



AFFECT RESPONSE TO NCCUSL COMMENTARY ON UCITA 2002 REVISIONS

December 4, 2002

Introduction and Overview

Americans for Fair Electronic Commerce Transactions (AFFECT) is a broad-based national coalition of consumers, retail and manufacturing businesses, financial institutions, technology professionals and librarians opposed to the Uniform Computer Information Transactions Act (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. In 2001 AFFECT submitted a package of thirty recommended amendments (www.affect.ucita.com) to the UCITA Standby Committee of the National Conference of Commissioners on Uniform State Laws (NCCUSL), the organization charged with promulgating uniform state laws. Most of AFFECT's major concerns were not adequately addressed. Even after approval of the 2002 Amendments (www.law.upenn.edu), UCITA continues to be unfairly biased toward the interests and desires of licensors to the detriment of their customers.

Although NCCUSL accepted some changes recommended by an American Bar Association (ABA) Working Group on UCITA (www.abanet.org/leadership/ucita.pdf), it failed to adopt two crucial substantive recommendations of the ABA group:

- **Pre-transaction disclosure of terms.** The ABA group urged that, "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." NCCUSL rejected this recommendation.
- **Continuing to treat goods with embedded software as goods.** The ABA group recommended excluding from UCITA's scope software that is "embedded in and marketed as an integral part of the goods." NCCUSL also failed to adopt this approach.

Furthermore, the ABA group took a strong position about the drafting of UCITA, finding it to be:

- **Unclear and much too complex.** The ABA group said that in its deliberations, which involved parsing many sections, "time and again ... the individual members of the Group could not agree on what the particular section said or meant." The group also found wanting the "general organizational structure of the statute," its dependence on exclusions of many industries that objected to it and on lengthy definitions with unfamiliar terminology, and its attempt to "audaciously ... cover virtually every issue of concern." The result is a statute that "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 law." Accordingly, the ABA group stated it believes "UCITA should be redrafted to make it easier to understand and use."

NCCUSL's 2002 Amendments have not reduced the ambiguity and complexity of UCITA, which has now expanded to 256 pages of difficult-to-penetrate text and commentary.

To facilitate easy comparison between NCCUSL's advocacy concerning the UCITA revisions approved in August 2002 and our comments on those changes, we have inserted our response to NCCUSL's memo of August 23, 2002, reproduced below. **[AFFECT's comments are bracketed and given in bold, as in this sentence.]** This AFFECT document is also available at <http://www-affect@ucita.com/pdf/AmendmentAnalysisFinal.pdf>

NCCUSL Memorandum **[With AFFECT commentary]**
August 23, 2002

UCITA 2002 REVISIONS -- MEMORANDUM AND CHART

Amendments to UCITA Addressing ABA Working Group Suggestions

In 1999, the National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the Uniform Computer Information Transactions Act, (UCITA), a groundbreaking effort to establish uniform rules for information transactions, as UCC Article 2 does for goods. Since its initial promulgation, UCITA has been enacted, with some modifications, in two states (Virginia and Maryland) and has been the subject of much debate in legislative, academic, and other fora.

[NCCUSL offered UCITA as a free-standing uniform act in 1999 after the American Law Institute (ALI) took the position that it should not be included as a new article in the Uniform Commercial Code (UCC). ALI withdrew from the project and explained in its official publication that it had "significant reservations about some of the act's key substantive provisions and its overall clarity and coherence."

Three states (Iowa, North Carolina and West Virginia), rather than enacting UCITA, have adopted so-called "bomb-shelter" provisions to protect their residents from application of UCITA through choice of law provisions in which the drafter selects Maryland or Virginia law (the only two states where UCITA has passed). In most states, UCITA has either not been introduced because of lack of enthusiasm for it or has stalled in the legislative process after legislators became alerted to its many deficiencies by the diverse coalition of manufacturing and retail businesses, financial institutions, libraries, consumers and, indeed, software professionals who oppose it.]

In the three years since its promulgation, the NCCUSL UCITA Standby Committee has continued to study issues being raised by both supporters and opponents of the act. In the Fall of 2001, the UCITA Standby Committee held a public comment session attended by more than 100 interested parties, including a special UCITA Working Group established by the American Bar Association. Following this meeting, the UCITA Standby Committee released a set of draft recommendations for amendments to UCITA, and shortly thereafter the ABA Working Group released its own set of recommendations.

[The UCITA Standby Committee is largely made up of the original drafting committee members. To date, this group has been unable to take a fresh look at UCITA's deficiencies

or to produce a simpler, more balanced statute capable of winning broad, consensus support. The ABA Working Group, which was a short-term and special-purpose entity, does not continue to function and thus is not in a position to comment on the latest NCCUSL amendments.]

Since that time, the UCITA Standby Committee has worked to review all of the commentary received from all parties, together with the recommendations of the ABA Working Group, in preparing a coherent set of substantive amendments for UCITA. These amendments were presented to the assembled state Commissioners of the National Conference in its 2002 Annual Meeting earlier this month, and were approved in a vote of the state delegations by a margin of 49 to 0.

[Representatives of AFFECT attended the NCCUSL 2002 Annual Meeting and witnessed the development that a large group of commissioners petitioned the NCCUSL leadership to downgrade UCITA to a model act, which would not require ABA approval, rather than pursue it as a uniform law. As a result of the petition drive by opponents, King Burnett, the NCCUSL president, made an unusual announcement concerning UCITA before the vote of the states. He indicated that if more states do not soon enact UCITA and if the ABA does not approve it, “a different approach to the subject matter will have to be taken.” The membership vote in this context was a vote to give the project another year. Many in NCCUSL, as well as outside it, believe that the ABA should withhold approval of UCITA and indeed encourage a different approach to its subject matter.]

The following memo is meant as a guide to the very substantive changes contained in the 2002 UCITA Amendments, with special reference to the specific recommendations proposed by the ABA Working Group.

[We do not agree that the changes are “very substantive,” as will be spelled out below.]

It is organized to track the structure of UCITA, section-by-section, but some of the substantive highlights for the amendments include:

1. **Electronic Self-Help Banned.** Vendors (called licensors mainly) of digital information, including software, may not disable the use of that information by electronic means if there is a breach of an information contract. Vendors have an expedited remedy for a material breach of contract in a court of law.

[This description of UCITA’s so-called “electronic self-help” provisions omits reference to its continued authorization of “electronic regulation of performance” by means of an automatic restraint. Such a restraint may be used where a contract is *terminated* if “a term of the contract authorizes use of the restraint” or to prevent a use “that is inconsistent with the agreement.” Sec. 605 (b) In short, UCITA approves of electronic self-help by another name. Because UCITA has two similar concepts, “electronic self-help” and “electronic regulation of performance,” its purported ban on electronic self-help does not ban what amounts to the same thing, electronic regulation by the vendor of performance by the licensee.

Even to the extent applicable, the UCITA ban on electronic self-help provides no meaningful remedy for customers when self-help is wrongfully used. (Most of the damages that would result from use of electronic self-help would likely be

consequential damages, and most software agreements exclude all liability for consequential damages.) Also, UCITA does not bar inclusion of disabling code or even require disclosure of its presence. This type of code creates what are often called “black holes” or “security holes” that put the confidentiality, integrity and security of a business’s computer systems at serious risk of exploitation by hackers.

We note that NCCUSL’s choice in its memorandum to describe producers as “vendors” rather than by the UCITA terminology “licensors” suggests that it recognizes that UCITA’s concept of the end-user license is not a well-understood or settled commercial model, ready for uniform law codification.]

2. **A State’s Consumer Protection Law Trumps UCITA.** An information contract is expressly subject to and may not waive any consumer protection provided in state or federal law. Included are laws providing for conspicuous disclosure, unfair or deceptive trade practices laws, and laws relating to electronic signatures and records.

[NCCUSL failed to adopt the important recommendation of the ABA Working Group that pre-transaction disclosure of terms be required. Instead, UCITA continues to give explicit protection to the practice of deliberately holding back pre-drafted terms until after the customer has taken delivery. Thus, even if applicable to UCITA transactions, consumer protection laws stated in general terms (for example, prohibiting “unfair and deceptive acts”) may be watered down by UCITA’s more specific protection for post-transaction disclosure.

Furthermore, the UCITA amendment directing courts to apply consumer protection laws that “would have applied in the absence of this Act” is highly uncertain in application. This test would make it necessary for a consumer to first win the argument that a consumer protection statute, such as one written in terms of sales of goods and services rather than licenses of information, would have applied to UCITA transactions in the absence of UCITA, and only then could the consumer make use of the protections of the statute.]

3. **Right to Criticize Protected.** Information contract terms that prohibit criticism of an information product are unenforceable. Parties may contract in a manner consistent with other law such as the law of trade secrets.

[This description of the amendment leaves out its limiting words. The new provision concerning terms banning criticism provides protection only to an end-user licensee and only if the information is made “generally available” and “in its final form.” Section 105(c). This amendment thus contains a huge loophole. For example, if a producer described a product as “not in final form/subject to updates,” then the protection for criticism would not apply.]

4. **Remedies for Known Material Defect Preserved.** Remedies for a known material defect of a product are expressly made available as fully as for defective goods or services.

[This amendment clarifies that the common law of fraud continues to apply to UCITA transactions. However, it is unresponsive to worthwhile proposals made to the Drafting Committee and then to the Standby Committee to give new incentives to software producers

to disclose material defects and thus reduce the huge costs now borne by individual and business users because of buggy software; disclosure would allow information technology experts to take account of “bugs” known to the producer, allowing at least some users to avoid suffering their consequences.]

5. **Reverse Engineering for Interoperability Expressly Authorized.** An information contract may not prohibit reverse engineering that is done for the purposes of making an information product work together with other information products.

[Reverse-engineering is a universal software development practice, in which engineering techniques are used to discover the underlying ideas and principles that make a machine, computer program or other device work. Licensees need to be able to reverse engineer in order to detect and fix defects in software as well as for purposes of interoperability (for example, to allow use of a software program that works on an operating system made by another company). Federal copyright law protects reverse-engineering for purposes of interoperability, finding public domain elements and detecting and repairing defects. Although the new UCITA provision is an improvement over previous versions of UCITA, it is too narrow, protecting only reverse-engineering for the sole purpose of interoperability. This amendment provides less than federal fair use rights.]

6. **Special Open-Source Software Provisions.** Open-source software is expressly not covered by the Act if only copyright permission is given and is not part of a contract. If there is a contract, there are no implied warranties if there is no commercial gain from the transaction.

[The Section 410 provision on warranties does not do enough to facilitate the open source model. The UCITA provision actually protects “free” software, rather than open source software. Since a small fee is often charged for open source software, the open source community’s concerns are not satisfied by the proposed changes.

The lack of sensitivity to the needs of the open source community, which uses very different transactional models than those assumed in UCITA, is matched by a similar insensitivity to the potential impact of UCITA on small developers. These developers in many contexts have been used to thinking of themselves as service-providers who therefore would not give implied warranties of merchantability for a product. By treating software development contracts as licenses of products, UCITA creates a trap for unwary small developers. UCITA assumes as its paradigm “licensor” a sophisticated producer of products who will have in place form contracts routinely disclaiming implied warranties. This is not a paradigm that fits either the world of open source software or software development services. For this reason, the open source software community, which had not previously opposed UCITA, has now asked that it be withdrawn.]

**2002 Amendments to UCITA, Including Responses to
ABA Working Group Suggestions**

I. Scope (generally)

<p>SUGGESTION: The Working Group recognizes there is no bright line rule when UCITA should govern goods with integrated software. However the line drawn should be better formulated to meet normal and reasonable expectations of the parties. A better approach, more consistent with a buyer's expectations, would be a formulation based on how the goods are marketed. UCITA should not apply to the sale or lease of the goods. Rather, UCC Article 2 and 2A should govern the sale or lease of goods with embedded software.</p>	<p>ACTION: The drafting committee had tried many suggestions, including this one, before it settled on the approach in UCITA. A similar approach was adopted in Revised Article 9 and the Committee believes that the current approach best offers guidance to courts and parties for deciding what law should apply. The definition of goods in amended Article 2 of the UCC, recently approved by NCCUSL, excludes "information". The Preliminary Comments to amended Article 2 and the Official Comments to UCITA state that chips (software) embedded in goods in most cases will be governed by UCC Article 2. However, as the working group acknowledges, there is no bright line and in some cases the court will have to determine whether a particular transaction is an information transaction subject to the common law or UCITA, or a goods transaction subject to UCC Article 2.</p>
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[AFFECT Comment: In other words, UCITA will be the operative law for the software on chips in “smart goods” if a form contract states that the software is “licensed.” This will complicate the law of consumer electronics as well as that of complex electronic machinery, making it easier to disclaim warranties and potentially imposing restrictions on use and transfer under the “license” form of transaction. Consumers will most certainly not understand what it means to “license” a component of goods – or, indeed, the entire product. See Section 103(b)(1)(A) (excluding computer programs “sold or leased as part of goods,” but not computer programs “licensed” as part of the transaction) and its Comment 4(b)(3) (stating that “materiality” of use of a computer program in goods—and thus coverage by UCITA—is “ordinarily clear if the program is separately licensed as part of the transaction.”)]

II. Section 102(a) Definitions

(11) “Computer Information Transaction”

<p>SUGGESTION: The Working Group expressed concern about the impact of UCITA on professional regulatory standards, especially in regards to implied warranties, and suggested clarification of UCITA's application to the rendering of professional services.</p>	<p>ACTION: Clarified in an Official Comment</p>
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[AFFECT comment: The ABA Working Group pointed out one surprising implication of the definition of “computer information transaction” (that a lawyer’s work delivered on a disk or on line might be a UCITA transaction). Although the Comment supposedly clarifies this, the

change is not to the black letter text. (In some states the Comments may be treated as definitive while in others Comments are considered merely as advisory.) In addition, the meaning of the term “computer information,” and thus “computer information transaction,” remains unclear in many other ways.]

(12) "Computer Program"

<p>SUGGESTION: The definition, "Published informational content", should exclude computer programs as it was uncertain if the definition of computer program was meant to be interpreted differently from under the Copyright Act.</p>	<p>ACTION: Clarified in an Official Comment.</p>
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[AFFECT comment: The text has not been clarified as suggested in the ABA Working Group report.]

III. Former Section 104 "Mixed Transactions: Agreement to Opt-In or Opt-Out."

<p>SUGGESTION: Since UCITA section 113 already contains rules for variation by agreement, the suggestion is that section 104, containing more detailed and complex rules, be deleted.</p>	<p>ACTION: Deleted the former section 104 completely.</p>
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[AFFECT comment: While the deletion of Section 104 is a stylistic improvement, a licensor still can use a form contract term to opt-in or –out of UCITA.]

IV. Section 105

<p>SUGGESTIONS:</p> <p>a. UCITA should include a provision that it does not displace the application of consumer protection statutes or rules of law that would have applied in the absence of UCITA.</p> <p>b. There is no public policy reason to permit contractual terms that would bar the public discussing of the quality of performance of computer programs licensed to businesses. The prohibition should only apply to computer</p>	<p>ACTIONS: Divided section 105 into two sections (the new 104 and 105).</p> <p>a. Deleted section 105(c) and added new section 104. New section 104 explicitly states that unless otherwise provided, UCITA does not limit, modify, or supersede any consumer protection laws. Additionally, subsection (1) revises the statutory language to clarify the scope of “consumer protection laws”. Subsection (5) states that consumer rules continue to govern without change after enactment of UCITA.</p> <p>b. Former Section 105(d) was deleted. A new (c) was incorporated, which reads as follows:</p> <p>“(c) Lawful Public Comment Not Prohibited. In a transaction in which a</p>
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<p>information that is made generally commercially available.</p> <p>c. For clarification, a comment to section 105 should be added to state that UCITA is not the appropriate place for the interoperation of federal copyright law.</p>	<p>copy of computer information in its final form is made generally available, a term of a contract is unenforceable to the extent that the terms prohibits an end user licensee from engaging in other lawful public discussion relating to the computer information. However, this subsection does not preclude enforcement of a term that establishes or enforces rights under trade secret, trademark, defamation, commercial disparagement, or other laws. This subsection does not alter the applicability of subsection (d) to any term not rendered unenforceable under this section.”</p> <p>c. An Official Comment will clarify the relation is between UCITA and federal copyright law along the lines suggested by the Working Group.</p>
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[AFFECT comment: Under Section 104(e), a standard of assent or consent, if any, in a consumer protection statute will apply. However, if no such standard is included, UCITA’s standard of assent or consent would apply. Because UCITA fails to require pre-transaction disclosure of terms as part of assent under UCITA, as strongly recommended by the ABA Working Group, the Act even as amended waters down the concept of assent or consent in state consumer law. Pre-transaction disclosure of material terms is a central norm in consumer protection law (as well as in contract law more generally), and UCITA’s failure to embrace it makes it an anti-consumer piece of legislation.

Also, the failure to exclude computer programs in smart (embedded) goods from UCITA makes the law of these products more complex and difficult to use, making it harder to make out warranty claims. UCITA’s anti-disclosure model will apply to computer programs in smart goods.

The provision on public criticism contains a huge loophole, making its protections inapplicable if the producer designates the product as “not in final form” (a concept not suggested by the ABA Working Group). Because computer programs are frequently updated, it would be easy for producers to use a label such as “not in final form/subject to updates” to escape the protection offered by this amendment.

V. Section 105 (additional amendments):

<p>Additional Improvements Adopted by NCCUSL (not contained in ABA Working Group recommendations).</p>	<p>ACTION: The new section 105 retains the statutory expression that fundamental public policy may invalidate a contract or term(s) of a contract.</p> <p>ACTION: A new 105(d) clarifies that</p>
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	<p>UCITA does not apply to non-contractual copyright notices, and provides that "this act does not apply to an intellectual property which is solely based on intellectual property rights and not part of a contract. The effect of such notice is determined by law other than this Act." This clarifies that UCITA does not apply to non-contractual, voluntary relationships merely granting IP permission(s) in open source transactions.</p>
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[AFFECT Comment: Because parts of the open source community use contracts rather than mere permissions, this change is not fully responsive to the community’s needs.]

VI. Former Section 110

<p>Additional Improvements Adopted by NCCUSL (not contained in ABA Working Group recommendations).</p>	<p>ACTION: Amended to clarify that this section adopts the rule on choice of forum adopted in the Restatement and the vast majority of reported cases and reads as follows.</p> <p>"(c) The enforceability of an agreed choice of exclusive forum is a question for determination by a court of competent jurisdiction in the state in which the action is brought."</p>
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[AFFECT Comment: AFFECT opposes the broad authorization of choice of forum in UCITA, which is not contained in UCC Revised Article 1, recently approved by the ABA, NCCUSL and the ALL.]

VI. Section 112(e)(3) [Numbering in original. This should be numbered VII]

<p>Modify (e)(3) to clarify that, if there is no right of return required under (e)(3) (now the new section 113), the licensee must at least have an opportunity to review the license terms before the licensee is bound by the license agreement.</p>	<p>ACTION: Former subsection (e) was deleted and a new section 113 was added for clarity purposes without substantive change. Under section 112 and 113 the licensee must have an opportunity to review the license terms before the licensee is bound by the license agreement. The section referred to deals with proposed modifications to existing contracts and the right to a refund. The comments will make that clear. In addition, Section 209 was substantially amended to ensure that terms are not part of a contract unless there is, specifically, an opportunity to review and assent, and unless three other requirements stated in Section 209 are also met.</p>
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[AFFECT Comment: The “opportunity to review” referred to here is an opportunity that can be provided after payment and delivery. Therefore, it comes too late. NCCUSL failed to adopt the ABA Working Group recommendation of *pre-transaction disclosure*, and a belated opportunity to review does not make up for this serious defect in UCITA. In order to comparison shop under UCITA, a consumer or business customer would have to make a series of transactions and attempt to reverse them in order to find the best terms. UCITA is anti-competitive because of this burden that it places on making comparisons of terms.

The much-touted "right of return" in UCITA is an attempt to make a belated opportunity to review seem real, but the crucial time when a customer is most likely to review terms is prior to deciding to enter into a transaction, not after ordering and receiving a product. Furthermore, the UCITA right of return disappears if the customer does not reverse the transaction before making use of the product. In addition, the opportunity to review and the right of return provided for in Section 209 are only applicable to mass-market licenses. The term "mass-market transaction" is so narrowly defined that most business or professional acquisitions of software--including those by small businesses and sole proprietors--would not be covered. To qualify as a mass-market transaction, the product must be one that is marketed to consumers on substantially the same terms for the same information. See Section 102(a)(45)(B)(i). Thus, any software that is a specialized product not used by consumers or that is marketed in a "business" or "professional" version, at a different price or with different features than a consumer version, would not be covered, so that an opportunity to review and a right of return would not be required.]

VIII. Former Section 113 (now Section 115)

<p>SUGGESTION Section 304(b)(2), which requires that the other party to a mass-market transaction have the right to terminate (subject to good faith) a continuing contract as to future performance if a proposed change alters a material term, should be listed among the non-variable provisions listed in section 113 (now section 115).</p>	<p>ACTION: In section 115, section 304(b)(2) is now listed among the non-variable provisions. Section 115(3) reads as follows:</p> <p>(3) [Other Non-Variable Rules] Limitations on enforceability of, or agreement to, a contract, term, or right expressly stated in the sections listed in the following subparagraphs may not be varied by agreement except to the extent provided in each section:</p> <p>(A) the limitations on agreed choice of law in Section 109(a);</p> <p>...</p> <p>(H) the requirements of Section 304(b)(2).</p> <p>..."</p>
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[AFFECT comment: AFFECT opposes UCITA’s provision for “continuing terms.” Under Sections 304 and 102(a)(53)(B) (defining “receipt” of a notice), a licensor that includes a “continuing terms” clause in a license first revealed after payment and delivery, and defines “receipt” as a posting on its own Web site, can later change the terms (for example, raising the price for continued use) by posting notice on its Web site, without even giving e-mail

notice. The right of mass-market customers to terminate upon a change (a right that non-mass-market customers do not get at all!) may disappear if the customer does not promptly cancel after such a Web posting. Finally, “mass-market transaction” is so narrowly defined that even most small business users are not included.]

IX. Former Section 114 (now sections 116 and 117):

<p>SUGGESTION: UCITA should not displace the laws of fraud or other tort law or unfair or deceptive acts or practices. The additional sentence in section 114(a) should be deleted. UCITA should also make it clear that tort law or unfair or deceptive practices statutes or rules or laws, including laws dealing with the failure to disclose defects, are not displaced.</p>	<p>ACTION: Former section 114 (now section 116) was clarified to emphasize that the law of fraud, misrepresentation and unfair and deceptive practices, as they deal with disclosure of defects, is not displaced by UCITA.</p>
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[AFFECT comment: This amendment clarifies that the common law of fraud continues to apply to UCITA transactions. However, it is unresponsive to worthwhile proposals made to the Drafting Committee and then to the Standby Committee to give new incentives to software producers to disclose material defects and thus reduce the huge costs now borne by individual and business users because of buggy software; disclosure would allow information technology experts to take account of “bugs” known to the producer, allowing at least some users to avoid suffering their consequences.]

X. New Section 118

<p>SUGGESTION: The language [in Section 115(a) of the Interim Standby Committee Report referring to] "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.</p>	<p>ACTION: A new section, now numbered 118 in the final 2002 Amendments, was created to provide that contract terms cannot preclude reverse engineering. While the specific language change recommended by the Working Group was not adopted, this amendment to UCITA adopts a rule that enhances the right to reverse engineer for interoperability. The contract rule also is subordinate to the rule under copyright, patent and other intellectual property law (<i>see</i> § 105).</p>
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[AFFECT comment: The ABA Working Group recommendation was not adopted. In addition, the new Section 118, while an improvement over original UCITA, is severely limited. Section 118 protects reverse engineering “solely” for purposes of interoperability, but it does not protect reverse-engineering otherwise permitted under copyright law, such as to discover public domain elements or to discover security holes or other defects. The protection for reverse-engineering for purposes of interoperability disappears if the reverse-engineering is undertaken for other purposes at the same time.]

XI. Section 209

SUGGESTION: 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.

ACTION: The suggestion had already been addressed in UCITA but was further implemented to the extent the standby committee believed feasible without dictating a change in well-established and long-standing contracting practice. For example, most reported cases enforce contracts with terms provided after the initial agreement. These contracts have become central to multi-billion dollars of commerce.

In particular, the amendment provides that a term is **not** part of a mass-market standard form contract **unless:**

- (1) The licensee has an opportunity to review terms before assenting to them, if the terms are not available to the licensee before assent; or
- (2) The terms are available after assent in one of the following three forms:
 - (a) an immediately available non-electronic record that the licensee may keep.
 - (b) an immediately available electronic record that the licensee can be printed or stored for archival and review purposes.
 - (c) in a copy available at no additional cost if the record was unable to be printed or stored.
- (3) Additionally, (d) was added to apply to the situation where a copy of the license is not available to review by the licensee before the obligation to pay, then notice must be given to the licensee that a refund may be obtained from the person to whom the payment was made or other person designated in the notice if the licensee refused the terms.
- (4) The term is neither unconscionable nor contrary to fundamental public policy.

See also discussion in relation to Section 112(e)(3) (the new Section 113), *supra*; and *see* Section 208 (regarding adoption terms of records); Section 113 (providing opportunity to review); and Section 114 (former Section 211)(allowing for pre-transaction disclosure in Internet type transactions).

[AFFECT comment: NCCUSL failed to adopt the ABA recommendation of pre-transaction disclosure, which is crucial to comparison shopping for the best terms. Section 209 continues to permit licensors to withhold their terms until after payment and delivery, even in mass-market transactions. The “opportunity to review” referred to here is one that may come after the customer has ordered, made payment and taken delivery. This belated opportunity to see terms is not a substitute for pre-transaction disclosure. Furthermore, even a belated opportunity for review is not required in non-mass-market transactions under Section 208. NCCUSL also discusses a change concerning making a copy of terms available for the licensee to store, but this copy for storage also may be made available only after payment and delivery. Thus, the two changes discussed—a delayed opportunity to review terms and a delayed offer of a copy of terms for storage—do not respond to the important recommendation of the ABA group that terms should have to be available before payment and delivery. The only meaningful opportunity to review is one that occurs before a decision to enter into a transaction.]

XII. Section 216

<p>SUGGESTION: UCITA section 216 (UCITA Standby Committee Recommendation 7), which elaborates on the contract formation rules in the event of post-payment terms should be deleted.</p>	<p>ACTION: The Section 216 referred to here was a proposed new section which was deleted.</p>
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[AFFECT comment: We applaud this deletion of a section that was impossible to understand and appeared to add nothing.]

XIII. Sections 307(c) and 308 [and 207(c)]

<p>SUGGESTION: These default rules on license duration and permitted users should be deleted.</p>	<p>ACTION: Both suggested sections were deleted, as was related Section 207(c).</p>
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[AFFECT comment: Although these deletions of default rules, which were contrary to standard business practice, are an improvement, UCITA still fails to codify the expectation, that if not explicitly stated, a license is perpetual and the number of users is unlimited. Moreover, these changes still do not remedy the more fundamental problem that such basic elements of a license as duration and use restrictions can be designated in terms not disclosed until after payment and delivery. This makes it inevitable that many customers acquire products under licenses that do not fit their intended uses. This is a problem for all licensees, including consumers, businesses and libraries.]

XIV. Section 401 (d)

<p>Additional Improvements Adopted by NCCUSL (not contained in ABA Working Group recommendations).</p>	<p>ACTION: Amended to provide a clear method by which a licensee or licensor can disclaim the hold-harmless obligation that arises in some cases.</p>
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[AFFECT comment: In the context of negotiated licenses, this provision appears to be helpful. In the context of non-negotiable end-user licenses, Section 401(d) benefits only

licensors, giving them a way to disclaim warranties against interference with a user's enjoyment of the information or against infringement.]

XV. Section 410

<p>SUGGESTION: Businesses that obtain a profit from providing ancillary services or other software should give the implied warranties of non-interference and non-infringement. Additionally 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.</p>	<p>ACTION: Created new section 410 which reads as follows: "No Implied Warranties for Free Computer Program. The warranties under section 401 and 403 apply to a computer program only if the licensor intends to make a profit from the distribution of the copy of the program or acts generally for commercial gain derived from controlling use of the program or making, modifying, or redistributing copies of the program."</p>
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[AFFECT comment: This change may solve some problems for some open source software community members, but it will not address the problems of those who charge a fee for open source software, even a very small one. Also, because the provision is written in terms of "free" as opposed to "open source software," it may end up relieving commercial closed source licensors from warranties in some circumstances. The drafting of the provision is ambiguous, but under one interpretation might mean that—even without a disclaimer—there are no implied warranties given for a program such as Internet Explorer, for which there is no charge to the customer. The section does not require use of the open source model to get its protection; to qualify as "free software" under the proposed change, it is not necessary for the vendor to give the customer the right to make copies, modify, reverse engineer, obtain source code or distribute it – the customarily required features of open source software.]

XVI. Section 501(a)

<p>SUGGESTION: Clarify to avoid implication that "and identified to the contract" in section 501(a) adds an additional requirement before ownership of informational rights in a computer program arises under the Copyright Act.</p>	<p>ACTION: According to the existing Official Comments to section 501, identification to the contract requires both completion to a sufficient level to separate the information from other information of the transferor and an indication by the transferor that the particular information is that which will be transferred under the contract. The term "identification to the contract" should be interpreted in light of that use. However, if the agreement is that the licensee will own all work in progress and working drafts, then those are the contractual subject matter. They are identified to the contract when created if creating the work in progress is connected to the contract.</p>
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[AFFECT comment: AFFECT has no objection to this technical amendment.]

XVII. Section 503

Additional Improvements Adopted by NCCUSL (not contained in ABA Working Group recommendations).	ACTION: Amended to improve clarity and in part to reflect rules adopted in Virginia regarding certain transfers with respect to schools, libraries, and in other non-commercial transactions.
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[AFFECT comment: This change was not proposed by the library community as it is too narrow to adequately address its concerns. Section 503(2)(C) protects transfers of computer programs contained in a computer as part of a gift to a public elementary or secondary school, a public library or from a consumer to another consumer. Thus, gifts of computers to private schools and public or private universities are not protected, and gifts of computer programs without the computer—even when no copy is kept by the donor—are not protected at all against contractual restrictions on transfer. This amendment provides much less than the transferability that attends a “first sale” of a copy of a copyrighted work.]

NCCUSL continues to dismiss deeper library concerns. UCITA as currently drafted threatens to undermine the carefully wrought balances inherent in federal copyright law and therefore should be amended to specify that terms in "click-wrap" or non-negotiable licenses will be unenforceable if they are contrary to permitted uses under federal copyright law. Terms in mass-market licenses can effectively prohibit core library activities, e.g. inter-library loan, archiving or preservation. The language in UCITA Section 105(a) and (b), regarding preemption by federal law and fundamental public policy exceptions to enforcement of contract terms, does not provide the needed clear and unambiguous protection for important library functions that serve the public interest. It is not an adequate answer to say, for example, that research libraries should use scarce resources in litigation to establish their rights to archive and preserve digital content that would otherwise be lost.]

XVIII. Section 509

Additional Improvements Adopted by NCCUSL (not contained in ABA Working Group recommendations).	ACTION: Amended to reflect current, standard NCCUSL language dealing with the interface between the Act and federal law on electronic commerce.
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[AFFECT has no comment on this technical change to adopt standard NCCUSL language.]

XIX. Sections 815 and 816

SUGGESTION: In dealing with electronic self-help, the language authorizing the licensor to take "further steps with respect to the copy, including erasing the copy by electronic means" should be deleted from section 815(b) as "further steps" is not necessary to the licensor's rights to be protected. This would not prevent the licensor from taking possession of the copy.	ACTION: Basically conforms to the suggestion. (1) Added language provides that a licensor may exercise self-help under 815(a) only if it can be done "by taking possession of a tangible copy" without a breach of the peace. (2) UCITA still uses the language "further steps". However, language was added to make the operational phrase "taking further steps" subject to the same obligations that arise in section 618(a) relating to return of the
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	<p>licensee’s information and requiring that a licensor shall exercise reasonable care in the custody and preservation of the licensee’s property in the licensor’s possession.</p> <p>(3) Electronic self-help as a remedy upon cancellation is prohibited.</p>
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[AFFECT comment: The statement that electronic self-help is prohibited as a remedy upon cancellation fails to address the concern that Section 605 permits “electronic regulation of performance” if a contract provision so provides. Such a term can be part of a license first disclosed after payment and delivery. Electronic regulation thus can be used to “prevent use of information contrary to the contract” with the licensor determining unilaterally whether there may be such a use. In short, in Section 605, UCITA provides for electronic self-help by another name.]

XX. Style Changes to Improve Readability and Overall Clarity

<p>SUGGESTION: UCITA should be redrafted to make it easier to understand and use. The redrafting effort should reduce intuitive definitions, eliminate ambiguities and inconsistencies, and seek more organizational and stylistic clarity in the ways the rules are written.</p>	<p>ACTION: The following Amendments have been made to UCITA to clarify or restructure for clarity and to add subheadings giving guidance for use of the Act.</p> <p>(1) Section 106: A new subsection (e) adopted to reflect standard policies under the UCC that section headings are part of this Act but subsection headings are not.</p> <p>(2) Section 202 was amended to clarify what type of disputes prevents creation of a contact.</p> <p>(3) Section 211 was relocated (now the new Section 114) due to its relationship with other rules.</p> <p>(4) The following sections were edited to improve clarity and style.</p> <ul style="list-style-type: none"> - Section 202 - Section 205 - Section 212 - Section 303 - Section 402 - Section 404 - Section 601 - Section 605 - Section 613 - Section 702 - Section 204 - Section 208 - Section 302 - Section 309 - Section 403 - Section 504 - Section 604 - Section 610 - Section 701 - Section 802
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[AFFECT comment: Adding subheadings throughout UCITA and tinkering with the wording of numerous sections and comments still does not fundamentally improve UCITA’s drafting style. UCITA continues to suffer from a lack of “overall clarity and coherence,” noted by the ALI upon its withdrawal from the project. It also has yet to meet the standards set by the ABA Working Group, which include a “general organizational structure” and “stylistic clarity” to meet the objective of bringing greater certainty to this area of the law. After the recent changes, there is still the problem—as the ABA group put it—that “if UCITA, in its present form, goes forward, there would be considerable controversy and litigation over what its various ‘rules’ really mean.”]

Americans for Fair Electronic Commerce Transactions
1301 Pennsylvania Ave. NW Suite 403
Washington, D. C. 20004
v-202-628-8410
f-202-628-8419
e-mail-cashworth@alawash.org
www.affect.ucita.com