January 15, 2003

Mr. Carlyle C. Ring
Ober, Kaler, Grimes & Shriver
1401 H Street, N.W.
5th Floor
Washington, DC 20005-3324

Re: ABA Resolution concerning the Uniform Computer Information Transactions Act

Dear Mr. Ring:

I am writing to members of the House of Delegates to support adoption of the resolution that the Association approves the Uniform Computer Information Transactions Act (UCITA) as an appropriate act for adoption by states that approve its substantive provisions.

By way of background, I have spent many years of my academic career working principally in the fields of Commercial Law and Sales although, in more recent years, I have been working on other economic topics, in particular on questions relating to the operation and industrial organization of the computer software industry.[1]

I believe that UCITA is important because there is a distinct need for a statute that distinguishes the transfer of computer information from the sale of goods now controlled most generally by the UCC's Article 2. There are significant economic differences between goods and information that generate differences in the basic contractual rules appropriate for each area. The rules of UCC Article 2 are entirely appropriate for the transfer of goods; they are inadequate in many ways for the transfer of rights to use computer information. UCITA provides a statutory framework better suited for the information context.

In our modern economy, computer information is typically--perhaps universally–transferred through the contractual arrangement of license, rather than sale. There is a straightforward economic explanation for the choice of this contractual form. Computer information differs from manufactured goods--hard goods--such as a car or an appliance in various ways. First, unlike with a car or appliance, a knowledgeable buyer of computer

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[1]In case there is any question, I am submitting this statement entirely pro bono.

information can easily disassemble, reconfigure, reproduce and, in whole or in part, make that information available at low cost to thousands or even millions of non-buyers. A second principal difference--though one less fully understood--is that it appears that computer information, especially information in the form of a computer program, can be put to a greater variety of uses by buyers than is typical of manufactured products.

With respect to these two differences, the terms of the typical license of computer information can be viewed as a contractual method of making the risks and liabilities attending the transfer of computer information more closely resemble the risks and liabilities attending the transfer of hard goods like a car or appliance. Auto manufacturers selling cars do not face the risk that a buyer may disassemble, reconfigure or reproduce the car in whole or in part in order to sell an identical or slightly varied product to thousands of others--the physical character of the car alone prevents such an effort or, even if possible (such as disassembly), renders it unimportant. In contrast, providers of computer information--including providers of products with embedded, but accessible, computer information--are not protected from these risks by the physical character of what they transfer. Instead, they reduce these risks--make the risks more resemble those of sellers of hard goods--by transferring the information or the product incorporating the information by a license that imposes limitations on the consumer's use of the information.

Similarly, the seller of a hard good such as a car can anticipate a relatively limited set of uses of the product among the entire set of consumers. Facing a wider and more uncertain set of potential uses of computer information--especially computer programs--providers of information will often include in their licenses an entirely different set of warranty obligations and performance disclaimers as well as other provisions even more unique to information.

UCITA is a worthy effort to deal with these differences. It acknowledges different forms of contract formation as well as different contexts for the transferability of license rights. It fills a distinct void in current law chiefly because Article 2, even with its recent amendments, does not purport to address the many differences between the sale of hard goods and the transfer of rights to information.[2] This is not to say that UCITA is perfect in every sense. To my mind, its provisions constraining electronic self-help place much more severe restrictions on licensors than does Article 2 on sellers. But disputes of this nature can be worked out in the states as state legislatures address and debate substantive issues of this nature.

My point, instead, is that the significance of the differences between the sale of goods and the transfer of rights to use computer information as well as the importance of computer information in our new economy call for a structure of law that focuses with particularity on the specific rules appropriate for the transfer of computer information. UCITA is such a statute.

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[2]The recent revisions themselves acknowledge the existence of many unresolved issues of this nature in both Section 2-102 defining the scope of the Article and in Section 2-103(l) defining "goods."

Sixty years ago, Karl Llewellyn initiated the Uniform Commercial Code project with the ambition to "unhorse" sales--i.e., to transform the paradigmatic sales transaction from the sale of a horse to modern, including mass, transactions involving manufactured goods. We have all benefited from the transformation of the law that he and many others achieved. It is now time, however, not to "un-goods" sales, but to create a statutory framework for the transfer of rights to use computer information that is distinct from the statutes that control the sale of goods. I encourage the House of Delegates to adopt the UCITA resolution.

Yours sincerely,

George L. Priest

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