Suggested Amendment
To UCITA
AFFECT Amendment-Consumer #1
(Other State Consumer Laws Applicable)

Identification of Section to be changed:

Section 105. Relation to Federal Law; Fundamental Public Policy; Transactions Subject to Other State Law.

Text Deleted and Inserted:

SECTION 105. RELATION TO FEDERAL LAW; FUNDAMENTAL PUBLIC POLICY; TRANSACTIONS SUBJECT TO OTHER STATE LAW**.**

(c)<u>(1) For the purposes of this subsection the term "law which protects consumers" includes, without limitation:</u>

<u>[Here list state consumer protection statutes]</u>

<u>(2)Law which protects consumers applies to a licensee or recipient of computer information or computer programs under a consumer contract in the same manner in that law which protects consumers applies to consumer goods.</u>

<u>(3)</u>Except as otherwise provided in subsection (d), if this [Act] or a term of a contract under this [Act] conflicts with a consumer protection statute [or administrative rule], the consumer protection statute [or rule] governs.

Explanation of Amendment (Current law/change made/reason for the change)**:**

State consumer protection laws have traditionally applied to all "goods" and "services". Under UCITA, agreements for computer software and on-line services, such as AOL, are "licenses". The licensing regime under UCITA therefore creates a loophole allowing these transactions to escape existing state consumer protections.

This change would assure that transactions for software and on-line services, such as AOL, would continue to fall under existing state consumer protections. This is not really a change! The two state enactments of UCITA to date, Maryland and Virginia, have made this change. However, they made the change by

amending their individual consumer protection laws. In order to assume uniformity in making this change in other states that may adopt UCITA, the change should be made part of the body of UCITA. A note could offer the possibility of making the change in the individual states' consumer protection statutes instead.

This change is necessary in order to modernize state consumer laws to keep up with the use of a "licensing regime."

Suggested Amendment
To UCITA
AFFECT Amendment-Consumer #2

~~**SECTION 112. MANIFESTING ASSENT; OPPORTUNITY TO REVIEW.**~~

~~(a) A person manifests assent to a record or term if the person, acting with knowledge of, or after having an opportunity to review the record or term or a copy of it:~~

~~(1) authenticates the record or term with intent to adopt or accept it; or~~

~~(2) intentionally engages in conduct or makes statements with reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term.~~

~~(b) An electronic agent manifests assent to a record or term if, after having an opportunity to review it, the electronic agent:~~

~~(1) authenticates the record or term; or~~

~~(2) engages in operations that in the circumstances indicate acceptance of the record or term.~~
~~(c) If this [Act] or other law requires assent to a specific term, a manifestation of assent must relate specifically to the term.~~

~~(d) Conduct or operations manifesting assent may be proved in any manner, including a showing that a person or an electronic agent obtained or used the information or informational rights and that a procedure existed by which a person or an electronic agent must have engaged in the conduct or operations in order to do so. Proof of compliance with subsection (a)(2) is sufficient if there is conduct that assents and subsequent conduct that reaffirms assent by electronic means.~~

~~(e) With respect to an opportunity to review, the following rules apply:~~

~~(1) A person has an opportunity to review a record or term only if it is made available in a manner that ought to call it to the attention of a reasonable person and permit review.~~

~~(2) An electronic agent has an opportunity to review a record or term only if it is made available in manner that would enable a reasonably configured electronic agent to react to the record or term.~~

~~(3) If a record or term is available for review only after a person becomes obligated to pay or begins its performance, the person has an opportunity to review only if it has a right to a return if it rejects the record. However, a right to a return is not required if:~~

~~(A) the record proposes a modification of contract or provides particulars of performance under Section 305; or~~

~~(B) the primary performance is other than delivery or acceptance of a copy, the agreement is not a mass-market transaction, and the parties at the time of contracting had reason to know that a record or term would be presented after performance, use, or access to the information began.~~

~~(4) The right to a return under paragraph (3) may arise by law or by agreement.~~

~~(f) The effect of provisions of this section may be modified by an agreement setting out standards applicable to future transactions between the parties.~~

~~(g) Providers of online services, network access, and telecommunications services, or the operators of facilities thereof, do not manifest assent to a contractual relationship simply by their provision of those services to other parties, including, without limitation, transmission, routing, or providing connections, linking, caching, hosting, information location tools, or storage of materials, at the request or initiation of a person other than the service provider.~~

Explanation of Amendment:

This proposed amendment is interrelated with proposed amendments to Sections 204, 205, 208, 209, and 210. The proposed approach is to eliminate the UCITA concept of "manifesting assent" as defined in Section 112 and to retain the standard "show agreement," used in Sections 202 and 203.

UCITA has two overlapping contract formation concepts, "show agreement" and "manifesting assent." In general contract law, these are synonyms. In UCITA, "manifesting assent" has been turned into a term of art by Section 112. This term includes formation by double clicking after payment and delivery. Sections 112(d) and (e).

UCITA's approach to assent has caused major opposition. This approach was a key reason that the American Law Institute withdrew from the project, and it has also been a reason for opposition from state attorneys general. By specifically approving of the practice of holding back terms until after payment and delivery (in Sections 112, 208 and 209, among other places), UCITA protects behavior that is contrary to contract and consumer protection law norms of pre-transaction disclosure. The proposal is to use the flexible approach to assent embodied in UCC Article 2, already included in UCITA in Section 202 and 203, which should be retained.

Suggested Amendment
To UCITA
AFFECT Amendment-Consumer #3

SECTION 204. ACCEPTANCE WITH VARYING TERMS.

~~(a) In this section, an acceptance materially alters an offer if it contains a term that materially conflicts with or varies a term of the offer or that adds a material term not contained in the offer.~~

~~(b) Except as otherwise provided in Section 205, a definite and seasonable expression of acceptance operates as an acceptance, even if the acceptance contains terms that vary from the terms of the offer, unless the acceptance materially alters the offer.~~

~~(c) If an acceptance materially alters the offer, the following rules apply:~~

~~(1) A contract is not formed unless:~~

~~(A) a party agrees, such as by manifesting assent, to the other party's offer or acceptance; or~~

~~(B) all the other circumstances, including the conduct of the parties, establish a contract.~~

~~(2) If a contract is formed by the conduct of both parties, the terms of the contract are determined under Section 210.~~

~~(d) If an acceptance varies from but does not materially alter the offer, a contract is formed based on the terms of the offer. In addition, the following rules apply:~~

~~(1) Terms in the acceptance which conflict with terms in the offer are not part of the contract.~~

~~(2) An additional nonmaterial term in the acceptance is a proposal for an additional term. Between merchants, the proposed additional term becomes part of the contract unless the offeror gives notice of objection before, or within a reasonable time after, it receives the proposed terms.~~

A definite and seasonable expression of acceptance in a record operates as an acceptance even if it contains terms additional to or different from the offer.

Explanation of Amendment:

This proposed amendment and the proposed amendment to Section 205 are taken from the amended version of UCC Article 2, Sections 2-206 (3) and 2-207, as presented to the NCCUSL annual meeting in August 2001. UCITA adopts a “last

shot: approach to the battle of the forms (by use of the concept of "manifesting assent"), contrary to the approach being taken in Amended Article 2.

Suggested Amendment
To UCITA
AFFECT Amendment-Consumer #4

~~SECTION 205. CONDITIONAL OFFER OR ACCEPTANCE.~~

~~(a) In this section, an offer or acceptance is conditional if it is conditioned on agreement by the other party to all the terms of the offer or acceptance.~~

~~(b) Except as otherwise provided in subsection (c), a conditional offer or acceptance precludes formation of a contract unless the other party agrees to its terms, such as by manifesting assent.~~

~~(c) If an offer and acceptance are in standard forms and at least one form is conditional, the following rules apply:~~

~~(1) Conditional language in a standard term precludes formation of a contract only if the actions of the party proposing the form are consistent with the conditional language, such as by refusing to perform, refusing to permit performance, or refusing to accept the benefits of the agreement, until its proposed terms are accepted.~~

~~(2) A party that agrees, such as by manifesting assent, to a conditional offer that is effective under paragraph (1) adopts the terms of the offer under Section 208 or 209, except a term that conflicts with an expressly agreed term regarding price or quantity.~~

SECTION 205. TERMS OF CONTRACT; EFFECT OF CONFIRMATION.

If (i) conduct by both parties recognizes the existence of an contract although their records do not otherwise establish a contract, (ii) a contract is formed by an offer and acceptance, or (iii) a contract formed in any manner is confirmed by a record that contains terms additional to or different from those in the contract being confirmed, the terms of the contract, subject to Section 2-202, are:

(1) terms that appear in the records if both parties;

(2) terms, whether in a record or not, to which both parties agree; and

(3) terms supplied or incorporated under any provision of [the Uniform Commercial Code].

Explanation of Amendment:

See explanation of amendment for Section 204.

Suggested Amendment
To UCITA
AFFECT Amendment-Consumer #5

~~SECTION 208. ADOPTING TERMS OF RECORDS.~~

~~**Except as otherwise provided in Section 209, the following rules apply:**~~

~~**(1) A party adopts the terms of a record, including a standard form, as the terms of the contract if the party agrees to the record, such as by manifesting assent.**~~

~~**(2) The terms of a record may be adopted pursuant to paragraph (1) after beginning performance or use if the parties had reason to know that their agreement would be represented in whole or part by a later record to be agreed on and there would not be an opportunity to review the record or a copy of it before performance or use begins. If the parties fail to agree to the later terms and did not intend to form a contract unless they so agreed, Section 202(e) applies.**~~

~~**(3) If a party adopts the terms of a record, the terms become part of the contract without regard to the party's knowledge or understanding of individual terms in the record, except for a term that is unenforceable because it fails to satisfy another requirement of this [Act].**~~

Explanation of Amendment:

Same as Section 112.

Suggested Amendment
To UCITA
AFFECT Amendment-Consumer #6

SECTION 209. ~~MASS-MARKET LICENSE.~~ DISCLOSURE OF MASS-MARKET LICENSE TERMS.

~~(a) A party adopts the terms of a mass-market license for purposes of Section 208 only if the party agrees to the license, such as by manifesting assent, before or during the party's initial performance or use of or access to the information. A term is not part of the license if:~~

~~(1) the term is unconscionable or is unenforceable under Section 105(a) or (b); or~~

~~(2) subject to Section 301, the term conflicts with a term to which the parties to the license have expressly agreed.~~

~~(b) If a mass-market license or a copy of the license is not available in a manner permitting an opportunity to review by the licensee before the licensee becomes obligated to pay and the licensee does not agree, such as by manifesting assent, to the license after having an opportunity to review, the licensee is entitled to a return under Section 112 and, in addition, to:~~

(b) A term is not part of the license if the term is not available for viewing both before the consumer is required or requested to perform or pay (whichever occurs first) and thereafter:

(1)in a printed license; or

(2)in electronic form that:

(A) Can be printed or stored for archival and review purposes by the licensee; or

(B) Is made available by a licensor to a licensee, at no cost to the licensee, in a printed form on the request of a licensee that is unable to print or store the license for archival and review purposes.

~~(1) reimbursement of any reasonable expenses incurred in complying with the licensor's instructions for returning or destroying the computer information or, in the absence of instructions, expenses incurred for return postage or similar reasonable expense in returning the computer information; and~~

~~(2) compensation for any reasonable and foreseeable costs of restoring the licensee's information processing system to reverse changes in the system caused by the installation, if:~~

~~(A) the installation occurs because information must be installed to enable review of the license; and~~

~~(B) the installation alters the system or information in it but does not restore the system or information after removal of the installed information because the licensee rejected the license.~~

~~(c) In a mass-market transaction, if the licensor does not have an opportunity to review a record containing proposed terms from the licensee before the licensor delivers or becomes obligated to deliver the information, and if the licensor does not agree, such as by manifesting assent, to those terms after having that opportunity, the licensor is entitled to a return.~~

Explanation of Amendment:

Current UCITA allows the software publisher or on-line service provider to hide the terms of the agreement until after the consumer has paid and, in the context of software purchased in a box at the mall, until after the consumer has taken the software home, prepared to use it, unwrapped it, loaded it in a computer drive and begun loading it. Only then, under UCITA, would a consumer know that, for example, the brand new software is being sold "as is" with no implied warranty of merchantability, the way cheap used cars are sold in some jurisdictions.

Current UCITA does, in the struck through language, give a right of return. But this right exists only until the consumer, clicks on the box agreeing to the terms. In fact, a consumer who does not install the software soon after the purchase may lose the right of return without ever seeing the license. In the mall-bought software example above, once the consumer clicks on that box, if the license would contain a disclaimer of all warranties and consequential damages, then the consumer does not have the right to even get the consumer's money back if the software does not work, or if it loads a virus onto the computer that erases the hard drive.

Current case law is unclear whether the post-sale disclaimer of implied warranties/consequential damages currently being attempted for most new software is valid. In one commercial case Washington State Supreme Court held that a contractor who lost $1.5 million due to a software bug which the software publisher knew about was not allowed to have consequential damages because an employee or a consultant of the company clicked a license disclaiming consequential damages after the software was paid for. That case pointed out that it was a business and not a consumer involved.

The amendment simply says that no term can be an enforceable part of a license agreement unless the consumer can see and save it before the consumer

pays for the software or online service. The right of return in subsection(c) is therefore removed because it would be unnecessary.

This change will allow consumers to comparison shop for the best terms in the best traditions of our free market economy. The change will also let magazine writers etc. view all the licenses for competing software to compare the licenses without having without having to pay for the software. The ability to have these comparison articles written is what makes a competitive economy competitive economy.

The changes to (a) are part of the package of amendments suggested to Section 112 in other proposed amendments eliminating "manifesting assent" generally. The explanation the changes to this section in coordination with changes to 112 follows below.

The current draft of UCITA permits the practice of licensors withholding the terms of the transaction until after the licensee has performed or has become obligated to perform. In order to give such a practice an appearance of legitimacy, the drafters have created a web of new concepts (such as manifestation of assent, the opportunity to review, and the right of return.) which are set forth in section 112. The current version of section 209 builds on those concepts, providing for some reimbursement of expenses in the right to return (subsection (b)) and requiring licensees to return software after not agreeing (subsection (c)). The current version of section also makes unconscionable clauses unenforceable in mass market transactions (subsection (a)(1)) and prevents terms which have not been agreed upon from overriding agreed upon terms (subsection (a)(2).

The proposed amendments to UCITA reject the concept of post sale disclosure of terms. Therefore, the provisions of 209 which are dependant on that concept would be no longer necessary. Similarly there is no need for a provision dealing with conflicts between agreed upon terms and subsequently disclosed terms. The unconscionability clause of Section 209 would be redundant. Consequently AFFECT proposes the deletion of the entire text of the current 209 and substitution of new language.

With the renewed emphasis on pre sale disclosures, AFFECT believes it is essential to require that licensors provide potential licensees with disclosure of terms that facilitate meaningful consideration of terms and choice among

competing products. Licensors have not always disclosed terms in a format that customers can adequately study. Hence, we propose the revised Section 209, which insures that customers can easily view and print the license terms.

Since electronic advertising, payment and product delivery can be (and sometimes are) done in a way that consumers would have no ability to have and preserve a physical copy of the contract terms, the revised Section 209 requires that consumers must have access to a printed version of the license both before and after they have paid or become obligated to pay.

Suggested Amendment
To UCITA
AFFECT Amendment-Consumer #7

~~**SECTION 211. PRETRANSACTION DISCLOSURES IN INTERNET-TYPE TRANSACTIONS.**~~

~~This section applies to a licensor that makes its computer information available to a licensee by electronic means from its Internet or similar electronic site. In such a case, the licensor affords an opportunity to review the terms of a standard form license which opportunity satisfies Section 112(e) with respect to a licensee that acquires the information from that site, if the licensor:~~

~~(1) makes the standard terms of the license readily available for review by the licensee before the information is delivered or the licensee becomes obligated to pay, whichever occurs first, by:~~

~~(A) displaying prominently and in close proximity to a description of the computer information, or to instructions or steps for acquiring it, the standard terms or a reference to an electronic location from which they can be readily obtained; or~~

~~(B) disclosing the availability of the standard terms in a prominent place on the site from which the computer information is offered and promptly furnishing a copy of the standard terms on request before the transfer of the computer information; and~~

~~(2) does not take affirmative acts to prevent printing or storage of the standard terms for archival or review purposes by the licensee.~~

Explanation of Amendment:

See Section 209, which requires that mass-market license terms be made available for viewing before the customer is required or requested to perform or pay. Section 211 is weaker and thus should be deleted.

Suggested Amendment
To UCITA
AFFECT Amendment-Consumer #8
(Prohibiting disclaimer of implied warranties of merchantability,
compatibility and fitness.)

Identification of Section to be changed:

Section 406(h). Disclaimer or Modification of Warranty.

Text Deleted and Inserted:

SECTION 406. DISCLAIMER OR MODIFICATION OF WARRANTY.

. . .

[*Note that the change in (b)below is included in the text here only because it is suggested in another suggested amendment of AFFECT. The change which is the subject of this amendment in (h)*]

(b) Except as otherwise provided in subsections (c), (d), and (e), to disclaim or modify an implied warranty or any part of it, but not the warranty in Section 401, the following rules apply:

(1) Except as otherwise provided in this subsection:

(A) To disclaim or modify the implied ~~warranty~~ <u>warrantie</u>s arising under Section 403, language must mention "merchantability" ~~or~~ <u>and</u> "quality" <u>and</u> <u>“known defects”</u> or use words of similar
import and, if in a record, must be conspicuous.

(B) To disclaim or modify the implied warranty arising under Section 404, language in a record must mention "accuracy" or use words of similar import.

(2) Language to disclaim or modify the implied warranty arising under Section 405 must be in a record and be conspicuous. It is sufficient to state "There is no warranty that this information, our efforts, or the system will fulfill any of your particular purposes or needs", or words of similar import.

(3) Language in a record is sufficient to disclaim all implied warranties if it individually disclaims each implied warranty or, except for the warranty in Section 401, if it is conspicuous and states "Except for express warranties stated in this contract, if any, this 'information' 'computer program' is provided with all faults,

and the entire risk as to satisfactory quality, performance, accuracy, and effort is with the user", or words of similar import.

(4) A disclaimer or modification sufficient under [Article 2 or 2A of the Uniform Commercial Code] to disclaim or modify an implied warranty of merchantability is sufficient to disclaim or modify the warranties under Sections 403 and 404. A disclaimer or modification sufficient under [Article 2or 2A of the Uniform Commercial Code] to disclaim or modify an implied warranty of fitness for a particular purpose is sufficient to disclaim or modify the warranties under Section 405.

. . .

[*Note that the change in (d)below is included in the text here only because it is suggested in another suggested amendment of AFFECT. The change which is the subject of this amendment in (h)*]

~~(d) If a licensee before entering into a contract has examined the information or the sample or model as fully as it desired or has refused to examine the information, there is no implied warranty with regard to defects that an examination ought in the circumstances to have revealed to the licensee.~~

. . .

<u>(h) Notwithstanding the provisions of subsections (a) through (f) of this section, oral language or language in a record used in a mass-market transaction will be ineffective to exclude or modify any implied warranty of merchantability of a computer program under section 403 of this Act or any implied warranty of fitness for a particular purpose or that components will function together under section 405 of this Act or to exclude or modify the remedies for a breach of those warranties, is unenforceable. The provisions of this subsection do not apply to computer information that is available for the public at no charge beyond the cost of media and delivery and that may be redistributed at no charge beyond the cost of media and delivery, or to computer information provided as a bona fide beta test or similar experimental version of the computer information or computer program that is not generally distributed.</u>

Explanation of Amendment (Current law/change made/reason for the change)**:**

The implied warranty of merchantability in UCITA section 403 is that "the computer program is fit for the ordinary purposes for which such computer programs are used". The implied warranty of fitness for a particular purpose in UCITA section 405 is, "[I]f a licensor at the time of contracting has reason to know any particular purpose for which the computer information is required and that the licensee is relying on the licensor's skill or judgment to select, develop, or furnish suitable information . . . there is an implied warranty that the information is fit for that purpose." Both these warranties are parallel to what exists in the Uniform Commercial Code for sales of goods. The implied compatibility warranty in UCITA is unique. It provides, "If an agreement requires a licensor to provide or select a system consisting of computer programs and goods, and the licensor has reason to know that the licensee is relying on the skill or judgment of the licensor to select the components of the system, there is an implied warranty that the components provided or selected will function together as a system."

The UCC allows disclaimer of its warranties. Many states have statutes prohibiting or limiting the disclaimer of the implied warranty of merchantability for consumer goods. Generally where allowed, the disclaimer is only used for cheap used goods, such as low value used cars. At least under the UCC the used car salesman has to tell the consumer that there is no warranty before the consumer buys the used car, whereas other provisions of UCITA provide that the consumer will not find that out about the lack of any warranty on the new software after the consumer pays for the software (unless other suggested amendments are adopted).

Currently the licenses of most brand new software attempts to disclaim the implied warranties and sell the new software "as is". One of the reasons is that purchasers cannot find that out until after they purchase the software, so they cannot shop for a software product that has a warranty.

Current case law is unclear whether the disclaimer currently being attempted for most new software is valid. In one commercial case Washington State Supreme Court held that a contractor who lost $1.5 million due to a software bug which the software publisher knew about could not get consequential damages because an employee or a consultant of the company clicked a license disclaiming consequential damages. That case pointed out that a business and not a consumer

was involved. UCITA would clearly allow the commercial case's result to extend to consumers and to other software purchasers in all cases.

The change proposed is parallel to a modification that the Maryland Legislature made when it enacted UCITA. If this provision can be tolerated by software publishers and on-line service providers in Maryland, it should be tolerable in other states.

Suggested Amendment
To UCITA
AFFECT Amendment-Consumer #9
(No prohibitions of reviews of software and on-line services.)

Identification of Section to be changed:

Section 209. Mass-market License.

Text Deleted and Inserted:

SECTION 209. MASS-MARKET LICENSE.

. . .

(d) In a mass-market transaction, a license may not include a term that has the effect of forbidding or restricting the rights or abilities of licensees of computer information or others to engage in public disclosure of a description, criticism, comparison, or evaluation of the computer information or its license, and any such term included is unenforceable to the extent these rights or abilities are not prohibited by other law.

Explanation of Amendment (Current law/change made/reason for the change)**:**

Public policy doctrines and "Fair Use" under copyright law allow for products to be reviewed. These reviews, like movie reviews, are frequently made in newspaper and magazine articles (or even in whole magazines like Consumer Reports) and now on web sites etc. This kind of information is fundamental to a successful free market economy.

Many software companies have such provisions in their license which attempt to prevent these exercises of free speech. However, case law has not yet arisen to prohibit such overreaching terms in the context of the technologies to while UCITA applies. UCITA is currently silent on this issue. That could be interpreted by the courts as condoning these practices. Unless outlawed, these provisions will chill, if not freeze, reviews because of newspaper, magazine and

other publisher's fears of the massive litigation that powerful software producers would bring to bear.[1]

The change is based on a provision adopted in Virginia's UCITA. Only two modifications from the Virginia provision were made. The first was to state that not only is a term prohibiting reviews unenforceable, it should not be in the license in the first place. The second was to make sure that the license term could not prohibit others, in addition to the licensee, from reviewing the software or on-line service.

[1]Software publishers do use the prohibitions to block magazine reviews. ("The Test That Wasn't," August 1999 PC Magazine 29. According to that article, Oracle, "Formally declined to let us [PC Magazine] publish any benchmark test results.") (The following restrictions were downloaded on July 20, 1999 from www.mcafee.com, the website for VirusScan, a mass-market software product. "The customer shall not disclose the results of any benchmark test to any third party without McAfee's prior written approval.")

Suggested Amendment
To UCITA
AFFECT Amendment-Consumer #9
(Procedures for changing the terms of the initial agreement.)

Identification of Section to be changed:

Section 304. Continuing Contractual Terms.

Text Deleted and Inserted:

SECTION 304. CONTINUING CONTRACTUAL TERMS.

(a) Terms of an agreement involving successive performances apply to all performances, even if the terms are not displayed or otherwise brought to the attention of a party with respect to each successive performance, unless the terms are modified in accordance with this [Act] or the contract.

(b) If a contract provides that a term~~s~~ may be changed as to future performances by compliance with a described procedure, a change proposed in good faith pursuant to that procedure becomes part of the contract if the procedure:

(1) reasonably notifies the other party of the change; and

(2) in a mass-market transaction, ~~permits the other party to terminate the contract as to future performance if the change alters a material term and the party in good faith determines that the modification is unacceptable.~~

(i) the term is available for viewing both before the consumer is required or requested to perform or pay (whichever occurs first) and thereafter:

(1)in a printed license; or

(2)in electronic form that:

(A) Can be printed or stored for archival and review purposes by the licensee; or

(B) Is made available by a licensor to a licensee, at no cost to the licensee, in a printed form on the request of a licensee that is unable to print or store the license for archival and review purposes, and

(ii) the licensee agrees to the term

(c) The parties by agreement may determine the standards for reasonable notice unless the agreed standards are manifestly unreasonable in light of the commercial circumstances.

(d) The enforceability of changes made pursuant to a procedure that does not comply with subsection (b) is determined as follows:

(i) in a mass market transaction, the term is enforceable if after receiving notice of the term the licensee explicitly agrees to the term, or

(ii) otherwise by the other provisions of this [Act] or other law.

Explanation of Amendment (Current law/change made/reason for the change)**:**

UCITA, as drafted allows the terms of the initial agreement to which the user originally agreed, to be changed by a "reasonable procedure" stated in the initial agreement. The terms could therefore be changed without the user first agreeing to the change, or deciding to discontinue the use of, for example, an on-line service. An on-line service could argue, for example, that the change need only be posted on a web site to be "reasonable". Hence, an on-line service that charges the users' credit cards each month could change the amount of the charge by posting the notice on a web site and charging the larger amount to the user's credit card.

While this may be appropriate for a negotiated contract, it is inappropriate in a mass-market setting where users do not have a procedure in place for monitoring the changing terms of the contract. The licensor should have the responsibility to assure the customer's awareness of such changes. The proposed amendment requires that any procedure adopted by the on-line service still has to require the user's prior agreement to the change in the same way that other suggested amendments would require initial agreement.

Suggested Amendment
To UCITA
AFFECT Amendment-Consumer #10
(Mixed hardware/software products.)

Identification of Section to be changed:

Section 103(b). Scope; Exclusions:
(Companion amendment:) Section 102. Definitions. Section (9): “Computer”

Text Deleted and Inserted:

SECTION 102. DEFINITIONS.

(a) In this [Act]:

. . .

(9): “Computer” means an electronic device that ~~accepts~~ is designed for the sole purpose of accepting information in digital or similar form and manipulates it for a result based on a sequence of instructions.

. . .

SECTION 103. SCOPE; EXCLUSIONS:

(a) This [Act] applies to computer information transactions.

(b) Notwithstanding any other provision of this Act, this Act does not govern contract formation in a transaction including both computer information and goods. For issues other than contract formation, ~~E~~except for subject matter excluded in subsection (d) and as otherwise provided in Section 104, if a computer information transaction includes subject matter other than computer information or subject matter excluded under subsection (d), the following rules apply:

(1) If a transaction includes computer information and goods, this [Act] applies to the part of the transaction involving computer information, information rights in it, and creation or modification of it. However, if a copy of a computer program operates the features ~~is contained in and sold or leased as part~~ of goods, this [Act] applies to the copy and the computer program only if:

(A) the goods are a computer ~~or computer peripheral; or~~

~~(B) giving the buyer or lessees of the goods access to or use of the program is ordinarily a material purpose of transactions in goods of the type sold or leased.~~

(c) . . .

Note that the change in (d) below is included in the text here only because it is suggested in another suggested amendment of AFFECT.

(d) This [Act] does not apply to:

(1) a financial services transaction;

~~(2) an insurance services transaction;~~

(3) an agreement to create, perform or perform in, include information in, acquire, use, distribute, modify, reproduce, have access to, adapt, make available, transmit, license, or display:

(A) a motion picture or audio or visual programming, other than in (i) a mass-market transaction or (ii) a submission of an idea or information or release of informational rights that may result in making a motion picture or similar information product; or

(B) a sound recording, musical work, or phonorecord as defined or used in Title 17 of the United States Code as of July 1, 1999, or an enhanced sound recording, other than in the submission of an idea or information or release of informational rights that may result in the creation of such material or a similar information product.

(4) a compulsory license;

(5) a contract of employment of an individual, other than an individual hired as an independent contractor to create or modify computer information, unless the independent contractor is a freelancer in the news reporting industry as that term is commonly understood in that industry;

(6) a contract that does not require that information be furnished as computer information or a contract in which, under the agreement, the form of the information as computer information is otherwise insignificant with respect to the primary subject matter of the part of the transaction pertaining to the information;

(7) unless otherwise agreed between the parties in a record:

(A) telecommunications products or services provided pursuant to federal or state tariffs; or

(B) telecommunications products or services provided pursuant to agreements required or permitted to be filed by the service provider with a federal or state authority regulating those services or under pricing subject to approval by a federal or state regulatory authority; or

(8) subject matter within the scope of [Article 3, 4, 4A, 5, [6,] 7, or 8 of the Uniform Commercial Code].

Explanation of Amendment (Current law/change made/reason for the change)**:**

A mixed transaction is a transaction in which the product being sold contains both hardware and software. Examples would be smart toasters, refrigerators or even cars which have, or soon will have, microprocessors in them that run the hardware based on software which on the chips or which is supplied to the product from a website, or through another method of deliver. If UCITA governs the software in these goods, which law should apply to issues which can't be split between different parts of a single product, such as the law for contract formation? Should it be existing UCC article 2 on sales of goods, or should it be UCITA which is designed for purchases of software and on-line services.

The issue of mixed transactions, those involving both goods and software or other computer information, is difficult and important. Indeed, the Article 2 drafting committee struggled with this issue for years. One might initially, but erroneously, think that the line could be drawn based on whether the software is "contained in" or embedded in the goods. However, numerous technical commentators have noted that the line between embedded and non-embedded software cannot be drawn with precision, and that any line can be easily engineered around in product design. Software can be delivered to goods on a chip, through a wireless query to a computer or website, and in a wide variety of other methods. Competing goods may use different methods to acquire and refresh software which contributes to features of goods. Yet another problem is that goods may compete in the same marketplace even though some of the goods use computer information, while others do not. A digital watch and a ticking watch, after all, compete for the same wrist. We believe that it is important for competing goods to be governed by the same law, to the maximum extent possible.

The proposed change would apply the current law of contact formation for goods to all mixed goods/software transactions. The amendment further applies the law of goods to all aspects of the goods transaction, including software aspects, unless the goods are a computer.

The rule now found in UCITA applies UCITA to software sold or leased with goods if any of the following occur: 1) the software is not "contained in" the goods; 2) the goods are a computer or a computer peripheral, or 3) a material purpose of transactions in goods of that type is to obtain access to or use of the software. UCITA may perhaps also apply if the software is not "sold or leased"

with the goods, but instead licensed. Our amendment tightens this considerably, restricting UCITA to software transactions not involving goods, or software transactions where the goods are a computer.

The current UCITA standard is too open, too factual, and will sweep too much of the software which operates goods into UCITA. The current UCITA rule would create a hodgepodge of conflicting law applying to different parts of the same transaction. It would base the selection of applicable law for software-driven features of goods on the factual question of whether the software is "contained in," the goods, a result that can be changed by product design decisions. It would exclude software contained in any smart goods that are deemed to be "computers", broadly defined, and "computer peripherals," an even broader category. It also contains a broad "material purpose" inclusion standard for software which operates smart goods.

The UCITA rule is flawed because competing goods would be governed by different law, depending on whether and to what extent those goods are operated by software. The UCITA rule also creates a risk that the same product will be covered by different law in different jurisdictions, because jurisdictions may differ in how they apply the factual predicates such as "contained in" and "material purpose," or in how they define "computer peripheral."

Any rule that draws a line between UCITA and other law for software in smart goods will be either under-inclusive or over-inclusive. Software in too many kinds of goods will be pulled in, or in too few. The UCITA drafters selected an over-inclusive definition. We respectfully suggest that it is better to be under-inclusive than over-inclusive when moving software which operates non-computer goods out of the ambit of traditional goods law.

The changes we have proposed would mean that all software which operates features of a non-computer consumer electronic product, a home appliance, an automobile, and other similar consumer goods would be excluded from UCITA. This simple rule could not be "engineered around" by changing the manner of delivery of programs contributing to the features of goods. Competing goods would be treated under the same law, regardless of whether or how those goods use software. Unlike the UCITA test, which is highly factual, the application of this test for the scope of UCITA should not depend on factual questions that will have to be litigated on a product by

product basis, and that may be decided differently in different jurisdictions, even for the same product.

Another reason to abandon the UCITA scope rule on mixed transactions is that under the current UCITA rule, UCITA will cover the software aspects of more and more goods transactions as the line between goods and software continues to blur in the marketplace. Proponents of UCITA might accurately point out that UCITA would reach only the software, not the hardware, portions of those goods. However, when something goes wrong with a good, it should not be the responsibility of the consumer to determine whether the problem was a hardware or a software problem, and the consumer's remedies should not differ depending on which part of the goods – hardware or software, caused the problem.

The definition of computer also should be changed. The definition of computer now found in UCITA is so broad that virtually any devices that processes digital information is a computer, including a heater thermostat, a braking software chip, and other items that would not fall into any commonsense definition of computer. Because the definition of "computer" is used in UCITA to sweep software sold with goods into UCITA, that definition should be much narrower than the current UCITA definition.

Suggested Amendment
To UCITA
AFFECT Amendment-Consumer #11
("Opt-in/opt-out" for mixed hardware/software products.)

Identification of Section to be changed:

Section 104. Mixed Transactions: Agreement to Opt-in or Opt-out.

Text Deleted and Inserted:

SECTION 104. MIXED TRANSACTIONS: AGREEMENT TO OPT-IN OR OPT-OUT.

The parties may agree that this [Act], including contract-formation rules, governs the transaction, in whole or part, or that other law governs the transaction and this [Act] does not apply, if a material part of the subject matter to which the agreement applies is computer information or informational rights in it that are within the scope of this [Act], or is subject matter within this [Act] under Section 103(b), or is subject matter excluded by Section 103(d)(1) or (3). However, any agreement to do so is subject to the following rules:

(1) An agreement that this [Act] governs a transaction does not alter the applicability of a statute, rule, or procedure that may not be varied by agreement of the parties or that may be varied only in a manner specified by the statute, rule or procedure, or of any law protecting ~~including~~ a consumers ~~protection statute [or administrative rule].~~ In addition, in a mass-market transaction, the agreement does not alter the applicability of a law applicable to copy of information in printed form.

(2) An agreement that this [Act] does not govern a transaction:

(A) does not alter the applicability of Section 214 or 816; and

(B) In a mass-market transaction, does not alter the applicability under [this Act] of the doctrine of Unconscionability or fundamental public policy or the obligation of good faith.

(3) In a mass-market transaction, any term under this section which changes the extent to which this [Act] governs the transaction must be conspicuous.

(4) A copy of a computer program which operates the features ~~contained in and sold or leased as part~~ of goods and which is excluded from this [Act] by 103(b)(1) cannot provide the basis for an agreement under this section that this [Act] governs the transaction.

Explanation of Amendment (Current law/change made/reason for the change)**:**

UCITA is intended to apply to “computer information” -- software and on-line services. The proponents of UCITA have argued that UCITA is needed for “computer information” because “computer information” is different and needs different provisions -- provisions that have ended up being less protective to consumers and other end users.

However, this section of UCITA authorizes sellers to put provisions in their boilerplate agreements top bring under UCITA products that are not “computer information.” That is, the boiler plate can “opt-in” transactions now covered by other law into UCITA. "Opt in" raises all the problems described in connection with mixed transactions in which goods are operated in whole or in part with software. (See the amendment relating to this issue in Section 103.) The suggested amendments here to Section 104 do two things:

The first, and principal, change suggested in this section is in subsection (4). UCITA contains a useful provision in section 104(4) that a copy of a computer program covered under section 103(b)(1) cannot be the basis for an opt-in of the whole transaction to UCITA. This language must be tightened so that calling the license part of the goods transaction a “license” rather than a “sale” or “lease” does not change the result. It must also be tightened so that whether the software is “contained in” the goods or delivered to them for use in

another way is not a deciding factor. The proposed amendment makes these changes.

Without these changes, the protection of subsection 101(4) against broadly opt-in goods transactions into UCITA could be illusory. Goods that are merely operated by software should not be brought under the umbrella of UCITA regardless of how the software is delivered to the goods. A provision permitting broad opt-in in a non-negotiated contract honors drafter power, not mutual autonomy of the parties. UCITA's proponents contend that goods law and other law is poorly designed for computer information transactions, and that UCITA's rules are designed particularly for computer information transactions. A broad opt-in authorization to bring some goods transactions under UCITA turns this notion upside down, for example, by applying rules to goods transactions that the proponents say are designed for non-goods. Without the suggested amendment, UCITA could be applied to transactions for which it was not designed, for example, a goods transaction, merely because that transaction has computer information elements which are not "contained in" the goods or which are licensed rather than sold or leased.

The second amendment is the change in section 104(1). It is needed because, as drafted, UCITA preserves consumer protection rules from the effect of opt-in only if those rules are "non-variable by agreement." This will have to be litigated under hundreds, if not thousands, of statutes, with attendant expense, delay, and uncertainty. Consumer protection rules, by their nature, are designed to be mandatory rules. In the rare event a consumer protection rule expressly states that it is variable by agreement, then it would be variable under its own terms, and the commentary to UCITA could recognize that it does not change such other explicit statutory language, if any such exists. UCITA should preserve those consumer protection rules which are simply silent on the ability to vary without requiring litigation on whether each one is variable by agreement, which seriously undermines the value of the preservation.

Suggested Amendment
To UCITA
AFFECT Amendment-Consumer #12
(Choice of Forum)

Identification of Section to be changed:

Section 110. Contractual Choice of Forum.

Text Deleted and Inserted:

SECTION 110. CONTRACTUAL CHOICE OF FORUM.

(a) The parties in their agreement may choose an exclusive judicial forum unless the choice is unreasonable and unjust.

(b) A judicial forum specified in an agreement is not exclusive unless the agreement expressly so provides.

<u>(c) In a consumer transaction a term that provides for a judicial forum that would not otherwise have jurisdiction over the licensee is unenforceable.</u>

Explanation of Amendment (Current law/change made/reason for the change)**:**

Current UCITA set out above lets the "parties in their agreement" choose a judicial forum unless is unreasonable and in addition unjust. Of course the agreement is always drafted by the software publisher or on-line provider and a consumer would not be able to get this term changed negotiation with the salesman even if the consumer had the sophistication to understand the term or its implications. According to the commentary to UCITA general case law states, "[A]n agreed choice of forum based on a valid commercial purpose is not invalid simply because it adversely affects one party, even if bargaining power was unequal."

The change is identical to Uniform Commercial Code Section 106 of Article 2A, covering leases.

Under UCITA, a consumer in Washington, D.C. who wants to sue to get back several hundred dollars paid to a software publisher will not be able to get to the California courts. Yet the software publisher will be able to name California as the forum state in the license terms which the consumer clicks on at some point so long as the publishers has a “commercial purpose” for naming California.

Suggested Amendment
To UCITA
AFFECT Amendment-Consumer #13
(Choice of law governing the transaction.)

Identification of Section to be changed:

Section 109. Choice of Law.

Text Deleted and Inserted:

SECTION 109. CHOICE OF LAW.

(a) Except as provided in subsection (e),t~~T~~he parties in their agreement may choose the applicable law. ~~However, the choice is not enforceable in a consumer contract to the extent it would vary a rule that may not be varied by agreement under the law of the jurisdiction whose law would apply under subsections (b) and (c) in the absence of the agreement.~~

(b) In the absence of an enforceable agreement on choice of law, the following rules determine which jurisdiction's law governs in all respects for purposes of contract law:

(1) Except for consumer contracts, a ~~A~~n access contract or a contract providing for electronic delivery of a copy is governed by the law of the jurisdiction in which the licensor was located when the agreement was entered into.

(2) A consumer contract

(i) that requires delivery of a copy on a tangible medium is governed by the law of the jurisdiction in which the copy is or should have been delivered to the consumer, or

(ii) otherwise is governed by the law of the jurisdiction in which the licensee resides at the time the license becomes enforceable

(3) In all other cases, the contract is governed by the law of the jurisdiction having the most significant relationship to the transaction.

(c) In cases governed by subsection (b), if the jurisdiction whose law governs is outside the United States, the law of that jurisdiction governs only if it provides substantially similar protections and rights to a party not located in that jurisdiction as are provided under this [Act]. Otherwise, the law of the State that has the most significant relationship to the transaction governs.

(d) For purposes of this section, a party is located at its place of business if it has one place of business, at its chief executive office if it has more than one place of business, or at its place of incorporation or primary registration if it does not have a physical place of business. Otherwise, a party is located at its primary residence.

(e) In a consumer contract, the choice of law is enforceable only if

(a) the law chosen by the parties is that of a jurisdiction in which the licensee resides at the time the license becomes enforceable, or within 30 days thereafter, or

(b) where the contract requires delivery of a copy on a tangible medium, the law chosen by the parties is that of a jurisdiction in which the copy of computer information is or should have been delivered.

Explanation of Amendment (Current law/change made/reason for the change)**:**

Current UCITA allows almost unlimited choice of law in commercial transactions. For consumers, the choice is also unfettered except for any provisions of the law of the consumer‘s home state that the home state has declared cannot be altered by agreement.

Current Uniform Commercial Code, Section 1-105 limits the choice of law to the laws of a state that have a reasonable relation to the transaction. It provides, “Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. ”

The suggested amendment parallels the choice of law provision for consumers in current Uniform Commercial Code Article 2A dealing with leases.

The suggested amendment provides that law be the state where the consumer resides, or is about to move to, or in the case of tangible medium, the state where it is delivered.

Unfettered choice of law makes some sense in commercial transactions. They often span state lines. They are frequently arranged with legal help with access to the laws of other states. They are frequently bargained at arms length.

Consumers are only familiar with the their states’ laws and are ill-equipped to find or evaluate the laws of another state the seller might choose to select. Consumers must accept boiler plate agreements or not make the purchase at all. The choice of law UCITA allows will simply cause a race to the bottom -- the state with the worst laws for consumers will be chosen. While the current UCITA draft makes concessions for laws of the consumer’s home state that cannot be varied by agreement, there are lots of other laws on the making of the formation of the agreement etc. that are important.

Suggested Amendment
To UCITA
AFFECT Amendment-Consumer #14
(Unconscionability/Reasonable Expectations)

Identification of Section to be changed:

Section 111. Unconscionable Unreasonable Contract or Term.

Text Deleted and Inserted:

SECTION 111. UNCONSCIONABLE UNREASONABLE CONTRACT OR TERM.

(a) If a court as a matter of law finds a contract or a term thereof to have been unconscionable or to have frustrated the reasonable expectations of the non-drafting party at the time it was made, the court may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable or the unreasonable term, or limit the application of the unconscionable or unreasonable term so as to avoid an unconscionable or unreasonable result.

(b) If it is claimed or appears to the court that a contract or term thereof may be unconscionable or unreasonable, the parties must be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.

Explanation of Amendment (Current law/change made/reason for the change)**:**

Unconscionability as proposed by the drafters makes unenforceable only terms that"shock the conscience" (or that violate public policy under section 105). This will not address other surprising terms included in standard form contracts under UCITA. The reasonable expectations standard is an appropriate way to augment the Unconscionability standard in the context of standard form contracts under UCITA because it facilitates evaluation of the term from the perspective of the non-drafting party.

Other Problems

The amendments submitted on behalf of consumers in full form address only the most fundamental of the consumer problems with UCITA. Other important amendments are also necessary for UCITA to be worthy of endorsement as a balanced piece of legislation by NCCUSL, the ABA or any state's legislative study commission.

They include:

- Delete section 108(b), addressing authentication, which makes compliance with a commercially reasonable authentication procedure adopted by the parties or established by law per se an authentication regardless of the surrounding circumstances.

- Amend the definition of "send" in section 102(60), so that it at least excludes from the definition of a sent item one which the sender knows has bounced back to the sender. The present definition is less friendly to recipients of messages than UETA. Under the UCITA definition, a message which bounced back to the send has per se been sent.

- Delete the definition of "return": The definition of "return" in section 102(57) should be deleted, because the structure of "delivery first, learn the terms later, return if you don't like the terms" should be deleted. The definition of return is also flawed because it covers only return of the computer information, and fails to include "goods sold or transferred, or for which the licensor become contractually obligated, in the same transaction." Under the current definition, the customer is stuck with the hardware while having a theoretical right to return the software.

- Restrict variation by agreement of the perfect tender rule: Section 113(3) should be amended to list the perfect tender rule of section 704(b) for mass market transactions as one of the items not variable by agreement.

- Amend the attribution rules so that they do not reach those acts of electronic agents which do not qualify as the act of an agent under agency law: Section 213 should delete the term "or its electronic agency." The general reference to agency rules would remain in place, and the deletion would prevent a per se rule binding the user of an electronic agent even when the use of the electronic agent would not bind the user under the requirements of agency law.

- Electronic error: In section 214, delete “if a reasonable method to detect and correct or avoid the error was not provided.” This prevents the mere existence of a confirmation screen from eliminating the electronic error defense.

- Express warranty: Delete “reasonably” before “conform” in section 402(a)(1)(3), so that a product must conform to the sample or model.

Software Professionals

Suggested Amendment to UCITA:
(Define "Free Software" and exclude it from Consumer and Mass-Market)

Identification of Section to be changed:
SECTION 102. DEFINITIONS.

Text Deleted and Inserted:
Section 102(a)(16) "Consumer contract" means a contract between a merchant licensor and a consumer. However, a contract to provide free software is not a consumer contract.

Section 102(a) (32) "Free software" means computer information that is available to the public at no charge beyond the cost of media and delivery, that may be redistributed at no charge, and that is distributed without contractual use terms. If the computer information includes a computer program, the source code is available for that program at no charge beyond the cost of media and delivery.

Section 102(a)(46~~5~~) "Mass-market transaction" means a transaction that is: ... (B) any other transaction with an end-user licensee if: ... (iii) the transaction is not: (V) a contract to provide free software.

Explanation of Amendment
The default rules for consumer and mass-market software are inappropriate for software that is created by volunteers, distributed for free, and whose source code is also available for inspection and modification.

Suggested Amendment to UCITA:
(Exclude safety-critical embedded software from UCITA)

Identification of Section to be changed:
SECTION 103. SCOPE; EXCLUSIONS.

Text Deleted and Inserted:

Section 103 (b) Except for subject matter excluded in subsection (d) and as otherwise provided in Section 104, if a computer information transaction includes subject matter other than computer information or subject matter excluded under subsection (d), the following rules apply:
(1) If a transaction includes computer information and goods, this [Act] applies to the part of the transaction involving computer information, informational rights in it, and creation or modification of it. However, if a copy of a computer program is contained in and sold or leased as part of goods, this [Act] applies to the copy and the computer program only if:
(A) the computer program does not control or interact with the goods in such a way that an error in the program could cause personal injury or damage to personal property, and
(BA) the goods are a computer or computer peripheral; or
(B) giving the buyer or lessee of the goods access to or use of the program is ordinarily a material purpose of transactions in goods of the type sold or leased.

Explanation of Amendment
In repeated drafting committee discussions during the drafting of UCITA, and in many places in the comments to UCITA, there is a clear intent that UCITA exclude embedded software. However, the black letter is ambiguous. Computer Science professionals have repeatedly warned that much safety-critical embedded software will either fit within the scope of UCITA today or manufacturers of goods will be able to bring the scope of their software within UCITA in the near future by making straightforward engineering changes.
The amendment specifically excludes safety-critical embedded software from UCITA. For those who believe that UCITA already excludes such software, this language merely restates this fact in the black letter in a clearer way.
This amendment does not take all other types of embedded software out of the scope of UCITA. Embedded software whose failure will cause economic losses but not injury or damage to tangible property may or may not fall within the scope of UCITA, depending on how courts interpret the rest of Sections 103 and 104.
We respectfully suggest that UCITA would be improved further by a broader change, deleting all of the language, "(A) the goods are a computer or computer peripheral; or (B) giving the buyer or lessee of the goods access to or use of the program is ordinarily a material purpose of transactions in goods of the type sold or leased," rather than adding new language that is restricted to safety-critical software.

Suggested Amendment to UCITA:
(Reverse Engineering and Public Discussion)

Identification of Section to be changed:

SECTION 105. RELATION TO FEDERAL LAW; FUNDAMENTAL PUBLIC POLICY; TRANSACTIONS SUBJECT TO OTHER STATE LAW.

Text Deleted and Inserted: (Add the following)

Section 105(f) (I)A term in a license is unenforceable if it restricts the licensee from reverse engineering if that reverse engineering is done to achieve interoperability or to discover, prove, repair, or mitigate the effects of software errors or security-related risks.

(II) A term in a license is unenforceable if it restricts the licensee from publishing benchmark studies, product reviews or other descriptions of the product that will assist the reader to achieve interoperability or to discover, prove, repair, or mitigate the effects of software errors or security-related risks.

(III) A term in a mass-market license is unenforceable if it restricts the licensee from reverse engineering a computer program or it restricts the licensee from publishing the results of benchmark studies or other reviews of the licensed computer information.

Explanation of Amendment

Restrictions on reverse engineering, in negotiated, signed licensing agreements, are generally enforceable. However, the Digital Millenium Copyright Act permits reverse engineering that is done to achieve interoperability or to reduce security risks. The European Union also allows for reverse engineering to achieve interoperability or safety. Section 105(f)(I) makes it explicit that UCITA-based contracts also allow reverse engineering for these limited purposes. In particular, it has become clearer since September 11, 2001 that there is enormous public interest in improving the security of computer systems. Reverse engineering is an essential method for investigating security. Software vendors must not be allowed to bar their customers from using basic methods for protecting themselves and their systems.

Restrictions on reverse engineering in mass-market and consumer software have rarely or never been upheld. Restrictions on speech, that would bar disclosure defects or poor performance of mass-market software, are fundamentally anti-competitive. When the software is available to all, including the software vendor's competitors, a ban on speech does not protect the vendor's secrets from discovery by competitors. It merely protects the vendor from publication of information that might cause customers to choose a competing product. Such a restriction has no place in a market economy.

Suggested Amendment to UCITA:
(Known Defects)

Identification of Section to be changed:
SECTION 403. IMPLIED WARRANTY: MERCHANTABILITY OF COMPUTER PROGRAM.

Text Deleted and Inserted: (Add the following)

Section 403(d) A licensor that is a merchant with respect to computer programs of the kind:

(1) Warrants that, as of the time of transaction, the licensed computer program has no known defects other than those which have been disclosed to the licensee at or before the time of the transaction. A defect has been disclosed to the licensee if it was made available to the licensee at no cost, for example by publication on the licensor's website, and the licensee was advised how to access the licensor's disclosure of this defect, and the disclosure is reasonably calculated to be informative to the typical licensee of a product of this kind, including a description of the errors or problems that the licensee would be expected to encounter as a consequence of this defect and the steps recommended to avoid or mitigate losses caused by the defect.

(2) Will be liable for incidental and consequential losses of the licensee that were caused by a defect that was known to the licensor at time of transacting but were not disclosed to the license. However a mass-market license may limit the remedy to reimbursement of not more than $500 for incidental losses and consequential losses that involved actual out-of-pocket expenses of the licensee. Unless the contract specifies otherwise, the licensor will not be liable for incidental and consequential losses of the licensee that were caused by a defect that was unknown to the licensor at the time of transacting or that was known and disclosed.

(3) May not disclaim this warranty in a mass-market license or a license for a computer program that will be embedded in goods and whose failure could cause a personal injury or damage to tangible property.

Explanation of Amendment

The issue of nondisclosure of known defects is one of the most controversial issues in the UCITA drafting process. It has been a lightning rod for opposition to UCITA, widely raised in the press and in discussions among working professionals.

UCITA allows the licensor broad power to set the terms of the contract, especially in a mass-market contract. There is widespread perception that it is fundamentally unfair to allow the vendor to sell products with known but undisclosed defects, under a non-negotiable contract that allows the vendor to disclaim warranties and exclude most or all remedies. There is widespread belief among computing professionals who have studied UCITA that, within the legal context set by UCITA, a practice of nondisclosure of known defects will have a corrupting influence on the field and will set back the process of developing high quality software.

This simplest and most straightforward approach to this issue, often advocated, is to write an implied warranty of disclosure of known defects into every software license and to hold the licensor accountable for incidental and consequential losses caused by nondisclosed known defects. However, this subjects the licensor to unlimited risk. The approach taken in this amendment is more cautious. The warranty, in practice, will apply only to mass-market and life-critical embedded software, not to commercial software. The mass-market warranty, in practice, will limit remedies to a maximum of $500 reimbursement for actual, out of pocket expenses (not lost profits) per customer. This is a strong, but limited, incentive to a manufacturer to disclose its defects. If this isn't a sufficient incentive, or if it does not result in the spread of good practices to commercial software, this section can be broadened later.

The warranty is also made nondisclaimable for embedded software that is safety-critical. Vendors of software that is to be embedded in goods are providing licenses that disclaim warranties and drastically limit remedies. Many vendors do not disclose known defects. Makers of goods that contain embedded software complain that they lack the market power needed to convince the large software vendors to disclose their defects. As a result, safety-critical devices are being built on top of a quality-unknown code base. People have died as a result of defects in safety-critical embedded software. As embedded software becomes even more pervasive in homes, offices, cars and motorcycles, more people will die as a result of defects in the embedded software.

One of the key standards for safety of embedded software is Underwriters Laboratory's STP 1998. This standard *recommends* that manufacturers of devices that incorporate embedded software from other vendors should obtain lists of known defects from the licensors of the software. Members of the drafting committee for the standard now known as STP 1998 advised me (Cem Kaner) that this was a recommendation, rather than a requirement, because of the limited market power of individual manufacturers. It would be unreasonable for an ANSI standard (such as STP 1998) to include a requirement that a reasonably diligent manufacturer could not meet. UCITA potentially exacerbates the problems of embedded software by granting licensors greater freedom. This amendment mitigates the problem by requiring licensors to disclose known defects to the device manufacturers, who will thereby be in a much better position to make their devices safe.

Suggested Amendment to UCITA:
(Dealing with Injuries)

Identification of Section to be changed:
SECTION 109. CHOICE OF LAW.

Text Deleted and Inserted: (Add the following)
Section 109(e) If a computer program, including a program embedded in a device, is the cause of an injury to a person or of damage to tangible property, a term of the license should not be enforced if it (i) selects the law of a state that is neither the state in which the injured party or property owner lives or the state in which the injury or property damage took place, or (ii) requires an injured person or owner of damaged property to travel to another state, or (iii) limits damages available to the injured person or property owner below those that would normally be available in a products liability suit.

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SECTION 307 - INTERPRETATION AND REQUIREMENTS FOR GRANT

(a) A license grants:

(1) the contractual rights that are expressly described; and

(2) a contractual right to use any informational rights within the licensor's control at the time of contracting which are necessary in the ordinary course
to exercise the expressly described rights.

(b) If a license expressly limits use of the information or informational rights, use in any other manner is a breach of contract. In all other cases, a
license contains an implied limitation that the licensee will not use the information or informational rights otherwise than as described in subsection (a).
However, use inconsistent with this implied limitation is not a breach if it is permitted under applicable law in the absence of the implied limitation.

(c) An agreement that does not specify the number of permitted users permits ~~a~~ an unlimited number of users. ~~which is reasonable in light of the informational rights involved and the commercial circumstances existing at the time of the agreement.~~

(d) A party is not entitled to any rights in new versions of, or improvements or modifications to, information made by the other party. A licensor's
agreement to provide new versions, improvements, or modifications requires that the licensor provide them as developed and made generally
commercially available from time to time by the licensor.

(e) Neither party is entitled to receive copies of source code, schematics, master copy, design material, or other information used by the other party in
creating, developing, or implementing the information.

(f) Terms concerning scope must be construed under ordinary principles of contract interpretation in light of the informational rights and the
commercial context. In addition, the following rules apply:

(1) A grant of "all possible rights and for all media" or "all rights and for all media now known or later developed", or a grant in similar terms, includes
all rights then existing or later created by law and all uses, media, and methods of distribution or exhibition, whether then existing or developed in the
future and whether or not anticipated at the time of the grant.

(2) A grant of an "exclusive license", or a grant in similar terms, means that:

(A) for the duration of the license, the licensor will not exercise, and will not grant to any other person, rights in the same information or informational
rights within the scope of the exclusive grant; and

(B) the licensor affirms that it has not previously granted those rights in a contract in effect when the licensee's rights may be exercised.

(g) The rules in this section may be varied only by a record that is sufficient to indicate that a contract has been made and which is:

(1) authenticated by the party against which enforcement is sought; or

(2) prepared and delivered by one party and adopted by the other under Section 208 or 209.

Issue: Number of Permitted Users

Under this default rule, a license agreement which does not specify the number of permitted users under a site or enterprise-wide license is restricted to a number of users deemed "reasonable in light of the...commercial circumstances" when the license became effective.

Rationale:

(a) This default rule runs contrary to current business practice and normal expectations under which most business licenses are for an unlimited number of users.

(b) This section encourages licensors to use ambiguous terminology in drafting their license agreements. This would trigger the default section favoring the licensor or drafter.

(c) Of particular concern is that this section gives the licensor the opportunity to bring the licensee's operations (or perhaps a sublicensee's operations) to a standstill, at its discretion, by utilizing an automatic restraint authorized under Section 605, without notice to the licensor, based on its opinion that a licensee's use of the software, in terms of number of users, is "inconsistent with the agreement."

(d) Section 307 allows the licensor in the first instance to decide what is a reasonable number. Conflicts will arise and the courts (or arbitration panels) will be called upon to decide what constitutes a "reasonable number of users," which runs directly contrary to the stated goal of providing certainty.

SECTION 308 - DURATION OF CONTRACT - If an agreement does not specify its duration, to the extent allowed by other law, and subject to cancellation for breach of contract, ~~the following rules apply:~~

~~(1) Except as otherwise provided in paragraph (2),~~ the agreement is enforceable indefinitely and the duration of any license to use licensed subject matter is perpetual as to the contractual rights and contractual use terms. ~~for a time reasonable in light of the licensed subject matter and commercial circumstances but may be terminated as to future performances at will by either party during that time on giving seasonable notice to the other party.~~

~~(2) The duration of contractual rights to use licensed subject matter is a time reasonable in light of the licensed informational rights and the commercial circumstances. However, subject to cancellation for breach of contract, the duration of the license is perpetual as to the contractual rights and contractual use terms if:~~

~~(A) the license is of a computer program that does not include source code and the license:~~

~~(i) transfers ownership of a copy; or~~

~~(ii) delivers a copy for a contract fee the total amount of which is fixed at or before the time of delivery of the copy; or~~

~~(B) the license expressly grants the right to incorporate or use the licensed information or informational rights with information or informational rights from other sources in a combined work for public distribution or public performance.~~

Issue: Duration of License

Under this default rule, license agreements which do not specify a license term are limited to a "time reasonable," rather than a perpetual term.

Rationale:

(a) This default rule runs contrary to current business practice and normal expectations under which most business licenses are for a perpetual term.

(b) As with Section 307 (discussed above), this provision gives the licensor

the opportunity to bring the licensee's operations (or perhaps a sublincensee's operations) to a standstill, at its discretion, by utilizing an automatic restraint authorized under Section 605, without notice to the licensor, based on its opinion that a licensee's use of the software, in terms of the duration of the license, is "inconsistent with the agreement."

(c) By forcing the courts (or arbitration panels) to decide what constitutes a "reasonable period," Section 308 works exactly opposite of the stated goal of providing certainty.

SECTION 401 - WARRANTY AND OBLIGATIONS CONCERNING NONINTERFERENCE AND NONINFRINGEMENT

(a) A licensor of information that is a merchant regularly dealing in information of the kind warrants that the information will be delivered free of the rightful claim of any third person by way of infringement or misappropriation, but a licensee that furnishes detailed specifications to the licensor and the method required for meeting the specifications ~~holds the licensor harmless against any such claim that arises out of compliance with either the required specification or~~ warrants to the licensor that compliance with the specifications and the required method ~~except for a claim that results from the failure of the licensor to adopt, or notify the licensee of, a noninfringing alternative of which the licensor had reason to know~~ will not result in a rightful claim of infringement or misappropriation by a third person.

(b) A licensor warrants:

(1) for the duration of the license, that no person holds a rightful claim to, or interest in, the information which arose from an act or omission of the licensor, other than a claim by way of infringement or misappropriation, which will interfere with the licensee's enjoyment of its interest; and

(2) as to rights granted exclusively to the licensee, that within the scope of the license:

(A) to the knowledge of the licensor, any licensed patent rights are valid and exclusive to the extent exclusivity and validity are recognized by the law under which the patent rights were created; and

(B) in all other cases, the licensed informational rights are valid and exclusive for the information as a whole to the extent exclusivity and validity are recognized by the law applicable to the licensed rights in a jurisdiction to which the license applies.

(c) The warranties in this section are subject to the following rules:

(1) If the licensed informational rights are subject to a right of privileged use, collective administration, or compulsory licensing, the warranty is not made with respect to those rights.

(2) The obligations under subsections (a) and (b)(2) apply ~~solely~~ to informational rights arising under the laws of the ~~United States or a State any state and under the laws of any other country, to the extent the rights are recognized under a treaty or international convention to which the country and the United States are signatories~~, any country, unless the contract expressly provides that the warranty obligations extend only to rights

under the laws of ~~other countries. Language is sufficient for this purpose if it states "The licensor warrants 'exclusivity' 'noninfringement' 'in specified countries' 'worldwide'", or words of similar import. In that case, the warranty extends to the specified country or, in the case of a reference to "worldwide" or the like, to all countries within the description, but only to the extent the rights are recognized under a treaty or international convention to which the country and the United States are signatories~~ the United States or any State.

(3) The warranties under subsections (a) and (b)(2) are not made by a license that merely permits use, or covenants not to claim infringement because of the use, of rights under a licensed patent.

(d) Except as otherwise provided in subsection (e), a warranty under this section may be disclaimed or modified only by specific language or by circumstances that give the licensee reason to know that the licensor does not warrant that competing claims do not exist or that the licensor purports to grant only the rights it may have. In an automated transaction, language is sufficient if it is conspicuous. Otherwise, language in a record is sufficient if it states "There is no warranty against interference with your enjoyment of the information or against infringement", or words of similar import.

(e) Between merchants, a grant of a "quitclaim", or a grant in similar terms, grants the information or informational rights without an implied warranty as to infringement or misappropriation or as to the rights actually possessed or transferred by the licensor.

Issue: Limitation of Warranty of Noninfringement

Under this default rule, a vendor's implied warranty of noninfringement is limited to usage in the United States, even when the license is granted worldwide.

Rationale:

(a) This section limits a vendor's implied warranty of non-infringement to U.S. transactions, even if the license is granted worldwide. This default rule runs contrary to current business practice and normal expectations by reducing the non-infringement warranties given by vendors. When a license is granted worldwide, the default under UCITA should be a worldwide implied warranty of non-infringement.

(b) A licensor selling software to a multinational company warrants that the product does not infringe copyrights held outside the USA, unless the contract specifies otherwise.

(c) A large or small business using software specifically developed for its usage should not be responsible for indemnifying the software vendor when using the software out of the country.

SECTION 402. EXPRESS WARRANTY.

(a) Subject to subsection (c), an express warranty by a licensor is created as follows:

(1) An affirmation of fact or promise made by the licensor to its licensee, including by advertising, which relates to the information and becomes part of the basis of the bargain creates an express warranty that the information to be furnished under the agreement will conform to the affirmation or promise.

(2) Any description of the information which is made part of the basis of the bargain creates an express warranty that the information will conform to the description.

(3) Any sample, model, or demonstration of a final product which is made part of the basis of the bargain creates an express warranty that the performance of the information will ~~reasonably~~ conform to the performance of the sample, model, or demonstration, taking into account differences that would appear to a reasonable person in the position of the licensee between the sample, model, or demonstration and the information as it will be used.

(b) It is not necessary to the creation of an express warranty that the licensor use formal words, such as "warranty" or "guaranty", or state a specific intention to make a warranty. However, an express warranty is not created by:

(1) an affirmation or prediction merely of the value of the information or informational rights;

(2) a display or description of a portion of the information to illustrate the aesthetics, appeal, suitability to taste, subjective quality, or the like of informational content; or

(3) a statement purporting to be merely opinion or commendation of the information or informational rights.

(c) An express warranty or similar express contractual obligation, if any, exists with respect to published informational content covered by this [Act] to the same extent that it would exist if the published informational content had been published in a form that placed it outside this [Act]. However, if the warranty or similar express contractual obligation is breached, the remedies of the aggrieved party are those under this [Act] and the agreement.

ISSUE: Conforming Products or Abandonment of Perfect Tender Requirement

Under Section 402 (a) (3), the express warranty that products will conform to samples, models and demonstrations is watered down to state only that products will

“reasonable” conform. This change should be read in conjunction with the rationale for Section 703 and Section 704.

SECTION 403 - IMPLIED WARRANTY: MERCHANTABILITY OF COMPUTER PROGRAM

(a) Unless the warranty is disclaimed or modified, a licensor that is a merchant with respect to computer programs of the kind warrants:

(1) to the end user that the computer program is fit for the ordinary purposes for which such computer programs are used;

(2) to the distributor that:

(A) the program is adequately packaged and labeled as the agreement requires; and

(B) in the case of multiple copies, the copies are within the variations permitted by the agreement, of even kind, quality, and quantity within each unit
and among all units involved; ~~and~~

(3) that the program conforms to any promises or affirmations of fact made on the container or label~~.~~; and

(4) that the program is free of defects or programming errors known to the licensor.

(b) Unless disclaimed or modified, other implied warranties with respect to computer programs may arise from course of dealing or usage of trade.

(c) No warranty is created under this section with respect to informational content, but an implied warranty may arise under Section 404.

Issue: Known Defects or Errors

Product should be free of defects or program errors known by the licensor.

Rationale:

Defects that are known should be remedied or fully disclosed. See also 406(d)-Disclaimer of Implied Warranty. Refer also to Software Professionals' suggested amendment on this section.

SECTION 406 - DISCLAIMER OR MODIFICATION OF WARRANTY

(a) Words or conduct relevant to the creation of an express warranty and words or conduct tending to disclaim or modify an express warranty must be construed wherever reasonable as consistent with each other. Subject to Section 301 with regard to parol or extrinsic evidence, the disclaimer or modification is inoperative to the extent that such construction is unreasonable.

(b) Except as otherwise provided in subsections (c), (d), and (e), to disclaim or modify an implied warranty or any part of it, but not the warranty in Section 401, the following rules apply:

(1) Except as otherwise provided in this subsection:

(A) To disclaim or modify the implied ~~warranty~~ warranties arising under Section 403, language must mention "merchantability" ~~or~~ and "quality" and “known defects” or use words of similar import and, if in a record, must be conspicuous.

(B) To disclaim or modify the implied warranty arising under Section 404, language in a record must mention "accuracy" or use words of similar import.

(2) Language to disclaim or modify the implied warranty arising under Section 405 must be in a record and be conspicuous. It is sufficient to state "There is no warranty that this information, our efforts, or the system will fulfill any of your particular purposes or needs", or words of similar import.

(3) Language in a record is sufficient to disclaim all implied warranties if it individually disclaims each implied warranty or, except for the warranty in Section 401, if it is conspicuous and states "Except for express warranties stated in this contract, if any, this 'information' 'computer program' is provided with all faults, and the entire risk as to satisfactory quality, performance, accuracy, and effort is with the user", or words of similar import.

(4) A disclaimer or modification sufficient under [Article 2 or 2A of the Uniform Commercial Code] to disclaim or modify an implied warranty of merchantability is sufficient to disclaim or modify the warranties under Sections 403 and 404. A disclaimer or modification sufficient under [Article 2 or 2A of the Uniform Commercial Code] to disclaim or modify an implied warranty of fitness for a particular purpose is sufficient to disclaim or modify the warranties under Section 405.

(c) Unless the circumstances indicate otherwise, all implied warranties, but not the warranty under Section 401, are disclaimed by expressions like "as

is" or "with all faults" or other language that in common understanding calls the licensee's attention to the disclaimer of warranties and makes plain that there are no implied warranties.

(d) ~~If a licensee before entering into a contract has examined the information or the sample or model as fully as it desired or has refused to examine the information, there is no implied warranty with regard to defects that an examination ought in the circumstances to have revealed to the licensee.~~

~~(e)~~ An implied warranty may also be disclaimed or modified by course of performance, course of dealing, or usage of trade.

~~(f)~~ (e) If a contract requires ongoing performance or a series of performances by the licensor, language of disclaimer or modification which complies with this section is effective with respect to all performances under the contract.

~~(g)~~(f) Remedies for breach of warranty may be limited in accordance with this [Act] with respect to liquidation or limitation of damages and contractual modification of remedy.

(g) Notwithstanding the provisions of subsection (a) through (f) if this section, oral language or language in a record used in a consumer contract which attempts to exclude or modify any implied warranties of merchantability of a computer program created under section 403 of this Act, or exclude or modify the consumer's remedies for a breach of thos warranties, in unenforceable.

Issue: Disclaimer of Implied Warranty with Regard to Defects and Inspection

Section 406(d) limits the implied warranties under Section 403 by providing that there is no implied warranty with respect to defects if the licensee examined the information, sample or model before entering into the contract or chose not to examine the information, relying instead on representations of the licensor, and the defects should have been revealed during such examination.

Rationale:

(a) This section allowed licensors to sell products with known defects without disclosing them. This practice that encourages poor quality of software and should not be permitted.

(b) Section 403 places an unreasonable burden on the licensee to discover defects during a trial period or be held to the contract terms, even if a defect significant to operations is later discovered.

(c) This provision virtually eliminates implied warranties. An implied warranty is lost when the licensee either (1) discovers a defect or (2) fails to inspect. The only instance in which a licensee will have the benefit of an implied warranty is when it undertakes a "reasonable" inspection that fails to reveal the defect. The effect is that any term in the license calling for an inspection has the effect of disclaiming implied warranties.

SECTION 503 - TRANSFER OF CONTRACTUAL INTEREST - The following rules apply to a transfer of a contractual interest:

(1) A party's contractual interest may be transferred unless the transfer:

(A) is prohibited by other law; or

(B) except as otherwise provided in paragraph (3) or (4), would materially change the duty of the other party, materially increase the burden or risk imposed on the other party, or materially impair the other party's property or its likelihood or expectation of obtaining return performance.

(2) Except as otherwise provided in paragraphs (3) and (4) and Section 508(a)(1)(B), a term prohibiting transfer of a party's contractual interest is enforceable, and a transfer made in violation of that term is a breach of contract and is ~~ineffective to create contractual rights in the transferee against the nontransferring party~~, except to the extent that:

(A) the contract is a license for incorporation or use of the licensed information or informational rights with information or informational rights from other sources in a combined work for public distribution or public performance and the transfer is of the completed, combined work; or

(B) the transfer is of a right to payment arising out of the transferor's due performance of less than its entire obligation and the transfer would be enforceable under paragraph (1) in the absence of the term prohibiting transfer~~.~~; or

(C) the transfer occurs in connection with a merger, consolidation, reorganization, restructuring or other similar transaction with respect to the transferor, or a sale or transfer of all or substantially all the assets of the transferor.

(3) A right to damages for breach of the whole contract or a right to payment arising out of the transferor's due performance of its entire obligation may be transferred notwithstanding an agreement otherwise.

(4) A term that prohibits transfer of a contractual interest under a mass-market license by the licensee ~~must be conspicuous~~ is not enforceable.

Issue: Restrictions on Transferability of License

Section 503(1)(B) creates a default rule prohibiting transfer of a party's contractual interest for vaguely stated reasons even if the contract does not expressly prohibit transfer.

Rationale:

(a) Under this default rule, a licensor may limit the transferability of a license, even where a large commercial user needs to transfer the license because of a corporate merger or reorganization or the sale of all or substantially all the assets of the user. The Virginia legislature adopted a similar provision ensuring no vendor approval is required when a transfer is in connection with a merger, acquisition or sale.

SECTION 605 - ELECTRONIC REGULATION OF PERFORMANCE

(a) In this section, "automatic restraint" means a program, code, device, or similar electronic or physical limitation the intended purpose of which is to prevent use of information contrary to the contract or applicable law.

(b) A party entitled to enforce a limitation on use of information may include an automatic restraint in the information or a copy of it and use that restraint only if:

(1) a conspicuous term of the agreement authorizes use of the restraint and

~~(2) the restraint prevents a use that is inconsistent with the agreement;~~ ~~or~~

~~(3)~~ the restraint prevents use after expiration of the stated duration of the contract or a stated number of uses~~; or~~ .

~~(4) the restraint prevents use after the contract terminates, other than on expiration of a stated duration or number of uses, and the licensor gives reasonable notice to the licensee before further use is prevented.~~

(c) This section does not authorize an automatic restraint that affirmatively prevents or makes impracticable a licensee's access to its own information or information of a third party, other than the licensor, if that information is in the possession of the licensee or a third party ~~and accessed without use of the licensor's information or informational rights~~.

(d) A party that includes or uses an automatic restraint consistent with subsection (b) or (c) is not liable for any loss caused by the use of the restraint.

(e) This section does not preclude electronic replacement or disabling of an earlier copy of information by the licensor in connection with delivery of a new copy or version under an agreement to replace or disable the earlier copy by electronic means with an upgrade or other new information.

(f) This section does not authorize use of an automatic restraint to enforce remedies because of breach of contract or for cancellation for breach. ~~If a right to cancel for breach of contract and a right to exercise a restraint under subsection (b)(4) exist simultaneously, any affirmative acts constituting electronic self-help may only be taken under Section 816, including the prohibition on mass-market transactions, instead of this section. Affirmative acts under this subsection do not include:~~

~~(1) use of a program, code, device or similar electronic or physical limitation that operates automatically without regard to breach; or~~

~~(2) a refusal to prevent the operation of a restraint authorized by this section or to reverse its effect.~~

(g) If an automatic restraint malfunctions, or is activated accidentally, or is activated intentionally in a manner not consistent with ~~subsection (b) or (c) of~~ this section, and such malfunction or activation causes damages to, or deletion of, information or other property of the licensee, the licensor will be liable for the loss occasioned thereby not withstanding any limitation of a liability provision in the agreement. In addition, third persons harmed by wrongful discontinuation of access may recover damages from the licensee to the same extent as recoverable by the licensee.

ISSUE: Use of Automatic Restraint for Vaguely-worded Reasons

Right of a licensor to shut down a licensee's system for reasons other than the termination of the license based on specific parameters.

RATIONALE:

A licensor should not be permitted to shut down a licensee's critical system, which could significantly affect its entire business operation and the rights of third parties, for reasons as vague as "a use inconsistent with the agreement."

SECTION 702 - WAIVER OF REMEDY FOR BREACH OF CONTRACT

(a) A claim or right arising out of a breach of contract may be discharged in whole or part without consideration by a waiver in a record to which the party making the waiver agrees after breach, such as by manifesting assent, or which the party making the waiver authenticates and delivers to the other party.

(b) A party that accepts a performance with knowledge that the performance constitutes a breach of contract and, within a reasonable time after acceptance, does not notify the other party of the breach waives all remedies for the breach, unless acceptance was made on the reasonable assumption that the breach would be cured and it has not been seasonably cured. However, a party that seasonably notifies the other party of a reservation of rights does not waive the rights reserved.

(c) A party that refuses a performance and fails to identify a particular defect that is ascertainable by reasonable inspection waives the right to rely on that defect to justify refusal only if:

(1) the other party could have cured the defect if it were identified seasonably; or

(2) between merchants, the other party after refusal made a request in a record for a full and final statement of all defects on which the refusing party relied.

(d) Waiver of a remedy for breach of contract in one performance does not waive any remedy for the same or a similar breach in future performances unless the party making the waiver expressly so states.

(e) A waiver may not be retracted as to the performance to which the waiver applies.

(f) Except for a waiver in accordance with subsection (a) or a waiver supported by consideration, a waiver affecting an executory portion of a contract may be retracted by seasonable notice received by the other party that strict performance will be required in the future, unless the retraction would be unjust in view of a material change of position in reliance on the waiver by that party.

(g) (1)For purposes of this section, "reasonable inspection" means reliance by the licensee on :
  (A) Exact technical specification provided by the licensor;
  (B) A sample, model or demonstration provided by the licensor; or
  (C) An express warranty made by the licensor.

(2) "Reasonable inspection" does not require the licensee to install or operate the computer program or information product in a manner that may endanger the licensee's information processing system or the informational content residing in the information processing system.

Issue: Waiver of Remedy for Breach of Contract

Section 702(c) provides that failure to identify a defect that is ascertainable by reasonable inspection waives the right under certain circumstances to rely on that defect to justify refusal.

Rationale:

(a) Section 702(c) fails to define what constitutes a "reasonable" inspection.

(b) As drafted Section 702(c) will likely lead to litigation over what constitutes a "reasonable inspection" and whether inspection of a model or sample is "sufficient."

SECTION 703 - CURE OF BREACH OF CONTRACT

(a) A party in breach of contract may cure the breach at its own expense if:

(1) the time for performance has not expired and the party in breach seasonably notifies the aggrieved party of its intent to cure and, within the time for performance, makes a conforming performance;

(2) the party in breach had reasonable grounds to believe the performance would be acceptable with or without monetary allowance, seasonably notifies the aggrieved party of its intent to cure, and provides a conforming performance within a further reasonable time after performance was due; or

(3) in a case not governed by paragraph (1) or (2), the party in breach seasonably notifies the aggrieved party of its intent to cure and promptly provides a conforming performance before cancellation by the aggrieved party.

(b) ~~In a license other than in a mass-market transaction, if the agreement required a single delivery of a copy and the party receiving tender of delivery was required to accept a nonconforming copy because the nonconformity was not a material breach of contract, the party in breach shall promptly and in good faith make an effort to cure if:~~

~~(1) the party in breach receives seasonable notice of the specific nonconformity and a demand for cure of it; and~~

~~(2) the cost of the effort to cure does not disproportionately exceed the direct damages caused by the nonconformity to the aggrieved party.~~

~~(c)~~ A party may not cancel a contract or refuse a performance because of a breach of contract that has been seasonably cured under subsection (a). However, notice of intent to cure does not preclude refusal or cancellation for the uncured breach.

SECTION 704 - COPY: REFUSAL OF DEFECTIVE TENDER

(a) Subject to ~~subsection (b) and~~ Section 705, ~~tender of a copy that is a material breach of contract permits the party to which tender is made to~~ if the tender of a copy fails in any respect to conform to the contract, the licensee may:

(1) refuse the tender;

(2) accept the tender; or

(3) accept any commercially reasonable units and refuse the rest.

(b) ~~In a mass-market transaction that calls for only a single tender of a copy, a licensee may refuse the tender if the tender does not conform to the contract~~.

~~(c)~~ Refusal of a tender is ineffective unless:

(1) it is made before acceptance;

(2) it is made within a reasonable time after tender or completion of any permitted effort to cure; and

(3) the refusing party seasonably notifies the tendering party of the refusal.

(c) ~~(d) Except in a case governed by subsection (b), a~~ A party that rightfully refuses tender of a copy may cancel the contract. ~~only if the tender was a material breach of the whole contract or the agreement so provides~~.

Issue: Conforming Products or Abandonment of Perfect Tender Requirement

Under Section 402(a)(3), the express warranty that products will conform to samples, models and demonstrations is watered down to state only that products will "reasonably" conform. Likewise, under Section 704, commercial licensees may refuse the tender of a copy only if it constitutes a *material* breach.

Rationale:

(a) Section 704 will, in effect, force licensees to accept products that are actually nonconforming. In fact, licensors can tender goods with knowledge of a defect or of nonconformance to a model and force performance by a licensee.

(a) Section 704 represents an abandonment of long-standing requirements under the Uniform Commercial Code, Article 2. The Article 2 "perfect tender rule" provides certainty; deviation from this rule needlessly injects doubt as to the adequacy of a tender.

(b) This provision will lead to endless litigation as to whether nonconforming products were "reasonably" close, which runs directly contrary to the state goal of provided certainty.

(c) This provision, along with the others in UCITA, discourages improvements in software development, which could result in a lack of global competitiveness for the U.S. software industry.

SECTION 815 - RIGHT TO POSSESSION AND TO PREVENT USE

(a) On cancellation of a license, the licensor has the right:

(1) to possession of all copies of the licensed information in the possession or control of the licensee and any other materials pertaining to that information which by contract are to be returned or delivered by the licensee to the licensor; and

(2) to prevent the continued exercise of contractual and informational rights in the licensed information under the license.

(b) ~~Except as otherwise provided in Section 814, a licensor may exercise its~~ In a proceeding to enforce a licensor's rights under subsection (a) ~~without judicial process only if this can be done~~,

~~(1) without a breach of the peace;~~

~~(2) without a foreseeable risk of personal injury or significant physical damage to information or property other than the licensed information; and~~

~~(3) in accordance with Section 816.~~

~~(c) In a judicial proceeding,~~ the court may enjoin a licensee in breach of contract from continued use of the information and informational rights and may order the licensor or a judicial officer to take the steps described in Section 618.

(~~d~~) (c) A party has a right to an expedited judicial hearing on a request for prejudgment relief to enforce or protect its rights under this section.

(~~e~~) (d) The right to possession under this section is not available to the extent that the information, before breach of the license and in the ordinary course of performance under the license, was so altered or commingled that the information is no longer identifiable or separable.

(~~f~~) (e) A licensee that provides information to a licensor subject to contractual use terms has the rights and is subject to the limitations of a licensor under this section with respect to the information it provides.

Issue: Section 815 authorizes extra-judicial exercise of self-help or "electronic repossession".

Section 815 permits a licensor, upon "cancellation of a license," to obtain possession of or prevent use of the licensed information (electronic self-help).

While Section 816 purports to establish limits on the use of self-help, it actually validates the use of a practice which is currently considered unacceptable in the marketplace.

Rationale:

(a) The electronic self-help provisions allow a software licensor to unilaterally interrupt the use of licensed products and shut down mission critical software, with potentially catastrophic consequences, without obtaining prior court approval.

(b) Section 815 is premised on the notion that electronic self-help has already received judicial blessing, when in fact most courts which have considered its use have held the practice to be void as contrary to public policy.

(c) The self-help provisions are even more problematic "down-line" as software end user licensors incorporate licensed products of others into their applications. An end user licensee company that purchases a software license may be in a position to protect itself against the exercise of electronic self-help by its immediate licensor, but cannot protect itself against the exercise of electronic self-help by the licensor's component supplier of code or software products. This places the end user licensee in the middle of the dispute between its licensor and the licensor's supplier of component code or software. The economic consequences of this predicament could be disastrous, since it affords a component licensor the power to unilaterally exercise its right to self-help to the detriment of all of the end user licensees of the allegedly offending licensor. The end user licensees must then suffer the consequences of the dispute between their licensor and its component supplier, without the ability to resume usage until resolution of the dispute. In most instances, business interruption is anathema to manufacturing, telecommunications, raw materials processing, and the insurance and financial industries, and thus this provision is completely unreasonable.

SECTION 816 - ~~LIMITATIONS ON~~ PROHIBITION OF ELECTRONIC SELF-HELP

~~(a) In this section:~~

(1) ~~“Electronic “self-help” means the~~ The use of electronic means to exercise a licensor’s rights under Section 815 ~~(b)~~ (a) is prohibited.

~~(2) "Wrongful use of electronic self-help" means use of electronic self-help other than in compliance with this section.~~

~~(b) On cancellation of a license, electronic self-help is not permitted, except as provided in this section. Electronic self-help is prohibited in mass-market transactions.~~

~~(c) If the parties agree to permit electronic self-help, the licensee shall separately manifest assent to a term authorizing use of electronic self-help. In accordance with Section 112(c), a general assent to a license containing a term authorizing use of electronic self-help is not sufficient to manifest assent to the use of electronic self-help. The term must:~~

~~(1) provide for notice of exercise as provided in subsection (d);~~

~~(2) state the name of the person designated by the licensee to which notice of exercise must be given and the manner in which notice must be given and place to which notice must be sent to that person; and~~

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

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

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

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

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

~~(e) A licensee may recover direct and incidental damages caused by wrongful use of electronic self-help. The licensee may also recover consequential~~

~~damages for wrongful use of electronic self-help, whether or not those damages are excluded by the terms of the license, if:~~

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

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

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

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

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

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

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

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

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

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

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

~~(i) This section does not apply if the licensor obtains physical possession of a copy without a breach of the peace and without use of electronic self-help, in which case the lawfully obtained copy may be erased or disabled by electronic means.~~

Issue: The limitations in Section 816 are inadequate.

Limitations on self-help are grossly inadequate. Self-help or electronic repossession should be banned. Self-help provisions create opportunities for abuse and accidental triggering of a shutdown of critical systems and expose businesses to unacceptable security risks when a "back door" is installed by the vendor.

Rationale:

(a) The inclusion of a notice period does not cure the harm of the cessation of usage.

(b) The code required to implement electronic self-help, even if never activated by the licensor, constitute a serious security threat for licensees.

(c) The concept of self-help with consequential damages for improper exercise simply favors vendors with deep pockets.

(d) Self-help converts the software business into a "wild west" and an environment in which computer vulnerabilities are multiplied.

~~(39) "Insurance services transaction" means an agreement between an insurer and an insured which provides for, or a transaction that is, or entails access to, use, transfer, clearance, settlement, or processing of:~~
~~(A) an insurance policy, contract, or certificate; or~~
~~(B) a right to payment under an insurance policy, contract, or certificate.~~

Issue: Insurance Services Transactions as defined makes no sense.

Rationale:

The proposed language is unlike the language adopted in Maryland and as drafted runs directly contrary to the stated goal of uniformity. VA, the only other state to enact UCITA does not include this definition.

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

Issue: Mass-market transactions should be defined by the transaction.

Mass-market transactions should not be defined by the quantity purchased when there is no opportunity to negotiate the license agreement. Circumstances and terms of the transaction, rather than quantity, will define a mass-market transaction.

Rationale:

Maryland and Virginia adopted the change deleting "in a quantity." Without this change, large and small business users will be deprived of the few protections afforded to users of mass-market products if they have to guess on the issue of quantity that would be consistent with an ordinary transaction. Since shrink-wrap terms are not negotiated, the number of products purchased should not alter the transaction or be used as the basis for eliminating protections.

Under the current wording of the definition, the mass market protections would not extend to a recently laid-off worker trying to establish a home business using the Internet or to a teacher, whether of elementary school or college students, using the Internet to help prepare for a class. Proprietors of small businesses would be uncertain at best as to whether their software purchases would qualify.

The amendment clarifies that mass-market licenses refer to the market the computer information is sold in, not the number of copies purchased. Also, this amendment provides that site licenses and access contract are excluded from the definition of "mass market transaction".

SECTION 103. SCOPE; EXCLUSIONS.

(a) This [Act] applies to computer information transactions.
(b) Except for subject matter excluded in subsection (d) and as otherwise provided in Section 104, if a computer information transaction includes subject matter other than computer information or subject matter excluded under subsection (d), the following rules apply:
(1) If a transaction includes computer information and goods, this [Act] applies to the part of the transaction involving computer information, informational rights in it, and creation or modification of it. However, if a copy of a computer program is contained in and sold or leased as part of goods, this [Act] applies to the copy and the computer program only if:
(A) the goods are a computer or computer peripheral; or
(B) giving the buyer or lessee of the goods access to or use of the program is ordinarily a material purpose of transactions in goods of the type sold or leased.
(2) Subject to subsection (d)(3)(A), if a transaction includes an agreement for creating, or for obtaining rights to create, computer information and a motion picture, this [Act] does not apply to the agreement if the dominant character of the agreement is to create or obtain rights to create a motion picture. In all other such agreements, this [Act] does not apply to the part of the agreement that involves a motion picture excluded under subsection (d)(3), but does apply to the computer information.
(3) In all other cases, this [Act] applies to the entire transaction if the computer information and informational rights, or access to them, is the primary subject matter, but otherwise applies only to the part of the transaction involving computer information, informational rights in it, and creation or modification of it.
(c) To the extent of a conflict between this [Act] and [Article 9 of the Uniform Commercial Code], [Article 9] governs.
(d) This [Act] does not apply to:
(1) a financial services transaction;
~~(2) an insurance services transaction;~~
(3) an agreement to create, perform or perform in, include information in, acquire, use, distribute, modify, reproduce, have access to, adapt, make available, transmit, license, or display:
(A) a motion picture or audio or visual programming, other than in (i) a mass-market transaction or (ii) a submission of an idea or information or release of informational rights that may result in making a motion picture or similar information product; or
(B) a sound recording, musical work, or phonorecord as defined or used in Title 17 of the United States Code as of July 1, 1999, or an enhanced sound recording, other than in the submission of an idea or information or release of informational rights that may result in the creation of such material or a similar information product.
(4) a compulsory license;
(5) a contract of employment of an individual, other than an individual hired as an independent contractor to create or modify computer information, unless the independent contractor is a freelancer in the news reporting industry as that term is commonly understood in that industry;

(6) a contract that does not require that information be furnished as computer information or a contract in which, under the agreement, the form of the information as computer information is otherwise insignificant with respect to the primary subject matter of the part of the transaction pertaining to the information;
(7) unless otherwise agreed between the parties in a record:
(A) telecommunications products or services provided pursuant to federal or state tariffs; or
(B) telecommunications products or services provided pursuant to agreements required or permitted to be filed by the service provider with a federal or state authority regulating those services or under pricing subject to approval by a federal or state regulatory authority; or
(8) subject matter within the scope of [Article 3, 4, 4A, 5, [6,] 7, or 8 of the Uniform Commercial Code].
(e) As used in subsection (d)(3)(B), "enhanced sound recording" means a separately identifiable product or service the dominant character of which consists of recorded sounds, but which includes (i) statements or instructions whose purpose is to allow or control the perception, reproduction, or communication of those sounds or (ii) other information, as long as recorded sounds constitute the dominant character of the product or service.
(f) In this section:
(1) "Audio or visual programming" means audio or visual programming that is provided by broadcast, satellite, or cable, as defined or used in the Communications Act of 1934 and related regulations as they existed on July 1, 1999, or by similar methods of delivery.
(2) "Motion picture" means:
(A) "motion picture" as defined in Title 17 of the United States Code as of July 1, 1999; or
(B) a separately identifiable product or service the dominant character of which consists of a linear motion picture, but which includes (i) statements or instructions whose purpose is to allow or control the perception, reproduction, or communication of the motion picture or (ii) other information, as long as the motion picture constitutes the dominant character of the product or service.

Issue: Insurance services transaction exemption

Rationale:

The "insurance services transaction" exemption is deleted as it provides no benefit and does not reflect core insurance functions or insurance transactions.

SECTION 805. LIMITATION OF ACTIONS.

(a) Except as otherwise provided in subsection (b), an action for breach of contract must be commenced within the later of four years after the right of action accrues or one year after the breach was or should have been discovered, but not later than five years after the right of action accrues.
(b) If the original agreement of the parties alters the period of limitations, the following rules apply:
(1) The parties may reduce the period of limitation to not less than one year after the right of action accrues but may not extend it.
(2) In a ~~consumer contract~~ mass-market transaction, the period of limitation may not be reduced.
(c) Except as otherwise provided in subsection (d), a right of action accrues when the act or omission constituting a breach of contract occurs, even if the aggrieved party did not know of the breach. A right of action for breach of warranty accrues when tender of delivery of a copy pursuant to Section 606, or access to the information, occurs. However, if the warranty expressly extends to future performance of the information or a copy, the right of action accrues when the performance fails to conform to the warranty, but not later than the date the warranty expires.
(d) In the following cases, a right of action accrues on the later of the date the act or omission constituting the breach of contract occurred or the date on which it was or should have been discovered by the aggrieved party, but not earlier than the date for delivery of a copy if the claim relates to information in the copy:
(1) a breach of warranty against third-party claims for:
(A) infringement or misappropriation; or
(B) libel, slander, or the like;
(2) a breach of contract involving a party's disclosure or misuse of confidential information; or
(3) a failure to provide an indemnity or to perform another obligation to protect or defend against a third-party claim.
(e) If an action commenced within the period of limitation is so concluded as to leave available a remedy by another action for the same breach of contract, the other action may be commenced after expiration of the period of limitation if the action is commenced within six months after conclusion of the first action, unless the action was concluded as a result of voluntary discontinuance or dismissal for failure or neglect to prosecute.
(f) This section does not alter the law on tolling of the statute of limitations and does not apply to a right of action that accrued before the effective date of this [Act].

Issue: The period of limitations may not be reduced in mass-market transactions.

Rationale:

Mass-market licensees do not negotiate the terms of the license, therefore it is inappropriate to permit a licensor from reducing the period of limitations. 805 (b) (2) was adopted by the Maryland legislature to provide protections to licensee's of mass-market licenses, and not restrict this to the sub-group of "consumers." Mass-market transactions are not negotiated, therefore the period of limitations should not be reduced to protect all licensees.

SECTION 814. DISCONTINUING ACCESS.

(a) Subject to subsection (b) of this section, on material breach of an access contract or if the agreement so provides, a party may discontinue all contractual rights of access of the party in breach and direct any person that is assisting the performance of the contract to discontinue its performance.

(b) Except as provided in subsection (c) of this section, before discontinuing all contractual rights of access in an access contract, a party shall give notice in a record to the party in breach stating:
(1) That the party intends to discontinue all contractual rights of access in the access contract on or after 3 days following the date notice is given;
(2) The nature of the claimed breach that entitles the party to discontinue all contractual rights of access in the access contract;
(3) The opportunity to cure as provided under section 703 of this title; and
(4) Information to allow for communication concerning the claimed breach, includes the party's:
(I) Address and telephone number; and
(II) Facsimile number or e-mail address
(c) The notice required in subsection (b) of this section is not required for a discontinuation to meet a statutory or legal requirement.

Issue: Notice of Termination for access contracts.

Rationale:

This amendment was adopted by the Maryland Legislature to ensure proper notice before termination of an access contract. Without this amendment, UCITA allows the discontinuance of access without proper notice or opportunity to cure. Any denial of access will have a serious impact on a business. Also, UCITA allows immaterial breaches to constitute a "material breach". Further adding to the unpredictability of access denial.

SECTION 410 – EXPRESS WARRANTY OF CONTAMINANT-FREE INFORMATION -

(a)(1) A licensor warrants that computer information that it provides is, to the best of its knowledge, free of any virus or any other contaminant, or disabling devices including, but not limited to, codes, commands or instructions that may have the effect or be used to access, alter, delete, damage or disable the information, or other software, information or property, other than code, commands or instructions specifically disclosed in the license agreement; and further warrants that it has not and will not introduce into and the software does not contain any such virus or other contaminants or disabling devices.

(2) A merchant licensor warrants that it has made reasonable efforts to discover whether computer information that it provides is free of viruses, worms, or other such contaminants.

(3) This warranty may not be disclaimed except in a contract with the specific purpose of providing access to the licensee of code that has been contaminated with viruses, worms, or other such contaminants.

(b) Notwithstanding any provision to the contrary in a license agreement, a licensor shall be liable for incidental and consequential losses that are caused by any breach of security of the licensee's information by a third party where the breach of security was facilitated by the licensor's breach of the warranty set forth in subsection (a) of this section.

Issue: Warranty of Contaminant-free Information

A licensor's ability to introduce viruses or other contaminents or disabling devices into software or to allow them to remain there presents a very serious security risk to licensees. Viruses, contaminents or disabling devices open "black holes" that can allow unauthorized and even unintended use and/or access by outsiders, including access by third parties with malicious intent.

Rationale:

Given the serious security risk, a licensor should be required to warrant that it the software is contaminent free. This does not prevent a licensor from inserting a metering mechanism into software specifically designed to operate on a limited access or functionality basis (e.g., a limited period of time or limited number of uses) pursuant to the license specifications.

SECTION 105. RELATION TO FEDERAL LAW; FUNDAMENTAL PUBLIC POLICY; TRANSACTIONS SUBJECT TO OTHER STATE LAW.

(a) A provision of this [Act] which is preempted by federal law is unenforceable to the extent of the preemption.

~~(b) If a term of a contract violates a fundamental public policy, the court may refuse to enforce the contract, enforce the remainder of the contract without the impermissible term, or limit the application of the impermissible term so as to avoid a result contrary to public policy, in each case to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of the term.~~

(b) (1) If a term of a standard form contract favors the drafting party and violates a public policy, including policies embodied in the copyright law, the court shall refuse to enforce the contract, enforce the remainder of the contract without the impermissible term, or limit the application of the impermissible term so as to avoid a result contrary to public policy.

(b) (2) If a term of a negotiated contract violates a fundamental public policy, the court may refuse to enforce the contract, enforce the remainder of the contract without the impermissible term, or limit the application of the impermissible term so as to avoid a result contrary to public policy, in each case to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of the term.

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

(d) If a law of this State in effect on the effective date of this [Act] applies to a transaction governed by this [Act], the following rules apply:

(1) A requirement that a term, waiver, notice, or disclaimer be in a writing is satisfied by a record.

(2) A requirement that a record, writing, or term be signed is satisfied by an authentication.

(3) A requirement that a term be conspicuous, or the like, is satisfied by a term that is conspicuous under this [Act].

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

[(e) The following laws govern in the case of a conflict between this [Act] and the other law: [List laws establishing a digital signature and similar form of attribution procedure.]]

Purpose of the Amendment

Public policies attempt to strike a balance between competing interests. Often they attempt to define how burdens and risks are allocated between parties, thereby preventing undesirable results that occur due to unequal strengths between parties. An example of this is the policy embodied in copyright law, wherein the creator is given a limited exclusive right to control the work for a finite term of protection as an incentive to create it. In return, society gains the use of the work without limitation after the limited time. In contrast to public policies, which apply to everyone, contract law often permits contracting parties to circumvent the balance struck by public policies. This value is known as "freedom of contract."

While there are many scenarios in which contracting around a public policy is socially and economically desirable, it is of substantial concern when it is combined with standard form contracts. Standard form contracts are contracts, like parking lot tickets, that do not permit the parties to negotiate the terms. While this is efficient in minimizing the cost of the transaction, it can be detrimental to the party being forced to

accept the terms. The problem is that where the non-drafting party has virtually no negotiating power, the drafting party should not be able to force the non-drafting party to waive rights that have an overarching social benefit. For example, libraries, like most businesses, use mass-market retail or on-line information products. The licensing terms for such products can limit access to and use of electronic materials, prohibit making copies of materials for archiving or preservation, or prevent inter-library loan, prohibit the transfer or donation of electronic products. These are considered core library services and each is permissible under copyright law. Similarly, the fair use exception in the copyright law allows for limited use of copyrighted works, without the permission of the creator, for news reporting, criticism and classroom use. These are socially beneficial uses that should not be overridden by standard form contracts.

The revision of 105 (b) that we propose has two strengths. First, 105 (b) (2) permits licensors and licensees to contract around public policies in a negotiated setting, thereby facilitating commerce otherwise constrained by the laws that embody these public policies. Second, 105 (b) (1) maintains the beneficial aspects of existing public policies by preventing the drafting party from imposing overreaching licenses in a standard form contract that favor the drafter. This is particularly important where the value of the rights being removed is small on a license-by-license basis, but substantial in a broader social context. For example, in the context of copyright law, although individuals might be willing, in some cases, to give up fair use rights, the broader effect of including such terms in all standard form contracts (because there would be virtually no disincentive to licensors in doing so) would severely limit the ability to cite, criticize, reverse engineer and otherwise use these works to move society forward. To require negotiation of licenses which include terms that conflict with public policy maintains the flexibility of UCITA while protecting socially beneficial public policies from being overridden by freedom of contract in a standard form setting.

SECTION 111. UNCONSCIONABLE OR UNEXPECTED CONTRACT OR TERM.

(a) If a court as a matter of law finds a contract or a term thereof to have been unconscionable or to have frustrated the reasonable expectations of the non-drafting party at the time it was made, the court may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable or unexpected term, or limit the application of the unconscionable or unexpected term so as to avoid an unconscionable or unexpected result.

(b) If it is claimed or appears to the court that a contract or term thereof may be unconscionable or unexpected, the parties must be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.

Rationale for the Amendment

The unconscionability standard proposed by the drafters requires that a term must "shock the conscience" to be knocked out on any ground other than public policy under section 105. This is an extremely high legal standard. Moreover, this criterion for unenforceability does not address the scenario wherein a surprising term included in a standard form contract under UCITA does not reach the level of a public policy concern. The reasonable expectations standard should be added to the existing unconscionability standard in the context of standard form contracts under UCITA because it facilitates evaluation of the term from the perspective of the non-drafting party without requiring the term to necessarily "shock the conscience." In proposing this amendment, we believe that many, if not all, unconscionable terms would also frustrate the reasonable expectations of the non-drafting party.