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November 13, 2001

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Carlyle C. Ring
Ober, Kaler, Grimes & Shriver
1401 H Street, NW, Suite 500
Washington, DC 20005

Re: The Uniform Computer Information Transactions Act (UCILA)

Dear Mr. Ring:

In July, 1999, the Attorneys General of more than twenty states expressed their strong opposition to the Uniform Computer Information Transactions Act (UCITA) and requested that NCCUSL table the project. In light of the fact that many aspects of the proposed law had already been the subject of analysis and criticism by a wide variety of groups and individuals, the Attorneys General chose at that time to focus on UCITA's direct impact on state consumer law. More specifically, the letter pointed out that provisions in UCITA regarding disclosure requirements, contract formation and manifestation of assent, and modification of terms would displace existing consumer law, substituting provisions that would afford substantially less protection to consumers.

To date, UCITA has been enacted in only two states, Maryland and Virginia, and continues to be the subject of controversy, with many individuals and organizations still strongly opposed to its enactment.

We continue to oppose UCITA for the reasons described in our July, 1999 letter; namely, that it would displace important provisions of existing consumer law and is therefore contrary to the best interests of consumers. We also believe, however, that UCITA is fundamentally flawed in its scope and approach, and that the need for such sweeping changes to the law governing numerous consumer and business transactions has not been demonstrated. We are writing to reiterate our continuing opposition to UCITA and to describe more fully the basis for that

opposition. Given that a NCCUSL drafting committee will soon be reexamining UCITA in light of concerns raised by members of the American Bar Association and by others, we thought it important to reemphasize our concerns at this time.

UCITA Is Overbroad

The scope and applicability of UCITA, as well as its general approach to regulating "computer information transactions," would have potentially devastating effects on consumers. UCITA does not simply regulate software transactions; it also applies to goods with embedded software and to consumers' contracts with Internet service providers (ISPs). It does so by defining "computer" and "computer information" very broadly; the latter is defined to include any information "which is in a form capable of being processed by a computer."

In addition to UCITA's broad applicability based on these definitions, the proposed Act specifically allows transactions which would not otherwise come under UCITA to be brought within its purview. Section 104 allows such an opt in for "mixed transactions," where a "material part" of the transaction consists of computer information or informational rights in computer information that are within the scope of UCITA. The Comments, however, make it likely that this materiality requirement would not often be an impediment to such an opt in, since the materiality requirement is to be liberally construed. So long as the computer information has "some significance" to the transaction and is not "a trivial or otherwise insignificant aspect," the Section 104 opt in is available. Using form contracts that "opt in" to UCITA, sellers of a vast range of consumer goods, such as televisions, cameras, VCRs, and other ordinary household products, would thus be able to bring sales of these products under UCITA, thereby exempting such sales from the UCC and other laws.

Even where a seller in a mixed transaction does not include a provision in the contract that UCITA will apply, the law governing the sale of goods will apply only to part of the transaction. UCITA would still apply to the computer programs embedded in many ordinary consumer goods, so long as use of the computer program and its capabilities are "important to the purpose in obtaining the goods."² Given the increasing number of consumer goods whose operation is dependent on such embedded software, many simple consumer purchases would therefore be subject to two different bodies of law with respect to such important issues as contract formation, warranties, and remedies.

UCITA Transforms Sales of Goods into Licensing Transactions

Consumers who buy mass-marketed software or make purchases of goods that could be characterized as "mixed transactions" and thus brought within the scope of UCITA believe they are simply buying a product. Consistent with these expectations, precedent in most states holds that mass-marketed software transactions constitute sales of goods, rather than mere licenses, and that such transactions are therefore covered by the UCC and other laws.³ UCITA, however, would transform such purchases into licensing transactions.

This change is more than semantic. Because agreements to "license" rather than "sell" an item are generally not covered by the UCC, and some jurisdictions afford the end user only those rights expressly granted by the license (a principle UCITA specifically acknowledges), consumers under UCITA lose many rights that generally accompany the sales of goods.

Page 2 Consumers thus could be placed at the mercy of whatever oppressive or surprising provisions sellers choose to insert into their contracts. Such provisions would more likely be upheld under UCITA than under present law because, while UCITA recognizes that unconscionable contracts are unenforceable, its standard of unconscionability is generally more difficult for consumers to meet than the unconscionability standard applied to most contracts.⁴

UCITA's transformation of many consumer purchases into licensing transactions thus raises at least two very significant concerns: first, that laws relating to the purchase or sale of goods and services may not be applicable to transactions that, by UCITA's definition, are "licenses"; and second, that the sort of use restrictions sellers place on licenses will further harm consumers.

Laws Governing Goods

Since UCITA would identify the transactions it covers as "licenses" of "information" rather than "sales of goods," it would remove a vast range of transactions from laws that specifically apply to the sale of goods. In addition to the UCC, UCITA could effect an end-run around such federal statutes as the Robinson-Patman Act (prohibiting price discrimination), which arguably does not apply to mere "licensing agreements,"⁵ and the Magnuson-Moss Act (setting standards for consumer warranties), which applies to any "buyer ... of any consumer product.,"⁶

Likewise, arguments are sure to be made that state consumer protection laws do not extend to "licenses" of "information." Thus, by designating a wide range of consumer transactions as the licensing of "information," rather than the purchase of "goods," UCITA could provide the basis for sellers to argue that state consumer protection laws are inapplicable in the first instance. While we believe any such argument should ultimately fail, it will still generate litigation, create uncertainty and increase the likelihood that consumers will not receive all the protections of existing consumer law in transactions that are subject to UCITA.

Restrictions on Consumer Rights

The rights of the parties in a licensing transaction are different from those involved in a sale of goods. For example, as the NCCUSL Summary notes, one difference between a licensing contract and sales contract "is that the license generally contains restrictions on use and transfer of the computer information by the licensee." The Comment makes clear just how significant such restrictions can be: "A license for use in Peoria implies the lack of a right to do so in Detroit, . . ." (Comment 3, See. 3 07.) Consumers would no doubt be quite startled to learn that consumer goods such as those sold subject to a form contract that opts in to UCITA are not theirs to use where and how they wish.⁷

Possible restrictions on consumer rights are not limited to use limitations. Some jurisdictions hold that the customary rule interpreting a contract against the drafter does not apply in the case of a license. In addition, licenses are assumed to prohibit any use not authorized.⁸

Page 3 Such restrictions led library organizations to characterize UCITA's primary purpose as a shift in the "balance of power in mass-market transactions involving information products" that strengthens "the ability of vendors to dictate terms in standard form contracts that are difficult " for consumers to negotiate."⁹ Existing general consumer protection laws provide some defense against onerous and unfair terms being imposed on consumers by sellers through exercise of their market power and the use of complex contracts that are incomprehensible to an ordinary consumer. UCITA jeopardizes that protection by displacing consumer laws in transactions that are subject to UCITA; and it compounds the effect by allowing a wide range of ordinary purchases to be treated as licensing transactions.

UCITA's Specific Provisions May Displace More General Consumer Protection Laws

As noted above, UCITA's transformation of a wide range of consumer purchases into licensing transactions may result in those consumer protection laws which, on their face, apply to the sale of goods being deemed inapplicable. UCITA's specific provisions might also be held to supersede more general consumer protection laws. It is a basic tenet of statutory construction that a specific statute takes precedence over a general one. Because most state consumer protection laws are statutes of general application that prohibit unfair or deceptive practices, it will be argued that the more specific provisions of UCITA apply to the vast array of consumer transactions that could be brought within its scope. For example, state consumer protection laws often do not include definitions of important terms or specific standards. UCITA, by contrast, sets forth many definitions of terms and delineates clear standards and procedures. A seller who follows such standards and procedures (sometimes referred to as "safe harbors") will argue that its practices are presumed to be in compliance with the law. This is yet another example of how UCITA will create confusion, increase the likelihood that only those consumers who can afford to litigate to assert their rights will be protected, and further burden the limited resources of those law enforcement agencies charged with protecting consumers.

If the specific standards of UCITA are held to take precedence over more general consumer protection law, some significant and long-standing consumer rights would be severely compromised. Some of these are described below.

Manifestation of Assent and Disclosure of Terms

Under UCITA a person "manifests assent" to a term if after having an "opportunity to review" the term, s/he engages in conduct with reason to know the other party may infer assent from that conduct. (Section 112(a)(2).) However, such an "opportunity to review" requires only that the term be available "in a manner that ought to call it to the attention of a reasonable person." (Comment 2, Section 112.) Furthermore, such terms are binding even if they are not available for review until after a person pays or becomes obligated to pay, so long as the person has a right of return. (Section 112(e)(3).)¹⁰ It is very unlikely that consumers will read through lengthy disclosures (particularly those made on a computer screen that requires pages of scrolling) and then, when dissatisfied with the terms, return the product. Such provisions seem likely to punish businesses that attempt to make full initial disclosure, placing them at a competitive disadvantage to less forthright businesses that obscure important terms.

Page 4 These provisions also depart from an important principle of consumer protection law: that material terms must be disclosed prior to consummation of the transaction. In the states, this principle is enforced through each state's Unfair and Deceptive Practices Act. UCITA would permit the post-sale disclosure of material terms and conditions, including warranty terms, when a consumer purchases software at a retail location ("shrinkwrap") or online ("clickwrap"), or signs up for Internet service online. (Section II 2(e)(3).) For example, UCITA allows licensors of software to disclose the terms of the contract after the consumer has paid for the software, taken it home, and loaded it on a computer. Only then can the consumer finally review the terms. UCITA thus weakens consumer rights and results in purchases for which consumers have had no real opportunity to bargain or to compare terms. Consumers who wish to make informed choices in the marketplace will be unable to do so. 11

We do not believe the need for such a drastic change in the way transactions are conducted has been demonstrated, particularly in light of the fact that sellers have for years found the means of making required disclosures prior to sale. For example, the federal Magnuson-Moss Warranty Act (15 U.S.C. 2301 et seq.) requires that the terms of warranties be available prior to sale so consumers have knowledge of the terms and can compare the warranties of different sellers. UCITA, however, would permit post-sale disclosure of warranty terms of software based on proponents' claim that it is too difficult to disclose the terms of the warranty on the box or by some other means. The Magnuson-Moss Act has addressed this problem for goods by having warranty terms available at the service counter, referring in catalogs to a location for the warranty terms, or posting the warranty terms online. It is difficult to understand why software sales could not be handled in the same way.

Modification of Terms

UCITA appears to permit virtually unilateral modification of terms by allowing contract terms to be modified merely by posting the changes. Section 304 provides that terms of an agreement involving successive performances (e.g., an ongoing contract) may be changed by reasonably notifying the other party of the change and permitting that party to terminate if the change is unacceptable. Since the parties may determine the standards for "reasonable notice," a form contract could specify any method so long as it is not "manifestly unreasonable in light of the commercial circumstances." (Section 304(c).) Merely making the notice available at a location such as a Web site designated in the contract would appear to be adequate.

UCITA's extremely permissive standard for modification avoids the essential inquiries that courts in virtually all states customarily engage in when evaluating notice of modification, such as whether (1) the notice in question was reasonably calculated to actually inform the consumer of the change in terms, 12 (2) the consumer had an effective right to reject the change by canceling the contract prior to its effective date, 1 3 and (3) prior custom suggested that consumers knew how to object to modifications. 14

Unfettered Choice of Law

UCC Section I- 1 05 requires that an enforceable choice of law provision bear a

Page 5 "reasonable relationship" to the transaction. Section 187(2)(a) of the Second Restatement of Conflict of Laws similarly provides that the law of the state chosen by the parties will not be applied where "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice . . ." State consumer protection laws have generally been interpreted to impose at least these minimum standards with respect to the choice of law governing consumer transactions.

UCITA, however, expressly rejects the UCC's reasonable relationship requirement as "inappropriate" in a "global information economy," and especially "in cyberspace where physical locations are often irrelevant or not knowable." Under UCITA's rationale, "parties may appropriately wish to select a neutral forum because neither is familiar with the law of the other's jurisdiction, so that the applicable law "may have no relationship at all to the transaction."

This rationale, however, ignores the fact that UCITA may be applied not only to mass-market software purchases and ISP contracts, but also to the wide array of consumer products that are mixed transactions for which the seller may specify, in its standard form contract, that UCITA shall apply. There is simply no reason why consumers purchasing personal or household goods should not be protected by the laws of their state, as is generally the case under existing law. Furthermore, parties remain free to contract for certain arrangements consistent with consumer protection laws even without UCITA.

The rationale seems strained even for those transactions in cyberspace cited in the Comments since it is misleading to say the location of persons and business entities contracting on the Internet is "not knowable." Finally, this rule would permit contract drafters to survey the entire landscape of law in the United States and select the favorable law of a state having nothing to do with any party or the transaction at hand, potentially placing consumers of all states, through the use of form contracts, at the mercy of a single legislature that restricts consumers' rights. Such a rule not only negates long-standing laws regarding consumer protection but also offends well-established principles of federalism.

Unconscionability

UCITA provides that if a term of a contract violates a "fundamental" public policy, the court may refuse to enforce the contract to the extent that the interest in enforcement is "clearly outweighed" by public policy. (Section 105(b).) Because of the requirement that a fundamental public policy be at stake and that the public policy interest clearly outweigh the interest in enforcement, it would be more difficult under UCITA to demonstrate that a contract should not be enforced. States' existing standards of unconscionability generally impose a lesser burden on the party asserting that a contract is unconscionable.

Disclaimer of Implied Warranties

UCITA makes it easier for manufacturers to disclaim implied product warranties by permitting them to present these disclaimers in ways that might not be obvious to consumers. It does this by adopting a relatively broad definition of when such disclaimers are "conspicuous," particularly when such disclaimers are made on the Internet.

Page 6 Specifically, Section 102(14)(A)(iii), which pertains to Web sites and e-mails, states that a disclaimer of such warranties is sufficiently "conspicuous" if it is "prominently referenced in an electronic record or display which is readily accessible or reviewable from the record or display." This emphasis on whether a term is "accessible or reviewable" would permit Web sites to hide disclaimers within lengthy text and behind hyperlinks. For example, a warranty disclaimer might fit within the definition of "reviewable" even if placed on the 499th line of a 500-line screen.

This permissive standard of disclaimer departs from the traditional analysis applied under most states' general consumer protection laws that would require a disclaimer to be more than merely "accessible or reviewable" by consumers. Permitting manufacturers and software developers to easily, and less visibly, disclaim warranties in this manner is particularly troublesome since it removes an important incentive to ensure the safety and reliability of the software sold or embedded in products ranging from automobiles to medical equipment.

Narrower Express Warranties

UCITA not only permits easier disclaimer of implied warranties, but also narrows what may be considered express warranties. Under UCC section 2-313(1)(c), an express warranty, such as a statement that a-product will operate in a certain manner, can be formed by a description, model, or sample of a product. Thus, consumers may expressly rely on the fact that a product will do what the manufacturer, whether through demonstrations, illustrations, or advertisements, indicates it will do.

Under Section 402(b)(2), however, a display or description of a portion of information does *not* create an express warranty if the purpose is "to illustrate the aesthetics, market appeal, or the like, of informational content" - a potentially broad exclusion. This would diminish protections against false advertising and deception, in that manufacturers of software and products containing software could, under UCITA, freely show or describe their products as being fit for certain uses, or having certain characteristics (such as speed, operability, durability, and flexibility), yet evade the presumption that such promises constitute a legally enforceable warranty.

The Need for UCITA Is Questionable

Laws, such as UCITA, that are very complex and extremely broad in scope are likely to have unintended or unforeseen consequences, particularly from the consumer's perspective. Thus, we believe that promulgation of a law as sweeping as UCITA requires a strong demonstration of the pressing need for change, and a thorough analysis of whether the law proposed addresses that need.

The principal impetus for UCITA appears to be the purported need for new laws to protect vendors of computer information. Proponents of UCITA claim that differences between computer information and ordinary goods justify the changes embodied in UCITA. In particular, the Summary provided by NCCUSL asserts that "computer information is peculiarly vulnerable to dissipation of its value by copying" and states that UCITA was intended to give such vendors

Carlyle C. Ring, Jr.
National Conference of Commissioners on Uniform State Laws
November 13, 2001

Page 7 the ability to control copying and dissemination of computer information. 15

We have seen no evidence that most or all of UCITA's concerns cannot be addressed through existing laws. For example, the need to prevent the misleading use of comparative information by competitors might be met by libel, false advertising (under state law and the Lanham Act), and other product disparagement laws which already protect companies from such harm. UCITA provisions purportedly drafted to protect rights under copyright law, such as Sections 815 and 816, either supplement or are coterminous with already existing copyright law. If they supplement them, they are arguably preempted by federal copyright law, and thus unenforceable. If they simply parallel rights under copyright law, then they are superfluous. In either case, they are likely to lead to unnecessary litigation and confusion.

Conclusion

Proponents of UCITA justify its sweeping changes as necessary to address differences between ordinary goods and software, goods with embedded software, and access contracts that would be governed by UCITA. Even assuming that different treatment under the law is appropriate, we believe that a more prudent course would be to amend statutes, if any, that present difficulties as applied to such software products. Instead of doing this, UCITA not only enacts a whole new set of standards, it expands the applicability of those standards far beyond software. UCITA's broad definitions and opt-in provision will result in it being applied to transactions in goods that would not, to any ordinary observer, appear to involve "computer information."

At the very least, UCITA is likely to "create great uncertainty and resulting cost. Consumers would pay this cost in at least two ways - in the price of products and in the price of obtaining legal services to resolve disputes."¹⁶ This cost does not seem justified, particularly in light of the fact that UCITA appears to go much farther than necessary to meet legitimate needs of the information age.

We fully respect the intentions of those who have called for the formation of a committee to draft amendments and of those who will soon participate in that meeting. However, in our view, UCITA is so flawed that any amendments which could reasonably be expected to result from this process would not significantly ameliorate UCITA's negative impact on consumers, or on the marketplace in general. Thank you for your consideration of our views.

Sincerely,

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Attorney General of Arkansas

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1 Comment 2 to Section 104.

2 Comment 4.b.(3) to Section 103.

3 See, e.g., *Berthold Types, Ltd. v. Adobe Systems, Inc.*, 101 F.Supp.2d697,698 (N.D. 111. 2000) (license not covered by UCC). UCITA would change this, by adopting the premise that purchasers of software or other computer information goods only *license*, but do not own, their software. See UCITA section 102 (definitions of "goods," "license," and "licensee."); see also comments to section 103(2).

4 UCITA provides that if a term of a contract violates a "fundamental" public policy, the court may refuse to enforce the contract to the extent that the interest in enforcement is "clearly outweighed" by public policy. (Sec. 105(b).) These standards impose a significantly greater burden on a party asserting that a contract should not be enforced than do existing standards in most states.

5 See *KMG Kanal-Muller-Gruppe Intl v. Inliner U.S.A., Inc.*, 1999 U.S. Dist. LEXIS 13895 at * 10 (S.D. Tex. May 1'), 1999); *Record Club of America, Inc. v. Columbia Broadcasting System, Inc.*, 3 1 0 F. Supp. 1241 (E.D. Pa. 1970).

6 See 15 U.S.C. section 2301(3).

7 Although it is unlikely that companies would bring actions against consumers for any such violations, the fact that an inappropriate law may not generally be enforced is a poor defense for that law. We also note that the problem of software piracy, which UCITA proponents have cited as creating a need for the new law, might better be addressed through technological solutions, continued development of existing law or, if new law is found to be necessary, through a narrower and more targeted change in the law than that proposed by UCITA.

8 See, e.g., *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1088 (9th Cir. 1989).

9 July 1999 statement opposing UCITA from the American Library Association and other library organizations, available at www.ari.org.

10 If the term is a modification of a contract, the person does not even have a right of return. (Section I 12(e)(3)(A).)

11 The relatively small number of cases that have decided the issue of whether contract terms are enforceable when disclosed to purchasers only after payment show mixed results and do not squarely address the question of the application of states' unfair practices acts to post-sale disclosures. (For example, *Klocek v. Gateway 2000, Inc.*, 104 F. Supp.2d 1332 (D. Kan. 2000) and *Step-Saver Data Systems v. Wyse Technology*, 939 F.2d 91 (3d Cir. 199 1) held terms disclosed post-sale were not enforceable; while *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) and *Brower v. Gateway*, 246 A.D.2d 246, 676 N.Y.W.2d 569 (1 st Dep't 1998) enforced terms disclosed post- sale.) Consumer protection law generally requires that material terms be fully disclosed, and failure to do so may constitute an unfair or deceptive practice. UCITA, however, attempts to change that by making terms that were not disclosed until after the purchaser has paid fully enforceable, with the purchaser's only remedy being to incur the transaction costs involved in exercising the right of return.

12 By analogy, in *Utility Sold Waste Activities Grp.v.EPA*,236F.3d749(D.C.Cir.2001),the court held that a posting on a Web site was not sufficient notice in the context of federal rulemaking.

13 In *Powertel, Inc. v. Bexley*, 743 So.2d 570 (Fla. Ct. App. 1999), for instance, the court struck down as unconscionable purported modifications in a cell phone contract, because, though customers could avoid the effect of the [new] arbitration clause by canceling their phone service and signing an agreement with another provider, actually doing so would cause them a great deal of inconvenience, including the need to obtain and publish a new telephone number.

14 See, e.g., *Fineman v. Citicorp*, 137 111. App.3d 1035, 1043, 485 N.E.2d 591, 595 (111. Ct. App. 1985) (following Restatement (Second) of Contracts, section 69(1)(c)(I 98 1)).

15 NCCUSL's Summary regarding UCITA, available at the NCCUSL Web site, www.nccusi.org.

16 June, 1999 letter to NCCUSL from members of the Working Group on Consumer Protection, American Bar Association Business Law Section, Committee on the Law of Cyberspace, Subcommittee on Electronic Commerce.