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{1}I'm Terry Riley from the Hampton Roads Technology Council, and technology councils represent business. But predominantly we represent small business, and predominantly we represent users of software, not developers and sellers of software. In the case of my own technology council down [in the] southeastern part of the state, 85 percent of our members have 25 or fewer employees. Less than 5 percent of our members are developers, sellers, or licensors of software. So to a very substantial extent my views and my representations of the interests of my membership have to do with their concerns or their rights as customers, as users of software, as opposed to the developer or vendors of software. [There are] a couple of principles I'd like to establish, but, first, let me remind [you] again that none of us are attorneys. So we wouldn't sit up here and attempt to instruct you on the law. But we have developed, through reading UCITA way more hours than we wanted to, perhaps a lay person's view of what UCITA says and what it does. And I'd like to review some of the details as I understand them in the context of what is it about this part of UCITA that is good for vendors and what is good for customers.

{2}First: Some principles. One is freedom to contract is fundamental. This is America, after all. Fool-proof commerce is unachievable. This is humanity, and reasonableness and some common sense should guide us. But the other thing I would say about UCITA is we don't have the time to wait for trade practices to become clear and established. Because I would predict that for the foreseeable future UCITA in Virginia will become the law that never sleeps. Doug mentioned the annual tweaking of criminal codes, and I predict that UCITA will be tweaked routinely in every General Assembly session because trade practices in this industry are changing all the time. The old models are being discarded, new models are getting invented. The market is very dynamic. It's explosive. It's very, very large, and it underscores the need for us to act immediately to stay

ahead of the curve. [The] first area has to do with mass market licenses and transactions. Mass market licenses are standard forms, terms, that are used in mass market transactions. And there are two flavors of that. The transaction may be a consumer contract, that is what [you] buy for [your] personal use, that is what you license for your personal use. Or other end-user licenses, which is what is applied to business use. The purchase of a license is not for redistribution of the intellectual property, it's not customized, it's not a site license, it's not an access contract, which I'll mention later on. In the original version of UCITA, also, the license had to be in normal retail quantities, but that's not defined. And that ended up amended out, so if you have a copy of [such] notes, just cross that out. That is no longer part of UCITA, which is on the table for Governor Gilmore to sign.

{3}I noticed by the show of hands not many of you in fact have read through all of UCITA. But let me ask you a couple of other questions. How many of you bought shrink wrap software before? Okay. Hold your hands up for a second. How many of you with your hands up have at least on one occasion read all of the license terms before clicking "I accept?" Leave your hands up. Okay. How many of you have done that more than one time? Can I ask you why you would do that? We're talking about a $30 purchase here. Where is the balance between reasonableness in invested time [to prevent] potential damage versus the utility and what it is you're trying to get at? Sometimes as a lay person I am frustrated by the advocates of more and more protections to be built into the law where we're talking about something that already seems out of balance in some respects. I would suggest to you that market competition offers greater safeguards to consumers and business end users than the law does. Laws are a remedial process; something's messed up, you fix it. But market competition is what companies are going to respond to far more rapidly. Because you can choose not to enter the market. You can choose even in the face of the statement that information is not fungible. You can choose to find alternatives in the market place. And there are alternatives for almost everything you want to do, and that's what's going to drive companies to change practices, not what's written in the law.

{4}Now, with respect to mass-market licenses and transactions, what's good for vendors about UCITA? Well, something that's really good is the idea of manifest assent. Clicks count. And that's now recognized in law. It's pretty much the standard practice, has been for a lot of years, and now it's written into the law. The other good thing for vendors is that they're not bound by a proposed term that the customer would send to them, and that notice gives the customer the go ahead to use the software if the vendor hasn't had a chance to review that proposed change term before the use occurs. That's often overlooked. There's actually protection for vendors in there that end users can't propose changes to the terms and provide so-called notice and go ahead and begin to benefit from the product when the vendor hasn't had a chance to view the proposed change.

{5}The other side of the coin is that the same thing is true for the end user. They are entitled to read the terms before a deal is actually done. I think a problem that a lot of the consumer advocates have is that we've now separated the transfer of funds from the binding contract. In a purchase of consumer goods, typically those come together: When money is turned over, the deal is done. Here you take the product home and install it, you can read your terms. Only when you click "I agree" does it actually become legally binding. So that's what's good for customers is you always get to read the terms first before you're legally bound by those terms. And if you don't like them, you have a right to return. If you review those terms, you have the right to return, to recover your return costs whether the vendor says send it back to me by mail or destroy it or whatever. You can recover those costs. You also have a right to recover costs to return your computer system back to its original state. And those are rights that didn't exist without UCITA. You also, by the way, have the right to recover from an electronic error, what I call the "de-click clause". If you mistakenly click the "I agree" button and decide sometime after that you really didn't mean to click "I agree," you can recover that as well. What you have to do is give the vendor notice, you should not use or receive benefit from the product, and you should follow the vendor instructions for return. But the point is you can recover from an honest mistake. [Next], the area of Web downloads, something that Doug [Koelemay] has indicated is going to become far more prevalent in the future. Web downloads are basically e-commerce licenses that apply to data

subscriptions, software updates, application software that you download, that sort of thing. What's good for vendors about the UCITA provisions with respect downloads is that there is a predictable requirement for the information that has to be at the website and [for] the functionality requirements at the website so that user interests are protected. What's good for customers is you have to be able to review the terms before download occurs or there is an obligation to pay. You must be able to do that. The other things [are that] terms or a link to the terms has to be prominently displayed immediately in proximity to the product description, that you can get an e-copy of the terms on request before the product is downloaded to you, and that the site may not prevent your ability to store or print those terms. So [these are] all good protections, now predictable, which makes it good for vendors as well as end users.

{6}In the area of warranties there are a number of protections. What UCITA assures is that there's an express warranty that the product will conform substantially to the affirmation, promise, description, or model that you see in the packaging. It has to basically do what it says it's going to do. There is also a warranty of noninterference and non-infringement. That means the vendor is not going to interfere with your right to freely use the software. It also means that the licensor says, "yeah, I really do have a right to license this to you; it's not someone else's property." Now, this could actually be disclaimed, this warranty, but only by the inclusion of very specific language or the existence of very specific circumstances. Those are the things that are more or less assured by UCITA, and UCITA goes further to provide for some implied warranties, but all of these implied warranties can be disclaimed by the vendor. So what I'm emphasizing here is if you want to be knowledgeable with what you are agreeing to, you've got to read the terms, true of so many other things in life. There is an implied warranty of merchantability: Yes, the product is fit for ordinary purposes. It can be disclaimed. There's an implied warranty for informational content, that is the data are accurate. That can be disclaimed. There's an implied warranty with respect to the licensee's purpose of system integration, that is what will it work with, what will it not work with. This implied warranty is that the vendor directions for integration will be accurate, but again this can be disclaimed. Why should vendors be able to disclaim all of this? Well, think in terms of a freeware or a shareware vendor, someone who developed something and wants to share it with a broad audience over the Internet but doesn't want all of the baggage that goes along with being a for-profit software enterprise. They are able to disclaim any of this, and even establish an "as is" provision in their license. They still own it, but they're letting you use it for free. They are not making any money on it, and you take it and use it on an "as is" basis. Freedom to contract "as is" does have its place in the electronic world. What's good for vendors about all these warranties is there are now predictable warranty requirements and options. They know what they must do, and they know what they can do, but they are free to disclaim. And it provides good guidance for advertising other claims that appear in the retail packaging.

{7}What's good for customers in the warranty area? Well, basically, what's really good is a customer can rely on the packaging or web description as part of the bargain. What is said now counts. It matters as a matter of law. They also can count on the fact that the product should work as described. And the warranties to consumers [are] extended to everybody in the immediate household. [A] Business is not [a] consumer, by the way. There is that distinction, so this applies where you purchase software for personal use. And I was surprised at that as I read the law. I didn't even realize that myself with respect to consumer protection. And I'd just like to underscore here that an amendment is before the Governor to be signed [that] makes it clear that all provisions of the Consumer Protection Act are applicable to the contracts which UCITA addresses.

{8}In the area of access contracts, what those are, really, are Internet service providers, application service providers, where you're getting a service over the Internet. And it's for access over a period of time. The parts of UCITA that are good for vendors in the access contracts section is that they can have downtime and not be sued for it: Downtime, for example, for scheduled maintenance, downtime for reasonable failure of equipment, software communications, and events that reasonably they can't control. So there isn't a basis for going after them if they're doing the best that they can. What's good for customers, though, is that under access contracts there can be no use restrictions. You're entitled to all the capabilities at the site. Your access will be per the express terms of the agreement, but also access is per "ordinary standards of the business,

trade, or industry." So what it does is it ties the hands of the access provider to a certain degree in terms of treating different parts of their customer base differently.

{9}And, finally, I wanted to touch on the area of what I call "good cause gifts." There was a late amendment to make it okay to donate computers with resident licensed software to schools and to libraries, and I think that's wonderful. In fact, from my perspective and my constituency, there is an awful lot of sympathy for the great work that the public library system does in Virginia and in the nation for our country. But there's still this issue of who owns the intellectual property, and even if it's okay to transfer these licenses to schools and to libraries without the permission of the individual property owner. What about to charities? What about to Aunt Susie? What about . . . there are any number of places you might send an old computer with resident software. I ask you, who owns the intellectual property? How many here think that Napster is legal under current law? We all recognize we have a real issue here between the creator of the intellectual property and people who want to freely use it. The fundamental issue is the licensor is the owner, the creator is the owner, and the duration of the license under UCITA is perpetual unless expressly agreed to otherwise. So [if] you have an old machine with licensed software on it, you do not have a right to give that away or transfer it. If you have a leased car, and it's old and it's tired, and you don't want to use it any more, do you have a right to give it away? If you have an old leased copy machine that doesn't do very well anymore, you want a new one, can you give that to the local church? No, you can't. But [what] I would suggest to you is this (which is something I think you will find again comes back to principle of reasonableness): Just as academic institutions, as professors can ask a publisher for permission to go ahead and copy so much of a chapter of this book or that article to use for the class, it's very easy to ask for permission from a vendor to donate that licensed software to a good cause. And I would recommend that to you as a standard practice. It's not difficult to ask. And frankly at the rate with which new generations and new versions of software are created, if you have something that's three or four years or five years old that's on a hard disk, or on an old computer you want to give away, I don't think there's going to be a problem to get them to agree and grant you permission to do so for the local church or a community activity.

ENDNOTES

[*]Terry Riley is the Executive Director of the Hampton Roads Technology Council (HRTC). Mr. Riley's experience includes a twenty year career with Eastman Kodak Company in which he served in a broad range of operational management positions in engineering, long range product planning, marketing, international finance, pricing, equipment service, technical and educational services, and manufacturing. He relocated to the Hampton Roads region in early 1987 as the founder and president of Enterprise Management Corporation, a finance, marketing, and management consulting firm principally serving clients in the Commonwealth of Virginia. He received his B.S. in Electrical Engineering from MIT, and his MBA from Rochester Institute of Technology with an emphasis in finance and marketing. In 1990, Mr. Riley joined Old Dominion University (ODU) as the Director of its Technology Applications Center undertaking short-term engineering and technology projects with Virginia industry. In 1994, he was appointed by ODU as Executive Director of its Accelerated Career Transition Education (ACTE) Program. The ACTE program, funded by a $7,000,000 grant secured for ODU by Mr. Riley from the United States Department of Labor, provided high technology training to Virginia workers affected by decisions of the Base Realignment and Closure Commission. In 1995, Governor Allen appointed Mr. Riley a member of the Virginia Technology Council. In July 1997, Mr. Riley became the Executive Director of the Council. The Council promotes the interests and accomplishments of the Hampton Roads technology industry within the region, and at the state and federal levels. It also seeks to promote the high-tech character and capabilities of Hampton Roads nationally and globally. The HRTC receives financial support from the Hampton Roads Partnership, and member technology firms throughout Hampton Roads. Mr. Riley is a member of the Board of directors of the Virginia Technology

Alliance representing the nine regional technology councils across the Commonwealth. He currently serves on the Digital Opportunities Taskforce appointed by Governor Gilmore, and is an industry advisor to the Joint Commission on Technology and Science of the General Assembly.

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