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To the Hon. Attorneys General:

Re: Uniform Computer Information Transactions Act

I am one of two Commissioners on Uniform State Laws for the Commonwealth of Massachusetts. As a NCCUSL commissioner, I have served on the drafting committee of the Uniform Computer Information Transactions Act ("UCITA") since its inception and continuing in its stand-by capacity. I strongly oppose the complex, mass-market publisher-centered UCITA in any State.

I have been asked by the anti-UCITA coalition, AFFECT, to provide some information on the status of UCITA within NCCUSL. I cannot speak for NCCUSL, but can provide my own observations for balance. I have received no compensation for my continuing opposition to UCITA. I have devoted personal resources to this opposition because, after twenty-five years of intellectual property practice in the computer field, I have seen no "market failure" in the field and find UCITA to be radically, but subtlely detrimental to the interest of all but a few large publishers of information and to the traditional conceptions of "contract" and "intellectual property" that have formed the basis for the primacy in commerce and technology enjoyed by our nation and, particularly, my State.

- UCITA allows publishers of information products to always get "the last shot" by changing the Uniform Commercial Code rule that terms added after what the parties reasonably expect to be "the deal", come in, if at all, only if they are consistent with the deal; under UCITA, if the terms provided with the product are materially different, there is no deal, and the terms provided with the product become the contract when the person or "electronic agent" installing the product "clicks" a "manifestation of assent" after "opportunity to review". The situation is far different from that of being presented with a sheath of papers to sign – indeed, the publisher proponents of UCITA have refused to require Internet posting of their terms as "too expensive".

- UCITA would artificially establish a different set of standards for software implementations of hardware functions that from a technology point of view should be the same. This goes far beyond merely affecting warranties on "smart goods", which explains why UCITA advocates have lobbied hard to take software

out of Uniform Commercial Code Article 2 (Sale of Goods), where it has comfortably been for more than two decades in my State and almost all States.

- By lumping together functional information products (computer programs) with other "computer information" (empirical data such as stock quotations and seismology soundings), UCITA creates warranties from "upstream" creators such as research institutions to the publishers, changing baselines for negotiation.

- To buy the neutrality of the motion picture industry, UCITA includes a rule from an old New York case on an idea for profitability of the nature "buy low, sell high" to make unenforceable *contracts* for idea submissions where the idea is not "concrete" and "novel". This may invalidate many legitimate non-disclosure agreements – it belies any argument that UCITA is "non-regulatory" or represents "freedom of contract".

- The UCITA "compromise" of procedural safeguards and consequential damages against wrongful "electronic self-help" (time bombs, Trojan horses) not only invites the proliferation of devices that may harm unsuspecting third parties, but in fact hurts smaller software developers because prudent counsel for licensees will insist upon using only larger developers who can answer in such damages or can post a bond.

Why was UCITA promulgated? The following are my personal observations:

For more than a century, NCCUSL has brought together appointed commissioners from the various states to draft laws for enactment by the States. Its "crown jewel" is the Uniform Commercial Code ("UCC"), which has guided commerce for forty years and stewardship of which it shares with the American Law Institute ("ALI"). Most of NCCUSL's more than one hundred "uniform laws" are obscure and enacted in fewer than ten states. The Uniform Consumer Credit Code is an example of a failure; it was downgraded to a "model code" for which NCCUSL expends no resources for enactment.

The prescribed procedure for NCCUSL's development of laws in recent years has been to have a drafting committee of commissioners meet during the course of two or three years, along with observers, to develop a draft that is read line by line and debated at two annual meetings of the committee of the whole of NCCUSL before voting the draft out to a roll-call vote of the States by commission. At the 1995 NCCUSL Annual Meeting in Kansas City, President Richard Hite welcomed the gathered commissioners and told them that they would be deciding, after a first reading of proposed revisions to UCC Article 2 specifically addressed to software, whether NCCUSL should conform to the wishes of the Business Software Alliance, represented by Holly Towle of Preston, Gates of Seattle, to take software out of Article 2. By the time reading had begun, however, the Executive Committee decided to spin out the draft into a new UCC Article 2B on "licensing" ("UCC2B").

Commissioner Carlisle Ring, a former NCCUSL president and the "savior" of other troubled NCCUSL projects, was appointed Chair. Professor Raymond Nimmer, often wrongly confused with the "copyright Nimmers", was appointed Reporter. Of the dozen committee members, only I and one ALI representative concentrated our practices in the technology area. Partly for this reason, the project was driven by the stakeholders – the mass-market software publishers of the Business Software Alliance and the representative from NASDAQ – which sought a way to firm up their contracts restricting the retransmission of sales quotations prior to the expiration of fifteen minutes. In my view, nothing is in UCITA that did not pass muster with these two proponents.

Although it is justified by the need to have champions for enactment, the special position of mass-market information publishers continues to bother many commissioners. Many were particularly outraged at Reporter Nimmer's representation of Microsoft Corporation in a tax characterization of software case at the same time UCITA was being drafted and presented.

Participation in the project was unprecedented. At one meeting in California, there were more than a hundred present. However, observers tended to represent those whose "profit centers" were affected ("licensors"), rather than those whose "cost centers" ("licensees") were affected, even within the same companies, and many industry segment appeared only to negotiate a deal. What is more troubling is that, unlike other projects where observers were experts in the field, many of the observers were there primarily to negotiate, and during the time between the open meetings, the promoters met often with the Chair and Reporter and "lobbied" other industries, much as they continue to do today.

Because of major disputes over scope and approach to the basic idea of "assent", which are reflected in my reasons for opposing UCITA, the ALI in March 1999 parted ways with NCCUSL on the UCC2B project which then became UCITA. The three ALI representatives on the drafting committee declined to continue in protest. I became the sole dissenter on the committee.

At the start of the 1999 NCCUSL Annual Meeting, many commissioners believed that the highly complex and controversial UCITA might simply "go away," or that it might be downgraded to a "model law". The joint letter of the State Attorneys General added to that perception, but was twisted into outrage by some commissioners as being presented at the "eleventh hour". (I understand that my own State and others would have signed the letter, but for the fact that it had to be put together during the summer when most public offices were understaffed.)

Unlike other NCCUSL products, UCITA met an unprecedented challenge against its release from the committee to the vote of the States. The main argument for UCITA was that the States would be preempted by Congress if they didn't act in this area and that UCITA should be put out to the States for field testing.

As the president Gene Lebrun and now president John McClaugherty emphasized to allay the concerns of many commissioners about introducing the controversial UCITA product in their States – they need not do so if they did not believe it appropriate for their state, but promulgate it so others might introduce it. Even then, the motion to send UCITA to a vote of the States succeeded only by a vote of 37-11-5. Few introductions have been made by the commissioners.

What about the fears of being preempted by Congress? UETA was promulgated unanimously, and still Congress preempted it subject to enactment by a State of the pristine version. Congress made no reference to UCITA and has no bill before it that would speak to UCITA in particular.

While I cannot officially speak for them, it is my perception that many commissioners expect UCITA to die as did the Uniform Consumer Credit Code. In my own State, the commissioners deem UCITA inappropriate for our technology- and consumer-friendly State, and the Information Technology Division of the administrative branch and those who have considered the issue at the Attorney General's office and legislative committees all seem to agree.

Respectfully submitted,

Stephen Y. Chow