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UCITA and the Virginia General Assembly

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I. CHRONOLOGY -- 1998 - 2000

A. Virginia became the first state to actively follow the deliberations on UCITA when it was still Article 2B of the Uniform Commercial Code back in 1998. The Joint Commission on Technology and Science began a review of NCCUSL's work at that time and actively studied the Uniform Computer Information Transactions Act or UCITA the following year, during the 1999 interim of the General Assembly.

B. JCOTS established Advisory Committee Five to conduct the study and to hold public hearings. The Committee was chaired by Delegate Diamonstein and myself and was composed of 27 citizens representing a variety of interested parties, including professors, lawyers, business people, librarians, consumer group representatives and government employees.

C. At its last meeting in January 2000, JCOTS adopted the Committee recommendations with some clarifying amendments. One of these amendments clarified the reach of UCITA. UCITA is not implicated when a party obtains the software from a source, other than the licensor. Other laws cover this situation.

D. The 2000 Session of the General Assembly

1. Deliberations on UCITA took place in the House under House Bill No. 561. The House Committees on Science & Technology and on Corporations, Insurance & Banking discussed the bill. It passed the House 95-2. In the Senate, the Committee on General Laws discussed the bill. It passed the Senate 39-0.

2. The bill was also introduced in the Senate under Senate Bill No. 372. The Senate Committees on General Laws and Courts of Justice discussed the bill. It passed the Senate 39-0. In the House, the Committee on Science & Technology discussed it. It passed the House 98-1.

3. The General Assembly made two major changes to the bills. Regarding Electronic Self-Help, it extended the time period in which the licensor must notify the licensee of its intentions from 15 days to 45 days. It also added a delayed effective date of July 1, 2001 and directed JCOTS to study its effects on Virginia's businesses, libraries and consumers.

4. Senate Joint Resolution No. 239 also directed JCOTS to study UCITA.

II. CHRONOLOGY -- 2000 - 2001

A. JCOTS Advisory Committee Five was created to conduct the study. Co-chaired by Senator (now Congressman) Edward Schrock and myself, the committee was composed of many of the same interested parties as the previous advisory committee.

B. The committee met five times around the Commonwealth to give the public an opportunity to address the committee. Members of the public and of the committee presented proposed amendments to the committee and explained why the amendment was needed. Everyone wishing to address the committee was instructed to explain what the problem was and how the proposed amendment would solve the problem.

C. The committee reviewed over 70 proposed amendments and adopted 23. With small changes, the Commission adopted those proposed amendments. The Commission also adopted a proposal to modify the Virginia Consumer Protection Act (VCPA) to provide further protections for consumers. The results of JCOTS' study are reported as Senate Document No. 24.

D. Areas of Debate:

1. Relation to other laws -- contract, employment, copyright, and consumer protection. UCITA operates on the state level in conjunction with other laws and is preempted by copyright law. In addition, if UCITA conflicts with consumer protection laws, the consumer protection laws govern.

2. Scope -- insurance transactions, libraries, educational institutions, and non-profit entities. The Advisory Committee could not reach an agreement on exemptions from UCITA for insurance transactions. This issue has yet to be resolved. House Bill No. 2412 amends UCITA as it affects libraries, educational institutions and archives.

3. Consumer Protection -- included in Senate Bill No. 1017

4. Electronic Self-help -- included in House Bill No. 2412

5. Mass-Market Licenses -- included in House Bill No. 2412

III. The 2001 Session of the General Assembly

A. The Commission requested and I introduced House Bill No. 2412 to amend UCITA. Senator Stephen Newman patroned Senate Bill No. 1017 to adopt the VCPA.

B. House Bill No. 2412 proposed 4 major changes:

1. CONSUMER PROTECTION

- a. Includes statutes and regulations and other consumer protection laws (in addition to the Consumer Protection Act) as laws that can only be varied according to those laws as opposed to UCITA.
- b. Includes other consumer protection laws (in addition to the Consumer Protection Act) as laws that supercede UCITA in the event of a conflict.
- c. Prohibits electronic self-help in a mass-market transaction.

2. TERMS OF MASS-MARKET LICENSES

- a. States that a term is not part of a mass-market license unless it is available for viewing before and after assent. Provides options for how it is to be available (e.g., must be retrievable, archivable, and printable).
- b. Provides that a license term is not enforceable if it prohibits the licensee from describing, criticizing, comparing or evaluating computer information to the extent other laws do not prohibit these activities.

3. NON-PROFIT LIBRARIES, ARCHIVES, AND EDUCATIONAL INSTITUTIONS

- a. Provides that unless otherwise prohibited by other law (state or federal), the licensees mentioned may, without any purpose of direct or indirect commercial advantage:
 - i. Make a tangible copy available to library or archive users;
 - ii. Make a tangible copy for archival or preservation purposes;
 - iii. Engage in inter-library lending of tangible copies; and
 - iv. Make classroom and instructional use of tangible copies.
- b. Adds rules for terms that vary these provisions:
 - i. It must be conspicuous;
 - ii. The licensee must assent to the term; and

iii. The term must either be available before ordering or the licensee must have known or had reason to know that terms would follow the order and have a right of return with reimbursement for reasonable expenses.

c. This section does not alter the burden of proof in an infringement action, authorize making the information available on a network for simultaneous access and use by multiple users, or limit any defense that the term violates a fundamental public policy or copyright law.

4. TRANSFERABILITY

a. A term can not prohibit the transfer of a license if it is in connection with a merger or the acquisition or sale of a subsidiary or affiliate.

i. The transfer must be between the licensee and a third party; and

ii. The transfer must be made to preserve the integrity of information or information systems used by the licensee or to ensure compatibility of the information or information systems among the parties involved.

C. General Assembly Action on H.B. 2412

1. House of Delegates

a. Committee on Science and Technology

b. Passed the House with minor amendments 98-0

2. Senate of Virginia

a. Committee on General Laws

b. Passed the Senate with minor amendments 38-0

3. The amendments passed the House 96-1

D. Senate Bill No. 1017 included licenses within the protection afforded by the Virginia Consumer Protection Act (VCPA). According to testimony presented by the Attorney General's representative on the JCOTS Advisory Committee, that office already interprets the VCPA to cover licenses. SB 1017 also amends the definition of goods to make it clear that intangible property includes computer information covered by UCITA.

E. General Assembly Action on S.B. 1017

1. Senate of Virginia

a. Committee on General Laws

b. Passed the Senate 39-0

2. House of Delegates

a. Committee on Science and Technology

b. Passed the House with a minor amendment 100-0

3. The amendments passed the Senate 40-0

F. The bills now await the signatures of the House Speaker and Senate President. After they sign the bill, it will be sent to the governor for his response (i.e., sign, recommend amendments, veto).

IV. Delegate Whittington W. Clement introduced House Bill No. 2387, which proposed further changes to clarify UCITA and the VCPA.

A. The House version amended the definition of goods in the VCPA and clarified the term rules in UCITA to mean administrative rules with respect to consumer protection.

B. The Senate passed amendments to:

1. Further clarify the definition of goods as it appears in the VCPA;

2. Clarify the term rules in UCITA to mean administrative rules in all circumstances;
and

3. Amend the VCPA's requirement that a supplier post its return policy either at its premises or as an attachment to its goods to exclude those circumstances where the right is provided under UCITA.

C. The House rejected those amendments. The Senate insisted on those amendments and requested a committee of conference. The House acceded to that request.

D. Committee of Conference

1. Recommendations

2. House Action

3. Senate Action

ENDNOTES

[*] Delegate Joe T. May, known as the resident technology expert in the Virginia General Assembly, is currently serving his fourth term in the House of Delegates. May serves as co-chairman of the Science and Technology Committee, is chairman of the Joint Commission on Technology and Science, is co-chairing a technical advisory committee that is formulating new e-commerce laws for the Commonwealth, and is a member of the Governor's Commission on Information and Technology. Delegate May, a registered professional engineer who holds 17 patents, is founder and CEO of the Virginia based electronic engineering and manufacturing firm, (EIT). May also serves as a member of the Virginia House of Delegates' Appropriations, Transportation, General Laws and Interstate Cooperation committees.

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