

UCITA FACTS

WHAT IS UCITA? The Uniform Computer Information Transactions Act – UCITA – is a uniform commercial law dealing with contracts for computer (digital) information. Today, the only uniform contract laws are based on sales or leases of *goods*. The Court of Appeals for the Second Circuit recognized this value of UCITA in “that ‘a body of law based on images of the sale of manufactured goods ill fits licenses and other transactions in computer information,’ [it is] a code resembling UCC Article 2 in many respects but drafted to reflect emergent practices in the sale and licensing of computer information.”¹

WHO WROTE IT? The National Conference of Commissioners on Uniform State Laws (NCCUSL) wrote UCITA. The drafting process included representatives from four Sections of the American Bar Association (ABA). The drafting project was originally suggested by the ABA.

WHAT DO NEUTRAL ACADEMICS SAY ABOUT IT? A number of academics from major law schools have and will support UCITA. Their support is offered without compensation because they believe that UCITA is important.

WHAT HAS BEEN ITS EFFECT? UCITA has already been enacted in two states (Maryland and Virginia) by overwhelming majorities in both states.

WHAT DO COURTS THINK ABOUT UCITA? Courts are looking to UCITA for guidance because it clarifies law. For example, the Second Circuit Court of Appeals and the Supreme Court of Washington referred favorably to UCITA rules on formation of contracts² and the Federal Circuit Court of Appeals remarked favorably on UCITA’s rule regarding transfer of non-exclusive licenses.³

WHEN WAS IT WRITTEN? Writing UCITA took about 12 years of open, public meetings. One writer observed, this was the *most open and attended* drafting process in the history of NCCUSL, with meetings often attended by more than eighty lawyers, members of the public, and representatives of consumer, library and other interest groups. Over thirty amendments were made in 2002 in response to a report of an ABA working group.

WHY DID NCCUSL WRITE IT? Because the ABA recommended it and there is a need for uniform contract law for the most vibrant part of our modern economy. Currently, the primary codified law is Article 2 of the Uniform Commercial Code; as many courts recognize, Article 2 is inappropriate for information transactions.

WHAT IS A LICENSE? A license is simply a contract. It gives the licensee rights to use information rights owned by somebody else. Licenses allow transactions to fit the rights and the price for information to the interests of the licensee. A consumer may license the right to use a database for consumer purposes for \$5; a business might license the right to use the same database for commercial purposes for \$10,000.

HOW DOES UCITA APPROACH CONTRACT LAW? UCITA rejects radical concepts. It incorporates traditional principles of freedom of contract. Indeed, a leading contract law scholar

¹ *Specht v. Netscape Communications Corporation*, 306 F3d 17 (2nd Cir. 2002)

² *Specht v. Netscape Communications Corporation*, 306 F3d 17 (2nd Cir. 2002). See also *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 970 P.2d 803 (Wash. 2000)

³ See *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corporation*, 284 F3d 1323 (Fed. Cir. 2002).

wrote article that UCITA follows traditional concepts of how to create contracts. Like UCC Article 2, most UCITA rules are default rules that provide an appropriate solution if the parties' agreement does not otherwise deal with the issue. This is not a regulatory statute.

DOES UCITA RADICALLY CHANGE ENFORCEMENT OF STANDARD FORM LICENSES? No. Reported court decisions today enforce shrink-wrap, onscreen and other forms of modern automated contracting, if they comply with contract concepts similar to UCITA and, indeed, some cases allow contract formation without the protections that UCITA creates. An allegation that these contracts would be unenforceable without UCITA is simply wrong.

HOW DOES UCITA DEAL WITH CONSUMERS? UCITA leaves unchanged and specifically defers to consumer protection laws. It also adds some new consumer protections.

HOW DOES UCITA DEAL WITH OTHER PARTICULAR ISSUES? Like Article 2 and UCC Article 9, approved several years ago, UCITA deals with a large number of issues and cannot be fully summarized in a brief report. However, the following describe some of the issues treated in UCITA:

- **Express warranties:** As under UCC Article 2, an express warranty is created by any representation or promise that becomes part of the basis of the bargain of the parties. UCITA expressly recognizes that this might occur through statements in advertising.
- **Computer program quality:** Computer programs distributed by merchants are also subject to an implied warranty of merchantability which in overall effect is like that applied under the UCC to goods. Under current law, there are no statutory provisions explicitly designed for implied warranties of computer programs.
- **Open-source or free-software:** UCITA provides that so-called open-source or free software (not provided for commercial gain) does not carry an implied warranty of quality or of non-infringement.
- **Informational content:** UCITA makes clear that there is no warranty implied with respect to the aesthetic appeal, accuracy, or other quality of information made generally available to the public. This is an area of first amendment concern; UCITA follows case law developed from general concepts of First Amendment law.
- **Contract formation – generally:** UCITA provides that a person does not manifest assent to terms of a contract in a record unless the person's manifestation of assent is made after having had an opportunity to review the terms. It provides guidance on what each of these standards means. These standards are consistent with current case law and with the Restatement of Contracts.
- **Contract formation – online:** UCITA provides guidance for the creation of contracts online that collects and reflects majority case law. Again, a consent to terms must come after an opportunity to review them and the terms must be presented in a way that ought to call them to the attention of a reasonable person. Reported cases consistently follow this standard, including a very recent Second Circuit decision which favorably discusses UCITA.
- **Contract formation – "Later terms":** As do most reported cases, UCITA acknowledges that terms presented after the initiation of the contracting process can become part of the contract. UCITA, however, generally allows this to happen only if 1) the other party had reason to know terms would be presented later, 2) that party manifested assent to the terms *after* having an opportunity to review them, and 3) that party had a right to return and receive a refund if it did not agree to the terms.

- **Reverse engineering:** UCITA places restrictions on terms that prevent reverse engineering of software if the reverse engineering is necessary to make other programs interoperable. As stated recently by the Federal Circuit, this limitation does not exist under current law.
- **Electronic “self-help”:** Electronic self-help refers to the use of technology controls to prevent continued use of software or other digital information in the event of a breach of contract. UCITA bans such action because NCCUSL believed that it was too great of a risk for licensees. No other statutes and no case law ban unauthorized electronic self-help and, indeed, various other uniform laws do not affirmatively preclude it.
- **Transferability of a license:** UCITA provides that contractual rights under a license are presumptively transferable unless: 1) the transfer would materially harm the other party, 2) other law, such as federal law, precludes transfer, or 3) the contract itself precludes transfer. *The Court of Appeals for the Federal Circuit recently referred to UCITA as reflecting the appropriate rule for transferability of licenses.*

ISN'T IT TRUE THAT SOFTWARE COMPANIES ARE LARGE, WHILE THEIR CUSTOMERS NEED PROTECTION? No. The average software company has less than twenty employees. But many who oppose UCITA are large insurance corporations.

WHAT IF A UCITA RULE DOESN'T WORK FOR ME? The agreement, not the statute, controls.

WHY ARE SOME GROUPS FIGHTING? NCCUSL achieved in UCITA a balanced statute. Some groups have concluded that their own interests are best served if they oppose UCITA unless the statute changes law to fit their own corporate objectives.

WHY IS THERE CONTROVERSY? A paradigm shift creates controversy and we are in a paradigm shift today. When Article 2 was introduced in the 1940s, it took over 5 years for the first state to adopt it and four more years before the second state did so. Change was resisted by consumer advocates and others; the remaining states delayed adoption until the 1960s. By then, the misinformation had cleared. UCITA faces the same resistance and inaccurate information, but it is proceeding at a faster pace. UCITA has become a convenient vehicle for large industry interest groups who see it as a chance to advance their own particular agenda.

WHY DOES AFFECT OPPOSE UCITA? This is a lobbying group created solely for the purpose of opposing this Act.

WHY ARE LIBRARY GROUPS OPPOSED TO UCITA? The digital information age puts stress on libraries and some see opposing UCITA as a way to ensure that old practices remain despite new technologies. Congress enacted special rules in the Copyright Act to address libraries. Librarians would like more rights; publishers might like less. They have fought in Congress and in international negotiations. There is no simple solution. UCITA tries to stay out of the struggle by expressly bowing to federal law and by allowing state courts to invalidate contract clauses that violate a fundamental public policy without deciding policies that Congress must resolve.

DOES UCITA ALLOW CONTRACT TERMS THAT PRECLUDE CRITICISM OF PUBLICLY DISTRIBUTED PRODUCTS? No. UCITA is the only uniform state law that precludes use of such contract terms when not supported by other law.

WHERE IS MORE INFORMATION AVAILABLE? A copy of UCITA may be obtained at http://www.law.upenn.edu/bll/ulc/ulc_frame.htm.