

January 29, 2003

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

Dear President Carlton and Delegates:

At the upcoming 2003 American Bar Association Midyear Meeting, the House of Delegates will be considering Resolution 113G that approves the Uniform Computer Information Transactions Act (UCITA) as an act appropriate for consideration by state legislatures. While we appreciate the considerable efforts of the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the ABA, we must urge you not to vote in favor of this resolution.

UCITA attempts to codify and make uniform practices and judicial opinion that impact areas of the law that are not yet settled. Thus, it attempts to anticipate the future legal needs of the continually evolving technology sector. In 2002 the ABA Working Group that studied UCITA noted that UCITA “attempts to address this area of the law audaciously by trying to cover virtually every issue of concern.” Stephen Chow, a member of NCCUSL’s UCITA Drafting Committee and a practitioner in this area of the law, has repeatedly stated that Article 2 has served quite adequately for the last twenty-five years. While the ABA Working Group opined that it is “desirable to have a uniform law with uniform enactment in the various states,” it did not suggest that such a law is necessary at this time. Furthermore, Virginia and Maryland have enacted different versions of UCITA and three states (Iowa, West Virginia, North Carolina) have taken the unusual step of passing “bomb-shelter” legislation to protect citizens and businesses in their states from UCITA’s reach. The goal of uniformity appears more elusive than ever.

After more than a decade of debate, the scope, clarity, and inherent bias are among the fundamental issues that continue to perpetuate a lack of consensus about UCITA that is necessary to successful uniform laws. In 1999 the American Law Institute would not join in approving “UCC2B” due to “significant reservations about both some of its key substantive provisions and its overall lack of clarity and coherence.” (www.ali.org) The ABA Working Group later raised lack of clarity as one of the critical concerns about UCITA. NCCUSL’s addition of sub-titles, minor tinkering and declaration of success did not resolve these problems.

AFFECT’s membership includes both small and large business and non-profit users of computer information products, some of whom are in a position to frequently negotiate contract terms. However, most business users, including the ABA and its members, would be substantially impacted by UCITA because the licenses in nearly all software products are non-negotiable. The “freedom of contract” so valued by the proponents of UCITA is enjoyed only by the licensors who draft the

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click-to-agree forms all of us are familiar with. AFFECT finds that UCITA fails to balance the needs of licensors with the needs of licensees in any meaningful way. Instead, it is highly tilted toward licensors.

AFFECT is a broad-based national coalition of retail and manufacturing businesses, consumers, financial services institutions, libraries and technology professionals. Some of our members have been following the development of UCITA for over a decade and in 2001 worked collaboratively to develop a package of amendments that AFFECT submitted to NCCUSL. AFFECT's diverse membership reflects the broad opposition to UCITA that persists notwithstanding revisions made in 2002. AFFECT believes that support for Resolution 113G would endorse a process that has created a highly flawed and controversial act that is still not ready for consideration by state legislatures.

Sincerely,

Miriam Nisbet
President

Encl.