

Holme Roberts & Owen LLP



January 17, 2003

Judith H. Holmes
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Dear Ms. Holmes:

I am writing personally to encourage an affirmative vote on the UCITA resolution that will be before you at the mid-year meeting of the ABA House of Delegates in February.

I was asked to serve as an ABA Advisor to the UCITA Drafting Committee from the Intellectual Property Section of the ABA. From 1996 to 1999, I attended a majority of the 16 two and one-half day meetings of the Drafting Committee where UCITA was discussed in depth section by section. I also attended the 1999 Annual Meeting of NCCUSL where UCITA was adopted by NCCUSL.

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The drafting meetings were open to anyone who wished to attend and everyone had full opportunity to participate actively in the discussion. The attendance was large with often over 100 participating. Over the course of 4 years, every issue was discussed and rediscussed in some excellent dialog and debate. The result was substantial compromise and accommodation.

Admittedly, not all issues were resolved in a manner satisfactory to every diverse interest. Is it perfect? No, it is not. In fact, there are some provisions that I personally would like to see handled in a different manner. However, this is to be expected in an Act that will affect such a multitude of diverse interests. No Act covering this area can ever be all things to all people.

In short, the give and take was substantial and, on balance, I personally believe that the end product is worthy of testing in the arena of state legislatures. I expressed that belief in 1999, when I joined four of the five ABA Advisors (the fifth was not in attendance) in stating before the Conference that NCCUSL should promulgate UCITA as a Uniform Act. I still maintain that belief, and I strongly support UCITA as appropriate for consideration by the state legislatures. UCITA will fill a void that has existed for too long. The states can no longer allow this void to continue, and substantial uniformity in the states is the only practical solution. Certainty and predictability need to be established.

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Since 1999, UCITA has been enacted in two states, and was subject to a great deal of scrutiny in those efforts. Three courts have referenced UCITA favorably.¹ These cases acknowledge the "legislative void" that exists without UCITA, and that UCITA's provisions "offer insight," "seem to be consistent with well-established principals," and "provide guidance."

This is not to say that, like any legislation, refinements will not be needed over time. Since adopting UCITA at the Annual Meeting in 1999, several amendments have been adopted by NCCUSL. In addition, as you are probably aware, the ABA appointed a Working Group that participated in a public hearing on proposed amendments to address remaining concerns. As a result, NCCUSL adopted 38 amendments to UCITA addressing in substantial part concerns identified by the ABA Working Group.

The resolution before the House of Delegates is not for adoption of UCITA as ABA policy, but only approval of the process (in which the ABA has participated from the beginning) as an Act appropriate for consideration by states interested in the subject.

Speaking for myself only as an active participant in the deliberative process (and not on behalf of the IP Section – which, it is my understanding, can only come from resolutions adopted by the Council of the IP Section), I strongly urge an affirmative vote on the resolution.

Sincerely,



Lynn P. Hendrix

¹ Specht v. Netscape Communications Corp., 306 F.3d 17, 34 (2d Cir. 2002) (finding that "UCITA's provisions offer insight into the evolving online 'circumstances'," and that "UCITA's notice and assent provisions seem to be consistent with well-established principles governing contract formation and enforcement"); Rhone Poulenc Agro, S.A. v. Dekalb Genetics Corp., 284 F.3d 1323, 1330-31 (Fed. Cir. 2002) (finding that UCITA is "relevant to the application of the bona fide purchaser rule to intellectual property," and that "UCITA (pertaining to the licensing of intangible property) provides guidance on the U.C.C.'s view of the common law"); and I.Lan Sys., Inc. v. Netscout Serv. Level Corp., 183 F. Supp. 2d 328, 332 (D. Mass. 2002) (acknowledging the "legislative void" that exists without UCITA, and stating that "Article 2's familiar provisions--which are the inspiration for UCITA – better fulfill [business persons' reasonable] expectations than would the common law").