

UCITA STANDBY COMMITTEE

Report to Conference and Response to Concerns Expressed in ABA Working Group Report¹

May 29, 2002

Introduction

On November 16-18, 2001, the Standby Committee convened an open meeting to consider possible amendments of the Official Text of the Uniform Computer Information Transactions Act (UCITA). In addition to members of the Standby Committee, the meeting was attended by over one hundred lawyers, lobbyists, interest group advocates, librarians, and technology professionals, representing a wide diversity of views. The meeting involved over sixteen hours of open debate and discussion over a two and one-half day period. This was the seventeenth such meeting in the UCITA project, but the first since UCITA was promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and adopted by two states.

The meeting was also attended by members of an ABA Working Group. After a report was issued by the Standby Committee based on consideration of the amendments proposed during the November meeting, the ABA Working Group published a report raising eleven concerns about UCITA. In this memorandum, the UCITA Standby Committee responds to those concerns. That report is available at www.nccusl.org. The Working Group Report also stated its general agreement with the purposes and rationale of the UCITA project. The Report states:

The Working Group concurs ... that it is desirable to have a uniform law that would set forth legal rules concerning licensing of, and other transactions in computer software and other computer information. *Report at p. 5.*

This reaffirms the fundamental policy judgment that has led to the multi-year project that resulted in UCITA and that supports the dedication of immense resources and substantial time by

¹ **NOTE: THIS REPORT SUPERSEDES THE RECOMMENDATIONS IN THE STANDBY COMMITTEE REPORT OF DECEMBER 17, 2001. THE NINETEEN RECOMMENDATIONS OF THE DECEMBER REPORT ARE INCORPORATED INTO THE THIRTY EIGHT RECOMMENDATIONS FOR AMENDMENTS MADE BY THIS REPORT FOR CONSIDERATION AT THE ANNUAL MEETING OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS TO BE HELD IN JULY, 2002. THE DECEMBER REPORT OF THE COMMITTEE CAN BE OBTAINED AT www.nccusl.org**

hundreds of lawyers, bar groups, and companies in this project. The Working Group Report, further states:

The working Group also agrees ... that UCITA contains a number of provisions that will be beneficial to many parties that deal in software and other computer information. *Report at p. 5.*

Against this background of general agreement on objectives, the UCITA Standby Committee has reviewed the Working Group Report as reactions by interested lawyers who have spent some time with the draft and the issues it involves, including attending one Committee meeting in November, 2001.

Based on the November meeting and other information it received, in December, 2001, the UCITA Standby Committee proposed 19 amendments to UCITA to respond to concerns that various opponents have expressed. The Working Group Report endorsed those changes, suggesting further changes in two of the nineteen.

This Response is prepared by the Standby Committee to discuss the eleven concerns expressed in the Working Group report and to make additional recommendations to NCCUSL for amendments to UCITA. Of the concerns expressed by the Working Group, the Standby Committee has recommended further amendments to UCITA for ten of the eleven concerns (including 4 of the six miscellaneous points which were provided by the Working Group as suggestions for clarification). In addition, as discussed below, the Standby Committee appointed a Subcommittee to review the Act's structure and clarity. The report of that Subcommittee, which recommends numerous clarifying amendments, is attached as Appendix 2. No specific amendments are recommended for one concern expressed in the Working Group report, as explained in item 2 beginning on page 6 hereof.

Overall, based on the original December report, the work of the Subcommittee, and the Standby Committee's further consideration of the ABA Working Group report, the Standby Committee recommends thirty-eight amendments to the Official Text of UCITA. While many of these address issues of style and clarification, others address significant substantive concerns. The proposed amendments are attached as Appendix 1 to this Report.

Concerns Expressed in Working Group Report

In the following pages, the UCITA Standby Committee provides responses to the concerns expressed by the Working Group.

1. ABA # 1: Clarity issues.

The Working Group expressed concern about the clarity and structure of the Act, as well as suggesting that it addresses too many issues. It recommended that the draft be rewritten. After considering this recommendation, the Standby Committee considered several substantive amendments to the Act and authorized the appointment of a subcommittee to examine the structure and clarity of the draft. The Subcommittee Report of May 11, 2002 made numerous clarifying recommendations, all of which have been adopted by the Standby Committee.

While virtually any written product can be improved as to style and clarity, none is likely to be perfect. In considering the Working Group comments on this issue, it is important to recognize the context from which UCITA emerged. UCITA was drafted over a ten year period. During that time, drafts were continuously commented on by various committees and individuals within the ABA and by various ABA representatives. An active Business Law Section subcommittee was involved throughout; many of its proposals are incorporated in UCITA. The Drafting Committee received in-put from hundreds of commentators, including numerous drafting suggestions. Drafts were repeatedly reviewed by the NCCUSL Style Committee, experts in statutory drafting, considered at Annual Meetings of NCCUSL, and reviewed by a special committee attempting to harmonize the language of UCITA, revisions of Article 2, and revisions of Article 2A.

During this time, it was an inevitable consequence of an open political process that some words or phrases were chosen to achieve consensus or solve a problem at one point in time. Other, later commentators might prefer different wording for purposes of clarity, but new wording may resurrect the old debate or may cause those who participated in that debate to feel that their expressed concerns have been subsequently overridden.

The nature of the project distinguishes it from some other NCCUSL projects. When an existing statute is rewritten, such as in UCC Article 9, there is less complexity than in a project such as UCITA which melds different and sometimes conflicting legal disciplines. UCITA incorporates and blends parallel legal principles and wording that involves principles found in common law, UCC Articles 1 and 2, the Copyright Act and other relevant bodies of contract law.

Approximately 68% of UCITA's relevant provisions intentionally stem largely from rules and language in existing Article 1 or Article 2, or language in other uniform laws.² Substantial changes in that language could create the inference of a change in law when none was intended. Indeed, this was a primary objection raised by industry to the original Article 2 revision project and a primary reason for abandoning many of the changes suggested for revised Article 2 during that project.

The reaction of the Working Group is that of a relatively small group, most of whom heard only a limited amount of the overall debates, and some of whom attempted to learn a complex area during a very brief period of time and without benefit of input from a full spectrum of views. Others had previously expressed strong public opposition to UCITA. This is not to say that the concerns expressed are unfounded, but on the contrary to place them in context of the work of others, including extensively work within the ABA through its advisors, committees and other input over the ten year drafting project.

a. Subcommittee Report

The Working Group raised issues with merit to which this Report responds positively. The Committee recognizes that there is always room to improve any text and all good legislation. For example, in the first several years after promulgation, Revised Article 9 was amended numerous times to clarify text and intent. Thus, in response to the Working Group Report, the

² Out of the 106 total sections in UCITA, 71 come from the UCC, UETA, federal law, and NCCUSL boilerplate (68% of the whole). Of that 68%, 32 sections (30%) are virtually verbatim. Thirty-nine sections (38%) are in concept and wording substantially the same. Of the 77 definitions in UCITA Section 102, 45 are virtually verbatim (60%), four are substantially the same, for a total of 64% from the UCC, UETA or NCCUSL boilerplate. Thirty-four are substantially new or from other sources representing 36% of the total definitions.

Committee appointed a Subcommittee to review the structure and language of the Act with the goal of improving the clarity of its presentation. As described in the attached Report, the Subcommittee made numerous proposed amendments that the Committee believes productively enhance the ease of use of the Act. These include:

1. Restructuring several core substantive sections of the Act.
2. Adoption of subtitles identifying the content of subsections in the Act in a manner consistent with recently promulgated revisions of UCC Article 9.
3. Recommendations to modify the Official Comments to increase the extent to which cross-references and interaction among sections are clarified.
4. Editorial amendments to twenty-nine sections or previously recommended substantive amendments.

In total, the Subcommittee has recommended thirty-eight amendments in addition to the subtitles to provide clarity and ease of use of the Act. A draft of the Act with subheadings based on the 2001 Official Text is attached as Appendix 3 to this report.

b. Specific Issues Mentioned.

The Working Group Report mentions several specific clarity concerns or illustrations. We examined each with the following results:

(1) *“The text ... is ... filled with terminology that is largely unfamiliar to the average reader, necessitating lengthy definitions of those terms.”* This is inherent in the subject matter. UCITA blends various areas of converging law and practice that use different terminology and traditions, including the common law, the Copyright Act and UCC Articles 1 and 2; any person familiar with some but not all will find the others unfamiliar. A reason for writing UCITA was to find a common ground that can be learned by those attempting to deal with this converging area.

In addition, the practice of defining terms is standard statutory drafting practice and is heavily relied on in NCCUSL projects to provide clarity, even though, as the Working Group notes, it may require referencing back to other text in order to understand a section. The following comparisons may be helpful:

- UCITA uses 66 definitions and cross-references another 11 definitions in other law. Many of the 66 are from UCC Article 1 and Article 2 ; they are repeated in UCITA largely unchanged because UCITA is not part of the UCC.
- Revised Article 9 of the UCC regarding security interests has 80 definitions, 35 cross-references to other law, and incorporates 46 definitions from Article 1. Many Article 9 definitions are substantively different from prior law and practice, such as the definitions of “consignment” and “account”, and many of which are entirely new to commercial practice.
- Current Article 2 contains 35 definitions, incorporates 46 from Article 1, and contains a number of definitions embedded in its substantive provisions.

Like Article 2 but in contrast to Article 9, UCITA provides definitional cross-references for each of its substantive sections. But in all three statutes, understanding numerous definitions that are

not necessarily intuitive is a part of understanding the statute. It may also be helpful to note that some of the definitions and provisions reflect concepts or language from the federal Copyright Act and thus will be unfamiliar to those not used to dealing with that act or with those concepts. Again, a purpose of UCITA is to try and make coherent to lawyers from converging disciplines, concepts that will be foreign to some or all of them until dealing in information becomes as common as dealing in real estate or goods.

(2) “[T]he text frequently suggests that there are other sections that may affect a particular rule (and which therefore should be considered), but which are not specifically referenced (e.g., “pursuant to the applicable sections of this [Act], including Section 209, 211 and 102(a)(57)”).” The only example cited by the Working Group is a proposed amendment that has not been styled or enacted; and this Report recommends that this proposed amendment be withdrawn. If the Working Group has other illustrations, we would appreciate further guidance. We have been unable to locate any other examples.

The Working Group may be referring to a different use of the term “including” in UCITA. Various uses of the term “including” in UCITA serve specific, legitimate purposes common in statutory drafting. They identify factors or considerations that are within a general principle, but are singled out to highlight them or to avoid doubt about or to provide guidance regarding whether they are intended to be included. For example:

- An Article 1 (and UCITA) definition provides that “agreement” means the bargain of the parties in fact, as found from the circumstances *including course of dealing, usage of trade or course of performance*. This language highlights the sources of practical construction that are particularly, but not exclusively relevant.
- Article 2 (and UCITA’s adaptation) provides: “A contract may be formed in any manner sufficient to show agreement, *including offer and acceptance or conduct of both parties or operations of electronic agents which recognize the existence of a contract*.” This language highlights relevant ways of forming a contract.
- UCITA Section 402(1) provides: “An affirmation of fact or promise made by the licensor to its licensee, *including by advertising* ... creates an express warranty that the information to be furnished under the agreement will conform to the affirmation or promise.” The “including” clause resolves a conflict that arose in Article 2 case law about whether an express warranty can arise from advertising – had this use of the word been used in the original, that conflict would have been avoided.

There are other illustrations and all serve a useful purpose in avoiding areas of dispute and providing the clarification that is the goal.

(3) “[In] far too many instances it is impossible to understand a “rule” simply by reading the section that supposedly sets forth that rule. Instead, the reader must wend his or her way not only through some intricate prose, but also through a number of other sections that are cross-referenced in the rule.” The use of definitions is, as explained above, inherent in most statutes. Statutory cross-references are also an important part of statutory drafting and are found in virtually all statutes of significant length. In UCITA, they are used in two contexts. In one, some rules are not cross-referenced in black-letter text because they are of general applicability (e.g., ideas of offer-acceptance, variation by agreement, unconscionability,

fundamental public policy, etc.), or they are definitions (for which non-statutory cross-references are provided). The other context entails cross-reference to specifically applicable provisions that condition the effect of the particular rule.

All NCCUSL commercial law statutes require consideration of inter-locking provisions and all contain both explicit and implicit cross-references. For example:

- Revised Article 9-312(b), consisting of 8 lines of text in one publication, contains express cross-references to four other sections and at least 9 terms are either defined elsewhere or require analysis of another section to understand. The subsection, in turn, has an impact on understanding numerous other sections dealing with “priority” of a “perfected” interest and, as to those sections, includes additional, multiple cross-references.
- Revised Article 9-202 states: “*Except as otherwise provided with respect to consignments or sales of accounts, chattel paper, payment intangibles, or promissory notes*, the provisions of this chapter with regard to rights and obligations apply whether title to collateral is in the secured party or the debtor.” Provisions regarding each of the referenced collateral and transaction types appear in numerous sections of Article 9 (i.e., there are multiple provisions with respect to payment intangibles, not just one).
- The current Article 2 “perfect tender” rule is in Section 2-601, consisting of 11 lines of text in one publication. It makes an express cross-references to 3 other sections. To understand it, one needs to understand the role of trade usage, etc. (in several unreferenced sections), the right to cure (an unreferenced section), the effect of “rejection” (several sections), the effect of “acceptance” (several sections), the meaning and manner of “tender of delivery” (several sections) and more.

The point is not that these statutes are aberrant or poorly drafted. Quite the contrary. The point is that in commercial law statutes, cross-references and the like are normal and essential.

(4) “*At times ... general language differs from similar language used elsewhere in UCITA, raising the question as to whether a different meaning is intended (e.g., “general public as a whole” versus “general public including consumers”).*” Other than the instance cited by the Working Group, we could not locate other instances of this principle. If the Working Group discovered other illustrations, we would appreciate further guidance. As for the cited case, it refers to language in a proposed amendment that has not yet been styled relating to terms precluding public criticism. We have appreciated the point made and have revised the language for the amendment to reflect the appropriate concept.

(5) “*In areas where consensus with a particular industry was not reached, that industry was excluded from the statute. However, the definition of the “excluded” industry adds to the complexity of UCITA, especially with regard to scope.*” While this is not precisely a style or clarity comment, it should be noted that none of the UCITA scope provisions exclude an *industry*. Such exclusion was requested by some industries but that approach was not adopted. To ensure equal treatment of all engaged in particular transactions, whatever their “industry,” the scope provisions instead deal with types of activities or subject matter. Thus, for example, the

banking industry is not excluded. Instead, anyone engaging in identified types of financial services activities is excluded whether the person is a bank or nonbanking entity.

Regarding the complexity of exclusions, numerous exclusions are often needed for commercial statutes. UCITA follows the structure in Article 9, the current version of which contains 17 exclusions in addition to the limitation of coverage to “security interests”, a term that often but not always excludes transactions described by the parties as a “lease.” Article 9 exclusions have historically been difficult to apply and, as to leases, extensively litigated under prior Article 9. The issue of uncertainty at the periphery of a statute’s scope is common and unavoidable. The scope of Article 2, which covers *transactions in goods*, has been the most heavily litigated issue in the statute since enacted in the 1950’s.

(6) *“The “Comments” try to amplify the “black letter” rules, but in several instances the “Comments” go beyond, or are inconsistent with, what the “black letter” rule provides (e.g., Comment 3 to UCITA § 501 states that a program “identified to the contract” should be interpreted in the light of UCC Article 2’s use of the term, but then provides examples where the result would differ from UCC Article 2 with respect to work in process).”* The statement regarding Section 501 is incorrect, but a clarifying comment can be added.³ More generally, it has always been the case that Comments provide policy bases and illustrations of the intent of the statutory language. Whether or when comments go *beyond* statutory language can be debated. For example, commentators on current Article 2 frequently debate whether the comments add to or limit the statutory text. In Revised Article 9, there are several illustrations that arguably supplant statutory text. This is inherent in fulfilling the purpose of the comments which is to explain in non-statutory language what is intended by the statute. Ultimately, however, the law is the statutory text and the comments merely provide guidance.

2. ABA # 2: Scope - Embedded Programs.

The Working Group expressed concern about, and recommended a revision of, Section 103 on the scope of UCITA with reference to software marketed as part of, and embedded in goods that are sold or leased.

No provision of UCITA has received more thorough consideration and debate than the question of scope. It has been discussed and debated in and outside of UCITA and proposed UCC Article 2 for almost a decade. This reflects the reality that this area is extremely complex and deals with a modern economy which involves shifting and varying methods of distribution, shifting uses of software capabilities, and shifting and new market demands. The issue of scope is difficult in *any* uniform law. For example, it is one of the *least* settled parts of UCC Article 2 which covers “transactions in goods.” The term “goods” is defined as “all things that are movable.” This has been the most litigated Article 2 provision. Courts ask whether this term includes data, electricity, motion pictures, ideas, oil and gas, cable television signals, compressed air, electricity, telephone transmissions, blood, and on and on. UCITA covers “computer

³ The concept of identification to the contract under Article 2 and Section 501 of UCITA holds that a subject matter is identified to the contract when either 1) identification is done in any manner agreed by the parties or 2) when goods are shipped, marked, or otherwise identified by the seller as the goods to which the contract pertains (e.g., if the contract refers to the “completed program”, when the work reaches a point that indicates it is the contract subject matter). While the Working Group provides no support for its statement, the group apparently assumes that Article 2 provides a different rule. To clarify, we will propose adding to the UCITA comments a sentence from the comments to UCC Article 2 as indicated subsequently in this memorandum.

information transactions,” a concept more clearly delineated but nevertheless equally hard to define with absolute precision.

An area of extensive debate has been how to draw the line between Article 2 coverage and UCITA in cases where computer programs are embedded in goods other than computers that are sold or leased. This is a difficult, gray area with constantly changing technology and commercial practice. The Working Group proposal represents another attempt by a new group to deal with a difficult, often seemingly intractable issue. While we appreciate the effort and the thought that went into the proposal, it was necessarily developed without the benefits of full discussion about the nature of current and future software and the concerns of all affected groups, including Article 2 and UCITA industries. The proposal would not satisfy the concerns, policies and needs revealed in those discussions; it does not resolve, but merely illustrates the difficulty of, the issue.

The UCITA approach has been vetted repeatedly in numerous forums, and, while not perfect, better addresses the myriad issues and concerns and does not hinge on marketing choices. While the scope promulgated under UCITA does not satisfy everyone, it does provide a coherent intellectual framework typically provided by laws of this type.

During this long history many different formulations of scope have been considered, including those submitted over the ten years by ABA groups and advisors that helped shape the current scope. The UCITA language has been approved by several votes of Drafting Committees and by votes at the NCCUSL Annual Meeting; additionally, with a minor word change, it was sustained by a vote at an ALI annual meeting for inclusion in UCC Article 2. The present scope has been directly or indirectly endorsed by numerous groups including many who are not in the software industry, such as the National Electronic Manufacturers’ Association, the National Association of Manufacturers, and the American Electronics Association. It has been enacted in Maryland and Virginia.

The basic UCITA approach is to use information-related law (e.g., UCITA) where software and similar digital products are not embedded in goods or where they are embedded in goods that are a computer or computer peripheral. In cases where the software is embedded in other goods, the standard asks whether acquiring the computer program was a *material* part of the reason for acquiring the goods. This flexible standard allows courts to develop the law as circumstances evolve, rather than attempting the impossible - creation of a bright line test.

Recommended Action

For these reasons, the Standby Committee recommends no change in the general scope of UCITA. Article 2 as approved by NCCUSL in August 2001 is consistent with UCITA’s approach. If a different formulation for Article 2 emerges, the Standby Committee at that time will take that formulation under advisement.

3. ABA # 3: Scope: Professional Services.

The ABA Working Group expressed concern that UCITA might cover professional services provided by attorneys or members of other regulated professions because they are not listed as excluded in Section 103. As noted earlier, Section 103 does not exclude industries or professions, but rather excludes specified activities that might otherwise fall within the affirmative scope of UCITA.

Professional legal or accounting services do not fall within the affirmative scope of UCITA. A contract to provide legal advice is not a contract for the creation, modification or

license of computer information even if the advice is delivered electronically (see e.g., UCITA's definition of "computer information transaction" which does not include transactions merely because parties communicate electronically). An express exclusion for professional services was deleted by the Committee in 1998 when the final definition of "computer information transaction" was formulated. The conclusion then was that the exclusion was no longer necessary.

In light of the ABA concern, however, the Committee proposes the following amendment to clarify that professional services are not computer information transactions.

Recommended Response:

(11) "Computer information transaction" means an agreement or the performance of it to create, modify, transfer, or license computer information or informational rights in computer information. The term includes a support contract under Section 612. The term does not include an agreement for performance of professional services by a member of a regulated profession, such as a doctor or lawyer, or an agreement merely providing that transaction merely because the parties' agreement provides that their communications about the transaction will be in the form of computer information.

4. ABA # 4: Opt-In Rules:

The Working group recommended deletion of Section 104 regarding the ability of parties to opt-in or opt-out of contract law coverage by UCITA or other laws.

The fundamental point made by the Working Group is correct, i.e., that "Parties are generally free to agree to contractual terms unless the agreement is contrary to a statute or rule of law," and thus any guidance intended by the inclusion of Section 104 is technically not necessary. Given that and the Working Group's belief that the section may create unnecessary issues, the Committee makes the following recommendation:

Recommended Response:

Delete Section 104.

5. ABA # 5: Relation to Other Law: Law of Fraud.

Based on debate at the November, 2001 meeting of the Committee, Committee *Recommendation 6* proposed an amendment to Section 114 stating that UCITA does not displace the law of fraud, misrepresentation or unfair and deceptive practices as they relate to non-disclosure of known, material defects. This amendment was intended to clarify the position of UCITA in response to claims that UCITA changes law to permit distribution of known defective products. The language would have buttressed existing language to make it clear that, as under UCC Article 2, these issues are handled by the law of fraud and unfair practices, bodies of law that UCITA does not address.

The ABA Working Group and several opponents of UCITA, however, believe that the language of *Recommendation 6* created an inference that other applications of the law of fraud are displaced. While that inference is precluded by Section 106(c) and was not intended, clarification may be useful. Accordingly, the Committee makes the following recommendation to correspond to the Working Group suggestion.

Recommended Response

Amend the recommended amendment of Section 114 as follows:

(a) Unless displaced by this [Act], principles of law and equity, including the law merchant and the common law of this State relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, and other validating or invalidating cause, supplement this [Act]. Among the laws supplementing and not displaced by this [Act] are trade secret laws, ~~and unfair competition laws and~~ and. ~~This Act does not displace the law of fraud, misrepresentation and unfair and deceptive practices, including as they may deal with failure to disclose defects. may relate to intentional failure to disclose defects that are known to be material.~~

6. ABA # 6: Relation to Other Law: Consumer Law.

Based on the November, 2001 meeting, the Committee recommended adoption of language relating to the fact that UCITA does not alter or override consumer protection laws. The language discussed with several state attorneys general. The ABA Working group, however, commented:

Despite the broad subordination to consumer law in UCITA § 105, the Working Group is concerned that a court should not infer that by treating computer information transactions as other than the sales of goods, UCITA may limit the application of consumer protection statutes or rules of law that would have been applied by the court in the absence of UCITA. ... The Working Group believes that UCITA should include a provision to the effect that UCITA does not displace the application of consumer protection statutes or rules of law that would have applied in the absence of UCITA.

While the Committee believes that this potential inference is unlikely, to avoid confusion and in response to the Working Group report, the Committee recommends modifying its consumer law proposal to read as follows:

Recommended Action:

Delete Current Section 105(c) and (d) and replace with a new section 104:

SECTION 104. CONSUMER PROTECTION LAW GOVERNS. Except as otherwise provided in this section, this [Act] does not limit, modify, or supersede a consumer protection law applicable to the subject matter of this [Act] that is consistent with the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 et. seq. To the extent that consumer protection law provides greater protection to consumers than is provided in this [Act], the more protective consumer protection law applies.

(1) **[Consumer Protection Law Defined]** In this section, “consumer protection law” means a consumer protection statute, rule, or regulation, and other state action by the executive, legislative or administrative branch of government which has the effect of law, and applicable judicial or administrative decisions interpreting those statutes, rules, regulations, or actions.

(2) **[Standard of Conspicuousness]** If a consumer protection law requires a term to be conspicuous, the standard of conspicuousness under the consumer protection law applies. However, a provision in the consumer protection law requiring a term to be conspicuous does not preclude the term from being presented electronically.

(3) **[Required Writing or Signature]** Subject to the consumer laws identified in Section 905, if a consumer protection law requires a writing or a signature, a record or an authentication suffices.

(4) **[Required Assent]** If a consumer protection law addresses assent, consent, or manifestation of assent, the standard of assent, consent, or manifestation of assent under the consumer protection law applies and, subject to the consumer laws identified in Section 905, may be accomplished electronically.

(f) **[Applicability of Consumer Law]** Except as otherwise provided in this paragraph, the applicability of a consumer protection law is determined by that law and not be this [Act]. [However, the consumer protection laws of this State which apply to the subject matter of this [Act] include: *[Insert statutes that, on review by the legislature and amendment as appropriate, are determined to be applicable to the subject matter of this [Act] such as a state's unfair and deceptive practices act with amendments as appropriate.]*

The Official Comments for this section will make reference to the provisions of federal E-Sign that are retained with reference to consumer consents and notices.

7. ABA # 7: Terms before payment.

The Working Group Report states that *“There is no longer any economic justification for failing to [make all of the terms of the license available for review by the licensee before the licensee pays, or becomes obligated to pay, and before the licensee otherwise becomes bound by the license agreement].”* This is an incorrect economic conclusion. The Working Group had no representatives of the software industry in its membership, met with none, and conducted no economic analysis of the market. The view expressed by the Working Group is held by some, but many (including ABA groups) hold the opposite view for reasons that have often been expressed in UCITA hearings and meetings.

Significantly, under UCITA, a licensee is not bound by a license agreement until it has had an opportunity to review the license. If the licensee rejects the terms, the contract is not formed, no payment is required, and any prior payment must be refunded. Thus, in most respects, the Working Group idea is already met, but its inclusion in this report suggests that more is intended.

In its recommended actions by the Standby Committee, this principle is stated expressly and clearly in a proposed amendment. In a mass-market transaction the amendment provides that there is no term for which there is no chance to see the terms and no notice of the availability of a refund. Further, in its December Report, the Committee recommended an amendment that terms in a mass-market transaction be available before and after assent (see C14 at page 13 in the attachment).

That something more would appear to be a desire fundamentally to alter existing methods of software distribution by eliminating a distribution channel that is used by numerous industries in addition to the software industry. Terms provided on screen or in a package is a format currently used for hundreds of *billions* of dollars of commerce, and widely enforced by a strong majority of cases. In addition, there are thousands of contracts throughout commerce in which work begins before all contract terms are settled (or are available for review) and thousands of other circumstances in which some terms of commercial agreements are treated as trade secrets. Mandating, in a contract law statute, that these practices be changed would create a critical disruption and impose severe regulatory costs on the information industries, and would be discriminatory given the similar formats of “later terms” distribution methods used in numerous

other commercial settings, such as in the computer hardware industry, the cellular telephone industry, the insurance industry, the commodities trading industries, the airline and cruise line industries, the banking industry and other industries. If a change in the fundamental approach to contract law is made, it should be made across the board for all industries and all contracts.

There are practical and economic justifications for not banning existing practice. In addition to avoiding a costly disruption of existing market formats, any mandated change would impose substantial new distribution and record-keeping costs and risks. For example:

- A rule requiring that terms be available online would require all software (and other) vendors, small or large, to maintain online sites, maintain databases of licenses, keep them current, be able to prove they are kept current and available, and arguably develop a notice-giving system and provide alternatives for customers who do not have online access.
- A rule requiring that terms be available on request would place UCITA in the business of regulating conduct unrelated to contracting. Any request would trigger such a rule and, in addition to the above, require maintaining a database of requests, proof that they have been met, mailing costs for hard copy requests, as well as legal risk of non-compliance.
- A rule requiring full presentation of terms at the time of ordering would involve costs and uncertainties that vary depending on whether the software is acquired directly from the licensor or whether, as is more common in the mass-market for example, it is obtained from a third party vendor. These costs include proving whether the requirement was met, monitoring records so that all licenses currently in the market are available to a vendor or at a vendor site, costs in obtaining agreement by third party vendors to perform the disclosure, monitoring costs involved in ensuring that third-party vendors who deal with the customer actually make terms available, etc.; and litigation costs generated by the fact that such is impossible to ensure in all but theoretical commerce. A reason some vendors package their terms with their products is because they cannot control or risk the mistakes made by distributors – sealing the terms in the product addresses that reality.

There are also numerous legal issues associated with the consequence of failing to prove compliance with the requirement such as damages, class action recoveries, contract invalidity leading to end user infringement, and contract invalidity denying the copyright owner control over distribution terms, etc.

Some cost and legal risk might be justified if significant positive effects were achieved, but as compared to a system allowing return of a product without legal obligation if terms are not desired (the UCITA system), few benefits flow from an alternative approach and many problems are created. Testimony to the Committee and in other federal and state arenas suggest that strong economic benefits are obtained through present practices and that these benefit both licensors and licensees.⁴

⁴ For example, as described by commentators schooled in law and economics theory, economic efficiencies support the practice of providing terms along with a product or, at least, after the initial contact between the purchaser (licensee) and provider (licensor). The practice eliminates costs associated with lengthy recitation of terms that may be unimportant to the purchaser. It allows a customer to review terms without the pressure of inherent in other settings and allows *remote* publishers to engage in transactions in an open market that can

The Committee believes that UCITA strikes a proper balance. That balance *invalidates* later terms unless 1) there was reason to know at the outset that they would be provided, 2) when they are provided, the licensee has an opportunity to review them, including a right to refund or cancellation of any payment it made, and 3) the licensee affirmatively assents to the terms.

Both the ABA (for matters of style and substance) and several commentators have argued that the proposed Recommendation 7 summary of the “later terms” rules be withdrawn. The Committee accepts this view.

In response to the ABA Working Group concern and in order to clarify the intent of Recommendation 8, the wording is modified to make clear there is no contract without a chance (opportunity) to see the terms and notice of a refund if the terms are refused as well as its recommendation that, in a mass-market transaction, the terms also be available after assent.

Recommended Action:

1. Withdraw Recommendation 7 (Summary re later terms).

**2. Modify recommended changes to Section 209 (Recommendation 8) as follows:
Amend Section 209(a) as follows:**

- (a) A term is not part of the license if:
 - (1) the term is unconscionable or is unenforceable under Section 105(a) or (b); ~~or~~
 - (2) subject to Section 301, the term conflicts with a term to which the parties to the license have expressly agreed;
 - (3) under Section 112, the licensee does not have an opportunity to review the term before agreeing to it; or
 - (4) the term is not available to the licensee after assent to the license in one or more of the following forms:
 - (A) an immediately available nonelectronic record that the licensee may keep;
 - (B) an immediately available electronic record that can be printed or stored by the licensee for archival and review purposes; or
 - (C) a copy available at no additional cost on a reasonable request in a record by a licensee that was unable to print or store the license for archival and review purposes.
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- (d) In a case governed by subsection (b), notice must be given in the license or otherwise that a refund may be obtained if the terms are refused.

efficiently tailor the digital product to a market, allowing purchasers to acquire and pay for only those rights to use software that they desire. It is possible that the Working Group did not fully consider the fact that a large number of software transactions involve three, rather than two parties, and that the software publisher does not directly provide the software to the licensee. In such instances, enforcing or establishing practical term disclosure procedures would be difficult even for the largest companies and effectively precluded for small companies. An example of this kind of literature is a statement by Professor Richard Epstein: “It is clear that all suppliers of software and other computer information products draft detailed written agreements because they believe in the gains from standardization. There are few, if any, consumers, who believe that the silence of sales representatives is meant to displace the detailed terms of the written agreement found in the package in favor of the default UCC provisions that the firm has gone to great lengths to contract out of. The background expectations of these consumers is that all suppliers attach maximum weight to the conditions under which goods and services are sold or licensed. The law of contracts should not make offer and acceptance a treacherous voyage into the unknown. It should seek to reinforce the established patterns of doing business.”

8. ABA # 8: Free software warranty.

Based on the November meeting, the Committee proposed a new section that excludes “free software” providers from certain implied warranties. The Working Group apparently agrees with the purpose of the proposal, but found the draft both over and under-inclusive. It stated:

The Working Group believes that a business obtaining a profit from providing ancillary services or other software should give the implied warranties of non-interference and non-infringement (subject, of course, to being able expressly to disclaim the warranties). The Working Group also believes that 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. Generally, those obtaining software in the free software environment would not expect to receive the implied warranties. One way of implementing this recommendation would be to modify the definition of “merchant” in UCITA § 102 so that it applies only to a person who otherwise falls within the current definition but is “in the business” or is otherwise acting generally for consideration.

The Committee concurs that a change should be made. It considered the Working Group proposal of modifying the definition of “merchant,” but concluded that this change and the language suggested brought too many risks of potentially unexpected results. The UCITA definition of merchant parallels the fifty-year-old Article 2 definition and both statutes make policy decisions that depend on uses of the term that would not necessarily be consistent with the Working Group concept. Instead, recognizing the importance of the concerns expressed by the Working Group, the Standby Committee recommends changing its earlier recommendation regarding free software.

Recommended Action:

Modify prior Recommendation 10 as follows:

Add the following new section:

Section 410. NO IMPLIED WARRANTIES FOR FREE COMPUTER PROGRAM

~~(a) Except as provided in subsection (b), the warranties under Sections 401 and 403 do not apply to a computer program only if the licensor acts generally for commercial gain derived from controlling use, or from making, modifying or redistributing of copies of the program. makes a copy of the program available to the licensee in a transaction in which there is no contract fee for the right to use, make copies of, modify, or distribute copies of the program.~~

~~(b) Subsection (a) does not apply if the copy of the computer program is contained in and sold or leased as part of goods or if the transaction is with a consumer licensee that is not a software developer.~~

9. ABA # 9: Public criticism.

The Committee reviewed the language and policy of the “public criticism” proposal and agrees with the Working Group that the proposal should be expanded to adopt the policy suggested by the Working Group. The change expands the proposal to cover any computer

information that is placed generally into the stream of commerce, it being the case that as to issues of public discussion, we see no policy reason for a narrower scope.

SECTION 105(d)

(d) [~~Lawful Public Comment Not Prohibited~~] In a transaction in which a copy of computer information is ~~is offered~~ in its final form is made generally available in commerce to the general public including consumers, a term of a contract is unenforceable to the extent that the term prohibits an end-user licensee from engaging in otherwise lawful public discussion of the quality of performance of 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.

10. ABA # 10: Self-help.

Based on the November, 2001 meeting, the Committee recommended a rule prohibiting electronic self-help in enforcing remedies for cancellation of a license. The Working Group agrees, but found a problem in language allowing a licensor to delete computer information from a tangible copy that has come into its possession lawfully. The concern relates to whether the licensor can delete licensee information on that copy. The Group proposed deletion of the right to delete information in this context.

The concern about licensee information is appropriate but is already treated in UCITA. To make this clearer, the Committee will modify its recommendation by referencing the provision of UCITA requiring that information that is to be returned after termination (e.g., licensee information) cannot be erased (the newest language is in italics).

SECTION 815. RIGHT TO POSSESSION AND TO PREVENT USE.

(b) [**Limitation on Exercise Without Judicial Process**] Except as otherwise provided in Sections 814 and 816, a licensor may exercise its rights under subsection (a) without judicial process only if this can be done by taking possession of a tangible copy: (1) without a breach of the peace, in which event the licensor may take further steps with respect to the copy, including erasing the copy by electronic means, subject to Section 618(a) relating to return of the licensee's information.; and
~~(2) without a foreseeable risk of personal injury or significant physical damage to information or property other than the licensed information; and~~
~~(3) in accordance with Section 816.~~

11. ABA # 11: Miscellaneous. The Working Group offered several suggestions for modifications to or clarifications of UCITA:

a. Change definition of computer program (Section 102).

Some members of the Working Group urged that the definition of “computer program” should not exclude “informational content.” That exclusion is in the second sentence of the definition. This point was the subject of frequent public discussions at Committee meetings. As explained in the final comments, the exclusion of “informational content” reflects the difference between the use of these terms in UCITA as contrasted to copyright law and is necessary to avoid confusion under either law:

The second sentence distinguishes between computer programs as operating instructions communicated to a computer and “informational content” communicated to human beings. This distinction parallels that used in discussions of formal programming languages between syntax (grammar) and semantics (meaning). As used in this Act, “computer program” refers to functional and operating aspects of a digital or similar system, whereas “informational content” refers to material that communicates to a person. In resolving an issue that turns on this distinction, the test lies in whether the issue concerns operations (program) or communicated content (informational content). The definition pertains solely to contract law issues. ... The distinction here is more like that in copyright law between a computer program as a “literary work” (code) and output as an “audiovisual work” (images, sounds). In copyright, that distinction relates to property and infringement issues. In this Act, the distinction relates to contract law issues such as liability risk and performance obligations.

This distinction between functionality and communications is increasingly important even under copyright case law (see e.g., *Universal City Studios, Inc. v. Corley*, 273 F3d 429 (2d Cir. 2001), and it is integral to the warranty structure of UCITA. Informational content (e.g., text, images, etc.) is not subject to an implied warranty of merchantability whereas a computer program is subject to that implied warranty. Cases such as *Corley* indicate that under the First Amendment, the distinction made in UCITA is necessary to avoid First Amendment restrictions and that any attempt to create such liability for this type of speech (informational content) might fail under constitutional law standards.

b. Clarification about states interpreting copyright law (Section 105).

With respect to issues raised by library groups, the Working Group suggested clarifying in UCITA that state courts are not an appropriate place to litigate the substantive meaning of copyright law. As is reflected in Section 105’s effort to honor federal policies, the Committee agrees with this and will recommend adding the following language to the comment to Section 105: “UCITA is not the appropriate place to seek changes in or to clarify rules of federal copyright law.”

c. Clarification of Section 112(e)(3).

The Working Group stated that UCITA § 112(e)(3) should be modified to make clear that, if there is no right of return because no such right is required under (e)(3), the licensee must have an opportunity to review the license terms before becoming bound by the license. The concern is unfounded. The statutory language only refers to the right to return and does not alter other aspects of the opportunity to review and manifestation of assent rules. We will make this clear in the comments.

d. Add section 304(b)(2) to Section 113 non-variable terms.

The Working Group suggested that Section 304(b)(2), which sets out one method by which terms may be modified, should be added to the list of non-variable term in Section 113. We will propose an amendment to Section 113 adding the following to the list of nonvariable terms: “the provisions of Section 304(b)(2), in cases where the party seeks to come within that subsection.”

e. Section 115(a) proposed amendment.

The Working Group proposed that the new section on reverse engineering be modified to delete reference to interoperability with *independently created* computer program. That language is intended and should not be changed. It follows language in 17 USC § 1201 regarding reverse engineering, which provision is tracked by the proposed amendment to Section 115(a). While we might have written the federal statutory language differently, the use of different language would create the inference that a variance with federal law was intended when none is intended.

f. Section 501 identification to the contract.

The Working Group suggested that Section 501(a) be clarified to avoid the implication that the language “and identified to the contract” adds an additional requirement before ownership of informational rights in a computer program arises under the Copyright Act. The Committee, however, believes that this is the appropriate rule based on Article 2. Indeed, the UCITA language already changes state law in a manner beneficial to licensees. The Committee has not been provided with case law suggesting a different rule exists under copyright law for computer information. In fact, as cited in the comments, one reported case suggests that title cannot pass until delivery of the completed product. The rule in UCITA allows passage of title before that time. To clarify any confusion, we propose to add the following sentence to the comments, adapted from the comments to Article 2: “In view of the limited function of identification, there is no requirement in this section that the information be in deliverable state, that all of the licensor’s duties with respect to processing the information be completed, or that the information be shipped to the licensee in order that identification occur.” This is consistent with the existing UCITA comment, which provides that the agreement governs.

SUMMARY

This Report recommends to the Conference 38 amendments and additional official comments which respond positively, in whole or part, to 10 out of the 11 concerns expressed by the ABA Working Group. Previously, the Standby Committee made 19 recommendations for amendments in December, which were endorsed by the Working Group (subject to modifications to 6 of those recommendations made herein and the deletion of one recommendation), which are now incorporated into the 38 amendments to UCITA now recommended to the Conference by this Report.

Respectfully Submitted

UCITA Standby Committee

Carlyle C. Ring, Jr., Chair

John A. Chanin

Stephen Y. Chow

Patricia Brumfield Fry

Thomas T. Grimshaw

Leon M. McCorkle, Jr.

Thomas J. McCracken, Jr.

James C. McKay, Jr.

Bruce Munson
Barry H. Evenchick, Division Chair
King Burnett, President

Participating:

Fred Miller, Chair, Executive Committee
Bill Henning, Executive Director

APPENDICES:

APPENDIX 1: PROPOSED 2002 AMENDMENTS FOR CONSIDERATION AT THE
NCCUSL 2002 ANNUAL MEETING

APPENDIX 2: SUBCOMMITTEE REPORT

APPENDIX 3: DRAFT OF ACT WITH SUBHEADINGS BASED ON 2001 OFFICIAL TEXT