



April 21, 2003

President Michael Traynor and Members
American Law Institute
4025 Chestnut Street
Philadelphia, PA 19104-3099

Dear President Traynor and Members of the Institute:

We understand that the American Law Institute is scheduled to vote in May on final approval of amendments to Uniform Commercial Code Article 2. We write to urge you not to approve the amendments. We have two concerns about them. The first is that the new exclusion of "information" from the definition of goods will destabilize the law of transactions in software and digital content. The second is that the Article 2 amendments fail to take a clear stand against delayed disclosure of contract terms, even in Internet transactions, despite strong support for this position within the ALI itself and the American Bar Association. We request that you distribute this letter to ALI members and, if possible, post this letter on ALI's website.

AFFECT, Americans for Fair Electronic Commerce Transactions, is a broad-based national coalition of retail and manufacturing businesses, consumers, financial services institutions, technology professionals and librarians opposed to the enactment of the Uniform Computer Information Transactions Act (UCITA). This coalition of digital product customers has been involved in every state where UCITA has been legislatively active. UCITA has only been enacted in two states, while three states have enacted "bomb shelter" provisions to shield their residents from application of UCITA under choice of law clauses. In February of this year, a motion seeking approval of UCITA by the ABA House of Delegates was withdrawn, so that UCITA lacks ABA endorsement.

By now, there is a large body of case law dealing with disputes over digital products, most of it applying Article 2. Although we do not agree with every case, we find the current state of the law preferable to a situation in which all the case law would be subject to reconsideration because of the introduction of a new, undefined term, "information," into Article 2.

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CONSUMER PROJECT ON TECHNOLOGY
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GALLANT TECHNOLOGIES, INC.
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NATIONAL RETAIL FEDERATION
NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS
NATIONWIDE INSURANCE COMPANY
NEW YORK LIFE INSURANCE COMPANY
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OPENCONTENT
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SHARE
SHELLER LAW FIRM
SOCIETY FOR INFORMATION MANAGEMENT
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VIRGINIA CONSUMER COUNCIL
WALGREEN CORPORATION
WORKSTATION

Many of our constituencies lack resources for extensive litigation and all of us would prefer to put our resources to more productive uses than litigating what "information" means. Putting all existing case law in doubt would impose new planning and drafting costs, with no compensating gains in legal predictability.

The scope change, including the text change in the definition of goods and a draft new comment, would not clarify the core scope questions, such as whether Article 2 applies to computer programs delivered on computers or on disks. In addition, the proposed comment's distinction between downloaded software and embedded software is artificial and will become increasingly unworkable as product features are more commonly delivered or updated by download.

We understand that the comment leaves room for continued application of Article 2 to pure software transactions by analogy, but courts are more likely to continue to do that without the proposed change. Because courts might read the change as a signal to apply the common law without the benefit of Article 2 by analogy, there would be considerable new uncertainty about such questions as whether there are warranties for software, the content of those warranties, the methods to disclaim them, and performance standards. Article 2 has been working well to define these aspects of contracts for software products. Uncertainty about state law of warranties for software also would place in doubt the consumer protections in the federal Magnuson-Moss Warranty Act, which prohibits disclaimer of state law warranties when a written warranty is provided.

Because of our strong opposition to UCITA, we are particularly concerned by the proposed use of the undefined term "information" in Article 2's definition of goods. Use of this term--which is defined in UCITA--to exclude transactions from direct coverage by Article 2 could too easily be misrepresented. We believe that UCITA's proponents would portray ALI approval of this proposal as an indirect or implicit endorsement of UCITA. We understand that an argument could be made that, by using the term "information" rather than "computer information," the ALI was rejecting UCITA's terminology, but unfortunately UCITA also uses the term "information" and defines it to include computer programs. The proposed change in Article 2 could create a sense that there now is a void in the law and therefore new urgency for the enactment of UCITA.

Furthermore, even if UCITA is not enacted in any more states, explicit exclusion of "information" from the definition of goods and thus from Article 2's scope would risk encouraging courts to use UCITA as persuasive authority. Because Article 2 uses the term "information" without defining it, courts might turn to UCITA for a definition. It would be a logical next step to make use of its substantive rules, too, even where it has not been enacted.

We expressed our concern with the proposed scope change to President Traynor and the ALI Council last fall. We continue to strongly oppose it.

In the intervening months, we have engaged in further analysis of the proposed Article 2 amendments, and as a result we have identified a second major problem with them. Our additional concern is with the failure of Article 2 to take any steps to clarify the unacceptability of delayed disclosure of standard form terms. This substandard practice is currently a huge problem in transactions in goods, including software, as indicated by the recent case law concerning terms in the box or on interior packaging ("shrink-wrap") or even embedded in the product ("click wrap") and not disclosed until after order, payment and delivery. Comment 5 to Amended Section 2-207 indicates an unwillingness to address the delayed disclosure problem forthrightly, despite the strong positions taken by high-level committees within both the ALI and the ABA against delayed disclosure.

The ALI Council Committee on Article 2B wrote in 1999 that Article 2B's "provisions on assent to post-transaction terms are inconsistent with sound contract policy." It added: "There is no good reason in contracts formed over the Internet why the terms could not be made available to the potential licensee through links on the relevant website at the time of contracting, rather than supplied later." This committee also made the point that "issues concerning post-transaction terms do not appear to be unique to transactions within the scope of Article 2B."

More recently, an American Bar Association group, charged with reviewing UCITA, was equally outspoken about delayed terms in electronic commerce. The ABA Working Group on UCITA wrote in its 2002 report:

While the Working Group lauds UCITA's right of return in these situations [in which disclosure of terms is delayed], the Working Group believes that a licensor should make all the terms of the license transaction available for review by the licensee before the licensee pays, or becomes obligated to pay, for its use of or access to the computer information and before the licensee otherwise becomes bound by the license agreement. There is no longer any economic justification for failing to do so. For example, a licensor may easily provide its license terms on its Internet web site. [Emphasis supplied.] Further, a licensor may easily do so even in situations in which the delivery of the information itself is not available from the licensor's Internet web site.

The ALI and ABA committees thus have provided sound policy analysis applicable to goods transactions in general, not just software and digital content transactions, yet the Article 2 amendments do nothing to implement their clear recommendations of pre-transaction disclosure. The issue is left to the vague question whether parties "agree" to terms sent later. See Amended Section 2-207(b). Courts would have to decide whether opening packaging, clicking on a screen or simply not returning the product would amount to agreement to delayed terms. Amended Article 2 downgrades the standard of assent to material alterations in terms from "express" agreement to mere agreement and applies this approach to all terms, even material alterations in consumer contracts.¹ Arguably, even terms first provided after order, payment and delivery-which could easily have been disclosed in advance on an Internet site-could be considered agreed to by

such actions as opening packaging marked to indicate that doing so constitutes "agreement." It is not reasonable to expect customers to return products to avoid a possible appearance of assent under such tricky procedures.

It is revealing to compare the lack of attention to the problems customers have in avoiding delayed, embedded standard terms with the approach taken in a new electronic commerce provision in the amendments, Section 2-202(4). This new provision protects a party that makes use of an electronic agent from being bound by an individual's actions or statements to which the electronic agent cannot react. One finds no comparable solicitude in the amendments for the practical inability of customers to react to terms in or on packaging and not disclosed in advance.

In summary, we have two major concerns with amended Article 2. Its explicit exclusion of "information," an undefined term, from the definition of goods will only increase uncertainty concerning transactions in software, mixed hardware and software and digital content. In addition, amended Article 2 fails to implement sound contract policy concerning pre-transaction disclosure of terms. Therefore, we must oppose the amendments as drafted and urge you not to finally approve them.

Sincerely,

Miriam Nisbet
President

1. Compare current Section 2-207(2) which allows only nonmaterial changes to be made in additional terms, and even so only between merchants, and its comment 2, providing that material alterations only come into the contract if "expressly agreed to," a comment which when written in the 1950s did not envision shrink-wrap and click wrap as means to try to create an appearance of agreement to belatedly disclosed terms. Shrink-wrap or the equivalent can be used for any goods, and click wrap will increasingly be useable in transactions in a range of goods, from cars to manufacturing equipment, that include computer screens.