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FOREWORD

UNIFORM COMPUTER INFORMATION TRANSACTION ACT

by ANN LOUSIN†

The John Marshall Law School's *Journal of Computer and Information Law* ("Journal") is pleased to present this symposium issue on The Uniform Computer Information Transaction Act ("UCITA"). This is the second symposium we have published concerning uniform acts regulating computer information. In 1997, the *Journal* was the first law review in the country to publish a symposium on the proposed Article 2B of The Uniform Commercial Code, which also would have regulated computer information transactions.¹

The origins of UCITA date from the early 1990's, when those beginning to re-draft Article 2-Sales conceived the "hub and spoke" concept. They thought that certain transactional concepts common to all transfers, or at least to all sales, ought to be placed into Article 2. This was the "hub." Then, those concepts unique to each type of transaction, such as computer information transfers, would be gathered into one part of the article—a "spoke" of the hub. As I understood the idea, it was a rough approximation of the European code system, in which a general civil code lays the basis for all transactions, while special codes govern particular transactions, e.g., a commercial code.

For whatever reasons, the "hub and spoke" idea did not find wide favor. As a result, the proposed regulation of computer information became a proposed Article 2B of the Uniform Commercial Code. Article 2 would continue to be "Sales;" Article 2A would be "Leases of Goods," as it has been since 1990; and Article 2B would govern transfers of computer information, i.e., software.

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1. 16 J. Marshall J. Computer & Info. L. 2 (1997).

One aspect of the new scenario troubled some observers: because most software is "licensed," not "sold" or "leased," the "terrible two's" of the U.C.C. would consist of three different types of transactions. Because Article 2A is similar in organization and substance to Article 2, the principal differences between the two articles arose from the functional differences between sales of goods and leases of goods. Proposed Article 2B would have covered licenses *and* have changed the subject of the transaction to something often considered to be "non-goods." Indeed, it is unclear how one should characterize the new animal of "software"—goods, non-goods or something quite unique. Beyond that, it was arguably possible to extend the definition of "lease" in UCC 2A-103 (1)(j) to cover a "license," raising the possibility that Article 2A—Leases of Goods would provide the legal framework for software licensing.

By 1998 or 1999 it was clear that a uniform law on licensing of software was not to be part of the U.C.C. As Professor Chanin says in his article in this symposium, "only a delving into the legislative history of the drafting efforts might provide some insight into reasons for this decision."

In any event, the drafting committee, under the chairmanship of Carlyle C. Ring and with Raymond T. Nimmer as reporter, re-grouped its forces. It created a separate uniform act, now known as UCITA. Popular opinion contends that it is substantively the same as Article 2B, an Article 2B cut loose from the framework, support and perhaps constraints of the U.C.C.

The purpose of this symposium issue is to acquaint those who labor in the computer field, both lawyers and non-lawyers, with the new UCITA. We are delighted that outstanding experts who have monitored the development of UCITA have contributed articles.

John A. Chanin summarizes the drafting history of UCITA from "hub and spoke" days to the drafting of UCITA. He then provides an overview of the purpose and framework of the act, which covers licensing of information. He explains committee decisions, the effect of the U.C.C. upon the framework of UCITA, the problems with the scope of UCITA, the concept of "assent" to the license agreement and the characteristics of a mass-market transaction.

Stephen Y. Chow compares UCITA with its companion statute, the Uniform Electronic Transactions Act ("UETA"). He contends that UETA, whose goal is "to enable electronic commerce," is a better statute for the developing world of e-commerce. UCITA, he contends, is hampered by a vision limited to the 1990's, notably the framework of Article 2B, which he believes the UCITA drafters never discarded. He then makes several detailed suggestions for the improvement of UCITA.

Micalyn S. Harris analyzes UCITA in depth, but is particularly concerned with transactions between parties having greatly disparate bargaining power. She discusses mass-marketing transactions, ethical obligations and flexibility in creating and performing the contract. She pays special attention to the warranties and remedies provisions of UCITA.

Jean-Francois LeRouge, a Belgian lawyer, provides a unique perspective. The problems of e-commerce face Europe as well as the U.S., and he compares the developing European Union model with UCITA. Both economic powerhouses seek to establish clear rules that reflect the rapid changes in e-commerce. The civil law countries inevitably must approach e-commerce within their own framework, which has a civil code base, while U.S. lawyers have drafted UCITA against the background of common law contracts and the U.C.C. Finally, he suggests ways to reconcile the two systems in order to facilitate transactional e-commerce.

Michael L. Rustad contends that legislatures should adopt UCITA instead of listening to the criticisms of interest groups opposed to UCITA. Although he believes UCITA provides a necessary legal infrastructure, he proposes two amendments to UCITA. One would seek to guarantee a minimum standard of quality of software, and the other would make it clear that state deceptive trade practices acts govern UCITA transactions.

Professor Rustad believes that UCITA will not become law in many states until the software industry is willing to give implied warranties and minimum adequate remedies. His two proposed amendments may provide a compromise that will facilitate wide-spread adoption of UCITA.

Cem Kaner writes as both a lawyer and a software engineer. He explains the opposition to UCITA by particular groups. In the longest article in this symposium, he enumerates each specific ground for opposition and analyzes it. His extensive experience as a software engineer informs every paragraph of his article. He believes that engineers were essentially ignored during the drafting process.

Mr. Kaner concludes that "small business customers, independent software developers and consultants" will suffer from UCITA. He warns the software industry that it "stands at a crossroads" and suggests that it should seek a legal framework for software licensing other than UCITA. This is a sobering conclusion.

The Journal of Computer and Information Law cannot take a position for or against adoption of UCITA and/or UETA. However, it believes that these articles afford the best basis for study of UCITA by legislators and those concerned with e-commerce. *The Journal* offers this symposium with pride.

