

ASSIGNMENT: *Preliminary Summary of UCITA*

BACKGROUND

(see, e.g., "Background," www.2B.guide; Brenda Sandburg, "E-Commerce Plan Faces Tough Fight," www.callaw.com/stories/edt0804e.html)

The UCC does not currently address the licensing of intangible goods, the most prevalent form of commercial software transaction today. Nor does it apply to service contracts such as software development, maintenance, and access contracts. Each jurisdiction just applies its own distinct laws. In response, the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL), the co-sponsors of the UCC, attempted to pass a uniform set of rules, called Article 2B, governing such transactions.

However, they announced on April 7, 1999, that Article 2B would no longer be pursued. Instead, NCCUSL proceeded on its own, without the co-sponsorship of the ALI, renaming the proposed statute the Uniform Computer Information Transactions Act (UCITA). NCCUSL passed UCITA on July 29, 1999 and will begin to be presented in state legislatures for approval this fall.

Supporters of the bill primarily consist of the software, Internet, and banking industries. Opponents include 24 state attorney generals, Federal Trade Commission, and the motion picture, communications and publishing industries. One danger is that if UCITA passes only in a few states, there may actually be a reduction in uniformity from states having different licensing laws.

AREAS OF CRITICISM/DEBATE IN UCITA

I. Scope

Because such a wide array of industries (from software to motion pictures to publishing) engage in information transactions, weaving a set of common rules is quite difficult. Although the scope provisions limit the act to a "computer information transaction," there are a host of unanswered questions about what constitutes such information and about what entertainment and publishing media fit that definition.

II. UCITA's Detailed Codification Is Premature

(see Jean Braucher, "Why UCITA, Like UCC Article 2b, Is Premature And Unsound," <http://www.2Bguide.com/docs/0499jb.html>)

Miller and Ring [of the NCCUSL] recognize that it is early for codification of the law of software transactions. They say that what is needed, instead of a new UCC article, is an "intermediate step," a NCCUSL-only uniform law. But if NCCUSL is successful in winning widespread enactment for UCITA, it will be just as much a uniform codification as a new UCC article would be. Perhaps the suggestion is that UCITA will not win universal enactment. This indeed seems likely because of the vigorous opposition to it from many quarters. A premature uniform law, enacted in a handful of states, will do less damage than codification in the UCC, but no codification at all for the next five years would be preferable. Five years is more than a generation in computer technology, and by the end of that time we will have a better idea of emerging business models and of whether the UETA adequately resolves many of the current issues. If mass-market software publishers get what they want in UCITA and win enactment in a few states, however, it will be harder to get balanced legislation in the future because these publishers will use UCITA as a line they must hold.

Miller and Ring quote Grant Gilmore's statement that the object of commercial legislation is to be "accurate and not ...original." This is not possible when business practices are

in flux and case law has not yet had a chance to sift the issues. At this stage, codification is likely to freeze practices or channel them in undesirable ways.

UCITA devotes a great deal of attention to validation of post-payment "terms in the box" or "terms on the disk," to facilitate telephone and mail orders of mass-market software. The few cases dealing with the enforceability of these terms are split. But before enough litigation or widespread enactment of UCITA could settle this issue, this method of contracting is likely to wither away. Software will increasingly be ordered and delivered on the Internet. The special rules in UCITA validating post-transaction terms have no legitimacy as applied to transactions entered into on line, where pre-payment disclosure of terms is easy.

III. Interaction with Intellectual Property Law

(*see* Pamela Samuelson, Foreward, 87 CLR 1 (1999))

Another area of debate is how UCITA will interact with existing intellectual property laws. Although Article 2B took a 'neutral stance' on federal preemption, the preemption issue will play an important role in determining UCITA's scope. Anti-preemptionists favoring UCITA may argue that state contract law falls outside intellectual property claims, and that states should be able fully legislate in the licensing of information. Others are concerned that licensors will be able to circumvent federal IP law to prevent the potential overriding of user protections, such as fair use of copyrighted material, via UCITA licenses.

IV. UCITA Does Not Adequately Protect The Public Interest In Free Speech

(*see* Braucher, *supra*)

Miller and Ring note that UCITA recognizes the public interest in free speech as a reason for limiting the warranty liability of licensors. But UCITA's concern about free speech and the

public interest seems to only operate in favor of licensors. Users are not adequately protected against contract boilerplate that purports to limit their ability to, for example, publish results of tests of software or other criticism (found in several licenses) or use it for "immoral purposes" (as one word processing license currently provides). There is also insufficient concern about sweeping contract restrictions on quotation or communication of non-copyrightable information.

V. Warranty Rights of Purchasers

(*see* Peter Alces, 87 CLR 269 (1999))

Rules setting standards for information products, such as the software warranty rules proposed in Article 2B (and UCITA?), affect investment incentives. Given the seemingly unilateral bias to industry licensors in Article 2B, it sets relatively low warranty standards. Greater warranty standards may be desirable, both from the standpoint of society and from the standpoint of the software industry, since setting very low warranty standards can harm market growth in the long run if such standards lead consumer to have too little faith in the products or services that such standards cover. Plus, product liability law would then play a greater role.

VI. Section 105's Preemption of Existing State Consumer Law Disclosure Requirements

(*see* Attorney Generals' Letter, July 23, 1999)

Attorney Generals are concerned that §105(d) preempts long-standing consumer protection law relating to the time, place and manner in which important disclosures are made and replaces those laws with a standard which is inconsistent with the fundamental principles underlying those laws. UCITA's definition of 'conspicuous' disclosures fails to ensure that material disclosures are actually communicated to consumers and that such disclosures are made in a timely manner (i.e. no post-purchase disclosures, which are permitted under UCITA).

VII. Contract Formation Issues

(*see* Attorney Generals' Letter, July 23, 1999)

The state attorney generals also believe that UCITA's contract formation provisions permit practices that are contrary to purchaser expectations. They argue that §112 and §211 permit a party offering a mass-market license to withhold almost any contract terms it wishes until after a sale has occurred and provides that such terms become part of the contract if the purchaser reviews and accepts the terms after the sale. A second possible danger lies in §112(f), which allows the parties to a contract to modify the rules of contract formation in future transactions, potentially leading to consumer confusion and deception.