggestion. The Working Group believes that UCITA should include a provision to the effect that UCITA does not displace the application of consumer protection statutes or rules of law that would have applied in the absence of UCITA.

7. Availability of Terms before Payment

Background. Some licensors of computer information structure their license transactions so that the license terms are not available until the licensee has already paid, or become obligated to pay, for its use of or access to the computer information. A typical example is an acquisition by a licensee of a software package in which the license terms for the software are inside the box, or are contained in the software itself, and are not available for review by the licensee until after purchase.

UCITA Approach. UCITA provides that, if a licensee pays or becomes obligated to pay for the use of or access to the computer information before a term of the transaction is available for review by the licensee, the licensee, in certain circumstances (such as where the licensee is a “mass-market” licensee), is entitled to a statutory right to return the product, with the licensor (in the case of a “mass-market” license), bearing the shipping and related costs. UCITA §§ 112(e) and 209(b). In addition, UCITA § 211 provides a “safe harbor” for a licensor that makes computer information available from the licensor’s Internet site and discloses the terms of the

transaction before payment by making those terms available for review on the site itself. An Internet licensor which follows the “safe harbor” of UCITA § 211 does not need to provide a right of return to the licensee.

Working Group Concerns. While the Working Group lauds UCITA’s right of return in these situations, the Working Group believes that a licensor should make all of the terms of the license transaction available for review by the licensee before the licensee pays, or becomes obligated to pay, for its use of or access to the computer information and before the licensee otherwise becomes bound by the license agreement. There is no longer any economic justification for failing to do so. For example, a licensor may easily provide its license terms on its Internet web site. Further, the licensor may easily do so even in situations in which the delivery of the information itself is not available from the licensor’s Internet web site.

Working Group Suggestions. All terms of the transaction should be made available by the licensor to a potential licensee before the licensee pays or becomes obligated to pay or otherwise becomes bound by the license agreement. UCITA § 216 (UCITA Standby Committee Recommendation 7), which elaborates on the contract formation rules in the event of post-payment terms, should be deleted.

8. Free Software

Background. UCITA covers so-called “open source” or “free software” transactions where the programs are developed by open contributions from the public and are made available to the public without charge. Some providers of this software are individuals who are not seeking a profit and do not charge for the access to or use of the software. Other providers are businesses that may not charge for the use of or access to the software itself but are seeking to profit from providing ancillary services or other software. Still other providers are businesses that incorporate the “free software” into software that they license to others for a profit. UCITA generally contains

provider warranties of noninterference, non-infringement and merchantability relating to the software. These warranties are implied unless expressly disclaimed.

UCITA Approach. UCITA § 410 (Recommendation 10 of UCITA Standby Committee) provides that the implied warranties in UCITA §§ 401 (noninterference and non-infringement) and 403 (merchantability) do not apply if there is no contract fee paid for the software. However, consumers who are not software developers would still benefit from the warranties even if the software were provided without a contract fee.

Working Group Concerns. UCITA § 410 appears to members of the Working Group to be both overinclusive and underinclusive. It appears overinclusive, because it removes the implied warranties from transactions in which the provider is a business which chooses to earn its profits by providing the software code without charge but earns revenues from related documentation, other services or software. It appears underinclusive since a member of the free software community providing the software at no contract fee still gives the implied warranties to most consumers.

Working Group Suggestions. The Working Group believes that a business obtaining a profit from providing ancillary services or other software should give the implied warranties of non-interference and non-infringement (subject, of course, to being able expressly to disclaim the warranties). The Working Group also believes that it is appropriate to acknowledge the realities of the free software environment and not impose these implied warranties on those who are not in the business of providing software. Generally, those obtaining software in the free software environment would not expect to receive the implied warranties. One way of implementing this recommendation would be to modify the definition of “merchant” in UCITA § 102 so that it applies only to a person who otherwise falls within the current

definition but is “in the business” or is otherwise acting generally for consideration.

9. Contractual Prohibitions on Criticism of Software

Background. UCITA does not require that known defects in computer programs be disclosed. Accordingly, many believe that UCITA should expressly invalidate contract terms which prohibit criticism of the performance of computer programs, especially where the criticism would disclose the defects in or limitations of a product.

UCITA Approach. UCITA § 105(d) (UCITA Standby Committee Recommendation 5) invalidates contract terms prohibiting the discussion of the quality of performance of computer information. However, the prohibition applies only to computer information offered in its final form to “the general public including consumers.”

Working Group Concerns. The Working Group is concerned that software licensed generally to businesses (e.g., accounting software for medical professionals) would not have the benefit of UCITA § 105(d)’s override of contractual terms prohibiting criticism of the quality of performance of computer programs after they are released as commercial products. The Working Group sees no policy reason to permit contractual terms that would bar the public discussion of the quality of performance of these computer programs.

Working Group Suggestions. The prohibition should apply only to computer information that is made commercially generally available.

10. The Remedy of Self-Help

Background. If a licensee fails to pay or perform when required under the license agreement, the license agreement typically grants to the licensor various rights to prohibit the licensee from continuing to have the use of or access to the computer information. Some licensors have included in licensed software certain programming by which, in such situations, the licensor can

deny the licensee's continued use of or access to the software following the licensee's default. Default remedies by which the licensor may shut off the use of or access to the software by the licensee are often referred to as "electronic self-help." Electronic self-help is very controversial since denial of the use of or access to the software by the licensee may shut down the licensee's business abruptly and may also, in some circumstances, threaten life or property (e.g., the exercise of electronic self-help on a license of software used by air controllers at a local airport). Another element of the controversy is the concern of some licensees that the code placed in software to enable implementation of electronic self-help presents a serious security risk to their systems, even if electronic self-help is never implemented.

UCITA Approach. UCITA § 816(b), as proposed by the UCITA Standby Committee as Recommendation 4, prohibits the use of electronic self-help. However, if the computer information is contained in "a tangible copy," the licensor may take possession of the copy without judicial process, so long as it does so without breaching the peace. UCITA § 815(b). Once the licensor has possession of the copy, the licensor "may take further steps with respect to the copy, including erasing the copy by electronic means."

Working Group Concerns. While generally agreeing with UCITA's approach of prohibiting electronic self-help, the Working Group is concerned that the language authorizing the licensor to take "further steps" implies an authorization for the licensor to destroy information belonging to the licensee contained on the copy.

Working Group Suggestions. The Working Group recommends that the language authorizing the licensor to take "further steps with respect to the copy, including erasing the copy by electronic means" be deleted. The deletion would not prevent the licensor from taking possession of the copy, thereby denying the computer information to the defaulting licensee. The

“further steps” language, however, is not necessary for the licensor’s rights to be protected.

11. Miscellaneous Other Suggestions.

The Working Group members offer several other suggestions for modifications to or clarifications of UCITA:

§ 102. UCITA’s definition of “published informational content” should exclude computer programs. The Working Group was uncertain whether the definition of “computer program” was meant to be interpreted differently from under the Copyright Act in view of the last sentence in the UCITA definition that is not contained in the Copyright Act definition and, if so, why. Some members of the Working Group therefore believe that the second sentence of “computer program” should be deleted.

§ 105. To provide some clarification in relation to the concerns of the librarians, it might be helpful to add a Comment to UCITA § 105 to the effect that UCITA is not the appropriate place for the interpretation of federal copyright law.

§ 112(e)(3). UCITA § 112(e)(3) should be modified to make clear that, if there is no right of return because no such right is required under (e)(3), the licensee must at least have an opportunity to review the license terms before the licensee is bound by the license agreement.

§ 113. UCITA § 304(b)(2)(right of termination following change of material terms in a mass-market transaction) should be among the non-variable provisions listed in UCITA § 113.

§ 115(a). In UCITA § 115(a) (UCITA Standby Committee Recommendation 19) the words “an independently created computer program” should be changed to “the computer program” to avoid what might be interpreted as an inappropriate and perhaps unintended limitation.

§§ 307(c) and 308. The Working Group concurs with Recommendations 15 and 16 of the UCITA Standby Committee to delete these default rules.

§ 501(a). The Working Group suggests that Section 501(a) be clarified to avoid the implication, noted in the discussion of D.(1) above, that the language “and identified to the contract” adds an additional requirement before ownership of informational rights in a computer program arises under the Copyright Act.

Minority Report

My name is Donald Cohn. I am a member of the ABA Working Group reviewing UCITA. I have been involved in the UCITA drafting process for over ten (10) years, first as a Business Law Section ABA Advisor and later as one of the two full ABA advisors to the NCCUSL drafting committee.

It is with a great deal of regret that I am unable to join in the substance or conclusions of the Working Group report. Nevertheless I would like to commend Judge Vittone and all of the members of the Working Group for their intense effort, fellowship, and dedication in reviewing UCITA in the short time allocated to them.

The report is very long with an extensive preamble, in depth discussion of a number of policy issues, recommendations and conclusions. I will not attempt to address every point made in the report. In many cases the Working Group has provided useful guidance to NCCUSL and the State Legislatures. **However, I fundamentally disagree with the premise of the report, the tone of the report, and the conclusions reached by the Working Group.**

There are two major themes in the report. First, the Working Group concludes that UCITA is “extremely difficult to understand”, that it is “audacious(ly) by trying to cover virtually every issue of concern” , the statute is “daunting for even knowledgeable lawyers to understand and apply” and that “UCITA should be redrafted to make it easier

to understand and use”. The most important sentence in the report is: “Nevertheless, the Working Group has concluded that UCITA, even with these modifications, raises a number of critical concerns that should be addressed before UCITA is submitted to the House of Delegates.” The Working Group also quotes the ALI as withdrawing from the UCC Article 2B process because of “the proposed act’s scope and overall coherence and clarity.”

I know of no way that the report can be read other than to require a rewrite of UCITA to simplify it and to change many of the policy decisions embedded in it as a quid pro quo for favorable ABA action.

Secondly, the Working Group addresses a limited number of provisions contained in UCITA, explains their concern with the provisions, and offers recommendations.

I would also like to address the process by which the ABA interacts with NCCUSL on uniform laws based on my UCITA experience , the question of whether the ABA should get into the policy debate, the staffing of the Working Group, and the strategic implications of rejecting UCITA.

With regard to the withdrawal of the ALI from the drafting process, to the best of my knowledge, the ALI reasons for withdrawing were set forth in an official press release that does not mention coherence or clarity as reasons for the withdrawal. While some individual ALI members may have expressed this view, I do not believe that it represents the ALI’s position.

Is UCITA unnecessarily complex, difficult to understand or audacious?

UCITA is the product of a ten (10) year process to create a uniform law on information licensing. The drafting committee, in one form or another, has debated the provisions of UCITA in at least forty (40) three (3) day sessions. Hundreds of interested parties, lobbying groups, and observers participated in the process. The cast of observers has run the gamut from software vendors and vendor lobbying groups, to consumer advocates, librarian organizations, software licensee organizations and to the motion picture, book publishing, and recording industries. I believe it is safe to say that this is the most intensely debated, comprehensive, uniform law ever introduced by NCCUSL. It represents the good faith efforts of NCCUSL commissioners, the NCCUSL UCITA reporter, the ABA advisors and the observers in trying to fashion an important new law. It is a testament to the adage that “no good deed ever goes unpunished”.

One issue raised by the majority report is that UCITA is complicated, unclear, and will be difficult for general practitioners to understand and apply. In my many years of practice I do not believe that I have ever read a law, either State or Federal, that was not complicated, unclear, and difficult to understand and apply. If this is a criteria for a favorable ABA review then the ABA should have rejected the original UCC Article 2, the new revision to UCC Article 9 and most other legislative initiatives brought to its attention. Many people forget that the same arguments being made against UCITA were also made against UCC Article 2. Fifty years after enactment, there are still cases trying to decide what is a “good” within the scope of Article 2. Moreover, I note that

most law schools offer full year courses in UCC Article 2 and a full semester course in UCC Article 9 which should be considered in the context of whether UCITA is any more complicated or difficult to understand than the UCC or any other law.

Any general practitioner who attempts to practice commercial law, secured transactions, bills and notes, bankruptcy law, etc. that relies simply upon a reading of the relevant statutes will quickly find that they will be required to make a much greater effort to understand an area of the law, if, for no other reason, than to avoid a suit for malpractice. I am inundated with seminars and lecture brochures for new laws and very day offering to explain a multitude of State and Federal enactments simply because a statute, on its face, rarely answers the questions that real practitioners in the real world need to have answered.

The real issue is whether UCITA is more flawed, or more difficult to understand than the “average” or “median” law, however one decides to try to create such a benchmark? Having just read the 2001 US Patriots Acts and the 1986 Electronic Communications Privacy Act and reviewed portions of the Internal Revenue Code, I suggest that UCITA is no more difficult or incomprehensible than most other laws that attempt to address complicated issues and is comprehensive, thought out, and much better written than most other statutes. Simplicity and ease of use, while useful goals, should not override the need to provide as much guidance as possible to judges and practitioners, both in the statutes and comments, to assist them in understanding the policy choices

made by the NCCUSL drafting committee and by State Legislatures that have and will pass UCITA.

It is important to note that at least two sophisticated legislatures, after extensive review, deemed UCITA worthy of enactment. To the best of my knowledge these were the only two States that have engaged in extensive hearings and in a comprehensive analysis of the Statute. The NCCUSL commissioners are appointed by the States and in most cases have extensive legislative experience. The State Legislatures are, of course, made up of elected representatives. I suggest that whether the law is too complicated or difficult to understand should be left up to the State Legislatures and not the ABA. We set a very bad precedent by beginning a journey down the road of having the ABA making broad subjective judgements about the relative readability, simplicity, or ease of use of statutes.

In my view, the real issue is not whether UCITA is more or less easy to read or understand than other laws, but rather that a number of Working Group members, ABA members, and others do not agree with the substantive policy decisions made by the NCCUSL drafting committee after open, comprehensive debate and with the decision of the NCCUSL at its annual meeting in overwhelmingly approving UCITA to be submitted to the States.

Many of the recommendations of the Working Group have merit and should be presented to the NCCUSL stand by drafting committee for further consideration. But,

acceptance of these recommendations should not be a determining factor in whether the ABA favorably considers UCITA.

As an example, the Working Group has raised the question of scope. The scope issue has been the most controversial and difficult part of UCITA since its inception. Scope has been discussed at every NCCUSL drafting committee meeting. The Working Group proposes an alternative regarding the “smart goods” issue. The UCC Article 2 NCCUSL drafting committee attempted to address this issue but, as of this writing, has not been able to reach a consensus, after years of focused intense effort. While the Working Group suggestion is a good approach, it should be pointed out that the Working Groups proposal was submitted to the NCCUSL drafting committee by a Working Group member during the drafting process, was fully debated, and was rejected. If the idea was truly new, or if the NCCUSL drafting committee had not already discussed the proposal then it would be appropriate to raise it again. The real issue is whether members of the Working Group or other ABA members who are unhappy that their proposal have not been adopted or that policy decisions embedded in UCITA are contrary to their viewpoint or constituent interests, should use the ABA to get another opportunity to influence the Statute. Further, as proposed in the report, I do not believe that it is the role of the ABA to determine whether the policy decisions “meet normal and reasonable expectations of the parties”. The expectations of the parties were fully aired during numerous debates by the interested parties themselves or their representatives. We should not, at the 12th hour, attempt interpose our own prejudices to overturn the drafting committee’s judgement.

The scope provisions are complicated, but no more complicated than provisions in many other laws. I would point out that I gave a three (3) hour tutorial to the Working Group members including charts diagramming the scope issue. While the issue may be complicated, within a very short period of time, the members of the Working Group that were not part of the drafting process, had no real prior exposure to UCITA and/or do not practice in this area of the law were able to very intelligently address and understand this issue and the UCITA provisions.

Is the NCCUSL/ABA review process flawed?

While not mentioned in the report, the impetus for starting this NCCUSL project arose from a report and recommendation of the ABA. In addition, the ABA Business Law Section Subcommittee on Software Licensing engaged in a multiyear study to determine whether the existing UCC Article 2 statute on the sale of goods was sufficient to meet the needs of the marketplace or whether a new statute was necessary. Over a seven (7) year period, the Business Law Section did extensive research and provided dozens of research papers to the drafting committee on many of the legal issues addressed in UCITA, and conducted a series of seminars and programs at both ABA annual meetings and Business Law Section Spring meetings to educate the ABA about the proposed UCC Article 2B and later UCITA. There were at least five (5) section ABA advisors at the drafting meetings in the last five (5) years of the drafting process. Members of the Business Law Section, NCCUSL commissioners, ALI representatives on

the UCC Article 2 B drafting committee, and the UCITA reporter communicated with all of the ABA sections asking them to participate in the UCITA drafting committee's work.

ABA advisors were present at annual NCCUSL meetings on the dais with the UCITA drafting committee commissioners when UCITA was overwhelmingly enacted by NCCUSL. The two ABA advisors to the UCITA drafting committee publicly expressed their support of the statute as did the two other ABA section advisors who were present. At no time, to my knowledge, did any of the ABA advisors ever voice the opinion that the ABA would not, or should not, favorably review UCITA.

The TIPS resolution was introduced by a section that had not participated in the drafting process and did not choose to appoint an ABA advisor to the committee.

Notwithstanding the Working Group's report, the real ABA opposition to UCITA has been instigated by an industry group, heavily represented in the TIPS section that is unhappy with the policy decisions incorporated into UCITA in the belief that UCITA does not go as far as they would have liked to protect licensee rights, especially large company licensee rights.

Almost all of the issues raised in the Working Group's report have been raised, fully addressed and debated in numerous NCCUSL drafting committee meetings. In fact, in many instances, it was members of the Working Group that have raised these issues both in the drafting committee process and in State legislatures.

The key policy issue that confronts the Board of Governors in reviewing the Working Group's report is whether narrow parochial interest groups that have failed to win policy or political arguments in the open, comprehensive, and very fair NCCUSL drafting process will have a "second chance" to defeat or significantly modify a NCCUSL approved statute by coming to the ABA and agitating within their sections and the ABA as a whole.

If the ABA is going to become just one more battle ground in addition to the State legislatures in the uniform drafting process, I question the need to have ABA advisors as part of the NCCUSL drafting process. In my view, there needs to be a threshold of trust and faith placed in its advisors and in the ABA advisor appointment process. If that is not the case I do not understand why anyone would want to go through the difficult, often torturous, process of acting as an ABA advisor or why NCCUSL would want to participate in the process of requesting an ABA resolution that a particular uniform law is worthy of enactment or consideration.

While I have the highest regard for the honesty and integrity of the chairman and members of the Working Group, I must point out that of the nine (9) Working Group members, two represent large corporations as licensee attorneys, have written extensively in opposition to UCITA, and have actively opposed UCITA in the drafting process and/or in State Legislatures, one voted against UCITA on the floor of the NCCUSL annual meeting, and one was appointed by the ABA section that had introduced the resolution to

have the ABA oppose UCITA. None of the ABA section advisors to the drafting committee, who have the deepest understanding of UCITA, were appointed to the Working Group. Most telling, no one from the software or information licensing vendor community was appointed to the Working Group. While I have tried to present both sides of the argument on many of the policy decisions called into question by members of the Working Group, I am not a licensor attorney. Nor do I claim to be knowledgeable in all aspects of the policy issues addressed in UCITA or have a memory that can remember all of the discussions in the drafting committee meetings over the ten (10) years of the drafting process. The make up and lack of balance of the Working Group must call into question the validity of the conclusions reached in the report as not being truly representative of all viewpoints on the issues. Again, I must stress that I am not questioning the good faith, honesty or integrity of the individual Working Group members.

What are the strategic implications of adopting the Working Group recommendations?

In my view, acceptance of the Working Groups recommendation that UCITA be rewritten before it should be submitted to the Board of Governors will result in either UCITA being withdrawn by NCCUSL for further consideration or the ABA being widely criticized for its process. While it is always good practice to clarify language whenever possible, it is important to understand that the UCITA language is based upon: UCC Article 2, industry practice as discovered in ten (10) years of meetings, a careful reading

of case law and both U.S. and international statutes; intense debate and negotiation by NCCUSL commissioners with interested groups; and the experience of having had two legislatures review, debate, and pass UCITA. I do not believe that a major rewrite of the statute to make the statute more understandable could or would be undertaken by NCCUSL. Nor do I think that NCCUSL will be interested in restarting this process.

The failure of the ABA to report out UCITA as being worthy of enactment or consideration by the States will arm UCITA's opponents with a weapon that will make the passage of UCITA in any new State legislatures almost impossible. While a few interest groups would be very happy with this result, I suggest that such a result will be damaging to our country. When the Uniform Electronic Transactions Act ("UETA") was heavily amended by a number of States, the Federal Government interceded by enacting the "E-Sign Act" providing that if a State did not adopt the "pure UETA" then the E Sign Act would control electronic contract formation. If UCITA is unsuccessful, we can immediately look for a federal initiative in this area. I for one, do not want the federal government to interject itself into the commercial contracting practice.

Ultimately, UCITA derives its principles from the UCC. A basic concept in Article 2 is "freedom of contract", the belief that individuals and corporations can negotiate and enter into contracts without having the States or federal government impose contract terms for them. Another guiding principle is that UCITA should "reflect industry practice". In other words, the statute should not attempt to change the industry by imposing a whole new business model or sets of requirements or to attempt to change

the negotiating power of parties to a contract by statute, except, in some circumstances, to protect consumers. There is no uniform way that State legislatures have adopted to protect their consumers. Each State has enacted consumer laws that reflect the political will of their citizens. UCITA is, and has always been, intended, as a commercial statute. Some interest groups have attempted to try to change UCITA into a national uniform consumer protection statute. Where appropriate the drafting committee has created important new consumer protections. The problem that UCITA has always faced is a desire on the part of various interest groups to require UCITA to include mandatory, non waivable, provisions to protect their constituents, even large companies that do not need this type of protection. To the credit of the NCCUSL drafting committee and its reporter, UCITA maintains these key principles to a remarkable degree. There are more mandatory provisions in UCITA than in UCC Article 2, and most of those provisions favor consumers and other licensees. The concepts of mass market licenses, rights of return of shrink-wrap software and a ban on electronic self help are examples of key improvements for licensees and consumers. In many instances, the complexity of UCITA is caused by “carve outs” and references to other sections in order to preserve the additional protection for consumers and licensees.

The underlying current in the opposition to UCITA is a desire for more mandatory provisions rather than less. More restrictions to freedom of contract and not less. More disruptions to the marketplace and not less. I urge the Board of Governors to avoid the temptation to endorse the use of UCITA In this manner.

It is always easier to criticize than to create. The NCCUSL process has been a noble attempt to “get it right” and provide open, broad interactions by interested parties. Given the experiences with UETA and now UCITA, we must question whether it is more important to preserve the uniform State law process that has worked so well until recently or to turn the ABA into another forum for legislative debate.

I urge the Board of Governors to look upon UCITA in a favorable light. I support the idea of making recommendations to the NCCUSL drafting committee on ways to improve the Statute. I do not support making the submission of UCITA to the ABA or an ABA determination that UCITA is worthy of consideration or enactment contingent on adoption of the recommendations of the Working Groups majority report or a rewrite of the Statute.

Respectfully Submitted,

Donald A. Cohn

January 29, 2002

"Minority Report Addendum

The minority report that I submitted to Judge Vittone was based upon the then current draft of the majority report as of approximately noon on Monday, January 28, 2002. I have now had an opportunity to carefully read the "final" majority report and would appreciate this opportunity to add to my remarks.

It does my fellow working group members credit that the harsh wording of a number of the conclusions and provisions in the majority report have been softened. Lawyers by their nature try to be persuasive, unfortunately, the report still reads as if it were a litigators brief rather than a balanced report on the merits and issues associated with UCITA. The report is thirty one (31) pages long. I have been unable to find any really positive statements with regard to anything that the NCCUSL or ABA advisors have been laboring over for ten (10) years except that the working group thinks a uniform law (but not necessarily this law) would be useful or that " UCITA presently contains a number of provisions that will be beneficial to many parties..." . Given that two State legislatures have enacted UCITA and that NCCUSL overwhelming passed UCITA, I would have hoped that there was at least something my colleagues could have found to said in support of UCITA. It is interesting to note that the majority report manages to be at the same time both devastating in tone, and not really that bad in terms of the substantive recommendations that are proposed in the last two sections of the report.

The reference that " the Working Group has been told that the ALI was concerned about the proposed act's scope and its overall coherence and clarity.." (emphasis added) suggests that we are now dealing in hearsay rather than facts. I was at all of the working group meetings and conference calls and I do not remember anyone telling me what the ALI said. The ALI position is contained in their press release and DOES NOT mention clarity or coherence.

I still must voice my objection to the majority view. The recommendation made by the majority on page 9 of the report that " the Working Group believes that UCITA should be redrafted to make it easier to understand and use" is unacceptable to me. While the Working Group has backed off of the explicit linkage between a rewrite and the submission of UCITA to the Board of Governors or the House of Delegates, it is clear that the report sends a clear message to that effect, which in my view is both unjustified and unwarranted.

In conclusion, I support a number of the proposed recommendations that the working group has made in their report. In my view, the ABA should

present those recommendations to the NCCUSL UCITA drafting committee for their further consideration. I object to the tone of the report, its lack of balance, and to the assertion that it is somehow worse than other laws being promulgated everyday by legislatures and therefore needs to be rewritten.

The Board of Governors would be wise to either consent to UCITA going to the States as an act worthy of consideration or enactment or to make that recommendation to the House of Delegates with the understanding that the ABA will pass on the Working Group's recommendations to , and offer to work with, NCCUSL to further improve the Statute.

Respectfully Submitted,

Donald A. Cohn