



HAND DELIVERED

April 9, 2001

The Honorable Drew Edmondson
Oklahoma Attorney General
112 State Capitol Building
2300 North Lincoln Blvd.
Oklahoma City, OK 73105

Dear General Edmondson:

We all thank you and your staff for taking the time on Thursday morning, April 5, 2001 to meet with members of Americans for Fair Electronic Commerce (AFFECT) and members of the state coalition opposing UCITA. The purpose of this letter is to provide the information you requested during the meeting.

1. The letter to be sent to NCCUSL acknowledging the negotiated amendments concerning the consumer protection issues raised in the AGs' letter of July 1999.

First, we understand that, in view of the good faith negotiations you participated in with Microsoft and AOL, you feel an obligation to send a letter to NCCUSL acknowledging that the amendments you have obtained address the consumer protection concerns that were raised in the original AGs' letter of July 19, 1999 to NCCUSL. Our concern with this letter, as we expressed to you, is that it will be touted as an overriding endorsement of UCITA by the AG's, thereby reviving support for legislation that is dead or dying everywhere. As we indicated to you, we are so concerned that the UCITA proponents may use your letter as evidence of your "withdrawal of opposition to UCITA" that we hope you will insert the strongest language possible to state your position clearly.

To accomplish this objective, we believe and implore you to state unequivocally in your letter that neither the signatories individually nor the National Association of Attorneys General are endorsing UCITA. Furthermore, you are withdrawing your opposition *only* with respect to those specific consumer protection issues over which you have jurisdiction and that you raised in your July 19, 1999 letter to the NCCUSL. Finally, you continue to have strong concerns about the impact of UCITA on libraries, universities and other educational institutions and businesses, large and small.

Accordingly, we suggest that the following or similar language be used in your letter:

“The amendments negotiated by the Attorneys General of Oklahoma and Kansas are acceptable to address those consumer protection issues raised in our earlier letter of July 19, 1999 and over which we have jurisdiction, but this letter should not be considered as an endorsement of UCITA by its signatories or by the National Association of Attorneys General (NAAG) because of remaining concerns we and others have about the impact of UCITA on other constituencies, such as libraries, educational institutions and businesses, large and small. These concerns also need to be addressed before UCITA can represent a model state act that is acceptable to all classes of consumers and other users of computer information.”

2. Concerns of consumers and other constituencies not fully addressed by the amendments.

We understand the amendments produced by your negotiations do not address consumer issues not raised in your original letter or issues of concern to other constituencies. As we all acknowledged, there are a number of such issues, including:

Consumer Concerns:

- While the amendment declaring that state consumer laws prevail over UCITA's provisions is helpful, we are concerned that if a state were to enact UCITA, the legislature might not follow the suggestion that, “Legislatures should examine states' consumer protection laws to determine whether the scope of coverage of those laws needs to be amended to cover computer information transactions.” Furthermore, we believe that the federal Magnusson-Moss Act may not be applied by the courts to transactions based on UCITA's license regime.
- We are concerned that UCITA's permitted “as is” disclaimer of implied warranties will continue to prevail under the proposed amendments inasmuch as it is UCC Article 2, and not any consumer statute, that governs this formation question.
- The amendment barring vendors of mass-market licenses in “final form” from prohibiting critical reviews is a significant improvement. However, it is more restrictive than current “fair comment” law. And, since it only applies to the “final form” version of software, a well-advised software publisher may publish continually developing software. Finally, it only applies to the limited “mass market” licenses and would not apply to family farm or other mass-market business software.
- The amendment deleting the choice of forum provision, as opposed to including a provision that puts the forum for litigation in the home state of the consumer, is

problematical since, as the comment to Section 110 says, "Choice of forum agreements are generally enforceable.

- While a paragraph in an official comment saying that notices of contract changes may be given by posting changes on a web site, the actual language of UCITA is not changed.
- In contrast to the current law of mistake, UCITA's "electronic error" provisions are very troublesome for consumers. (According to the *Restatement Second of the Law of Contracts*, under current law, a consumer would not be bound by his mistake - such as in ordering 100 hundred copies of Quicken to be sent to an apartment address instead of 1 copy - if the seller had reason to believe that the consumer had made a mistake. Since these are general provisions, and not "consumer protection" provisions, it does not appear the proposed amendment would apply to trump UCITA in this case.
- Under UCITA consumers selling or giving away a computer can not sell or give away their copy of the software that came with it. The proposed amendments are ineffectual against such prohibitions as UCITA's overriding of existing copyright and intellectual property law is not characterizable as "consumer protection."
- As of course you know, the significant cost impact of UCITA on businesses will ultimately be reflected as additional costs to consumers.

Library Concerns:

- Libraries oppose UCITA because it places the imprimatur of the state on the practices of major computer information sellers who try to evade the policies of copyright law by using the term "license" to describe mass distributions of information instead of acknowledging that these transactions are, in reality, sales.
- UCITA allows licensors to insert contract terms that prohibit activities that are permitted under the federal copyright statute. The rights and statutory exemptions given libraries and educational institutions under copyright law, e.g. fair use, reproductions for classroom use, preservation and interlibrary loan, are often prohibited by licenses.
- Current language in UCITA (Sec. 105) fails to address the legal uncertainties in mass-market licensing and provides insufficient direction to the courts. (The proponents of UCITA have repeatedly offered amendments which appear to deal with the problem but which they know will at best create confusion and most likely lead to a radical upheaval in the availability of information so vital for a free society.) UCITA must have language that clearly and explicitly prohibits the

overreaching by sellers that will profoundly affect the ability of libraries and educational institutions to provide core services to their communities.

Business Concerns:

The concerns of the business community were delineated in a memorandum to Senator Glenn Coffee dated October 24, 2000, attached hereto. The issues addressed in that memorandum include:

- Unconditional validation of “shrink-wrapped” or “click-through” licenses combined with onerous default provisions.
- Restriction on number of permitted users as default provision.
- Limitation on duration of license as default provision.
- Limitation warranty of non-infringement.
- Permitted disclaimer of implied warranty regarding defects - even those known to the software publisher at time of license.
- Restriction on transferability - while prohibited under the recent proposed amendment to UCITA in the case of mergers or sales of business - are still allowed in other cases.
- Permitted use of automatic or passive restraint - for a reason as vague as the “prevention of use inconsistent with the agreement”
- Waiver of remedy for breach of contract
- Deletion of the requirement to deliver a product conforming to the contract and the abandonment of perfect tender rule
- Electronic repossession or self-help

3. The Virginia library association’s position on the Virginia amendments to UCITA.

In response to your questions regarding the position of the library community in Virginia, we are attaching a letter from Ruth Kifer, Virginia Library Association representative. In this letter, you should note that the Virginia library community reluctantly accepted a limited library amendment after UCITA had already been passed. The amendment was not endorsed by other library associations in Virginia and was never viewed either as a national model amendment or as a library acknowledgement that UCITA is now acceptable.

4. Information on NCCUSL's procedures for promulgating UCITA, the current status of UCITA within NCCUSL and UCITA's prospects.

In response to your request for further information on NCCUSL's procedures, UCITA's current status within NCCUSL and UCITA's prospects for wide enactment by the states, we are attaching a letter from Stephen Chow, Massachusetts NCCUSL Commissioner and member of the UCITA Drafting Committee. While Mr. Chow states that he cannot speak for NCCUSL, he has vast personal knowledge and insight concerning UCITA and NCCUSL as a commissioner and as a member of the UCITA drafting committee. He personally strongly opposes the enactment of UCITA in any state and provides his personal observations as to why UCITA was promulgated by NCCUSL.

CONCLUSION

We hope the foregoing and the enclosures contribute to your understanding of our opposition to UCITA and help you in drafting your letter to NCCUSL in a manner that will prevent it from being touted as a withdrawal of your opposition to and as an endorsement of UCITA.

We thank you again for the opportunity to present our views to you and your staff and will be happy to answer any remaining question you may have.

Very truly yours,

Gordon Pence
AFFECT President

cc: The Honorable Carla J. Stovall
Mr. C. Steven Rarrick
Ms. Jane F. Wheeler
Mr. Thomas A. Bates