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Taking UCITA on the Road: What Lessons Have We Learned?

Amelia H. Boss*

INTRODUCTION

In 1999, with a great deal of fanfare, the National Conference of Commissioners on Uniform State Laws completed its work on a new statute designed to bring the Conference—and state law—into the new millennium: the Uniform Computer Information Transactions Act or UCITA. Two years and two state enactments later, there are those who argue that UCITA should be the model not only for this country, but for other countries—and regional and international policy makers—to adopt.

Should UCITA be an international model? The answer to that question is both “yes” and “no.” If one speaks of UCITA as a concept—the concept that there is a need to address a type of transaction whose use is increasing exponentially in importance in today’s economy—the transfer of information by contract—then the answer is yes. If one views UCITA as standing for the proposition that a comprehensive and accessible body of law covering information contracts would add the predictability and certainty desired by those engaged extensively in electronic commerce, the answer is yes. And if one views UCITA as a “checklist” of issues that must be confronted in efforts to deal with new information-based transactions (whether those efforts are those of a practitioner in drafting a license or a legislator determining what issues to address next), the answer is again yes.

Unfortunately, however, if one views UCITA as a specific body of law, to be enacted substantially as is with little reevaluation, reexamination and reassessment of its provisions (especially in the international context), then the answer is no. My involvement in

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the drafting of UCITA for over fourteen years—from the inception of the idea until almost the end¹—has undoubtedly influenced both of my responses to the main question.

It has also convinced me that the nature of the debate surrounding UCITA needs to change. Over the two years since UCITA was promulgated by the National Conference of Commissioners on Uniform State Laws, and indeed dating from before its enactment, there has been extensive opposition to the project.² Opponents of the legislation have raised concerns over the adoption process (some concerns meritorious, others mere reiterations of concerns without basis or repetition of old concerns since proven wrong), and in the bulk of states to date, that opposition has led to the failure of UCITA to successfully navigate the state legislative process or, in some cases, has led to enactment of anti-UCITA legislation.³ In the process, proponents of the legislation have tried to negotiate compromises, asking opponents to identify those provisions on which there is disagreement to see whether concerns could be addressed.⁴ Thus, the debate has centered on whether to

1. I chaired the Ad Hoc Committee on Scope of the Uniform Commercial Code of the American Bar Association's Section of Business Law, Uniform Commercial Code Committee, and in 1985 helped launch the initial study on software contracting under the UCC. That group ultimately produced a report recommending statutory treatment of software contracts, at which point I began working with the National Conference of Commissioners on Uniform State Laws (NCCUSL) to study the potential of this new project. When the Conference (along with its sister organization, the American Law Institute) approved the creation of a Drafting Committee on software contracting, I was appointed to that committee as the American Law Institute representative and similarly served on the Drafting Committee to revise Uniform Commercial Code Article 2. When the decision was made to split information/software licensing off from Article 2, I continued on the Article 2 Drafting Committee and also served as the American Law Institute member of the Drafting Committee on Article 2B Licensing. I served in that capacity until the Spring of 1999, when the American Law Institute withdrew from the process, and the project was retitled the "Uniform Computer Information Transactions Act" (UCITA). At that time, I was asked to continue as an advisor on the project, but declined to do so. Three months later the National Conference completed its work on UCITA. The complete text of the Act is available at <http://www.law.upenn.edu/bll/ulc/ucita/ucitsFinal00.htm>. This article reflects developments through August 2001.

2. See *infra* notes 18-28 and accompanying text. For a sampling of the depth and breadth of the opposition, see <http://www.4cite.org> (last visited Nov. 10, 2001) and <http://www.badsoftware.com> (last visited Nov. 10, 2001).

3. See *infra* note 19 and accompanying text.

4. This led to the drafting of amendments to UCITA, but not to any extensive revisions. The NCCUSL approved amendments to UCITA in 2000 and 2001, making minor changes to section 103 (excluding motion picture industry), section 216

enact UCITA as a whole, enact it with minor amendments, or (at the other extreme) kill the legislation.

The time has come to reevaluate UCITA. It does not make sense to ask what amendments to isolated provisions might make it "sell" to different constituencies. UCITA contains a number of controversial provisions on which consensus can never be achieved, and the opposition will remain.⁵ Although it is undoubtedly possible to enact a law about which there is some controversy, the fact that UCITA contains so many controversial provisions compounds the difficulties of enactment. Rather than focusing on the controversial provisions and how they can be amended to satisfy the opponents, the focus might better be placed on what positive can be gleaned and saved from UCITA.

UCITA stands as a potential roadmap outlining the issues of importance for future development, debate and resolution; guiding developments in other venues (such as international law-making venues); or identifying those points on which there is sufficient agreement that legislative enactment of those provisions could be achieved. UCITA was (and is) an extremely ambitious project that invites and merits intense scrutiny and study. Such a detailed analysis, however, is beyond the scope of this much more limited endeavor—to permit someone who was at many stages deeply involved in the process the luxury of ruminating over what has transpired. I am one who believes that the lessons to be learned from UCITA (and the process by which it was drafted) are worth far more than its provisions themselves. These lessons may prove ex-

(adding idea submission provisions) and section 816 (clarifying limitations on self-help). See *Amendments to the Uniform Computer Information Transactions Act* (ratified Aug. 4, 2000), available at <http://www.law.upenn.edu/bll/ulc/ucita/ucitaAMD.htm> (last visited Oct. 8, 2001); *Amendments to Sections 605 and 816 of the Uniform Computer Information Transactions Act* (as Last Revised in 2000), available at <http://www.ucitaonline.com/docs/0101a.htm> (last visited Oct. 8, 2001); *Amendments Approved by NCCUSL Executive Committee Pending Ratification of the Conference* (Feb. 2000), available at <http://www.law.upenn.edu/bll/ulc/ucita/aproveamend.htm> (last visited Oct. 8, 2001).

5. An example of this may be § 209, the choice of law provisions. There has been an inability to reach consensus on them in other fora such as the Hague Conference on Private International Law. See Paul Hofheinz, *Birth Pangs For Web Treaty Seem Endless*, Wall St. J., Aug. 16, 2001, at A11. In UCITA, the real problem comes from the bundling together of many controversial issues such as this into one package.

tremely valuable to those who toil in the field of legislative reform, both domestically and internationally.

I. A BIT OF BACKGROUND

Over the last ten years, our economic marketplace has dramatically changed in many significant ways.⁶ With the advent of the Internet and the rise of computer technologies generally, we have witnessed the commoditization of information: information itself has become the subject of commercial transactions, not just the medium for performing them. This is, in essence, a key feature of our emerging information economy. Business can now be conducted at lightning speed between parties at great distances from one another; national boundaries and cultural differences are both invisible. There have been increasing demands on the law, developed in the context of different transactions, to catch up and adapt to these new transactions; cries for clarity, certainty, and international uniformity abound.⁷ Uniformity eliminates the "jurisdictional risk" of non-uniform law in cross-border activities, which is particularly a problem in Internet transactions. A contractual code, it is argued, will facilitate information exchange; codification lowers negotiation costs by supplying off-the-shelf terms parties

6. See, e.g., Neil B. Cohen, *Introduction to Symposium, Software as a Commodity: International Licensing of Intellectual Property*, 26 Brook. J. Int'l L. 3 (2000). For an interesting analysis of how technology has transformed society over a longer period, see M. Ethan Katsh, *The Electronic Media and the Transformation of Law* (1989).

7. See, e.g., William J. Clinton & Albert Gore, Jr., *A Framework for Global Electronic Commerce* (1997), available at <http://www.iitf.nist.gov/eleccomm/ecom.htm> (last visited Nov. 11, 2001) [hereinafter Clinton & Gore, *Framework*].

Many businesses and consumers are still wary of conducting extensive business over the Internet because of the lack of a predictable legal environment governing transactions. This is particularly true for international commercial activity where concerns about enforcement of contracts, liability, intellectual property protection, privacy, security and other matters have caused businesses and consumers to be cautious.

Id. The White House report noted the work being done by the United Nations and the National Conference of Commissioners on Uniform State Laws in developing rules governing electronic documents and signatures, and observed:

The United States Government supports the adoption of principles along these lines by all nations as a start to defining an international set of uniform commercial principles for electronic commerce. We urge UNCITRAL, other appropriate international bodies, bar associations, and other private sector groups to continue their work in this area.

Id. (emphasis added).

can adopt, filling gaps if they cannot agree and providing the backdrop against which negotiations occur.⁸

It is against this background that UCITA was drafted. The drafting history of UCITA has been described at length elsewhere.⁹ Nonetheless, a few critical aspects of that history bear repeating.

First, the concept of statutory treatment of software transactions originally surfaced over fifteen years ago as commercial lawyers grappled with judicial attempts to apply the goods provisions of the Uniform Commercial Code to software.¹⁰ At the outset, the issues and the discourse were framed from a commercial perspective, focusing on contracting issues such as warranties and remedies in the software context; only later in the process (as more and more software and information industry representatives became involved) did the focus shift from the potential of a new software contracting statute to more expansive treatment of information

8. See, e.g., Mary Jo Howard Dively & Carlyle C. Ring, Jr., *Overview of Uniform Computer Information Transactions Act*, in *Advanced Licensing Agreements for the New Economy* 2001, 201 (P.L.I. ed., 2001); Jeff C. Dodd, *Time and Assent in the Formation of Information Contracts: The Mischief of Applying Article 2 to Information Contracts*, 36 Hous. L. Rev. 195 (1999); Philip M. Nichols, *Electronic Uncertainty Within the International Trade Regime*, 15 Am. U. Int'l L. Rev. 1379 (2000).

9. There has been an exceptional amount of literature devoted to UCITA. At least two law review symposia issues have dealt with the topic. Symposium, *Licensing in the Digital Age*, 36 Hous. L. Rev. 1 (1999); Symposium, *Approaching E-Commerce Through Uniform Legislation: Understanding the Uniform Computer Information Transactions Act and the Uniform Electronic Transactions Act*, 38 Duq. L. Rev. 205 (Winter 2000). See, e.g., Raymond T. Nimmer, *Images and Contract Law—What Law Applies to Transactions in Information*, 36 Hous. L. Rev. 1 (1999) [hereinafter Nimmer, *Images*]; Raymond T. Nimmer, *Through the Looking Glass: What Courts and UCITA Say about the Scope of Contract Law in the Information Age*, 38 Duq. L. Rev. 255 (2000) [hereinafter Nimmer, *Looking Glass*]; Raymond T. Nimmer & Holly K. Towle, *UCC Article 2B Would Govern Software Licensing*, Nat'l L.J., Feb. 12, 1996, at C2; Holly K. Towle, *Mass Market Transactions in the Uniform Computer Information Transactions Act*, 38 Duq. L. Rev. 371 (2000); Holly K. Towle, *The Politics of Licensing Law*, 36 Hous. L. Rev. 121 (1999).

10. The concept of a statute devoted to software arose out of the work of an Ad Hoc Subcommittee on the Scope of the Uniform Commercial Code Committee of the American Bar Association and was first discussed in print in 1988. See Amelia H. Boss & William J. Woodward, Jr., *Scope of the Uniform Commercial Code: Survey of Computer Contracting Cases*, 43 Bus. Law. 1513 (1988); Amelia H. Boss et al., *Scope of the Uniform Commercial Code: Advances in Technology and Survey of Computer Contracting Cases*, 44 Bus. Law. 1671 (1989); Jeffrey B. Ritter, *Scope of The Uniform Commercial Code: Computer Contracting Cases and Electronic Commercial Practices*, 45 Bus. Law. 2533 (1990).

and additional protections for licensors of information.¹¹ This evolution—from contract issues to information policy issues—increased the visibility of the product. Moreover, it significantly added to the complexity of the project and the number of economic interests affected by the proposal, making consensus on such a statute harder to achieve and contributing to the growing dissatisfaction with its provisions.

Second, the efforts to address software contracts were initially combined with other efforts to revise domestic sales law—a recognition that in the generic area of contracting, there was a great deal of overlap between contracts for the transfer of goods and contracts for the transfer of information.¹² Although it was acknowledged that certain aspects of information contracts might require different provisions, the similarities were deemed sufficient enough, at the outset, to justify a core set of provisions (“hub” prin-

11. This shift occurred during the period when the use of licensing to govern and restrict the use of information gained importance and visibility as courts and Congress refused to grant copyright protection to information such as databases. The prominence of licensing also illustrated the desire of licensors to place additional restrictions on the use of copyrighted information not otherwise granted by copyright law. See David A. Rice, *Legal-Technological Regulation of Information Access*, in *Libraries, Museums, and Archives: Legal Issues and Ethical Challenges in the New Information Era* 275 (Tomas A. Lipinski, ed. 2002). A second significant development occurred during this period that profoundly affected the substance of the UCITA discussions. Although early cases, such as *Vault Corp. v. Software Ltd.*, 847 F.2d 255 (5th Cir. 1988) and *Step-Saver Data Sys. v. Wyse Tech.*, 939 F.2d 91 (3d Cir. 1991), cast significant doubt on the enforceability of licenses in the software context, two significant cases from the Seventh Circuit Court of Appeals, *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir.1996), and *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir.1997), *cert. denied*, 522 U.S. 808 (1997), upheld this method of contracting. This development permitted the software industry, in particular, to refocus its efforts on what it hoped to achieve from the UCITA drafting process.

12. From 1991 to 1995, the Drafting Committee to revise Article 2 considered not only the substance of the goods provisions, but also the question of whether to deal with software in the context of Article 2—in what was dubbed as a “hub-and-spoke” approach—or in a separate statute (whether or not a part of the UCC). See Linda J. Rusch, *A History and Perspective of Revised Article 2: The Never Ending Saga of a Search for Balance*, 52 SMU L. Rev. 1683, 1715 (1999); Richard E. Speidel, *Introduction to Symposium on Proposed Revised Article 2*, 54 SMU L. Rev. 787 (2001) [hereinafter Speidel, *Symposium Intro*]; Richard E. Speidel, *Revising UCC Article 2: A View From the Trenches*, 52 Hastings L.J. 607 (2001) [hereinafter Speidel, *Trenches*]. Folding the discussions of how to treat software licensing into the ongoing Article 2 sale of goods revision process was an implicit recognition of the substantial overlap between the substantive rules governing each type of transaction.

ciples) governing both goods and information contracts, with special rules ("spoke" rules) necessary to deal with the unique aspects of each.¹³ This recognition (that there are similarities as well as differences between information and goods contracts) is frequently overlooked in the literature proclaiming the need for an entirely separate body of information law.¹⁴

Third, the critical decision to separate goods from software and information during the drafting process was not, as some have portrayed, the result of a determination that contract issues surrounding the licensing of information were so distinct from those involving the sale of goods that a different body of rules were required. By 1995, the drafting committee originally charged with responsibility in the field was prepared to recommend a "hub-and-spoke" treatment for goods and information. A central core of basic contracting principles governing all transactions (sales, leases, licenses and possibly other transactions such as services) would be combined with specific rules where needed. Nonetheless, in 1995 the leadership of the National Conference of Commissioners on Uniform State Laws made the surprising announcement that it was abandoning attempts to treat software within Article 2, and was instead creating a new Drafting Committee (the Article 2B Drafting Committee) with a new reporter to draft a new statute on the licensing of information.¹⁵ This split was *not* justified on the grounds that information and software were significantly different,

13. Under the proposed "hub-and-spoke" approach, the core contracting principles would apply to every transaction: sales (existing Article 2); leases (existing Article 2A) and software licenses. Potentially, they could also apply to other types of contracts, such as services contracts. These core principles would be followed by "spokes" setting forth specific rules for the particular transaction at hand.

14. See, e.g., Nimmer, *Looking Glass*, *supra* note 9. Professor Nimmer examines the cases struggling with which law (Article 2 or common law) to apply to information transactions, but often fails to examine *why* the question is important. Asking whether the licensing of information is the same as, or different from, the sale of goods is the same as asking "is the glass half empty or half full." The answer is "it depends." If one is in need of a drink, the salient fact is that there is something in the glass (it is half full); if the question is whether to refill the glass, the salient fact is that it is half empty. In the context of UCITA, the question is not whether licensing of information is different than sales of goods, but whether those differences in the transactions justify a difference in the applicable legal rule.

15. It is noteworthy that this important step was taken by the leadership of the NCCUSL with minimal input from its partner in the Code revision process, the American Law Institute, and with minimal input from the Chair, Reporter or Drafting Committee on Article 2. For a diplomatic account of the failure of the hub-and-spoke approach, see Speidel, *Trenches*, *supra* note 12, at 612-15.

but rather on the basis that the logistics of restructuring Article 2 into a hub with spokes would require extraordinary time and resources.

My perception is that an additional, unarticulated motive was surely behind this surprising decision. As long as sales and software were being handled by the same Drafting Committee, decisions on fundamental issues—such as the treatment of adhesion contracts, the nature of assent, the role of formalities in contract, the availability of damages—would be the same. Yet pressure was being placed on the Conference by the software industry, which primarily represents the interests of licensors and was uncomfortable with what it perceived as the liberal “pro-buyer” or “pro-consumer” positions being advanced in the context of Article 2.¹⁶ Thus, splitting off the two committees allowed for the development of the licensing law in a different direction than the sales article. In attempts following the creation of the Article 2B Drafting Committee to coordinate the two drafts, both the degree of divergence between the two and their fundamentally different approaches to contract law became apparent.¹⁷

Fourth, UCITA in the United States has not been met with total acceptance—it has been enacted in only two states to date. Indeed, one might characterize its reception in some quarters as down right hostile. For example, the attorneys general in many states opposed the original adoption of UCITA by the National Conference.¹⁸ In addition to lobbying *against* enactment of UCITA by states, opponents have actually gone on the offensive and urged state legislatures to adopt legislation that would affirmatively *pre-*

16. *Id.*

17. One of the key results of the split is that the Article 2 Drafting Committee was under increased pressure—in the name of “uniformity”—to revise its provisions to follow the more conservative ones in Article 2B. This impact was felt in such areas as the Statute of Frauds (which the Article 2 drafting committee originally voted to eliminate but which was vigorously defended by the Article 2B committee; it was later reinstated in Article 2), the parol evidence rule (Article 2 wanted to liberalize the rule, but Article 2B strengthened it; ultimately, Article 2 was made to conform to Article 2B), and contract policing (Article 2 contained additional provisions absent in Article 2B that were eventually eliminated).

18. Letter from State Attorneys General to Gene N. Lebrun, President of the NCCUSL (July 23, 1999), *available at* <http://www.2bguide.com/docs/799ags.html> (last visited Sept. 8, 2001); Letter from Attorneys General of 11 States to Gene Lebrun, President of the NCCUSL (July 28, 1999), *available at* <http://www.2bguide.com/docs/799mags.html> (last visited Sept. 8, 2001) (agreeing with July 23, 1999, letter).

clude application of UCITA by courts in that state even where the parties have chosen UCITA as the governing body of law.¹⁹ Opposition and dissension has surfaced in other bodies as well, such as the American Bar Association, which had observers attending all drafting committee meetings and is normally called upon to endorse uniform acts produced by the National Conference.²⁰ The ac-

19. Three states have already adopted such "anti-UCITA" legislation. Ironically, these states (Iowa, West Virginia and North Carolina) have included such a provision in their enactment of the Uniform Electronic Transactions Act, another product of the National Conference. See Uniform Electronic Transactions Act, Iowa Code Ann. § 554D (West Supp. 2001), 2000 Iowa Legis. Serv. H.D. 2205 (West) (last visited Aug. 8, 2001), available at <http://www.legis.state.ia.us/GA/78GA/Legislation/HF/02200/HF02205/Current.html> (codified at Iowa Code § 554D.104 (repealed 2001)) ("A choice of law provision . . . which provides that the contract is to be interpreted pursuant to the laws of a state that has enacted the uniform computer information transactions Act . . . or any substantially similar law, is voidable."); Uniform Electronic Transactions Act, W. Va. Code § 55-8-15 (2001), 2001 W. Va. Leg. Serv. 120 (West); Uniform Electronic Transactions Act, ch. 2001 N.C. Sess. Laws 2001-295 sec. 66-329 (July 21, 2001). Ironically, at the time West Virginia passed this provision, it was the home of the president of the NCCUSL. More recently, the New York Attorney General's office proposed legislation would declare that UCITA violates New York public policy. The concern of the N.Y. Attorney General was the impact of UCITA on consumers, and particularly UCITA's validation of click-wrap contracting practices and licenses that "diminish significant rights and protections established over many years for the protection of consumers" in New York. N.Y. Attorney General's Legislative Program Bill No. 33-01, 12 BNA Electronic Com. & L. Rep. 288 (2001); see *Am. Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699 (Cal. Ct. App. 2001) (invalidating a choice of forum and law clause invoking Virginia law, including UCITA, as contrary to California public policy.).

20. Typically, upon the completion of new proposed uniform legislation, the National Conference places the item on the agenda of the House of Delegates of the American Bar Association for ratification by that group. In the year following the completion of UCITA, the National Conference submitted a resolution calling for ABA approval of another piece of electronic commerce legislation, the Uniform Electronic Transactions Act, but failed to put UCITA on the agenda of the House. To the extent that this failure illustrated a perception that there would be a fight in the House over any such resolution, the perception has proven to be true. In the Summer of 2001, a resolution was introduced in the House that would *disapprove* of UCITA and call upon the Conference to withdraw it as a proposed statute for state enactment. This resolution was withdrawn by its sponsor, the Torts Insurance and Practice Section, pending additional discussions between the ABA and the National Conference on substantive objections to UCITA. In January 2002 an ABA Working Group issued its report on UCITA, describing it as "a very complex statute for even knowledgeable lawyers to understand and apply," and concluding that in addition to requiring substantial changes in many of its sections, UCITA should be "redrafted to make it easier to understand and use." American Bar Association Working Group Report on the Uniform Computer Information Transac-

ademic literature abounds with critiques of UCITA²¹ and even regulatory bodies such as the Federal Trade Commission have expressed reservations about the product.²² Whether or not one agrees with the arguments raised by opponents of UCITA, the fact remains that at this stage there is no consensus about its acceptability.

Last, events occurring in 1999 have undoubtedly had the most significant impact on Article 2B (soon to become UCITA) and its chances of enactability: attempts to include the treatment of information within the Uniform Commercial Code (as Article 2B Licensing) were abandoned; the American Law Institute withdrew from the process; and the National Conference reformulated the draft as a freestanding uniform act. The only "official" reason given for the split, according to the joint press release of the two organizations, was that "this area [computer information transactions] does not presently allow the sort of codification that is represented by the Uniform Commercial Code."²³ The problem was much more fundamental.

tions Act (UCITA), Jan. 31, 2002, available at <http://www.abanet.org/leadership/ucita.pdf>.

21. See, e.g., Symposium, *Intellectual Property and Contract Law in the Information Age: The Impact of Article 2B of the Uniform Commercial Code on the Future of Information and Commerce*, 13 Berkeley Tech. L.J. 809 (1998) (criticizing the predecessor of UCITA); Symposium, *Intellectual Property and Contract Law for the Information Age: The Impact of Article 2B of the Uniform Commercial Code on the Future of Information and Commerce*, 87 Cal. L. Rev. 1 (1999) (same).

22. In October of 2000, the Federal Trade Commission held a Public Workshop on Warranty Protection for High-Tech Products and Services devoted almost exclusively to whether the FTC should enact consumer protection provisions to supplement or override UCITA. See *Federal Trade Commission: Warranty Protection for High-Tech Products and Services*, at <http://www.ftc.gov/bcp/workshops/warranty/> (last visited Sept. 8, 2001); Letter from the Bureau of Consumer Protection, Bureau of Competition, Policy Planning of the Federal Trade Commission, to Carlyle C. Ring, Jr., Chairman of the NCCUSL Article 2B Drafting Committee (Oct. 30, 1998), available at <http://www.ftc.gov/be/v980032.htm> (last visited Sept. 8, 2001) (expressing concerns about Article 2B); Letter from the Bureau of Consumer Protection, Bureau of Competition, Policy Planning of the Federal Trade Commission, to John L. McLaugherty, Chair of the Executive Committee of the NCCUSL (July 9, 1999), available at <http://www.ftc.gov/be/v990010.htm> (last visited Sept. 8, 2001) (stating that concerns of prior letter were not addressed in any significant respect).

23. Joint Press Release, ALI-NCCUSL, *NCCUSL to Promulgate Freestanding Uniform Computer Information Transactions Act—ALI and NCCUSL Announce that Legal Rules for Computer Information Will Not Be Part of UCC* (Apr. 7, 1999), available at <http://www.law.upenn.edu/bll/ulc/ucita/2brel.htm> (last visited Dec. 18, 2001) ("The Conference believes that UCITA can provide a framework in which

The decision to part ways with Article 2B came after several years of mounting tension about this project between the two sponsoring organizations.²⁴ In 1998, and again in 1999, the American Law Institute refused to put Article 2B on the agenda for approval at its annual meetings.²⁵ Even in its stance as a "discussion draft," Article 2B attracted much criticism at the annual ALI meetings, precipitating significant motions for changes in substance.²⁶ An

sound business practices may further evolve in the marketplace bounded by standards of appropriate public policy." The press release does not say that the American Law Institute shared that belief.

24. It should be noted that the "tension" referred to is not tension between the two bodies as a whole, but a tension between the leadership of those bodies. UCITA was not without controversy even within the NCCUSL process. Objections to UCITA were so strong that the 1999 motion to refer UCITA for a final vote by the Conference (normally a pro forma matter) was highly debated and only passed by a 37-11 vote with five abstaining; the final vote of the states on UCITA was 43-6, with two states voting to abstain and two states not voting at all. [The total number of states is fifty-three not fifty, as the District of Columbia, Puerto Rico and the Virgin Islands are also counted.] The final approving vote was undoubtedly influenced by pleas from Conference leadership who maintained that unless UCITA was passed, the Conference would be preempted by Congress (an event which did not come to pass) and who asked that UCITA be passed to allow a field test of its provisions in the states with no obligation on individual commissioners to support it. Many undoubtedly expected UCITA to die a natural death upon its final promulgation.

25. See Press Release, ALI, *Major Projects Scheduled for Completion at American Law Institute's 75th Annual Meeting* (May 1, 1998), available at <http://www.ali.org/ali/pr0501.htm> (last visited Sept. 8, 2001) ("[A] special ad hoc committee of the Institute's Council has recommended that ALI take no final action this year because of present concerns about both the architecture and scope of 2B."); *Institute to Review Seven Drafts at 1999 Annual Meeting*, A.L.I. Rep. (Winter 1999), available at http://www.ali.org/ali/Rptr_7drafts.htm (last visited Sept. 8, 2001) ("While the leadership of NCCUSL also plans to seek final approval of Article 2B this year, the ALI Council continues to have significant reservations about 2B, especially concerning its provisions on scope, invalidation for fundamental public policy, and assent to post-transaction terms, but also regarding its overall coherence and clarity.").

26. See, e.g., Jean Braucher & Peter Linzer, Motion Regarding Assent Issues in Proposed UCC Article 2B (May 5, 1998), at <http://www.ali.org/ali/Braucher.htm> (last visited Nov. 17, 2001); Charles R. McManis, Motion Regarding UCC Article 2B § 2B-308 (Tentative Draft Apr. 14, 1997) (May 9, 1997), available at <http://www.ali.org/ali/McManis.htm> (last visited Nov. 17, 2001); Charles R. McManis, Motion Regarding UCC Article 2B § 2B-208 (Mass Market Licenses) and § 2B-105 (Relationship to federal law) (Tentative Draft, Apr. 15, 1998) (May 5, 1998), available at <http://www.ali-aba.org/ali/McManis2.htm> (last visited Sept. 8, 2001); William J. Woodward, Jr., Motion to Delete Section 2B-107(a) from Draft UCC Article 2B (May 6, 1998), at <http://www.ali.org/ali/Woodward1.htm> (last visited Nov. 17, 2001); William J. Woodward, Jr., Motion to Delete Section 2B-108 from Draft UCC Article 2B (May 6, 1998), at <http://www.ali.org/ali/Woodward2.htm> (last visited

ALI official publication, reporting on the joint decision to remove Article 2B from the Uniform Commercial Code, explained that while the National Conference believed that "the proposed statute is currently ready to provide a viable legal framework for the evolution of sound business practices in computer-information transactions," the American Law Institute Council "continued to have significant reservations about both some of its key substantive provisions and its overall clarity and coherence."²⁷ The substantive basis for the ALI decision could not be clearer. Following the withdrawal of the ALI from the process, the three ALI members of the drafting committee were asked to remain as advisors,

Nov. 17, 2001). For additional motions, see <http://www.ali.org/ali/Motions.htm> (last visited Nov. 17, 2001).

27. *Article 2B Is Withdrawn from UCC and Will Be Promulgated by NCCUSL as Separate Act*, A.L.I. Rep. (Spring 1999), available at http://www.ali.org/ali/R2103_Art2b.htm (last visited Sept. 8, 2001); see also Geoffrey C. Hazard, Jr., Report of the Director, Address Before the American Law Institute (May 1999), in 76 A.L.I. Proc. 11 (2000), available at http://www.ali.org/AR99_director.htm (last visited Sept. 8, 2001) ("There has been great difficulty in arriving at a suitable definition of the scope of the provisions aimed at licensing and some differences concerning the provisions on electronic contracting."); Letter from Geoffrey C. Hazard, Jr., Director of the ALI, to Gene N. Lebrun, President of the NCCUSL, and Charles A. Wright, President of the ALI (Mar. 26, 1998), at <http://www.2bguide.com/docs/ghmar98.html> (last visited Sept. 8, 2001) (stating that the text "needs significant revision" and expressing concerns regarding scope, architecture, clarity of expression, relation to other law, electronic contracting, and other controversial issues); Memorandum from Geoffrey C. Hazard, Jr., et. al., to Drafting Committee on Uniform Commercial Code Article 2B-Licenses, *July 1998 Draft: Suggested Changes* (Oct. 9, 1998), available at <http://www.2bguide.com/docs/gch1098.pdf> (making suggestions: scope too broad; need to cover all access contracts questionable; post-contract assent provisions not true assent; contract formation provisions should be drafted by an appropriate group "that considers these matters in broader context" than Article 2B); Memorandum from David A. Rice, ALI Drafting Committee Member, to Article 2B Drafting Committee (Mar. 18, 1998), available at <http://www.2bguide.com/docs/ricemar.html> (last visited Sept. 8, 2001) (commenting and proposing changes to Article 2B); Memorandum from David A. Rice to ALI Council Subcommittee on Article 2B, *Critical Considerations Concerning the Readiness of Article 2B* (Mar. 17, 1998), available at <http://www.2bguide.com/docs/ricemar.html#alic> (last visited Nov. 17, 2001); Memorandum from Amelia H. Boss, et al., to UCC2B Drafting Committee and Raymond T. Nimmer (Nov. 4, 1996), available at www.2bguide.com/docs/polmem.html (last visited Sept. 8, 2001) (proposing policy issues for resolution). Some took great offense at the ALI's criticism of Article 2B, reducing the debate to (anonymous) *ad hominem* attacks. See *A Firefly on the Wall: The UCC2B Experience*, available at <http://www.2bguide.com/docs/afotw.html> (last visited Sept. 8, 2001) (responding to Geoffrey Hazard's comments made at the meeting).

but declined, citing "a number of underlying concerns including matters of substance, process, and product:"

In terms of product, the draft has, in attempting to address numerous concerns of affected constituencies, progressively moved away from articulating sufficient and generally applicable default rules toward establishing increasingly particular and detailed rules. In so doing, the draft sacrificed the flexibility necessary to accommodate continuing fast-paced changes in technology, distribution, and contracting. In terms of process, the guiding principle appeared to be the Conference's desire to expedite approval and commence enactment of the draft. This led to obviating rather than learning from strong concerns expressed by Conference and Institute discussions over the entire course of the project, ranging from scope and drafting to the interplay with intellectual property rules. Substantively . . . the three of us often disagree. Yet we believe that some rules, although they may assure important constituencies' support for the draft, nonetheless jeopardize enactability because of the ultimate balance of interests achieved.

These are not new, or newly expressed, concerns. They are fundamental concerns and have been aired before in Conference and Institute discussions, by individual members, Drafting Committee members and observers, and Internet discussion list participants, as well as by software and other computer science enterprises and professional organizations, law professors, and editorial writers. The persistent din of these concerns has contributed significantly to our decision to decline the invitation to participate as advisors.²⁸

28. See Memorandum from David Bartlett et al., to Uniform Computer Transactions Act Drafting Committee (May 7, 1999), *available at* <http://www.2bguide.com/docs/50799dad.html> (last visited Sept. 8, 2001). It should be emphasized that the three of us were seldom aligned on individual substantive issues that came before the drafting committee; nonetheless, we were united in our decisions to recommend that the ALI withdraw from the project and to decline to continue our own participation.

II. THE INTERNATIONAL DEBATE

A. *Goods, Services, or Sui Generis: Herein the application of the CISG*

Although UCITA is a domestic statute written against the backdrop of US law, the pressures that were behind its evolution are present on the international level as well. With the growth of information transactions, there has been increasing recognition that many of the primary sources of law governing international commercial transactions do not effectively cover information. Just as the UCITA discussions had their origins in dialogue over whether and to what extent Article 2 of the Uniform Commercial Code might be adapted to cover information,²⁹ the same question is being asked globally (in case law, in academic literature and in the legislative process) about the UNCITRAL Convention on the International Sale of Goods (CISG).³⁰ Should the international equivalent of UCC Article 2, the United Nations Convention on the International Sale of Goods, be modified to accommodate non-goods transactions?³¹

The scope of the CISG is limited, both in terms of the subject matter of the transaction (goods) and the structure of the transac-

29. See Boss & Woodward, *supra* note 10; Boss et. al., *supra* note 10; Ritter, *supra* note 10.

30. United Nations Convention on Contracts for the International Sale of Goods, art. 19(3), U.N. Doc. A/CF.97/18 (1980), available at <http://www.uncitral.org/english/texts/sales/CISG.htm> (last visited Sept. 15, 2001) [hereinafter CISG]. For example, the question of whether to classify software transactions as goods transactions arises in contexts other than the sale of goods, such as their treatment under trade agreements within the WTO. See, e.g., Stewart A. Baker et al., *E-Products and the WTO*, 35 Int'l Law. 5 (2001); Joseph Tasker, Jr., *The Information Technology Agreement: Building A Global Information Infrastructure While Avoiding Customs Classification Disputes*, 26 Brook. J. Int'l L. 917, 947 (2001).

31. For selected articles on the extension of the Convention on the International Sale of Goods to software see *infra* note 34. The question of whether information transactions are analogous to goods transactions is being debated in many areas in addition to the area of general contract law. In WTO discussions, for example, the question is whether information fits within GATT (goods) or GATS (services).

There is a second issue raised about the coverage of the CISG: whether it should deal with electronic transactions—i.e., those contracts electronically created. The question of the medium of the communication, dealt with by the UNCITRAL Model Law on Electronic Commerce, is distinct from the question of the nature of the subject matter of the transaction.

tion (sales).³² Although the Convention is limited to goods, the term is not defined.³³ Thus, there is the question of whether the term "goods" should be construed to apply to "virtual goods." The argument has been made by legal commentators that the sale of software may fall under the Convention's substantive sphere of application, even though it is not tangible, with the qualification being that the software be "off the rack" software i.e., not custom-made software or software that has been extensively modified to meet the user's needs.³⁴ Recent judicial decisions have supported such application.³⁵ To the extent, however, that the result is arguably unclear, it has been maintained that the CISG should be extended to services and intangibles to deal with electronic commerce.³⁶

The United Nations Commission on International Trade Law, which was responsible for the drafting of the CISG, has also been a key player in the development of legal structures for electronic commerce: in 1996 it completed its work on the Model Law on Elec-

32. CISG, *supra* note 30, at Annex I. A third limitation in the application of the CISG is that it is inapplicable to consumer transactions, which currently represent a significant proportion of international electronic commerce.

33. *Id.* ¶ 21-22.

34. See, e.g., Christina H. Ramberg, *The E-Commerce Directive and Formation of Contract in a Comparative Perspective*, 26 Eur. L. Rev. 449 (2001) (urging extension of CISG to services and intangibles to deal with electronic commerce and noting that the Principles of European Contract Law and the UNIDROIT Principles on International Commercial Contracts had already extended many of the provisions of the CISG outside the goods context); Frank Diedrich, *Maintaining Uniformity in International Uniform Law Via Autonomous Interpretations: Software Contracts and the CISG*, 8 Pace Int'l L. Rev. 303, 336 (1996) (stating that CISG can be applied to computer software); Trevor Cox, *Chaos Versus Uniformity: The Divergent Views of Software in the International Community*, 4 Vindabona J. Int'l Com. L. & Arb. 3 (2000); see also James E. Bailey, *Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales*, 32 Cornell Int'l L.J. 273 (1999) (challenging belief that CISG reaches uniformity); Marcus G. Larson, *Applying Uniform Sales Law to International Software Transactions: The Use of the CISG, Its Shortcomings, and a Comparative Look at How the Proposed UCC Article 2B Would Remedy Them*, 5 Tul. J. Int'l & Comp. L. 445 (1997) (discussing the applicability of CISG to software sales).

35. OLG Köln, 26 August 1994, Neue Juristische Wochenschrift Rechtsprechungs-Report 246 (1995) = CLOUT case n. 122; OLG Koblenz, 17 September 1993, Recht der internationale Wirtschaft 934 (1993) = CLOUT case n. 281. The CLOUT reference is to the UNCITRAL project (Case Law on UNCITRAL Texts) reporting on all cases involving the interpretation of the CISG and other UNCITRAL products. See <http://www.uncitral.org>.

36. See *supra* note 34.

tronic Commerce,³⁷ and in 2001 it completed work on the Model Law on Electronic Signatures.³⁸ In its deliberations in the winter of 2001 on potential future work in the area, the UNCITRAL Working Group on Electronic Commerce turned its attention to the CISG.³⁹ In addition to looking at whether the sales Convention needs to be updated to take into account the electronic formation of contracts, the question was raised as to whether its scope should be extended beyond goods to information—or what the report called “virtual goods.” “It is apparent that a clarification of whether the software should be considered as ‘goods’ in the sense of the Convention would be useful in order to ensure uniformity.”⁴⁰ Revisions could clarify that the CISG covers all software, only software incorporated into tangible goods, or only off-the-shelf (i.e., non-custom) software.⁴¹

The scope issue under the Convention involves not only the issue of what constitutes “goods” but what constitutes a “sale.” Much software is not sold but rather licensed. “The differences in these approaches are considerable. A sales contract, for instance, frees the buyer (i.e., “user”) from restrictions as to the use of the product bought and, thus, clearly delineates the boundaries of control that may be exercised . . . In contrast, a license agreement allows the producer or developer of ‘virtual goods’ (or services) to exercise control over the product down through the licensing chain.”⁴²

37. U.N. Comm’n on Int’l Trade Law, *UNCITRAL Model Law on Electronic Commerce with Guide to Enactment* (Dec. 16, 1996), available at <http://www.uncitral.org/english/texts/electcom/ml-ecomm.htm> (last visited Sept. 8, 2001).

38. U.N. Comm’n on Int’l Trade Law, *UNCITRAL Model Law on Electronic Signatures*, U.N. Doc. A/56/17, Supp. 17, Annex II (June 23, 2001), available at <http://www.uncitral.org/english/texts/electcom/ml-elecsig-e.pdf> (last visited Nov. 17, 2001); see also *Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures*, U.N. Doc. A/CN.9/WG.IV/WP.88 (Jan. 30, 2001), available at http://www.uncitral.org/english/workinggroups/wg_ec/wp-88e.pdf (last visited Sept. 8, 2001).

39. See *Legal Aspects of Electronic Commerce: Possible Future Work in the Field of Electronic Contracting: An Analysis of the United Nations Convention on Contracts for the International Sale of Goods*, U.N. Doc. A/CN.9/WG.IV/WP.91 (Feb. 9, 2001) [hereinafter *Legal Aspects*].

40. *Id.* ¶ 24.

41. *Id.*

42. *Id.* ¶ 28.

The issues confronting UNCITRAL then included whether the scope of the CISG should be broadened to pick up software licensing agreements, or whether the rules derived from the CISG should be developed for these kinds of transactions. The Working Group report to UNCITRAL, however, placed more emphasis on the application of the CISG to contracts concluded by electronic means for the international sale of tangible goods "in view of the urgent need for the introduction of the legal rules that would be needed to bring certainty and predictability to the international regime governing Internet-based and other electronic commerce transactions."⁴³ Apparently recognizing the controversy surrounding the enactment of UCITA, the report was cautious in recommending any expansion of the CISG to non-tangible goods transactions: "Broadening the scope of such work so as to include transactions involving goods other than tangible goods, such as the so-called "virtual goods" or rights in data, was an avenue that should be approached with caution, given the uncertainty of achieving consensus on a harmonized regime."⁴⁴ Nonetheless, the report cryptically noted:

There was general agreement within the Working Group that existing international instruments, notably the United Nations Sales Convention, did not cover a variety of transactions currently made online and that it might be useful to develop harmonized rules to govern international transactions *other than sales of movable tangible goods in the traditional sense*. The Working Group proceeded to consider what elements should be taken into account to define the scope of application of such a new international regime.⁴⁵

Ultimately, the Working Group to the Commission recommended that preparation of a legal instrument "dealing with certain legal issues in electronic contracting be begun on a priority basis."⁴⁶ What is unclear is the extent to which that instrument will include work in the area of software, computer information

43. U.N. Comm'n on Int'l Trade Law, *Report of the Working Group on Electronic Commerce on the Work of Its 38th Session*, U.N. Doc. A/CN.9/484, ¶ 95 (Apr. 14, 2001). The issues preliminarily identified were: offer and acceptance; receipt and dispatch; internationality of the sales transaction; and parties to the sales transaction.

44. *Id.*

45. *Id.* ¶ 115 (emphasis added).

46. *Id.* ¶ 134.

and licensing.⁴⁷ Also unclear is the extent to which UCITA will be used as a model in those deliberations. The Secretariat, in its report to the Working Group on the issue, noted the existence of other instruments, including UCITA, designed to harmonize certain areas of electronic commerce and suggested that further study of these rules needed to be undertaken.⁴⁸ Undoubtedly because of a recognition of the controversial nature of UCITA, references to it were conspicuously missing from the Working Group report to the Commission.

B. *UCITA's Implications for the CISG*

The debates surrounding UCITA (and not necessarily the provisions of UCITA as they stand in the official version) might shed light on three issues confronting UNCITRAL: whether (or how) to extend the scope of the CISG beyond pure goods; adapting the existing contract formation rules of the CISG (beyond merely incorporating the electronic contracting provisions of the Model Law) to address newer contracting methods such as shrink-wrap or click-wrap used frequently in electronic commerce; and extension of the

47. There are "electronic contracting" and scope issues under the CISG that do not implicate the question of whether the CISG should be extended beyond the sale of goods: how to determine the "internationality" of a transaction for purposes of determining the applicability of the Convention; the "place of conclusion of the contract"; who are parties to the sales convention, especially when automated systems or "electronic agents" are used; coverage of consumer contracts and particularly consumer protection issues; offer and acceptance, including manifestation of assent; receipt and dispatch. *Id.* ¶¶ 96-113, 119-22, 125-27.

48. *Legal Aspects*, *supra* note 39, ¶ 7.

As an example of such rules that may require further study, the Uniform Computer Information Transactions Act (UCITA) was developed in the United States of America, since it was felt that the approach of the 'sale of goods' transactions embodied in the Uniform Commercial Code (UCC) was not adequate to address the way in which technology services and items such as software were being sold.

Id. The Secretariat's report also noted two ICC projects: the draft Uniform Rules and Guidelines for Electronic Trade and Settlement (URETS) and the Model Electronic Sales Contract. *Id.* Elsewhere, the UNCITRAL staff member for the Working Group on Electronic Commerce for UNCITRAL noted that UCITA "may serve as a useful introduction to electronic contracting issues that should be addressed, in addition to those already included in the Model Law, on a global scale." Renaud Sorieul et al., *Establishing a Legal Framework for Electronic Commerce: The Work of the United Nations Commission on International Trade Law (UNCITRAL)*, 35 *Int'l Law.* 107, 120 (2001).

CISG into the consumer area. Each of these three areas has been extremely controversial in the UCITA process.

Scope

The appropriate scope of UCITA has been a persistent problem throughout its drafting history. As was noted earlier, work on information contracts in the United States began with an examination of the scope of Article 2. Attempts to broaden Article 2 to cover software were ultimately abandoned in favor of separate statutory treatment of goods and information. As also noted earlier, the decision to separate goods and software was not one reached by the drafting committee, but by the Conference leadership, its decision representing a political or administrative decision much more than a decision on the merits. After the split, the scope provisions of UCITA (and its predecessor, Article 2B) received a great deal of discussion throughout the remaining drafting process, were the object of most of the criticism of the draft by the American Law Institute, and have continued to be quite controversial.⁴⁹ As the history of UCITA demonstrates, there was a two-fold recognition in the drafting process: that to some extent the application of some of the sales provisions to software and information products was appropriate, but that there was a need for different rules in certain areas. The first battleground has been on where there are sufficient differences to justify different rules i.e., which of Article 2's rules could be applied without change to software or information contracts. Industry has been adamant in its opposition to the expansion of Article 2 in any fashion to cover information products (including software).⁵⁰ That opposition ultimately led to the split between Articles 2 and Article 2B. After the split, however, a second battleground developed that still persists: what transactions are covered by the old sale of goods rubric (Article 2) and which are subject to the new act (UCITA).

After abandonment of attempts to include software products within the scope of the Article 2 of the Uniform Commercial Code, efforts were made to define the line between what constituted goods (covered by the UCC) and what constituted information (gov-

49. See *supra* notes 25, 27.

50. See, e.g., Lorin Brennan, *Why Article 2 Cannot Apply to Software Transactions*, 38 Duq. L. Rev. 459 (2000) (arguing, however, that either Article 2 must apply in its totality or a separate statute must govern).

erned by Article 2B or UCITA).⁵¹ Since both Article 2 and UCITA contain scope provisions, two different but interrelated debates flourished. Those supporting UCITA (and its substantive provisions) wanted as broad a scope provision as possible in that act and as restrictive a scope provision as possible for Article 2; in addition, they wanted to give the parties the ability to opt into the scope of UCITA through contract.⁵² Those opposing UCITA, of course, wanted to keep its scope narrow and were opposed to any attempt to limit the scope of Article 2 in any way. Some were of the view that software and information (particularly off-the-shelf software) should *not* be excluded at all from the definition of goods, primarily on the grounds that this would deny purchasers protections they previously had.⁵³

51. Indeed, not only did the decision to split Article 2B off from Article 2 increase the importance of the scope provisions, it turned the scope provisions of both drafts into a "political football." See Speidel, *Symposium Intro*, *supra* note 12, at 792 ("[A]fter the collapse of 'hub and spoke,' there was growing tension between the Article 2 and the Article 2B projects (now UCITA), both as to the degree of textual conformity that should exist between them and the line beyond which a sale of goods stopped and a computer information transaction began. That tension persists to this day."); see also Ann Lousin, *Proposed UCC 2-103 of the 2000 Version of the Revision of Article 2*, 54 SMU L. Rev. 913 (2001) (explaining the changes to the draft Article 2). For a critique of the current scope provisions of UCITA, see Stephen Y. Chow, *UCITA: A 1990's Vision of E-Commerce*, 18 J. Marshall J. Computer & Info. L. 323 (1999).

52. The broad reach of UCITA, and the potential it might sweep in transactions that would otherwise be governed by Article 2, led to a motion at the 1998 ALI Annual Meeting discussing Article 2B, the predecessor of UCITA, to "limit the scope of Article 2B to software contracts, access contracts, and such other transactions as are included expressly and defined with sufficient clarity to avoid surprise to affected parties." The motion was withdrawn in light of representations by the Chair of the Drafting Committee that a task force would be producing a report on the appropriate scope of Article 2B. *Actions Taken with Respect to Drafts Submitted at 1998 Annual Meeting*, at <http://www.ali.org/ali/ACTIONS.htm> (last visited Jan. 13, 2002).

53. The argument was that courts had "gotten it right" when the question had arisen in the past, and thus it would be inadvisable to override existing law. See, e.g., Stephen Y. Chow, *Motions Relating to Proposed Revised Uniform Commercial Code Article 2* (1999), at http://www.ali-aba.org/ali/1999_CHOW_UCC2.htm (last visited Sept. 8, 2001); Memorandum from Jean Braucher & Peter Linzer to Members of the American Law Institute (May 5, 1998), available at <http://www.ali-aba.org/ali/braucher.htm> (last visited Sept. 8, 2001). At the 1998 ALI Annual Meeting, a motion was made to delete the scope provisions in the 1998 Article 2 draft that would have excluded software from Article 2 coverage in order to remain silent on the issue; the motion was defeated by a vote of 97 to 78. See *Actions Taken with Respect to Drafts Submitted at 1999 Annual Meeting*, available at <http://www.ali.org> (last visited Nov. 17, 2001); see also Peter A. Alces, *W(h)ither*

One issue was the mixed transaction: goods with an element of information (either “embedded” in or packaged with the goods). Critics of UCITA expressed concern (i) that the presence of software or information would appropriately exclude something from Article 2 coverage; and (ii) that in appropriate circumstances Article 2 would cover both the information and the goods as a unit.⁵⁴ By contrast, supporters of UCITA wanted to retain the ability, to the extent possible, to have UCITA continue to cover the information and even the medium or tangible good on which the information was delivered.⁵⁵ Extreme discomfort with the scope provisions of Article 2 (based in part on the UCITA formulation) led to a straw vote of the membership of the Institute in 2000 favoring a clear statutory statement that coverage of Article 2 extends to so-called “smart goods,” products (such as a refrigerator or a car) that include computer programs important to their performance.⁵⁶ Efforts to produce an acceptable scope provision continued to engender controversy, and, following an online discussion forum

Warranty: The B(l)oom of Products Liability Theory in Cases of Deficient Software Design, 87 Cal. L. Rev. 271 (1999) (concluding that strict liability could replace the warranty protections in the UCC); Marion W. Benfield, Jr. & Peter A. Alces, *Reinventing the Wheel*, 35 Wm. & Mary L. Rev. 1405 (1994) (analyzing the hub and spoke approach with regard to contract law and commercial law).

54. The classic example is the automobile with a computer chip controlling the automatic braking system. The consensus was that, in the event of a failure of the braking system, the buyer of the car would be able to proceed under Article 2 and not have her remedies depend upon proof of whether the hardware or the software was the cause. For a criticism of UCITA's treatment of the mixed transaction, see Chow, *supra* note 51, at 331.

55. UCITA as currently drafted covers not only computer software, but the medium on which it is stored, i.e., the “copy.” See UCITA § 103(b)(1).

[This] Act treats the medium that carries the computer information as part of the computer information and within this Act, whether the medium is a tangible object or electronic. This Act applies to the copy, documentation, and packaging of computer information; these are within the definition of computer information itself. They are mere incidents of the transfer of the information.

Id. at cmt. 4(b)(ii) (citation omitted).

56. *Article 2 Update*, A.L.I. Rep. (Summer 2000), at http://www.ali.org/ali/R2204_Update.htm (last visited Sept. 8, 2001); *Actions Taken on 2000 Annual Meeting Drafts*, at <http://www.ali.org> (last visited Nov. 17, 2001). See also *Heavy Agenda Planned for 2001 Annual Meeting*, A.L.I. Rep. (Winter 2001), at http://www.ali.org/ali/R2302_heavy.htm (last visited Sept. 8, 2001) (“The most difficult and controversial problem confronting the drafters of Revised Article 2 of the UCC has been that of determining and defining the extent to which computer programs associated with goods, particularly those contained in so-called ‘smart goods,’ should be subject to the provisions of Article 2.”).

hosted by the Institute, these efforts were abandoned. The draft finally approved by the Institute in May 2001 made no attempts at all to change the scope provisions to address computer software or information generally.⁵⁷ Ironically, the *failure* to amend the scope of Article 2 has caused some interest groups (particularly the software industry) to announce their opposition to the amendments to Article 2 as they go forward to the National Conference for approval.⁵⁸

Contract Formation

The second area of controversy that may have important ramifications on the CISG discussions on electronic contracting is the treatment of contract formation issues in the context of licensing, and in particular, its application to shrink-wrap situations (where an item is purchased in a box or wrapping containing language that by opening or using the item, the user consents to terms contained therein) as well as click wrap situations (where a party signifies its acceptance of new or additional terms by a mere mouse click). In many respects, this second set of issues deals with straight contract formation. Theoretically, contract formation rules should be the same, no matter what the nature or subject

57. See *Proposed Amendments for Uniform Commercial Code Article 2—Sales* (May 2001), available at <http://www.law.upenn.edu/bll/ulc/ucc2/ART20501.htm> (last visited Sept. 8, 2001) (noting in the Prefatory Note to the draft: "These amendments also reflect an inability to reach reasonable consensus on some issues, such as . . . the proper scope of the Article.").

58. See Letter from Microsoft to Commissioners of the National Conference of Commissioners on Uniform State Laws (July 2001). The desire of industry to push for a carve-out, particularly for pure information, was undoubtedly spurred by cases such as *Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001) (purporting to apply Article 2 to pure information contracts such as Internet downloads where only information and no goods are involved).

At the August 2001 Annual Meeting of the National Conference, the software and information industries succeeded in convincing the Drafting Committee to change its position, by a vote of 6-3, and recommend a new scope provision carving out information from the coverage of Article 2, and introducing new provisions to govern mixed transactions. Later that day, the new provision survived a motion to delete on the floor of the Conference by a vote of 60 to 98, but a motion necessary to obtain NCCUSL approval of the entire project (including the new scope provision) failed on a vote of 53 to 89. This leaves the issue of the scope of revised Article 2, and indeed the larger question of whether there will ever be a revised or amended Article 2, unresolved.

matter of the transaction,⁵⁹ yet there was continual tension between the Article 2 and Article 2B processes as to what those correct contract formation rules should be. The contract formation rules of UCITA have proven to be quite controversial, in large part because of their impact upon intellectual property law regimes.⁶⁰ Even apart from their content, however, the approach exemplified by UCITA's provisions has been challenged, and indeed they have not been mirrored in the Article 2 contract formation provisions.⁶¹

UCITA legitimates both shrink-wrap and click-wrap agreements.⁶² Key to its provisions is the concept of "manifesting assent" after an "opportunity to review" the terms of a standard form license of information.⁶³ Although there is general agreement that parties should be able to contractually agree to the terms applicable to their transaction,⁶⁴ the continuing refrain heard from opponents is that under UCITA there is no true bargain and no true "meeting of minds," and thus there is no contract in a classical

59. As Judge Easterbrook said in *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997), *cert. denied*, 522 U.S. 808 (1997) (involving a purchase of a computer which was delivered with new and additional terms), about attempts to distinguish the prior case of *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (involving purchased software which came with a shrink-wrap license limiting use): "ProCD is about the law of contract, not about the law of software."

60. See *infra* notes 123-44 and accompanying text; see also Brennan, *supra* note 50.

61. See, e.g., Speidel, *Trenches*, *supra* note 12; Rusch, *supra* note 12.

62. Most shrink-wrap or click-wrap agreements would qualify as "mass market" licenses under UCITA's provisions, and their enforceability would be governed by UCITA § 209. See UCITA § 112 & official cmt. 5 (setting forth several illustrations of the enforceability of click-wrap agreements).

63. UCITA provides that an opportunity to review is presented if licensor displays "prominently and in close proximity to a description of the computer information, or to instructions or steps for acquiring it, the standard terms or a reference to an electronic location from which they can be readily obtained." UCITA § 211. Alternatively, the license can "disclos[e] the availability of the standard terms . . . on the site . . . and promptly furnis[h] a copy of th[os]e standard terms on request before the transfer of the computer information" *Id.* In either case, the licensor is not permitted to prevent the printing or storage of the standard terms for archival or review purposes by the licensee. *Id.*

64. This position was advanced by the Clinton administration as critical to the developing framework for electronic commerce. Clinton & Gore, *Framework*, *supra* note 7 ("In general, parties should be able to do business with each other on the Internet under whatever terms and conditions they agree upon."). Freedom of contract has been one of the key foundations of UCITA. See Carlyle C. Ring, Jr., *Uniform Rules for Internet Information Transactions: An Overview of Proposed UCITA*, 38 Duq. L. Rev. 319 (2000).

sense.⁶⁵ Such fictional assent is arguably present in a host of circumstances leading to a binding agreement under UCITA. For example, assent may be found by a simple "click of the mouse"—or a double-click—when a person is attempting to access information. Thus, the person may not have read the terms, known they were present, or even known that the "click" was a binding agreement, and still be bound to the transaction.⁶⁶ Assent may be found where an individual clicks through one screen on a website, even though the governing terms are not themselves displayed on the website but are simply available should the individual choose to click through to another page. The terms to which the party agreed may allow the licensor to define any conduct as assent in the future, or it may allow the licensor in access contracts (involving electronic access to information on another's system)⁶⁷ to unilaterally change the terms of the agreement. Thus, the concept of "manifestation of assent" has been attacked as a mere fiction.⁶⁸ Indeed, recent events have demonstrated that not only are licensees frequently unaware of the terms in click-wrap agreements, but sometimes even the licensors are unaware of what they have in

65. See, e.g., Jean Braucher, *Uniform Computer Information Transactions Act (UCITA): Objections From The Consumer Perspective*, 5 Cyberspace Law., Sept. 2000, at 2, available at <http://www.cpsr.org/program/UCITA/braucher.html> (UCITA "validates fictional assent (e.g., double clicking a mouse to get access to a product after you've paid for it) and even allows one party to define any conduct as assent in future transactions, without requiring that form terms meet consumers' reasonable expectations."); Chow, *supra* note 51, at 337.

66. Under UCITA, a person "manifests assent" if the person, after having an opportunity to review the record or term, intentionally engages in conduct with reason to know that the other party assents from that conduct. UCITA § 112(a). It is not necessary that the person know whether the record or term exists; rather he or she simply needs an opportunity to review. Nor is it necessary for the person to know that their conduct constitutes assent; there need only be a "reason to know."

67. See UCITA § 102 (a)(1).

68. But see Raymond T. Nimmer, *International Information Transactions: An Essay on Law in an Information Society*, 26 Brook. J. Int'l L. 5, 44-45 (2000).

Some have argued that a double click on an 'I agree' icon is only 'fictional' assent that should be ignored. . . . Most likely, however, this argument is disingenuous; the persons using it actually believe that parties should not be bound by standard forms, even in the online world. But in Internet commerce, all contracts involve standard forms. Does that then indicate that contractual terms cannot be agreed to online? The consequences of such a rule would be draconian and would contradict the basic notion of contract and the economic reality of modern information commerce.

Id.

their own standard form provisions, with the result that "implied assent" is carried to a new level.⁶⁹

Whatever one thinks of the "assent agreement" under domestic United States law, there is the additional problem of its compatibility with legal principles internationally. The expansive concept of personal autonomy exemplified in UCITA has also been criticized as contrary to non-U.S. concepts of assent.⁷⁰ Additionally, the UCITA provisions seem to conflict with principles articulated in several international instruments. For example, a directive of the European Union deems as presumptively unfair a term "irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract."⁷¹ Also deemed unfair are terms enabling the supplier to alter the terms of the contract unilaterally without a valid reason specified in the contract.⁷²

In addition, UCITA for the first expressly validates post-payment disclosure of terms—"pay now, terms later"⁷³—under what is known as the "rolling contract" theory of contract formation. While it may not always be possible to disclose (or make available) all applicable terms prior to the creation of a binding agreement (as in

69. A recent incident involved Microsoft's license for Passport, which purported to claim an ownership interest in all personal data passing through the system, thus granting Microsoft the right to "use, modify, copy, distribute . . . or sell" all personal data. When this draconian term (which had been included in the license for some time) finally came to light, Microsoft responded that it was unaware of the term in its own licensing agreement. See Farhad Manjoo, *Fine Print Not Necessarily in Ink*, *Wired News* (Apr. 6, 2001), available at <http://www.wired.com/news/print/0,1294,42858,00.html> (last visited Sept. 8, 2001). The irony is, of course, that without judicial intervention setting aside the terms in the Microsoft license, the licensor and the licensee have agreed to terms of which neither are aware! Yet there has been the creation of an agreement under UCITA.

70. This is especially true in the intellectual property area. See Samuel K. Murumba, *The Emerging Law of the Digital Domain and the Contract/IP Interface: An Antipodean Perspective*, 26 *Brook. J. Int'l L.* 91, 113 (2000) ("UCITA itself rests less on any utilitarian conception and more on that most neo-Kantian and neo-classical of all conceptions: autonomy. There is an unmistakable resistance in Australia, and it seems in Europe, to a wholesale embrace of this super-naturalistic view of intellectual property rights, whether it comes in the guise of autonomy or code or both.").

71. Council Directive 93/13/EEC of 5 Apr. 1993 on Unfair Terms of Consumer Contracts, 1993 O.J. (L 095) 29, Annex 1(i).

72. *Id.* at Annex 1(j).

73. Maureen A. O'Rourke, *Progressing Towards a Uniform Commercial Code for Electronic Commerce or Racing Towards Nonuniformity?*, 14 *Berkeley Tech. L.J.* 635, 651 (1999).

the case of a telephone purchase order), that is not the case with respect to online transactions where information can be made readily accessible. Indeed, one can argue that the Internet is the quintessential marketplace: a place where the notional or theoretical fully-informed party to a transaction can be more closely approximated than in physical markets; an environment capable of providing the information that buyers need to make informed shopping decisions.⁷⁴ Rather than recognizing the ability of the media to resolve informational distribution issues, however, UCITA condones the delay of disclosure of terms until a consumer is committed to the deal, no matter how important the terms.⁷⁵ This is contrary to the approach in the European Union, where prior disclosure of terms is mandated in certain instances.⁷⁶ As stated in Guidelines of the Organisation for Economic Co-Operation and Development: "Businesses engaged in electronic commerce should provide sufficient information about the terms, conditions and costs associated with a transaction to enable consumers to make an informed decision about whether to enter into the transaction."⁷⁷

The easier it is to find or imply assent to the terms of a contract, the greater the pressure becomes to impose a method to prevent unfair or overreaching terms in the resulting agreements.⁷⁸ The question of whether to enforce shrink-wrap or click-wrap li-

74. See *id.* at 652 ("Would it not be consistent . . . to draft legal rules that enhance the market's efficiency by providing more information to customers, correcting for information asymmetries that might otherwise exist and distort market performance?"); see also Jean Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice*, 46 Wayne L. Rev. 1805 (2000) (arguing that marketing to consumers online and failing to make pre-transaction disclosures amounts, like other bait and switch practices, to unfair and deceptive practices in violation of the Federal Trade Commission Act and states' little FTC acts).

75. See Braucher, *supra* note 65. UCITA does, however, contain a "safe harbor" to encourage posting. See UCITA § 211.

76. Council Directive 97/7/EC of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts, 1997 O.J. (L 144) 19. A basic purpose of the directive is consumer protection through prior information, written confirmations, right of withdrawal, performance, payment by card, and prevention of inertia selling.

77. Organisation for Economic Co-Operation and Development, Consumer Protection in the Context of Electronic Commerce Guidelines, § III(C) (Dec. 9, 1999) [hereinafter OECD], available at <http://www.oecd.org/oecd/pages/home/displaygeneral/0,3380,EN-document-0-nodirectorate-no-24-320-0,FF.html>.

78. The concept of contractual free choice and assent often sound good to the businessperson:

censes is related to a second problem: what techniques are there for policing unfair or overreaching terms included in the license by the licensor?⁷⁹ To the extent that these click-wrap agreements are adhesion contracts, the user or licensee effectively has no choice but to accept the objectionable term or reject the entire transaction. To the extent the user has already purchased a product and then finds additional terms (either under a rolling contract theory or because the licensor changes the terms after the conclusion of the contract), the licensee may find itself bound by terms it had no ability to negotiate.

Repeated attempts in the Article 2 revision process to deal with unfair terms in adhesion contracts were constantly objected to by industry groups, with the result that ultimately no changes were included in the 2001 final amendments to Article 2.⁸⁰ UCITA deals with the objectionable term in the license in two ways.⁸¹ First, any term that is found to be "unconscionable" will be unen-

However, contract law has a darker side as well. Cyberspace is not an egalitarian society with equal chances for every 'netizen.' In a world totally ruled by contract, weaker parties risk being subjugated and fundamental freedoms may be jeopardized. Freedom of contract may become contractual coercion, especially when dominant undertakings abuse their market power to impose contractual rules on powerless consumers, as if they were public authorities.

P. Bernt Hugenholtz, *Copyright, Contract and the Code: What Will Remain of the Public Domain*, 26 Brook. J. Int'l L. 77, 79 (2000).

79. See John J.A. Burke, *Contract as Commodity: A Nonfiction Approach*, 24 Seton Hall Legis. J. 285 (2000) (surveying the policing approaches available to standard form contracts and recommending a regulatory response).

80. See, e.g., section 2-206(b) of the November 1, 1996, Council Draft (providing that where a consumer manifests assent to a "standard form, a term contained in the form which the consumer could not have reasonably expected is not part of contract unless the consumer expressly agrees to it."). In the July 1999 draft, subsection (a) to section 2-206 provided that "in a consumer contract, a court may refuse to enforce a standard term in a record the inclusion of which was materially inconsistent with reasonable commercial standards of fair dealing in contracts of that type, or . . . conflicts with one or more nonstandard terms to which the parties have agreed." Commercial interests opposed all versions of new section 2-206, argued that the problem was already adequately addressed in the unconscionability provisions of UCC section 2-302, and insisted that any efforts to particularize UCC section 2-302 should be in the comments. See Speidel, *Trenches*, *supra* note 12 (calling attempts to draft a new provision particularizing the elements of unconscionability for consumer contracts the "pea under the mattress"). See also *infra* note 82.

81. In the drafting of UCITA (as well as the drafting of amendments to Article 2) attempts were made to deal with adhesion contracts generally. Ultimately, those attempts were abandoned, primarily because of opposition from licensors.

forceable.⁸² Second, if the term is available to the licensee only after a person becomes obligated to pay or begins performance, the licensee after having an opportunity to review the license may if it chooses return the information and obtain a refund.⁸³ Although allowing an opportunity to return has been lauded by some as a step forward for consumer protection, the objectors note that the right of return is of questionable value: the right of return can be easily obviated by the licensor who makes the information available ahead of time by posting it on the website,⁸⁴ thus ignoring the fact that the terms are non-negotiable and unread; the right does not apply if the new terms are construed as proposed modification of terms;⁸⁵ and most users or licensees never read the terms in the license anyway. Even if they read the term, the term at the time of acquisition may not seem sufficiently important to merit a return; the costs invested in the deal to date may be great; and transaction costs (time, aggravation, replacement) are not covered.

The only policing mechanism is that of unconscionability. The second method, discussed below, deals only with terms that come after the obligation to pay.

82. UCITA § 111. There has been a continuing argument about whether the unconscionability concept found in UCC section 2-302 gives sufficient protection against onerous terms in adhesion contracts. As a result, the 1999 Article 2 Annual Meeting Draft contained the following addition to section 2-302, which was approved by a 2-1 margin:

(b) In a consumer contract, a nonnegotiated term in a standard form record is unconscionable and is not enforceable if it

- (1) eliminates the essential purpose of the contract;
- (2) subject to Section 2-202, conflicts with other material terms to which the parties have expressly agreed; or
- (3) imposes manifestly unreasonable risk or cost on the consumer in the circumstances. *Id.*

When the 1999 Annual Meeting Draft was withdrawn from consideration, the provision was abandoned and not carried over by the new Drafting Committee into what are now the 2001 Amendments to the Article 2, in large part because of the organized opposition of industry. See Speidel, *Trenches*, *supra* note 12. Thus, the question of policing standard terms in adhesion contracts has been left to the courts on a case-by-case basis.

83. UCITA § 112 (explaining that a person can manifest assent to a term or record only if he or she has had an opportunity to review its terms, which in the case of terms coming after the obligation to pay arises, means only if the person has a right to a return if he or she rejects the term). This concept is further elaborated in the case of mass market licenses in UCITA section 209.

84. UCITA §§ 112, 212 (if there is pre-transaction disclosures of contract terms in Internet transactions where the contract is formed online for an electronic delivery of information then an opportunity to review is deemed given).

85. *Id.* § 112.

Again, these types of provisions must be examined against international concepts of appropriate policing tools, where the concept of policing against unfairness is seen as a business issue as much as a consumer issue.⁸⁶ The most relevant provision laid out in the UNIDROIT Principles of International Commercial Contracts allows a court to set aside a term in a standard form if it is "of such a character that the other party could not reasonably have expected it"⁸⁷ Ironically, this formulation, which the UNIDROIT Principles apply to commercial contracts, was rejected by the UCITA drafting committee as too liberal, even in the consumer context. Other international documents give additional powers to courts to police transactions in the consumer context, powers going well beyond the UNIDROIT rules.⁸⁸

The combination of the assent rules of UCITA (which find a binding agreement at the slightest click of a mouse) and the policing rules which do not give adequate oversight against overreaching led to passage of the following sense-of-the-house motion at the 1998 ALI Annual Meeting discussion on Article 2B (UCITA's precursor): "The current draft of proposed UCC Article 2B has not reached an acceptable balance in its provisions concerning assent to standard form records [§§2B-111, 2B-203, 2B-207, 2B-208, and 2B-304] and should be returned to the Drafting Committee for fundamental revision of the several related sections governing assent."⁸⁹ Of course, membership of the ALI never evaluated the final act (renamed UCITA) against this motion to police compliance with its wishes as a result of the disengagement of the ALI from the process in the spring of 1999.

86. See Michael J. Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* 90 (Rome, 1994).

An optimistic assumption that long prevailed at both domestic and international level was that contracts between merchants are concluded only by experienced and competent professionals in acting in accordance with well-established principles of fair dealing This assumption is increasingly being questioned . . . the UNIDROIT Principles move from a more realistic evaluation of international commercial bargains and provide a variety of means for 'policing' the contract or its terms against both procedural and substantive unfairness.

Id.

87. UNIDROIT Principles of International Commercial Contracts (1994), art. 2.20(1), available at <http://www.unidroit.org/english/principles/pr-main.htm>.

88. See *infra* notes 93-104.

89. Braucher & Linzer, *supra* note 26.

Consumer Transactions

The third area of controversy with potential relevance to the CISG debate involves coverage of consumer transactions within the CISG. The need to cover consumer as well as commercial transactions under one international legal rubric stems from an important feature of electronic commerce: on the Internet, the retail and wholesale markets converge, and the ability to distinguish between consumers and merchants diminishes. Were the CISG to cover consumer transactions, there would undoubtedly be both the risk that the CISG would undermine existing consumer protection under national laws, and the risk that pressure would be brought in the revision process to deal with consumer protection in the convention itself (a very difficult task given the disparate nature of consumer protection regimes around the world). In the drafting of UCITA, consumer protection was a significant area of concern,⁹⁰ sparking opposition by, among others, the Federal Trade Commission and the National Association of Attorneys General.⁹¹ For example, the failure of UCITA to deal with such matters as prior online disclosure of terms has been criticized as a failure to recognize applicable norms in consumer protection.⁹²

90. See, e.g., Ajay Ayyappan, *UCITA: Uniformity at the Price of Fairness?*, 69 Fordham L. Rev. 2471 (2001) (discussing the warranty provisions of UCITA and their impact on fairness); Christopher T. Poggi, *Electronic Commerce Legislation: An Analysis of European and American Approaches to Contract Formation*, 41 Va. J. Int'l L. 224 (2000) (urging efforts to develop international conventions on electronic commerce, particularly in the consumer area, but noting that U.S. proposals such as UCITA are "far from uncontroversial"); Michael L. Rustad, *Making UCITA More Consumer-Friendly*, 18 J. Marshall J. Computer & Info. L. 547, 581 (1999) ("If UCITA is to serve as an international template for licensing software, [it] should at least incorporate some additional consumer protections."); Saami Zain, *Regulation of E-Commerce by Contract: Is It Fair to Consumers*, 31 UWLA L. Rev. 163 (2000) (examining deficiencies in contractual approach, and in UCITA, with regard to consumer concerns in e-commerce).

91. See Letter from State Attorneys General to Gene N. Labrun, *supra* note 18.

92. O'Rourke, *supra* note 73, at 653.

Over the years, federal and non-uniform state enactments in the consumer protection area effectively either preempted or modified parts of Article 2, reflecting emerging views of relevant differences between business-to-business transactions and business-to-consumer transactions. Article 2B has the opportunity to incorporate consumer protection into its text, avoiding the later preemption that characterized Article 2.

Id.

Traditional contract law, in the United States and other jurisdictions, has developed doctrines that allow courts to set aside contracts, in whole or in part, if their terms (or one of their terms) are objectionable. Outside the United States, the law appears to be more protective against the application of unfair contract terms. The UNIDROIT Principles of International Commercial Contracts is a prime example, barring the enforceability of terms in standard form contracts that are both unreasonable and "surprising."⁹³ It is noteworthy that the UNIDROIT Principles are *not* consumer protection principles; by their own terms, the Principles apply only to commercial contracts.⁹⁴ Yet, this formulation for governing terms in standard form contract was rejected during the drafting of UCITA (and the revisions to Article 2 as well).⁹⁵

The European Union has enacted two regulations that give added protection to consumers, protection not similarly afforded in UCITA. The EU Directive on Unfair Terms in Consumer Contracts deals with unfair terms in sales contracts with a consumer buyer. Under that Directive, a term is unfair if (i) it has not been individually negotiated,⁹⁶ and (ii) it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.⁹⁷ The annex to the directive lists some terms that are *prima facie* unfair, including some terms ostensibly condoned by UCITA.⁹⁸ Terms must be in plain and intelli-

93. See *supra* note 87.

94. UNIDROIT Principles of International Commercial Contracts (1994), Preamble, available at <http://www.unidroit.org/english/principles/princ.htm#NR1> (last visited Nov. 17, 2001) ("These Principles set forth general rules for international commercial contracts. They shall be applied when the parties have agreed that their contract be governed by them.").

95. See, e.g., Speidel, *Trenches*, *supra* note 12; Rusch, *supra* note 12.

96. Council Directive 93/13/EEC of 5 Apr. 1993 on Unfair Terms of Consumer Contracts, 1993 O.J. (L 95) 29, art. 3.2 ("A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of pre-formulated standard contract.").

97. *Id.* at art. 4 ("[T]he unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract . . .").

98. Examples of possibly unfair terms under the Directive potentially conflicting with UCITA include: inappropriate exclusions or limitations on a consumer's remedies against the seller or supplier, including a right of offset granted the seller (Annex 1(b)); terms requiring a breaching consumer to pay a disproportionately high sum in compensation (Annex 1(e)); terms allowing the seller to terminate a

gible language.⁹⁹ Furthermore, where there is doubt about the meaning of a term, the interpretation most favorable to the consumer shall prevail.¹⁰⁰ The European Directive on Distance Selling Contracts grants certain substantive safeguards in "distance contracts."¹⁰¹ These safeguards include requiring certain disclosures prior to formation, in addition to granting consumers a seven-day unilateral right to withdraw.¹⁰² Choice of law clauses which deny consumers the benefit of such rights are suspect.¹⁰³ Other attempts to protect consumers against overreaching in adhesion contract situations have been proposed in Europe.¹⁰⁴ Any at-

contract of indefinite duration without reasonable notice except where there are serious grounds for doing so (Annex 1(g)); terms irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract (Annex 1(i)); and terms allowing the supplier to unilaterally change the terms of the contract without a valid reason specified in the contract (Annex 1(j)).

99. Council Directive 93/13/EEC of 5 Apr. 1993 on Unfair Terms of Consumer Contracts, *supra* note 96, at art. 5 (stating "where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language").

100. *Id.*

101. Council Directive 97/7/EC of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts, 1997 O.J. (L 144) 19. A distance contract means any goods or services contract "concluded between a supplier and a consumer under an organized distance sale . . . scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication" prior to contract creation. *Id.* at art. 2(1). This would include contracts created by e-mail as well as those concluded electronically.

102. *Id.* at arts. 4-6.

103. *Id.* at art. 12.

Member States shall take the measures needed to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-member country as the law applicable to the contract if the latter has close connection with the territory of one or more Member States.

Id.

104. In a recent letter to Parliament, the Dutch Minister of Justice suggested introducing so called "unwaivable use rights" in order to expressly protect information consumers against unconscionable licensing practices. Hugenholtz, *supra* note 78, at 83 n.27; see also Francois Dessemontet, *The European Approach to E-Commerce and Licensing*, 26 Brook. J. Int'l L. 59, 68 (2000) ("[T]he French Conseil d'Etat has suggested that a hyperlink be created so that the professional codes of conduct be embodied as General Terms and Conditions of the contract Such a renewed confidence in General Terms and Conditions could allow for the European Law and the U.S. self-regulatory approach to converge to a larger extent.") Arguments made during the UCITA drafting process, however, that certain terms (e.g., choice of law rules) should be "non-waivable" in mass market licenses were rejected.

tempts to enlarge the scope of the CISG, or to draft another international instrument dealing with both commercial and consumer transactions, will need to come to terms with these norms, which are broadly accepted in major trading nations.

C. *UCITA as an International Uniform Act*

An alternative to enlarging the scope of the CISG to accommodate software or information contracts is to follow the UCITA precedent and develop an international uniform law dealing with such transactions. Again, if such an effort were undertaken, there is much to learn from UCITA and the discussions surrounding its drafting and adoption. It is highly unlikely, however, that UCITA would ever be found amenable to wholesale adoption on the international level.¹⁰⁵

Structural Issues

There are a number of observations (both general and specific) that support this conclusion. First, some say a picture is worth a thousand words. Picture a draft 261 single-spaced pages long (or 123,829 words), consisting of eight parts with a total of one-hundred four (104) substantive provisions.¹⁰⁶ Its sheer length and complexity makes UCITA a difficult act to understand, even for those who are familiar with its provisions. Additionally, the technical nature of much of the material and the detailed definitions (66 in total—many with substantive rules in the definitions) combine to make reading and understanding the act a challenge. Compounding the problem is the drafting style that is often impenetrable, even for those familiar with UCITA. An example is section 601(d): "Except as otherwise provided in section 603 and 604, in the case of a performance with respect to a copy, this section is subject to sections 606 through 610 and sections 704 through 707."¹⁰⁷

105. A forthcoming German book examines the appropriateness (or inappropriateness) of the UCITA model under German law, considering such areas as warranties, choice of law, and formation. *Der E-Commerce Vertrag nach US Recht—eine Einführung in den Uniform Computer Information Transaction Act (UCITA) unter Berücksichtigung der Auswirkungen auf das Vertragsrecht für IT Produkte* (Otto Schmidt Verlag, forthcoming 2002).

106. If one considers the transition rules as well, there are 109 provisions in nine parts.

107. UCITA § 601(d).

There are two factors that contributed to the long, comprehensive nature of the UCITA draft, which has ambitiously tried to cover virtually every issue raised during the drafting process. Although the original project set out only to cover software, and UCITA, as finalized, covers only computer information transactions, drafts during the intervening stages were much broader in scope, covering all transactions in information.¹⁰⁸ This broad scope brought a wide variety of industries to the drafting table, all with their own agendas and issues; many provisions were incorporated into the final draft in an attempt to build support for the Act.¹⁰⁹ When the scope was narrowed, many of these provisions were left in.¹¹⁰ Even with its narrowed scope, however, there are those who have pointed out that the multiplicity of types of transactions covered by UCITA (ranging from off-the-shelf purchases of software, to access contracts, to contracts and to design software or databases) makes a "one size fits all" strategy unworkable.¹¹¹ "The net result is that (UCITA), in trying to be all things to all types of computer transactions, has reached a level of complexity that is at odds with . . . [the] goals of simplicity and clarification."¹¹²

A second factor contributing to the length and complexity was the desire to include provisions that were deemed essential to "sell" UCITA to legislatures and others. One such set of provisions are those dealing with contracting electronically (e.g., using electronic

108. See Pamela Samuelson & Kurt Opsahl, *How Tensions Between Intellectual Property Policy and UCITA Are Likely to be Resolved*, in *Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series* 741, 747 (1999) ("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.").

109. There was a second tendency that arose when an industry raised substantial objections to the draft: eliminate them from the act's coverage. See UCITA § 103(d) (excluding, inter alia, financial services transactions; insurance services transactions; motion picture or audio or visual programming; sound recordings, musical works, or phonorecords; and telecommunications products or services).

110. UCITA has been analogized to a huge Christmas tree with ornaments for every possible industry; the problem is that when the scope was changed and the Christmas tree was cut back, the number of ornaments remained the same.

111. See O'Rourke, *supra* note 73, at 648 (noting to the extent that the product consists of a bundle of rights granted under a license, the contract and not any objective tangible characteristics defines the product; the result is that a change in contract terms changes the product and results in a multiplicity of types of contracts).

112. *Id.* at 647.

mail or the Internet).¹¹³ Ironically, at the same time UCITA was being drafted, the National Conference was working on a separate product—the Uniform Electronic Transactions Act¹¹⁴—covering precisely those issues: electronic contracting. Questions were repeatedly raised during the drafting process about the need to include such provisions in UCITA in light of this separate Conference product;¹¹⁵ the justification articulated for keeping these provisions in UCITA was that it would be better for those under UCITA to have all contracting rules included in one place. A more likely explanation for the reticence to remove these provisions is that these were exactly the types of provisions being sought by many major industries seeking certainty regarding the enforceability of electronic contracts. By including these needed provisions, the hope was that those doing electronic contracting would support the draft as a whole.¹¹⁶ The importance of these

113. By contrast, those developing other types of e-commerce legislation found it important to distinguish between the rules governing electronic contracting in general, and the substantive rules governing the underlying transaction. Thus, the UNCITRAL Model Law on Electronic Commerce and the Uniform Electronic Transactions Act focus solely on the use of an electronic medium to contract and do not attempt to combine those issues with the substantive ones. *See also* O'Rourke, *supra* note 73, at 648 (noting that the unifying factor in the European E-Commerce Directive was the means of contracting rather than the subject matter of the contract, and suggesting that UCITA might "benefit from some synthesis" with the Commission Directive).

114. The Uniform Electronic Transactions Act (UETA) was adopted by the National Conference of Commissioners on Uniform State Laws in August of 1999. The full text of the act, with comments, is available at <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.htm> (last visited Nov. 17, 2001). As of September 2001, the UETA had been enacted in 38 states. Up-to-date information on the enactment status of the UETA may be found at http://www.nccusl.org/uniformact_factsheet/uniformacts-fs-ueta.asp.

115. Indeed, the ALI was one of those questioning the need for those provisions.

116. There are those who have cynically observed that most people are unaware of the distinctions between UCITA and UETA, frequently confusing the two, and that those who have indicated support for the former may well have only intended to support the latter! There are undoubtedly substantive reasons why the UCITA Drafting Committee wanted to retain its electronic contracting provisions. By comparison to the UETA drafting committee, the UCITA Drafting Committee was in favor of detailed rules that would strengthen the ability of parties (e.g., licensors) to enforce electronic contracts. *See* Amelia H. Boss, *Searching for Security in the Law of Electronic Commerce*, 23 Nova L. Rev. 585 (1999). Thus, UCITA's proposed rules on attribution were more detailed and directive than the corresponding provisions in the UETA. Ultimately, however, UETA's formulation prevailed and was adopted for UCITA on the floor of the National Conference.

electronic contracting provisions is illustrated by the argument repeatedly made during the drafting process that UCITA needed to be finished quickly to avoid federal preemption.¹¹⁷ The only major threat of preemption from inaction was in the field of electronic contracting, and that was realized with the passage of the federal E-Sign legislation.¹¹⁸

The exceptional detail in UCITA is a substantial barrier to its utility on the international level. Even if such detail might be warranted in the United States, for domestic and legislative purposes, it would be difficult to reach consensus on such technical matters internationally, given the divergent legal systems that need to be accommodated. Moreover, many of the provisions of UCITA were written against the backdrop of U.S. law,¹¹⁹ and the resulting rules may not be consistent with other legal systems.

In addition, UCITA was built against a backdrop of existing trade usages and practices—usages and practices that may not be representative of those occurring on the international level, or indicative of those that may exist in the future. Indeed, one of the persistent questions raised about UCITA is whether, even within the United States, industry practice is sufficiently established to justify codification.¹²⁰ One of the reasons given for the decision to abandon attempts to include information within the Uniform Commercial Code (Article 2B) and to proceed with a uniform law outside the Code was that the industry was sufficiently in flux that

117. This argument was made frequently by the Article 2B Reporter and Drafting Committee Chair during presentations to both the ALI and the National Conference.

118. Electronic Signatures in Global and National Commerce Act of 2000, 15 U.S.C.A. §§ 7001-07 (2001). Ironically, the passage of UCITA has spurred some pressure to respond with federal legislation or regulation preempting UCITA provisions, at least in the consumer area. See, e.g., *supra* note 22.

119. For example, the provisions on informational content (which were not uncontroversial) were drafted against the backdrop of the United States Constitution and its protection of free speech.

120. See O'Rourke, *supra* note 73, at 651 ("In many industries which would be governed by [UCITA], it is premature to refer to a usage of trade. Customs are rapidly evolving, and deference to a particular norm at a particular time may not be appropriate."). Additionally, the technologies themselves are still rapidly changing. See A. Michael Froomkin, *Article 2B as Legal Software for Electronic Contracting- Operating System or Trojan Horse?*, 13 Berkeley Tech. L.J. 1023, 1026 (1998) ("One reason why Article 2B [and UCITA have] proven to be so difficult to get right is that the information technologies to which [they] would apply are themselves in a state of ferment.").

it would be premature to include it within the Code. This same reasoning may well justify not proceeding with it at all, domestically or internationally, at this time.¹²¹

It should be noted that, on an international level, not all concepts included in UCITA may be necessary or desirable. To the extent UCITA purports to cover electronic contracting, for example, much of it may be unnecessary in light of products such as the UNCITRAL Model Law on Electronic Commerce or the UNCITRAL Model Law on Electronic Signatures. More importantly, as noted earlier, many of the concepts of UCITA may be inconsistent with international standards. Much of the consumer treatment, for example, must be considered in light of international norms such as those evolving within the OECD.¹²²

Collision With Intellectual Property

Probably the greatest obstacle to the wholesale adoption of UCITA internationally is its intrusion into the area of intellectual property. Although UCITA purports to be simply a "contracting" statute rather than an "intellectual property" regime,¹²³ one of the big areas of controversy in the United States is the intersection of UCITA and its validation of licensing on intellectual property regimes.¹²⁴ The relationship of licensing to intellectual property law is a complex one.¹²⁵ Although some have argued that a license is merely an agreement of the licensor not to sue for any violation of its intellectual property rights (and therefore merely supports the existing intellectual property regime), modern licensing schemes go much further: licensors use licenses to get *more* than they are granted by intellectual property law by increasing the sanctions against licensees for violation of that law; by placing limitations on

121. Commercial law tends to be descriptive or enabling rather than normative; until there is something to describe, it is difficult to legislate.

122. See OECD, *supra* note 77 and accompanying text.

123. See, e.g., Nimmer, *Looking Glass*, *supra* note 9, at 304 ("UCITA deals with contracts and not property rights.").

124. Hugenholtz, *supra* note 78, at 78-79; Rochelle C. Dreyfuss, *UCITA in the International Marketplace: Are We About to Export Bad Innovation Policy?*, 26 Brook. J. Int'l L. 49, 52-53 (2000) [hereinafter Dreyfuss, *Marketplace*]; Rochelle C. Dreyfuss, *Do You Want to Know a Trade Secret? Licensing Under Article 2B of the Uniform Commercial Code*, 87 Cal. L. Rev. 1193 (1999) [hereinafter Dreyfuss, *Trade Secret*].

125. A full exploration of that relationship is beyond the scope of this article. For a glimpse into the problem, see Rice, *supra* note 11.

the rights granted to licensees by applicable intellectual property law (e.g., on users' rights in or use of the information or by avoiding the first sale doctrine);¹²⁶ and by creating limitations on use of information that is not even protected by intellectual property law (e.g., non-copyrightable information).¹²⁷ In addition, to get even more protection than is given under applicable intellectual property law and contract law, licensors have sought the technological ability to restrict the use of information (both copyrighted and non-copyrighted), legislative authorization of these technological means,¹²⁸ and legislative penalization of those who attempt to circumvent those technological means.¹²⁹ These efforts have been criticized both on the basis of conflicts with intellectual property policy and competition policy.¹³⁰

126. See David A. Rice, *Licensing the Use of Computer Program Copies and the Copyright Act First Sale Doctrine*, 30 *Jurimetrics J.* 157 (1990); Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 *S. Cal. L. Rev.* 1239 (1999).

127. See generally *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (involving a license in a non-copyrightable compilation of telephone numbers).

128. See, e.g., World Intellectual Property Organization Copyright Treaty, art. 11, Dec. 20, 1996, 36 *I.L.M.* 65, 71; Digital Millennium Copyright Act of 1998, 17 *U.S.C.* § 1201 (Supp. IV 1998).

129. See, e.g., Council Directive 01/29/EC of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10, art. 6. [hereinafter *European Copyright Directive*], available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_167/l_16720010622en00100019.pdf. The proposed Copyright Directive implementing the WIPO Copyright Treaty contains a provision prohibiting acts of circumvention and also the manufacturing and selling of equipment suitable for that purpose. See also Council Directive 91/250/EEC of 14 May 1991 on the Legal Protection of Computer Programs, 1991 O.J. (L 122) 42, art. 7(1)(c) (containing earlier recognition of protection of technological means) [hereinafter *Software Directive*], available at http://europa.eu.int/eur-lex/en/lif/dat/1991/en_391L0250.html.

130. The use restrictions and restrictions on assignability are particularly egregious to some. As one writer has noted:

Software publishers expanded copy-use licensing objectives from protection against copying to shielding their programs from product-line competition, regulating development of interoperable products, and protecting information content not protected by copyright. Other use and transfer restrictions are employed to differentiate, and thereby price discriminate between, user markets . . . [and] foreclose the development of product resale or system maintenance competition.

Rice, *supra* note 11, at 281; but see Dessomentet, *supra* note 104, at 75 ("The very existence of a well-developed body of unfair competition law supplementing the unavoidable loopholes of the statutory intellectual property rights prevents Europeans from viewing the legislative protection of IP rights as an implicit exclusion of all other protection by means of contractual rights.").

It is in this light that the suitability of the UCITA provisions must be examined. The debates about what type of intellectual property protection is appropriate, particularly in an electronic environment, have been occurring on an international as well as a domestic basis. UCITA has a direct effect on that debate, since UCITA allows individual licensors to "preempt" that debate through licensing.

First, of course, it is necessary to determine under existing law those rights that cannot be changed by contract. European legislation grants certain rights to copyright users, for example, that do not depend upon contract for their existence. Four are included in the European Software Directive:¹³¹ (i) the right to make a back-up copy;¹³² (ii) the right to observe, test or study a computer program;¹³³ (iii) the right to test for error correction;¹³⁴ and (iv) the right to "decompile" or reverse engineer.¹³⁵ The Software Directive, however, is silent on whether these limits may be waived or varied by contract. Rights under the European Database Directive include the right to perform acts inherent to normal usage,¹³⁶ and the right to re-utilize substantive parts of a database.¹³⁷ Similarly, the law of other countries, in setting out the intellectual property balance of that regime, may give licensees of information certain use and other rights that may not be varied by contract.¹³⁸ However, an examination of these rights, and the extent to which they are mandatory, is only the beginning of the analysis.¹³⁹

131. Software Directive, *supra* note 129.

132. *Id.* at art. 5(2). That right "may not be prevented by contract insofar as it is necessary for that use." *Id.*

133. *Id.* at arts. 5(3), 9(1).

134. *Id.* at art. 5(1).

135. *Id.* at arts. 6, 9(1).

136. Council Directive 96/9/EC of 11 Mar. 1996 on the Legal Protection of Databases, 1996 O.J. (L 77) 20, art. 6(1) [hereinafter Database Directive], available at http://europa.eu.int/index_en.htm.

137. *Id.* at art. 8 (noting that the right may not be overridden).

138. See, e.g., Murumba, *supra* note 70, at 107 (discussing such issues under Australian law and the use of licenses "to destroy the delicate balance between the private and public domains that copyright in particular, and intellectual property in general, have maintained over the years").

139. UCITA recognizes that some of its provisions may be preempted by federal law such as copyright; if federal law invalidates a contract term, then federal law controls. It further recognizes that a license provision may be unenforceable because it contravenes fundamental public policy "to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of the term." UCITA § 105. Provisions such as these avoid, rather than confront, the

The second and larger question is what the appropriate framework should be for protection of rights in data. As Professor Rochelle Dreyfus has noted, there is a balance struck in every intellectual property scheme proposed (copyright, trademark, patent): the right of the creator inventor to exploit and the right of the public to use.¹⁴⁰ Of course, the balance struck in the United States is not necessarily the same as the balance struck in other countries: the inability to reach international consensus on appropriate international intellectual property schemes raises the possibility of similar difficulties in attempts to reach international consensus on appropriate private contractual schemes controlling the right to use information. UCITA is one-sided to the extent that it allows licensors of information to change that balance, i.e., by allowing a creator of information to tie up that information longer, or for more uses, than would be allowed by IP law, without recognition of the public domain and its importance:

Each [intellectual property] regime premised is around leaks. Each depends upon information being private for long enough for the creators to earn a profit, but then each permits the information to leak—drip—into a place where the public can use it freely. UCITA, in contrast, finds every hole, and then either plugs it or allows the contracting parties to plug it. Under UCITA, a licensor can “take out” a licensee—put a licensee out of competition in the licensor’s creative market forever. A licensor can bar fair use, reverse engineering, follow-on inventions, and new applications. The licensor can require grantbacks, tie ins and tie outs. What is more, UCITA is very efficient. It facilitates mass market contracts, and it makes sure those restrictions are imposed on successive licensees and remote purchasers, even when those purchasers are not aware of what they are letting themselves in for. . . . In the final analysis, what UCITA does is this: in the name of promoting exploitation of this generation of works, it hobbles future generations of creators.¹⁴¹

The acceptability of such provisions internationally is far from clear. As one commentator observed: “from a European perspec-

more critical issues of what those laws or policies should be—which is of course the subject of the ongoing intellectual property law debates. Query whether it is not better to get the balance right at the outset, rather than to depend upon an external body of law to draw the limits on enforceability.

140. Dreyfuss, *Marketplace*, *supra* note 124.

141. *Id.* at 52-53.

tive, . . . [t]he combination of contract and technology poses a direct threat to the copyright system as we know it, and may require an entirely new body of information law to safeguard the public domain."¹⁴² On the other hand, another commentator has noted that "most of the European laws' limitations on copyright laws are not mandatory in my view: licensors and licensees can establish their own regulations for themselves, disregarding the limitation to the copyright that benefit all people not bound by contract."¹⁴³

Whether or not one ultimately agrees with these observations, the point is that adoption of UCITA-like principles on the international level without a full inquiry into the merits of such arguments would be undesirable. Enactment of a uniform information transaction code without a "coherent, integral information policy"—or at least without consideration of such a policy—would be dangerous.¹⁴⁴

Other Substantive Issues

There are, of course, controversial provisions within UCITA that will have special significance on the international level. For example, "hidden" within the lengthy act are two provisions of profound consequence for all transactions: those addressing choice of law and choice of forum issues.¹⁴⁵ Again, the expansive grant of party autonomy in these areas, and whether those rules are appropriate, is the subject of much ongoing debate—both within the context of UCITA¹⁴⁶ and on a more generalized basis as well.¹⁴⁷

142. See Hugenholtz, *supra* note 78, at 78-79 (footnote omitted).

143. Dessemontet, *supra* note 104, at 76.

144. Dreyfus, *Marketplace*, *supra* note 124; see also Murumba, *supra* note 70, at 92.

Although they effect fundamental changes, these legislative initiatives are sometimes characterized as just an effort to systematize or reconfigure transactional law into a form useable in the digital environment, but the vigorous worldwide debate which has surrounded these initiatives—especially UCITA—indicates that there is much more at stake here than mere systematization or adaptation . . . [What] is at stake is no less than the very foundations of an emerging law of the digital domain. In the context of software licensing, that law consists of three interlocking components: contract, intellectual property, and increasingly, the law-like architectural features and protocols of that domain.

Id.

145. UCITA §§ 109, 110.

146. See, e.g., Amos Shapiro, *Territorialism, National Parochialism, Universalism and Party Autonomy: How Does One Square the Choice-of-Law Circle?*, 26

Obviously, before such rules are raised to the international level, it is necessary to examine their consistency with other law,¹⁴⁸ such

Brook. J. Int'l L. 199, 205 (2000) (noting that "a choice-of-law methodology that aspires to promote the idea of objective fair notice ought to refrain from designating as applicable a system of law that clearly has no appropriate relationship with a party to the litigation"); William J. Woodward, Jr., *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, 54 SMU L. Rev. 697 (2001). At least one author appears to believe that in the case of applicable law, uniformity is nigh impossible. Ted Janger, *Jurisdictional Competition and the Dim Prospects for Uniformity*, 26 Brook. J. Int'l L. 187, 196 (2000).

Thus a law of the licensor rule is unlikely to become a uniform choice-of-law rule under either a decentralized or uniform law approach, and is likely to create an incentive towards a substantive race to the bottom if it is adopted as a mandatory rule of international law. [The] law of the licensee rule would not appear to solve the problem. The same pressures that would likely defeat uniform adoption of a UCITA type rule would work in reverse with regard to a law of the licensee rule.

Id.

At the 1997 meeting, discussions on choice of law were curtailed when the Reporter agreed to reexamine whether the parties to a contract may choose the law of a jurisdiction with no connection to the transaction as the law governing the transaction, as well as the issue of what constitutes a manifestation of assent to the law of a given jurisdiction. At the 1998 ALI Annual Meeting discussing Article 2B, the membership appeared to be equally divided over a sense-of-the-house motion to delete this subsection and the choice of law provisions in their entirety, leaving the issue of the UCC's contractual choice-of-law provision to be resolved by the Article 1 Drafting Committee. The decision of the ALI to withdraw from the process precluded any further ALI action on these provisions.

147. The changes to the choice of law provisions contained in proposed revisions to Article 1 of the Uniform Commercial Code have provoked a great deal of discussion. See Woodward, *supra* note 146; Fred H. Miller, *Intrastate Choice of Applicable Law in the UCC*, 54 SMU L. Rev. 525 (2001); Amelia H. Boss, *The Jurisdiction of Commercial Law: Party Autonomy in Choosing Applicable Law and Forum under Proposed Revisions to the Uniform Commercial Code*, 32 Int'l Law. 1067 (1998); Kathleen Patchel, *Choice of Law and Software Licenses: A Framework for Discussion*, 26 Brook. J. Int'l L. 117 (2000).

148. One particular aspect of the choice of law rule bears special note: the differentiation between the law of jurisdictions inside and outside the United States. Under UCITA, if the laws of a country outside the United States apply as a result of the choice of law provisions, that law governs only if it provides substantially similar protections and rights to a party not located in that jurisdiction as are provided under UCITA. UCITA § 109(c). Significantly, this rule applies only if there is no contract choice of law provision: the theory being that the parties (including consumers) can agree to give up the protections they would otherwise be entitled to. To the extent that this provision demonstrates a "U.S.-centric" provision, its propriety on an international basis is extremely questionable. A similar problem exists in the proposed revisions to Article 1 of the Uniform Commercial Code.

as the Rome Convention which determines choice of law¹⁴⁹ and the 1968 Brussels Convention on choice of forum,¹⁵⁰ and to examine their propriety in light of international discussions such as those currently taking place in the Hague.¹⁵¹ Recognition of party autonomy is taken to an even further extreme in UCITA's condonation of a licensee's self-help rights, which calls into question the propriety (from both a legal and policy perspective) of the use of technological methods to replace both contract and intellectual property law as a method of protecting a licensor's rights in information.¹⁵²

Despite the difficulties inherent in adopting UCITA as model international legislation, UCITA is nonetheless useful as a guide to future work in the field. Even the critics of UCITA recognize the contributions that it has made to the development of the law,¹⁵³ and many of UCITA's provisions deserve attention and study to determine what can be learned from them. UCITA has succeeded in identifying many of the electronic commerce issues that need resolution, even if the solutions it proposes do not ultimately prevail. In addition, UCITA has succeeded in formulating some more general concepts that represent a step forward in the development of the law. The challenge is to ferret out the good.

149. Convention on the Law Applicable to Contractual Obligations, *opened for signature* June 19, 1980, 1980 O.J. (L 266) 1.

150. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1978 O.J. (L 304) 77.

151. Hague Conference on Private International Law.

152. See generally Robbin Rahman, *Electronic Self-help Repossession and You: a Computer Software Vendor's Guide to Staying out of Jail*, 48 Emory L.J. 1477 (1999); Craig Dolly, *The Electronic Self-help Provisions of UCITA: A Virtual Repo Man?*, 33 J. Marshall L. Rev. 663 (2000). One of the arguments frequently advanced in favor of the self-help provisions is that self-help is already recognized in the Uniform Commercial Code Article 9 provisions dealing with default; this is one area where there is apparently a reluctance to admit that the issues involving electronics are sufficiently different to merit a different rule. See Hugenholtz, *supra* note 78, at 78-79 ("The combination of contract and technology poses a direct threat to the copyright system as we know it, and may require an entirely new body of information law to guard the public domain.").

153. See, e.g., Dreyfuss, *Marketplace*, *supra* note 124, at 49 (while criticizing UCITA, expresses enthusiasm for "a system along the lines" of UCITA—"a contractual code facilitating information exchange, applicable uniformly throughout a trading region.").

One concept that originated in UCITA, that of a "mass market" license, deserves particular study.¹⁵⁴ In the past, much legislation has distinguished between transactions based upon the identity of the parties to the transaction: e.g., merchant versus non-merchant¹⁵⁵ or consumer versus merchant. UCITA, however, recognizes that it may make sense to distinguish between transactions based *not* on the identity of the parties, but on the nature of the contracting process leading to the agreement. One should distinguish the execution from the concept of the mass market contract: whether or not one agrees with the particulars of the definition of the "mass market" license, or with the specifics of the rules applicable to such a license,¹⁵⁶ the concept may become a useful tool for future analysis.

A second example of an attempt in UCITA to deal with legitimate issues is in the area of mistake. Although mistakes occur in any environment and with regard to all kinds of subject matter, UCITA recognizes that the possibility of mistake in an electronic environment is sufficiently high and the costs of protecting against such error relatively low so that legislative inducements to reduce error and protect individuals may be appropriate. As a result, UCITA contains a specific error correction procedure,¹⁵⁷ as does the Uniform Electronic Transactions Act.¹⁵⁸ Although there are differences between the two formulations,¹⁵⁹ they both arguably go beyond the more traditional rules of mistake found in United States law or in European contract law.¹⁶⁰ The need for error correction procedures has been acknowledged in the European E-Commerce Directive, which mandates that each member state en-

154. See Holly K. Towle, *Mass Market Transactions in the Uniform Computer Information Transactions Act*, 38 Duq. L. Rev. 371 (2000).

155. This is the distinction adopted in Article 2 of the Uniform Commercial Code.

156. See, e.g., Chow, *supra* note 51 (critiquing section 109's applicability to mass market licenses). A frequent criticism of UCITA is the failure to recognize that mass market licenses, to the extent that they are not negotiated and based on true assent, may need special rules in such areas as choice of law and forum and transferability restrictions. See Braucher, *supra* note 65, at 2.

157. UCITA § 214.

158. UETA § 10.

159. UCITA deals with consumers, the UETA with individuals. UCITA applies if there has been an error in an electronic message created by a consumer using an information processing system, whereas the UETA deals with both errors by the individual and changes in the message occurring during transmission.

160. See Ramberg, *supra* note 34.

sure that service providers make available "appropriate, effective and accessible technical means allowing [the customer] to identify and correct input errors, prior to the placing of the order."¹⁶¹ The directive, however, simply mandates the presence of error correction procedures, but gives no remedy in the case of uncorrected errors. UCITA, as well as the UETA, may help inform the debate on these issues.¹⁶²

III. THE BIGGER PICTURE

How does the UCITA experience fit into the broader framework of law making? In many respects, that experience (and its potential international component) raises the question of the nature of law-making both domestically and internationally. At least one European scholar has characterized the substantial failure of the states to enact UCITA as a demonstration that the United States "has not yet resolved to regulate by law, on a nation-wide scale, the basic issues raised by contracting on the Net."¹⁶³ Thus, in the United States, common law will develop to respond to the needs of electronic commerce, filling the gaps as need be. By contrast, the lack of any common law in many European and other countries means that, if there is to be *any* body of law on electronic commerce, it must be imposed by statute or be "regulatory." Thus,

161. Council Directive 00/31/EC of 8 June 2000 on Certain Legal Aspects of Information Society Services, In Particular Electronic Commerce, In the International Market (Directive on Electronic Commerce), 2000 O.J. (L 178) 1, art. 11. The directive does allow, however, non-consumer parties to agree that such procedures not be provided, and further exempts from the error correction procedures "contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications." Thus, it appears to be geared primarily toward web-based applications facilitating the placement of orders. Query whether, in the case of a merchant buyer, the Directive would give effect to a provision in a click-wrap agreement on the site waiving any rights to error correction procedures.

162. There are, of course, many other concepts in UCITA that merit study, such as its concept of electronic agents. See, e.g., Ian R. Kerr, *Spirits in a Material World: Intelligent Agents as Intermediaries in Electronic Commerce*, 22 Dalhousie L.J. 188 (1999); Jean-Francois Lerouge, *The Use of Electronic Agent Questioned under Contractual Law: Suggested Solutions on a European and American Level*, 18 J. Marshall J. Computer & Info. L. 403 (1999) (noting the need to address issues raised by use of electronic agents in electronic commerce, particularly in the areas of assent and mistake, but rejecting the UCITA approach and formulation); Ian R. Kerr, *Providing for Autonomous Electronic Devices in the Uniform Electronic Commerce Act*, at <http://www.ulcc.ca/en/cls/index.cfm?sec=4&sub=4f>.

163. Dessemontet, *supra* note 104, at 61.

arguably the need for a detailed statutory framework for electronic commerce is greater in Europe than in the United States.

Yet most of its supporters would undoubtedly balk at characterizing UCITA as "regulatory." UCITA proponents went to great lengths to assure that, from their perspective, the resulting act *was not* regulatory and resisted attempts to include provisions that they had deemed regulatory in substance.¹⁶⁴ This apparent disagreement as to whether or not UCITA is "regulatory" reveals a far more fundamental difference between UCITA and the type of legislation one typically finds in civil law or European countries. In the latter, legislation or regulation is most frequently aimed at putting restrictions on what private parties may do, or mandating what they must do. An example is the European Directive on Electronic Commerce, which requires disclosures of prescribed information and use of prescribed procedures in commercial transactions.¹⁶⁵ UCITA arguably represents a different perspective of an appropriate legal framework for electronic commerce than one might find internationally.¹⁶⁶ As one commentator noted:

By applying national law rather than some cyberspace law that would of course be heavily influenced by U.S. law, we try to keep some autonomy. By applying the consumer's law, we apply European law in most cases where a U.S. supplier is involved. But for how long can we check the advance of U.S. notions of e-commerce? The question is moot. Legislative autonomy is important inasmuch as it allows Europe to bargain for fair terms and conditions when an international convention of some sort will be prepared. Legislative autonomy is not an end in itself, but a means to reach a balanced solution—for contracting generally, for privacy, for intellectual

164. Ring, *supra* note 64, at 326-27.

165. See, e.g., Directive on Electronic Commerce, *supra* note 161, at art. 5 (required disclosures of information by service providers), art. 7 (restrictions on unsolicited commercial communications) and art. 11 (mandating procedures to be followed upon receipt of orders and mandating availability of error correction procedures).

166. There are some that might argue that UCITA is an example of "private rent-seeking" where private interests influence the lawmaking process to achieve redistributive goals, e.g., licensors of software "dominate the rulemaking process and impose on the rest of the world a set of rules that diminishes overall welfare but that make licensors better off." Paul B. Stephen, *Choice of Law and Its Consequences: Constitutions for International Transactions*, 26 Brook. J. Int'l L. 211, 215 (2000); see also Iain Ramsay, *The Politics of Commercial Law*, 2001 Wis. L. Rev. 564.

property protection and transactions, and for conflicts of law.¹⁶⁷

Despite this apparent conflict, there is a lot to be learned from UCITA and the drafting experience. One view is that the process is just beginning. There may be a lesson to learn here from the UCC; it was initially completed by the National Conference and the ALI in 1952, and Pennsylvania quickly became the first to enact it. Adoptions stopped, however, when the Code came under intense scrutiny and attack, leading the drafters to abandon enactment efforts and completely overhaul the Code, resulting in a finally enactable version in 1958.¹⁶⁸ It may well be time to sit back and reflect on UCITA: its contributions, its controversies and its criticisms.¹⁶⁹ It is time for the international community to critically scrutinize and (where appropriate) adopt and adapt provisions from UCITA, allowing a symbiotic process to occur which furthers the improvement and harmonization of law.¹⁷⁰

167. Dessemontet, *supra* note 104, at 64.

168. For an interesting comparison of the drafting histories of both the UCC and UCITA, see Thomas J. Murphy, *It's Just Another Little Bit of History Repeating: UCITA in the Evolving Age of Information*, 30 Golden Gate U. L. Rev. 559 (2000).

169. See O'Rourke, *supra* note 73, at 657 ("The point is that [UCITA] should not be abandoned. Rather, it should provide the basis for a national and international discussion of how best to reconcile the sometimes conflicting goals of flexibility and uniformity in the context of an overarching desire to encourage global electronic commerce.").

170. Amelia H. Boss, *Electronic Commerce and the Symbiotic Relationship Between International and Domestic Law Reform*, 72 Tul. L. Rev. 1931 (1998) (analyzing the symbiotic process in the area of electronic signatures and electronic records leading to the UNCITRAL Model Law on Electronic Commerce and the Uniform Electronic Transactions Act).

