

**MINUTES OF COMMISSION MEETING**  
**May 2, 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 and Vito Gagliardi, Jr. Grace Bertone attended on behalf of Commissioner Rayman Solomon and Professor William Garland attended on behalf of Commissioner Patrick Hobbs.

Also attending were: Carlyle Ring and Barry Evenchick, National Conference of Commissioners on Uniform State Laws; Joseph Frankel, Arthur Herrmann, Karen Howell and Riva Kinstlick, Prudential; John P. Friedman, USAA; Richard Stokes, Insurance Council of New Jersey; Carol Roehrenbeck, New Jersey Library Association and American Association of Law Libraries; James R. Maxeiner, Dun and Bradstreet; Carol S. Jacobson, Office of the Attorney General of New Jersey; Richard Goldberg, American Electronics Association; Mitchell Friedman, MetLife; Joseph Keeley, Business Software Alliance; Kris Ann Cappelluti, Riker Danzig; Mary Yenesel, Bell Atlantic; Joel Wolfson, Counsel to Nasdaq; and Sean Kennedy, Capital Public Affairs.

Minutes

The Commission approved the minutes of the March 23, 2000 meeting as submitted.

UCITA

Commissioner Burstein opened the meeting by noting that the meeting was convened to consider the Uniform Computer Information Transactions Act. He noted that Carlyle Ring and Barry Evenchick of the National Conference of Commissioners on Uniform State Laws were present to respond to memoranda prepared by Commission staff which identify several problems with UCITA.

Mr. Evenchick noted that UCITA began its life as Uniform Commercial Code Article 2B. Regrettably, the American Law Institute perceived 2B as of inadequate quality for incorporation into the Code. NCCUSL disagreed with this evaluation, renamed the proposed law and promulgated UCITA as a stand-alone act. The work on Article 2B began eight years ago; three years later Mr. Ring became the chairman of the drafting committee. Numerous drafting committee meetings attended heavily by interested parties were held; each drafting committee meeting was characterized by scholarly discussion of all the issues. UCITA then was approved overwhelmingly by the conference. It is law in two states, Virginia and Maryland.

Mr. Evenchick stated that although UCITA has caused controversy, the need for the act is obvious given the development of technology and the importance of the computer age. Mr. Evenchick noted that Mr. Ring and Ray Nimmer had submitted written comments addressing the Commission's concerns with UCITA.

Chairman Burstein asked Mr. Ring two questions: (1) whether it would not be more appropriate to resolve legal issues dealing with computer transactions at the federal level in view of the unlikelihood of achieving uniformity at the state level and (2) whether the Act was immature given the fact that the type of commerce it governed is new and in the early stages of development. Is NCCUSL too far ahead of the curve?

As to the first question, Mr. Ring stated that there are three ways of getting a uniform law: (1) international treaty, (2) federal legislation and (3) uniform state laws. According to Mr. Ring, the uniform state law process is the best approach. If the matter of computer transactions is left to Congress, the legal system is left with the problem of integrating UCITA, a piece of contract law, within the established framework of state contract law since there is no federal contract law. The Federal courts now look to state law to resolve contract questions. In addition, a national UCITA would shift contract litigation from the state to the federal courts; now, most contract disputes are handled in state courts. The delegation to Congress of power now exercised by the states may have undesirable political consequences. Lastly, the process of shepherding legislation through Congress may not produce the best result. UCITA best fits within general state contract law.

As to the second question, the law needs to precede the full development of commercial practice. Mr. Ring cited the example of UCC 4A (Funds Transfers) whereby federal banking officials and banks asked for a law regulating the area. UCC 4A was a cutting edge statute that had a large degree of consensus. Similar circumstances surround UCITA. It is preferable to set rules to assure consistency; the alternative is the haphazard development of the common law. Support for this view is found in the Clinton administration paper on Internet development and diverse groups clamoring for new regulation. For example, because Internet transactions cross borders, the same legal result of making a contract should pertain in New Jersey and California.

Commissioner Gagliardi asked by UCC Article 2 does not cover the on-line procedure of goods, including software. Mr. Ring responded that Article 2 covers only goods, defined as tangible goods. Most information today is not contained on any physical media, like a disk to bring it arguably within the scope of UCC Article 2. Most software is downloaded where there is no tangible element. Article 2 does not apply to these transactions. In addition, there are policy reasons for treating goods differently than information. Information has First Amendment and intellectual property right implications.

Mr. Wolfson of the Nasdaq stock market emphasized that UCITA is not a software but an information statute. He said that there is no case law holding that information constitutes a good. The common law has not met the task of addressing legal problems arising under the contracting of information. UCITA deals directly with the on-line contracting process, warranties and the overlay of intellectual property law. UCITA provides clarity to rights and obligations of financing software, at present unsecured financing.

In response to Chairman Burstein's question that UCITA appears to disregard applicable federal law, Mr. Wolfson stated that UCITA contains a federal pre-emption clause and a clause providing that UCITA is subordinate to state fundamental public policy. Historically, courts have meshed federal copyright and state contract law.

Mr. Maxeiner of Dun & Bradstreet stated that information is covered by amorphous common law or contract. A uniform law on this subject is needed now and the quickest way to achieve that goal is through the NCCUSL process. The business community needs legal certainty, a law that it can point to in order to show that its contract terms are valid. UCITA will clarify the law and is better than dealing with fifty different laws. The business community does not expect perfect uniformity and expects changes to be made along the way.

Carol Jacobson of the Attorney General's Office stated that UCITA would impact the consumer. UCITA appears to favor a small group of vendors as opposed to the large group of consumers. There is concern with regard to Section 105's definition of "conspicuous" which is at odds with New Jersey law. UCITA's default provisions also favor the licensor rather than consumers. UCITA's use of licensing rather than sale raises additional problems in the Attorney General's view.

Mr. Ring responded to the Attorneys General letter submitted to NCCUSL. Changes were made at the annual meeting to address concerns raised by the Attorneys General. In Maryland, it was clarified that the consumer protection laws of that state, primarily geared to goods, apply to information transactions. The consumer problem exists already, is not caused by UCITA and in fact, is ameliorated by UCITA. UCITA follows the same rule as UCC; in case of conflict, consumer law controls.

Professor Garland asked the Attorney General's representative what more the Attorney General wanted in terms of consumer protection. Ms. Jacobson stated that UCITA was unclear as to whether it trumped consumer law. She also noted that, under UCITA, the vendor had the right to dictate the choice of forum and choice of law. In addition, UCITA contains a narrow definition of fundamental public policy. Professor Garland noted that it did not seem that the two parties were that far apart. Mr. Ring acknowledged that NCCUSL accepted non-uniformity as the inevitable product of individual state consumer law.

Professor Garland suggested identifying specific New Jersey consumer law statutes and listing them in UCITA itself.

Maureen Garde stated that UCITA defers to consumer law only to a certain extent. The default jurisdiction under UCITA depends on the nature of the transaction. If you buy the software in a store, there is one rule for jurisdiction. If you download it, there is another rule for jurisdiction. The question is whose consumer law applies in the case of a New Jersey consumer? On its face, UCITA can be read to divest the New Jersey Attorney General of his jurisdiction over UCITA covered transactions. Mr. Ring stated absolutely not. Choice of law pertains only to private parties, not a third party state official. It only binds those parties.

The question was posed if a New Jersey consumer puts AOL on his computer from a diskette sent by AOL, does New Jersey consumer law apply to the transaction. Ms. Garde stated that the disk is given free and that, subsequent to installing the software, a separate access contract is made that would be governed by the vendor's law, in this case Virginia. Mr. Wolfson maintained that the words of Section 105 were being read incorrectly. The term "this state" is not the choice of state law, but in a New Jersey transaction would be New Jersey.

John Cannel stated that it could be made clear that New Jersey consumer provisions continue to apply regardless of the parties' choice of law, but the more serious problem is that New Jersey consumer law includes non-consumers, that is, businesses. Mr. Cannel recounted a New Jersey case involving two commercial entities and a claim of consumer fraud. UCITA's definition of consumer is much narrower than the New Jersey definition. Mr. Ring stated that the UCITA definition is based on well-accepted definitions in commercial law.

Joe Frankel of Prudential stated that the legislation impacts the insurance business and that Prudential is not comfortable with it. He asked the Commission to proceed slowly.

The Attorney General's representative stated that Section 105's definition of "conspicuous" is based on the reasonable person standard. In New Jersey, the measure of man is not the reasonable person, but the average person. This is another source of serious conflict between UCITA and New Jersey consumer law.

Ms. Garde stressed that UCITA is an unclear statute and it is unclear how its rules would play out if enacted.

Mr. Wolfson maintained that the anonymity of information transactions created problems for the drafting committee resolving jurisdictional questions. Some vendors do not want to require personal information about the buyer. The issue is whether the law should require users to give up personal data.

Mr. Maxeiner stated that cyberspace transactions would likely deconstruct choice of law, as it is now known. Therefore, he feels it is important to deal with the issue in a statute to provide some clarity to the legal problem.

Ms. Garde stated that staff has called into question the claim of how different cyberspace transactions are from non-cyberspace transactions. These transactions are not as anonymous as they appear. Your IP knows where you are and so does your credit card company. The question of where people are is a supposed difficulty. Joseph Keeley of the Business Software Alliance disagreed, stating that his company's web business had difficulty identifying where purchasers were from, the issue being important because of his business's different price structures. UCITA creates a needed level of certainty in resolving these problems.

Mr. Cannel stated that the Commission would likely make a recommendation containing non-uniform amendments. Mr. Ring stated that in certain areas a state can have non-uniformity but in other areas deviating from uniformity defeats the purpose of the statute. Mr. Ring stated that non-uniform amendments must be dealt with on a case-by-case basis and offered to comment on any proposed non-uniform amendments. Mr. Ring could not define exactly the untouchable provisions. But he did say that the default rules should be universal around the country, as well as the formation rules. The consumer provisions were more open to non-uniformity.

Mr. Wolfson stated that meshing New Jersey consumer law with UCITA is unobjectionable, the Legislature having already spoken on the issue. But if the Legislature undermines the whole theory of the statute, there is no use in having it. Mr. Gagliardi noted that subsequent common law decisions interpreting the statute result in non-uniformity. However, Mr. Wolfson noted that the UCC lives with this degree of variation and the variations tend to be minor.

Mr. Cannel offered to pull all consumers out of the statute. Mr. Ring stated it would be difficult technically to do this and it would be unnecessary. The intent of UCITA is not to take away any existing consumer protections.

Carol Roehrenbach, representing the New Jersey Library Association and the American Association of Law Libraries objected to UCITA. Library staff that might deal with licenses is ill equipped to understand their terms. She was also concerned that UCITA might adversely impact the library loan process.

Richard Stokes of the Insurance Council of New Jersey also voiced his association's objection to the act.

Riva Kinstlick of Prudential objected particularly to the self-help provisions that allow vendors to put a time capsule in the program to shut it down. In a dispute, the vendor may improperly take advantage of this remedy. Hackers also may inadvertently trigger these time capsules.

Mr. Ring stated that electronic self-help required express consent of the parties. Under common law, a vendor can insert a time bomb in software and use a non-conspicuous term in the contract. UCITA reverses the common law. Unless the provision is separately assented to, the electronic self-help remedy is not available. In terms of the hacker argument, you cannot have the time bomb

unless you agreed to it and if you do have it, most companies out-source security and maintenance issues.

In closing, Mr. Evenchick offered to work with the Commission. He predicted that there would be a UCITA, or something like it, in New Jersey. UCITA has been introduced in the New Jersey Legislature.

Chairman Burstein stated the Commission had considered the project at length and hoped that the Commission would be able to find a middle ground.

Miscellaneous

The Thursday, May 25 meeting date remains as originally scheduled.