INTRODUCTION

Woe is UCITA! Despite rather grandiose language by the National Conference of Commissioners on Uniform State Laws ("Conference") labeling the Uniform Computer Information Transactions Act ("UCITA") a "statute for our time," the Act has weathered the pull-out by the American Law Institute's contributing drafters concerted
and well-organized efforts to contest its passage and a very cold reception by the states. And, despite a Conference initiative to address the concerns by UCITA opponents, influential organizations including the American Bar Association ("ABA") have officially suggested that UCITA be scrapped in favor of a new start with new ideas, and receiving this memorandum, the Council decided not to place Article 2B on the agenda of the May 1999 Annual Meeting for approval by the ALI membership.

Following the announcement that Article 2B would not be promulgated and that NCCUSL would sponsor UCITA alone, Fred H. Miller, NCCUSL Executive Director, and Carlyle C. Ring, chair of the erstwhile Article 2B drafting committee and its successor the UCITA drafting committee, issued a robust defense of UCITA. This defense was published in the June UCC Bulletin. This article responds to the arguments of Miller and Ring and summarizes the reasons why UCITA is opposed by the news and entertainment industries, business and consumer customers, libraries, engineers and authors, many intellectual property and contract scholars, and even sectors of the software industry.


3. See, eg., AFFECT, available at http://www.4cite.org (last visited Jan. 24, 2003) [hereinafter AFFECT]. UCITA's most formidable, organized opposition comes from AFFECT, an organization created exclusively to oppose the Act. Its web site states its mission: "AFFECT, Americans for Fair Electronic Commerce Transactions, is a broad-based national coalition of consumers, retail and manufacturing businesses, insurers, technology professionals and librarians opposed to the Uniform Computer Information Transaction Act (UCITA). AFFECT has been dedicated to educating the public and policy makers about the dangers of UCITA." Id.


most state legislatures have decided not to consider UCITA in upcoming legislative sessions.\footnote{According to the Conference's web site, only the District of Columbia and the U.S. Virgin Islands are considering bills to adopt UCITA. Other states have chosen either to defer or suspend consideration of the act. See supra note 4 and accompanying text (providing a state by state treatment of the status of UCITA in state legislatures).
}

This essay offers substantive and political reasons for UCITA's discouraging reception and suggests a solution. It first argues that the opposition mounted against UCITA as originally drafted was different from and measurably more formidable than that mounted against many other Conference promulgations, including the Uniform Commercial Code ("UCC"), itself the object of strong initial opposition.\footnote{The following works provide both contemporary and historic views of the proposal and adoption of the Uniform Commercial Code. Robert Braucher, Federal Enactment of the Uniform Commercial Code, 16 LAW & CONTEMP. PROBS. 100 (1951); Frederick K. Beutel, The Proposed Uniform Commercial Code Should Not Be Adopted, 61 YALE L.J. 334 (1952); Allen R. Kamp, Downtown Code: A History of the Uniform Commercial Code 1949-1954, 49 BUFF. L. REV. 359 (2001); Allen R. Kamp, Uptown Act: A History of the Uniform Commercial Code: 1940-1949, 51 SMU L. REV. 275 (1998); Soia Mentschikoff, Origins and Evolutions: Drafters Reflect upon the Uniform Commercial Code, 43 OHIO ST. L.J. 537 (1982).
}

Some suggest congruency between the initial receptions of UCITA and the UCC, claiming that these two significant Conference works will have similar fates.\footnote{See, e.g., Holly K. Towle, The Politics of Licensing Law, 36 Hous. L. REV. 121, 136-54 (1999) (arguing that the problems facing UCITA parallel those faced by the UCC and that UCITA, like the UCC, is worthy of adoption). The decision originally to introduce UCITA as Article 2B of the UCC linked UCITA and the UCC. This paper generally examines the substantive similarities between the two Acts. For a more thorough discussion by advocates of UCITA, see Raymond T. Nimmer, Through the Looking Glass: What Courts and UCITA Say About the Scope of Contract Law in the Information Age, 38 DUQ. L. REV. 255 (2000); Carlyle C. Ring, Jr., Uniform Rules for Internet Information Transactions: An Overview of Proposed UCITA, 38 DUQ. L. REV. 319 (2000). For a decidedly different perspective on UCITA, see Amelia H. Boss, Taking UCITA on the Road: What Lessons Have We Learned?, 7 ROGER WILLIAMS U. L. REV. 167 (2001) (arguing that UCITA's worth is as a learning tool rather than as a uniform law for computer information transactions).
}

While they offer useful comparisons, they also ignore differences between the two Acts and their respective constituencies.

The differences between UCITA as first proposed to the states and the UCC are fundamental. They lie in the Conference's decision for UCITA to accept a UCC-like freedom of contract norm for software contracts and to apply this norm to either one-size-fits-all, standard contracts or at least a cadre of standard contract provisions for more customized contracts.\footnote{See infra notes 14-26 and accompanying text.} In either case, the licensing contract fails adequately to consider how potential licensees might perceive the importance of key licensing terms, especially those involving proprietary and quality issues. UCITA's freedom of contract theme embraces
these contracts and, by doing so, the Conference has alienated a diverse constituency which included powerful business and commercial interests—a crucial constituency that played an important, supporting role in the adoption of the UCC.

Despite these problems, the Conference's response to detractors offers a path to a solution. At its 2002 annual meeting, the organization voted to amend UCITA and thus to make it more palatable to its opposition, especially large and powerful commercial interests alienated by the original Act. However, the ABA's opposition appears to persist despite these amendments, suggesting that UCITA's opposition continues to be entrenched and formidable.

This essay, divided into two additional parts and a conclusion, traces the political origins of UCITA's opposition, identifies three potential paths for the future regulation of software transactions, and concludes that one of these alternatives, adoption of UCITA as amended by the Conference, represents an acceptable middle ground. Part I generally surveys UCITA's treatment of freedom of contract in light of the proprietary, quality and other concerns of the contracting parties. While licensors seem to have solidified their positions on contract terms, licensees and their contracting needs are diverse, thus inspiring a range of UCITA opposition from consumers to multinational corporations. UCITA's tacit acceptance of standard contracting for all has therefore angered a well-organized and formidable crowd. Part II searches for some resolution. Proposing three different paths—maintenance of the status quo, a wholesale redraft with a decidedly more regulatory rather than commercial theme, or adoption of UCITA as recently amended—Part II argues that an amended UCITA is the most desirable and flexible alternative.

I.

The substantive and political problems facing the Conference in its proposal of the original UCITA are important. The primary source of these problems lies in UCITA's acceptance of freedom of contract, one of commercial law's most revered and workable constructs, as an organizing principle.

11. See supra note 2 and accompanying text.
12. See infra notes 30-53 and accompanying text.
13. The ABA working group made its statements opposing UCITA after the Conference had announced its proposed amendments but before the Conference approved them. The working group assumed in its recommendations to the ABA that the amendments would be approved. See ABA, supra note 6.
A. Freedom of Contract for Digital Products

The drafters' decision to accept freedom of contract as an overarching norm for UCITA would seem to be a natural and predictable extrapolation of existing law. The freedom to structure agreements that jointly serve contracting parties is a central principle of contract law. Indeed, existing contracts for digital products, whether shrink-wrapped and available at retail stores or "click-wrapped" and available via the Internet, appear to depend on contracting freedom as a central tenet. The prevailing trend among courts is to yield to the parties' software contracts in cases involving assent, product quality and proprietary rights.

The general basis for UCITA's opposition is its application of freedom of contract to both traditional contracts issues, especially those involving product quality, and to those associated with a licensor's desire to retain intellectual property rights in its software. UCITA's default rules, like those in the UCC, apply only if the parties have not otherwise agreed on a subject. If the law supports standard contracts based loosely on a freedom of contract principle, then the terms

---


15. The leading case on point is ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996), in which Judge Easterbrook held that a shrink-wrap agreement read by a software buyer after purchase nonetheless bound that buyer to the terms of the contract, because his failure to return the software after reading the licensing agreement amounted to an assent to those terms. ProCD, 86 F.3d at 1450, 1452. The ABA working group created to examine UCITA argues that ProCD not only supported the software contracting freedom claims by licensors, but additionally played an important role in the Conference's decision to embrace freedom of contract as a central theme in UCITA. See ABA, supra note 6.


17. In ProCD the court determined that Zeidenberg's attempt to resell portions of the database licensed to him violated the express provisions of the licensing agreement in which the licensor retained full rights to the commercial use of the database. ProCD, 86 F.3d at 1449-50.

18. UCITA § 106(b) states: "[E]xcept as otherwise provided in Section 113(a), the use of mandatory language or the absence of a phrase such as 'unless otherwise agreed' in a provision of this [Act] does not preclude the parties from varying the effect of the provision by agreement." UCITA § 106(b), 7 U.L.A 249 (2002).
of that contract will tend to favor the drafter over the other side,\(^\text{19}\) unless a court adjudges the contract or provision unconscionable.\(^\text{20}\) Once again, UCITA is ostensibly doing what has previously been done and often endorsed.

The problems associated with software contracts arise because software producers want both to limit and retain full title to the licensee's use of the product. Producers have predictably and naturally used the licensing model as a means to retain legal rights over digital products that can be, for little cost, copied and transferred globally millions of times each day.\(^\text{21}\) Added to their battery of standard protective provisions are reverse-engineering proscriptions that restrict licensees from identifying and using a program's sources code.\(^\text{22}\) The

\(^{19}\) Standard or form contracts have tested the bounds of freedom of contract for many years. One author suggests that these form contracts are particularly inapt for software contracts: "... for the most part, the black letter doctrine [favoring the use of form contracts] has enforced the form-giver's whim on the basis that the form-taker should have read the contract and demanded a change or refused to deal is she did not like the terms." Leo L. Clarke, *Performance Risk, Form Contracts and UCITA*, 7 MICH. TELECOMM. & TECH. L. REV. 1, 3 (2001). Friedrich Kessler labeled standard contracts "contracts of adhesion," based on their ostensible defiance of the underlying assumptions of freedom of contract. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943).

\(^{20}\) The historic, interpretative battle involving freedom of contract, standard forms and unconscionability has moderated little in recent years. White and Summers state that the UCC's unconscionability provision is "intended to prevent one party from taking undue advantage of the other, as by striking an unconscionable bargain." JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 110 (1972). One cannot miss the interpretive wiggle room arising from terms such as "undue advantage" and "unconscionable." Likewise, UCITA's retention of an unconscionability provision ensures that the battle will continue between those who use standard forms to incorporate their self-serving terms and reduce transactions costs and those who claim such terms are unconscionable. The official comment to UCITA § 111 states:

This section and Section 114 allow courts to rule directly on the unconscionability of the contract or a particular term. The basic test is whether, in light of the general commercial background and the commercial needs of the particular trade or case, the terms involved are so one-sided as to be unconscionable under the circumstances existing at the time the contract was made. The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.

UCITA § 111 cmt. 2 (2002).


\(^{22}\) Licensors hope to prohibit reverse engineering, even in cases in which the licensee needs to undertake this procedure because of the software's interoperability. Because of its deference to the agreement, the original UCITA sanctioned such a contract provision. Importantly, the European Union has adopted a rule that disallows contract provisions prohibiting reverse engineering to deal with interoperability problems. Council of Ministers Directive 91/250/EEC of 1991 O.J. (L122) 42. The Conference has recently amended UCITA explicitly to allow licensees to reverse engineer software to insure interoperability with the licensee's existing software. As amended, UCITA § 115 states:
licensor also may include self-help terms that empower the licensor to reclaim electronically licensed software if the licensee violates any of the contract provisions. As originally enacted, UCITA's freedom of contract theme would enforce contract provisions that support these and other proprietary interests of the licensor.

Relying heavily on a UCC template, UCITA additionally allows software producers and sellers to limit or disclaim liability for product defects. Disclaimers have long played a central part in contracts in-

(a) Notwithstanding the terms of a contract under this Act, a licensee that lawfully obtained the right to use a copy of a computer program may identify, analyze and use those elements of the program which are necessary to achieve interoperability of an independently created computer program with other programs if: (1) the elements have not previously been readily available to the licensee; (2) the identification, analysis, or use is performed solely for the purpose of enabling such interoperability; and (3) the identification, analysis or use is not prohibited by other law.

(b) In this section, “interoperability” means the ability of computer programs to exchange information, and of such programs mutually to use the information that has been exchanged.

UCITA § 111 (2002).

23. UCITA § 815(b) reads:
Except as otherwise provided in Section 814, a licensor may exercise its rights under subsection (a) without judicial process only if this can be done: (1) without a breach of the peace; (2) without a foreseeable risk of personal injury or significant physical damage to information or property other than the licensed information; and (3) in accordance with Section 816.

UCITA § 815(b), 7 U.L.A. 441 (2002).


25. UCITA's warranty disclaimer provision is very similar to that in the UCC.

UCITA § 406 reads:
Words or conduct relevant to the creation of an express warranty and words or conduct tending to disclaim or modify an express warranty must be construed wherever reasonable as consistent with each other. Subject to Section 301 with regard to parol or extrinsic evidence, the disclaimer or modification is inoperative to the extent that such construction is unreasonable. (b) Except as otherwise provided in subsections (c), (d), and (e), to disclaim or modify an implied warranty or any part of it, but not the warranty in Section 401, the following rules apply: (1) Except as otherwise provided in this subsection: (A) To disclaim or modify the implied warranty arising under Section 403, language must mention “merchantability” or “quality” or use words of similar import and, if in a record, must be conspicuous. (B) To disclaim or modify the implied warranty arising under Section 404, language in a record must mention “accuracy” or use words of similar import and, if in a record, must be conspicuous. (2) Language to disclaim or modify the implied warranty arising under Section 405 must be in a record and be conspicuous. It is sufficient to state “There is no warranty that this information, our efforts, or the system will fulfill any of your particular purposes or needs”, or words of similar import. (3) Language in a record is sufficient to disclaim all implied warranties if it individually disclaims each implied warranty or, except for the warranty in Section 401, if it is conspicuous and states “Except for express warranties stated in this contract, if any, this ‘information’ ‘computer program’ is provided with all faults, and the entire risk as to satisfactory quality, performance, accuracy, and effort is with the user”, or words of similar import. (4) A disclaimer or modification sufficient under Article 2 or 2A of the Uniform Commercial Code to disclaim or modify an implied warranty of merchantability is sufficient to disclaim or modify the warranties under Sections 403 and 404. A
volving the sale and lease of goods.26 Once again, licensees predictably would desire the opportunity to use contracting freedom to include disclaimers in their licensing contracts.

B. WHY NOT FREEDOM OF CONTRACT FOR DIGITAL GOODS?

This section examines generally why freedom of contract poses more problems for UCITA and software contracts than for the UCC and contracts for the sale and lease of goods. Section C will then review the political fallout occasioned by these differences.


In general, freedom of contract works for the UCC because contracting parties—sellers, buyers, lessors and lessees—embrace freedom of contract as an overarching norm for a variety of reasons. Many licensees, however, do not. For example, in commercial settings, freedom of contract principles may inspire seller or even buyer-dominated agreements, but parties to such contracts routinely change roles and thus often have a bilateral perception of contract terms. Commercial buyers understand arbitration provisions and warranty disclaimers because they incorporate these same provisions in their resale contracts. The parties to UCITA contracts tend to have static roles. Licensors are typically software producers and licensees are not. Rather, licensees are multinational corporations, small entrepreneurial firms, professionals, educational institutions, not-for-

profit organizations and consumers. Their primary interest is utilitarian—obtaining functional software to improve their lot. While some of these licensees may support the ex ante facto arrangements of contract, others, as section C suggests, would prefer some regulatory control over software production and sales.

2. Tangible versus Digital Products

Another difference that challenges UCITA's reliance on freedom of contract arises because of the fundamental differences between tangible and digital products. In sales and lease contracts, parties almost invariably have the opportunity to inspect the tangible subject matter either in advance of the contract or, at least, before accepting and being required to pay for tendered goods. Licensees of digital products usually have nothing to inspect. Their license describes the "product," and their opportunity to discern that product's quality happens only after they have paid for it. This use of a UCC template, some claim, is "good-centric," based on an incorrect assumption that the governing rules including freedom of contract are as apt for digital as for tangible products.

Arguably, the UCC's freedom of contract norm may not be a good fit for UCITA transactions. UCITA opponents appear unified in their stance that the original Act's fidelity to freedom of contract strongly favored licensors over licensees. Yet, a similar debate preceded the states' consideration of the UCC over fifty years ago, suggesting that the states might have eventually embraced the original UCITA just as they did the UCC. Section C argues otherwise.

27. See Maureen A. O'Rourke, Progressing Towards a Uniform Commercial Code for Electronic Commerce or Racing Towards Nonuniformity?, 14 Berkeley Tech. L.J. 635, 648 (1999) (noting that, unlike goods, software licenses are the products because they describe "the bundle of rights granted").

28. Robert W. Gomulkiewicz, The License is the Product: Comments on the Promise of Article 2B for Software and Information Licensing, 13 Berkeley Tech. L.J. 891, 894 (1998). During the drafting phase for Article 2B, now UCITA, one commentator warned of the challenges of finding common ground between a UCC, Article 2 template and software transactions:

To further complicate matters, the drafting committee used as its starting point Uniform Commercial Code Article 2, a hard good-centric [emphasis mine], sales-oriented set of rules. Though some observers believe a license for software in packaged-goods-form resembles a sale of goods, these transactions differ in many ways from a sale of goods and represent only a fraction of licenses for software and information products.

Id.

29. Section I.C. discusses the similarities between the histories of the UCC and UCITA. See infra notes 30-64 and accompanying text.
C. THE POLITICS OF UCITA AND THE UCC

There is good reason to believe that the politics surrounding the proposal of and states' reception to the original UCITA were different from those surrounding the consideration and eventual passage of the UCC. This section traces that difference.

1. UCITA's Opposition

The Conference has always been canny about its promulgations. Ambitious projects like UCITA tend to be good tests of the organization's political standing. 30 One must wonder, therefore, whether the Conference, and especially UCITA's drafters, were incredulous about the Act's diverse and powerful opposition. With all due respect, they should not have been.

UCITA mirrors the UCC in many ways, but most notably because UCITA, like the UCC, is commercial legislation. For commercial legislation to be palatable to the Conference and, more importantly, to the states, it must build on existing contract principles and impose few regulatory restrictions on freedom of contract. The propensity of the Conference scrupulously to follow these two guidelines is well known to insiders and other commentators. 31 Being so disposed, the Conference rarely adopts and is currently resistant to promulgations such as consumer protection acts that would tend to restrict or place limitations on contracting freedom. 32 It is therefore predictable that consumers and others who are governed by commercial laws, but for whom few obviously protective provisions are included, might be predictable opponents to the Act.

By virtually any standard, UCITA is not, and was never intended to be, consumer legislation. This, at least partially, explains consumer opposition to the Act. Consumers care about both proprietary and quality issues, but care more about the quality of their software than about whether they can transfer or lend it to others. Consumers have little reason to worry about reverse-engineering or the licensor's

30. See infra notes 31-32 and 82-86 and accompanying text.
31. See, e.g., Fred H. Miller, U.C.C. Articles, 3, 4 and 4A: A Study in Process and Scope, 42 ALA. L. REV. 405, 413-15 (1991) (suggesting that the states' willingness to adopt the Conference's promulgations is partially dependent on an act's avoidance of regulatory or consumer rules).
self-help provisions. Rather, consumers insist that digital products meet their utilitarian needs. Warranty disclaimers and, to a lesser extent, license choice of law, forum selection, and assent terms, favor licensors over consumer licensees and represent the primary concerns among consumers opposed to UCITA.33

Educational and community libraries represent another coalition opposing UCITA. Like consumers, they care about software quality. However, their primary concerns are proprietary. Libraries have historically relied on traditional copyright principles such as the “first sale”34 and “fair use”35 doctrines. Libraries claim that software producers are using their licensing agreements to eliminate or restrict these doctrines.36 Such provisions will likely prohibit typical library policies that would allow them to loan, donate or resell software or CD-ROMs.37 License restrictions may also prohibit routine library functions such as copying for education purposes. One on-line source argues that these prohibitions are often embedded in license contracts and are therefore sometimes too obscure for library licensees to detect before assenting.38


36. The American Library Association identifies UCITA’s potentially adverse effects on first sale and fair use:

Because information products are licensed and leased from vendors, rather than purchased and owned by libraries, copyright law’s “first sale doctrine” does not apply. This means that libraries can no longer assume that they can legally loan software or cd-roms to library users. License provisions could eliminate the right of libraries to lend products, donate library materials, or resell unwanted materials in the annual library book sale. License provisions may restrict traditional “fair use” of a product by defining what rights buyers have in relation to an information product. For example, license provisions could exclude the right to quote from a work, or make a small portion of the work for personal use, or to use the product in a non-profit, educational setting. These restrictions can even be asserted through electronic means, preventing a library user from creating a copy. With “click-on” license or shrink wrapped license agreements, the library user or the library may be unaware that they have agreed to these limitations since the provisions of the license agreement are embedded in the license or not readily available before purchase.


37. Id.

38. Id. The ALA notes:
The open-source movement represents another constituency potentially affected by UCITA. Open source advocates favor the free dissemination of software and source codes with a view toward the rapid and efficient enhancement of software quality.\(^{39}\) The movement's underlying assumption is that the strictures of existing licensing contracts diminish rather than enhance that quality and that the only means to ensure product improvement is to allow free access to those capable of learning from and enhancing current source codes.\(^{40}\) Open-source contracts typically require licensees and transferees to acknowledge a producer's copyright but also allow licensees to change and redistribute source code as they see fit.\(^{41}\) Warranty disclaimers are common.\(^{42}\)

Open-source advocates are actually divided over UCITA. Some argue that the Act advances the movement because it allows parties freely to contract for open-source-type options, such as free access to source codes.\(^{43}\) Others oppose the Act. They disdain the propensity of most licensors to retain proprietary rights and are largely uninterested in asserting warranty or other quality claims based on software they have the capacity to improve themselves.\(^{44}\) In general, UCITA's freedom of contract norms would tend to support open-source licenses.

---


\(^{40}\) Id. The following quote illustrates the intent of open source dissemination of software:

The basic idea behind open source is very simple: When programmers can read, redistribute, and modify the source code for a piece of software, the software evolves. People improve it, people adapt it, people fix bugs. And this can happen at a speed that, if one is used to the slow pace of conventional software development, seems astonishing. Id.


\(^{44}\) One of the underlying assumptions of the open source movement is that licensees with access to source codes can improve software faster than developers. "We in the open source community have learned that this rapid evolutionary process produces better software than the traditional closed model, in which only a very few programmers can see the source and everybody else must blindly use an opaque block of bits." Open Source Initiative, supra note 39. For opposition to UCITA, see Open Source Now,
The movement's indifference to or division over UCITA even further diminishes UCITA's chances of being adopted.

The opposition of UCITA by consumers, libraries and some open-source advocates is neither unpredictable nor particularly threatening to the Act's passage. Rather, these constituents are directly affected by, but are not the intended, positive beneficiaries of UCITA. As the foregoing text suggests, the Conference's crucial constituencies in drafting UCITA are commercial interests.

It is all the more ironic, therefore, that among the most vociferous and well-organized opponents of UCITA are traditional business and commercial interests. Like others, these potential licensees are concerned about product quality and understand the potentially catastrophic losses that defective software may cause. UCITA provisions requiring deference to standard warranty disclaimers and liability limitations will diminish the ability of some members of this group to sue licensors for defective software. Larger companies will certainly have some bargaining clout and can negotiate terms to ameliorate or eliminate this problem. Acceptance testing, for example, provides a prescribed "shake-out" period during which the licensee can use the software and determine whether it meets the licensee's needs. Both express warranties and service agreements are also negotiable terms.

Smaller firms that do not enjoy this type of bargaining power must accept standard warranty disclaimers because virtually all software licensors include them in their licenses. These enterprises will also have the most to lose if software fails. They may not be able to bill their customers, comply with state and local reporting require-


45. A partial list of businesses and commercial interests opposed to the original UCITA includes the Alliance of American Insurers, American Council of Life Insurers, Anheuser-Busch, Boeing, Caterpillar, Deere & Company, Georgia Pacific, H.B. Fuller, International Paper, John Hancock, Mass. Mutual, Reynolds Metals, and Walgreens. For an expanded list, see AFFECT, supra note 3.


47. UCITA § 406, supra note 25.


49. Clarke, 7 MICH. TELECOMM. & TECH. L. REV. at 8, 14-15 (noting that form contracting is especially applicable to small businesses). Small business licensees, according to Clarke, do not "knowingly allocate the risk of the particular performance failure involved." However, neither to they assume these risks, at least in a classic way consistent with freedom of contract. Id.
ments, or keep adequate financial records without software. Their opposition to UCITA is understandable.

Both large and small businesses have voiced opposition to the licensor's retention of significant proprietary rights in software. This is especially so as it applies to the original UCITA's endorsement of license provisions prohibiting reverse engineering and allows the licensor to reclaim software in some cases via self-help. Although the Conference has voted to delete both of these UCITA provisions from the promulgation, their inclusion in the original Act has inspired a good deal of criticism and opposition and likely diminished any goodwill between the Conference and commercial interests.

In sum, UCITA alienated virtually every segment of the licensee population. This is a quite a feat, given the Conference's political aims and its experience associated with promulgating and proposing the UCC.

2. UCC Opposition

At a glance, the substantive and historic similarities between the UCC and UCITA are striking. UCITA embodies the drafters' assumptions about the transactional similarities between trades in digital and tangible goods. Likewise, the history of UCITA's creation and the resistance to it by the states invite comparisons. Just as the UCC initially fared poorly in state legislatures, so has UCITA. The UCC had detractors, was generously revised and still faced nearly twenty years of state-by-state adoption before it became uniform.

The Conference seems inclined to believe that similar compromise and revision are conditions to the states' receptivity to UCITA. For the Conference, listening to and proposing UCITA revisions in response to its critics must evoke a déjà vu to the halcyon days of the UCC, itself a product of revision and compromise, rather than a desperate and last-ditch attempt to convince the states that the Conference can lead the way in the area of computer information transactions.

But the UCC, as proposed to the states, enjoyed the support of one key constituency already alienated by the Conference's proposed UCITA: business and commercial interests. In his two comprehensive articles tracing the history of the UCC, Alan Kamp addresses the political barriers confronting the drafters of the UCC based on its initial

50. See supra note 22 and accompanying text.
51. See supra note 23 and accompanying text.
52. See supra note 5 and accompanying text.
53. See supra notes 33-51 and accompanying text.
54. See supra note 8 and accompanying text.
draft.\textsuperscript{55} Well before the Conference presented the UCC to the states, Karl Llewellyn circulated drafts to several constituencies, but most notably the downtown business and commercial establishment in New York whose interests were remarkably different from those of Llewellyn and other uptown drafters.\textsuperscript{56} Early drafts of the UCC were decidedly more regulatory and included measurably more judicial oversight of commercial activities.\textsuperscript{57} The downtown group wanted a modern law, but one with little oversight and a prevailing freedom of contract norm.\textsuperscript{58} Their overall perception of the Code's early draft was negative. Some described it as "social legislation," "paternalistic," and even "leftist."\textsuperscript{59}

This history is particularly edifying in light of UCITA's reception. That the Conference drafters, including Llewellyn, conceded a good deal to the downtown critics and modified the UCC to reflect an overarching freedom-of-contract norm is not well known among judges and lawyers today. Kamp claims that our ignorance of its history fosters an assumption that the UCC is value-free and ignores early drafts that included far more consumer protection principles.\textsuperscript{60}

In reference to UCITA, the history of the UCC suggests three things. First, it explains the Conference's clear, even categorical preference for commercial rather than consumer or regulatory promulgations.\textsuperscript{61} If those most affected by the Act are unwilling to support it, then its chances of passage are slim. Llewellyn's concessions to commercial interests were essential conditions to passage of the UCC.\textsuperscript{62} UCITA's assumption of a freedom of contract motif then is predictable and, ostensibly, a sensible condition to any chance of passage. Second, the history of the UCC provides clues about UCITA's future. While incorporating freedom of contract as an overarching norm may be a necessary condition for its adoption by the states, UCITA's freedom of contract principles have alienated large and well-organized commercial interests because of the peculiar nature of licensing contracts. As

\textsuperscript{55} Kamp, 49 Buff. L. Rev. at 359; Kamp, 51 SMU L. Rev. at 275.

\textsuperscript{56} Kamp, 51 SMU L. Rev. at 346-48; Kamp, 49 Buff. L. Rev. at 371-78.

\textsuperscript{57} Kamp, 49 Buff. L. Rev. at 362.

\textsuperscript{58} Generally, Llewellyn and Soia Mentschikoff, his wife and key aid in drafting the UCC, envisaged a more regulatory system of commercial law, based on "good business practices . . . ." "Judicial oversight would replace antiquated formal laws and unregulated private agreement." The commercial, downtown crowd were averse to regulation. Rather, they "wanted autonomy and freedom from oversight by trade groups, statutes, and judges." Kamp, 49 Buff. L. Rev. at 371.

\textsuperscript{59} Kamp, 49 Buff. L. Rev. at 371.

\textsuperscript{60} Id. at 366-67.

\textsuperscript{61} See supra notes 30-32 and accompanying text.

\textsuperscript{62} Soia Mentschikoff argued that "special interests" convinced the drafters to convert the UCC from an act protecting small merchants and consumers to one elevating contracting freedom. Kamp, 49 Buff. L. Rev. at 361.
stated before, freedom of contract works well in the UCC because commercial parties tend to view their roles in such transactions as bilateral. Commercial buyers willingly accept warranty disclaimers because they also use them. Licensing contracts rarely involve such bilaterality. Software licensees, even large and powerful ones such as Boeing, use licensing contracts rather than re-license software. Finally, and ironically, commercial and business licensees will opt in favor of freedom of contract only if it serves their best interests. If, however, freedom of contract would enforce typical license provisions such as proscription on reverse-engineering and licensor access to electronic self-help, then these same interests may actually seek some form of regulatory protection. In the case of UCITA, commercial interests have apparently convinced the Conference to amend the Act so as to eliminate these two licensing terms.

UCITA has not fared well because its initial application of contracting freedom to software licenses alienated too many constituents, including commercial interests whose support is an essential condition to the Act's passage. But is UCITA dead? Perhaps the Conference's only fault was its failure to listen more closely to its detractors before submitting the Act to the states. It may not be too late. With its changes, the Conference has made concessions that may resurrect the Act. Part II argues that UCITA, as revised, provides a worthy foundation for development in this area and merits strong reconsideration by the states.

II.

Although there may be other possibilities, the three possible courses for UCITA issues addressed here are the most likely. These are 1) to retain the status quo, which is a state-by-state treatment of software transactions, 2) to redraft, starting from scratch or at least comprehensively, a uniform law for software contracts, but one with a decidedly more regulatory theme, or 3) to adopt UCITA as amended by the Conference. The following sub-sections survey each of these choices.

63. Boeing's objections to UCITA were those of a user, not a re-licensor. For example, Boeing opposed the Act's allowance of electronic self-help, since cut from UCITA. See Patrick Thibodeau, Users, Vendors Face off Over UCITA in Texas, INFOWORLD (Mar. 7, 2001), available at http://www.infoworld.com/articles/hn/xml/ 01/03/07/010307hntexas.xml (last visited Feb. 12, 2003).

64. As amended, UCITA allows for reverse engineering in some cases and prohibits electronic self-help. See supra notes 5, 22-23 and accompanying text.

65. With, perhaps, some additional tweaking. See infra notes 94-99 and accompanying text.
A. STATE-BY-STATE RULES

There are those who claim that the states can forge consistent and efficient laws governing software transactions without intervention by the Conference.66 This don't-fix-what-isn't-broken argument merits discussion because it has both intuitive appeal and modest empirical support.

The appeal of a state-by-state evolution of rules for software transactions is based on Justice Brandeis' often-used description of states as laboratories for the creation, testing, and acceptance or rejection of applicable laws.67 Often used as a defense of state and local control and to counter federal preemption, the states-as-laboratories model has allowed the common law and state legislation to evolve without undue influence from exogenous sources like the Conference or national Congress.68 While their consideration of Conference promulgations such as UCITA is certainly consistent with this idea, so are the states' powers independently to forge their own rules.

The loosely-woven empirical basis for a Brandeisian response in the area of software transactions relies on two rather convincing but contestable observations. First, those who support the status quo might claim that the normal empirical basis for rule uniformity in a given area does not exist for software transactions. This argument would tend to rely on a Coasean version of federalism that justifies the adoption of uniform rules—proposed by the Conference or by Congress—based on the negative externalities wrought by diverse state laws.69 Those who claim the need for uniformity in this area, the ar-

---

66. See, e.g., Katy Hull, The Overlooked Concern with the Uniform Computer Information Transactions Act, 51 HASTINGS L.J. 1391, 1391-92 (2000) (arguing that case law can adapt better to the rapidly changing technology that UCITA seeks to govern); A. Michael Froomkin, Article 2B As Legal Software for Electronic Contracting—Operating System or Trojan Horse?, 13 BERKELEY TECH. L.J. 1023, 1024 (1998) (arguing that states have managed electronic contracting well with "few legal crashes").


68. See, e.g. Edmund W. Kitch, Regulation, the American Common Market and Public Choice, 6 HARV. J.L. & PUB. POL'Y 119 (1982) (touting interstate competition as a better means of delivering public goods); Nim Razook, A Contract-Enhancing Norm Limiting Federal Preemption of Presumptively State Domains, 11 BYU J. PUB. L. 163 (1997) (arguing that state experimentation is usually preferable to federal preemption for traditionally state-governed areas such as product liability law); Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J. POL. ECON. 416 (1956) (providing an economic justification for favoring local—e.g. state—control). It is important to note that these works favor state over federal control. They would, therefore, ostensibly accept state consideration and adoption of the Conference's promulgations over federal preemption.

69. See, e.g., William L. Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83 YALE L.J. 663 (1974) (arguing that state corporation laws intended to attract firms can create negative externalities); Razook, Signaling and Federal Preemption, supra note 32, at 46-48 (applying Coase to the Uniform State Law process); David
argument goes, have not demonstrated that a state-by-state formulation of rules for software transactions has yielded significant interstate diversity in the area. On the contrary, most would agree that states have generally embraced freedom of contract as an overarching norm for such transactions. The differences among states tend to address those issues typical of cases that test contract freedom based on various conception of potential market failure. These often include consumer contracts in which issues such as contract assent, forum selection and warranty disclaimers pit contract provisions against other principles such as unconscionability. If the current state-by-state regime is not that diverse and has not posed significant barriers to the industry, then, at least arguably, the signals that would typically provoke some uniform treatment are absent.

Second, even if interstate diversity exists, some claim that this diversity has hindered neither the creation nor the dissemination of software in this country. Rather, the U.S. continues to be the leader in the field of information technology. If rules influence the decisions about whether to produce and market software, then our state-by-state rules must stack up well against the more centralized IT rules of Europe and other countries because their commercial and consumer users continue to rely on U.S.-produced software, especially that provided by Microsoft. Of course, this is a rather facile observa-

70. See supra notes 15-17 and accompanying text.
71. See supra notes 15-17 and accompanying text.
POLITICS AND PROMISE OF UCITA

tion because the central empirical question asks whether extant state-by-state rules hinder our ability to produce and distribute software, not whether we are IT leaders. If a uniform treatment makes us better, then our current leadership in the area provides a less-than-compelling defense for the status quo.

For those who accept the status quo, these are convincing arguments. For others, these are the arguments of inertia, not merit. They place an unduly heightened burden on UCITA advocates. While UCITA proponents will find it difficult to demonstrate that UCITA would enhance this country’s leadership in IT, they can demonstrate that UCITA provides a level of legal certainty that a state-by-state regime does not. A modicum of consistency among a few decisions is remarkably different from the type of uniformity promised by UCITA. The states’ responses to budding problems for which UCITA provides direction is unpredictable and will likely be diverse. Conference promulgations like the UCC have provided significant, interstate uniformity and allowed the states to retain regulatory control over virtually all areas of private law. To impose upon the Conference and states some threshold of interstate or Coasean difficulties as a condition to passing UCITA seems shortsighted.

Perhaps the alternative is for the Conference to reconcile its differences with the ALI and start over with an improved Uniform Law. Section B examines that possibility.

B. REDRAFTEd UCITA

Absent some concrete revision, it is rather difficult to critique the merits of a new and improved Conference promulgation. However, one can sketch the general theme of a significantly revised Act based on the criticisms waged by UCITA opponents, the reports in the legal press, and the suggested changes offered by academics. Among these sources, there exists one common, overarching recommendation. A revised Act should rely more on regulation and less on freedom of contract. As stated in Part I, most UCITA opponents argue that a freedom of contract motif unduly favors licensors over licensees and is therefore anti-consumer, anti-commercial user and anti-education. Consumers claim that UCITA denies them protections that they enjoy in other consumer transactions. Libraries must routinely accept standard contracts that impose limits on their ability effectively to

2003] (Ralph Nader’s concern about Microsoft’s role as the “world’s most important information service company”).

74. Among their criticisms of UCITA, consumers are wary of how existing consumer laws—federal and state—are affected by the act. See supra note 3 and accompanying text; James E. Rogers, Proposed Uniform Computer Information Transactions Act (UCITA): Objections From the Consumer Perspective (Dec. 3, 1999), available at http://
service their patrons.\textsuperscript{75} Businesses argue that the standard contracts diminish their ability to use software appropriately.\textsuperscript{76} Even those businesses that can demand a customized and negotiated agreement may insist that software producers wield sufficient power over these negotiations either to ensure too many licensor–friendly terms or to foster protracted negotiations resulting in higher transaction costs.

The specific content of a start–from–scratch UCITA, then, is less important than the revision’s general theme that subordinates freedom of contract to what UCITA detractors would call a more balanced regulatory regime. It is also fair to assume that the changes countenanced by this new UCITA would far exceed the UCITA as recently amended by the Conference. As evidence of this, a sub–group of the American Bar Association has proposed some fairly comprehensive changes in UCITA in addition to those just enacted by the Conference.\textsuperscript{77} A new UCITA will therefore diminish rather than extinguish the licensor’s ability to use standard contracting provisions.

For example, a redrafted UCITA may attempt to temper freedom of contract’s effects on quality issues. UCITA retains a strongly “good-centric” disposition for licensing agreements despite the differences associated with software transactions. UCITA essentially yields to the licensors’ desires to use standard contract disclaimers to eliminate or limit their warranty liability.\textsuperscript{78} These disclaimers will apparently govern most licensing contracts except for those in which the parties have negotiated different terms.\textsuperscript{79}

Leo Clarke offers one example of an alternative and more regulatory regime of product quality rules. He asserts that standard contracts and disclaimers pose peculiar problems for software transactions because licensors (form givers) use standard contracts to reduce transactions costs and ignorant, typically small-business licensees (form takers) have no incentive to incur the costs of negotiating


\textsuperscript{75} See supra notes 34–38 and accompanying text.

\textsuperscript{76} See supra notes 45–53 and accompanying text.

\textsuperscript{77} The ABA working group identified eleven different points about UCITA that require change. Some are broad, such as their insistence that UCITA “is extremely difficult to understand.” Without supplying sufficient information about how the drafters can meet the group’s demand that UCITA be clearer, the working group is ostensibly suggesting a fairly comprehensive change in the act’s wording. Other points include UCITA’s application to goods containing software, potentially broad definition of computer information transactions, opt–in provision, relation to other laws, including consumer laws, allowance of post-pay licensing contracts, relationship with open-source and free software, and self-help provision. They also suggest some miscellaneous changes. ABA, supra note 6.

\textsuperscript{78} See supra note 5 and accompanying text.

\textsuperscript{79} Acceptance testing and negotiated express warranties are two examples. See supra note 48 and accompanying text.
separate product performance terms.\textsuperscript{80} These suppositions, according to Clarke, have their most dramatic and unjust applications to software licenses. This is so because of the nature of software. As stated previously, without some tangible product to inspect, licensees rely exclusively on any assertions made by the licensor and the licensing agreement itself. Allowing the agreement both to identify the product with no accompanying tangible representation and to eliminate a licensee's contract claims based on poor quality renders those form contracts, in the words of Clarke, "not worth the paper on which they are printed."\textsuperscript{81} Arguing that licensees should not unilaterally bear product quality risks, he suggests a balanced, share-the-risk plan.\textsuperscript{82}

Clarke's prescription may be a worthwhile alternative to UCITA's warranty disclaimer regime; however, the Conference's history strongly hints that a revised and decidedly more regulatory UCITA will not originate with that organization, nor would such an effort be well received by the states. Its political blunders surrounding UCITA notwithstanding, the Conference is nothing if not a political organization. Its most compelling decision rule concerning its promulgations is political—to adopt acts that stand decent chances of being adopted by the states.\textsuperscript{83} As stated previously, others have stated or demonstrated that the Conference is averse to proposing regulatory legislation, primarily because of the states' lack of receptivity to it.\textsuperscript{84} Conference history clearly supports this. The Conference has scrupulously avoided consumer-oriented content in its centerpiece promulgations like the UCC\textsuperscript{85} and, given the states' resistance to its introduction of consumer protection laws,\textsuperscript{86} is ostensibly not amenable to a more regulatory treatment for UCITA.

That states will not support a more regulatory UCITA is, by itself, a sufficient reason to reexamine UCITA as enacted and recently amended by the Conference. In fact, the choice for the Conference between a new, improved, more regulatory UCITA and UCITA's current freedom of contract motif falls decidedly in favor of the UCITA improved by the Conference's recent revisions. Section C examines this third alternative.

\textsuperscript{80} Clarke, 7 MICH. TELECOMM. & TECH. L. REV. at 3.
\textsuperscript{81} Id. at 4.
\textsuperscript{82} Id. at 57-84.
\textsuperscript{83} See James J. Brudney, Mediation and Some Lessons from the Uniform State Law Experience, 13 OHIO ST. J. ON DISP. RESOL. 795, 799 (identifying potential for adoption as an essential part of the Conference's decision to promulgate a uniform act).
\textsuperscript{84} Miller, 42 ALA. L. REV. at 413-14.
\textsuperscript{85} Id.
\textsuperscript{86} Patchel, 78 MINN. L. REV. at 124; Razook, Signaling and Federal Preemption, supra note 32, at 74-75.
C. UCITA AS AMENDED (UCITA+)

If UCITA's shortcomings were only political, then its detractors would likely not have been as successful in their opposition. In fact, UCITA's problems are both political and substantive. However, the Conference's recent decision to revise the promulgation signals the organization's willingness to be conciliatory. The two most notable UCITA revisions are the removal of the wholesale prohibition against licensee reverse engineering\(^{87}\) and deletion of the licensor's right to use electronic self-help to reclaim software in the case of breach by the licensee.\(^{88}\) These changes, accompanied by some minor software-use changes aimed at appeasing libraries, other educational users and consumers, address two of the most contentious proprietary issues raised by UCITA's opposition, especially its commercial constituents.\(^{89}\) As the Conference learned from its experiences with the UCC, conciliating its disagreements with its business opponents must be an essential part of its UCITA strategy. These revisions will make the Act more palatable to those interests.

However, these substantive changes are apparently insufficient to encourage the American Bar Association, perhaps an essential political partner, to support UCITA. In a report issued in early 2002, an ABA working group stated formally its opposition to UCITA even as revised. The report supported the need for uniformity in the area of computer information transactions but argued for further revisions, including significant changes to make UCITA clearer\(^{90}\) and a requirement that licensees assent in every case to contract terms before payment.\(^{91}\) Both the proposed changes and the working group's tone imply a need for a complete overhaul of UCITA. One member of the group, Donald Cohn, offered a rather scathing dissent to the report chastising the majority for suggesting that the ABA not support UCITA unless it is revised as they state.\(^{92}\)

\(^{87}\) See supra notes 5 and 22 and accompanying text.

\(^{88}\) See supra notes 5 and 23 and accompanying text.

\(^{89}\) The changes deal primarily with typical practices that would likely be characterized as fair use, but may be limited under standard form, mass-marketed licenses. The amendment allows for the transfer by gift or donation (i) to a public elementary or secondary school, (ii) to a public library, or (iii) from a consumer to another consumer. Such change would ostensibly allow public educational institutions and consumers to receive gifts of software, notwithstanding transfer prohibitions in the licensee's contract. See supra note 5.

\(^{90}\) ABA, supra note 6 and accompanying text.

\(^{91}\) Id.

\(^{92}\) Cohn states, "I know of no way that the [ABA Working Group's] report can be read other than to require a rewrite of UCITA to simplify it and to change many of the policy decisions embedded in it as quid pro quo for favorable ABA action." Id.
The key issue, then, is whether UCITA+ offers a better choice to the states than retention of the status quo or a new, more regulatory UCITA, which may include some or all of the working group's proposals. For two important reasons, I would argue that UCITA+ is the best choice.

1. **Adopting UCITA+ Enhances This Country's Leadership in IT**

UCITA+ sends both important and appropriate signals to the international community that our federal system can respond adequately to the need for legal uniformity in the area of software transactions. In a rapidly changing technological environment, legal and regulatory support for that technology is important. For the U.S. to retain a leadership role in information technology, it must demonstrate that it is capable of effecting legal principles that foster the growth of software technology and balance the needs of the parties.

The ABA working group's insistence that UCITA+ requires additional, substantial change, then, must be viewed in the context of available choices. History strongly suggests that states will be unreceptive to a decidedly more regulatory version of UCITA. On the other hand, UCITA+, by addressing some of its most prominent proprietary and political shortcomings, has become more appealing to important commercial constituencies and perhaps more passable. If a more regulatory UCITA is politically doomed, then UCITA+ must be measured against the status quo, the current state-by-state [non]regime.

UCITA+ is clearly better than the status quo. It is the product of pro-action rather inaction, offers uniformity rather than actual and potential diversity, but nonetheless invites the states to experiment with its provisions, just as they have done with the UCC. In fact, its allegiance to a freedom of contract theme offers this flexibility.

2. **Freedom of Contract Provides a Workable Framework for Development in This Area**

UCITA's adoption of freedom of contract offers the only appropriate framework for the development in this important area. Its affinity to and resemblance of the UCC is no accident. Now over fifty years old, the UCC has demonstrated not only the relevance and resiliency of contracting freedom, but also its receptivity to necessary, state-by-state regulatory incursions.

---

Once again, the Conference's experience with the UCC offers hope. The UCC has taught us that a freedom of contract norm provides both a reasonable opportunity for the parties to structure their licensing agreements and the flexibility needed to inject regulatory interventions as their need becomes evident. Any objective reader of UCITA would conclude that, like the UCC, UCITA includes many provisions that contain interpretative wiggle room.

As states continue to tweak the UCC in cases involving heightened legal responsibilities for merchants and competing forms in sales transactions, so will courts struggle and occasionally disagree about UCITA provisions.

For example, both the UCC and UCITA use unconscionability provisions to limit freedom of contract. When it became apparent that product sellers were using warranty disclaimers to avoid liability for defective products, many courts rule that these disclaimers were unconscionable when applied to cases involving personal injury. Experience will likely do the same with UCITA. Scrupulous licensors will be careful about both the provisions they include in their standard contracts and their means of ascertaining with certainty that licensees consented to these terms. If either of these practices is in question, then courts may appropriately review whether the licensor used a standard contract to visit uncustomary terms on the licensee and/or failed adequately to assure the licensee's assent to standard but substantively important terms such as disclaimers.

Ex ante facto agreements between the parties, even in cases involving standard contracts, more closely mirror the contemporary

94. In his dissent to the ABA Working Group's criticism of UCITA, Donald Cohn argues that UCITA is at least as clear as most federal and state laws, including the UCC. If [clarity] is a criteria for a favorable ABA review then the ABA should have rejected the original UCC Article 2, the new revision to UCC Article 9 and most other legislative initiatives brought to its attention. Many people forget that the same arguments being made against UCITA were also made against UCC Article 2. Fifty years after enactment, there are still cases trying to decide what is a 'good' within the scope of Article 2. See supra note 6 and accompanying text.

95. Whether one is a "merchant" under UCC Article 2 has historically been problematic for courts. See U.C.C. § 2-104 (defining merchant); Nelson v. Union Equity Coop. Ex., 548 S.W.2d 352, 355-58 (Tex. 1977) (holding that a farmer is a merchant under § 2-104).

96. See U.C.C. § 2-207 (attempting to resolve contract formation issues when the parties exchange competing forms—purchase orders and acknowledgements—in their transaction).

97. See, e.g., Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960) (holding a warranty disclaimer unconscionable when used as a means to avoid liability for personal injuries to an automobile purchaser).

norms surrounding software contracts than any other legal regime. Like it or not, licensors currently control the technological cards, know exactly the rights they wish to retain and liabilities they wish to avoid, and have found huge numbers of willing licensees who nonetheless choose to purchase these carefully delineated users’ rights. Of course, it is not necessarily naive for law to aspire to heights beyond that manifested by human behavior, but there is little to suggest a need for or possibility of adoption of a more extensive regulatory treatment of proprietary or quality issues. As states experiment with UCITA+, their legislatures or courts may determine that, consistent with Clarke’s position, standard software contracts do not allocate risks efficiently and require some statutory or judicial intervention. However, even those who agree that standard contracts may yield inefficient or unjust results would likely prefer contracting freedom as a springboard to necessary regulatory incursion rather than imposing regulatory restrictions that may burden many of the actors involved in these transactions.

If UCITA+ requires additional tweaking, then the states are apt loci for these changes. Just as interstate experimentation with and supplementation of the UCC has wrought important changes related to the sale and lease of goods, the same efforts can improve the regime governing software transactions. Beginning with a freedom of contract assumption, and given its aim to clarify and correct its provisions governing some of the key proprietary concerns of software users, UCITA+ offers a UCC-like promise of increased uniformity and a dynamic framework for necessary change. By adopting UCITA+, the states will have signaled their willingness and ability to find a common and dynamic legal ground from which to operate. The status quo or a more regulatory UCITA offers neither.

CONCLUSION

Accounts of UCITA’s demise were only somewhat exaggerated. Because it alienated too many key players involved in software transaction, UCITA, in its original form, was bound to fail. The Conference’s decision to adopt revisions that appeal to an essential constituency, commercial interests, offers hope. UCITA+, because of its promise of uniformity and a dynamic framework for governance and change, provides the states a preferable choice over retention of the status quo or a more regulatory UCITA.
