

## THE UNIFORM COMPUTER INFORMATION TRANSACTION ACT

The Uniform Computer Information Transaction Act (UCITA)<sup>1</sup> 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.<sup>2</sup> UCITA provisions cover a wide variety of 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 agreements for most internet-based information.<sup>3</sup> The NCCUSL passed UCITA in hopes of clarifying, and in many cases establishing, the law governing computer information transactions and making the law uniform among the various jurisdictions.<sup>4</sup>

Since its inception, efforts to establish a uniform state law governing computer information transactions have been fraught with controversy.<sup>5</sup> 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 have tabled it indefinitely.<sup>6</sup> This note tracks the most significant of these legislative developments and analyzes their likely effect on the future of UCITA.

Part I outlines the history of UCITA and the most salient issues surrounding its drafting. Part II discusses the three most significant responses taken by the states in response to UCITA: Virginia (nearly full adoption), Maryland (qualified adoption), and Iowa (adoption of a “bomb-

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<sup>1</sup> See UNIF. COMPUTER INFO. TRANS. ACT (July 1999 Draft) [hereinafter UCITA]. This draft of UCITA is available from the Uniform Law Commissioner's official draft site at <<http://www.law.upenn.edu/bll/ulc/ucita/ucita200.htm>>.

<sup>2</sup> See *Id.*

<sup>3</sup> See *Id.*

<sup>4</sup> See Richard Raysman And Peter Brown, *Will States Enact Uniform Software Licensing Act?*, 222 No. 72 NEW YORK LAW JOURNAL 3 (COL. 1) (1999).

<sup>5</sup> See *States Begin to Adopt UCITA - Model Legislation for Licensing (Uniform Computer Information Transactions Act)*, 4 No. 6 INFORMATION OUTLOOK **p.?** (2000).

<sup>6</sup> See <<http://www.ucitaonline.com/whathap.html>>.

shelter” statute to preempt invocation of UCITA jurisdiction). Finally, Part III analyzes how these three different approaches are likely to impact other states’ decisions to adopt or reject UCITA-like legislation.

## I. **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.”<sup>7</sup> Initially entitled UCC Section 2-B, the NCCUSL lost the prestigious ALI label when the Institute dropped out after four years of drafting due to irreconcilable concerns and disagreements with fundamental aspects of the proposed law.<sup>8</sup> The Conference thereafter issued UCITA as its own free-standing uniform law, which was finally approved in July 1999.<sup>9</sup>

The states have reacted in varying degrees to UCITA, a few passing it into law,<sup>10</sup> others introducing legislation subject to future consideration,<sup>11</sup> and the majority failing to take any action whatsoever on UCITA until its effects are better understood. The most hostile reaction has come from a few states that have contemplated “bomb shelter” statutes to prevent UCITA from governing any computer information transaction contract within the borders of their

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<sup>7</sup> Charles H. Fendell, Dennis M. Kennedy, *UCITA Is Coming!!! Part Two: Practical Analysis For Licensors' Counsel*, 17 NO. 8 COMPUTER LAWYER 3, 3 (2000).

<sup>8</sup> As the legislative process developed, the drafters adopted increasingly broad definitions of computer information while dramatically expanding the general scope of UCITA. See Jones, Day, Reavis & Pogue, *United States: Controversial New Rules for Computer Contracts*, Mondaq Business Briefing, August 8, 2000 [p.2](#).

<sup>9</sup> “UCITA was written by an NCCUSL drafting committee composed of commissioners from several states in an open, public drafting process, with full participation by interested parties, including consumer representatives. The committee met in a series of 16 public drafting meetings, which occurred in major cities around the U.S. over a four-year period from 1996 - 1999. Interested participants from industry, trade organizations and consumer groups attended the drafting sessions, and expressed their views on all the issues. Additional interested parties submitted written comments.” <<http://www.ucitaonline.com/slhpwri.html>>.

<sup>10</sup> Virginia was the first state to pass UCITA into law on March 15, 2000. See H.D. 561, 2000 Leg., **2th** Sess. (Va. 2000). Maryland followed suit one month later on April 10, 2000. See H.D. 19, 2000 Leg., 414th Sess. (Md. 2000)

<sup>11</sup> 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). See <<http://www.ucitaonline.com/whathap.html>>.

respective states.<sup>12</sup> Although state reactions have varied tremendously, they all evince a sense of hesitancy regarding UCITA primarily because of the intense opposition levied by consumer advocacy groups, academics, and state government agencies. Although this note does 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.<sup>13</sup>

Most criticism levied at UCITA claims that it gives too much power to the computer information industry and strips consumers of many significant rights that would be protected in non-UCITA jurisdictions. Consumer advocacy groups,<sup>14</sup> academics, and state officials concerned with the nebulous type of mass-market licenses<sup>15</sup> condoned by UCITA cite three causes of alarm: 1) oftentimes consumers must agree to the terms of the contract *before* they are able to review them;<sup>16</sup> 2) as a license rather than a sale, these agreements unavoidably reduce the

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<sup>12</sup> 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. See Andrea L. Foster, *New Software-Licensing Legislation Said to Imperil Academic Freedom*, 46 NO. 49 CHRONICLE OF HIGHER EDUCATION A-47 (2000).

<sup>13</sup> 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); Pratik A. Shah, *The Uniform Computer Information Transactions Act*, 15 Berkeley Tech. L.J. 85 (2000). 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). See generally Symposium, *Intellectual Property and Contract Law in the Information Age: The Impact of Article 2B of the Uniform Commercial Code on the Future of Transactions in Information and Electronic Commerce*, 13 BERKELEY TECH. L.J. 809 (1998); Symposium, *Intellectual Property and Contract Law for the Information Age: The Impact of Article 2B of the Uniform Commercial Code on the Future of Information Commerce*, 87 CALIF. L. REV. 1 (1999).

<sup>14</sup> Such consumer advocacy groups include the Consumer Federation of America, the Consumer Project on Technology, the Consumer's Union, the National Consumer League, and the United States Public Interest Research Group. See <http://www.4cite.org/oppose.html>.

<sup>15</sup> A "mass-market transaction" is defined by UCITA as "(A) a consumer contract; or (B) any other transaction with an end-user licensee if: (i) the transaction is for information or informational rights directed to the general public as a whole, including consumers, under substantially the same terms for the same information; (ii) the licensee acquires the information or informational rights in a retail transaction under terms and in a quantity consistent with an ordinary transaction in a retail market; and (iii) the transaction is not: (I) a contract for redistribution or for public performance or public display of a copyrighted work; (II) a transaction in which the information is customized or otherwise specially prepared by the licensor for the licensee, other than minor customization using a capability of the information intended for that purpose; (III) a site license; or (IV) an access contract." See UCITA, *supra* note 1, §102(44).

<sup>16</sup> See UCITA, *supra* note 1, §209; John H. Minan, *Consumers May Lose to Software Industry*, THE SAN DIEGO UNION-TRIBUNE, Friday, July 16, 1999, at B9 ("UCITA validates the use of "shrink-wrap" and "click-wrap" mass-market licenses. Unlike most contracts where the parties know all the terms of their agreement before purchasing the

rights of the buyer;<sup>17</sup> and 3) the language of the license (drafted by the licensor) determines the law governing the license, allowing the licensor to choose the jurisdiction most favorable to its interests.<sup>18</sup>

Other concerns voiced by UCITA critics related to the use of mass-market licenses include the following: “self-help” practices, which entitle licensors to shut off or repossess the product should the licensee violate the terms of the agreement;<sup>19</sup> the ability to change the terms of the agreement without notifying the other party directly;<sup>20</sup> the right to explicitly disavow any implied warranties required by state law;<sup>21</sup> permitting contract law (in lieu of federal copyright law) to govern transactions for digital information;<sup>22</sup> and privacy concerns with the licensing of

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product, often this is not the case with mass-market licenses of software. The terms to the license may become known only after a consumer purchases the product. When installing the program, the consumer is often greeted for the first time with the terms of the license that govern its use. Under UCITA, the purchaser may be bound by these restrictions by failing to act, so-called ‘assent by silence.’”)

<sup>17</sup> See UCITA, *supra* note 1, Prefatory Note (“Transactions in computer information involve different expectations, different industry practices, and different policies from transactions in goods. For example, in a sale of goods, the buyer *owns* what it buys and has exclusive rights in that subject matter (e.g., the toaster that has been purchased). In contrast, someone that acquires a copy of computer information may or may not own that copy, but in any case rarely obtains all rights associated with the information.”), §502 Official Comment (2)(c), §613(a)(2), and §613 Official Comment (4); Jones, Day, Reavis & Pogue, *United States: Controversial New Rules for Computer Contracts*, Mondaq Business Briefing, August 8, 2000 P.? (“The basic model for a UCITA transaction is the license. A license conveys less than all of the rights in the computer information and restricts the use of that information. A license differs from a sales contract in that the value in a license may be primarily in the terms of the agreement, not the underlying subject matter. For example, in a contract for the sale of a widget, typically the value is in the widget itself. But the value in a software license will vary widely depending upon whether the contract allows the software to be used by 10 people or 10,000 people, even though the intrinsic value of the underlying software itself is unchanged. Two typical business license transactions covered by UCITA are electronic commerce and mass-market licenses.”).

<sup>18</sup> See UCITA, *supra* note 1, § 109. See also Fendell, *supra* note 7, at 3. Compare Kathleen Patchel, *Choice of Law and Software Licenses: A Framework for Discussion*, Symposium, *Software As A Commodity: International Licensing of Intellectual Property*, 26 Brook. J. of Int’l L. 117 (2000).

<sup>19</sup> See UCITA, *supra* note 1, §§ 815-16; Timothy P. Heaton, Note, *Electronic Self-Help Software Repossession: A Proposal to Protect small Software Development Companies*, Boston University Journal of Science and Technology Law (2000); Robin Rahman, *Electronic Self-Help Repossession And You: A Computer Software Vendor’s Guide To Staying Out Of Jail*, Emory Law Journal (1999); see also Fendell, *supra* note 7, at 12.

<sup>20</sup> See UCITA, *supra* note 1, § 304; Margaret Jane Radin, *Humans, computers, and Binding Commitment*, 75 Ind. L.J. 1125, P.? (2000). See also Fendell, *supra* note 7, at 8.

<sup>21</sup> See UCITA, *supra* note 1, § 406; Mary Jo Howard Dively, *The UCITA Revolution: The New E-Commerce Model for Software and Database Licensing*, Practising Law Institute, Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series, PLI Order No. G0-00D9, April-May, 2000, see also Fendell, *supra* note 7, at 10.

<sup>22</sup> See UCITA, *supra* note 1, § 103; See also Fendell, *supra* note 7, at n.21.

personal data.<sup>23</sup> Coupled with the three problems listed above, these additional concerns have caused many states to look at UCITA with a jaundiced eye.

All of these criticisms – many of which have been expressed by high-level state officials, including the attorneys general of 26 states<sup>24</sup> – have significantly delayed both the introduction and passage of UCITA or UCITA-like legislation in most of the states. However, at the very least, it is expected to be introduced in all 50 states and territories during the next year and a half.<sup>25</sup> Once the states begin to seriously consider UCITA in earnest, they will most likely have three different models to choose between based on UCITA legislation passed thus far.

## II. Three Legislative Models

The three states that have taken the most legislative action in response to UCITA are Virginia, Iowa, and Maryland. Although other state legislatures are currently in the final drafting phases of similar bills,<sup>26</sup> these three states alone have completed the drafting process and have enacted – or are slated to enact – UCITA or anti-UCITA statutes. Their respective approaches represent the three likely alternatives available to 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.

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<sup>23</sup> See Pamela Samuelson, *Privacy as Intellectual Property?*, Symposium, *Cyberspace and Privacy: A New Legal Paradigm?*, 52 STAN. L. REV. 1125 (2000); Pratik A. Shah, *UCITA's Facade: Creating a One-Size-Fits-All Information Policy Under the Guise of a Commercial Contract Statute* (Boalt Hall School of Law, Working Paper, 2000).

<sup>24</sup> See Letter from the Attorneys General of 24 states to the NCCUSL (July 23, 1999), available at <http://www.2bguide.com/docs/799ags.html>.

<sup>25</sup> See Jaikumar Vijayan, *UCITA*, 6/5/00 *Compworld* 72, 76 (2000).

<sup>26</sup> For example, Oklahoma is considering legislation similar to Maryland, while Delaware is leaning towards Iowa's approach. See *States Begin to Adopt UCITA - Model Legislation for Licensing (Uniform Computer Information Transactions Act)*, 4 No. 6 INFORMATION OUTLOOK **P.?** (2000).

### **A. Virginia: A High-Tech Mecca**

Virginia became the first state to adopt UCITA on March 15, 2000.<sup>27</sup> 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.<sup>28</sup> The final product practically reproduces the original language of UCITA as submitted to the states by the NCCUSL.<sup>29</sup>

In response to consumer concerns, Virginian officials have indicated that they will give consumer qualms due diligence in studies prior to and directly following enactment, scheduled for July 1, 2001.<sup>30</sup> Virginia officials claim that a year of study will provide a sufficient period of time to "iron out" any concerns expressed by consumer groups regarding consumer protection provisions that are notably absent in Virginia's UCITA legislation. At the same time, a year of enacted law will probably attract other internet businesses to the state.

### **B. Iowa: The Poison Pill**

Iowa's legislature considered UCITA while concurrently evaluating the Uniform Electronic Transactions Act (UETA),<sup>31</sup> a similar, but more limited piece of legislation related to the use of electronic modes of conducting transactions. Although Iowa ratified UETA, it flatly rejected UCITA. It thereafter amended the UETA bill to include a "bomb-shelter" provision expressly forbidding any party from enforcing UCITA as the choice of law against an Iowa

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<sup>27</sup> See M.J. Zuckerman, Software law could be a hard sell, USA TODAY, Wednesday, March 29, 2000, at 3D.

<sup>28</sup> See Ed Foster, *The Gripe Line: Mid-Atlantic States Vie To Become The First To Enact The Controversial UCITA*, 22 NO. 10 INFOWORLD **p.?** (2000).

<sup>29</sup> See *Id.* 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.

<sup>30</sup> 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. See Michael P Bruno, *UCITA Passes Virginia Legislature*, NEWSBYTES NEWS NETWORK, Tuesday, February 15, 2000, at **p.?**

<sup>31</sup> See UETA.

citizen or business.<sup>32</sup> In short, Iowa not only rejected UCITA, but also rendered other states' adoption of UCITA meaningless within the borders of Iowa since the provision allows Iowa consumers and businesses to override any express provision in a contract that makes UCITA the governing law.

This move is not surprising since Iowa's Attorney General was one of the 26 in the country strongly opposed to the model statute as it stood before the NCCUSL in July 1999.<sup>33</sup> The bomb-shelter provision followed closely on the Attorney General's negotiations with AOL forcing the company to notify users in Iowa of the change in its terms of service, a requirement that could be revoked under UCITA provisions. Such experiences help explain Iowa's reticence to implement UCITA as promulgated by the NCCUSL.<sup>34</sup>

Iowa's poison pill provision – the first of its kind – presents an option to states that many may not have considered. Like Iowa, states may choose to evaluate UCITA and UETA separately since there is no compelling reason why they *must* be passed together. The two statutes clearly complement one another in their approach to the adaptation of traditional law to transactions for “goods and services” in the computer age. However, the changes proposed by the two laws are dramatically divergent. UETA is a model law designed to help states create

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<sup>32</sup> 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 the state specified in the choice of laws provision if that state's law were applied to the agreement.” H.D. 2205, 2000 Leg., 78<sup>th</sup> Gen. Assem., 2<sup>nd</sup> Sess. §554D.104 Scope (Ia. 2000).

<sup>33</sup> See Letter, *supra* note 24; see also Cem Kaner, *Software Engineering and UCITA*, Symposium, *Uniform Computer Information Transaction Act* 18 JOHN MARSHALL J. OF COMPUTER & INFO. L. 435, 439 (1999).

<sup>34</sup> See Washington, *supra* note 61, at 1C.

uniform rules for electronic transactions and signatures.<sup>35</sup> It differs from UCITA in that its scope only extends to the conduct of electronic transactions. In fact, the terms of UETA expressly limit its application to transactions not within the scope of UCITA.

Both UCITA and UETA are also remarkably different in their approach to the adaptation of the law to the online world. “UETA retains the contract-as-consent model and merely aims to remove specific obstacles in the way of contracting electronically; whereas UCITA moves significantly toward the contract-as-product model and aims to change the substantive law in that direction. UETA takes up a few pages; UCITA a few hundred.”<sup>36</sup> Unlike UCITA, UETA does not attempt to create a new substantive system of legal rules for electronic commerce, but rather codifies clear legal rules giving legal and binding force to transactions conducted in an electronic format.<sup>37</sup>

While UETA merely attempts to codify the law of electronic signatures, a notably well-accepted area of the law, UCITA attempts to create many new areas of law that are far from accepted<sup>38</sup> and “unlike UETA, [UCITA] does not retain much from the traditional picture of autonomous consent.”<sup>39</sup> Despite the pervasive need in the states today for uniform e-commerce law and the ability of UETA and UCITA to meet this need, due to the different subject matter and scope covered by the two proposals, these changes can be passed separately without harming the integrity of either law. Iowa has chosen this path and claims that it will review UCITA once again during the 2001 legislative session.<sup>40</sup>

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<sup>35</sup> See M. Michael Cramer, M. King Hill, Jr. and K. King Burnett, *Uniformity in State Laws*, 33 Maryland Bar Journal 48, 48 (2000).

<sup>36</sup> See Margaret Jane Radin, *Humans, computers, and Binding Commitment*, 75 Ind. L.J. 1125, **P.?** (2000).

<sup>37</sup> See Jonathan Angel, *Electronic signatures and contracts made via PKI are Legally Valid, but the Jury's Still Out on How Enforceable They're Going to Be*, NETWORK MAGAZINE, October 1, 2000, at 48.

<sup>38</sup> See Radin, *supra* note 36.

<sup>39</sup> Radin, *supra* note 36.

<sup>40</sup> See Washington, *supra* note 61, at 1C.



### C. Maryland: UCITA-Lite

Maryland became the second state to adopt UCITA on April 10, 2000.<sup>41</sup> Unlike Virginia, the Maryland legislature refused to accept UCITA with open arms. However, unlike Iowa, it did not reject UCITA out of hand. It opted for an alternative route, a form of compromise whereby the legislature reviewed UCITA for six weeks and adopted several substantial amendments to the bill.<sup>42</sup> These amendments reflected a deliberative effort to fashion UCITA to the realities of computer information transactions in Maryland.

Perhaps the most significant change Maryland made to UCITA relates to mass-market licenses and shrink-wrap/click-wrap agreements,<sup>43</sup> one of the major concerns of consumer interest groups. UCITA validates such agreements; thus, under UCITA, a consumer will be construed to manifest assent to the terms of a mass-market license by simply purchasing and opening a software package, even before the consumer has access to the terms.<sup>44</sup> This inaccessibility prior to purchase and installation is the defining feature of shrink-wrap/click-wrap mass-market agreements. Although UCITA allows the consumer to return the product at the licensor's expense should the terms prove disagreeable,<sup>45</sup> this undue hassle could be avoided were the terms made available prior to purchase. Contrary to UCITA, Maryland's amended version makes a license unenforceable if the party is unable to view the terms both before *and* after granting assent.<sup>46</sup> This amendment significantly weakens the legal force behind mass-

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<sup>41</sup> See Jeffrey W. Reyna, Maryland adopts software transaction law, UPSIDE Today, Tuesday, May 2, 2000, at P.2.

<sup>42</sup> **Citation Needed**

<sup>43</sup> "Shrink-wrap [and click-wrap] licenses are a special form of mass-market license. They are not revealed until after an initial agreement to acquire a product; in other words, there is no opportunity to review terms before payment." Shah, *supra* note 13, at 91.

<sup>44</sup> See Jones, Day, Reavis & Pogue, United States: Shrink-Wrap and Click-Wrap Agreements: How to Make Sure They Work, Mondaq Business Briefing, August 11, 2000 P.2.

<sup>45</sup> See UCITA, *supra* note 1, §209.

<sup>46</sup> 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

market licenses in Maryland by allowing consumers to demand to see the license before purchasing the product.

Second, the Maryland statute removes the UCITA provision upholding choice of governing law in the context of a consumer contract or a mass-market license.<sup>47</sup> Therefore, all lawsuits regarding mass-market licenses in Maryland are governed by Maryland law, rather than the state law of the licensor's choosing (such as one that has a less adulterated version of UCITA). This should protect consumers in Maryland by forcing companies doing business in Maryland to operate under Maryland's revised version of UCITA.<sup>48</sup>

The Maryland legislature also took another important step by reinstating a manufacturer's implied warranties of merchantability for all consumer contracts.<sup>49</sup> The original language of UCITA allows manufacturers to explicitly disclaim all warranties of merchantability.<sup>50</sup> Under the UCITA provisions, many producers could use the click-wrap/shrink-wrap agreements to disavow the state's implied warranty law regarding software sales (which says programs must do

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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.”).

<sup>47</sup> 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)

<sup>48</sup> See H.D. 19, 2000 Leg., 414th Sess. §21-110: Contractual Choice of Forum, (A) (2) (Md. 2000).

<sup>49</sup> See H.D. 19, 2000 Leg., 414th Sess. §21-406: Disclaimer or Modification of Warranty (Md. 2000) (inserting the following language: “(H) the provisions of subsections (a) through (g) of this section [outlining the ability of manufacturers to explicitly disclaim all warranties, express or implied] do not apply to a consumer contract; (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.”)

<sup>50</sup> See UCITA, *supra* note 1, §406.

what they purport to do).<sup>51</sup> Maryland's version of UCITA prevents vendors from disclaiming such warranties in cases of mass-market sales.<sup>52</sup>

Maryland lawmakers also came out against remote disabling, a self-help practice sanctioned by UCITA allowing manufacturers to remotely disable a user's product (typically software) in the event that they fail to abide by the user agreement. The Maryland legislature strictly prohibited the use of self-help or remote disabling devices in mass-market licenses.<sup>53</sup> It also removed the UCITA provision permitting software manufacturers to engage in self-help in non-mass-market licenses so long as substantial notice and the opportunity to cure are provided.<sup>54</sup>

The legislature also further narrowed the scope of UCITA in two significant regards: copyright protection and alternative dispute resolution. Maryland lawmakers inserted language in the statute addressing concerns voiced by preemption critics – notably regarding the effect of UCITA on fair use – that explicitly prevents UCITA from varying a rule or procedure that could not be varied under federal copyright law.<sup>55</sup> Maryland legislators also envisioned alternative

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<sup>51</sup> *See Id.*

<sup>52</sup> *See* H.D. 19, 2000 Leg., 414th Sess. §21-406: Disclaimer or Modification of Warranty (Md. 2000) (“(h) the provisions of subsections (a) through (g) of this section do not apply to a consumer contract; (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. However, it notably leaves such agreements in place for sales to businesses customers.”).

<sup>53</sup> *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.”).

<sup>54</sup> *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.”).

<sup>55</sup> *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.*”).

dispute resolution under Maryland's version of UCITA, an option not included in the original version of UCITA.<sup>56</sup>

Although Maryland evinced greater reservation than Virginia with UCITA's original language, the uniform law will be enacted in Maryland before Virginia. In fact, Maryland will be the first state in the country to enact UCITA provisions on October 1, 2000.<sup>57</sup> Nevertheless, Maryland officials have insisted that the statute retain senate language creating a legislative oversight commission to study the act and recommend additional revisions in the near future.<sup>58</sup>

#### **D. The Political Reality Behind the Statutes:**

The statutes drafted in Virginia, Iowa and Maryland envision three distinct approaches to the technological transformation of contract law espoused by UCITA. This dispersion among the states has arguably resulted from pervasive lobbying by consumer advocacy and software manufacturing groups. While the latter have concentrated their efforts in high-tech states such as Virginia and Maryland, consumer advocacy groups tend to be much more effective in states like Iowa where technology industries have less influence over local politics.<sup>59</sup> Nevertheless, all three states have been forced to contend with these rival forces to a certain degree and this political interaction between the various groups has shaped the outcome of UCITA in all three states.

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<sup>56</sup> 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 mechanism, including mediation, arbitration, or other non-judicial dispute resolution process, as the means for resolving a dispute under the agreement.”).

<sup>57</sup> See Vijayan, *supra* note 25, at 76.

<sup>58</sup> See *States Begin to Adopt UCITA - Model Legislation for Licensing (Uniform Computer Information Transactions Act)*, 4 No. 6 INFORMATION OUTLOOK **p.?** (2000).

<sup>59</sup> **Citation Needed**

The Virginia legislature allegedly glossed over consumer concerns voiced by UCITA critics in hopes of attracting high-tech industries in the near future.<sup>60</sup> Technology industries have voiced their strong support for UCITA and have indicated that they would prefer to do business in states with UCITA-friendly legislation.<sup>61</sup> By retaining most of the original UCITA language, Virginia has established a competitive advantage in the 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 – such as Maryland. 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 biggest commercial Internet service provider in the world.<sup>62</sup>

Like Virginia, Maryland's adoption of UCITA was 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*.<sup>63</sup> Only hours away from the technology corridor in northern Virginia, Maryland's passage of UCITA aims at drawing many of these companies northward by providing an amicable environment for technology firms. Although Maryland did significantly amend the original UCITA language, these changes have been largely cosmetic, leaving most of the controversial, pro-software industry provisions untouched. For example, by leaving intact UCITA's narrow definitions of "consumer"<sup>64</sup> and "mass-market transaction,"<sup>65</sup> while also failing

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<sup>60</sup> *See id.*

<sup>61</sup> See Kevin Washington, *Plugged In: Software law foes see route to harm; Regulation: Debate rages over whether licensing-agreement legislation hurts the public*, The Baltimore Sun, Monday, June 19, 2000, at 1C.

<sup>62</sup> See Scott W. Burt, *Controversial New Rules For Computer Contracts*, 8 No. 6 METROPOLITAN CORPORATE COUNSEL p.? (June 2000).

<sup>63</sup> In fact, the day after signing UCITA into law, Maryland Governor Parris Glendening headed to Silicon Valley for a visit with industry heavy-hitters. See Reyna, *supra* note 41.

<sup>64</sup> Although several amendments to the bill provide for specific consumer protections missing in UCITA, most businesses and those who work at home will not benefit from these changes due to the narrow definition of "consumer" in the Maryland statute: "'consumer' means an individual who is a licensee of information or informational rights that the individual at the time of contracting intended to be used primarily for personal, family, or household purposes. The term does not include an individual who is a licensee primarily for

to affirmatively prohibit backdoor self-help by software companies,<sup>66</sup> Maryland's version of UCITA remains a highly attractive alternative to technology firms.<sup>67</sup>

Unlike Virginia and Maryland, Iowa does not have to appease substantial technology industries within its state borders. As a primarily agricultural state, its consumers of technology dramatically outnumber its producers. Iowa has no desire to change this imbalance by attracting technology companies from states like Maryland and Virginia. Consequently, Iowa lawmakers naturally focus on consumers' rights when formulating state law related to computer information transactions. Since UCITA has tremendous potential to affect citizens outside the state that enacts it (due to choice of governing law provisions), Iowa is best serving the interests of its constituents in the foreseeable future by enacting a bomb-shelter statute.

Nevertheless, Iowa is not advocating an anti-technology approach to future contract law. When it comes to goods and services, Iowa understands the innumerable benefits that technology and innovation can bring to a state. As discussed above, Iowa was one of several states to pass

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professional or commercial purposes, including agriculture, business management, and investment management other than management of the individual's personal or family investments." See H.D. 19, 2000 Leg., 414th Sess. § 21-120: Definitions (Md. 2000).

<sup>65</sup> According to the Maryland statute, a "mass market transaction" is "(a) a consumer contract; or (b) any other transaction with an end-user licensee if: (i) the transaction is for information or informational rights directed to the general public as a whole, including consumers, under substantially the same terms for the same information; (ii) the licensee acquires the information or informational rights in a retail transaction under terms consistent with an ordinary transaction in a retail market; and (iii) the transaction is not: 1. A contract for redistribution or for public performance or public display of a copyrighted work; 2. A transaction in which the information is customized or otherwise specially prepared by the licensor for the licensee, other than minor customization using a capability of the information intended for that purpose; 3. A site license; or 4. An access contract." According to this definition, a New Jersey legislative commission, after studying the UCITA reporter's comment on mass-market transactions, noted that "In light of the comment, it would appear that the purchase of a single shrink-wrapped copy of Microsoft Office at a mass-market retail outlet such as Staples or OfficeMax by a four-person law firm would not fall within the UCITA definition of a "mass market transaction." See Foster, *supra* note 28.; As a result, the strict requirements and limitations issued in Maryland on such transactions will have less impact.

<sup>66</sup> See Foster, *supra* note 28. Despite Maryland's vehemence against self-help provisions, there is still room for manufacturers to implement back-door mechanisms to disable software they believe is being used improperly. For example, vendors could include time bombs for anti-piracy in the operating system for the utility company, effectively shutting down the power to the entire city should they find a violation of the contract terms. See Jessica Davis, *The licensing game: Proposed statutes and regulations have the power to forever change how companies implement software*, InfoWorld, Vol. 22, Issue 31 (2000). Furthermore, even where such self-help is triggered accidentally, causing tremendous damage to a system, software manufacturers are not responsible for this damage and are protected under the Maryland statute. See Foster, *supra* note 28.

UETA this year,<sup>68</sup> indicating its support for a shift in the law governing goods and services to better fit today's technological aspects of commerce. However, Iowa's participation in the "technological revolution" is tempered by UCITA's controversy. UETA provisions codify law that has been largely accepted by many states, unlike UCITA which has only passed in two state legislatures and been severely criticized in both the private and public sector. Until states like Iowa view UCITA as a mutually beneficial advancement in contract law for both tech-laden and tech-barren states alike, UCITA's chances of becoming uniform law in similar states remain low.

### **III. The Future of UCITA: Two Steps Forward, One Step Back**

This section evaluates UCITA's prospects following the legislative developments in Virginia, Iowa, and Maryland. Since the success or failure of uniform laws hinges directly on the competition among the states to adopt them, UCITA's progress can be assessed by a model of state competition. Most states will probably not adopt UCITA in the short term due to current perceptions of the proposal. Long-term success, however, will largely depend on how well businesses and consumers fare under the three different statutes. Using the concept of the "race-to-the-top," this part of the note explores the negative perceptions of UCITA held by dissenting states and concludes that until a positive perception of UCITA emerges, it will fail to be adopted by a majority of the states and become uniform law.

#### **A. The Double-Edged Sword of Federalism**

The success of any uniform law is easily measured by counting the number of uniform adoptions.<sup>69</sup> The ratification process, however, is slow and deliberative; it takes a long time for states to review a uniform law proposal, study its provisions, determine its likely effects, and

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<sup>67</sup> See Foster, *supra* note 28.

<sup>68</sup> See Michael Carlson, *Will E-sign boost e-commerce?*, 185 No. 17 NORTHWESTERN FINANCIAL REVIEW, Sept. 9, 2000, at 16.

move it through the state legislature. Any sort of interference or legislative obstacle could postpone the entire process until the following session or derail it indefinitely.<sup>70</sup>

The rate of speed at which a law moves through a state legislature directly relates to its perceived *need* by legislators. The less necessary a bill appears, the less likely it is to pass, or for that matter, even be considered. The success of a Uniform Law, however, does not depend completely on the perceived *need* for the legislation, but also on the perceived *success* in fulfilling a need in other states where that legislation has been enacted.<sup>71</sup>

A clear and identifiable competition exists among the states to enact laws that will best serve their constituents. Where another state passes a law which clearly benefits its constituents, rival states will also consider legislation to the same effect to bring some of those benefits over to its own citizens. In the same vein, if legislation in other states harms that state's citizens, rival states will avoid similar proposals, even where the need for such legislation is great.

State competition can take two primary routes. The ideal form of competition takes place where the interaction among the states fosters the adoption of the most efficient form of law for all sectors of society. In corporate law, this has been termed the "race-to-the-top,"<sup>72</sup> where "states compete to offer, and managers compete to use, beneficial sets of legal rules."<sup>73</sup>

Although this competition aims to ease corporate rules so as to attract corporations to the state,

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<sup>69</sup> For example, although the UCC was eventually adopted by all fifty states, this entire process took well over twenty years, not including the ten years prior required to draft it. See Lane H. Blumenfeld, *Russia's New Civil Code: The Legal Foundation For Russia's Emerging Market Economy*, 30 INT'L LAW. 477, 491 (1996).

<sup>70</sup> **Citation Needed**

<sup>71</sup> **Citation Needed**

<sup>72</sup> See Frank H. Easterbrook, *Managers' Discretion and Investors' Welfare: Theories and Evidence*, 9 Del. J. Corp. L. 540, 571 (1984) (describing the race-to-the-top); Daniel R. Fischel, *The "Race-to-the-bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 Nw. U. L. Rev. 913, 919 (1982) (attacking the thesis that state competition causes lax corporate standards, and arguing that interstate competition creates efficient markets); see also Peter Dodd & Richard Leftwich, *The Market for Corporate Charters: "Unhealthy Competition" Versus Federal Regulation*, 53 J. Bus. 259, 282 (1980) (arguing that federal regulation is unnecessary); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. Legal Stud. 251, 256-57 (1977) (questioning the conventional wisdom that federal regulation is needed to control corporate managers and to protect shareholders).



several authors have noted that such races-to-the-top produce laws that are genuinely beneficial for both shareholders and management alike.<sup>74</sup> Although this competition among states takes place primarily in the realm of corporate law, as Edward Janger points out, this theory can also be applied to other areas of state-led legislative efforts, such as the Uniform Law process.<sup>75</sup> UCITA is no exception to this rule.

The other route of state competition is aptly entitled the “race-to-the-bottom”<sup>76</sup> As Justice Brandeis pointed out in 1933, in a race-to-the-bottom, giving more power to corporations is not seen as desirable in and of itself, but rather a necessary evil to keep corporations from fleeing to less restrictive states. Brandeis stated “the race was one not of diligence but of laxity....the great industrial States yielded in order not to lose wholly the prospect of the revenue and the control incident to domestic incorporation.”<sup>77</sup> Therefore, under these circumstances, states enact more flexible corporate laws not only to attract more corporate capital but also to keep the corporate capital they already have. These races can cause dramatic reductions in consumer welfare both inside and outside the state.<sup>78</sup>

Although both races-to-the-bottom and races-to-the-top can result in substantial state ratification, as Janger points out, only a race-to-the-top will bring prospects of truly lasting and

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<sup>73</sup> See Easterbrook, *supra* note 72, at 571.

<sup>74</sup> See Fischel, *supra* note 72, at ; Dodd, *supra* note 72, at ; Winter, *supra* note 72, at **P?**; Analogizing the corporate system to a democratic government, legislators act like corporate directors and must report to their constituents just as much as directors must report to shareholders. At the same time, directors and legislators must attract capital to the state and the corporation respectively. Therefore, as in a corporation, there is a system of incentives and accountability requiring state legislators to pass laws which will benefit both consumers and producers alike. Corporations Textbook...get later.

<sup>75</sup> See Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569 (1998). Janger notes that this competition among states also takes place in environmental protection, occupational safety, child labor laws, welfare, and tort reform.<sup>75</sup> *See id.*

<sup>76</sup> This phrase was first coined by William L. Cary in 1974 in *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 665-66 (1974), although the concept may have been developed initially by Justice Brandeis as a "race to laxity:"

<sup>77</sup> *Liggett Co. v. Lee*, 288 U.S. 517, 557-60 (1933) (Brandeis, J., dissenting).

<sup>78</sup> Incidentally, where there are costs to consumers due to lax incorporation statutes, a state will surely have trouble enacting such legislation. However, where a state can put these costs off on consumers in other states, they will

uniform law for two reasons:<sup>79</sup> First, while a race-to-the-bottom will attract some states, others will view this process as a fruitless waste of time and refuse to compete. Without a certain percentage of state ratifications, the law cannot be considered uniform.

Second, even if all fifty states enact the law, the very nature of a race-to-the-bottom undermines its soundness. A law enacted via a race-to-the-bottom is, by definition, bad law based on inefficient policy favoring one group over another.<sup>80</sup> Therefore, its prospects of survival are low in the long run. Eventually, legislators favoring anti-consumer policy will be voted out of office and the law will probably be overturned in most, if not all of the states that enacted it. Therefore, clear and lasting uniform law can only be enacted via a race-to-the-top. UCITA must engage in such a race before it can become uniform law across the United States.

### **B. UCITA's Ever-Elusive "Race-to-the-Top"**

In order to be considered uniform law, UCITA must be adopted by a supermajority of the states. Although a few states might refuse to pass UCITA legislation indefinitely, so long as a substantial number of states enact it, UCITA will be considered a success.<sup>81</sup> However, as pointed out above, the engine of ratification is driven primarily by competition; for UCITA to become effective and lasting legislation among all fifty states, a race-to-the-top must take place. Unfortunately, this race has not yet taken place and might not surface for quite a while for several reasons.

#### ***1. Absence of Critical Mass***

A race-to-the-top must have a minimum number of participants. If other states fail to compete in the drafting process, there cannot be a race. Although it is unclear exactly how many

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most certainly choose to do so. This so-called interstate externality is a cause for concern. See Janger, *supra* note 61, at 569.

<sup>79</sup> See Janger, *supra* note 75, at 569.

<sup>80</sup> See Janger, *supra* note 75, at 569.

states must enact UCITA before a race-to-the-top can emerge, two states alone do not constitute this critical mass. Moreover, Maryland should not even be considered a true adoption since the legislature substantially amended the original text of UCITA before enacting the bill. Therefore, until more states enact pure, unadulterated versions of UCITA, the race-to-the-top cannot occur.

## *2. A Race of Laxity*

Even if a critical mass were achieved, a race-to-the-top may be near impossible at this point because many states – such as Iowa and Delaware – perceive the race to be, in the words of Justice Brandeis, one of laxity rather than diligence.<sup>82</sup> These states consider the efforts of legislators in Virginia and Maryland as appeasement of the technology industry at a substantial cost to consumer interests. Furthermore, the costs of such races-to-the-bottom potentially transcend state boundaries and are externalized to consumers in other states. This cost externalization is always a sign of a race-to-the-bottom.<sup>83</sup> Until these states perceive UCITA as an efficient and productive endeavor, they will not only effectively boycott the race but will continue to sabotage any success of the participants within their own borders.

The fears expressed by opposing states revolve primarily around the concept of “capture:” capture of the NCCUSL and capture of the state legislatures. First, these states probably suspect that the NCCUSL was captured by technology industries, which in turn influenced the drafting of key UCITA provisions.<sup>84</sup> The ALI’s abandonment of UCITA only further buttressed this argument. Some authors have gone so far as to allege that the commission has always drafted uniform laws blatantly favoring big business and UCITA is no exception to

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<sup>81</sup> For example, the UCC was considered a success even though Louisiana never fully ratified it.

<sup>82</sup> See *Liggett*, 288 U.S. at 557-60.

<sup>83</sup> See quote, *supra* above

<sup>84</sup> For example, the primary drafter of UCITA, Ray Nimmer, also serves as counsel to the Microsoft Corporation.

this rule.<sup>85</sup> Janger himself notes that “if competition will yield a race-to-the-bottom, the drafters, if they are to preserve uniformity, must scrape the bottom as well.”<sup>86</sup>

Objective evaluation of these accusations, however, reveals their improbability. The NCCUSL employs deliberative processes that involve representatives from all fifty states. Capture of such a large and diverse group would be extremely difficult and highly implausible. Moreover, the Commission’s primary concern is to secure passage of uniform legislation in as many states as possible.<sup>87</sup> To allow the interests of one group to trump the interests of another would seriously endanger this objective.

Second, these states fear that the state legislatures considering UCITA have also been captured by the tech industry lobby. Although much more probable than capture of the NCCUSL, even if it were true, the results would be largely inconsequential in the long run. As discussed above, while individual legislators can be captured, legislatures cannot. Should the laws in Virginia or Maryland prove highly anti-consumer and the drafters resistant to change, the consumers have the option of voting them out of office. New legislators would likely be elected on an anti-UCITA platform.<sup>88</sup>

### 3. *The “Wait-and-See” Attitude*

Although Iowa and Delaware have presented the states with a third option that others may not have considered, most states do not take such a hostile approach to UCITA. Rather, the majority of states actually favor proposals like UCITA, but want to assure their constituents that such provisions will not be as harmful as UCITA’s opponents allege. As a result, a race-to-the-top may not take place until the effects of UCITA are better understood. Most states prefer to

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<sup>85</sup> See Kathleen Patchel, *Interest Group Politics, Federalism and the Uniform Law Process: Some Lessons from the Uniform Commercial Code*, 78 Minn. L. Rev. 83 (1993).

<sup>86</sup> See Janger, *supra* note 75, at 569.

“wait and see” how UCITA will work in Maryland and Virginia before unleashing its provisions on their own citizens.<sup>89</sup> Only by testing the statutes empirically will the states be able to truly evaluate UCITA’s potential – for better or for worse.<sup>90</sup>

Should the states find the law to be successful in both attracting corporate business and placating consumer concerns, UCITA will probably be adopted by a majority of the states in short order. However, should they find Iowa’s concerns to be justified, even in small part, they may enact their own bomb-shelter statutes against the present draft of UCITA, turning the race-to-the-top on its head. Although such poison pills will not prevent all efforts to pass UCITA-like legislation, it would certainly doom the current draft of UCITA and force Maryland and Virginia to seriously rethink their “legislative achievements.”

### **C. Persistent Problems**

Even if a substantial portion of the states do imitate either the Virginia or the Maryland statutes, a few problems will remain unresolved by substantial state ratification of UCITA. First, the uniformity of UCITA will be in doubt following substantial amendment in all fifty state legislatures. Second, by the time UCITA is enacted, its provisions may already be out of date. These problems could pose significant hurdles to legislators genuinely interested in passing uniform law that will be effective for years to come throughout the fifty states.

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<sup>87</sup> See M. Michael Cramer, M. King Hill, Jr. and K. King Burnett; *Uniformity in State Laws*, X Maryland Bar Journal 48, 49 (2000).

<sup>88</sup> See Janger, *supra* note 75, at 569.

<sup>89</sup> As UCITA opponent Mary Alice Baish of the American Association of Libraries saw in a consistent pattern outside of Maryland: “These things get looked at, then legislators learn about the controversy and table it.” Washington, *supra* note 61, at 1C; *see also* Ed Foster, *supra* note 28 (“Nevertheless, at least this gives Virginia a year to realize it’s made a mistake. And since many other states were waiting to see what Virginia would do, many of them will now wait to see what, if any, changes the advisory committee makes to the draft. After all, as a uniform state law, UCITA is supposed to be adopted in the same form by all states, but uniformity may be very difficult to achieve.”)

<sup>90</sup> See Fischel, *supra* note 72, at 919.

### ***1. Uniform Laws that are Not Uniform***

Even if UCITA is widely adopted by the states, uniformity will be severely undermined. As Maryland's legislative process aptly demonstrates, each state that attempts to pass UCITA legislation will face numerous amendments to the original text.<sup>91</sup> These amendments will depend on the individual consumer interests and concerns of each state. This dissonance among the states could theoretically create countless versions of UCITA depending on both the number and character of amendments in each state. As a result of this harried and unpredictable drafting process, these divergent versions of state law could lead to more confusion than clarification.

### ***2. No Time Like the Present***

Considering that the UCC took twenty years to be ratified by most states,<sup>92</sup> it is not improbable that UCITA will be redrafted several times over the course of a decade before being adopted by a majority of state legislatures. If UCITA takes this long to become uniform law, its provisions could be largely irrelevant. Much of the language in UCITA deals with concepts such as self-help software, mass-market licenses in the form of shrink-wrap/click-wrap agreements, and other detailed technological concepts, all of which are intimately related to the current state of technology art. Therefore, by the time UCITA is enacted by a majority of state legislatures, its provisions may be seriously outdated due to the rapid pace of technological advancement.<sup>93</sup>

Furthermore, legislation on computer information transactions is badly needed today. Many of the states that vociferously opposed UCITA admit that there exists today a pernicious need for technology legislation to address the deficiencies in contract law related to computer information transactions.<sup>94</sup> Relying on current aspects of contract law to evaluate concepts that

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<sup>91</sup> See Washington, *supra* note 61, at 1C.

<sup>92</sup> See Blumenfeld, *supra* note 69, at 491.

<sup>93</sup> **Citation Needed**

<sup>94</sup> See Foster, *supra* note 28.

simply do not fit into traditional “goods and services” categories could do more harm to both consumers and the technology industry in the long run.

#### **IV. Conclusion**