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It's Just Another Little Bit of History Repeating: UCITA in the Evolving Age of Information

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COMMENT

IT'S JUST ANOTHER LITTLE BIT OF HISTORY REPEATING: UCITA IN THE EVOLVING AGE OF INFORMATION

I. INTRODUCTION

After barely a decade of development, the Uniform Computer Information Transactions Act ("UCITA" or the "Act") has tumultuously come to fruition.[1] On July 29, 1999, the National Conference of Commissioners on Uniform State Laws ("NCCUSL")[2] adopted UCITA at their annual conference in Denver, Colorado.[3]

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[1] *See* Stephen Y. Chow, *Intellectual Property Licensing Under UCC 2B*, 532 PLI/PAT 723, 726 (1998).

[2] *See* Uniform Law Commissioners, *The National Conference of Commissioners on Uniform State Laws* (last modified Aug. 24, 2000) <http://www.nccusl.org>.

> The National Conference of Commissioners on Uniform State Laws (NCCUSL) is now in its 108th year. The organization is comprised of more than 300 lawyers, judges, and law professors, appointed by the states as well as the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, to draft proposals for uniform and model laws and work toward their enactment in legislatures. Since its inception in 1892, the group has promulgated more than 200 acts, among them such bulwarks

UCITA's original incarnation was that of a proposed new article, Article 2B, to the Uniform Commercial Code ("UCC").[4] Article 2B was designed to address the formidable issues surrounding the sale and distribution of intangible goods which its supporters insisted were not addressable under existing law, inclusive of the existing UCC provisions.[5] As such, Article 2B was an attempt to create a standardized commercial law for transactions involving intangible property.[6] However, due to significant dissatisfaction with the proposed Article's terms, the UCC committee decidedly abandoned the effort.[7] Undaunted, the NCCUSL reinvented the work as UCITA, ultimately creating a set of uniform default rules which regulate computer information transactions.[8] While UCITA no longer falls under the authoritative UCC title, it still has the potential to significantly impact future business transactions.[9].

While ambitious, UCITA, like its predecessor Article 2B, has been hotly debated and severely criticized by legal scholars, law practitioners and other interest groups (collectively, the "Critics").[10] Emerging at the forefront are the criticisms that the Act is both premature and contradictory to current

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of state statutory law as the Uniform Commercial Code, the Uniform Probate Code, and the Uniform Partnership Act. *Id.*

[3] *See* Carol A. Kunze, *The Website Formerly Known as The 2B Guide; A Guide to the Proposed Uniform Computer Information Transactions Act* (visited Feb. 20, 2000) <http://www.2bguide.com>.

[4] *See* Pamela Samuelson and Kurt Opsahl, *How Tensions Between Intellectual Property Policy and UCITA Are Likely To Be Resolved*, 570 PLI/PAT 741, 747 (1999).

[5] *See id.* at 746.

[6] *See id.* at 747.

[7] *See id.*

[8] *See id* at 747-748. Default rules are activated when terms of agreements are not explicitly negotiated. *See id.*

[9] *See* Samuelson and Opsahl, *supra* note 4, at 748.

[10] *See* Bad Software: What To Do When Software Fails, *Organizations That Have Opposed or Criticized UCITA*, (visited July 29, 1999) <http://www.badsoftware.com/oppose.htm>. *See also*, Jean Braucher and Peter Linzer, *Memorandum to Members of the American Law Institute* (visited Feb. 20, 2000) <http://207.103.196.3/ali/braucher.htm>. *See also* Lawrence Lessig, *Sign It and Weep*, (last modified Nov. 20, 1998) <http://www.thestandard.com/articles/display/0,1449,2583,00html>.

industry standards.[11] In support of this assertion, the Critics point out that established business practices in the area of computer transactions have yet to solidify, and further, that established norms of licensing are effectively circumvented by many of the Act's provisions.[12] As such, the Critics have repeatedly called for UCITA's abandonment.[13]

UCITA, however, has since been adopted by the NCCUSL, which has the authority to independently propose the Act to state legislatures.[14] Consequently, the NCCUSL has the ability to implement UCITA on an equally broad scale as any UCC article and to effectuate what the opponents of Article 2B have sought to hamper.[15]

This article will address the procedural and substantive reasons why UCITA is, in fact, overly ambitious. With regard to procedure, Part II.A of this comment will outline the historical naissance and development of the highly successful Uniform Commercial Code and contrast that with the development of UCITA. With regard to substance, Part II.B will address what many practitioners have cited as key objections to UCITA. Further, Part II.B discusses examples of terms used in UCITA and compares them to those of common, established practice. Differentiating UCITA from the UCC in these ways will illustrate how UCITA misses the mark it so fervently

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[11] *See* Jean Braucher, *Why UCITA, Like Article 2B, Is Premature And Unsound* (visited Feb. 20, 2000) <http://www.2bguide.com/docs/0499jb.html>. *See also* Hank Barry, *Letter opposing UCITA* (last modified July 8, 1999) <http://www.2bguide.com/docs/wsgr7899.pdf>.

[12] *See id.*

[13] *See* Lessig, *supra* note 10. The entire act was not viewed as worthless. In fact, many concepts of UCITA were praised. Ultimately, though, many involved parties were eager to see UCITA tabled until the law developed more systematically. *See id.*

[14] *See* Dan Gillmor, *What is UCITA?* (last modified July 26, 1999) <http://www.infoworld.com/cgi-bin/displayStory.pl?/features/990531ucita1.htm>. "Uniform acts, including the UCC are adopted by the states individually after they are drafted and approved by the NCCUSL organization, a body of 300+ commissioners appointed by their respective states." *Id.*

[15] *See* Ed Foster, *Why is UCITA Important?* (last modified Aug. 30, 1999) <http://www.infoworld.com/cgi-bin/displayStory.pl?/features/990531ucita2.htm>.

sought to hit and how, consequently, it is likely to add confusion to an otherwise emerging body of law.

Finally, as an alternative to adoption of UCITA at the state level, Part III will present an analysis of existing mechanisms capable of managing the unique problems faced in this "Age of Information." Part III will also present a feasible course of action regarding how the legal profession, and those industries affected by UCITA, might otherwise view legal developments absent this Act. In this veritable renaissance in which we live, this article posits that we presently have the tools we need to accommodate the current issues arising out of computer transactions.

II. EASE ON DOWN THE ROAD

Over the past century, the United States economy has transformed from a primarily goods-based system to that of a service-based system.[16] During most of that time, the UCC effectively served commercial and consumer interests alike by providing a uniform set of laws upon which to rely.[17] However, with the emergence of personal computers into mainstream society in the 1960's, and the later emergence of software as its own product, the question arose as to what protection the law afforded such technology.[18] Consequently, the contracting or "licensing"[19] of intangibles, such as software, came into widespread use.[20]

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[16] *See* Carol A. Kunze, *Background: Why a New Law* (last modified Apr. 20, 1999) <http://www.2Bguide.com/bkgd.html>.

[17] See Mary Jo Howard Dively, *Overview of Proposed UCC Article 2B*, 557 PLI/PAT 7, 9 (1999). *See also* U.C.C. § 1-102(2) (1990), "Underlying purposes and policies of this Act are (a) to simplify, clarify and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; (c) to make uniform the law among the various jurisdictions." *Id.*

[18] See David A. Rice, *Digital Information as Property and Product: U.C.C. Article 2B*, 22 U. DAYTON L. REV. 621, 623 (1997).

[19] *See* Stephen Y. Chow, *Intellectual Property Licensing Under UCC 2B*, 532 PLI/PAT 723, 728 (1998). "A classic definition of a "license" is an agreement by the

Contracts falling within the purview of the UCC contemplate the sale of delivery of goods in terms of a complete transfer of title.[21] Conversely, contracts to license intangible goods combine a permissive, limited use of such intangibles with a confidentiality requirement.[22] Thus, title to intangibles does not typically transfer to the licensee.[23] Consequently, when license contract disputes first emerged, the courts had a particularly difficult time with navigating the law and its relationship to such contracts.[24] Oftentimes, courts attempted to resolve these contract disputes by awkwardly placing them into the "sales" category, whereby the UCC Article 2 would apply, or by calling them "services" contracts, whereby it would not apply.[25] Confusion inevitably ensued, leading to conflicting results from one jurisdiction to another.[26]

Whether or not the information industry is ready for, or in need of, a new "standardized" body of law governing these ever-evolving transactions is hotly debated.[27] The proponents of standardization call the resistance irresponsible,[28] while

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licensor not to sue the licensee where the licensee acts in infringement of the licensor's exclusive right under some property law." *Id.*

[20] *See* Rice, *supra* note 18, at 624.

[21] *See id.*

[22] *See id.*

[23] *See* Dively, *supra* note 17, at 9. The complete transfer of all of one's interest in intellectual property is referred to as an assignment. *See* Dictionary.com, *Assignment* (visited March 22, 2000) <http://www.dictionary.com/cgi-bin/dict.pl?term=assignment>.

[24] *See* Dively, *supra* note 17, at 9.

[25] *See id.*

[26] *See id.*

[27] *See id.* at 9-10. *See also* Lawrence Lessig, *Sign It and Weep*, (last modified Nov. 20, 1998) <http://www.thestandard.com/articles/display/0,1449,2583,00.html>.

[28] *See* Dively, *supra* note 17, at 9-10.

> Whether one likes [the new standardized] contracting procedures or not, it is not responsible to require one of the largest industries in the United States economy to wait for the development of the law on a case by case basis over a period of years to know whether the [contracts] by which they do the majority of their contracting are in fact valid, or have different results in different jurisdictions. *Id.*

those who counsel caution call standardization premature and unsound.[29]

While UCITA no longer dons the authoritative title of a UCC article, it is nevertheless an act that shares the same goal: to standardize an area of commercial law.[30] Indeed, the widespread enactment of UCITA would serve to codify as uniformly as any UCC Article ever has.[31] As such, a historical survey of the UCC's foundation and subsequent development, as compared to that of UCITA, illustrates the characteristics that UCITA lacks, characteristics which are necessary to achieve similar success.

A. THE MECHANICS

1. In the Beginning: The Uniform Commercial Code

The concept of a comprehensive commercial code was proposed in 1940 as a result of the growing dissatisfaction with the various uniform commercial acts then in effect.[32] Spanning from 1896 to 1940, when dissatisfaction peaked, the NCCUSL had promulgated numerous acts, each of which focused on their respective areas of commerce.[33] Over time, however, con-

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[29] *See* Lessig, *supra* note 10. "Humility should be our first principle when legislating about cyberspace: We should be honest about how much we don't know yet. Although [codification] would facilitate tight control of information on the Net, we don't know whether tight control makes sense." *Id.* *See also* Jean Braucher and Peter Linzer, *Memorandum to Members of the American Law Institute* (visited Feb. 20, 2000) <http://207.103.196.3/ali/braucher.htm>. "The case law of software transactions is spotty, and business practices are rapidly changing. In these circumstances, detailed codification is unwise." *Id.*

[30] *See* Pamela Samuelson and Kurt Opsahl, *How Tensions Between Intellectual Property Policy and UCITA Are Likely To Be Resolved*, 570 PLI/PAT 741, 748 (1999).

[31] See *id.* at 750-751.

[32] *See* William A. Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1, 1-2 (1967).

[33] *See id.* at 2. Among the NCCUSL circulated acts were: in 1896, the Negotiable Instruments Law; in 1906, both the Uniform Warehouse Receipts Act and the Uniform Sales Act; in 1909, both the Uniform Bills of Lading Act and the Uniform Stock Transfer Act; in 1918, the Uniform Conditional Sales Act; in 1933, the Uniform Trust Receipts Act. *See id.*

flicts arose between these pre-UCC bodies of law.[34] In addition to these conflicts, the NCCUSL found certain established provisions of the various acts to be unsuitable for contemporary business practices.[35] At first, the NCCUSL prepared amendments to the acts as needed, but inconsistent state adoption of the amendments led to further incongruity.[36] Ultimately, instead of further patching up the holes in this vast regatta of wavering acts, the NCCUSL Commissioner proposed that the organization salvage the best of each act and prepare one comprehensive and uniform commercial code therefrom.[37] The NCCUSL enthusiastically adopted this proposal.[38] Realizing the magnitude of such an endeavor,[39] however, the NCCUSL invited the American Law Institute[40] ("ALI") to participate and it immediately accepted.[41] In 1944, the organizations submit-

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[34] *See id.* at 2.

[35] *See id.*

[36] *See* Schnader, *supra* note 32, at 2.

[37] *See id.* The Commissioner of the NCCUSL at the time was the author of this cited article, William A. Schnader. *See id.*

[38] *See id.*

[39] *See* Homer Kripke, The Principles Underlying the Drafting of the Uniform Commercial Code, 1962 U. ILL. L. F. 321, 321 (1962).

> The nature of the Code project was such that only in the faculties of the law schools could the requisite manpower be found to do the drafting . . . [O]nly the law faculties could devote the time in large enough quantities to the enormous task of drafting and redrafting. Only the law faculties had the background of adequate knowledge of the existing uniform acts, where they were obsolescent, and where the interpretations created lack of uniformity. Only the faculties had the adequate time for the necessary research. *Id.*

[40] *See* The American Law Institute, *Welcome to the ALI Home Page* (visited Feb. 20, 2000) <http://www.ali.org>.

> The American Law Institute was established in 1923 to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work. The Institute drafts for consideration by its Council and its membership and then publishes various Restatements of the Law, Model Codes, and other proposals for law reform. *Id.*

[41] *See* Schnader, *supra* note 32, at 3. The ALI had just finished revising its Restatement of the Law and was thereafter to be dismantled. The NCCUSL proposal infused the ALI with the workload it needed to justify its existence. *See id.*

ted and signed an agreement outlining the details for this immense project.[42]

To tackle such a considerable undertaking, the NCCUSL/ALI assembled a drafting committee and broke down drafting tasks hierarchically.[43] The most important of these tiers was that of the Chief Reporter, who essentially served as the Editor-in-Chief of the Code.[44] In choosing Professor Karl Llewellyn of the Columbia University Law School for the task, the NCCUSL and the ALI sought to draw upon Professor Llewellyn's legal expertise and practical guidance in developing the Code.[45] Llewellyn advocated a more normative approach when drafting code, thereby calling for actual commercial considerations to be taken into account – a point that would be lost on the future drafters of UCITA.[46] Echoing the spirit of this approach, the NCCUSL/ALI required the drafting organization to filter any code proposals through several expert bodies before such proposals were presented to them.[47] Such an approach would thereby guarantee thorough consideration and input from interested parties and facilitate a mutually agreeable result.[48] In January of 1945, the actual drafting of the Uniform Commercial Code (the "Code") commenced.[49]

With the drafting underway, the NCCUSL and the ALI met separately at their respective annual meetings of 1946 and 1947 to evaluate the progress of the Code and to review the

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[42] *See id.* While contract negotiations proceeded, the NCCUSL completed a Revised Uniform Sales Act. Since the Sales Act would eventually become a part of the envisioned commercial code, the ALI assisted with the final revisions. *See id.*

[43] *See id.* at 4.

[44] *See id.*

[45] *See id.* at 4. "Not only was Professor Llewellyn a student of commercial law as it appeared in the law books, but he was the type of law professor who was never satisfied unless he knew exactly how commercial transactions were carried out in the market place." *Id.*

[46] *See* Schnader, *supra* note 32, at 4.

[47] *See id.* at 3-4.

[48] *See id.*

[49] *See* Schnader, *supra* note 32, at 4-5.

proposals.[50] In 1948 and 1949, however, the groups convened for joint meetings and resolved to pass tentative final drafts of the Code.[51] These joint meeting proved kinetic, provoking great intellectual and practical debates on almost every provision of the Code.[52] In the latter joint meeting of September 1949, the NCCUSL/ALI approved the tentative final draft of the Code and granted the Editorial Board three months to make any final edits.[53] The Editorial Board then forwarded the draft to various interest groups for further review, comments and criticism.[54] The NCCUSL/ALI also granted the Editorial Board the power to hold hearings to determine whether the criticisms and comments received from any interest group were significant enough for the NCCUSL/ALI to review.[55]

In January 1951, although past their three month deadline, the Editorial Board held hearings in New York City before the various interest groups and thereafter recommended a number

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[50] *See id.* at 5. It was not until 1948, however, that the NCCUSL and ALI fully considered any portion of the Code. The volume of materials, and interest therein, presented at the 1948 meeting was so great that two groups were created in order to review all of the materials. *See id.*

[51] *See id.*

[52] *See* Schnader, *supra* note 32. at 5. "There were vigorous debates and differences of opinion on the Code's many provisions, all of which had to be decided by a majority vote when they came before the two sponsoring bodies for final adoption." *Id.*

[53] *See id.*

[54] *See id.* at 5-6. Copies of the draft were sent to,

> [M]embers of the [ALI] and the [NCCUSL], to the members of the Board of Governors, the House of Delegates and the appropriate committees of the Section on Corporation, Banking and Business Law of the American Bar Association, to members of committees of State or local bar associations assigned to make a study of the Code, to governmental agencies and legislative committees which request[ed] copies, to the officers and appropriate committees of national associations of farmers, merchants, manufacturers, bankers, investment bankers, financial institutions, warehouseman, railroads and others affected by the Code's provisions, and to any other agencies or persons deemed appropriate by the Editorial Board. *Id.*

[55] *See* Schnader, *supra* note 32, at 6. Because of this immense increase in control, the five member Editorial Board was expanded to fifteen members to ensure against tainted decision making. *See id.*

of revisions to the NCCUSL/ALI.[56] By that summer, the NCCUSL/ALI had critically considered and systematically addressed each of the various positions taken by the interest groups in response to the draft.[57] In September 1951, the NCCUSL/ALI accepted those resulting revisions and the Code was seemingly complete.[58]

When previously silent interest groups made additional objections to the Code in the fall of 1952, the Editorial Board reconvened to assess the merits of the objections.[59] Finding valid concerns, the Editorial Board recommended additions to the Code and presented them to the NCCUSL and ALI at their respective annual meetings of 1953.[60] At those meetings, the NCCUSL and ALI each approved the additions, and the Code was thereby completed.[61]

The NCCUSL's Commercial Code Committee then began the campaign for support and ratification of the Code by each state legislature.[62] This campaign came to a halt after a few

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[56] *See id.* at 6-7. The Editorial Board met again in March of 1951 to further discuss the proposed draft revisions. *See id.*

[57] *See id.* at 7. Among the more vocal interest groups were the Federal Reserve Bank, the Bankers Association for Foreign Trade ("BAFT") and The Warehouseman's Association ("WA"). Difficulties encountered with the banking interest groups caused the NCCUSL/ALI to eliminate Article 4 – bank collections, from the draft. It was later reinserted after significant redrafting. The BAFT dissatisfaction with the draft's "letters of credit" provision generated several days of discussion and numerous satisfactory changes. The WA's concerns were addressed by simply rearranging parts of Article 7 of the Code. *See id.*

[58] *See id.* The American Bar Association's Board of Governors and House of Delegates unanimously endorsed the Code the week following the meeting. *See id.*

[59] *See* Schnader, *supra* note 32, at 7.

[60] *See id.* at 7-8.

[61] *See id.* at 8.

[62] *See id.* Over this time period there were additional comments and critiques made of the Code. Most notably New York, the most significant commercial state in the country, offered much resistance to the originally proposed Code. In fact, when presented with the draft, the New York Legislature "referred it to the New York Law Revisions Commission for study and recommendation and gave to the Commission an appropriation almost as large as the total cost of preparing the Code." When New York's opposition to the Code became known, the ratification process came to a virtual halt, leaving Pennsylvania the sole ratifier of the Code at that point. The Editorial board reconvened to review the New York suggestions. In 1956, once the

states made objections, but resumed again in 1958 after yet another series of revisions.[63] Between 1956 and 1968, the District of Columbia, the Virgin Islands, and every state legislature except Louisiana enacted the Code, making it the swiftest enactment of legislation to date, and the most thorough.[64]

2. *The Wonderful World of UCITA*

Unlike the slow, careful development of the UCC, UCITA has materialized at breakneck speed out of the practice of licensing, which developed in response to the emergence of mass software distribution to the public.[65] Originally, the manufacturer and end user in the software market negotiated the terms of the contract between themselves.[66] With the ever-increasing use of software, however, this contracting method of distributing software became inefficient.[67] To effectuate a more efficient means of contracting between parties, the shrink-wrap license developed.[68]

Through the shrink-wrap license, commercial software publishers, like Microsoft, were able to offer contract terms to customers in tandem with the actual product, rather than

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NCCUSL/ALI accepted the revisions the ratification process was again underway. *See id.* at 8-9.

[63] *See* Schnader, *supra* note 32, at 9. At this point, the ALI's involvement was complete. "The [ALI] is a tax-exempt organization and as such is prohibited from advocating the passage of legislation. The [NCCUSL], on the other hand, is an organization of state officials not subject to the restriction which prevents the [NCCUSL] from actively seeking the passage of legislation." *Id.* at 8.

[64] *See id.* at 9-10.

[65] *See* Chow, *supra* note 1, at 731.

[66] *See* Samuelson and Opsahl, *supra* note 4, at 746.

[67] *See id. See also* Chow, *supra* note 1, at 731. The microcomputer boom of the 1980's resulted in the practice becoming inefficient. As software prices fell, it became impossible to maintain the costs of negotiations. *See id.*

[68] *See* Samuelson and Opsahl, *supra* note 4, at 746. *See also* Chow, *supra* note 1, at 731. A shrink-wrap license is one where the terms of the license are contained either within or on the package of software. A customer essentially assents to the terms of the license by simply tearing the shrink-wrapped packaging from the box and using the software. *See id.* at 731-732.

prior to delivery as had occurred before.[69] As stipulated by a typical contract, customers accepted each of the presented terms simply by opening the product's package or, as a variation on the theme, by "clicking through" the presented terms when installing the software products.[70]

Through the use of such licenses, software publishers began limiting their liability and simultaneously decreasing the scope of intellectual property rights granted.[71] Such actions led to disgruntled customers, which inevitably led to litigation.[72] When inconsistent court holdings in such cases created confusion as to the rights and enforceability involved with the shrink-wrap license, both consumers and manufacturers became dissatisfied.[73]

With the growth of this dissatisfaction, the increase in software licensing transactions, and the inadequacies of existing UCC provisions, the NCCUSL considered incorporating software transactions into the existing UCC.[74] Before attempting such an endeavor, however, the NCCUSL called upon the American Bar Association ("ABA") to study such a proposal.[75] At the end of 1991, the ABA study group proposed ex-

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[69] See Batya Goodman, *Honey, I Shrink-Wrapped The Consumer: The Shrink-Wrap Agreement As An Adhesion Contract*, 21 CARDOZO L. REV. 319, 332-333 (1999).

[70] *See id.*

[71] *See* Samuelson and Opsahl, *supra* note 4, at 746.

[72] *See* Goodman, *supra* note 69, at 320.

[73] See Step-Saver Data Sys, Inc. v. Wyse Technology, Inc., 939 F.2d 91 (3rd Cir. 1991), where the court refused to enforce the terms of the license because the consumer had not expressly agreed to the terms. *See id.* See also, ProCD Inc. v. Zeidenberg, 86 F.3d 1447, 1453 (7th Cir.1996), where the Seventh Circuit Court of Appeals overturned the lower courts holding that the software license was unenforceable. The Seventh Circuit found a significant amount of 'manifestation of assent' and thereby called the license valid. *See id.*

[74] *See* Samuelson and Opsahl, *supra* note 4, at 747. *See also* Chow, *supra* note 1, at 735.

[75] *See id.*

panding the existing Article 2 of the UCC[76] to incorporate this emerging form of transacting business.[77]

Similar to their collaboration in the original UCC project,[78] the NCCUSL joined forces with the ALI to revamp the modern UCC.[79] Initially, the NCCUSL and the ALI formed a drafting committee (the "Drafting Committee") that sought to integrate the commercial law of licensing into the existing Article 2 of the UCC in a "hub and spoke" approach.[80] To that end, the Drafting Committee spent the years between 1991 and 1995 writing draft provisions.[81] As other issues emerged,[82] the Drafting Committee recognized that licensing was only the tip of the iceberg with regard to what needed incorporation; by 1995, the scope of the proposed revisions had become so broad that an entirely new article to the UCC was proposed, Article 2B.[83]

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[76] *See* PETER A. ALCES AND HAROLD F. SEE, THE COMMERCIAL LAW OF INTELLECTUAL PROPERTY 629-630 (1994). The impetus for contemplating a new UCC Article included the recognition that: (1) the UCC was already well accepted vehicle for commercial transaction and more readily intellectually accessible than complex licensing agreements; (2) The courts, additionally, seemed more at ease implementing a UCC approach to controversy (*See e.g., Step-Saver*, 939 F.2d 91, where the court essentially treated the license of a computer program as a sale of good falling under the auspices of Article 2 of the UCC); (3) the simultaneous goals of gap filling and encouraging technology transfer would be met; and (4) basic uniformity where areas of intellectual property law had started to significantly overlap. *See id.*

[77] *See* Samuelson and Opsahl, *supra* note 4, at 747.

[78] *See* Schnader, *supra* note 32, at 3.

[79] *See* Samuelson and Opsahl, *supra* note 4, at 747.

[80] *See id.* at n. 14. *See also* Chow, *supra* note 1, at 735. The "hub and spoke" approach envisions utilizing existing UCC general contracting principles as the focal point of the Code, from which various, more specific areas of law would branch. *See id.*

[81] *See* Dively, *supra* note 17, at 10. The esteemed Raymond F. Nimmer was the Reporter for the project. *See id.*

[82] *See* Samuelson and Opsahl, *supra* note 4, at 747. "Initially only software was involved, but then on-line databases came onboard, followed by digital information products and services such as CD-ROMs. By 1995, the scope of the proposed law. . . had expanded to cover information licensing generally." *Id.*

[83] *See id.* The scope expanded from simply addressing 'commercial licensing law' to including therein: the licensing of *information*; all software contracts; service contracts; maintenance contracts; on-line databases; and digital information products and

After a series of refinements and revisions, the proposed article's reach was still quite vast, causing the ALI to insist on paring down the proposed article before it would offer its endorsement, an endorsement that was necessary for the initiative to survive as a UCC article.[84] As such, the Article 2B drafters scaled back the scope to include solely "computer information transactions."[85] Still unconvinced that the new article could successfully fit into the cadre of the UCC, however, the ALI withdrew its support.[86] Undaunted, the NCCUSL continued the initiative which it now touted as a 'uniform act' under the new title of the Uniform Computer Information Transactions Act, or UCITA.[87]

As expected, UCITA still suffers from the same criticisms of its predecessor as little has changed in terms of its content.[88] Nevertheless, on July 29, 1999 the NCCUSL approved UCITA

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services. *See id.* The "NCCUSL determined that there were sufficient differences between sales of goods and licenses of information to justify a separate article in the UCC treating licenses of computer information." *Id.*

[84] *See* Memorandum from Geoffrey C. Hazard et al to Drafting Committee on Uniform Commercial Code Article 2B-Licenses (visited Feb. 20, 2000) <www.2bguide.com/docs/gch1098.pdf>.

[85] *See* Samuelson and Opsahl, *supra* note 4, at 747.

[86] *See* NCCUSL, *ALI and NCCUSL Announce that Legal Rules for Computer Information Will Not Be Part of UCC* (last modified on Apr. 7, 1999) <http://www.2bguide.com/docs/040799pr.html>. *See also* Braucher and Linzer, *supra* note 10. The American Law Institute membership supports the following statement:

> The current draft of proposed UCC Article 2B has not reached an acceptable balance in its provisions concerning assent to standard form records and should be returned to the Drafting Committee for fundamental revision of the several related sections governing assent. *Id.*

[87] *See* Holly K. Towle, *Advanced Issues in Drafting and Updating Online Contracts and Website Disclaimers*, 563 PLI/PAT 427, n.2 (1999). "Examples of such acts are the Uniform Trade Secrets Act and the Uniform Limited Partnership Act." *Id.*

[88] *See* Bad Software, *supra* note 10. *See also* Letter from Bureaus of Consumer Protection and Competition and of the Policy Planning office of the Federal Trade Commission to John McClaugherty, NCCUSL Chair from Federal Trade Commission (last modified July 9, 1999) <http://www.ftc.gov/be/v990010.htm>. *See also* Braucher and Linzer, *supra* note 10.

and it is now slated, on a fast track, to be sent to each of the state legislatures.[89]

3. *The Road Not Taken*

UCITA has learned none of the historical lessons taught by the Uniform Commercial Code. The UCC is the compilation of over seven decades of established business practices.[90] Its achievement is the result of the culminated and concentrated efforts of the country's most esteemed judges, lawyers and law professors.[91] In addition, the NCCUSL/ALI's focused efforts to solicit, encourage and incorporate comments from the various interest groups ensured a complete and acceptable Code.[92] Conversely, the origins of UCITA and its UCC predecessor, Article 2B, share few of the qualities that have contributed to the UCC's overwhelming success.

In less than ten years, the NCCUSL has produced an Act that may very well change the way in which business over electronic media takes place, from contract formation to liability limitations.[93] While the determination and resolve that accompanied the procedural development of UCITA is admirable, UCITA's failure to address the basic principles to which the drafters of the UCC held fast may inevitably lead to its demise.[94]

a. History/Time Factor

The historical development of the UCC is in sharp contrast to that of UCITA. When the idea to create a Uniform Commercial Code came to fruition, it did so only after established

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[89] *See* Carl C. Ring and Raymond T. Nimmer, *Series Of Papers On Ucita Issues* (last visited Nov. 3, 1999) <http://www.NCCUSL.org/pressrel/UCITAQA.HTM>.

[90] *See* Schnader, *supra* note 32, at 2.

[91] *See id.* at 10 ("No piece of legislation was ever considered as carefully").

[92] *See id.*

[93] *See* Lorin Brennan & Glenn A. Barber, *Why Software Professionals Should Support The Uniform Computer Information Transactions Act (And What Will Happen If They Don't)* (visited Feb. 20, 2000) <http://www.badsoftware.com/uccindex.htm>.

[94] *See* Lessig, *supra* note 10.

case law and business practices had emerged.[95] Conversely, UCITA attempts to codify the quickly evolving and constantly shifting area of computer transactions without such a foundation and evolved norms.[96] Scholars have warned that such rushed codification may likely have a chilling effect on the innovation of new ways of conducting business.[97]

b. Support Factor

The original UCC drafters went to great lengths to ensure a thorough critique of the proposed Code.[98] Consequently, both consumer and commercial groups supported the Code.[99] Conversely, neither UCITA nor its Article 2B predecessor, have enjoyed such comprehensive support. In fact, the ALI formally stated that it had "become apparent that this area does not presently allow the sort of codification that is represented by the Uniform Commercial Code."[100]

In addition, myriad interest groups have been similarly critical of UCITA and its Article 2B predecessor.[101] Among the more influential of these interested parties include: the Association for Computing Machinery,[102] the Society for Information Management,[103] the Institute of Electrical and Electronics Engineers,[104] the Consumers Union, the Association of Computing

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[95] *See* Schnader, *supra* note 32, at 2.

[96] *See* Braucher and Linzer, *supra* note 10. "The case law of software transactions is spotty and business practices are rapidly changing." *Id.*

[97] *See* Lessig, *supra* note 10.

[98] *See supra* notes 32-64 and accompanying text.

[99] *See id.*

[100] *See* NCCUSL, *supra* note 86.

[101] *See* Bad Software, *supra* note 10.

[102] *See* Jim Carr, *UCITA Could Alter Warranty Rights, Too* (visited Oct. 25, 1999) <http://www.microtimes.com/198/industry.html#carr1>.

[103] *See* Society for Information Management, *Issues Advocacy – UCITA* (visited Jan. 29, 2000) <www.simnet.org/search/ucita>.

[104] *See* Institute of Electrical and Electronics Engineers Letter from Paul J. Kostek, President, Institute of Electrical and Electronic Engineers, to Gene Lebrun, President, NCCUSL (last modified July 20, 1999) <http://www.ieeeusa.org/FORUM/POLICY/1999/99july20.html>.

Machinery,[105] and the Motion Picture Association of America.[106] Such influential and pervasive disapproval undermines the very reason the NCCUSL/ALI developed the idea – to unify.

c. Consumer Protection Factor

In developing the UCC, staff members were particularly concerned with the protection of consumers as well as with the unconscionability of contracts; thus, they drafted the Code's provisions accordingly.[107] Conversely, Critics have called UCITA a "sweetheart bill for software publishers"[108] and a compilation whose provisions clearly favor "the *companies* whose lobbyists have been sitting at the . . . table."[109]

Consequently, UCITA is unconcerned with the average consumer, as evidenced by the fact that certain terms seem to shift liability to consumers.[110] Limited warranties, for example, serve to protect customers against malfunctions only so long as the software warranty lasts.[111] The typically short time frame of these warranties removes the incentives for commercial software publishers to work out irregularities or ensure safely running programs, leaving the consumer unprotected.[112]

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[105] *See* Society for Information Management, *supra* note 104.

[106] *See* Coalition Letter, *supra* note 82.

[107] *See* Kripke, *supra* note 39, at 323-324. "But in early versions of the official comments, the staff made this section into one under which the courts had a roving commission to protect against unequal bargaining power or too drastic results in practice." *Id.* at 324. *See also* U.C.C. § 2-302 (1995).

[108] *See* Society for Information Management, *supra* note 103.

[109] Lessig, *supra* note 10 (emphasis added). *See also* Silicon Valley Software Industry Coalition (visited Feb. 1, 2000) <http://www.softwareindustry.org/coalition/docs/UCITA_support.pdf>.

[110] *See infra* notes 147-158 and accompanying text. *See also* Andrew Leonard, *Life or Death Software* (visited Feb. 12, 2000) <http://www.salon.com/tech/feature/1999/08/05/anesthesia/index2.html>.

[111] *See id.*

[112] *See id.*

d. Open Forum Factor

The continued efforts of the entire UCC committee to both hear and address the varying interest groups' concerns was another one of the UCC's unwavering strengths.[113] Proponents of UCITA claim that the drafting process has been similarly open to and attended by a large faction of interest groups' representatives.[114] However, while UCITA's "process" has been technically "open," the resultant terms clearly weigh in favor of the manufacturer, suggesting that consumers have been grossly underrepresented.[115] In fact, many of the drafting meetings have been complex endeavors consisting of the interested parties' attorneys hammering out fine points of law.[116] Due to such inequitable representation, UCITA "has been heavily criticized by every consumer advocate that has analyzed it."[117]

e. Enduring Goals Factor

Unlike UCITA, the UCC reflects a careful consideration of both consumer and business interests because the drafters of the UCC sought to "critically examine the most fundamental assumptions in the search for an appropriate structure of law."[118] Instead of haphazardly fusing together what they thought might work, the UCC drafters imbued the Code with universal qualities that would survive the passage of time.[119] Accordingly, the drafters of the Code adopted "rules of law that were not fixed but which would reflect current business prac-

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[113] See Schnader *supra* note 32, at 7-9.

[114] *See* Dively, *supra* note 17, at 10.

[115] *See* Lessig, *supra* note 10. *See also* Ed Foster, *UCITA Threatens Rights Of Consumers In The New Age Of Electronic Commerce* (visited Feb. 1, 2000) <http://www.idg.net>.

[116] *See* Ed Foster, *What is UCITA?* (visited Feb. 1, 2000) <http://www.infoworld.com/cgi-bin/displayStory.pl?/features/990531ucita1.htm>.

[117] *See* Consumer Coalition Letter (visited Feb. 27, 2000) <http://www.cptech.org/ucc/sign-on.html>.

[118] *See* Kripke, *supra* note 39, at 323.

[119] *See id.* at 332.

tice" and endeavored to "keep the Code abreast of business practice."[120]

UCITA does not share such hard-wearing goals. While UCITA proponents claim that it reflects the "commercial realities and practices" and the "freedom of contract" perspective of the UCC, Critics have pointed out the fact that UCITA was essentially no more than a back-up plan that the NCCUSL pushed through when the ALI withdrew its support.[121] UCITA's subsequent hurried development and failure to consider the unpredictability of current business practices is a recipe for legal disarray.[122]

B. OIL – THE SUBSTANCE OF THE ACT

While a comprehensive listing and critique of each of the problematic UCITA issues is beyond the scope of this article, this section will illustrate five of the most troublesome provisions.[123]

1. Electronic Self-Help

"Electronic Self-Help" essentially means that the licensor has the ability to remotely disable licensed software.[124] Under UCITA Sections 814 and 816, a software vendor can resort to "electronic self-help" in order to prevent a consumer from utilizing the software after his or her license has been cancelled due to a breach of contract.[125] While at first glance this may

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[120] *See id.* at 330.

[121] Samuelson and Opsahl, *supra* note 4, at 746.

[122] *See* Cem Kaner, *A Bad Law for Bad Software* (visited Feb. 27, 2000) <http://www.badsoftware.com/ucbkaner.htm>.

[123] See Bad Software: What To Do When Software Fails (visited Feb. 27, 2000) <http://www.badsoftware.com/uccindex.htm>, for an exhaustive critique of UCITA issues. *See id.*

[124] *See* Uniform Computer Information Transactions Act ("UCITA"), § 816(a) (1999) (visited Feb. 27, 2000) <http://www.law.upenn.edu/bll/ulc/ucita/citam99.htm>.

[125] *See id.* at § 814. "Section 814. Right To Discontinue Access. On material breach of an access contract or if the agreement so provides, a party may discontinue all contractual rights of access of the party in breach and direct any person that is assisting the performance of the contract to discontinue its performance." *Id.* "Section 816.

seem reasonable, UCITA Section 815(b) allows for such electronic self-help "without judicial process."[126] Essentially, then, a vendor is permitted to bypass the legal system and effectuate a result that it alone decides is just.[127]

Self-help has been traditionally viewed as a remedy of last resort, and even then it has been clearly and carefully limited.[128] UCITA Sections 815(b) and 816, however, essentially allow electronic self-help whenever the vendor deems it necessary, putting the reliant customer at the mercy of the vendor instead of the legal system.[129] UCITA Critics point out that to allow vendors the right and ability to disable or deny access to software raises serious due process, public policy and unconscionability issues.[130]

2. *Warranties Reduced*

Generally, a software vendor's goal in any given transaction is to gain the most favorable price for the least amount of assurances.[131] The now common use of click-wrap and shrink-wrap[132] licenses makes achieving this goal even more possible

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Electronic Self-Help. (a) In this section, 'electronic self-help' means the use of electronic means to exercise a licensor's rights . . ." *See id.* at § 816.

[126] *See id.* at § 815(b).

> Except as otherwise provided in Section 814, a licensor may exercise its rights under subsection (a) without judicial process only if this can be done: (1) without a breach of the peace; (2) without a foreseeable risk of personal injury or significant physical damage to information or property other than the licensed information; and (3) in accordance with Section 816. *Id.*

[127] See Bryan Pfaffenberger, *Shrink-Wrapped UCITA* (visited Feb. 28, 2000) <http://www2.linuxjournal.com/articles/currents/005.html>.

[128] See Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089, 1110 (1998), for a thorough history and application of self-help as remedy. *See id.*

[129] *See* UCITA §§ 815(b), 816 (1999)

[130] *See* Pfaffenberger, *supra* note 128.

[131] *See generally* Goodman, *supra* note 69, at 333-337.

[132] *See* Gary L. Founds, *Shrinkwrap and Clickwrap Agreements, 2B or not 2B*, 52 FED. COMM. L.J. 99, 100 n.2 (1999). "Software agreements that appear on the packaging containing the installation CD or diskettes are called shrinkwrap agreements;

by providing consumers with an even faster way to bypass the terms that are never read in the first place.[133] Further, the lack of legal sophistication of many consumers ensures that even the most diligent consumer who does read the terms of the agreement will not comprehend the intricacies of disclaimers contained therein.[134] It is simply unrealistic to bind a consumer to terms that they are neither encouraged to read nor capable of understanding.[135]

Traditionally, a written disclaimed warranty must be conspicuous.[136] In the event that a contract, through bold or capitalized lettering, or contractor, through actively drawing attention to, fails to bring such a clause to the contractee's attention, it would inevitably be deemed unenforceable.[137] UCITA, however, adjusts the standard of conspicuousness to require that only the "mass-market transaction,"[138] which is one that is directed at individual members of the purchasing public, bear

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software agreements that appear on screen prior to downloading software from the Internet or prior to installation of the software are called clickwrap agreements." *Id.*

[133] *See id.* at 100.

[134] *See* Lessig, *supra* note 10.

[135] *See* Founds, *supra* note 132, at 100.

[136] *See* R.J. Robertson Jr., *A Modest Proposal Regarding The Enforceability Of "As Is" Disclaimers Of Implied Warranties: What The Buyer Doesn't Know Shouldn't Hurt Him*, 99 COM. L.J. 1, 9 (1994). *See also* UCC § 2-316 (1995).

[137] *See* Lessig, *supra* note 10. "The principle makes perfect sense. The law spares consumers the burden of reading 100 pages of turgid prose, instead letting people rely on what's reasonable and focus only on what's different." *Id.*

[138] *See* UCITA § 101(46).

> Mass-market transaction means a transaction under this [Act] that is: (A) a consumer contract; 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 a quantity consistent with an ordinary transaction in a retail market; and (iii) the transaction is not: (I) a contract for redistribution or for public performance or public display of a copyrighted work; (II) a transaction in which the information is customized or otherwise specially prepared by the licensor for the licensee other than minor customization using a capability of the information intended for that purpose; (III) a site license; or (IV) an access contract. *Id.*

the burden of "conspicuousness."[139] Because entire software-reliant market segments, like family owned businesses and small franchises, fall outside of this sweeping "mass-market" category, they are effectively excluded from the conspicuous disclaimer requirement.[140] UCITA claims that this merely reflects modern practice; however, it actually leaves these unassuming customers out in the cold.[141] Ironically, these are precisely the groups of consumers that most need safeguards like "conspicuousness."

3. *In No Uncertain Terms*

As has become an industry standard, a typical software license grants the licensee a perpetual license.[142] While granting this type of license allows vendors to charge higher licensing fees, it nevertheless gives the customer the right to use such licensed software indefinitely.[143]

UCITA section 308, however, seeks to change this standard by mandating that a license grant, which is silent on duration, shall be only for a "time reasonable" under "commercial circumstances."[144] Allowing UCITA to replace this established standard with inequitable durations would unduly favor software vendors by taking away one of the only presumed con-

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[139] *See* UCITA § 406(5). "In a mass-market transaction, language in a record that disclaims or modifies an implied warranty must be conspicuous." *Id.*

[140] *See* UCITA § 101(16).

> 'Consumer' means an individual who is a licensee of information or informational rights that the individual at the time of contracting intended to be used primarily for personal, family, or household purposes. The term does not include an individual who is a licensee primarily for profit-making, professional, or commercial purposes, including agriculture, business management, and investment management other than management of the individual's personal or family investments. *Id.*

[141] *See* UCITA, *supra* note 125, at Summary.

[142] *See* H. Ward Classen, *Fundamentals Of Software Licensing*, 37 IDEA 1, 6 (1996).

[143] *See generally id* (explaining the fundamental issues that licensors and licensees confront in the negotiation and drafting of software license agreements).

[144] *See* UCITA § 308(2).

sumer licensing rights that benefit consumers.[145] Software vendors, then, could essentially force original licensees into relicensin expired software. Critics assert that these types of inequitable terms are inappropriate to a codification of this magnitude.[146]

4. Buyer Beware

Businesses are becoming increasingly, if not totally, reliant on computers and the software necessary to run them.[147] Therefore, it is imperative that software and equipment malfunctions remain as minimal as possible since any failure or defect can immobilize such technology-reliant businesses.[148] Accordingly, technology-reliant businesses naturally see the prevention or immediate correction of any software malfunction or defect of primary importance.[149] Thus, when malfunctions inevitably occur, a reasonable consumer will logically look immediately to the party most capable of remedying such a failure: the vendor.[150] UCITA threatens to thwart this logical consumer expectation by absolving the very manufacturers of defective software of responsibility and shifting liability to the customer.[151]

Traditionally, under the theory of *caveat emptor* or *buyer beware*, vendors cannot be held liable for defects because buyers have assumed the responsibility for verifying the value and

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[145] *See* Bad Software, *supra* note 123.

[146] *See id.*

[147] *See id.*

[148] *See* MICHAEL A. EPSTEIN, EPSTEIN ON INTELLECTUAL PROPERTY, §15.05(C). "Computer software is susceptible to particular defects that do not arise in the context of other technology licenses. Accordingly, licensees should ensure that the license agreement contains warranties against such defects before entrusting critical tasks to the licensed software." *Id.*

[149] *See* Bad Software, *supra* note 123.

[150] *See id.*

[151] *See* Andrew Leonard, *Life or Death Software* Salon.com (last visited Feb. 2, 2000) <http://www.salon.com/tech/feature/1999/08/05/anesthesia/index2.html>.

quality of a purchased product.[152] Such an approach makes sense in situations where the verification is easily obtained. For example, a prospective purchaser of a used automobile can easily have a mechanic check the car for defects before the purchase.[153] However, in situations such as licensing software, where verification is difficult, or impossible, the notion of *caveat venditor* or *seller beware* has been argued as the more appropriate theory which to apply.[154] This latter approach transfers the burden from the consumer and logically places it squarely in the lap of the party more able to detect potential problems.[155]

UCITA, however, does not shift any of the liability to the vendor, but instead adds to the consumer's burden by stating that the consumer has no recourse for any defect that occurs outside the parameters of an express warranty period.[156] This UCITA provision clearly favors the vendor in at least two ways. First, the warranty period is for an invariably short term, spanning only thirty to ninety days in duration.[157] In reality, however, defects often arise long after such time. Second, the warranty runs from the time of *delivery*, not *installation*.[158] One could easily imagine a situation where delivered software is left uninstalled for the duration of the warranty period, essentially leaving the customer with only an illusory warranty.

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[152] *See* Linda J. Rusch, *A History And Pespective of Revised Article 2: The Never Ending Saga of a Search For Balance*, 52 SMU L. Rev. 1683, 1697 (1999).

[153] *See* 1 RICHARD L. BERNACCHI, ET AL., BERNACCHI ON COMPUTER LAW § 3.31 (1992).

[154] *See id.* Caveat Emptor means "The axiom or principle in commerce that the buyer alone is responsible for assessing the quality of a purchase before buying." *See* Dictionary.com, *Caveat Emptor* (visited Feb. 2, 2000) <http://www.dictionary.com/cgi-in/dict.pl?term=caveat%20emptor>.

[155] *See* Patrick A. Vittori, *If UCITA were applied to the Auto Industry* (visited Feb. 28, 2000) <http://www2.linuxjournal.com/cgi-bin/frames.pl/articles/currents/005.html>.

[156] *See* UCITA § 805, n. 3. "Thus, a ninety day warranty means that there is no breach unless the defect appears within ninety days after delivery." *Id.*

[157] *See* UCITA §805.

[158] *See id.*

5. *Manifesting Assent*

It is a well established contracting principle that material terms are to be disclosed prior to a transaction and that terms not expressly agreed to will not become a part of the contract.[159] This principle has developed, in part, based on the realization that consumers and buyers alike often fail to actually read the terms contained in their agreements.[160] As such, in the shuffle of papers that typically ensues in the formation of contract, additional terms not expressly assented to are treated as "proposals for additions to the contract" and not as incorporations thereof.[161]

UCITA, however, adopts an approach contradictory to this established principle and allows assent to the post-purchase presentation of terms via the evolving "click-through" method.[162] Critics have referred to this "manifestation of assent" as "a perversion of the objective theory of contract" because by presenting terms only after purchase, it effectively undermines the "freedom to contract" principle touted by the original UCC and, ironically, by UCITA.[163] Simply clicking on "I Agree" is enough to manifest assent under UCITA, thus making it absurdly easy for manufacturers to include terms favoring themselves in such contracts.[164]

Addressing this exact problem, the Restatement (Second) of Contracts warns that the unchecked drafters of standard form

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[159] *See* U.C.C. § 2-207, n. 3.

[160] *See* W. David Slawson, *The New Meaning of Contract: The Transformation of Contract Law By Standard Forms*, 46 U. PITT L. REV. 21 (1984).

[161] U.C.C. § 2-207(2).

[162] *See* UCITA § 112, Manifestation of Assent, Reporter's Notes, Illustration 1 & 2. A "click-through" license refers to the license that appears on the computer screen while, say, installing software. *See id.*

[163] *See* Jean Braucher and Peter Linzer, Letter to ALI (last modified May 5, 1998) <http://www.ali.org/ali/Braucher.htm>.

[164] *See* Braucher, *supra* note 11. "There is reason to question whether these are adequate formalities to carry with them the idea of assent, particularly blanket assent to a long license when not in the context of a bargain, but rather in the context of supposed post-purchase validation of terms." *Id.*

contracts "may be tempted to overdraft."[165] This means that a standard form contract drafter could easily insert terms that if negotiated or reviewed would simply never make it into a contract. For example, a typical license agreement termination provision may read as follows: "Either party may terminate this agreement for any reason so long as thirty (30) days written notice is provided to the other party." Imagine, though, if an overzealous standard form contract drafter changed this clause to read: "Licensor may terminate this agreement at any time, without cause. Licensee may terminate this agreement at any time upon the showing of a judicial determination that Licensor has breached a material term of this Agreement." With merely the click-through method of assention, a consumer may not notice such a clause or may even think it is too late to negotiate, and thus be left to accept these unfavorable terms.

Fearing that UCITA's references to 'manifestation of assent' could present such overdrafting problems in the future, the American Law Institute ("ALI") expressly objected to this click-through method of manifesting assent when reviewing UCITA as Article 2B.[166] As a result of this objection, the ALI adopted the foregoing statement: "The current draft of proposed UCC Article 2B has not reached an acceptable balance in its provisions concerning assent to standard form records and should be returned to the Drafting Committee for fundamental revision of the several related sections governing assent."[167] Many Critics agree.[168] Thus, while standard form contracts certainly serve to facilitate easier contracting in this era of the "mass-market," it is nevertheless imperative to monitor their potentially overreaching scope. UCITA fails in this respect by con-

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[165] *See id.*

[166] *See id.*

[167] *See id.*

[168] *See* Letter, *supra* note 88. "UCITA departs from an important principle of consumer protection that material terms must be disclosed prior to the consummation of the transaction. UCITA does not require that licensees be informed of licensing restrictions in a clear and conspicuous manner prior to the consummation of the transaction." *Id. See also* Lessig, *supra* note 10.

tradicting established norms and encouraging inequitable contract terms.

By drafting provisions inconsistent with established industry standards and by failing to incorporate the many varying factors that led to the success of the UCC, UCITA has defeated its own purpose. However, such defeat has gone unnoticed as e-commerce has flourished and an increasing number of consumers are engaging in computer transactions.[169] Additionally, analysts assert that revenues in the worldwide Internet commerce application market will more than double in the next year.[170] While such projections seem conservative, the point is clear: even in the absence of the uniform system attempted by UCITA, computer transactions are occurring successfully in increasing numbers under the existing, and steadily developing law.

III. WELCOME TO OZ

UCITA presupposes that the law is the most efficient mechanism through which to handle the emerging issues of this technological revolution. However, there are a plethora of tools that work in tandem with the law to ensure that society functions smoothly.

Generally, the public looks initially to the law for resolution and guidance. However, the law is only one of many interactive mechanisms that help shape societies and regulate behavior.[171] Until computer transactions, particularly as they relate to the Internet, begin to standardize in a way suitable for codification of such a magnitude as UCITA, other modes of regulating behavior can successfully navigate the challenges that have, and will, continually arise.

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[169] *See* Internet World, *Statistics Toolbox* (last visited Nov. 22, 1999) <http://www.internetworld.com/daily/stats>.

[170] *See* e-marketer (last modified Dec. 1, 1999) <http://www.e-land.com/estats/ec_proj.html>.

[171] *See* Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 112 HARV. L. REV. 501, 503 (1999).

A. HIGH SOCIETY

Social norms can regulate behavior in extraordinary ways.[172] As in the physical world, norms in cyberspace have developed over time and have been implemented by the community of users.[173] Indeed, whole communities have developed in cyberspace for the sole purpose of proposing guidelines for the "proper" use of the Internet.[174] Each "community of users" may be induced to perform a voluntary act based on social customs or based on the more elusive concerns related to building relationships.[175] Included among these social concerns are decency and mutual respect.[176]

In the context of computer transactions, there is a clear parallel: the community of users, for instance, of a particular type of software can easily organize and communicate through various mechanisms, including newsgroups and listserves.[177] Disgruntled users might choose bottom-up regulation and join together to oppose a software company's unfair contract terms by "spamming"[178] that company, thereby clogging up its vital bandwidth. Alternatively, those same users might agree to respond to unsolicited emails from their common software pro-

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[172] *See* Jay M. Feinman, *Relational Contract and Default Rules*, 3 S. CAL. INTERDISC. L.J. 43, 53 (1993).

[173] *See* Julian Dibbell, *A Rape in Cyberspace How an Evil Clown, a Haitian Trickster Spirit, Two Wizards, and a Cast of Dozens Turned a Database Into a Society*, 1994 ANN. SURV. AM. L. 471 (1994). *Also at* http://www.levity.com/julian/bungle_vv.html>. The toading of Mr. Bungle is a particularly illustrative example. *See id.*

[174] *See* Netiquette Working Group, *"Netiquette Guidelines"* (last modified Oct. 15, 1995) <http://sunsite.cnlab-switch.ch/ftp/doc/standard/rfc/18xx/1855>.

[175] *See* Lisa Bernstein, *Social Norms and Default Rules Analysis*, 3 S. CAL. INTERDISCIPLINARY L.J. 59, 68 (1993).

[176] *See id.*

[177] *See e.g.* St. Paul ATARI Computer Enthusiasts (last modified Nov. 19, 1999) <http://www.library.carleton.edu/space/>.

[178] *See* Dictionary.com, *Spamming* (visited Mar. 7, 2000) <www.dictionary.com/cgi-bin/dict.pl?term=spamming>. Spamming is defined as, "Unsolicited e-mail, often of a commercial nature, sent indiscriminately to multiple mailing lists, individuals, or newsgroups; junk e-mail." *Id.*

vider by "blacklisting" those emails.[179] Such tactics could easily tarnish a company's reputation and impact its revenue stream. Regardless of how the message is conveyed, a norm which rejects unfair terms and unsolicited email could have a significant impact on whether an offending company would consider crossing those boundaries again.

B. OFF TO MARKET

Like the development of social norms, the simple economic power in various markets can serve to effectively regulate behavior in the computer transaction context as well.[180] Clearly, markets are regulated by price and, because market price is what the consumer is willing to pay for a particular item in the marketplace, the community of users is at a particular advantage to influence the terms of a computer transaction. Simple real world tactics, such as boycotting the products of an egregiously unfair company are effective mechanisms to induce change.[181] While one might initially disparage this assertion given the market presence of various companies and the pressure to use specific software applications, the tides are seemingly turning.[182]

Competition in the market place is also a key factor in regulating behavior. With the rise of Internet-based emerging-growth companies that tout intellectual property as their key asset, their respective competitors will inevitably feel the market pressure to offer more favorable consumer terms in their standard contracts in order to gain or maintain a market

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[179] *See* Dictionary.com, *Blacklist* (visited Mar. 7, 2000) <www.dictionary.com/cgi-bin/dict.pl?term=blacklist>. Blacklist is defined as, "A list of persons or organizations that have incurred disapproval or suspicion or are to be boycotted or otherwise penalized." *Id.*

[180] *See* Lessig, supra note 173, at 508.

[181] *See* The Montgomery Bus Boycott Page (visited Mar. 31, 2000) <http://www.socsci.colorado.edu/~jonesem/montgomery.html>.

[182] *See e.g.* U.S. v. Microsoft Corp., 165 F.3d 952 (1999).

share. As has historically been the case, united consumers can use this pressure to effectuate great change.[183]

C. ARCHITECTURE DIGESTED

The role of "architecture" has also been asserted as having the potential to regulate behavior.[184] In the real world, architecture refers to "the physical world as we find it."[185] In the context of cyberspace, however, 'architecture' means the "code, or the software and the hardware that makes cyberspace."[186] This code regulates behavior in a variety of ways, including requiring passwords, tracing a user's link path, or allowing for encrypted messages.[187] This code also facilitates renegade intellectual property protection in light of slow legislation, by entrusting programmers with the tools necessary to, for example, block hackers, become hackers and track hackers.[188]

This code is a great regulator.[189] In the context of UCITA, the code facilitates the existence of the controversial click-through license agreement.[190] The code, however, can also facilitate a more balanced approach to information contracting by supporting the pre-payment disclosure of terms. With this support, insistence by consumers on the pre-payment disclosure of terms would not only serve to "permit the continued expansion of commercial practices of custom, usage, and

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[183] *See* The Montgomery Bus Boycott Page (visited Mar. 31, 2000) <http://www.socsci.colorado.edu/~jonesem/montgomery.html>. *See also* Mercata.com, *Welcome to Mercata* (visited Mar. 7, 2000) <http://www.mercata.com>.

[184] *See* Lessig, *supra* note 171, at 508.

[185] *See id.* "That I can't see through walls is a constraint on my ability to snoop. That I can't read minds is a restraint on my ability to know whether you are telling me the truth. That I can't lift large objects is a constraint on my ability to steal." *Id.*

[186] *See id.*

[187] *See id.* at 511.

[188] *See* Lawrence Lessig, *The Code is the Law,* (last modified Apr. 9, 1999) <http://www.thestandard.com/article/display/0,1151,4165,00.html>. *See also* Slawson, *supra* note 162 at 23. "The law almost always lags behind societal developments." *Id.*

[189] *See* Lessig *supra* note 171, at 508.

[190] *See supra* notes 159-170 and accompanying text.

agreement of the parties,"[191] but would also serve to mitigate the click-through license's 'manifestation of assent' problem raised by many of UCITA's critics.[192] This more balanced approach would counter the fostered laziness on the part of consumers and encourage them to actually *read* agreements, while simultaneously allowing them to effectively shop for the most favorable terms. This approach would also encourage the pro-competitive attitude upon which western markets thrive. While not an end in itself, pre-payment disclosure of terms is at least one among many ways in which the code can assist in regulating behavior.

D. THE LAW

The law is perhaps the most obvious example of a method by which behavior is regulated because it orders people to behave in conforming ways.[193] When the Internet gained momentum in the early 1990's, a debate began regarding whether existing law could accommodate and direct the mounting legal issues. This debate continues to thrive into the present. On the one hand, some commentators assert that the Internet poses no new legal problems; that only a considered modification of already existing law can serve to handle the plethora of legal issues that are arising.[194] On the other hand, other commentators stress the "unique" nature of the Internet and the computer transactions occurring thereon and urge the devel-

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[191] U.C.C. § 1-102(2)(b).

[192] *See supra* notes 159-170 and accompanying text.

[193] *See* Lessig, *supra* note 171, at 507. "The law tells me not to buy certain drugs, not to sell cigarettes without a license, and not to trade across international borders without first filing an international customs form. It promises strict punishment if these orders are not followed." *Id.*

[194] *See* Timothy Wu, *Application-Centered Internet Analysis*, 85 VA. L. REV. 1163, 1163 (1999).

opment of a new legal framework.[195] Still others call for total anarchy.[196]

While proponents of UCITA lean more toward the second group, their dramatic and overarching approach may be unnecessary at this point. Currently, although not an exact fit, existing UCC provisions regulating the sale of goods and state commercial laws have effectively served to supply the default terms, as well as others, to qualifying software transactions.[197] Additionally, established intellectual property doctrines are successfully maneuvering through evolving computer transactions issues.[198] Thus, until codification on the UCITA-scale is warranted, it may be prudent to revisit the original "hub and spoke" approach to the existing Article 2, which was abandoned in the drafting process.[199]

For all other issues falling outside the hub-and-spoke UCC approach and beyond the intellectual property protections, the NCCUSL has recently approved the Uniform Electronic Transaction Act ("UETA").[200] Although much more limited in scope than UCITA, UETA essentially serves to imbue in electronic contracts the same legal significance given to their real-

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[195] *See* Jack E. Brown, *New Law For The Internet*, 28 ARIZ. ST. L.J. 1243, 1243 (1997).

[196] *See* John Perry Barlow, *A Declaration of Independence of Cyberspace*, (visited Nov. 30, 1999) <http://www.eff.org/pub/Publications/John_Perry_Barlow/barlow_0296.declaration>. "Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather." *Id.*

[197] *See* Braucher and Linzer, *supra* note 9. *See also* Bernacchi, *supra* note 155, §§ 3.30-3.40. *See also* IEEE Letter, *supra* note 104.

[198] *See* 17 U.S.C.A. § 117.

[199] *See* Kenneth L. Carson and Gail E. Horowitz, *Software And Computer Law: Old Questions To Be Answered In The New Millennium*, 43 OCT B. B.J. 10, 10 (1999). For example, the consideration of software as "movable goods" under the existing UCC § 2-105(1) definition of "Goods" would thereby *expand* the relevant UCC concepts to software, while simultaneously remaining connected to the larger Article 2. *See id.*

[200] *See* NCCUSL, *Uniform Act On Electronic Transactions Completed* (last modified Aug. 2, 1999) <http://www.nccusl.org/pressrel/Eta799.htm>.

world equivalents.[201] Supportive of this practical approach to computer transactions, California has led the way for all the other states by adopting UETA on September 16, 1999.[202]

IV. THERE'S NO PLACE LIKE HOME

UCITA has sought to accomplish great things. It fails, however, in overlooking the historical lessons of its predecessors and underestimating the non-legal mechanisms of regulating behavior. With the combined forces of the existing UCC provisions, the established intellectual property doctrines and UETA, there is no urgent need for an act with the breadth and scope of UCITA. "The only rule that will not become obsolete is the rule that automatically adjusts to change."[203] UCITA does not provide for such adjustments and will inevitably only add confusion to an emerging body of law. While these varying viewpoints have ultimately produced heated intellectual debate, the foresight called for by the more cautious group is the prudent route to take in an area of law that is racing to keep up with itself. As the NCCUSL embarks on promoting UCITA,[204] this article encourages each of the State legislatures to consider the analysis set forth herein, and reject the adoption of the Act at this time.

Thomas J. Murphy[*]

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[201] *See id.*

[202] *See* The ETA Forum, *California ETA* (visited Mar. 8, 2000) <http://www.webcom.com/legaled/ETAForum/caeta.html>.

[203] Kripke, *supra* note 39, at 332.

[204] See Society for Information Management, *supra* note 103, for an up-to-date list of UCITA's status in each of the State legislatures.

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In memory of Yvette Rochon, whose life was a testament to the power of perseverance.