

AUGUST 23, 2002

UCITA 2002 REVISIONS -- MEMORANDUM AND CHART

Amendments to UCITA Addressing ABA Working Group Suggestions

In 1999, the National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the Uniform Computer Information Transactions Act, (UCITA), a groundbreaking effort to establish uniform rules for information transactions, as UCC Article 2 does for goods. Since its initial promulgation, UCITA has been enacted, with some modifications, in two states (Virginia and Maryland) and has been the subject of much debate in legislative, academic, and other fora.

In the three years since its promulgation, the NCCUSL Standby Committee on UCITA continued to study issues being raised by both supporters and opponents of the act. In the Fall of 2001, the UCITA Standby Committee jointly held a public comment session attended by more than 100 interested parties, together with a special UCITA Working Group established by the American Bar Association. Following this meeting, the UCITA Standby Committee released a set of draft recommendations for amendments to UCITA, and shortly thereafter the ABA Working Group released its own set of recommendations.

Since that time, the UCITA Standby Committee has worked to review all of the commentary received from all parties, together with the recommendations of the ABA Working Group, in preparing a coherent set of substantive amendments for UCITA. These amendments were presented to the assembled state Commissioners of the National Conference in its 2002 Annual Meeting earlier this month, and were approved in a vote of the state delegations by a margin of 49 to 0.

The following memo is meant as a guide to the very substantive changes contained in the 2002 UCITA Amendments, with special reference to the specific recommendations proposed by the ABA Working Group. It is organized to track the structure of UCITA, section-by-section, but some of the substantive highlights for the amendments include:

1. **Electronic Self-Help Banned.** Vendors (called licensors mainly) of digital information, including software, may not disable the use of that information by electronic means if there is a breach of an information contract. Vendors have an expedited remedy for a material breach of contract in a court of law.
2. **A State's Consumer Protection Law Trumps UCITA.** An information contract is expressly subject to and may not waive any consumer protection provided in state or federal law. Included are laws providing

for conspicuous disclosure, unfair or deceptive trade practices laws, and laws relating to electronic signatures and records.

3. **Right to Criticize Protected.** Information contract terms that prohibit criticism of an information product are unenforceable. Parties may contract in a manner consistent with other law such as the law of trade secrets.
4. **Remedies for Known Material Defect Preserved.** Remedies for a known material defect of a product are expressly made available as fully as for defective goods or services.
5. **Reverse Engineering for Interoperability Expressly Authorized.** An information contract may not prohibit reverse engineering that is done for the purposes of making an information product work together with other information products.
6. **Special Open-Source Software Provisions.** Open-source software is expressly not covered by the Act if only copyright permission is given and is not part of a contract. If there is a contract, there are no implied warranties if there is no commercial gain from the transaction.

**2002 Amendments to UCITA, Including Responses to
ABA Working Group Suggestions**

I. Scope (generally)

<p>SUGGESTION: The Working Group recognizes there is no bright line rule when UCITA should govern goods with integrated software. However the line drawn should be better formulated to meet normal and reasonable expectations of the parties. A better approach, more consistent with a buyer’s expectations, would be a formulation based on how the goods are marketed. UCITA should not apply to the sale or lease of the goods. Rather, UCC Article 2 and 2A should govern the sale or lease of goods with embedded software.</p>	<p>ACTION: The drafting committee had tried many suggestions, including this one, before it settled on the approach in UCITA. A similar approach was adopted in Revised Article 9 and the Committee believes that the current approach best offers guidance to courts and parties for deciding what law should apply. The definition of goods in amended Article 2 of the UCC, recently approved by NCCUSL, excludes “information”. The Preliminary Comments to amended Article 2 and the Official Comments to UCITA state that chips (software) embedded in goods in most cases will be governed by UCC Article 2. However, as the working group acknowledges, there is no bright line and in some cases the court will have to determine whether a particular transaction is an information transaction subject to the common law or UCITA, or a goods transaction subject to UCC Article 2.</p>
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II. Section 102(a) Definitions

(11) “Computer Information Transaction”

<p>SUGGESTION: The Working Group expressed concern about the impact of UCITA on professional regulatory standards, especially in regards to implied warranties, and suggested clarification of UCITA’s application to the rendering of professional services.</p>	<p>ACTION: Clarified in an Official Comment.</p>
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(12) “Computer Program”

<p>SUGGESTION: The definition, “Published informational content”, should exclude computer programs as it was uncertain if the definition of computer program was meant to be interpreted differently from under the Copyright Act.</p>	<p>ACTION: Clarified in an Official Comment.</p>
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III. Former Section 104 “Mixed Transactions: Agreement to Opt-In or Opt-Out.”

<p>SUGGESTION: Since UCITA section 113 already contains rules for variation by agreement, the suggestion is that section 104, containing more detailed and complex rules, be deleted.</p>	<p>ACTION: Deleted the former section 104 completely.</p>
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IV. Section 105

<p>SUGGESTIONS:</p> <p>a. UCITA should include a provision that it does not displace the application of consumer protection statutes or rules of law that would have applied in the absence of UCITA.</p> <p>b. There is no public policy reason to permit contractual terms that would bar the public discussing of the quality of performance of computer programs licensed to businesses. The prohibition should only apply to computer information that is made generally commercially available.</p>	<p>ACTIONS: Divided section 105 into two sections (the new 104 and 105).</p> <p>a. Deleted section 105(c) and added new section 104. New section 104 explicitly states that unless otherwise provided, UCITA does not limit, modify, or supersede any consumer protection laws. Additionally, subsection (1) revises the statutory language to clarify the scope of “consumer protection laws”. Subsection (5) states that consumer rules continue to govern without change after enactment of UCITA.</p> <p>b. Former Section 105(d) was deleted. A new (c) was incorporated, which reads as follows:</p> <p>“(c) Lawful Public Comment Not Prohibited. In a transaction in which a copy of computer information in its final form is made generally available, a term of a contract is unenforceable to the extent that the terms prohibits an end user licensee from engaging in other lawful public discussion relating to the computer information. However, this subsection does not preclude enforcement of a term that establishes or enforces rights under trade secret, trademark, defamation, commercial disparagement, or other laws. This subsection does not alter the applicability of subsection (d) to any term not rendered unenforceable under this section.”</p>
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c. For clarification, a comment to section 105 should be added to state that UCITA is not the appropriate place for the interoperation of federal copyright law.	c. An Official Comment will clarify the relation between UCITA and federal copyright law along the lines suggested by the Working Group.
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V. Section 105(additional amendments):

<p>Additional Improvements Adopted by NCCUSL (not contained in ABA Working Group recommendations).</p>	<p>ACTION: The new section 105 retains the statutory expression that fundamental public policy may invalidate a contract or term(s) of a contract.</p> <p>ACTION: A new 105(d) clarifies that UCITA does not apply to non-contractual copyright notices, and provides that “this act does not apply to an intellectual property which is solely based on intellectual property rights and not part of a contract. The effect of such notice is determined by law other than this Act.” This clarifies that UCITA does not apply to non-contractual, voluntary relationships merely granting IP permission(s) in open source transactions.</p>
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VI. Former Section 110

<p>Additional Improvements Adopted by NCCUSL (not contained in ABA Working Group recommendations).</p>	<p>ACTION: Amended to clarify that this section adopts the rule on choice of forum adopted in the Restatement and the vast majority of reported cases and reads as follows.</p> <p>“(c) The enforceability of an agreed choice of exclusive forum is a question for determination by a court of competent jurisdiction in the state in which the action is brought.”</p>
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VI. Section 112(e)(3)

<p>Modify (e)(3) to clarify that, if there is no right of return required under (e)(3) (now the new section 113), the licensee must at least have an opportunity to review the license terms before the licensee is bound by the license agreement.</p>	<p>ACTION: Former subsection (e) was deleted and a new section 113 was added for clarity purposes without substantive change. Under section 112 and 113 the licensee must have an opportunity to review the license terms before the licensee is bound by the license agreement. The section referred to deals with proposed modifications to existing contracts and the right to a refund. The comments will make that clear. In addition, Section 209 was substantially</p>
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	amended to ensure that terms are not part of a contract unless there is, specifically, an opportunity to review and assent, and unless three other requirements stated in Section 209 are also met.
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VIII. Former Section 113 (now Section 115)

<p>SUGGESTION Section 304(b)(2), which requires that the other party to a mass-market transaction have the right to terminate (subject to good faith) a continuing contract as to future performance if a proposed change alters a material term, should be listed among the non-variable provisions listed in section 113 (now section 115).</p>	<p>ACTION: In section 115, section 304(b)(2) is now listed among the non-variable provisions. Section 115(3) reads as follows:</p> <p>(3) [Other Non-Variable Rules] Limitations on enforceability of, or agreement to, a contract, term, or right expressly stated in the sections listed in the following subparagraphs may not be varied by agreement except to the extent provided in each section:</p> <p>(A) the limitations on agreed choice of law in Section 109(a);</p> <p>...</p> <p>(H) the requirements of Section 304(b)(2).</p> <p>...”</p>
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IX. Former Section 114 (now sections 116 and 117):

<p>SUGGESTION: UCITA should not displace the laws of fraud or other tort law or unfair or deceptive acts or practices. The additional sentence in section 114(a) should be deleted. UCITA should also make it clear that tort law or unfair or deceptive practices statutes or rules or laws, including laws dealing with the failure to disclose defects, are not displaced.</p>	<p>ACTION: Former section 114 (now section 116) was clarified to emphasize that the law of fraud, misrepresentation and unfair and deceptive practices, as they deal with disclosure of defects, is not displaced by UCITA.</p>
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X. New Section 118

<p>SUGGESTION: The language [in Section 115(a) of the Interim Standby Committee Report referring to] “an independently created computer program” should be changed to “the computer program” to</p>	<p>ACTION: A new section, now numbered 118 in the final 2002 Amendments, was created to provide that contract terms cannot preclude reverse engineering. While the specific language change recommended by the Working Group was not adopted, this amendment</p>
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<p>avoid what might be interpreted as an inappropriate and perhaps unintended limitation.</p>	<p>to UCITA adopts a rule that enhances the right to reverse engineer for interoperability. The contract rule also is subordinate to the rule under copyright, patent and other intellectual property law (<i>see</i> §105).</p>
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XI. Section 209

<p>SUGGESTION: All terms of the transaction should be made available by the licensor to a potential licensee before the licensee pays or becomes obligated to pay or otherwise becomes bound by the license agreement.</p>	<p>ACTION: The suggestion had already been addressed in UCITA but was further implemented to the extent the standby committee believed feasible without dictating a change in well-established and long-standing contracting practice. For example, most reported cases enforce contracts with terms provided after the initial agreement. These contracts have become central to multi-billion dollars of commerce.</p> <p>In particular, the amendment provides that a term is <u>not</u> part of a mass-market standard form contract <u>unless</u>:</p> <p>(1) The licensee has an opportunity to review terms before assenting to them, if the terms are not available to the licensee before assent; or</p> <p>(2) The terms are available after assent in one of the following three forms:</p> <p>(a) an immediately available non-electronic record that the licensee may keep.</p> <p>(b) an immediately available electronic record that the licensee can be printed or stored for archival and review purposes.</p> <p>(c) in a copy available at no additional cost if the record was unable to be printed or stored.</p> <p>(3) Additionally, (d) was added to apply to the situation where a copy of the license is not available to review by the licensee before the obligation to pay, then notice must be given to the licensee that a refund may be obtained from the person to whom the payment was made or other person designated in the notice if the licensee refused the terms.</p> <p>(4) The term is neither unconscionable nor contrary to fundamental public policy.</p>
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	<p><i>See also</i> discussion in relation to Section 112(e)(3) (the new Section 113), <i>supra</i>; and <i>see</i> Section 208 (regarding adoption terms of records); Section 113 (providing opportunity to review); and Section 114 (former Section 211)(allowing for pretransaction disclosure in Internet type transactions).</p>
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XII. Section 216

<p>SUGGESTION: UCITA section 216 (UCITA Standby Committee Recommendation 7), which elaborates on the contract formation rules in the event of post-payment terms should be deleted.</p>	<p>ACTION: The Section 216 referred to here was a proposed new section which was deleted.</p>
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XIII. Sections 307(c) and 308 [and 207(c)]

<p>SUGGESTION: These default rules on license duration and permitted users should be deleted.</p>	<p>ACTION: Both suggested sections were deleted, as was related Section 207(c).</p>
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XIV. Section 401(d)

<p>Additional Improvements Adopted by NCCUSL (not contained in ABA Working Group recommendations).</p>	<p>ACTION: Amended to provide a clear method by which a licensee or licensor can disclaim the hold-harmless obligation that arises in some cases.</p>
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XV. Section 410

<p>SUGGESTION: Businesses that obtain a profit from providing ancillary services or other software should give the implied warranties of non-interference and non-infringement. Additionally it is appropriate to acknowledge the realities of the free software environment and not impose these implied warranties on those who are not in the business of providing software.</p>	<p>ACTION: Created new section 410 which reads as follows: “No Implied Warranties for Free Computer Program. The warranties under section 401 and 403 apply to a computer program only if the licensor intends to make a profit from the distribution of the copy of the program or acts generally for commercial gain derived from controlling use of the program or making, modifying, or redistributing copies of the program.”</p>
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XVI. Section 501(a)

<p>SUGGESTION: Clarify to avoid implication that “and identified to the contract” in section 501(a) adds an additional requirement before ownership of informational rights in a computer program arises under the Copyright Act.</p>	<p>ACTION: According to the existing Official Comments to section 501, identification to the contract requires both completion to a sufficient level to separate the information from other information of the transferor and an indication by the transferor that the particular information is that which will be transferred under the contract. The term "identification to the contract" should be interpreted in light of that use. However, if the agreement is that the licensee will own all work in progress and working drafts, then those are the contractual subject matter. They are identified to the contract when created if creating the work in progress is connected to the contract.</p>
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XVII. Section 503

<p>Additional Improvements Adopted by NCCUSL (not contained in ABA Working Group recommendations).</p>	<p>ACTION: Amended to improve clarity and in part to reflect rules adopted in Virginia regarding certain transfers with respect to schools, libraries, and in other non-commercial transactions.</p>
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XVIII. Section 509

<p>Additional Improvements Adopted by NCCUSL (not contained in ABA Working Group recommendations).</p>	<p>ACTION: Amended to reflect current, standard NCCUSL language dealing with the interface between the Act and federal law on electronic commerce.</p>
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XIX. Sections 815 and 816

<p>SUGGESTION: In dealing with electronic self-help, the language authorizing the licensor to take “further steps with respect to the copy, including erasing the copy by electronic means” should be deleted from section 815(b) as “further steps” is not necessary to the licensor’s rights to be protected. This would not prevent the licensor from taking possession of the copy.</p>	<p>ACTION: Basically conforms to the suggestion.</p> <p>(1) Added language provides that a licensor may exercise self-help under 815(a) only if it can be done “by taking possession of a tangible copy” without a breach of the peace.</p> <p>(2) UCITA still uses the language “further steps”. However, language was added to make the operational phrase “taking further steps” subject to</p>
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	<p>the same obligations that arise in section 618(a) relating to return of the licensee’s information and requiring that a licensor shall exercise reasonable care in the custody and preservation of the licensee’s property in the licensor’s possession.</p> <p>(3) Electronic self-help as a remedy upon cancellation is prohibited.</p>
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XX. Style Changes to Improve Readability and Overall Clarity

<p>SUGGESTION: UCITA should be redrafted to make it easier to understand and use. The redrafting effort should reduce intuitive definitions, eliminate ambiguities and inconsistencies, and seek more organizational and stylistic clarity in the ways the rules are written.</p>	<p>ACTION: The following Amendments have been made to UCITA to clarify or restructure for clarity and to add subheadings giving guidance for use of the Act.</p> <p>(1) Section 106: A new subsection (e) adopted to reflect standard policies under the UCC that section headings are part of this Act but subsection headings are not.</p> <p>(2) Section 202 was amended to clarify what type of disputes prevents creation of a contact.</p> <p>(3) Section 211 was relocated (now the new Section 114) due to its relationship with other rules.</p> <p>(4) The following sections were edited to improve clarity and style.</p> <table data-bbox="824 1331 1419 1694"> <tr> <td>- Section 202</td> <td>- Section 204</td> </tr> <tr> <td>- Section 205</td> <td>- Section 208</td> </tr> <tr> <td>- Section 212</td> <td>- Section 302</td> </tr> <tr> <td>- Section 303</td> <td>- Section 309</td> </tr> <tr> <td>- Section 402</td> <td>- Section 403</td> </tr> <tr> <td>- Section 404</td> <td>- Section 504</td> </tr> <tr> <td>- Section 601</td> <td>- Section 604</td> </tr> <tr> <td>- Section 605</td> <td>- Section 610</td> </tr> <tr> <td>- Section 613</td> <td>- Section 701</td> </tr> <tr> <td>- Section 702</td> <td>- Section 802</td> </tr> </table>	- Section 202	- Section 204	- Section 205	- Section 208	- Section 212	- Section 302	- Section 303	- Section 309	- Section 402	- Section 403	- Section 404	- Section 504	- Section 601	- Section 604	- Section 605	- Section 610	- Section 613	- Section 701	- Section 702	- Section 802
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