UCITA's Imperialism

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Despite strong efforts from its sponsoring organization, the National Conference of Commissioners on Uniform State Laws (NCCUSL), the Uniform Computer Information Transactions Act (UCITA) has been enacted, with modifications, in only two states, Virginia and Maryland. This important uniform statute, intended to cover many licensing transactions -- particularly those involving software -- must be counted as less than an unqualified success for NCCUSL. In what might be regarded as a parallel development, efforts to narrow the scope of Article 2 of the Uniform Commercial Code to exclude software transactions met with strong resistance, ultimately failing during the summer of 2001. Both of these developments seem to suggest that many courts will continue to analyse software transactions as sales, regardless of the name the vendor attaches to the transaction. But this might not be as true as might appear from the dearth of legislative support of UCITA. There are provisions in both UCITA and a newly minted Article 1 of the UCC that could well project the policy decisions of the Maryland and Virginia legislatures to the furthest reaches of all of the United States. Those provisions, which give UCITA tremendous outreach or "imperialism," are the focus of this article. What this article will try to show is how the provisions in UCITA and the new UCC Article 1 give UCITA a very strong extraterritorial effect -- strong enough that it in fact may not matter whether UCITA is enacted anywhere else.[2] One's views of UCITA will generally determine whether this is viewed as a good or bad thing in a narrow sense, but in a broader sense, even UCITA proponents might wonder what mischief these provisions may have unleashed.

Background

In the fall of 2001, a Federal Court in California decided *SoftMan Products LLC v. Adobe Systems Inc.*[3] Notwithstanding the click-wrap intended to proclaim that the contract was a license, thereby entitling the vendor to restrict the vendee's transfer of the software, the court held the transaction to be a sale of goods which thereby permitted the vendee to disregard the vendor's restrictions on transfer.

In *SoftMan* the ultimate issue was whether Adobe could restrict SoftMan's distribution of "unbundled" components of the Adobe Collections in violation of the Adobe End User License Agreements (EULA). SoftMan conceded that it distributed unbundled Adobe software and that

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1. My thanks to Jean Braucher for her comments on an earlier draft.

2. There are qualifications and exceptions to nearly everything that follows but there is insufficient space or reader patience to develop all the ins and outs here. Those wishing a full treatment should see William J. Woodward, Jr., *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, 54 S.M.U. Law Rev. 697 (2001).

3. 2001 WL 1343955 (C.D. Calif. October 19, 2001).

the EULA prohibited it, but it contended that, for various reasons, the EULA restrictions were unenforceable.[4]

At the core of the court's holding that the contract's restrictions were unenforceable was the conclusion, strongly fuelled by federal copyright policy, that the transaction was a "sale" rather than a "license." This analysis meant that the First Sale Doctrine from copyright law applied to void the restrictions.[5] The court rejected the argument that the click-wrap license agreement was, under the particular facts of the case,[6] effective to convert what was functionally a "sale" into a "license."

SoftMan was decided in California and, even though copyright policy may have driven the decision,[7] it apparently involved California law.[8] The court followed a distinct line of cases[9] that have taken the position that software vendors transact business through sales, not licenses, and therefore implications of copyright law such as the First Sale Doctrine[10] follow.[11] UCITA, of course, calls such transactions "computer information transactions" and, were it applicable in *SoftMan*,[12] it seems more likely[13] that the transaction would have been termed a "license."[14] A

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4. *SoftMan* had somewhat unusual facts. SoftMan never had to load the software and, therefore, never assented with its mouse. The court rejected Adobe's claim that SoftMan was bound by the legend on the outside of the boxes telling the reader that she was bound by the license on the inside. *SoftMan* at 7. This freed the court to consider, apart from the terms of any purported contract, whether the transaction was a license or a sale.

5. *Id*. at 3.

6. Because SoftMan was not an end user, it never loaded the software or was given an opportunity to click an assent. *Id.* at 6. Purported assent to the terms on the disk inside the box on the basis of labels on the packaging was rejected by the court. *Id.* The court referred to the click-to-agree EULA as "shrinkwrap" rather than the newer term "clickwrap."

7. In arriving at the conclusion that the transaction was a "sale" rather than a "license," the court relied in part on David A. Rice, Licensing the Use of Computer Program Copies and the Copyright Act First Sale Doctrine, 30 Jurimetrics J. 157 (1990), an article maintaining the copyright policy overrides vendors efforts to escape the First Sale Doctrine by calling their transactions "licenses."

8. The SoftMan court does not directly focus on the applicable law but notes that Adobe made unfair competition claims against SoftMan under the California Business & Professional Codes Section 17200 *et seq.* *Id.* at note 21.

9. See Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670, 676 (3d Cir.1991); Step-Saver Data Systems, Inc. v. Wyse Technology, 939 F.2d 91 (3d. Cir. 1991); Downriver Internists v. Harris Corp., 929 F.2d 1147, 1150 (6th Cir.1991).

10. If the First Sale doctrine were to apply to a given transaction, it would not matter whether the transaction were called a "sale" or a "license" in the contract. State law is powerless to convert what is functionally a "sale" into a "license" in order to avoid the federal policy embodied in the First Sale doctrine. *See generally* Rice, *supra* note .

11. Another potential implication is that calling a software transaction a "sale" subjects it to the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.* That Act applies to "tangible personal property," and would likely *not* apply to software transactions if they were considered to be licenses.

12. If this case were to arise in a UCITA jurisdiction, UCITA would define the transaction as a "computer information transaction" and thereby bring it within its scope. UCITA §§ 102(12) and 103.

13. *See* note , *supra.*

14. UCITA § 102 (41) defines "license" in part as "a contract that authorizes access to, or use, distribution, performance, modification, or reproduction of, information or informational rights, but expressly limits the access or uses authorized or expressly grants fewer than all rights in the information whether or not the transferee has title

literal reading of UCITA would then validate the transfer restrictions.[15] Additionally, were proposed revisions to UCC Article 2 successful in narrowing its scope to explicitly exclude software transactions, the court would have had great difficulty calling the transaction a "sale." In either case, the outcome the court reached in *SoftMan* would be less likely.[16]

UCITA's imperialism has increased the odds that the next case similar to *SoftMan* will be subject to UCITA, therefore providing a greater likelihood that the court will hold that the EULA will limit redistribution of the software -- the opposite to the *SoftMan* court. The reach of UCITA will expand even further if California or other states enact the newly-approved Article 1 of the UCC, provided that such non-UCITA courts regard *SoftMan* cases to be somewhere within the scope of the UCC (*e.g.,* "transactions in goods"). It should be emphasized that these developments can take place without California or a single other state legislature ever enacting UCITA. Fans of UCITA will applaud these developments and may well have anticipated them while contributing to the development of UCITA. Others may find it problematic that one or two state legislatures can effectively write the rules for non-consumers in the rest of the country.

This legislative juggernaut comes from UCITA's provisions on choice of law and choice of forum. As is usually the case with issues touched by conflict of laws principles, the analysis can be quite complex. Fortuitously, *SoftMan* has provided a good vehicle for showing the analytical steps.

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to a licensed copy." UCITA thus attempts to convert nearly all "computer information contracts" into "licenses" provided the vendor has the good sense to restrict some aspect of the vendee's use.

UCITA § 112 defines "manifesting assent" to include "intentionally engag[ing] in conduct or mak[ing] statements with reason to know that the other party . . . may infer from the conduct or statement that the person assents to the record or term." If vendee agreement that the transaction was a license were necessary under UCITA, Adobe would have argued that the standard was satisfied when SoftMan read the labels on the software containers subjecting those who dealt with the software to the contents of the license agreements inside.

15. UCITA § 503(2) makes restrictions on transfer generally enforceable.

Notwithstanding § 502(2), if the case were analyzed under UCITA, the court *could* arrive at the *SoftMan* result by engaging in a preemption analysis to apply the First Sale doctrine to the case notwithstanding the contract terms. UCITA § 105(a) provides that "A provision of this [Act] which is preempted by federal law is unenforceable to the extent of the preemption."

16. While no lawyer's prediction is infallible, many would predict a different outcome to SoftMan under UCITA than she would under the set of rules that the court used in the case. Calling the transaction a "license" rather than a "sale" tilts the rules in the direction of enforcement of the restrictions on redistribution. In *Adobe Systems Incorporated V. One Stop Micro, Inc.,* 84 F.Supp.2d 1086 (N. D. Calif. 2000), the court inferred from the many restrictions on transfer in the underlying contract that the transaction was a "license" and not a "sale" and therefore the transfer restrictions were enforceable.

SoftMan and Licensing

UCITA brings a new imperialism to legislative policy-making through a substantial change in the conflict of laws principles that govern the law that state courts apply to cases before them. The change, if combined with non-negotiable choice-of-UCITA provisions in vendors' form contracts, will, in practice, project UCITA's policies far beyond Virginia and Maryland, the two states that have enacted it. Residents of states like California that have not considered – or indeed have rejected – UCITA can nonetheless come under its rules because of this change.

Current law requires that if the parties to a contract choose the governing law, they must choose law "related" to the contract.[17] The change to that principle is located in UCITA § 109 which, with minor exceptions, permits the parties to a contract governed by UCITA to choose *any* law to govern that contract. To the extent that this UCITA conflict of laws rule is applicable, people from all over the world can "choose" – click "I agree" at the little box on their monitors -- the law of Virginia or Maryland, *i.e.,* UCITA, to govern their contract. This is true even though neither legislature otherwise would have any authority whatsoever over other states' citizens. The enacted law of Virginia and Maryland thus can have very substantial extraterritorial effect. The degree of this effect depends on two factors: 1) how many cases within the scope of UCITA will actually be litigated in either Virginia or Maryland; and 2) how many licensing contracts choose the law of Virginia or Maryland (or UCITA) to govern the relationship. Both are empirical questions.

The Importance of Forum

To understand UCITA's expansive (some might say "unconstitutional"[18]) reach, we must detour through some basic principles of Conflict of Laws. This is the body of law governing the threshold question all courts must face: what law should be applied to the controversy before the court. Given the diversity of our state and national law, the answer to this "choice of law" question can influence the outcome of the whole controversy as it well might in a case like *SoftMan*. Not surprisingly, the development of conflict of laws principles has been the province of the courts and not the legislatures.

Perhaps the most basic of the underlying principles is that the court looks to its jurisdiction's conflict of laws principles to determine the governing law. The local law governs how courts are to decide cases and applies to a jurisdiction's courts because they are part of the legal machinery of the state. In the United States this means that conflict of laws principles are matters of state law[19] and subject to state-to-state variation. This, in turn, means that one can "choose" the governing conflict of laws principles by litigating one's case in the jurisdiction with the desirable principles. Put differently, forum shopping works when one is shopping for conflict of laws principles.

If the conflict of laws principles are substantially similar from jurisdiction to jurisdiction, there is not much point in shopping for conflicts principles. On the other hand, when the conflict

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17. *See, e.g.*, UCC § 1-105; Restatement (Second) of Conflict of Laws § 187; *Application Group, Inc. v. The Hunter Group*, 61 Cal.App.4th 881, 896 (1998)(California law).

18. *Cf.* Richard K. Greenstein, *Is the Proposed U.C.C. Choice of Law Provision Unconstitutional*, 73 Temple L. Rev. 1159 (2000).

19. *See, e.g.*, Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496-97 (1941).

of laws principles are different, one might well be able to affect the substantive outcome of a case by wisely choosing the jurisdiction for the litigation.

By enacting UCITA, Virginia and Maryland have enacted a conflict of laws principle unlike nearly any other in the United States.[20] And because litigants obtain the choice of law rule of the court in which they litigate, one party or the other can obtain the UCITA choice of law rule by taking the litigation to Virginia or Maryland in order to get it. Because the choice of law rule can influence the outcome of litigation in cases such as *SoftMan*, and because the applicable rule depends on where the litigation is conducted, it should be obvious that in some cases the parties will actually litigate whether the litigation should be transferred to – or out of – Virginia or Maryland.

Contests over forum are nothing new to litigators, and UCITA has given litigators a powerful new reason to consider it. Because contractual provisions through which the parties agree to a litigation forum are common – perhaps pervasive -- many such cases will turn on whether or not the court will enforce a choice of forum clause in the underlying contract. UCITA § 110 provides that such clauses are generally enforceable, but unless the litigation is in a UCITA state, this provision would not likely apply. Outside Virginia or Maryland, a forum court will look to its own contracts principles to determine whether agreement to a particular forum is enforceable and to other principles to determine if there are overriding principles suggesting non-enforcement even if there is agreement. If either Maryland or Virginia is the forum, it is likely that a contractual choice of forum will be enforced.

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20. The precedents for the new rule are few and narrow, generally applying only to large transactions among sophisticated parties. *See generally* Woodward, note , *supra* at 740-45.

The Substance of UCITA's Choice of Law Rule

Because there are complex exceptions for "consumer contracts,"[21] a narrowly-drawn definition that excludes any small business including sole-practitioner lawyers or doctors,[22] the focus here will be on the general principle applicable to all but consumer contracts. The new rule of section 109 is "The parties in their agreement may choose the applicable law." The Official Comments make clear that under the UCITA rule the requirement that the law chosen be "related" to the parties or transaction is rejected. This means that two California parties (or two Belgians, for that matter) could choose Virginia law to govern their entirely local transaction. The same would be true of contracting partners from any other jurisdictions.

With the choice of "unrelated" law likely to be unenforceable in nearly all domestic jurisdictions,[23] getting enforcement will require litigation in the states with the expansive new rule, currently Virginia or Maryland. To expand the reach of UCITA beyond the borders of Virginia and Maryland, UCITA proponents anywhere in the world merely have to 1) choose UCITA as the governing law, and 2) get their litigation into Virginia or Maryland.

At least in the near term, we can expect the first requirement to be met in nearly all contracts within the scope of UCITA. The substantial involvement of the software industry in the development of UCITA is widely thought to confirm that UCITA contains a set of principles favored and supported by the software industry. We can thus expect those in the industry to choose UCITA as the governing law. We can expect this "choice of law" term to appear in the vast bulk of the contracts within the scope of UCITA: those that are drafted by the vendors, come on electronic or paper forms that are seldom read, are non-negotiable, and (at least if UCITA's principles apply) are assented to through shrinkwrap or clickwrap.

The Mechanics of Choice of Law in UCITA-type Contracts

It is easiest to show how the rules will work by offering some examples of the rules in action.

SoftMan provides a ready-made set of basic facts on which to base a hypothetical case. Assume a form software contract entered into between a vendor located in Florida and a customer located in California. Assume further that the contract contains a restriction on redistribution and a clause providing "The law of Virginia governs this contract." Because the enforceability of this latter provision differs between UCITA states and other states, the enforceability of this clause will depend on where the litigation is conducted. That, in turn, will depend on who brings the first lawsuit (and thereby chooses the forum) and whether the initial forum court will sustain the choice of forum or, alternatively, dismiss the case without prejudice to refiling in a different forum.

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21. UCITA § 109(a), (b), and (c).

22. "Consumer" is defined as:

> 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 professional or commercial purposes, including agriculture, business management, and investment management other than management of the individual's personal or family investments.

UCITA § 102(15). A "consumer contract" is "a contract between a merchant licensor and a consumer." UCITA § 102(16). I discuss the incoherence of UCITA's consumer exception Woodward, *supra* note , at 731.

23. *See* note , *supra*.

If litigation is brought to (or moved to) Virginia, it is likely that UCITA will be the governing law. This would be the case if the vendor brought the lawsuit in Virginia. **Figure 1** summarizes the analysis. Because forum is so critical to enforcing the choice of law clause, one could anticipate the customer moving to reject Virginia as an appropriate forum through challenges to personal jurisdiction, venue, and the like. If the underlying contract had a choice of forum clause selecting Virginia, the customer could be expected to challenge (on whatever grounds it could find) whether such a provision is enforceable. Given that the Virginia legislature has enacted UCITA, which specifies that choice of forum clauses be enforced with narrow exceptions,[24] it seems very unlikely that a Virginia court would not sustain jurisdiction in Virginia.

Litigation started in Virginia under current law

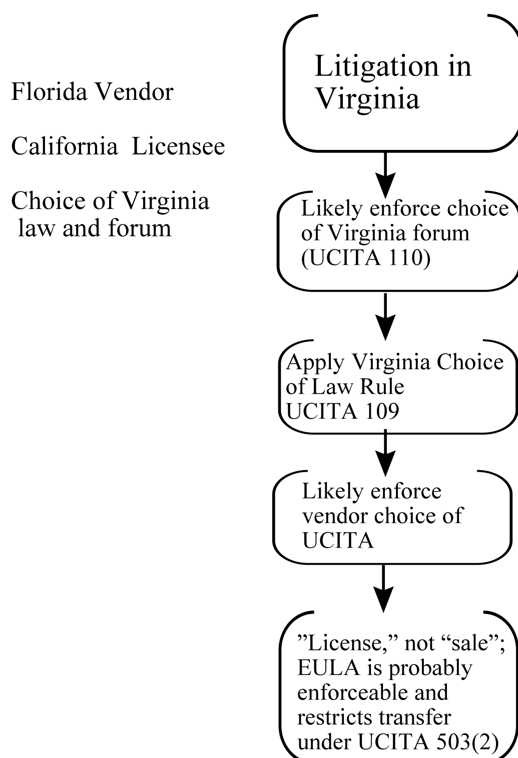

Figure 1

After jurisdiction in Virginia is sustained, the Virginia court must apply the Virginia choice of law rule to the controversy. That rule is UCITA 109, and if the chosen governing law were UCITA, that law would be used regardless of the connections either party or their contract had with Virginia. If UCITA were used to adjudicate the controversy, it is more likely that the transaction would be a "license" and that the transfer restriction (rejected in *SoftMan*) would be enforced under UCITA § 503(2).[25]

Suppose, alternatively, that litigation were brought in California (or Florida). This litigation would likely be brought by the California customer with a claim against the vendor or an interest (to be established through a declaratory judgment or similar procedure) in *not* having UCITA govern her controversy with the vendor. The contract will likely have a choice of Virginia forum clause, so an obstacle to sustaining the litigation in California will be that clause in the underlying contract.

Here again, the court must begin with its domestic contract law in order to adjudicate whether a contractual choice of forum is enforceable. The question would be analysed like any

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24. UCITA § 110 provides for enforcement of a choice of forum clause "unless the choice is unreasonable and unjust." Official Comments make it clear that the exception is to be narrowly interpreted.

25. *But see* notes , *supra*.

other contract question: can we find an enforceable "agreement" in what the parties did?[26] A more formal approach would simply look to the vendor's form, conclude there was agreement to it, and dismiss the suit because the suit was in the wrong forum. A less formal approach would look to the circumstances of the making of the contract, the likelihood that customer choice was actually involved in the choice of forum, and decide accordingly whether the provision was binding. If the court sustains the choice of forum, it will dismiss the suit and relief will be available in Virginia. When the Virginia court gets the suit, it will pursue the analysis outlined in **Figure 1**, which has become the left branch of **Figure 2**. Enforcement of the restrictions on transfer is more likely under UCITA than it is under California law.

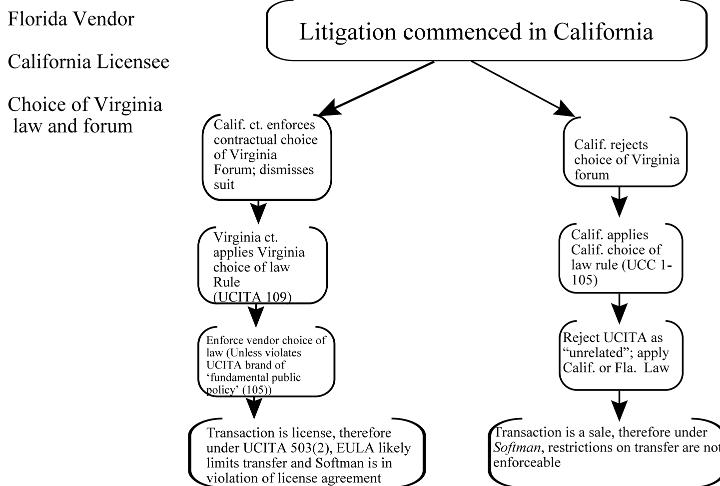

Figure 2

As shown in the right branch of **Figure 2**, if the case remains in California then California will apply its own choice of law rule to the controversy. That rule, in a case within the scope of the Uniform Commercial Code, is UCC § 1-105 which requires that the law chosen by the parties have some relationship with the parties or their contract.[27]

If the case is outside the Uniform Commercial Code, the rule is likely to be similar to the UCC rule: Restatement (Second) Conflicts of Law § 187 requires enforcement "unless the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice."[28] If the court applies either rule, it will reject the choice of UCITA because, by hypothesis, Virginia law had nothing to do with the parties or their

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26. There may be statutes addressing this problem, one way or the other. For example, UCITA has its own choice of forum provision in Section 110. If litigation arises in a UCITA state in a contract involving something within UCITA, it seems likely a court would use the UCITA rule and conclude that the choice of forum clause was enforceable. An example of a provision that limits the parties in their choice of forum is UCC § 2A-106 making unenforceable the choice of a forum other than a forum that otherwise would have jurisdiction in a consumer customer's leasing contract subject to UCC Article 2A.

27. The mere fact that the parties have chosen "unrelated" law is probably insufficient to establish the connection sufficient to make the law "related" to them or their contract.

28. Restatement (Second) of Conflict of Laws section 187(2),

contract. A court pursuing this analysis is likely[29] to apply California law to the problem and reach the actual *SoftMan* result.[30]

Practice Implications of UCITA's Choice of Law Rule

It should be obvious that the effectiveness of license terms can depend on the law that is applied in analysing them and that, therefore, contractual choice of law will be an important consideration either in planning or in litigation. Had *SoftMan* been decided under UCITA, the result might well have been different than that reached by the court.

The enforceability of a contractual choice of law clause depends, under current law, on the place in which the litigation takes place. Particularly, those licensors that consider UCITA to be a licensor-friendly legal regime need to get the litigation into Virginia or Maryland, states that have enacted UCITA and will therefore recognize the choice of UCITA as governing law. Conversely, those who believe that UCITA presents a less than optimal legal regime will want to avoid a choice of law clause selecting UCITA as the governing law or (assuming neither they nor the vendor have a presence in a UCITA state)[31] will want to keep any litigation over the contract out of a UCITA state.

For planners wishing to avoid application of UCITA, this also means avoiding a choice of forum clause selecting a UCITA state as the exclusive forum for litigation. This may be possible when contracts are actually negotiated, but such contracts are unlikely in most situations. It is widely believed that in the bulk of software contracts, the vendee will have little awareness of the contract's terms and no ability to negotiate over them. Much software is distributed under take-it-or-leave-it adhesion contracts when negotiating over terms is neither contemplated nor permitted. The tiny box on the computer screen does not invite responses other than "I accept" or "I decline." This take-it-or-leave-it aspect may be partly accountable for the likely fact that few vendees will actually peer into the box, but will instead simply click "I agree" in order to get on with the software installation. Moreover, if a vendee were to peep into the box to find a choice of law clause, she would be very unlikely to understand the implications of the clause sufficiently to make a decision whether to accept or decline the contract's terms.

Thus, there will be cases where a dispute will arise under a contract with a UCITA choice of law clause where the vendee's litigation lawyer will first recognize the implications of applying UCITA to the dispute and will want to contest it. For example, had *SoftMan* contained a clause choosing UCITA as governing law, SoftMan's trial lawyer would have wanted to resist

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29. In an interstate contract between the Florida vendor and California vendee, it is possible that the court would apply Florida law to the controversy if the connection between Florida law and the transaction was greater than was the connection between California law and the transaction. If the question were close, the court would likely use familiar California law.

30. This assumes, of course, that the California court would follow *SoftMan* and not Adobe Systems Incorporated V. One Stop Micro, Inc., 84 F.Supp.2d 1086 (N. D. Calif. 2000), an earlier California case that came out the other way. *See* note , *supra.*

31. If either the vendor or vendee are located in a UCITA State, UCITA will be "related" to the contract or the parties and, under the non-UCITA choice of law rules in force nearly everywhere, the choice of UCITA as governing law will be enforceable.

its application in the dispute over redistribution of the software. Avoiding the choice of UCITA as governing law will, in most cases,[32] require that the vendee's lawyer keep the litigation out of a UCITA state where the choice of UCITA will be more likely to be enforced. If the vendee is the plaintiff, this will involve bringing suit in a non-UCITA jurisdiction and then persuading the Court to disregard the likely choice of forum clause. If the vendor is the party with the claim – as was Adobe in *SoftMan* – the vendee will want to choose the forum by bringing a declaratory judgment or similar action seeking clarification of the implications of the software contract.

The Choice of Law Rule in Proposed Article 1 of the Uniform Commercial Code

As suggested by the foregoing examples, the near-universal choice of law rule outside the UCITA context is that the law chosen by the parties must bear some relationship with the parties or underlying transaction. UCITA's rule permits the parties to choose *any* law, including the law of a jurisdiction that has nothing to do with them or their contract. As explained above, this would have the likely effect of altering the result in *SoftMan* if litigation were brought in a UCITA state. When the choice of forum can appreciably influence the result in litigation, forum shopping (both through choice of forum clauses and through litigation strategy) is the result.

A recent amendment to Article 1 of the Uniform Commercial Code may make it unnecessary for a vendor to bring the litigation to a UCITA state in order to have UCITA govern its contract. The change, UCC § 1-301,[33] not yet enacted in any state, will permit parties to any contract governed by the Uniform Commercial Code to choose *any* domestic law to govern their contracts.[34]

The implications of such a change are to reverse the likely choice of law analysis described above. If, for example, the new UCC rule were in place for the *SoftMan* litigation, the result might well have been different for the very court that decided the case. The analysis can be found in **Figure 3.**

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32. *See* note , *supra*.

33. One may find a detailed analysis of both the proposed UCC provision and of the UCITA choice of law rule Woodward, *supra* note .

34. There are, of course, qualifications and exceptions. The new rule will limit domestic parties to the choice of domestic law, create a different rule for consumer contracts, and provide for non-enforceability if enforcement would violate a narrowly-defined "fundamental policy." None of these is likely to be of use in a contract such as that involved in *SoftMan*.

Under Proposed UCC § 1-301, the Court begins with the question "what body of law governs this dispute." If the Court sustains a choice of law clause in the contract, the contents of that clause will govern; if the clause is not enforced, the court will use its own conflict of laws principles to determine the law to be applied. The enforceability of the choice of "unrelated" Virginia law in this hypothetical case thus depends on the content of California's choice of law rule.

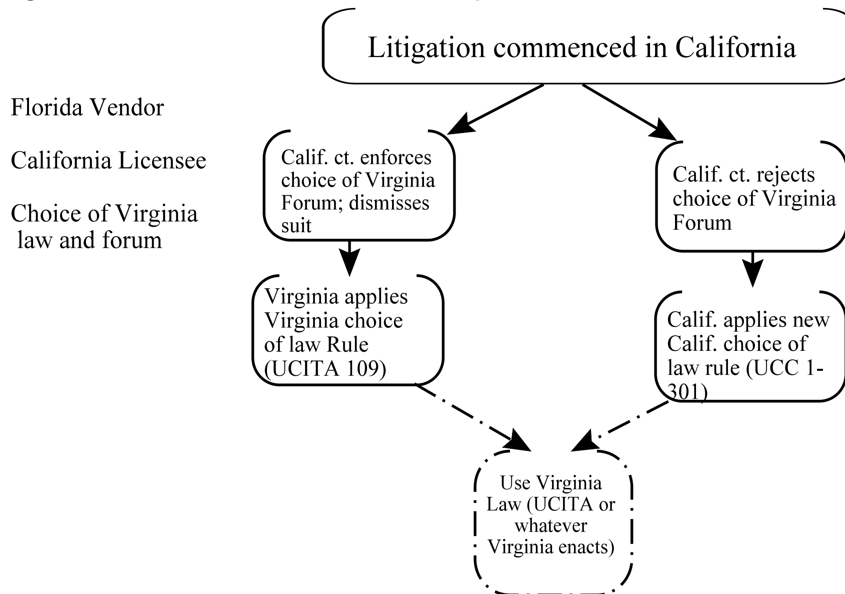

Figure 3

Under the regime of a new Article 1, the choice of law rule itself will depend on what sort of transaction is involved. If the transaction is within the scope of the UCC, the UCC's new rule requiring no relationship will govern. If, on the other hand, the transaction is not within the scope of the UCC, then general conflict of laws principles that embody the "relatedness" requirement will govern. It seems quite likely that many courts will continue to regard the distribution of boxes of software to be "transactions in goods" thereby bringing them within the new UCC choice of law rule.

Under current UCC § 1-105, as explained above, the California court would have likely rejected a choice of Virginia law because it was "unrelated" to the contract. Under proposed UCC § 1-301, by contrast, the court would lack a "relatedness" reason to deny enforcement and would more likely enforce the choice of unrelated Virginia law (UCITA). Having done that, the court would then more likely enforce the *SoftMan* restrictions on redistributing unbundled software and find that SoftMan's redistribution was a breach of the license.[335]

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35. An argument making the rounds goes something like this. New UCC § 1-301 is very limited: it says it only "applies to a transaction to the extent that it is governed by another Article of [the Uniform Commercial Code]." Somehow this limiting provision is said to close the UCITA back door.

While one might wish for such a result, it is hard to see how it comes from the new UCC provision. *SoftMan* was not in any sense a "mixed transaction" with which the quoted language might deal. It was, rather, the conveyance of something moveable that had value. Efforts to explicitly exclude such transactions from the scope of

Implications

Obviously, one's view of the benefits of UCITA will color any judgment about whether the new choice of law rules are positive or negative developments. Supporters of UCITA will press for its enactment outside of Virginia and Maryland and will, similarly, press for the enactment of new UCC § 1-301 because both of these enactments will expand the reach of UCITA. Foes of UCITA will do the opposite.

But there are larger implications that are worth pondering. If one assumes, for example, that *SoftMan* embodies some aspects of California policy applicable to California businesses,[36] Virginia's enactment of UCITA overrides that policy provided 1) there is a choice of UCITA in the contract and 2) that litigation occurs in a UCITA state. Even if California were to make such clauses unenforceable in California, a Virginia court would have to weigh that California policy against its own legislature's mandate to enforce such clauses.[37] States have not yet reacted to UCITA with criminal provisions, for example, making it a crime either to click agreement to UCITA or to include a UCITA choice of law clause in a software contract. It seems unlikely they will do so.

The effect, when projected beyond California, is the possibility that UCITA will govern software contracts coast-to-coast, provided that vendors insert choice-of-UCITA clauses into their contracts and can manage to get their litigation into a UCITA state.

The power of the Virginia and Maryland legislatures to set the rules for the rest of the country expands to the extent that states adopt new UCC § 1-301. With narrow exceptions for "consumer contracts" and "fundamental policy," that new rule would call on enacting state courts to use UCITA (if selected in the software contract) provided that the contract came within the very wide scope of the Uniform Commercial Code as cases like *SoftMan* implicitly do.[38] The implication is that those who have specified in their forms that UCITA should govern their transactions will not need to bring their litigation to Virginia or Maryland in order to get UCITA's choice of law rule. They will be able to get a very similar rule by litigating their case in a UCC 1-301 state.[39]

UCC Article 2 were rejected by its sponsoring organizations. The implication is that such transactions *can* be subject to Article 2 and case law establishes that some *are* subject to it. If a court found *SoftMan* subject to the UCC or Article 2, it would then have to use the UCC choice of law rule that explicitly applies to such transactions.

36. As suggested earlier, it may be that federal – not California – policy is behind *SoftMan*. The discussion in the text uses *SoftMan* as a possible illustration of a decision that may embody some aspects of California policy. The broader point is that UCITA's imperialism could effectively override many aspects of California policy.

37. UCITA's choice of law rule has given rise to so-called "bomb shelter" provisions–State laws that provide that agreements to have UCITA apply to contracts of a State's citizens are unenforceable. Again, a UCITA state court would have to recognize such a provision in order for it to have real effect.

States have not yet reacted to UCITA with criminal provisions, for example, making it a crime either to click agreement to UCITA or to include a UCITA choice of law clause in a software contract. It seems unlikely they will do so.

38. Both UCITA and proposed UCC § 1-301 permit a court to deny enforcement of chosen law for "fundamental policy" reasons. Both statutes instruct that "fundamental policy" is to be very narrowly construed. Whether a California court would regard its legislative rejection of UCITA to be "fundamental policy" in a case involving the choice of UCITA as governing law is an open question but, based on the Official Comments to both provisions, it seems unlikely.

39. Even if California had enacted a "bomb shelter" that other State courts would recognize, the change in the UCC would still be useful to vendors. For example, as suggested earlier, a narrowed scope of Article 2 was defeated this past Summer at the NCCUSL Annual Meeting. This means that State courts can continue to follow cases like

One could, of course, argue that the Virginia or Maryland legislatures are not projecting rules at all; rather, the vendees themselves are *selecting* UCITA rules in their software contracts. Though this might be plausible in very large contracts where choice of law is actually negotiable, it is not true in any but a very formal sense in the vast bulk of software contracts. The fact that UCITA defines some act as "assent" does not make it empirically so and cannot be used for policy support for imposition of the rules themselves. These contracts are primarily vendor contracts where the choice of law is given on a take-it-or-leave-it basis, and where, in addition, it is unlikely that the vendee is even aware of the choice of law clause.

Indeed, in this context, the idea of "assent" confuses the issues more than it clarifies them because there will be little other than a purely formal form of "assent" in the overwhelming majority of cases: recall that Adobe argued that SoftMan "assented" merely by handling boxes with a sign on them that cross-referenced terms that were unavailable.[40]

Thus, if a Virginia court applies UCITA to a "foreign" or "unrelated" contract, it is collaborating with contract drafters to project its legislature's enactments beyond its borders to govern those who give formal assent and nothing else to the application of UCITA.

One may view UCITA as sound policy yet still wonder if legislative imperialism will end with UCITA. The precedent that it sets, reinforced and expanded by the proposed UCC Article 1 provision, means that no one is free from the decisions of another state's legislature, if the subject matter is within the broad scope of the Uniform Commercial Code or if an imperialist legislature includes a choice of law provision similar to UCITA's in the legislation.[41] Any group with the lobbying power to create "desirable" legislation in one state could amplify the effects of that legislation by including a UCITA-type choice of law provision in the legislation and insisting on contractual choice of law terms selecting that desirable law in their contracts. It is hard to imagine what this future state legislation might look like or, if the UCITA precedent becomes widespread, what it will do to our notions of Federalism.

SoftMan. But suppose an industry group prevailed on State X to narrow *its* scope of Article 2 and then inserted a choice of State X's law into its form contracts. Similar to the analysis in Figure 3, the California court would initially find the choice of law rule in the UCC, in new § 1-301. That provision would instruct the court to apply the law of State X. State X's law would provide no coverage by the UCC. The California court would then have to analyze the case without the use of the sales analogies it used in *SoftMan.* Other mandatory rules within the official UCC could be altered in a similar way by one State's altering them and then some industry's form contracts choosing the law of that State to govern the contract.

40. *Softman* at 6.

41. Virginia's tendencies in this direction are worth noting. Its legislature has developed in subsection (b) of its UCITA a non-uniform amendment which reads as follows:
In the absence of an enforceable agreement on choice of law, the contract is governed by the law of Virginia.
This amendment, of course, exports UCITA to any software contract that has no choice of law clause, provided again, that the litigation be brought to Virginia. In addition to making its own courts' workload a little easier, this provision gives those who find UCITA desirable – but did not get a choice-of-UCITA clause into their contracts – a reason – "incentive" – to litigate their cases in Virginia. *Compare* See Bruce H. Kobayashi & Larry E. Ribstein, *Uniformity, Choice of Law And Software Sales,* 8 Geo. Mason L. Rev. 261, 294 (1999), advocating legislative imperialism as an avenue to uniformity–and economic benefits – for a State so persuaded.

Conclusion

UCITA's choice of law and forum provisions give the legislation a potential to set the rules for those who lie outside the ordinary jurisdiction of states that enact it. In that respect, the legislation is unlike nearly all other state legislation to date. Perhaps UCITA's policy choices are so sound that they deserve recognition even in states where, for one reason or another, the legislature will not enact it. But even if one likes the policy choices reflected in the new law and would therefore applaud UCITA's broad influence, the precedent it sets for state legislative outreach in other areas may be troubling. It will be interesting to see whether the UCITA model will be an isolated development or, as suggested by possibilities ushered in by new UCC § 1-301, the mere beginning of a more widespread effort of state legislatures to govern those who lie far beyond their borders.