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 VIRGINIA ASSOCIATION OF LAW LIBRARIES  
 VIRGINIA CONSUMER COUNCIL  
 WALGREEN CORPORATION  
 WORKSTATION

VIA E-MAIL AND U.S. MAIL

May 18, 2004

Senator Lorraine L. Berry  
 Chair, Committee on Public Safety, Judiciary,  
 Homeland Security & Justice  
 25th Legislature  
 P.O. Box 1690  
 St. Thomas, VI 00804  
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RE: Bill #25-0198

Dear Senator Berry:

I am writing on behalf of the Americans for Fair Electronic Commerce Transactions (AFFECT), a broad-based national coalition of retail and manufacturing businesses, consumers, financial services institutions, technology professionals and librarians that has been deeply engaged in the policy debate about the Uniform Computer Information Transactions Act (UCITA) since 2000.

AFFECT has just learned that you recently introduced UCITA as a part of Virgin Islands Senate bill #25-0198 and that a hearing is scheduled for May 19. On behalf of AFFECT's more than sixty members, I urge you to withdraw your sponsorship of UCITA.

UCITA is a controversial proposed state contract law developed to regulate transactions in computer information products such as computer software, online access contracts, online databases and all other forms of digital information. AFFECT and other critics of UCITA continue to maintain that it is biased in favor of the needs of software vendors to the detriment of business and consumer end users of information products. Indeed, AFFECT believes that this bias is UCITA's fatal flaw that amendments cannot satisfactorily ameliorate.

Numerous provisions in UCITA change current law and commercial practice. UCITA's new rules for software licensing, online access and other transactions in computer information will increase the cost of doing business for any organization that makes significant use of software and other technologies.

One of the most controversial sections of UCITA allowed a vendor to remotely disable software when there is a purported breach of the contract. Recent changes to UCITA prohibit "electronic self-help" but do not change the automatic restraint provisions of UCITA that effectively allow the same procedure in order to, among other things, "prevent a use inconsistent with the agreement." Indeed, in a February 6, 2003 letter to the President of the National Conference of Commissioners on Uniform State Laws (NCCUSL), Suzanne E. Spaulding, the chair of the American Bar Association (ABA) Standing Committee on Law and National Security, stated that the committee was unable to support ABA approval of UCITA "because the "automatic restraint" provision could allow for the installation of 'back doors' and present a significant security concern, potentially affecting key aspects of our nation's critical infrastructure."

AFFECT members have estimated that UCITA could cost a large company as much as \$30 million annually for added testing, security, asset management, and legal and contract negotiation.

All of the major consumer advocacy organizations in the U.S. have opposed UCITA and support passage of anti-UCITA "bomb-shelter" legislation. Consumers are concerned about UCITA's interaction with state consumer laws, especially the fact that most state consumer protection laws apply to "goods" but not to "information; "the absence of a requirement for pre-payment disclosure of terms; and the right of a vendor to waive warranties.

In a November 13, 2001 letter to NCCUSL, the Attorney General of the Virgin Islands, Iver Stridiron, joined thirty-three other state attorneys general in stating that UCITA would "create great uncertainty and resulting costs" to consumers. Contrary to a recommendation made by the American Bar Association Working Group that reviewed UCITA, recent amendments to the Act do not incorporate any pre-disclosure requirement. ([http://www-affect.@ucita.com/pdf/Nov132001\\_Letter\\_from\\_AGs\\_to\\_Carlyle\\_Ring.pdf](http://www-affect.@ucita.com/pdf/Nov132001_Letter_from_AGs_to_Carlyle_Ring.pdf))

Computer and software professionals join business and consumer end users in their concern that UCITA shields software publishers from having to disclose known defects that can cause substantial harm to a business or consumer computer system. UCITA makes it harder for customers to recover even minimum damages in the event a known defect is the cause. UCITA continues to allow a software vendor to prohibit reverse engineering to ensure that products have no security holes or other defects.

The American library community has been a persistent critic of this Act, noting basic concerns about its validation of the non-negotiated "shrink-wrap" or "click-wrap" licenses that accompany mass-market retail products and on-line access contracts. UCITA would allow software publishers to insert terms in these contracts that prohibit certain activities allowed under federal copyright law. UCITA proponents make the misleading claim that there are adequate protections to prevent this end run around federal law but American libraries assert that the language in the Act is too vague to provide the certainty needed to assure their concerns.

AFFECT's substantive concerns about UCITA have been echoed by other knowledgeable critics. After a thorough review of the Act in 2001, the American Bar Association Working Group on UCITA issued a report on January 30, 2002 that recommended a number of changes to the Act; NCCUSL only partially addressed these concerns in amendments it subsequently approved. (<http://www.abanet.org/leadership/ucita.pdf>) The ABA group concluded that UCITA "would not achieve the principal objective that a uniform law is supposed to achieve, namely, the establishment of a high level of clarity and certainty." AFFECT has studied the changes that NCCUSL approved subsequent to that report and found many problems that are explained in the Summary of AFFECT's Response to the 2002 UCITA Revisions. (attached electronically)

Finally, UCITA's controversial and essentially failed legislative and policy history should be carefully noted. Despite almost a decade of drafting, UCITA failed to garner the support of either the American Law Institute or the American Bar Association, the two prestigious legal organizations that usually partner with the NCCUSL in promulgating uniform acts. UCITA's legislative history is equally poor. Since 1999 only Virginia and Maryland have enacted UCITA, despite introductions in ten states and pre-introduction consideration in at least ten more.

One of the most unique and telling barometers of concerns about UCITA is increasing interest in anti-UCITA "bomb-shelter" legislation that is designed to protect the citizens and businesses of a state from the choice of law and choice of forum provisions a vendor might include in an agreement that designate the law of Virginia or Maryland and, hence, UCITA. Four states have already passed such legislation and as of this writing there are active bomb-shelter bills in Massachusetts and Louisiana. AFFECT encourages the Virgin Islands to join Iowa, North Carolina, West Virginia and Vermont in passing its own "bomb-shelter" bill.

UCITA itself is long and complex; so, too, is its legislative and policy history. There is little substantively or historically to support passage of this discredited act. AFFECT believes it would not be in the best interests of the businesses and consumers of the Virgin Islands to enact the current Senate bill.

The urls for two of the documents cited are provided; the third is attached electronically. All three documents will be sent as hard copy attachments as well. Of course, we will be happy to answer any questions you may have and, if you wish, to meet with you to discuss the issues surrounding UCITA. Thank you for this opportunity to present our views.

Sincerely,



Miriam Nisbet  
President

Enclosures (in hard copy):  
ABA Working Group Report  
Summary of AFFECT Response to 2002 UCITA Revisions  
NAAG letter