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Members of the House of Delegates
American Bar Association

Re: Uniform Computer Information Transactions Act

Dear Delegate:

I am writing to encourage you to vote favorably on the Resolution before the House of Delegates which provides that the Uniform Computer Information Transactions Act is acceptable for consideration by the state legislatures.

I suspect that you may hear from a number of people who have not actually read UCITA, but feel qualified to offer opinions based upon what they have heard about it. I have read UCITA, and have participated closely in every step of its development. This paragraph is provided so that you will have a basis to judge the extent to which my conclusions herein are informed by actual experience: Among my experience is service as one of the five ABA Advisors to the UCITA Drafting Committee. I spent almost twenty years in private practice, initially as a business lawyer handling diverse transactions (including many UCC Article 2 matters) and the last fifteen focused on information technology transactions for both licensors and licensees. As the Business Law Section ("BLS") Advisor to the UCITA Drafting Committee, I participated in all but two of the more than 20 meetings of the Drafting Committee and all of the NCCUSL Annual Meetings at which UCITA was considered. I also have been a member since 1987 of the BLS Subcommittee on Information Licensing and for the last several years have chaired that Subcommittee. In that capacity, I participated in several programs on UCITA presented to ABA members at Annual and Section meetings. I am a member of the American Law Institute and participated in the debate about UCITA that took place within that body. Finally, after UCITA was passed by NCCUSL, I was engaged by a client to assist in the enactment of UCITA in the states. (Prior to that time, during my service as an ABA Advisor, I had not accepted clients that had an interest in the passage of UCITA.) During the past two and a half years, I have represented a client before various state legislatures as they have considered UCITA, and in discussions with representatives of the National Association of Attorneys General, the American Library Association, and numerous large corporate licensees, all in an effort to reach compromise on those provisions of UCITA, or lack of provisions, which particularly concerned those groups. In September, 2002, I became the Vice President and General Counsel of

Carnegie Mellon University. In December, 2002, I was appointed a NCCUSL Commissioner for my home state of Pennsylvania. The views expressed herein are my own, and do not reflect the opinions of my employer, NCCUSL, or any client.

Of threshold consideration must be whether a law such as UCITA is even needed. Several of UCITA's critics have argued over the years that it is not needed, asserting that UCC Article 2 is sufficient to govern these matters and that in areas where Article 2 is not applicable, enough cases have been decided to provide guidance. With due respect to those critics, none of them has as its core business the manufacture or distribution of information products, and all of them have enjoyed the benefit of settled commercial law in which to grow their companies. Contrasted against this is the dearth of statutory and case law to govern even the most basic aspects of information contracting. Indeed, one court observed recently that "software licensing exists in a legislative void". *I.Lan Systems, Inc. v Netscout Service Level*, 183 F.Supp. 328 (D.Mass 2002). The lack of a predictable and stable body of law is inhibiting the growth of the information products industry, and causing significant confusion and frustration among those who manufacture, distribute or use such products. This should come as no surprise to ABA members; after all, it was an ABA subcommittee which, over a decade ago, authored a study which concluded that UCC Article 2 was not a proper home for software transactions, and which urged the development of law in this area. The answer, as suggested by that ABA subcommittee, is a statute which relies on UCC Article 2 for its policy choices so as to be consistent with other American commercial law, but which tailors the actual rules to fit the specifics of information transactions. This is what UCITA does, and, regardless of one's conclusion about how well UCITA does it, to argue that such a law is not needed is simply irresponsible.

Having concluded that a law such as UCITA is necessary, the next question should be whether it is in a form appropriate for consideration by the states. Over three hundred NCCUSL commissioners, who are experienced in drafting uniform legislation that fairly balances competing interests and is enactable, thought so. The Maryland and Virginia legislatures thought so. And, in at least one respect, the Second Circuit appears to have thought so. *Specht v Netscape Communications Corp.*, 306 F.3rd 17, Note 13 (2nd Cir. 2002):

Recognizing that "a body of law based on images of the sale of manufactured goods ill fits licenses and other transactions in computer information," the National Conference of Commissioners on Uniform State Laws has promulgated the Uniform Computer Information Transactions Act ("UCITA"), a code resembling UCC Article 2 in many respects but drafted to reflect emergent practices in the sale and licensing of computer information.

To be sure, there is passionate criticism of UCITA and you will properly consider whether that criticism is sufficient cause for you to determine that UCITA is not appropriate for consideration by the states. Who are the critics? Essentially, they are a group of large corporate licensees, led by a few insurance companies, and national library associations who have focused their opposition in the past two years through a lobbying

group known as Americans for Fair Electronic Commerce (“AFFECT”). In my opinion, some of this criticism has merit, but much does not. All of AFFECT’s objections were raised during the UCITA drafting process and considered by the Drafting Committee. The 2002 Report on UCITA of the ABA Working Group illuminated the difference between merited and unmerited criticism. It cited 11 specific areas where UCITA should be changed. These recommended changes generally reflected universal concerns, such as the recommendations for amendments which would ban terms in contracts that prohibited otherwise lawful public comment and reverse engineering, and the recommendation to ban electronic self help. The Working Group largely ignored the more self-serving amendments which had been sought by AFFECT. The Working Group also did not recommend the substantive changes requested by national library associations, but instead asked NCCUL to include a note regarding these issues “that UCITA is not the appropriate place for the interpretation of federal copyright law.” It seems clear that the Working Group understood that the issues of concern to libraries are not for a state contracting law to solve, but must be addressed by Congress. As you will see by comparing the 2002 UCITA Amendments adopted by NCCUSL to the Report of the Working Group, NCCUSL’s response to the ABA Working Group was to adopt at its 2002 Annual Meeting 38 amendments to UCITA which address 95% of the Working Group’s concerns.

The one major substantive area in which NCCUSL declined to follow the Working Group’s advice was the enforceability of “shrinkwrap” contracts. (By “shrinkwrap”, I am using shorthand to refer to a contracting form where the licensee or buyer pays for the product before actually seeing the terms of the contract, which are contained in the box, or sent in the mail, for example. It is perhaps more accurate to refer to these as “pay now, terms later” contracts.) The Working Group had urged NCCUSL to render this contracting form unenforceable, stating that it was no longer necessary. NCCUSL chose to stay with its original solution for pay now, terms later contracts, which was elegant and simple: UCITA says that if a licensee pays for the product before having an opportunity to review the terms of the license, and the licensee, upon reviewing the terms of the license decides that it does not agree with them, then the licensor is obligated to take the product back, cost free, and provide to the licensee a full refund. I believe that NCCUSL made the right decision on that issue, for the following reasons: First, the overwhelming majority of courts, and all courts in the past eight years, have upheld the enforceability of this contracting model. Second, this contracting model is used not only in information contracting, but many other kinds of contracting, such as airline ticketing, insurance binders and mail order purchases of goods, to name just a few. It would have been unfair, and confusing to practitioners and parties, to render it unenforceable in the information area, but allow it to continue to be enforceable in the many other areas in which it is used. Third, although the ABA Working Group suggested that there no longer is any reason for this contracting model, my experience certainly does not indicate that, and the Working Group cited no evidence to back up its claim. (One possible reason for this conclusion by the Working Group might be that it did not have within its membership a representative of the information industry who could have provided context and background on that industry’s practices; the Working Group did include a representative of the insurance industry and another individual who has been

among the most outspoken opponents of UCITA—it is not clear why there was no attempt to provide even token representation of the industry which would be most affected by the conclusions of the Working Group.) In fact, billions of dollars in commerce is done using this contracting model every year, and the effect of banning it would be dramatic and I believe unprecedented in American law.

National consumer groups also have opposed UCITA. I respect their efforts greatly, and believe that they play a critical role in shaping American law. I understand their mission to be to make as many improvements in the law for consumers as possible. Thus, no matter how protective of consumers a particular law may be, it could always be more protective. This leaves little incentive for compromise. And that has been the case with UCITA. Although it is more protective of consumers than any existing uniform contracting law (including the recently revised Article 2), and makes the law better for consumers than it is currently, national consumer advocates wanted it to be even more protective. They advocated a structure which essentially would have overridden existing state consumer protection laws, and substituted broad new consumer protective provisions in UCITA. This would have made consumer protection law in this area uniform in one fell swoop, rather than having each state consider its consumer protection law and decide how protective it should be. While it is understandable that the former approach would be the most satisfactory to national consumer protection advocates because it is the most efficient, it is unimaginable that such an approach would have been uniformly enactable. States' approaches to consumer protection simply vary too much for any proposed uniform treatment to have a chance of uniform passage. UCITA's drafting committee chose the more reasonable course: the statute expressly states that UCITA defers to state consumer protection law, and advises lawmakers to consider their state consumer protection law at the time they consider UCITA, to see whether any changes are indicated. This is exactly what happened in Virginia and Maryland when UCITA was enacted in those states, and the consumer protection law of both states is now better for it. But, and this proves out the wisdom of the Drafting Committee's approach, the Virginia and Maryland consumer protection laws differed from one another at the beginning of that review, and their respective legislatures made different changes to them.

In making up your mind about UCITA, you naturally will examine the claims of the critics carefully against the actual text of UCITA. The experience of the Virginia and Maryland legislatures may be helpful in that regard. I had the opportunity, as mentioned above, to participate in the consideration of UCITA before the legislatures of both of those states. In both cases, AFFECT representatives strongly pressed their standard package of amendments. In both cases, the legislatures exhaustively considered these amendments. In Virginia, a legislative joint committee studied UCITA and listened to testimony on the AFFECT amendments for almost a year before UCITA was presented to the Virginia legislature. The Virginia legislature enacted UCITA with almost no amendments, but took the precaution of appointing a study committee to study UCITA again for a full year after its enactment, and to recommend whether any amendments should be passed. Again, the AFFECT amendments were considered, again, they were, in the main, rejected. In Maryland, the AFFECT amendments were considered at public

hearings by separate legislative committees. In Maryland, as in Virginia, once the legislators had the opportunity to fully consider the AFFECT amendments, and to read the actual text of UCITA, the decision was made to go with the original UCITA text. While I cannot know why the legislators determined to do so, the arguments that appeared to be most persuasive to them were that the changes being sought to UCITA by AFFECT would have rendered it significantly different from UCC Article 2, or any other commercial law and that UCITA simply does not do many of the things that its critics allege.

Indeed, the latter echoes a theme I have noticed over the years: that UCITA is criticized more for what it does NOT contain than for what it does contain. In other words, the fact that UCITA does not prohibit something which is today enforceable under common law is fodder for criticism that UCITA somehow “permits” that thing to be done—when in fact it is the current law which permits it. Perhaps the clearest example of this was the debate over electronic self help. Under current case law, licensors have the right to exercise electronic self help as long as they put a notice somewhere in the license that they have the ability to do so.¹ Recognizing the significant damage that could be inflicted by the unfettered use of electronic self help, the Drafting Committee made the decision that UCITA needed to be more protective than that case law. Not wanting to completely overrule the case law, it instead developed a series of strict protections and expressly stated that electronic self help could not be used unless all of the protections were provided. An accurate statement about UCITA’s electronic self help provisions would have been: “In a move that is significantly more protective than current case law, UCITA says that licensors can’t use electronic self help unless they (i) give the licensee fifteen days prior written notice, (ii) give the licensee the right to expedited court proceedings to stop the shut down, (iii) place in the initial contract a conspicuous notice as to the ability to exercise self help that must be separately agreed to by the licensee or it is not enforceable against the licensee; (iv) do so in a manner that does not endanger other information of the licensee; and (v) provide non waivable consequential damages if they fail to abide by these rules”. The critics instead elected to describe this provision as UCITA permitting licensors to shut off computer systems without notice, in the dead of night. Anyone who had actually read UCITA would know that was inaccurate, but too often the UCITA debate has relied upon things people have heard about UCITA, rather than what UCITA actually says. And so, this characterization of UCITA’s treatment of electronic self help grew in the popular press and nonacademic circles until the Drafting Committee had little choice but to change UCITA to outright ban electronic self help. Whether that was the right substantive decision is debatable; as a political matter, the issue was distracting too much attention away from the merits of UCITA and the Drafting Committee had little choice but to make the change.

The Technology Committee of the ABA Section Officers Council has written a report widely distributed to delegates, to which the President of NCCUSL has responded. To the extent that you intend to give attention to the report of the SOC Technology

¹ See “Reported Cases on Electronic Self Help” by Mary Jo Dively, September, 2000, at www.nccusl.org/nccusl/uniformact-memo/uniformacts-memo-ucita.asp

Committee, I encourage you also to read President Burnett's response, which is posted on the NCCUSL website at www.nccusl.org.

Finally, I am writing you individually because, without general BLS debate and without requesting input from our Subcommittee (the only subcommittee within the BLS that has directed its attention to the substance of UCITA in detail and debated it over the course of seven years and in many ABA fora), or either of the BLS members who served as ABA Advisors to the Drafting Committee, the BLS Council recently determined to instruct the BLS Delegates to vote to postpone the proposed motion (and, failing postponement, to vote against it) and instructed our Subcommittee not to communicate as a subcommittee with House of Delegates. I am not suggesting by this that the Subcommittee is unanimous in its views of UCITA, observing merely that the action by the Council did not include full and public debate. I understand that the Council followed the ABA rules in reaching its decision and that it is not required to consult with subcommittees or advisors. However, in an organization purportedly devoted to acting on full information and pursuant to open debate, this is more than discouraging. It is markedly at odds with the consideration of UCITA by the legislatures of Maryland and Virginia. The latter undertook the type of full and informed debate that has not taken place in the ABA process and in both cases, the legislators, although initially inclined against UCITA no doubt due to what they had heard about it, after reading the actual text of UCITA and considering the criticism in a full and public debate, ultimately supported UCITA with almost no changes. I do not know whether this would have happened in the ABA, but do know that had such full and informed debate occurred, I would have had more confidence in the ultimate decision, whatever it may be.

No one would argue that UCITA, or any uniform law, is flawless. It is in the main, however, an excellent product which balances the competing interests in this area, improves existing law for both licensors and licensees, and provides much needed guidance. It reflects the input over seven years of five ABA advisors. The alternative would be to continue to drift along on a case by case basis, and that is even less acceptable today than it was 14 years ago when the conclusion was first reached that Article 2 was not a proper legal home for software transactions. The experience of the Virginia and Maryland legislatures, particularly when contrasted against the ABA's recent process, suggests that the state legislatures are the appropriate bodies to take up UCITA and determine whether it is useful for their states. I encourage you to vote favorably on the motion.

Very truly yours,

Mary Jo Dively