



August 6, 2002

AN OPEN LETTER TO THE PRESIDENT AND HOUSE OF DELEGATES OF THE  
AMERICAN BAR ASSOCIATION

Dear President Carlton and Members of the House of Delegates:

We appreciate the hard work that both the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Bar Association (ABA) have invested in reviewing the troubled Uniform Computer Information Transactions Act (UCITA). We respectfully submit, however, that the changes made at NCCUSL's annual meeting in Tucson, Arizona, last week do not significantly improve UCITA or respond to key recommendations made by an ABA Working Group. Therefore, we urge you not to approve UCITA when NCCUSL brings it before you.

AFFECT is a broad-based national coalition of retail and manufacturing businesses, consumers, financial services institutions, technology professionals and librarians. AFFECT representatives attended NCCUSL's annual meeting in Tucson, at which NCCUSL considered and acted upon some proposed changes to UCITA.

Although NCCUSL adopted some changes recommended by the ABA Working Group that studied UCITA, NCCUSL failed to adopt two crucial recommendations of the ABA group: to require disclosure of the terms of a contract before a licensee becomes obligated to pay and to exclude from UCITA software that is "embedded in and marketed as an integral part of the goods." Moreover, NCCUSL did not respond sufficiently to a critical, core recommendation by the ABA Working Group that, because UCITA is unclear and much too complex, it should be redrafted to make it easier to understand and to use. Because the most recent changes by NCCUSL do not significantly improve the law, AFFECT remains committed to opposing further enactment of UCITA. UCITA continues to be fundamentally flawed and unfairly biased in favor of the software and information industries and against their customers.

King Burnett, NCCUSL president, made an unusual announcement concerning UCITA at the close of the NCCUSL annual meeting last week. He indicated that if more states do not soon enact UCITA and the ABA does not approve it, "a different approach to the subject matter will have to be taken." We believe that a different approach is much needed, one that is more balanced and uses better drafting, and we therefore urge the ABA not to lend support to UCITA.

Following Burnett's comments, Commissioner William Breetz of Connecticut spoke on behalf of a large group of commissioners who had petitioned to downgrade UCITA to a model act rather than a uniform law. Breetz said that after discussions with leadership, it had been agreed that it would be "premature" to downgrade UCITA this year. If UCITA had been downgraded, ABA approval would not be necessary and NCCUSL would not continue to work for uniform enactment.

Thus, NCCUSL has in essence decided to seek ABA guidance on whether UCITA should continue to be pursued as uniform law. We urge that your answer should be no. Furthermore, we observed last week that many within NCCUSL share this view. NCCUSL seems to be on the brink of reconsidering UCITA, and the ABA should encourage this development by withholding approval.

In addition to the petition-drive against UCITA at the NCCUSL annual meeting, another indication that NCCUSL was moving away from UCITA came in the form of the organization's approval of a new approach to scope of Article 2 of the Uniform Commercial Code (UCC), which governs transactions in goods and has been widely applied by courts in litigation over software. The new version of Article 2 rejects UCITA terminology such as "computer information" and its complex line-drawing between hard and soft goods. According to the Article 2 drafting committee chair, Boris Auerbach, the new approach, which revises the definition of goods, represents a decision to "trust the courts." While we would prefer law that takes specific account of the legitimate needs of customers of software and digital content and balances them with the needs of producers, the Article 2 approach is preferable to UCITA.

The Article 2 proposal leaves the actual scope section unchanged, applicable to "transactions in goods," but with goods redefined to exclude "information," a term that is not defined. In discussion on the floor at NCCUSL, this exclusion was described as a "truism" and as "substanceless," leaving the courts to sort out the extent to which Article 2 applies to transactions in copies of computer programs and digital content. The Article 2 proposal must now go to the American Law Institute for approval, which could come at the earliest next May.

In addition to the change in definition of goods, the new Article 2 approach includes a one-paragraph comment referring to certain types of transactions in computer programs and digital content. This comment states that Article 2 would not apply "directly" to downloaded software, thus indicating that application of Article 2 to downloaded software, by analogy, would remain up to the courts. Courts also would be left to decide some key types of cases, such as whether Article 2 applies in whole or part to computer programs delivered in computers or on diskettes. In the two states where it has been enacted, UCITA clearly covers the computer programs in those cases, but the new Article 2 scope approach rejects the lines drawn in UCITA and leaves it open to the courts to continue to apply Article 2 where UCITA is not applicable.

Page 3

The new Article 2 comment clarifies that embedded software in goods would continue to be covered by Article 2. It states that transactions in cars, despite the presence of many computer programs, are “fully within Article 2.” This is a positive development because it avoids splitting many transactions into hard goods and software components. In the context of consumer transactions, it helps to clarify that state consumer protection laws applicable to goods also apply to the software in goods.

NCCUSL’s approval of a new approach to Article 2 scope, one that leaves open its continued applicability to computer programs and digital content, is a positive development paving the way for UCITA’s approach to be retired. The ABA should withhold support from UCITA to encourage that outcome.

Sincerely,

A handwritten signature in black ink, appearing to read "Miriam Nisbet". The signature is written in a cursive style with a large initial "M".

Miriam Nisbet  
President

