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FROM: King Burnett
President, National Conference of Commissioners on Uniform State Laws

DATE: January 16, 2003

SUBJECT: Report from SOC Technology Committee

As President of the National Conference of Commissioners on Uniform State Laws and on the advice of several ABA leaders, with whom I have discussed this matter, I am responding to the "Report of the SOC Technology Committee" ("Report") on the Uniform Computer Information Transactions Act (UCITA) recently circulated to section officers and delegates. There are some misstatements about UCITA, and particularly about the relationship between the Conference and the ABA, in this Report. As President of the Conference and as the Delegate of the NCCUSL to the ABA House of Delegates, I believe that providing the most correct information is essential. I hope that members of the Section Officers Council and all those to whom this Report has been circulated will do the Conference the courtesy of a careful reading of my response, which is intended to provide information and to encourage an informed judgment respecting UCITA itself, and also about the methods and operations of the Conference and its long-standing, time-honored relationship with the ABA. There are issues about which reasonable persons may disagree, but the relationship between the ABA and the Conference is mutually beneficial and all steps to preserve it should be taken. In the spirit of reasonable exchanges of information and opinions and to promote beneficial relationships, I offer the following responses:

1. Complexity and Style. The Report quotes the ABA Working Group comment that UCITA is complex and could create litigation over intended meaning. The Report does not mention that:

- After being enacted in two states, UCITA has not produced any reported court decisions regarding its meaning and, in fact, courts in other jurisdictions have turned to UCITA for guidance on issues they faced under current law. No reported decision has criticized an approach taken by UCITA.

- In response to the Working Group comment, NCCUSL created a special committee solely to review the draft in light of that comment and (a) addressed all specific criticisms made by the Working Group, and (b) made numerous additional clarifications.

- Comments like that in the Report have been made about many commercial statutes. This includes the UCC which, despite similar and worse comments and decades of litigation over its intended meaning, has

been highly successful. This fact of life is so much a part of every commercial law project that it was noted in a footnote to NCCUSL's report to the ABA House of Delegates. Given the Report, however, I quote the prior note here:

[O]ne of the criticisms made of the UCC when it was proposed fifty years ago was that it contained more than 170 defined terms amounting to "an entirely new and strange vocabulary...highly technical and exotic language...a totally new set of terms..." Gilmore, Grant, *"The Uniform Commercial Code: A Reply to Professor Beutel,"* 61 Yale 364, 367 (1952). The Code was also criticized for its "sheer bulk. It's too big; it's too long; it weighs too much." *Id.* at 379. It was also criticized for its complexity: "Look [the opponent] seems to say: We all know this stuff is simple as ABC, shouldn't take more than a few lines at most, but some mad genius actually dreamed up eight subsections and the damn thing runs two full pages." But Gilmore's response makes the appropriate point with respect to commercial legislation: "The breaking down of a complicated question into manageable components is a lengthy process: oversimplification and clarity are not the same things, and the doubtful expedient of pretending that hard questions don't exist may well be the longest way home." *Id.*

2. Uniformity. The Report questions whether UCITA will be enacted uniformly given the controversy that surrounds it and states that this reason alone is sufficient to recommend against adoption. The Report does not note that:

- Controversy is a hallmark of effective lobbying, strongly held views or important issues. It is not determinative of whether uniform laws are appropriate for consideration by those states who will make their own policy determinations.

- Controversy is inevitable in new areas of law and practice. As noted in the NCCUSL report, Grant Gilmore said this about the original UCC: "There comes a point of diminishing returns. Further drafting on this Code ... would be mostly tinkering ... or else reopening policy questions which have already been endlessly debated and solved as well as anyone knew how."¹

3. Electronic Regulation. The Report states that although UCITA eliminates electronic self-help, it "retains the concept of 'electronic regulation of performance' which some believe is the functional equivalent of self help." The Report does not note:

- That the ban on electronic self-help is unique to UCITA (e.g., UCC Revised Article 9 does not prohibit electronic self-help). It is not present in any other state or federal law and self-help is lawful. That a fair and reasonable reading of UCITA will show that § 605, the section which deals with electronic regulation, expressly prohibits it from being used in response to a breach and eliminates any chance it will become the alleged functional equivalent under current law.

- That this request is extreme, has no basis in current law, and has been heard, debated and rejected both by NCCUSL and the ABA Working Group.

- That state law may not ban the use by copyright owners of technological measures of the type covered by UCITA Section 605; it is not even clear that UCITA can regulate them as much as it does since these devices are expressly authorized by federal law. The international Berne Convention requires treaty countries to allow copyright owners to protect their works technologically and federal law implements that

¹ Gilmore, Grant, *"The Uniform Commercial Code: A Reply to Professor Beutel,"* 61 Yale 364, 366 (1952).

concept.

4. Pre-Transaction Disclosures. The Report states that UCITA “fails to require pre-transaction disclosure of terms” and that this is part of the reason UCITA is not part of the UCC. The Report does not note:

- That both the existing UCC Articles 2 and 2A, and the proposed amendments to them, as well as other contract law also fail to require pre-transaction disclosures.
- That UCITA does require availability of contract terms prior to any assent to them.
- That contracts where terms are presented for assent after an initial agreement are routinely enforced by an overwhelming majority of courts, even courts that assume Article 2 of the UCC governs the transaction. Attached is an exhibit of illustrative case law.
- That contracts of this type are currently used in a wide variety of industries and account for a huge amount of commerce. It has not been NCCUSL’s practice, or, traditionally, the ABA’s, to discriminate among industries by banning a practice in one industry that is permitted for all other industries.
- That the Second Circuit Court of Appeals, which is recognized as one of the most capable courts in commercial law matters, recently concluded that, despite controversy, *“UCITA’s notice and assent provisions seem to be consistent with well-established principles governing contract formation and enforcement”*²

5. Loud Criticism. The Report says there is loud and strong criticism by diverse groups suggesting a broad opposition. The Report does not note:

- That there is also strong support.
- That the place for battling out opposing views on the basis of numbers and identity as opposed to substance, is state legislatures, not NCCUSL (nor the ABA). The Protocol provides that the basis for ABA review is whether the proposal is appropriate for review by states that choose to do so.
- That although the Report lists librarians as a group objecting to UCITA, the ABA Working Group Report specifically declined substantive recommendations sought by librarians and, instead, asked NCCUSL to include a note with respect to librarians, “that UCITA is not the appropriate place for the interpretation of federal copyright law.” The library issues are being, and have been considered, by Congress, in international treaty negotiations, and by the Copyright Office. This is not a state contract law issue. The authors of the Report obviously disagree and thus illustrate the multiple and contradictory voices with which the ABA seemingly seeks to speak.
- That the volume and noise level of lobbying should not control. For example, loud objections were raised by the groups referenced in the Report when UCITA was adopted in Virginia and Maryland by overwhelming positive votes. For a year, those objections were examined by a special committee of the legislature which once again rejected the objections.

6. 1995 Protocol. The Report condemns UCITA because the Protocol between NCCUSL and the ABA requires submission to the ABA House of Delegates for consideration “as soon as practicable” and notes that two years have elapsed, thereby allegedly proving the “political nature” of the act. The Report fails to note:

² *Specht v. Netscape*, -- F.3d --, No. 01-7870, 2002 WL 31166784, Note 16 (2d Cir. October 1, 2002).

- That the protocol actually reads as follows (emphasis added):

6. It is desired that Acts approved by the Conference at its Annual Meeting be considered by the House of Delegates of the ABA as soon as practicable. *It is understood that the Conference may promulgate Acts approved at its Annual Meeting, even though the Act has not been considered by the ABA House of Delegates.*

Consistent with this language, NCCUSL does endeavor to submit acts to the ABA but it is also free to proceed without doing so. Moreover, an act expected to be amended in enactment may not be presented until final form is more certain. NCCUSL has exercised this discretion in the past.

- That although the Protocol was mischaracterized by some in 2001, NCCUSL responded by holding an additional public meeting in November, 2001 and addressing the ABA Working Group concerns even though that group was instituted outside the ABA Protocol, and by now submitting the amended UCITA to the ABA House of Delegates. The NCCUSL has a long history of working with the ABA to resolve perceived issues in uniform acts. UCITA has not been treated differently in the NCCUSL/ABA relationship than any other act.

7. Probation. The Report states that “UCITA is on probation within the NCCUSL,” that a strong challenge was launched to downgrade UCITA and that action on this “was deferred to enable the proponents a year to achieve adoption of UCITA by another state or two.” The Report fails to note:

- That the actual vote by NCCUSL commissioners on UCITA at the 2002 meeting was to approve it, without any change in status, by a vote of the state delegations, 49 to 0. The comment in the Report confuses debate leading up to promulgation with an assumed continuing opposition after NCCUSL as a body has acted.

- There is no process or procedure for putting an act on “probation” in the NCCUSL. It is an unheard of idea or concept.

8. ABA Negotiations. The Report concludes that “Not even the ABA is large enough to negotiate away the “obnoxious” provisions authorized by UCITA.” The Report does not note:

- That we are in doubt as to what “obnoxious” provisions are authorized by UCITA; it is simply a contract law statute that has been criticized for not solving all of the hypothetical risks and potential practices its opponents can invent, and which experience indicates do not exist.

- That numerous ABA advisors and several ABA committees have been intimately involved in formulating UCITA and, with the exception of one advisor, have agreed with the value and appropriateness of the Act.

- That all provisions identified by the ABA Working Group as being of concern, were addressed by NCCUSL and, with two exceptions, resulted in amendments of UCITA. The two exceptions are addressed in the NCCUSL report to the ABA. They deal with suggestions that also were not adopted (by NCCUSL or the American Law Institute) for the proposed revisions to UCC Articles 2 and 2A.

- That a purpose of the Protocol between NCCUSL and the ABA is to prevent just the kind of last minute, non-specific comment that is made by the Report. An express purpose of the extensive relationship envisioned by the Protocol is to ensure that ABA input is “considered thoroughly by the NCCUSL drafting committees during the drafting stages of the Acts, rather than after the Acts are approved by the Conference

and are awaiting consideration by the ABA House of Delegates.” Thus, UCITA had five ABA advisors during its lengthy development period. Yet, the SOC has elected to do exactly what the Protocol is designed to avoid.

9. Hacking. The Report claims that “because UCITA permits backdoors in software, the ABA and its members are vulnerable to being hacked.” The Report does not note:

- That UCITA does not “permit” hacking. No provisions make hacking legal and none purport to regulate software design.
- That, if the objection is that UCITA does not prohibit hacking, that is the province of criminal law. State and federal laws regarding unauthorized access to computers already exist in ample supply.
- That hacking is typically done by persons who are not parties to any contract, e.g., by employees acting outside the scope of their employment or by third parties. It is not a contract law issue.

Finally, I note that NCCUSL and the ABA have traditionally sought to look at all sides of complex issues and see both the benefits and burdens. Because the Report does not reflect that balance, I will enclose a brief piece on some of the reasons for UCITA and the benefits it provides to all involved, including the groups referenced in the Report as objecting to it. Further information can be supplied upon request and I also recommend to you the report of NCCUSL to the ABA House of Delegates.

Respectfully submitted,



K. King Burnett, President
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

EXHIBIT RE “TERMS LATER” CASES

The following is illustrative of the cases enforcing “terms later” contracts:

- ***ProCD, Inc. v. Zeidenberg***, 86 F.3d 1447 (7th Cir. 1996) (contract enforceable; limits use of database to consumer purposes only)
- ***Mudd-Lyman Sales and Services Corporation v. UPS***, 2002 WL 31687683 (ND Ill.) (shrinkwrap license enforceable under federal common law)
- ***Bowers v. Baystate Technologies***, 302 F.3d 1334 (Fed. Cir. 2002) (Shrinkwrap license effective to preclude reverse engineering of software)
- ***M.A. Mortenson Co., Inc. v. Timberline Software Corp.***, 970 P.2d 803 (Wash. 2000) (License enforced even when it followed purchase order. Appellate court had noted: “Reasonable minds could not differ concerning a corporation’s understanding that use of software is governed by licenses containing multiple terms.”)
- ***I.Lan Systems, Inc. v. Netscout Service Level Corp.***, 183 F.Supp.2d 328 (D. Mass. 2002) (“Court agrees with those cases embracing the theory of ProCD... “Money now, terms later” is a practical way to form contracts, especially with purchasers of software”)
- ***Bischoff v. DirectV, Inc.***, 180 F.Supp.2d 1097 (D. Cal, 2002) (“The nature of the business in which DirecTV engages is similar to that of the customers in *Gateway*. Practical business realities make it unrealistic to expect DirecTV, or any television programming service provider for that matter, to negotiate all of the terms of their customer contracts, including arbitration provisions, with each customer before initiating service.”)
- ***Lozano v. AT&T Wireless***, 216 F.Supp.2d 1071 (2002) (“The Court finds that providing customers with terms and conditions after an initial transaction is acceptable, and that such terms and conditions are enforceable.... As noted in *Bischoff*, the economic and practical aspects of selling services to mass consumers allows for terms and conditions to follow an initial transaction”)
- ***Management Computer Controls, Inc. v. Charles Perry Const., Inc.***, 743 So.2d 627 (Fla. App. 1999) (shrink wrap license enforced)
- ***Green Book Int’l Corp. v. Inunity Corp.***, 2 F. Supp. 112 (D. Mass. 1998) (enforceable shrink wrap that gave greater rights of distribution)
- ***Information Handling Services, Inc. v. LRP Publ., Inc.***, 2000 U.S. Dist. Lexis 14531 (E.D. Pa. 9/20/2000) (enforces shrink wrap)
- ***Kaczmarek v. Microsoft***, 39 F. Supp. 2d 974 (ND Ill. 1999) (treats contract as enforceable without discussion)
- ***Peerless Wall and Window Coverings, Inc. v. Synchronics, Inc.***, 85 F.Supp2d 519 (W.D. Pa. 2000) (terms enforceable)
- ***Against Gravity Apparel, Inc. v. Quarterdeck Corp.***, 699 NYS2d 368 (NYAD 1999) (terms enforced)
- ***Rinaldi v. Iomega Corp.***, 1999 WL 1442014, 41 UCC Rep.Serv.2d 1143 (Del. Super. 1999) (commercial practicalities of modern retail purchasing make it eminently reasonable for seller of a product such as a Zip drive to place a disclaimer within the plastic packaging. The buyer can read the disclaimer after payment for the Zip drive and then later have the opportunity to reject the contract terms (i.e., the disclaimer) if the buyer so chooses)
- ***Lieschke v. Realnetworks, Inc.***, 2000 WL 198424 (ND Ill. 2000) (The court did not dwell on enforceability, but assumed it. The license was displayed as a precondition to installing the software by the user who downloaded the software.)
- ***Westendorf v. Gateway 2000***, 2000 WL 307369 (Del. Ch. 2000) (contract enforceable against later donee)

- **Reed Technology & Information Services, Inc. v. Future Vision Holding, Inc.**, 1998 WL 1181781 (Mass. Super. 1998) (Retaining software for more than the thirty day period in the contract precluded rejection of encyclopedia software.)
- **Scott v. Bell Atlantic**, 97 NY2d 698, 765 NE2d 299, 739 NYS2d 95)(fact that telephone company warranty disclaimers for DSL service was in an agreement included in installation CD-ROM and was not seen pre-purchase did not impair enforcement of that agreement or render the disclaimers inconspicuous)
- **Moore v. Microsoft Corp.**, 293 AD2d 587, 741 NYS2d 91 (2002) (software user was bound by license agreement where terms were prominently displayed on computer screen before software could be installed and where user was required to indicate assent by clicking "I agree")

The primary case not enforcing a “shrinkwrap” contract is a 1991 case, *Step-Save Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91 (3d. Cir. 1991). The *I.Lan* case referenced above describes the current status of *Step-Saver*:

Step-Saver once was the leading case on shrinkwrap agreements. Today that distinction goes to a case favoring NextPoint, *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996). The holding of *ProCD* is best summarized as follows: "terms inside a box of software bind consumers who use the software after an opportunity to read the terms and to reject them by returning the product."