Summary of AFFECT Response to 2002 UCITA Revisions

Introduction and Overview

In 2002, the National Conference of Commissioners on Uniform State Laws (NCCUSL), the organization charged with promulgating uniform state laws, approved revisions to the Uniform Computer Information Transactions Act (UCITA). (www.law.upenn.edu) This report summarizes AFFECT's analysis of some of the amendments that relate to persistent areas of concern previously cited by AFFECT. (www.affect.ucita.com) A more technical analysis of the amendments as they relate to the American Bar Association's (ABA) Working Group's recommendations are available in another report, *AFFECT Response to NCCUSL Commentary on UCITA 2002 Revisions, December 4, 2002.* (www-affect@ucita.com/pdf/AmendmentAnalysisFinal.pdf)

AFFECT finds the changes in the approved 2002 amendments less than "substantive" and inadequate in addressing AFFECT members' concerns and the many criticisms repeatedly articulated by the Act's other opponents. UCITA continues to be unfairly biased toward the interests and desires of licensors to the detriment of their customers. AFFECT will continue to oppose UCITA vigorously in the coming year and recommends that it be thoroughly and substantively reconsidered.

NCCUSL's interest in amendments in 2001-2002 occurred when controversy and opposition to UCITA persisted, the Act failed to pass in any state legislatures and the ABA Working Group on UCITA criticized numerous sections of the Act. (www.abanet.org/leadership/ucita.pdf) Furthermore, in 2001 three states adopted so-called "bomb-shelter" provisions to protect their residents from application of UCITA through certain choice of law provisions.

Americans for Fair Electronic Commerce Transactions (AFFECT) is a broad-based national coalition of consumer organizations, retail and manufacturing businesses, financial institutions, technology professionals and librarians opposed to UCITA. AFFECT members have been following UCITA for the past decade, and the coalition has been involved in every state where UCITA has been legislatively active. In 2001 AFFECT recommended thirty amendments to NCCUSL's UCITA Standby Committee. (www.affect.ucita.com)

NCCUSL reports that state delegations passed these amendments by a vote of 49-0 at its 2002 annual meeting. Representatives of AFFECT attended the meeting and witnessed the development that a large group of commissioners petitioned the NCCUSL leadership to downgrade UCITA to a model act rather than pursue it as a uniform law. After over a decade of consideration and drafting, it is indeed noteworthy that UCITA continues to be a divisive issue, even within NCCUSL.

NCCUSL fails to adopt two crucial ABA recommendations

Although NCCUSL accepted some changes recommended by the ABA Working Group on UCITA, it failed to adopt two of the group's crucial substantive recommendations:

- **Pre-transaction disclosure of terms**. NCCUSL rejected the ABA Working Group's recommendation that licensors should make all terms of transactions available to potential licensees before they become obligated to pay or become bound by the license agreement.

- **Continuing to treat goods with embedded software as goods.** NCCUSL also failed to adopt the ABA Working Group's recommendation that UCITA should exclude software that is "embedded in and marketed as an integral part of the goods" from its scope.

Re-writing UCITA

The ABA Working Group took a strong position about the drafting of UCITA, finding it to be:

- **Unclear and much too complex.** The ABA Working Group said that in its deliberations, which involved parsing many sections, "time and again … the individual members of the Group could not agree on what

> the particular section said or meant." The group also found wanting the "general organizational structure of the statute," its dependence on exclusions of many industries that objected to it and on lengthy definitions with unfamiliar terminology, and its attempt to "audaciously … cover virtually every issue of concern." The result is a statute that "would not achieve the principal objective that a uniform law is expected to achieve, namely, the establishment of a high level of clarity and certainty in a particular area of law." Accordingly, the ABA group stated it believes "UCITA should be redrafted to make it easier to understand and use."

In response to the ABA's recommendations, the Standby Committee has deleted some sections, rearranged others and added subtitles and other mostly stylistic changes. The Amendments have not reduced the ambiguity and complexity of UCITA, which has now expanded to 256 pages of difficult-to-penetrate text and commentary.

Electronic self-help
The recent amendment appears to address this most controversial area by actually banning "electronic self-help." However, UCITA continues to authorize "electronic regulation of performance" by means of automatic restraint. In short, UCITA approves of "electronic self-help" by another name. Because UCITA has two similar concepts, "electronic self-help" and "electronic regulation of performance," its purported ban on electronic self-help does not ban what amounts to the same thing.

Also UCITA does not bar a licensor from including disabling code nor even require that the licensor disclose its presence. This type of code creates what are often called "black holes" or "security holes" that put the confidentiality, integrity and security of business computer systems at serious risk of exploitation by hackers.

In software agreements vendors disclaim liability for the kinds of damages that are most likely to result from the use of a remote shutdown. The recent amendment does nothing to remedy this problem, and therefore the prohibition has no teeth.

UCITA and state consumer protection laws
UCITA provides an opportunity to review mass-market license terms after payment and delivery—an opportunity that comes too late. The much-touted "right of return" tries to make this belated opportunity to review the terms seem real. A customer is most likely to review the terms, in order to comparison shop, prior to a transaction, not after ordering and receiving a product. Furthermore, this "right of return" disappears if the customer does not reverse the transaction before actually using the product and does not apply to most business and professional software acquisitions, further narrowing the usefulness of this provision.

NCCUSL failed to adopt the important recommendation of the ABA Working Group that pre-transaction disclosure of terms be required. Instead, UCITA continues to give explicit protection to the practice of deliberately holding back pre-drafted terms until after the customer has taken delivery. Thus, even if applicable to UCITA transactions, consumer protection laws stated in general terms may be watered down by UCITA's more specific protection for post-transaction disclosure.

Furthermore, the UCITA amendment directing courts to apply consumer protection laws that "would have applied in the absence of this Act" is highly uncertain in application.

UCITA still does not require remedies for known material defects
UCITA still does not require the licensor to reveal known defects to the licensee. The 2002 amendment affirms that the common law of fraud continues to apply to UCITA transactions. However, the revision does not incorporate worthwhile proposals made throughout the drafting process to give new incentives to software producers to disclose material defects and thus reduce the huge costs now borne by individual and business users because of buggy software.

Right to criticize a product

UCITA has been criticized for allowing software licensors to include terms in their contracts that prohibit a journalist or other critic from publishing a review of the software without the permission of the seller. The ABA found that there was no "public policy reason" to permit such a prohibition.

The new amendment contains a huge loophole because it provides protection only if the information is made "generally available" and "in its final form." For example, if a producer labeled a product "not in final form/subject to updates," then the protection for criticism would not apply. Furthermore, the amendment only protects an end-user licensee.

Reverse Engineering

Reverse-engineering is a universal software development practice, in which engineering techniques are used to discover the underlying ideas and principles that make a machine, computer program or other device work. Licensees need to be able to reverse engineer in order to detect and fix defects in software as well as for purposes of interoperability (for example, to allow use of a software program that works on an operating system made by another company). Federal copyright law protects reverse-engineering for purposes of interoperability, finding public domain elements and detecting and repairing defects. Although the new UCITA provision is an improvement over previous versions of UCITA, it is too narrow, protecting only reverse-engineering for the sole purpose of interoperability. This amendment provides less than federal fair use rights.

Libraries

A 2002 amendment allows transfers of computer programs contained in a computer as part of a gift to a public elementary or secondary school, a public library or from a consumer to another consumer. Thus, gifts of computers to private schools and public or private universities are not protected, and gifts of computer programs without the computer—even when no copy is kept by the donor—are not protected at all against restrictions on transfer. The revision thus provides much less than the transferability that attends a "first sale" of a copy of a copyrighted work and has not received endorsement by the library community.

NCCUSL continues to dismiss deeper library concerns. UCITA as currently drafted threatens to undermine the carefully wrought balances inherent in federal copyright law and therefore should be amended to specify that terms in "click-wrap" or non-negotiable licenses will be unenforceable if they are contrary to permitted uses under federal copyright law. Terms in mass-market licenses can effectively prohibit core library activities, e.g. inter-library loan, archiving or preservation. The language in UCITA Section 105(a) and (b), regarding preemption by federal law and fundamental public policy exceptions to enforcement of contract terms, does not provide the clearly worded protection for important library functions that serve the public interest. Research libraries should not be compelled to use scarce resources in litigation to establish their rights to archive and preserve digital content that would otherwise be lost.

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