



**RESPONSE TO  
2001 NCCUSL UCITA AMENDMENT PROPOSALS**

**May 2002**

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## **Introduction**

On December 20, 2001, the UCITA Standby Committee (the Committee) of the National Conference of Commissioners of Uniform State Laws (NCCUSL) recommended nineteen amendments to the Uniform Computer Information Transactions Act (UCITA). The Committee had drafted them in response to more than seventy proposed amendments presented by interested parties at a hearing it sponsored November 16-18, 2001.

Americans For Fair Electronic Commerce Transactions (AFFECT) is a broad-based national coalition of consumers, retail and manufacturing businesses, insurers, technology professionals and librarians opposed to UCITA. AFFECT members have been following UCITA for the past decade and the coalition has been involved in every state where UCITA has been legislatively active. AFFECT submitted a package of thirty amendments, reflecting the major concerns of its members, to the Committee prior to the November hearing.

This report offers AFFECT's responses to the Committee's nineteen recommendations. The headings are consistent with those used by the Committee. In the interest of space, AFFECT's comments are presented just with sub-headings referencing both the Committee's recommendations and the text of UCITA. In addition to the comments presented with each recommendation, there are two attachments that provide more technical analysis of the electronic-self help amendment (*Attachment 1*) and the library issues (*Attachment 2*).

This report is also available online at <http://www.affect@ucita.com/pdf/AFFECTresponse5-15-02.pdf>

NCCUSL's December 20, 2001 press statement, the text of the recommendations and associated comments can be found at [www.nccusl.org/nccusl/pressreleases/UCITA\\_releasedec20.asp](http://www.nccusl.org/nccusl/pressreleases/UCITA_releasedec20.asp).

## EXECUTIVE SUMMARY

### *Overview*

- AFFECT appreciates that the nineteen amendments proposed by the UCITA Standby Committee (the Committee) reflect its desire and efforts to improve UCITA. We are pleased to see that the Committee has addressed four minor points highlighted by AFFECT and has incorporated two small improvements recommended by AFFECT. However, we believe that the Committee's proposals, taken as a whole, are inadequate in addressing the more substantive concerns that AFFECT members and others have articulated for years.
- The Committee's proposed changes do not alter AFFECT's contention that UCITA is fundamentally flawed and needs to be redrafted. AFFECT continues to believe that UCITA proponents have failed to justify the need for such a sweeping and complex law that still clearly favors the software and information industries. Existing law has proven sufficient in addressing legal issues regarding computer information transactions. Based on a presumption that software and online transactions have special needs, UCITA goes beyond modernizing current law and fundamentally changes the balance between seller and buyer.

### *Consumer issues*

- Consumer advocates find that the proposed amendments do not seriously diminish the harm to consumers. Indeed, Recommendation 10 (Warranties for Free Software) actually increases the jeopardy to consumers.
- UCITA would still negate many of the currently enacted state consumer protection laws unless state legislatures were to specifically identify and list each consumer protection statute and indicate its applicability to computer information transactions. Consumers would be forced to seek amendment or reenactment of every consumer statute, an unduly burdensome responsibility.
- UCITA would still allow software vendors to make inconspicuous the fact that the seller is disclaiming implied warranties that the software will work right and that it will work with other software. Vendors would still be able to provide that the warranty does not apply after the consumer has purchased the product and started installation.
- The scope of UCITA remains unchanged. It would still allow makers of new smart "goods" that include software to be bought and sold under the greatly reduced consumer protections of UCITA rather than the regime of law for other goods that has been in place for forty years. AFFECT still believes UCITA poses a risk to consumers by potentially allowing products with safety-critical software to fall under the less rigorous consumer protection standards allowed under UCITA.

### ***Electronic self-help***

- The Committee has proposed a recommendation to prohibit electronic self-help that appears to offer relief regarding a controversial issue. However, the equivalent of electronic self-help is still permitted. A licensor is still permitted to contractually exclude or limit damages for an improper exercise of electronic self-help or implement automatic restraint to prevent use. (*Attachment 1*)

### ***Public Criticism***

- Although the Committee has included a recommendation that prevents terms in a license from prohibiting reviews or criticism of a product, the new language is so limiting as to make the benefits of the recommendation more illusory than real.

### ***Known Defects***

- The recommendation seems to merely restate the current law of fraud but additional Committee amendment language actually seriously weakens it.

### ***Contract Formation Rules***

- An amendment proposed in response to criticisms that UCITA allows vendors to withhold contract terms until after the consumer has paid for the product adds nothing meaningful to protect consumers. A second amendment merely inserts E-Sign and UETA requirements.

### ***Open source software***

- The open-source software community proposed changes that would have protected open source developers and users from UCITA. The amendments proposed by the Committee transform that proposal into an amendment that hobbles open source developers while creating advantages for large closed-source companies like Microsoft.

### ***Library issues***

- The Committee's recommendation provides only a narrow library exception that does not respond meaningfully to the library concerns. The Committee has still not responded adequately to library arguments that clear language is needed in the statute to avoid the potential collision between state contract law and federal copyright law.
- In lengthy comments regarding library issues, the Committee bases its statements on an egregious misrepresentation of the library arguments, attributing to libraries positions that they have not only never advocated but which are contrary to library practices and ethics. (*Attachment 2*)

### ***Licenses: Warranties***

- Although the Committee has incorporated two minor improvements proposed by AFFECT, the three recommendations relating to warranties are not substantial and do not alter consumer objections.

### ***Licenses: Default Rules***

- The Committee did not revise UCITA to include rules that are consistent with prevailing business practices as recommended in AFFECT proposals. Rather the Committee has addressed the issue by deleting the two default rules regarding duration of license and number of users.

### ***Reverse engineering***

- A Committee proposal to prohibit terms that prevent reverse engineering for the purpose of interoperability offers no more than existing law.

## **Background**

The November hearing was the seventeenth drafting meeting of the UCITA Standby Committee since 1996. The quantity and breadth of the more than seventy proposals discussed reflect the many unresolved controversies that the Committee has not responded to for a decade. An audience of over one hundred including individual interested parties, insurance and manufacturing concerns, software and technology professionals, academics, libraries, consumer organizations and lawyers representing software and access providers articulated both sides of the many debated issues.

While the hearing permitted a full airing of all parties' concerns, the resulting amendments proposed by the Committee fall short of what is necessary to resolve the many issues of controversy. Four relatively minor improvements submitted by AFFECT are included among the nineteen recommendations for adoption. Since the substantial equivalents of two of these amendments were already written into the Maryland and Virginia versions of UCITA in 2000 their inclusion in the Committee's recommendations does not represent progress beyond the currently enacted versions of UCITA.

The Committee's recommendations are subject to final approval by NCCUSL at its annual meeting in the summer of 2002. Any state considering UCITA prior to that time has the option of adopting them or not.

NOTE: The Committee scheduled its November 2001 hearing after the American Bar Association (ABA) Board of Governors' decided to appoint a UCITA "working group" to conduct a review of the act. This "working group" participated in the November hearing as observers. That group's report to the ABA Board of Governors, issued on January 30, 2002, made eighteen recommendations including one advising that UCITA be redrafted to correct its inherent complexity and ambiguity. That report also addressed proposals included in the UCITA drafting committee's package by providing criticisms and suggestions for their improvement. The ABA report is available at [www.abanet.org/ucita/report\\_on\\_ucita.pdf](http://www.abanet.org/ucita/report_on_ucita.pdf)

## **A. CONSUMER PROTECTION LAWS**

### ***Recommendation 1: Regarding consumer protection laws*** ***UCITA: Sec. 105 ( c ) ( d )***

State and federal consumer protection laws have traditionally applied to the sale or lease of "goods" and "services." UCITA defines a software or online transaction as a license that allows the licensee a right to use – but not to own – a copy of the software. By so doing, UCITA allows software to remain outside the scope of the consumer protection laws – creating a loophole for these transactions to escape existing state and federal consumer protections. While

Recommendation 1 involves a minor revision to UCITA, it does not alter the fundamental fact that software remains outside the scope of the consumer warranty laws.

A recommended legislative note instructing state legislatures to consider changing existing consumer laws is a woefully inadequate solution. The burden will be on consumer advocates in each state to seek amendment or reenactment of every consumer protection statute. Since the changes are not a part of the text of UCITA this would be an onerous undertaking.

AFFECT proposed an amendment that would assure that transactions for software and on-line services would continue to fall under existing state consumer protections. In order to ensure legal uniformity, the change should be part of the body of UCITA. Then, any required changes to the existing relevant state laws would be made if UCITA passes.

***Recommendation 2: Regarding Electronic Signatures and Global and National Commerce Act  
UCITA: Section 905***

The federal “E-Sign Act” was passed by Congress after UCITA was promulgated by NCCUSL. The federal act overrides state acts unless the state act has certain language. The Committee’s change contains language that “preempts” the override and includes the consumer protections that exist in the “E-Sign Act.”

***Recommendation 3: Judicial Forum  
UCITA: Section 110***

“Choice of forum” clauses stipulate where contract disputes will be adjudicated. UCITA allows the software vendor to choose a state that has no relation to the consumer or licensee of the contract unless the choice is “unreasonable and unjust.” In mass-market license agreements where the vendor unilaterally determines the terms of the license, choice of forum terms may be particularly unfair. The Committee’s proposal changes “unreasonable and unjust” to “unreasonable or unjust” and thus only slightly broadens the grounds for a court to strike down the objectionable choice of forum term.

AFFECT proposed an amendment that made the contractual stipulation of judicial forum unenforceable if the courts of the designated state would not otherwise legitimately have jurisdiction over the license in a consumer transaction. AFFECT believes this change offers a more reasonable result.

**B. ELECTRONIC SELF-HELP**

***Recommendation 4: Electronic self-help  
UCITA: Sections 815, 816, 605 (f)***

UCITA provides licensors of computer products broad powers of control over a licensee’s use of that product through “electronic self-help,” by allowing licensors (in other than mass-market licenses) to remotely disable computer information in cases where the licensor believes the licensee has breached the terms of the license--without first seeking judicial determination that a breach had indeed been committed. Electronic self-help has been extremely controversial not only because it allows a licensor to shut down a licensee’s mission critical system but also because the code inserted in the software to enable self-help poses a serious security threat to a

licensee's systems—even if self-help is not implemented. AFFECT has argued that its use should be prohibited.

The Committee proposes to amend UCITA to prohibit the use of electronic self-help “under this Act.” At first glance, this amendment appears to provide the relief that AFFECT and other groups had requested. However, the inclusion of the phrase “under this Act” leaves open the possibility that electronic self-help may still be allowed under the common law or other statutes, even though not allowed under UCITA.

In addition, the equivalent of electronic self-help would still be permitted under Section 605 of UCITA. This section allows “the use of an automatic restraint to prevent use” where the contract has terminated *or where the licensor believes it is preventing “a use inconsistent with the agreement.”* In addition, the recommendation permits the licensor to use electronic self-help, if it can be done “by taking possession of a tangible copy”, and to erase the copy electronically. Further, although the proposed amendments prohibit electronic self-help, they do not prohibit a licensor from relying on a contractual exclusion or limitation of damages to limit its liability for an improper exercise of electronic self-help. As a result, a licensor could ignore UCITA's prohibition of electronic self-help with little fear of the consequences. See *Attachment 1* for further analysis.

### **C. PUBLIC CRITICISM AND CONTRACT TERMS**

#### ***Recommendation 5: Public criticism and contract terms*** ***UCITA: new Section 105(d)***

Product reviews are essential for informed consumer purchasing in our free market economy and they contribute to the continual improvement of all products. In the intensely competitive technology market, vendors often rush “buggy” software to stake out market share.

UCITA permits a licensor to prohibit a newspaper or magazine writer from publishing a review of the software without the permission of the seller. Such a prohibition is not only a restriction on free speech but is also contrary to federal copyright law that allows the “fair use” of material for purposes of public criticism. Coupled with UCITA's provisions allowing licensors to sell defective software without informing licensees of the defects, UCITA encourages the software industry to continue to produce defective products. Recommendation 5 would amend UCITA to make terms in software and on-line licenses that prohibit reviews or criticism of a product unenforceable.

However, the recommendation is of no worth to the business user because it applies only to “end-user licensees” and only when a product [that] has been “offered in its final form to the general public including consumers.” This proposed amendment is a good example of “an apparent substantive change to UCITA that is, in fact, illusory.

### **D. KNOWN DEFECTS**

#### ***Recommendation 6: Known defects*** ***UCITA: Section 114***

As stated earlier, software publishers often release their products with known significant defects. UCITA clearly shields vendors by permitting them to disclaim warranties and limit remedies for

known defects while making it harder for a customer to establish that a product demonstration upon which the customer relied actually created an express warranty, and to recover a “minimum adequate remedy.”

AFFECT urged that UCITA be amended to require software publishers to reveal known software defects to the purchasing public. Instead of providing such meaningful requirements, Recommendation 6 merely purports to restate the current law-- that UCITA does not displace the laws of “fraud, including fraudulent inducement, misrepresentation, or unfair and deceptive practices.” However, the recommendation goes on to modify the law by adding, “as they may relate to intentional failure to disclose defects that are known to be material.” In so doing, the recommendation actually weakens the current law so that it will not apply to the *negligent* failure to disclose known defects. Finally, by imposing a “known to be material” standard, UCITA further limits the right of licensees to obtain relief.

## **E. CONTRACT FORMATION RULES**

### ***Recommendation 7: Later terms in standard form contracts*** ***UCITA: Add new Section 216***

The issue of post-payment disclosure of terms is one of the key reasons all of the national consumer organizations oppose UCITA. The Committee’s approach to dealing with this important issue is illustrative of its cold shoulder to complaints about the fundamental unfairness of UCITA. The implied warranty that the product will do what it is supposed to can be disclaimed after the consumer has purchased the product, taken it home, and begun loading it on his computer. UCITA still fails to simply require that vendors post their terms for review *prior* to purchase. Instead, it allows vendors to change terms *after* the initial assent.

In requiring vendors to disclose that there are additional terms inside, Recommendation 7 appears to add nothing to UCITA’s rules. Indeed, it serves to demonstrate UCITA’s bias in favor of software publishers.

UCITA’s proponents have touted its “right of return” as an example of its consumer-friendliness. Actually, this “benefit” was promoted by software vendors and has never been endorsed by consumer protection advocates because the “right” disappears after the consumer has clicked on the license box to load the software. It is only after the software is loaded that the consumer may find that the software does not work or has caused a virus to infect his computer. At that point, he may have no right to get his money back.

### ***Recommendation 8: Mass-market disclosure and retention of terms*** ***UCITA: Section 209(a)***

Consumer advocates have taken issue with UCITA’s failure to include the most basic consumer protections. AFFECT proposed changes that would clarify that no term can be enforceable unless the consumer can see and save it before the consumer pays for the software or online service.

In commenting on Recommendation 8, the Committee states that with respect to a mass-market license, the proposed amendment “requires that a record of the contract terms be printable, printed, or available to the licensee on seasonable request.” The Committee has simply inserted

into UCITA what is already required by both E-Sign and UETA. The Committee's recognition that it needs to "confirm" in this section that the licensee must have the opportunity to view the license terms as part of the opportunity to review" exemplifies the lack of clarity in UCITA on the most basic points of contract law.

## **F. OPEN SOURCE OR FREE SOFTWARE**

Open source software (often confusingly called "free" software) allows anyone to use, make copies of, modify and distribute copies of their software source code. In contrast with the closed source software where vendors guard their source codes, open source software operates on a different business model and has been trying to gain some recognition of those differences from the UCITA drafters for years. A fee is often charged for open source software so the open source community concerns are not satisfied by the proposed changes. The 2001 proposed changes to UCITA do not appear to adequately address the unique concerns of this sector and in fact, create a loophole that greatly benefits closed source vendors who could charge for other components of the bargain but make their software free of charge.

***Recommendation 9: new subsection (g): non-contractual permission notices  
UCITA: Section 105***

Recommendation 9 adds a new section that states that UCITA does not cover permissions that are not intended as contracts. This section has implications for the open source and free software community who do use permissions that are, in fact, contracts and provides absolutely no protection to that burgeoning sector of technology.

***Recommendation 10: warranties for free software  
UCITA: New Section 410***

By attempting to provide an important protection for free software, Recommendation 10 broadens it in a way that may provide a new benefits for vendors of closed source commercial software. The proposal eliminates implied warranties of merchantability and operability for software when there is "no contract fee for the right to use, make copies of, modify, or distribute" the software. All of these conditions are requirements for open source software. By inserting *or* rather than *and* in this list of conditions, the vendor needs to satisfy only one of these conditions in order to claim that the software has no implied warranties.

Under this new distinction, Internet Explorer is free software and has no implied warranties because there is (currently) no contract fee for the right to use the software if it comes with a computer. In order to qualify as "free software" under the proposed change, it is not necessary for the vendor to give the consumer the right to make copies, modify, reverse engineer, obtain source code or distribute it -- the customarily required options of open source software. If the vendor sells installation and support services and adds the software "for free", the vendor achieves free software status and no warranties apply. Thus, this amendment creates a significant loophole for traditional closed source software vendors to escape all warranty liability and does not satisfy the open source community that does sometimes charge for its software. Ultimately, Recommendation 10 leads to a result that is worse than doing nothing.

## **G. LIBRARIES**

Libraries have been most troubled by UCITA's threat to federal copyright doctrines that are cornerstones for the provisions of essential library services. Libraries have consistently argued that UCITA as currently drafted threatens to undermine the carefully wrought balances inherent in federal copyright law and therefore should be amended to specify that terms in "click-wrap" or non-negotiated licenses will be unenforceable if they contradict the doctrines of the federal law. Although NCCUSL insists that UCITA provides sufficient protections, libraries have found the statute's language regarding fundamental public policy preemptions ambiguous and therefore inadequate as a safe harbor provision.

### ***Recommendation 11: Transfer of computer software to libraries and public schools UCITA: Section 503(2)***

In the face of the deep and broad concerns that relate to core library operations, NCCUSL has offered just one narrow amendment that allows the transfer or donation of computer software—but only to a public library or public elementary or secondary school and only so long as the computer program is donated with the computer. Although this proposed amendment takes a small step in the right direction, it is still too limited in scope and should be more consistent with the copyright "first sale" doctrine that does not specify who the recipients of such gifts must be.

This single library amendment to Sec. 503 does not respond adequately to library arguments about the need for more clear language in the statute to avoid the potential collision between state contract law and federal copyright law.

The comments accompanying the recommendations attempt to justify the Committee's decision to ignore the libraries' proposals and are based on an egregious misrepresentation of the library arguments, attributing to libraries positions that they have not only never advocated but which are contrary to library practices and ethics. See *Attachment 2* for a detailed analysis of the libraries concerns.

NOTE: From the standpoint of business licensees, the proposed amendment would do nothing to prohibit the ability of a licensor to limit the transferability of each license and each software or information copy where a commercial user needs to make a transfer because of a corporate merger, reorganization, or sale of assets. This represents a change from normal expectations. Software developers and publishers should not be empowered to act as toll collectors on wholly unrelated business transactions that impose no additional burdens on them. Moreover, enforcing such transfer restrictions will significantly increase the transaction and due diligence costs associated with corporate reorganizations, mergers, and asset sales.

## **H. LICENSES: WARRANTIES**

### ***Recommendation 12: Express warranty by sample, model or demonstration UCITA: Section 402(a)***

UCITA does not require a seller to conform the product delivered to the sample, model or demonstration that the seller used to convince the buyer to purchase the product. The new language states that the goods must "conform" rather than "reasonably conform" to the sample, model or demonstration, a change consistent with an AFFECT proposal. This is only a small

improvement, however, because even as modified, UCITA still provides that “[a] display or description of a portion of the information to illustrate the aesthetics, appeal, suitability to taste, subjective quality, or the like of informational content” does not create a warranty. If the product differs from the sample model or demonstration in those aspects, the consumer should be able to return the altered product and get the purchase price refunded. Further, it is not a breach of contract if there are differences in the user interface and usability between the demonstrated model and the model shipped, even if these impede the consumer’s use of the product.

***Recommendation 13: Infringement and hold harmless duties***  
***UCITA: Section 401(d)***

Recommendation 13 incorporates one of the relatively minor improvements recommended by AFFECT in its package of amendment proposals. While this recommendation rectifies an imbalance in the current version of UCITA that specifies how a licensor can disclaim its implied warranty of non-infringement, it does not specify how a license can avoid a hold-harmless obligation that UCITA imposes on licensees who provide specifications that result in infringement.

***Recommendation 14: Scope of implied warranty***  
***UCITA: Section 403***

The issue of warranties regarding known defects has been a fundamental concern for licensees. AFFECT has maintained that computer information products, like other products, should be free of defects or program errors known to the licensors. If a licensor knows of a defect in its software, that licensor should be required at the very least, to fully disclose it. AFFECT proposed a change that would require the licensor to warrant that the program is free of defects or programming errors known to the licensor.

By limiting the scope of the implied warranties, Recommendation 14 works against the interests of licensees. The change limits who can be sued and adds some proof requirements to any lawsuit brought by a consumer for software or an online service that violates the implied warranty. Additionally, since sellers may disclaim implied warranties and need not disclose such disclaimer until after the consumer has paid for the software, taken it home and begun to install it, problems regarding defective products remain.

## **I. LICENSES: DEFAULT RULES**

***Recommendation 15: Duration of the license***  
***UCITA: Delete Section 308***

Under the current version of UCITA, when a license is silent, the duration of a software license is only for some “reasonable” time. A vendor may terminate a license, after the sale, by determining that a “reasonable” amount of time has passed. This rule runs contrary to current business practice and normal expectations under which most licenses are considered for a perpetual term unless otherwise expressly stated. An AFFECT proposal had recommended reversing this default rule to reflect current business practice.

UCITA proponents argue that UCC Article 2 and the common law make indefinite term contracts good for a reasonable time but subject to being terminated at will by either party. Large licensees

argue that there are long-standing expectations that, if a license term is not specifically limited and the term is not limited by other law, the licensee is free to use the software as long as it wants. Therefore, they argue that Section 308 should be amended to provide that outcome.

To avoid controversy, the Committee recommends that the duration default provided in Section 308 be deleted. This will simply create uncertainty and shift the burden to licensees to resolve the issue through litigation. Because the licensor controls the terms of its standard form agreement, the burden should be on the licensor to state a specific contract duration if it intends that duration to be a limited one.

***Recommendation 16: Number of users***  
***Delete Section 307(c)***

UCITA currently states that “an agreement that does not specify the number of permitted users permits a number of users which is reasonable in light of the informational rights involved and the commercial circumstances existing at the time of the agreement.” This default rule runs contrary to current business practice and normal expectations under which most business licenses are for an unlimited number of users unless otherwise expressly stated. An AFFECT proposal recommended reversing this default rule to reflect current business practice.

To avoid controversy, the Committee recommended deleting the default rule. This resolution is inadequate and ambiguous; it does not provide clarification for the construction of many outstanding agreements and places a significant risk and burden on licensees to clarify through litigation. Because the licensor controls the terms of its standard form agreement, the burden should be on the licensor to specify the number of permitted users if it intends that number to be a limited one.

***Recommendation 17: Automatic restraints***  
***UCITA: Section 605(c) and (d)***

AFFECT members have repeatedly criticized a portion of this section that would allow a licensor to shut down a licensee’s critical systems, potentially affecting its entire business operation and the rights of third parties, for reasons as vague as “a use inconsistent with the agreement”. AFFECT proposed changes that would prevent such a practice. (See *Attachment 1*) Recommendation 17 does nothing to address the issues raised by AFFECT.

***Recommendation 18***  
***UCITA: Section 613***

This amendment merely corrects a typographical error and has no policy impact.

## **J. REVERSE ENGINEERING**

***Recommendation 19: Terms on reverse engineering***  
***UCITA: Section 115***

Reverse engineering determines the process by which a product was developed or manufactured by starting with an existing product and working backward. Reverse engineering contributes to innovative product development, allows for systems’ interoperability and enables the detection of

security holes. UCITA allows vendors to include licensing terms that prohibit reverse engineering, a position criticized by software developers.

While Recommendation 19 allows reverse engineering for the purposes of interoperability it is no more than is already permitted under the Digital Millennium Copyright Act (DMCA) and is not responsive to many licensee's concerns.

## **K. SCOPE OF THE ACT**

The scope of UCITA has been the source of continuing controversy for a decade. Spirited debate occurred again at the recent hearings. The current package includes no recommendations to change UCITA's existing scope and the comments continue to defend the drafting committee's position. AFFECT still believes the scope of UCITA is far too broad, including as it does, embedded software. In addition, UCITA's "opt-in" provisions, allowing vendors to have UCITA apply to goods sold with software are overreaching and detrimental to consumers.

The AFFECT proposals would have provided that all software that operates features of a non-computer consumer electronic product, a home appliance, an automobile and other similar consumer goods would be excluded from UCITA. UCITA's distinction between embedded and non-embedded software is considered spurious by many technology professionals. AFFECT believes that there has been no serious discussion to address the potential consequences of applying UCITA to embedded software, or especially, to safety-critical software. AFFECT remains concerned that there will be unintended consequences, potentially harmful to consumer safety, if UCITA can be broadly applied.

## ATTACHMENT 1

### **Analysis of Recommended Amendments on Electronic Self-Help**

#### ***Overview:***

“Electronic self-help” in UCITA means the remote disabling of a licensee’s use of software or computer information. Controversy about this issue has persistently plagued UCITA. At first glance, the recommended amendments to electronic self-help appear to provide some degree of relief. Although the proposed amendments are an improvement over existing language, careful analysis reveals that in many cases the equivalent of electronic self-help would be permitted under other sections of the law. Further, although the proposed amendments prohibit electronic self-help, they do not prohibit a licensor from relying on a contractual exclusion or limitation of damages to limit its liability for an improper exercise of electronic self-help. As a result, a licensor could ignore UCITA’s prohibition of electronic self-help with little fear of the consequences.

#### ***Background:***

UCITA, which allows licensors to exercise electronic self-help in cases of a material breach after giving notice to the licensee, was amended in 2001 to ban the remedy in “mass-market” transactions. AFFECT and other opponents argued that electronic repossession should be banned in all transactions.

Opponents have argued that electronic repossession of software for any material breach is a broader right for the licensor than is generally recognized under the Uniform Commercial Code in other “repossession” statutes in which the repossession right arises only if there is a violation of a financial agreement for which the repossessed good is a security or in the cases of leases where there is danger that the leased good would be destroyed by the lessee without repossession. The opponents argued that UCITA should ban electronic repossession.

#### ***What the proposed amendment does:***

- Strikes the current section 816, which allowed for electronic repossession of software, and replaces it with a new section 816 that prohibits electronic repossession “under this Act”
- Provides that the prohibition on electronic self-help cannot be waived or varied by an agreement made before the breach
- Indicates that electronic self-help may still be allowed under the common law or under other statutes such as the Digital Millennium Copyright Act
- Allows expedited proceedings to determine whether software should be repossessed and authorizes attorney’s fees to the prevailing party, notwithstanding any term of a license to the contrary
- Provides that if the licensor takes physical possession of a copy, it may erase the copy

***What the proposed amendment does not do:***

- ***Does not address licensee security concerns***  
Under the proposal, a licensor may still include disabling code in software that can be used by hackers to disable the software; there is no requirement that the licensor affirmatively disclose that the software contains such code.
- ***No relief in denial of service cases***  
Under the proposal, UCITA still would allow denial of service in an access contract (such as AOL) for any breach of the agreement.
- ***No damages for wrongful use of electronic repossession***

While electronic repossession would be prohibited under the proposed amendment, there is no specific language that would impose damages for wrongful use of the remedy. Because UCITA allows for the contractual exclusion of damages, including consequential damages, there may be no remedy for the licensee in case of a wrongful electronic repossession – and correspondingly little incentive for licensors to comply with the self-help prohibition.

- ***Electronic “regulation of performance” is still allowed***
  - Section 605 allows a software vendor to disable licensed software without notice to the licensee whenever the licensee is using the software in a manner “inconsistent with the agreement”. Disablement without notice is also allowed under other circumstances if the vendor includes a provision in its license agreement authorizing such action.
  - A licensor is not liable for any loss to the licensee caused by the use of a restraint allowed under Section 605, provided that one of two alternate requirements is satisfied. Under this provision, a licensor can avoid all liability to the licensee simply by showing that the licensor’s action did not prevent the licensee from accessing the licensee’s own information by means other than use of the licensor’s software.
  - While disablement under Section 605 is allowed only to the extent necessary to prevent use that is contrary to the contract or applicable law, this can have the same effect as electronic self-help. For example, if the licensor believes use of the software by a certain subsidiary of the licensee is inconsistent with the agreement, the licensor can disable all copies of the software in that subsidiary’s possession, without notice. Likewise, if the licensee has removed the software from Machine A and installed it on Machine B, the licensor can disable the software on Machine B without notice if it believes that use on Machine B is inconsistent with the agreement.
  - While Section 605 provides that the section does not authorize use of a restraint to enforce remedies because of breach of contract or for cancellation for breach in order to exercise the equivalent of electronic self-help under Section 605, a licensor need only state that he is not canceling the contract and not alleging breach, but merely preventing a use “inconsistent with the agreement”. There is only one circumstance where a licensor may run into difficulty using this approach, and that is when the only ground available to the licensor for using the restraint would be under Section 605(b)(4) -- to prevent use “after the contract terminates, other than on expiration of a state duration or number of uses”. In

this case only, if a right to cancel for breach and a right to use a restraint under Section 605(b)(4) exist simultaneously, the licensor must treat it as a cancellation for breach and be bound by the prohibition of Section 816.

- The few minor changes made to Section 605 by the recommended amendments do not resolve any of the problems noted above.
- ***Electronic self-help may still be allowed under other law.***
  - A report by a committee of the Washington State Bar Association, commenting on the proposed prohibition of electronic self-help in UCITA, includes the following assertion: “UCITA cannot speak beyond its scope and thus only applies to electronic self-help ‘under’ UCITA. Electronic self-help under other Washington law, therefore, is not affected. The latest Washington law allowing electronic self-help is UCC Revised Article 9, which was recently adopted by the Washington State legislature without serious restriction on its self-help provisions, electronic or otherwise. Electronic self-help is also allowed under UCC Articles 2A and Article 2 (to sellers who retain title to goods), and Washington’s common law.” If the assertion is correct that electronic self-help is still allowed under the common law, even though prohibited “under” UCITA, then the NCCUSL committee’s proposed amendment to UCITA prohibiting electronic self-help is a meaningless gesture. If the Committee wants to actually ban the use of electronic self-help under state laws, it should delete the words, “under this Act.”

## ATTACHMENT 2

### Library response to NCCUSL amendment proposals January 2002

#### *Summary*

On December 20, 2001, the UCITA Standby Drafting Committee proposed 19 amendments to the Uniform Computer Information Transactions Act (UCITA) for approval by the National Conference of Commissioners of Uniform State Laws (NCCUSL) in 2002. The recommendations followed hearings in November 2001 when the committee heard arguments from all sides regarding over 70 submitted amendments.  
([www.nccusl.org/nccusl/pressreleases/ucitareleasesdec20.asp](http://www.nccusl.org/nccusl/pressreleases/ucitareleasesdec20.asp))

ALA, ARL and AALL proposed two amendments at those hearings. The library amendment language sought (1) to clarify that terms in mass-market non-negotiated licenses would not be enforceable if they prohibited activities normally permissible under federal copyright law; and (2) to broaden the criteria for declaring contract terms unenforceable.

The proposed NCCUSL amendments do not respond to the core library concerns; provide only a narrow library exception that allows the donation or transfer of computer software to a public library or public elementary or secondary school, but only when a computer is donated with the software; and do not respond adequately to library arguments about the need for more clear language in the statute to avoid the potential collision between state contract law and federal copyright law.

The drafters accompanied their recommendations with comments that attempt to justify their decision not to accept the amendments proposed by libraries. However, the drafters base their comments on an egregious misrepresentation of the library arguments, attributing to libraries positions that they have not only never advocated but which are contrary to library practices and ethics.

Finally, the drafters conclude by referring the libraries back to Congress to address their copyright concerns. Although libraries will continue to work with Congress regarding digital copyright issues, we also believe that it is appropriate to ask state legislators to exercise good public policy by preventing the far-reaching and damaging effects that UCITA would inflict on the institutions in their states.

#### *NCCUSL amendment hearings*

Following the announcement that the American Bar Association (ABA) had established a working group at the end of 2001 to evaluate UCITA, NCCUSL agreed to accept amendment proposals from any interested parties and to have public hearings November 16-18 in Washington D.C. Over 70 amendments were submitted and debated at length at these hearings in the presence of the ABA review panel. The AFFECT coalition (Americans for Fair Electronic Computer

Transactions), the national coalition opposed to UCITA, submitted 30 amendments from its members, including two from libraries.

On December 20, 2001, the NCCUSL UCITA Standby Drafting Committee issued a press release and a report recommending that 19 amendments be referred to NCCUSL for acceptance as amendments to the official version of UCITA. The amendments purport to “address the concerns expressed during the November meeting.” While the library amendment proposals were not accepted, NCCUSL did provide a lengthy discussion of the library arguments regarding UCITA. The NCCUSL discussion greatly misrepresents the positions that libraries have consistently offered over the last three years.

### ***Essential library concerns about UCITA***

Libraries have been most troubled by UCITA’s threat to federal copyright doctrines that are cornerstones for the provisions of essential library services. Libraries have consistently argued that UCITA as currently drafted threatens to undermine the carefully wrought balances inherent in federal copyright law and therefore should be amended to specify that terms in “click-wrap” or non-negotiated licenses will be unenforceable if they contradict the doctrines of the federal law. Although NCCUSL insists that UCITA provides sufficient protections, libraries have found the statute’s language regarding fundamental public policy preemptions ambiguous and therefore inadequate as a safe harbor provision. Here’s why.

### ***UCITA and a sample library case.***

UCITA’s Section 105(b) provides that “If a term of a contract violates a fundamental public policy, the court may refuse to enforce the contract, enforce the remainder of the contract without the impermissible term, or limit the application of the impermissible term so as to avoid a result contrary to public policy, in each case to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of the term.” But how would this work in practice?

Let’s consider the case where a court is hearing a contract dispute governed by UCITA. A vendor alleges that a library has violated a contract or license term that prohibits some activity such as copying a page of a digital article or lending a digital journal to another branch of the library. The library might argue that such a term, hidden away in a click-wrap license, prohibits what the library otherwise would be able to do under federal copyright law and therefore should not be valid, even if the other terms of the contract or license agreement are enforceable. In order to consider such a defense to a breach of contract case under UCITA, the court first must determine that copyright is a fundamental public policy. UCITA itself does not specify which public policies are relevant to this judicial inquiry. Only the “official comments” to the law -- not legally binding in themselves -- note that fair use (part of copyright law) is likely to be one of the fundamental public policies of interest to the courts.

But that’s not the end of the matter in our hypothetical court case. Section 105(b) states that the courts can refuse to enforce the term “in each case to the extent that interest in enforcement is clearly outweighed by a public policy against enforcement of the term.” Plain language: The right of parties to enter into a contract – and the importance of upholding (enforcing) the terms of a contract that the parties have agreed to -- is in itself a fundamental public policy. Section 105(b) of UCITA therefore directs the court to engage in a balancing test to determine whether the public policy of enforcing contracts is outweighed by another public policy.

Moreover, the official comments to section 105 advise that the court would have to be sure that whatever public policy is at issue in the contract dispute supersedes the public policy regarding contracting, which is that contract terms should be enforced unless the offended public policy can be clearly delineated. “A term or contract that results from an agreement between commercial parties should be presumed to be valid and a heavy burden of proof should be imposed on the party seeking to escape the terms of the agreement under subsection (b).” Consequently, the courts may or may not decide that its interest in enforcing the licensing provision outweighs a public policy that prohibits the offending license term. The language in Section 105 ultimately provides insufficient direction to the court and the two-step balancing process provides no safety net for libraries. The language must be more specific if it is to be effective as a safe harbor provision.

***NCCUSL offers one amendment specific to libraries.***

In the face of these deep and broad concerns that affect core library operations, NCCUSL has offered only a narrow amendment that allows the transfer or donation of computer software only to a public library or public elementary or secondary school and only so long as the computer program is donated with the computer. Although this proposed amendment takes a small step in the right direction, this recommendation is still too limited in scope and should be more consistent with the copyright “first sale” doctrine that does not specify who the recipients of such gifts must be.

***NCCUSL tries to discredit library arguments by misrepresenting them.***

The NCCUSL drafting committee has not only refused to respond meaningfully to the core library concerns that have been repeatedly voiced over the past three years but has dismissed those arguments by egregiously misrepresenting the library position as the basis for its repudiation of those proposals.

The drafters allege that libraries believe “that they should not be subject to contract terms with copyright owners” and that they seek to be “protected from their own agreements.” This is patently absurd. Libraries negotiate contracts for billions of dollars of computer information products annually, including millions of dollars for mass-market products, and appreciate the benefits of doing business in this way.

Our oft-repeated concern with UCITA is that it makes all the terms in *non-negotiated* contracts – such as those entered into through online click-on agreements – as equally enforceable as those terms in *negotiated* contracts. In negotiating contracts, libraries can agree to forego certain activities, such as allowing an unlimited number of patrons to have access to an electronic journal in exchange for a lower subscription price. (Or they can agree to pay a higher price for a digital journal in order to ensure unlimited access by the library patrons.)

In shrink-wrap and click-on licenses, however, there is no meeting of the minds: the user “agrees” to all of the terms set by the software publisher by opening a package or clicking OK. These terms designed for mass-market users can effectively prohibit library activities --like inter-library loan or archiving and preservation-- that are normally permitted under existing federal copyright law in the absence of any contractual arrangement to the contrary. Libraries are simply asking for UCITA to more clearly state that terms in non-negotiated contracts cannot prohibit activities that are otherwise allowed under the provisions of the copyright law.

Libraries are staunch upholders of copyright law. It is absolutely untrue that we expect any law to “bar parties from contracting about copyrightable works” or to “*solve* the library problems” in the

Digital Age. The Digital Age poses great challenges and opportunities for everyone. Libraries have risen to this challenge by expanding the scope of their professional training programs, creating virtual libraries, wiring public libraries for Internet access, and contracting for online products and services. Unfortunately, UCITA is one of the library community's problems in the Digital Age. Thus, the amendment proposals submitted to NCCUSL by the libraries attempted to clarify the legal framework that should also govern the new licensing regimes that UCITA fosters. This legal framework-- 200 years of copyright law--has proven to be up to the task of guiding intellectual property through the new Digital Age. UCITA would undermine this framework.

### ***The Virginia Library Amendment***

NCCUSL correctly notes that a compromise library amendment adopted in Virginia was not supported as a national model. The Virginia amendment, adopted in 2001 after UCITA had already been passed as Virginia law, is extremely narrow in scope and applies only to tangible copies obtained by libraries. It applies only to a small and diminishing fraction of most libraries' collections. Although NCCUSL has attempted to tout this amendment as responding to library concerns, it was not widely supported even by the Virginia library community and has received no support from the national library associations.

### ***NCCUSL sidesteps the issue by referring libraries back to Congress.***

NCCUSL dismisses the library arguments by claiming that libraries are trying to "get" benefits inappropriately from UCITA and that those concerns about copyright are best addressed at the federal level. After throwing the ball back in Congress' court, NCCUSL nevertheless attempts to bolster its position by referring to reports and rulemaking proceedings by the U.S. Copyright Office in which that office purported to reject "proposed exemptions or changes in copyright law restricting the effect of contractual restrictions on use of copyrighted works as they relate to libraries." Those proceedings dealt primarily with other copyright issues. Moreover, NCCUSL fails to make clear that although the Copyright Office determined that it was premature to recommend a legislative "fix," that office expressly has recognized that the issues libraries raise regarding licenses and contracts, particularly non-negotiated licenses, are complex and legitimate. For example, in its most recent report in August 2001 on the first sale doctrine, the Copyright Office repeatedly noted that the issue of contract preemption was outside the scope of its study (a point omitted from the quotation offered by NCCUSL). However, the Office went on to recognize the possibility that statutory change by Congress could be necessary if consumer privileges are effectively redefined through the use of non-negotiated contract terms, enforceable under state contract law and not adequately constrained by market forces (*DMCA Section 104 Report*, p. 103-04):

On the one hand, copyright law has long coexisted with contract law. On the other hand, the movement at the state level toward resolving questions as to the enforceability of non-negotiated contracts coupled with legally-protected technological measures that give right holders the technological capability of imposing contractual provisions unilaterally, increases the possibility that right holders, rather than Congress, will determine the landscape of consumer privileges in the future. Although market forces may well prevent right holders from unreasonably limiting consumer privileges, it is possible that at some point in the future a case could be made for statutory change.

Some legal practitioners and law professors who work in this complex area where intellectual property and contract law intersect believe that when this issue eventually reaches the U.S.

Supreme Court, the Court will conclude that federal law does indeed preempt shrink-wrap or click-on terms that interfere with fair use or override other statutory limitations on copyright protection. In the meantime, however, the traditional use practices of consumers, universities and libraries are at risk. The libraries' keen interest in UCITA has always been based on their awareness that UCITA will enable software licensors to effectively undercut the doctrines of federal law, a practice that libraries find contrary to public policy. It is entirely reasonable to request those responsible for drafting state laws to ensure that state contract law complements federal copyright, rather than displaces it.