Oklahoma City University School of Law

From the SelectedWorks of Alvin C. Harrell

2000

UCITA: Opportunity or Obstruction

Alvin C. Harrell, *Oklahoma City University School of Law*

Available at: https://works.bepress.com/alvin_harrell/167/

UCITA: OPPORTUNITY OR OBSTRUCTION?

ALVIN C. HARRELL*

The Uniform Computer Information Transactions Act (UCITA) was approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1999 and revised in 2000. It has been enacted in Maryland and Virginia and is under consideration in six other states, including Oklahoma.

UCITA is designed to govern transactions (including sales and leases) in computer information such as software. As software leasing transactions have become increasingly important to the United States economy, the need for rules to govern such transactions has become more apparent.

Consistent with most of the case law, UCITA adopts an approach that is consistent with American legal traditions, including contract law tempered by specified consumer protections. This raises the basic question: Is it appropriate to extend American legal traditions to the world of electronic commerce, or is a more regulatory model needed? In answering this question, UCITA has drawn various criticisms. This Article discusses these issues.

I. BACKGROUND OF UCITA

The Uniform Computer Information Transactions Act (UCITA) is a recent addition to the numerous uniform laws sponsored by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and

* Your Author wishes to express his appreciation to University of Oklahoma College of Law Professor Fred H. Miller for his assistance in the preparation of this Article. Your Author remains solely responsible for any errors.

HeinOnline -- 25 Okla. City U. L. Rev. 333 2000

offered to the states for enactment.[1] A guiding purpose of NCCUSL is to draft uniform laws through a process that utilizes highly regarded legal talent in a relatively nonpartisan atmosphere more conducive to good draftsmanship than the typical legislative session. While such a process can never be fully nonpolitical, NCCUSL's success in producing superior legislative products is impressive. Arguably, the result, including masterpieces such as the Uniform Commercial Code (UCC), is the best drafted set of statutes ever written.

UCITA began life as a proposed addition to the UCC, to be called Article 2B.[2] However, as work progressed it became apparent that proposed Article 2B would represent a departure from the UCC, in that Article 2B would cover relatively new types of transactions, whereas most of the UCC covers types of transactions that have been conducted for hundreds of years.[3] Even though UCITA is fully consistent with the UCC, in that both are based on well established principles of law, it became clear that any effort to confirm these principles in the context of electronic information transactions would encounter new political opposition from those who would prefer to create an alternative legal structure. Thus, the consistency of UCITA with the UCC and other established law came to be viewed as a strength by UCITA's supporters, but as a weakness by its detractors. Rather than taint the well-established and widely accepted principles of the UCC

---

1. *See generally* Fred H. Miller & Robert T. Luttrell, *Local Comments to Uniform Laws: A Winning Combination*, 48 CONSUMER FIN. L.Q. REP. 60 (1994).

2. *See* Fred H. Miller, *UCC Article 2B: Good Law or Flawed Law*, 52 CONSUMER FIN. L.Q. REP. 374 (1998).

3. *See, e.g.*, ROBERT L. JORDAN & WILLIAM D. WARREN, NEGOTIABLE INSTRUMENTS, PAYMENTS AND CREDITS 1-4 (4th ed. 1997) (quoting Grant Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441, 446-50 (1979), and citing JAMES S. ROGERS, THE EARLY HISTORY OF THE LAW OF BILLS AND NOTES (1995)); JOHN O. HONNOLD ET AL., SECURITY INTERESTS IN PERSONAL PROPERTY 1-7 (2d ed. 1992) (citing numerous authorities). When originally drafted, UCC Article 9 was perhaps even more revolutionary than UCITA, and its subsequent overwhelming success is a tribute to the uniform law process. But, unquestionably, such innovation carries political risks that can complicate the enactment process. Even Article 9, for all of its acclaim, may have needed the coincidental boost provided by a bizarre federal case that threatened pre-Article 9 secured credit laws in bankruptcy, making Article 9 an expedient political solution. *See* Constance v. Harvey, 215 F.2d 571 (2d Cir. 1954) (expanding the rule of *Moore v. Bay*, 284 U.S. 4 (1931) so as to endanger a large number of non-UCC secured claims in bankruptcy). The U.S. Supreme Court ultimately rejected the *Constance* view, in *Lewis v. Manufacturers National Bank of Detroit*, 364 U.S. 603 (1961), but by then Article 9 and the UCC were well on their way to nationwide enactment. Obviously, UCITA cannot count on such assistance.

HeinOnline -- 25 Okla. City U. L. Rev. 334 2000

with the controversy inherent in any effort to enact new legislation, Article 2B was withdrawn from the UCC and sponsored independently by NCCUSL as a separate uniform law called UCITA.[4]

As with any proposed legislation, UCITA should be considered on its merits and not on the basis of its procedural history. Thus, it is interesting, but largely irrelevant for critics of UCITA to argue that it should not be enacted because it was withdrawn from the UCC.[5] Computer information transactions did not exist when Lord Mansfield and his colleagues adapted the Law Merchant to create the common law of contracts, including a law of commercial transactions that ultimately evolved into the UCC, and therefore the job of integrating computer information transactions into our system of commercial law was left to the twentieth and twenty-first centuries. It is time for that job to proceed, and the only valid question is whether UCITA is the best available means to do it.

II. WHAT IS UCITA?

As noted, UCITA is a uniform law approved last year by NCCUSL and offered to the states for enactment. It governs transactions in computer information, such as licenses of computer software, in much the same way

---

4. UCITA was first approved by NCCUSL at the 108th Annual Meeting of NCCUSL, July 23-30, 1999. (1999 uniform text). Amendments were approved at the 109th NCCUSL Annual Meeting, July 28 - August 4, 2000, creating the 2000 uniform text.

Most of the amendments, to sections 103, 104, and 112, and a new section 216, broaden the exclusions from UCITA to exclude certain transactions of interest to the Motion Picture Association of America, Magazine Publishers of America, Newspaper Association of America, National Cable Television Association, National Association of Broadcasters, and the Recording Industry Association of America. As a result these groups withdrew their previous opposition to UCITA. *See* Explanation of Amendments, NCCUSL 2000 Annual Meeting draft of UCITA. Additional 2000 amendments to UCITA section 816, affecting electronic self-help, are discussed *infra* at Part VIII.

5. Withdrawal from the UCC was a joint decision of NCCUSL and the American Law Institute (ALI), sponsors of the UCC. The ALI adopted a neutral stance on the substance of Article 2B, and NCCUSL proceeded alone to promulgate UCITA. While unusual, there is nothing particularly significant in this chain of events, beyond the considerations noted *supra* in this text. After the fact, some individuals involved in this process have voiced their personal opinions on specific issues in UCITA, sometimes complaining about one thing or another, and sometimes intimating that criticisms reflect badly on UCITA. But anyone who has observed a legislative or uniform law drafting process knows that such differences of opinion on individual issues are common to the point of being inevitable, and essentially are irrelevant to the value of the final product, which necessarily must represent a series of compromises between such divergent views.

HeinOnline -- 25 Okla. City U. L. Rev. 335 2000

that UCC Article 2 covers sales of goods and Article 2A covers leases of goods.[6] Specifically, UCITA covers "computer information transactions," defined to include agreements to create, modify, transfer, or license computer information and related rights.[7] While in many ways UCITA is the functional equivalent of Articles 2 and 2A, a license is sufficiently different from a sale or lease, and computer information is sufficiently different from goods, that separate legal treatment of computer information transactions is warranted.

But as noted, UCITA is consistent with Articles 2 and 2A in many ways, particularly in its recognition of party autonomy and the law of contracts. UCITA largely avoids a regulatory approach that would mandate contract terms or prescribe detailed requirements for transaction terms. Instead, it recognizes the parties' agreement as the foundation for their legal relationship, and seeks to adapt this transactional view to the context of computer information transactions. While this is consistent with commercial law practice and precedent, including the UCC, it also seems to be a basic point of contention that makes UCITA unacceptable to some critics.[8]

UCITA, however, is not unfettered contract law; it seeks to reinforce and enhance, in the context of computer information and related transactions, traditional and contemporary protections against abuse, using standards of reasonableness,[9] good faith,[10] unconscionability,[11] and public policy.[12] With regard to specific issues, such as the enforcement of form contracts or standardized agreements, UCITA combines principles from a variety of current sources of law to recognize rules that are thought to work fairly and efficiently in the context of software licenses and other computer information transactions.[13] Essentially, UCITA seeks to recognize and preserve freedom of contract, within the parameters of reasonable contract expectations and societal protections. It should be emphasized, however, that UCITA is not, and is not intended to be, primarily a consumer protection statute. Like the UCC, it is primarily commercial law, designed

---

6. *See* U.C.I.T.A. § 103 (2000 uniform text); Miller, *supra* note 2.
7. *See id* §§ 103 (scope), 102(a)(11) (definition).
8. This is reflected in arguments that UCITA is so "fundamentally flawed" that it is unworthy of consideration and should be totally rejected.
9. *See* U.C.I.T.A. §§ 104, 109 (choice of law) (2000 uniform text).
10. *See id.* § 104.
11. *See id.*
12. *See id.* § 105.
13. *See id.* §§ 106-107; Miller, *supra* note 2.

HeinOnline -- 25 Okla. City U. L. Rev. 336 2000

to provide an efficient legal foundation for voluntary economic transactions.[14] If some parties are to be relieved of responsibility in such transactions, or subjected to mandatory contract terms or other restrictions, or otherwise protected from contract risks in ways that go beyond normal judicial scrutiny, such protections are beyond the goals UCITA seeks to accomplish. This is the realm of consumer protection law, and the nature or desirability of such protections, in electronic transactions or otherwise, is left to consumer law and is largely beyond the scope of UCITA.[15] Criticisms of UCITA on the grounds that it is not a consumer protection statute seem misplaced, and should be directed instead at consumer protection statutes and agencies. But, regardless of what consumer protection remedies are needed, there will also be a need for fundamental commercial transaction laws in this area to govern the form, formation, interpretation, performance, and enforcement of private agreements, just as UCC Article 2 provides the legal foundation governing sales of goods in both consumer and commercial transactions. The question, then, is whether UCITA should be that law, or whether some other approach would be demonstrably superior.

III. WHAT DOES IT MEAN FOR THE STATES?

The merits of UCITA cannot be considered in a vacuum. Political and economic ramifications are inevitable and must be considered. In the political sphere, fundamental questions relating to the appropriate relation between federal and state law, dating at least to the eighteenth century, remain unanswered and contentious in the United States at the dawn of the twenty-first century.[16] Among these issues is the question of whether state

---

14. *See* U.C.I.T.A. § 106 (2000 uniform text). *Cf.* U.C.C. § 1-102 (2000 uniform text) (purpose of UCC is to simplify, clarify and modernize the commercial law and permit the expansion of commercial practices through custom, usage and private agreements.)

15. Aside from a few issues essential to the existence of electronic commerce, UCITA defers broadly to other state and federal laws, specifically including consumer protection statutes. *See* U.C.I.T.A. § 105 (2000 uniform text).

16. The recent flap as to whether federal law needs to regulate working conditions in private homes is merely a highly publicized example of the similar debates that are affecting numerous other issues across a wide spectrum of contexts. The home work debate is nonetheless illustrative of these debates, which are frequently settled by federal regulatory agencies outside any legislative or judicial forum. *See, e.g.*, Morgan Reynolds, *Today's Debate: Do We Need Federal Safety, Health Rules in Home Workplaces? No: Pandering to Big Labor*, DAILY OKLA., Jan. 26, 2000, at A9; Eileen Appelbaum, *Today's Debate: Do*

HeinOnline -- 25 Okla. City U. L. Rev. 337 2000

or federal law should govern fundamental aspects of private economic transactions, and whether that law should primarily seek to protect private autonomy or to regulate human behavior.

These are important issues for the states and federal government, for the legal profession, and for private citizens. Commercial and consumer law traditionally has been based on common law contracts, property, and tort law concepts, and such concepts are primarily state law. Controversies have been resolved locally, by state-licensed attorneys, in courts that recognize traditional notions of due process in the context of our adversary system. In contrast, much federal law today tends to be regulatory, created and administered by federal agencies outside the legislative and judicial systems, and designed to prescribe specific behavior (often in detail that seems incomprehensible to the non-specialist) rather than accommodate private decisions.[17] Thus, regulatory issues are often resolved at the agency level and require the assistance of specialized counsel.[18] Agency procedures may bear little resemblance to traditional judicial standards of due process and an impartial tribunal.[19] Thus, a choice between UCITA and a federal alternative may also implicate other, fundamental issues of federalism and jurisprudence, and even the future role of the legal profession, with regard to a potentially predominate mode of commerce.

Beyond these issues there is an obvious economic impact on states such as Oklahoma, which is not home to many national companies and has experienced an exodus of legal and executive talent in recent years. Widespread consolidation of U.S. businesses, from banking to health care to retailing, has meant the merger of many traditional Oklahoma businesses into larger companies located out of state. Continuation of this trend may threaten to turn a state like Oklahoma into a kind of economic colony, dominated by out-of-state entities regulated and managed primarily at the national level. This could mean that such states and their citizens would increasingly lose control over their economic (and political) destinies. The

---

We Need Federal Safety, Health Rules in Home Workplaces? Yes: Reasonable Rules Needed, DAILY OKLA., Jan. 26, 2000, at A9.

17. *See, e.g.*, Anne P. Fortney, *Fair Lending Law Developments*, 55 BUS. LAW. 1309 (2000).

18. Often such counsel can only be found outside of states like Oklahoma, in national firms that employ former regulatory staff.

19. *See, e.g.*, Terry Carter, *Banking on Fear*, A.B.A. J., July 1999, at 40 (describing reported abuses by bank regulatory agencies). While hopefully not typical, such reports suggest the potential for differences between a judicial and administrative forum.

HeinOnline -- 25 Okla. City U. L. Rev. 338 2000

law of electronic commerce, including UCITA, offers a possible solution to this problem.

Yes, the current economy has been good to many Oklahomans. Jobs are relatively plentiful, though most are at the lower end of the economic spectrum.[20] The Oklahoma work ethic has proved a strong attraction for out-of-state employers, and the state has become a national center for information transactions such as telemarketing and data processing operations. The emergence of inexpensive and user-friendly, yet sophisticated, computer systems has dramatically increased the economic value of this work ethic, and hence, the Oklahoma labor pool, in the context of information transactions.

But so far this has failed to spark a dramatic increase in Oklahoma-based technology-related operations and employment. By this your author does not mean to suggest that we should ever expect a blossoming of Oklahoma Microsofts. But a state like Oklahoma could and should be the home to a wide range of companies and operations using modern information technology to serve world-wide markets, in the production, marketing, and servicing of goods and information-based products and services, including transactions governed by UCITA. Technology makes it possible to serve such markets as easily from Oklahoma as from San Francisco or New York, and the Oklahoma work ethic, availability of resources, and low cost of doing business should mean that Oklahoma will have a measurable world-wide competitive advantage in the twenty-first century, if only the leadership exists to create an optimal legal environment to showcase these advantages.

To achieve this, among other things, the state needs to create and maintain the best and most modern set of commercial laws available. Many components of this are already in place in Oklahoma. Oklahoma, in general, has a legal system that is superior to those of many other states. Partly, this is due to the state's strong common law heritage and pioneer spirit, along with a high quality legal profession and judicial system, aided by Oklahoma's receptiveness to the excellent uniform laws made available to the states through NCCUSL (which, in turn, typically are based in large

---

20. *See, e.g.*, Gregory Potts, *Income Growth Forecast*, DAILY OKLA., Jan. 20, 2000, at C1 (noting that Oklahoma personal incomes are expected to continue lagging the national rate, absent "significant changes to be put in place over a long period of time"); Patrick B. McGuigan, *Who's Not Underpaid in Oklahoma?*, DAILY OKLA., Jan. 28, 2000, at A8 (answer: nearly everyone).

HeinOnline -- 25 Okla. City U. L. Rev. 339 2000

measure on common law traditions that protect private contracts and property rights, essential elements of an entrepreneurial economy).

These legal traditions are under attack in some areas of the country, and it may be important to Oklahoma's future that its legal community reaffirm the continuity of its jurisprudential system and traditions. In addition, with legal authorities in some other states seemingly eager to abandon such traditions, a state like Oklahoma has an opportunity to increase its competitive edge by embracing a reasonable set of updated laws based on accepted legal standards, to provide a clear legal environment for computer information transactions. UCITA appears to represent such an opportunity, perhaps in a very significant way for a state like Oklahoma that suffers other competitive disadvantages in the age of a bi-coastal national economy.[21] Should, then, Oklahoma embrace UCITA as a means to facilitate and attract twenty-first century methods of doing business?

The importance of UCITA, and its potential impact on the future of a state like Oklahoma, seems hardly open to question. There may be legitimate differences of opinion as to details, or even whether UCITA represents the best available approach. But surely no one can seriously deny that the matter is of the greatest potential importance to a state like Oklahoma, and therefore is worthy of legislative effort and consideration.[22]

IV. THE EVOLUTION AND ROLE OF LAW IN THE ELECTRONIC ENVIRONMENT

Advances in computer technology and the advent of computer licensing transactions have obviously impacted the economy and commercial transactions in many ways; and there has been no shortage of public discourse on these issues. The purpose of this discussion is to focus on the interplay between the law and electronic commerce.

The rapid development of electronic commercial practices has thus far outstripped the development of corresponding legal rules, with the result that electronic transactions are occurring to some extent in a legal vacuum. The courts are moving toward development of a common law of electronic commerce, largely by extension of common law contracts and property

---

21. Such as remoteness from major markets.

22. Nonetheless, something like this argument has been made by some Oklahoma state officials, asserting that there is no reason for Oklahoma to undertake an effort to consider issues relating to UCITA or its enactment, but rather that the state should wait and do nothing while these issues are resolved elsewhere.

HeinOnline -- 25 Okla. City U. L. Rev. 340 2000

concepts, but this process is slow, piecemeal, cumbersome, and expensive. While one can argue that so far this has not slowed the growth in electronic transactions, anyone who believes in the rule of law as a necessary ingredient for long-term economic progress must have some concern over the current lack of an adequate legal foundation for many types of electronic transactions. At some point the result is likely to be an increasing frustration of legitimate economic expectations and a stifling of future investment, employment, and transactions (and possible preemption of the field by federal law and regulations).

It may be said that the 1980s was a decade focused on legal and regulatory compliance,[23] and while these issues remain important it can also be said that in the 1990s the focus shifted, and the development and utilization of technology became a driving force in business operations and economic development. The regulatory model that is so entrenched in traditional banking law, and dominated the 1970s and 1980s, was largely discarded in a 1990s economic competition that focused instead on commercial practices and technical innovation in an entrepreneurial business climate.[24] The legal environment is now seeking to catch up, and perhaps the major issue of the moment is whether the result will be a continuation of the current state law and contract-based approach, or the imposition of a new federal regulatory model.

Whichever model prevails, it will have to reconcile the competing needs of legal certainty and compliance, operational capabilities, and technological change. This melding of law, operations, and technology greatly increases the challenges and opportunities for businesses, consumers, governments, courts, and lawyers, and may have a profound effect on the future of the legal profession as well as a variety of traditional businesses.[25] The states and legal profession can embrace these challenges and opportunities, or seek to ignore the issues, possibly at their peril.

The emergence of privacy as a dominant political issue, cutting across legal and technological lines, is one example of the consequences of this

---

23. *See, e.g.*, Alvin C. Harrell, *Deposit Insurance Issues and the Implications for the Structure of the American Financial System*, 18 OKLA. CITY U. L. REV. 179 (1993).

24. *See, e.g.*, Jacob M. Schlesinger, *Money-Go Round—Why the Long Boom? It Owes a Big Debt to the Capital Markets*, WALL ST. J., Feb. 1, 2000, at A1 (describing how new ways to transmit capital and spread financial risk have supplanted the traditional banking system as a means to fund growth and innovation).

25. A world-wide trend toward combined law, accounting, and technology firms is but one example.

HeinOnline -- 25 Okla. City U. L. Rev. 341 2000

trend.[26] The shift from sales to licensing of computer software, in order to better protect and restrict its uses, is another example. As a result our entire legal culture for sales, which works so well for goods in UCC Article 2, is threatened with obsolescence in this context by the emerging law of software licensing.[27] Still another example is the growth of Internet sales transactions.

The increasing importance of privacy policies, software licensing, and Internet transactions means that new or expanded commercial practices must be developed to legally effectuate such arrangements. Often these practices are based on contracts or other common law precedents and on this basis are usually upheld by the courts. An example is the notion of a "shrink-wrap" contract, based on the theory that a consumer breaking the shrink-wrap on a software package thereby agrees to be bound by the terms of the enclosed license.[28] But the resolution of these and related issues on a case-by-case, state-by-state basis, via a pure common law approach, could take decades and cost untold millions or even billions of dollars in legal fees. Lord Mansfield and his colleagues had the luxury of such a time frame. Today, we do not.

V. THE ROLE OF UCITA

A goal of UCITA is to articulate reasonable rules that work for these transactions, to protect party autonomy and the reasonable expectations of the parties to such agreements, based on established commercial practices that have been demonstrated to work, are widely utilized and accepted, and have been approved by the courts.[29] Along with protecting the reasonable expectations of the parties, this approach allows codification of recognized rules and practices to create a fair and certain legal environment and minimize transactional ambiguities, without the need to relitigate the full range of issues in every jurisdiction.

---

26. *See, e.g.*, Michael A. Benoit, *Privacy and Electronic Commerce*, 52 CONSUMER FIN. L.Q. REP. 384 (1998).

27. *See, e.g.*, Steven O. Weise, *The Financing of Intellectual Property Under Revised UCC Article 9*, 74 CHI.-KENT L. REV. 1077 (1999); Ronald J. Mann, *Secured Credit and Software Financing*, 85 CORNELL L. REV. 134 (1999); John Krahmer, *Software(s) Financing*, 52 CONSUMER FIN. L.Q. REP. 377 (1998).

28. UCITA endorses this view, subject to certain safeguards. *See* U.C.I.T.A. §§ 201-210 (2000 uniform text); discussion *supra* Part II., *infra* Part VI.

29. *Cf.* U.C.C. § 1-102 (2000) (*see supra* note 14). This is the same as the goal for any uniform law.

HeinOnline -- 25 Okla. City U. L. Rev. 342 2000

Critics of UCITA object to this approach, on grounds that the case law is not sufficiently well developed to represent established precedent, and therefore, codification is premature. Apparently some critics prefer uncertainty and increased litigation, perhaps in the hope of overturning parts of the current legal regime. Again, the basic question is: Is it better to wait, in the hope that some better alternative (perhaps in the form of federal legislation and regulation) will arrive, or should the states address the issues on the basis of existing and traditional state law concepts?

UCITA is patterned on UCC Article 2 and the basic foundation of contract law, but diverges significantly due to differences between sales of goods and licenses of software. This divergence suggested the need to convert proposed UCC Article 2B into stand-alone UCITA. But as noted, UCITA is philosophically consistent with the UCC, in terms of articulating and codifying common law rules as they have developed in the context of electronic transactions, to resolve ambiguities, provide certainty and predictability, and facilitate private commerce.[30] Few legal concepts are ever set in stone, but the huge volume of electronic transactions and the well-established nature of contract and commercial law principles mean that the state of the law for electronic transactions is surprisingly well advanced. It is time to begin articulating the result in the form of a comprehensive uniform law.

Some critics of UCITA apparently oppose *per se* the extension of contract law principles to electronic commerce, perhaps viewing this moment in history as an opportunity to substitute a more regulatory approach that would protect consumers by mandating specific substantive transaction terms. Yet UCITA itself goes beyond contract law to provide consumers with substantive protections, and is designed to work in conjunction with consumer protection laws.[31] UCITA is also more than a codification of current practices, seeking to offer both software vendors and consumers greater certainty and a more defined legal environment than is currently available. That is one reason it is needed. Many observers believe that consumers will be better off under UCITA than under the current system of largely undefined contract-based case law, with all of its uncertainty, nonuniformity, legal costs, and lack of consumer parameters. Or, for that matter, better than under some pie-in-the-sky utopian or federal regulatory solution.

---

30. *Id.*
31. *See* U.C.I.T.A. § 105 (2000 uniform text).

HeinOnline -- 25 Okla. City U. L. Rev. 343 2000

VI. HOW DOES UCITA WORK?

Consider a simple hypothetical: A consumer operating a small business purchases an office accounting system, including licensed accounting software. The license contains intrusive and oppressive terms that allow the licensor unlimited access to the licensee's office and business records, and an absolute right to audit any aspect of the licensee's business at any time. It also requires the licensee to provide a dedicated telephone line for dial-up access to the on-line features of the package. The licensee knows nothing of these terms until the shrink-wrap package is broken, and the consumer becomes bound by the contract terms.

Critics of UCITA cite this type of scenario as illustrating the horrors of UCITA. But is such criticism fair? First, as noted, this arrangement is enforceable under current law without UCITA, and certainly current law does nothing better in terms of protecting the consumer in these circumstances.[32] However, quite likely the inspection and audit provisions would be unenforceable as unconscionable under either UCITA or other law, while the dial-up line requirement is probably reasonable and enforceable under UCITA or otherwise.[33]

But UCITA also provides a specific, detailed right of the consumer to review the terms of the license after breaking the shrink-wrap, and to subsequently reject the deal and return the product.[34] Similarly, in the context of an erroneous "click-wrap" contract (for example, where the consumer seeks to order, e.g., four books over the Internet but erroneously punches the button four times so as to send an order for sixteen books), the error can be remedied on a variety of common law theories (offer and acceptance, meeting of the minds, mutual assent, reformation for unilateral mistake, unconscionability, etc.) under either UCITA or current law. But

---

32. *See, e.g.*, ProCD v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996); Storm Impact, Inc. v. Software of the Month Club, 13 F. Supp. 2d 782 (N.D. Ill. 1998); Micro Star v. Formgen, Inc., 942 F. Supp. 1312 (S.D. Cal. 1996), *aff'd on other grounds*, 154 F.3d 1107 (9th Cir. 1998); Hotmail Corp. v. Van$ Money Pie, Inc., 47 U.S.P.Q.2d (BNA) 1020 (N.D. Cal. 1998); RESTATEMENT (SECOND) OF CONTRACTS §§ 17, 18 (1981); UCC § 2-206(1)(a) (2000).

33. *See* U.C.I.T.A. §§ 104, 111 (2000 uniform text).

34. *See id.* §§ 112, 210. *See also id.* § 707 (revocation of acceptance). *Cf.* U.C.C. §§ 2-601, 2-602, 2-608 (2000) (providing similar rules).

HeinOnline -- 25 Okla. City U. L. Rev. 344 2000

UCITA goes beyond current law to provide the consumer a specific remedy for correcting such errors.[35]

As another example, UCITA allows a contract to be formed by an interaction between a buyer and the seller's electronic agent,[36] or between two electronic agents,[37] but only if the buyer is free to decline to take the action required to form the contract.[38] This is similar to the validation of shrink-wrap licenses, formed by breaking the shrink-wrap, but subject to a subsequent right of the licensee to review the terms and reject the deal.[39] This combines somewhat the contract and UCC Article 2 rules on acceptance of an offer with those on acceptance of the seller's tender of delivery,[40] an appropriate analogy since a shrink-wrap license combines elements of contract formation and acceptance of the product.

VII. CHOICE OF LAW

Consistent with current law, UCITA recognizes a contractual choice of law and/or choice of forum, subject to certain safeguards. There is a standard of reasonableness for the choice of forum,[41] and a general rule on unconscionability.[42] In addition, the contractual choice is limited in consumer cases where the resulting choice differs from the otherwise applicable law.[43]

Absent a contractual choice of law, an electronic license is governed by the law of the jurisdiction where the licensor is located;[44] a paper contract is governed by law where it is delivered to the consumer;[45] and all other cases are governed by the *Restatement Second* most significant relationship

35. *See* U.C.I.T.A. § 216 (2000 uniform text).
36. Defined at UCITA section 102(28) (2000) to include a computer program.
37. *See, e.g.*, U.C.I.T.A. §§ 112(b), 202(a), 206 (2000 uniform text).
38. *See id.* §§ 202-208.
39. *See id.* §§ 112, 120, 210; *see also id.* §§ 609 (acceptance), 707 (revocation of acceptance). *Cf.* U.C.C. §§ 2-206, 2-601, 2-602, 2-606, 2-808 (2000) (providing rules similar to UCITA).
40. *See* U.C.C. §§ 2-206, 2-606 (2000).
41. *See* U.C.I.T.A. § 110 (2000 uniform text).
42. *See id.* § 111.
43. *See id.* § 109.
44. *See id.* § 109(b)(1).
45. *See id.* § 109(b)(2).

HeinOnline -- 25 Okla. City U. L. Rev. 345 2000

test.[46] Again, all choice of law in a consumer contract must be reasonable.[47] This seems to represent a balanced approach that reflects current law and is fair to parties on both sides of the transaction, and it is surprising that these rules have become a focal point for UCITA's critics.[48] It is difficult to see how these rules could be changed significantly without abrogating the benefits of UCITA or basic principles on choice of law, but as noted, the UCITA choice of law rules have attracted criticism.

One objection is that UCITA would eliminate (for covered transactions) the UCC requirement that the law chosen by the parties must bear a "reasonable relation" to the transaction.[49] But, a purpose of UCITA is to accommodate electronic transactions by reducing the importance of physical locations, making a reasonable relation test based on physical location somewhat less relevant. Moreover, even under current law the courts are very liberal in validating contractual choice of law provisions, often upholding choices on the basis of minimal contacts that bear little relation to the transaction in question.[50] Even so, it seems unlikely that any UCITA vendor would seek a choice of law or forum wholly unrelated to both parties and the transaction, hoping to pass muster under UCITA despite the lack of a reasonable relation under UCC section 1-105, as such a choice could be inconvenient for the vendor and legally risky despite UCITA.[51] Moreover, if a vendor is this determined to seek a particular

---

46. *See id.* § 109(b)(3).

47. *See id.* §§ 109-110.

48. As with any law reform effort, some such criticism may be directed not at the merits of UCITA but at disappointment that UCITA does not include specific policy initiatives advocated by the critics. Thus, as noted *supra* in this text at Part I, for some the consistency of UCITA with established law may be considered a deficiency.

49. *See* U.C.C. § 1-105(1) (2000).

50. *See, e.g.*, Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991); Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972); Medtronic v. Janss, 729 F.2d 1395 (11th Cir. 1984); Alvin C. Harrell, Case Note, Evans v. Harry Robinson Pontiac-Buick *and UCC Choice of Law in Consumer Sales Transactions*, 53 CONSUMER FIN. L.Q. REP. 198 (1999). Indeed, as the UCC is being revised the trend is toward greater autonomy. *See, e.g.*, U.C.C. §§ 1-105; 5-116; 8-110 (2000).

51. *See generally* Warren E. Agin, *Coping with Personal Jurisdiction with Personal Jurisdiction in Cyberspace: Liability Report of the ABA Subcommittee on Internet Law*, 53 CONSUMER FIN. L.Q. REP. 86 (1999).

HeinOnline -- 25 Okla. City U. L. Rev. 346 2000

choice of law, it is a small matter under UCC section 1-105 or other current law to establish a sufficient connection with the desired location.[52]

Thus, it seems that UCC section 1-105(1) offers little that UCITA does not, and there is no reason to place an unneeded choice of law straight-jacket on electronic transactions under UCITA in order to create precise parity with the paper-based world. But in any event, the reasonableness and consumer protection requirements and unconscionability rules in UCITA sections 109-111 seem a very adequate substitute for the reasonable relation test in UCC section 1-105, and should allow a court to do all that could be done under current law to protect consumers against wholly unreasonable contractual choices of law.

VIII. SELF-HELP ENFORCEMENT

As originally approved by NCCUSL, UCITA potentially allowed private enforcement of remedies for a licensee's violation of a software license, including cancellation and various forms of electronic self-help.[53] This is consistent with current law and common practices in such transactions. However, UCITA went beyond current law in limiting electronic self-help and providing specific licensee safeguards. Thus, it seems ironic that the UCITA self-help rules have been a source of criticism for opponents of UCITA.

The primary self-help limitations are at UCITA section 816. Section 816 originally prohibited self-help, except as provided therein.[54] Among the requirements which had to be met before self-help was permissible, the licensee had to separately and specifically authorize the self-help remedy, and the licensor had to give advance notice at least fifteen days before utilizing this remedy.[55]

---

52. Oklahoma critics of UCITA have argued that Oklahoma should not enact UCITA because this would allow licensors outside Oklahoma to utilize Oklahoma law to the detriment of consumers nationwide, without any other connection to Oklahoma. Aside from the issue of whether the legal effects of UCITA should be considered detrimental, it is likely that any licensor with that strong an interest in applying Oklahoma law would establish a presence in Oklahoma, to bolster its choice of Oklahoma law and its legal position under traditional choice of law doctrine. This would trigger Oklahoma consumer protections as well as creating an economic benefit to Oklahoma.

53. *See* U.C.I.T.A. § 815 (2000 uniform text).

54. *See id.* § 816(b).

55. *See id.* § 816(c), (d). The notice must meet certain other, enumerated requirements. *See also id.* §§ 802 (requirements for cancellation); 815 (general remedies).

HeinOnline -- 25 Okla. City U. L. Rev. 347 2000

At its 109th Annual Meeting on July 28 - August 4, 2000, NCCUSL approved certain revisions to UCITA (the 2000 uniform text). These revisions included two changes to UCITA section 816, affecting electronic self-help. First, the following sentence was added at the end of section 816(b): "Electronic self-help is prohibited in mass-market transactions."[56] Second, the clause "[i]f the parties agree to permit electronic self-help" was added at the beginning of section 816(c).

The "Explanation of Amendments" accompanying the 2000 NCCUSL Annual Meeting draft of the proposed 2000 amendments to UCITA, as submitted to NCCUSL at its 2000 Annual Meeting, states as follows:

> Amendment to Section 816
>
> These amendments clarify the limitations on electronic self-help. The prohibition for mass-market transactions more clearly states a result that was the most likely effect of the existing limitations in the section. The addition to subsection (d) is a non-substantive clarification the inclusion of which was indicated by discussion in the various States.

It appears the reference in the quoted language to subsection (d) may be intended as a reference to subsection (c). The addition to section 816(c) does appear to be nonsubstantive.

Thus, the 2000 uniform text of UCITA incorporates even greater restrictions on self-help remedies, as compared to current law. Moreover, the restrictions on self-help at section 816 must be read in conjunction with other remedial limitations and requirements at UCITA sections 802 and 815. Taken together, these provisions represent significant substantive and procedural limitations on licensor remedies, recognizing a right of self-help only within specified parameters designed to fairly balance the interests of all parties. Moreover, UCITA section 105(c) preserves additional state consumer protection rules in addition to the UCITA safeguards. All in all,

---

56. *Id.* § 816(b). "Mass-market transactions" is defined at UCITA section 102(a)(44) as a transaction that is (i) a consumer contract, or (ii) other transaction with an end-user that is directed to the general public, or (iii) a retail transaction consistent with ordinary retail market transactions, and (iv) is not: a contract for redistribution or public performance or public display of a copyrighted work; a transaction in which the information is significantly customized; a site license; or an access contract. This is a summary of the definition; the full statutory definition should be consulted.

HeinOnline -- 25 Okla. City U. L. Rev. 348 2000

this seems to represent a balanced package of licensee rights and licensor remedies.

IX. SUMMARY AND CONCLUSIONS

Internet shopping and software licensing may well become the predominate ways of doing business in the twenty-first century. They may imperil traditional purveyors of goods and services, cut out traditional retailers and other middlemen, serve to constrain retail prices and inflation, and lead to better informed consumers. But, of course, they may also increase impulse sales, unnecessary consumer borrowing, and bankruptcies, and increasingly place consumers at the mercy of large and sophisticated remote parties and even electronic con artists. In some instances there probably will be calls for a more regulatory approach to replace traditional contract law principles as the governing law. There may be related pressures for an increased federal law presence in this area of commerce.

Into this political and legal maelstrom comes UCITA, seeking to preserve traditional state law norms: freedom of contract; the distinctions between a license and a sale; and the concept that a license transfers but does not create property rights.[57] UCITA is largely a codification of contract law, and is consistent with the UCC. This is perhaps its greatest strength to its supporters and its greatest offense to its detractors. In the final analysis, the fundamental issue is whether state contract law should be preserved as the framework for electronic transactions, and whether UCITA deserves a chance to show that it can work.

UCITA is a lot like the UCC, it recognizes the primacy of party autonomy, provides gap filling rules, and sets some outer parameters for private agreements. But in the eyes of some, this suggests a scenario where giant Microsofts take advantage of clueless consumers using outrageously unfair adhesion contracts. And indeed, UCITA is designed to facilitate software licensing and Internet shopping, goals that Microsoft very likely shares. If one's overriding goal is to oppose companies like Microsoft and eliminate the use of standardized private contracts as the basis for economic bargains, perhaps substituting a regulatory alternative, UCITA offers nothing good.

---

57. So as to *partially* overcome the effects of the *Peregrine* case despite preemption of state law by federal law. *See* National Peregrine, Inc. v. Capitol Fed. Sav. & Loan Ass'n.; *In re* Peregrine Entertainment, Ltd., 116 B.R. 194 (C.D. Cal. 1990); Weise, *supra* note 27.

HeinOnline -- 25 Okla. City U. L. Rev. 349 2000

But if one's goal is to make current law work better, to simplify, clarify, modernize, and make more uniform the traditional legal principles currently governing electronic transactions,[58] UCITA has much to offer. UCITA is subordinate to federal law, state consumer protection laws, standards of reasonableness and unconscionability, and basic constraints of public policy. It is not a license for software giants to run rampant, but it is a gateway to the information age. Just as the UCC facilitated the development of a manufacturing economy and the transition from a cash-based economy to a paper-based checking and credit economy, UCITA can now smooth the way to an information-based electronic economy.

There can be no question that electronic transactions need an updated legal framework. UCITA is designed to mesh with the Uniform Electronic Transactions Act and the comprehensive UCC revisions that have been under way for a decade, to provide such a framework. This new and important commercial law framework preserves the traditional underlying state substantive law foundation while adapting its rules to the needs of electronic commerce. It preserves the traditional relationship between state and federal law, and the distinction between contract law and federal regulation. It favors practical business customs over academic ideals. It is technology neutral and conducive to continuing technological and economic development. It is an opportunity to embrace the future, without obstructing the lessons of the past. It deserves a chance to show what it can do.

58. *See* U.C.C. § 1-102(1) (2000); U.C.I.T.A. § 106 (2000 uniform text).

HeinOnline -- 25 Okla. City U. L. Rev. 350 2000