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MAKING UCITA MORE CONSUMER-FRIENDLY

by MICHAEL L. RUSTAD†

Butch: Is that what you call giving cover?

Sundance: Is that what you call running? If I knew you were going to stroll . . .

Butch: Good. For a moment there, I thought we were in trouble.¹

Butch Cassidy & the Sundance Kid

I. INTRODUCTION

The approval of the Uniform Computer Information Transactions Act (“UCITA”) in July, 1999, by the National Conference on Uniform State Laws (“NCCUSL”) is the culmination of a ten-year war between the software industry, consumer representatives, the entertainment industry and other stakeholders over the fundamental rules for electronic contracts, software licensing, and Internet contracts. In the early 1990s, NCCUSL and the American Law Institute (“ALI”) agreed to update the Uniform Commercial Code (“UCC”) to include software-licensing agreements. Initially, UCITA was proposed as Article 2B, a new article of the UCC. The new article would include software licenses in the UCC for the

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1. *Butch Cassidy and the Sundance Kid* (visited Oct. 4, 1999) <<http://webclass.ncu.edu.tw/12024/notes/butch.html>>.

first time. The inclusion of software and online contracts was part of a general remodeling of the UCC that began in the late 1980s.²

The ALI's withdrawal of its support for Article 2B led the NCCUSL to propose UCITA as a stand-alone statute.³ UCITA applies to "computer transactions,"⁴ which is broadly construed to cover "contracts to create, modify, transfer or license computer information or informational rights in computer information."⁵ UCITA pertains to wide variety of Internet-related mass-market licenses⁶ including contracts to download software,⁷ access contracts,⁸ click-wrap agreements,⁹ Web-wrap agree-

2. See generally Amelia H. Boss, *Developments on the Fringe: Article 2 Revisions, Computer Contracting and Suretyship*, 46 BUS. LAW. 1803 (1991); Jeffrey B. Ritter, *Software Transactions and Uniformity: Accommodating Codes Under the Code*, 46 BUS. LAW. 1825 (1991).

3. See Thom Weidlich, *Commission Plans New UCC Article*, NAT'L L. J. (Aug. 28, 1995), at B1 (noting that NCCUSL appointed Houston law professor Raymond T. Nimmer as Technology Reporter for the new UCC Article 2B); See also Raymond T. Nimmer, *Intangibles Contracts: Thoughts of Hubs, Spokes and Reinigorating Article 2*, 35 WM. & MARY L. REV. 1337 (1994).

4. U.C.I.T.A. § 103(a) (NCCUSL Draft for Approval, July 1999) [hereinafter U.C.I.T.A.].

5. U.C.I.T.A. § 102(a)(12).

6. U.C.I.T.A. § 102(a)(44). U.C.I.T.A. defines the mass-market license to mean "a standard form that is prepared and used in a mass-market transaction." *Id.* A mass-market transaction, in turn, means:

(A) A consumer transaction; or (B) any other transaction with an end-user licensee if: (i) the transaction is for information or informational rights directed to the general public as a whole including consumers, under substantially the same terms for the same information; (ii) the licensee acquires the information or rights in a retail transaction under terms and in quantity consistent with an ordinary transaction in a retail market.

Id. § 102(a)(46).

7. See, e.g., Adobe Sys. Int'l, *CustomerFirst Support License Agreement* (visited Feb. 1, 1999) <<http://www.adobe.com/supportservice/custsupport/Library>>. Adobe Systems, Inc., for example, conditions the downloading of software from its Web site on agreement with terms and conditions. *Id.* The license agreement advises the Web site visitor that they must agree to the terms and conditions of its end user license agreement as a condition for downloading software. *Id.* The Adobe license agreement states:

By downloading software of Adobe Systems Incorporated or its subsidiaries ("Adobe") from the site, you agree to the following terms and conditions. If you do not agree with such terms and conditions do not download the software. The terms of an end user license agreement accompanying a particular software file upon installation or download of the software shall supercede the terms presented below.

Id.

8. See U.C.I.T.A. § 102(a)(1). An access contract "means a contract to obtain electronically access to, or information from, an information processing system of another person, or the equivalent of such access." *Id.* U.C.I.T.A. will therefore cover access contracts such as Westlaw, LEXIS, Microsoft Network, America Online, and the on-line version of the *Wall Street Journal*, which is subscription-based.

9. See, e.g., Phillips Fox, *On-Line Transactions and Click-Wrap Agreements* (June, 1999) <<http://www.phillipsnizer.com/artnew27.htm>>. Many companies use "click-wrap

ments,¹⁰ and electronic data interchange.¹¹ UCITA also validates shrink-wrap agreements that accompany boxed software.¹²

The statutory purposes of UCITA are to facilitate computer or information transactions in cyberspace; clarify the law governing computer information transactions; enable expanding commercial practice in computer information transactions by commercial usage and agreement of the parties; and make the law relating to these transactions uniform.¹³ UCITA provides key infrastructure to e-commerce not found in any state or federal statute. For example, UCITA defines and validates the use of electronic agents¹⁴ to form online contracts. UCITA provides legal rules

agreements" where a subscriber signifies acceptance or rejection by clicking the mouse on a highlighted "I accept" or "I decline" icon. *Id.* Netscape's Navigator is distributed with an end user "click-wrap" or "click-stream" license. See Netscape Communications Corp., *Netscape Client Software End User License Agreement* <<http://home.netscape.com/download/client.html>>. The typical click-wrap agreement will state: By clicking the 'accept' button, you are consenting to be bound by and are becoming a party to this agreement. If you do not agree to all of the terms of this agreement, click the 'do not accept' button and the installation process will not continue. *Id.* (illustrating similar agreement language).

10. See, e.g., Real Networks, *Legal Notice, Disclaimer, and Terms of Use* (visited Feb. 9, 1999) <<http://www.real.com/company/legal.html>>. A Web-wrap or click-stream contract is typically structured as a license agreement. Web site visitors are given a license to use material on a given Web site. The license, for example, may restrict the visitor from distributing, copying, or preparing derivative works from a company's Web site materials. The license spells out permitted and restricted uses by visitors, and access to and use of the Web site is provided subject to the license agreement's terms and conditions. Real Networks for example, conditions use of information, artwork, text, video, audio or pictures on the visitor's acceptance of its terms of service. *Id.*

11. See Robert W. McKeon, Jr., *Electronic Data Interchange: Uses and Legal Aspects in the Commercial Arena*, 12 J. MARSHALL J. COMPUTER & INFO. L. 511, 512-514 (1994). In a typical Electronic Data Interchange ("EDI") agreement, the parties enter into a trader party agreement with subsequent transactions handled automatically by electronic agents. *Id.* EDI transactions are business-to-business online contracts. *Id.* Under the common law there must be a formal offer by one party and acceptance by the other. *Id.* EDI is a contracting practice by which the parties set guidelines for what qualifies as an offer and acceptance. *Id.* It is a means for businesses to communicate electronically computer-to-computer, and it eliminates the need for maintaining paper record systems and multiple data entries. *Id.* The major legal questions to EDI contracts are the validity and enforceability of computer contracts. See Jeffrey B. Ritter, *Scope of the Uniform Commercial Code: Computer Contracting Cases and Electronic Commercial Practices*, 45 BUS. LAW. 2533, 2555 (1990).

12. Software is often packaged with shrink-wrap plastic covering the package. The shrink-wrap license receives its name from the practice of software vendors of printing shrink-wrap licenses beneath the shrink-wrap or in the box containing software. While some shrink-wrap license agreements are printed on the outside of the box, others cannot be seen until the software is paid for and the box opened. Still other software vendors display the shrink-wrap license agreement only after the software is booted up and the terms are displayed on the user's screen.

13. See U.C.I.T.A., Prefatory Note.

14. See U.C.I.T.A. § 102(a)(27).

for electronic events such as the "electronic authentication, display, message, record or performance" that are critical to Internet transactions.¹⁵

Article 2B and UCITA, its successor statute, are the most controversial codification projects in recent history. *Butch Cassidy and the Sundance Kid* was a 1969 film that featured Paul Newman and Robert Redford playing two famous outlaws of the American Wild West.¹⁶ Butch and Sundance were pursued by a relentless posse after repeatedly robbing the Union Pacific railroad.¹⁷ The outlaws used every technique to evade the posse but the lawmen just kept coming.¹⁸ Butch finally turned to Sundance and asked: "Who are those guys?"¹⁹ The battles over the enactment of UCITA and former UCC Article 2B resemble the last days of Butch and Sundance when the posse just kept pursuing the outlaws. UCITA is in danger of being killed off by interest groups that vow to oppose the model statute when it is introduced into state legislatures. If UCITA is not enacted, courts will be left with no alternative but to stretch UCC Article 2 to Internet and software licenses.

In Part II of this article, I make the case that state legislatures should adopt UCITA rather than capitulate to the anti-UCITA posse. UCITA will "simplify, clarify and modernize" the commercial law and is a vast improvement over applying Article 2 to computer information contracts.²⁰ UCITA brings certainty to information-based license agreements in a way that brings common sense to the common law.

In Part III, I recommend two modest amendments to UCITA, which could serve to clarify UCITA's benefit to consumers. UCITA would be even more forward-looking if software vendors were held to a minimum standard that required their software to substantially conform to its documentation. The inclusion of this mandatory term would bring greater balance to consumer transactions which are entirely adhesive. Consumers would be entitled to a full refund plus reasonable incidental damages under a mandatory minimum remedy. The software industry generally advocates a law of licensing that permits the vendor to contractually limit the end-user's remedies to repair, replacement or refund. Under my proposal, vendors could not disclaim the implied warranty of merchantability. If software did not substantially conform to its docu-

15. U.C.I.T.A. § 102(a)(29).

16. See *Butch Cassidy and the Sundance Kid* (Twentieth Century Fox/Campanile 1969).

17. See *id.*

18. See *id.*

19. *Id.*

20. U.C.C. § 1-102 (1999). U.C.I.T.A. shares these common purposes with the UCC. Like the UCC, U.C.I.T.A. will permit the continued expansion of commercial practices such as Internet contracts, e-commerce, and online contracting. *Id.*

mentation, the consumer would be guaranteed a refund and reimbursement of reasonable incidental damages.

UCITA already recognizes the necessity of a minimum adequate remedy. Section 803 states that "if performance of an exclusive or limited remedy causes the remedy to fail of its essential purpose, the aggrieved party may pursue other remedies."²¹ The policy underlying the doctrine of "failure of essential purpose" is "that at least minimum adequate remedies be available."²²

Consumer licensees who enter into mass-market transactions should be guaranteed a minimum adequate remedy of a right to a refund plus incidental damages when the software substantially fails to conform to its documentation.²³ The present "minimum adequate remedy" of § 803 represents the default warranties and remedies of UCITA.²⁴ However, § 803 only applies where the parties specify that a limited remedy is the exclusive or sole remedy.²⁵ Software licensors frequently disclaim all warranties and consequential damages, without specifying an exclusive or limited remedy. Whether a limited remedy is exclusive or not, the concept of a minimum adequate remedy should be extended to all mass-market licenses.

My second suggested amendment would be that UCITA explicitly declare it is governed by state deceptive trade practice acts. Mass-market licenses are retail transactions that should be treated as the functional equivalent of a sale. There is some uncertainty as to whether federal or state consumer protection statutes applying to durable goods also apply to information licenses. Section 105 states that UCITA gives way to consumer protection statutes.²⁶ The proposed amendment would make it clear that UCITA will not supplant state or federal consumer protection. Section 105 should be amended to explicitly state that UCITA extends federal and state consumer protection statutes to mass-market computer software and other licenses.²⁷ This amendment is only necessary because of the uncertainty whether courts will extend state and federal consumer protection laws developed for durable goods to in-

21. U.C.I.T.A. § 803.

22. U.C.C. § 2-719, O.C. 1.

23. A consumer transaction is one where the software or other information is used or bought primarily for personal, family or household purposes. U.C.I.T.A. § 102(a)(16). The amendment proposed here adapts UCC § 9-109(1) to U.C.I.T.A. mass-market transactions. See U.C.C. § 109(2).

24. U.C.I.T.A. § 803.

25. See *id.*

26. See U.C.I.T.A. § 105(c). The section states "[e]xcept as otherwise provided in subsection (d), if this [Act] conflicts with a consumer protection statute [or administrative rule], the conflicting statute [or rule] governs." *Id.*

27. See U.C.I.T.A. § 105(c).

tangibles such as software or access contracts.²⁸

As in the final scene of *Butch Cassidy and the Sundance Kid*, the guns are blazing and UCITA is trapped on a ledge in big trouble. In the nine months after NCCUSL approved the model statute, only Virginia and Maryland have enacted UCITA.²⁹ Iowa has adopted a poison pill statute "which declares voidable a choice of law clause if the state law selected was UCITA."³⁰ UCITA has been introduced in Delaware, the District of Columbia, Hawaii, Illinois, and Oklahoma.³¹ UCITA has not even been introduced in any of the other states, making it quite clear that the model statute is unlikely to be adopted nationwide any time soon. UCITA will not be widely enacted without the support of consumer groups in the state legislatures, and consumer groups are united in their opposition to UCITA. Chief Justice John Marshall, in addressing the Supreme Court, stated that there were times when a question has been discussed, "until discussion has been useless. It has been argued, until argument is exhausted."³² UCITA will not be widely adopted by the state legislatures unless the key stakeholders are willing to meet on Marshall's ground of compromise.

II. THE CASE FOR ADOPTING UCITA

Modification implies growth. It is the life of the law.

Louis Brandeis³³

A. THE POLITICS OF UCITA

UCITA has been controversial from the start when it was conceived as Article 2B of the UCC. It has been difficult to engineer a consensus about the rules for information transfers because few interest groups came to the bargaining table with a spirit of compromise. The innumerable drafts of Article 2B, which preceded UCITA, were hotly debated by industry, consumer and bar association groups. In March of 1995, NCCUSL approved a "hub and spoke" model³⁴ that treated Article 2B as a

28. The Magnuson-Moss Act, for example, applies to consumer goods used for personal or household purposes. See 15 U.S.C. §§ 2301 (1997). It is uncertain, though, whether the Magnuson-Moss Act will be extended to the licensing of software to consumers.

29. U.C.I.T.A. Online, *What's Happening to UCITA in the States* (visited May 3, 2000) <<http://www.U.C.I.T.A.online.com/whathap.com>>.

30. *Id.*

31. *Id.*

32. ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL 505* (1919) (quoting John Marshall), reprinted in EUGENE C. GERHART, *QUOTE IT COMPLETELY!* 177 (1998).

33. *Washington v. Dawson Co.*, 264 U.S. 219, 236 (1924).

34. See U.C.C. Revised Article 2 (Proposed "Hub and Spoke" Draft, Feb. 10, 1995) [hereinafter Hub and Spoke Draft]. Hub provisions included general standards such as good faith or reasonableness as well as specific rules that were shared by each spoke: Arti-

separate spoke sharing hub provisions with Articles 2 and 2A. The hub and spoke model sought to harmonize Articles 2, 2A and 2B by forging general principles common to each article. It envisioned a common hub and separate spokes for Articles 2, 2A and 2B that correspond to sales, leases and licenses respectively.³⁵

A wide variety of stakeholders such as The Software Publishers Association ("SPA") opposed the hub and spoke model.³⁶ The SPA claimed that, "[e]xcept for [two people], no one on the 16-member drafting committee working on Article 2 of the UCC seems to have any experience in licensing, high-technology matters and intellectual property."³⁷ The SPA was critical of the model for being too anti-industry and too pro-consumer.³⁸ A corporate counsel for a Fortune 500 company complained that the drafting committee included too many law professors with a pro-consumer bias.³⁹ Other critics argued just the opposite, that Article 2B was a statute by and for the software industry against consumers.⁴⁰ Consumer representatives argued that Article 2B was anti-consumer and that they were not included in the drafting process.⁴¹ Ralph Nader's Consumer Project on Technology also calls for the defeat of UCITA because of its pro-industry bias.⁴² The Federal Trade Commission ("FTC") questions whether it is appropriate for UCITA to depart from well-established "consumer protection and competition policy principles in a state commercial law statute."⁴³ The FTC believes that UCITA needs to be modified to protect consumers.

The death knell for the hub and spoke model sounded in late July, 1995, when NCCUSL abandoned the entire hub and spoke architecture in favor of making Article 2B a separate UCC article.⁴⁴ NCCUSL eliminated the hub and spoke but retained Raymond Nimmer as the Article

cles 2, 2A and 2B. *Id.* The idea was that common provisions to the Articles would be found in the hub, whereas provisions unique to sales, leases and licenses, would be in specialized spokes. *Id.*

35. *See id.*

36. *See* Jonathan Groner, *This Uniform Code Does Not Compute: Software Industry Balks at Rewrite of Commercial Law*, LEGAL TIMES, Nov. 1, 1993, at 1.

37. *Id.*

38. *See id.*

39. *See id.*

40. *See generally* Cem Kanner, *UCC Article 2B: A New Law of Software Quality* (visited Oct. 12, 1999) <<http://www.badsoftware.com/uccsq.htm>>.

41. *See id.* (summarizing consumer objections to the drafting of U.C.I.T.A.).

42. *See id.*

43. *See* Letter from the Federal Trade Commission ("FTC") to John L. McLaugherty, Chief, Executive Committee, National Conference of Commissioners on Uniform State Law (July 9, 1999), available at <<http://www.ftc.gov/be/v990010.htm>>.

44. *See* Weidlich *supra* note 3.

2B reporter.⁴⁵ In addition to Professor Nimmer, the key players for the Article 2B project were the American Bar Association,⁴⁶ NCCUSL and the ALI.⁴⁷ Both the ALI and the NCCUSL needed to approve a completed draft before it could be introduced in the state legislatures.⁴⁸

In May, 1999, the ALI withdrew sponsorship of Article 2B as a separate article of the UCC, and the NCCUSL approved the new Uniform Computer Information Transactions Act two months later.⁴⁹ Unlike Article 2B, UCITA will not be proposed as a UCC article but will be introduced to state legislatures as a stand-alone statute.⁵⁰ The final approved version of UCITA reflects compromises with various consumer and industry stakeholders. The problem for the reporter and the UCITA Drafting Committee was that by the time a compromise was reached with one aggrieved stakeholder, another interest group stepped forward arguing that they were unrepresented in the drafting process. Wave after wave of UCITA critics have come forward in the ten-year war over its enactment. Like Butch Cassidy, the UCITA's Reporter must be asking himself: "Who are these guys?"

B. THE IDEOLOGY OF UCITA

Karl Mannheim's sociology of knowledge provides some insight into the sources of opposition to UCITA.⁵¹ Mannheim, like the legal realists, argued that all ideas were socially constructed and situated.⁵² To Mannheim, ideas were shaped by ideologies. Under his sociology of knowledge, commercial law would be viewed as a set of beliefs that explain and justify social arrangements. He viewed ideology as a justification of the status quo or "things as they are."⁵³ Professor A.P. Simonds describes Mannheim's theory of ideology and utopia as fundamentally opposed.⁵⁴

45. See Carol A. Kunze, *The 2Bguide: Background* (visited Apr. 25, 1999) <<http://www.2bguide.com/bkgd.html#I>>.

46. I participated in the Article 2B drafting process through the American Bar Association as a task force leader for the *Scope of Article 2B for the ABA Subcommittee on Software Licensing* (later to be named *Information Licensing*) of the Business Law Section co-chaired by Donald Cohn and Mary Jo Dively.

47. See Kunze, *supra* note 45.

48. See *id.*

49. See Joint Press Release from N.C.C.U.S.L. and A.L.I., *NCCUSL to Promulgate Freestanding Uniform Computer Information Transactions Act—ALI and NCCUSL Announce that Legal Rules for Computer Information Will Not Be Part of UCC* (Apr. 7, 1999), available at <<http://www.2bguide.com/docs/040799pr.html>>. See also U.C.I.T.A.

50. *Id.*

51. See generally KARL MANNHEIM, *IDEOLOGY AND UTOPIA* (Louis Wirth & Edward Shils, trans., 1936).

52. See *id.*

53. See *id.*

54. See A.P. SIMONDS, *KARL MANNHEIM'S SOCIOLOGY OF KNOWLEDGE* 99 (1978).

An ideology is a set of beliefs that reflects the interest of dominant groups to explain and justify their own economic interests.⁵⁵ In contrast, utopia is critical of the status quo and tends to be forward looking.⁵⁶ Professor Simonds notes that Mannheim distinguishes "between the terms 'ideology' and 'utopia' in order to emphasize the significance of this difference."⁵⁷

Although there are many differences among and between stakeholders, there are basically two camps representing ideological and utopian perspectives. The supporters of UCITA favor a regime of private ordering, whereas its opponents favor social welfaristic or regulatory approach to software licenses.⁵⁸ UCITA is ideological in favoring a private market approach over a regulatory approach.⁵⁹ The co-chairs of the ABA Software Licensing Committee acknowledge that the task for UCITA drafters is to create "gap fillers" that conform to industry practices.⁶⁰ They contend that the drafting "process is not intended to rewrite the law for commercial parties, the fundamental tenets of [freedom of contract that] have been in place since the creation of the UCC."⁶¹

The ideology of private ordering views autonomous choices as the "legitimate exercise of the right of self-government or self-determination."⁶² UCITA advocates oppose mandatory non-waivable provisions as reallocating the risk "between the contracting parties in ways that are contrary to current industry practice in many cases."⁶³ UCITA's software industry supporters seek to codify industry practices, such as shrink-wrap or click-wrap licenses. Many of the opponents of UCITA

55. See generally MANNHEIM, *supra* note 51.

56. See *id.*

57. See SIMONDS, *supra* note 54.

58. U.C.I.T.A. is premised on the private ordering of software licensing. U.C.I.T.A.'s reporter and the drafting committee have a belief in the efficacy of the free market and in the right to private property.

59. See generally John Locke, SECOND TREATISE ON GOVERNMENT (1690). The "free market" ideology may be traced back John Locke. Locke defended the rights of the emerging mercantilist middle class to own property and conduct business with a minimum of government interference. *Id.* The Clinton Administration favors a free market approach to the Internet and e-commerce. See generally THE WHITE HOUSE, A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE (July 1, 1997). The White House endorsed a minimalist role for the government and that the "governments should refrain from imposing new and unnecessary regulations, bureaucratic procedures, or taxes and tariffs on commercial activities that take place via the Internet." *Id.*

60. Mary Jo Howard Dively & Donald A. Cohn, *The Treatment of Consumers Under Proposed UCC Article 2B Licenses*, 16 J. MARSHALL J. COMPUTER & INFO. L. 315, 317 (1997).

61. *Id.*

62. MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 8 (1993).

63. Dively & Cohn, *supra* note 60, at 317.

favor a pro-regulatory approach under which terms and conditions for software licenses are strictly policed.

Pro-regulatory opponents of UCITA, such as the Consumer Project on Technology and others, regularly attended Article 2B and UCITA meetings.⁶⁴ They point out that mass-market licenses are adhesive contracts that offer no possibility of negotiation. The freedom of contract is a legal fiction in "take it or leave it" mass-market licenses. Free market individualism is premised on the assumption that human beings are motivated primarily by economic self-interest and have a right to pursue self-interest "without interference from others or the imposition of alternative conceptions of the good by others."⁶⁵ It is in the self-interest of the software industry to disclaim all warranties and consequential damages, which may leave consumers without a minimum adequate remedy.

At the federal level, the Clinton Administration endorses a minimalist role for government regulation of the Internet. The Clinton White House Report on Global Electronic Commerce argues that the government "should be able to support and enforce a predictable, minimalist, consistent and simple legal environment for commerce."⁶⁶ The White House supports the efforts of "participants in the marketplace [as defining] most of the rules that will govern electronic commerce," thus endorsing Article 2B's attempt to apply the UCC to cyberspace.⁶⁷ The ideology of UCITA advocates is decidedly in the camp of supporting industry practices "as they are" with minimal government interference.⁶⁸

UCITA adopts the jurisprudence of the UCC that courts should enforce private ordering arrangements. Karl Llewellyn, reporter for UCC Article 2, wrote, "If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense."⁶⁹ UCITA did not descend from the legal heavens in the form of stone tablets.⁷⁰ The drafting of Article 2 was a response to "the apparent rigidity and incompatibility [of pre-Code law]

64. *Id.* at 319.

65. TREBILCOCK, *supra* note 62, at 9.

66. See WHITE HOUSE, *supra* note 59.

67. *Id.* The paper argues:

Parties should be able to do business with each other on the Internet under whatever terms and conditions they agree upon . . . To encourage electronic commerce, the U.S. government should support the development of both a domestic and global uniform commercial legal framework that recognizes, facilitates and enforces electronic transactions worldwide.

Id.

68. See generally, Dively & Cohen *supra* note 60.

69. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 374 (1960).

70. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935) (coining the term "legal heavens").

with commercial norms.⁷¹

UCITA follows Article 2's methodology in drawing distinctions between rules for merchants and non-merchants.⁷² Much of Article 2 can be characterized as default rules created by and for the business community. The parties may elect to opt in or opt out of UCITA, but they cannot alter mandatory consumer protection rules. The UCC, as a whole, is designed to permit the "continued expansion of commercial practices."⁷³ UCITA follows the UCC in the law-merchant tradition of incorporating business customs and trade usages into commercial law.⁷⁴ Section 211 provides that the terms of the contract include the express agreement, "course of dealing, usage of trade, and the nature of the parties' conduct."⁷⁵

Revised UCC Articles 3 and 4, for example, validated expanding commercial practices such as the electronic presentment of negotiable

71. Allen R. Kamp, *Between-the-Wars Social Thoughts: Karl Llewellyn, Legal Realism and the UCC in Context*, 59 ALB. L. REV. 325, 332 (1995).

72. Special merchant rules include: § 2-201(2), the Statute of Frauds; § 2-205, the merchants' only "firm offer" rule; § 2-207, the merchants' confirmatory memoranda rule for "battle of the forms;" § 2-209, the merchants' sales contract modification rule; § 2-312, merchant rule for warranty against infringement; § 2-314, implied warranty of merchantability; § 2-316(2), special merchant rule for disclaiming warranties; § 2-103(1)(b), special merchant rule for good faith; § 2-327(1)(c), merchants' rule for following reasonable instructions in "Sale on Approval" or "Sale or Return" contracts; § 2-603, special duties for merchant buyers in dealing with rejected goods; § 2-605, merchants' special rule for waiver of buyer's objection by failure to particularize defects; § 2-509(3), special merchants' rule for risk of loss in the absence of breach; § 2-402(2), merchants' rule for rights of seller's creditors; § 2-403(2) merchants' entrusting rule and power to transfer goods to a buyer in the ordinary course of business; and § 2-609, merchants' right to adequate assurance of performance. U.C.I.T.A. essentially adapts Article 2's methodology of having separate rules for merchants and non-merchants in computer transactions. U.C.I.T.A. defines the "merchant" as a person that deals in information or informational rights of the kind or that otherwise by the person's occupation holds itself out as having knowledge or skill peculiar to the practices or information involved in the transaction or a person to which such knowledge or skill may be attributed by the person's employment of an agent or broker or other intermediary that by its occupation holds itself out as having such knowledge or skill. U.C.I.T.A. § 102 (47). As with Article 2, U.C.I.T.A. has a special Statute of Frauds rule for merchants. U.C.I.T.A. § 201(d) (stating that where both parties are merchants there is an exception to the writing requirement where notice of objection "is not given within 10 days after a confirming record is received."). There is a special merchants' rule for U.C.I.T.A. § 204, which is the functional equivalent of § 2-207's battle of the forms. See U.C.I.T.A. § 204(d)(2) (stating that "between merchants, the proposed additional terms become part of the contract unless the offeror gives notice of objection before or within a reasonable time after it receives the proposed terms."). As with Article 2, U.C.I.T.A. has a large number of special merchant rules.

73. U.C.C. § 102(2)(b).

74. See *Mirabile v. Uda Udoh*, 399 N.Y.S.2d 869 (1977) (stating that "the principles of the law merchant supplement the UCC through § 1-103"). See also U.C.C. § 1-103 (incorporating the law merchant into UCC jurisprudence).

75. U.C.C., § 211(a).

instruments.⁷⁶ The revisions to these Articles helped to bring certainty to the law by validating banking practices in sending and presenting items to payor banks.⁷⁷ The UCC is a semi-permanent piece of legislation that is continually updated. Articles 3 and 4 were revised to update the law in a way that was favorable to the banking community.⁷⁸ It is well documented how the original draft of Article 3 and 4 was completed by and for the banking community.⁷⁹ Edward Rubin, a former ABA Subcommittee Chair for Articles 3 and 4, explains why the revised Articles have rules that unduly favor the banking community.⁸⁰ His brief history of the revision of Articles 3 and 4 provides a convincing account of how special interests captured the revision process.⁸¹ Professor Rubin went on to explain that he resigned from the ABA committee because the industry representatives that captured Articles 3 and 4 “thought like lawyers and acted as lobbyists.”⁸² He recounted how bank lawyers on the ABA committee he chaired claimed neutrality, yet their positions revealed the economic and social interests of their clients.

One attorney assured Professor Rubin of his value-neutrality: “When I participate in an advisory committee, I check my clients at the door.”⁸³ However, Rubin observed how each of the supposedly neutral attorneys “brought their conceptual frameworks in the room with them.”⁸⁴ Similar disclaimers are made by the leadership of other law reform organizations such as the American Law Institute whose President begins each annual meeting by asking members to “check their cli-

76. U.C.C. § 4-110.

77. U.C.C. § 4-204.

78. See U.C.C. § 3-605(c). The rules on the discharge of indorsers and accommodation parties are an obvious example of rules tilted in favor of the banking industry. Under the old Code, an accommodation party was discharged if a bank extended the due date of an obligation without permission of that party. However, under the revision an indorser or accommodation is not automatically discharged by extensions. *Id.* The burden is placed on the indorser or accommodation party to prove “that the extension caused loss to the indorser or accommodation party with respect to the right of recourse.” *Id.* Similarly, under the old Code a material modification of an obligation would have the effect of discharging an accommodation party or surety. *Id.* Under the revised code, the indorser or accommodation party has the burden of proving loss. See *id.*

79. See GENERAL COMMENT OF NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND THE AMERICAN LAW INSTITUTE (1962); SELECTED COMMERCIAL STATUTES 21-22 (West 1996 ed.). The members of the Subcommittees considering Articles 3 and 4 were disproportionately Boston and New York bankers and representatives from the Federal Reserve Bank. *Id.* See also Walter Malcolm, *The UCC in the United States*, 12 INT’L & COMP. L. Q. 226, 229 (1963).

80. See Edward L. Rubin, *Thinking Like A Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4*, 26 LOYOLA L.A. L. REV. 743, 749 (1993).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

ents at the door.⁸⁵

The assumption that lawyers can divorce their ideas from the economic interests of their clients is a positivist one.⁸⁶ German sociologist Max Weber thought that legal sociologists had to be value-free and conduct research without bias strictly according to the norms of scientific research—objectivity, verifiability and value-neutrality. Weber believed that “social scientists should test their hypotheses and leave politics to others.”⁸⁷ UCITA follows the UCC in permitting the expansion of commercial transactions in information. UCITA adopts the “principles of law and equity, including the law merchant.”⁸⁸ For many centuries, the business community had its own fair courts where they made their own law. The implied warranty of merchantability had its origin in these merchant courts.⁸⁹ The courts were an attractive alternative to “the stiff-necked judges of the King’s Bench who had been known to hold that there was no such thing as a negotiable promissory note.”⁹⁰ The merchant fairs were an integral part of commercial law from the medieval period through the end of the eighteenth century.⁹¹ The idea underlying the law merchant tradition was that the law should reflect business practices.⁹² Grant Gilmore, drafter of Article 9, argued that commercial law should reflect business practices.⁹³ His advice to UCC codifiers was to be “accurate not original.”⁹⁴ Codifying established business practices into the commercial law is particularly difficult when trade usages are still evolving. The World Wide Web is less than a decade old, and the software industry has largely developed since the 1980s. UCITA, like

85. The President of the American Law Institute is Charles Alan Wright, a distinguished professor at the University of Texas.

86. See generally ALLAN G. JOHNSON, *THE BLACKWELL DICTIONARY OF SOCIOLOGY: A USER’S GUIDE TO SOCIOLOGICAL LANGUAGE* (1995). Positivism was a social theory which held that it was possible to objectively “observe social life and establish reliable, valid knowledge about how it works.” *Id.* at 207.

87. JOHN B. WILLIAMSON, LINDA EVANS, & MICHAEL RUSTAD, *SOCIAL PROBLEMS: THE CONTEMPORARY DEBATES* 3 (4th ed. 1985) (discussing Weber’s sociological theory).

88. U.C.I.T.A. § 104.

89. See MICHAEL L. RUSTAD, *THE CONCEPTS & METHODS OF SALES, LEASES AND LICENSES* 180 (1998) (noting that the doctrine of merchantability is traced back to the law-merchant tradition).

90. Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 *YALE L.J.* 1341, 1342 (1948).

91. See RUSTAD, *supra* note 89, at 15.

92. *Id.* at 17. William Murray, Lord Mansfield, an eighteenth century English Chief Justice, was the father of commercial law. *Id.* Lord Mansfield, Chief Justice of the King’s Bench between 1756 and 1788, authored opinions that key to the development of commercial law. *Id.* He made a regular practice of consulting with the business practice before rendering commercial law opinions, and he went so far as to appoint merchant juries to decide commercial disputes. *Id.*

93. *Id.*

94. *Id.*

the UCC, must be a semi-permanent piece of legislation amended to take into account the continued expansion of the Internet.

The history of commercial law is a history of the business community working to transform commercial practices into a commercial law that reflects their economic interests.⁹⁵ Oliver Wendell Holmes prefigured the legal realists in arguing that "law was the supple tool of power . . . and identified the task of fashioning legal policy as one of cultural observation, not the mere invocation of rules."⁹⁶

C. THE UTOPIA OF UCITA'S OPPONENTS

The regulatory camp within UCITA is skeptical that there is any real freedom of contract with mass-market licensing. The pro-regulatory forces include consumer advocates, software customers, librarians,⁹⁷ writers, photographers, the entertainment industry, magazines and newspaper publishers.⁹⁸

The Consumer Project on Technology developed a UCITA protest page on its Web site.⁹⁹ The Consumer Federation of America argued that NCCUSL should table UCITA because of its "broad validation of shrink-wrap licenses . . . and other imbalances in the draft [that] make it unacceptably biased against consumer interests."¹⁰⁰ The Free Software Project has mounted a campaign to defeat UCITA entirely.¹⁰¹ Consumers argue that UCITA makes it too easy to disclaim warranties and consequential damages. The list of legal organizations opposing UCITA is a who's who of the profession: intellectual property law professors, law professors specializing in contracts and commercial law, the Consumer's Union, the American Intellectual Property Association, and the New York City Bar Association.¹⁰² Fifty leading intellectual property law

95. See, e.g., ROBERT L. NORDSTROM, *LAW OF SALES 2* (1970). The Merchants Association of the City of New York, for example, sponsored a federal sales act in 1938. *Id.* The members of the drafting committee and the participants from The American Law Institute and the National Conference of Commissioners on Uniform State Laws were lawyers who routinely represented business interests. *Id.*

96. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW 1* (1881).

97. See generally American Association of Law Libraries (visited Oct. 11, 1999) <<http://www.arl.org/info/letters/libltr.html>>.

98. See Cem Kaner, *Flash: Meeting on UCITA/Article 2B* (visited Oct. 11, 1999) <<http://www.badsoftyware.com>> (summarizing opposition to U.C.I.T.A.).

99. See Consumer Product on Technology, *Article 2B Protest Page* (visited Oct. 11, 1999) <<http://www.cptech.org/ucc/sign-on.html>>.

100. Steve Brobeck et al., Consumer Federation of America, Letter to Charles Alan Wright, President, American Law Institute and Gene N. Lebrun, NCCUSL, Nov. 10, 1998.

101. See, e.g., *Campaign Against Abusive Shrink-wrap Licenses* (visited Oct. 18, 1999) <<http://commons.somewhere.com/rre/1999/RRE.campaign.against.abu.html>>.

102. See Cem Kanner, *UCITA-Opposition* (visited Oct. 11, 1999) <<http://www.badsoftware.com/oppose.htm>>.

professors and forty three commercial law and contract professors signed a letter opposing UCITA's predecessor, Article 2B.¹⁰³ These law professors oppose UCITA because they perceive it as a special interest statute that will upset the balance of federal intellectual property rights.¹⁰⁴ Much of the motion picture industry, entertainment industry and important segments of the print media oppose UCITA.¹⁰⁵ Initially, the opposition was based on the industries' concern that UCITA would apply to movies, video, and satellite transmissions.¹⁰⁶

UCITA's § 103 excludes the entertainment industry, but media moguls continue their pledge to oppose the statute's enactment. The Institute of Electrical and Electronics Engineers ("IEEE"), the Association of Computing Machinery ("ACM") and the Society for Information Management ("SIM") likewise call for action to defeat UCITA.¹⁰⁷ ACM argues that the proposed statute will "deregulate product licensing . . . and allow vendors to shut down software remotely if they suspect a violation of the licensing terms."¹⁰⁸ ACM also objects to UCITA on the grounds that it would allow vendors to prohibit reverse engineering through contractual use restrictions in license agreements.¹⁰⁹ The National Writers Union argues that the proposed statute is objectionable to writers.¹¹⁰ Writers and librarians oppose UCITA because of its perceived diminution of the "fair use" doctrine of the Copyright Act.¹¹¹

Many of UCITA's critics constitute a pro-regulatory camp favoring built-in protections for consumers and other mass-market licensees.

103. See Letter from Prof. Mark A. Lemley et al. (intellectual property law professors) to Carlyle C. Ring, Jr. Esq., Gene N. LeBrun & Professor Geoffrey Hazard, Jr. (Nov. 17, 1998), available at <<http://www.2Bguide.com/docs/1198ml.html>>, and Letter from Mary Becker, DePaul University of Law et al., to President Gene Lebrun and Other Commissioners, NCCUSL (July 16, 1999), available at <<http://www.2Bguide.com/docs/799profs.html>>.

104. *Id.*

105. See Kanner, *supra* note 102 (noting that the representatives issued a letter to the ALI and the NCCUSL which included signatories such as the Motion Picture Association of America, Inc., the Recording Industry Association of America, Inc., the Newspaper Association of America, the National Association of Broadcasters, the National Cable Television Association and the Magazine Publishers of America).

106. *Id.*

107. See Society for Information Management (SIM), *Issues Advocacy—UCITA, Immediate Action Requested on Uniform Computer Information Transactions Act (Formerly UCC 2B)* (visited Oct. 11, 1999) <<http://www.simnet.org/public/programs/issues/uccode.html>>.

108. ACM Washington Update, U.S. Office of Public Policy of the Association for Computing Machinery, 3.1 ACM WASHINGTON UPDATE 1 (Aug. 3, 1999).

109. *Id.*

110. See National Writers Union, *Warnings and Cautions for Writers—Electronic Issues* (visited Oct. 11, 1999) <<http://www.sfw.org/beware/electronic.html>>. The writers argue that Article 2B, the predecessor to U.C.I.T.A. "reduces publishers' obligations to promote a work . . . makes it easier for publishers to reject a work, endorsed 'all rights' contracts, and invalidated writers transfer restrictions." *Id.*

111. *Id.*

These pro-regulatory critics believe that there must "be a progressively heavier regulatory approach towards transactions."¹¹² Liberal regulators generally support a software-licensing regime with mandatory terms such as restrictions on the disclaimability of warranties and remedies. Regulators are legal realists who question whether there is freedom of contract in mass-market transactions. The adhesive nature of shrink-wrap licenses is far from the ideal of the free market prevalent in the nineteenth century. Regulators view freedom of contract, at least in the context of mass-market license transactions, as a legal fiction.¹¹³

Article 2B, UCITA's predecessor, was also opposed by a diverse coalition of consumers, licensees, entertainment industry interests, and other powerful stakeholders. Like UCITA, Article 2B was designed to be comprehensive, providing the rules for the formation and performance of computer-based information transfers.¹¹⁴ The silver bullet that killed Article 2B came when ALI Executive Committee top guns withdrew their support.¹¹⁵

The ALI's withdrawal from the Article 2B process precluded the possibility that software licensing and Internet commercial transactions could be the subject of a specialized article of the UCC. Even though UCITA will not be Article 2B of the UCC, its drafters were inspired by the UCC. The UCC is the most influential and widely cited statute governing U.S. commercial transactions. UCITA adopts many of the concepts and methods of Article 2B, as well as the exact language of many sections. Had the UCC included software licensing, it would have been a quantum leap toward modernizing the UCC for the age of the Internet. UCITA's liberal contract formation rules are inspired by Article 2 and 2B, as are its warranties and remedies.¹¹⁶ UCITA updates and extends UCC principles to software licenses, computer transactions and the Internet. Unless the oppositional forces to UCITA are defused, the model

112. Roger Brownsword, *The Philosophy of Welfarism and its Emergence in the Modern English Law of Contract*, Chapter 2 in *WELFARISM IN CONTRACT LAW* 25 (Roger Brownsword, et al. eds., 1994).

113. Jean Braucher, *Proposed Uniform Computer Information Transactions Act (UCITA): Objections from the Consumer Perspective* (visited May 4, 2000) <<http://www.cpsr.org/program/U.C.I.T.A./bracher.html>> (arguing that U.C.I.T.A. validates fictional assent and does not require that the terms "meet reasonable expectations.").

114. See U.C.C. § 2B-103, Reporter's Note 1 (Tentative Draft, Apr. 15, 1998) available at <<http://www.law.upenn.edu/library/ulc/ulc.htm>>. Article 2B deals primarily "with software and multi-media contracts, access contracts, involving online and Internet transactions, and transactions involving licenses of data, text, and related information." *Id.*

115. See American Law Institute, *A Message from Charles Alan Wright, ALI President* (visited Oct. 11, 1999) <<http://www.ali.org/ali/caw.htm>>. In the spirit of disclosure, I am a member of the American Law Institute but not a member of the Executive Committee that made the decision to withdraw its support for U.C.I.T.A.

116. RUSTAD, *supra* note 89, at 459-67.

statute will not be enacted in many jurisdictions, and a consistent approach to contracting information-based transactions will be elusive.

D. THE CASE FOR ADOPTING UCITA

1. *UCITA Adapts UCC Principles to Cyberspace*

Before the UCC emerged, legal realists such as Karl Llewellyn criticized the then dominant model of legal formalism, which focused too much on elegant theories of contract formation and too little on commercial realities.¹¹⁷ Llewellyn drafted liberal Article 2 contract formation rules reflecting best business practices.¹¹⁸ U.C.C. § 2-203 eliminates the formality of contracts under seal.¹¹⁹ Section 2-204 states that a sales contract may be formed "in any manner sufficient to show agreement."¹²⁰ As with UCC Article 2, UCITA contracts "may be formed in any manner sufficient to show agreement."¹²¹ It also permits contracts to be formed by electronic agents in transactions that do not require human review.¹²² UCITA's flexible approach to online contracts will permit the expansion of electronic commerce.

UCITA eschews the formalism of classical contract theory in favor of the legal realism of Article 2. UCITA updates § 2-204 to include the possibility that licenses may be formed by the "operations of electronic agents that recognize the existence of a contract."¹²³ It follows Article 2 in its rejection of classical contract roles such as the "meeting of the minds,"¹²⁴ the mirror image rule, and contracts under seal.

UCITA's purpose is to adapt the UCC to cyberspace. UCITA was prefigured in a 1987 ABA Report by the "Ad Hoc Committee on the Scope of the UCC" (ABA Report).¹²⁵ The ABA Report concluded that there was a need for legislation that would provide "uniform, consistent rules that fairly distribute risk and establish coherent frameworks" for computer and software contracts.¹²⁶ Software contracts involve "a complex blend of service contract, intellectual property and product delivery ques-

117. See generally Imad D. Abyad, *Commercial Reasonableness in Karl Llewellyn's Uniform Commercial Code Jurisprudence*, 83 VA. L. REV. 429 (Mar. 1997).

118. *Id.* For adhesive contracts, the best business practices would be for the software industry to acknowledge the need to incorporate consumer protection into transactions where there is no possibility of negotiation.

119. U.C.C. § 2-203.

120. U.C.C. § 2-204.

121. U.C.I.T.A. § 202(a).

122. See U.C.I.T.A. § 102(a)(28).

123. U.C.I.T.A. § 202(a).

124. See U.C.C. § 2-204(2). This section states that the "precise moment of [a sales contract's] making [may be] undermined." *Id.*

125. See Raymond T. Nimmer, *Software Licensing Contracts: Proposal for Study* by the A.B.A. Ad Hoc Committee on the Scope of the UCC 1 (1987) [hereinafter ABA Proposal].

126. *Id.* at 2.

tions."¹²⁷ The ABA recognized that Article 2 did not adequately accommodate computer contracts because these transactions were a hybrid of sales and service.

Beginning in the late 1980s, the entire UCC began to be overhauled. Article 2 governing sales was born four decades before the advent of the software industry. The law of sales is based upon the idea of passing title to goods for a price, and Article 2 focuses on the sale of durable goods. The classic definition of a license is "a mere waiver of the right to sue" for infringement.¹²⁸ In contrast, software licensors retain title in order to "restrict the customer's resale rights, prohibit disassembly of the software, and limit warranty obligations and other liabilities."¹²⁹ Information licensing is different than the sale of goods because title does not pass. Licenses impose use restrictions which are unknown with the sale of goods.

A contract for the sale of goods is one in which a seller agrees to transfer goods that conform to the contract in exchange for valuable consideration.¹³⁰ Rather than being sold for commercial transfers of information, software is typically licensed.¹³¹ The licensing of downloadable software shares little common ground with the traditional attributes of a sale of goods. With the sale of goods, title passes when the buyer accepts and pays in accordance with the contract, and it is marked by physical delivery of tangible goods. No title passes with the licensing of software. Location and use restrictions are necessary for software developers to realize their investment in developing intangible information assets.

A licensee is typically not permitted to resell licensed software. Software, unlike goods, may be delivered computer-to-computer without human intervention. The licensor retains title to software or other information and imposes restriction on use. No mass-market software developer could stay in business if all rights were transferred to the software with the first sale.¹³² Licensing is a useful and necessary legal invention

127. *Id.*

128. *General Talking Pictures, Inc. v. Western Electric Co.*, 304 U.S. 175, 181 (1938) (defining the patent license as "a mere waiver of the right to sue.").

129. Andrew R. Basile, Jr., *Licensing Rights in Information Owned by Others*, ONLINE LAW: THE SPA'S LEGAL GUIDE TO DOING BUSINESS ON THE INTERNET 285 (Thomas Smedinghoff ed., 1996).

130. *See* U.C.C. § 2-301 (Draft 1999).

131. Software contracts, access contracts, multi-media contracts and a host of online contracts are structured as licenses rather than sales to avoid the "first sale" doctrine of Copyright Law. A license is permission to use software, databases, intellectual property or other information. Additionally, it may be based on number of copies licensed, the method of distribution, the type of end user, or the form of a license agreement.

132. The software industry has developed licensing as a means of bypassing first sale. Licensing is a useful legal invention, which permits the industry to realize value. A "sale" is defined by the "passing of title from a seller to a buyer for a price." U.C.C. § 2-106(1).

to permit software developers to realize their investment.

The drafters conceived of the UCC as a statute that would continually be updated to reflect social and technological change. Article 2 was authored fifty years ago, decades before the development of the software industry and the Internet. Cultural lag is a term that describes what happens in a legal system when the law regulating social institutions does not keep pace with technological changes.¹³³ The UCC and the software industry have both suffered from legal as well as cultural lag. The software licensing industry has been evolving since the mid-1980s. IBM held a press conference in August of 1981 to introduce a new concept, the IBM Personal Computer or the PC.¹³⁴ Eleven years later, the software industry had revenues that equaled the sale of hardware.¹³⁵ Since then, software and services expanded at a rate many times that of hardware.¹³⁶ The sale of goods, however, differs substantially from the licensing of information, and the commercial law for licensing information lags far behind social and technological developments. UCITA seeks to provide a legal infrastructure for the "fastest growing part of the United States economy . . . transactions that shape computer-information industries."¹³⁷ Software does not require a large inventory but "involves little or no raw-material cost and little or no inventory cost. It's just 1's and 0's."¹³⁸

Without UCITA, courts have no practical alternative but to stretch sales law to include the law of licensing. However, the courts' attempt to apply a fifty year old law of sales to the licensing of intangibles is like applying horse and buggy laws in the industrial age. "Software licenses are difficult to categorize as goods because they possess elements of both

Licensing is a lower-order transfer of a property interest, parsing a right to use software or digital information and other intangibles for a designated period of time or under designated conditions. The licensing of intangibles, like leases, validates the legal concept of the right to use property. The title to tangible copies of intangibles is not dispositive or even relevant to licensing rights. With software licensing, the medium is not the message, only the right to exploit information. The ease of copying software has made the invention of licensing the only efficient method of realizing value.

133. See generally WILLIAM F. OGBURN, *SOCIAL CHANGE* (1923). Sociologist William F. Ogburn defined cultural lag as what happens when culture that regulates society does not keep up with social change. *Id.*

134. See PC Magazine, *PC Magazine Celebrates The Fifteenth Anniversary of the PC: Special Issue Covers Fifteen Dynamic Years of the Computing, PCs of the Future and Conversations with The Founders of Microsoft and Intel*, PR NEWSWIRE, Mar. 6, 1997.

135. See Carolyn Van Brussel, *Mobile PCs: '90s Their Decade, Speaker Claims*, 18 COMPUTING CANADA 14 (June 22, 1992).

136. *Id.* (noting that by 1992 software services was expanding at a rate of two to three times that of hardware).

137. *Id.*

138. James Aley, *Give It Away and Get Rich! Plus Other Secrets of the Software Economy*, FORTUNE, June 10, 1996, at 90.

intangibles and goods which are treated differently under the Uniform Commercial Code (U.C.C.).¹³⁹ With the enactment of UCITA, courts will no longer need to classify intangibles as if they were the same as tangible goods. The test for whether or not transactions are included in or excluded from Article 2 is "whether their predominant factor, their thrust, their purpose, reasonably stated . . . is a transaction of sale."¹⁴⁰ Once the predominant purpose is established as an Article 2 sale of goods, the UCC applies to the entire transaction.¹⁴¹

The ABA Report argued that bad software cases were increasingly litigated as tort cases rather than as contract disputes partially because of the uncertainty of which rules should apply to computer contracts. For example, an intentional misrepresentation provided the basis for liability under the computer contract case of *VMark Software v. EMC Corp.*¹⁴² Computer litigation was the source of an "abnormally large number of reported opinions dealing with software under state laws of misrepresentation."¹⁴³

Punitive damages are increasingly awarded in computer contract disputes that involve independent torts or a "willful or knowing violation of a state unfair and deceptive trade practices act."¹⁴⁴ In *Chatlos Systems v. National Cash Register Corp.* ("NCR"), a telecommunications equipment manufacturer purchased a computer system from NCR.¹⁴⁵ The system was supposed to perform a number of bookkeeping and accounting functions, and NCR's sales agreement excluded liability for consequential damages and limited the manufacturer's liability to fixing errors or defects within sixty days.¹⁴⁶ However, when the system was still not working properly one and a half years later, the Third Circuit found that NCR's limited repair remedy "failed of its essential purpose" and awarded damages.¹⁴⁷ While it did not award consequential or punitive damages in this case, the court provided a concise definition illustrating when both can be awarded despite express liability limitation

139. *NMP Corp. v. Parametric Tech. Corp.*, 958 F. Supp. 1536, 1542 (D. Okla. 1997).

140. *Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974) (holding that a contract for sale of goods including substantial amounts of labor is covered by Article 2).

141. See *Colonial Life Ins. Co. v. Electronic Data Systems Corp.*, 817 F. Supp. 235, 238-39 (D.N.H. 1993).

142. *VMark Software, Inc. v. EMC Corp.*, 642 N.E.2d 587, 594 (Mass. App. Ct. 1994) (finding intentional misrepresentation as a predicate for Chapter 93A liability).

143. *Id.*

144. MASS. GEN. LAWS ch. 93A § 11 (proving for up to three but not less than two times actual damages for willful or knowing violations of the act). Double or treble damages are awarded for "willful or knowing" violations of section 2 of Chapter 93A. *Id.*

145. *Chatlos Systems, Inc. v. NCR Corp.*, 635 F.2d 1081, 1084 (3d Cir. 1980).

146. *Id.*

147. *Id.* at 1088.

clauses in a contract.¹⁴⁸

An empirical study completed by the ABA uncovered more than one hundred computer contract decisions were reported in a period of just two-years.¹⁴⁹ The ABA Report contended that the uncertain rules for software contracts "encouraged the use of non-contract [tort] theories of recovery."¹⁵⁰ Tort remedies are rapidly replacing contract remedies because the legal infrastructure for software contracts is so "unclear and unsettled."¹⁵¹ The ABA Report noted that there was "an ongoing uncertainty about . . . the basic characteristics of a software contract."¹⁵² The thrust was that computer contract law is "drowning in a sea of torts."¹⁵³ The committee concluded that the "development of the law relating to software contracts can be significantly advanced through uniform legislation."¹⁵⁴

UCITA's uniform contracting rules will bring greater certainty to the law governing all information licenses, including software contracts, online contracts and Internet contracts.¹⁵⁵ UCITA is based upon a software-licensing paradigm rather than on patent, copyright or trademark licensing models, and it employs an Article 2 template in its concepts and methods.¹⁵⁶ Article 2 has been the most successful codification project in Anglo-American jurisprudence and is a familiar template for the business community. However, Article 2 needs the tailoring of UCITA to fit computer transactions.

Today, software is often distributed by remote access or Internet download. Article 2 applies to "transactions in goods."¹⁵⁷ For example, it requires a writing for the sale of goods costing \$500 or more.¹⁵⁸ UCITA addresses one problem with digital transactions by substituting the concept of a "record" for a "pen and paper" signature. A record "means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form."¹⁵⁹ Therefore, UCITA validates computer-to-computer transac-

148. *Id.*

149. See Nimmer, ABA Proposal, *supra* note 125.

150. *Id.*

151. *Id.*

152. *Id.* at 5.

153. GRANT GILMORE, *THE DEATH OF CONTRACT* 87 (1994) (coining the expression).

154. Nimmer, ABA Proposal, *supra* note 125.

155. See U.C.I.T.A. § 103.

156. See generally U.C.I.T.A. §§ 101-905 and U.C.C. §§ 2-101-725. The parts of U.C.I.T.A. roughly track Article 2. (1) Definitions, General Scope and Terms; (2) Formation and Terms; (3) Warranties; (4) Construction; (5) Transfer of rights and interests; (6) Performance; (7) Breach of Contract; (8) Remedies; and (9) Miscellaneous Provisions. *Id.*

157. U.C.C. § 2-102.

158. U.C.C. § 2-201(1).

159. U.C.I.T.A. § 102(a)(58).

tions by substituting this concept of an electronic record as the functional equivalent of writing.¹⁶⁰

UCITA more closely fits the commercial realities of software licensing than does Article 2 of the UCC. A favorite question that Chief Justice Burger posed to counsel appearing before the Court was, "If it doesn't make good sense, how can it make good law?"¹⁶¹ How can it be good law to apply a fifty-year-old law designed for durable goods to software licensing and other computer contracts?

The durable sales legal paradigm is not even close to being a good fit with the commercial realities of software licensing. Since software can be downloaded from the Internet, no tangible goods are involved at all. Judges must treat software "as if" intangible digital information is the equivalent of durable goods because they have no specialized commercial law for licenses. The adoption of UCITA develops default terms for information transfers bringing settled expectations to the Internet and beyond. Successful companies in the next century will use digital information to redefine boundaries,¹⁶² but today there is no centralized body of contract law governing Internet commercial transactions.

2. *Legal Infrastructure for E-Commerce*

A new legal paradigm is necessary to facilitate e-commerce, which may soon eclipse brick-and-mortar commerce. UCITA recognizes that paper-based signatures are rapidly giving way to digital signature in e-commerce.¹⁶³ Just as with UCC Articles 2 and 2A, a UCITA agreement may be formed even if one or more terms are left open, or are to be agreed upon later.¹⁶⁴ UCITA permits contracts to be formed by electronic agents¹⁶⁵ with or without human review.¹⁶⁶ Electronic events, for

160. See U.C.I.T.A. § 107(a). Section 107(d) binds a person who uses electronic agents, "even if no individual was aware of or reviewed the agent's operations or the results of the operation." *Id.*

161. GERHART, *supra* note 32, at 557 (quoting Julius Duschla, *Chief Justice Burger Asks: "If It Doesn't Make Good Sense, How Can it Make Good Law?"* N.Y. TIMES MAG., Oct. 5, 1969 at 140).

162. See generally BILL GATES, FROM BUSINESS @ THE SPEED OF THOUGHT: USING A DIGITAL NERVOUS SYSTEM (1999).

163. A digital signature is an electronic identifier, created by encryption technology, intended by the party to have the same effect as a paper-based signature. Two dozen states have passed some form of "digital signature laws" in the past two years. A number of international organizations such as UNCITRAL and UNIDROIT favor the validation of digital signatures.

164. See U.C.I.T.A. § 202. Section 202(a) states: "A contract may be formed in any manner sufficient to show agreement, including offer and acceptance or conduct of both parties or operations of electronic agents which recognize the existence of a contract." *Id.*

165. See U.C.I.T.A. § 102(a)(28). An electronic agent "means a computer program, or electronic or other automated means used independently to initiate an action or respond to

example, may be "attributed to a person if it was the act of that person or its electronic agent."¹⁶⁷ Trading partner agreements form rules in advance for protocols for the ordering of goods and payment through electronic messages. UCITA develops a default for when an electronic message is triggered: "An electronic message is effective when received, even if no individual is aware of its receipt."¹⁶⁸

Electronic access contracts are a growing part of the information economy. America Online, for example, has millions of subscribers who obtain remote access to hundreds of thousands of databases.¹⁶⁹ UCITA provides the legal infrastructure for "access contracts" in which the user obtains electronic "[a]ccess to, or information from, an information processing system of another person or the equivalent of such access."¹⁷⁰ UCITA provides for contract formation, warranties, and remedies to accommodate a wide array of online contracts.

The commercial law needs to be modernized to validate a whole range of useful contracting forms that fuel the information economy.¹⁷¹ UCITA defines the "electronic agent" as a "computer program or electronic or other automated means used independently to initiate an action or respond to electronic messages or performances without review or action by an individual at the time of the action, response, or performance."¹⁷²

Electronic agency is a critical concept in e-business where orders and acknowledgment forms are processed without human review. Offer and acceptance may be made entirely by "the interaction of electronic agents."¹⁷³ The concept of manifestation of assent has been extended to electronic data interchange where records are authenticated without human review following rules established by trading partner agreements.¹⁷⁴ UCITA only adapts the common law concept of the reasonable person to the "reasonably configured electronic agent."¹⁷⁵ An electronic agent may have an "opportunity to review a record or term only if the

electronic messages or performances without review or action by an individual at the time of the action, response or performance." *Id.*

166. See U.C.I.T.A. § 112.

167. U.C.I.T.A. § 214(a).

168. U.C.I.T.A. § 217(a).

169. See, e.g., Houston Chronicle, *AOL Hits Mark of 10 Million Subscribers* (visited Apr. 25, 1999) <<http://www1.chron.com/cgi-bin/auth/story/content/chronicle/business/97/11/18/brf-aol.biz-0.html>>.

170. U.C.I.T.A. § 102(a)(1).

171. See WHITE HOUSE, *supra* note 60 (contending that the Global Information Infrastructure requires new rules for electronic commerce).

172. U.C.I.T.A. § 102(a)(28).

173. U.C.I.T.A. § 206(a).

174. See U.C.I.T.A. § 112(b).

175. U.C.I.T.A. § 102(a)(15).

record or term is made available in manner that would enable a reasonably configured electronic agent to react to the record or term."¹⁷⁶ "An electronic event is attributed to a person if it was the act of that person or its electronic agent, or the person is otherwise bound by it under the law of agency or other law."¹⁷⁷ Attribution procedures are defined as a means of verifying "that an electronic event is that of a specific person or to detect changes or errors in the information."¹⁷⁸ A court must assess the "efficacy and commercial reasonableness of an attribution procedure."¹⁷⁹

UCITA incorporates a concept of authentication that validates digital signatures that are already in widespread use. The attributes of a digital signature are unique identifiers to the user which are capable of verification and under the control of the user. Digital signatures use algorithms, which are "encrypted and decrypted using public and private keys."¹⁸⁰ Digital signatures use methods such as public key cryptography to bring security and authenticity to online transactions.¹⁸¹ An attribution procedure may be used to detect changes or errors in information. UCITA is a minimalist statute that does not favor one attribution procedure over another. This flexible approach allows UCITA to keep in step with changing attribution procedures. UCITA notes that attribution procedures may use "algorithms or other codes, identifying words or numbers, encryption, callback or other acknowledgments, or other procedures reasonable under the circumstances."¹⁸²

UCITA defines authentication to mean "to sign, or otherwise to execute or adopt an electronic symbol, sound, or process attached to, included in, or logically associated or linked with a record or term, with the intent to sign the record or a record to which it refers."¹⁸³ UCITA's concept of an authenticated record updates the concept of a signature to include digital signatures, encrypted signatures and other recent inventions.¹⁸⁴ UCITA's approach is liberal and standards-based, consistent with its UCC heritage. Authentication "may be proven in any manner,"¹⁸⁵ and if the parties comply with a "commercially reasonable attribution procedure for authenticating a record, the record is authenti-

176. U.C.I.T.A. § 112(e)(2).

177. U.C.I.T.A. § 214(a).

178. U.C.I.T.A. § 102(a)(5).

179. U.C.I.T.A. § 213.

180. Center for Social and Legal Research, *Security Tutorial, Digital Signatures* (visited July 2, 1999) <<http://www.privacyexchange.org/tsi/digitalsig.htm>>.

181. *Id.*

182. U.C.I.T.A. § 102(a)(5).

183. U.C.I.T.A. § 102(a)(6).

184. See U.C.C. § 2B-102, Reporter's Note 2 (Tentative Draft, Apr. 15, 1998).

185. U.C.I.T.A. § 108(a).

cated as a matter of law.”¹⁸⁶

UCITA provides legal rules for Web-site linking agreements, affiliate agreements, legal notices, license agreements, access contracts, click-wrap agreements, end-user agreements, click-wrap agreements, online shopping, auction bidding agreements, terms of services agreements, and online licenses of all kinds. Section 102 defines attribution procedures, authentication, computer information, electronic agents, electronic events, electronic messages, and other terms critical to e-commerce.¹⁸⁷

UCITA is a “cyberspace commercial statute” for licensing in the digital information economy.¹⁸⁸ Computers can already instantly convert text-to-speech, recognize speech itself, and configure neural networks.¹⁸⁹ In two decades, it may be possible to reverse-engineer the human brain and produce a virtual tactile environment.¹⁹⁰ UCITA is a modern statute that will facilitate computer information transactions such as these in the next millennium.

3. *The Exportability of UCITA*

A growing number of companies are distributing mass-market software on their Web sites. The Internet, by its very nature, is international, yet there is no uniform legal infrastructure for the distribution of software in the global marketplace. In the absence of international conventions, domestic law applies to license agreements. There is great uncertainty as to whose law will govern online commerce, which knows no international borders. Uniform rules for safeguarding commercial information transfers would be a desirable international development. The basic framework of UCITA comports well both with emergent information technologies and with radically different social, economic and legal systems.¹⁹¹

The movement to devise uniform rules to be used in private international law has evolved rapidly over the past century.¹⁹² For example, the United National Commission for International Trade (“UNCITRAL”), the International Institute for the Unification of Private Law (“UNIDROIT”), the Council on Europe (“Council”) and the International

186. U.C.I.T.A. § 108(b).

187. See U.C.I.T.A. § 102.

188. *Id.*

189. *Id.*

190. *Id.*

191. See Raymond T. Nimmer, *Licensing on the Global Information Infrastructure: Disharmony in Cyberspace*, 16 Nw. J. INT'L L. & BUS. 224 at 238 (1995) (arguing that the global information infrastructure requires a uniform licensing law).

192. See Anthony D'Amato & Doris Estelle Long, INTERNATIONAL INTELLECTUAL PROPERTY ANTHOLOGY 3 (Anthony D'Amato & Doris Estelle Long eds., 1996).

Chamber of Commerce (ICC) have all spearheaded past efforts to create international commercial law. UNCITRAL's Model Law on Electronic Commerce is consistent with UCITA's e-commerce infrastructure. The Model Law, like UCITA validates the digital signature as the functional equivalent of the "pen and paper" signature. Article 7 of UNCITRAL's model law on Electronic Commerce defines a signature as follows:

(1) Where the law requires the signature of a person, that requirement is met in relation to a data message if: (a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and (b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.¹⁹³

UCITA is also in harmony with the Convention of Contracts for International Sale of Goods ("CISG") drafted by UNCITRAL. UCITA's adoption of the Statute of Frauds is, however, inconsistent with international practice. The Statute of Frauds is an archaic formalism that has long been abolished in England.¹⁹⁴ UCITA's reporter retained the Statute of Frauds for contracts requiring payment of \$5,000 or greater¹⁹⁵ as a compromise to industry and consumer groups. The United States stands alone in world legal systems requiring the parties to a contract to memorialize their agreement in writing.

UCITA treats a "record" as the functional equivalent of a signed writing, updating the Statute of Frauds for Internet transactions.¹⁹⁶ A "record" means "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form."¹⁹⁷ CISG does not explicitly address software licensing. It is designed for the sale of goods and only applies to the licensing of information by analogy as with Article 2. In fact, CISG excludes "contracts in which the preponderant part of the obligations . . . consists in the supply of labour or other services."¹⁹⁸ CISG sought "to isolate from the body of commercial law, a special subset, the international sale, and create a unified set of rules for the group of transactions."¹⁹⁹ Many CISG concepts and methods are in harmony with UCITA's rules for licensing software.

193. UNCITRAL Model Law On Electronic Commerce, Article 7.

194. See James J. White & Robert S. Summers, U.C.C. 64 (5th ed. 1999).

195. See U.C.I.T.A. § 201.

196. *Id.* § 201(a)(1).

197. *Id.* at § 102(a)(58).

198. Final Act of the U.N. Conference on Contracts for the International Sale of Goods, Official Records, Annex I at 230 (Apr. 10, 1980), U.N. Doc. A/ Conf.9 7/18, reprinted in 19 INT'L LEGAL MATERIALS 668 (1980), art. 3(2) [hereinafter CISG].

199. Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 268 (1987).

a. Concept of Material Breach

UCITA provides that an "aggrieved party may refuse a performance that is a material breach as to that performance. . . ." ²⁰⁰ Therefore, UCITA adopts a substantial performance or material breach standard versus Article 2's parochial and unrealistic perfect tender rule for performance, which is followed by no other country. ²⁰¹ Article 25 of CISG sets the standard of performance as "fundamental breach," ²⁰² a concept closely akin to UCITA's material breach. A material breach is "a substantial failure to perform an agreed term that is an essential element of the agreement." ²⁰³ A substantial breach is one "that deprives the aggrieved party of a significant benefit it reasonably expected under the contract." ²⁰⁴ In contrast, the UCC Article 2 perfect tender rule permits a buyer to obtain substitute goods if the goods fail "in any respect to conform to the contract." ²⁰⁵ Perfect tender is not a realistic performance standard for the sale of goods, and courts find ways to bypass this harsh doctrine. Perfect tender is a disaster for the software industry where software may be composed of millions of lines of code. A licensee should not be able to cancel a software contract because of a minor bug or errant line of code. The material breach standard parallels the fundamental breach of CISG. ²⁰⁶ Finally, UCITA's material breach standard parallels UNIDROIT principles for performance that is reasonable and determined from the terms of the contract. ²⁰⁷

Under a fundamental breach standard, there is a question of what level of performance deficit in the software would warrant rejection. The vast majority of fundamental breach cases will be ones in which the software fails to substantially conform to its documentation. A survey of software cases regarding bad software reveals that the most common problems were errors or failures in the form of reports, processing

200. U.C.I.T.A. § 601(b)(1).

201. See U.C.I.T.A. § 601(b).

202. CISG, art. 25.

203. U.C.I.T.A. § 701 (b)(2).

204. U.C.I.T.A. § 701(b)(3)(B).

205. U.C.C. § 2-601.

206. See CISG, art. 25. Under CISG, "breach of contract" covers all failures of a party to perform any of his obligations. However, a fundamental breach is more serious and may warrant cancellation:

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

Id.

207. See U.C.C. § 2B-601, Reporter's Note (Draft, Dec. 1, 1995) (citing UNIDROIT, Principles Of International Commercial Contracts, Art. 5.6 Revised, as Uniform Law Source for this section).

speeds, amount of data that could be handled, and number of multiple users or peripherals that could be connected within a system.²⁰⁸ The case law reflects that fundamental breach in cases regarding bad software centers on the failure of acceptance testing,²⁰⁹ deviation from functional specifications,²¹⁰ late delivery computer software and products,²¹¹ the failure of compatibility,²¹² the amount of data that can be handled, and processing speed.²¹³ The licensee of bad software should have the power to cancel the contract or license where there is a material breach, rather than having to rely on the perfect tender rule of Article 2.²¹⁴

b. *Digital Signatures*

UCITA's e-commerce legal infrastructure is consistent with work being done by international organizations such as UNCITRAL and UNIDROIT. The goal of these initiatives is to validate binding international standards for electronic or digital signatures. UNCITRAL's Model Law on Electronic Commerce²¹⁵ and the ABA's Science and Technology Committee have developed digital signature guidelines that are harmo-

208. See Cynthia Anthony & Michael Rustad, *Breach and Adaptation of Computer Software Contracts: A Report to the ABA Software Licensing Subcommittee* (June 15, 1993) (surveying industries which produced software for mass-market design applications; student loans; accounting activities; health care insurance claims; and telecommunications services).

209. See, e.g., *Whittaker Corp. v. Calspan Corp.*, 810 F. Supp. 457 (W.D.N.Y. 1992) (finding that "the actual variances from the contract specifications raises a material question of fact as to the value of the delivered system.").

210. See e.g., *Photo Copy, Inc. v. Software, Inc.*, 510 So.2d 1337 (La. Ct. App. 1987) (holding that rejection of a computer system was warranted because the software program could not perform a key cross reference function and observing that the disappointed buyer's "principal motive or cause" in buying the system was to obtain a cross referencing function).

211. See, e.g., *Cash Management Services, Inc. v. Bancotec, Inc.*, U.S. Dist. LEXIS 10768 (D. Mass. Sept. 21, 1988) (finding that the late delivery of equipment prevented the vendee from conducting proper acceptance testing; failing to make prompt delivery within a reasonable time or within the time specified, the contract may be deemed to be fundamentally breached).

212. See, e.g., *Foundation Software v. Digital Equipment Corp.*, 807 F. Supp. 1195 (D. Md. 1992) (holding that the vendor failed to meet its warranty of promising that software would run on the Micro Vax).

213. See e.g., *Midland Management Corp. v. Computer Consoles, Inc.*, U.S. Dist. LEXIS 537 (No. 87 C 971, N.D. Ill., E.D. Jan. 21, 1992) (finding that the computer system could not support more than sixteen concurrent users and that the thirty two user capability warranty did not exist).

214. The performance standard for single delivery sales contract is perfect tender. See U.C.C. § 2-601.

215. See United Nations, *Uncitral Model Law on Electronic Commerce with Guide to Enactment* (visited May 4, 2000) <<http://www.unictral.org/english/texts/electcom/ml-ec.htm>>.

nized with UCITA's e-commerce concepts of attribution and authentication.

The International Chamber of Commerce proposes a broad self-regulatory program governing electronic commerce, including guidelines for secure and trustworthy digital transactions over the Internet.²¹⁶ Trustworthy e-commerce depends upon attribution procedures that verify the integrity of transactions and the authenticity of electronic messages. An attribution procedure may also be used to detect changes or errors in information. As stated earlier, UCITA notes that attribution procedures may use "algorithms or other codes, identifying words or numbers, encryption, callback or other acknowledgments, or other procedures reasonable under the circumstances."²¹⁷

Since some form of authentication is critical to the success of e-commerce, binding international standards must be developed for electronic or digital signatures. Towards that end, UNCITRAL is preparing uniform rules for electronic signatures and certificate authorities,²¹⁸ and UCITA is legitimizing computer-to-computer contracts by substituting the concept of an electronic "record" for the writing requirement that grew out of paper-based transactions.

Increasingly, digital signatures are having the same force and effect as a manual signature. UCITA's concept of authentication is the electronic equivalent of a paper-based signature.²¹⁹ UCITA defines the term "to authenticate" to mean "to sign or otherwise execute or adopt a symbol or to use encryption or another process with respect to a record. . . ."²²⁰ UCITA's attribution rules provide a legal template consistent with recent developments in international private law.

c. *Choice of Law and the Internet*

The Internet challenges choice of law principles because it is "not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of computers."²²¹ One of the vexing questions in this area is choosing which law should apply to multi-state or multi-national contracts in an increasingly global economy.

A European Council Working Group was established to revise the Brussels Convention governing the enforcement of judgments and the Rome Convention on the treatment of contracts. Both Conventions

216. *Id.* at 85.

217. U.C.I.T.A. § 102(a)(5).

218. *See* United Nations, *supra* note 215, at 85.

219. *See* U.C.I.T.A. § 102. U.C.I.T.A. updates the concept of signature to include digital signatures, encrypted signatures and other authenticated methods yet to be developed. *Id.* Online contracts may be formed simply by the exchange of electronic records. *Id.*

220. *Id.* at § 102(a)(6)(A)—(B).

221. *CompuServe v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1018 (S.D. Ohio, 1997).

adopt the "country of origin" doctrine,²²² and they recognize a consumer transactions exception "that under narrow circumstances, a consumer should be allowed to rely on the courts and the law of the country in which the services are received."²²³ The UCC permits the parties to choose applicable law, provided that the transaction bears a "reasonable relationship" to the chosen body of law.²²⁴

Choice of forum agreements may be found in a variety of online contracts, including license agreements, trading partner agreements or Web site development agreements. The UCITA reporter notes that by 1999 there were over 100 decisions on Internet personal jurisdiction:

The decisions reveal an uncertainty about when doing business on the Internet exposes a party to jurisdiction in **all** States and **all** countries. The uncertainty affects both large and small enterprises, but has greater impact on small enterprises that are and will continue to be the lifeblood of electronic commerce. Choice of forum terms allow parties to control this issue and the risk or costs it creates. This section allows the agreement to govern, but adds restrictions based on fundamental public policy considerations.²²⁵

Under UCITA, the parties to a license agreement have the discretion to choose an exclusive judicial forum unless it is "unjust." The license agreement needs to expressly state that the forum is exclusive in order for it to be enforceable, so a choice-of-forum term is not exclusive unless the agreement so provides.²²⁶ UCITA's choice-of-forum rules fairly balance the interests of the software industry with those of licensees. UCITA, as it is presently drafted, will fulfill the statutory objective of expanding business practices.

III. TOWARD A CONSUMER-FRIENDLIER UCITA

The codification of industry "things as they are" must be balanced with utopian regulatory rules and standards. UCITA is arguably far more consumer-friendly than any of the Articles of the UCC. UCITA, for example, does not preempt or invalidate state consumer protection statutes,²²⁷ and its warranties and remedies are supplemented by federal consumer statutes which provide prevailing plaintiffs with attorney's fees and, in some cases, treble damages.²²⁸ Furthermore, unlike Article

222. See United Nations, *supra* note 215, at 85.

223. *Id.*

224. U.C.C. § 1-105.

225. U.C.I.T.A., Preface of Reporter.

226. See *Bremen v. Zapata Offshore Co.*, 407 U.S. 1 (1972) (holding that choice of forum clauses were presumptively valid).

227. See U.C.I.T.A. §105.

228. See, *e.g.*, 15 U.S.C. §§ 2301.

2, UCITA provides consumers with a right of refund if the terms of the mass market license are not acceptable.

A. GUARANTEED MINIMUM REMEDY FOR CONSUMERS

Shrink-wrap is the plastic or cellophane tightly wrapped around packages, such as the wrapping on packages of meat in supermarkets and cassettes and CD's in music shops. Increasingly, software licensors market their retail software packages covered in shrink-wrap. One example of a shrink-wrap license is a license agreement on the outside of a package covered in shrink-wrap that contains a diskette. These contracts are seldom, if ever, negotiated and marketed to the public under the same terms for the same information.²²⁹ UCITA makes shrink-wrap, click-wrap, and other mass-market license agreements broadly enforceable. A mass-market license is a standard form agreement where the terms are offered to the general public on a "take it or leave it basis."²³⁰

1. *Mass-Market Licenses as Reverse Unilateral Contracts*

The mass-market license agreement generally begins with a legal notice, disclaimer, or terms of use. The Web site agreement of Real Networks, for example, conditions access and use of its Web site on acceptance of its terms and conditions.²³¹ Professor Mark Lemley notes that the purpose of such a clause is to create a "reverse unilateral contract."²³² "Vendors intend that, by opening the plastic wrap and actually using the software, customers will bind themselves to the terms of the shrink-wrap license."²³³ Adobe Systems license, for example, provides that the customer's downloading of software from the site signifies agreement to its terms and conditions.²³⁴ Real Network likewise intends that Web site visitors will bind themselves to the Real Network's terms and conditions, an example of the kind of agreement raising concerns about its potential for abuse.²³⁵ A pundit states, "by unwrapping a software package or downloading a demo, you've agreed to a thickly worded con-

229. See U.C.I.T.A. § 102(a)(46)(b)(i).

230. U.C.I.T.A. § 102(a)(45)—(46).

231. See Real Networks, *supra* note 11.

232. Mark A. Lemley, *Intellectual Property and Shrink-wrap Licenses*, 68 S. CAL. L. REV. 1239, 1241 (1995).

233. *Id.*

234. See Adobe Systems, Inc., *CustomerFirst Support* (visited Feb. 1, 1999) <<http://www.adobe.com/supportservice/custsupport>>.

235. See Lemley, *supra* note 232. Professor Lemley notes a similar logic with respect to shrink-wrap agreements: "Vendors intend that, by opening the plastic wrap and actually using the software, customers will bind themselves to the terms of the shrink-wrap license." *Id.*

tract that may result in enslaving your first-born child to Bill Gates for all you know."²³⁶

Due to these concerns, the enforceability of shrink-wrap and other mass-market licenses is a deal breaker provision. Billions of dollars are spent each year on shrink-wrap or click-wrap license transactions, yet there is considerable uncertainty about the degree of enforceability of such licensing arrangements. A 1995 survey of Computer Law Association attorneys found shrink-wrap issues to be one of the most frequently mentioned subjects for reform.²³⁷ Many computer lawyers in our sample believed that shrink-wrap licenses should not be enforceable.²³⁸ One contended that "We should get rid of the idea that shrink-wraps are enforceable."²³⁹ Another contended that "simple shrink-wrap licenses are not legally effective. Shrink-wrap licenses are limited to the protection afforded by copyright."²⁴⁰ Yet another computer lawyer observed: "I believe the copyright laws should not be discarded based on an unsigned, unbargained adhesion agreement."²⁴¹ One respondent stated:

I can't see any reason why this should apply to software and not everything else like books, tapes, stereo systems, etc. If that is the case, it is bad precedent to allow a vendor to unilaterally propose restrictions on the use of a product after it has been paid for.²⁴²

Another lawyer felt that the single most important area for reform was shrink-wrap and the unequal bargaining power of parties to these transactions.²⁴³ He viewed shrink-wrap agreements "as contracts of adhesion" which must be regulated.²⁴⁴ While a majority of survey respondents (65%) generally favored the enforceability of shrink-wrap licenses,²⁴⁵ more than a third (35%) opposed the enforceability of mass-market licenses.²⁴⁶ Even the supporters of the shrink-wrap acknowledge the need to provide standard terms that protect end-users.²⁴⁷

236. Margie Wylie, *Shrink-Wrapping the Social Contract* (Apr. 23, 1997) (visited Mar. 10, 1998) <http://www.news.com/Perspectives/mw/mw4_23_97_a.html>.

237. See Michael Rustad, et al., *An Empirical Analysis of Software Licensing Law & Practices (Part 2)*, 10 COMPUTER L. ASS'N BULL. 3, 8 (1995).

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. See Rustad, *supra* note 237, at 8.

243. *Id.* at 9.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

2. *Mass-Market Licenses as Anti-Warranties*

Mass-market licenses are so controversial because the software industry is unwilling to provide implied warranties of quality. One can read hundreds of click-wrap, Web site, shrink-wrap, and other mass-market transactions and have yet to find a single example of a software licensor willing to provide any warranty for its software, software products or services. The mass-market license agreement provides no warranties of any kind. Adobe Systems, for example, is typical in disclaiming all warranties and damages:

DISCLAIMER OF WARRANTIES: YOU AGREE THAT ADOBE HAS MADE NO EXPRESS WARRANTIES TO YOU REGARDING THE SOFTWARE AND THAT THE SOFTWARE IS BEING PROVIDED TO YOU 'AS IS' WITHOUT WARRANTY OF ANY KIND, ADOBE DISCLAIMS ALL WARRANTIES WITH REGARD TO THE SOFTWARE, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE, MERCHANTABILITY, MERCHANTABILITY OR NONINFRINGEMENT OF THIRD PARTY RIGHTS.²⁴⁸

The warranties offered in mass-market transactions are in effect anti-warranties, which require the user to waive all rights to a remedy if the software or computer contract fails. The licensor makes no express or implied warranties with respect to the software, product or services.

Most consumers have no reasonable contractual expectations that, by merely breaking open a shrink-wrap license or clicking agreement, they are entering into a licensing agreement. Legal formalists object, feeling that mass-market license agreements do not take the form of offer, acceptance and consideration, which is the staple of first year contract courses. Professor Slawson wrote in 1971 that "[t]he contracting still imagined by courts and law teachers as typical, in which both parties participate in choosing the language of their entire agreement. . ." is a legal fossil.²⁴⁹ What does it mean to contract as we move to a new millennium? The commercial reality is that many contracts in our post-industrial economy are adhesive contracts where all rights and remedies are contracted away without even the possibility of negotiation.²⁵⁰

Mass-market licenses are useful legal inventions, but they are not contracts in their classical form. The legal formalists who oppose mass-

248. Adobe, *supra* note 234.

249. W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971).

250. The concept of the "contract of adhesion" was first formulated by Edwin Patterson. See Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919). This concept of the adhesion contract was further developed by Friedrich Kessler. See Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

market licenses do not suggest an alternative contracting form that will be cost-efficient. It is clear that mass-market licenses depart markedly from traditional contract formation. These contracts do not present even the possibility that the terms are negotiable. In many software contracts, the licensee does not even learn about the terms until after payment.

Mass-market software or computer contracts are adhesive, but so is almost every other contract. When was the last time a consumer bargained with an airline, an insurance company, a car rental company, and the gas company? The take-it-or-leave-it nature of consumer contracts was lampooned in the 1970s by *Laugh In's* Lily Tomlin: "We're the phone company. We don't care; we don't have to."²⁵¹ Software vendors go even further than the telephone company: they don't even bother to answer the telephone, placing the customer on hold.²⁵² Ninety-nine percent of all contracts are standard form contracts where there is no bargaining over terms, and the consumer is offered the contract on a take-it-or-leave-it basis.²⁵³

UCITA broadly validates mass-market licenses so long as "the party agrees to the license, such as by manifesting assent, before or during the party's initial performance or use of or access to the information."²⁵⁴ UCITA's view is that an adequate objective manifestation of assent consists of a mere opportunity to review the record coupled with an affirmative act such as clicking an icon or tearing open shrink-wrap plastic on boxed software. "If a licensee does not have an opportunity to review a mass-market license or a copy of it before becoming obligated to pay and does not agree, such as by manifesting assent, to the license after having that opportunity, the licensee is entitled to a return."²⁵⁵ The alternative to mass-market licensing would be to retain an attorney and negotiate the terms, but negotiated mass-market license agreements are not cost-efficient.

Few topics engender more debate than the enforceability of shrink-wrap, click-wrap and Web-wrap license agreements. Take again the example of the shrink-wrap license agreement that appears on the outside of the box containing a diskette or CD-ROM. Suppose the license agreement provides: "Opening the Envelope containing the diskette will constitute your agreement to the license which is contained on the outside of

251. Lily Tomlin as Ernestine, the Telephone Operator from Hell, *Lily Tomlin Quotes* (visited Dec. 6, 1999) <<http://members.aol.com/earthwest/mquotes.html>>.

252. See CEM KANER & DAVID PELS, *BAD SOFTWARE: WHAT TO DO WHEN SOFTWARE FAILS* 28, 29 (1998) (citing Software Publishers Association Study that the average hold time for a software service call is 12.2 minutes).

253. See Slawson, *supra* note 249 at 235.

254. U.C.I.T.A. § 210(a).

255. U.C.I.T.A. § 210(b).

the envelope." Professor Mark Lemley's survey of the laws of twenty-four countries concludes that there is no clear consensus on the enforceability of these shrink-wrap licenses in the global marketplace.²⁵⁶ Policies ranged widely, from treating them as presumptively unenforceable to considering them enforceable. Lemley notes that "[a] number of countries either refuse to enforce shrink-wrap licenses at all or place restrictive conditions on the form and contents of such licenses. Relatively few countries freely enforce shrink-wrap licenses."²⁵⁷

If UCITA is to serve as an international template for licensing software, should at least incorporate some additional consumer protections. Article 2 does not provide buyers a right to the return of the price except under strictly limited circumstances.²⁵⁸ The right to a refund, a right not given by Article 2, would be a significant advance for consumers. Courts in many countries promote reasonableness and fairness in contracting by legislating mandatory terms or through judicial intervention.²⁵⁹ UCITA already tempers freedom of contract using the tools of unconscionability, public policy limitations and "failure of essential purpose."

Social welfarism in contract law has been particularly well developed in England and Scandinavia.²⁶⁰ Mass-market licenses are adhesive contracts and need to be policed for unfair terms. In many European countries, welfarism in contract law has taken the form of mandatory terms and police powers given to courts to adjust unfair contracts.²⁶¹ The enforceability of online contracts is critical to the expansion of e-commerce. UCITA will not become a model for global Internet commercial transfers of information if shrink-wrap or click-wrap licenses are not widely enforced. As mentioned, the CISG governs sales of goods between buyers and sellers in different signatory nations. Unlike Article 2, however, CISG does not govern consumer transactions. CISG is largely consumer neutral and permits countries to determine their own basic provisions with their own desired level of social welfare. UCITA, as presently drafted, while consumer neutral, does provide mass-market licensees with limited due process rights. If UCITA is to be a model for an international convention for information transfers, it will need further consumer protections.

256. See Lemley, *supra* note 232.

257. *Id.* at 1252-53.

258. See U.C.C. § 2-709.

259. See generally ROGER BROWNSWORD, *WELFARISM IN CONTRACT LAW* 1 (1993).

260. *Id.*

261. See, e.g., Thomas Wilhelmsson, *The Philosophy of Welfarism and its Emergence in the Modern Scandinavian Contract Law*, in *WELFARISM IN CONTRACT LAW* 68 (Roger Brownsword, et al. eds., 1994).

B. MANDATING MINIMUM ADEQUATE REMEDIES FOR CONSUMERS

Parties to a computer contract may exclude or modify implied warranties so long as the warranty disclaimer is conspicuous and specific. The original drafts of Article 2B, however, did not extend § 2-719(2) to information contracts. The present draft of UCITA already adopts Article 2's concept of the "Failure of Stipulated Remedy to Achieve its Essential Purpose" in § 804. It follows the UCC's § 2-719(1) and provides that parties to a contract may agree to limit the remedies available in the event of a breach, but it states the limited remedy is optional "unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy."²⁶²

Plaintiffs have successfully challenged limited or exclusive remedies by showing they failed of their essential purpose in diverse factual settings. The New York Law Revision Commission noted that § 2-719(2) "is not concerned with arrangements which were oppressive at their inception, but rather with the application of an agreement to novel circumstances not contemplated by the parties."²⁶³ For example, a ten-day period to reject goods was struck down when the court in *Wilson Trading Corp. v. David Ferguson, Ltd.* applied § 2-719(2).²⁶⁴ In *Wilson*, the seller delivered yarn that "shaded" after it was woven into sweaters and laundered.²⁶⁵ The seller provided a limited exclusive remedy that any defects in the yarn must be reported within 10 days.²⁶⁶ The shading problem, however, could not be discovered until the cloth was knitted and washed. The court found that a contract that barred all claims of defects in clothing was unconscionable because the remedy failed of its essential purpose.²⁶⁷ The *Wilson* court reversed the summary judgment on behalf of the defendant and remanded the case to determine whether the shading defects were discoverable before knitting and processing.²⁶⁸

The case law on "failure of essential purpose" reveals that this doctrine is used by courts to mitigate harsh or oppressive bargains. A repair limitation failed of its essential purpose after one party unsuccessfully

262. U.C.C. § 2-719(1).

263. 1 N.Y. ST. L. REVISION COMMISSION 1955 REP. at 584 (1955).

264. See *Wilson Trading Corp. v. David Ferguson, Ltd.*, 244 N.E.2d 685 (N.Y. 1968).

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* But see *White & Summers*, *supra* note 194, at 453. White and Summer argue that the court misapplied 2-719(2) in the *Wilson Trading* case. *Id.* They argue that "the exclusive remedy might have been unreasonable but did not fail of its essential purpose. *Id.* The exclusive remedy should have been invalidated, if at all, under Code provisions that deal with terms oppressive at inception." *Id.*

tried to repair an automobile seven times in nine months.²⁶⁹ Another repair or replace parts limitation failed when the goods could not be repaired or parts replaced to make the goods free of defect.²⁷⁰ In lemon automobile cases, the doctrine is used to strike down an exclusive repair remedy where the automobile can not be fixed after numerous attempts.

UCITA allows vendors to disclaim implied warranties, limit their liability, and restrict licensee's remedies within the parameters of good faith, commercial reasonableness and conscionability. It also permits parties to set their own remedies and measure of damages, but this is a legal fiction when the model is extended to mass-market transactions. Therefore, there should be a minimum adequate remedy if the exclusive remedy provided by the vendor is, in effect, no remedy at all. Professors White and Summers state that "§ 2-719(2) raises two main questions, which can be attributed to the two clauses that make up the provision. When does an exclusive or limited remedy fail of its essential purpose? When a remedy fails, what remedies are available to the buyer?"²⁷¹ Courts will not enforce a remedy for an adhesive software license that "fails of its essential purpose," so where a court finds this failure, the aggrieved consumer should have the full panoply of UCITA remedies at their disposal.

Professors White and Summers observe that § 2-719(2) has been the most powerful tool in the UCC arsenal for dissatisfied customers.²⁷² They argue that "it is hard to find any provision in Article 2 that has been more successfully used by aggrieved buyers in the last [25] years than Section 2-719(2)."²⁷³ The first official comment to § 2-719 states the statutory purpose of the failure of essential purpose doctrine:

[I]t is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. . . .²⁷⁴

The most recent draft of UCITA extends this doctrine to computer information transactions.²⁷⁵ Section 803 provides that if an exclusive or

269. See *King v. Taylor Chrysler-Plymouth, Inc.*, 184 Mich. App. 204, 457 N.W.2d 42 (1990).

270. See *Great Dane Trailer Sales, Inc. v. Malvern Pulpwood, Inc.*, 301 Ark. 436, 785 S.W.2d 13 (1990).

271. White & Summers, *supra* note 194, at 449.

272. *Id.*

273. *Id.*

274. U.C.C. § 2-719.

275. See U.C.C. [NEW] REVISED ARTICLE 2 SALES § 2-719 at 107 (A.L.I., Reporter's Interim Draft, Nov. 1999). The Reporter provides no rationale for excluding the well-established doctrine of "failure of essential purpose" which has been adopted by Revised Article 2. *Id.* Section 2-719(b) of Revised Article 2 provides:

limited remedy "fail[s] of its essential purpose, the aggrieved party may pursue other remedies under [UCITA]."²⁷⁶ The commercial reality is that mass-market license agreements are the classic embodiment of the adhesive contract. Software customers are entitled to a non-disclaimable minimum adequate remedy.

UCITA's adoption of Article 2's failure of essential purpose provision moderates the harsh effects of the seller's attempts to disclaim warranties and consequential damages. Under Article 2, a disclaimer occurs when a seller of goods uses language or conduct to negate or limit implied warranties,²⁷⁷ and UCITA's methodology for disclaiming warranties parallels Article 2's provisions. Arguably, courts already have ample tools under UCITA to police abuses of power in computer contracts. "A court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by . . . unconscionability, or it may strike any single term or group of terms" in an online contract or license agreement.²⁷⁸

1. *Manifesting Assent & Review of Terms*

UCITA already provides mass-market licensees with some protection from unfair oppressive terms. For example, it provides licensees with procedural protection when they enter into standard-form agreements. A party adopts the terms of a record, including a click-wrap or shrink-wrap agreement, only if there is a manifestation of assent. Section 112 binds a party to the terms of a shrink-wrap or click-wrap agreement if the party had reason to know his acts would be treated as assent to the terms. Mass-market licenses are adopted "only if the party agrees to the license, such as by manifesting assent, before or during the party's initial performance, or use have of or access to the information."²⁷⁹ Quite simply, under UCITA, there is no manifestation of assent without the party having an opportunity to review the terms prior to assent.

(b) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose in a contract other than a consumer contract, remedy may be had as provided in this Act. However, an agreement expressly providing that consequential damages are excluded is enforceable to the extent permitted under subsection (d).

Id. § 2-719.

276. U.C.I.T.A. § 803(b).

277. See U.C.C. § 2-316 (providing the methodology for disclaiming and limiting warranties).

278. U.C.I.T.A. § 111(a). Defendants are given an opportunity to present evidence regarding the circumstances that existed at the time the license agreement or other online contract was made: "If it is claimed or appears to the court that a contract or any term thereof may be unconscionable, the parties must be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect, to aid the court in making the determination." *Id.*

279. U.C.I.T.A. § 210(a).

Section 212 validates Internet-type transactions in which “computer information [is made] available to a licensee electronically from its Internet or similar electronic site.”²⁸⁰ A licensor must afford a Web site visitor “an opportunity to review the terms of a standard form license . . . before the information is delivered or the licensee becomes obligated to pay, whichever comes first.”²⁸¹ If the party has no “opportunity to review a mass-market license or a copy of it before becoming obligated to pay and does not agree,” he or she is entitled to a refund along with reasonable expenses.²⁸²

Section 212 provides that the terms of an Internet license must be displayed “prominently and in close proximity to a description of the computer information.”²⁸³ Another option is to disclose “the availability of the standard terms in a prominent place on the site from which the computer information is offered and promptly furnish a copy of the standard terms on request before the sale or license of the computer information.”²⁸⁴

The licensor can create a “safe harbor,” proving manifestation of assent with the built-in “double click,” which requires the user to reaffirm assent. For example, a consumer may be asked to accept or decline terms with one click, and then be asked to confirm that they are certain of their acceptance with a second click. A party adopts the terms of a shrink-wrap or click-wrap license if the customer has an opportunity to review the terms and manifested assent by some affirmative act. Software licenses typically limit all damages and provide an exclusive remedy. UCITA’s contract formation rules provide consumers with limited procedural protections not guaranteed by present industry practices. As with all other contracting forms, there is no duty to read mass-market agreements. The consumer carelessly clicking through screens without reading them does so at his or her peril, but UCITA provides courts with the tools to strike down grossly unfair or misleading software or click-through licensing agreements.

2. *Policing Unconscionability*

UCITA adopts Article 2’s concept of unconscionability, which give courts the power to strike down unconscionable contracts or terms, and this doctrine applies to all UCITA license agreements. Section 111 of UCITA gives courts the power to police contracts or any term.²⁸⁵ A court

280. U.C.I.T.A. § 212.

281. U.C.I.T.A. § 212(1).

282. U.C.I.T.A. § 210(b).

283. U.C.I.T.A. § 212(1)(a).

284. U.C.I.T.A. § 212(1)(b).

285. See U.C.I.T.A. § 111.

may refuse to enforce the entire contract or the "remainder of the contract without the unconscionable term, or it may so limit the application of any unconscionable term as to avoid any unconscionable result."²⁸⁶ The issue of unconscionability is a matter of law and one for the trial judge rather than the jury.²⁸⁷ The basic test is whether the license agreement or term should be invalidated because it is "so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."²⁸⁸ Unconscionability is an amorphous doctrine designed to prevent "oppression and unfair surprise."²⁸⁹

Arthur Neff distinguished between procedural unconscionability where there is a lack of a meaningful choice due to unfair bargaining and substantive unconscionability, which is the resultant unfair term.²⁹⁰ The use of hidden terms is procedural unconscionability, whereas an exorbitant price constitutes substantive unconscionability.²⁹¹ In order to strike down a license agreement or a clause in a license agreement, a court must find both an unfair bargaining process, which is procedural unconscionability, as well as unfair terms, which is substantive unconscionability.

Procedural unconscionability means that the contract negotiation or bargaining was unfair. Substantive unconscionability exists when the terms of the resultant contract are unfair or abusive. One example of procedural unconscionability is when one of the parties has no reasonable opportunity to know what he is signing. A door-to-door salesman, for example, intentionally spills coffee on a prospective customer to divert his attention and then switches a promissory note for the sweepstakes entry form the consumer thought he was signing. This creates a problem of procedural unconscionability. In contrast, substantive unconscionability is a finding that a license agreement has grossly one-sided terms evaluated "in light of the general commercial background and the commercial needs of the particular trade or case."²⁹²

Subsection (b) of § 111 follows Article 2's methodology in requiring a court to hear evidence of the commercial setting and other circumstances before invalidating a license agreement on the grounds of unconscionability.²⁹³ The UCITA reporter notes that "[t]he principle is one of the

286. U.C.I.T.A. § 111(a).

287. *Id.*

288. *Maxwell v. Fidelity Financial Services, Inc.*, 184 Ariz. 82, 88, 907 P.2d 51, 57 (1995).

289. U.C.C. § 2-302, O.C. 1 (1995).

290. See Arthur Neff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967).

291. See RUSTAD, *supra* note 89, at 277.

292. *Id.*

293. See U.C.I.T.A. § 111.

prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.²⁹⁴ Unconscionability, however, has proved to be a toothless tiger when it comes to computer contracts. There are few cases where a court has struck down either a clause or an entire contract as unconscionable. UCITA already provides non-consumer mass-market licensees with sufficient protection against oppressive and unfair contracts. The extension of a minimum adequate remedy for consumer transactions, therefore, will fairly balance freedom of contract with the need to regulate contracts where there is no possibility of negotiation.

C. SUPPLEMENTAL CONSUMER PROTECTION

1. *Extending Consumer Protection to Cyberspace*

Incorporating statutory or common-law remedies for fraud or misrepresentation may also punish fraudulent practices by software vendors. UCITA follows the UCC practice of supplementing the statute with principles of law and equity. UCITA's § 104 parallels UCC's § 1-103 in permitting common law concepts to supplement the statute. The concept of unconscionability, for example, is supplemented by the common law doctrine of mistake. Increasingly, electronic agents are used in e-commerce, a practice validated by § 206 of UCITA. The "unconscionability doctrine may invalidate a term caused by breakdowns in the automated contracting processes."²⁹⁵

A second reform would be to make it even more clear that state and federal consumer statutes applicable to the sale of goods applies to the licensing of software.²⁹⁶ It would be beneficial to consumers to receive a full federal warranty provision for software whether it is downloaded from the Internet or sold in an office supply store. The software industry would not be harmed if it were required to conspicuously disclose any exclusions or limitations of consequential damages.

2. *Extending Magnuson-Moss to Cyberspace*

The Magnuson-Moss Act applies to consumer products costing more

294. U.C.I.T.A. § 111, Reporter's Note 2.

295. *Id.*

296. *See, e.g.,* The Magnuson-Moss Act, 15 U.S.C. §§ 2301—2312 (1997). Article 2 warranties are supplemented and supplanted by federal consumer statutes such as the Magnuson-Moss Act – Federal Trade Commission Improvement Act. *Id.* The Magnuson-Moss Act is a federal law applying to all written warranties for consumer goods costing more than \$10. *See* H.R. REP. No. 93-1107 (1974). The Act requires all warranties made to the consumer buyer to be labeled as either full or limited. *See* 15 U.S.C. § 2303(a). This applies "to written warranties on tangible personal property which is normally used for personal, family, or household purposes." *See* 16 C.F.R. § 700.1(a).

than \$10 that are "distributed in commerce."²⁹⁷ This federal consumer protection statute was a response to the "developing awareness that the paper with the filigree border bearing the bold caption 'Warranty' . . . was often of no greater worth than the paper it was printed on."²⁹⁸ However, it is unclear whether the Magnuson-Moss Act applies to computer software transactions or information products.

The Magnuson-Moss Act bifurcates all warranties made to consumer buyers as either full or limited. It does not cover merchant-to-merchant sales, so it is chiefly a consumer protection statute. Under the Magnuson-Moss Act, the implied warranty of merchantability is not disclaimable.²⁹⁹ It provides that a supplier may not disclaim or modify any implied warranty to a consumer if the supplier makes any written warranty to the consumer or if, at the time of the sale or within the next 90 days, the supplier enters into a service contract with the consumer regarding the product.³⁰⁰ If only a limited warranty is given, any implied warranty may be limited to the duration of the limited written warranty, provided that its duration is conscionable, that it is set forth in clear and unmistakable language, and that it is prominently displayed on the face of the warranty.³⁰¹

If the Magnuson-Moss Act was extended to computer information transactions, it would provide a remedy in cases involving "repeated failures to pass agreed upon acceptance tests," and cases where failure to provide deliverables, such as source code, caused the licensee to withhold payment.³⁰² There should be, in effect, a "lemon law" for computer software, which permits attorney fees and costs to be recovered. Under a lemon law, it would be presumed that a reasonable number of attempts have been undertaken to conform a computer system to the licensor's express warranty. If the Magnuson-Moss Act is extended to software licenses, the implied warranty of merchantability would be non-disclaimable in consumer transactions.

3. *Extending State Deceptive Trade Practices Acts to UCITA*

Most states have enacted deceptive trade practices acts sometimes referred to as "little FTC acts."³⁰³ Section 2 of Massachusetts' Chapter

297. 15 U.S.C. § 2301(13).

298. H.R. REP. NO. 93-1107 (1974).

299. *Id.* The implied warranty of merchantability is not disclaimable if goods are used for personal, household, or family purposes.

300. See 15 U.S.C. § 2308(a)(1) – (2).

301. See 15 U.S.C. § 2308.

302. *Whittaker Corp. v. Calspan Corp.*, 810 F. Supp. 457, 460 (W.D.N.Y. 1992).

303. See, e.g., Ladas & Parry, *United States – "Little FTCs" Steal the Act* (visited Apr. 25, 1999) <http://www.ladas.com/BULLETINS/1997/1297Bulletin/US_LittleFTCs.html>; Terry W. Schackmann & Clayton L. Barker, *The FTC Act and the Franchise Disclosure*

93A makes it unlawful to engage in "unfair methods of competition and unfair or deceptive acts or practices."³⁰⁴ Case law defines unfair or deceptive acts as those that arise "to a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce."³⁰⁵ A mass-market license with grossly unfair terms may be found to be "unfair" or "deceptive."

Massachusetts' Chapter 93A provides double or treble damages and attorneys fees for unfair and deceptive trade practices.³⁰⁶ While there is no case law on point, nothing in UCITA precludes an aggrieved consumer from filing a Chapter 93A claim for bad software. However, UCITA's reporter notes that consumer protection regulations "may not be consistent with an electronic contracting environment."³⁰⁷ Section 104 of UCITA permits state and federal consumer legislation to supplement UCITA. However, if a reporter's note were added to make this explicit, UCITA would be more consumer-friendly and more likely to be enforced in the global marketplace.

IV. CONCLUSION

UCITA, like Article 2B, has been a product of the most open codification project in Anglo-American jurisprudence. "Electronic democracy makes it possible for Internet users to participate in the codification process."³⁰⁸ Unlike many prior codification projects, many of the lawyers participating in UCITA represent both licensors and licensees, precluding the possibility that "the law is driven solely by the licensor industry" representatives.³⁰⁹ UCITA is also unprecedented in its reporter's willingness to listen to diverse stakeholders and points of view. He has met with and listened to the concerns of hundreds of industry groups, bar associations and consumer groups. The fact that the UCITA drafting process is open, however, does not satisfy some stakeholders.³¹⁰ UCITA has been the subject of open debate, and the reporter has enacted compromises based upon his meetings with diverse interest groups.

Rule in Nieman v. Dryclean U.S.A. Franchise Company, 18 FRANCHISE L.J. 108, 108 (Winter, 1999).

304. MASS. GEN. LAWS ch. 93A, § 2; See also MASS. GEN. LAWS ch. 93A, § 11 (applying statute to businesses).

305. *Levings v. Forbes & Wallace, Inc.*, 8 Mass. App. Ct. 498, 496 N.E.2d 149, 153 (Mass. App. 1979).

306. See MASS. GEN. LAWS ch. 93A, § 9(2).

307. Raymond T. Nimmer, *Selling Products Online: Issues in Electronic Contracting*, 467 PLL/PAT 823 (Jan. 1997).

308. Michael L. Rustad, *Commercial Law Infrastructure for the Age of Information*, 16 J. MARSHALL J. COMPUTER & INFO. L. 255, 313 (1997).

309. Dively & Cohn, *supra* note 60, at 319.

310. *Id.* at 313, n. 409.

If a mandatory minimum adequate remedy is extended to computer transactions, UCITA will fairly balance the interests of licensees and the software industry. The explicit extension of state and federal consumer protection to UCITA would make the proposed statute more attractive to consumer groups and more enforceable in the world economy. Additionally, greater certainty in the rules for online contracts will benefit consumers in the long run by reduced transaction costs. Fortunately, UCITA is flexible enough to accommodate transfers of information, whether they occur across borders by remote access or through technologies yet to be conceived.

APPENDIX A: PROPOSED AMENDMENT TO UCITA § 406:
DISCLAIMER OR MODIFICATION OF WARRANTY.

(6) The implied warranty of merchantability is non-disclaimable in consumer mass-market licenses or transactions as defined in § 102(45) or (46). If software or other information does not substantially conform to the promises or affirmation of those made on the container or label, computer screen or other documentation, a consumer is entitled to a fund plus reasonable incidental expenses, but not consequential damages.

A consumer mass-market transaction is one where information is used or bought for use primarily for personal, family, or household purposes.

APPENDIX B: PROPOSED AMENDMENTS TO UCITA § 105.
SECTION 105: RELATION TO FEDERAL LAW; FUNDAMENTAL
PUBLIC POLICY; TRANSACTIONS SUBJECT TO OTHER
STATE LAW.

(a) A provision of this [Act] which is preempted by federal law is unenforceable to the extent of the preemption.

(b) If a term of a contract violates a fundamental public policy, the court may refuse to enforce the contract, may enforce the remainder of the contract without the permissible term, or so limit the application of the impermissible term as to avoid any 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.

(c) Except as otherwise provided in subsection (d), if this [Act] conflicts with a consumer protection statute [or administrative rule], the conflicting statute [or rule] governs.

For mass-market transactions, state and federal consumer protection that applies to the sale of consumer goods, applies equally well to mass-market licenses and transactions with consumers. Mass-market licenses and transactions must qualify as standard-form licenses as defined in UCITA, § 102(45) and (46).