

**MINUTES OF COMMISSION MEETING**  
**January 27, 2000**

Present at the meeting of the New Jersey Law Revision Commission held at 153 Halsey Street, 7<sup>th</sup> Floor, Newark, New Jersey were Commissioners Albert Burstein, Hugo Pfaltz, Jr., Vito Gagliardi, Jr., and Peter Buchsbaum. Grace Bertone and Professor William Garland attended on behalf of Commissioners Rayman Solomon and Patrick Hobbs, respectively.

Also attending were: Dawn Shanahan and Tisha Adams of the Division of Consumer Affairs, and Riva Kinstlick of the Prudential Insurance Company.

Minutes

The Commission approved the Minutes of the December 16, 1999 meeting as submitted.

Annual Report

Commissioner Buchsbaum said that the Property Tax project should be put into the Report as work in progress even though the Commission has not worked on the project since Judge Lawrence Lasser died. The Commissioners asked Mr. Cannel to try to get Harry Haushalter and Edward Rosenblum to resume work on the project, and also to ask Judges Andrew and Crabtree if they would be willing to help.

Uniform Computer Information Transaction Act (UCITA)

Maureen Garde presented the two areas of UCITA analyzed in the January 18, 2000 memorandum: forum selection clauses, and federal copyright law preemption and "first sale" doctrine.

Regarding forum selection clauses, there is a difference between a peer-to-peer negotiated contract and a mass-market contract. The Caspi case (Caspi v. The Microsoft Network, L.L.C., et al, 323 N.J. Super. 118 (App. Div. 1999), certif. denied, 1999 NJ Lexis 1478 (NJ Oct 25, 1999)) validates a forum selection clause. But it is a class action case. One approach is to limit forum selection clauses in certain kinds of transactions, and to define a class of cases when home forum is preserved. A \$10,000 limit for this class would take in every mass-market transaction. If the provision is eliminated from UCITA, the common law will determine the outcome.

Rive Kinstlick of Prudential said that if the criterion is monetary, that is fine, but if a case must be a mass market transaction as defined by UCITA it will pose problems. Mr. Cannel replied that under the Commission's approach, the term "mass market" includes more than consumer cases.

Professor Garland said that in a commercial context, the parties should be allowed to negotiate a forum selection clause. Commissioner Buchsbaum recalled that the Commission had removed a restriction on forum selection clauses from the Report on Standard Form Contracts because the restriction was limited and stated that New Jersey consumers only have the right to use New Jersey courts and so seemed chauvinistic. He asked if the Commission should consider either the Cem Kaner approach or the Article 2A approach, and that Ms. Garde's memo was "terrific."

Ms. Garde suggested that the Commission not make a firm decision until it reaches more issues. Chairman Burstein said that at this time the Commission should be guided by its position on Standard Form Contracts. Commissioner Buchsbaum asked if a 2A approach to choice of forum also might be better for the Commission's position on Standard Form Contracts. Commissioner Gagliardi favored adopting either the first or second approaches found on page five of the memorandum, but not the third. (1<sup>st</sup> approach: amend Section 110 to make forum-selection clauses unenforceable in cases involving mass market transactions of moderate value; 2<sup>nd</sup>: limit enforcement of forum-selection clauses in all mass market cases; 3<sup>rd</sup>: eliminate the forum selection clause entirely.) Grace Bertone agreed with Commissioner Gagliardi. Commissioner Pfaltz said that perhaps the third approach is the right approach.

Chairman Burstein said that this issue, divided 3-3, should be laid aside while the Commission tests out the other issue.

There was unanimous agreement to not make a distinction between consumer and other mass-market transactions.

Regarding the second issue, Ms. Garde said that the issue of interaction between federal copyright law and UCITA is difficult. UCITA weights state law so that a transaction will be a license, not a sale. While what is a sale under copyright is a federal law question, UCITA attempts to affect that classification. She referred to the New Jersey Library Association's paper (Fax 1/26/00) which sets out library organizations' concern about UCITA and reasons for opposing its adoption. Increasingly, electronic books will be used, and will fall under UCITA.

Chairman Burstein said he did not grasp where the problems exist. Mr. Cannel referred to the Novell case (Novell, Inc. v. Network Trade Center, Inc., 25 F.Supp. 2d 1218 (D. Utah Cent. Div. 1997)) in which plaintiff lost in federal court. Chairman Burstein said that he want Carlyle Ring's opinion on the question: What is the occasion for restriction? Why does UCITA say licensor/licensee instead of buyer/seller?

Professor Garland asked if state law could make reasonable, as opposed to unreasonable, restraints on sales. Staff will ask NCCUSL to explain how it sees UCITA's relation to copyright law.

Chairman Burstein asked why libraries dislike UCITA. Mr. Cannel said because under UCITA more restrictions can be put on use of disks, etc. Commissioner Pfaltz said it would be premature now for the Commission to decide what restrictions on the use of computer materials were reasonable. Professor Garland favored letting the common law evolve. Ms. Garde reported that Lawrence Lessig of Harvard, Special Master in the Microsoft case, has written on UCITA and states that it is a mistake to attempt to codify the law yet. Chairman Burstein said that the Commission should go slowly.

Riva Kinstlick said that, under UCITA, a business concern may have licensed expensive software, then the corporation is prohibited from transferring it to a newly organized corporation.

Tisha Adams of Consumer Affairs asked whether the Commission should just say that UCITA is poorly drafted and proposes that the Legislature not adopt it. Chairman Burstein said that the commission needs to investigate further before so concluding.

#### Common Interest Ownership

Mr. Cannel will meet with Commissioner Buchsbaum and Professor Garland to do technical drafting. The Commission will be able to review the draft produced and to consider substantive issues at the February meeting.

Legislative State of Commission Projects

Uniform Anatomical Gift Act: Judith Ungar reported that Assemblywoman Charlotte Vandervalk has been approached as a possible sponsor, by the New Jersey Organ and Tissue Sharing Network.

Cemeteries: Mr. Cannel reported that introduction of a bill based on the cemetery project is still delayed by the inability of the Cemetery Association to formulate its own legislative suggestions.

Environmental Protection: Ms. Garde reported that bills on this project were still awaiting OLS action.

Miscellaneous

The Commission voted to change two proposed 2000 meeting dates (from June 22 to June 15, from October 19 to October 12) and to accept the other dates as proposed.

The next Commission meeting is scheduled for February 24, 2000.