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Dear ABA Delegates:

Re: **UCITA ABA Advisor Report to the ABA Staff and House of Delegates**

As an ABA advisor to the NCCUSL UCITA drafting committee, I am writing this report to strongly recommend and encourage you to vote **FOR** the Uniform Computer Information Act ("UCITA") resolution that is being placed before the ABA House of Delegates at the 2003 mid year ABA meeting.

I submit this report pursuant to Article 3 of the agreement between the ABA and NCCUSL concerning participation of ABA Liaisons on NCCUSL drafting committees.

I have been involved with the creation of UCITA since 1991, first, as the Business Law Section Advisor and then as a full ABA advisor to a series of NCCUSL drafting committees developing UCITA. I have attended almost all of the drafting meetings during the twelve (12) years of the drafting process and have actively participated in all of the drafting committee deliberations.

It has been my experience that the UCITA drafting committee process has been conducted in an open, honorable, and highly ethical manner. NCCUSL has created a reasonable, balanced, and equitable uniform law to deal with software licensing and database access contracting. Drafting meetings were conducted in all regions of the country. There have been over forty (40) three (3) day drafting sessions in formulating the Act. Hundreds of individuals and groups were encouraged to and did participate in the drafting process both in open meetings and in the submission of hundreds of position papers. All drafts, meetings, and deliberations have been open and available to the general public.

Extensive changes were made over the years to reflect the reasonable needs and requests of various interest groups and to accommodate the convergence of technologies that are within the scope of UCITA. As late as last year, significant changes were made by NCCUSL based upon a report by the ABA working group that reviewed UCITA.

You will have received a number of excellent memoranda setting forth the basic provisions of UCITA. I especially call your attention to the report submitted by George Graff, the other full UCITA ABA advisor, which I strongly endorse. Rather than repeat their summaries of the Act, I would like to address two broad issues.

1. The UCITA drafting process represents an unprecedented reaching out by the NCCUSL drafting committee and your ABA advisors to interested groups and to the Sections of the ABA in a successful attempt to make the process as open, inclusive, and as fair as possible.

- Over the last ten (10) years, The Business Law Section Subcommittee on Information Licensing sponsored a large number of Annual Meeting and Business Law Section programs for ABA members to educate the ABA membership on the progress of the drafting process and the provisions of the Act. Other UCITA ABA section advisors made comparable presentations at their Section meetings.

- During the drafting process, the Business Law Section subcommittee on Information Licensing numbered in excess of one hundred (100) ABA members that did substantial research and generated a large number of written position papers that were submitted to the NCCUSL drafting committee. In many instances the work of the subcommittee became the basis of policy decisions incorporated into UCITA such as the “right of return” shrink-wrap license innovation.
- Many of the drafting committee members, especially the Chair and Reporter of the drafting committee dedicated much of their free time traveling across the country to speak at seminars and with interested groups to generate the broadest possible awareness of, and interest, in UCITA.
- Mary Jo Howard Dively, the Business Law Section ABA Advisor and I, spent years communicating with all of the ABA sections requesting that they send representatives to participate in the UCITA drafting process. A large number of the sections responded. You have received letters and reports from many of these ABA Section Advisors in support of UCITA.
- There is nothing revolutionary, surprising or radical in UCITA. It is a conservative statute that represents the best synthesis of current law and commercial practice relating to software licensing and database access agreements available today anywhere in the world.

2. UCITA is an appropriate Act for those States desiring to adopt the specific substantive law suggested therein. UCITA strikes a fair and reasoned balance between the interest of consumers, vendors, and commercial licensees.

- UCITA has been enacted in Maryland and Virginia. You will be receiving additional letters from legislators in those States attesting to the successful enactment and use of UCITA in those States.
- The courts in a number of jurisdictions have cited and used UCITA to clarify the laws of their States. This attests to the continuing need for, and acceptance of, UCITA by our judicial system.
- To their credit, the NCCUSL drafting committee members have adhered to two (2) underlying principles: (1) the Act would reflect existing commercial practices; and (2) “freedom of contract”.
- “Freedom of Contract” is the most important issue before you. UCITA adopts the view of Article 2 of the Uniform Commercial Code, that, in most instances, Americans, rather than academics or other “elite’s”, are best able to determine what is best for themselves by being permitted to create appropriate private contractual relationships without undue government interference.
- After you read all of the competing claims made both for and against UCITA, I think you will see that the seminal issues is whether you trust your fellow citizens to be able to determine what is best for themselves or do you want to broadly impose additional mandatory contractual provisions on them that reflect one or another interest group’s proscriptive agendas.
- To what extent should a law like UCITA contain mandatory provisions to protect consumers and other interest groups (e.g. the Insurance Industry or the Librarians) that cannot be changed by contract? There is no absolutely right answer to this question. In some instances these interest groups should and do have protection! This a balancing act requiring a thoughtful analysis of the issues and an even handed approach to making these policy decisions. UCITA is a commercial contracting statute. It is not intended to be a comprehensive consumer protection statute or an attempt, inconsistent with Federal preemption, to amend the U.S. Copyright law to change the intent of Congress for the benefit of librarians. The drafting committee looked at each issue raised by these interest groups and made fair and reasonable decisions that reflected existing law and practice. In making these policy decisions, UCITA does break significant new ground in consumer protection. Opponents are unhappy that they did not get everything that they asked for in the Act and have adopted an all or nothing approach in reaction to the final version of the Act.
- It is my view that additional consumer protection may be provided on a State by State basis consistent with existing State consumer protection statutes which reflect differing determinations by State legislatures as to the degree and scope of consumer protection in their State. It is not possible to have a uniform law like UCITA address this matrix of conflicting statutes and policy decisions. If the National Association of Attorney Generals is concerned about this issue, the simplest and most effective way to adequately protect consumers would be for the States Attorney General to propose State specific legislation in their States to secure the additional consumer protections they think appropriate.

- It is unfortunate that “single” issue interest groups, having been unable to provide sufficient justification for their positions, have resorted to distortions and misrepresentations about UCITA in their attempt to defeat it. The drafting committee has formulated policy decisions that reflect the careful debate and discussion in the drafting process, the underlying existing law, and the principle of “Freedom of Contract”.
- Notwithstanding some very unfortunate accusations, I have seen no evidence that any commissioner has reflected vendor partisanship or bias. Anyone who has actually participated in the process knows that the vendor community did not “control” or “dictate” the terms or policy decisions contained in UCITA.
- Without UCITA, consumers, small business, and other commercial entities are in a much worse position than under existing law on a number of important issues such as shrink-wrap licensing and electronic self help. UCITA creates incentives for responsible vendors to act responsibly and severely punishes irresponsible vendors when they attempt to overreach.

The process has been very fair. The policy decisions are reasonable and reflect the drafting principles and existing law and practice. The drafting committee has acted honorably and treated all interested parties in an even handed manner. While there will be a great deal of debate on individual provisions and policy decisions in the States when UCITA is submitted to the States, in my view the ABA House of Delegates, consistent with its agreement with NCCUSL, should approve UCITA so that the State legislatures will have the opportunity to determine whether they think the Statute should be enacted.

Sincerely

Donald A. Cohn
ABA Advisor

CC: The American Bar Association Secretary and Staff Liaison
The Executive Secretary of NCCUSL