OPPOSING ADOPTION OF THE
UNIFORM COMPUTER INFORMATION
TRANSACTIONS ACT (UCITA)
BY THE STATES

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A Grassroots Information Kit
For Concerned IEEE U.S. Members

28 August 2000

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1. INTRODUCTION

In Fall 1999, representatives of the National Conference of Commissioners for Uniform State Laws (NCCUSL) and major software interests, such as the American Electronics Association, the Business Software Alliance, and the Northern Virginia Technology Council, began lobbying legislative leaders in targeted states to adopt the Uniform Computer Information Transaction Act (UCITA). Legislators, with little time and few resources available to evaluate such complex legislation during their brief 30-90 day legislative sessions and pressured by the need for their states to be seen as "technology-friendly" by industry, quickly climbed on board in several states. During the 2000 legislative session, UCITA bills were signed into law in Maryland and Virginia, and introduced in a dozen more states. In 2001, the pro-UCITA lobby will renew and expand their efforts to gain state passage.

What exactly is UCITA? In brief, UCITA is a 109 page model law developed by NCCUSL outlining proposed legal standards for states to adopt for the purpose of governing commercial transactions involving software, computer programs, multimedia products, computer games, online access to databases. Current law regulating commercial transactions of tangible property did not clearly encompass the issues raised by transactions involving intangible property, like computer software and data. Therefore, UCITA's drafters set out with the purpose of outlining a new set of clear, consistent and uniform rules that would give businesses and consumers certainty of online transactions and software purchases.

While endorsing the need for clear and consistent rules, IEEE-USA and other opponents of this legislation believe that NCCUSL's efforts largely failed. The reasons are outlined more fully in IEEE-USA's position statement, and related statements by the Association for Computing Machinery, by 26 states' Attorneys General, the Federal Trade Commission, the American Library Association, and others, which are included in appendices below.

The crux of IEEE-USA's concern is that the model legislation as drafted takes bargaining power and the protections of current law away from consumers and users and gives it to the big software concerns. We believe the law will injure the interests of consumers, discourage innovation, put small entrepreneurial businesses and software consultants at a competitive disadvantage, pose a potential threat to computer security, and encourage extensive litigation. As software becomes increasingly ubiquitous in all aspects of modern life (with computer chips in our homes, our automobiles, and even our bodies) IEEE-USA is also concerned that UCITA will be used to circumvent other areas of settled law, eliminating consumer protections and undermining intellectual property laws.

For these reasons, IEEE-USA's Board of Directors has approved a position opposing the adoption of UCITA by the states and we are communicating that position to key decision-makers at every opportunity. However, our resources are limited and there is no realistic way that IEEE-USA can "lobby" in each of the state legislatures when UCITA bills are
introduced. We must look to our members to carry our banner and to express their own concerns about UCITA and its implications to their own state representatives.

This Grassroots Advocacy Kit is designed to help you do that. It contains a brief description of UCITA, highlights issues and arguments against UCITA made by the IEEE-USA and other concerned organizations, summarizes the status of UCITA legislation in the various states, points you to other information sources on-line, and describes in detail how you can help.

IEEE-USA realizes this thick package of "introductory" materials demands a lot of your time and energy to digest. UCITA poses complex issues, often veiled in "legalism" that make them hard to decipher, much less explain. They are critically important issues, however, and we ask you to familiarize yourself with UCITA and its implications. The volunteers and staff who comprise our Ad Hoc IEEE-USA UCITA Task Force will be there to assist you. Having made the commitment to understand the issues, we urge you to put that knowledge into action by expressing your views to your elected representatives either directly or through the local media.

2. WHAT IS UCITA?

The Uniform Computer Information Transactions Act (UCITA) is a proposed state contract law developed to regulate commercial transactions involving intangible goods such as computer software, online databases and other information products in digital form.

WHERE DID IT COME FROM -- UCITA began with an attempt to expand Article 2 of the Uniform Commercial Code (UCC) to encompass intangible, as well as tangible goods. The UCC has been adopted in almost all of the states and territories of the U.S., in order to ensure consistent rules governing contract law from state to state.

The two legal bodies charged with drafting changes to the UCC are the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI). After efforts to address intangible property in a revised Article 2-B, ALI withdrew from the process when NCCUSL took little note of their ALI’s input and then decided to recast their proposal as stand-alone legislation (i.e. UCITA), which was adopted in July 1999 despite objections and criticisms lodged by:

♦ IEEE-USA
♦ The Federal Trade Commission
♦ 26 States Attorneys General
♦ Software Developers
♦ Consumer Advocates
♦ Librarians and library users
♦ Large Software Customers (e.g. insurance companies)
♦ Magazine and Newspaper Publishers
Trade Associations for the Entertainment Industry
Numerous Law Professors
American Intellectual Property Association

**WHO IS NCCUSL** -- The National Conference of Commissioners on Uniform State Laws (NCCUSL) is an organization comprised of more than 300 lawyers, judges, and law professors, appointed by the states and U.S. territories. NCCUSL's mission is to draft uniform and model laws and work toward their enactment in state legislatures.

As a body, NCCUSL meets once a year to consider draft UCC articles and uniform acts for final approval. Most of the actual drafting work is done by committees comprised of a dozen or so commissioners. Committee meetings are open to public participation, but because of the highly legal subject matter, are generally attended by lawyers representing the interested parties. In the case of UCITA, the drafting committee worked on draft legislation for nearly 12 years with active participation by the software industry and relatively little input from software consumers and other interested organizations to balance the process until almost the end, where their input was largely ignored.

**WHAT ARE THE “PROBLEMS” WITH UCITA** -- The following collection of issues raised by UCITA critics was published by InfoWorld (http://www.infoworld.com/cgi-bin/displayStory.pl?/features/990531ucita3.htm):

♦ **One-sided shrinkwrap terms** -- UCITA's fundamental purpose of endorsing shrinkwrap licenses will make many unfair terms enforceable in courts, whereas today many such terms are at least sometimes thrown out.
♦ **Cost of negotiated contracts** -- UCITA defaults favoring licensors, which will force corporate customers to negotiate from a weaker position and will require expensive reviews of all shrinkwrapped licenses.
♦ **E-commerce impact** -- UCITA's vendor-friendly rules for e-commerce will conflict with other state, federal, and international efforts to bring some order to the Internet, creating less uniformity of law rather than more.
♦ **Software industry competitiveness** -- Disclaimed warranties and other protections for the software industry provide disincentives for companies to improve product quality and encourage the premature release of buggy products.
♦ **Electronic self help** -- Even a limited right of software publishers to electronically "repossess" software poses major security issues and would be a "gun to the head" of corporate customers in case of disputes.
♦ **Reverse engineering** -- UCITA could allow software publishers to unilaterally outlaw all forms of reverse engineering, even when it's done only for reasons of interoperability.
♦ **Transfer of ownership** -- Common shrinkwrap license terms prohibiting transfer of ownership would become enforceable under UCITA, possibly forcing companies to repurchase software they already have after corporate acquisitions, mergers, or restructuring.
Bug disclosures -- UCITA offers protection from lawsuits to software publishers who knowingly distribute software with bugs, even if they hide the knowledge from users who suffer major damage as a result.

No pre-sale access to term -- Software publishers are still allowed to take the traditional "terms inside the box" approach denying customers opportunity to review terms before they buy, even in the case of online sales where providing the terms would be easy.

PO terms ignored -- Companies that rely on the boilerplate terms they print on their purchase orders to cancel out shrinkwrap license terms will find that doesn't work under UCITA.

Scope of law -- UCITA threatens to impact establish practices in a variety of industries other than software, particularly those involving intellectual property and/or embedded software.

Choice of law and forum -- UCITA provides some loopholes that allow publishers to have any legal actions held in their state rather than the consumer's, and under their state's laws, or even the laws of a third state that has adopted UCITA.

In a one page advisory (see http://arl.cni.org/info/frn/copy/prud.html), Principal Financial Group and Prudential Insurance Company of America highlighted the following UCITA provisions to its clients, noting that UCITA would:

- validate shrink wrapped (standard, take-it-or-leave-it) licenses;
- allow vendor to threaten disruption of licensee’s critical systems through electronic "self-help" if its demands were not met; whether vendor may waive right to self-help is questionable
- impose new uncertainty regarding the duration of licensee’s right to use licensed software change commercial practice through new default rules as to number of permitted users under license
- place unreasonable burden on licensee to discover defects during an evaluation (thereby subjecting user to licensor’s contract terms)
- limit vendor’s implied warranty of non-infringement to US usage, even for worldwide licenses
- restrict "perfect tender" rule to narrowly defined "mass market" transactions

3. UCITA Information Resources On-Line

Your primary information resource on-line is IEEE-USA’s UCITA Grassroots Network, at http://www.ieeeusa.org/grassroots/ucita. The following additional sites are highlighted by the IEEE-USA as information resources only, to help you track developments and expose you to different perspectives on the issue. The IEEE-USA does not necessarily agree with or support the views or positions expressed at these other sites:

4-CITE (A coalition of organizations opposing adoption of UCITA)
http://www.4cite.org
• 4-CITE UCITA Briefing Book
  http://www.4cite.org/bbook/Bcover.html
• UCITA Opponents
  http://www.4cite.org/oppose.html
• Overview of State UCITA Activity
  http://www.4cite.org/qikstate.html

Association of Computing Machinery
http://www.acm.org

• ACM Copyright and Intellectual Property Page (UCITA materials)
  http://www.acm.org/usacm/copyright/
• Letter from ACM President to NCCUSL Opposing UCITA Adoption
  http://www.acm.org/usacm/copyright/usacm-ucita.html

Association of Research Libraries
http://www.arl.org

• A Quick Look at UCITA
  http://www.arl.org/info/frn/copy/ucita.html
• Letter by Library Associations to NCCUSL Opposing UCITA Adoption

BadSoftware.Com (Cem Kaner)
http://www.badsoftware.com

• Includes or links to numerous opposition comments. Currently being redeveloped.

Computer Professionals for Social Responsibility
http://www.cpsr.org/

• CPSR UCITA Fact Sheet
  http://www.cpsr.org/program/UCITA/ucita-fact.html
• CPSR 12/3/99 press release raising consumer objections to UCITA
  http://www.cpsr.org/program/UCITA/braucher.html
• CPSR 02/11/00 letter to Virginia legislators
  http://www.cpsr.org/program/UCITA/barry_ucita.html

Federal Trade Commission
http://www.ftc.gov

• Letter by FTC staff to NCCUSL opposing UCITA
  http://www.ftc.gov/be/v990010.htm
Infoworld
http://www.infoworld.com

• Infoworld UCITA Page
  http://www.infoworld.com/ucita/index.html
  http://archive.infoworld.com/UCITA
• Article: It's Your Job to Tell Your CEO About UCITA
  http://www.infoworld.com/articles/op/xml/00/05/15/000515oplewis.xml
• Article: States Shouldn't be So Sure UCITA Will Bring Jobs/Talent
  http://www.infoworld.com/articles/op/xml/00/03/13/000313opfoster.xml
• Article: UCITA Lets Vendors Reach In and Disable Your Software
  http://www.infoworld.com/articles/op/xml/00/08/21/000821opfoster.xml
• Article: How UCITA Hurts the Software Industry
  http://www.infoworld.com/articles/uc/xml/00/08/21/000821ucindustry.xml
• Article: Observations on the UCITA Drafting Process
  http://www.infoworld.com/articles/uc/xml/00/08/21/000821ucdrafting.xml

National Conference of Commissioners on Uniform State Laws
http://www.nccusl.org

• Copy of UCITA as approved by NCCUSL in July 1999
  http://www.law.upenn.edu/bll/ulc/ucita/ucita_99.htm
• UCITA drafts and comments
  http://www.law.upenn.edu/bll/ulc/ulc.htm#ucita
• NCCUSL's Q&A on UCITA
  http://www.nccusl.org/uniformact_qanda/uniformacts-q-ucita.htm
• NCCUSL UCITA Summary
  http://www.nccusl.org/uniformact_summaries/uniformacts-s-ucita.htm
• NCCUSL UCITA Fact Sheet (List of Pending States)
  http://www.nccusl.org/uniformact_factsheets/uniformacts-fs-ucita.htm

Ring and Nimmer UCITA White Papers
http://www.ober.com/alerts/ringucit.htm#menu

• A series of white papers by the chair and reporter of the NCCUSL UCITA Drafting Committee designed to answer criticisms of UCITA, its scope, and likely effects. Ring and Nimmer outline how UCITA addresses issues identified by critics and generally rejects them as being overblown, but offers no additional evidence to support their conclusions.

Protecting Yourself from UCITA by Stan Klein
http://www.cpcug.org/user/comm/UCITA-700/index.htm

• Practical advice to engineering consultants and computer users from a member of IEEE-USA’s Ad Hoc UCITA Task Force.
Society for Information Management
http://www.simnet.org

♦ Follow link above and select UCITA Issue Brief

UCITANews.Com
http://www.ucitanews.com

♦ UCITA news source offers lists of supporters and opponents, UCITA-related newspaper articles, a legislative scorecard, and links to other UCITA resources.

UCITA On-Line
http://www.ucitaonline.com/

Pro UCITA cite offers briefing materials for state legislators and responses to UCITA critics. This site replaces the web site formerly known as the 2BGuide, that published the following UCITA critiques, which are still on-line:

- Dissent by Steven Chow, UCITA drafting committee member
  http://www.2bguide.com/docs/citopp.html
- Memo from former American Law Institute members of drafting committee declining further participation
  http://www.2bguide.com/docs/50799dad.html

4. Call to Action:
   IEEE-USA Needs Your Help to Oppose UCITA

A. How You Can Help:

If you are concerned about the potential negative impacts of UCITA, then you can help by taking one or more of the following actions:

1. **KEEP TRACK OF DEVELOPMENTS**: Using your state legislature’s web site and other information resources, keep track of what’s going on in your state. Help IEEE-USA keep track of the status of UCITA legislation in your state (see Section B below).

2. **NETWORK**: Share information about UCITA with fellow IEEE members in your section/chapter and with professional colleagues at meetings, by writing articles, or through personal, one-on-one contacts.

3. **MEET**: Visit your State Legislator(s) in the district or state capital office and express your concerns about the UCITA legislation. *(For tips on how to identify and/or contact your state legislator, see Section C below.)* Be prepared with details on the pending legislation and provide a copy of IEEE-USA’s position statement and any other materials you believe are relevant. Ask them to vote against UCITA legislation pending in your state legislature.
4. **WRITE**: Send your State Legislator(s) a personal letter expressing your concerns about pending UCITA legislation and forwarding background information such as IEEE-USA’s position statement. Ask your legislator to vote against UCITA and/or to vote for a related amendment (see report for Iowa in section B below) that would bar its application in your state. (See the Tips on writing an effective letter in Section D and a model letter in section E below.)

5. **RESPOND**: Whenever you see UCITA mentioned in print in your local newspaper(s), write a response to the editor highlighting problems with UCITA and its prospective impacts. Also respond to every pro-UCITA story or letter you see in print or on TV or hear on the radio. (See the tips provided in Section F below).

6. **ORGANIZE**: Recruit concerned IEEE members and others to do the same. Form a grassroots network that works together to spread the word and take collective action.

7. **COORDINATE**: Let IEEE-USA know what you’re doing and call on us for advice and assistance. Contact Chris Brantley, Director of Gov’t Relations & Operations, IEEE-USA at 202-785-0017 (ext. 8347), by fax to 202-785-0835, or by email to c.brantley@ieee.org.

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**B. The Status of UCITA Legislation in the States:**

The following status report is based on information available as of 1 Sept. 2000. For the latest on the status of UCITA in your state, use your state legislature’s web site to search or check the IEEE-USA’s Legislative Scorecard at [http://www.ieeeusa.org/grassroots/ucita/statematrix.html](http://www.ieeeusa.org/grassroots/ucita/statematrix.html).

<table>
<thead>
<tr>
<th>State</th>
<th>Status</th>
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<tbody>
<tr>
<td>Alabama</td>
<td>No UCITA legislation introduced in 2000.</td>
</tr>
<tr>
<td></td>
<td>Track Alabama legislation at <a href="http://www.legislature.state.al.us/">http://www.legislature.state.al.us/</a></td>
</tr>
<tr>
<td>Alaska</td>
<td>No UCITA legislation introduced in 2000.</td>
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<tr>
<td></td>
<td>Track Alaska legislation at <a href="http://www.legis.state.ak.us/">http://www.legis.state.ak.us/</a></td>
</tr>
<tr>
<td>Arizona</td>
<td>No UCITA legislation introduced in 2000.</td>
</tr>
<tr>
<td></td>
<td>4-CITE reports that Governor's Information and Technology Agency (GITA) is working with the Legislative Council to prepare a UCITA bill and that nothing is happening soon.</td>
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<tr>
<td></td>
<td>Track Arizona legislation at <a href="http://www.azleg.state.az.us/">http://www.azleg.state.az.us/</a></td>
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<tr>
<td>Arkansas</td>
<td>No legislative session in 2000.</td>
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<td></td>
<td>Track Arkansas legislation at <a href="http://www.arkleg.state.ar.us/">http://www.arkleg.state.ar.us/</a></td>
</tr>
<tr>
<td>California</td>
<td>No UCITA legislation introduced in 2000.</td>
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<td></td>
<td>Track California legislation at <a href="http://www.leginfo.ca.gov/">http://www.leginfo.ca.gov/</a></td>
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<tr>
<td>State</td>
<td>Details</td>
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<tr>
<td>Colorado</td>
<td>No UCITA legislation introduced in 2000.</td>
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<tr>
<td>Connecticut</td>
<td>No UCITA legislation introduced in 2000.</td>
</tr>
<tr>
<td>Delaware</td>
<td>Senate Bill 307 was introduced by Sen. Sharp on March 22 and referred to the Senate Judiciary Committee. House bill 610 was introduced by Rep. Wagner on May 18 and referred to the House Judiciary Committee. House Bill 696 was introduced by Rep. Stone on June 30 and referred to the House Commerce Committee. This bill would have allowed Delaware residents or entities to void choice of law provisions contained in a computer information agreement or contract based on the Uniform Computer Information Transaction Act or on a substantially similar law. Bills remained in committee when the Delaware legislature adjourned on June 30, 2000. Track Delaware legislation at <a href="http://aosta.state.de.us/Lis/LIS140.nsf/$$WebHome?openform">http://aosta.state.de.us/Lis/LIS140.nsf/$$WebHome?openform</a> or through <a href="http://www.state.de.us/research/assembly.htm">http://www.state.de.us/research/assembly.htm</a>.</td>
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<td>District of Columbia</td>
<td>The District of Columbia Uniform Computer Information Transactions Act of 2000 (B13-607) was introduced by DC Council Chair Linda Cropp at the request of Mayor Anthony Williams, and referred on Feb. 22 to the Council's Committee on Consumer and Regulatory Affairs, chaired by Councilmember Sharon Ambrose for review. IEEE-USA requested an opportunity to testify at a committee hearing initially scheduled for April 20, 2000, tentatively rescheduled in May 2000, and then postponed indefinitely. UcitaNews.Com reports B13-607 was withdrawn and reintroduced as B13-716, but this does not track with DC legislation on-line and has not been confirmed. Track DC legislation at <a href="http://www.dccouncil.washington.dc.us/status.HTML">http://www.dccouncil.washington.dc.us/status.HTML</a>.</td>
</tr>
<tr>
<td>Florida</td>
<td>No UCITA legislation introduced in 2000. Legal measures normally subject to prior review by Florida State Bar Association. Track Florida legislation at <a href="http://www.leg.state.fl.us">http://www.leg.state.fl.us</a></td>
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<tr>
<td>Georgia</td>
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<tr>
<td>State</td>
<td>Actions and Legislation</td>
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<tr>
<td>Idaho</td>
<td>No UCITA legislation introduced in 2000. Track Idaho legislation at <a href="http://www2.state.id.us/legislat/legislat.html">http://www2.state.id.us/legislat/legislat.html</a></td>
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<tr>
<td>Illinois</td>
<td><strong>(S.B. 1309)</strong> introduced by Sen. Dillard on Jan. 12, referred to Senate Rules Committee. Postponed on Jan. 27 and rereferred to Rules Committee on Feb. 9, where it was tabled. Track Illinois legislation at <a href="http://www.state.il.us/legis">http://www.state.il.us/legis</a></td>
</tr>
<tr>
<td>Indiana</td>
<td>No UCITA legislation introduced in 2000. Track Indiana legislation at <a href="http://www.state.in.us/legislative/">http://www.state.in.us/legislative/</a></td>
</tr>
</tbody>
</table>
| Iowa | No UCITA legislation introduced in 2000. Iowa approved the [Iowa Uniform Electronic Transactions Act (UETA), (H.J. 2383)](http://www.state.ia.us/docs/legis/generic/2000/2000hj2383.htm) concerning digital signatures, which was amended ([House Amendment 8232](http://www.state.ia.us/docs/legis/generic/2000/2000haj8232.htm)) to declare null and void any "computer information transaction" contract based on UCITA with any individual that resides, or company that has its principal place of business, in Iowa. The bill as amended was signed into law on May 15. The specific language of section 554D.104(4) reads:  

> A choice of law provision, which is contained in a computer information agreement that governs a transaction subject to this chapter, that provides that the contract is to be interpreted pursuant to the laws of a state that has enacted the uniform computer information transactions Act, as proposed by the national conference of commissioners on uniform state laws, or any substantially similar law, is voidable and the agreement shall be interpreted pursuant to the laws of this state if the party against whom enforcement of the choice of law provision is sought is a resident of this state or has its principal place of business located in this state. For purposes of this subsection, a "computer information agreement" means an agreement that would be governed by the uniform computer information transactions Act or substantially similar law as enacted in the state specified in the choice of laws provision if that state's law were applied to the agreement. |

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<tr>
<th>State</th>
<th>UCITA Legislation Status</th>
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<td>Iowa</td>
<td>No UCITA legislation</td>
<td><a href="http://www.legis.state.ia.us/">http://www.legis.state.ia.us/</a></td>
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<td>Kansas</td>
<td>No UCITA legislation</td>
<td><a href="http://www.ink.org/public/legislative/index.cgi">http://www.ink.org/public/legislative/index.cgi</a></td>
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<td>Kentucky</td>
<td>No UCITA legislation</td>
<td><a href="http://www.lrc.state.ky.us/home.htm">http://www.lrc.state.ky.us/home.htm</a></td>
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<td>Louisiana</td>
<td>No UCITA legislation</td>
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<td>Maine</td>
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<td><a href="http://janus.state.me.us/legis">http://janus.state.me.us/legis</a></td>
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<td>Maryland</td>
<td>Passed (H.B. 19/S.142)</td>
<td><a href="http://mlis.state.md.us">http://mlis.state.md.us</a></td>
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<td>Michigan</td>
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<td><a href="http://www.michiganlegislature.org/">http://www.michiganlegislature.org/</a></td>
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<td>Minnesota</td>
<td>No UCITA legislation</td>
<td><a href="http://www.leg.state.mn.us/">http://www.leg.state.mn.us/</a></td>
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This provision will automatically sunset on July 1, 2001.

The bill also contains the following section: "It is the intent of the general assembly that the general assembly consider the proposed uniform computer information transactions Act, as adopted by the national conference of commissioners on uniform state laws, during the 2001 regular session."

Track Iowa legislation at http://www.legis.state.ia.us/.


Track Louisiana legislation at http://www.legis.state.la.us/.

Track Maine legislation at http://janus.state.me.us/legis.

Track Maryland legislation at http://mlis.state.md.us.


Track Minnesota legislation at http://www.leg.state.mn.us/.
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<th>State</th>
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<td>Montana</td>
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<td>Nevada</td>
<td>No legislative session in 2000.</td>
<td><a href="http://www.leg.state.nv.us/">http://www.leg.state.nv.us/</a></td>
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<td>Nebraska</td>
<td>No UCITA legislation introduced in 2000.</td>
<td><a href="http://www.unicam.state.ne.us/index.htm">http://www.unicam.state.ne.us/index.htm</a></td>
</tr>
<tr>
<td>New Hampshire</td>
<td>No UCITA legislation introduced in 2000.</td>
<td><a href="http://www.state.nh.us/gencourt/iegencourt.html">http://www.state.nh.us/gencourt/iegencourt.html</a></td>
</tr>
<tr>
<td>New Jersey</td>
<td><strong>S.1201</strong> introduced by Senator Joseph Kyrillos on May 4 and referred to the Senate Judiciary Committee.</td>
<td><a href="http://www.njleg.state.nj.us/">http://www.njleg.state.nj.us/</a></td>
</tr>
<tr>
<td>New Mexico</td>
<td>No UCITA legislation introduced in 2000.</td>
<td><a href="http://legis.state.nm.us/">http://legis.state.nm.us/</a></td>
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<tr>
<td>North Carolina</td>
<td>No UCITA legislation introduced in 2000.</td>
<td><a href="http://www.legislature.state.nc.us/">http://www.legislature.state.nc.us/</a></td>
</tr>
<tr>
<td>North Dakota</td>
<td>No session in 2000</td>
<td><a href="http://www.state.nd.us/ir/">http://www.state.nd.us/ir/</a></td>
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<tr>
<td>Ohio</td>
<td>No UCITA legislation introduced in 2000.</td>
<td><a href="http://www.state.oh.us/ohio/legislat.htm">http://www.state.oh.us/ohio/legislat.htm</a></td>
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<tr>
<td>Oklahoma</td>
<td><strong>(S.B. 1337)</strong>, introduced by Sen. Glen Coffee on Feb. 8. Passed as amended by the Senate on March 13 (37 to 7 vote) and passed as amended in the House, but died in conference committee on May 26, 2000. An interim study is being conducted before further consideration during the 2001 legislative session.</td>
<td><a href="http://www.ls%D0%B1.state.ok.us/">http://www.lsб.state.ok.us/</a></td>
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<tr>
<td>State</td>
<td>UCITA Legislation Status</td>
<td>Track Legislation at</td>
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<td>-----------------------------------------------------------</td>
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<td>Oregon</td>
<td>No UCITA legislation introduced in 2000.</td>
<td><a href="http://www.leg.state.or.us">http://www.leg.state.or.us</a></td>
</tr>
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<td>Pennsylvania</td>
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<td><a href="http://www.legis.state.pa.us/">http://www.legis.state.pa.us/</a></td>
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<td>Rhode Island</td>
<td>No UCITA legislation introduced in 2000.</td>
<td><a href="http://www.rilin.state.ri.us/">http://www.rilin.state.ri.us/</a></td>
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<td>South Carolina</td>
<td>No UCITA legislation introduced in 2000.</td>
<td><a href="http://www.leginfo.state.sc.us/">http://www.leginfo.state.sc.us/</a></td>
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<td>South Dakota</td>
<td>No UCITA legislation introduced in 2000.</td>
<td><a href="http://www.state.sd.us/state/legis/lrc.htm">http://www.state.sd.us/state/legis/lrc.htm</a></td>
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<td>Tennessee</td>
<td>No UCITA legislation introduced in 2000.</td>
<td><a href="http://www.legislature.state.tn.us/">http://www.legislature.state.tn.us/</a></td>
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<td>Texas</td>
<td>No legislative session in 2000.</td>
<td><a href="http://www.capitol.state.tx.us/">http://www.capitol.state.tx.us/</a></td>
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<td>Utah</td>
<td>No UCITA legislation introduced in 2000.</td>
<td><a href="http://www.le.state.ut.us/">http://www.le.state.ut.us/</a></td>
</tr>
<tr>
<td>Vermont</td>
<td>No UCITA legislation introduced in 2000.</td>
<td><a href="http://www.leg.state.vt.us/">http://www.leg.state.vt.us/</a></td>
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<td>Virginia</td>
<td>VA passed UCITA but delayed enactment by one-year and mandated a study of the legislation with a report of recommendations due in December 2000, which can be addressed in the 2001 legislative session.</td>
<td>Key bills were <a href="http://jcots.state.va.us">HB561</a> and <a href="http://jcots.state.va.us">SB 372</a>. H.B. 561 passed House by 95 to 2 on Feb. 15 and was referred to Senate Committee on General Laws. Senate amended version was passed on Feb. 25 and adopted by House on Feb. 29. SB. 372 passed Senate by 39 to 0 on Feb. 15 and referred to House Committee on S&amp;T. The House approved SB 372 with amendments by 98 to 1 on Feb. 29. The Senate concurred in House amendments by 39 to 0 on March 3. Gov. Gilmore signed the SB 372 into law on March 14, 2000. Separate Legislation to commission a study of UCITA (H.J.277 and S.J.239) failed the House but passed the Senate on Feb. 15 and was referred to House Committee on Rules. The final law directs the Joint Commission on Technology and Science (<a href="http://jcots.state.va.us">http://jcots.state.va.us</a>) to study the impact of the act and report</td>
</tr>
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</table>
findings to the Governor and General Assembly by December 1, 2000. This gives the legislature one more chance to reconsider before the law takes effect on July 1, 2001. JCOTS UCITA Advisory Committee has been formed (see http://jcots.state.va.us/adv_coms/2000/00_AC_5.htm) and is holding a series of public meetings around the state on August 23, Sept. 12, and Oct. 17 to collect recommended amendments (see http://jcots.state.va.us/documents/00-01/00UCITA.htm for details).

Track Virginia legislation at http://legis.state.va.us/

**Washington**

No UCITA legislation introduced in 2000.

4-SITE reports a UCITA proponent in the state bar association is holding meetings and lobbying for introduction.


**West Virginia**

No UCITA legislation introduced in 2000.

Track West Virginia legislation at http://www.legis.state.wv.us.

**Wisconsin**

No UCITA legislation introduced in 2000.

4-SITE reports Governor Thompson has been persuaded to leave UCITA out of his agenda by business lobby, but legislative action may occur.

Track Wisconsin legislation at http://www.legis.state.wi.us

**Wyoming**

No UCITA legislation introduced in 2000.

Track Wyoming legislation at http://legisweb.state.wy.us.

C. **How to Contact Your State Legislators**

Typically you will be represented by one or more state legislators, who have titles like Delegate or Representative or Senator or Assemblyman depending on how the legislature is organized in the state you live in. If your state has a two house legislature (e.g. a Senate and a House), then you will have at least two representatives. In some cases, you may be represented by a slate of at-large representatives rather than a single representative assigned to your specific geographic area.

Contact information for your state legislators should be listed in your local phone book in the local government section (blue pages). Many state legislatures also publish contact information through the legislative web site. Typically a state legislator will have an office or address while in session and when not in session. An in session address is usually the legislator’s office or mail stop in the state capital, while the out of session address is often a district office or personal address.

If you are not sure how to contact your state legislators (or are not sure who your legislators are), find your voter registration card to determine your district and then call
your local board of elections or check at the reference desk of your local public library for help. You can also contact Chris Brantley in the IEEE-USA Washington office for assistance at c.brantley@ieee.org or by phone at 202-785-0017 (ext. 8347).

Don’t hesitate to contact your state legislator by telephone or in person. Many legislators keep regular hours in their district offices to meet with concerned citizens or have some other mechanism for constituent feedback. Since staff for state legislators is typically limited the odds are good that you will be able to talk to your legislator directly. Don’t be intimidated; remember that they are elected to represent your interests. By the same token, be prepared and concise, don’t threaten or get emotional, and make sure you are clear about what you would like them to do (or not do); don’t waste their time.

D. Tips on Writing an Effective Letter to Your Legislator

Letters to a legislator serve two basic purposes. First, they provide information that helps to inform the legislator about an issue or advocate for a certain position. Second, the letter is almost like a “vote”. It is a statement from a concerned constituent indicating (directly or indirectly) how the legislator should act on a specific issue. Legislators, who need a majority of votes to get reelected, generally try to accommodate the wishes of their constituents as much as possible. They know that if you are willing to take the time to write a letter, you feel strongly about the issue and will consider the legislator’s response in the next election. As a matter of fact, you may feel strongly enough to go out and convince others to do the same. Thus, a legislator looks at each letter received not as just one vote, but as the tip of a voter iceberg.

Here are some tips to writing an effective letter to your state legislator:

**Timing, Timing, Timing**: Unless actively sponsoring a particular bill, most state legislators are not aware of, and do not devote much attention to legislation until the point comes for them to take some action on it. That could be a hearing on the bill, a committee mark-up, or a debate/vote on the floor of the House or Senate. A letter sent long before an issue is under active consideration is likely to be forgotten; one sent after the body has acted is a missed opportunity. Therefore, before you write, it is important to know when the best time for your letter to arrive is.

**Identify Yourself as a Constituent**: Elected officials are responsive to their own constituents but apt to ignore letters/material received from non-constituents. At best, you can hope that they will forward your letter/material to your own legislator (if they can determine who that is from your letter). To make sure your letter is read, it is very important to identify yourself as a constituent in the letter. The best way to do that is to include your name, postal address, and a nine-digit zip code. Use the postal address where you actually vote (i.e., usually a home address, rather than a business address or post office box unless you are sure they are in the Representative's district). Also, it doesn't hurt to say (assuming it is true) that you are constituent in the body of your letter. For example, "I am writing as a constituent to ask your support for...."
Address Your Letter Properly: An accurate mailing address and appropriate salutation is important to make sure the letter get's where you want it to go in a timely fashion and creates the proper impression once it arrives. Address your legislator formally and include the appropriate title and any applicable honorifics. For example:

The Honorable Susan B. Anthony  
Maryland House of Delegates  
Low House Office Building, Room 999  
84 College Ave.  
Annapolis, MD 21401 - 1991

Dear Delegate Anthony,

One Page/One Subject: The best letters are concise and to the point. The basic rule of thumb is "one page, one subject." The "three paragraph" rule is also a useful way to focus your letter. In the first paragraph, explain your reason for writing, tell the Member what you would like them to do, and briefly describe your "credentials" or experience. Letter writers often forget to ask their representatives to do something or fail to describe the action they want taken (e.g. vote against a bill). If you don’t ask for anything, then you’ll get exactly what you ask for. It is that simple. In the second paragraph, describe the importance of the issue and why the member should vote or otherwise take the action requested. This is the rationale and should be used to relevant facts and refer to supporting materials. In the final paragraph, thank the Member for considering your views and offer further assistance.

Identify the Specific Legislation Of Interest or Concern: Whenever possible, you should identify the specific bill (by name and bill number) you are urging your representative to take action on. During each legislative session, thousands of bills are introduced, many on the same or similar subjects. By providing a bill name and number, you are helping the reader research the legislation and respond to your letter in an intelligent way.

Provide Your Credentials: Where appropriate, include a brief description of yourself and/or the organization or company you are writing on behalf of. A little personal information is both useful and welcome. Credentials cover more than just a job or professional title. It includes anything that adds weight and legitimacy to your perspective. For example, if you're writing about UCITA, the fact that you are a computer professional or business consumer of software reinforces your observations. There is also such a thing as political credentials. If you worked as a volunteer on your legislator's campaign or for the political party as a supporter, find a way to work in a reference. Similarly, if you have some personal relationship with the legislator (e.g., you were classmates or members of the same fraternity/sorority; you were in the army together; you sat next to the legislator at a local meeting etc.), look for a way to work it in if you think it will create a positive association.
Offer A Compelling Rationale: The most difficult part of letter writing is providing a compelling rationale for the action you are requesting in a one-page letter. It is not only important to make arguments that are supportable, but also to avoid signaling a bias or betray an ignorance of the issues that will undermine your credibility. It is not enough to say something is in the public interest or national interest. You also need to briefly explain why. The most effective letters support your arguments/position by describing the social and economic impact that a particular bill would have on you, your organization, your community and the country if it is passed or defeated. There is an old truism that "All politics is local." Applied to grassroots letter writing, this means you need to explain how this bill will effect you and others living in your legislative district on a personal level. If you are going to cite facts and figures, reference the source so that they can be confirmed.

Avoid technical jargon: Very few legislators have enough technical background to decipher engineering jargon. Stay away from jargon and from acronyms that may not be familiar to the reader.

Avoid using form letters. Form letters are often dismissed by legislators as “astroturf lobbying,” i.e., they signal that you are not concerned enough about the issue to write your own letter. So personalize your letter as much as possible. If you are participating in an IEEE-USA letter writing campaign, use the model letter we provide as a suggested guideline, but add examples and arguments from your personal experience, and remove arguments that you don't agree with or that you feel are less persuasive.

E. Tips on Writing an Effective Letter to the Editor

Engineers most typically write letters to the editor to correct annoying “technical” errors that occasionally appear in print stories. Letters to the editor can also be valuable as a grassroots tool because they help to raise public awareness and understanding of your issue or concern. A good letter to the editor can help educate and recruit potential allies and cause elected officials to take note of an area of “controversy” and think twice before acting.

Go to your newspapers editorial page and follow the instructions for submission of letters to the editor. You can also use the Media Guide in IEEE-USA’s Legislative Action Center (http://congress.nw.dc.us/ieeeusa) to identify media contacts. Some newspapers encourage you to respond to stories on-line, in discussion forums or as separate items. This is good, but also try to get your response into print where it reaches the largest possible audience.

Here are some tips on writing an effective letter to the editor prepared by IEEE-USA public affairs consultant Paul Donnelly:

First: Think before you write. Even before you write a word, decide for yourself the ONE thing you want to say. To be effective, a letter to the editor should get a single point across. There may be several reasons WHY you think Ohm’s Law ought to be taught in
kindergarten – but a letter to the editor should say one thing well, not several things badly. Don’t start writing until you know what that one thing is, and make everything else – anything else – support that one point.

**Second: Response or soapbox?** Without starting to write yet, decide if you are responding to something the newspaper reported or editorialized about, or if instead you are writing what is known as a "soapbox letter", in which the writer is expressing an opinion that does not respond to anything in the newspaper itself. Many larger papers will not print soapbox letters, while papers that publish soapbox letters will often allow a writer more leeway. This will help you to focus.

**Third: Make clear what you’re responding to.** If you are responding to something published in the paper, identify what it is in the first sentence of your draft letter to the editor. Letters to the editor are counter punches. The usual format is something like "In arguing for the abolition of the patent system ("Congress Goes Nuts, Again," The Daily Howl, February 30, 2000), your editorialist…” That way, the editor – and the paper’s readers, when it’s published – know why you are writing from the start. And, perhaps as important, so will you.

**Fourth: Is that so?** Decide if you are expressing an opinion, or correcting a fact. Naturally, this can be a tricky business, but the difference between the two (as Mark Twain neatly put it) is the difference between a lightning bug, and lightning. For example, a letter to the editor which uses many words to criticize the newspaper’s endorsement of a candidate for Mayor because (so the paper says) he has a reputation for independence is unlikely to be as effective as one that notes how the paper erred describing him as "independent" – because (in fact) he is a well-paid lobbyist for the Hypocrisy Foundation seeking passage of the Bribery Deregulation Act. Say so; prove it and stop talking.

**Fifth: Tell them what you think.** If you are expressing an opinion in response, be clear about it. Don’t try to correct “facts” that are in dispute. If you do, you are likely to try to say too many things at once. When evaluating a letter to the editor for publication, a newspaper will generally place much weight on an opinion that is strong enough to know when it is just an opinion. That doesn’t mean that you shouldn’t use facts to support your opinion – just that you should be sure which is which.

**Sixth: Be brief.** It is often helpful to write the first draft TOO short. Many writers find it easier to add than to cut – and the more work you make for the editor, the less likely your letter will be printed. As a model of brevity for an effective letter to the editor, again, consider Mark Twain’s famous letter to the New York Sun: "Reports of my demise have been greatly exaggerated."

**Seventh: Re-write.** When you have written a draft that responds to something the newspaper has written in a specific article on a particular day, that says just ONE thing (with perhaps a reason or two WHY it is important), that corrects the paper on one fact, and cites two others, that strongly expresses what you think – then you should probably
take a few minutes to challenge every word in it: Do I really need to say this? Odds are, you don’t.

Obviously, personal attacks and overheated language can be a drawback – even if they are published, they may come back to haunt you. The old advice of saying only sweet words, in case you have to eat them, is sound.

But what truly makes a letter to the editor effective – like most writing – is focus, force and style. For most of us, that doesn’t come in the first draft, but in the second or third. When you’ve decide what is "the one true thing" that you want to get across, write your first draft – and then re-write it as many times as you think necessary (and maybe more one besides) to make it tight and clear.

Don’t make the editor ask "What’s this trying to say?"

Most publications will limit letters to the editor to a few hundred words, at most. A letter from an exceptional authority – such as a famous technologist writing about a technological misconception – will sometimes get more space, but don’t count on it. Focus is the key to force, and style must serve the first two; it can’t substitute for them.

**Eighth: Be timely.** A final note – newspapers are in the NEWS business. When you are responding to an article, try to get your (effectively written) letter to the editor in time for the original article to be fresh in the mind of the audience. This is especially effective in correcting facts.

**Conclusion.** Few letters to the editor have as powerful an influence on both a daily newspaper and its readership as a letter published the next day that in one sentence observes that a key statement or assumption in the news story or editorial was false.

F. **A Model Letter**

The following model letter is offered as a starting point. You are encouraged to tailor the letter by using the talking points provided below and by using your own words.

Dear (TITLE) (LAST NAME):

I am writing as a constituent to urge you to oppose (NAME & NUMBER OF BILL) when it comes before you during the legislative session. As an (ENGINEER) who uses the Internet both professionally and as a consumer, I am excited by the possiblities of e-commerce and think it is important for (NAME OF YOUR STATE) to promote high-tech business opportunities to help grow our economy. UCITA, however, is not the answer. If passed, it will most certainly have the reverse effect, by hurting (NAME OF YOUR STATE) consumers and making it more difficult for business users of software, for high-tech entrepreneurial start-ups and computer contractors to do business.
By changing what would otherwise be considered a sale into a licensing transaction, UCITA encourages the broad use of "shrink-wrap" software and "click-on" licenses, whose terms become fully enforceable when you open the package or click the button on-line. You can’t negotiate the terms even if you are aware of them, and the vendor can reserve the right to change them at any time without what reasonable people might consider effective notice. Software publishers will have free reign to enforce contract provisions that are onerous, burdensome or unreasonable, such as disclaiming any liability for failure to disclose known defects. The purchaser bears the burden of proving that these provisions are unconscionable, but under UCITA, the purchaser may not even be able to seek a remedy in their own state. UCITA can be used to restrict the practice of “reverse engineering” to develop compatible or complimentary products. UCITA is also so broadly drafted that it may ultimately affect transactions involving all manner of goods where software is involved (e.g. your car, your house, your kitchen appliances, etc.).

UCITA is not the way to go. It has been actively opposed or criticized by 26 state attorneys general, by software developers, by consumer advocacy organizations, by every major library association, by writers and photographers, by the Federal Trade Commission, by the American Law Institution, and by my own organization, the Institute of Electrical and Electronics Engineers – United States of America (IEEE-USA). Please oppose this legislation until these serious problems are fully addressed and take action to ensure that UCITA provisions adopted in other states do not adversely affect us here in (NAME OF STATE).

Respectfully,

(YOUR NAME)

G. UCITA Talking Points -- In writing a letter to your legislator(s), you may wish to consider using one or more of these talking points as the focus of your letter:

**General Concerns:**

- UCITA would enforce the broad use of "shrink-wrap" and computer "click-on" licenses (called "mass-market licenses" in UCITA). By changing what would otherwise be considered a sale into a licensing transaction, UCITA permits software publishers to enforce contract provisions that may be onerous, burdensome or unreasonable, and places on the purchaser the burden and cost of proving that these provisions are unconscionable or "against fundamental public policy."

- By licensing rather than selling something, a vendor can wield more control of the downstream use of the product. Placing new constraints on the use of information in mass-market transactions can, in turn, constrain the use of information for important
public purposes such as democratic speech, education, scientific research, and cultural exchange.

- UCITA allows software publishers to disclaim warranties and consequential damages even for software defects known to the publisher prior to sale, undisclosed to the buyer, and having damages that can be reasonably foreseen. For example, under UCITA a software publisher could not only prohibit publication of information on security vulnerabilities that users identify but could avoid responsibility for fixing these vulnerabilities.

- The scope of UCITA is extremely broad. "Computer information," under UCITA, includes everything from copyrighted expression, such as stories, computer programs, images, music and web pages; to other traditional forms of intellectual property such as patents, trade secrets, and trademarks; to newer digital creations such as online databases and interactive games. Although the statute claims to be limited to information in electronic form, it allows other transactions to "opt-in" to being governed by UCITA.

- UCITA is opposed by a large number of individuals and organizations representing a diversity of views and interests, including the American Law Institute (ALI), consumer advocacy groups, libraries, 26 state attorney generals, the Federal Trade Commission, the Institute of Electrical and Electronics Engineers – United States of America (IEEE-USA).

- UCITA is not necessary. Existing common law and copyright law are developing independently of UCITA that can handle the new types of information-based transactions emerging in the information economy.

**Specific Technology and Innovation Concerns:**

- UCITA would make enforceable contract provisions including prohibitions against public criticism of software and limitations on purchasers’ rights to sell or dispose of software. The first provision prohibits the reviews, comparisons, and benchmark testing that are critical for an informed, competitive marketplace. The second issue could legally complicate transactions including corporate mergers/acquisitions, sales of small businesses, the operation of businesses dealing in second-hand software, and even yard sales.

- Through contract terms, UCITA could undermine Federal intellectual property law which permits "reverse engineering" for certain important purposes, such as development of compatible (interoperable) software products and information security testing. Reverse engineering is the examination of software to identify and analyze its internal elements. Current shrink-wrap agreements often contain strict provisions forbidding reverse engineering. By making these provisions enforceable, UCITA would undermine efforts to develop compatible systems, stifle innovation and
competition in the software industry, and straightjacket user efforts to provide information security protection for their systems.

- The "self-help" provisions of UCITA would allow software publishers to embed backdoors and other functions in their software which create a security risk and that could be used by less scrupulous computer hackers to mount "denial-of-service" attacks (remote disablement or destruction of the software). Yet UCITA allows the publishers to avoid liability for accidental triggering of the attacks or exploitation of these functions by malicious intruders.

**Consumer Concerns:**

- By making “click” licenses legally valid, UCITA strengthens the ability of vendors to dictate terms in standard form contracts that are difficult for consumers to negotiate, even if they are aware of the terms being proposed. For example, UCITA would enable a vendor of information products, such as computer software, to restrict a consumer's right to sue for a product defect, to donate the product to charity, to use the product, or even to publicly discuss or criticize the product or information contained in it.

- UCITA would enable software companies and other information product providers to require that consumers bring all claims against the software company in a state of the software company's own choosing and that may be far from where the consumer lives. Thus, UCITA would allow software publishers to make expensive and burdensome any efforts by purchasers to protect their rights.

**Library Community Concerns:**

- UCITA represents a shift in power between copyright law and contract/license law that would endanger the balanced set of copyright law principles and privileges under which the library community currently operates—such as fair use, preservation, and the unhindered use of works in the public domain. For example, fair use and related exemptions could be eliminated via a click-on license. The scope of UCITA is so broad it could be used (at least in theory) to require mass-market licensing of books and to impose new constraints on public domain information and materials, including those already protected by intellectual property law.

- UCITA would create new layers of costly procedures for libraries as more time and money would be needed to educate library staff, negotiate licenses, track use of materials, and investigate the status of materials donated to libraries.
5. Conclusion

UCITA is important legislation that has already been adopted by Maryland and Virginia and that soon will be given serious consideration in almost every other state. If you are a software programmer or use software or data applications in your engineering practice, this law will directly affect you. If you rely on the services of software/data users such as universities, libraries, doctors, retail stores, public utilities, the media, your state and local government and others, you will also be affected, albeit indirectly. IEEE-USA and a wide variety of other technical and non-technical organizations believe that those effects will be largely negative ones that are bad for the consumer, bad for innovation and technology, and bad for our country.

For that reason, IEEE-USA is working to educate you and other members about UCITA and the problems that we see with this legislation. We will do our best, within the limits of our resources, to communicate those concerns to policy-makers at the state and federal level. However, we need your help to make a real difference. We need you to express your concerns as a constituent to your own elected representatives and take the time to educate them about the problems with UCITA. We'll do everything we can to help you.

So please step up to the plate. If not you, than who?
APPENDIX A

4-SITE's Myths and Facts about UCITA
(http://www.4cite.org/bbook/myths.html)

MYTH: UCITA will bring high-technology businesses to states that pass the legislation

FACT: On the contrary, UCITA allows a company in any state to take advantage of any other state's version of UCITA. According to high-technology corporate relocators and academics, the availability of an educated work force, telecommunications infrastructure and quality of life are the vital determinants in an advanced technology company's decision to relocate. Regulation is seldom, if at all, a determining factor. UCITA dissuades companies from moving rather than encouraging them to move.

MYTH: UCITA addresses a market failure

FACT: According to a U.S. government report entitled the "Emerging Digital Economy" the software and information industry's value has more than doubled between 1990 -- 1998 without the benefit of UCITA.

MYTH: UCITA helps stop piracy

FACT: The Digital Millennium Copyright Act and the No Electronic Theft Act are federal laws that have already established severe penalties for those that would pirate software or digital information. UCITA adds nothing to this protection.

MYTH: UCITA protects consumers

FACT: Consumer laws, not UCITA, protect consumers. UCITA adopts the software industry desire to call transactions "licenses" of information rather than "sales" of goods and services, thereby avoiding traditional protections for consumers that govern warranties and disclosure of terms. Under UCITA vendors are allowed to hide their terms from consumers until AFTER the consumer has paid for the product, brought it home and begun installing it. UCITA’s sponsors talk of a "right of return," but it only applies if the consumer does not agree to the contract shown seconds before loading the product on the computer. It does not protect consumers from defects that show up on first use of the product. Companies that knowingly distribute software with defects can charge consumers who call for support or fixes. Vendors can impose nondisclosure terms that prevent consumers from publishing articles or letters critical of the product. These are just a few of the anti-consumer practices allowed under UCITA.

MYTH: UCITA will have no negative impacts on libraries, archives and higher education

FACT: Through the use of non-negotiated licenses, UCITA allows software vendors to limit how a library may make use of (electronic) information and to prevent people from donating materials (such as software) to libraries. For 200 hundred years American copyright law has balanced the interests of creators with the needs of the society to use and create new information. UCITA upsets this balance.
MYTH: Copyright law prevents UCITA from granting unfair power to software vendors

FACT: As a general matter, the Copyright Act does not specifically forbid contracts from limiting its exceptions. Moreover, courts typically have held that the Copyright Act does not preempt negotiated agreements which conflict with these provisions. There are, however, very few cases that have considered whether the Copyright Act or the U.S. Constitution preempt non-negotiated, mass-market agreements which conflict with the provisions of the Copyright Act. Given this absence of authority, states need to protect their consumers, librarians, and educational institutions by explicitly preserving their federal copyright privileges via state contract law.

MYTH: Common law allows (sellers to undertake) self-help, UCITA controls it.

FACT: Except for real estate mortgages and personal property security interests (both of which are highly regulated), the law rarely allow sellers to use self-help. Self-help is the equivalent of repossessing or denying access to an information product. Currently, a company using self-help can be held liable for any damage caused by the use of the procedure. Further, the many different laws against computer trespass and computer tampering make the use of self-help involving computers legally risky at best. UCITA enables a company to use self-help without incurring the legal risks associated with current law.

MYTH: Other states are scrambling to pass UCITA

FACT: (As of Sept. 2000)
- California has decided not to introduce UCITA this year.
- Illinois has tabled the measure for this year.
- Hawaii will take no further action of the legislation this year.
- Maine has opted not to consider UCITA before 2001.
- Iowa has created "bomb-shelter" legislation that exempts Iowa residents and companies from the effects of UCITA (through 2001).

MYTH: UCITA protects customers with the right of return

FACT: First, the "right to return" applies only to consumers purchasing "mass-marketed" software, and not to businesses or software used for any type of commercial purpose. Second, this right instantly evaporates when the "I Agree" button is clicked, which occurs before a consumer can even load the program to see if it is even a program he/she wants, regardless of the license terms.

MYTH: UCITA outlaws bad license terms when they are "unconscionable"

FACT: Under UCITA a judge may only void a license term if it is unconscionable or violates a fundamental public policy. This is an extremely high legal standard. To be unconscionable a term has to "shock the conscience" of the court. Under current law, judges can void unconscionable terms in contracts but they almost never exercise this power. Instead, they look to the statutes to find any specific terms that the legislature has declared unfair or unreasonable. But in UCITA, the kinds of practices most likely to be weighed into an unconscionability decision, such as hidden contract terms, nondisclosure
terms, nontransfer terms, no warranties, and no remedies (not even a refund) for losses caused by defects, are explicitly approved in UCITA. Further, the term fundamental public policy is not defined adding to the difficulty of interpreting whether or not a license term violates a public policy.

MYTH: Everyone was at the table when UCITA was drafted

FACT: Some of us were at the table, but our concerns were not addressed by those with the power to decide. Moreover, the prestigious American Law Institute, a partner in the development of UCITA, withdrew from the drafting process citing grave concerns over the unbalanced nature of the legislation. UCITA was introduced over the concerns of 25 Attorneys General, the Federal Trade Commission, 11 different software and computer organizations, 6 different consumer groups, more than 12 different industry associations, 5 separate library organizations, 3 independent information and content developers, 4 different organizations within the entertainment and newspaper industries, 50 intellectual property professors, 43 contract law professors and the 2 leading intellectual property law bar associations in the United States.

MYTH: UCITA preserves the freedom to contract

FACT: Software and information companies currently have the freedom to contract with any organization wishing to purchase their product. However, a viable free market system requires institutions that promote the integrity of the process. The freedom to contract has always been limited by courts and legislatures where unfair terms and unfair bargaining power are involved.
IEEE-USA Position Statement Opposing
Adoption of UCITA By the States (February 2000)
(http://www.ieeeusa.org/forum/positions/ucita.html)

On behalf of The Institute of Electrical and Electronics Engineers - United States of America (IEEE-USA) and its nearly 240,000 U.S. members who are electrical, electronics, computer and software engineers, we wish to reiterate to the state legislatures the concerns regarding the Uniform Computer Information Transactions Act (UCITA) that we previously expressed to the National Council of Commissioners on Uniform State Laws (NCCUSL).

We believe UCITA should be rejected by the states. UCITA would have a widespread, complex impact including: (a) its interaction with the existing statutes, principles, and interpretations of Federal intellectual property law; (b) the provisions currently found in "shrink wrap" and "click-through" software agreements -- many of them questionable or unenforceable under current law -- that UCITA seeks to make enforceable; and (c) UCITA's effect on existing business practices and reasonable purchaser expectations. Into the existing and evolving legal and business situation, UCITA would inject an ironclad statutory framework that is very easy to abuse to the serious detriment of consumers, large business users, and small business users of computer software, software developers, computer consultants and the general public.

Many organizations, including 24 state Attorneys General, the staffs of the Bureau of Competition, Bureau of Consumer Protection, and Policy Planning Office of the Federal Trade Commission, professional and trade associations, consumer groups, the American Law Institute (originally NCCUSL's partner in drafting UCITA), and others have expressed opposition or concern regarding UCITA. In some cases the concerns of these organizations parallel ours, and in other cases they raise additional issues. Our concerns are in the following areas:

1. By changing what would otherwise be considered a sale into a licensing transaction, UCITA permits software publishers to enforce contract provisions that may be onerous, burdensome or unreasonable, and places on the purchaser the burden and cost of proving that these provisions are unconscionable or "against fundamental public policy." Examples of these provisions include prohibitions against public criticism of the software and limitations on purchasers' rights to sell or dispose of software. The first provision prohibits the reviews, comparisons, and benchmark testing that are critical for an informed, competitive marketplace. The second issue could legally complicate transactions including corporate mergers/acquisitions, sales of small businesses, the operation of businesses dealing in second-hand software, and even yard sales.

2. UCITA would undermine the protections provided by Federal intellectual property law and upset the carefully achieved balance between owners and purchasers of intellectual property. For example, one major protection is that "fair use" case law and statutory copyright law permit "reverse engineering" for certain important purposes, such as development of compatible (interoperable) software products and information security testing. Reverse engineering is the examination of software to identify and analyze its internal elements. Current shrink-wrap agreements often contain strict provisions forbidding reverse engineering. By making these provisions enforceable, UCITA would stifle innovation and
competition in the software industry, and would straightjacket efforts of users to provide information security protection for their systems.

3. UCITA allows software publishers to disclaim warranties and consequential damages even for software defects known to the publisher prior to sale, undisclosed to the buyer, and having damages that can be reasonably foreseen. For example, under UCITA a software publisher could not only prohibit publication of information on security vulnerabilities that users identify but could avoid responsibility for fixing these vulnerabilities.

4. By legalizing the choices of law and forum often included in software agreements, especially shrink-wrap and click-through, UCITA would allow software publishers to make expensive and burdensome any efforts by purchasers to protect their rights. This includes issues that for a sale would be handled in local small-claims courts.

5. The "self-help" provisions of UCITA would allow software publishers to embed security vulnerabilities and other functions in their software that facilitate "denial-of-service" attacks (remote disablement or destruction of the software) while avoiding liability for accidental triggering of the attacks or exploitation of these functions by malicious intruders.

We urge the state legislatures to reject UCITA.

This statement was developed by the Committee on Communications and Information Policy and the Intellectual Property Committee of The Institute of Electrical and Electronics Engineers - United States of America (IEEE-USA), and represents the considered judgment of a group of U.S. IEEE members with expertise in the subject field. The IEEE-USA promotes the careers and public-policy interests of the nearly 240,000 electrical, electronics, computer and software engineers who are U.S. members of the IEEE.

(See the related IEEE-USA position statement on the importance of Reverse Engineering on-line at http://www.ieeeusa.org/forum/positions/reverse.html.)
March 3, 2000

Dear Representative,

We are writing to express our concerns about the negative impact the proposed Uniform Computer Information Transaction Act (UCITA) will have on small entrepreneurs, consultants, and all users of software. By allowing mass market software producers to protect themselves from liability for product defects, UCITA will encourage a race to the bottom in terms of software quality and robustness. At a time when our efforts should be on improving the security and robustness of our national information infrastructure, we will instead be rewarding a "first out the door" mentality for software development. Worse yet, UCITA will legalize shrink-wrap licenses that prohibit reverse engineering - one of the tools used to fix defective software - and the publication of benchmarking articles that compare the quality of commercially available software products.

The Association for Computing Machinery is the oldest scientific, educational, and professional association of computer professionals and practitioners in the United States. The ACM's 80,000 members (60,000 in the US) represent a critical mass of computer scientists in education, industry, and government. (The next paragraph referring to positions of IEEE-USA and other organizations is omitted.)

UCITA enables software producers to limit their legal accountability for defective products, reducing the incentive for companies to examine products to detect software defects and ensure secure code. Software producers can disclaim warranties and restrict their liability to the purchase price of the software, even if the producer was aware of the defects or security vulnerabilities prior to sale. UCITA can lead to a lowering of standards in the computer field and undermine efforts to create a robust system that can endure rigorous scrutiny.

Vendors, moreover, can subject customers to non-negotiable terms through shrink-wrap licenses. Shrink-wrap licenses go into effect upon the installation and use of the software, and customers can be subjected to these terms even if the company refuses to disclose the terms to the customer before the sale. Because the terms are hidden, software vendors will be tempted to include outrageous provisions in the license. Customers will not be able to comparison shop over such issues as warranty or service policy. In most business contracts, customers will not have the right to return the product if they disagree with the terms, even further encouraging outrageous contract provisions.

Vendors could constrain the use of information for legitimate scientific, research, or educational purposes. Software publishers could enforce contract provisions that restrict a customer's right to sue for product defects. Through nondisclosure agreements, vendors could ban users from comparing software or publicizing information about insecure products. Researchers could be restricted from conducting benchmark studies of competitive products and publishing negative reviews. The prohibition of such speech harms the consumer, who is unable to read articles...
comparing products, and jeopardizes the information infrastructure by enabling companies to produce inferior software without the risk of having weaknesses exposed in the press. The speech restrictions also hinder educators, scholars, and creators of research-driven products because learning from mistakes is essential to the ongoing improvement of work.

UCITA allows publishers to ban reverse engineering by means of contractual use restrictions. Reverse engineering is critical for systems interoperability and facilitates the research, development, and testing of information processing systems. The software engineering and research communities utilize reverse engineering to investigate security risks and develop programs that impede the spread of viruses. UCITA allows software companies to impose upon computer researchers the onerous burden of undergoing litigation to get permission to use reverse engineering. The ban could stifle innovation among independent software engineers and limit their ability to create noncommercial applications for the public domain. Existing trade secret and copyright law permit reverse engineering, but UCITA allows publishers to unilaterally outlaw the practice.

UCITA may shift the balance of rights among intellectual property creators, publishers, and users in the United States by undermining the fair use and first sale provisions of intellectual property law. The legislation allows publishers to circumvent fair use protections for comparing competitive products, reverse engineering, and making copies of materials for use in non-profit, educational settings. UCITA impacts first sale doctrine by limiting users' rights to borrow, lend, and share copies of products. The restrictions could curtail access to published materials in the public domain, such as digitally stored documents in a public library.

UCITA's "self-help" provisions would permit software vendors to place software vulnerabilities in a business's software and threaten disruption of the business's critical systems if a licensee were to violate use restrictions. Even if the software vendor does not itself shut down a customer's software, by creating a weakness in the customer's system security, the vendor exposes the customer to attacks by third parties. If the vendor can shut down a customer's system remotely, someone else may be able to do so as well. UCITA imposes no risk of liability on vendors for third-party attacks, and these attacks could shut down hospital control systems, criminal record or fingerprint search systems, manufacturing assembly line control software, and other systems that are important to the safety and welfare of the public.

Independent software engineers and small consulting firms could also be negatively impacted by UCITA. The restrictions on the sale and transfer of used software and computers could hinder their ability to control costs and form partnerships. Furthermore, vendors can limit the right of licensees to contract independent service providers to perform maintenance functions.

In summary, we urge you to be cautious as you evaluate UCITA. Part of the ACM Code of Ethics states: "Excellence is perhaps the most important obligation of a professional. The computing professional must strive to achieve quality and to be cognizant of the serious negative consequences that may result from poor quality in a system." We urge you to carefully consider a bill that so many believe could cause long-term damage to America's most successful industry and to its customers. If there is any way we can be of assistance, please do not hesitate to call us at (202)544-4859. Thank you for your consideration.

Respectfully submitted,

Dr. Barbara Simons, President
Association for Computing Machinery

Eugene H. Spafford, Chair
U.S. ACM Public Policy Committee
Laws relating to computers, software, and the Internet are being proposed and passed at such a breathless rate that even those of us trying to follow them are having trouble keeping up. Unfortunately, some bad laws, such as the Uniform Computer Information Transactions Act (UCITA), are likely to encourage other bad laws, such as proposals to increase surveillance of the Internet. Yet, few people have heard of UCITA, an extraordinary example of a legal proposal with far-reaching consequences. Because commerce is regulated at the state level in the United States, UCITA is being considered in several states; Virginia and Maryland have passed it.

UCITA will write into state law some of the most egregious excesses contained in shrink-wrap software licenses. These include statements that disclaim liability for any damages caused by the software, regardless of how irresponsible the software manufacturer might have been. Shrink-wrap licenses may forbid reverse engineering, even to fix bugs. Manufacturers may prohibit the non-approved use of proprietary formats. They can prohibit the publication of benchmarking results. By contrast, software vendors may modify the terms of the license, with only email notification.

They may remotely disable the software if they decide that the terms of the license have been violated. There is no need for court approval, and it is unlikely that the manufacturer would be held liable for any harm created by the shutdown, whether or not the shutdown was groundless. (The mere existence of such mechanisms is likely to enable denial of service attacks from anywhere.)

Since a small contractor probably will have a contract that holds him or her liable for damages, the little guy may be forced to pay for damages resulting from buggy commercial software. Furthermore, the small business owner may be unable to sell the software portion of the business to another company, because most shrink-wrap licenses require the permission of the software vendor before a transfer of software can occur.

Very few manufacturers of other products have the chutzpah to disclaim all liability for any damage whatsoever caused by defects in their products, and most states restrict the effectiveness of such disclaimers. Software vendors base their non-liability claim on the notion that they are selling only licenses, not ‘goods’. Consequently, so the argument goes, U.S. federal and state consumer protection laws, such as the Magnuson-Moss Warranty Act, do not apply. The strong anti-consumer component of UCITA resulted in opposition from twenty-six state attorneys-general, as well as consumer groups and
professional societies such as the IEEE-USA, the U.S. Technology Policy Committee of ACM (USACM), and the Software Engineering Institute (SEI). (See [1] for more information about ACM's activities).

When most people learn of UCITA, they assume that the unreasonable components of software licenses won't survive court challenges. But because there is very little relevant case law, UCITA could make it difficult for courts to reverse the terms of a shrink wrap license.

Quoting from the state attorneys-general letter [2], "We believe the current draft puts forward legal rules that thwart the common sense expectations of buyers and sellers in the real world. We are concerned that the policy choices embodied in these new rules seem to almost invariably favor a relatively small number of vendors to the detriment of millions of businesses and consumers who purchase computer software and subscribe to Internet services. ... [UCITA] rules deviate substantially from long established norms of consumer expectations. We are concerned that these deviations will invite overreaching that will ultimately interfere with the full realization of the potential of e-commerce in our states."

We know that it is almost impossible to write bug-free software. But UCITA will remove any legal incentives to develop trustworthy software, because there need be no liability. While the software industry is pressuring the states to pass UCITA, law enforcement is pressuring Congress to enact laws that increase law enforcement's rights to monitor email and the net. Congress, concerned about the insecurities of our information infrastructure, is listening. So, in addition to the risks relating to unsecure and non-robust software implied by UCITA, we also have the risk of increased surveillance and the accompanying threats to speech and privacy.

If you want to learn about the status of UCITA in your state and how you might get involved, information is available from a coalition of UCITA opponents [3].

1. http://www.acm.org/usacm/copyright/
3. http://www.4cite.org

Barbara Simons has been President of the ACM for the past two years.
July 23, 1999

Gene Lebrun
President,
National Conference of Commissioners on Uniform State Laws
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611

Dear Mr. Lebrun:

The Attorneys General of Connecticut, Idaho, Indiana, Iowa, Kansas, Maryland, Nevada, New Mexico, North Dakota, Oklahoma, Pennsylvania, Vermont, Washington and the Administrator of the Georgia Fair Business Practices Act are disappointed with the provisions of the proposed Uniform Computer Information Transactions Act (UCITA). For the reasons explained below, we urge NCCUSL to table this project. If NCCUSL decides to continue the project, we hope that by going on record with our concerns, NCCUSL will be persuaded to defer any attempt to introduce the statute in our state legislatures until such time as it has considered and addressed the problems that we identify.

We believe the current draft puts forward legal rules that thwart the common sense expectations of buyers and sellers in the real world. We are concerned that the policy choices embodied in these new rules seem to almost invariably favor a relatively small number of vendors to the detriment of millions of businesses and consumers who purchase computer software and subscribe to internet services.

Preemption of Existing State Consumer Law Disclosure Standards

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 section 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. Moreover, we are concerned that the safe harbors in the new standard will be easily circumvented by those who wish to hide material facts from purchasers.

(text omitted)
Contract Formation Issues

The contract formation provisions of UCITA permit practices that are contrary to purchaser expectations. Sections 112 and 211 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.

A second danger in the contract formation provisions of UCITA lies in section 112(f), which allows the parties to a contract to modify the rules of contract formation in future transactions. This is entirely inappropriate in most consumer transactions. For example, the terms of a simple purchase agreement under section 112(f) could contain a provision providing that future transactions could take place on a negative option basis, allowing the seller to propose new contracts and enforce them unless the buyer objects within a fixed period of time. The Attorneys General certainly understand the need for commercial buyers and sellers to be able to determine for themselves how they will conduct business over a course of dealing. However, extending the ability to change the basic rules of contract formation to merchants doing business with consumers via mass market contracts will open the door to consumer confusion and deception.

Contract Modification Issues

In the area of contract modification, section 304 of UCITA allows vendors to unilaterally make enforceable modifications to contracts involving continuing performances, requiring only minimal notice as a condition for doing so. The sole remedy available to persons against whom such modifications would operate is cancellation, and even that remedy is limited to parties to mass market contracts. The value of that limited remedy is further diminished by the fact that is unavailable to parties to access contracts, such as contracts with internet service providers and online information services, that will probably comprise the largest class of contracts subject to section 304.

There is great peril in section 304 for persons to whom modifications are proposed. Section 304(b) allows a contract to specify a modification procedure if the procedure reasonably notifies the other party of the change. The modest safeguard in section 304(c) that permits a court to reject standards of notice that are manifestly unreasonable would, if interpreted in accordance with the reporter's notes, permit procedures that are highly unlikely to result in any notice at all. The reporter's notes seem to approve a procedure whereby terms of service can be modified simply by posting the changes to a particular location or file. Such a procedure places the entire burden of discovering whether a modification has been proposed upon the offeree, rather than the offeror. It requires parties to whom such a modification may be proposed to continuously monitor the designated location to determine whether a modification has in fact been proposed.

From a practical point of view, it has been the experience of the Attorneys General that offerees simply do not monitor online locations for contract modifications. Indeed, attempting modification in such a manner is so unlikely to actually inform offerees of a proposed modification that the Attorneys General have taken the position that any such modification procedure is illegal under current law. In a highly publicized recent case, America Online agreed to make just over $2.5 million dollars in refunds to consumers who may not have received a price change notification that was posted in the manner suggested in the reporter's note.
The deficiencies of the recommended procedure become quite clear when projected into likely practices of the near future, in which a person, much as a person now may have multiple magazine subscriptions, may subscribe to numerous different sources of information and entertainment via contracts governed by UCITA. There really is no possible common sense justification for requiring such a person to monitor numerous services on a daily basis to learn of possible changes in terms.

The cancellation provision in section 304(b)(2) is hollow. The largest category of contracts to which section 304 applies are contracts with internet service providers and online information service providers who are not bound by section 304(b)(2) because contracts with such entities are access contracts excluded from the definition of mass market contract. Purchasers of such services may well be faced with a modification, proposed in good faith but which deprives them of the benefit of their bargain, that they have no choice but to accept.

There is additional danger here because of the nature of the billing relationships between the parties for the kinds of contracts to which section 304 applies. In many instances, particularly in agreements with internet service and information providers, the user of the service authorizes the service provider to automatically charge amounts due under the agreement to the user's credit card or checking account. In the case of a price increase implemented by posting online, it will likely be the case that the user will only discover the increase after it has been paid. The fact that payment has already been made substantially reduces the user's bargaining power in seeking a refund of the amount of a surprise price increase.

A Cautionary Tale

We are concerned that should UCITA become law in its present form in even one state, the following scenario will become legally sanctioned: Jane Consumer purchases a piece of software that promises analysis and advice concerning various investment options. When she installs the software, she learns from a message displayed during the installation process that she must subscribe to a proprietary information service to use it, rather than the competing service she already uses to obtain such information. Even though other similar software packages are available which do not impose such requirements, Jane is loath to begin the shopping process over again in order to decide which of those packages to purchase, so she accepts the new terms. Jane subscribes to the new information service, selecting a discounted 1 year agreement rather than a full price month to month agreement, and logs onto the system for the first time. When she does, she is presented a screen which contains a hyperlink in the upper left hand corner labeled "important information." She is also presented with a flashing icon calling her attention to a hot stock tip. She decides to check out the tip before reviewing the information. After deciding the tip was not something she wants to pursue, she returns to the main screen, but the "important information" hyperlink is gone.

She continues to use the service for a period of months. About 6 months later, a package arrives in the mail. It is an upgrade to her investment analysis software. Because she did not order the upgrade and there is nothing contained in the package advising her otherwise, she assumes it is a free bug fix upgrade. After a couple of weeks, she installs it and logs onto the service to try it out. When she does she sees the "important information" hyperlink. Because this hyperlink eluded her before, she decides to immediately review the information and discovers that the software upgrade was not free, but was sent to her on a negative option basis. She learns that she will be billed $49.95 for the software because she failed to return it within 7 days of receipt as required by the upgrade service provisions of her original contract.
Confused because she was never aware of any such provision, she calls the software company's customer service line for an explanation. She is told that the term was conspicuously displayed behind the "important information" hyperlink when she first logged onto the service and that the company has a no refund policy. She is somewhat condescendingly told that she should read her contracts before she agrees to them. She asks where on the service a copy of the contract is available for her review, but is told that it is only available during the initial session of use. She angrily asks to cancel the service, but is told that she cannot do so until her 12 month term expires.

The next month, she reviews her credit card statement and discovers not only the $49.95 charge for the software, but also that the monthly fee for the service has increased by $5. She logs onto the service and goes to the customer service area to see if she can find any information about the fee increase. In the customer service area, she finds a lengthy letter from the president of the company explaining that its former business model was flawed and that the company had to choose between raising its prices or going out of business. The letter closes with a reminder that customers should periodically check the customer service area for notice of such fee changes, as required by the company's standard contract. She again calls customer service and asks to cancel the service because of the price increase, but is again told she cannot do so until her 12 month term expires.

Jane writes to her credit card company asking for charge-backs in the amounts of the unexpected fees, but when provided a copy of the agreement by the software company, her credit card company declines the charge-backs, saying that the charges were appropriate under the agreement. Jane angrily uninstalls the software and decides that she will return to the expensive but relatively trustworthy stockbroker that she had used before.

Certainly, the Attorneys General hope that even if UCITA were enacted, Jane Consumer's experience would be atypical, if only because merchants would realize that consumer goodwill would be damaged by such practices. However, in our experience as law enforcement officials, we have found that there is a substantial element in our society unconcerned with matters such as consumer goodwill, who will exploit any method to gain advantage in their dealings with others. As it currently stands, UCITA is an open invitation to those persons to exploit our citizens.

Conclusion

The overriding purpose of any commercial code is to facilitate commerce by reducing uncertainty and increasing confidence in commercial transactions. We believe that UCITA fails in this purpose. Its rules deviate substantially from long established norms of consumer expectations. We are concerned that these deviations will invite overreaching that will ultimately interfere with the full realization of the potential of e-commerce in our states. Certainly it would be counter to the goals of UCITA to promote an environment in which people like Jane decide that the legal pitfalls of doing business online outweigh the benefits.

Sincerely,

(Signatures of 26 States Attorney Generals and related state officials omitted to save space)
APPENDIX F

LETTER BY THE FEDERAL TRADE COMMISSION
EXPRESSING CONCERNS RE: UCITA
(http://www.ftc.gov/be/v990010.htm)

July 9, 1999

Mr. John L. McClaugherty
Chair, Executive Committee
National Conference of Commissioners on Uniform State Laws
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611

Dear Mr. McClaugherty:

As the National Conference of Commissioners on Uniform State Laws (NCCUSL) prepares to consider adoption of the Uniform Computer Information Transactions Act (UCITA), the staff of the Bureaus of Consumer Protection and Competition and of the Policy Planning office of the Federal Trade Commission (FTC) wishes to express the same consumer welfare concerns that it raised in its October 30, 1998 letter to Carlyle C. Ring and Professor Geoffrey Hazard, Jr. about UCITA's predecessor, Uniform Commercial Code Article 2B (August 1, 1998 draft).(1) Those concerns, with one exception, have not been addressed in any significant respect in UCITA.(2) We briefly summarize the October 30, 1998 letter and have attached a copy for your convenience.

UCITA endorses a license model for "computer information transactions."(3) For example, under UCITA a license to use software (rather than the sale of the software itself) would allow the licensor to control how the licensee uses the software, even where the software has been mass-marketed to consumers. Examples of these limits or controls include restrictions on a consumer's right to sue for a product defect, to use the product, or even to publicly discuss or criticize the product.(4)

Unlike the law governing sales of goods, UCITA departs from an important principle of consumer protection that material terms must be disclosed prior to the consummation of the transaction. UCITA does not require that licensees be informed of licensing restrictions in a clear and conspicuous manner prior to the consummation of the transaction.(5) For example, UCITA allows licensors of software to disclose these restrictions after the transaction has been completed, such as when the licensee opens the software box and discovers the terms of the license. Thus, in effect there may be no "meeting of the minds" prior to the consummation of the transaction. Moreover, UCITA adopts a definition of the term "conspicuous" that has the effect of allowing material license terms not to be disclosed clearly and conspicuously at any point before or after the transaction is completed.(6)

In addition, in its effort to establish a legal framework to facilitate electronic commerce, UCITA allocates significant risks to consumers in the event of unauthorized transactions. This, in turn, might deter, rather than advance, development of electronic commerce.
Further, UCITA expands the scope and power of contracts, particularly contracts designed by software vendors and intellectual property owners. The effect of such a change is potentially to provide state contract law with primacy over federal intellectual property laws in those cases where the licensor seeks to acquire or restrict rights beyond what federal or state law permits. For example, if a state were to adopt UCITA, state law could permit licensors to include anti-competitive grant-back terms in a license that reduce the licensee's incentive to engage in research and development, unless the licensee took on the uncertain task of challenging the term subject to UCITA Section 105.(7) By doing so, this could upset the delicate balance between intellectual property and competition policy, which has been carefully calibrated to recognize certain limits on intellectual property so as not to stifle competition or innovation. By allowing licensors of computer information to expand their rights, there is a possibility that these state-enforced contracts could restrain trade in violation of the antitrust laws, constitute misuse of intellectual property, and/or violate state trade secret statutes. As a result, UCITA may not have a neutral effect on competition policy.

In sum, we question whether it is appropriate to depart from these consumer protection and competition policy principles in a state commercial law statute, especially since many of these same principles are now being included as core elements in international e-commerce discussions. UCITA proposes these changes based on the implicit assumption that there is something unique about the technology involved (software and information access) that necessitates this departure from the traditional law of sales. If this is the case, we believe it would be more appropriate to seek a change to the underlying laws that are deemed to be inappropriate to software and other UCITA products. If a license model is deemed most appropriate nonetheless, the FTC staff in its October 30, 1998 letter recommended a number of changes to an earlier draft of UCITA which would help alleviate the staff's concerns.

It is our hope that the NCCUSL membership will consider the issues raised in the attached letter during deliberations over whether to adopt UCITA.

Respectfully submitted,

Joan Z. Bernstein, Director
Adam G. Cohn, Attorney
Division of Marketing Practices
Bureau of Consumer Protection

William J. Baer, Director
David A. Balto, Assistant Director for Policy and Evaluation
Bureau of Competition

Susan S. DeSanti, Director
Michael S. Wroblewski, Advocacy Coordinator
Policy Planning

FEDERAL TRADE COMMISSION

(footnotes and attachments omitted)
APPENDIX G

NATIONAL LIBRARY ASSOCIATIONS' STATEMENT ON UCITA
(http://www.ala.org/washoff/nea13.html)
(see also http://www.arl.org/info/letters/lebrun7.12.html)

Statement of James G. Neal,
Dean, University Libraries
Johns Hopkins University

on behalf of the Maryland Library Association, American Association of Law Libraries,
American Library Association, Association of Research Libraries, Medical Library Association
and Special Libraries Association

before the Maryland General Assembly's Joint Meeting of the Senate Finance Committee
and the House Economic Matters Committee

February 3, 2000

Mr. Chairmen, I am James G. Neal, Dean, University Libraries, Johns Hopkins University and
Past President of the Association of Research Libraries and a current member of the Executive
Board of the American Library Association. I have been very active on intellectual property
matters, serving as an advisor to the American delegation at the World Intellectual Property
Organization treaty negotiations in Geneva in 1996, testifying before congressional committees
on copyright legislation, and participating on national and international committees working on
intellectual property matters for a digital world.

I am testifying today on behalf of the Maryland Library Association and the nation's major library
associations: the American Association of Law Libraries, the American Library Association, the
Association of Research Libraries, the Medical Library Association, and the Special Libraries
Association. Collectively, we represent 80,000 librarians in research, academic, medical, public,
law, state-based, and special libraries throughout North America. Thank you for the opportunity
to appear before these two Committees to share our views of House Bill 19/Senate Bill 142 -- the
proposed Maryland Uniform Computer Information Transactions Act (UCITA).

The proponents of UCITA are hoping that Maryland and other states will enact a uniform set of
rules for commercial transactions involving electronic information. We can appreciate that goal.
We believe, however, that the rules as set out in UCITA will do that in a way that will harm
software consumers and users of electronic databases which, in addition to many businesses and
individuals, include Maryland libraries of all kinds.

Our state's libraries have embraced technological advances and are a significant element in
Maryland's electronic commerce. We not only provide patrons with computerized access to
electronic information products and services, we use software to run our internal operations. As a
result, we are among the largest consumers of software. We are also the largest consumers of fee-
based electronic services and databases: the nation's public, academic, medical, special and
government libraries expend hundreds of millions of dollars in fees each year for databases and
electronic library materials.

For example, in the current fiscal year, the acquisitions budget for the libraries at Johns Hopkins
University is over $9 million with approximately $2 million devoted to the purchase or licensing
of electronic and online resources. These figures do not include hardware, software, network
support and equipment, or personnel. Unfortunately, as I explain below, if the Maryland UCITA
is enacted, research and educational institutions would see a substantial rise in their cost of access
to information, which is their life-blood. In addition, as with businesses, UCITA would likely
apply to applications software utilized across the entire academic and library enterprise --
afflicting information databases; payroll operations; safety, health and environmental programs;
accounting systems; and more.

The library community, therefore, has a huge stake in the outcome of your deliberations on the
future of UCITA here in Maryland. Although we have many concerns with UCITA, I would like
to bring to your attention this afternoon some of the major areas of concern to the library
community.

First is our concern with UCITA's validation of shrink wrap and clickable licenses. Currently,
many software and information products are sold as shrink-wrapped packages or as products
downloaded through the Internet from a vendor's web site. Indeed, obtaining software and
information products through the Internet is an important element of e-commerce that is a
convenience for us all. However, when a buyer breaks the wrapping or clicks "ok" with his or her
mouse, that buyer is entering into a contract or license with terms that may restrict otherwise
legitimate uses of the product, such as legally transferring the software or digital works; publicly
discussing the product; or providing access to other users. And the buyer likely does not even
know that he or she has agreed to those contract terms.

Although many courts today would not enforce such restrictive terms in "shrink wrap" and "click-
on" licenses, particularly against researchers, under UCITA [Section 21-209] those terms would
be enforceable with very few exceptions short of "unconscionability." Moreover, under UCITA
[Section 21-102(44)] even those few exceptions would not be available to libraries, or to
businesses, when they purchase or license products through "shrink wrap" and "click-on"
licenses. For a product obtained in that manner -- as opposed to the typical contracts or license
agreements that libraries negotiate to obtain library materials -- a library may find that the terms
of the license agreement restrict uses that are otherwise allowed under copyright law, such as
making copies for library patrons. In other words, UCITA would allow an end run around
currently legitimate practices under the copyright exceptions for fair use, first sale, and
preservation.

Second, UCITA [Section 21-112] would make it easier for a researcher or librarian to enter into a
license agreement in which he or she inadvertently releases valuable information rights to a
publisher to the detriment of their institutions.

Third, UCITA's provisions [Sections 21-605 and 21-815] on electronic regulation of performance
and electronic self-help would permit a licensor to recover its data or prevent the use of its
product when a license expires. These provisions would seriously undermine a library's
traditional role of preserving information resources. In addition, the electronic self-help provision
of a “manifesting assent” has no requirement of conspicuousness and there are insufficient
procedural protections when you consider the potential disruption to expensive and sensitive
research.
Finally, UCITA assumes a competitive market, where users have meaningful choices between vendors who compete with each other. For some types of software and information products and databases, there is virtually no competition. This is certainly true with many of the products marketed to educational institutions. This absence of competition would allow licensors to exploit the provisions of UCITA and to impose onerous terms that the institutions would be unable to negotiate because they would have little or no bargaining power.

In summary, the provisions of UCITA would substitute the private law of contract for the public law of copyright in ways that would be detrimental to consumers, including libraries. We oppose UCITA in its current form and urge that it not be recommended for adoption without a more thoughtful study of its effects on all of Maryland's citizens.
MEMO FROM THE AMERICAN LAW INSTITUTE
DECLINING TO PARTICIPATE ON THE
UCITA DRAFTING COMMITTEE
(http://www.2bguide.com/docs/50799dad.html)

Memo
To: Uniform Computer Transactions Act Drafting Committee
From: David Bartlett, Amy Boss, David Rice
Date: May 7, 1999

The American Law Institute and the National Conference of Commissioners on Uniform State Laws have decided not to proceed with Article 2B as an addition to the Uniform Commercial Code. Instead, the Conference plans to bring forward the Uniform Computer Information Transaction Act as a proposed uniform state law. This change had the effect of ending our roles as ALI members of the Drafting Committee for Article 2B. Instead the Conference has asked that we serve as advisors to the UCITA Drafting Committee.

The three of us have been actively engaged members of the Drafting Committee for Article 2B since its inception, and were involved as well in the prior evolutionary stages of what became the UCC 2B draft. We believed, as did the American Law Institute in deciding to co-sponsor the project, that a focused effort to clarify contract law governing computer software and related transactions was desirable. We have enjoyed working with and learning from all of our NCCUSL colleagues while seeking to accomplish this. We greatly value the many new friends we have made through participation in this ambitious enterprise.

Those factors have made our individual decisions difficult. Nonetheless, the three of us have each concluded that we will not continue to participate as advisors. It is important to us, and we hope instructive to you, to share the reasons common to our decisions.

A few months ago, following the final Drafting Committee meeting, it became apparent that the Conference was determined to recommend the draft for final approval in July despite concerns from many sectors regarding its suitability for enactment. The three of us consequently recommended to the leadership of the Institute that the draft not be included in the UCC at this time. Our recommendation was based on a number of underlying concerns including matters of substance, process, and product.

In terms of product, the draft has, in attempting to address numerous concerns of affected constituencies, progressively moved away from articulating sufficient and generally applicable default rules toward establishing increasingly particular and detailed rules. In so doing, the draft sacrificed the flexibility necessary to accommodate continuing fast-paced changes in technology, distribution, and contracting. In terms of process, the guiding principle appeared to be the Conference’s desire to expedite approval and commence enactment of the draft. This led to obviating rather than learning from strong concerns expressed by Conference and Institute discussions over the entire course of the project, ranging from scope and drafting to the interplay with intellectual property rules. Substantively, as you know, the three of us often disagree. Yet we believe that some rules, although they may assure important constituencies’ support for the draft, nonetheless jeopardize enactability because of the ultimate balance of interests achieved.
These are not new, or newly expressed, concerns. They are fundamental concerns and have been aired before in Conference and Institute discussions, by individual members, Drafting Committee members and observers, and Internet discussion list participants, as well as by software and other computer science enterprises and professional organizations, law professors, and editorial writers. The persistent din of these concerns has contributed significantly to our decision to decline the invitation to participate as advisors.

The limited time remaining before presentation of UCITA for final approval does not permit changes that might address such fundamental concerns. Thus, inasmuch as the draft is now on the final approval track, what contributions we could make to the draft have been made.

We therefore decline the Conference’s invitation that we participate as advisors.
MEMO FROM THE AMERICAN LAW INSTITUTE REQUESTING RETURN OF UCC ARTICLE 2B PROPOSALS TO THE DRAFTING COMMITTEE FOR FUNDAMENTAL REVISION

To: Members of the American Law Institute
From: Jean Braucher and Peter Linzer
Re: Assent issues in Proposed UCC Article 2B
Date: May 5, 1998

We believe that the Tentative Draft (April 15, 1998), Uniform Commercial Code Article 2B, takes a flawed approach to basic issues of contract law, particularly concerning assent. This is more than a philosophical or jurisprudential difference of opinion; this new UCC Article would affect billions of dollars in transactions involving software and information. While problems with many sections of the draft are detailed in the accompanying examples and discussion, we do not ask the membership to adopt specific drafting solutions during our Annual Meeting. Rather, we think it appropriate for the Institute membership to express its disapproval of the underlying philosophy exhibited in the current draft and to ask the Drafting Committee to produce legislation in keeping with principles of freedom of contract expressed in the Restatement (Second) of Contracts.

Moved: The American Law Institute membership supports the following statement:

The current draft of proposed UCC Article 2B has not reached an acceptable balance in its provisions concerning assent to standard form records and should be returned to the Drafting Committee for fundamental revision of the several related sections governing assent.

MEMORANDUM IN SUPPORT

The Draft reflects a persistent bias in favor of those who draft standard forms, most commonly licensors. It would validate practices that involve post-purchase presentation of terms in both business and consumer transactions (using "shrinkwrap" and "clickwrap"), undermining the development of competition in contingent terms, such as warranties and remedies. It also would allow imposition of terms outside the range of reasonable expectations and permit routine contractual restrictions on uses of information traditionally protected by federal intellectual property law. A fundamental change in approach is needed. The purpose of this broad Motion is to reject the Draft’s general approach to finding contractual assent, an approach found in several interrelated sections (Sections 2B-203, 2B-207, 2B-208, 2B-111 and 2B-304). While these Sections as written should be stricken, simply striking them will not produce an acceptable draft without some rethinking and redrafting. The purpose of this Motion is to return the Draft to the Drafting Committee for that work. After giving some examples of how the Draft in its present form would work, we discuss more generally the provisions that produce these results.
Examples

Two cases illustrate many of the problems with proposed Article 2B’s treatment of assent to standard forms and show how the Draft deviates from long-standing contract law:

**Case 1:** User Co. sends (whether by mail, fax or e-mail) an order form for accounting software to Producer Co., which responds with an acknowledgment. The two forms conflict on material terms. User Co.’s form provides for delivery of merchantable software and for resolution of disputes by litigation in its home state. Producer Co.’s form disclaims the implied warranty of merchantability and provides for dispute resolution by arbitration. It also provides that Producer Co. may change the terms of the contract in the future by giving notice to User Co. Producer Co. then ships disks containing the software to User Co., and User Co. pays. (Alternatively, Producer Co. might deliver the software on line.) During installation of the software, a technician at User Co. clicks through a screen that states that licensee assents to a standard form license. It is necessary to click on this screen to access the software. The license contains the same terms as those in Producer Co.’s acknowledgment.

Many courts would now apply Article 2 to this transaction and find that the terms of the transaction are those on which the two forms agree, plus the gap-fillers of Article 2, Section 2-207(3). This would mean that User Co. would get an implied warranty of merchantability, disputes would be subject to resolution by litigation, and the "future changes" clause would not become part of the contract. Under Article 2B, the terms would be those of the "click through" license, and Producer Co. would get its warranty disclaimer and its arbitration term. Sections 2B-203(b)(1)(A) and (c)(2), 2B-207, and 2B-111. In addition, Producer Co. would have the right under Article 2B to change even material terms of the contract, by giving notice, and User Co. would not have the right to cancel if it did not like the changes. Section 2B-304. Article 2 has no comparable provision to give blanket validity to 'future changes' without further assent of the other party. Compare current Article 2, Section 2-209(1)(permitting modification, which requires both parties to agree).

**Case 2:** User, an individual, wants personal financial management software for household use. User is interested in finding a provider who includes in the deal a period of free telephone help. User goes to Software Retailer and looks at the boxes for this type of software. None of them have terms on the outside of the box. User asks an employee what the terms inside the boxes say, but employee says she does not know, and she refuses to let User open the boxes. User goes home and logs on to the Internet and attempts to find license terms that include a period of free telephone help. Unfortunately, User discovers that many producers do not put their licenses or warranties on their Web sites. User orders some software on line and pays by giving a credit card number. Producer Co. sends a disk to User. In order to access the software, User is asked during installation to assent to a license by clicking on a screen. User clicks on the screen. The software license terms include a warranty stating that the disk is free from defects in material and workmanship and giving a remedy of replacement of the disk. The license also states that the software itself, as opposed to the disk, is provided "AS IS," that User may not publish a review of the product without Producer Co.’s prior written permission and that telephone help is provided at $3 per minute. User discovers a bug in the program and calls Producer Co. for telephone help. Producer Co. charges $3 per minute, even though User is calling to report the bug and get help on how to deal with it. User decides to write a negative review of the product for a computer magazine, but Producer Co. refuses to give permission for its publication and threatens to sue for damages.
Again, many courts now would apply Article 2 to the transaction, and they would not enforce the license delivered after purchase, making the warranty disclaimer and "no review" term ineffective. In addition, the Magnuson-Moss Warranty Act probably applies to the transaction, so that warranty terms must be made available prior to purchase on request. 15 U.S.C. Section 2302(a); 16 C.F.R. Section 702.3(a)(2). Thus, Retail Store violated Magnuson-Moss by not providing access to the content of written warranties when asked about them by User. Also, implied warranties cannot be disclaimed when a written warranty is given, so that Producer Co. has also violated Magnuson-Moss. 15 U.S.C. section 2308.

Under Article 2B, however, User would be bound to all terms in the "click through" license, unless they are unconscionable. Sections 2B-208(a), 2B-111. The right of refund in Section 2B-208(b) would be lost when User clicked. The implied warranty could be effectively disclaimed in terms provided after purchase, unless Magnuson-Moss pre-empts Article 2B on this point (which may well be the case, although licensors are not warned of that possibility in Article 2B). Also, under Article 2B, there is an attempt to disown Section 211(3) of the Restatement (Second) of Contracts, which makes bizarre or oppressive terms unenforceable, whether in commercial or consumer contracts. See Section 211, comment e. Compare Sections 2B-207 and 2B-208 and Reporter’s Notes to those section. (See especially Reporter’s Note 1 to 2B-208.) Thus, User would not have the "reasonable expectations" doctrine as a tool to challenge the enforceability of the "no reviews" term. Because Article 2B validates post-transaction presentation of terms, the fact that the term was in a "click through" license may not be enough to show "procedural" unconscionability, making it hard to use that theory because unconscionability case law usually requires both substantive and procedural unconscionability.

**Discussion**

Standard form contracts are a fact of commercial life, with significant economies of scale in the production of contracts, akin to those achieved in the mass production of goods and services. This point is made in the Restatement (Second) of Contracts, Section 211, comment a. On the other hand, the Restatement also recognizes significant costs associated with standard form contracts, including the problem that those drafting them "may be tempted to overdraw." Id. at comment c. The very ease of drafting forms has led to their proliferation, making it impossible for either individuals or businesses to read and understand all the contracts to which they purportedly "assent." The idea that reading form documents is not realistic is embodied in sales law, existing Article 2, Section 2-207, which finds assent and provides gap-filling terms even though forms exchanged are not mirror images, in recognition that commercial sellers and buyers do not read and reconcile the forms they exchange.

Despite these widely accepted realities, Article 2B adopts a hard version of fictional assent to form contracts. While the Reporter’s Notes claim that the approach serves freedom of contract, it would in fact undermine freedom of contract in favor of regulation by the one who drafts the form. In addition to dictating limited quality assurance and remedies, the drafter could impose form terms restricting uses of information traditionally protected by federal intellectual property law. The Reporter’s Notes also portray Article 2B as a collection of "default rules" that can be displaced by the parties’ agreement. But in the vast majority of transactions, including acquisitions by business users, the "parties’ agreement" will be the terms of the drafter’s form, first presented to the user after order and payment for purported assent by a click on a computer screen during installation. Only the largest or most specialized transactions will involve assent after negotiation.
The American Law Institute should not abandon its balanced compromise view of what is objectively manifested by blanket assent, a view adopted in the Restatement (Second) of Contracts. Blanket assent to a standard form is "to the type of transaction." Section 211, comment c. The Restatement explains, "Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation." Id. at comment f.

In a commercial world dependent on form contracts, at least two forms of checks are needed: (1) pre-transaction availability of terms to permit shopping, and (2) a doctrine to make bizarre or oppressive terms unenforceable. A third section below discusses several other, although not all, assent problems in Article 2B.

1. Pre-transaction availability of terms

Pre-transaction availability of terms reduces the costs of shopping for the best terms and makes market competition possible. If terms are presented after purchase, the only way to shop for the best terms is to make multiple purchases and return products that come with objectionable terms, a costly proposition that impedes competition. In addition to the time involved, the purchaser may already feel committed to the deal, having ordered and paid and in some instances waited for delivery. If terms were available pre-contract, it would be possible for reporters for computer or other periodicals to gather them and publicize who is offering the best terms. While it is true that there is competition in many aspects of the software market, it is not so clear that the industry is as yet interested in competing on the basis of contingent terms involving quality assurance and remedies. It is to be hoped that the industry will evolve in the direction of warranty competition, making it inadvisable to codify current practices that may stand in the way of that goal.

Post-purchase terms are troublesome under contract law. If a contract has already been formed, as in an Internet or telephone purchase directly between the producer and the end-user, there is no consideration for the new terms. Modern contract doctrine makes modifications enforceable without consideration in some circumstances but requires a change in circumstances not anticipated by the parties at the outset of the transaction. The Restatement, in Section 89(a), makes modifications binding without consideration "if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made...." See also Article 2, Section 2-209, c. 2. ("[G]ood faith’ ... may in some situations require an objectively demonstrable reason for seeking a modification.") Thus, modification does not fit the situation where the software producer plans from the outset to present terms post-purchase.

Conditional assent or manipulation of when acceptance occurs are other possible doctrinal ways to attempt to make terms enforceable even though delivered after order and payment. However, software producers often do not use these techniques because they want the customer to feel that a deal has already been made. Article 2B would not require licensors to communicate at the time a transaction is entered into that the terms have not yet been presented. The Article 2B drafting committee should investigate new pro-competitive approaches that take advantage of the communicative power of computer technology. This would be in keeping with the admonition of the White House Report on Global Electronic Commerce not to carry existing law unthinkingly on to the Internet. Technology could be used to attempt to better communicate terms, rather than to obscure them. For example, in an on-line transaction, there is no reason a seller of goods or licensor of software cannot present the terms before an order is made. To facilitate shopping in general, terms could be available at Web sites.
To the extent that terms are now presented post-transaction, using "shrinkwrap" or "click through" contracts or similar methods, sellers or licensors who are well-advised by counsel know that it is doubtful that the terms are enforceable. Codifying the validity of this practice as a means to impose any term, unless unconscionable, would constitute a major shift in the balance in software transactions. Software licensors, by means of a simple "click" during installation, could routinely get all of the following: warranty disclaimers, remedy limitations, choice of law, choice of forum, prohibitions on reverse engineering and criticism, and future changes clauses. Something more meaningful in the way of assent is essential.

2. Policing Bizarre or Oppressive Terms

The Restatement (Second) of Contracts in Section 211(3) recognizes a modest limit on blanket assent to standardized contracts. As explained in comment c to that section, the drafter may be tempted to overreach. The assent that a customer gives is blanket, but as comment f points out, that should not reasonably be interpreted as giving the drafter a blank check. Under comment f, the limit on form terms is that they not be "bizarre or oppressive" or eviscerate terms explicitly agreed to or eliminate the dominant purpose of the transaction. The doctrine of reasonable expectations is closely related to the policy against unconscionable terms and the rule of interpretation of contracts against drafters. Id. at comment f.

The reasonable expectations doctrine of the Restatement has been incorporated into the UNIDROIT Principles for International Commercial Contracts, Article 2.20, (principles for commercial, not consumer, contracts). The unenforceability of unfair terms is generally recognized in Europe, Japan and many other legal systems. Article 2B will have no chance of achieving the goal of serving as a model for global software and electronic commerce if it hews to a narrow and fictional view that blanket assent means assent even to unfair terms. As of last summer the doctrine of reasonable expectations was included in the Article 2B draft (for mass-market contracts). The Drafting Committee for Article 2B voted to eliminate it last September, while the Revised Article 2 Drafting Committee continues to work on codifying the doctrine at least for consumer transactions. Neither the Restatement nor the UNIDROIT Principles restrict the doctrine to consumer or mass-market contracts.

3. Other Issues

A. Allowing one who drafts a contract to define what "manifests assent." Allowing one party, the drafter, to define objectivity is a perversion of the objective theory of contract, yet Article 2B-111(a)(2) does just that by stating that the drafter may designate conduct or operations as manifesting assent. In addition to allowing drafters to set forth what actions will manifest assent, the Reporter’s Notes to Section 2B-111 recognize as sufficient devices to manifest assent, ones that a drafter might specify: (a) opening of shrinkwrap, and (b) clicking on a screen with an undisplayed license. There is reason to question whether these are adequate formalities to carry with them the idea of assent, particularly blanket assent to a long license when not in the context of a bargain, but rather in the context of supposed post-purchase validation of terms. In the Statute of Frauds, contract law has treated signing a writing as of particular significance as a formality. See also Restatement Section 211(1), referring to signing a writing as a clear case of manifestation of assent (subject to the reasonable expectations doctrine). Adoption of a digital signature in an electronic record ought to be given equal significance, but clicking—something computer users often do hundreds of times a day—is much less significant than using a code or identifying symbol pre-designated as a means of authentication.
Under contract law, oral bargain is also treated as a sufficient formality for formation. But opening a package or clicking on a computer screen after a bargain has been entered into does not necessarily satisfy the functions of a formality identified by Lon Fuller (the cautionary, evidentiary and "channeling" functions, the last meaning a device that parties know courts will treat as significant). It would be easy for a user of software to fail to understand that opening a package or clicking a computer screen has legal effect, and questions about the agency of the one opening or clicking could undercut the evidentiary function (does it matter if an employee without actual authority or your six-year-old child did the opening or the clicking?) Especially in the business context, issues concerning the agency of installing technicians would undercut the supposed certainty of the Draft’s approach.

B. Validating "Future Changes" Clauses. Section 2B-304(b) permits a drafter to put into a license a term permitting future changes in the terms, so long as notice is given at the time of the change, but without the need for the other party’s further assent. (Although the section uses the term "modification," this is a misleading characterization, because true modifications require mutual assent at the time of the change.) Under Section 2B-304(b), a term authorizing future changes need not be called to the attention of an adhering party or separately assented to. In mass-market contracts, Article 2B requires that the non-drafter have a right to terminate the contract at the time a change is made, but only if the change deals with a material term. Thus, a nonmaterial change that a party objects to comes in and the objecting party cannot terminate. In a nonmass-market contract, a party who "manifests assent" to a license with a future changes clause does not have a right to terminate even if a material change is made. Could the drafter increase the rate for future use, without giving the other party a right to terminate? It seems the answer is yes. The fact that someone agreed to such a "future changes" clause, without limitation to nonmaterial or advantageous changes, seems to be good evidence that the clause was not read or understood.

Only in nonmass-market licenses are material changes binding, without right to terminate as to future performance, under future change clauses. Should this allay concern about Section 2B-304(b)? The definition of a mass-market transaction in Section 2B-102(31) does not include many transactions that in common understanding might be considered mass-market ones. For example, a solo dentist who signed up for an on-line dental reference service for $50 a month for two years would not be engaging in a mass-market transaction because dental reference services are not marketed to "the general public as a whole." Thus, a dentist entering into such a license could be subject to higher charges (say, increasing the fee per month to $75) without the right to cancel the contract.

The idea of a category broader than "consumer contract" is in general a good one, to reflect that many non-consumers are as unsophisticated and as unlikely to be represented by counsel as consumers (or as likely to have too little at stake to make it worth while to use a lawyer when making the transaction or dealing with a dispute). However, the way the "mass-market" category is used in Article 2B is to give mass-market licensees the "default" rights that all buyers of goods have under Article 2, at most, and to give nonmass-market licensees less. The definition of mass-market transaction and the use of this concept in Article 2B need further attention.

Conclusion

The assent provisions in the current Article 2B draft would have a synergistic effect, amounting to a delegation of regulatory power to licensors who draft form contracts. The American Law Institute should ask the Drafting Committee to engage in fundamental rethinking to achieve a more balanced policy position on basic contract law issues.