

UNIVERSITY OF ARIZONA
James E. Rogers College of Law

Paper Submitted to the Federal Trade Commission, September 11, 2000

Reference: High-Tech Warranty Project—Comment, P994413

[Braucher@nt.law.arizona.edu](mailto:braucher@nt.law.arizona.edu)

Direct dial: 520-626-7251

Prepared August 21, 2000

**The Uniform Computer Information Transactions Act (UCITA):
Objections From The Consumer Perspective**

By Jean Braucher, Roger Henderson Professor of Law, University of Arizona *

Background

The Uniform Computer Information Transactions Act, or UCITA, was approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in the summer of 1999 after a turbulent drafting process. This uniform law, applicable to software and digital content contracts, originally was conceived as new Article 2B of the Uniform Commercial Code, largely patterned after Article 2 on sales of goods.

The UCC is co-sponsored by NCCUSL and the American Law Institute (ALI). In an action unprecedented in the 50-year history of the UCC, the ALI withdrew from participation in the drafting project early in 1999, insisting that Article 2B should not become part of the UCC. The two organizations have never before parted ways on a UCC drafting project. Members of the ALI Council and ALI representatives on the drafting committee expressed strong reservations both about the substance and technical quality of the proposed law, but NCCUSL decided to go forward with the project on its own and renamed it UCITA. The ALI director explained to the

* Jean Braucher is the Roger Henderson Professor of Law at the University of Arizona, where she teaches contracts, commercial law and bankruptcy. Her scholarly work has focused on consumer contracting and consumer debt. She is a member of the American Law Institute who has followed UCITA since its inception as proposed Uniform Commercial Code Article 2B. She is also co-chair of the American Bar Association Working Group on Consumer Protection in E-Commerce (within the Business Law Section, Committee on the Law of Cyberspace, Subcommittee on Electronic Commerce). The views expressed in this memorandum are her own, formed with the benefit of consultation with a number of consumer law experts, consumer advocates and state and federal consumer officials. Inquiries concerning this article or other UCITA issues can be directed to her at the above e-mail address or telephone number.

ALI membership at the organization's May 1999 annual meeting that the ALI had no power to stop the project because NCCUSL has the legal right to go forward without ALI.¹

In addition to failing to respond to the concerns of its UCC co-sponsor, NCCUSL proceeded over opposition and concerns expressed by state and federal consumer protection officials, commercial customers, library associations, law professors, intellectual property bar groups, computer professionals, consumer organizations, and the broadcast, newspaper and motion picture industries, among others. The president of NCCUSL conceded that UCITA is flawed when he urged approval at the 1999 annual meeting to allow a "field test" in the legislatures.

Although UCITA was introduced in a number of legislatures in 2000, only two enacted it, both with amendments. In Virginia, UCITA was enacted with a delayed effective date of July 1, 2001 and creation of a commission to look into user concerns in the meantime, so there may be amendments before the effective date. During the Virginia legislative consideration, several industry groups—including motion pictures, newspaper and magazine publishers, music recording companies and telecommunications--negotiated exclusions from UCITA. To deal with general user concerns, the commission was set up as a compromise, to put off reckoning with the mounting opposition expressed in Virginia by many business users, library organizations and consumer advocates, among others.

UCITA also was enacted in Maryland, with an October 1, 2000, effective date. In addition to the exclusions in the Virginia version, the insurance industry got a partial exclusion from UCITA's scope in the Maryland version, but neither insurance regulators nor industry representatives were fully satisfied. Also in Maryland, the office of the attorney general managed to get some modest consumer amendments.² The Maryland attorney general was unsuccessful, however, in efforts to use the strategy of industry groups and have consumer transactions excluded from UCITA. The largest volume of transactions covered by UCITA will be consumer contracts.

Other states resisted jumping into this legal thicket, but this will not necessarily protect their residents. After October 1, 2000, software publishers may begin choosing Maryland law and a Maryland forum in their terms and conditions, to try to get the advantages that UCITA gives them. Anticipating this possibility, in Iowa, a "bomb shelter" provision was enacted as part of the Uniform Electronic Transactions Act; this provision denies application of another state's law pursuant to a choice of law clause if UCITA is the chosen law.³

At its July-August 2000 annual meeting, NCCUSL amended the uniform version of UCITA to add the exclusions negotiated by industry groups in Virginia and Maryland but not the consumer amendments made in Maryland. A partial insurance industry exclusion was added to the uniform text, different from that adopted in Maryland and even less satisfactory to the industry. NCCUSL also added a prohibition on self-help in mass-market transactions, but it left

¹ 1999 American Law Institute Proceedings 405.

² The most important of these was an amendment to Maryland's consumer protection statute to include UCITA consumer contracts within its scope. 2000 Md. Laws ch. 11 (H.B. 19), amending Md. Coml. Sec. 13-101.1.

³ See 200 Ia. Leg. Serv. H.F. 2205 (West), Ia. St. sec. 554D.104.4.

in place an “electronic regulation of performance” section that might be usable for the same purpose—to allow software licensors to shut down use of software and goods with embedded software, thus gaining leverage against consumers.

In an amendment not made public before the summer 2000 NCCUSL meeting, a new section was added to UCITA⁴ that appears to be an attempt to override consumer protections for use of electronic records included in the federal Electronic Signatures in Global and National Commerce Act, which was signed into law at the beginning of July and will become effective October 1.

This memorandum presents objections to UCITA as it affects the interests of consumers. Some of the persons and entities that submitted letters to NCCUSL registering opposition to UCITA or stating serious concerns from the consumer perspective include: 24 State Attorneys General; Federal Trade Commission senior staff; Consumer Federation of America, Consumers Union, Consumer Project on Technology, and the U.S. Public Interest Research Group, with the National Consumer Law Center joining the opposition after UCITA was promulgated; 45 professors of contracts and commercial law (also stating objections from the perspective of business customers); and members of the Working Group on Consumer Protection of the American Bar Association’s Business Law Section, Committee on the Law of Cyberspace, Subcommittee on Electronic Commerce.⁵

No group that takes the consumer perspective has endorsed UCITA. The Federal Trade Commission has initiated an inquiry into whether new federal regulation is needed to undo the ill effects of UCITA.⁶ UCITA is so flawed and so complex that it is not a good starting point for drafting reasonable legislation.

Overview

UCITA has two prominent features. First, it validates terms held back until after payment and delivery, presented in so-called “shrinkwrap” or “clickwrap” contracts. Second, it recharacterizes software and digital content contracts as “licenses” of use, rather than sales of copies, raising two issues that will require a great deal of litigation to resolve. The first issue is whether consumer protection laws applicable to “sales” of goods and services apply to these transactions. The second is whether software and digital content providers can use license terms to rewrite users’ basic intellectual property deal, for example by taking away the right to transfer a copy, criticize a product or quote content.

Both of these features are harmful to consumer welfare. Post-payment presentation of terms inhibits consumer shopping for the best terms. At a minimum, terms should be available on line when products are marketed on line.⁷ The advantage of computer technology is its ability to

⁴ Section 905, added in August 2000 by vote at the NCCUSL annual meeting.

⁵ Statements and letters by most of these groups can be found at <http://www.2Bguide.com> or <http://www.ucitaonline.com> or <http://www.nclc.org> (see NCLC initiatives, UCITA section).

⁶ See <http://www.ftc/gpv/0s/2000/05/hightechforum.htm>

⁷ See Jean Braucher, Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice, forthcoming Wayne Law Review 2001.

store and retrieve vast quantities of information, and the law should make use of this technology to promote market competition in terms.

Characterization of these transactions as “licenses” means use of an obscure legal category that consumers do not understand. Furthermore, today there is little doubt that consumer protection statutes, written so that they cover “sales” of goods and services, apply to contracts for software and on-line services, but under UCITA this would be put in doubt. Also, if UCITA succeeds in providing a technical end-run around federal intellectual property law, consumers will lose the benefits of doctrines of first sale (allowing transfer of a copy) and fair use (allowing quotation and criticism).

Far from creating greater legal certainty, UCITA will require decades of litigation to sort out its meaning. Its primary effect is to give licensors new arguments to use in that long, wasteful process. UCITA, if it becomes effective nationally, will reduce competition and legal incentives to improve software quality. Consumers of software, on-line services and digital content would be much better served by certain rules straightforwardly protecting their reasonable interests and expectations. In the absence of such an approach, consumers are better off under current law, which includes the common law of contract, UCC Article 2, state and federal consumer law, and federal intellectual property law.

Many myths have been used to try to promote UCITA. Some of these are:

Myth 1. UCITA will bring high-tech jobs to a state that enacts it. Corporate location specialists say, to the contrary, that an educated work force is the most important factor in drawing high tech businesses and that a law such as this will have little or no effect. Also, choice of law and forum clauses provide a way for software and content companies to take advantage of UCITA from any location.

Myth 2. UCITA is needed to protect against software piracy. Piracy is already illegal and carries heavy penalties under federal law.

Myth 3. UCITA preserves consumer protections and is a fair compromise. UCITA attempts to undermine the consumer protection principle that early disclosure of material terms is the first line of defense against deception and unfairness. Efforts at improvements—such as required pre-payment disclosure of terms in Internet transactions--have been vigorously opposed by NCCUSL representatives, working along side lobbyists for interests that will get advantages under UCITA.

This memorandum first lists key flaws in UCITA, followed by a section-by-section analysis that gives more detail on these flaws and most of the many others. It is based on the uniform text, February 2000 Draft, as amended by NCCUSL at its 2000 annual meeting in July-August, and on the June 2000 “Final” Comments.⁸

⁸ See http://www.law.upenn.edu/bll/ulc/ulc_fram.htm Despite the “final” label given to the June 2000 comments, UCITA Online, a software industry Web site, reported in mid-August that another version was expected to be made available. See <http://www.ucitaonline.com>.

Problems with UCITA: The Top 12

This summary of the top problems with UCITA was adapted from a list prepared by one of the volunteer pro-consumer experts in the national debate. It gives an overview of some of the many problems with UCITA. Additional information prepared by the same expert can be found at <http://www.badsoftware.com/uccindex.htm>.

UCITA:

1. Validates post-payment disclosure of terms. This would provide a poor model for electronic commerce, making comparison shopping (one of the great potential benefits of on-line shopping to consumers) impractical. Delay of disclosure of terms until after a customer is psychologically committed to the deal is the approach used in UCITA for all terms, even important elements of the deal such as warranty disclaimers, remedy limitations, transfer restrictions, prohibitions on criticism of the product, and the key feature of a license--the restrictions on the number of users and the length of time that use is authorized. Post-payment disclosure of terms also makes it hard for journalists to gather information about the best available deals and present comparative information.
2. Validates fictional assent (e.g., double clicking a mouse to get access to a product after you've paid for it) and even allows one party to define any conduct as assent in future transactions, without requiring that form terms meet consumers' reasonable expectations.
3. Creates doubt about whether software transactions are covered by goods-related consumer protection laws, such as the California Song-Beverly Act, the federal Magnuson-Moss Warranty Act (which incorporates features of state law), or state laws banning unfair and deceptive practices in sales of goods and services. UCITA does this by defining consumer software contracts under state law as not involving sales of goods, but rather as "licenses" of "computer information." In the absence of UCITA, most courts have treated mass-market software transactions as sales of goods. While creating confusion about the scope of existing consumer laws, UCITA fails to extend analogous consumer protection to mass-market software contracts that are functionally like other consumer product transactions, despite new legal labels. Most consumers think that they are buying a consumer product when they pay money for software.

UCITA is also objectionable because there is a fundamental conflict between its approach, providing legal protection for holding back terms, and that of state and federal anti-deception statutes and regulations, which provide that early and prominent disclosure of key terms is crucial to an efficient marketplace based on meaningful consumer choice.

4. Interferes with sale of goods law by allowing opt-in to UCITA for computer sellers who also provide software and for sellers of any goods if software is also provided and is a "material" part of the transaction. "Material" is described in a comment as meaning anything more than a trivial element of the deal. Because many goods are sold with software, from cars to cameras, UCITA would create a lot of uncertainty about its reach and would govern many transactions that are predominantly sales of goods.

5. Validates the use of transfer restrictions in the mass market that conflict with normal customer expectations. These license restrictions would interfere with the market in used goods that contain software (potentially, video games to cars). They would also prevent consumers from legally transferring or acquiring used software or digital works (whether buying or selling second-hand or making or receiving gifts). The effect would be reduced competition between new and used products, driving up prices.
6. Authorizes too flexible choice of law and forum in mass-market transactions, allowing choice of any US forum (and possibly a foreign one) for the convenience of the producer. Will deprive many consumers of a forum they can afford by requiring suits to be brought in a remote location.
7. Attempts to override consumer protections for use of electronic records provided for in the federal Electronic Signatures in Global and National Commerce Act. Although this attempt will probably be unsuccessful, litigation will be necessary to establish that UCITA cannot displace the federal consumer protections without supplying any measures as effective or more effective to protect consumers.
8. Fails to take a clear position invalidating restrictions on public discussion of product flaws. Even if the courts eventually ruled that such restrictions are against public policy, this will take years to settle through repeated litigation and the effect in the meantime will be to chill public comment on bad products. We already see software licenses that purport to ban publication of critical articles; trade journals have stated that they decided not to risk being sued under these terms. UCITA would increase this sort of chill on disseminating product information.
9. Approves use and transfer restrictions on mass-market software and information products that will harm libraries. These features of UCITA would limit the access of consumers as library patrons to information and have the ripple effect of driving up prices in the marketplace. The result would be to increase the technology gap between rich and poor.
10. Eliminates the key benefit of the Article 2 doctrine of failure of essential purpose of a limited remedy. Expressly permits boilerplate to preserve exclusion of incidental and consequential damages even when an agreed exclusive remedy fails or is unconscionable.
11. Fails to require disclosure of known defects. A lot of problems with software wouldn't happen if producers disclosed defects they know about. But UCITA does not require them to do so. With its strong support for remedy limitations and warranty disclaimers, even after a customer pays, UCITA is more concerned with protecting producers than with giving customers a chance to avoid problems.
12. In "electronic regulation of performance" section, it allows vendors to shut down software when they terminate a contract for various reasons. The vendor could use this right to threaten to turn off a software-driven product. This is already being tried in Detroit in used car deals made on credit. By licensing computer programs in cars, sellers

of cars might be able to opt into UCITA, making it more likely that a practice of remote disabling of goods will stand up in court.

Section by section list of many of UCITA's flaws:
(in the order in which they appear in the UCITA text)

Part 1

Definition of computer is overbroad: UCITA's definition of "computer" is astonishingly broad. The definition covers any electronic device that "accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions." (According to this definition, many products containing electronic chips are computers.) Section 102(a)(9). Comment 7 instructs courts to use common sense when interpreting the definition, but this is not a satisfactory cure of its overbreadth. Statutory comments are not enacted and have only persuasive authority. In many states, statutory comments are not included in the statute publications, making it less likely that courts will see them.

If the objective is a common sense meaning, the term should be left undefined. The sweeping language of this definition is likely to encourage an inappropriately broad scope for UCITA, particularly as more consumer goods include chips and programs.

Definition of computer information is overbroad: UCITA's broad definition of computer information may swallow up even information on paper. UCITA defines "computer information" to be any "information in electronic form which is obtained from or through the use of a computer or which is in a form capable of being processed by computer." Section 102(a)(10). The structure of this first sentence of the definition creates ambiguity about whether the information must be in electronic form or whether instead it also covers information that can be processed by a computer. The second sentence clearly refers to non-electronic information ("any documentation or packaging") as computer information. Since most paper documents now can be scanned into a computer and therefore are capable of being processed by a computer, they may be "computer information" under UCITA's overbroad definition. A comment (see Comment 8) tries to clear up the fog, but the limiting language (computer information "is limited to electronic information in a form capable of being directly processed in a computer" and "does not include information merely because it could be scanned or entered into a computer") needs to be part of the statutory language.

Defines terms to be conspicuous when they aren't: UCITA defines terms to be conspicuous if they are in contrasting type, color, or font even if that type, color, or font is difficult or impossible to read (for example, yellow letters on a white background). Section 102(a)(14)(A)(ii). UCITA also defines a term to be conspicuous when the customer has to link to another record to find it. Section 102(a)(14)(A)(iii). Comment 12, contrary to the weight of UCC case law authority, suggests that the definition's illustrations operate as "safe harbors" even when terms would not have been noticed by a reasonable person. It does this by stating, "The illustrations are not exclusive. For cases outside their terms, the general standard governs." So, for example, even if a customer had to scroll through pages of text on

a computer screen to see a term, the term would be conspicuous if put in bold type. Terms are deemed conspicuous even when disclosed after payment or delivery. See Section 209(b). Conspicuousness should be defined to require pre-transaction disclosure that meets the general standard of notice to a reasonable person entering a transaction of the type. Furthermore, the definition should be updated to reflect federal and state deception law that measures conspicuousness of a disclosure by whether it has been effectively communicated so that it can be understood. UCITA fails to provide certainty of achieving communication, the purpose of disclosure.

Doesn't recognize constructive knowledge: UCITA fails to attribute to a commercial entity knowledge of facts of which it has constructive knowledge. The UCITA definition of knowledge is limited solely to actual knowledge. Section 102(a)(40).

Defines notice to have been given when it has not been received: UCITA defines "notify" and "give notice" to have been accomplished when reasonable steps are taken, even if the notice is not, in fact, given or received. Section 102(a)(49). This applies, for example, to the requirement under Section 304(b)(1) that a licensor "notify" a licensee of changes in terms.

Allows licensor to promise customer will receive information, then only post it to a Web site: Under UCITA a consumer has "received" information if the information has been posted to any designated location. Under UCITA, a Web seller can promise that the customer will receive information, then define receipt to have occurred when the information is posted to the seller's own Web site. There is no reasonableness restriction on the boilerplate redefinition of receipt permitted under UCITA. Section 102(a)(53)(B)(ii). See also discussion of Sections 215 and 905.

Defines information to have been received when the customer can't access that information: UCITA also defines information to have been received when it gets to a system from which a customer cannot access it, as long as the sender does not know that the customer cannot access the information. Section 102(a)(53)(B)(ii)(II).

Consumer who returns software is stuck with the hardware: UCITA creates a right of return only with respect to the information (software) and not with respect to hardware sold at the same time. See Section 112(e)(3), and Section 102(a)(57), defining "return" to include only return of the information, not of any hardware sold with it. If a consumer buys a computer with software, and the computer seller opts into UCITA, including its contract formation rules (permitted by Section 104), the seller could put the terms in the box and a consumer who didn't like those terms could return the software but not the computer. Or if a consumer buys a car with a computer in it and the software in the computer is licensed as a material part of the transaction, the car seller could opt into UCITA, with the result that the consumer's right of return would cover the embedded software but not the car.

Permits broad redefinition of "send": UCITA permits the license to define what constitutes "sending," regardless of whether that definition is reasonable ("or as otherwise agreed" language). Section 102(a)(60).

Interferes with sale of goods law by covering all software embedded in a computer:

UCITA purports to exclude software that is embedded in goods, so that state statutes and policies affecting the sale of goods may continue to apply to software embedded in goods. However, software is covered only by UCITA and not state sales law if the software is embedded in goods which are “a computer or computer peripheral.” Section 103(b)(1)(A). The definition of computer is so broad that it will include many goods. See Section 102(a)(9), defining as a computer any electronic device that accepts information in a digital or similar form and manipulates it for a specific result based on a sequence of instructions. Furthermore, comment 7 to Section 102 suggests that much software embedded in cars is covered by UCITA by stating “an automobile might contain a computer or several computers....” Most new cars sold today have computers in them.

Covers software embedded in non-computer goods: UCITA also covers any software embedded in goods if giving the buyer of the goods access to or use of the software program is “ordinarily a material purpose of transactions in goods of the type.” Section 103(b)(1)(B). Although not defined in the statute, “material” is described in a comment as “*not* ...what is the most significant or primary part,” but rather a part that has “some significance” and is not “trivial.” Section 104, comment 2. A great deal of litigation will be needed to sort out how much significance is “some significance” without being “trivial.”

Section 103(b) provides for exclusion of certain embedded programs “sold or leased as part of the goods,” suggesting a big loophole for embedded programs *licensed* as part of the transaction. Comments 3b to Section 104 and 4b to Section 103 support this reading. The example given in Comment 3b to Section 104 is braking software (used in anti-lock brakes). This software is not covered by UCITA when “sold or leased as part of the car.” But if the software is licensed, presumably it is covered. Comment 4c to Section 103 states that materiality is to be judged in part on “the extent to which the agreement made the program’s capacity a separate focus,” concluding that “Materiality is ordinarily clear if the program is separately licensed as part of the transaction.” By licensing software embedded in goods, a seller (or third party licensor) makes it “ordinarily clear” that UCITA applies to the software.

Allows opt-in for many goods transactions: UCITA permits sellers of goods to opt into it if they are selling a computer with software or if giving access to a computer program is a material purpose of the transaction. Section 104(4), incorporating Section 103(b)(1). Sellers of cars could opt in on the basis of software in computers in cars. Alternatively, sellers can opt the whole transaction into UCITA if they license embedded software. A single contract form could be used to license software and at the same time opt the whole transaction into UCITA, including its contract rules--so that the disclosure of the opt-in could be made after payment. Comment 2 to Section 104 states, “The materiality requirement should be liberally construed to enable agreements.”

In sum, Sections 103 and 104 and their comments are extremely tricky and would have the opposite effect from clarifying the law. They would allow sellers to argue in litigation that they can opt into UCITA on the basis of embedded software if the goods have an internal computer or if the embedded software is licensed.

Requires balancing test when a contract term violates fundamental public policy:

UCITA limits the common law discretion of a court to refuse to enforce a contract or a portion of a contract when the contract violates public policy. This doctrine is limited in UCITA to cases where the court finds that the public policy is “fundamental,” and then only “to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of the terms.” Section 105(b). If a term violates a fundamental public policy, should the court also have to engage in a process of balancing the interest in enforcing that term against the public policy? The Restatement (Second) of Contracts, in Section 178, calls for balancing, but does not require that the public policy be “fundamental.”

A further objection to this provision is that it will require decades of litigation to find out what sort of license terms are unenforceable. The provision should be clarified with a list of examples of unenforceable terms (for example, terms that prohibit reasonable quotation of digital works or that restrict public comment on mass-market products).

Creates doubt about applicability of consumer protection statutes: Courts now typically treat mass-market software transactions as sales of goods. UCITA instead conceives of these transactions as “licenses” of “computer information.” Section 102(a)(41) and (10). Most state and federal consumer protection statutes do not specifically refer either to licenses or computer information because they were drafted before consumer software transactions became common. Therefore, the supposed preservation of consumer protection law in Section 105(c) is misleading, because consumer protection laws specifically for software are few and far between. UCITA’s recharacterization of these transactions throws in doubt the scope of existing statutes; the argument that software producers and access contract providers can make is that UCITA defines their transactions as not involving sales of goods or services. Changes in the wording of Section 105(c) in the November 1999 draft of UCITA do not affect this problem. If UCITA is going to recharacterize these transactions, it should provide that state consumer protection laws that apply to sales of goods and services also apply to UCITA consumer contracts, a change made in Maryland when it enacted UCITA.⁹

Another problem with UCITA is that it conflicts with the approach of statutes prohibiting unfair and deceptive practices. There are many cases and regulations applying these statutes so as to require early disclosure of key elements of transactions. By specifically authorizing post-payment disclosure of terms, UCITA would have one of two effects: misleading producers into thinking that this approach is legally protected, or watering down anti-deception laws by influencing interpretation of them to permit delayed disclosure.

UCITA section 105(d) interferes with state consumer protection policy in four specific areas:

- State consumer protection statutes or administrative rules requiring that a term, waiver, notice, or disclaimer be in writing are displaced by a record. (UCITA defines a record to include even a recorded phone call. Section 102(a)(55).)

⁹ See note 2 supra.

- Requirements for an actual signature are displaced by an authentication, defined in Section 102(a)(6)(B) to include adopting a process (presumably including clicking).
- Any otherwise applicable state definition of conspicuous is displaced by UCITA's weak per se definition of conspicuousness.
- State statutory requirements of consent or agreement to a term are displaced in favor of UCITA's approach that assent is manifested by clicking a mouse after payment or delivery.

See discussion also of Sections 215 and 905, concerning interaction of UCITA with the federal Electronic Signatures in Global and National Commerce Act. The federal statute requires that consumers affirmatively consent, after receiving certain disclosures, to use of electronic records in place of required written notices.

Rule of construction in favor of boilerplate: UCITA states it is to be construed to promote “commercial usage and agreement,” not to protect consumers. Section 106(a)(3).

Undercuts the concept of unconscionability with a rule of construction: Section 106(d) provides that, “To be enforceable, a term need not be conspicuous, negotiated, or expressly assented or agreed to, unless this [Act] expressly so requires.” The unconscionability section, Section 111, does not expressly require conspicuousness, negotiation, or express assent, but the outcome of unconscionability cases holding contracts unenforceable has frequently turned on these procedural aspects of transactions. Section 106(d) is objectionable because it potentially undercuts much of the case law doctrine of unconscionability.

Broad choice of law regardless of the size of the transaction: UCITA permits a contract drafter to choose the law of a state or country that has nothing at all to do with the transaction. Section 109(a).

Broad choice of forum regardless of the size of the transaction: UCITA permits a boilerplate license to select an exclusive place for litigation to occur which is unjust, so long as it is not also unreasonable. Section 110. Comment 3 provides that a choice of forum “is not invalid simply because it adversely effects one party, even if bargaining power was unequal.” Comment 3 states that to be both unreasonable and unjust, a choice of forum would have to have no commercial purpose (and licensors could always cite their convenience as a commercial purpose) and *also* have “severe and unfair impact” on the other party.

Because of this broad provision, a technology company would not need to move to a state that has enacted UCITA to choose that state as a forum. Rather than drawing technology businesses to a state, early enactment of UCITA is likely to draw only their litigation.

Doesn't prohibit unconscionable inducement to contract: UCITA contains no prohibition on unconscionable inducement to contract. Section 111 on unconscionable contract terms is

silent on unconscionable inducement to contract. Current UCC Article 2 is also silent, but current Article 2A on leases of goods contains such a prohibition.

Allows fictional assent by double click: Section 112(d) could be read as creating per se assent so long as the customer double clicks on a button in order to continue to use the information, even when this is done after payment or delivery in order to get access to a product already acquired. See Section 112(e). Section 112(d) attempts to undermine the basic standard of intentional agreement otherwise stated section 112(a)(2).

Allows even more fictional assent for future transactions: UCITA's basic section on manifesting assent and the opportunity to review terms before being bound by them, although weak, can be avoided entirely by a licensor that engages in a series of transactions with a customer. Section 112(f) permits a licensor to rewrite standards for manifesting assent and opportunity to review for all future licenses between the same two parties, for example providing that use of a product manifests assent to terms first disclosed after payment or delivery.

Permits “pay first, see the contract terms later” even for key terms including warranty disclaimers and limitations of remedy: UCITA defines “opportunity to review” in such a way as to provide that a customer who doesn't see terms until after he or she has paid and taken delivery of the information is deemed to have an opportunity to review those terms. Section 112(e)(3). There is no exception for terms required to be conspicuous, so that a term is “conspicuous” even when first disclosed after payment or delivery. See Section 406 for conspicuousness requirement as to warranty disclaimers.

Doesn't require contract terms to be provided before payment, even when it is easy and thus only reasonable to do so: UCITA contains no requirement that terms of the contract be made available before payment is accepted and delivery is made, even when it would be easy to do so. Instead, UCITA gives the licensor (or the seller of a combination of goods and software) unfettered discretion to decide to provide the customer with the terms before or after the customer pays and receives shipment. Section 112(e)(3).

Uses unfair “manifestly unreasonable” test: UCITA allows a software maker to use its standard form license to pick the standards that will measure the obligations of good faith, diligence, and reasonable care as long as the consumer or other party cannot prove that those standards are “manifestly unreasonable.” Section 113(a)(1). This is a particularly inappropriate rule for non-negotiated consumer contracts. The standard comes from the original Uniform Commercial Code, drafted 50 years ago, before the consumer movement.

Allows boilerplate waiver of the right to terminate the contract for a material change in terms: UCITA doesn't prohibit waiver of the section that allows a party to a mass-market transaction to terminate a contract if there is a unilateral change in a material term. Section 113, omitting cross-references to Section 304.

Right to cancel for failure to deliver what was promised can be waived: UCITA allows waiver of a customer's basic right in a mass-market transaction to refuse the software or other

information if it doesn't comply with what was promised in the contract. Section 113, omitting cross-reference to Section 704(b). See also Section 803(a)(1) permitting a limitation of remedy that precludes the right to cancel.

May displace other key legal principles: UCITA Section 114(a) provides that UCITA may sometimes displace principles of law and equity, including agency, fraud, misrepresentation, duress, coercion, and mistake. The section states that these principles supplement UCITA, but only "unless displaced by this Act." Section 114(a). Although this provision is derived from UCC Section 1-103, it is objectionable in UCITA because of its provisions that undercut aspects of the common law that protect customers, for example common law doctrines dealing with contracts against public policy (Section 105(b)), mistake (Section 217) and fraudulent omission (Sections 208, 209 and 304).

UCITA Section 114 gives the question of conspicuousness to a court and not a jury: Conspicuousness is a question of fact appropriately left to a jury, but UCITA reserves it for the court.

Part 2

Makes terms in standard form contracts more enforceable: Under UCITA, a party adopts all the terms of a standard form contract if the party agrees to that document by manifesting assent. Sections 208 and 209. The definition of manifesting assent includes certain kinds of pro forma conduct. See Sections 112(d) and 112(f). UCITA also makes terms that a party did not know about or did not understand part of the contract unless those terms are unconscionable or fail some other UCITA requirement. Section 208(3).

Allows standard form terms to undermine the essential purpose of the transaction: UCITA makes standard form terms enforceable once there is manifested assent even when those standard terms eliminate the essential purpose of the contract. Sections 208(3) and 209(a). This approach is contrary to the common law of contract in many states.

Permits standard form terms which are inconsistent with the consumer's reasonable expectations: UCITA broadly authorizes and makes enforceable standard form contract terms that are inconsistent with the reasonable expectations of the consumer in the circumstances, so long as those terms are not so extreme that they will be found unconscionable. Sections 208(3) and 209. This approach is contrary to the common law of contract in many states.

Right of return evaporates after double click on "I agree": The right of return touted by UCITA's sponsors is close to meaningless. The right of return evaporates the moment that the consumer double clicks on the "I agree" screen. Section 209(b). Many software companies have included this right of return in the absence of UCITA, and they know that a return right is rarely invoked by customers who have already paid or taken delivery, and who are anxious to get access to the product and must click to do so.

Right of return is easily eliminated: UCITA's right to return software or information if the customer disagrees with the terms disappears if the licensee has any opportunity to review the license before becoming obligated to pay. Section 209(b).

Has a tricky Internet disclosure safe harbor that does not require posting terms on the site where orders are made or providing a link from that site: UCITA permits a licensor to claim it has made information available to the licensee when the licensor has only posted the information to a different web site without any link to the place where the sale is made. Section 211(1)(A). The payment screen can contain an address without a hyperlink and satisfy UCITA's very weak definition of availability. Section 211(1)(A). A licensor may even claim that terms were available prior to sale when the customer had to write in for those terms to a designated mailing address posted on the web site where payment is to be made. Section 211(1)(B). It is necessary to parse Section 211(1)(B) very carefully to see how little it requires: that the availability of the terms be disclosed on the site, and that the terms be furnished on request. The terms do not have to be on the site or available by link, and the site could provide a mailing address from which to request them. Comment 3 states that the terms might be made available "through providing a potential licensee with an address (electronic *or otherwise*) from which the terms can be obtained [emphasis added]." So long as the Web merchant provides terms in response to mailed requests (if any), the safe harbor is met.

As tricky and limited as Section 211 is, it is not even a required disclosure method. An Internet merchant governed by UCITA can choose to hold back terms until after payment or delivery. Section 112(e)(3). This is a terrible model for electronic commerce, where providing the terms before order is easy.

Error defense contains huge loophole: UCITA purports to offer a new consumer defense for electronic errors, but then eliminates this defense whenever the order process includes a confirmation screen or other message to detect and correct or avoid the error. Section 214(a). A consumer who types an order, confirms it without noticing the error, and then calls the merchant before the order is filled is out of luck under this very limited provision. The common law of mistake in most states would protect consumers better. The last clause of Section 214(a), "if a reasonable method to detect and correct or avoid the error was not provided," should be eliminated. The merchant is protected by other parts of Section 214, in that the consumer cannot invoke the error defense unless the consumer returns or destroys any copies received and has not used the information.

Messages effective even when no one knows a message was received: UCITA makes all electronic messages it covers effective when received, as receipt is defined in Section 102(a)(53), even if the individual is not aware of the message. Section 215. (The revision of Section 215(a) in the November 1999 draft does not appear to change the substance; it merely introduces redundancy: "Receipt ... is effective when received....") An electronic message will be effective against a consumer when it is received by the consumer's internet service provider even if it is filtered out before the consumer gets it, for example as suspected junk mail, spam, or pornography. In addition, Section 215 does not reflect consumer practice; many consumers have e-mail accounts that they do not check regularly. It is unfair to adopt a statutory standard that is inconsistent with consumer usage. When consumers provide an e-

mail address to a merchant, they will frequently not know or have reason to know that in addition a form contract term (later disclosed) will state that any e-mail address provided is a place designated to receive messages about changes in terms or service. E-mails are not necessarily regularly checked in the way that regular mail is, and consumers typically change e-mail addresses more, with less likelihood of forwarding, than is the case with regular mail. At a minimum, a consumer should have to be informed by a conspicuous disclosure at the time that the consumer gives an e-mail address if that address will be used for purposes of giving notice of changes in terms or any other important matter.

The federal Electronic Signatures in Global and National Commerce Act probably pre-empts UCITA's electronic commerce provisions. To avoid uncertainty and to be sure that the federal consumer protections are preserved, UCITA should explicitly state that there is no intention to override them. Instead, UCITA includes a section attempting to override the federal consumer protections. See discussion of Section 905.

Part 3

Retains parol evidence rule: UCITA carries over from UCC Article 2 the flawed parol evidence rule, not geared to consumer transactions, which sellers can use to attempt to evade responsibility for oral promises made by their own agents and salespeople. Section 301.

Permits an inconspicuous boilerplate term authorizing unilateral future changes: Section 304(b)(2) specifically authorizes a form drafter to put in a term that permits unilateral future changes. This safe harbor provision requires notice of changes, but under Section 304(c), the form drafter can define what will suffice as notice so long as it does so in a not "manifestly unreasonable" way, which might permit "notice" by posting to a Web site, without any effort to reach customers individually. Section 304(d) and its comment 3 indicate that the procedural requirements of Section 304 (notice and a right to terminate as to future performance in the event of material changes in mass-market transactions) are merely safe harbors, so that future changes without notice or a right to terminate might be enforceable.

No provision for pro-rata refund of up-front fee after a change in terms: UCITA allows change in a material term without any refund of amounts already paid. UCITA permits a contract drafter to collect a large up-front fee based on certain contract terms and then change any of those terms. The customer could cancel as to future performance but might not get any refund of the up-front fees. Section 304(b)(2).

Use of information may be restricted: UCITA permits a contract to restrict the use of computer information more narrowly than the copyright law doctrine of fair use. Section 307(b).

No right to bug fixes: UCITA states that a customer is not entitled to improvements, modifications or upgrades made by the licensor, regardless of the reason for those improvements, modifications or upgrades, unless there is an agreement to do so that meets heightened procedural requirements. Section 307(d) and (g). Even if a licensor promises to

provide upgrades, that promise is not enforceable unless the licensor authenticated a record promising upgrades or the licensor provided a form record promising an upgrade and the licensee manifested assent to it. A salesperson's oral promise would not be good enough.

Part 4

Permits a licensor to use boilerplate language to escape all responsibility for providing information which is not subject to a claim of infringement or for misappropriation:

These obligations can be eliminated by burying these words in boilerplate: "There is no warranty against interference with your enjoyment of the information or against infringement," or similar words. Section 401(d).

Retains the flawed "basis of the bargain" standard found in current UCC Article 2 for deciding when a promise or affirmation of fact to a customer creates an express warranty and treats that standard as requiring knowledge of an advertising warranty:

Section 402 recognize that warranties can be created by factual statements in advertising, something not recognized by the text of UCC Article 2 but already recognized in the case law to existing Article 2. Comment 3 to Section 402, however, requires knowledge by the licensee of an advertising warranty in order for it to be effective, so that a consumer who acquires software based on reputation created by advertising does not get the benefit of warranties unless the consumer can prove that he or she had knowledge of the specific promises. This comment is worse than existing case law.

Permits a product to fail to fully conform to a sample, model, or demonstration even when that sample, model, or demonstration was part of the basis of the bargain and created an express warranty: Under Section 402(a)(3), the actual product need only "reasonably conform" to the sample, model, or demonstration.

Eliminates some express warranties created by a display or description of a portion of the information: Under UCITA, a display or description of a portion of information doesn't create an express warranty if the purpose was: "to illustrate the aesthetics, market appeal, or the like, of informational content." In other words, the licensor can show or describe the information, but the information doesn't have to fully live up to that display or description. Section 402(b)(2). No similar restriction is found in UCC Article 2.

Restricts the elements of the implied warranty of merchantability offered to the end-user of a computer program: UCC Article 2, section 2-314, sets forth six elements of the implied warranty of merchantability. UCITA Section 403 offers the end-user only one of these elements. Most of the other elements are retained, but only as warranties to the distributor and not as warranties to the customer.

Allows a seller to escape responsibility if hardware and software sold together don't work together: UCITA permits a seller of both computer programs and hardware who

knows that the customer is relying on the seller to escape any responsibility for a warranty that those components will in fact function together as a system. Section 405. UCITA creates an implied warranty that systems sold together will work together, but only if the licensor has reason to know that the licensee is relying on skill and judgment of licensor to select hardware and software that will work together. Even when the seller knows the customer is relying on it, the seller can still eliminate this obligation with a simple disclaimer of implied warranty. See section 405 (a) and (c), and 406(b)(2). The disclaimer can simply say: “There is no warranty that the information, our efforts, or the system will fulfill any of your particular purposes or needs.” Section 406(b)(2). If a seller of both computer programs and hardware has reason to know that a buyer is relying on it to provide products that work together, the seller should not be able to disclaim this warranty.

Provides a new way to eliminate the implied warranty of fitness for a particular

purpose: UCITA contains new language that will always be sufficient when conspicuous to eliminate the implied warranty of fitness for a particular purpose, even if that language does not under the circumstances communicate to the customer that the product is not guaranteed to be fit for the customer’s purposes. Section 406(b)(2).

No implied warranty if the customer doesn’t examine the software or other

information: UCITA removes the implied warranty if the customer could have examined the information, or a sample or model but declined to do so. Section 406(d).

Modification eliminates warranties: UCITA warranties evaporate if the customer modifies a computer program, even if the modification could reasonably have been expected and is not the source of the problem with the program. Section 407.

Restricts responsibility to third party beneficiaries more narrowly than UCC Article 2:

UCITA adopts an extremely narrow definition of third party beneficiaries of warranties. This definition excludes guests of the licensee even if they could have been reasonably expected to use the product. Compare UCITA Section 409, with UCC Section 2-318 and its three alternatives. Even the narrowest alternative in UCC 2-318 covers family, household members and guests if their use was reasonably expected. UCITA section 409 eliminates guests altogether. UCC 2-318 Alternatives B and C, adopted in many states, extend to any natural person who may reasonably expected be to use or to be affected by the goods (Alternative B) or to any person, not limited to natural persons (Alternative C).

Part 5

Would interfere with gifts and the market in used software and goods containing

software: UCITA Section 503(2) permits a license to prohibit transfer of software or other information without the permission of the licensor, even if the licensee keeps no copy. This would mean, for example, that a consumer who wants to give away or sell a used computer with the operating system could be prohibited from doing so. In addition, second-hand computer and software stores and other businesses known as “resellers” could be shut down.

Part 6

UCITA is one-sided: The party who does not draft the license may only cancel if a breach is “a material breach of the whole contract.” However, the drafting party can cancel for any breach which it calls material in the contract. Section 601. A mass-market licensor could eliminate the perfect-tender rule (Section 113 does not prohibit contractual waiver of Section 704(b)), thus leaving a consumer with a right to cancel only for a material breaches of the whole contract. At the same time the licensor could define minor licensee breaches as “material,” giving itself a broad cancellation right. The licensor could even eliminate the customer’s right to cancel under Section 803(a)(1), while writing itself a right to cancel for minor breaches.

UCITA is convoluted: For example, Section 601(d) reads: “Except as otherwise provided in Section 603 and 604, in the case of a performance with respect to a copy, this section is subject to sections 606 through 610 and sections 704 through 707.”

Endorses restraints that automatically disable a program: In its section on “electronic regulation of performance,” UCITA authorizes use of code, electronic, or physical limitations in a program to restrict its use, even when the restrictions will make it impracticable for the licensee to reach its own information because the program is needed to do so. Section 605(a), (b), and (c). This would allow a form of self-help, despite the August 2000 amendments to UCITA adopted by NCCUSL, which purport to prohibit self-help in mass-market transactions. Section 816(b).

Subsections 605(b)(2) and (3) permit use of automatic restraints to prevent use of a product that is inconsistent with the licensor’s terms and to enforce required renewal payments. For example, this section could be used to enforce transfer restrictions on software and thus to effectively prohibit a second-hand market not only in software but also in goods with embedded software. If the seller of a car licensed the software in the car’s computer, the seller could put a transfer restriction in the license prohibiting transfer of the software to anyone other than the initial car buyer. If the buyer attempted to transfer the software as part of a sale of the car, the seller could use code to turn off the computer program and disable the car.

Section 605(b)(3) permits disabling after expiration of a stated duration. Using this provision, cars with software in them might be licensed by the week, with a renewal option requiring further payment. If the consumer did not pay for the next week, the licensor could terminate the contract for nonrenewal. This would give rights to software licensors that secured creditors with consumer goods collateral or lessors of consumer goods do not have under UCC Articles 9 and 2A. Disabling of consumer goods apart from repossession is not authorized by Article 9 (see UCC Section 9-503, Revised Section 9-609, authorizing disabling only for equipment, defined as goods used in a business) or by Article 2A (see UCC Section 2A-525(2), permitting disabling only for goods “employed in trade or business”). These provisions recognize that *in terrorem* self-help is ethically suspect and thus particularly inappropriate as a remedy in consumer transactions. (The FTC’s Credit Practices Rule bars non-possessory, non-purchase money household goods security interests because they were

primarily used for threat value.) This kind of self-help is different from repossession that is necessary to resell goods sold on secured credit. Repossession of a car, for example, is a way for a secured creditor or lessor to realize value from collateral or leased goods. No value is realized by turning off software to disable goods; the reason to do so is purely for leverage.

May make it easier for licensors to force customers to acquire upgrades: UCITA expressly contemplates boilerplate agreements permitting the licensor to electronically disable an existing copy of information in order to electronically replace earlier copies with upgrades. Section 605(e).

Sometimes eliminates the right to inspect: Section 608(b) eliminates the right to inspect where “inconsistent” with the agreement, a vague and potentially broad concept.

Acceptance occurs too soon: UCITA defines acceptance to occur even before the buyer has had a reasonable opportunity to inspect the software if the software is commingled with other information upon installation. Section 609(a)(3). Rather than eliminate the consumer’s right of inspection and of rejection where installation for first use causes commingling, the aggrieved consumer should not have to make a return of the copy unless the breaching licensor can extract it without destroying the consumer’s information.

Eliminates remedy if notice not given, even when no harm from lack of notice: UCITA bars a licensee from any remedy at all for failure to give notice of a breach of contract discovered after acceptance of the product, even if the failure to give notice did not harm the other party in any way. Section 610(c)(1). This carries forward a much-criticized trap for the unwary from Article 2, a rule that is particularly unfair in consumer transactions because consumers may not have ready access to legal advice that they should give early written notice to best preserve their legal rights.

Facilitates arbitration clauses: UCITA expressly recognizes arbitration clauses and states that they survive the termination of a contract. Section 616(b)(6). Arbitration rules frequently disfavor consumers, for example by requiring large fees, and research shows that arbitration results favor repeat players in the system. The explicit approval of arbitration weakens the case for unconscionability of these clauses in consumer contracts.

Part 7

Narrowly defines material breaches: UCITA narrowly defines what breaches of contract are material. Section 701(b)(2), for example, provides that a breach is material if it “is a substantial failure to perform a term that is an essential element of the agreement.” The supposed source of this provision does not make a boilerplate contract provision stating that any breach is material effective to deem it so. See Restatement (Second) of Contracts, Section 214; compare with UCITA Section 701(b)(1). The Restatement section does not use the word “substantial,” as UCITA does repeatedly, in Section 701(b)(2), (3)(A) and (3)(B). The Restatement commentary indicates that it uses a “flexible” analysis that depends on consideration of numerous circumstances, rather than the rigidly narrow approach of UCITA.

Requires partial payment for use of bad software: UCITA requires a customer who has received bad software and must use that software while waiting for a replacement or refund to pay a fee for the reasonable value of use to the licensor who provided the bad software. Section 706(b)(1).

Part 8

Permits elimination of the right to cancel: Section 803(a)(1) contains language not found in Article 2 permitting a limited remedy “precluding a party’s right to cancel for breach of contract.” This seems to permit boilerplate to eliminate the right to refuse a tender that does not conform to the contract, thus effectively undermining the perfect tender rule supposedly established for mass-market transactions in Section 704(b). See also Section 802(d), referring to terms prohibiting cancellation.

Rewards unconscionably narrow limited remedies: Under UCC Article 2, if a limited remedy is so narrow that it fails of its essential purpose, a consumer usually can then fall back on all available remedies, including incidental and consequential damages (for example, costs of repair or value of lost information). UCITA expressly authorizes restrictions on incidental and consequential damages to survive even when the limited remedy was so narrow that it was unconscionable. Section 803(c).

Suggests that a disclaimer of responsibility for personal injury may be permissible for computer programs if the program is not contained in consumer goods: Section 803(d) states that an exclusion of consequential damages for injury to the person in a consumer contract for a computer program which is contained in consumer goods is prima facie unconscionable. By implication, the section suggests that a restriction on all responsibility for personal injury caused by a computer program that is licensed in a freestanding transaction or that is contained in commercial goods is acceptable.

Permits a licensor to turn off software electronically under certain conditions: Section 816(b) was amended by NCCUSL at its 2000 annual meeting in August to state, “Electronic self-help is prohibited in mass-market transactions.” But electronic disabling may still be permissible under section 605, providing for “electronic regulation of performance.” See discussion of that section.

Attempts to override federal consumer protections in the use of electronic records. Section 905, added at the July-August 2000 NCCUSL annual meeting without prior public notice, states that UCITA’s provisions concerning the enforceability of electronic records and signatures “supersede, modify, and limit the Electronic Signatures in Global and National Commerce Act.” This is an attempt to override the consumer protections in the new federal law, which becomes effective October 1, 2000. The federal law requires in its section 101(b) that consumers “affirmatively consent” to use of electronic records in place of any otherwise required written notice. This consent is only valid if given after various conspicuous disclosures, including disclosure of the categories of records that may be provided electronically and the hardware and software requirements for accessing and retaining them.

Under the federal law, section 102(a)(2), UCITA could only displace the federal requirements if it “specifies alternative procedures or requirements for the use or acceptance (or both) of electronic records” that are “consistent” with the federal consumer protections. UCITA specifies no alternative protections equivalent to those in the federal law, making it both bad policy and unlikely to withstand legal challenges. If enacted, Section 905 would lead to a great deal of litigation. A more certain approach, as well as better policy, would be to explicitly state that there is no intention to displace the federal consumer protections by adding a section stating, “Nothing in this act is intended to modify, limit or supersede the provisions of section 101(b)-(e) of the federal Electronic Signatures in Global and National Commerce Act.”