

UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT (“UCITA”)

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**REPORT
OF
LAW OF COMMERCE IN CYBERSPACE COMMITTEE
BUSINESS LAW SECTION
WASHINGTON STATE BAR ASSOCIATION**

April 12, 2000

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A. Recommendation

The Law of Commerce in Cyberspace Committee (“Committee”) is a committee of the Business Law Section of the Washington State Bar Association (the “Section”). The Committee recommends to the Executive Committee of the Section:

That the Executive Committee recommend enactment of the Uniform Computer Information Transactions Act (UCITA) in Washington. In the view of the Committee, UCITA creates a balanced and much-needed commercial code for computer information transactions and electronic commerce.

We make this recommendation with knowledge of controversial claims made about UCITA. Many of the claims are not accurate. We examine illustrative samples of these claims in Appendix B to this Report in an attempt to provide information about existing law, about what UCITA actually says, and about what counter-arguments can be made. We conclude that many of the claims are without merit, that some of the meritorious claims are addressed by UCITA, and that none of the claims warrants amendment of UCITA. Some of the controversy reflects debates that are not confined to UCITA and that cannot be resolved in it – if there is ever a resolution of these kinds of debates, it should take the form of a universal overhaul of all Washington commercial law, including U.C.C. Article 2 and the common laws, so as not to discriminate against any group of industries. In our view, no such overhaul is needed or warranted at this time.

We also make this recommendation with knowledge that the controversial claims include objections by some consumers. On the other hand, some observers assert that UCITA is over-protective of consumers and would make significant changes to Washington's commercial laws. Part C and Appendixes A and B of this Report identify some of these controversial provisions. While we do not object to any of the increased protections for consumers, the breadth and the subtlety of the consumer protections in UCITA may not be obvious to persons not familiar with commercial law.

While both consumer groups and businesses have objected to certain sections of UCITA, we believe that UCITA, taken as a whole, adopts numerous interconnected and beneficial policy balances that are consistent with appropriate treatment of all parties, including consumers. These policy balances are also consistent with long-standing principles of commercial law in Washington and with Washington's desire to support electronic commerce and national and global trade.

Last, we have been asked to comment on whether it is necessary to enact the Uniform Electronic Transactions Act (UETA) in order to give full effect to UCITA. The answer is no. UCITA is a stand-alone statute that enables electronic commerce as to its subject matter. Washington's Electronic Authentication Act also enables electronic commerce for parties who comply with the provisions of that act. Electronic commerce has not been otherwise enabled by statute in Washington even though appropriate legislation would be desirable. However, until UETA is uniformly amended by NCCUSL to resolve the problems discussed in our report regarding it (see <<http://www.wsba.org/sections/biz/lccc/report/1999.htm>>), we recommend against adoption of UETA in Washington.

B. What is UCITA, Why Is It Needed and What Does It Say?

A. What is UCITA? The Uniform Computer Information Transactions Act (UCITA) is a proposed uniform act adopted in July, 1999 by the National Conference of Commissioners on Uniform State Laws. A copy of the text of UCITA and of the official comments can be obtained at <http://www.law.upenn.edu/bll/ulc/ulc.htm#ucita>. UCITA is intended to create a uniform commercial code for computer information transactions and for Internet access contracts. Currently, the only codified commercial contracts code in Washington is Article 2 of the Uniform Commercial Code. However, that code was written over 50 years ago to cover transactions in goods -- computer information did not then exist. All information, including computer information, is fundamentally different from goods and rules written for goods do not create the level of certainty needed in a legal infrastructure that must increasingly support an information economy.

We believe UCITA will be an important statute in the 21st century. As explained by a local company,¹ UCITA would provide the following benefits to Washington:

- ◆ Creates definitive rules on the formation of contracts and contract terms established in Internet transactions.
- ◆ Creates rational choice-of-law rules.
- ◆ Establishes the equivalence of electronic records and signatures and their traditional paper counterparts.
- ◆ Makes "shrink-wrap" licenses unenforceable unless the licensee (a) had a reason to know terms would be presented after payment, (b) had a chance to review them, (c) assents to them, and (d) had a right to a refund if it refused to assent.
- ◆ Applies warranty of merchantability to computer programs.
- ◆ Creates a presumption that many software licenses are for a perpetual term.

There are additional benefits as well. UCITA creates a uniform commercial code for computer information transactions by adapting, preserving, and creating principles of: commercial law; Article 2 sales of goods law; common laws related to software, contracting, published informational content and services; U.C.C. consumer law and consumer protection statutes; intellectual property law; secured

¹ See letter dated July 12, 1999 from The Boeing Airplane Company to NCCUSL (edited for currency with final text of UCITA).

transaction and lease-financing law; and electronic commerce. This is not an easy task and UCITA, formerly known as “Article 2B,” took approximately 10 years of effort and sifting of input from hundreds of affected groups:

Justice Brandeis stated that, '[s]unlight is the best of disinfectants.' Article 2B has been the most open codification project in Anglo-American history. Electronic democracy makes it possible for Internet users to participate in the codification process. The Reporter has met with hundreds of interested industry groups, bar associations and consumer groups. The evolving path of Article 2B reflects an attempt to balance competing concerns. It is not possible to draft an Article 2B that will satisfy everyone.

Michael L. Rustad, *Commercial Law Infrastructure For The Age Of Information*, 16 Marshall J. Computer & Info. L. 255, 313 (1998).

B. Why Is UCITA Needed? Because computer information transactions are a relatively new phenomena in the law, courts have been struggling with the question of what is the appropriate contract law to apply to such transactions. There are only two choices: either courts may apply the common law, which is not uniform, or they may apply Article 2 of the Uniform Commercial Code. Article 2 is relatively uniform but does not work well for computer information transactions. One commentator has explained the problem with applying Article 2 this way:

The Courts apply Article 2 by analogy to the licensing of information because no suitable alternative paradigms exist. The concepts of Article 2 are adapted to information contracts though “legal fictions.” Judges must ‘pretend’ that a law constructed for the sale of tangibles also accommodates the licensing of information. . . . The courts’ strained efforts of applying the law of sales to the licensing of intangibles is like the television commercial in which two mechanics are trying to fit an oversized automobile battery into a car too small to accommodate it. The car owner looks on with horror as the mechanics hit the battery with mallets, trying to drive it into place. The owner objects and the mechanics say, ‘we’ll make it fit!’ The owner says, ‘I’m not comfortable with make it fit.’”

Similarly, judges are applying a sales law that does not fit with the commercial realities of licensing software. Judges must treat software ‘as if’ it fits a sale of goods because no specialized commercial law for licensing information commodities exists. Doing nothing only exacerbates the problem by proliferating ‘legal fictions’ rather than applying a rationally constructed information law.²

A more subtle problem is also created by application of Article 2 to computer information transactions. Anyone brought up in a world of goods thinks in “images” of *goods* instead of images of contract *rights* or *information*, and this can lead to wrong results. The same wrong results were the reason that Article 2 was written 50 years ago: the economy had then shifted from an agrarian economy to one based on manufactured goods, but judges were still using agrarian images to deal with sales of goods --- and this was leading to wrong results. The law needed to catch up and Article 2 was the answer. Today the economy has shifted (or is shifting) from manufactured goods to information and services. Again, the law needs to catch up, but this time because thinking in terms of “goods” leads to wrong results for information:

² Rustad, Michael L., “Commercial Law Infrastructure For The Age of Information,” MARSHALL J. COMPUTER & INFO. L. 255 at 270 (1997).

The early courts that dealt with manufactured goods referred for guidance, in part, to the law of horses and, more accurately, to contract decisions dealing with horses. However, the practice regarding horses required the buyer to inspect and take the risk, while in Llewellyn’s [the author of Article 2] mind, the commercial expectations for manufactured wares [goods] were (and should have been) different. . . .

Courts and legislatures categorize issues based upon their own experiences and the images that these experiences establish. This is always true. Yet, especially after a paradigmatic change, the images of past experiences often lead to waging or continuing the wars of a prior era with tools developed from that era, while the world of commerce has already been transformed. . . . Llewellyn described this situation as one that presents a question about whether courts and others have been given suitable “intellectual equipment” (analytical structures) to approach the issues. . . .

What, for example, is the role of a “right to inspect” before payment (presumed under Article 2) in a contract to view a motion picture at a theater? What is the relevance of a “resale” [presumed in Article 2] that fixes damages for breach in a non-exclusive license of a patent which, by definition, could be re-licensed by the licensor with or without breach by the licensee? . . . The answer to these and other similar questions is simple: a creative judge might be able to bend, fold, and staple sale of goods concepts to avoid incorrect results in the different commercial contexts of information and services, but this mode of analysis is wrong and not conducive to consistently correct results in litigation. It does not yield a reasonably adequate fit between contract law and commercial practice.³

This is the need for UCITA: the need to supply suitable intellectual equipment for parties that contract for computer information and judges who interpret those contracts. Such equipment is not supplied by U.C.C. Article 2.

C. What Does UCITA Say? The provisions of UCITA constitute a comprehensive commercial code. It is beyond the scope of this Report to summarize each provision, but we provide the following chart to provide a glimpse of UCITA’s subject matter.

The Uniform Information Transactions Act at a Glance

Part 1: General Provisions

101 & 102: title and definitions
103- Scope: governs computer information transactions, including multi-media, and Internet and other access contracts. <ul style="list-style-type: none"> • Excludes movies, print books, tv, cable and records; money and traditional banking activities. A proposed uniform amendment would include mass-market transactions in some of the entertainment products.
104 –Mixed goods/information transactions: Article 2 controls the good; UCITA controls the information. <ul style="list-style-type: none"> • Computer information included in goods: when computer information is contained in and sold as part of a good, UCITA controls the information when the good is a computer or computer peripheral or if using the software itself (as opposed to the good generally) is a material purpose of the transaction. Otherwise, Article 2 applies. • Opt-In/Out: UCITA covers converged industries but its narrow scope splits some of them and their products. To allow contracting between covered and "uncovered" industries, UCITA allows the excluded

³ Nimmer, Raymond T, *Images and Contract Law—What Law Applies to Transactions In Information,* 36 HOUSTON L.REV.1 at 8 and 21(1999).

industry to opt in, or the included industry to opt out. Restrictions apply, including unalterable rules.
105- explains relationship of UCITA to other law: federal law, fundamental public policies, and substantive consumer protection statutes override UCITA.
106- lists rules of statutory construction
107- enables electronic records (instead of paper writings) and electronic agents
108- explains how to prove an electronic signature (authentication).
109- makes the parties choice of law enforceable except for unalterable consumer rules. Sets default choice of law for silent contracts.
110- adopts U.S. Supreme court rule re exclusive choice of forum: the choice is enforceable unless it is unreasonable and unjust.
111- repeats existing Article 2 rule re unconscionability
112- defines manifestation of consent and opportunity to review. <ul style="list-style-type: none"> • Manifesting assent: adopts Section 19 of Restatement (Second) of Contracts rule that manifest assent must be an intentional act made with reason to know that the other party will infer assent from the act. • Opportunity to Review: new rule based on principles of procedural unconscionability: there is no opportunity to review unless a reasonable chance to review a term or record is offered. If opportunity is delayed until after payment, refund must be offered.
113- Unalterable rules: states traditional principle that UCITA rules are largely default rules. Lists which rules cannot be altered by agreement.
114- Supplementary principles: lists principles that supplement UCITA (e.g., trade usage, fraud, estoppel) and other general rules (e.g., of good faith).

Part 2: Formation and Terms
Subpart A – Formation of Contract

201- Statute of Frauds, adapted to information industries
202- basic formation of contract rules. Generally parallels existing Article 2, but acknowledges lack of contract when parties disagree on what their transaction is for.
203- offer and acceptance rules. Generally parallels existing Article 2. Rejects "mailbox" rule for electronic contracts (uses time of receipt instead of time of sending).
204- explains what happens if terms of acceptance vary from the offer terms (if material alteration, no contract unless it's formed by conduct or one party later agrees to the other's terms).
205- allows parties to condition their offer or acceptance, but requires material consistent behavior to avoid waiver.
206- allows electronic agents to form contracts (makes it clear that traditional "meeting of the minds" requirement doesn't require human minds). Also sets rule for contracts between one e-agent and one human (human can't trick the e-agent by making a "counteroffer" that the agent can't comprehend).

Subpart B – Terms of Records

207- Releases: sets uniform rule for releases of informational rights
208- terms of a record are adopted by agreeing to it, including agreement after performance begins if the adopter had reason to know that more terms would be coming.
209- mass market license terms aren't adopted unless the licensee agrees to them. Terms must not be unconscionable or violate a fundamental public policy and they can't conflict with expressly agreed terms. If terms aren't available for review before purchase, they're not enforceable unless the licensee had reason to know terms would follow and can obtain a cost-free refund and costs of system restoration (if it was altered to see the terms).
210- terms of contract when a record isn't agreed and contract is formed by conduct (common law rule: court looks to all the circumstances).
211- encourages pre-transaction disclosures of contract terms

Subpart C – Electronic Contracts: Generally
212- explains how the efficacy of an attribution procedure is determined. A WA non-uniform amendment is suggested for this section.
213- determines when an electronic act is attributed to a person. A WA non-uniform amendment is suggested for this section to base the rule on the UCC Article 4A rule.
214- creates a new defense for consumers to avoid electronic errors without litigation.
215- rejects the mailbox rule for electronic messages (they're effective upon receipt)
216- Submissions of information: correlates common law to set a uniform rule for who owns information that is volunteered (e.g., chat room participant suggests a great idea for an improved product: who may use the idea?). This section is proposed as a uniform amendment.

Part 3-- Construction

Subpart A- General

301- parol evidence rule (follows existing Article 2)
302- contract construction rules (follows existing Article 2)
303- rules for modifying contracts (generally follows existing Article 2 and clarifies application of statute of frauds)
304- creates safe harbor rule for ongoing contracts with affirmative continuing performances, including amendments and allowing termination by mass market licensees; protects that licensee by requiring notice and right to withdraw
305- allows contract formation notwithstanding open terms (follows existing Article 2)
306- sets default rule for performance under open terms (follows existing Article 2)
Subpart B- Interpretation
307- sets default rules for what the language of a license grant means and what rights the parties have
308- sets default rules for the duration of a contract. Largely adopts common law but also creates perpetual licenses.
309- sets default rule for interpreting performance that is subject to one party's satisfaction

Part 4 -- Warranties

401- imposes a warranty of quiet enjoyment and non-infringement. Re infringement, generally follows existing Article 2 but grants more protection for licensees who provide specifications and honors patent practice. Settles conflict re meaning of "exclusivity."
402- sets rules for express warranty (follows existing Article 2) but includes an advertising warranty, adds "demonstration" to sample rules and adopts common law rule for public informational content.
403- imposes an implied warranty of merchantability for computer programs (adapted to remove focus of Article 2 on broad range of products)
404- imposes an implied warranty for informational content (uses common law services rule and retains common law protection for published informational content)
405- imposes an implied warranty of fitness for particular purposes (follows and adapts Article 2 to common law services concepts) - creates a new implied warranty for systems integration
406- rules for disclaiming an implied warranty (follows existing Article 2 but uses more detailed and consumer oriented language for disclaimers)
407- preserves warranty for original unmodified computer program but allows unauthorized modification to make it inapplicable to the altered copy
408- sets rules for harmonizing conflicting warranties (follows existing Article 2)
409- extends warranties to persons not in privity in certain circumstances (follows and expands majority rule under

existing Article 2)

Part 5 -- Transfer of Interest and Rights

Subpart A- Ownership and Transfers

501- establishes default rule for transfers of ownership of information

502- establishes default rules for title transfer to copies of information

503- establishes default rules for transfer of contract rights

504- states the consequences of transferring contractual rights and the meaning of common language

505- sets default rules for performance by a subcontractor

506- sets default rule for transfer by licensee

Subpart B -- Financing Arrangements

507- establishes default rules for "non-security interest" financing by a lender who is not itself a licensee (and thus has no rights to sublicense)

508- establishes default rules for "non-security interest" financing by lender who is a licensee and may sublicense rights

509- follows Article 2A by giving effect to a hell or high water clause in a non-consumer loan agreement, but (unlike Article 2A) requires the clause to be set forth in the agreement

510- explains effect of cancellation of the loan agreement on the licensor and the licensee and their various rights

511- clarifies relationship of licensee's lender and licensor

Part 6 -- Performance

Subpart A -- General

601- establishes general default rules for performance of a contract

602- requires licensor to enable use of the information (adaptation of tender)

603- establishes default rule for meaning of contract requiring that information be to a party's "satisfaction" and adapts "tender" rules to accommodate information differences and practices

604- sets a rule for delivery of information that can't be inspected before payment without effecting full performance

605- sets rules for restraints that restrict information use (akin to expiration of laundromat washer period)

Subpart B-- Performance in Delivery of Copies

606- establishes default rules for delivery of or access to copies (e.g., place)

607- sets rules for interplay of delivery and payment

608- sets inspections rights (follows and adapts existing Article 2)

609- sets acceptance rules (follows and adapts existing Article 2)

610- explains consequences of acceptance (follows and adapts existing Article 2)

Subpart C--Special Types of Contracts

611- Access contracts: establishes default rules for contracts for access to another's information or web site

612- Correction and support contracts: sets basic rules for such contracts (service contracts)

613- deals with relationship between retailer, information publisher (typically the manufacturer and intellectual

property rights owner) and the customer (licensee): conditions retailer-customer contract on customer's acceptance of customer/manufacture license. Changes existing law to allow customer to avoid retailer's contract if customer doesn't accept the "manufacturer's" contract.
Subpart D -- Loss and Impossibility
614- sets risk of loss rules for copies
615- explains when excuse is a defense because of a failure of assumed conditions (follows existing Article 2) [
Subpart E -- Termination (ending contract other than for breach)
616- sets a list of default clauses that survive upon termination.
617- sets rules for giving notice of termination
618- sets default rules for party's obligations or rights upon termination of a license

Part 7—Breach of Contract

701- sets default rules for what is a breach and what is a material breach
702- explains rules for what constitutes a waiver and the consequences of waiver
703- sets rules for cure of contract breach. Requires licensor to attempt cure if licensee was required to accept tender with an immaterial breach.
Subpart B--Defective Copies
704- explains rights of the nontendering party upon a defective tender of a copy (adopts existing Article 2 conforming tender rule for mass market licensees; adopts common law substantial performance rule for other contracts)
705- sets default rules for when informational rights are independent of copy -- if there's a defective tender of a copy, licensee may still vest rights while obtaining a replacement copy (instead of having to reject the entire contract)
706- explains rights and obligations once a tender is rightfully rejected
707- revocation of acceptance rules (follows existing Article 2)
Subpart C--Repudiation and Assurances
708- adopts existing Article 2 re right to adequate assurance of performance
709- adopts existing Article 2 re anticipatory repudiation of a contract
710- adopts existing Article 2 re retracting an anticipatory repudiation

Part 8 -- Remedies

Subpart A--General

801- states general remedy principles and related obligations
802- sets default rules for cancellation and notice (ending a license for breach)
803- sets rules for modifying remedies by contract (follows existing Article 2)
804- sets rules for liquidation of remedies
805- statute of limitations (follows existing Article 2 but also adds detail and adopts a modified discovery rule)
806- supplies remedies for fraud (follows existing Article 2)
Subpart B-- Damages
807- states general rules for damages such as duty to mitigate damages

808- lists the damages for a licensor
809- lists the damages for a licensee
810- explains recoupment right of aggrieved party
Subpart C-- Performance Remedies
811- explains rules for specific performance contract clauses
812- details right of licensor to complete information upon breach by licensee
813- details right of licensee who hasn't cancelled the license, to continue use of information upon breach by licensor
814- explains right of access licensor to cease performing upon breach by licensee
815- explains rights and restrictions regarding licensor's ability to obtain possession of information or to prevent use by licensee upon cancellation
816- restricts licensor's ability to contract for and exercise right of electronic self-help

Part 9 -- Miscellaneous

901- effective date of act
902- transition rules for coverage under the act

C. Selected Items Re Washington Law

UCITA will be more or less familiar to practitioners depending upon their range of experience with the many areas of law that it blends to create a coherent commercial code. We list below a few items that may be of particular interest. See also Appendices A and B.

Definition of Consumer (Section 102). UCITA follows Washington's existing law in defining a consumer as an individual who at the time of contracting intended the information to be used for "personal, family, or household purposes." However, it expands consumer protection in Washington by also including in the definition of a consumer transaction, computer information obtained for management of family investments. Under Washington's usury statute, RCW 19.52.080, a transaction primarily for investment purposes is not considered to be a consumer transaction. UCITA would not appear to conflict with the policy of RCW 19.52.080 because UCITA applies only to the "management" of an investment, as opposed to the "investment itself. The Committee's view is that the benefits to consumers and of a uniform statute outweigh any need to amend UCITA to confine it to Washington's traditional definition of consumer.

Definition of Mass Market License (Section 102). Like most state and federal law, Washington law traditionally draws a bright dividing line between consumer and business transactions. UCITA eliminates that line in "mass market transactions" by providing certain consumer protections to businesses, large or small. This is done through UCITA's definition of mass market license and provisions affecting mass market licenses or mass market transactions. While the effect of this structure is to extend some consumer protections to businesses, its purpose stems from market factors that can reasonably be viewed as pertaining to the class of mass market transactions as defined. The Committee believes that this change in Washington law is supportable given the need to maintain uniformity, the market-purpose distinction sought to be drawn in UCITA, the narrow scope of transactions to which UCITA applies, and the benefits of this new concept, particularly to small businesses. The Committee recommends against any broad use of the concept or extension of it in UCITA or into other areas of commerce.

Choice of Forum Rule (Section 110). The UCITA choice-of-forum rule has been criticized by some groups, but it mirrors Washington law which in turn follows a line of U.S. Supreme Court cases. See *Voicelink Data v. Datapulse*, 86 Wn. App 613, 937 P.2d 1158 (1997) (Nevada, like Washington, requires enforcement of forum selection clauses unless they are 'unreasonable and unjust.' . . .This is consistent with the test set forth by the U.S. Supreme Court. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14; *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S.1, 10, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972) ").

Shrinkwrap Licenses. UCITA Section 209 acknowledges that modern commerce includes "pay now, terms later" contracts. While the Attorney General has questioned whether parties should be able to make contracts before all terms are seen, any prohibition to that effect would effect a sea change in commercial law: numerous industries depend on "pay now, terms later" contracts, including the airline industry, the insurance industry, the mail and telephone industries, the cruise line industry, and the software industry. Washington courts also recognize such contracts. See *M.A. Mortenson Co. v. Timberline Software Corp.*, 93 Wash.App. 819, 970 P.2d 803 (1999). Furthermore, UCITA is unique in providing a clear statutory right of refund which must be cost free. The vendor cannot alter this result by contract. Additional protections are provided in Section 209 as well as by requirements for a manifestation of assent to terms after an opportunity to review. See Section 112. These are defined terms that codify common law concepts of procedural unconscionability. For a response to claims made about "shrinkwrap" contracts, see Appendix B.

Disclaimer of Implied Warranty of Merchantability. Article 2-316 of the Uniform Commercial Code allows implied warranties to be disclaimed. UCITA does the same, although at the request of consumer representatives, it encourages use of more extensive language that will be more informative to consumers: "Except for express warranties stated in this contract, if any, this [information] [computer program] is provided with all faults, and the entire risk as to satisfactory quality, performance, accuracy, and effort is with the user." In contrast, a typical Article 2 disclaimer would read to this effect: "We hereby disclaim any implied warranty of merchantability or of fitness for a particular purpose."

Washington has a non-uniform version of Article 2-316: the non-uniform Washington version requires disclaimers with "particularity" in consumer contracts. The Committee recommends against adoption of a non-uniform version in UCITA. First, uniformity is more important in today's national and global economy than it was when Washington's version of Article 2 was adopted. Second, the UCITA language already includes a more particularized description. Third, a "particularized" disclaimer of computer information would be meaningless, given the complexity of computer information and the impact upon it of varying hardware and software configurations. No meaningful "particularized" disclaimer could be made. One commentator explains this concept as follows: "In the late 1990's, a popular program for small computers used by both consumers and commercial licensees contained over ten million lines of code or instructions. In the computer these instructions interact with each other and with other programs. This contrasts with a popular commercial airliner that contained approximately six million parts, many of which had no interactive function. Typical consumer goods contain fewer than one hundred parts."

Contractual Modification of Remedy. UCITA Section 803(d) parallels the uniform version of Article 2-719 instead of the non-uniform version found in RCW 62A.2-719. Washington's non-uniform version requires sellers of consumer goods to maintain or provide within Washington, facilities to repair or replace goods. For several reasons, the Committee recommends against adoption in UCITA of Washington's non-uniform version of Article 2-719. First, from the perspective of a licensee of computer information in the age of the Internet, geographic locations are essentially irrelevant. Software code and computer information can just as easily be repaired in or replaced from Maine as in Washington. Second, from the perspective of Washington's businesses, if Washington's rule were adopted by other states Washington's Internet and computer software business would suffer. Third, adopting the uniform version of UCITA will make it consistent with (a) Washington's version of Article 2A-503 (leases of goods), where Washington did not follow its non-uniform version of RCW 62A.2-719, and (b) the uniform version of Article 2 (1998, Official Text). We also note that UCITA Section 803 provides a new protection for all licensees that is relevant to, but is not contained in, Washington's version of Article 2-719. Under UCITA, failure of an agreed remedy also causes a failure of an exclusion of consequential damages *unless* the agreement expressly provides otherwise. That is not the case under the majority interpretation of U.C.C. Article 2 or the common law. See Appendix B.

Electronic Self-Help. Section 816 sets forth the electronic self-help sections of UCITA and is quite controversial. The Committee carefully reviewed this section and the viewpoints of all affected persons. The interests of those who will be benefited by electronic self-help and the interests of those who will be adversely affected by it are so divergent that reaching a standard that will satisfy both parties is not possible. However, the consensus of the Committee is that the section makes a reasonable compromise of the conflicting interests that must be considered. Nothing else would appear to be appropriate, including amendment or deletion of the section or a ban on self-help -- each of these alternatives would create serious harms that are not created by the compromise reflected in Section 816. Uniformity is also an important objective.

It should also be noted that the Washington legislature just considered a revision of U.C.C. Article 9. That revision does not impose any special restrictions on the use of electronic self-help by

secured parties similar to those imposed on licensors in UCITA. Under Article 9, and revised Article 9, a secured party can use electronic self-help to render "equipment" (a defined term in Article 9) unusable or can use electronic self-help to render computer information unusable that is taken as collateral. However, a licensor under UCITA cannot use electronic self-help for the same computer information without complying with all of the UCITA restrictions. This difference in treatment does not necessarily signal an inconsistency in the approaches taken by Article 9 and UCITA since the difference in interests may warrant a difference in treatment. However, it does illustrate that reasonable minds differ on the need for restrictions on electronic self-help. For a more detailed discussion of self-help, see Appendix B.

D. Suggestions for Uniform Version of UCITA

The NCCUSL Executive Committee adopted several amendments to UCITA after its initial passage in July, 1999. These amendments eased concerns of several industries regarding the application of UCITA to their particular customs and practices. Consistent with the action of the NCCUSL Executive Committee and consistent with the bracketed language that appears in the uniform act, we recommend adoption of the following uniform amendments to UCITA. Items 1-3 are amendments suggested by the NCCUSL Executive Committee; items 4 through 8 are suggestions by this WSBA Committee pursuant to uniform options offered in UCITA. If further uniform amendments are recommended before the introduction of UCITA in Washington, we will undertake a review of any such amendments and supplement this Report.

1. AMEND SECTION 103. SCOPE; EXCLUSIONS, AS FOLLOWS.

(a)

(b) Except for subject matter excluded in subsection (d) and as otherwise provided in Section 104, if a computer information transaction includes subject matter other than computer information, the following rules apply:

.....

(2) If a transaction includes an agreement for creating or for obtaining rights to create computer information and a motion picture, this [Act] does not apply to the agreement if the dominant character of the agreement is for creating or obtaining rights to create a motion picture. In all other such agreements, this [Act] does not apply to the part of the agreement that involves a motion picture excluded under subsection (d)(2), but does apply to the computer information.

(3) In all other cases, this [Act] applies to the entire transaction if the computer information and informational rights, or access to them, is the primary subject matter, but otherwise applies only to the part of the transaction involving computer information, informational rights in it, and creation or modification of it.

.....

(d) This [Act] does not apply to:

.....

(2) an agreement to create, perform or perform in, include information in, acquire, use, distribute, modify, reproduce, have access to, adapt, make available, transmit, license, or display:

(A) a motion picture or audio or visual programming, other than in (i) a mass-market transaction or (ii) a submission of an idea or information or release of informational rights that may result in making a motion picture or a similar information product that is provided by broadcast, satellite, or cable as defined or used in the Federal Communications Act and related regulations as they existed on July 1, 1999, or by similar methods of delivering that programming;
or

(B) a motion picture, sound recording, musical work, or phonorecord as defined or used in Title 17 of the United States Code as of July 1, 1999, or an enhanced sound recording;

.....

(f) In this section, "motion picture" means:

(1) "motion picture" as defined in Title 17 of the United States Code as of July 1, 1999; or

(2) a separately identifiable product or service the dominant character of which consists of a linear motion picture, but which includes (i) statements or instructions whose purpose is to allow or control the perception, reproduction, or communication of the motion picture or (ii) other information as long as the motion picture constitutes the dominant character of the product or service despite the inclusion of the other information.

(g) In this section, "audio or visual programming" means audio or visual programming that is provided by broadcast, satellite, or cable as defined or used in the Communications Act of 1934 and related regulations as they existed on July 1, 1999, or by similar methods of delivery.

2. AMEND SECTION 201 AS FOLLOWS:

.....
(d) Between merchants, if, within a reasonable time, a record in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, the record satisfies subsection (a) against the party receiving it unless notice of objection to its contents is given in a record within a reasonable time ~~40 days~~ after the confirming record is received.

3. ADD THE FOLLOWING AS A NEW PART AND SECTION:

D. Idea or Information Submissions

SECTION 216. IDEA OR INFORMATION SUBMISSION.

(a) The following rules apply to a submission of an idea or information for the creation, development, or enhancement of computer information which is not made pursuant to an existing agreement requiring the submission:

(1) A contract is not formed and is not implied from the mere receipt of an unsolicited submission.

(2) Engaging in a business, trade, or industry that by custom or practice regularly acquires ideas is not in itself an express or implied solicitation of the information.

(3) If the recipient seasonably notifies the person making the submission that the recipient maintains a procedure to receive and review submissions, a contract is formed only if:

(A) the submission is made and a contract accepted pursuant to that procedure; or

(B) the recipient expressly agrees to terms concerning the submission.

(b) An agreement to disclose an idea creates a contract enforceable against the receiving party only if the idea as disclosed is confidential, concrete, and novel to the business, trade, or industry or the party receiving the disclosure otherwise expressly agreed.

Portions of Section 216 track existing Washington law (see e.g., *Machen, Inc. v. Aircraft Design, Inc.*, 65 Wn.App. 319, 329, 828 P.2d 73 (1992)(dismissal of trade secret claim affirmed in the absence of evidence establishing the confidentiality of the information disclosed). Subsection (b) addresses an issue that has not been addressed by Washington courts but which is in conflict in other states; the subsection adopts the majority rule which is most developed in New York State. Washington businesses and customers will benefit from guidance in this area.

4. SECTION 104(1): DELETE THE BRACKETED PHRASE "ADMINISTRATIVE RULE" SUCH THAT SECTION 104(1) WILL READ AS FOLLOW:

(1) An agreement that this [Act] governs a transaction does not alter the applicability of any rule or procedure that may not be varied by agreement of the parties or that may be varied only in a manner specified by the rule or procedure, including a consumer protection statute ~~[or administrative rule]~~. In addition, in a mass-market transaction, the agreement does not alter the applicability of a law applicable to a copy of information in printed form.

In Washington, administrative rules only follow from and are used to interpret statutes. Because the relevant statutes are preserved, there is no need to reference the administrative rules. This same format is used in RCW 62A.2-102 (Washington’s U.C.C. Article 2): Washington retains “statutes” regulating sales to consumers, but does not reference administrative rules.

5. SECTION 105(c): REMOVE BRACKETS AND REVISE AS FOLLOWS:

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

6. SECTION 105 (e): REMOVE THE BRACKETS AND INSERT CHAPTER, 19.34, RCW (WASHINGTON ELECTRONIC AUTHENTICATION ACT) SO THAT SECTION 105(e) WILL READ AS FOLLOWS:

{(e) The following laws govern in the case of a conflict between this [Act] and the other law: Chapter 19.34, RCW. ~~{List laws establishing a digital signature and similar form of attribution procedure.}}~~

7. SECTION 902: REMOVE BRACKETS AND COMPLETE AS FOLLOWS:

SECTION 902. EFFECTIVE DATE. This [Act] takes effect _____
{_____}.

We recommend that UCITA take effect on the date that is 90 days after the end of the legislative session in which it is adopted. It does not appear that an emergency date or a delayed date is necessary.

8. SECTION 903: REVISE TO READ AS FOLLOWS:

SECTION 903. REPEALS. The following acts and parts of acts are repealed: _____.

The Committee is not aware of Washington statutes that should be repealed, but will work with the Code Reviser if such is not the case.

E. Suggestions for Non-Uniform Amendments to UCITA

One of the chief values of uniform acts is their uniformity. Accordingly, the Committee is reluctant to make any “non-uniform” amendment to UCITA. Notwithstanding that, the Committee recommends that the following non-uniform amendments be made:

1. AMEND SECTION 201(F) TO READ AS FOLLOWS:

(f) A transaction within the scope of this Act is not subject to a statute of frauds contained in another law of this state, including RCW 19.36.010.

This amendment will not affect the substantive uniformity of UCITA but will aid Washington practitioners in locating Washington statutes of frauds. The amendment may also address constitutional concerns that can arise in Washington when one statute makes a change that might render another statute erroneous, without mentioning the other statute. In fact, that concern likely is not present with UCITA because as a comprehensive code, the scope of rights and duties as to computer information transactions can be determined without reference to other Washington statutes. See e.g., *Washington Education Association v. The State of WA*, 97 Wn.2d. 899, 652 P.2d.1347 (1982). Nevertheless, practitioners, licensors and licensees will welcome the amendment.

2. AMEND SECTION 212 AS FOLLOWS:

SECTION 212. EFFICACY—AND COMMERCIAL REASONABLENESS OF ATTRIBUTION PROCEDURE. The efficacy, including the commercial reasonableness or efficacy, of an attribution procedure is determined by the court. In making this determination, the following rules apply:

- (1) An attribution procedure established by law is effective commercially reasonable and effective for transactions within the coverage of the statute or rule.
- (2) Except as otherwise provided in paragraph (1), commercial reasonableness and effectiveness is determined in light of the purposes of the procedure and the commercial circumstances at the time the parties agreed to or adopted the procedure.
- (3) An commercially reasonable attribution procedure may use any security device or method that is commercially reasonable under the circumstances.

The recommended changes to Section 212 are intended to reflect the change recommended to Section 213. The change recommended for Section 213 focuses on commercial reasonableness and thus we recommend amendment of Section 212 to do the same. However, in some states attribution procedures are judged in terms of “efficacy” and thus it is important to clarify that in Washington, a commercially reasonable attribution procedure is also an efficacious one. The suggested amendment preserves both concepts but shifts the emphasis to the concept of commercial reasonableness in order to match the change recommended for Section 213.

3. AMEND SECTION 213 BY REPLACING IT WITH THE FOLLOWING:

SECTION 213. DETERMINING ATTRIBUTION OF ELECTRONIC EVENT TO PERSON.

(a) An electronic event, including an electronic message, display, record, authentication or performance, is attributed to a person if it was the act of that person or its electronic agent, or if the person is otherwise bound by it under the law of agency or other law.

(b) If there is an attribution procedure between the parties with respect to the electronic event, the following rules apply:

(1) The effect of compliance with an attribution procedure established by other law or administrative rule is determined by that law or rule.

(2) In all other cases, if the parties agree to or otherwise knowingly adopt an attribution procedure to verify the person from which an electronic event comes, the electronic event is attributable to the person identified by the procedure, if the party relying on that attribution satisfies the burden of establishing that:

- (A) the attribution procedure was commercially reasonable;
- (B) the party accepted or relied on the electronic event in good faith and in compliance with the attribution procedure and any additional agreement with or separate instructions of, the other party; and
- (C) the attribution procedure indicated that the electronic event was that of the person to which attribution is sought.

(3) If the electronic event is not attributable to a person under subsection (a) but would be attributable to that person under subsection (2) of this paragraph (b), the electronic event is nevertheless not attributable to that person under paragraph (b) (2) if that person satisfies the burden of establishing that the electronic event was caused directly or indirectly by another person:

- (A) that was not entrusted at any time with the right or duty to act for the person with respect to such electronic events or attribution procedure;
- (B) that lawfully obtained access to transmitting facilities of the person if such access facilitated the misuse of the attribution procedure; or
- (C) that obtained, from a source controlled by the person, information facilitating misuse of the attribution procedure.

(c) The provisions of subsection (b) may not be varied by agreement in a consumer contract except in a manner that provides greater protection to the consumer. In all other cases, the effect of an attribution procedure may be specified by agreement if the attribution procedure is commercially reasonable.

The source of the foregoing rule is RCW 62A.4A-202, Washington's rule for attribution of wire transfers under the Uniform Commercial Code. This approach was reflected in UCITA until July, 1999, when the National Conference of Commissioners of Uniform State Laws sought to harmonize UCITA with a model act also then adopted by the conference, the Uniform Electronic Transactions Act ("UETA"). UETA has been reviewed and a recommendation made against its adoption in Washington until significant problems are resolved uniformly. Please see the report at <http://www.wsba.org/sections/biz/lccc/report/1999.htm>. The harmonization of UCITA with UETA resulted in a final version of UCITA that is inferior to the originally proposed version of UCITA. That other states are likely to reach a similar conclusion is reflected in legislation of the State of Pennsylvania, which legislation follows the U.C.C. Article 4A approach instead of the UETA approach, even though UETA was adopted in Pennsylvania, with amendments. See Section 701 of Senate Bill No. 555, Session of 1999, The General Assembly of Pennsylvania.

The above amendment of UCITA Section 213 recommended by this Committee blends the original approach taken in UCITA with the approach taken in Pennsylvania, to achieve uniformity among states that reject the "UETA" approach in favor of the "U.C.C. Article 4A" approach. Subsection (c) of our language also retains the consumer protection included in UCITA's original approach (Pennsylvania did not include that protection but instead relied upon its version of UETA – however, we have recommended against adoption of UETA).

Given the consumer protection included in subsection (c), we believe that the approach reflected in our recommended amendment and in Article 4A of existing Washington law is superior to the "UETA" approach that is reflected in the uniform "UETA harmonized" version of UCITA. The difference is that under our amendment, the person supplying an attribution procedure (such as a vendor) is required to make it a commercially reasonable procedure. Once a court determines that the procedure was commercially reasonable, the person to whom the vendor seeks to attribute a message or signature (e.g., the customer) may still avoid attribution, but only if the person essentially shows that it was not negligent in handling passwords or other aspects of the attribution procedure.

Some representatives of consumers have argued that this approach is not beneficial to consumers because they will not be able to show that they acted reasonably. While that may be true, in an egregious case we think that consumers, as well as businesses, will be better able to show that the procedure was not commercially reasonable, and that the ability to challenge commercial reasonableness is of greater benefit to consumers than the burden of proving that they acted appropriately. In Washington, this approach is also consistent with Title RCW 19.34., RCW, Washington's Electronic Authentication Act. That act encourages commercially reasonable or reliable procedures and also expects customers to handle their digital signatures with some degree of care.

4. AMEND SECTION 611 TO READ AS FOLLOWS:

SECTION 611. ACCESS CONTRACTS.

(a) If an access contract provides for access over a period of time, the following rules apply:

(1) The licensee's rights of access are to the information as modified and made commercially available by the licensor from time to time during that period.

(2) A change in the content of the information is a breach of contract only if the change conflicts with ~~an express term~~ of the agreement of the parties.

(3) Unless it is subject to a contractual use term, information obtained by the licensee is free of any use restriction other than a restriction resulting from the informational rights of another person or other law.

(34) Access must be available:

(A) at times and in a manner conforming to the express terms of the agreement;
and

(B) to the extent not expressly stated in the agreement, at times and in a manner reasonable for the particular type of contract in light of the ordinary standards of the business, trade, or industry.

(b) In an access contract that gives the licensee a right of access at times substantially of its own choosing during agreed periods, an occasional failure to have access available during those times is not a breach of contract if it is:

(1) consistent with ordinary standards of the business, trade, or industry for the particular type of contract; or

(2) caused by:

(A) scheduled reasonable downtime;

(B) reasonable needs for maintenance;

(C) reasonable periods of failure of equipment, computer programs, or communications; or

(D) events reasonably beyond the licensor's control, and the licensor exercises such commercially reasonable efforts as the circumstances require.

With respect to the amendment suggested in subsection (a)(2), the uniform version of Section 611 honors the agreement of the parties but requires an agreement prohibiting a change in content to be reflected by an express term (e.g., a clause in the contract or a specific statement, if the contract can be oral). Our suggested amendment honors the concept that the parties' agreement should be respected, but broadens the methods by which the agreement may be created, such as creation through trade usage or course of dealing.

F. Suggested Amendments For Related Washington Statutes or Judicial Rules

1. AMEND RCW 62A.2-102 AND RCW 62A.2A-102 TO READ AS FOLLOWS:

62. 2-102 Scope; certain security, computer information and other transactions excluded from this Article. Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers. This Article and Article 1 of Title 62A, RCW, do not apply to a transaction that is covered by Title _____, RCW [UCITA] as provided in RCW _____ [Section 103 of UCITA] or RCW _____ [Section 104 of UCITA].

62A. 2A-102 Scope; certain computer information excluded from this Article. This Article applies to any transaction, regardless of form, that creates a lease. This Article and Article 1 of Title 62A, RCW, do not apply to a transaction that is covered by Title _____, RCW [UCITA] as provided in RCW _____ [Section 103 of UCITA] or RCW _____ [Section 104 of UCITA].

If UCITA is adopted in Washington, it is advisable to clarify when UCITA applies to a transaction in computer information, other Washington commercial codes do not also apply. The above amendments are recommended for that purpose. The cited sections of UCITA explain the interaction of UCITA with Washington's other commercial codes, Articles 2 and 2A of the Uniform Commercial Code, both of which codes incorporate U.C.C. Article 1 (UCITA does not incorporate Article 1 because it builds into UCITA, the relevant sections of Article 1). By its terms, UCITA does not cover goods or certain

computer programs that are “embedded” in goods. Accordingly, the above amendment leaves coverage of such goods and programs to existing law.

2. AMEND RCW 62A.2-105 AND RCW 62A.2A-1-3(H) TO READ AS FOLLOWS:

62A. 2-105 Definition: Transferability; “goods”; “future” goods; “lot”; “commercial unit”.

(1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. “Good” also includes the unborn young of animals and growing crops and other identified things attached to reality as described in the section on goods to be severed from realty (RCW 62A.2-107). For purposes of this Article, the term does not include computer information (RCW _____)[UCITA], money, the subject matter of foreign exchange transactions, documents, letters of credit, letter-of-credit rights, instruments, investment property, accounts, chattel paper, deposit accounts, or general intangibles.

62A.2A-103(h) "Goods" means all things that are movable at the time of identification to the lease contract, or are fixtures (RCW 62A.2A-309), but the term does not include money, documents, instruments, accounts, chattel paper, general intangibles, computer information (RCW _____)[UCITA] or minerals or the like, including oil and gas, before extraction. The terms also includes the unborn young of animals.

The suggested amendment adds a new sentence to the Article 2 definition of goods, which sentence is the same as the last sentence of the definition of goods in UCITA. In addition to harmonizing UCITA and Article 2, the sentence also updates the Article 2 definition along the lines already implemented in Washington’s Article 2A (regarding leasing). The Article 2A definition is also updated as to the terminology used in UCITA. If such updating is not desired, then the new sentence could be confined to referencing computer information and the relevant citation to UCITA.

3. JUDICIAL RULES.

Judicial rules will need to be developed to accommodate the requirement in Section 815(d) for an expedited hearing regarding prejudgment judicial relief upon cancellation of a license. UCITA Section 815 sets forth the rights of the parties that courts are to enforce, but it appropriately does not state exactly what kind of hearing is contemplated because judicial procedures vary from state to state. A related section, Section 816(g), contemplates an injunction. Until the judicial branch develops appropriate rules, it may be appropriate to use existing rules that apply to preliminary injunctions, except that, the factors that parties must meet to qualify for injunctive relief should be those that are set forth in Section 815 or 816, as opposed to the grounds required for traditional injunctions. The other rules for obtaining preliminary injunctions, such as rules regarding notice and the like, would appear to be appropriate for Sections 815 and 816.

G. The Law of Cyberspace Committee and its Work

A list of the Committee’s general membership is attached. While all members were furnished minutes of each meeting of the Committee, not all members were able to participate in the actual review of UCITA. To review UCITA, the Committee invited participation by its members. In addition, a letter inviting participation was sent to all members of the UCC Committee of the Business Law Section. Invitations were also sent to members of the following WSBA sections by invitation to the chairperson of each section: Consumer Protection, Antitrust & Unfair Business Practices, Corporate Law, Creditor-Debtor, International Practice Law, Intellectual Property, Real Property Probate & Trust, and Taxation Law. An invitation was also extended to members of the Law and Technology Section of the King

County Bar Association by invitation to that section's chair. An invitation was also directed to and contact made with the Washington State Office of the Attorney General, and minutes of each meeting have been circulated within that office. Each of the Act's parts or sections was assigned to a Committee member(s), who reviewed the assigned provisions and prepared a report for the full Committee. To discuss the reports, the Committee held ten (10) half-day meetings beginning October 6, 1999, and minutes were taken, circulated and approved with respect to each meeting. This Report is the product of that study.

Among the guiding principles used by the Committee were the following:

1. UCITA is intended to promote commerce by being the same in each state. Accordingly, the Committee's bias was for uniformity.

2. The role of the bar is to serve as an educational vehicle for the legislature and to review proposed legislation from all perspectives, including small and large parties to consumer and business transactions or contracts. Committee members endeavored to leave any client hats at the door.

3. The Committee adopted the premise that extra burdens should not be placed on electronic transactions simply because they are electronic. Absent clear justification to the contrary, "paper" and "electronic" transactions should be treated equally.

4. The Committee also assumed that UCITA should not disturb or displace Washington's Electronic Authentication Act, Chapter 19.34, RCW, or disturb or displace, except as warranted by the differences between information and goods, traditional principles of commercial law as found in U.C.C. Article 2 or Washington's common law.

The Committee members who participated in at least one or more meetings appear below.

Joanna Allen

Kathryn Milam

Andrea Blander

Alex Modelski

Scott David

Peter Schalestock

Helen Donigan

Paul Swanson

Brad Englund

Gordon Tanner

Cassondra Joseph

William Taylor

Brian Kennan

Holly Towle

Tom Melling

Mark Wittow

**Washington Bar Association Business Law Section
Committee on the Law of Commerce in Cyberspace**

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David Goldstein Attorney at Law Seattle, WA	Cassandra Joseph Bellevue, WA
Walt Krueger WSBA Standing Electronic Communications Committee (existing chair) Kirkland, WA	Mark Lewington Graham & Dunn Seattle, WA
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