



# Briefing Book

**Americans for Fair Electronic  
Commerce Transactions**

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# **Action Materials**



# What You Can Do

- **The most important action you can take is to join the AFFECT coalition.**  
To do so, just complete a sign up form and mail it or fax it to us. Or join on-line at [www.affect.ucita.com](http://www.affect.ucita.com).
  
- **Write to your legislators.**
  - Send an e-mail by visiting [www.affect.ucita.com](http://www.affect.ucita.com)
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  - Visit [www.affect.ucita.com](http://www.affect.ucita.com)
  
- **Keep up to date on what's happening.**
  - Visit [www.affect.ucita.com/happening.html](http://www.affect.ucita.com/happening.html)
  - Sign-up to receive monthly e-mail updates
  
- **Share information on UCITA with colleagues, employees and members of organizations to which you belong.** You may use any of the background materials provided by AFFECT in this Briefing Book or on the Web site.
  
- **Include information about UCITA and how to help the AFFECT coalition in your employee or organization newsletters.**
  
- **Add your voice to the local press and send a letter to the editor of your local paper.**
  
- **Join other AFFECT coalition members at editorial board meetings or legislative visits in your community.** Send an e-mail to [cashworth@alawash.org](mailto:cashworth@alawash.org) to let us know you're interested.



AMERICANS for FAIR ELECTRONIC COMMERCE TRANSACTIONS  
formerly 4CITE

I oppose UCITA.

**Membership Category:**

- Company or Organization
- Public Official
- Individual

Signature (required): \_\_\_\_\_

**Member Information** (please print):

- Mr. First Name: \_\_\_\_\_
- Ms. Last Name: \_\_\_\_\_
- Dr. Title: \_\_\_\_\_

Organization Name: \_\_\_\_\_

Mailing Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_

Email Address: \_\_\_\_\_

I prefer:  fax  e-mail updates (select one)

**I can help defeat UCITA by:**

- granting permission to list my company or organization as a member of AFFECT
- distributing information
- speaking at public events
- writing my legislators
- authoring letters to the editor
- sending information to employees/colleagues/members
- placing an article in our employee/member newsletter
- contributing financially (please indicate amount \$ \_\_\_\_\_ and submit a Contribution Information Form or contact us for more information)

**Please complete this form and return by mail or fax to:**

Americans for Fair Electronic Commercial Transactions  
1301 Pennsylvania Avenue NW Suite 403 Washington, D.C. 20004 FAX: (202) 628-8419

For more information please call (916) 448-4199 or visit our Web site at  
[www.affect.ucita.com](http://www.affect.ucita.com)



## How To Make a Financial Contribution

Americans for Fair Electronic Transactions is a California non-profit, mutual benefit corporation which has applied for Section 501(c)(4) status under the Internal Revenue Code. Contributions to the organization are not deductible as a charitable contribution for federal income tax purposes, but a portion may be deductible as a business expense. AFFECT has determined that 20% of its 2001 membership fees

are not deductible under the Omnibus Budget Reconciliation Act of 1993. Federal Tax I.D. Number: 94-3379751.

Contributions are not deductible as charitable contributions for income tax purposes.

Contributions are not subject to any contribution limits.

Contributions may be accepted from any source.

**Options for contributing financially to AFFECT include:**

**1. To contribute by personal or business check**

- Make your check payable to Americans for Fair Electronic Commerce Transactions. The federal employer identification number is 94-3379751.
- Mail your check and Contributor Information Form (PDF version) to AFFECT – 1301 Pennsylvania Avenue NW, Suite 403, Washington D.C. 20004

**2. To contribute stock**

- Send a Stock Transfer Authorization Letter to your broker and fax a copy to Jason Kaune at (415) 388-6874.
- Complete the enclosed Stock Contribution Notification Form and fax to Jason Kaune at (415) 388-6874.
- It is much easier for the campaign to accept unrestricted stock. In the event that you are transferring restricted stock, you or your broker must call the Committee's Merrill Lynch broker in advance of making the stock transfer: Terri Brown at (415) 289-8844.

**3. To loan cash to the organization - prior to contributing stock**

- Check the box on the Contributor Information Form indicating you are loaning cash to the campaign. AFFECT will provide you with a note payable.

**4. To wire transfer cash**

- Please send all wire transfers to:  
AFFECT  
Account # 01-322452; Routing #: 121141877  
C/O Bank of Marin 50 Madera Blvd., Corte Madera, CA 94925
- Fax the Contributor Information Form to the number on the form.



AMERICANS for FAIR ELECTRONIC COMMERCE TRANSACTIONS  
formerly 4CITE

591 REDWOOD HIGHWAY, #4000  
MILL VALLEY, CALIFORNIA 94941  
(415) 389-6800 (phone)  
(415) 388-6874 (fax)

## CONTRIBUTOR INFORMATION FORM

Contributions should be made payable to Americans for Fair Electronic Commerce Transactions and sent to:

Americans for Fair Electronic Commerce Transactions  
c/o Nielsen, Merksamer  
591 Redwood Highway, No. 4000  
Mill Valley, CA 94941

Please provide and enclose the following information:

Contributor's Name: \_\_\_\_\_

Company (if applicable): \_\_\_\_\_

Address: \_\_\_\_\_

Phone: (\_\_\_\_\_) \_\_\_\_\_ Fax: (\_\_\_\_\_) \_\_\_\_\_

If contributor is an individual, please also provide the following information:

Occupation: \_\_\_\_\_

Employer: \_\_\_\_\_

TO: Supporters of Americans for Fair Electronic Commerce Transactions (AFFECT)

FROM: Jason Kaune, Counsel

RE: Donation of Appreciated Stock

Americans for Fair Electronic Commerce Transactions (AFFECT) is a coalition of business, non-profit and consumer organizations formed to educate the public and policy makers about anti-competitive state law proposals concerning electronic commerce transactions, such as the Uniform Computer Information Transactions Act.

AFFECT is a California non-profit corporation, and is in the process of applying for exemption from taxation under section 501(c)(4) of the Internal Revenue Code.

Contributions of Appreciated Stock Are Permissible,  
and May Result in Tax Advantages for the Donor

As you may know, contributors to nonprofit organizations such as AFFECT may contribute appreciated stock in lieu of, or in addition to, monetary contributions.

Contributions of low-basis stock may avoid the imposition of capital gains (or ordinary income) tax and therefore may result in significant tax advantages for the contributor; potential contributors should consult a tax lawyer or an accountant to determine whether this is the case (as well as to determine whether any gift tax issues exist).

In order to contribute restricted or unrestricted stock to AFFECT, please follow the instructions below, and complete the enclosed Transfer Authorization and Contributor Information Form.

## **Stock Transfer Instructions**

The information you may need to effectuate a stock transfer to Americans for Fair Electronic Commerce Transactions is as follows:

DTC #: 5198

Account #: 27G-04502

Account Name: Americans for Fair Electronic Commerce Transactions  
c/o Merrill Lynch  
100 Shoreline Highway, Bldg. A; Suite 125  
Mill Valley, CA 94941

Merrill Lynch Contact: Terri Brown at (415) 289-8844

It is much easier for the organization to receive unrestricted stock. In the event that you are transferring restricted stock, you or your broker must call the organization's Merrill Lynch broker in advance of making the stock transfer.

Because it is important for the organization's tax and lobbying reporting purposes, please "cc" me by fax (415/388-6874) a copy of your instructions/authorization to your broker to make the transfer. We have enclosed a draft Transfer Authorization that you may use to send to your broker. Please also complete the enclosed Contributor Information Form and fax it to our attention at the same time.

\* \* \* \* \*

Please feel free to contact me or Kerry Murphy with any further questions.

JDK  
7316.01

**STOCK TRANSFER AUTHORIZATION**

[DATE]

[BROKER NAME]  
[BROKERAGE FIRM]  
[ADDRESS]  
[CITY/STATE/ZIP]

Dear [BROKER]:

Please be advised of my intent to donate in-kind [XXX] shares of [company name] stock to:

Americans for Fair Electronic Commerce Transactions  
c/o Merrill Lynch  
100 Shoreline Highway, Building A, Suite 125  
Mill Valley, California 94941

Taxpayer I.D.: 94-3379751  
DTC: 5198  
Account Number: 27G-04502  
Attention: Terri Brown, Merrill Lynch

This letter shall serve as your authorization to facilitate the transfer and re-registration, if necessary, of the above referenced stock.

Sincerely yours,

[Name of Donor]

cc: Jason D. Kaune, Esq.  
Americans for Fair Electronic Commerce Transactions  
Fax: 415-388-6874

## **STOCK CONTRIBUTION NOTIFICATION FORM**

To make a contribution of stock to Americans for Fair Electronic Commerce Transactions (AFFECT), please complete this form and fax it to Jason Kaune (415-388-6874):

Contributor's Name: \_\_\_\_\_

Company (if applicable): \_\_\_\_\_

Address: \_\_\_\_\_

Occupation: \_\_\_\_\_

Employer: \_\_\_\_\_

Date Contribution Made: \_\_\_\_ / \_\_\_\_ / \_\_\_\_

Stock Name: \_\_\_\_\_ # of Shares: \_\_\_\_\_

Date Donated: \_\_\_\_ / \_\_\_\_ / \_\_\_\_

Value: \$ \_\_\_\_\_  
[FMV on date of transfer]

Is this stock restricted?    Yes            No

[If Yes, please contact Terri Brown at Merrill Lynch at (415) 289-8844 for information on how to donate such stock.]



# Talking Points

- UCITA modifies existing contract law **to favor large software publishers** in their sales to and contracting with businesses and consumers.
- UCITA allows consumers to become licensees who are bound to the terms of the contract provided in "shrink-wrap" products or "click-on" agreements.
- UCITA allows software publishers to shut down mission-critical software remotely **without court approval** and without incurring liability for the foreseeable harm caused.
- UCITA allows software publishers to **prohibit the transfer** of software from one person to another or one company to another -- even in the course of a merger or acquisition.
- UCITA shields software publishers from liability for damage caused by defects **known to the software publisher, but undisclosed to the licensee**, at the time of purchase.
- If the consumer wants to sue over a defective product, UCITA allows the software publisher to restrict legal action to a specific jurisdiction -- a particular county, state or even a different country.
- UCITA threatens library services currently permissible such as inter-library loan, distance learning programs, archiving and preservation.
- UCITA binds purchasers to terms disclosed **only after the purchaser pays** for the software, and allows the software publisher to change the terms of the contract unilaterally by e-mail.
- UCITA allows software publishers to legally track and collect confidential information about personal and business activities of licensees.
- UCITA even allows software publishers to **prohibit public criticism of their products!**



# Sample Letters

AFFECT has prepared several sample letters to help you in preparing your letter to your legislators. We encourage you to supplement these messages with examples of how UCITA will personally affect you or your business.

## Letter #1

On behalf of (name of organization), I urge you to oppose (bill #) to enact the Uniform Computer Information Transactions Act (UCITA). UCITA is a complex law that will adversely affect consumers, schools, libraries, business and industry. The only beneficiaries would be very large software developers, publishers and online service providers who will profit at the expense of everyone else.

Hundreds of groups in (state) and across the country oppose UCITA. Among the many concerns with this proposed law are:

- It modifies existing contract law to favor large software publishers in their sales to and contracting with businesses and consumers.
- It allows software publishers to shut down mission-critical software remotely without court approval.
- It allows software publishers to prohibit the transfer of software from one person to another or one company to another -- even in the course of a merger or acquisition.
- It shields software publishers from liability for damage caused by defects known to the software publisher, but undisclosed to the licensee, at the time of purchase.
- It threatens library services currently permissible, such as inter-library loan, distance learning programs, archiving and preservation.
- It binds purchasers to terms disclosed only after the purchaser pays for the software, such as a disclaimer of all warranties.
- It allows the software publisher to change the terms of the contract unilaterally -- such as increasing monthly access charges -- simply by posting the change to their Web site.
- It even allows software publishers to prohibit public criticism of their products!

This proposed uniform state law negates traditional consumer protections governing warranties and disclosure of terms. And because the law is overly broad it will impact every facet of commerce -- and could cost (consumers/business/industry) billions of dollars.

Please carefully consider these concerns and oppose this legislation.

## **Letter #2**

(Bill Number - Sponsor) has been introduced and will be heard by (name of committee). Americans for Fair Electronic Computer Transactions (AFFECT) urge you to join us in opposing this legislation and vote "No" when this legislation comes before you.

AFFECT is a broad-based national coalition of industry leaders, libraries, consumer organizations, and others. Individually and collectively we are dedicated to educating the public and policy makers about the dangers of UCITA, the Uniform Computer Information Transactions Act. UCITA is a dangerous, anti-consumer, anti-business measure that will harm the American economy, and stagnate the use of electronic commerce and new technologies.

Despite what you may have been told, nothing in this statute will help bring business to (state). Nothing in this statute is needed to improve software protection. But the flaws in the proposed legislation are many.

UCITA is dangerously broad in scope. It applies to everything in digital form from computer programs, text, data, online databases, and audio/visual works (graphics, images, photos, video clips, music, interactive games and web pages).

UCITA also condones the transformation of the nature of transaction from that of a "sale" to a restricted license agreement. The consumer, no longer the owner of the computer information product, becomes a licensee whose use of the product is limited by the terms of the agreement. UCITA turns the clock back on consumer protections to the days of "let the buyer beware." Consumers can be bound by terms they are not allowed to see until after they make their purchase. Called "shrink-wrap/click on" licenses, this fundamentally unfair practice weakens the ability of consumers to compare products and make informed choices.

The proposed law upsets the careful balance in intellectual property rights that has been developed over the last 200 years. Fundamental protections granted to libraries under federal copyright law could be circumvented in mass-market licenses. The kinds of library services now permissible under

law -- like inter-library loan, distance learning programs, archiving and preservation -- will be threatened.

UCITA will stifle innovation and retard the development of new technologies. By allowing software publishers to disclaim warranties and consequential damages even for known defects, it removes all legal liability for releasing poorly designed and insufficiently tested software. Common terms in license agreements under UCITA would prohibit standard industry practices now used for developing compatible systems, thereby diminishing competition and curtailing the growth of the burgeoning free software movement. License provisions prohibiting public criticism of products by customers will inhibit the free flow of information necessary for an informed marketplace.

UCITA also provides the right of manufacturers of goods, which are not explicitly covered, to "opt-in" and have their sales governed by its rules.

UCITA is harmful to the economy. Every business, large and small, depends on computer technologies to conduct mission critical processes -- such as payments to suppliers, payroll and tax compliance. Because of its broad scope, UCITA will create uncertainty regarding the duration of a licensee's rights to use licensed software. The proposed law also allows software publishers and vendors to shut down mission-critical software -- remotely and without a court order -- if they deem such action reasonable.

UCITA (Bill # - sponsor) is anti-consumer and anti-business. Please join us in opposing this legislation.



## Tips on Communicating with your Legislators

### Tips on Writing RIGHT!

Here are a few tips to help you get your message past the clutter or "white noise" surrounding almost every legislative issue.

- Use your own words. Make it personal. Tell exactly how you, your employees, your community will be hurt by UCITA.
- Say exactly what you want. Ask the legislator to vote no in committee or on the floor vote when it comes up. Make it very clear what action you want.
- Stick to the point and only address one issue per message/or letter. Don't clutter up your communication on UCITA with other issues -- even if they are technology related.
- Include your home address (this says you are a constituent and therefore can VOTE) and your home phone and office phone. This indicates you are sincere and open to learning the legislator's point of view.
- Address your message appropriately (Yes, even via e-mail):

The Honorable John Doe  
State Capitol  
City, State Zip

Dear Senator Doe:  
The Honorable Jane Doe  
State Capitol

City, State Zip  
Dear Assemblywoman Doe:

- Track the action. If the legislator voted in the way you asked, send a brief thank you note. If they didn't, express your disappointment and request reconsideration in the future.

## **Almost Ten Commandments of Successful Verbal Communication**

1. Smile when appropriate and keep your face open. The open face is the name we give to the expression you show when you elevate your eyebrows and create the horizontal lines in your brow. It's the face of affection and friendship.
2. Pause often. To be most effective you must learn to think before you speak. It's unnatural to pause, and that means that you have to work at incorporating a healthy pause before, during and after powerful statements.
3. Remain silent in the pause. The pause gives you opportunity to focus and think before you speak. The...uh...intrusions of...you know...unnecessary sounds...kind of like tends to...uh...like detract from your message.
4. Maintain eye contact.
5. Avoid Getting trapped. Some targets are anxious to put words into your mouth to create a greater controversy or, at least, an appearance of controversy. Because of UCITA's complexities it will be even more important to speak with precision and not let words be put in your mouth.
6. Be honest. If you don't know the answer, say so. But volunteer to find out and get back to them. Then do it.
7. Be positive and caring. If you need time to move from the negative to the positive, try these lead-ins: "I can understand how you'd reach that conclusion. Let me tell you why I think it's mistaken." "Let me explain what the facts really are."
8. Keep it simple and easy to understand. Get rid of jargon, acronyms, governmentese, legalese and all other communication killers.
9. Be memorable. Come prepared to give relevant, memorable, unique statements and tell interesting, humorous stories to illustrate your point. The "mobile consumer connectivity unit" instead of "car" is a good example for the UCITA issue.
10. Practice, practice, practice. Winston Churchill would anticipate circumstances and be prepared with appropriate retorts. So should we.

# **Informational Materials**



## Why We Oppose UCITA

If signed into law in any state, UCITA will undermine consumer and privacy protections. This proposed legislation would change the rules for purchase and use of computer software and information products for businesses, individuals and non-profits. And if successful, UCITA will cost software consumers billions. In essence, the UCITA legislation validates a "shrink-wrap" or "click-on" approach to electronic licensing, superseding consumer protections, copyright law, and privacy protections. UCITA would change software and informational purchases in the following ways:

### **The software purchased would no longer belong to the buyer.**

- UCITA allows consumers to become licensees who are bound to the terms of the contract provided in "shrink-wrap" products or "click-on" agreements.
- UCITA allows restrictions on use to be revealed after purchase.
- UCITA allows software publishers to change the terms of the contract after purchase.
- UCITA allows software vendors to prohibit the transfer of software from one person to another or from one company to another, even in the course of a merger or acquisition.
- UCITA allows terms that may severely limit the use of the product.
- UCITA allows restrictions that prohibit users from criticizing or publicly commenting on software they purchased.

### **UCITA would permit invasions of privacy.**

- UCITA allows software publishers to legally track and collect confidential information about personal and business activities of licensees.
- UCITA allows software and information products to contain "back door" entrances, potentially making users' systems vulnerable to infiltration by unauthorized hackers.

### **Software companies could knowingly ship defective products.**

- UCITA allows software publishers to deny both large and small businesses many of the current warranty protections they have under present law.

- UCITA allows software publishers to sell their products "as is" and to disclaim liability for product shortcomings. Imagine buying a refrigerator or stove where the producer does not guarantee that the product will work correctly.
- If the consumer wants to sue over a defective product, UCITA allows the software publisher to restrict legal action to a specific jurisdiction -- a particular county, state or even a different country.

**UCITA would allow software to be disabled without notification.**

- UCITA allows software publishers to shut down mission critical software *remotely* without court approval and without incurring liability for the foreseeable harm caused.
- UCITA allows software publishers to modify the terms of contracts after the sale simply by sending an e-mail -- regardless of whether the consumer receives the notification or not.
- UCITA allows software publishers to remove their product, simply because usage fees arrive late.
- UCITA puts consumers at the mercy of software publishers to "blackmail" users for more fees by their unhindered ability to disable or remove their product for unspecified "license violations."

**UCITA would threaten existing privileges granted under federal copyright laws.**

- UCITA would permit an end-run around federal copyright law in mass-market licensing agreements that are used by virtually all consumers and that are the mainstay of most library and business operations.
- UCITA threatens fair use privileges that allow for the provision of fundamental library services like inter-library loan, archiving and preservation.
- UCITA threatens "first sale" privileges that permit donation, transfer or resale of a product.



## The History of UCITA

The Uniform Computer Information Transaction Act (UCITA) is a proposed state contract law designed to standardize the licensing of software and all other forms of digital information. UCITA is a complex law that will adversely affect individual consumers, businesses, industries, libraries, schools and universities -- anyone using software or any kind of digital information.

UCITA originated as a new article -- Article 2B -- to the Uniform Commercial Code (the "UCC"), which was co-sponsored and drafted by the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL). The drafting process took almost a decade. Typically, Uniform Commercial Codes proffered by ALI and NCCUSL are adopted by all 50 states because they are fair and balanced to both sides of the transaction, arrived at through a consensus between competing interests of the parties. But this is not the case with UCITA. As the interests of software producers increasingly biased the perspective of the drafters and the law became increasingly complex, ALI withdrew its sponsorship and support for UCC 2B because it was convinced that NCCUSL would not change UCC 2B to make it fair. ALI's withdrawal from UCC 2B -- an unprecedented event -- killed any chance of it becoming part of the Uniform Commercial Code.

During the drafting, NCCUSL received letters from 26 attorneys general, the Federal Trade Commission and many intellectual property and commercial law professors indicating their concerns. But instead of letting UCC 2B die as it should have, NCCUSL recast UCC 2B as a stand-alone code and renamed it UCITA. Now, NCCUSL and certain software companies are urging state legislatures to enact UCITA, causing the present controversy and clamor among users to erupt.

In 2000, UCITA was passed by two states: Maryland and Virginia. Maryland's law went into effect in October 2000. The Information Technology Board's UCITA Committee is evaluating the need for further legislation. None is planned in 2001.

Virginia is refining its law to go into effect July 1, 2001. After passage in 2000, the Joint Commission on Technology and Science (JCOTS) appointed a sub-committee to consider amendments to the law before its effective date. Seventy-four amendments were proposed by businesses, libraries and non-profits. Twenty-four were accepted and referred to the Legislature for passage. The amendment package is expected to pass in early 2001.



## What's Wrong with UCITA

- **UCITA is poorly drafted.** It is long, confusing, and unnecessarily complex. Instead of providing greater predictability in the law governing computer information transactions, as proponents claim, UCITA will create more uncertainty.
- **UCITA is biased in favor of the software industry.** Numerous provisions in UCITA change current law to the detriment of individual consumers and business and institutional users of software. For example, UCITA will:
  - expressly authorize a software publisher, in a dispute over license rights, to remotely shut down an organization's mission-critical software without court approval -- in many cases shielding the software publisher from liability for the harm caused
  - make it very difficult to challenge unfair or one-sided provisions in "shrink-wrap" and "click-on" agreements (such as clauses prohibiting public criticism of the licensed software, or requiring the end user to litigate disputes in the courts of a distant state or country)
  - make it easier for software publishers and access providers to avoid being sued for breach of contract
  - allow the service provider in an access or maintenance contract to change the terms of the contract unilaterally by posting the changes somewhere on its Web site
  - make it easier for a software publisher to claim that an end-user organization is required to pay additional license fees to continue using the licensed software after a period of initial use
  - make it easier for a software publisher to leave the end user holding the bag if the licensed software infringes on a third party's intellectual property rights
- **UCITA will increase the cost of doing business for organizations that make significant use of software and other technologies.** Among other things, it is anticipated that UCITA will result in higher asset management, legal and contract negotiation costs.

- **UCITA upsets the copyright law's careful balance between the interest of the public in the free flow of information and the protection of the rights of creators of software programs and other computer information.** This has led researchers, librarians and legal scholars to oppose UCITA.
- **Unlike other uniform laws (such as UETA), UCITA does not reflect the consensus of the interested parties involved in the drafting process and therefore is highly controversial.** To make it less controversial, states that choose to enact UCITA will likely amend it in various ways, destroying the goal of 50-state uniformity. This will make end users subject to a confusing maze of potentially 50 different sets of rules, depending on which state's law is designated as the "governing law" in a particular agreement.

#### **You Should Also Know That...**

- **Claims by supporters that UCITA is pro-consumer are untrue.** UCITA is opposed by every consumer group that has taken a position on UCITA, and has been criticized on consumer grounds by the Federal Trade Commission and the attorneys general of 26 states.
- **Claims that UCITA will attract high-tech business to an enacting state have little or no basis in reality.** A high-tech business such as a software company does not need to move to a state that has enacted UCITA in order to take advantage of that state's enactment of UCITA. For example, a California software company can remain in California and simply designate the law of Maryland (the first state where UCITA has taken effect) as the governing law in its "click-on", "shrink-wrap" and other standard form contracts.



## Five Reasons Consumers Oppose UCITA

- **UCITA allows software publishers to sell software "as is"; as used cars are sold in some places, meaning there is no warranty that it works right or that you can get your money back if it does not.**
- **Many licenses require consumers to get notices from a software publisher or on-line service.** Those notices may change the terms of the software or access license. UCITA allows the notice to be "received" by a consumer if the notice is only posted on a Web site by e-mail with no guarantee that it was ever read or even received.
- **If the consumer wants to sue over bad software or over a bad on-line service, UCITA allows the software publisher or Internet service to restrict legal action to a specific jurisdiction -- a particular state, or county -- and in some cases different countries.**
- **UCITA allows the consumer to be trapped into agreeing to all of this *after the consumer buys the software or on line service and before the user can even load the software to determine if it's what he or she wants or if the software works.*** Under UCITA these provisions may be placed in the boilerplate fine "print" that the consumer sees for the first time only after the consumer buys the software and takes it home (or downloads it), unwraps the box, puts the disk in the computer and starts loading the software. It is only then that the consumer will be given the opportunity to understand the rules and contract provisions that the courts will enforce.
- **UCITA allows the software license to say that the software cannot be reviewed by a magazine or newspaper *without the software publisher's permission unless and until the courts find such a provision to be unenforceable!*** Even then UCITA allows the provision to remain in the contract! This will prevent critical reviews of software from appearing in newspapers or magazines making it harder for consumers to find out if software works correctly before they buy the software.

Prepared 4/14/00 by David B. McMahon, J.D.  
922 Quarrier Street, Suite 525, Charleston, WV 25301  
304-415-4288 or [wvdavid@access.mountain.net](mailto:wv david@access.mountain.net)



## Frequently Asked Questions

### **What Is UCITA?**

The Uniform Computer Information Transactions Act (UCITA)\* is a proposed uniform law that would create new rules for software licensing, online access and other transactions in computer information. UCITA was originally a joint project of the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws. However, ALI withdrew its support in the final drafting stages, due to numerous problems with the proposed draft.

\*UCITA is not to be confused with UETA, the Uniform Electronic Transactions Act.

### **How bad is UCITA?**

Pretty bad. After all, in a majority of states, the leading legal official, the Attorney General, is urging legislators not to make UCITA law. The concern comes from the overwhelming power of the software designer and the lack of recourse for the public and the consumer. Simply by installing or unwrapping a new package of software, consumers can surrender the right for refunds and even the right to criticize the product. Not even used-car dealers can come close to getting away with that.

### **How does UCITA change software and informational purchases?**

First, under UCITA, the software purchased would no longer belong to the buyer -- UCITA allows consumers to become licensees who are bound to the terms of the contract provided in "shrink-wrap" products or "click-on" agreements. UCITA further allows these restrictions on use to be revealed or changed after the user purchases the software. UCITA then allows software publishers to prohibit the transfer of software from one person to another or from one company to another, even in the course of a merger or acquisition.

### **Can software publishers knowingly ship defective products?**

Yes. UCITA allows software publishers to sell their products "as is" and to disclaim liability for product shortcomings. Imagine buying a refrigerator or stove where the producer does not guarantee that the product will work correctly! If the consumers wants to sue over a defect, UCITA allows the software publisher to restrict legal action to a specific jurisdiction -- a particular county, state or even a different country.

### **Can software publishers remotely shut down an organization's mission critical software?**

Yes. UCITA expressly authorizes a software publisher, in a dispute over license rights, to remotely shut down an organization's mission critical software without court approval -- in many cases shielding the software publisher from liability for the harm caused.

### **Does UCITA address privacy issues?**

UCITA actually permits invasions of privacy. It allows software publishers to legally track and collect confidential information about personal and business activities of licensees. Additionally, because it allows software and information products to contain "back door" entrances, user's systems can potentially become vulnerable to infiltration by unauthorized hackers.

### **Who Opposes UCITA?**

- 33 Attorneys General
- Software developers
- Every consumer advocacy organization that has looked at it
- Large software customers
- Librarians
- Other independent information content developers (writers, photographers)
- Many law professors

Visit [www.affect.ucita.com/say\\_list.html](http://www.affect.ucita.com/say_list.html) for a comprehensive list of organizations and others that have opposed or criticized UCITA.

### **How do I fight UCITA?**

The AFFECT Web site is filled with information and resources for those who want to stop UCITA from becoming law. Visit our Action Kit and find out how to contact your legislators, how to spread the word, and, if interested, how to donate.



## Myths and Facts

**MYTH:** UCITA will bring high-technology businesses to states that pass the legislation.

**FACT:** On the contrary, UCITA allows a company in any state to take advantage of any other state's version of UCITA. According to high-technology corporate relocators and academics, the availability of an educated work force, telecommunications infrastructure and quality of life are the vital determinants in an advanced technology company's decision to relocate. Regulation is seldom, if at all, a determining factor. UCITA dissuades companies from moving rather than encouraging them to move.

**MYTH:** UCITA addresses a market failure.

**FACT:** According to a U.S. government report entitled the "Emerging Digital Economy" the software and information industry's value has more than doubled between 1990 -- 1998 without the benefit of UCITA.

**MYTH:** UCITA helps stop piracy.

**FACT:** The Digital Millennium Copyright Act and the No Electronic Theft Act are federal laws that have already established severe penalties for those that would pirate software or digital information. UCITA adds nothing to this protection.

**MYTH:** UCITA protects consumers.

**FACT:** Consumer laws protect consumers, not UCITA. UCITA adopts the software industry desire to call transactions "licenses" of information rather than "sales" of goods and services, thereby avoiding traditional protections for consumers that govern warranties and disclosure of terms. Under UCITA vendors are allowed to hide their terms from consumers until AFTER the consumer has paid for the product, brought it home and begun installing it. UCITA's sponsors talk of a "right of return," but it only applies if the consumer does not agree to the contract shown seconds before loading the product on the computer. It does not protect consumers from defects that show up on first use of the product. Companies that knowingly distribute software with defects can charge consumers who call for support or fixes. Vendors can impose nondisclosure terms that prevent consumers from publishing articles or letters critical of the product. These are just a few of the anti-consumer practices allowed under UCITA.

**MYTH:** UCITA will have no negative impacts on libraries, archives and higher education.

**FACT:** Through the use of non-negotiated licenses, UCITA allows software vendors to limit how a library may make use of information and to prevent people from donating materials to libraries. For 200 hundred years American copyright law has balanced the interests of creators with the needs of the society to use and create new information. UCITA upsets this balance.

**MYTH:** Copyright law prevents UCITA from granting unfair power to software vendors.

**FACT:** As a general matter, the Copyright Act does not specifically forbid contracts from limiting its exceptions. Moreover, courts typically have held that the Copyright Act does not preempt negotiated agreements that conflict with these provisions. There are, however, very few cases that have considered whether the Copyright Act or the U.S. Constitution pre-empt non-negotiated, mass-market agreements which conflict with the provisions of the Copyright Act. Given this absence of authority, states need to protect their consumers, librarians, and educational institutions by explicitly preserving their federal copyright privileges via state contract law.

**MYTH:** Common law allows self-help, UCITA controls it.

**FACT:** Except for real estate mortgages and personal property security interests (both of which are highly regulated), the law rarely allows sellers to use self-help. Self-help is the equivalent of repossessing or denying access to an information product. Currently, a company using self-help can be held liable for any damage caused by the use of the procedure. Further, the many different laws against computer trespass and computer tampering make the use of self-help involving computers legally risky at best. UCITA enables a software company to use self-help without incurring the legal risks associated with current law by following its "safe-harbor" provisions.

**MYTH:** Other states are scrambling to pass UCITA.

**FACT:** UCITA has passed in only two states, Maryland and Virginia. Virginia appointed a sub-committee to evaluate the need for amendments and received 74 amendment proposals. Maryland has a committee to examine the need for further legislation regarding UCITA. Many states have tabled the bill for further review. The New Jersey Law Revision Commission did an extensive review of the law and recommended extensive changes. Iowa passed "bomb shelter" legislation to specifically protect Iowa residents from being subject to UCITA licensing terms. A Blue Ribbon Technology Commission in Maine did not endorse UCITA. As legislators are examining

UCITA more closely, they are reluctant to pursue a bill that is surrounded by so much controversy and is opposed by so many significant groups in the business community. As more states consider amendments, the "uniform" character of the bill is likely to be more compromised.

**MYTH:** UCITA protects customers with the right of return.

**FACT:** First, the "right to return" applies only to consumers purchasing "mass-marketed" software, and not to businesses or software used for any type of commercial purpose. Second, this right instantly evaporates when the "I Agree" button is clicked, which occurs before a consumer can even load the program to see if it is even a program he/she wants, regardless of the license terms.

**MYTH:** UCITA outlaws bad license terms when they are "unconscionable."

**FACT:** Under UCITA a judge may only void a license term if it is unconscionable or violates a fundamental public policy. This is an extremely high legal standard. To be unconscionable, a term has to "shock the conscience" of the court. Under current law, judges can void unconscionable terms in contracts but they almost never exercise this power. Instead, they look to the statutes for specific terms that the legislature has declared unfair or unreasonable. But in UCITA, the kinds of practices most likely to be weighed into an unconscionable decision, such as hidden contract terms, nondisclosure terms, non-transfer terms, no warranties, and no remedies (not even a refund) for losses caused by defects, are explicitly approved in UCITA. Further, the term fundamental public policy is not defined as adding to the difficulty of interpreting whether or not a license term violates a public policy.

**MYTH:** Everyone was at the table when UCITA was drafted.

**FACT:** Some were at the table, but the concerns of many were not addressed by those with the power to decide. Moreover, the prestigious American Law Institute, a partner in the development of UCITA, withdrew from the drafting process citing grave concerns over the unbalanced nature of the legislation. UCITA was introduced over the concerns of 25 Attorneys General, the Federal Trade Commission, 11 different software and computer organizations, six different consumer groups, more than 12 different industry associations, five separate library organizations, 3 independent information and content developers, four different organizations within the entertainment and newspaper industries, 50 intellectual property professors, 43 contract law professors and the two leading intellectual property law bar associations in the United States.

**MYTH:** UCITA preserves the freedom to contract.

**FACT:** Software and information companies currently have the freedom to contract with any organization wishing to purchase their product. However, a viable free market system requires institutions that promote the integrity of the process. The freedom to contract has always been limited by courts and legislatures where unfair terms and unfair bargaining power are involved.



## Glossary of Terms

**Computer** - Under UCITA, an electronic device that accepts information in a digital or similar form and manipulates it for a result based on a sequence of instructions.

*Relevance:* This definition would allow all sorts of devices to be called computers. Therefore, it allows UCITA to regulate a tremendous number of products, some of which we might not ordinarily consider as computers. One example would be pacemakers. These devices use "software" to regulate one's heart beat and they would be considered "computers" under UCITA.

**Computer Information** - Under UCITA, means information in electronic form which is obtained from or through the use of a computer or which is in a form capable of being processed by a computer. The term includes a copy of the information and any documentation or packaging associated with the copy.

*Relevance:* This definition allows ANYTHING digital to fall within UCITA's jurisdiction. Electronic books, music, movies, computer software, on-line magazines, web sites, anything that might be used within the broad definition of a computer.

**Computer Information Transaction** - Under UCITA, means an agreement or the performance of it to create, modify, transfer, or license computer information. The term includes a support contract under Section 612.

*Relevance:* This definition permits shrink-wrap/click-on license, i.e. clicking "I Agree" when installing software, signing-up for Internet access, or using an electronic book.

**Consumer** - Under UCITA, means an individual who is a licensee of information or informational rights that the individual at the time of contracting intended to be used primarily for personal, family, or household purposes. The term does not include an individual who is a licensee primarily for professional or commercial purposes, including agriculture, business management, and investment management other than management of the individual's personal or family investments.

*Relevance:* This is an extremely narrow definition. Under this definition, a teacher that uses his or her personal copy of a spreadsheet to maintain and calculate grades would be considered a business user of the software. If that same teacher used his or her personal Internet account to research lesson plans, those activities would be considered business uses of the service. The result, business users do not have the same rights as consumers and this definition allows software vendors to exclude large numbers of software customers from consumer protections.

**Disclaimer** - A term in a license that allows a person or organization to refuse responsibility. For instance, used cars come with the disclaimer "AS IS." They are sold with no warranty of any kind.

*Relevance:* Many software vendors sell new software "AS IS" by disclaiming responsibility for defects in the software.

**Electronic Self-Help** - The process where a software vendor or licensor may electronically disable, remove, or otherwise prevent the usage of computer information. This could be done remotely through "back doors" or hidden entrances in the software or the software may have hidden shut-down commands that may be activated by phone or through other mechanisms.

*Relevance:* The ability to shut down a company's mission critical software through electronic self-help would enable unscrupulous software vendors to "blackmail" companies into paying more money by merely threatening to shut down their software. Electronic self-help also poses serious security issues for software because any weakness or holes in the software may not only be used by the licensor, but also disgruntled employees or malicious third parties with the skills to exploit them. Proponents will say that restrictions in UCITA for using self-help protect users. However, by complying with the recipe outlined in UCITA, software vendors are granted a "safe-harbor" that relieves them from any liability for the damages caused to the user.

**Fair Use** - Copyright law affords users the right to make "fair use" of copyrighted materials without permission from the copyright holder. A fair use (Section 107) is a use permitted by the copyright statute that might otherwise be infringing. Fair use is necessary to achieve the constitutional purpose of copyright -- to advance knowledge and promote learning. Thus, the public needs to make some uses of works in order to create new works. Fair use applies to all copyrighted works regardless of format. As a matter of fair use, a user may, under certain circumstances, copy (generally a small

portion of a copyrighted work) or distribute, display, perform, or prepare a derivative work based on a copyrighted work without copyright holder authorization. However, a user may not infringe copyright simply to avoid purchasing a work.

**First Sale** - The First Sale Doctrine of federal copyright law limits the exclusive right of distribution to copyrighted works. First Sale is a specific exemption in the federal copyright law that allows an individual or a business to the right to transfer, resell, rent or loan lawfully acquired copies.

*Relevance:* UCITA removes this legitimate right by categorizing transactions of software and computer information as a "license" rather than a sale.

**Goods** - Under UCITA, all things that are movable at the time relevant to the computer information transaction.

*Relevance:* This refers to anything "physical" included with the computer information, including but not limited to a computer with bundled software, a digital camera with software, or a law journal CD packaged with a paper version of the information. This definition does not include computer software and digital information. Most state consumer laws deal with either goods or services. According to UCITA software is neither and is therefore not protected under those laws.

**Licensee** - Under UCITA, a person entitled by agreement to acquire or exercise rights in, or to have access to or use of, computer information under an agreement to which UCITA applies.

*Relevance:* This is the customer.

**Licensor** - Under UCITA, a person obligated by agreement to transfer or create rights in, or to give access to or use of, computer information or informational rights in it under an agreement to which UCITA applies.

*Relevance:* This is the vendor or seller of the software.

**Mass Market License** - Under UCITA, a standard form used in a mass-market-transaction.

*Relevance:* This definition applies to any NON-NEGOTIATED license used in products generally available to the public. For instance software purchased at your local office supply store relies on a non-negotiated standard license. This type of license is often referred to as "click-on" or "shrink-wrap" because you agree to the terms of this contract by opening the plastic wrapping on the box or by clicking "I Agree." Normally, the customer cannot see these contracts until AFTER he or she has paid for the product and brought it home.

**Reverse-Engineering** - Under UCITA, the process of examining a computer program or digital product. This process is performed for many legitimate reasons, including debugging and developing interoperable products. Reverse-engineering is also used academically to teach students how software is constructed and to critique the software.

*Relevance:* UCITA would validate software licensing terms forbidding this legitimate use of the software. Reverse-engineering is a completely legal and permitted process for any purchaser of goods and for the "owner" of a copy of software under U.S. copyright law. UCITA removes this legitimate right by categorizing transactions of software and computer information as a "license" rather than a sale.

**Shrink-Wrap/Click-On Licenses** - Under UCITA, these are "contracts" that are created by opening the plastic wrap on the outside of the software or by clicking "I agree" during set-up.

*Relevance:* UCITA condones the practice of binding consumers to terms that are hidden until after purchase. This practice relieves vendors from competing with each other on license terms because these shrink-wrap/click-on licenses cannot be read before the software is purchased and brought home. These licenses are not negotiated, they are "take-it-or-leave-it" licenses.

# **About AFFECT**



## Who We Are

The AFFECT coalition was established in November 1999, under the name For a Competitive Information Technology Economy (4CITE) to coordinate active nationwide opposition to the Uniform Computer Information Transaction Act (UCITA). UCITA will be introduced in all 50 states and U.S. Territories to enact uniform rules for licensing information and computer related transactions.

AFFECT believes that the information economy should be fair and competitive. UCITA poses a direct threat to the economy by giving the "licensor" or software/information producer, unprecedented and unfettered control over the contracts of sale for their products without ensuring adequate protections for the "licensees" or users of those products. In response to this threat, AFFECT has adopted the following mission statement:

**"AFFECT, Americans for Fair Electronic Commerce Transactions, is a broad-based national coalition of consumers, retail and manufacturing businesses, financial services institutions, technology professionals and librarians opposed to the Uniform Computer Information Transaction Act (UCITA). AFFECT has been dedicated to educating the public and policy makers about the dangers of UCITA. AFFECT members have been following UCITA for the past decade and the coalition has been involved in every state where UCITA has been legislatively active. AFFECT supports improvements in high-quality computer and information technology and the growth of fair and competitive markets in the United States and believes that UCITA is a dangerous, anti-competitive, anti-business, anti-consumer measure that will have a negative impact on the American economy and the development of electronic commerce and new technologies."**

AFFECT is creating an information clearinghouse for the distribution of educational materials for the state legislatures, the press, business, consumers and the general public. Members from across the country are forming "micro-coalitions" in all fifty states to monitor legislation, educate legislators and voice opposition to UCITA. AFFECT also serves as a source for educational speakers and central coordination of state-by-state initiatives to insure a shared message and the benefits of a diverse, national coalition.

**Americans for Fair Electronic Commerce Transactions**  
**[www.affect.ucita.com](http://www.affect.ucita.com)**