

1999

2B or Not 2B; Future of UCITA now Depends on States

Troy Stark

Follow this and additional works at: <http://lawcommons.luc.edu/lclr>

 Part of the [Consumer Protection Law Commons](#)

Recommended Citation

Troy Stark *2B or Not 2B; Future of UCITA now Depends on States*, 12 Loy. Consumer L. Rev. 101 (1999).

Available at: <http://lawcommons.luc.edu/lclr/vol12/iss1/8>

This Consumer News is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola Consumer Law Review by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

14. See U.C.C. § 4-406(c).
15. See Bureau, *supra* note 1.
16. See *id.*

2B or Not 2B; Future of UCITA now Depends on States

On July 29, 1999, by a vote of 43-6, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") approved the Uniform Computer Information Transactions Act ("UCITA"). The NCCUSL's approval of UCITA sends the proposed uniform law to state legislatures for enactment.¹ Since its inception more than a decade ago, however, this controversial law has generated widespread criticism.² Its critics, including many consumer advocates, hope the law will fail to win widespread approval by the states.³ The controversy is a result of the approach taken by UCITA in codifying computer information transactions law.

UCITA was first proposed more than ten years ago as Article 2B of the Uniform Commercial Code ("UCC").⁴ The primary reason behind the law's creation is the lack of consistency and uniformity in the regulation of intangible computer information transactions.⁵ The NCCUSL and the American Law Institute ("ALI"), the organizations responsible for drafting and amending various aspects of the UCC, originally created UCITA.⁶ In response to the NCCUSL's failure to address what it viewed as fundamental problems, the ALI withdrew its support of UCITA in April of 1999, thereby preventing its acceptance as part of the UCC.⁷ Now, the ALI is among those groups opposing the law's enactment. Yet, despite widespread criticism from groups like the ALI, the Federal Trade Commission, and the American Library Association, the NCCUSL would like UCITA to become law in all fifty states.⁸ With its controversial provisions, however, UCITA faces an uphill battle.

Most of the criticism is aimed at UCITA's unique stance on transactions involving computer information, including "sales" of computer software. Under UCITA, consumers who "purchase" computer software are not actually buying the program. Rather, they are purchasing a *license to use* the program.⁹ Many organizations fear this could lead to a severe curtailment of consumer rights in the area of

computer information transactions.¹⁰ Accordingly, much of the current criticism is aimed at UCITA's failure to provide adequate levels of consumer protection.¹¹ In fact, the proposed act has been called a "sweetheart bill for software publishers, computer manufacturers, and large software consulting firms."¹²

Initially, the licensing scheme set forth in UCITA allows software manufacturers to place restrictions on the use of their products, even when individuals in the mass consumer market buy those products.¹³ For example, consumers are allowed to purchase books, read them and later sell the used product.¹⁴ The consumer is not allowed to keep a copy of the book, as doing so would violate copyright laws. Under UCITA, on the other hand, if a software producer so desires, companies are allowed to prevent software purchasers from selling their old computer programs, even if the purchaser deletes the program from the computer on which it was installed. The ability to issue such restrictive licenses under UCITA could severely curtail the now flourishing used software market. Restrictive licensing could have additional negative impacts, including non-disclosure provisions that could prevent consumers from publishing comments regarding the program without prior approval from the manufacturer.¹⁵

Likewise, software producers are not required to make the terms of their licenses available to consumers prior to purchase.¹⁶ Under current practices, which UCITA codifies, consumers often do not discover the terms of a software license until product installation begins.¹⁷ Even then, many consumers fail to read the terms of the license and simply click the "agree" button to install the program. Consumers may limit their rights by "agreeing" to the license terms in such a manner and, in the event something goes wrong with the program, may have a difficult time seeking compensation or recovery from the software producer.

Such limitations may include venue and choice of law restrictions, mandatory arbitration clauses, and even simple provisions requiring purchasers to pay postage and restocking fees on all returns. These restrictions may, in some cases, make it more cost effective to delete the program and purchase a substitute rather than return the product.¹⁸ Accordingly, failing to disclose these terms prior to sale, which would require little more than posting the terms on the manufacturer's web-site, could severely limit consumer rights.

UCITA's supporters have responded to many of these criticisms, including those relating to pre-sale disclosure of license terms. Despite widespread fear that UCITA will allow software publishers to create and conceal unduly restrictive license terms, the bill's supporters reply

that UCITA permits consumers to return and get full, cost free refunds for products whose license terms are unacceptable, as long as they do so prior to installation.¹⁹ Additionally, courts may refuse to enforce unconscionable licenses and contract terms that violate public policy, even if the consumer agrees to those terms and installs the product.²⁰

Many UCITA supporters also point to the fact that the new law preserves all current consumer protection laws.²¹ Accordingly, state and federal laws protecting consumers will take priority over any conflicting rules set forth in UCITA. When an individual becomes involved in a dispute that brings into question rights secured by consumer protection laws, those laws will control insofar as UCITA contradicts them.

Finally, supporters of the proposed law are quick to point out all the *new* rights given to consumers under UCITA. Some of UCITA's new protections include an obligation of good faith in the performance of all computer information transactions, a warranty of quiet enjoyment and non-infringement, a warranty of merchantability for all computer programs, and an implied warranty of fitness similar to that contained in UCC Article 2.²² All of these new rights, say UCITA's supporters, will prevent software manufacturers from taking advantage of consumers under the licensing scheme contained in the proposed law.

Whether UCITA's supporters are right remains to be seen. It is clear, however, that the proposed legislation faces an uphill battle in many states. UCITA has generated more criticism than any other proposed uniform law to date and, though it would normalize computer information transactions, the fact that so many groups have voiced concerns suggests UCITA may never become much more than a proposition.

Endnotes

1. See Carlyle C. Ring et al., *Uniform Law for Computer Info Transactions is Offered; After a Decade of Consideration, NCCUSL has Proposed UCITA, a Controversial Model State Law to Govern High-Tech Commerce*, NAT'L L.J., Aug. 30, 1999, at B7.
2. See Cem Kaner, *In My Opinion: Objections to the Proposed Uniform Computer Information Transactions Act*, CYBERSPACE LAWYER, June 1999, at 14.
3. See Hiawatha Bray, *KO this Statute*, BOSTON GLOBE, Aug. 19, 1999, at D1.
4. See Kaner, *supra* note 2, at 14.
5. See Ring et al., *supra* note 1, at B7.

6. See Gerald T. McLaughlin and Neil B. Cohen, *Licensing Transactions and the UCC*, N.Y. L.J., Apr. 26, 1999, at 3.
7. See Kaner, *supra* note 2, at 14.
8. See Bray, *supra* note 3, at D1.
9. See Kaner, *supra* note 2, at 14.
10. See Bray, *supra* note 3, at D1.
11. See George L. Graff, *Controversial Computer Act Offers Major Innovations; A proposed Uniform Statute for the Information Age is Approved*, COMPUTER L. STRATEGIST, Aug. 1999, at 1.
12. See Kaner, *supra* note 2, at 14.
13. See Letter from Joan Z. Bernstein, Director of the Bureau of Consumer Protection, Federal Trade Commission, et al., to John L. McLaugherty, Executive Committee Chairperson, *National Conference of Commissioners on Uniform State Laws* (July 9, 1999) <<http://www.ftc.gov/be/v990010.htm>>.
14. See Kaner, *supra* note 2, at 14.
15. See *id.*
16. See Letter, *supra* note 13.
17. See Graff, *supra* note 11, at 1.
18. See Kaner, *supra* note 2, at 14.
19. See Ray Nimmer, *Correcting Some Myths About UCITA* (visited Sept. 20, 1999) <<http://www.2bguide.com/docs/rne.htm>>
20. See Graff, *supra* note 11, at 1.
21. See Nimmer, *supra* note 19.
22. See Graff, *supra* note 11, at 1.





Loyola Consumer Law Review

