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BRIEFING PAPER

I. Introduction

The Uniform Computer Information Transaction Act (UCITA) is a uniform commercial code for computer information transactions. Drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL), it was approved and recommended for enactment in all fifty states in July 1999. UCITA provisions cover a wide variety of different topics related to computer information including, but not limited to, standard software licenses, contracts for the custom development of computer programs, licenses to access online databases, website user agreements, and most internet-based information. UCITA was passed in hopes of clarifying, and in many cases establishing, the law governing computer information transactions and making the law uniform among the various jurisdictions.

Since its inception, the opponents of UCITA have far outweighed its supporters. State legislators have levied severe criticism against UCITA provisions. At the time of writing, only two states have adopted UCITA while most other states have either refused to consider it or tabled it indefinitely. This comment will attempt to track the most significant of these legislative developments and analyze their likely effect on the future of UCITA.

Part II of this comment will briefly outline the history of UCITA and the most salient issues surrounding its drafting. Part III will discuss the three most significant responses taken by the states in response to UCITA: Virginia (virtual adoption of UCITA in its entirety), Maryland (qualified adoption of UCITA) and Iowa (adoption of a "bomb-shelter" statute to preempt invocation of UCITA jurisdiction). Finally, Part IV will analyze the different approaches to UCITA and how these are likely to impact other states' decisions regarding UCITA legislation.

II. History of UCITA

UCITA began as a joint effort of the NCCUSL and the American Law Institute (ALI) to adapt the Uniform Commercial Code (UCC) to the modern needs of computer-related "goods and services." This section was entitled UCC Section 2-B. However, the NCCUSL lost the prestigious ALI label early on when the Institute dropped out mid-stream due to serious concerns over the allegedly anti-consumer content of section 2-B. The Conference thereafter issued UCITA as its own free-standing uniform law, which was finally unveiled in July 1999.

The states have reacted in varying degrees to UCITA, many passing it into law,[1] others introducing legislation subject to future discussion and consideration,[2] and the majority failing to take any action whatsoever on UCITA until its effects are better understood. A token few have actually considered "bomb shelter" statutes to prevent UCITA from governing any contract interpretation whatsoever within the borders of their state.[3] Although the states' reactions are divergent, common among them all is a sense of hesitancy in regards to UCITA due primarily to the intense lobbying campaign levied by consumer advocacy groups and state government agencies. Although this comment will not discuss the criticisms of UCITA at length, it is useful to briefly list them to put the legislative concerns – and subsequent statutory responses to these concerns – in context.[4]

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[1] Virginia was the first state to pass UCITA into law on March 15, 2000. Maryland followed suit one month later on April 10, 2000.

[2] UCITA legislation has been introduced in Delaware (introduced in Senate but no movement in House), District of Columbia (awaiting public hearing), Hawaii (no further action at this time), Illinois (tabled indefinitely), Maine (tabled until 2001), and Oklahoma (passed Senate and House but legislation must undergo interim study before further consideration).

[3] Iowa was the first state to pass one of these laws and Delaware is currently considering a comparable bill alongside the UCITA legislation currently pending.

[4] For a thorough discussion of the criticisms and fears of UCITA opponents, *see* Cem Kaner, *Why You Should Oppose UCITA*, 17 NO. 5 COMPUTER LAW. 20 (2000); Michael L. Rustad, *Making UCITA More Consumer-Friendly*, 18 J. MARSHALL J. COMPUTER & INFO. L. 547 (1999). *Compare* David A.P. Neboyskey, *A Leap Forward: Why States Should Ratify the Uniform Computer Information Transactions Act*, 52 FED. COMM. 793 (2000); Raymond T. Nimmer, *UCITA: A Commercial Contract Code*, 17 NO. 5 COMPUTER LAW. 3 (2000).

Most criticism levied at UCITA claims that it gives too much power to the computer information industry and strips consumers of many important rights that would be protected in non-UCITA jurisdictions. Consumer advocacy groups are primarily concerned with the mass-market licenses condoned by UCITA for three reasons: 1) oftentimes consumers must agree to the terms of the contract *before* they can read them; 2) these agreements reduce the rights of the buyer because it is a license rather than a sale; and 3) governing law is determined by the language in the license, allowing the licensor to choose the jurisdiction most favorable to their interests.

Secondary concerns voiced by these groups include: "self-help" practices, which entitle licensors to shut off or repossess the product should the licensee violate the terms of the agreement; the ability to change the terms of the agreement without notifying the other party directly; the ability to disavow any implied warranties required by state law; and permitting contract law (in lieu of federal copyright law) to govern transactions for digital information. Although these secondary concerns are not as widespread as those related to the mass-market license, they have certainly caused many states to look at UCITA with a jaundiced eye.

All of these concerns – many of which have been expressed by high-level state officials, including the attorneys general in 24 states – have significantly delayed both the passage and introduction of UCITA or UCITA-like legislation in most of the states. In the end, the most salient of these criticisms will likely prevent UCITA from being ratified by every state. However, at the very least, it is expected to be introduced in all 50 states and territories during the next year and a half.[5] Where it will go after that is up to the states themselves, but overall, they would appear to have three alternatives to choose from.

[5] *See* Jaikumar Vijayan, *UCITA*, 6/5/00 Compworld 72, 76 (2000).

III. Three Legislative Models

The three states that have taken the most legislative action in response to UCITA are undoubtedly Virginia, Iowa and Maryland. Although other state legislatures are currently in the final phases of consideration of similar bills[6] these three states have moved beyond the legislative process and have enacted UCITA or anti-UCITA statutes. These three approaches to the UCITA movement represent the three alternatives available to the states today: 1) to embrace UCITA, 2) to reject UCITA, or 3) to accept and reject certain provisions of UCITA according to legislative findings and debate.

A. Virginia: a High-Tech Mecca

The state of Virginia became the first state to adopt UCITA on March 15, 2000. Although under study for six months, Virginia's version of UCITA did not undergo extensive legislative debate, nor was it submitted to substantial review by legislative committees. The final product was virtually identical to the original language of UCITA as submitted to the states by the NCCUSL. The legislature slightly amended the bill to qualify the choice of law provision adding that it would only be allowed so long as it does not vary a rule that may not be varied under Virginia law. That is, a license agreement cannot extend the choice of law to an area of the law that cannot be adjudicated anywhere except under Virginia law. However, this change leaves most of the more controversial provisions largely untouched. Moreover, this limit on UCITA's scope is relatively innocuous since UCITA does not extend to other fields of law outside contracts related to computer information transactions.

Virginia decided to gloss over the many consumer concerns listed above in hopes of attracting high-tech industries, most of which give strong support for UCITA and have indicated

[6] For example, Oklahoma is considering legislation similar to Maryland, while Delaware is leaning towards Iowa's approach.

that they would prefer to do business in those states where UCITA-friendly legislation is enacted. By attracting such commerce, Virginia would establish a competitive advantage in an increasingly cutthroat industry of recruiting internet business. Furthermore, Virginia has a strong interest in retaining the business it already has and not losing it to other states. Northern Virginia is home to many Internet-related companies likely to be affected by UCITA, including the ubiquitous AOL and MCI subsidiary UUNET Technologies, which claims to be the world's biggest commercial Internet service provider.

In response to consumer concerns, Virginia officials have indicated that they will give consumer qualms due diligence in studies slated to follow prior to and directly following enactment, which is not scheduled until July 1, 2001. For example, the Joint Commission on Technology and Science was required to appoint an advisory committee to review the legislation and prepare a report that might include proposed amendments by December 1, 2000. Other studies will follow in the interim. Virginia officials claim that a year of study will provide enough time to "iron out" any concerns expressed by consumer groups regarding consumer protection provisions that are notably absent in Virginia's UCITA legislation while a year of enacted law will attract other internet businesses to the state.

B. Iowa: the Poison Pill

Iowa's legislature considered UCITA while also evaluating the Uniform Electronic Transactions Act (UETA), a similar but unrelated piece of legislation promulgated by the NCCUSL dealing with electronic rather than computer information transactions. Although Iowa ratified UETA, it flatly rejected UCITA and amended the UETA bill to include a provision expressly forbidding any contract from enforcing UCITA as the choice of law against an Iowa

citizen or business.[7] In short, Iowa not only rejected UCITA provisions, but also rendered other states' adoption of UCITA meaningless within the borders of Iowa since the provision allows Iowa citizens and businesses to automatically override any express provision in a contract making a UCITA-state the governing law.

This move is not surprising since Iowa's attorney general was one of the 26 in the country who strongly opposed the model statute as it stood before the NCCUSL in July 1999. This move followed closely on the attorney general's negotiations with AOL forcing the company to notify users in Iowa of its change in its terms of service, a requirement that could be revoked under UCITA provisions. Therefore, Iowa's reticence to implement UCITA as promulgated by the NCCUSL is understandable.

Although Iowa's poison pill provision in UETA is not determinative in UCITA legislation nation-wide, it certainly presents an option to states that many may not have considered. Iowa claims that it will review UCITA further during the 2001 legislative session, but refuses to adopt the provisions until they are certain of the outcome. This is sharply contrasted to Virginia's plan to "adopt first and study later."

C. Maryland: Reverse-Engineering UCITA

Maryland became the second state to adopt UCITA on April 10, 2000. Unlike Virginia, the Maryland legislature refused to accept UCITA with open arms. However, unlike Iowa, it refused to reject UCITA in its entirety. It opted for an alternative route, a form of compromise

[7] The relevant section of the statute states "(4) A choice of law provision, which is contained in a computer information agreement that governs a transaction subject to this chapter, that provides that the contract is to be interpreted pursuant to the laws of a state that has enacted the uniform computer information transactions Act, as proposed by the national conference of commissioners on uniform state laws, or any substantially similar law, is voidable and the agreement shall be interpreted pursuant to the laws of this state if the party against whom enforcement of the choice of law provision is sought is a resident of this state or has its principal place of business located in this state. For purposes of this subsection, a "computer information agreement" means an agreement that would be governed by the uniform computer information transactions Act or substantially similar law as enacted in

whereby UCITA was submitted to six weeks of arduous and intense lobbying and discussion during which several substantial amendments were considered and adopted. These amendments reflected a deliberative effort to fashion UCITA to the realities of computer information transactions law in Maryland.

Perhaps the most significant change Maryland made to UCITA has to do with mass-market licenses and shrink-wrap/click-wrap agreements, one of the major concerns of consumer interest groups. Under the original language of UCITA, a party manifests assent to the terms of a mass-market license before the party even has access to the information, namely in shrink-wrap, mass-market agreements. However, Maryland amended this rule so that a license is not enforceable if the party is unable to view the terms both before *and* after granting assent.[8] A clear result of this amendment is to significantly weaken the legal force behind mass-market licenses by allowing consumers to demand to see the license before purchasing the product.

A second, and equally important change Maryland made to UCITA was in regards to the licensing versus purchasing question. One major issue most consumer advocacy groups have with UCITA is its sanctioning of licensing procedures that supplant purchasing rights and deny consumers the full rights they would otherwise if the transaction were considered a sale. In order to solve this problem, Maryland inserted language which stated that mass-market transactions are always governed by Maryland law. This is good for Maryland consumers because it allows Maryland to interpret the contract rather than UCITA or another state's law. Although these provisions do not solve the problem of licensing versus purchasing, they do augment consumer

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the state specified in the choice of laws provision if that state's law were applied to the agreement." H.D. 2205, 2000 Leg., 78th Gen. Assem., 2nd Sess. §554D.104 Scope (Ia. 2000).

[8] *See* H.D. 19, 2000 Leg., 414th Sess. § 21-209: Mass-Market License (Md. 2000) ("(A)…A term is not part of the license if:…(4) the term is not available for viewing before and after assent: I. In a printed license; or II. in an electronic format that a) can be printed or stored for archival and review purposes by the licensee; or b) is made available by a licensor to a licensee, at no cost to the licensee, in a printed form on the request of a licensee that is unable to print or store that license for archival and review purposes.").

rights by allowing them to submit it to a court for review rather than rejecting it outright under the original UCITA provisions.

Third, the Maryland version of UCITA removes the provision invalidating choice of governing law in the context of a consumer contract or a mass-market license holding otherwise.[9] This is very important because it requires lawsuits over license contracts to be adjudicated in Maryland, rather than in a state of the licensor's choosing (such as one that has a less adulterated version of UCITA). This certainly bolsters consumers' ability to determine their choice of law regardless of the type of contract being formed. Furthermore, the legislature also provided an additional safeguard against mass-market licensing by stating that "in a mass-market transaction, the enforceability of a choice of forum term shall be decided by a Maryland court."[10]

Another important amendment made by the Maryland legislature is to reinstate a manufacturer's implied warranties of merchantability.[11] Many producers use the click-wrap/shrink-wrap agreements to disavow the state's implied warranty law, which says programs must do what they purport to do. Maryland's version of UCITA prevents vendors from disclaiming such warranties in cases of mass-market sales.[12]

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[9] The original language in UCITA stated "[t]he parties in their agreement may choose the applicable law. However, the choice is not enforceable in a consumer contract or a mass-market license to the extent it would vary a rule that may not be varied by agreement under the law of the jurisdiction whose law would apply under subsections (B) and (C) of this section in the absence of the agreement." U.C.I.T.A. §109: Choice of Law (2000)

[10] *See* H.D. 19, 2000 Leg., 414th Sess. §21-110: Contractual Choice of Forum, (A) (2) (Md. 2000).

[11] *See* H.D. 19, 2000 Leg., 414th Sess. §21-406: Disclaimer or Modification of Warranty (Md. 2000) ("(I)(1) Any oral or written language used in a consumer contract, which attempts to exclude or modify any implied warranties of merchantability of a computer program created under § 21-403 of this subtitle, or implied warranties of fitness for a particular purpose under § 21-405 of this subtitle, or exclude or modify the consumer's remedies for a breach of those warranties, is unenforceable. (2) A merchant may recover from a manufacturer or a licensor that caused the breach any damages resulting from the breach of implied warranties of merchantability or fitness for a particular purpose that could not be disclaimed or modified under this section. (3) Any oral or written language used in a consumer contract which attempts to limit or modify a consumer's remedies for breach of a *merchant's, licensor's, or* manufacturer's express warranties is unenforceable unless the *merchant, licensor, or* manufacturer provides reasonable and expeditious means of performing the warranty obligations.")

[12] However, it notably leaves such agreements in place for sales to businesses customers.

One interesting change made by the Maryland legislature was in regards to remote disabling, a practice sanctioned by UCITA which essentially allows manufacturers to remotely disable a user's product (typically software) in the event that they fail to abide by the user agreement ("self-help"). The Maryland legislature prohibited the use of self-help or remote disabling devices in mass-market software[13] and erased the provision permitting software manufacturers to engage in self-help under any other circumstances without both substantial notice and opportunity to cure the defect.[14]

Two relatively minor changes made by the legislature had to do with copyright protection and alternative dispute resolution. Maryland lawmakers inserted language to address the copyright question that fails to protect public policy interests in fair use.[15] Maryland legislators also envisioned alternative dispute resolution under Maryland's version of UCITA, an option not included in the original version of UCITA.[16]

Like Virginia, Maryland's adoption of UCITA is part and parcel of a larger plan to attract technology companies to the state by creating a tech-friendly legal climate aptly entitled the *eMaryland Agenda*. The day after signing UCITA into law, Maryland Governor Parris Glendening headed to Silicon Valley for a visit with industry heavy-hitters. At the same time,

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[13] *See* H.D. 19, 2000 Leg., 414th Sess. §21-816: Limitations on Electronic Self-Help (Md. 2000) ((B)"Notwithstanding the provisions of this section, electronic self-help is prohibited in mass-market transactions.").

[14] *See* H.D. 19, 2000 Leg., 414th Sess. § 21-814: Discontinuing Access (Md. 2000) ((B)…"Before discontinuing all contractual rights of access in an access contract, a party shall give notice in a record to the party in breach stating: (1) that the party intends to discontinue all contractual rights of access in the access contract on or after 3 days following the date notice is given; (2) The nature of the claimed breach that entitles the party to discontinue all contractual rights of access in the access contract; (3) The opportunity to cure as provided under § 21-703 of this title; and (4) Information to allow for communication concerning the claimed breach, including the party's address and telephone number, facsimile number; and/or e-mail address.").

[15] *See* H.D. 19, 2000 Leg., 414th Sess. § 21-105: Relation To Federal Law; Fundamental Public Policy; Transactions Subject To Other State Law (Md. 2000) ("(A)(2) A contract term is unenforceable to the extent that it would vary a statute, rule, regulation, or procedure that may not be varied by agreement under the federal copyright law*, including provisions of the federal copyright law related to fair use*.").

[16] *See* H.D. 19, 2000 Leg., 414th Sess. § 21-110: Contractual Choice Of Forum (Md. 2000) ("(C) Notwithstanding the provisions of this section or a contrary term in an agreement, the parties to a computer information transaction that is for the creation of computer information may, by mutual consent, choose an alternative dispute resolution

although Maryland was the second state to adopt UCITA, it will be the first state to enact UCITA provisions on October 1, 2000. Although Maryland responded to consumer criticisms early on, officials have also noted that Maryland's law retained senate language that creates a legislative oversight commission to study the act and recommend additional revisions in the future.

mechanism, including mediation, arbitration, or other non-judicial dispute resolution process, as the means for resolving a dispute under the agreement.").