Mass Market Transactions in the Uniform Computer Information Transactions Act

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INTRODUCTION

Existing law routinely draws a bright line between transactions with consumers and transactions between commercial parties. In this way, the law accords special protections to persons qualifying for status as consumers that are not accorded to businesses. The Uniform Computer Information Transactions Act ("UCITA")[1] dramatically changes this tradition by

[1] UCITA, formerly known as "Article 2B of the Uniform Commerical Code," is a new uniform act for computer information transactions. It was drafted under the sponsorship of the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). "The purpose of [NCCUSL] is to promote uniformity in state law on all subjects where uniformity is desirable and practicable." NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1997-98 REFERENCE BOOK 6. To accomplish this goal, the commissioners participate in drafting acts and endeavor to secure their consideration by state legislatures. *See id.* NCCUSL is composed of approximately four commissioners from each state, the District of Columbia, Puerto Rico and the U.S. Virgin Islands. Commissioners are appointed by state governors and tend to be law school professors, legislators, practicing lawyers, and state code revisers. *See id.* Commissioners are appointed to drafting committees and a "reporter" is chosen to draft each proposed act. The Reporter for UCITA is Dean Raymond T. Nimmer, Leonard Childs Professor of Law, University of Houston Law Center. All citations herein are to the November 1, 1999 draft (available at <http://www.law.upenn.edu/bll/ulc/ucita/ucitanc.htm>) except as otherwise noted. UCITA is the product of comments on or meetings regarding numerous previous drafts. Commentators include, but are not limited to, the NCCUSL Drafting Committee for UCITA, the American Law Institute, representatives of the software, publishing, banking, entertainment and information industries, business and consumer end-users, federal regulators, various state bar associations, and numerous American Bar Association committees.

providing what amount to consumer protections to businesses as well as to consumers, if the businesses acquire computer information in a mass-market transaction.

This article discusses (1) the traditional application of consumer protections under existing law, (2) UCITA's new concept of "mass-market transaction," and (3) UCITA's mass-market and consumer transaction protections. Together, these protections retain and update consumer protections available under existing consumer and commercial statutes, and add new consumer protections.

Some of this protective package is also extended, for the first time, to businesses that become mass-market licensees. Courts should apply this extension carefully to avoid distortions between commercial parties: when extra protections are extended to businesses as customers, extra burdens are placed on businesses as vendors. When those burdens and benefits are reciprocal, i.e., when the business-as-customer is required to extend the same protections to its customers when it acts as a vendor, then a level playing field is maintained. But when the business-as-customer essentially obtains a windfall, i.e., when it receives a benefit as customer that it is not required to provide when it acts as vendor of its own products, then an imbalance is created that should be avoided when possible.

I. THE TRADITIONAL LINE: CONSUMER RULES AND BUSINESS RULES, NEVER THE TWAIN SHALL MEET

Federal Regulation Z,[2] which implements the federal Truth in Lending Act, is typical of most state and federal consumer protection statutes. Its protections apply only to consumers, defined as "natural person[s]" who obtain credit "primarily for *personal, family or household purposes*."[3] It does not apply to corporations or other businesses.[4] It expressly excludes credit

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[2] *See* 12 C.F.R. § 226 (2000).

[3] *Id.* at § 226.2 (11) and (12) (emphasis added).

[4] *See* 12 C.F.R. § 226.3(a) (2000) (stating that this regulation does not apply to "[b]usiness, commercial, agricultural or organizational credit" or to "[a]n extension of credit to other than a natural person, including credit to government agencies or instrumentalities"). *See also* 12 C.F.R. 213.2(e)(1) (2000) (Regulation M, consumer leases) and U.C.C. Article 2A § 103(1)(e) (consumer leases), both of which exclude entities or businesses from their definition of "consumer;" Uniform Consumer Credit Code § 2.104 (the U.C.C.C. covers consumer credit sales which are defined to protect only buyers who are not organizations and who purchase primarily for personal or family purposes; agricultural purposes are also protected) (copy available, Consumer Credit Guide at ¶ 5044 (Commerce Clearing House Inc.)); FTC Telemarketing Sales Rule, 16 C.F.R. § 310.6(g) (2000) (stating that although this telemarketing sales rule literally applies to all "customers" of telemarketers, exempted from the rule are "[t]elephone calls between a telemarketer and any business, except calls involving the retail sale of [certain] cleaning supplies). *But see* 12 C.F.R. § 226.12(a) and (c) (2000) (extending the protection of selected credit card issuance and liability rules to businesses); and federal Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312 (1994) (protecting all buyers but only if the buyer purchases a consumer product). However, the term 'consumer product' means any tangible personal property which is distributed in commerce and which is *normally used for personal, family, or household purposes*. 15 U.S.C. § 2301(1). The regulations make it clear that consumer products do not include products purchased solely for commercial use and that should preclude most business purchases. 16 C.F.R. § 701.1(b). Also, various sections of the Act expressly do not apply to products purchased for business use. For example, the rule requiring

extended "primarily for a *business, commercial or agricultural purpose*" or to government agencies or instrumentalities.[5] As do many consumer statutes, it also exempts high-dollar transactions.[6]

UCITA parallels this typical definition of consumer but also expands it in two respects: first, UCITA does not limit the dollar amount of a consumer contract; second, it expands the definition to include management of the individual's personal or family investments.[7] Both of

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sellers to make written warranty terms available for review before purchase excludes businesses. *See* 16 C.F.R. § 702.1(b) (2000) (redefining "consumer product" for purposes of the pre-sale availability rules to exclude "products which are purchased solely for commercial or industrial use"). "Seller," the party that must comply with the pre-sale availability rules, is also redefined to *exclude* sellers who offer a product for "use in the ordinary course of the buyer's business." 16 C.F.R. § 702.1(e).

[5] 12 C.F.R. § 226.3(a) (2000) (emphasis added).

[6] *Id*. at § 226.3(b) (exempting Regulation Z from credit over $25,000 unless secured by real property or a dwelling). $25,000 is also the limit under NCCUSL's Uniform Consumer Credit Code. *See* U.C.C.C. at § 2.104. Under both acts, the financing of high-priced products, like an airplane, is not covered even if purchased by a consumer. Similarly, the definition of "consumer lease" in UCC Article 2A-103(e) contains an option for states to impose a dollar limit, and a dollar limit is imposed in federal Regulation M regarding leasing ("consumer lease" is defined as not exceeding $25,000). 12 C.F.R. § 213.2(e)(1) (2000). Under federal Regulation Z, the Federal Reserve Board is further empowered essentially to eliminate consumer protections for individuals who have net assets in excess of $1,000,000 or an annual income of more than $200,000. *See* 15 U.S.C. § 1604(g)(1) (1996).

[7] UCITA defines consumer as follows:

> "Consumer" means an individual who is a licensee of information or informational rights that the individual at the time of contracting intended to be used primarily for personal, family, or household purposes. The term does not include an individual who is a licensee primarily for professional or commercial purposes, including agriculture, business management, and investment management other than management of the individual's personal or family investments.

U.C.I.T.A. § 102(a)(15) (1999). "A 'consumer contract' means a contract between a merchant licensor and a consumer." *Id*. at § 102(a)(16).

For typical dollar limits on consumer contracts, *see supra* note 6. With respect to UCITA's inclusion of an individual's management of personal or family investments, this extends the traditional definition of "consumer" to management of investments. The investment itself should not be included because of the limitation to personal, family or household purposes. *See, e.g.*, In Re Manning, 126 B.R. 984, 989 (Bankr. M.D. Tenn. 1991) (holding that where the borrower purchased partnership units or property primarily for personal or family use, no consumption was contemplated and citing the legislative history of the Bankruptcy Code for the definition of consumer debt as debt incurred for a "personal, family, or household purpose"):

> To hold that an investment debt may be classified as a consumer debt would stand the English language on its ear. "Consumption" is the antitheses of "investment." Expenditures . . . for the purpose of personal, family or household "consumption" are for necessities or luxuries in

these expansions significantly increase the scope of protection that is available to consumers under UCITA, but that is not available under typical state or federal consumer protection statutes.

To understand the typical application of consumer protection statutes, consider a transaction by an accountant who purchases, on credit from a retailer, a computer and telephone for an office in the accountant's home. Both items are also commonly used by the accountant's children, although the primary purpose of the purchase is to equip the home office. A few months earlier the accountant purchased, on credit from the same retailer, an identical computer and telephone for the family room. Do the consumer protection provisions of federal and state laws, including usury laws, apply to the transaction to equip the home office? Note that in each case the items purchased are obtained from the very same source, are the very same items, and are purchased by the very same person.

The answer is "No," the consumer protection provisions of most federal and state statutes do not apply to the transaction for the home office.[8] I emphasize this because, throughout the UCITA drafting process, countless statements were made by consumers and representatives of commercial licensees to the effect that the answer would be "yes" under existing law: there was an assumption that if the same item (i.e. the computer or telephone) was purchased from the same source (i.e. the retailer who extended credit), then the law treated consumers and businesses identically. Under most consumer protection laws, however, that is absolutely wrong. To implement the dividing line between consumer protections laws and commercial laws, and to confine consumer protections to consumers, the home office transaction is viewed as a business transaction and the accountant is expected, in the pursuit of her business or commercial goals, to conduct herself as a businessperson. The purchases she made for the family room were consumer transactions under existing consumer protection laws, i.e., they were primarily for personal, family or household purposes. But the purchases for the home accounting office are not for those purposes - they are for business or commercial purposes and consumer protection statutes do not apply to those purchases.

> daily existence. "Investment," on the other hand, *by definition*, is an expenditure today for an expected return in the future.

Id. (emphasis added). *Accord* WASH. REV. CODE ANN. § 19.52.080 (West 1999) (stating that under Washington's usury statute, "investment" purposes are not part of consumer transactions: excluded from consumer transactions are transactions "primarily for agricultural, commercial, *investment* or business purposes") (emphasis added). Put another way, transactions arising from a "profit-motive" are outside the definition of consumer purposes. *See, e.g.*, Matter of Booth, 858 F.2d 1051, 1054-55 (5th Cir. 1988) (explaining that the Bankruptcy Code definition of "consumer debt" is adapted from the definitions used in various consumer protection laws; "Cases decided under the Truth in Lending Act indicate that when the credit transaction involves a profit motive, it is outside the definition of consumer credit") (citations omitted). *But see* Thorns v. Sundance Properties, 726 F.2d 1417, 1419 (9th Cir. 1984) (holding that Regulation Z or FRB interpretation can be interpreted to allow some investments to be viewed as for personal purposes; remanding for trial question of whether loan for investment in limited partnership was consumer credit under Regulation Z).

[8] *See supra* note 4 and surrounding text.

This is long-standing and traditional American law. European law can be similar, although the concept is phrased differently.[9] In the United States, this separation between consumer and business transactions was influenced by Karl Llewellyn, the author of Article 2 of the Uniform Commercial Code. In Article 2, Llewellyn created the distinction between "merchants" and "nonmerchants"[10] that is taken for granted today:

> Llewellyn believed the policies and considerations involved in a mercantile situation differed from those in a nonmercantile situation, and that a unitary approach to sales rules would inevitably muddle policies and rationales. This result would jeopardize the predictability he so wanted to create for businessmen. Under a single rule, governing both businessmen and nonbusinessmen, a court trying to protect Aunt Tilly might manipulate, distort, or misconstrue the rule, making uncertain its later interpretation or application to Tilly, Inc. Rules fashioned specifically for a commercial setting, and insulated from nonmercantile considerations, would thus protect the rules' predictability for businessmen. One set of sales rules for businessmen and another for Aunt Tilly would eliminate the possibility of undermining the commercial rule to do justice to Aunt Tilly.[11]

Accordingly, Llewellyn classified certain Article 2 rules by a party's *status* as a merchant or nonmerchant. Ironically, Llewellyn apparently did not intend such a firm line but believed that the merchant (business) rules *should* be applied to nonmerchants (consumers) in appropriate circumstances.[12] That has not been the trend and, in fact, during drafting meetings for UCITA, the opposite argument was made; some business professionals sought status as nonmerchants so

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[9] *See, e.g.*, European Union Directive 97/7/EC of May 20, 1997 on the Protection of Consumers in Respect of Distance Contracts which pertains to "distance contracts." That term pertains to any contract concerning goods or services concluded between a supplier and a "consumer" at, essentially, a distance. "Consumer" means any "natural person who, in the contracts covered by this Directive, is acting for purposes which are *outside his trade, business or profession*." *Id.* at Article 2(1) and (2) (emphasis added).

[10] *See* U.C.C. § 2-104(1) (defining "merchant" as a professional) and the Article 2 rules that apply only to merchants, such as the warranty against infringement in U.C.C. § 2-312(3), the implied warranty of merchantability in U.C.C. § 2-314, and the "confirmatory memorandum" requirement of the statute of frauds in U.C.C. § 2-201.

[11] Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve The Good, The True, The Beautiful in Commercial Law,* 73 GEO. L.J. 1141, 1148-49 (1985) (footnotes omitted).

[12] *Id.* at 1175.

as to avoid merchant obligations.[13] At the same time, some merchants sought to ensure that the novice or first-time merchant was firmly subjected to merchant status.[14] Notwithstanding this

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[13] *See, e.g.*, Letter from National Writers Union UAW Local 1981, to Carlyle C. Ring, Jr., Chair, Article 2B Drafting Committee & Raymond T. Nimmer, Reporter, Article 2B Drafting Committee (letter dated Oct. 9, 1998) (visited April 13, 2000) <http://www.2bguide.com/docs/nwu1098.html>. This letter states:

> The notion of "merchant" in [the Sales] Article 2 did not include individual service providers (who marketed their own labor).
>
> . . .
>
> The National Writers Union respectfully submits that the original creators of information, who spend the bulk of their time creating information, and not dealing in already-created information, are not and should not be classified as merchants. To do so presumes and imposes a level of commercial sophistication which is not naturally acquired in the act of information creation. Requiring creators to acquire such sophistication is antithetical to the creative process. Further, the term "merchant" or "between merchants" (a phrase frequently utilized throughout Article 2B), implies a parity of power which in reality, original creators of information do not usually possess, vis-a-vis commercial publishers and producers. We therefore propose that the definition should contain the following sentence, to be added at the end of its presently drafted form:
>
> In a transaction involving the license or other transfer of rights in information under this Article, the original writers and/or artists who create that information are not merchants within the meaning of this subsection, nor are their agents, brokers or other intermediaries.

Id.

A premise of this view of merchant, i.e., that the definition is not intended to include a person who markets her own labor, presents an interesting policy question. If that view is correct, then a software developer hired to write computer code also should not be a merchant, although UCITA clearly treats developers as such. One could argue that software developers are distinguishable because they deliver something, i.e. the code. But writers, too, deliver something, i.e. the manuscript. Further, software is viewed as "speech" by some courts, so one could argue that software developers and writers engage in exactly the same profession. *See, e.g.*, Bernstein v. U.S. Department of State, 192 F.3d 1308 (9th Cir. 1999) (holding that encryption source code is expressive for First Amendment purposes and thus is entitled to the protections of the prior restraint doctrine under the First Amendment); *accord* Junger v. Daley, 209 F.3d 481 (6th Cir. 2000) Further, the majority of all software companies, not just sole proprietor developers, are small businesses that often have the same lack of sophistication claimed by writers and typically must contract with corporations that are vastly larger and more sophisticated (e.g. banks, insurance companies, and entertainment studios). *See, e.g.*, WASHINGTON SOFTWARE ALLIANCE, 1998-99 INDUSTRY OVERVIEW (1998) (describing that in Washington, despite being home to Microsoft, 64.5% of software companies have only 1 to 15 employees, with 22% of that percentage being companies comprised of 1 to 2 employees).

tussle to impose or avoid merchant obligations, except in UCITA mass-market transactions there is no indication that American law will shift away from the traditional dividing line between business and consumer transactions:

If the UCITA rule were that professionals who market their own labor are not merchants, then such a rule would need to cover software developers and other service providers, too, not just writers. While the National Writers Union would likely agree with that conclusion, commercial licensees of software would not. *See infra* note 14. The reality is that UCC Article 2 was not written with services in mind: it was written only to cover sales of goods. Accordingly, while the union suggests an interesting analysis, it is difficult to conclude that Article 2 makes an intentional analytical decision that the concept of merchant, i.e. the concept that a professional is charged with more knowledge than a nonprofessional, can never be applied to those who provide services.

The original NCCUSL drafting committee for proposed revisions to UCC Article 2 agreed: it rejected the conclusion that farmers can never be merchants and concluded that the merchant concept rests "on normal business practices which are or ought to be typical of and familiar to any person in business." *See* U.C.C. § 2-201 cmt. 2 (Proposed Official Draft Mar. 1999). This concept is recognized in the definition of "merchant" itself: it requires knowledge as to goods or information "of the kind" or "peculiar to the practices or goods [or information] involved." *Id.* § 2-102(19) (Proposed Official Draft Mar. 1999); *see also* U.C.I.T.A. § 102(a)(45) (1999). Further, particular sections of the UCC and UCITA allocate some burdens only to merchants who deal in goods or information "of the kind," not *all* merchants generally. *See, e.g.*, U.C.I.T.A. § 401(a) (1999) (setting forth that the warranty regarding non-infringement is only made by merchants "regularly dealing in information of the kind"); U.C.C. § 2-312(3) (1995) (providing that only merchants "regularly dealing in goods of the kind" warrant non-infringement under Article 2). This distinction, that merchant status sometimes is tied to the type of goods or information in question or practices involving them, is often missed. For example, the Independent Computer Consultants Association requested that the definition of "merchant" be revised because:

> It is a logical disconnect to state that just because one is a merchant of licensed goods, whether custom programs or video games or feature films, therefore one is a "merchant" of software. It doesn't work. Some of the best computer programmers do not have the expertise to evaluate development environments and languages.

ICCA letter dated October 5, 1998 to Carlyle Ring and Geoffrey Hazard, Jr., included in NCCUSL mailing of comments submitted for review at the November, 1998 meeting of the Article 2B Drafting Committee. The ICCA's point is as true for a seller of coffee as for a licensor of software, but the UCC and UCITA definition of merchant already acknowledges the distinction.

[14] This issue was first raised in a letter asking: "Is a first-time software developer, author or inventor a 'merchant'? Certain implied warranties and certain other provisions only are available in transactions with a merchant." Memorandum from Michele C. Kane, Walt Disney Co., to Uniform Commercial Code Article 2B Drafting Committee (letter dated December 2, 1997) (visited April 13, 2000) <http://www.2bguide.com/docs/mk-disn.html>. In response, the Committee eventually added the phrase "whether or not the person previously engaged in such transactions," to the definition of merchant. U.C.C. § 2B-102(a)(34) (Proposed Official Draft Dec. 1998). Given the desirability of conforming like definitions in like articles, it was long questionable whether the new phrase would remain in UCITA if it were not also added by the committee revising Article 2. That did not occur and the final version of UCITA does not contain the aberrant phrase. U.C.I.T.A. § 102(a)(45) (1999). This leaves in place existing law regarding the definition of merchant.

> In seeking to protect consumers online, we will keep in mind the distinctions between business-to-business and business-to-consumer transaction[s] in discussions at both domestic and international levels.[15]

II. THE SHIFT IN UCITA TO MASS-MARKET TRANSACTIONS

Under UCITA, the customer in a "mass-market transaction"[16] is afforded what amount to consumer protections, even if the customer is a business. As noted, this represents a dramatic legal shift. By definition, all consumer transactions are mass-market transactions in UCITA,[17] but the definition of mass-market transaction is not limited to consumer transactions.

A mass-market transaction includes all transactions in the retail market that are directed to the general public as a whole, including consumers, under substantially the same terms for the same information.[18] For example, if the WordPerfection software license used in one office of an international accounting firm is the same form and information that is provided to Aunt Tilly,

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[15] U.S. GOVERNMENT WORKING GROUP ON ELECTRONIC COMMERCE, FIRST ANNUAL REPORT at 27 (Nov. 1998).

[16] UCITA section 102(a)(44) defines a mass-market transaction as follows:

> "Mass-market transaction" means a transaction that is:
>
> (A) a consumer contract; or
>
> (B) any other transaction with an end-user licensee if:
>
> (i) the transaction is for information or informational rights directed to the general public as a whole, including consumers, under substantially the same terms for the same information;
>
> (ii) the licensee acquires the information or informational rights in a retail transaction under terms and in a quantity consistent with an ordinary transaction in a retail market; and
>
> (iii) the transaction is not:
>
> (I) a contract for redistribution or for public performance or public display of a copyrighted work;
>
> (II) a transaction in which the information is customized or otherwise specially prepared by the licensor for the licensee, other than minor customization using a capability of the information intended for that purpose;
>
> (III) a site license; or
>
> (IV) an access contract.

U.C.I.T.A. § 102(a)(44) (1999).

[17] *See* U.C.I.T.A. § 102(a)(44)(A) (1999).

[18] *See* U.C.I.T.A. § 102(a)(43) and (44) (1999).

then that license is a mass-market license: it is a standard form, directed to the general public, including consumers, neither the software nor the license is modified for the accountant or Aunt Tilly, and the license fee is a small dollar amount typical of retail markets. If, instead, the license were an "enterprise" license allowing use in all branches of a business worldwide, or a site license for 5,000 employees at headquarters, the license would not be a mass-market license. Those terms, contract pricing and quantities contemplate the purely commercial, non-retail market, or contemplate a site license.[19]

The Drafting Committee for proposed revisions to UCC Article 2 rejected the mass-market concept. Why, then, did the UCITA Drafting Committee (the "Committee") adopt it? The answer lies in the *marketplace* distinction made by the concept as opposed to a desire to provide consumer protections to businesses. Just as Llewellyn innovated the party status concept (merchant/nonmerchant), Dean Nimmer innovated a market concept that the Committee believed was useful for a particular category of product, i.e. "store-bought" software; the Committee believed that the market concept would be a useful tool to address certain issues in that market that it did not view as dependent upon the status of the customer of the product. In part the Committee is correct.[20] Because of the consumer protections, however, the concept recreates

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[19] *See* U.C.I.T.A. § 102(a)(44)(B)(iii)(III) (1999) (mass-market transaction does not include a site license).

[20] The mass-market concept is used in two ways: (1) to treat the marketplace as a surrogate for consumer protection, thereby extending consumer protections to business (i.e., merchant-to-merchant) transactions; and/or (2) as a marketplace identifier, which allows the definition of various expectations about the nature of transactions in that market. *See Information Age in Contracts* (Preface to ALI Draft Article 2B Nov. 1, 1997) (available at <http://www.law.upenn.edu/bll/ulc/ucc2/2bnov97.htm>). An illustration of both concepts is supplied by UCITA section 304, which creates a right of withdrawal from a continuing mass-market transaction upon the licensor's alteration of a material term pursuant to a previously agreed procedure. *See* discussion in Part III-A4, *infra*.

An example outside the coverage of UCITA would be a bank deposit contract: such contracts continue for years on standard terms and conditions for most depositors. The bank needs to be able to change the continuing contract in order to meet rising costs or changing risks and laws, but the depositor needs to be able to determine if those changes render the contract unacceptable. Under the UCITA concept, the "depositor" may withdraw if a change in a material term is unacceptable. The consumer protection inherent in this rule is obvious.

The "market" category of transaction to which this rule applies is the mass-market, i.e. the bank's standard deposit contract—not a customized contract or a contract only offered to commercial depositors. The latter category (non-mass-market commercial category) represents a different market, a market that typically involves contracts allowing unilateral amendments of all terms, even pricing (e.g. for a commercial depositor a bank might agree to wholesale pricing for basic services, but contract for the right unilaterally to amend for increases in costs or deposit reserve requirements). Deposit contracts are not covered by UCITA. The purpose of the example is to illustrate that UCITA codifies the concept that some contracts have features that are characteristic of a particular market and, thus, certain default rules are appropriate for contracts within that market. While this is correct in theory, in practice, use of the mass-market concept necessarily tends to emphasize the consumer protection aspects of the concept because of the variance in consumer protections in business-to-business transactions and the risk exposure attendant

the same problems that were solved by the party-status rules created in original Article 2 and later-developed consumer protection laws.[21]

In short, the mass-market license concept eliminates the merchant/non-merchant, party-status distinction as to a particular class of transaction. The opponents of the concept fear the same things that Llewellyn feared: if the same rules apply to Aunt Tilly and a Fortune 500 company, courts may be tempted to manipulate, distort, or misconstrue the rules in order to provide protections to Aunt Tilly that are not necessary for, or traditionally applied to, the Fortune 500 company (because of the merchant/non-merchant distinction).[22] Critics also object

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upon such transactions that must be controlled by contract (*e.g.*, the greater potential in commercial transactions for consequential damages such as lost profits).

[21] *See* Hillinger, *supra* note 11, at 1184 (arguing that the proliferation of consumer legislation in the 1980s indicated "the perceived need to create different rules for different classes of people"). Professor Hillinger also notes that the original UCC was criticized for not containing more consumer protection rules. *See id*. at 1184 & n.271. Given the proliferation of state and federal consumer protection laws after the UCC's passage, the same issue is not present today. *See id*. at 1184 (noting a "proliferation" in federal consumer protection statutes). UCITA leaves all of those consumer protection statutes in place except for a few aspects of electronic commerce, such as writing requirements. *See* U.C.I.T.A. § 105(c)-(d) (1999) (stating that with the referenced exceptions, consumer protection statutes conflicting with UCITA prevail over UCITA). Theoretically, it would be advisable to aggregate all of the state and federal consumer statutes and insert their common denominator into both Articles 2 and UCITA, with resulting uniformity. This would make it unnecessary for one doing business in multiple states to ascertain and comply with the varying consumer laws of each state. As a political matter, however, that would not be possible: attorneys for consumers in both Articles 2 and UCITA routinely requested additional consumer protections in the UCC, but never suggested that the new or uniform protections ought to replace existing consumer protections statutes. Thus, UCITA section 105(c) preserves those varying consumer statutes. For a discussion of the treatment of consumers under the UCC or UCITA, *see* Mary Jo Howard Dively & Donald A. Cohn, *Treatment of Consumers Under Proposed U.C.C. Article 2B Licenses*, 16 J. MARSHALL J. COMPUTER & INFO. L. 315 (1997) (concluding that Article 2B has treated consumers fairly); Gail Hillebrand, *The Uniform Commercial Code Drafting Process: Will Articles 2, 2B and 9 be Fair to Consumers?*, 75 WASH. U. L.Q. 69, 73 (1997) (summarizing Article 2B and the Revised Articles 2 and 9 drafts and arguing that the drafters "have a special responsibility to weigh the fairness of uniform law drafts on consumers"); Fred H. Miller, *Consumers and the Code: The Search for the Proper Formula*, 75 WASH. U. L.Q. 187 (1997) (describing the tensions, problems, and incentives created through inclusion of consumer protections in a commercial code). For a debate regarding requests made by an attorney for Consumers Union, *see generally* Gail Hillebrand & Holly K. Towle, *A Debate on Proposed Article 2B's Effect on Consumers* (pt. 1), UCC BULL., Sept. 1997, at 1; and Gail Hillebrand & Holly K. Towle, *A Debate on Proposed Article 2B's Effect on Consumers* (pt. 2), UCC BULL., Oct. 1997, at 1.

[22] *See, e.g.*, Memorandum from the Business Software Alliance et al. to National Conference of Commissioners on Uniform State Laws (July 15, 1998) (visited April 13, 2000) <http://www.2bguide.com/docs/amemo981.html>. This memorandum states:

> The debate regarding the definition of "mass market transaction" illustrates new demands made by commercial licensees.

to the disparity in the concept: large businesses are afforded protections as licensees that may harm the smaller licensor,[23] even though one of the assumptions of the mass-market concept is

> The Article 2 drafting committee rejected even the concept of a mass market transaction. State and federal laws typically do not accord consumer protections to businesses. Usually, a firm line is drawn between consumer and business transactions. Article 2B eliminates that line for a category of transactions, mass market transactions. Mass market transactions also include *all* consumer transactions *without a dollar limit*, even though consumer statutes generally impose a dollar limit.
>
> Most of the arguments regarding mass market licenses concern only the extent to which that category will be applied to *business-to-business* transactions in software. The reality is that none should be covered or, at most, that the concept should apply only to small businesses (if Article 2 and the common law are changed so that all industries may compete on a level playing field). But the software industry made a tremendous concession when it indicated that it would be willing to live with this incursion into business-to-business contracting. It made another significant concession when it indicated that it would live with dropping the dollar limit for mass market transactions (remember, all *consumer* transactions are covered without limit). It did this because it conceded the Drafting Committee's argument that there was no need for a dollar limit *because the remainder of the definition of "mass market transaction" is detailed enough to confine application of the concept to its intended purpose*: retail and consumer product-like transactions, not wholesale or true business-to-business transactions.
>
> Now licensees are asking to eliminate those details. And who is asking? Not consumers–they don't need to, because they're already fully covered. Fortune 500 and Fortune 100 companies are asking: SIM, The Society of Information Management, and the Motion Picture Association . . . .

Id. (footnotes omitted) (emphasis added).

[23] In the information industry, the licensor or vendor is more often than not smaller than the licensee or buyer and, as with information law generally, it is dangerous to premise laws on inaccurate images, such as an image that all buyers are smaller than all sellers. *See generally* Raymond T. Nimmer, *Images and Contract Law- What Law Applies to Transactions in Information*, 36 HOUS. L. REV. 1 (1999) (arguing that just as it was inappropriate to premise a manufactured goods economy on laws written for an agrarian economy, and thus Article 2 was drafted to provide appropriate images for a goods economy, so is it inappropriate to premise an information and services economy on laws and images written for a goods economy, and thus UCITA was drafted to provide appropriate images for an information economy). With respect to the respective size of licensors and licensees,

> an image of routinely subservient purchasers (licensees or buyers) does not accurately reflect practice. The nature of the information marketplace accentuates the degree to which the inaccuracy exists. Most vendors of information who provide works to publishers are individual

that limited extension of protection to small businesses is desirable or at least not harmful. In critiquing comments submitted by Consumers Union, an advocate of extension of protections to small businesses, one commentator explained the problem as follows:

> Consumer representatives have not acknowledged the variety in size of the companies engaged in software development, nor the fact that there are many small and medium-sized software companies which contract with licensees many times their size. They have taken the position that [Article] 2B should afford special protection to small and medium businesses - but only in their capacity as licensees. They appear to be indifferent to the impact on small and medium-sized software companies of the new risks and liabilities that they are so anxious to impose. They do not remark on the fact, pointed out numerous times, that their approach also grants "consumer protection" to large, Fortune 500 companies.
>
> This tunnel vision is troublesome. Worse, the inability to focus on the larger question - whether there is any collective public benefit, or the competitive impact of the many changes in the draft law that CU is demanding, suggests that the narrow tunnel vision is near-sighted as well.
>
> Individual, as well as class action law suits do impact costs in the industry that are then borne by the next consumer. An industry that is rife with lawsuits by companies demanding their consumer protection rights will add to the cost of producing software, making it a less hospitable industry for the small entrepreneur. The question is whether these lawsuits will have an overall incremental positive impact on the public good - will they result in better software products or just result in some individuals getting a recovery with the rest of the public footing the eventual bill.
>
> A simple example of the latter situation would be where a small software company is bankrupted by its attempt to defend itself against a claim, relating to a single transmission, that the care it took to avoid viruses was not sufficiently "reasonable." The

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> authors dealing with relatively large corporate *purchasers*. Although there are large companies in the modern computer software industry, the average size of a computer software provider is fewer than twelve employees. These small companies routinely deal with large corporate clients (*purchasers).* For example, Walt Disney Corp. is seldom the . . . unsophisticated party, especially in the many contracts in which it acquires services from small software development companies.

Id. at 25 (citations omitted).

> plaintiff recovers, the company goes out of business and consequently, the software held by all of its other customers, which is no longer technically supported or upgraded, becomes worthless and must be replaced, at each customer's expense, with other software. Consumer representatives cannot see beyond that first lawsuit - they are indifferent to the broader impact on consumers as a whole.[24]

To avoid the real problems outlined by Llewellyn, it would have been preferable to abandon the mass-market concept.[25] Given its retention, courts should use it primarily to protect consumers. It should not be used to advantage business licensees or to create an uneven playing field between businesses. Business licensees under UCITA, when providing their own products or services under UCC Article 2, UCC Article 2A or the common law, are not subject to mass-market restrictions or exposure. The contradictions that will result from a failure to recognize this were described in an article chiding large commercial licensees for their efforts to broaden mass-market protections:

> . . . if I represent a business buyer, I don't have the benefit of those nifty consumer protection laws. Why should shrink-wraps be different? The 2B draft provides that if I don't agree with the terms, I can return the software for a full refund (plus costs, if it is costly to accomplish the return). And by the way, when your company [the large commercial licensee] issues purchase orders to your vendors with the microscopic print on the back requiring your vendor to stand on its head and whistle the theme to Sesame Street,

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[24] Carol A. Kunze, *Hot Button Issue: Consumer Issues* (last modified Sept. 28, 1998) <http://www.2bguide.com/hbici.html>.

[25] This was actually suggested by Dean Nimmer at the November 1998 Drafting Committee meeting in response to arguments made by large commercial licensees. *See* Letter from John Stevenson, SIM, to Carlyle C. Ring, Jr., Chairman, NCCUSL Article 2B Drafting Committee (letter dated Oct. 8, 1998) (visited April 13, 2000) <http://www.2bguide.com/docs/simltr1098.html>. The Society for Information Managers ("SIM") and other large corporate licensees argued for removing limitations on the definition of "mass market transaction;" they wanted to apply the concept to wholesale and other commercial licenses allegedly to avoid problems with tracking purchasing channels. *See generally id.* Dean Nimmer noted that a solution to their complaints would be to abandon the mass-market concept and return to the existing consumer/business dichotomy. Otherwise, their suggestions would destroy the marketplace concept, which is an integral element of the mass-market concept. However, the suggestion to abandon the concept and, thus, remove consumer protections from their businesses was not supported by SIM.

SIM's failure to accept the invitation to return to the traditional consumer/business dichotomy is at odds with the consumer protections contemplated by the Clinton Administration. In discussing Internet consumer protection issues, a recent report noted: "In seeking to protect consumers online, we will keep in mind the distinctions between business-to-business and business-to-consumer transactions in discussions at both domestic and international levels." WORKING GROUP ON ELECTRONIC COMMERCE, *supra* note 15, at 27.

> should those be invalid, too? And when your company sells goods, does it include similar warranty disclaimers? For those who think that software vendors have broken new ground by creating grossly unfair shrink-wrap agreements, I invite you to compare a Microsoft (or other big vendor) shrink-wrap to any contract for the sale of goods (say, for example, a DuPont contract).[26]

III. UCITA'S EXPRESS MASS-MARKET TRANSACTION AND CONSUMER PROTECTIONS

This section discusses the protections provided to mass-market transactions in UCITA. Because all consumer contracts are mass-market transactions, this section also discusses UCITA's consumer protections. Many provisions of UCITA that are not discussed also provide mass-market and consumer protections, such as provisions that create implied warranties, some of which do not exist in UCC Article 2,[27] create perpetual licenses,[28] and provisions prohibiting unconscionability or violations of fundamental public policy,[29] or restricting the exercise of

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[26] Wayne D. Bennett, *Legal and Blinding*, CIO WEB BUS. MAG. (Oct. 1998) (visited April 14, 2000) <http://www.cio.com/archive/webbusiness/100198/graycontent.html>.

[27] For UCITA's implied or statutory warranties, *see, e.g.*, U.C.I.T.A. § 401 (warranty against infringement and interference), § 402 (express warranty; unlike UCC Article 2, this section expressly includes advertising), § 403 (implied warranty of merchantability in computer program), § 404 (implied warranty regarding informational content; a parallel warranty does not exist in Article 2 because it was designed for goods, not information), and § 405 (implied warranty re: licensee's purpose and an implied warranty regarding system integration – the latter warranty has no counterpart in Article 2).

[28] Under the common law and Article 2, a contract that fails to state its duration may be terminated by either party. *See* U.C.C. § 2-309(2) (stating that a contract that provides for successive performances but that is for an indefinite duration, is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party). *See also* Article 5.8 of the UNIDROIT Principles of International Commercial Contracts (1994) <http://www.jus.uio.no/lm/unidroit.contract.principles.1994/Article2.18.html> ("A contract for an indefinite period may be ended by either party by giving notice a reasonable time in advance.").

UCITA Section 308 better meets the expectations of parties to licenses of computer information by providing that an agreement that fails to state a duration is enforceable for a time that is reasonable in light of the licensed subject matter and commercial circumstances, but may be terminated as to future performances at will by either party upon seasonable notice. U.C.I.T.A. § 308(1) (1999). UCITA also creates a default rule that makes some licenses perpetual: if the license is of a computer program (other than source code) in which a copy is delivered for a fixed price set up-front, then the duration of the license is perpetual. *Id*. at § 308(2)(A)(ii).

[29] *See, e.g.*, U.C.I.T.A. § 105 (regarding unconscionability and violations of fundamental public policy: courts are expressly authorized to refuse to enforce contract terms that violate either concept). The Official Comments provide guidance regarding the important policy issues relating to information, such as those involving freedom of speech, reverse engineering and copyright fair use, and the need to balance appropriately these and other polices.

electronic "self-help" by licensors.[30] Such provisions apply to all UCITA contracts, however, so are not discussed in this article.

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[30] The electronic "self-help" provision of UCITA, Section 816, has been criticized by licensees and licensors (*see* the end of this footnote for the actual text of Section 816). For example, the Society of Information Management, a group of information management officers, describes the self-help provisions as follows:

> For example, a partial list of some of the blatant provisions follows:
>
> 1. Seller's unilateral right to electronically disable software ("Self Help").
>
> - All medium and large businesses, and most small businesses, rely on computer software to perform critical daily tasks, such as running their manufacturing processes, paying suppliers and employees, calculating and remitting taxes, and controlling pollution. Because of their complexity, business software systems are often very expensive and cannot easily be replaced.
>
> - UCITA would allow software companies to exploit this vulnerability and threaten disruption of these critical systems if their demands are not met.
>
> - UCITA assumes the customer is guilty until proven innocent. The customer must run to court to try to stop this Draconian "remedy."
>
> - There is a huge potential here for misuse and harm to businesses and the communities in which they operate.

See <http://www.simnet.org/public/programs/issues/UCITA040399.doc>. The SIM description of UCITA's self-help provision was addressed in a letter dated June 3, 1999, from Terrance Maher, an attorney who counsels both licensors and licensees with respect to software and information licensing transactions. Maher noted the inaccuracies in the SIM letter and requested that SIM post his letter to better provide SIM's members more balanced information about UCITA. SIM declined his request. A copy of Mr. Maher's letter can be found at <http://www.2bguide.com/docs/6399tm.html> (visited April 14, 2000). With respect to self-help, Mr. Maher responded as follows:

> For example, the SIM materials cite six "blatant provisions" that are "obvious points of prejudice against the buyer." Each of these complaints rests on a misunderstanding either of the present state of the law or of the provision's intent.
>
> 1. "*UCITA,*" says SIM, " *creates a unilateral right to disable software*." One can hardly read Section 816 and characterize the UCITA right of self-help as "unilateral." SIM should alert its members to the fact that under existing common law, parties are free to contract for a right of self-help, and that under existing and revised UCC Articles 2, 2A and 9, vendors not only have a self-help right, but one that is not encumbered by all of the significant restrictions imposed by UCITA. SIM was instrumental in obtaining most of the UCITA restrictions and licensees should be proud of its efforts. It seems a pity to mar them by now mischaracterizing Section 816 vis a vis existing law and its actual text.

Letter from Terrence P. Maher to SIM Members (letter dated June 3, 1999) (visited April 14, 2000) <http://www.2bguide.com/docs/6399tm.html>.

The purpose of this discussion, however, is to discuss Section 816 as it relates to mass-market or consumer transactions. For several reasons, it precludes, as a practical matter, use of self-help in the mass market. First, Section 816(c)(2) requires the licensee to designate the person to receive notice in the event of any exercise of self-help. In the mass-market, it will be impossible or very difficult for licensors to obtain any such designation (e.g. the clerk at the local computer store is not likely to hand out or complete and return to the licensor complying designations). Second, the licensee must separately manifest assent to the self-help *term* for it to be effective. Again, this requirement will be very difficult to meet in the mass-market and the benefits of obtaining consent (the right to use a restricted self-help right) likely will not outweigh the detriment of designing structures to obtain consent to the self-help *term* as opposed to obtaining general consent to the license. Third, and most importantly, the UCITA right of self-help only applies when the license can be cancelled, i.e. when there is a material breach. The most common kind of material breach is a failure to pay, but most mass-market software is fully paid at or before delivery, so the kind of breach that will most often encourage use of the self-help remedy will simply not be relevant in the mass-market.

If consumers were to begin to obtain secured financing for mass-market licenses (which is doubtful given the low prices typical of the retail market), they will be exposed to an exercise of self-help, *but not under UCITA*. Secured parties may lawfully exercise self-help without a contractual consent by the consumer and without the restrictions imposed by UCITA § 816. Secured parties, lessors and other persons with security interests (such as UCC Article 2 sellers of goods who retain title to goods such as a computer) *will be governed by laws other than UCITA, and the UCITA restrictions will not apply*. Thus, while it is true that largely unrestricted self-help rights can be exercised against consumers or mass-market licensees, this is *not* because of UCITA. Any exercise of self-help under UCITA will be restricted by Section 816; largely unrestricted exercise will occur under UCC Article 9, UCC Article 2A and UCC Article 2. While that may or may not be objectionable, depending upon one's position, it is not a result that is caused by or that relates to UCITA. The point here, that self-help may be rather freely exercised under other laws, is largely missed or mischaracterized. *See, e.g.*, Julie E. Cohen, *Copyright And the Jurisprudence Of Self-Help*, 13 BERKELY TECH. L.J. 1089 (1998). Professor Cohen's misstatements of existing law are addressed in Holly K. Towle, *NO GOOD DEED GOES UNPUNISHED, Comment on "Whither Warranty: The Bloom of Products Liability Theory In Cases of Deficient Software Design*, at footnote 50 (visited April 14, 2000) <http://www.2bguide.com/docs/berkht.html>.

UCITA Section 816 reads as follows:

> SECTION 816. LIMITATIONS ON ELECTRONIC SELF-HELP.
>
> (a) In this section, "electronic self-help" means the use of electronic means to exercise a licensor's rights under Section 815(b).
>
> (b) On cancellation of a license, electronic self-help is not permitted, except as provided in this section.
>
> (c) A licensee shall separately manifest assent to a term authorizing use of electronic self-help. The term must:
>
> (1) provide for notice of exercise as provided in subsection (d);
>
> (2) state the name of the person designated by the licensee to which notice of exercise must be given and the manner in which notice

must be given and place to which notice must be sent to that person; and

(3) provide a simple procedure for the licensee to change the designated person or place.

(d) Before resorting to electronic self-help authorized by a term of the license, the licensor shall give notice in a record to the person designated by the licensee stating:

(1) that the licensor intends to resort to electronic self-help as a remedy on or after 15 days following receipt by the licensee of the notice;

(2) the nature of the claimed breach that entitles the licensor to resort to self-help; and

(3) the name, title, and address, including direct telephone number, facsimile number, or e-mail address, to which the licensee may communicate concerning the claimed breach.

(e) A licensee may recover direct and incidental damages caused by wrongful use of electronic self-help. The licensee may also recover consequential damages for wrongful use of electronic self-help, whether or not those damages are excluded by the terms of the license, if:

(1) within the period specified in subsection (d)(1), the licensee gives notice to the licensor's designated person describing in good faith the general nature and magnitude of damages;

(2) the licensor has reason to know the damages of the type described in subsection (f) may result from the wrongful use of electronic self-help; or

(3) the licensor does not provide the notice required in subsection (d).

(f) Even if the licensor complies with subsections (c) and (d), electronic self-help may not be used if the licensor has reason to know that its use will result in substantial injury or harm to the public health or safety or grave harm to the public interest substantially affecting third persons not involved in the dispute.

(g) A court of competent jurisdiction of this State shall give prompt consideration to a petition for injunctive relief and may enjoin, temporarily or permanently, the licensor from exercising electronic self-help even if authorized by a license term or enjoin the licensee from misappropriation or misuse of computer information, as may be appropriate, upon consideration of the following:

(1) grave harm of the kinds stated in subsection (f), or the threat thereof, whether or not the licensor has reason to know of those circumstances;

(2) irreparable harm or threat of irreparable harm to the licensee or licensor;

(3) that the party seeking the relief is more likely than not to succeed under its claim when it is finally adjudicated;

(4) that all of the conditions to entitle a person to the relief under the laws of this State have been fulfilled; and

(5) that the party that may be adversely affected is adequately protected against loss, including a loss because of misappropriation or misuse of computer information, that it may suffer because the relief is granted under this [Act].

(h) Before breach of contract, rights or obligations under this section may not be waived or varied by an agreement, but the parties, in the term referred to in subsection (c), may specify additional provisions more favorable to the licensee.

(i) This section does not apply if the licensor obtains possession of a copy without a breach of the peace and the electronic self-help is used solely with respect to that copy.

U.C.I.T.A. § 816. In contrast, the existing uniform version of UCC § 9-503 reads as follows:

> Unless otherwise agreed *a secured party has on default the right to take possession of the collateral*. In taking possession *a secured party may proceed without judicial process if this can be done without breach of the peace* or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. *Without removal a secured party may render equipment unusable,* and may dispose of collateral on the debtor's premises under Section 9-504.

U.C.C. § 9-503 (emphasis added). The amendments to Article 9-609 appear largely to make stylistic changes, although they do broaden the right to act without judicial process by applying that right *both* to taking possession of collateral and to rendering equipment unusable. *See* Official Comment No. 3 to Revised Article 9-609. Under Article 9, computers used in business or by a non-profit organization or government (as opposed to computers held for sale or lease) are "equipment." *See* U.C.C. Article 9-109(2), revised Article 9-102(33), and Official Comment No. 4(a). Thus, under Article 9, a secured party should be entitled, without removal and without an express contract therefor, to render equipment unusable. The easiest way to render computers unusable is for the secured party to require the use of software that turns the equipment off after breach, and, thus, the secured party, not the software licensor, will impose that requirement and utilize self-help.

UCC § 2A-525 provides similar or broader rights to a lessor of goods:

> *After a default by the lessee under the lease contract of the type described in Section 2A-523(1) or (3)(a) or, if agreed, after other default by the lessee,* the lessor has the right to take possession of the goods. If the lease contract so provides, the lessor may require the lessee to assemble the goods and make them available to the lessor at a place to be

A. Mass-Market Transaction Rules

An overview of the special provisions of UCITA for mass-market transactions is provided in this Part A. Part B provides an overview of the special provisions of UCITA for consumer transactions.

1. Section 104: Mixed Transactions and Agreements to Opt-In Or Out of UCITA

UCITA Section 104 allows parties to opt in or out of all or part of UCITA in particular circumstances. The section is critical because of UCITA's narrow scope. For example, if a movie studio and a software developer desired to contract for the development of a digital movie, the movie studio would need to opt into UCITA or the software developer would need to opt out, if the parties desired to have one primary body of contract law govern their transaction. This is because contracts for the creation of movies are excluded from UCITA.[31] In one sense, Section 104 is not needed because under existing law parties generally are free to choose applicable law when there is no prohibition on such a choice. For example, if the parties to a common law contract for services decided to incorporate by reference all or part of UCC Article 2, generally there is no prohibition in the common law or in Article 2 against doing that.

UCITA does impose some restrictions on this freedom to opt in or out which are consistent with its purposes. UCITA was written because laws written for goods do not work well for information.[32] The converse is also true: laws written for information will not necessarily work well for non-information. Thus, if parties to a residential sales contract determined to contract for coverage by UCITA, the UCITA rules would make an awkward fit. Accordingly, one of the tests for opting into UCITA is that a material part of the subject matter of the agreement be computer information within UCITA's scope.[33] UCITA also imposes restrictions that preserve some of the essential protections in UCITA or in the other relevant body of law. Section 104 contains three rules that are illustrative.

The first such rule concerns print books. The first sentence of Section 104(1)[34] governs agreements to opt into UCITA and states the logical rule that parties cannot make such an

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> designated by the lessor which is reasonably convenient to both parties. *Without removal, the lessor may render unusable any goods employed in trade or business*, and may dispose of goods on the lessee's premises (Section 2A-527).
>
> (3) *The lessor may proceed under subsection (2) without judicial process if it can be done without breach of the peace* or the lessor may proceed by action.

U.C.C. § 2A-525 (emphasis added).

[31] *See* U.C.I.T.A. § 103(d)(2)(B) (1999) (excluding a contract to create a motion picture).

[32] *See* Nimmer, *supra* note 23, at 1-2.

[33] *See* U.C.I.T.A. § 104 (1991) (first paragraph).

[34] That sentence reads as follows: "(1) An agreement that this [Act] governs a transaction does not alter the applicability of any rule or procedure that may not be varied by agreement of the parties or

agreement if the law does not so allow, i.e., if applicable law cannot be varied and opting-in would vary it, then the unalterable law controls. The second sentence states: "In addition, in a mass-market transaction, the agreement does not alter the applicability of a law applicable to a copy of information in printed form." This sentence is a reminder that if a law such as the first sale doctrine under the Copyright Act[35] has a preemptive effect, preemption cannot be avoided by the opt-in or opt-out agreement. The law applicable to distribution of print information might be the same as or different than UCITA – this sentence does not attempt to define what the applicable law is, but simply leaves whatever it is undisturbed. This was felt to be particularly important in the retail market because that market often involves distribution of published informational content[36] in book form, and the UCITA Drafting Committee did not wish to disturb that distribution. One could argue that given the scope of UCITA (which only applies to computer information, not printed information) and Section 105(a) of UCITA (which acknowledges that federal law can preempt),[37] the second sentence is superfluous. However, it serves the laudable purpose of clearly reminding practitioners to comply with applicable laws, if any.[38]

The second rule regarding restrictions to opt in or out of UCITA allows fundamental principles to continue. Under Section 104(2)(B), an opt-out agreement in a mass-market

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that may be varied only in a manner specified by the rule or procedure, including a consumer protection statute [or administrative rule]." U.C.I.T.A. § 104(1) (1999).

35 *See* 17 U.S.C. § 117 (1994) (explaining that under the first sale doctrine, the owner of a copy of a copyrighted work may redistribute that copy).

36 UCITA coins a term to capture common law concepts applicable to the kind of information that is the stuff of most public discourse: "published informational content." In UCITA, the term means:

> informational content prepared for or made available to recipients generally, or to a class of recipients, in substantially the same form. The term does not include informational content that is: (A) customized for a particular recipient by one or more individuals acting as or on behalf of the licensor, using judgment or expertise; or (B) provided in a special relationship of reliance between the provider and the recipient.

U.C.I.T.A. § 102(a)(51) (1999).

37 Section 105(a) reminds practitioners and contracting parties that a contract provision that is preempted by federal law will be unenforceable to the extent of the preemption. U.C.I.T.A. § 105(a) (1999).

38 *See, e.g.*, Pamela Samuelson, *Legally Speaking: Does Information Really Want To Be Licensed?*, COMMUNICATIONS OF THE ACM (September 1998) (available at <http://www.sims.berkeley.edu/~pam/papers/acm_2B.html>) (arguing that Article 2B was intended to provide print publishers the ability to shrinkwrap books). By excluding print books, UCITA makes very clear that such is not the case. However, UCITA does not affect laws applicable to print books and Professor Samuelson's assumption that publishers cannot legally license print books under existing law, even if they chose to change their typical marketing practices, has not been demonstrated.

transaction does not alter the UCITA doctrines regarding unconscionability (Section 111), fundamental public policy (Section 105(b)) and good faith (Section 114(b)).

This provides more protections for mass-market licensees than is obvious. For example, the common law of certain states does not imply a duty of good faith in every contract[39] and under existing Article 1-201(19) of the UCC "good faith" means only honesty in fact. Thus, as long as a person acts honestly, he may nevertheless act arbitrarily.[40] Under the UCITA definition (and the definition in revised UCC Article 9, and proposed revisions to UCC Article 1), good faith means honesty in fact *and* the observance of reasonable commercial standards of fair dealing. This broader definition, which carries with it more protection for both parties, is automatically included in an opt-out agreement and thus continues after the opt-out.

The doctrine of unconscionability was created in UCC Article 2 and was not part of the common law.[41] While it may now be part of the common law in many states, UCITA's rule (to

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[39] S*ee, e.g.,* Creative Dimensions in Management v. Thomas Group, Inc., 1999 WL 225887, at 3 (E.D. Pa. 1999).

[40] *See, e.g.*, Zapatha v. Dairy Mart, Inc., 408 N.E.2d 1370 (Mass. 1980).

[41] Karl Llewellyn argued for a safety valve that would allow courts to deal with egregious contracts directly:

> Llewellyn did not like the judicial torture, manipulation and misconstruction of contractual language or intent to which courts resorted to achieve their desired result. He referred to these exercises in judicial gymnastics as "covert tools" of intentional and creative misconstruction, which were unacceptable to businessmen for three different reasons. First, businessmen, relying on what a court had said, would "recur to the attack" by attempting to draft contract language that better expressed their contractual intent: "We have all of us seen this kind of series of cases . . . . The clause is perfectly clear and the court said, "Had it been desired to provide such an unbelievable thing, surely language could have been made clearer." Then counsel redrafts, and they not only say it twice as well, but they wind up saying, "And we mean it," and the court . . . says, 'Had this been the kind of thing really intended to go into an agreement, surely language could have been found'" . . . . Judicial reliance on covert tools led businessmen down the primrose path: the problem was not one of better drafting, but of objectionable commercial intent.
>
> Second, judicial subterfuge failed to tell businessmen what was and was not permissible. Third, judicial use of covert tools would "seriously embarrass later efforts at true construction." In short, covert tools were unacceptable legal tools for business transactions . . . . "It means you never know where you are, and it does a very bad thing to the law indeed. The bad thing . . . is to lead to precedent after precedent in which language is held not to mean what it says and indeed what its plain purpose was and that upsets everything for everybody in all future litigation."

continue to apply the doctrine of unconscionability notwithstanding an opt-out agreement) makes clear that the doctrine applies even if the parties avoid UCITA's rules. UCITA also causes migration of its rule on fundamental public policy. That rule, that courts may refuse to enforce a contract term if it violates a fundamental public policy, is unique in uniform codes. It states the common law principle of certain states,[42] but that principle is not found in contract codes such as UCC Article 2. The UCITA comments also assist courts in adapting the fundamental public policy concept to policies applicable to information:

> The public policies most likely to be applicable to transaction within this Act are those relating to innovation, competition, and fair comment. Innovation policy recognizes the need for a balance between protecting property interests in information in order to create incentives for creation and the importance of a rich public domain upon which most innovation ultimately depends. Competition policy prevents unreasonable restraints on publicly available information in order to protect competition. Rights of free expression may include the right of persons to comment, whether positively or negatively, on the character or quality of information in the marketplace.[43]

No bright lines can be drawn in this area because of the competing and changing public policies and overarching federal questions, but UCITA is unique in recognizing the importance and need for consideration of these and other fundamental public policy issues in appropriate circumstances.

The third rule to be discussed here regards clauses opting in or out. In a mass-market transaction, any term that changes the extent to which UCITA governs the transaction must be

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> Article 2 gave a devastatingly simple solution to the covert tool problem and its attendant unsettling effect on the planning and transacting of business. Section 2-302, the unconscionability provision, gave courts an overt tool that would eliminate any need for covert activity. . . . the accumulation of opinions over time would provide businessmen with explicit guidelines as to what was and was not beyond the pale. The unconscionability provision, amorphous as it was, would give concrete direction to businessmen in the future drafting of their contracts.

Hillinger, *supra* note 11, at 1169-70 (footnotes omitted).

[42] For a description of the possible rules in common law courts, *see* RESTATEMENT (SECOND) OF CONTRACTS § 178 *et. seq*.

[43] UCITA § 105 cmt. 3 (Draft Comments dated October 15, 1999) (available at <http://www.law.upenn.edu/bll/ulc/ulc_frame.htm>). *See also* Lorin Brennan, *The Public Policy of Information Licensing*, 36 HOUS. L. R. 61 (1999) (discussing the myriad public policies applicable to information contracts and the need for a flexible balancing test to keep pace with changing policies and contracting paradigms); Cyber Promotions, Inc. v. America Online, Inc., 948 F. Supp. 436 (E.D. Pa. 1996) (finding that a private online company (AOL) was not prohibited by the First Amendment from limiting unsolicited e-mails sent by plaintiff company to AOL customers).

conspicuous.[44] Thus, if parties to a mass-market transaction are opting-in or out of UCITA (in whole or in part), the "opting" term must be conspicuous. This rule avoids surprise in either direction.

2. Section 113: Variation by Agreement

It is traditional in the UCC that its default rules may be varied by agreement unless alteration is prohibited.[45] This is also the case for intellectual property laws such as the Copyright Act.[46] UCITA follows this tradition by allowing parties to vary its terms by agreement unless UCITA provides otherwise. Section 113 contains the list of sections that cannot be altered (except to the extent a section expressly allows alteration), many of which pertain in full or part to mass-market license provisions. Many of the other unalterable rules indirectly pertain to mass-market licenses because they apply to all licenses generally.

Section 113 serves the public policy purpose of imposing on parties certain rules that legislatures view as so important that parties are not allowed to vary them by contract. While this is not a new concept, Section 113 laudably lists the nonvariable sections in one place that practitioners and other users of the statute can readily find. While this may be viewed by some as a mundane benefit, others will view it as a life-saver, particularly given that UCITA will be used by practitioners and businesses from diverse and converging industries.

3. Section 209: Mass Market Licenses

UCITA Section 209 acknowledges that in modern commerce, parties frequently do not form contracts at one point in time but form them as part of a "rolling" contract process:

> [I]n its examination of the formation of the contract, [the cited decision] takes note of the realities of conducting business in today's world. Transactions involving "cash now, terms later" have become commonplace, enabling the consumer to make purchases of sophisticated merchandise such as computers over the phone or by mail – and even by computer. Indeed, the concept of '[p]ayment preceding the revelation of full terms" is particularly common in certain industries, such as air transportation and insurance.[47]

For mass-market licenses, this concept is reflected in Section 209(b). Section 209 provides as follows:

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[44] *See* U.C.I.T.A. § 104(3).

[45] *See* U.C.C. § 1-102(3) ("The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.").

[46] *See infra* note 77 and surrounding text.

[47] Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 572 (App. Div. 1998).

> (a) A party adopts the terms of a mass-market license for purposes of Section 208 only if the party agrees to the license, such as by manifesting assent, before or during the party's initial performance or use of or access to the information. 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.
>
> (b) If a mass-market license or a copy of the license is not available in a manner permitting an opportunity to review by the licensee before the licensee becomes obligated to pay and the licensee does not agree, such as by manifesting assent, to the license after having an opportunity to review, the licensee is entitled to a return under Section 112 and, in addition, to:
>
> > (1) reimbursement of any reasonable expenses incurred in complying with the licensor's instructions for returning or destroying the computer information or, in the absence of instructions, expenses incurred for return postage or similar reasonable expense in returning the computer information; and
> >
> > (2) compensation for any reasonable and foreseeable costs of restoring the licensee's information processing system to reverse changes in the system caused by the installation, if:
> >
> > > (A) the installation occurs because information must be installed to enable review of the license; and
> > >
> > > (B) the installation alters the system or information in it but does not restore the system or information after removal of the installed information because the licensee rejected the license.
>
> (c) In a mass-market transaction, if the licensor does not have an opportunity to review a record containing proposed terms from the licensee before the licensor delivers or becomes obligated to deliver the information, and if the licensor does not agree, such as by manifesting assent, to those terms after having that opportunity, the licensor is entitled to a return.

Criticism of Section 209 tends to stem from (a) misunderstandings regarding how the section works, (b) misunderstandings about existing law, or (c) simple differences in views about the role of contract law in our society.

a. How Section 209 Works

A statement made by various state attorneys general illustrates the kind of misunderstanding that is common regarding Section 209:

> The contract formation provisions of UCITA permit practices that are contrary to purchaser expectations. Sections 112 and 211 [renumbered as Section 209] permit a party offering a mass-market license to withhold almost any contract terms it wishes until after a sale has occurred and provides that such terms become part of the contract if the purchaser reviews and accepts the terms after the sale. *Purchasers do not expect to be confronted with surprise terms after a purchase has been made. At a minimum, UCITA should require that prior to the formation of any enforceable contract from which terms have been withheld, notice should be given to the purchaser that additional terms will be provided in the future,* and the substance of any such terms that may be material to the purchasing decision should be disclosed. For example, a term limiting the number of copies that a purchaser can make of a software product would be a material term that should be disclosed prior to the purchase.[48]

The italicized portion of the quotation is the heart of the concern expressed by the attorneys general, yet it is already addressed by UCITA. Section 209 does not operate alone. The first sentence states that a party adopts the terms of a mass-market license "for purposes of Section 208" only if certain requirements are met. Section 208 reiterates the traditional rule that a party is bound by its agreements, but also provides as follows:

> The terms of a record may be adopted pursuant to paragraph (1) after beginning performance or use *if the parties had reason to know that their agreement would be represented in whole or part by a later record to be agreed on and there would not be an opportunity to review the record or a copy of it before performance or use begins.* If the parties fail to agree to the later terms and did not intend to form a contract unless they so agreed, Section 202(e) applies.[49]

It is the "reason to know"[50] requirement that addresses the primary concern of the attorneys general. They are correct in stating that a person ought not to be completely surprised that contract terms will not be delivered all at once: if I buy a stereo and think the transaction is done by the time I install the speakers in my ceiling, I do not want to discover 6 months later that the vendor has mailed me additional contract terms. On the other hand, if when I buy the stereo I

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[48] Letter from various State Attorneys General to Gene Lebrun, President, NCCUSL (letter dated July 23, 1999) (visited April 13, 2000) <http://www.2bguide.com/docs/799ags.html> (emphasis added).

[49] U.C.I.T.A. § 208(2) (emphasis added).

[50] UCITA explains "reason to know" by stating that "[a] person has reason to know a fact if the person has knowledge of the fact or, from all the facts and circumstances known to the person without investigation, the person should be aware that the fact exists." U.C.I.T.A. § 114 (f).

have reason to know that contract terms will follow, either because that is common in transactions for stereos or because I was told, the box said so or I was otherwise on notice, then I should not be surprised. The question then turns to what I can do if I don't like the terms once I see them.

UCITA contains the following safeguards:

- *Safeguard regarding timing:* Section 209 (a) sets a boundary on the time during which the terms can be sent: I must have an opportunity to review them before or during my initial performance or use of or access to the "stereo" (computer information) – the terms cannot be sent months later.

- *Safeguard regarding assent to the additional terms:* Section 209 (b) provides that the terms are effective only if I agree to them and had an opportunity to review them before agreeing. My initial purchase of the stereo does not count as agreement because I could not see the terms at that time – *after* I have had a chance to review the terms, I must agree to them by manifesting assent or otherwise. If the agreement is by a manifestation of assent, that is a defined term that contains its own protections which generally codify concepts that avoid procedural unconscionability.[51]

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[51] UCITA § 112 defines "manifesting assent" and opportunity to review; these concepts derive from the RESTATEMENT (SECOND) OF CONTRACTS § 19 (1979). UCITA states in pertinent part:

> (a) A person manifests assent to a record or term if the person, acting with knowledge of, or after having an opportunity to review the record or term or a copy of it:
>
> (1) authenticates the record or term with intent to adopt or accept it; or
>
> (2) intentionally engages in conduct or makes statements with reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term.
>
> (b) An electronic agent manifests assent to a record or term if, after having an opportunity to review it, the electronic agent:
>
> (1) authenticates the record or term; or
>
> (2) engages in operations that in the circumstances indicate acceptance of the record or term.
>
> (c) If this [Act] or other law requires assent to a specific term, a manifestation of assent must relate specifically to the term.
>
> (d) Conduct or operations manifesting assent may be proved in any manner, including a showing that a person or an electronic agent obtained or used the information or informational rights and that a procedure existed by which a person or an electronic agent must have engaged in the conduct or operations in order to do so. Proof of compliance with subsection (a)(2) is sufficient if there is conduct that assents and subsequent conduct that reaffirms assent by electronic means.

- *Safeguard regarding return right:* If I do not agree to the terms delivered post-payment, I am entitled to a uniform, statutory right of return under UCITA Section 209(b). Some argue that this right of return is not meaningful because the customer is already committed to the product.[52] It is true that it can be annoying to return a product, e.g., to find that a mail-

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> (e) With respect to an opportunity to review, the following rules apply:
>
> (1) A person has an opportunity to review a record or term only if it is made available in a manner that ought to call it to the attention of a reasonable person and permit review.
>
> (2) An electronic agent has an opportunity to review a record or term only if it is made available in manner that would enable a reasonably configured electronic agent to react to the record or term.
>
> (3) If a record or term is available for review only after a person becomes obligated to pay or begins its performance, the person has an opportunity to review only if it has a right to a return if it rejects the record. However, a right to a return is not required if:
>
> (A) the record proposes a modification of contract or provides particulars of performance under Section 305; or
>
> (B) the primary performance is other than delivery or acceptance of a copy, the agreement is not a mass-market transaction, and the parties at the time of contracting had reason to know that a record or term would be presented after performance, use, or access to the information began.
>
> (4) The right to a return under paragraph (3) may arise by law or by agreement.
>
> (f) The effect of provisions of this section may be modified by an agreement setting out standards applicable to future transactions between the parties.

U.C.I.T.A. § 112. *See also infra* note 90 and accompanying text for a discussion of the *Restatement's* impact on UCITA's rules regarding manifestation of assent.

[52] *See, e.g.*, Cem Kaner, *Restricting Competition in the Software Industry: Impact of the Pending Revisions to the Uniform Commercial Code*, (visited April 13, 2000) <http://www.badsoftware.com/nader.html> ("Once the customer has taken the product home or to the office, and started loading it on her computer, she is no longer in a shopping frame of mind. She's much less likely to reject harsh legal terms in a license after she's committed herself to the product, and returning it would be an often-significant inconvenience"). One commentator responded to this statement as follows:

> The right of return is a right which customers do not now have, either for software or other items ordered from catalogs, although many catalogs accept returns for marketing reasons. Thus, proposed Article 2B would give customers a right which they do not now have. Mr. Kaner, however, does not find the proposed arrangement satisfactory because if

order product is not as one had thought; that annoyance, however, must be balanced with the benefits and lower costs that come with distribution chains, such as those for mail or telephone orders or distribution of complex products, in which viewing the product or all contract terms is not always possible or even desirable. Such distribution channels are common for all industries, not just the computer information industries, and are beneficial:

> [Customer's] position therefore must be that the printed terms on the outside of a box are the parties contract – except for printed terms that refer to or incorporate other terms. But why would Wisconsin fetter the parties' choice in this way? Vendors can put the entire terms of a contract on the outside of a box only by using microscopic type, removing other information that buyers might find more useful (such as what the software does, and on which computers it works), or both. . . . . Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable (a right that the license expressly extends), may be a means of doing business valuable to buyers and sellers alike. . . .
>
> Transactions in which the exchange of money precedes the communication of detailed terms are common. Consider the purchase of insurance. The buyer goes to an agent, who explains

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> the customer must go to the trouble of returning software, he may not seek an alternative because the customer is no longer "in a shopping frame of mind."
>
> Destroying or significantly reducing the channels of trade for thousands of software applications in order to permit preshipment review because that is when the customer is "in a shopping frame of mind" seems, as a matter of public policy, a poor choice. Society does not impose such requirements on other items. If one brings home a shirt which turns out to be the wrong color, one may or may not have a right to return it, and in the absence of a defect, will have to bear the time and expense of a permitted return. It is not at all clear why software should be burdened with obligations not imposed on other items. As a matter of public policy, we do not insist that suppliers accept returns, or that they pay the cost of customer returns. Nevertheless, Article 2B as presently drafted, imposes that burden on software licensors if license terms are not available prior to payment and delivery of the licensed software. If there were any public policy concerns regarding inability to review license terms prior to shipment and payment, such concerns should be laid to rest by 2B-208, which requires a licensor who does not make license terms available prior to shipment and collecting payment, to place the licensee in as good a position as if he had reviewed such terms prior to ordering the software and found the terms unacceptable.

Micalyn S. Harris, *Is Article 2B Really Anti-Competitive*? 3 CYBERSPACE LAWYER No. 8, Nov. 1998 (available at <http://www.winpro.com/articles/anti-competitive.htm>) (footnotes omitted).

> the essentials (amount of coverage, number of years) and remits the premium to the home office, which sends back a policy. On the district judge's understanding, the terms of the policy are irrelevant because the insured paid before receiving them. Yet the device of payment, often with a "binder" (so that the insurance takes effect immediately even though the home office reserves the right to withdraw coverage later), in advance of the policy, serves buyers' interests by accelerating effectiveness and reducing transactions costs. Or consider the purchase of an airline ticket. The traveler calls the carrier or an agent, is quoted a price, reserves a seat, pays, and gets a ticket, in that order. The ticket contains elaborate terms, which the traveler can reject by canceling the reservation. To use the ticket is to accept the terms, even terms that in retrospect are disadvantageous. [citations omitted] Just so with to a ticket to a concert. The back of the ticket states that the patron promises not to record the concert; to attend is to agree. A theater that detects a violation will confiscate the tape . . . . One could arrange things so that every concertgoer signs this promise before forking over the money, but that cumbersome way of doing things not only would lengthen queues and raise prices but also would scotch the sale of tickets by phone or electronic data service.[53]

A proposal to scotch or at least encumber just such channels was made in connection with the drafting process to amend UCC Article 2. Academic commentators noted some of the problems associated with that proposal:

> Though the idea of consumers paying for goods before they examine all the terms of the agreement has spooked some academics, their concerns seem to have resulted from a quaint commitment to the offer-acceptance model of contractual assent that was supplemented to great fanfare by the current U.C.C. Section 2-204, rather than any real impairment of contractual consent.
>
> This is a solution in search of a problem. I speak here not only as a contracts professor who has written extensively on the importance of contractual consent, but as a frequent consumer of such goods as electronics and software. It is not a bother in the slightest to pay for a good in a store, or on-line, and then examine the terms in the comfort of my own home provided that I can return the good should I reject the terms. To the contrary, I cannot imagine anything other than an aesthetic objection to this practice.

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[53] ProCD v. Zeidenberg, 86 F.3d 1447, 1450-51 (7th Cir. 1996).

> True, consumers who dislike a term in the agreement are put to some inconvenience when they must return a good, as they would in returning any good with which they are not completely satisfied upon inspection, though even they benefit from the lower prices and more specifically tailored terms that result from the practice. But this minor inconvenience in no way warrants a frontal attack on this form of contracting on the grounds of lack of assent. There is certainly assent, though it happens after initial payment. There need not be law against that.[54]

In a similar vein, another commentator criticized the Article 2 proposal as follows:

> [The Article 2 proposal] seems aimed at the established retail practice of sending the full legal terms of a purchased product with the shipped product, after payment has already been made. This practice is of great value to both sellers and buyers. . .
>
> [The Article 2 proposal] creates a costly and unworkable system of contract administration. These costs will be passed on to consumers in the form of higher product costs. This approach seems based on the assumption, without any justification, that retention of a product is not an adequate form of assent. In fact, retention is the best and most efficient indication of assent.[55]

UCITA acknowledges the benefits of flexible distribution channels but also imposes uniform protections for terms of mass-market licenses that are not seen until after payment:

> *(i) Protections regarding Unconscionable Terms or Terms that Violate a Fundamental Public Policy*

Section 209(a)(1) provides that a term is not part of a mass-market license if it is unconscionable[56] or if the term violates a fundamental public policy.[57] Some criticism of UCITA comes from the fact that although it retains the traditional doctrine of unconscionability, and also adds a uniform requirement regarding fundamental public policy,[58] it does not go farther and add a new provision requested by representatives of some consumers and the

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[54] *See* Letter from Professor Randy E. Barnett, Austin B. Fletcher Professor, Boston University School of Law, to Lawrence J. Bugge, Chairman, Article 2 Drafting Committee (March 9, 1999) at 2 (on file with the author) (objecting to a proposal by the committee revising UCC Article 2 to add restrictions akin to those advocated by Cem Kaner (*see supra* note 52) and the attorneys general (*supra* note 48).

[55] *See* Letter from Professor Hal S. Scott, Nomura Professor of International Financial Systems, Harvard Law School, to Lawrence J. Bugge, Chairman, Article 2 Drafting Committee (March 10, 1999) (on file with the author) (citations omitted) (commenting on the same proposal referenced *supra* note 52).

[56] *See* U.C.I.T.A. § 105(a).

[57] *See* U.C.I.T.A. § 105(b).

[58] *See supra* note 29.

American Law Institute[59] in connection with proposed revisions to Article 2 of the UCC.[60] That proposed provision would have empowered courts to invalidate *conscionable* terms.

The proposal, however, was heavily criticized for inclusion in UCC Article 2[61] and was not adopted. The revisions currently proposed for Article 2 do not contain the proposal – the draft returns to the traditional doctrine of unconscionability, which has sufficiently protected consumers.[62] In explaining why the proposal for revised Article 2 was not needed and why the doctrine of unconscionability is sufficient, one commentator explained:

> Scholars and courts have wrestled with the general concept of unconscionability at least since the adoption of Section 2-302 and have developed a set of doctrines that are reasonably workable, if

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[59] *See What's Wrong with 2B*, COMPUTERWORLD (March 1, 1999), quoting Michael Traynor, as liaison on the UCITA (formerly known as "2B") process, (available at <http://www.computerworld.com/home/print.nsf/all/990222916A>) ("Except for clashes with 'fundamental public policy' or 'unconscionability,' which is a very high legal standard, courts may not intervene in a licensee's terms. 'The question is whether we're going to give licensees any rights to claim that a particular terms is not enforceable.'").

[60] Various iterations of the proposed provision were introduced during the course of the drafting process to revise Article 2. At one time, the Drafting Committee considered alternative proposals to exclude from consumer contracts "any non negotiated term that a reasonable consumer in a transaction of this type would not expect;" or any term of which the consumer was not "expressly aware" if a "reasonable consumer" in such a transaction would not expect the term; or terms that the person preparing the form had reason to know would not be agreed if the consumer were aware of them. *See* U.C.C. § 2-206(a) (NCCUSL Draft March 21, 1997) (alternatives A-C) (available at < http://www.law.upenn.edu/library/ulc/ucc2/397art2.html>).

One version, which appeared in Section 2-206 of UCC Article 2 (Proposed Official Draft March 1, 1999) (available at <http://www.law.upenn.edu/library/ulc/ucc2/ucc2399.htm>), was approved by the ALI and was described by Consumers Union as follows: "Courts wouldn't enforce terms in contracts that are much more restrictive than industry standards. Hence, a one-month toaster warranty – when the standard is two years – likely wouldn't hold up." *Your Rights at the Sales Counter,* CONSUMER REPORTS, January 1999, at 6.

[61] The change proposed for Article 2 was described by one commentator to be "as poor a job of statutory drafting as one is likely to see. It is badly written and conceptually confused, and manages to be both vacuous in content and probably pernicious in effect. The new Article 2 should omit it." *See* Letter from Professor Alan Schwartz, Sterling Professor of Law, Yale Law School, to Lawrence J. Bugge, Chairman, UCC Article 2 Drafting Committee (March 8, 1999) at 5 (on file with the author). In the letter, Professor Schwartz explains that he was retained by Gateway 2000 to review and comment on Section 2-206 and an additional section that was later deleted from the draft.

[62] After July, 1999, the Drafting Committee for revisions to Article 2 was reconstituted. The first draft published since July is available at <http://www.law.upenn.edu/bll/ulc/ulc_frame.htm>. The Reporter's note to Section 2-302 reads as follows: "*[Reporter's Note - With the exception of changing the word "clause" to "term" the text of this section is consistent with current Article 2. However, it might be supplemented with a new comment along the following lines . . . .*"

> more restrictive than some academics would like. . . . Rather than rest content with a generally favorable situation, however, the drafters [of revised Article 2] have launched a new initiative to expand the reach of the doctrine by seemingly heightening the scrutiny attached to consumer sales contracts. There is absolutely no warrant for this expansion. There is no great reservoir of problematic cases in which consumers have been victimized in ways that are not currently redressed by 2-302. I searched hard for such cases to include in my casebook . . . but to no avail. The seas were relatively tranquil.
>
> The new section 2-206 promises to disrupt that tranquility for no good purpose. . . . .
>
> It is an attempt to fix something that is not broken, with the effect of harming both consumers and sellers in the process. A modest suggestion: let this proposal be thoroughly aired in the law journals before it is recommended to the legislators of forty-nine states. I very much doubt it will survive the scrutiny of contract scholars.[63]

Claim has also been made that UCITA allows licensors to insert just about any term they like into a contract. Such a claim is not accurate.[64] While UCITA follows

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[63] *See* Letter from Professor Randy E. Barnett, Austin B. Fletcher Professor, Boston University School of Law, *supra* note 54, at 1 and 2. That the doctrine of unconscionability is alive and well can be seen in a recent case from New York, Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 572 (App. Div. 1998). In *Brower*, the Gateway computer contract contained an arbitration clause requiring arbitration in Chicago under International Chamber of Commerce ("ICC") rules. The ICC rules were difficult to obtain because the ICC is located in France, requires advance fees of $4,000 (more than the cost of the computer) of which $2,000 was nonrefundable, and contains the English "loser pays" rule for attorneys fees. The *Brower* court specifically stated that the inconvenience of the chosen arbitration site (Chicago) was *not* unconscionable, but did find that:

> [T]he excessive cost factor that is necessarily entailed in arbitrating before the ICC is unreasonable and surely serves to deter the individual consumer from invoking the process. . . . Barred from resorting to the courts by the arbitration clause in the first instance, the designation of a financially prohibitive forum effectively bars consumers from this forum as well; consumers are thus left with no forum at all in which to resolve a dispute.

Brower, 676 N.Y.S.2d at 574. The court also noted that Gateway had included a new arbitration clause in a newsletter, giving all of its customers the option to choose an arbitrator from the AAA and to designate any location for the arbitration by agreement of the parties, under which agreement Gateway would not unreasonably withhold its approval. The court remanded so that the parties could seek appropriate substitution of an arbitrator. *Id.*

[64] In responding to one such claim, counsel for a small developer commented as follows:

existing law allowing parties to determine the terms of their contracts, as noted, it likewise follows existing law insofar as it restricts what those terms can be and adds additional restrictions.

ii. Protection regarding Expressly Agreed Terms

Section 209(a) also provides that if a term in a mass-market license conflicts with an expressly agreed term, then the expressly agreed term controls. In the foregoing stereo example, if the vendor had confirmed that the stereo came with a 5 year warranty, but the warranty term in the standard form (the mass-market license) was actually for 2 years, the 2 year term would not be enforceable because of the express agreement regarding a 5 year warranty.[65] This protection is unique to UCITA - it does not directly appear in UCC Article 2.

In UCITA, the new protection is for consumers *and* business mass-market licensees. Some critics of UCITA acknowledge this new protection, but instead of applauding it, they characterize it as harming *non*-mass-market licensees:

> Mr. Kaner's general objection may be summarized by his comment that, in essence Article 2B is faulty because "giving publishers the right to create enforceable contracts does not mean that they should be allowed to toss in whatever terms they want, no matter how outrageous."
>
> Article 2B does not give anyone the right to create enforceable contracts containing "whatever terms they want." Article 2B was conceived and drafted as a contract statute. With regard to mass market licenses, 2B-208 provides for enforceability of mass market licenses under basic principles of contract law. License agreements under 2B-208 [now UCITA Section 209] are enforceable only to the extent other contracts in our society are enforceable. Terms which are "unconscionable" or against public policy are not enforceable, under Article 2B or under general principles of contract law.
>
> The theory underlying freedom of contract is that in a market society, supply and demand, the opportunity to obtain commercial benefits, and competition in the marketplace will assure that providers of goods and services will provide what people want and not waste resources on goods and services people do not want.
>
> Where a software license is neither unconscionable nor against public policy, a statute which calls for enforcing it in accordance with its terms reiterates the common law of contracts and is a statement of confidence in the market system, and the ability of the market to reject terms which are unacceptable. In the abstract, one might worry that individual "consumers," that is, licensees of mass market software, have little "bargaining power" in connection with licenses. Experience indicates otherwise.

Id. *See* Harris, *supra* note 52 (footnotes omitted).

[65] As with any agreement, the parol evidence rule will apply to both parties. *See* U.C.I.T.A. § 301, which parallels U.C.C. § 2-202.

> Suppose that a customer specifically negotiates a contract with a software publisher. On installing the software, he encounters a click-wrap license. He must click "OK" to install the software. He does. Under current law, the negotiated agreement prevails over the click-wrap (*Morgan Laboratories v. Micro Data Base Systems, Inc.*, Case Number 96-3988 THE, 1997, U.S. District Court, Northern District of California, Chief Judge Thelton Henderson). Under UCITA (211(a)(2)), the negotiated agreement prevails only for mass-market sales.[66]

This comment erroneously assumes that when a protection is extended to mass-market licensees, somehow the opposite must be true for non-mass-market licensees. Such "negative pregnant" reasoning is expressly precluded by UCITA Section 106(c).[67]

In fact, the *Morgan* case pertains not to adoption of contract terms but, rather, to modification of contracts, and the UCITA modification rules yield the *same* result as in *Morgan*. In *Morgan*, the parties made an agreement that could only be modified in a writing signed by both parties; the vendor then sent the customer a shrink-wrap license with different terms and claimed that the original contract had been varied by the shrink-wrap license. The court disagreed: the first contract only allowed modification in a signed writing and the shrink-wrap license did not meet that requirement. The same result would would be obtained under UCITA Section 303 regarding modifications of contract. The draft comments explain this intention explicitly:

> For example, a "no modification without authentication" term should prevent modification of a basic agreement through a later provided mass-market license that is not authenticated by the party receiving the license. *Morgan Laboratories, Inc. v. Micro Data Base Systems, Inc.*, 41 U.S.P.Q.2d 1850 (N.D. Cal. 1997).[68]

iii. Differences in Structure of Commercial and Consumer Law

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66 Cem Kaner, *A Response To: Why Software Professionals Should Support The Uniform Computer Information Transactions Act (And What Will Happen If They Don't)*, (visited April 13, 2000) <http://www.badsoftware.com/asqrebut.htm>. For a copy of the original article to which Kaner responds, *see* Lorin Brennan, *Why Software Professionals Should Support The Uniform Computer Information Transactions Act (And What Will Happen If They Don't)*, (visited April 13, 2000) <http://www.2bguide.com/docs/proucita4.doc>.

67 U.C.I.T.A. § 106(c) (providing that "[t]he fact that a provision of this [Act] imposes a condition for a result does not by itself mean that the absence of that condition yields a different result").

68 U.C.I.T.A. § 303 cmt. 3 (Draft Comments dated October 15, 1999) (available at <http://www.law.upenn.edu/bll/ulc/ulc_frame.htm>).

Finally, what about the contention of a number of attorneys general that all material terms should be disclosed before sale, even if the full contract is not then made available?[69] This request belies traditional concepts of commercial law.

The hallmark of *consumer* protection laws is regulatory disclosure requirements, such as those found in Regulation Z which requires certain credit disclosures to be delivered to consumers before the closure of a credit transaction.[70] An American Bar Association subcommittee at one time discussed such an approach for UCITA as a substitute for requiring a right of return under Section 209: if customers were provided with disclosures beforehand, there would be no reason to afford a right of return as well, thus avoiding the distribution chain complications created by the statutory return right.

A "disclosure" approach was ultimately viewed as less protective of consumers and mass market licensees than a right of return, and as unworkable because of the variety and ever-changing nature of computer information products. Any statutory disclosure format would be irrelevant as soon as drafted or it would be difficult, if not impossible, to settle on a meaningful list of disclosures. The example in the attorneys general letter is illustrative of the difficulty of determining a "correct" list of disclosures: the attorneys general seek to avoid "surprise" for consumers by requiring disclosure of limitations on the number of copies that can be made, yet *federal copyright law already prohibits any* copy from being made unless (1) the license grants a right to make copies, or (2) the customer is an owner of the copy, in which case he or she may make one copy for archival purposes only.[71] Given federal law, disclosure of the number of copies that can be made should not be on, or should be low on, any list of required disclosures: customers already know that the answer is zero or one. Of course, many licensors seek to educate customers about intellectual property laws as a means of avoiding the adverse impacts of infringement for the licensor and licensee, but such a recital of federal law is not and should not be mandated, just as it is not mandated for other vendors under other commercial laws.

The other problem with the consumer "disclosure" approach is that UCITA does not merely apply to consumers: the entire statute is a commercial code akin to UCC Article 2. Article 2 likewise contains none of the rules that the attorneys general request for inclusion in UCITA. As to Section 209, UCITA applies not just to consumer customers but also to all commercial customers, including Fortune 500 companies. UCITA protects all customers from any problems with terms that are not acceptable by affording them a statutory right of return and, for consumer customers, by preserving the substance of all consumer protections statutes.[72] Like UCC Article 2, however, UCITA is designed to be a commercial code. Such codes are as much needed in U.S. society as consumer protection statutes.

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[69] *See supra* note 48 and accompanying text for a discussion of this concern as expressed by the attorneys general. *See infra* note 74 for a discussion of some of the problems with this request, from the perspective of actual utility and costs to consumers.

[70] *See* 12 C.F.R. § 226 (2000).

[71] 17 U.S.C. § 117(a) (1994).

[72] *See* U.C.I.T.A. § 105(c) (1999).

In sum, Section 209 creates a fair balance of burdens and benefits. It does not please anyone completely, but overall the allocation is appropriate, and that should be the goal of any legislation.

The achievement of UCITA is that it improves recognized distribution channels in a manner that benefits both vendors and customers. It does this by establishing uniformity and imposing reasonable restrictions on all sides: vendors must give customers reason to know whether additional contract terms will follow payment, they must construct consent procedures allowing customers to agree or disagree with such terms, and they must provide a return right for customers who do disagree. Unlike existing law and practices for goods, the return for computer information must be cost-free and includes costs of restoration incurred (if any) to view the additional terms.[73] Customers who wish to receive the advantages of this distribution channel will be required to return information when they do not agree with terms not seen until after payment. In reality, the additional burdens imposed by UCITA on vendors and the overhead costs of handling returns are strong incentives to show contract terms before payment when such is commercially feasible. Under circumstances where it is not,[74] however, UCITA provides uniformity and customer protections in existing, beneficial distribution channels.

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[73] *See* U.C.I.T.A. § 209(b) (1999) (stating that if the licensee does not agree with the contract terms once seen, the licensee is entitled to a return (essentially, a refund for the computer information – *see* definition in UCITA Section 102(56)), and reimbursement of any reasonable expenses incurred in complying with the licensor's instructions for returning or destroying the computer information (or, in the absence of instructions, expenses incurred for return postage or similar reasonable expense in returning the computer information), and compensation for any reasonable and foreseeable costs of restoring the licensee's information processing system to reverse changes in the system caused by the installation).

[74] Some of the problems with any law requiring disclosure of all terms before payment are explained by Michalyn Harris, general counsel to a small developer:

> Even if all of the license terms were included on the outside of a software package, they would be available for review to relatively few customers. This is because distribution from retail stores accounts for only a few of the thousands of software applications made available to the mass market. Shelf-space in retail stores is limited, and reserved for the most popular software packages, most of which are produced by the larger companies. In terms of the number of different software applications, the vast majority is distributed via catalogs, and ordered via mail, fax or telephone. For small developers, the most effective method of distribution is often a targeted mailing and fulfillment via mail, fax and telephone orders.
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> It is possible for retail stores to make license agreement provisions available to customers. Egghead Software maintained a file of software licenses for every package it stocked, and customers could review these licenses. One had only to ask. Egghead Software**,** at least as a retail store operation**,** is now out of business, which may indicate, among other things, that being able to review software licenses was not a significant competitive advantage or otherwise a matter of concern to customers.

b. Criticism of Section 209 Frequently Fails to Consider Existing Law

As noted, criticism of Section 209 frequently reflects a misunderstanding, or at least a failure to consider, other possible interpretations of existing intellectual property or contract law.

i. Existing Intellectual Property Law

A point of confusion about UCITA is why a mass-market license is needed or desirable at all. When customers buy a car from a dealer they do not even deal with the manufacturer, so why should they care about obtaining a valid contract with the "manufacturer" (software publisher) of computer information?

> In any case, suppose there was a law that before shipping software, a licensor had to provide the customer-licensee with a copy of the license agreement and an opportunity to review it. Would the result benefit anyone? and if so, whom? Large software providers with packages available at retail would not suffer greatly. Retailers could be required to make licenses available to customers at the store. Catalog sales however, would become considerably less efficient than they are now. Software distributed via catalog would become more expensive because prior to shipping the software, a copy of the license agreement would have to be sent out, and an acknowledgment of its acceptability linked up to the ordering customer. The avenue of distribution most available to small developers, publicity through mailing lists and shipment based on orders placed by mail, fax or telephone, would become an administrative nightmare if a copy of the license agreement had to be sent first, and an acknowledgment of its acceptability received before software was shipped. The result would be to reduce competition for mass-market software, increase prices for the software which was available, and make it much more difficult for small developers to distribute software applications, thereby leaving the market to large providers. Such a result is far more anti-competitive than the alleged anti-competitive impact arising from customers' inability to compare license provisions before receiving a shipment of returnable software.
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> It is also not clear that customers regard providing the specific terms of a license agreement prior to shipment as information worth paying for. Providing the information, particularly for catalog and direct mail sales, which are the primary methods of distribution available to smaller developers, has a cost which would have to be reflected in the price paid to them. Mr. Kaner may believe that people choose software on the basis of what terms are or are not in a license agreement, but reviews rarely mention this factor as important. There is no evidence that the assumed benefit arising from preshipment review of license agreement terms is commensurate with the additional costs and burdens, which are particularly onerous for the small developer.

Harris, *supra* note 52.

With respect to copyrighted works, the answer is simple: infringement. If I buy a car from the dealer I am buying from someone who owns the car and can transfer whatever rights I need to buy it. When I acquire software from a retailer, that retailer typically is not the owner of the federal copyright and if I want to do more than is allowed by federal copyright law, I need a license from the copyright owner to avoid an infringement of that owner's rights.[75] In a three-party transaction I (as buyer) need to have two contracts, one with the dealer and one with the manufacturer (publisher). UCITA specifically addresses this problem in Section 613, which essentially conditions the contract with the retailer on the acceptability to the customer, of the contract with the manufacturer. This is a significant change – under existing law, the retailer is entitled independently to enforce its own contract (just as the dealer is).

Not all computer information is governed by intellectual property law and contracts are otherwise important to the computer information industry for the same reasons that they are important to other industries. Contracts allocate risks between the parties and various laws generally require certain contract verbiage to achieve particular results (e.g., both UCITA and UCC Article 2 require particular language to disclaim an implied warranty).

A basic theme espoused by certain UCITA critics is that if parties are allowed to make contracts about informational rights, that such contracts might be used inappropriately to vary rights under applicable intellectual property law. Pursuant to requests made by these commentators, UCITA addresses this concern on several levels. *First*, UCITA Section 105(a) expressly reminds contracting parties that their contracts are subject to federal law and, thus, they are not free to vary any nonvariable provisions. *Second*, Section 105(b) goes out of its way to invalidate terms that violate a fundamental public policy, while the comments alert courts to the pertinent information policies in this area of law.[76] *Third*, UCITA imposes on all contracts, not just those involving intellectual property, traditional restrictions such as those allowing courts to invalidate unconscionable terms.

While some commentators have suggested that the "balance" of the federal Copyright Act cannot be varied by contract,[77] this does not appear to be the general rule.[78] The latest

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[75] Licenses can be used to grant or restrict rights. *See, e.g.*, ProCD v. Zeidenberg, 86 F.3d 1447, 1455 ("Licenses may have other benefits for consumers: many licenses permit users to make extra copies, to use the software on multiple computers, even to incorporate the software into the user's products."). *See also* Robert W. Gomulkiewicz and Mary L. Williamson, *A Defense of Mass Market Software License Agreements*, 29 RUTGERS COMPUTER & TECH. L.J. 335, 354–55 (1996) (describing other rights sometimes extended in mass-market licenses, the exercise of which rights without a license could constitute an infringement).

[76] *See supra* note 29.

[77] *See, e.g.*, Pamela Samuelson, *How Tensions Between Intellectual Property Policy and UCITA are Likely to be Resolved*, 570 PLI/Pat 741, 744 (1999) ("UCITA . . . presumptively validates terms overriding the default settings of intellectual property law. . . . Contracting around doctrines like fair use would upset the essential balance of intellectual property."); *see also* Mark A. Lemley, *Intellectual Property And Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239 (1995) (arguing that the Copyright Act does establish a balance that cannot be varied by contract or, if the Act can be varied by contract, that shrinkwrap licenses do not qualify as such contracts because they are standard form contracts; also

example of this is provided by *Tasini v. The New York Times Co.*[79] wherein the court determined "whether, in the absence of a transfer of copyright or any rights thereunder, collective-work authors may re-license individual works in which they owned no rights."[80] In rendering its decision the court noted that it "turn[ed] entirely on the *default allocation . . . of rights provided by the [Copyright] Act*. Publisher and authors *are free to contract around the statutory framework*," but in the relevant instance, had not done so.[81]

Given that the ability to contract with respect to property governed by the Copyright Act is not new and not created by UCITA, the real concern of these commentators appears to be a fear that if rules for contracting are clarified, then more contracts will be made and more statutory provisions will be varied by contract. While this is theoretically possible, such contracting is already occurring and will continue to occur with or without UCITA – UCITA neither *creates* the right to contract nor *creates* the enforceability of standard form contracts. Given that UCITA cannot change federal policies regarding information (such as those concerning copyright, free speech, reverse engineering and the like), it seems rather draconian to argue that there should not be a uniform commercial code for computer information simply because intellectual property law will continue to apply. Intellectual property law will also

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arguing for unenforceability of standard form contracts that are not negotiated between parties of equal bargaining power, that are not in a signed writing or that bind a party to the whole contract upon signing).

[78] *See, e.g.*, Raymond Nimmer, *Breaking Barriers: The Relation Between Contract and Intellectual Property Law*, 13 BERKLEY TECH. L. J. 827 (1998) (arguing that there has been a long standing symbiotic relationship between contract and property law); *see also* Maureen A. O'Rourke, *Copyright Preemption After the ProCD Case: A Market-Based Approach*, 12 BERKELY TECH. L.J. 53 (1997) (explaining in Part III-A the competing views of copyright and contract law, i.e. the view that the Copyright Act is a series of default rules that may be changed by contract and the view that the Act balances competing rights through a series of immutable rules). Another commentator states:

> The force of [the] argument that the rules of the Copyright Act cannot be varied by contract is weakened to the extent that Congress, in striking that balance, contemplated that parties might contract out of these user rights. There is some evidence that this is in fact the case for certain provisions. For example, the Committee Report to section 109(a) of the Copyright Act indicates that Congress anticipated that private parties might contract out of a first sale right.

Lemley, *supra* note 77, at 1282. Of course, where the Copyright Act or any other statute expressly prohibits variation by contract, the provision subject to the variation cannot be altered. The referenced debate is had with respect to provisions that do not contain an express ban on alteration by contract.

[79] 206 F.3d 161 (2d Cir. 2000).

[80] *Tasini*, 206 F.3d at 170.

[81] *Id.* (emphasis added). *See also* DSC Communications Corp. v. Pulse Communications, Inc., 170 F.3d 1354 (5th Cir. 1996) (holding that when contract for copy of software imposed restrictions inconsistent with ownership of a copy, federal first sale doctrine did not apply).

continue to apply to contracts made in the absence of UCITA. The baby should not be thrown out with the bath water.

ii. Existing Contract Law

Mass-market licenses whose terms are not seen until after payment has been made (e.g."shrink-wrap licenses") are already enforceable under the majority of existing case law.[82] The most famous cases, or infamous, depending upon one's view, are *ProCD v. Zeidenberg,*[83] *Hill v. Gateway 2000, Inc.,*[84] *M.A. Mortenson Company, Inc. v. Timberline Software*

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[82] There are earlier cases that did not enforce shrink-wrap license in atypical circumstances. *See, e.g.,* Wyse Technology v. Step-Saver, 939 F.2d 91 (3d Cir. 1991); Arizona Retail Sys., Inc. v. Software Link, Inc., 831 F. Supp. 759 (D. Ariz. 1993); *cf.* Vault Corp. v. Quaid Software Ltd., 847 F.2d 255 (5th Cir. 1988).

[83] 86 F.3d 1447 (7th Cir. 1996). In *ProCD,* Zeidenberg bought a copy of SelectPhone, a computer database and software program containing residential telephone numbers at a retail outlet in Madison, Wisconsin. Every package of the SelectPhone product expressly stated that the software was subject to the license contained within the box. The license was also encoded on the CD-Rom, printed in the user manual, and appeared on the user's screen every time the program was executed. Zeidenberg violated the license restriction prohibiting commercial use by uploading the database to the Internet and allowing users to access the database for a fee. The court noted that there was notice on the outside of the box informing purchasers that the terms were on the inside, and that the contract was not formed until the shrink-wrap terms had been accepted. The *ProCD* court distinguished or disagreed with Wyse Tech. v. Step-Saver, 939 F.2d 91 (3d Cir. 1991) and Arizona Retail Sys., Inc. v. Software Link, Inc., 831 F. Supp. 759 (D. Ariz. 1993); *cf.* Vault Corp. v. Quaid Software Ltd., 847 F.2d 255 (5th Cir. 1988). The *ProCD* court concluded that UCC Article 2-204 allows for a contract to be made "in any manner sufficient to show agreement, including conduct by both parties" and, that the vendor, as master of the offer, could invite acceptance by specific conduct. Therefore, the court held that it was permissible for ProCD to propose a contract that Zeidenberg could only accept after Zeidenberg had an opportunity to read the license, but prior to Zeidenberg's use of the product. *See ProCD,* 86 F.3d. at 1452.

[84] 105 F.3d 1147 (7th Cir. 1997). In *Hill,* the Seventh Circuit confirmed enforcement of contract terms that are not seen until after delivery of the product even though the buyers engaged in no affirmative conduct to evidence their consent to the terms. In *Hill,* the purchasers of a computer contended that the arbitration clause included in the box was not enforceable because it was not seen until after the computer was purchased. The court essentially held that the buyers were not entitled to pick and choose what clauses would be enforceable: they knew certain clauses would be included in the box because they responded to Gateway ads touting a written warranty and lifetime support, yet did not bother to discover the details of such provisions before buying the computer. They had reason to know that a contract would come with the box, they were not free to take some but not all terms of the contract. Instead, the buyers chose one of three alternatives that the court detailed as allowing buyers to determine contract terms under modern distribution systems: (1) they may ask the vendor to supply the terms before purchase; (2) they may consult public sources such as vendor Web sites; or (3) they may inspect the documents upon receipt of the product and return it if the documents are not acceptable. In *Hill,* the buyers took the third option and, by retaining the product beyond the 30-day return period, were deemed to have accepted the contract. *See Hill,* 105 F.3d at 1153.

Corporation,[85] and *Brower v. Gateway 2000, Inc.*[86] The benefits of a distribution system allowing contract terms to be delivered after payment has been made is discussed above. The point of mentioning these cases is not to discuss them further but to note that with or without UCITA, contract terms will continue to be delivered after payment has been made. As Professor Barnett says, "There need not be a law against that."[87]

The underlying concern in the "shrink-wrap" debate would appear to relate to a traditional debate regarding the enforceability of standard form contracts or the enforceability of various methods of assent used in modern contracting. For example, one commentator states:

> The problem is that UCC2B would validate mass market as well as negotiated licenses for information as long as a consumer has manifested token assent to the license by such acts as clicking "I agree" or loading the information onto her computer after an opportunity to review the often lengthy and sometimes incomprehensible terms of the licenses.[88]

There are legitimate differences of opinion regarding all of these issues, but to swing too far in any single direction or to base UCITA on mistaken characterizations of existing law would not appear to be the proper solution. Regarding token assent, to conclude that clicking "I Agree" is

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[85] 970 P.2d 803 (Wash. 1999), *rev. granted* 138 Wn.2d 1001, 984 P.2d 1033 (1999). In *Mortenson*, a Washington court recognized that rolling contracts are made in modern commerce, i.e. all terms are not always seen at the time of payment:

> Mortenson [customer] argues that the purchase order reflects an offer, consideration, and acceptance, and that it satisfies the statute of frauds; thus, the purchase order is sufficient under § 2-204 to show agreement between the parties and constitutes the entire contract. . . .
>
> Mortenson's arguments ignore the commercial realities of software sales. . . . Mortenson licensed other software packages, the licenses of which were similar to Timberline's [software company] in that they came with software, disclaimed warranties, limited remedies, and include choice of law and forum selection clauses. Reasonable minds could not differ concerning a corporation's understanding that use of software is governed by licenses containing multiple terms. . . .
>
> We find that Mortenson's installation and use of the software manifested its assent to the terms of the license and that it is bound by all terms of that license that are not found to be illegal or unconscionable.

Id. at 808-09. For other cases enforcing post-payment terms, *see* Carlyle C. Ring, Jr. and Raymond Nimmer, *Series of Papers on UCITA Issues*, (visited April 13, 2000) <http://www.ucitaonline.com/docs/q&apmx.html>.

[86] 676 N.Y.S. 2d 569 (App. Div. 1998).

[87] *See supra* note 54 and accompanying text.

[88] *See* Samuelson, *supra* note 38, at 3.

not consent or is only "token" assent which cannot count as a form of agreement, would eliminate electronic commerce or vitiate normal assumptions about assent and contracting:

> MSN's membership agreement appears on the computer screen in a scrollable window next to blocks providing the choices "I Agree" and "I Don't Agree." Prospective members assent to the terms of the agreement by clicking on "I Agree" using a computer mouse. Prospective members have the option to click "I Agree" or "I Don't Agree" at any point while scrolling though the agreement. Registration may proceed only after the potential subscriber has had the opportunity to view and has assented to the membership agreement . . . .
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> . . . The scenario presented here is different [than a case in which the U.S. Supreme Court enforced contract terms of a cruise ticket not seen until after payment] because of the medium used, electronic versus printed; but in any sense that matters, there is no significant distinction.
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> . . . Plaintiffs must be taken to have known that they were entering into a contract; and no good purposes, consonant with the dictates of reasonable reliability in commerce, would be served by permitting them to disavow particular provisions or the contracts as a whole.[89]

On the other hand, to conclude that clicking "I agree" always means something, even when there has been no opportunity to review the terms supposedly agreed upon, would be harmful. UCITA goes to neither extreme: the definition of manifestation of assent in Section 112 ensures a real opportunity to review terms and requires the assenting person intentionally to engage in conduct or make statements with reason to know that the other party may infer from the conduct or statement that the person assents. This is not an unreasonable rule and is consistent with traditional contracting principles.

This debate leads to the second point regarding mistaken characterizations of existing law. One particular statement made about "manifestation of assent" is illustrative. In her article *How Tensions Between Intellectual Property Policy and UCITA are Likely to be Resolved,* Professor Pamela Samuelson states as follows:

> Most significantly, UCITA validates mass-market licenses for information products. . . .The transactions do not need to be negotiated, so long as the end user manifests assent.
>
> *This expansive concept of "manifesting assent" is unique to UCITA. It is designed to allow contract formation without "a signature, specific language or any specific conduct." This concept embraces the notion that opening a shrinkwrap covering,*

[89] Caspi v. Microsoft Network L.L.C., 732 A.2d 528, 530, 532 (N.J. Super. 1999).

> *or clicking on an electronic button is enough agreement to satisfy the law.*[90]

The comments to UCITA explain that the concept of "manifestation of assent" originated in the *Restatement (Second) of Contracts* Section 19. The *Restatement* comments expressly recognize that "words are not the only medium of expression," that "conduct may often convey as clearly as words a promise or an assent to a proposed promise," and that "there is no distinction in the effect of the promise whether it is expressed in writing, or orally, or in acts, or partly in one of these ways and partly in others. Purely negative conduct is sometimes, though not usually, a sufficient manifestation of assent."[91] The *Restatement* does require *conduct* (including negative conduct), and, notwithstanding Professor Samuelson's statement, so does UCITA. The text of the *Restatement's* provision on manifestation of assent reads as follows:

> (1) The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act.
>
> (2) The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.
>
> (3) The conduct of a party may manifest assent even though he does not in fact assent. In such cases a resulting contract may be voidable because of fraud, duress, mistake, or other invalidating cause.[92]

The related text of UCITA's provision on manifestation of assent reads as follows (emphasis added):

> (a) A person manifests assent to a record or term if the person, *acting with knowledge of, or after having an opportunity to review* the record or term or a copy of it:
>
> > (1) authenticates the record or term with intent to adopt or accept it; or
> >
> > (2) *intentionally* engages in *conduct* or makes statements *with reason to know* that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term.[93]

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[90] Pamela Samuelson, *How Tensions Between Intellectual Property Policy and UCITA are Likely to be Resolved*, 570 PLI/Pat 741, 752-53 (1999) (emphasis added); *supra* note 77.

[91] RESTATEMENT (SECOND) OF CONTRACTS § 19 cmt. A (1979).

[92] *Id*. at § 19.

[93] U.C.I.T.A. § 112(a) (1999).

In short, conduct can and always has been a way in which parties may form agreements under the common law and UCC Article 2. Any contrary legislation would not only be inappropriate under traditional principles of contract law, but would also impede rather than facilitate commerce. Commercial codes such as UCITA and UCC Article 2 are written to facilitate commerce.[94]

As for the length and readability of licenses, the criticism that some licenses can be lengthy and incomprehensible is accurate, but so are mortgages, credit card contracts, car rental contracts, insurance policies, brokerage agreements, and the myriad of other standard form contracts that we all encounter in our daily lives. The law is not always transparent and vendors who stray from statutorily required or judicially blessed wording often encounter unexpected results. So the criticism is logical but applies to all contracts. It is not reasonable to expect UCITA to change a universal reality.

c. How Differences in Views About Contract Law Affect Section 209.

UCITA is buffeted by many debates about contract law that have gone on for decades and will continue for decades. These debates include differences in opinions regarding the enforceability of the terms of standard form contracts,[95] whether businesses should be accorded consumer protections, whether parties should be free (within bounds of conscionability, etc.) to fashion their contracts or whether the law should fashion them for them, and whether the level of existing protections is too high or too low. The list is endless. It is also a list that concerns *all* contracting and that will exist irrespective of UCITA.

UCITA cannot resolve all of these timeless debates. However, the debates divert attention from the real need and real achievement of UCITA, i.e. its creation of a workable commercial code for contracts in computer information:

> The Courts apply Article 2 by analogy to the licensing of information because no suitable alternative paradigms exist. The concepts of Article 2 are adapted to information contracts though "legal fictions." Judges must 'pretend' that a law constructed for the sale of tangibles also accommodates the licensing of information. . . . The courts' strained efforts of applying the law of sales to the licensing of intangibles is like the television commercial in which two mechanics are trying to fit an oversized automobile battery into a car too small to accommodate it. The car owner looks on with horror as the mechanics hit the battery with mallets, trying to drive it into place. The owner objects and the mechanics say, "We'll make it fit!" The owner says, "I'm not comfortable with 'make it fit.'"

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[94] *See infra* note 137 for a discussion of the stated purposes behind the UCC and UCITA.

[95] *See, e.g.*, Holly K. Towle, *The Politics of Licensing Law*, 36 HOUS. L. REV. 121, 146-154 (1999).

> Similarly, judges are applying a sales law that does not fit with the commercial realities of licensing software. Judges must treat software "as if" it fits a sale of goods because no specialized commercial law for licensing information commodities exists. Doing nothing only exacerbates the problem by proliferating 'legal fictions' rather than applying a rationally constructed information law.[96]

4. Section 304: Continuing Contracts

Section 304(b) creates a safe harbor for contracts that continue over long periods but need to be amended from time to time by one of the parties pursuant to a contractual procedure. This is routine.[97] Under the common law, contracts authorizing one party to change terms pursuant to an agreed procedure, including price and other material terms, are enforceable and do not create an "illusory" contract if the party who changes terms exercises that power pursuant to restrictions such as good faith and fair dealing.[98]

Section 304 has been criticized for not being included in the list of UCITA sections that cannot be varied by agreement.[99] The criticism misunderstands the nature of the safe harbor approach. Section 304 is not mandatory, but licensors who do comply with its provisions (i.e., vendors who *do* allow termination for changes in material terms) can obtain its benefits. If licensors accept the burdens and benefits of Section 304(b), then they can obtain a bit more certainty than is available under the common law[100] regarding the enforceability of changes

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[96] Michael L. Rustad, *Commercial Law Infrastructure For The Age of Information*, 16 MARSHALL J. COMPUTER & INFO. L. 255, 270 (1997).

[97] *See supra* note 20.

[98] *See, e.g.*, Perdue v. Crocker Nat'l Bank, 702 P.2d 503 (Cal. 1985) (holding that a signature card was a contract authorizing bank to change terms of deposit contract, including an increase in NSF fees, subject to bank's duty of good faith and fair dealing in setting or varying such charges).

[99] *See* Letter by Gail Hillebrand of Consumers Union to Uniform Law Commissioners at 4 (June 21, 1999) (on file with the author). This letter states in pertinent part:

> UCITA appears in section 304 to permit cancellation if the change of terms is material, but section 104(c) permits that right to cancel to be varied by agreement. The result is that a licensor who has a customer in a long-term contract can use artful contract drafting to force the customer to accept even materially changed terms.

Id.

[100] Under the common law, the party who does not set the changed terms may argue, for example, that the contract is "illusory" or lacks "mutuality of obligation." *Perdue*, 702 P.2d at 507. Further, abuse of the power to specify terms can be viewed as bad faith conduct. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (1979). In Badie v. Bank of America, 79 Cal. Rptr.2d 273 (Cal. App. 1998), the court acknowledged the right of one party to make changes pursuant to an agreed procedure, but concluded that the obligation of good faith precluded exercise of the right to add an

made by one party. If licensors do not come within the safe harbor, they will be governed by common law that does *not* require termination for a material change in terms, but that does create greater uncertainty regarding the enforceability of changes.

For mass-market transactions, Section 304(b)(2) creates a rule that encourages more protection for licensees than the common law. *If* the parties have agreed that terms may be changed as to the future by compliance with a described procedure,[101] a change proposed in good faith pursuant to that procedure becomes part of the contract only if the procedure permits the mass-market licensee to terminate the contract for changes that alter a material term and if the licensee in good faith determines that the modification is unacceptable. This termination right exceeds the typical common law protection: under the common law, if the change is made in good faith and consistently with fair dealing, no termination right need be offered. While Section 304 was criticized in the letter from some state attorneys general, NCCUSL's response to that letter more accurately reflects the actual wording of Section 304 and existing law than does the attorneys general letter.[102]

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entirely new term waving a constitutional right to jury, when the new term (an arbitration clause) was not contemplated by and had no bearing on the original agreement. U.C.I.T.A. § 304 also imposes an obligation of good faith. *See also* U.C.I.T.A. § 114(b). The UCITA duty of good faith requires honesty in fact and the observance of reasonable commercial standards of fair dealing. Given the general nature of this duty, litigation such as that described in the *Badie* case will continue to act as a curb on changes made by one party.

[101] Section 304 only applies in situations where the parties have agreed that one party may change the terms pursuant to a procedure:

> The subsection states some conditions under which an agreed procedure used by the parties is effective under this Act. It addresses important practices in online and other contracts, such as outsourcing agreements. This section does not alter prior agreements or consent orders dealing with particular parties which may limit, or expand, the ability to make changes in terms of an on-going contract. This subsection deals with agreements that permit changes in terms, but does not create a unilateral right to change terms when the parties have not previously agreed to an applicable procedure.

U.C.I.T.A. § 304 cmt. 3 (Draft Comments dated October 15, 1999) (available at <http://www.law.upenn.edu/bll/ulc/ulc_frame.htm>).

[102] *See supra* note 48 and accompanying text for a discussion of the letter from some state attorneys general. In its response, NCCUSL stated as follows:

> Lastly, with respect to Section 304, you refer to a consent order with AOL. Any consent order with AOL would continue to be binding on AOL regardless of UCITA. Section 304 only applies if the parties already have agreed *to a procedure* for making changes to a contract. Moreover, the procedure is enforceable only if the party "reasonably notifies" the other of changes and that notice is given in "good faith" (which includes commercial standards of "fair dealing" (102(34)). It is incorrect to say, as your letter does, that the Act requires only "minimal

When either party has a right to terminate the contract, such as in a month-to-month online access contract, Section 304 does not add much: if the licensor needs to raise fees, for example, by virute of "month-to-month" or indefinite term contract concepts, it may terminate the contract of any licensee who does not agree to the fee increase. Similarly, if the licensee does not like the proposed amendment, it may terminate the contract.

The chief utility of Section 304 resides in contracts for a set term. A recent Canadian case illustrates the need to be able to change terms during a contract's duration. In *1267623 Ontario, Inc. v. Nexx Online, Inc*,[103] the plaintiff customer had a one year, prepaid contract for e-mail service with the defendant Internet service provider (ISP). The contract allowed the ISP unilaterally to add terms; if the terms were not acceptable to the customer, the contract required the ISP to refund the unused portion of the prepaid service fee. The ISP added a term prohibiting the sending of unsolicited bulk-emails and tendered a partial refund to the customer, who had been sending unsolicited bulk e-mails. The customer sued because it wanted to enforce its one-year contract; it could not obtain service from any other ISP because they all prohibited bulk e-mails.

The court held that because the ISP was entitled under the contract to add terms to the contract and because it had complied with the contract (it had tendered the partial refund), the ISP was justified in canceling the contract and disconnecting the customer. In the alternative, the court noted that the contract required the customer to comply with the rules of "Netiquette," and that such developing rules prohibited the sending of unsolicited bulk e-mails. Thus, the customer was actually in breach of the contract.

In the above case, the major value of the contract had not been earned at the outset and a partial refund of fees was an appropriate contract remedy. There will be circumstances, however, when that is not appropriate. For example, under various popular promotions, an Internet access provider offers to pay, say, $400 towards the purchase of a computer if the buyer signs up for a three-year access contract. The three-year term is necessary to "earn back" the up-front loss of

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> notice for doing so." "Reasonable" notice is not "minimal" notice. Article 1 of the UCC has always provided that standards for reasonable notice may be agreed upon if not "manifestly unreasonable" (*See* 1-102(3)). There have been no unjust results from the Article 1 standard applied for 50 years to the sale of goods. In mass-market transactions the other party has the right to terminate "if the change alters a material term." The consumer is protected in access contracts under 304(b)(2). "Mass-market transactions" includes "a consumer contract" 102(46). "Consumer contract" means a contract between "a merchant licensor and a consumer" 102(17). An "access contract" is such a contract. The approach is not greatly different than long sanctioned practice in open-end credit. *See, e.g.*, Regulation Z §226.9(c).

See Letter from Carlyle Ring, Jr. to W. A. Drew Edmondson, Attorney General of Oklahoma, at 6 (letter dated August 27, 1999) (visited April 14, 2000) <http://www.2bguide.com/docs/crag899.doc>.

[103] 3 ILR (P&F) 175 (Ont. Sup. Ct. Just. 1999).

$400. Assume that in year one, case law indicates that access providers wishing to be protected against suits for defamation in various European Union countries, where the protections of U.S. law do not apply,[104] should condition customer use of chat rooms on the execution of a written indemnity from the customer to the access provider for defamatory comments made by the customer. Also assume that the customer had already electronically signed a service contract promising not to make defamatory remarks and allowing the access provider to amend the contract upon 30 days notice. The access provider then provides notice and amends the contract to require a written indemnity from the customer before further access to chat rooms will be allowed.

As noted above, under existing law some courts would find the amendment to be enforceable because it was made pursuant to the agreed procedure and is not unconscionable. Others would consider whether the amendment is within the parameters of good faith and is the type of amendment contemplated by the parties as being within the scope of the procedure. Under either approach, the licensor should be able to make the amendment and also refuse to let the customer out of the contract, i.e., the licensor would not have to incur the loss of the $400 without a chance to earn it "back" over the 3 year duration of the agreement.

Under UCITA, the licensor still has a duty of good faith but also must offer the customer a chance to terminate the contract if the change alters a material term and the customer, in good faith, determines that the modification is unacceptable. Given the uncertainty inherent in the definition of "material," this section will encourage licensors who desire the "certainty" afforded by Section 304 to avoid making material amendments when possible. On the other hand, the customer must also act in good faith, i.e. the customer may not seize on an immaterial amendment as a way of avoiding legitimate contractual obligations (here, a chance to avoid the 3-year contract and to keep the $400 credit). The purpose of the example is not state an outcome but to illustrate the balance that UCITA encourages.

5. Section 503: Transferability

Section 503 reverses typical assumptions regarding transferability of non-exclusive licenses for works such as computer information that are protected by intellectual property law. However, consistent with general state common law,[105] UCITA restores to licensors who so contract, the ability to prevent transfers. The basic UCITA rule, as set forth in Section 503(1), is this:

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[104] *See, e.g.*, Godfrey v. Demon Internet Ltd., 4 ALL ER 342 (LEXIS) (Queen's Bench Division 1999) (finding that with respect to defamatory comment posted by unknown person in an Internet newsgroup, Internet service provider was deemed to be publisher for purposes of English defamation law notwithstanding contrary U.S. case law and statutes).

[105] The general common law rule is that contracts are assignable *unless* the assignment is expressly prohibited by statute or *contract* or is in contravention of public policy. *See, e.g.*, Berschauer/Phillips v. Seattle Sch. Dist., 124 Wn.2d 816, 829 (1994) (confirming general rule but also holding that where contract prohibition is not specific in a general anti-assignment clause, cause of action for breach of contract may be assigned).

> (1) *A party's contractual interest may be transferred unless the transfer*:
>
> (A) is prohibited by other law; or
>
> (B) except as otherwise provided in paragraph (3), would materially change the duty of the other party, materially increase the burden or risk imposed on the other party, or materially impair the other party's property or its likelihood or expectation of obtaining return performance.
>
> (2) Except as otherwise provided in paragraph (3) and Section 508(a)(1)(B*), a term prohibiting transfer of a party's contractual interest is enforceable,* and a transfer made in violation of that term is a breach of contract and is ineffective to create contractual rights in the transferee against the nontransferring party . . . .[106]

Subsection (1)(B) is standard UCC fare.[107] The UCITA rule, however, i.e. that a party's contract rights *may be transferred unless* a contrary contract is made, does not reflect licensing law for patents or copyright licenses:

> Ownership is the *sine qua non* of the right to transfer, and the copyright law distinguishes between exclusive and nonexclusive licenses . . . [and] the licensee under an exclusive license may freely transfer his rights . . . .
>
> By contrast, the *nonexclusive* license *does not* transfer any rights of ownership; ownership remains in the licensor . . . [and] the nonexclusive licensee does *not* acquire a property interest in the licensed rights . . . . Accordingly, *the nonexclusive license is personal to the transferee . . . and the licensee cannot assign it to a third party without the consent of the copyright owner.*[108]

The reason for this willingness to honor clauses restricting transfers stems from the protections accorded innovators under intellectual property law:

> Allowing free assignability – or, more accurately, allowing states to allow free assignability – in a *nonexclusive* patent license *would undermine the reward that encourages invention because a party seeking to use the patented invention could either seek a license*

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[106] U.C.I.T.A. § 503(1) (1999) (emphasis added).

[107] *See, e.g.*, U.C.C. § 2-210 (*cf.* changes made to Article 2-210 by amendments to UCC Article 9 for secured financing).

[108] In re Patient Educ. Media, Inc., 210 B.R. 237 240 (Bankr. S.D.N.Y. 1997) (emphasis added) (internal citations omitted). *See also* Everex Sys., Inc v. Cadtrak Corp. (In re CFLC, Inc), 89 F.3d 673 (9th Cir. 1996).

> *from the patent holder or seek an assignment of an existing patent license from a licensee. In essence, every licensee would become a potential competitor with the licensor-patent holder in the market for licenses under the patents.* And while the patent holder could presumably control the absolute number of licenses in existence under a free-assignability regime, *it would lose the very important ability to control the identity of its licensees.* Thus, any license a patent holder granted – even to the smallest firm in the product market most remote from its own, - would be fraught with the danger that the licensee would assign it to the patent holder's most serious competitor, a party whom the patent holder itself might be absolutely unwilling to license. *As a practical matter, free assignability of patent licenses might spell the end to paid-up licenses such as the one involved in this case.* Few patent holders would be willing to grant a license in return for a one-time lump-sum payment, rather than for per-use royalties, if the license could be assigned to a completely different company which might make far greater use of the patented invention than could the original licensee.
>
> . . . Federal law holds a nonexclusive patent *license to be personal and nonassignable* and therefore would excuse Cadtrak from accepting performance from, or rendering it to, anyone other than CFLC.[109]

Given this background, UCITA's attempt to give the initial advantage to the licensee by adopting a default rule allowing transfers may be subject to federal preemption.[110] However, assuming that licensors remember to contract for prohibitions on transfer, the issue can be avoided.

Notwithstanding federal law, some argued that UCITA should have refused to enforce transfer prohibitions. This would be a startling departure from existing state law as well as federal law. While it is true that concepts regarding restrictions on alienation of property inform contracts pertaining to transfers of goods, this is not automatically the case with respect to transfers of contract rights:

> In the absence of a statute or other contrary public policy, the parties to a contract have power to limit the rights created by their agreement. *The policy against restraints on the alienation of property has limited application to contractual rights . . . .* A term in a contract prohibiting assignment of the rights created may resolve doubts as to whether assignment would materially change the obligor's duty or whether he has a substantial interest in personal performance by the obligee; or it may serve to protect the

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[109] Everex Sys., Inc., 89 F.3d at 678-80 (emphasis added).

[110] *See* U.C.I.T.A. §105 (1999).

> obligor against conflicting claims and the hazard of double liability.[111]

An airline ticket, i.e. the *contractual right* to fly at a particular time, is illustrative — contract restrictions preventing transfer are routine.

This point, that *contractual rights*, including nonexclusive licenses, are different from *property*, and the point that federal copyright policy enforces prohibitions on transfer notwithstanding contrary state law, was made in a California decision wherein a transfer in a corporate reorganization of a non-exclusive license was treated as a breach of the contractual prohibition on transfer:

> SQL's reliance on several California cases which allowed assignment without invoking the *Trubowitch* test [see below] is similarly misplaced. These cases all involve real estate leases [citations omitted]. Courts have recognized that due to the strong presumption against restraints on alienation of *property*, real estate leases constitute a discrete exception to the general rule that the passage of a *contractual right* which occurs by operation of law is a transfer.
>
> . . . *Federal* copyright law provides a *bright line* prohibition against *transfer of copyright license rights*. *By contrast*, under California's *Trubowitch* rule, if a transfer of rights occurs through change in the legal form of a business, such a transfer is permissible if it does not adversely impact the party benefited by the prohibition against assignment.
>
> The court need not decide whether Oracle has been impacted adversely because it finds that federal copyright law is applicable to the transfer of the copyright *license right* which occurred in this case. State law is preempted by federal law in question of copyright law or policy.[112]

Why then was there objection to the UCITA rule enforcing contractual prohibitions on transfer of computer information licenses, particularly given the background of intellectual property law that views a license as so ephemeral that it does not create transferable property? Beyond political answers,[113] a possible answer is the very reason that UCITA was drafted:

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[111] RESTATEMENT (SECOND) OF CONTRACTS § 322 cmt. a (1981) (emphasis added).

[112] SQL Solutions, Inc. v. Oracle Corp., 1991 U.S.Dist. LEXIS 21097, at *10 (N.D. Cal. Dec. 18, 1991) (emphasis added) (internal citations omitted).

[113] No transferring party likes to engage in the due diligence required for many transfers. When parties engage in a merger, the merging party dreads the review of all contracts and leases to see which ones are transferable and which ones preclude transfer without consent. The same is true for intellectual property licenses: transferring parties do not like to review licenses to see which ones are transferable in a

academics and lawyers brought up in a world of goods think in images of *goods* instead of images of contract *rights* or *information*, and this leads to wrong results:

> Assume that Licensee acquires a copy of copyrighted word processing software subject to a license from Licensor. The license permits Licensee to copy the software into its network and to use the software so long as there are not more than ten simultaneous users. The license prohibits any transfer of the licensed software without Licensor's written permission and provides that the license will terminate if any of its provisions are breached. Despite the terms of the contract, Licensee transfers the software to X for $10,000. The relevant question for our purposes is whether this transfer of the licensed software is valid.
>
> Under current law, the answer . . . is likely to be controlled by federal law, which prohibits a transfer of a non-exclusive license without the consent of the licensor. Putting the preemption issues aside . . . [O]ne way of addressing the problem reflects a sale of goods model, while the other refers to a model centered on the information (the software) and the attempted transfer of a contract right to use that software. The sale of goods approach yields an image that the key transfer is a transfer of the disk containing the software and that the enforceability of a restriction on this transfer faces up against 'traditional' doctrines against restraints on alienation, precluding the enforcement of an anti-transfer clause in the sale of an item of goods. This doctrine, as applied to personal

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merger or other transaction. Thus, it is not surprising that the Society of Information Management, *see supra* note 25, lobbied for a change in state law:

> Finally, quite independent of federal law considerations, the "mass market" exception is unfair because it excludes software purchased by businesses in quantities of more than one copy (via the "mass market" definition). As noted by Drafting Committee member David Rice in his December 8, 1997, memo to the ALI, this will effectively preclude the sale of one's business without first obtaining the consent of every software licensor, which would create an enormous due diligence burden.

Letter from SIM to Carlyle C. Ring, Jr. (later dated March 23, 1998) (visited April 14, 2000) <http://www.2bguide.com/docs/simposit.html>. In reality, many mass-market licenses are transferable, but SIM's point can as easily be made (and was so made) as to commercial licenses in mergers and other acquisitions. However, the fact that due diligence is a burden does not and should not change applicable contract law for commercial contracts, leases or licenses. *See, e.g.*, Perlman v. Catapult Entertainment (In re Catapult Entertainment), 165 F.3d 747(9th Cir. 1999) (As part of its reorganization in bankruptcy, licensee sought to assume 140 executory contracts, including the non-exclusive patent license at issue. The court determined the license, per *Everex*, to be personal and assignable only with the consent of the licensor. Given the licensor's objection to the assignment, the court refused to allow it even though the transfer would have been to the licensee itself, as debtor in possession).

> property, argues that a seller cannot sell an item to a buyer and also restrict the buyer's ability to resell it. Yet, it is highly unlikely that Licensor would be concerned about Licensee's transfer of the disk (the goods) electronically cleansed of the software. Licensor is concerned, instead, about the transfer of the *right* to use the software . . . .
>
> Thus, the alternative view of the transaction is that it entailed a transfer of information (the software) subject to a contractual license, and that the transaction deals with the information, not primarily the diskette. As to restrictions on the transfer of copyrighted information and of contract rights, the common law applies a much different approach than with respect to resale of goods. This different approach is described in part in the *Restatement (Second) of Contracts*.
>
> . . . In this case, then, failing to shed an inappropriate sale-of-goods centered model yields a wrong analysis or, at least, an analysis that misstates the underlying principles pertinent to a contractual transfer of a license agreement.[114]

Other examples of the problems created in the information industries by a goods-centered analysis allowing transfer notwithstanding a contrary contract, are easy to see:

- Software company #1 is not willing to license its software to fierce competitor software company #2. #1 licenses to X instead with a prohibition against transfer. X promptly transfers the software to #1's fierce competitor, #2.

- Licensor grants a license to a company with 10 employees and charges the "small company" license fee; the license prohibits transfer. Small company transfers the license to, or merges with, a multi-national corporation and the transferee now has 100,000 employees, all of whom proceed to use the software without paying the "large company" license fee.

Federal law would enforce the above contractual prohibitions against transfer in order to protect the intellectual property rights of Software Company #1 and the Licensor, and the restrictions would also be enforceable under state common law.[115] UCITA Section 503 also enforces the contractual agreement, including in the case of mass-market licenses.

Some argued that an exception should be made for mass-market licenses because the identity of the licensee may not there be as important to the licensor as in purely commercial licenses. It is true that some licensors do not care if a mass-market license is transferred - that is why some mass-market licenses expressly allow transfer if no copy or documentation is retained

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[114] Raymond T. Nimmer, *Images and Contract Law—What Law Applies to Transactions in Information*, 36 HOUS. L. REV. 1, 22-23 (1999).

[115] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 322 (1979). *See also supra* note 108 and accompanying text.

by the transferor. But a blanket legal rule to that effect would nevertheless be inappropriate for the reasons stated above and because any such rule would be inappropriately simplistic. Dean Nimmer explains in draft comments to Section 503:

> Mass market licenses present a different context. Transfer of the license will frequently not materially increase the burden or risk imposed on the other party. . . . In other cases, however, a transfer may impair the licensor's interests. For example, if a mass market license for income tax reporting software includes a promise by the licensor to indemnify the licensee against IRS penalties incurred because of defects in the software calculations, repeated transfers of the license multiple times during a tax preparation season may increase the burden or risk.[116]

UCITA does provide a special rule for mass-market licenses. Under Section 503(4), a term prohibiting transfer of a contractual interest must be conspicuous. The purpose is to alert mass-market licensees to the prohibition. Given the context (i.e., that the norm in all licenses is to prohibit transfer, that the focus in computer information contracts is on contractual rights instead of goods, and that, typically, computer information contracts involve copyrighted works), the justification for this protection is questionable. But it is nevertheless a good rule: most consumers and even many mass-market licensees are not familiar with all intellectual property rules. After all, that is why UCITA is needed: most of society is conditioned to think in terms of goods and the attendant rights that go with them. When a product is computer information, the required shift in thinking is aided by help from UCITA.

6. Section 704: Refusal of Defective Tender

UCITA Section 704 blends common law and UCC Article 2 rules regarding tender of a copy. If a party tenders an item that *substantially complies* with the contract, under the common law the tender is good. Article 2-601 sets up a *different* rule in a *narrow* circumstance: the buyer may reject a tender if the delivery fails to conform in any respect to the contract. If the buyer exercises this right, it must either accept or reject the whole or accept any commercial units and reject the rest. This is an all or nothing proposition for single delivery contracts that do not have commercial units; it is known as the "perfect tender" rule. The rule is unique to UCC Article 2 and may be varied by agreement.[117]

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[116] *See* U.C.I.T.A. § 503 cmt. 3 (Draft Comments dated October 15, 1999) (available at <http://www.law.upenn.edu/bll/ulc/ulc_frame.htm>).

[117] *See* Thomas M. Quinn, QUINN'S UCC COMMENTARY AND LAW DIGEST (2d ed.) § 2-449:

> So, too, the perfect tender rule or, indeed, the right of rejection itself may be varied by agreement. Section 2-601 provides expressly that rejection is available for "any" nonconformity "unless otherwise agreed under the sections on contractual limitations of remedy" (Sections 2-178 and 2-719).

Despite this ability to vary the perfect tender rule by agreement, a representative for some consumers criticized the perfect tender rule in UCITA for not prohibiting variation by agreement. *See* Letter by Gail

Even in Article 2, however, the "perfect tender" rule does not apply to installment contracts. In fact, the actual "perfect" tender right is so restricted by exceptions and case law that authoritative commentators have concluded that that there would not really be a change in Article 2 if it were revised to reflect a material or substantial conformance rule, i.e. if its literal text were revised to reflect the UCITA rule. These commentators note:

> Section 2-601, the only section applicable to one-shot contracts, states a "perfect-tender" rule . . . . *We are skeptical of the real importance of the perfect tender rule. Even before enactment of the Code, the perfect tender rule was in decline, and the Code erodes the rule.* First of all, Section 2-601 renders the perfect tender rule inapplicable to installment contracts, and 2-612 permits rejection only if 'the non-conformity substantially impairs the value of that installment . . . .' The seller's right to cure a defective tender, in 2-508 . . .is a further restriction upon . . . 2-601. Additional restrictions . . . may be found in 2-504 (an improper shipment contract which causes a late delivery is grounds for rejection only if 'material delay or loss ensues') and in the Code's general invitations to use trade usage, course of dealing, and course of performance in the interpretation of contracts. If trade usage states that nineteen or twenty-one items are the equivalent of twenty items, a buyer who receives nineteen on a contract calling for twenty has received a perfect tender . . . .
>
> The courts may also deny rejection for what they regard as insubstantial defects by manipulating the procedural requirements for rejection. That is, if the court concludes that a buyer ought to be denied its right to reject because it has suffered no or only minor damage, the court might arrive at that conclusion by finding that the buyer failed to make an effective rejection . . . .
>
> *We conclude, and the cases decided to date suggest, that the Code changes and the courts' manipulation have so eroded the perfect tender rule that the law would be little changed if 2-601 gave the right to reject only upon "substantial" non-conformity. Of the reported Code cases on rejection, none that we have found actually grants rejection on what could fairly be called an insubstantial nonconformity, despite language in some cases allowing such rejection.*[118]

Hillebrand of Consumers Union to Uniform Law Commissioners at 4 (June 21, 1999) (on file with the author).

[118] JAMES WHITE & ROBERT SUMMERS, UNIFORM COMMERCIAL CODE at 440-41 (West 1995) (emphasis added).

Despite the narrow scope of the rule and the fact that it does not exist in the common law, some commentators characterize UCITA as "abandoning" what would otherwise be, impliedly, a robust perfect tender rule for all contract law.[119] For the reasons noted, UCITA does not adopt

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[119] One commentator writes:

> UCITA [Section 704(b)] is the "perfect tender rule," which allows the customer to reject a product if, on a quick inspection, the customer discovers a nonconformity between the product and the contract. *The perfect tender rule is a longstanding, basic rule of contract law.* The Response says that the perfect tender rule "makes no sense for custom software." Yes, sales law generally makes exceptions for custom work. But what about all those non-customized software products that are not mass-market? Complex products (like airplanes and nuclear reactor turbines) are subject to the perfect tender rule today. *UCITA takes this right away from all non-mass-market software customers*.

Cem Kaner, *Restricting Competition in the Software Industry: Impact of the Pending Revisions to the Uniform Commercial Code*, (visited April 13, 2000) <http://www.badsoftware.com/nader.html> (emphasis added). *See also* Letter from Riva F. Kinstlick of Prudential Insurance Company of America to Mr. Albert Burstein Chairman, New Jersey Law Revision Commission (Nov. 15, 1999) (on file with the author). Regarding perfect tender, the letter provides as follows:

> UCITA would abandon the seller's obligation to deliver a working product. If the software failed to conform to the contract, only a "mass-market" customer (narrowly defined) might refuse to accept it. A commercial licensee such as Prudential, or even a small business or professional corporation, might refuse the tender *only* if it constituted a material breach.

This repeats a letter to NCCUSL from Security Mutual Life, which listed the UCITA perfect tender rule among other UCITA rules alleged to "dramatically shift" the balance of buyers' and sellers' interests in favor of sellers:

> 3. Abandonment of the seller's obligation to deliver a working product ("Perfect Tender").
>
> If the software fails to conform to the contract, only a "mass -market" customer may refuse to accept it. The mass-market definition has been very carefully crafted to exclude entire market segments. For example, most businesses would lose the protection they have under current law.

Letter from Daniel J. Cerny, Chief Information Officer, Security Mutual Life to NCCUSL (letter dated May 26, 1999) (visited April 13, 2000) <http://www.2bguide.com/docs/52699dc.html>.

Both of the insurance company letters repeat a form letter offered by the Society of Information Management, a group of information management officers. *See* Letter from Terrence P. Maher, former member of the ABA's subcommittee on software licensing, to SIM Headquarters (June 3, 1999) (visited April 14, 2000) <http://www.2bguide.com/docs/6399tm.html>. Inaccuracies in the SIM form letter were addressed in Mr. Maher's letter. Mr. Maher, an attorney who counsels both licensors and licensees with respect to software and information licensing transactions, requested that SIM post his letter to better provide SIM's members accurate information about UCITA; SIM refused to do so. Mr. Maher's response regarding the perfect tender point is as follows:

the perfect tender rule but instead follows the common law rule and the *actual* UCC Article 2 rule by adopting a "material breach" standard.[120]

Exception, however, is made for mass-market transactions, where UCITA Section 703(b) adopts the "perfect tender" rule. Most such transactions involve a single delivery of a copy so UCITA's application of the rule is similar to its application under Article 2 (the Article 2 rule does not apply to installment contracts). A mass-market licensee may refuse the tender if it does not conform to the contract. If the refusal is rightful (i.e. the tender does not conform to the contract), then the mass-market licensee may also cancel the contract even if the breach is immaterial.[121] Adoption of any form of the perfect tender rule in UCITA is ironic, given that UCITA covers common law industries that are not subject to the perfect tender rule[122] and that Article 2 itself is being revised to erode the rule.[123]

> 3. *UCITA "abandons the seller's obligation to deliver a working product ("perfect tender").*
>
> - "Perfect" tender can never be the norm where software (often millions of lines of code) is involved. "Perfect" tender is largely a myth in any case: the common law does not even contain the concept and instead uses the UCITA rule. While the statutory text of Article 2 uses the phrase "perfect tender," case law does not actually require it (one tiny scratch on a car does not entitle the buyer to reject the tender). Also, proposed revisions to Article 2 further weaken the "perfect" tender rule by granting the seller an expanded cure right. Ironically, UCITA (Section 704) does provide perfect tender for mass market licenses: this was intended as a consumer and small business protection, but SIM companies will nevertheless benefit from it.
>
> - UCITA's rule is simple and sensible: a default in performance, however minor, is a breach of contract that may have a remedy in damages. But minor problems do not warrant rejection or cancellation of the entire contract. That rule is the familiar common-law and common-sense standard of "substantial performance."

Id.

[120] U.C.I.T.A. § 704(a) (1999).

[121] U.C.I.T.A. § 704(d) (1999).

[122] *See, e.g.*, Raymond T. Nimmer, *Images and Contract Law—What Law Applies to Transactions in Information*, 36 HOUS. L. REV.1 (1999) (arguing that the use of rules written for goods-based industries for information and services industries yields the wrong paradigm and wrong legal analysis). But for the questionable legal analysis employed by some courts that have viewed software delivered on a disk as a "good," all of the UCITA industries are common law industries, including the software industry, the data industry, the information industry, the electronic publishing industry, and the multi-media industry.

[123] *See* proposed revisions to UCC § 2-601 and other changes that expand or clarify the seller's right to cure in the November, 1999 Draft, *supra* note 62.

Why then, does UCITA adopt the "perfect" tender rule for mass-market licenses? The answer is consumer protection. One of the assumptions used in some consumer protection statutes is that certain transactions lack the economic stakes to make litigation an effective protection, thus creating the need for regulated outcomes.[124] When the low dollar amounts, retail store setting and routine contracts that typify mass-market transactions are involved, the perfect tender rule creates a form of buyer self-help, i.e. a swift and cheap means of avoiding litigation regarding non-conformities to a contract. UCITA's approach affords that remedy to the mass-market licensee. For other transactions, UCITA's approach avoids the inequities[125] that have kept common law courts from adopting the perfect tender rule and that have led (and will continue to lead) courts to apply the rule very narrowly, even when the rule does apply. The UCITA approach also provides more flexibility to non-mass-market licensees by allowing them to reject a nonconforming copy without rejecting the entire contract.[126]

Last, it is critical to note that UCITA customers who must accept a tender that materially conforms to the contract are not required to forfeit their right to damages for any nonconformity. UCITA contains a protection that does not appear in the common law: Section 703 (b) provides that if a non-mass-market licensee (i.e. a licensee to which the perfect tender rule does not apply) is required to accept an immaterial nonconformity, the licensor must promptly attempt to cure that nonconformity upon demand (assuming the cost of cure is not disproportionate). This protection does not appear in proposed revisions to Article 2 of the UCC even though the perfect tender rule there is applied to be, in effect, the same as the UCITA conforming tender rule.

In short, UCITA's conforming tender rule simply means that the parties have done enough to have a contract and that it would be inequitable to pretend that a contract has not been formed. However, if the customer has been damaged by an immaterial nonconforming tender, it still is entitled to its damages for the noncomformities and may also demand that the licensor attempt a cure in appropriate circumstances. This is an equitable result for all parties.

B. Consumer Contract Rules

Consistent with consumer protection statutes, some of UCITA's protections only pertain to consumers. These consumer protections are discussed in this section.

1. Section 104: Opt-in or Out Agreements - Consumer Protections are Preserved

As previously noted, the first sentence of Section 104(1)[127] states the logical rule that parties cannot make an agreement if the law does not so allow, i.e., if parties want to opt into or

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[124] *See, e.g.*, Nimmer, supra note 122, at 24 (citing John Hill, *Introduction to Consumer Law Symposium*)**.**

[125] *See* WHITE & SUMMERS, *supra* note 118.

[126] *See* U.C.I.T.A. § 705(1) (1999) (stating a party may refuse a tender of a copy which is a material breach as to that copy, but refusal of that tender does not cancel the contract).

[127] That sentence reads as follows: "(1) An agreement that this [Act] governs a transaction does not alter the applicability of any rule or procedure that may not be varied by agreement of the parties or that may

out of UCITA but applicable statutes cannot be varied, then they cannot opt in or out as to issues controlled by those unalterable rules. Consumer protections statutes (or administrative rules) are among the items that cannot be varied.[128]

2. Section 105: Transactions Subject to Other State Law - Consumer Protections are Preserved

UCITA preserves all state consumer protection statutes:

> Except as otherwise provided in subsection (d), if this [Act] or a term of a contract under this [Act] conflicts with a consumer protection statute [or administrative rule], the consumer protection statute [or rule] governs.[129]

This follows UCC Article 2-102, which provides that Article 2 does not "impair or repeal any statute regulating sales to consumers."[130] Accordingly, parties making consumer contracts must examine the consumer protection statutes of each jurisdiction applicable to the transaction. This is obviously a tremendous undertaking, but the task is no different than that required under existing UCC Article 2. Article 2 promoted uniformity by relieving parties and practitioners from the need to discover all of the common law in each jurisdiction regarding consumer contracts. However, it did not relieve them of the need to examine consumer protection statutes. Neither does UCITA.

UCITA does enable electronic commerce by updating selected procedural aspects of consumer protections statutes. Section 105(d) provides as follows:

> If a law of this State in effect on the effective date of this [Act] applies to a transaction governed by this [Act], the following rules apply:
>
> (1) A requirement that a term, waiver, notice, or disclaimer be in a writing is satisfied by a record.
>
> (2) A requirement that a record, writing, or term be signed is satisfied by an authentication.
>
> (3) A requirement that a term be conspicuous, or the like, is satisfied by a term that is conspicuous under this [Act].

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be varied only in a manner specified by the rule or procedure, including a consumer protection statute [or administrative rule]." U.C.I.T.A. § 104(1) (1999).

[128] *Id.*

[129] U.C.I.T.A. § 105(c) (1999).

[130] *See* U.C.C. § 2-102 (1998).

> (4) A requirement of consent or agreement to a term is satisfied by a manifestation of assent to the term in accordance with this [Act].[131]

These sections are intentionally very limited. For example, under subsection (d)(1) only the "writing" requirement is satisfied by an electronic record, *not* substantive requirements concerning the content, timing or format of a notice or waiver. Thus, if a consumer protection statute requires a written notice to be in red, bold letters, those requirements are not displaced. In order to address concerns expressed by some attorneys general, the comments to UCITA make this very clear:

> This rule does not, of course, affect other type of disclosure rules. For example, a consumer protection rule which requires disclosure before a transaction occurs is not affected. Similarly unaffected is any rule that refers to the content of the required disclosure or which regulates the specific timing, form or manner in which it must be made. This over-ride does not apply to statutes that relate to advertising or the like – such statutes are not within the scope of this Act or are preserved. [132]

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[131] U.C.I.T.A. § 105(d) (1999).

[132] U.C.I.T.A. § 105 cmt. 5 (Draft Comments dated October 15, 1999) (available at <http://www.law.upenn.edu/bll/ulc/ulc_frame.htm>). The state attorneys general expressed this concern:

> One of the most serious of our concerns is Section 105(d). This provision preempts any existing state law requirement applicable to a UCITA transaction that a term be conspicuously disclosed and replaces the preempted provision with UCITA's own definition of conspicuous in Section 102(15). We are concerned that [S]ection 105(d) preempts long-standing consumer protection laws relating to the time, place and manner in which important disclosures are made and replaces those laws with a standard which is inconsistent with the fundamental principles underlying the laws it preempts.

See Letter from various State Attorneys General to Gene LeBrun, President, NCCUSL, at 1 and 2 (letter dated July 23, 1999) (visited April 13, 2000) <http://www.2bguide.com/docs/799ags.html>. While this and other criticisms expressed by the attorneys general were addressed in a responsive letter from NCCUSL, that letter's explanation of the reason for addressing the "conspicuousness" issue is informative:

> As in the current UCC, UCITA provides a definition of "conspicuous." "Conspicuous" in e-commerce extends to the contrast for *notice* of the term and not to the time, manner and content of disclosures required by your state's law. In the sale of goods (UCC Article 2), "conspicuous" is defined by Article 1 (1-201(10)) in a similar way with safe harbors. I know of no case in which your state's consumer protection laws have conflicted with the Article 1 definition operative for the sale of goods. There is no reason to believe that a similar safe harbor definition of "conspicuous" for computer information would have any different result.

Each of the procedural provisions of consumer protection statutes that are enabled for electronic commerce in UCITA are also the subject of extensive definitions or protections in UCITA. "Record" is defined in Section 102(a)(54) to reflect definitions in UCC Article 5-102 and in amended UCC Article 9-102, and proposed revisions to UCC Article 1-201.[133] "Authentication" is defined in UCITA Section 102(a)(6) to reflect traditional definitions of "signature," as updated for electronic commerce.

"Conspicuous" is defined in Section 102(a)(14) to reflect the definition in UCC Article 1-201(10), as updated for electronic commerce. The comments address a consumer concern by making it clear that the UCITA rule operates only when the consumer statute requires something to be "conspicuous" but does not define what that means. If the other law contains a definition, that other law controls.[134]

Notwithstanding the fact that the UCC Article 1 definition has been the law for over fifty years for all commercial contracts, including common law and Article 2 contracts, some attorneys general have criticized the UCITA definition of "conspicuous," which updates the Article 1 definition.[135] The suggestion of these attorneys general for a "contextual" definition

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> It is very probable that your current state rule on "conspicuous" notice is paper focused and may thus be inapt in e-commerce. Also, if your state has a digital signature act, there may already be uncertainty as to the application of the concept "conspicuous" notice to e-commerce.

See Letter from Carlyle Ring, Jr. to W. A. Drew Edmondson, Attorney General of Oklahoma, at 5 (letter dated August 27, 1999) (visited April 14,2000) <http://www.2bguide.com/docs/crag899.doc>. As to the above concern, the draft comments buttress that response by making it clear that the statutory text is limited. *See* U.C.I.T.A. § 105(d) and cmt. 5 (Draft Comments dated October 15, 1999) (available at <http://www.law.upenn.edu/bll/ulc/ulc_frame.htm>).

[133] For a draft of the revisions proposed to Article 1, *see* <http://www.law.upenn.edu/bll/ulc/ulc_frame.htm>.

[134] The initial draft of the Official Comments provides: "Subsection (d)(3) updates the concept of conspicuousness when used, *but not otherwise defined, in other law.*" U.C.I.T.A. § 105 cmt. 5 (Draft Comments dated October 15, 1999) (available at <http://www.law.upenn.edu/bll/ulc/ulc_frame.htm>) (emphasis added). The comment resolves this objection: "If a state defines conspicuousness more effectively for consumers than the narrow safe harbor definition in UCITA, that state's judgment should not be overturned by UCITA." Letter by Gail Hillebrand of Consumers Union to Uniform Law Commissioners at 4 (June 21, 1999) (on file with author).

[135] The UCITA definition of "conspicuous" is as follows:

> "Conspicuous," with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. A term in an electronic record intended to evoke a response by an electronic agent is conspicuous if it is presented in a form that would enable a reasonably configured electronic agent to take it into account or react to it without review of the record by an individual. Conspicuous terms include the following:
>
> (A) with respect to a person:

of the type used in consumer protection statutes has been roundly criticized even for consumer contracts.[136] While these criticisms might be appropriate if UCITA (and Article 1) were designed to be consumer protection statutes, neither code (nor UCC Article 2) is so designed: UCITA is a commercial code whose purpose is to facilitate commerce.[137] As does the UCC,

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> (i) a heading in capitals in a size equal to or greater than, or in contrasting type, font, or color to, the surrounding text;
>
> (ii) language in the body of a record or display in larger or other contrasting type, font, or color or set off from the surrounding text by symbols or other marks that draw attention to the language; and
>
> (iii) a term prominently referenced in an electronic record or display which is readily accessible or reviewable from the record or display; and
>
> (B) with respect to a person or an electronic agent, a term or reference to a term that is so placed in a record or display that the person or electronic agent cannot proceed without taking action with respect to the particular term or reference.

U.C.I.T.A. § 102(a)(14) (1999). The UCC defines "conspicuous" as follows:

> "Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against which it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is conspicuous if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous". Whether a term or clause is "conspicuous" or not is for decision by the court.

U.C.C. § 1-201(10) (1981).

[136] *See, e.g.*, FTC request for public comment on its proposed interpretation of Rules and Guides to Electronic Media at 63 Fed. Reg.. 24,996 (1998) and the numerous problems with the FTC's proposed treatment of "conspicuous," many of which concepts (and consequent problems) are reflected in the attorneys general letter. A sample explanation of some of the problems created by the FTC/attorneys general approach can be found at <http://www.ftc.gov/bcp/rulemaking/elecmedia/comments/comment054.htm>.

[137] The purposes and policies of the Uniform Commercial Code are:

> (a) to simplify, clarify and modernize the law governing commercial transactions;
>
> (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
>
> (c) to make uniform the law among the various jurisdictions.

U.C.C. § 1-102(2) (1981). UCITA's purposes are similar:

> (1) support and facilitate the realization of the full potential of computer information transactions;

UCITA also contains consumer protections - but they are not the primary purpose of either code, and if both codes were converted to consumer protection statutes, there would be no commercial codes. Given the numerous consumer protection statutes that exist today and that are preserved by UCITA (and the UCC), there simply is no demonstrated need to abandon or refuse to create much needed commercial codes.

Last, "Manifestation of Assent" is defined in Section 112 to reflect and adapt the *Restatement (Second) of Contracts* Section 19 and to codify concepts of procedural unconscionability. For example, before a party can manifest assent to a term or record, it must have an "opportunity to review" that record or term.[138] That concept includes a fair chance to know about and see the record or term:

> How a record is made available for review differs for electronic and paper records. In both, however, a record is not available for review if access to it is so time-consuming or cumbersome as to effectively preclude review. It must be presented in a way as to reasonably permit review. In an electronic system, a record promptly accessible through an electronic link ordinarily qualifies. Actions that comply with federal or other applicable consumer laws that require making contract terms or disclosure available, or that provide standards for doing so, satisfy this requirement.[139]

In short, UCITA makes a narrow change to procedural aspects of consumer statutes while saving all substantive provisions and the procedural provisions regarding the content, timing and specific nature of disclosures and the like. Lest even this be viewed as too broad an approach by any state, a legislative note to UCITA allows states to list any procedural statutes that they do not wish to be disturbed at all, even for limited purposes.[140]

3. Section 109: Choice of Law (and Choice of Forum)

> (2) clarify the law governing computer information transactions;
>
> (3) enable expanding commercial practice in computer information transactions by commercial usage and agreement of the parties; and
>
> (4) promote uniformity of the law with respect to the subject matter of this [Act] among States that enact it.

U.C.I.T.A. § 106(a) (1999).

[138] U.C.I.T.A. § 112(d) (1999).

[139] U.C.I.T.A. § 112(e) cmt. 8(b) (Draft Comments dated October 15, 1999) (available at <http://www.law.upenn.edu/bll/ulc/ulc_frame.htm>). *See also supra* note 89 and surrounding text for a discussion of a case enforcing a contract when the plaintiffs were free to scroll through computer screens that presented the terms of their contracts before clicking their agreement.

[140] *See* the legislative note following U.C.I.T.A. § 105(e) (1999), which provides as follows: "Legislative Note: If there are any consumer protection laws that should be excepted from the electronic commerce rules in subsection (d), those laws should be excluded from the operation of that subsection."

One of the most critical issues in modern commerce is what law applies to a given transaction. Law firms routinely refuse to give "clean" opinions on the enforceability of choice-of-law clauses because the jurisprudence can be chaotic. For example, the following illustrates the confusion with the rule in UCC Article 1:

> Determining what law applies in a given situation is a problem that anyone can understand but only a lawyer can solve. Suppose, for example, the buyer lives in state A, the seller in state B, and the goods are destined for delivery in state C . . . The basic Code rule . . . provides that 'when a transaction bears a reasonable relationship to this state and also to another state or nation, the parties may agree that the law either of this state or of such other state or nation shall govern. . . .
>
> So the parties can pick and choose the law they prefer. . . . That is the general idea.
>
> But suppose they opt for the law of state D? It happens. A recent illustration of that occurred in New Hampshire. Result: The agreement as to the law of state D failed to work.
>
> . . . Now what? That was easy to decide, too, since the Code goes on to provide that 'failing such agreement this Act applies to transactions bearing an appropriate relation to this state.' Meaning what? Meaning that since the case was being tried in New Hampshire and since New Hampshire was "reasonably related" to the transaction, the law of New Hampshire applied.
>
> But a number of other states were also "reasonably related" to the transaction. True enough . . . . Anyone for a quiet game of Russian roulette?[141]

Why would parties choose "state D's" law to apply? Assume parties in Sweden and California: each does not know the other's law but they do know that law in New York is well-developed regarding the subject matter of their contract. Accordingly, they choose New York

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[141] THOMAS QUINN, QUINN'S UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST at 1-16 and 1-17 (2d ed. 1991). Also, *compare*, for example, the varying rules (and cases interpreting them) in UCC Article 1-105 ("when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties") *with* revised UCC Article 5-116 (parties may choose applicable law or letter of credit may state it, and it "need not bear any relation to the transaction") *and* RESTATEMENT (SECOND) CONFLICT OF LAWS § 187 (1971) (parties may contract for the law to govern their contractual rights and duties without restriction if the issue can be resolved by contract; if it cannot, the contractual choice will nevertheless be honored unless either (1) the chosen state has no substantial relationship to the parties or the transaction *and there is no other reasonable basis for the parties' choice*, or (2) application of the chosen law would be contrary to a fundamental policy of a state with a materially greater interest) (emphasis added).

law. In the alternative, assume that the same parties know nothing about New York law but seek a generally respected jurisdiction in which neither party will have a knowledge advantage. This kind of compromise, which involves choosing a law with which neither party is fully familiar but which puts both parties on an equal footing, will become increasingly necessary in a global economy.

Choice-of-law clauses are enforced more often than not, including in standard form contracts.[142] UCITA Section 109(a) makes a very important contribution by stating a clear rule for contracts between commercial parties: they may agree on the applicable law, subject, of course, to UCITA Section 105 which allows invalidation of unconscionable terms or terms that violate a fundamental public policy, and UCITA Section 114, which imposes on every contract, a duty of good faith and fair dealing.

For consumer contracts, however, a choice of law clause is not enforceable to the extent it would vary a rule that is nonvariable under the law of the jurisdiction whose law would apply under the default rules (which apply in the absence of an agreement). This is a beneficial consumer rule.[143] The U.S. Comptroller of the Currency, for example, would view it as too

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[142] *See, e.g.*, RESTATEMENT (SECOND) CONFLICT OF LAWS § 187 cmt. b (1971). Standard form contracts can sometimes fall into the category of "adhesion" contracts. In discussing adhesion contracts, the *Restatement* comment notes: "Choice-of-law provisions contained in such contracts are usually respected. Nevertheless, the forum will scrutinize such contracts with care . . . ."

[143] Some opponents of UCITA criticize Section 109 as not containing a new consumer protection; the claim is that choice of law rules are already uniformly subject to mandatory consumer rules. *See* Letter from Jean Braucher and Mark Budritz to Gene N. LeBrun, President of NCCUSL, at 2 and 4 [hereinafter *Braucher Letter*] (on file with the author) (stating that "UCITA makes a bow to existing common law authority by codifying a consumer exception making a choice of law unenforceable if it would vary a mandatory consumer rule that would otherwise apply. This is not a new consumer protection . . .").

The legal accuracy of the statement is questionable. It is true that the UCITA rule is similar to the *Restatement* rule. *See supra* notes 140-41 and accompanying text. Under the UCITA consumer rule and the *Restatement* rule, a choice-of-law clause that cannot be the subject of a contract will not be enforced. In such cases under UCITA, however, the choice-of-law clause is not enforceable at all and the default rules are triggered. Under the *Restatement*, the choice-of-law clause will still be honored if the chosen state has a substantial relationship to the parties or the transaction *or* the choice is not contrary to a fundamental policy of a state with a materially greater interest. *See* RESTATEMENT (SECOND) CONFLICT OF LAWS § 187(2). There should be many instances, then, in which the *Restatement* rule will allow enforcement of a choice-of-law clause in a consumer contract but UCITA will not. Accordingly, to say that "choice of law rules are already uniformly subject to mandatory consumer rules" would appear to be wrong or to overstate existing law. S*ee Braucher Letter, supra*.

If the claim made in the *Braucher Letter* is accurate, i.e. that choice-of-law provisions are already firmly and uniformly subject to contrary consumer rules, then the Office of the Comptroller of the Currency would appear to be wrong and the authorities cited by it regarding state law inaccurate. *See infra* note 143. In fact, it does not appear that the question is uniformly settled among the states or internationally, notwithstanding the *Braucher Letter*. The OCC position illustrates both the uncertainty that characterizes current law and the need for choice-of-law provisions. This need has been echoed by others:

protective of the consumer.[144] There is merit to the Comptroller's view, especially when balanced against the competing policy of maintaining the Internet as a place where small companies may compete with large companies on a level playing field.[145] As explained by the Clinton Administration:

> In order to protect consumers online, the global community must address complex issues involving choice of law and jurisdiction – how to decide where a virtual transaction takes place and what consumer protection laws apply.

U.S. GOVERNMENT WORKING GROUP ON ELECTRONIC COMMERCE, FIRST ANNUAL REPORT, 27 (Nov. 1998) (available at <http://www.doc.gov/ecommerce/E-comm.pdf>).

[144] That consumer contracts can be the appropriate subject of choice-of-law clauses can be seen in actions taken by the Comptroller of the Currency, the regulator for national banks. In 1998 it issued an interpretive letter concluding that a national bank was empowered to create a subsidiary to be a Utah certification authority and repository for certificates used to verify digital signatures. *See* OCC Letter regarding Operating Subsidiary Application by Zions First National Bank, Salt Lake City, Utah, Application Control N. 97-WO-08-0006, signed by Julie Williams, Chief Counsel (Jan. 12, 1998) (on file with the author). Utah is one of the few states that licenses certification authorities to issue certificates regarding digital signatures that require and rely on public-private key encryption technology. The letter is particularly significant because it recognizes the "new risks that arise from a new use of technology," and goes to great lengths to explain the risk reduction program in which the subsidiary must engage.

However, the risk reduction program touches on a very old legal debate: contractual choice of law provisions. As does UCITA, the Comptroller recognizes that settling the question of what law will apply to a contract is critical for handling these new risks. The Comptroller included as one of the "legal devices to control and limit [the subsidiary's] risk of liability," use by the subsidiary of a choice of Utah law in all of its contracts. While most of the initial contracts were to be between commercial parties, the Comptroller recognized that the subsidiary would eventually do business with consumers and required inclusion of choice-of-law provisions in the consumer contracts as well. The Comptroller acknowledge the uncertainty of existing law regarding the enforceability of choice-of-law clauses, but takes the position that choice-of-law provisions have long been enforced by state courts even as to consumer issues as important as usury. *See* OCC Letter to Jeremy T. Rosenblum (Feb. 17, 1998) (on file with the author) (regarding the ability of interstate national bank to charge the rate of interest allowed in the bank's home state under federal and state law). Noting that the ability of the subsidiary to control its liability by contract was not complete (because of the uncertainty regarding enforcement of choice-of-law clauses), the Comptroller also required the subsidiary to take "appropriate steps to manage its liability," such as by use of non-contractual disclaimers in the company's "certificate practice statement." *Id.* at 7.

[145] One of the primary benefits of the Internet is the fact that it affords the same "shelf space" to small vendors and sole proprietors as it affords to large, well-funded corporations. Instead of establishing, qualifying for or funding an extensive retail distribution system, the small vendor need simply establish a web site:

> My second jarring event was a chat with my brother Richard. He runs a small inn in Cape May, N.J. In the past year, he started advertising on the Internet with his own Web site. He's never seen anything like it; almost a fifth of his customers found the inn online. No magazine or newspaper ad ever showed remotely similar results. And the Internet is

> In this emerging digital marketplace, anyone with a good idea and a little software can set up shop, and become the corner store for the entire planet. This capability promises to unleash a revolution in entrepreneurship and innovation – a cascade of new products and services that today we can scarcely imagine. [146]

The same issues are being debated in other countries:

> Lands' End Inc., the Dodgeville, Wis., mail-order retailer . . . sells its classic chinos and cardigans in other countries by mail order and via the Internet.
>
> But the company is finding reason to question the logic of a global or even pan-European retail presence since running afoul of a German law banning marketing gimmicks such as an unconditional life-time guarantee—which happens to be one of Lands End's guiding principles. . . .
>
> Moreover, a new attempt by the EU to increase consumer protection in electronic commerce could make matters worse. A draft regulation now being debated in Brussels and other European capitals would requires vendors to comply with 15 different, and sometimes bizarre, sets of national rules on consumer protection – ranging from dozens of restrictions on advertising to France's requirement that all contracts must be concluded in French regardless of whether businesses intend to sell goods for export to France at all.[147]

Clearly, countries and U.S. states that desire to participate in global commerce will need to re-think which of their consumer protections actually need to be particularized to each jurisdiction. UCITA protects consumers in states that adopt it by preserving nonvariable consumer rules. Which and how many of such rules each state should retain is a separate and important question:

> inexpensive. He paid less than $1,000 to a small company in Indianapolis to create and maintain the site for a year. "On the Internet, you compete equally [with bigger inns and hotels]," he says. "You have a page, and they have a page."

Robert J. Samuelson, *Down with The Media Elite!?*, NEWSWEEK,July 13, 1998, at 47. (discussing loss of control by old media through new media).

[146] U.S. GOVERNMENT WORKING GROUP ON ELECTRONIC COMMERCE, FIRST ANNUAL REPORT at i (Nov. 1998) (available at <http://www.doc.gov/ecommerce/E-comm.pdf>). In keeping with this insight, the Clinton Administration included in its five issues for focus in 1999, "facilitating small business and entrepreneurial use of the Internet and electronic commerce." *Id.* at v.

[147] Brandon Mitchener, *Border Crossings*, THE WALL ST. J., Nov. 22, 1999, at R41.

> [Lands' End] is mocking German regulators in combative newspaper ads saying "Advertisement forbidden in Germany" and is considering an appeal of the ban [on advertising the Lands' End lifetime guarantee] to the European Court of Justice. . . .
>
> [A spokesman for a consumer group that seeks to prohibit Lands' End from honoring its guarantee in Germany] concedes that the German law might be an obstacle for non-German companies wanting to sell wares under the same conditions world-wide. Moreover, he says he's all for bringing divergent European consumer-protection laws more in line with one another.
>
> For now, however, he says Lands' End had better play by the rules. "As long as the law is there," he says, "they have to abide by it."[148]

Also a separate question is whether the UCITA rule will prove to be too protective in terms of its adverse impact on consumer choice and the compliance costs it will add to the provision of computer information and services, or its adverse impact on small businesses. The UCITA policy decision, however, is that these issues are less important than consumer protection.

Even so, the UCITA consumer protection has been criticized as not providing protection because it can be "eliminated by means of a choice of forum clause."[149] This would not appear to be accurate. Agreements regarding a choice of forum should not affect a valid choice of law clause. Courts in the jurisdiction where venue is laid routinely judge contracts under the laws of other jurisdictions if the contract contains an enforceable choice-of-law clause.

It would seem that the real objection by such critics is to UCITA's choice-of-forum rule. That rule is set forth in Section 110 which provides that the "parties in their agreement may choose an exclusive judicial forum unless the choice is unreasonable and unjust." This is the

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[148] *Id.*

[149] *See Braucher Letter, supra* note 142, which states:

> This is not a new consumer protection, and any benefit from this consumer rule can be eliminated by means of a choice of forum clause. Section 110 on choice of forum has no consumer rule and permits a vendor to choose any state as the exclusive judicial forum if it has a commercial purpose for doing so. *See* Reporter's Note 3, Section 110. Presumably a vendor's desire to minimize its own litigation costs would be a valid commercial purpose under this section, so that the cost of litigating in a remote forum would be shifted to the consumer purchaser. As a practical matter, most consumers would be denied any relief by choices of remote jurisdictions. Reporter's Note 3 shows no sympathy for this problem, stating, "a contractual choice of forum that responds to a valid commercial purpose is not invalid simply because it has an adverse effect on a party, even if bargaining power is unequal."

rule adopted by the U.S. Supreme Court in a series of decisions, one of which is *Carnival Cruise Lines, Inc. v. Shute*.[150] There, the Court considered a claim by a Washington resident that the choice of a forum clause contained in a standard form cruise contract specifying a Florida forum should not be enforced. The Court's comments are instructive as to that contract and for electronic commerce:

> [It would] be entirely unreasonable to assume that a cruise passenger would or could negotiate the terms of a forum clause in a routine commercial cruise ticket form. Nevertheless, including a reasonable forum clause in such a form well may be permissible for several reasons. Because it is not unlikely that a mishap in a cruise could subject a cruise line to litigation in several different fora, the line has a special interest in limiting such fora. Moreover, a clause establishing [the forum] has the salutary effect of dispelling confusion as to where suits may be brought. . . . Furthermore, it is likely that passengers purchasing tickets containing a forum clause . . . benefit in the form of reduced fares reflecting the savings that the cruise line enjoys . . . .[151]

When an indirect attempt was made in recently proposed revisions to UCC Article 2 to avoid this rule,[152] Professor Barnett, Austin B. Fletcher Professor, Boston University School of Law, commented as follows:[153]

> As you well know . . . the Supreme Court in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), [has] spoken to these issues and, while some aspects of the *Carnival Cruise Lines* case rubbed some professors the wrong way, surreptitious Congressional action to reverse the forum selection portion of that case were quickly reversed by a later Congress. *See Compagno. v.*

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[150] 499 U.S. 585 (1991).

[151] *Carnival Cruise Lines,* 499 U.S. at 586.

[152] Various drafts of proposed Article 2 contained various tests proposed for determining when a conscionable term of a contract should nevertheless be made unenforceable. Proposed Section 2-206 contained one version of that test. When asked at the February, 1999 Drafting Committee meeting for an example of egregious judicial decisions Section 2-206 was intended to overrule or cure, the Drafting Committee could not provide any examples. However, with respect to the kinds of clauses Section 2-206 was intended to prohibit, one member of the Committee gave two examples, arbitration clauses and choice of forum clauses. Professor Barnett commented on that effort as set forth in the text accompanying the next footnote. *See infra* text accompanying note 152.

[153] *See* Letter from Professor Randy E. Barnett, Austin B. Fletcher Professor, Boston University School of Law, to Lawrence J. Bugge, Chairman, Article 2 Drafting Committee (March 9, 1999) (on file with the author). Professor Barnett, who was retained by Gateway 2000 to examine the 1999 draft of Sections 2-206 and 2-207(d) of revised Article 2, stated: "I must say that, upon reading these two provisions, I was very pleased to have been given this opportunity to do so since both are quite unwise." *Id.*

Commodore Cruise Line, Limited, 1994 WL 4629997 (E.D. La. 1994).[154]

The *Carnival* case concerned a suit by one consumer. Two recent class actions have reached the same conclusion, including for electronic consumer contracts.[155] In *Caspi v. Microsoft Network, L.L.C.*,[156] a New Jersey appellate court said this about an online contract that included an exclusive choice-of–forum clause:

> [The lower court judge] correctly discerned that New Jersey follows the logic of the United States Supreme Court decision in *Carnival Cruise Lines v. Shute* [citation omitted] . . . The clause enforced in *Carnival* was very similar in nature to the clause in question here, the primary difference being that the *Carnival* clause was placed in small print in a travel contract while the clause in the case sub judice was placed on-line on scrolled computer screens.
>
> The trial court opinion went on to analyze plaintiffs' contentions:
>
> . . . plaintiffs were not subject to overweening bargaining power in dealing with Microsoft and MSN. The Supreme Court has held that a corporate vendor's inclusion of a forum selection clause in a consumer contract does not in itself constitute overweening bargaining power. . . .plaintiffs and the class which they purport to represent were given ample opportunity to affirmatively assent to the forum selection clauses. Like *Carnival*, plaintiffs here "retained the option of rejecting the contract with impunity." [citation of *Carnival* omitted]. In such a case, this court finds it impossible to perceive an overwhelming bargain situation.

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[154] *Id.* at 2-3.

[155] With respect to electronic contracting, a New Jersey appellate court commented as follows in *Caspi v. Microsoft Network*:

> The only viable issues that remain bear upon the argument that plaintiffs did not receive adequate notice of the forum selection clause, and therefore that the clause never became part of the membership contract which bound them. . . . The scenario presented here is different [from Carnival Cruise Lines] because of the medium used, electronic versus printed; but, in any sense that matters, there is no significant distinction. The plaintiffs in Carnival could have perused all the fine-print provisions of their travel contract if they wished before accepting the terms by purchasing their cruise ticket. The plaintiffs in this case were free to scroll through the various computer screens that presented the terms of their contracts before clicking their agreement.

Caspi v. Microsoft Network, 732 A.2d 528, 532 (N.J. Super. 1999).

[156] 732 A.2d 528 (N.J. Super. 1999).

> [The lower court judge] opined that application of MSN's forum selection clause did not contravene public policy. . . . Finally, [he] held that enforcement of the forum selection clause would not inconvenience a trial. . . .
>
> After reviewing the record . . . we are in substantial agreement with the reasons for decision articulated by [the lower court judge]. . . .The meaning of the clause is plain and its effect as a limiting provision is clear. Furthermore, New Jersey's interest in assuring consumer fraud protection will not be frustrated by requiring plaintiffs to proceed with a lawsuit in Washington as prescribed by the plain language of the forum selection clause.
>
> . . . Also, it seems clear that there was nothing extraordinary about the size or placement of the forum selection clause text. By every indication we have, the clause was presented in exactly the same format as most other provisions of the contract. . . .To conclude that plaintiffs are not bound by that clause would be equivalent to holding that they were bound by no other clause either, since all provisions were identically presented. Plaintiffs must be taken to have known that they were entering into a contract; and no good purpose, consonant with the dictates of reasonable reliability in commerce, would be served by permitting them to disavow particular provisions or the contracts as a whole.[157]

The same conclusion was reached by a Canadian court in a similar class action regarding the same choice-of-forum clause:

> What is equally clear is that the plaintiffs seek to avoid the consequences of specific terms of their agreement while at the same time seeking to have others enforced. . . . To give effect to the plaintiffs' argument would, rather than advancing the goal of "commercial certainty," . . . move this type of electronic transaction into the realm of commercial absurdity. It would lead to chaos in the market place, render ineffectual electronic commerce and undermine the integrity of any agreement entered into through this medium. . . .
>
> Having found that the terms of the Member Agreement, including the forum selection clause, bind the plaintiffs, I turn to a consideration of whether it is appropriate to exercise my discretion to override the forum clause agreed to by the parties. . . . On the facts of this case, it would not be appropriate for this court to

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157 *Caspi*, 732 A.2d at 534-35.

> permit the plaintiff to continue this action in Ontario contrary to the forum selection clause. [158]

While critics of *Carnival Cruise Lines* are sincere in their dislike of the U.S. Supreme Court rule, that does not mean that the rule is inappropriate in or out of UCITA. To the contrary, it also reflects existing state laws and common practice, as is illustrated by the exclusive choice-of forum clause utilized in Consumers Union's membership agreement for Consumer Reports Online:

> General.
>
> This Agreement constitutes the entire agreement between you and CU with respect to the Site and, if applicable, the Fee-Based Services and supersedes all prior agreements between you and CU. Failure by CU to enforce any provision of this agreement shall not be construed as a waiver of any provision or right. *Interpretation and enforcement of this agreement shall be governed by the laws of the state of New York (excluding its choice of law rules). You consent irrevocably to personal jurisdiction in the federal and state courts of New York County, New York for any action arising out of or relating to your use of the Site or Fee-Based Services. The federal and state courts of New York County, New York shall have exclusive jurisdiction over all such actions.* In any such action, the prevailing party shall be entitled to recover all legal expenses incurred in connection with the action . . . .[159]

As for choice-of-law clauses, what happens if parties do not make an enforceable contract regarding applicable law? In that event, the UCITA default rules apply. They are set forth in Section 109(b) and (c) and also contain a consumer protection rule. Subsection (b)(2) provides that in a consumer contract requiring delivery of a physical copy (e.g., computer information on a diskette), the governing law is the jurisdiction in which the copy is or should have been delivered. Because vendors will know where they are sending a physical copy (that is not necessarily the case with electronic copies)[160], the rule essentially requires the vendor to know

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[158] Rudder v. Microsoft Corp., (Ont. Super. Ct. 1999).

[159] Consumers Reports Online, *User Agreement clause 21* (visited April 13, 2000) <http://www.consumerreports.org/Subscribe/subtos.html> (emphasis added). While the clause speaks in terms of exclusive jurisdiction, parties generally cannot deprive courts of jurisdiction, although they can contract that the forum of any action will be in a particular place; accordingly, it is presumed that the quoted clause is intended to select New York as the exclusive forum. Regarding state law cases, *see e.g.*, Voicelink Data v. Datapulse, 937 P.2d 1158, 1160-61 (Wash. App. 1997) (Nevada, like Washington, requires enforcement of forum selection clauses unless they are "unreasonable and unjust," which is consistent with the test set forth by the Supreme Court). *See also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.14 (1985); M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972) .

[160] U.C.I.T.A. § 109(b)(2) (1999). Consumer privacy is an important issue in Internet commerce. To protect privacy, some consumers use "anonymizers," i.e., they use the services of sites that screen the consumer's identity and "click trail." Similarly, one of the reasons that some consumers

the mandatory consumer statutes of the jurisdiction into which it knowingly sends product. When vendors might not know that, i.e. when delivering electronic copies, the governing law is that of the licensor's location. What about foreign jurisdictions? When the jurisdiction that pertains under the foregoing rules is outside the United States, the law of that jurisdiction governs only if it provides substantially similar protections and rights to a party not located in that jurisdiction as are provided in UCITA.[161] Otherwise, the law of the U.S. state that has the most significant relationship to the transaction governs.

4. Section 214: Electronic Error Defense

Section 214 creates a consumer defense that is unknown in the UCC and the common law.[162] For electronic errors,[163] a consumer is not bound by an electronic message that she did not intend if the consumer:

> (1) promptly on learning of the error:
>
> (A) notifies the other party of the error; and
>
> (B) causes delivery to the other party or, pursuant to reasonable instructions received from the other party, delivers to another person or destroys all copies of the information; and
>
> (2) has not used, or received any benefit or value from, the information or caused the information or benefit to be made available to a third party.[164]

This is a significant advance for consumers over the common law. As explained in the *Restatement (Second) of Contracts*, common law courts "have traditionally been reluctant to

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desire to use electronic cash on the Internet, instead of credit cards, is to screen their identity and location. In the off-line world, a benefit of cash is the anonymous purchase.

[161] *Id.* at § 109(c).

[162] This defense has been followed and adapted in the Uniform Electronic Transactions Act ("UETA"). *See* U.E.T.A. § 10(2) (1999) (available at <http://www.law.upenn.edu/bll/ulc/ulc_frame.htm>). The application of the defense to commercial contracts available under UETA is among the reasons that some groups oppose adoption of UETA. *See, e.g.*, BUS. LAW SECTION WASH. STATE BAR ASS'N., REPORT OF LAW OF COMMERCE IN CYBERSPACE COMMITTEE at Section C, 10(b) (Nov. 6, 1999) (available at <http://www.wsba.org/sections/biz/lccc/report/1999.htm>).

[163] "Electronic error" means an error in an electronic message created by a consumer using an information processing system if a reasonable method to detect and correct or avoid the error was not provided. U.C.I.T.A. § 214 (1) (1999).

[164] U.C.I.T.A. § 214 (1999).

allow a party to avoid a contract on the ground of mistake, even as to a basic assumption, if the mistake was not shared by the other party."[165]

Assume a consumer seeks to avoid a unilateral mistake such as typing "12" instead of "10" on an online order form. Under the *Restatement*, the consumer could not avoid the unilateral mistake and would be bound by the order for 12 *unless* the consumer could prove: (1) that the *mistake was made as to a basic assumption* on which the consumer made the contract and had a *material* effect on the agreed exchange of performances that is adverse to the consumer; and (2) that the *other party had reason to know of the mistake or* that the effect of the mistake is such that enforcement of the contract would be *unconscionable*; and (3) *the risk was not allocated to her by agreement* of the parties or by the court on the ground that it was reasonable under the circumstances to do so; or *she was aware at the time of contracting that she had only limited knowledge regarding the facts but treated her limited knowledge as sufficient.*[166] Some, but not all of this could be proved in the hypothetical and the consumer would be bound by the order for 12 even under the *Restatement* rule (the *Restatement* rule is more protective of the party making the mistake than some state's common law).

The consumer would not be bound under UCITA Section 214, which varies the *Restatement* in at least the following ways:

- The consumer need not prove that the mistake concerned a basic assumption and need not prove that the mistake had a material adverse effect on the consumer;
- The consumer need not prove that the vendor had reason to know of the mistake (in the hypothetical, neither could be proved since the difference between 10 and 12 would not put the vendor on notice of a possible error), and the consumer likely could not prove that the effect of the mistake was unconscionable; and
- Section 113(a)(3)(F) removes the ability of the vendor to vary the result of Section 214 by agreement and thus the risk of the mistake cannot be allocated to the consumer.

Despite the significant new protection provided by UCITA Section 214, it is dismissed by some as not qualifying as "new consumer protection"[167] and as ineffective because the defense does

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[165] RESTATEMENT (SECOND) OF CONTRACTS § 153 cmt. a (1979).

[166] *See id*. at § 153 and § 154.

[167] *See Braucher Letter, supra* note 143, at 2. The discussion of Section 214 in the *Braucher Letter* appears as an illustration of the following claim: "Proponents of UCITA have claimed that it provides consumer protection not available under current law. . . . We disagree strongly. Consumers are much better off under current law. Currently courts apply common law and Article 2, either directly or by analogy, to purchases of off-the-shelf software." *Id*. With respect to Section 214 (electronic error defense), the claim is wholly inaccurate: Article 2 does not provide such a defense at all. The *Restatement* provides a defense but more often that not, consumers will not be able to qualify under the *Restatement* rules. In states that do not adopt the *Restatement* rules, even less protection is afforded to consumers and the general rule (that courts are reluctant to allow avoidance of contracts unless a mistake was known to the other party) tends to apply.

not apply[168] if the consumer is given "a reasonable method to detect and correct or avoid the error."[169] If this were a serious argument, the same criticism should have been made, but was not, regarding a similar provision in the Uniform Electronic Transactions Act ("UETA") which also eliminates the defense if an error correction procedure is made available. Further, and unlike UCITA, the UETA provision does not require the error correction procedure to be reasonable.[170]

The argument that the availability of a reasonable error correction method should not affect the electronic error defense, is expressly rejected by the *Restatement*. Section 154 of the *Restatement* states that a party bears the risk of mistake when "he is aware, at the time the contract is made, that he has only limited knowledge with respect to the fact to which the mistake relates but treats his limited knowledge as sufficient." Comment c explains that this is a "conscious ignorance" principle: if a party proceeds in the face of an awareness that he has limited facts, any resulting "mistake" is not really a mistake but is "conscious ignorance." When a consumer is offered a reasonable method to detect and correct or avoid an error, and ignoring that opportunity proceeds to place the order, the consumer is aware that an error could have been made and proceeds in conscious ignorance. Any resulting "mistake" is an assumption of risk.

As a consumer protection, the UCITA rule is significant and very beneficial to consumers: under it, a qualifying consumer always wins even in circumstances when that is not necessarily appropriate (e.g. when the mistake is not material to the consumer or when the other party had no reason to know of the mistake). Because of these and the concerns reflected by the other factors in the *Restatement* rules, the UCITA rule is not appropriate for, and thus does not apply to, non-consumer contracts. The Uniform Electronic Transactions Act inappropriately extends a similar defense to all contracts, including commercial contracts. Further, UETA does not allow commercial parties otherwise to allocate risk of mistake by contract. For the reasons underlying the policies in the *Restatement*, this is inappropriate.[171]

5. Section 303: Modification

Clauses in signed contracts prohibiting oral amendments ("no oral modification" clauses) are routine in modern contracting. Under the common law, the clauses are somewhat

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[168] *See Braucher Letter, supra* note 143, at 2.

[169] *See* U.C.I.T.A. § 214(a) (1999).

[170] Use of the defense in Section 10(2) of the UETA is not available if the electronic agent "did not provide an opportunity for the prevention or correction of the error." *See* U.E.T.A. § 10(2) (1999); *see also supra* note 162.

[171] *See* U.E.T.A. § 10 (1999); *supra* note 162. *See also* BUS. LAW SECTION WASH. STATE BAR ASS'N., REPORT OF LAW OF COMMERCE IN CYBERSPACE COMMITTEE (Nov. 6, 1999) (available at <http://www.wsba.org/sections/biz/lccc/report/1999.htm>) (containing a recommendation of the WSBA Business Section against adoption of UETA in Washington State until uniform amendments are made by NCCUSL to address several problems, including the application of Section 10 to commercial contracts).

meaningless because they can be waived orally.[172] However, Article 2-209(2) of the UCC changed the common law by making no-oral-modification clauses effective; they are also effective under UNIDROIT Principles of International Commercial Contracts.[173] In a form supplied by a merchant to a consumer, however, UCC Article 2 requires such clauses to be separately signed by the other party.[174]

UCITA Section 303(b) follows this trend by making no-oral-modification clauses effective. However, in a standard form supplied by a merchant to a consumer, a term requiring an authenticated record (signed contract, written or electronic) is not enforceable unless the consumer manifests assent to the term.[175] "Manifest assent," as defined in Section 112, requires an intentional act taken with reason to know that the act will be interpreted as assent, and also requires an opportunity to review the term. The assent must be had with respect to the *term*, not just to the record as a whole.[176]

6. Section 409: Third Party Beneficiaries of Warranty

UCC Article 2-318 offered states three uniform alternatives for extending warranties to persons who are not in privity of contract with the warrantor. California did not adopt any of the options and simply omitted the section. The UCC was written, however, at a time when products liability law had not yet developed and there was pressure to address this issue in the only uniform contracts code. "Alternative A" was adopted by the majority of states,[177] which extends

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[172] *See, e.g.*, Pacific Northwest Group A v. Pizza Blends, 951 P.2d 826, 828-29 (Wash. App. 1998) (noting that a paradox of the common law is that a contract clause prohibiting oral modification is essentially unenforceable because the clause itself is subject to oral modification, and that the Washington legislature abrogated the common law rule in limited circumstances such as in contracts involving the sale and lease of goods, and that other states have gone further, including New York and California, which have abrogated the common-law rule for all executory agreements) (citations to NY and CA statutes omitted).

[173] *See* Article 2.18 of UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (1994), which reads as follows:

> A contract in writing which contains a clause requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated. However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has acted in reliance on that conduct.

[174] *See* U.C.C. § 2-209 cmt. 3 (1998) (stating that if a consumer is to be held to such a clause on a form supplied by a merchant, it must be separately signed).

[175] *See* U.C.I.T.A. § 303(b) (1999).

[176] *See* U.C.I.T.A. § 112(c) (1999) ("If this [Act] or other law requires assent to a specific term, a manifestation of assent must relate specifically to the term.").

[177] Alternative B to UCC Article 2-318 parallels Alternative A except that the injured person need not be part of the buyer's family or household. Alternative C broadens Alternative B by covering

a seller's express or implied warranty to any *natural* person who is in the family or household of his buyer or who is a guest in his home, if it is reasonable to expect that such person may use, consume or be affected by the goods and who is *injured in person* by breach of the warranty. In short, protection is extended to family members of a consumer for foreseeable personal injury.

Given the development of products liability and tort laws since the UCC was written, a good argument can be made that Section 2-318 should be removed from the UCC altogether. UCITA provides protection against a lack of privity, however, by including an expanded version of Alternative A which is tied to the contractual concept of a third-party beneficiary. UCITA Section 409(a) states a general rule that except for published informational content, a warranty to a licensee extends to persons for whose benefit the licensor intends to supply the computer information or informational rights and who rightfully use the information in a transaction of a kind in which the licensor intended the information to be used. Subsection (b) goes on to provide a consumer protection: a warranty to a consumer extends to each individual consumer in the licensee's immediate family or household if the individual's use would have been reasonably expected by the licensor.

Note that unlike UCC Alternatives A and B, there is no limitation in UCITA to personal injury damages. However, as in Alternative C to UCC Article 2-318 (the only alternative that ventured beyond damages for personal injury), this extension of warranty can be varied by agreement except as to personal injuries to individual consumers.[178] In short, UCITA adapts, continues or expands the majority consumer protection of Article 2-318.

7. Section 509: Hell or High Water Clauses

UCC Article 2A-407 makes enforceable a "hell or high water" clause in a commercial finance lease. Such a clause requires the lessee to pay its financier regardless of problems with the leased item (i.e. the lessee must pay come "hell or high water"). UCITA Section 509 does the same thing. The UCC Article 2A consumer protection is also retained in UCITA: neither UCITA Section 509 nor Article 2A-407 apply to consumer leases.

UCITA Section 509 does provide a new licensee protection for financing within its scope, although the protection applies to all commercial licensees. The "hell or high water" clause must appear *in the finance contract* to be enforceable. This is unlike Article 2A-407, which creates a "hell or high water" result by statute, but "does not require inclusion in the lease, consent of the lessee, or even awareness on the part of the lessee . . . . It is a "self-execution section."[179] UCITA's Section 509 is not self-executing: the clause must appear in the financial agreement of the parties.

8. Section 803: Contractual Modification of Remedy

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any injury, not just personal injury. None of the alternatives may be varied by agreement with respect to personal injury. *See* U.C.C. Article 2-318 (1998).

[178] *See* U.C.I.T.A. § 409(c) (1999).

[179] THOMAS QUINN, QUINN'S UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST § 2A-145 (2d ed. 1991).

UCITA Section 803(d) follows UCC Article 2-719 by providing that an exclusion or limitation of consequential damages for personal injury in a consumer contract is prima facie unconscionable, if the exclusion or limitation pertains to a computer program that is subject to UCITA and is, essentially, a consumer good. This is viewed by some as a surprising provision, given that the question of whether computer programs are a "product" for purposes of products liability law is an open question, the intangible nature of computer programs and the inherent mix of ideas and expression.[180] Nevertheless, Section 803 appropriately allows a court to maintain the protection for goods available under Article 2-719. The purpose of the UCITA provision, however, is to avoid a loss of protection as to that good. It is not intended to create liability where none would otherwise exist.[181] Nevertheless, it is a significant consumer protection.

Section 803 provides another significant consumer protection that is not labeled as such by providing as follows:

> Failure or unconscionability of an agreed exclusive or limited remedy makes a term disclaiming or limiting consequential or incidental damages unenforceable unless the agreement expressly makes the disclaimer or limitation independent of the agreed remedy.[182]

This rule addresses the situation in which a limited remedy fails of its essential purpose. A question can then arise whether a clause excluding consequential damages applies even when the remedy fails, or whether the damage exclusion also fails, thereby allowing the customer to seek consequential damages. The majority rule is that there is no interdependency and that the damage exclusion continues to apply after failure of the remedy:

> Inevitably exclusive remedies - such as repair or replacement, or promises of refunds of the purchase price - are accompanied by clauses that deny liability for consequential damages. . . .

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[180] *See supra* note 13 for a discussion of cases determining whether a source code can be viewed as speech. *See also* Joel Rothstein Wolfson, *Electronic Mass Information Providers and Section 522 of the Restatement (Second) of Torts: The First Amendment Casts a Long Shadow,* 29 RUTGERS L.J. 67 (1997); RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 19 cmt (d) and Reporters' Note thereto (noting that products liability law was designed for tangible products but not for intangibles such as ideas and expression and that one case has suggested that software might be considered a product but no court has yet so held; the Reporters' Note suggests that courts ought to view software as a good if it is treated as a good under UCC Article 2). The analytical problem with the *Restatement* Reporters' Note regarding Article 2 has the same defects that inform the judicial decisions that have found software to be within Article 2. For a discussion of such cases, *see* Raymond T. Nimmer, *Through the Looking Glass: What Courts and UCITA Say About the Scope of Contract Law in the Information Age*, 38 DUQ. L. REV. (1999) (article appearing in this issue).

[181] *Id. See also* U.C.I.T.A. § 803(d) cmt. 7.

[182] U.C.I.T.A. § 803(c) (1999).

> In our opinion courts that accept buyer's argument [that when the basic remedy fails of its essential purpose a restriction on recovery of consequential damages is removed] are mistaken. Some courts favor buyers by narrow interpretations of the consequential damage disclaimer . . . .
>
> The leading case favoring sellers is *American Electric Power Co., Inc. v. Westinghouse Electric Corp*. That case represents the majority view. The court found 'no reason to disturb the consensual allocation of business risk.' The court concluded that this was not a case where the failure to repair left the plaintiff without a "minimum adequate remedy'" because the contract provided for a damage recovery that was distinct from the repair remedy. Given this, the two provisions (i.e., the repair promise and the exclusion of consequential damages) were considered independent and the failure of the limited remedy under section 2-719(2) did not affect the consequential damage exclusion.
>
> In general, we favor the *American Electric Power* line of cases. Those cases are most true to the Code's general notion that the parties should be free to contract as they please. The text of the Code disfavors judges' and juries' rewriting contracts that allocate risks between the parties.
>
> . . . Although the consumer purchaser makes a more sympathetic case for court intervention, we would apply *American Electric* in those cases as well. When the consequential damages consist of personal injury or property damage, the buyer can recover in tort without regard to the 2-719 limitation. When it consists of other loss, the consumer may be the lowest cost risk avoider. . . .[183]

To provide greater protection to customers, UCITA adopts a version of the minority rule: the clause fails unless it is stated to be independent.[184] This is a significant protection for *all* licensees, including consumer and mass-market licensees.

9. Section 805: Limitation of Actions

Section 805 contains statutes of limitation. Under existing common law, the length of a statute of limitations may be reduced by agreement. Under UCC Article 2 and proposed revisions to same, a statute of limitations may be reduced to not less than one year.[185] As a consumer protection, UCITA Section 805(2) provides that in a consumer contract, the period of

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[183] WHITE & SUMMERS, *supra* note 118, at 667.

[184] *See id.*

[185] U.C.C. § 2-725 (1) (1998) (stating that by the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it). Proposed revisions to UCC Section 2-725 follow this UCITA consumer protection. *See* U.C.C. § 2-725 (Proposed Draft November 1999).

limitation may not be reduced at all. The limitations period is typically 4 years but can be 5 under a new, modified "discovery" rule.[186]

CONCLUSION

Strong resistance appears to accompany all important and groundbreaking legislation. Drafting on what became the UCC, the only and most significant source of uniform contract law in the United States, started in the 1930s,[187] and it was first proposed in 1949.[188] However, it was not widely adopted until the 1960s,[189] more than ten years later.[190] It will be a shame if states wait that long to adopt UCITA:

> [I]nformation about objects is quickly becoming more valuable than the objects themselves. So people, countries, companies and industries that are more invested in the tangible rather than the intangible will wither.[191]

This change in our economy from a goods-based economy to an information/services economy must be supported by a uniform law that focuses on the right images and principles, or the legal infrastructure will not support the transactions that parties are making or seek to make:

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186 *See* U.C.I.T.A. § 805(a) (1999) (stating that except as otherwise provided, an action for breach of contract must be commenced within the later of four years after the right of action accrues or one year after the breach was or should have been discovered, but not later than five years after the right of action accrues).

187 *See* GRANT GILMORE, THE AGES OF AMERICAN LAW 140 n.38 (1977).

188 *See* Hillinger, *supra* note 11, at 1142 n.7.

189 *See id*. (stating that the Code was officially introduced in 1949; Pennsylvania was the first to adopt it in 1954 and Massachusetts followed in 1958, while the remaining states delayed adoption until the 1960s).

190 Professor Gilmore, reporter for Article 9 of the UCC, argued:

> [T]he legal establishment which controlled the bar associations (and had great influence with the bankers' associations) opposed the Code and was successful in preventing its enactment. In the 1960s the same people who had fought the Code ten years earlier had reversed their field and were counted among its most vigorous supporters. A plausible reason for this reversal is that during the 1950s the courts, in a surge of activism, had themselves been rewriting much of the law. The Code, which in the 1940s had seemed much too "liberal" to its conservative critics, had by the 1960s become an almost nostalgic throwback to an earlier period.

Gilmore, *supra* note 187, at 86.

191 Bernard Wysocki, Jr., *The Big Bang - Some Industries May Find Themselves Blown Apart by the Digital Age*, WALL ST. J., Jan. 1, 2000, at R34 (arguing that industries must fundamentally change to survive in a digital economy).

> We have experienced a fundamental shift from a good-based economy to one a substantial part of which entails distribution of digital information and services. The contract law developed in the 1940's and 1950's to accommodate sales of toasters, automobiles, and other wares, while adequate for those purposes, does not correspond to the commercial premises relevant to contracts for licensed access to a digital database, for multi-location use of network or communications software, or for access to or use of, other information assets. The images that legislators, judges, lawyers and academics tend to employ in understanding these information transactions, however, refer back to the other type of commerce, causing dislocation, misunderstanding and uncertainty.
>
> The idea that "information" can be the subject matter of a commercial exchange is not new, but the extent to which such transactions permeate the market place is new.
>
> . . . In the 1930's, Llewellyn used a seemingly simple insight to support development of what eventually became UCC Article 2 – he emphasized that the labels and images we use as references points do matter in making decisions about appropriate contract law. In a time following basic change in the economy, the images we deploy are likely to be throwbacks to an older era that may serve poorly in the new. In the 1930's, Llewellyn was talking about the change from an agrarian to an industrial economy. Today, we face the same issue caused by the change from a goods-based economy to an information and services economy. The images that we bring from the world of goods differ fundamentally from the reality and expectations in the world of information and services transactions. .
>
> . . . He [Llewellyn] commented:
>
> *Unless* the *stock* intellectual equipment is apt, it takes extra art or intuition to get proper results with it. Whereas *if* the stock intellectual equipment is apt, it takes extra ineptitude to get sad results with it.[192]

UCITA provides stock intellectual equipment that is apt for our digital information economy.

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[192] Raymond T. Nimmer, *Images and Contract Law- What Law Applies to Transactions in Information*, 36 HOUS. L. REV. 1, 3-9 (1999) (emphasis added).