

**REPORT OF THE
JOINT COMMISSION ON TECHNOLOGY AND SCIENCE**

Uniform Computer Information Transaction Act

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



SENATE DOCUMENT NO. 24

**COMMONWEALTH OF VIRGINIA
RICHMOND
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I. STUDY ORIGIN AND BACKGROUND

For the better part of the 1990s, the National Conference of Commissioners on Uniform State Laws (NCCUSL) has been drafting Article 2B of the Uniform Commercial Code (UCC 2B). Instead of creating the UCC 2B, in July 1999, the NCCUSL promulgated the Uniform Computer Information Transactions Act (UCITA). Modeled after Article 2 of the Uniform Commercial Code, UCITA was designed to be a uniform state law governing transactions of computer information.

Soon after UCITA was promulgated, an advisory committee of the Joint Commission on Technology and Science (JCOTS) reviewed UCITA and recommended that UCITA be adopted in Virginia. During the 2000 Session, the General Assembly of Virginia enacted UCITA (Senate Bill 372, Patron-Senator Edward L. Schrock; House Bill 561, Patron-Delegate Joe T. May), and Virginia became the first state to do so. UCITA, codified as Chapter 43 (§ 59.1-501.1 et seq.) of Title 59.1 of the Code of Virginia, becomes effective on July 1, 2001.

In addition to enacting and delaying the effective date of UCITA, through section 2 of Senate Bill 372, section 2 of House Bill 561, and Senate Joint Resolution 239, the General Assembly directed JCOTS to study UCITA again during the interim and report to the General Assembly and the Governor by December 1, 2001. In studying UCITA, the bills and the resolution instructed JCOTS to create an advisory committee to advise JCOTS on its work. Furthermore, the bills and the resolution specified that representatives of certain organizations and industries must be appointed to the advisory committee. (See Appendix 1)

II. MEMBERS OF ADVISORY COMMITTEE 5

Senate Bill 372, House Bill 561, and House Joint Resolution 239 required that the advisory committee studying UCITA:

shall include, but not be limited to, the following: two members of the Senate, two members of the House of Delegates, a representative of the Northern Virginia Technology Council, a representative of the Virginia Manufacturing Association, a representative of the insurance industry, a representative of the Virginia Library Association and a representative of the Richmond Technology Council.

The following persons were appointed to serve on the Committee to represent the organizations and industries specified in the bills and the resolution:

<u>Affiliation</u>	<u>Name</u>
Senate	The Honorable Edward L. Schrock, Co-chair The Honorable Stephen D. Newman
House of Delegates	The Honorable Joe T. May, Co-chair The Honorable Sam A. Nixon

<u>Affiliation</u>	<u>Name</u>
Northern Virginia Technology Council	J. Douglas Koelemay
Virginia Manufacturers Association	John Rudin
Insurance Industry	James F. Donnellan
Virginia Library Association	Ruth E. Kifer
Richmond Technology Council	Robert J. Stolle

The following persons were also appointed to the Committee:

<u>Name</u>	<u>Affiliation</u>
The Honorable Kathy J. Byron	House of Delegates
Robert M. Bailey	Region 2000 Technology Council
Leslie Blanchard	Southwestern VA Technology Council
Brian Dengler	America Online, Inc.
Sarah B. Deutsch	Bell Atlantic Corp.
Jean Ann Fox	Virginia Citizens Consumer Council
Warwick R. Furr	Holland & Knight LLP
Donna L. Leaman	USAA
Colin Learmonth	Virginia Piedmont Technology Council
Chris Mohr	Meyer & Klipper
David C. Niemi	Sallie Mae
Daniel G. "Bud" Oakey	LeClair Ryan Oakey, L.L.C.
Terry E. Riley	Hampton Roads Technology Council
Carlyle C. Ring, Jr.	National Conference of Commissioners on Uniform State Laws

<u>Name</u>	<u>Affiliation</u>
Richard Schweiker	Office of the Attorney General of Virginia
Ginger W. Stanley	Virginia Press Association
Deborah Tussey	University of Richmond School of Law
Gail Warren	Supreme Court of Virginia

The Committee was comprised of the twenty-seven people listed above, and it was co-chaired by Senator Edward L. Schrock and Delegate Joe T. May.

III. STUDY PROCEDURE AND PROCESS

To carry out the study, the Committee met five times from June 2000 through November 2000. The initial meeting, which was held on June 29, 2000, in Richmond, Virginia, was an organizational meeting. The purpose of this organizational meeting was to determine how the study would be conducted. Chairman May outlined the process that the Committee followed. (See Appendix 2)

To maximize citizen accessibility to the meetings, the Committee held its meetings throughout the Commonwealth. Following the Richmond meeting on June 29, 2000, meetings were held in Norfolk on August 23, 2000, Lynchburg on September 12, 2000, Fairfax on October 17, 2000, and again in Richmond on November 9, 2000. Throughout these meetings, members of the public and the members of the Committee proposed amendments to UCITA. Persons proposing amendments were required to be present at the meeting and provide the exact nature of the proposed amendment, the reasons for the proposed amendment and the proposed amendment's impacts. The Committee then voted on the proposed amendment to determine whether it should receive further consideration. At the final meeting, held in Richmond on November 9, 2000, the Committee reviewed all the proposed amendments that passed the initial screening. Those proposed amendments that passed the vote at the final meeting were recommended to JCOTS during its meeting on November 16, 2000. All the proposed amendments submitted for consideration are included in this report.

In addition to proposing amendments to UCITA, members of the public and the Committee testified verbally, in writing, or both in favor of or in opposition to UCITA in general or to certain proposed amendments. Copies of the written testimonies are available on the Commission's website or by contacting the Commission staff.¹

¹ Joint Commission on Technology and Science. 910 Capitol Street, Second Floor, Richmond, Virginia 23219. <<http://jcots.state.va.us/>>

IV. COMMITTEE ACTIONS ON PROPOSED AMENDMENTS

The proposed amendments and the Committee's actions are discussed in alphabetical order of the proponent's last name. The reasons given for the proposed amendments are those of the proponents, not of the Committee.

A. PROPOSED AMENDMENTS SUBMITTED BY DAVID ANDERSON ON BEHALF OF CIRCUIT CITY

1. Amendment 1

a. Nature of the Proposed Amendment

Amends UCITA to disallow the use of automatic restraints as a functional alternative to electronic self-help as follows: (1) forbid the use of automatic restraints "because of breach of contract or for cancellation of contract" and, (2) require that where a right to cancel for breach of contract and a right to exercise restraints under certain circumstances exist simultaneously, affirmative acts constituting electronic self-help must be taken under the self-help procedures contained in § 59.1-508.16.

In § 59.1-506.5(f) strike "in the event" and insert in lieu thereof "because;" strike "of cancellation" and insert in lieu thereof "for cancellation;" and, following "breach." insert the following: "If a right to cancel for breach of contract and a right to exercise a restraint under subsection (b)(4) exist simultaneously, affirmative acts constituting electronic self-help must be taken under § 59.1-508.16 instead of this section. Affirmative acts under this subsection do not include (i) use of a program, code, device, or similar electronic or physical limitation that operates automatically without regard to breach or (ii) a refusal to prevent the operation of a restraint authorized by this section or to reverse its effect."

b. Language of the Statutory Text with the Proposed Amendment

§ 59-506.5. Electronic regulation of performance

(f) This section does not authorize use of an automatic restraint to enforce remedies ~~in the event because of breach of contract or of for cancellation for breach.~~ If a right to cancel for breach of contract and a right to exercise a restraint under subsection (b)(4) exist simultaneously, affirmative acts constituting electronic self-help must be taken under § 59.1-508.16 instead of this section. Affirmative acts under this subsection do not include (i) use of a program, code, device, or similar electronic or physical limitation that operates automatically without regard to breach or (ii) a refusal to prevent the operation of a restraint authorized by this section or to reverse its effect.

c. Proponent's Reasons for the Proposed Amendment

Under UCITA, automatic restraints are programs, codes, devices or "similar electronic or physical limitation[s] the intended purpose of which [are] to restrict use of information."² Although generally thought of as "passive devices,"³ automatic restraints can be employed to "prevent use after a contract has terminated,"⁴ including use to enforce the termination at will of a contract.⁵ In such circumstances, "the restraint may do more than merely prevent use" and may involve affirmative acts by the licensor.⁶

As a remedy for breach and upon cancellation of contract, UCITA also authorizes a licensor to enforce its rights remotely through electronic self-help. In order to invoke self-help remedies, certain procedures intended to protect the licensee must be followed with respect to both including a self-help term in the license and in providing notice that the licensor is resorting to self-help remedies.⁷ Licensees are further protected in that they may recover direct and incidental damages caused by the "wrongful use of electronic self-help."⁸ Consequential damages may also be recovered under certain circumstances.⁹

² Va. Code §59.1-506.5(a).

³ *See*, UCITA §605, comment 3c. Although termed "automatic" and described in the official comments as "passive devices," nowhere in the actual language of the statute is it required that the restraint actually be self-effectuating.

⁴ § 59.1-506.5(b)(3).

⁵ Va. Code §59.1-506.18(c). In addition to use upon termination of contract, licensors may use automatic restraints where a term of the agreement authorizes use of the restraint; the restraint prevents a use that is inconsistent with the agreement; or, the restraint prevents use after expiration of the stated duration of the contract or a stated number of uses. §59.1-506.5(b).

⁶ UCITA § 605, comment 3d.

⁷ UCITA places the following limitations on the use of electronic self-help: electronic self-help must be expressly contemplated by the license agreement and the licensee must "separately manifest assent" to the electronic self-help term, Va. Code § 59.1-508.16(c); before the licensor may exercise electronic self-help, it must provide the licensee with 45 days prior notice; and, notice must include both a description of the alleged breach and a means of communicating with the licensor concerning the breach. Va. Code §59.1-508.16(d). During the 45-day period, the licensee has the right to seek injunctive relief to prevent the use of electronic self-help and the court will give such cases "prompt consideration." Va. Code §59.1-508.16(g). Electronic self-help may never be used where the licensor has reason to know that such use could create a grave danger to the public health or safety. Va. Code § 59.1-508.16(f).

⁸ Va. Code § 59.1-508.16(e).

⁹ Namely, where, during the 45 day notice period, the licensee makes a good faith description of the types of consequential damages that may result from the use of electronic self-help or the

Although UCITA does "not authorize the use of an automatic restraint to enforce remedies in the event of breach of contract or of cancellation for breach,"¹⁰ where the contract is terminable at will the effect can be the same. Under UCITA, agreements are terminable at will following "reasonable" notice.¹¹ As noted above, once the contract is terminated, automatic restraints may be used by the licensor to enforce termination. Thus, where the contract is terminable at will, a licensor can take affirmative action that would constitute self-help without going through any of the self-help procedures contained in §59.1-508.16. Indeed, the self-help procedures can potentially be avoided wherever the licensor can choose between canceling a contract for breach or employing a restraint upon termination of a license under § 59.1-506.5(b)(4). In such circumstances, the licensee loses more than the procedural safeguards of the self-help provisions of UCITA. The licensee also loses his right to recover damages because UCITA immunizes licensors from liability "for any loss caused by the use of [an automatic] restraint."¹²

Circuit City proposes to close this loophole with this amendment to subsection (f) of § 59.1-506.5.

The amendment to the first sentence of the subsection (f) makes it absolutely clear that UCITA does not authorize the use of automatic restraints as a substitute for self-help remedies. The second and most crucial sentence makes clear that where a licensor has a choice between and using automatic restraints upon termination of the contract or invoking self-help as a result of breach of contract, he must invoke self-help and follow the procedures set forth in § 59-508.16. The last sentence makes clear that this limitation is intended to reach restraints that are remotely or externally triggered (as in the case of a termination at will) and not programming that operates "automatically." It is also intended to discourage the use of a breach as a means of imposing a compulsory license on the licensor.

d. Committee Action

Motion to accept all of Circuit City's proposed amendments in a block. Motion carried on a unanimous vote. The proposed amendment was accepted.

licensor had reason to know that its use of electronic self-help could create a grave danger to the public health or safety. Va. Code § 59.1-508.16(e).

¹⁰ Va. Code § 59.1-506(f).

¹¹ Va. Code §59.1-506(a). Any term setting standards for giving notice are enforceable so long as they are not "manifestly unreasonable." Va. Code §59.1-506(c). Notice is never required where the contract specifies that termination occurs "on the happening of an agreed event," Va. Code §59.1-506(a), and generally is not required where the contract is an access contract, Va. Code §59.1-506(b), that is, a "contract to obtain by electronic means access to, or information from, an information processing system of another person, or the equivalent of such access." Va. Code § 59.1-501.2(a)(1).

¹² Va. Code §59.1-506.5(d).

e. JCOTS Action

Upon first review the Commission believed that this amendment clouded the distinction between "automatic restraints" and "electronic self-help." Therefore, the Commission rejected this amendment. The proponent asked for reconsideration and the Commission reconsidered this amendment at its final meeting of the 2000 interim on January 9, 2001.

Section 59.1-506.5(b)(4) authorizes the use of automatic restraints to "prevent use after the contract terminates, other than on expiration of a stated duration or number of uses, and the licensor gives reasonable notice to the licensee before further use is prevented." Termination means the ending of a contract by a party pursuant to a power created by agreement or law otherwise than because of breach of contract. In the event that a breach occurs on a contract that is terminable at will, this amendment would force the licensor to use electronic self-help instead of automatic restraints.

With the consent of the proponents, this amendment was amended prior to being reintroduced to the Commission. It was proposed to the Commission as:

(f) This section does not authorize use of an automatic restraint to enforce remedies ~~in the event~~ because of breach of contract or ~~of~~ for cancellation for breach. If a right to cancel for breach of contract and a right to exercise restraint under subdivision (b) (4) exist simultaneously, affirmative acts constituting electronic self-help must be taken pursuant to § 59.1-508.16, including its prohibition on mass-market transactions, instead of this section. Affirmative acts under this subsection do not include (i) use of a program, code, device, or similar electronic or physical limitation that operates automatically without regard to breach or (ii) a refusal to prevent the operation of a restraint authorized by this section or to reverse its effect.

The staff withdrew its objection and this amendment was adopted by a unanimous vote.

2. Amendment 2

a. Nature of the Proposed Amendment

Amends UCITA to define "wrongful use of electronic self-help" as failure to follow the provisions of § 59.1-508.16. In § 59.1-508.16(a) following "section" insert "(1)" and following "§ 59.1-508.15(b)" insert "and (2) "wrongful use of electronic self-help" means use of self-help other than in compliance with this section."

b. Language of the Statutory Text with the Proposed Amendment

§ 59.1-508.16. Limitations on electronic self-help.

(a) In this section,

(1) "electronic self-help" means the use of electronic means to exercise a licensor's rights under § 59.1-508.15 (b), and

(2) "wrongful use of electronic self-help" means use of electronic self-help other than in compliance with this section.

c. Proponent's Reasons for the Proposed Amendment

Even where a licensor resorts to self-help, the licensee's right to recover damages may be insecure in that UCITA leaves the "wrongful" use of electronic self-help -- a clearly crucial term -- undefined. It would seem fairly clear that "wrongful use" would reach to a failure to follow the procedures established by UCITA for the use of electronic self-help. Whether any failure to follow statutory procedures, or only a substantial or material failure, would be "wrongful" is unclear but may best be left to future judicial interpretation. It would also seem reasonable that, even if the licensor followed the procedures of § 59.1-508.16, if he invoked self-help remedies when the licensee was not in breach, that too would be wrongful.¹³ There is little reason not to include this meaning of "wrongful use of electronic self-help" in the statute.

d. Committee Action

Motion to accept all of Circuit City's proposed amendments in a block. Motion carried on a unanimous vote. The proposed amendment was accepted.

e. JCOTS Action

This amendment was adopted by a unanimous vote.

3. Amendment 3

a. Nature of the Proposed Amendment

Amends UCITA to clarify that the parties have the right to prohibit the use of self-help. In § 59.1-508.16(h) following "but" insert "the parties may prohibit use of electronic self-help, and".

b. Language of the Statutory Text with the Proposed Amendment

§ 59.1-508.16. Limitations on electronic self-help.

¹³ Given the provisions for consequential damages, it would appear that determining generally whether the use of electronic self-help was wrongful may include a review of the conduct of the parties during the 45-day negotiation period. Thus, it may be that through their conduct during the 45 day period, the parties may cure or create conditions that could lead to a finding of wrongfulness (separate and apart from the issue of consequential damages).

(h) Before breach of contract, rights or obligations under this section may not be waived or varied by an agreement, but the parties may prohibit use of electronic self-help, and the parties, in the term referred to in subsection (c), may specify additional provisions more favorable to the licensee.

c. Proponent's Reasons for the Proposed Amendment

While UCITA generally follows a policy of "freedom of contract," it prevents the parties from agreeing to waive or prohibit the resort to self-help.¹⁴ There seems to be little justification for such a limitation on the freedom of the parties. Indeed, the National Conference of Commissioners on Uniform State Laws (NCCUSL) has recognized this problem and adopted the following amendment at its August 2000 meeting.

d. Committee Action

Motion to accept all of Circuit City's proposed amendments in a block. Motion carried on a unanimous vote. The proposed amendment was accepted.

e. JCOTS Action

This amendment was adopted by a unanimous vote.

4. Amendment 4

a. Nature of the Proposed Amendment

Amends UCITA to clarify that automatic restraints may be used to prevent use of information that is contrary to the contract and to applicable law. In § 59.1-506.5(a) strike "restrict" and insert in lieu thereof "prevent" and following "information" insert "contrary to the contract or applicable law."

b. Language of the Statutory Text with the Proposed Amendment

§ 59.1-506.5. Electronic regulation of performance.

¹⁴ Va. Code §59.1-508.16(h) states that "before breach of contract, rights or obligations under this section may not be waived or varied by an agreement, but the parties, in the term referred to in subsection (c), may specify additional provisions more favorable to the licensee." Whether a complete waiver of self-help rights by the licensor would be a "right ... [that] may not be waived or varied by an agreement" or simply an "additional provision more favorable to the licensee" is nowhere clearly answered in the statute.

(a) In this section, "automatic restraint" means a program, code, device, or similar electronic or physical limitation the intended purpose of which is to ~~restrict~~ prevent use of information contrary to the contract or applicable law.

c. *Proponent's Reasons for the Proposed Amendment*

UCITA's definition of automatic restraint as currently drafted may not reach misuse of computer information in violation of copyright and other applicable law.

d. *Committee Action*

Motion to accept all of Circuit City's proposed amendments in a block. Motion carried on a unanimous vote. The proposed amendment was accepted.

e. *JCOTS Action*

This amendment was adopted by a unanimous vote.

B. PROPOSED AMENDMENTS SUBMITTED BY RANDOLPH H. CABELL

1. Amendment 1

a. *Nature of the Proposed Amendment*

Modifies the definition of "conspicuous" as used in UCITA.

b. *Statutory Text with the Proposed Amendment*

§ 59.1-501.2. Definitions

(a) As used in this chapter:

(14) "Conspicuous," with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. A term in an electronic record intended to evoke a response by an electronic agent is conspicuous if it is presented in a form that would enable a reasonably configured electronic agent to take it into account or react to it without review of the record by an individual. Unless the context otherwise requires, with respect to a person, conspicuous terms include (i) a heading in capitals in a size equal to or greater than, or in contrasting type, font, or color to, the surrounding text, (ii) language in the body of a record or display in larger or other contrasting type, font, or color or set off from the surrounding text by symbols or other marks that draw attention to the language, and (iii) a term prominently referenced in an electronic record or display which is readily accessible or reviewable from the record or display. With respect to a person or an electronic agent, conspicuous terms include a term, or reference to a term, that is so placed in a record or display

that the person or electronic agent cannot proceed without taking action with respect to the particular term or reference.

c. Proponent's Reasons for the Proposed Amendment

The reasons for this amendment can be found in a letter dated July 9, 1999 from the Bureau of Consumer Protection and Competition and the Policy Planning Office of the Federal Trade Commission to the Chair of the Executive Committee of the NCCUSL:

UCITA's approach to "conspicuous" disclosure fails to take into consideration the context in which the disclosure is given. For example, UCITA includes several broad safe harbors in its definition of "conspicuous," so that, for example, a disclosure which is "in capitals in a size equal to or great than, or in contrasting type, font or color to, the surrounding text" would be considered conspicuous, regardless of the context of the disclosure. Thus, under UCITA a disclosure would be considered "conspicuous" even if such a disclosure were buried amid boilerplate license text, or were printed on one of many different leaflets within a software box. This is the opposite approach the FTC has used to fulfill its law enforcement responsibilities. The term "clear and conspicuous" in FTC law refers to a general standard of effective communication.¹⁵

In addition to the concerns stated in the FTC letter, the Internet provides reasons to avoid codifying a particular standard of conspicuousness. As the Internet and Internet-connected devices evolve, computer information transactions will take place on devices and in manners that can only be imagined today. It would therefore be premature to codify a particular definition of "conspicuous" based on dated concepts from printed matter, instead of encouraging licensors to adopt new, more effective methods of communication appropriate to the medium.

d. Committee Action

Proposal withdrawn. Proponent withdrew the proposed amendment from the Committee's consideration. Committee took no action on this proposed amendment. The proposed amendment was not accepted.

No further action was taken.

¹⁵ Footnote (6) from a letter dated July 9, 1999 to Mr. John L. McClaugherty, Chair, Executive Committee of the NCCUSL, from the Directors of the Bureau of Consumer Protection, Bureau of Competition, and Office of Policy Planning of the Federal Trade Commission. Available online at www.ftc.gov/be/v99001 O.htm.

2. Amendment 2

a. *Nature of the Proposed Amendment*

Modifies subsection (c) of §59.1-501.5 regarding the Virginia Consumer Protection Act of 1977 (§ 59.1-196 et seq.).

b. *Statutory Text with the Proposed Amendment*

§ 59.1-501.5. Relation to federal law; fundamental public policy; transactions subject to other state law.

(c) Except as otherwise provided in subsection (d), if this chapter or a term of a contract under this chapter conflicts with the Virginia Consumer Protection Act of 1977 (§59.1-196 et seq.), the Virginia Consumer Protection Act governs. For the purposes of the Virginia Consumer Protection Act of 1977, computer information is considered to be either a good or a service, depending on the context of the transaction.

c. *Proponent's Reasons for the Proposed Amendment*

The Virginia Consumer Protection Act of 1977 (VCPA) was written before the existence of mass-market computer software, and hence mentions goods and services with no reference to computer information. UCITA explicitly excludes computer information from the definition of goods,¹⁶ thereby raising doubt as to the applicability of the VCPA to computer information transactions. Although the intent of subsection (c) of §59.1-501.5 clearly is to acknowledge the importance of the VCPA and allow that statute to govern in cases of conflict with UCITA,¹⁷ the VCPA cannot provide any protection unless, within its context, computer information is considered a good or a service.

There is justification for considering computer software as either a good or a service. The American Law Institute has noted that current case law considers mass-market computer software to be a good, and software written specifically for a customer to be a service.¹⁸ More recent examples can be found where courts have determined that computer software has characteristics similar to goods, notwithstanding its expressive nature: "The presence of some expressive content in the code should not obscure the fact of its predominant functional

¹⁶ UCITA, §59.1-501.2(33): "'Goods' means all things that are movable at the time relevant to the computer information transaction . . . The term does not include computer information."

¹⁷ Official Comments to UCITA, June 2000, Section 105, comment (4).

¹⁸ ALI's Restatement (Third) of Torts: Product Liability (1998), Section 19, Reporter's Note Comment (d).

character--it is first and foremost a means of causing a machine with which it is used to perform particular tasks."¹⁹

Passage of this proposed amendment would preserve existing protections based on the interpretation of mass-market software as a good, and would certainly be in the spirit of claims that UCITA enhances existing consumer protections.²⁰

d. Committee Action

Proposal withdrawn. Proponent withdrew the proposed amendment from the Committee's consideration. Committee took no action on this proposed amendment. The proposed amendment was not accepted.

No further action was taken.

C. PROPOSED AMENDMENTS SUBMITTED BY JEAN ANN FOX ON BEHALF OF THE VIRGINIA CITIZENS CONSUMER COUNCIL

1. Nature of the Proposed Amendment

Clarifies that UCITA does not supplant the consumer protections contained in the federal Electronic Signatures in Global and National Commerce Act by adding new subsection (g) to § 59.1-501.5.

2. Statutory Text with the Proposed Amendment

§ 59.1-501.5. Relation to federal law; fundamental public policy; transactions subject to other state law.

(g) Nothing in this Act is intended to modify, limit or supercede the provisions of section 101(c), (d), and (e) or Section 103(b) of the Electronic Signatures in Global and National Commerce Act.

3. Proponent's Reasons for the Proposed Amendment

The Federal Electronic Signatures in Global and National Commerce Act ("E-Sign") was enacted by Congress in June 2000 and took effect in October 2000. This law provides that electronic signatures and electronic records generally satisfy legal requirements for signatures or writings. E-Sign authorizes the substitution of electronic notices for paper notices including,

¹⁹ Universal Studios, Inc. v. Shawn C Reimerdes, United States District Court for the Southern District of New York, August 2000.

²⁰ See *Frequently Asked Questions about UCITA*, Carlyle C. Ring, Jr. and Raymond Nimmer, August 26, 1999, available at <<http://www.ucitaonline.com/slhpfaqs.html>>.

most, but not all, types of consumer notices. E-Sign also includes a number of important protections to ensure that consumers can receive, keep and use electronic notices provided to them. The E-Sign consumer protections are far superior to UCITA.

NCCUSL adopted an amendment to the model UCITA this summer to try to displace E-Sign with UCITA's rules on the enforceability of electronic records and signatures. The JCOTS study committee had initially deferred action on this provision.

Federal statutes generally preempt state statutes unless the federal statute expressly defers to an identified state statute. The E-Sign law exempts preemption for only two state laws: The Uniform Electronic Transactions Act as promulgated by NCCUSL (with no amendments), and a state statute that mirrors the E-Sign consumer protections for the use of electronic signatures and records. Virginia enacted an amended version of the model UETA before Congress passed E-Sign; therefore, the federal E-Sign law applies in Virginia along with the Virginia UETA law.

Congress did not exempt UCITA from E-Sign. And, UCITA does not qualify as a displacing state statute under E-Sign. E-Sign requires displacing statutes other than the model UETA to provide alternative procedures or requirements for the use or acceptance of electronic records or signatures that are consistent with E-Sign. UCITA is not consistent with E-Sign.

For example, E-Sign requires affirmative electronic consent to consumers' use of electronic records in place of legally required written notices. UCITA does not require that the consent to communicate electronically be given by electronic means, but instead would appear to permit a paper form contract for future electronic notices.

UCITA does not require a disclosure to the consumer about the consequences of a request to revert to paper notices at a later time, which is required by E-Sign.

UCITA does not require any disclosure to the consumer at the time of consent or at any other time about what hardware and software will be needed to receive the communications that are to be provided electronically, another requirement of E-Sign.

UCITA is weaker than both E-Sign and UETA and should not qualify as a displacing statute. Virginia should NOT adopt UCITA section 905 as proposed by NCCUSL to avoid the need for litigation on this question. JCOTS #5 should adopt this VCCC amendment to make it crystal clear that the uniform national consumer protections in E-Sign apply to transactions covered by UCITA in Virginia.

4. *Committee Action*

Proposal withdrawn. Proponent withdrew the proposed amendment from the Committee's consideration. Committee took no action on this proposed amendment. The proposed amendment was not accepted.

No further action was taken.

D. PROPOSED AMENDMENTS SUBMITTED BY W. SCOTT JOHNSON ON BEHALF OF INTERNATIONAL PAPER

1. Amendment 1

a. Nature of the Proposed Amendment

Creates new subsection (g) under §59.1-508.15 regarding access or disclosure of confidential or proprietary information.

b. Statutory Text with the Proposed Amendment

§59.1-508.15. Right to possession and prevent use.

(g) The right to possession under this chapter does not include any right to possess or access any confidential or proprietary information of the licensee. Any such proprietary or confidential information belonging to the licensee shall not be accessed or disclosed by the licensor or otherwise without the express consent of the licensee. Such access or disclosure or information shall constitute computer trespass in violation of § 18.2-152.4.

c. Committee Action

Proposal withdrawn. Proponent withdrew the proposed amendment from the Committee's consideration. Committee took no action on this proposed amendment. The proposed amendment was not accepted.

No further action was taken.

2. Amendment 2

a. Nature of the Proposed Amendment

Strikes subsection (b) of § 59.1-507.15 regarding a licensor's right to possession and to prevent use.

b. Statutory Text with the Proposed Amendment

§59.1-508.15. Right to possession and prevent use.

(a) On cancellation of a license, the licensor has the right:

(1) to possession of all copies of the licensed information in the possession or control of the licensee and any other materials pertaining to that information which by contract are to be returned or delivered by the licensee to the licensor; and

(2) to prevent the continued exercise of contractual and informational rights in the licensed information under the license.

~~(b) Except as otherwise provided in § 59.1-508.14, a licensor may exercise his 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 § 59.1-508.16.~~

c. Committee Action

Proposal withdrawn. Proponent withdrew the proposed amendment from the Committee's consideration. Committee took no action on this proposed amendment. The proposed amendment was not accepted.

No further action was taken.

3. Amendment 3

a. Nature of the Proposed Amendment

Creates new subsection (g) under § 59.1-501.3 regarding donations of computer software.

b. Statutory Text with the Proposed Amendment

§ 59.1-501.3 Scope; exclusions.

(g) Donations of computer software to organizations exempt from taxation pursuant to Section 501(c)(3) of Title 26 of the United States Code (IRS Code of 1954), primary or secondary schools and libraries shall not be prohibited or limited by this Chapter.

c. Committee Action

Proposal withdrawn. Proponent withdrew the proposed amendment from the Committee's consideration. Committee took no action on this proposed amendment. The proposed amendment was not accepted.

No further action was taken.

4. Amendment 4

a. Nature of the Proposed Amendment

Creates new subsection (4) under § 59.1-502.8 regarding adoption of a contractual use term.

b. Statutory Text with the Proposed Amendment

§ 59.1-502.8. Adopting terms of records.

(4) A party adopts a contractual use term only if the licensor gave notice of such term to the consumer or licensee in a conspicuous manner prior to the sale.

c. Committee Action

Proposal withdrawn. Proponent withdrew the proposed amendment from the Committee's consideration. Committee took no action on this proposed amendment. The proposed amendment was not accepted.

No further action was taken.

E. PROPOSED AMENDMENTS SUBMITTED BY RUTH E. KIFER ON BEHALF OF THE VIRGINIA LIBRARY ASSOCIATION

1. Amendment 1

a. Nature of the Proposed Amendment

Creates new subsection (f) under § 59.1-501.5 regarding licenses to libraries, archives, or educational institutions.

b. Statutory Text with the Proposed Amendment

§ 59.1-501.5. Relation to federal law; fundamental public policy; transactions subject to other state law.

(f) In a non-negotiated agreement, a term which has the effect of restricting the ability of a library, archive, or educational institution to engage in circulation, course reserves, and inter-library lending services; classroom and other fair uses; distance education; or archiving and preservation, is unenforceable to the extent those activities are not prohibited by other law.

c. Proponent's Reasons for the Proposed Amendment

This amendment applies only to non-negotiated agreements when the licensee is a library, archive or educational institution. Following are examples of how UCITA, without this

proposed amendment, would restrict libraries from lending materials, supporting education and research, and providing other core library services to the citizens of Virginia.

Until a few years ago, libraries circulated primarily print materials to their library users. However, libraries now receive and make available informational material in many formats including CD-ROMs, on-line databases, multi-media, and other formats. Virginia libraries and educational institutions routinely negotiate contracts for these materials, spending millions of dollars each year. In the negotiation process, libraries take care to ensure that the license or contract terms allow reproduction or distribution for library uses, as permitted under federal copyright law. Often, however, these transactions are not governed by a negotiated agreement, but rather are off the shelf purchases, arriving in shrink-wrap or on-line products with click-on agreements. Terms in such non-negotiated licenses received after purchase could prohibit libraries from circulating the materials or even making them available to all users in the library. The option of returning the materials is not feasible in the many instances in which the materials are available solely from one source.

School and academic libraries, as an extension of classroom teaching, provide course reserves services to supplement required readings. Materials included in reserves collections have historically included print, video, audio, and now electronic formats. Restrictions placed on the distribution or reproduction of electronic information by non-negotiated licenses could prohibit authorized student use, whether on site or via remote access. Another essential service provided by all libraries is interlibrary loans to provide library materials not available at the home library. This is particularly important for smaller libraries, such as those in rural areas. Although negotiated licenses may provide for interlibrary loan applications, non-negotiated licenses prohibiting this practice could greatly curtail the interlibrary loan of research material among university and other libraries.

Under federal copyright law, educators may legally photocopy a portion of a book or other printed document for classroom use. Without the proposed amendment, educators could be barred, by the terms of a click-on license, from making the same use of equivalent text from an e-book or other electronic document. With increased emphasis on distance learning throughout the Commonwealth, this situation could have a negative impact on the availability of educational resources to students in distance learning programs, thus hampering Virginia's colleges and universities from becoming preeminent in this area. The last library-use named in the proposed amendment is the archiving and preservation function. Under federal copyright law, libraries are permitted to make a limited number of copies of a work for archival or preservation purposes. Unreasonably restrictive terms in non-negotiated licenses could result in diminished archives in Virginia libraries.

The federal copyright law over the past two centuries has established a very careful balance between the interests of authors and users. This amendment ensures that the balance is preserved with respect to copyrighted works that libraries, archives and universities make available to their users. The general provision on preemption is not sufficient to achieve this end because some courts have held that the Copyright Act does not preempt bona fide contracts.

Further, the scope of Constitutional preemption is uncertain. The provision on fundamental public policy, § 59.1-501.5(b), is too vague to provide certainty to libraries and educational institutions that rely on fair use and other copyright exceptions. Significantly, this amendment applies only to works licensed by the specified institutions through non-negotiated agreements. Use of works distributed under negotiated agreements could continue to be restricted by contractual terms.

d. Committee Action

Motion to accept. Motion failed on an 11-12 vote (YEAS--Newman, Byron, Blanchard, Donnellan, Kifer, Leaman, Niemi, Rudin, Schweiker, Tussey, Warren; NAYS--May, Nixon, Bailey, Dengler, Furr, Koelemay, Learmonth, Mohr, Oakey, Riley, Ring, Stanley). The proposed amendment was not accepted.

No further action was taken.

2. Amendment 2

a. Nature of the Proposed Amendment

Creates new subsection (f) under § 59.1-501.5 regarding standard licenses to libraries, archives, or educational institutions.

b. Statutory Text with the Proposed Amendment

§ 59.1-501.5. Relation to federal law; fundamental public policy; transactions subject to other state law.

(f) (1) No standard form license shall prohibit a non-profit library, archive, or educational institution from engaging in circulation, course reserves, and inter-library or other lending services; classroom and instructional uses; or archiving and preservation, to the extent these activities are permitted under:

(i) 17 U.S.C. Section 107 (Limitations on Exclusive Rights: Fair Use);

(ii) 17 U.S.C. Section 108 (Limitation on exclusive rights: Reproduction by libraries and archives);

(iii) 17 U.S.C. Section 109 (Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord); and

(iv) 17 U.S.C. Sections 110(1) and (2) (Limitations on exclusive rights: Exemption of certain performances and displays).

(2) A term in a standard form license which attempts to prohibit any activity permitted under subsection (f)(1) shall be unenforceable unless such activity is prohibited by other law.

(3) Nothing in subsection (f)(1) shall permit a non-profit library, archive, or educational institution to engage in the online distribution of computer programs or any other activity not permitted by subsection (f)(1).

c. Proponent's Reasons for the Proposed Amendment

This revised library amendment contains three significant changes. First, the term "non-negotiated license" has been replaced with "standard form license," a defined term in UCITA.

Second, the scope of the amendment has been limited to non-profit libraries, archives, and educational institutions, thereby excluding the many libraries at law firms and corporations.

Third, the traditional library and educational functions we wish to continue are clearly limited by what is permitted under the Copyright Act. In other words, libraries and educational institutions may continue to engage in these activities only to the extent these activities are now permitted under the referenced provisions of the Copyright Act. 17 U.S.C. 107 permits limited reproductions for purposes such as criticism, teaching, scholarship and research. The Guidelines for Classroom Copying in Not-For Profit Educational Institutions contained in U.S. House of Representatives Report 94-1476 provide courts with detailed guidance on how this provision is to be applied in the classroom setting. 17 U.S.C. Section 108 sets forth several unique situations, such as preservation, in which libraries and archives can make no more than three copies of a work. 17 U.S.C. Section 109 is the provision that permits libraries to lend to the public materials they have purchased-- the core library function. Finally, 17 U.S.C. Sections 110(1) and (2) allow a teacher to display a work in a physical or virtual classroom.

In short, the library community wants nothing more than what is currently permitted under the Copyright Act. At the Lynchburg meeting it was suggested that the exceptions we were seeking would permit a librarian to make thousands of copies of a work, or to upload a work onto the Internet where it can be accessed and downloaded by millions of users around the world. This was not our intent, and we added the specific reference to the provisions of the Copyright Act we seek to preserve to make this clear.

These exceptions to the Copyright Act are extremely narrow, and do not condone widespread copying. Further, we added subsection (f)(3) to emphasize that only the limited copying and distribution permitted to libraries and educational institutions under the Copyright Act would be permitted under UCITA.

Some have suggested that the Copyright Act preempts inconsistent sections of UCITA, and therefore this provision is unnecessary. If the Copyright Act does in fact preempt UCITA, then provision will have no effect and no one should object to its adoption. On the other hand, if the Copyright Act does not preempt inconsistent terms contained in standard form licenses entered into under UCITA, then this provision is necessary to prevent publishers from unilaterally upsetting the balances enacted by Congress in the copyright law. Subsection (f)(2) makes clear

that a court should not permit a standard form license under UCITA to override privileges granted to libraries and educational institutions under the Copyright Act.

d. Committee Action

Motion to reject. Motion failed on a 12-12 vote (YEAS: May, Nixon, Dengler, Furr, Koelemay, Learmonth, Mohr, Oakey, Ring, Schweiker, Stanley, Stolle. NAYS: Newman, Byron, Bailey, Blanchard, Donnellan, Fox, Kifer, Leaman, Niemi, Riley, Rudin, Warren.)

Motion to accept. Motion failed on a 12-12 vote (YEAS: Newman, Byron, Bailey, Blanchard, Donnellan, Fox, Kifer, Leaman, Niemi, Riley, Rudin, Warren. NAYS: May, Nixon, Dengler, Furr, Koelemay, Learmonth, Mohr, Oakey, Ring, Schweiker, Stanley, Stolle.) Proposed amendment not accepted.

No further action was taken.

F. PROPOSED AMENDMENTS SUBMITTED BY J. CHRISTOPHER LAGOW ON BEHALF OF NATIONWIDE INSURANCE

1. Amendment 1.

a. Nature of the Proposed Amendment

Modifies § 59.1501.3 to exclude insurance from the scope of UCITA.

b. Statutory Text with the Proposed Amendment

§ 59.1-501.3. Scope; exclusions.

(d) This chapter does not apply to:

(5) a contract that does not require that information be furnished as computer information or in which under the agreement the form of the information as computer information is otherwise insignificant with respect to the primary subject matter of the part of the transaction pertaining to the information; or

(6) subject matter within the scope of Titles 8.3, 8.4, 8.4A, 8.5A, 8.6A, 8.7, or 8.8A; or

(7) (A) A computer information transaction or access contract related to

1. an insurance or other financial service or product;

2. a premium, claim, distribution or other charge or obligation of an insurer, its affiliates or subsidiaries, or its policyholder, contract-holder, certificate-holder, customer, applicant, claimant, beneficiary, member or consumer;

3. the solicitation or application for insurance or other financial service or product, whether through an insurance producer or by any other distribution method;

4. regardless of the person to whom the information is eventually provided, information required or requested of an insurer or its affiliates or subsidiaries by:

(i) an insurance rating bureau;

(ii) a state insurance regulator;

(iii) the National Association of Insurance Commissioners;

(iv) a state or federal regulator, legislator, or other governmental entity or official;

5. a contract or service with a governmental entity;

6. any business, operational, support or administrative system of an insurer, its affiliates or subsidiaries;

7. any provision to an insurer, its affiliates or subsidiaries, of informational products or systems, including information processing systems, informational content and informational rights related to the provision of informational products or systems;

(B) a computer information transaction or access contract involving an insurer and any other provider of financial services, including a governmental entity or quasi-governmental entity.

(C) identifying, verifying, access-enabling, authorizing or monitoring information related to a computer information transaction or access contract.

c. Proponent's Reasons for the Proposed Amendment

This amendment provides a complete exclusion from UCITA for insurers and their affiliates and subsidiaries, as well as any business or internal management contracts involving insurers. The exclusion is not a transactional exclusion and states that UCITA does not apply to any computer information transaction or access contract involving an insurer or its affiliates or subsidiaries. The amendment allows individual companies to opt-in to UCITA at their discretion for individual contracts.

d. Committee Action

Motion to Reject. Motion carried on a 14-6 vote by roll call (YEAS: Nixon, Blanchard, Dengler, Koelemay, Learmonth, Mohr, Oakey, Riley, Ring, Rudin, Schweiker, Stanley, Stolle, Tussey; NAYS: Donnellan, Fox, Kifer, Leaman, Niemi, Warren). The proposed amendment was not accepted.

No further action was taken.

2. Amendment 2

a. *Nature of the Proposed Amendment*

Amends § 59.1-504.1 regarding warranty of non-infringement and copyright.

b. *Statutory Text with the Proposed Amendment*

§ 59.1-504.1. Warranty and obligations concerning noninterference and noninfringement.

(a) A licensor of information that is a merchant regularly dealing in information of the kind warrants that the information will be delivered free of the rightful claim of any third person by way of infringement or misappropriation, but a licensee that furnishes detailed specifications to the licensor and the method required for meeting the specifications ~~holds the licensor harmless against any such claim that arises out of compliance with either the required specification or the required method except for a claim that results from the failure of the licensor to adopt, or notify the licensee of, a noninfringing alternative of which the licensor had reason to know~~ warrants to the licensor that the information contained in the specifications and the method required to meet the specifications will be delivered free of the rightful claim of a third person by way of a claim of infringement or misappropriation.

(c) The warranties in this section are subject to the following rules:

(1) If the licensed informational rights are subject to a right of privileged use, collective administration, or compulsory licensing, the warranty is not made with respect to those rights.

(2) ~~The~~ Unless the contract provides otherwise, the obligations under subsections (a) and (b) (2) apply ~~solely~~ to informational rights arising under the laws of the United States or a state, ~~unless the contract expressly provides that the warranty obligations extend to rights under the laws of other countries. Language is sufficient for this purpose if it states, "The licensor warrants exclusivity, noninfringement, in specified countries, worldwide," or words of similar import. In that case, the warranty extends to the specified country or, in the case of a reference to "worldwide" or the like, to all countries within the description, but only to the extent the rights are recognized under a treaty or international convention to which the country and the United States are signatories.~~

c. *Proponent's Reasons for the Proposed Amendment*

This amendment provides that a licensee that specifies certain requirements warrants non-infringement to the licensor; this, is a fairer standard than holding the vendor totally harmless. In addition this amendment provides that the warranty of non-infringement under the Virginia UCITA law, for a licensor that has chosen this law, applies to other countries with which the USA has treaty obligations regarding informational rights. In other word, a licensor selling software to a multinational company warrants that the product does not infringe copyrights held outside the USA, unless the contract specifies otherwise.

d. Committee Action

Motion to accept. Motion failed on a 10-11 vote by roll call (YEAS: Blanchard, Donnellan, Fox, Kifer, Leaman, Niemi, Rudin, Schweiker, Tussey, Warren; NAYS: May, Nixon, Dengler, Koelemay, Learmonth, Mohr, Oakey, Riley, Ring, Stanley, Stolle). The proposed amendment was not accepted.

No further action was taken.

3. Amendment 3

a. Nature of the Proposed Amendment

This proposed amendment is regarding violation of public policy (weight of violation), limitation or waiver of standards (reasonability), and modifications of warranties.

b. Statutory Text with the Proposed Amendment

§ 59.1-501.5. Relation to federal law; fundamental public policy; transactions subject to other state law.

(a) A provision of this chapter which is preempted by federal law is unenforceable to the extent of the preemption.

(b) If a term of a contract violates a fundamental public policy, the court may refuse to enforce the contract, enforce the remainder of the contract without the impermissible term, or limit the application of the impermissible term so as to avoid a result contrary to public policy, ~~in each case to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of the term.~~

§ 59.1-501.13. Variation by agreement; commercial practice.

(a) The effect of any provision of this chapter, including an allocation of risk or imposition of a burden, may be varied by agreement of the parties. However, the following rules apply:

(1) Obligations of good faith, diligence, reasonableness, and care imposed by this chapter may not be disclaimed by agreement, but the parties by agreement may determine ~~the standards by which the performance of the obligation is to be measured if the standards are not manifestly unreasonable~~ reasonable standards by which the performance of the obligation is to be measured.

§ 59.1-504.3. Implied warranty; merchantability of computer program.

(a) Unless the warranty is disclaimed or modified under § 59.1-504.6, a licensor that is a merchant with respect to computer programs of the kind warrants:

(1) to the end user that the computer program is fit for the ordinary purposes for which such computer programs are used;

(2) to the distributor that:

(A) the program is adequately packaged and labeled as the agreement requires; and

(B) in the case of multiple copies, the copies are within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved; and

(3) that the program conforms to any promises or affirmations of fact made on the container or label.

(b) Unless disclaimed or modified under § 59.1-504.6, other implied warranties with respect to computer programs may arise from course of dealing or usage of trade.

(c) No warranty is created under this section with respect to informational content, but an implied warranty may arise under § 59.1-504.4.

§ 59.1-504.4. Implied warranty; informational content.

(a) Unless the warranty is disclaimed or modified under § 59.1-504.6, a merchant that, in a special relationship of reliance with a licensee, collects, compiles, processes, provides, or transmits informational content warrants to that licensee that there is no inaccuracy in the informational content caused by the merchant's failure to perform with reasonable care.

§ 59.1-504.5. Implied warranty; licensee's purpose; system integration.

(a) Unless the warranty is disclaimed or modified under § 59.1-504.6, if a licensor at the time of contracting has reason to know any particular purpose for which the computer information is required and that the licensee is relying on the licensor's skill or judgment to select, develop, or furnish suitable information, the following rules apply:

(1) Except as otherwise provided in paragraph (2), there is an implied warranty that the information is fit for that purpose.

(2) If from all the circumstances it appears that the licensor was to be paid for the amount of its time or effort regardless of the fitness of the resulting information, the warranty under paragraph (1) is that the information will not fail to achieve the licensee's particular purpose as a result of the licensor's lack of reasonable effort.

c. *Proponent's Reasons for the Proposed Amendment*

This amendment takes away language that would require the courts to find that public policy clearly outweighs the necessity of enforcement of a contract. Instead, the amendment leaves it up to the court to determine the standard it will use in weighing public policy against the enforcement of a contract under UCITA, as the court is the best arbiter of such conflicts.

UCITA allows the parties to determine the standards by which the performance of the obligation under a contract is to be measured if the standards are not manifestly unreasonable. This amendment rewrites this provision to provide that the parties may determine reasonable standards for the enforcement of the contract. "Manifest unreasonability" is a very restrictive standard and does not belong in a contractual situation where there is supposedly an "arm's-length" agreement between two parties.

In addition, the amendment makes a technical change to clarify that disclaimer or modification of warranties should be made pursuant to the standards of §59.1-504.6, which sets out the standards for modification or disclaimer of warranties.

d. *Committee Action*

Motion to Reject. Motion carried on a 16-5 vote by roll call (YEAS: May, Nixon, Blanchard, Dengler, Koelemay, Learnnoth, Mohr, Oakey, Riley, Ring, Rudin, Schweiker, Stanley, Stolle, Tussey, Warren; NAYS: Donnellan, Fox, Kifer, Leaman, Niemi). The proposed amendment was rejected.

No further action was taken.

4. *Amendment 4*

a. *Nature of the Proposed Amendment*

Amends § 59.1-505.3 regarding transferability.

b. *Statutory Text with the Proposed Amendment*

§ 59.1-505.3. Transfer of contractual interest.

(2) Except as otherwise provided in paragraph (3) and § 59.1-508 (a) (1) (B), a term prohibiting transfer of a party's contractual interest is enforceable, and a transfer made in violation of that term is a breach of contract and is ineffective to create contractual rights in the transferee against the nontransferring party, except to the extent that:

(A) the contract is a license for incorporation or use of the licensed information or informational rights with information or informational rights from other sources in a combined

work for public distribution or public performance and the transfer is of the completed, combined work; or

(B) the transfer is of a right to payment arising out of the transferor's due performance of less than its entire obligation and the transfer would be enforceable under paragraph (1) in the absence of the term prohibiting transfer; or

(C) The transfer is in connection with a merger or the acquisition or sale of a subsidiary or affiliate involving the licensee and another person and is made to:

(1) Preserve the integrity of information and information processing systems used by the licensee; or

(2) Ensure compatibility of information and information processing systems among the parties involved in the merger, acquisition, or sale.

c. Proponent's Reasons for the Proposed Amendment

This provides an exception to the provision that allows the prohibition of a transfer of a contractual interest. It would allow transfer of rights in cases where the transfer of rights is in connection with the acquisition or sale of a subsidiary or affiliate and is necessary to preserve the integrity of the information systems of the resulting entity.

d. Committee Action

Motion to Accept. Motion carried on a 12-9 vote by show of hands. The proposed amendment was accepted.

e. JCOTS Action

This amendment was adopted by a unanimous vote. After the vote, Delegate Bennett filed an objection. (See Appendix 3)

5. Amendment 5

a. Nature of the Amendment

Amends §§ 59.1-503.7 and 59.1-503.8 regarding number of users and duration of a license.

b. Statutory Text with the Proposed Amendment

§ 59.1-503.7. Interpretation and requirements for grant.

(c) An agreement that does not specify the number of permitted users permits ~~a number of users which is reasonable in light of the informational rights involved and the commercial circumstances existing at the time of the agreement~~ unlimited number of users.

§ 59.1-503.8. Duration of contract.

If an agreement does not specify its duration, to the extent allowed by other law, the agreement is enforceable indefinitely. the following rules apply:

~~(1) Except as otherwise provided in paragraph (2), the agreement is enforceable for a time reasonable in light of the licensed subject matter and commercial circumstances but may be terminated as to future performances after a reasonable time duration at will by either party during that time on giving reasonable notice to the other party.~~

~~(2) The duration of contractual rights to use licensed subject matter is a time reasonable in light of the licensed informational rights and the commercial circumstances. However, subject to cancellation for breach of contract, the duration of the license is perpetual as to the contractual rights and contractual use terms if:~~

~~(A) the license is of a computer program that does not include source code and the license (i) transfers ownership of a copy or (ii) delivers a copy for a contract fee the total amount of which is fixed at or before the time of delivery of the copy; or~~

~~(B) the license expressly grants the right to incorporate or use the licensed information or informational rights with information or informational rights from other sources in a combined work for public distribution or public performance.~~

c. Proponent's Reasons for the Proposed Amendment

This amendment inserts as default rules unlimited number of users and indefinite duration where there are no contractual provisions governing number of users and duration.

d. Committee Action

Motion to Reject. Motion failed on a 10-11 vote by show of hands.

Motion to Accept. Motion failed on a 10-10 vote by show of hands. The proposed amendment not accepted.

No further action was taken.

6. Amendment 6

a. Nature of the Amendment

Amends § 59.1-502.9 regarding fundamental policies concerning competition and innovation.

b. Statutory Text with the Proposed Amendment

§ 59.1-502.9. Mass-market license.

(a) A party adopts the terms of a mass-market license for purposes of § 59.1-502.8 only if the party agrees to the license, such as by manifesting assent, before or during the party's initial performance or use of or access to the information. A term is not part of the license if:

(1) (A) the term is unconscionable or is unenforceable under § 59.1-501.5 (a) or (b), or (B) unenforceable after weighing fundamental public policies, including fundamental public policies concerning competition or innovation; or

(2) subject to § 59.1-503.1, the term conflicts with a term to which the parties to the license have expressly agreed.

c. Proponent's Reasons for the Proposed Amendment

This states that, in determining whether a contract under UCITA is enforceable, the courts shall look to the public policy of promoting competition and innovation. This would state expressly that it is the public policy of the State that UCITA is not intended to be used to create contracts that hinder competition or innovation in the computer information marketplace.

d. Committee Action

Motion to Reject. Motion carried on a 17-3 vote by show of hands. The proposed amendment was not accepted.

No further action was taken.

7. Proposed Amendment 7

a. Nature of the Proposed Amendment

Amends § 59.1-508.5 regarding limitation of actions.

b. Statutory Text with the Proposed Amendment

§ 59.1-508.5. Limitation of actions.

(b) If the original agreement of the parties alters the period of limitations, the following rules apply:

(1) The parties may reduce the period of limitation to not less than one year after the right of action accrues but may not extend it.

(2) In a consumer contract or a mss-market transactions, the period of limitation may not be reduced.

c. Committee Action

Motion to Accept. The motion failed on a 10-10 vote by show of hands. The proposed amendment was not accepted.

No further action was taken.

8. Amendment 8

a. Nature of the Amendment

Amends § 59.1-501.3 regarding government contract.

b. Statutory Text with the Proposed Amendment

§ 59.1-501.3. Scope; exclusions

(g) This chapter does not apply to products or services provided to federal government contractors.

c. Committee Action

Proposal withdrawn. Proponent withdrew the proposed amendment from the Committee's consideration. Committee took no action on this proposed amendment. The proposed amendment was not accepted.

No further action was taken.

9. Amendment 9A

a. Nature of the Amendment

Amends § 59.1-508.15 regarding electronic repossession.

b. Statutory Text with the Proposed Amendments

§ 59.1-508.15. Right to possession and to prevent use.

(g) The discontinuation of contractual rights by the licensor under subsection (b) of this section is only permitted for:

(1) wrongful repudiation by the licensee;

(2) a material breach resulting from the failure to make payment when due; or

(3) a material breach that may substantially impair the value of the licensed information and informational rights to the licensor or subject the licensor to liability to a third party resulting from the material breach by the licensee.

(h) (1) Prior to the cancellation of a license in which the parties have agreed to permit the use of electronic self-help, the licensor shall provide the licensee with an opportunity to cure the claimed breach giving rise to the discontinuation of contractual rights under subsection (b) of this section.

(2) The opportunity to cure shall be consistent with the provisions of 59.1-507.3.

(i) Electronic self-help may not be used in the absence of an express term authorizing such use and meeting the requirements under subsection (c) of § 59.1-508.16.

c. Committee Action

Motion to accept. Motion failed on a 7-14 vote by show of hands. The proposed amendment not accepted.

No further action was taken.

10. Amendment 9B

a. Nature of the Amendment

Amends § 59.1-508.16 regarding electronic self-help.

b. Statutory Text with the Proposed Amendment

§ 59.1-508.16. Limitations on electronic self-help.

(a) In this section, "electronic self-help" means the use of electronic means to exercise a licensor's rights under § 59.1-508.15 (b).

(b) Notwithstanding the provisions of this section, electronic self-help is prohibited in mass-market transactions.

~~(b)~~(c) On cancellation of a license, electronic self-help is not permitted, except as provided in this section.

~~(c)~~(d) If the parties agree to electronic self-help, a licensee shall separately manifest assent to a term authorizing use of electronic self-help. The term must:

(1) provide for notice of exercise as provided in subsection (d);

(2) state the name of the person designated by the licensee to which notice of exercise must be given and the manner in which notice must be given and place to which notice must be sent to that person; and

(3) provide a simple procedure for the licensee to change the designated person or place.

~~(d)~~(e) Before resorting to electronic self-help authorized by a term of the license, the licensor shall give notice in a record to the person designated by the licensee stating:

(1) that the licensor intends to resort to electronic self-help as a remedy on or after forty-five days following receipt by the licensee of the notice;

(2) the nature of the claimed breach that entitles the licensor to resort to self-help; and

(3) the name, title, and address, including direct telephone number, facsimile number, or e-mail address, to which the licensee may communicate concerning the claimed breach.

~~(e)~~(f) A licensee may recover direct and incidental damages caused by wrongful use of electronic self-help. The licensee may also recover consequential damages for wrongful use of electronic self-help, whether or not those damages are excluded by the terms of the license, if:

(1) within the period specified in subsection (d) (1), the licensee gives notice to the licensor's designated person describing in good faith the general nature and magnitude of damages;

(2) the licensor has reason to know the damages of the type described in subsection (f) may result from the wrongful use of electronic self-help; or

(3) the licensor does not provide the notice required in subsection (d).

~~(f)~~(g) Even if the licensor complies with subsections ~~(c)~~ and (d) and (e), electronic self-help may not be used if the licensor has reason to know that its use will result in substantial injury or harm to the public health or safety or ~~grave harm to the public interest~~ substantially substantial harm to the public interest affecting third persons not involved in the dispute.

~~(g)~~(h) A court of competent jurisdiction of the Commonwealth shall give prompt consideration to a petition for injunctive relief and may enjoin, temporarily or permanently, the licensor from exercising electronic self-help even if authorized by a license term or enjoin the licensee from misappropriation or misuse of computer information, as may be appropriate, upon consideration of the following:

(1) ~~grave~~ substantial harm of the kinds stated in subsection ~~(f)~~(g), or the threat thereof, whether or not the licensor has reason to know of those circumstances;

(2) irreparable harm or threat of irreparable harm to the licensee or licensor;

(3) that the party seeking the relief is more likely than not to succeed under his claim when it is finally adjudicated;

(4) that all of the conditions to entitle a person to the relief under the laws of the Commonwealth have been fulfilled; and

(5) that the party that may be adversely affected is adequately protected against loss, including a loss because of misappropriation or misuse of computer information, that he may suffer because the relief is granted under this chapter.

~~(h)~~(i) Before breach of contract, rights or obligations under this section may not be waived or varied by an agreement, but the parties, in the term referred to in subsection ~~(e)~~(d), may specify additional provisions more favorable to the licensee.

~~(i)~~(j) This section does not apply if the licensor obtains possession of a copy without a breach of the peace and the electronic self-help is used solely with respect to that copy.

c. *Committee Action*

Motion to Reject. Motion carried on a 17-1 vote by show of hands. The proposed amendment was not accepted.

No further action was taken.

11. *Amendment 10*

a. *Nature of the Amendment*

Amends § 59.1-508.9 regarding consequential damages and liability to third person arising out of denial of access and electronic repossession.

b. *Statutory Text with the Proposed Amendment*

§ 59.1-508.9. Licensee's damages.

(c) Third persons harmed by the wrongful discontinuation of access under § 59.1-508.14 or wrongful use of electronic self-help under §59.1-508.15(b), may recover damages from the licensor to the same extent as recoverable by the licensee.

(d) In the case of wrongful termination of access under an access contract under §59.1-508.14, the licensor shall be liable for damages to the licensee to the same extent as provided for wrongful exercise of self-help under § 59.1-508.16.

c. Proponent's Reasons for the Proposed Amendment

This amendment provides that injured third parties may recover damages from the licensor to the same extent recoverable by the licensee. In addition, it provides that wrongful access termination is subject to the same liability as electronic repossession.

d. Committee Action

Motion to Reject. Motion carried on a 13-3 vote by show of hands. The proposed amendment was not accepted.

No further action was taken.

12. Amendment 11

a. Nature of the Amendment

Amends the definition of consequential damages.

b. Statutory Text with the Proposed Amendment

§ 59.1-501.2. Definitions

(13) "Consequential damages"

(A) resulting from breach of contract includes (i) any loss resulting from general or particular requirements and needs of which the breaching party at the time of contracting had reason to know and which could not reasonably be prevented, and (ii) any injury to an individual or damage to property other than the subject matter of the transaction proximately resulting from breach of warranty;

(B) resulting from wrongful use of electronic self-help, as set out in § 59.1-508.16 includes any loss resulting from general or particular requirements and needs of which the party exercising electronic self-help at the time of the exercise had reason to know and which could not be reasonably prevented; and

(C) ~~The term~~ does not include direct damages or incidental damages.

c. Committee Action

Motion to Reject. Motion carried on a 11-10 vote by show of hands. The proposed amendment was not accepted.

No further action was taken.

13. Amendment 12

a. Nature of the Proposed Amendment

Amends §§ 59.1-501.9 and 59.1-501.10 regarding choice of law and choice of forum.

b. Statutory Text with the Proposed Amendment

§ 59.1-501.9. Choice of law.

(a) The parties in their agreement may choose the applicable law. However, the choice is not enforceable in a consumer contract or a mass-market transaction to the extent it would vary a rule that may not be varied by agreement under the law of Virginia.

(b) In the absence of an enforceable agreement on choice of law, the contract is governed by the law of Virginia.

§ 59.1-501.10. Contractual choice of forum.

(a) Subject to the provisions of § 59.1-501.9, the parties in their agreement may choose an exclusive judicial forum unless the choice is unreasonable ~~and~~ or unjust.

(b) A judicial forum specified in an agreement is not exclusive unless the agreement expressly so provides.

c. Proponent's Reasons for the Proposed Amendment

This amendment provides that a choice of law provision in a contract involving a mass-market transaction is not enforceable to the extent it would vary a rule that may not be varied under Virginia law. In addition, it subjects choice of forum to the same restrictions as exist in the choice of law provisions. Finally, it provides that the choice of forum provision may not be unreasonable or unjust. For example, a choice of forum of the State of Washington may not be unreasonable per se, but if the licensee is a small Virginia businessman (such as an insurance agent) the exclusive forum of Washington State courts may be unjust.

d. Committee Action

Motion to Accept. Motion failed on a 10-11 vote by show of hands. The proposed amendment was not accepted.

No further action was taken.

14. Amendment 13A

a. Nature of the Amendment

Amends § 59.1-506.5 regarding automatic restraint.

b. Statutory Text with the Proposed Amendment

§ 59.1-506.5. Electronic regulation of performance.

(c) This section does not authorize an automatic restraint that affirmatively prevents or makes impracticable a licensee's access to its own information or information of a third party, other than the licensor, if that information is in the possession of the licensee or a third party ~~and accessed without use of the licensor's information or informational rights.~~

c. Proponent's Reasons for the Proposed Amendment

This amendment clarifies that a licensee is always entitled to recover his own information, even if it involves use of the licensor's software. This is essential, as the original language would prevent the licensee from recovering his own computer information in his possession (on his servers) if it involved use of the licensor's software.

d. Committee Action

Motion to Accept. Motion carried on a 10-9 vote. The proposed amendment was accepted.

e. JCOTS Action

This amendment was adopted by a unanimous vote.

15. Amendment 13B

a. Nature of the Amendment

Amends § 59.1-506.5 regarding automatic restraint.

b. Statutory Text with the Proposed Amendment

§ 59.1-506.5. Electronic regulation of performance.

~~(d) A party that includes or uses an automatic restraint consistent with subsection (b) or (c) is not liable for any loss caused by the use of the restraint.~~ In the case of wrongful exercise of automatic restraint, the licensor shall be liable for damages to the licensee to the same extent as provided for wrongful exercise of self-help under § 59.1-508.16.

c. Proponent's Reasons for the Proposed Amendment

This amendment strikes the hold harmless clause for automatic restraint and puts in place the same standards for damages as exist under electronic repossession ("self-help").

d. Committee Action.

Proposal withdrawn. Proponent withdrew the proposed amendment from the Committee's consideration. Committee took no action on this proposed amendment. The proposed amendment was not accepted.

No further action was taken.

16. Amendment 14

a. Nature of the Proposed Amendment

Amends § 59.1-501.12 regarding agency and scope of employment.

b. Statutory Text with the Proposed Amendment

§ 59.1-501.12. Manifesting assent; opportunity to review.

(f) An employer does not manifest assent to a contractual relationship due to the actions of an employee or agent unless:

(1) the employee's or agent's conduct is within the scope of his or her employment or agency; and

(2) the employer:

(A) having knowledge of such conduct, authorizes or ratifies the conduct; or

(B) recklessly disregards such conduct.

(f)(g) The effect of provisions of this section may be modified by an agreement setting out standards applicable to future transactions between the parties.

c. *Proponent's Reasons for the Proposed Amendment*

The amendment clarifies the circumstances under which an employee may bind an employer under UCITA.

d. *Committee Action*

Motion to Reject. Motion carried on a 15-4 vote by show of hands. The proposed amendment was not accepted.

No further action was taken.

17. Amendment 15

a. *Nature of the Proposed Amendment*

Amends § 59.1-508.14 regarding limitations on access denial.

b. *Statutory Text with the Proposed Amendment*

§ 59.1-508.14. Discontinuing Access

(a) Subject to the provisions of this section, on material breach of an access contract or if the agreement so provides, a party may discontinue all contractual rights of access of the party in breach and direct any person that is assisting the performance of the contract to discontinue its performance.

(b) (1) Except as provided in subsection (c) of this section, before discontinuing access rights under an access contract, a party shall give notice in a record to the party allegedly in breach party at least 3 days before discontinuance.

(2) The notice shall state:

(A) that the party intends to discontinue all access rights under an the access contract;

(B) the nature of the claimed breach that entitles the party to discontinue all access rights under an access contract;

(C) the opportunity to cure as provided under 12-703 of this chapter; and

(D) to the extent applicable, information to allow for communication concerning the claimed breach, including the party's:

(i) address and telephone number;

(ii) facsimile number; and

(iii) e-mail address.

(c) the notice requirement under this section does not apply for a discontinuation required to meet a statutory requirement or court order.

(d) the discontinuation of access rights under the contract by the licensor under this section is only permitted for:

(1) wrongful repudiation by the licensee;

(2) subject to subsection (e) of this section, a material breach resulting from the failure to make payment when due; or

(3) a material breach that may substantially impair the value of the access contract to the licensor or subject the licensor to liability to a third party resulting from the material breach by the licensee.

(e) in cases of a material breach for failure to pay an amount due, when the amount in controversy is deposited in an escrow account conforming with the industry standard, a licensor may not discontinue access until final resolution of the dispute.

c. Proponent's Reasons for the Proposed Amendment

UCITA allows the discontinuance of access without notice or opportunity to cure. This amendment allows both, as a denial of access will have a severe impact on a business. Think of denial of access as an intentional "Y2K" event.

UCITA allows discontinuance of access for a material breach. First, the determination of what constitutes a material breach is up to the vendor. Second, UCITA allows immaterial breaches to constitute a material breach. Generally, we have no objection to discontinuance where there is wrongful repudiation by the licensee, failure to make payment when due, impairment of the value of the access contract to the licensor, or creating liability of the licensor to a third party resulting from the material breach by the licensee. However, we do object to allowing (as UCITA does) access denial in cases where the "material breach" results from a legitimate contract dispute.

d. Committee Action

Motion to Reject. Motion carried on an 18-1 vote by show of hands. The proposed amendment was not accepted.

No further action was taken.

18. Amendment 16

a. Nature of the Proposed Amendment

Amends the definitions of "mass-market transactions."

b. Statutory Text with the Proposed Amendment

§ 59.1-501.2. Definitions

(a) As used in this chapter:

(44) "Mass-market transaction" means a transaction that is:

(A) a consumer contract; or

(B) any other transaction with an end-user licensee if:

(i) the transaction is for information or informational rights directed to the general public as a whole, including consumers, under substantially the same terms for the same information;

(ii) the licensee acquires the information or informational rights in a retail transaction under terms ~~and in a quantity~~ consistent with an ordinary transaction in a retail market; and

(iii) the transaction is not (a) a contract for redistribution or for public performance or public display of a copyrighted work; or (b) a transaction in which the information is customized or otherwise specially prepared by the licensor for the licensee, other than minor customization using a capability of the information intended for that purpose; ~~(c) a site license; or (d) an access contract.~~

c. Proponent's Reasons for the Proposed Amendment

This amendment clarifies that mass-market licenses refer to the market the computer information is sold in, not the number of copies purchased. In other words, there is a difference between customized computer information transactions and the purchase of pre-packaged computer information on the open marketplace which the purchaser has no contractual right to alter or

reverse engineer. Such products are fungible in the same sense as any other mass produced product and the definition of mass-market should not treat purchasers differently, merely because of the size of the purchase.

The amendment also provides that site licenses and access contracts are not excluded from the definition of "mass-market transaction".

d. Committee Action

Proposal withdrawn. Proponent withdrew the proposed amendment from the Committee's consideration. Committee took no action on this proposed amendment. The proposed amendment was not accepted.

No further action was taken.

19. Amendment 17

a. Nature of the Proposed Amendment

Amends § 59.1-507.2 regarding inspection, reliance on specifications, and express warranty.

b. Statutory Text with the Proposed Amendment

§ 59.1-507.2. Waiver of remedy for breach of contract.

(g) (1) For the purposes of this section, "reasonable inspection" means reliance by the licensee on:

(i) exact or technical specifications provided by the licensor;

(ii) a sample, model, or demonstration provided by the licensor; or

(iii) an express warranty made by the licensor.

(2) Reasonable inspection does not require the licensee to install or operate the computer program or information product in a manner that may endanger the licensee's information processing system or the informational content residing on the information processing system.

c. Proponent's Reasons for the Proposed Amendment

This amendment clarifies that the licensee may rely on specific representations by the licensor when performing a "reasonable inspection". In other words, "reasonable inspection" means that the licensee is not required to install or operate the computer information or program to such an extent that it may endanger his own systems or information.

d. Committee Action

Motion to Accept. Motion failed on an 8-12 vote. The proposed amendment was not accepted.

No further action was taken.

G. PROPOSED AMENDMENTS SUBMITTED BY TAMARA MADDOX

1. Amendments 1a & 1b

a. Nature of the Proposed Amendment

Provides damages for unconscionable terms.

b. Statutory Text with the Proposed Amendment

§ 59.1-501.11. Unconscionable contract or term.

(d) Any person or entity who successfully challenges a contract or a term thereof as unconscionable or in conflict with fundamental public policy shall be entitled to recover actual damages, or \$500.00, whichever is greater. Should the trier of fact determine that the term or provision is particularly egregious or determine that a deliberate deception was propagated against the licensee, then the trier of fact may award treble damages or \$1,000.00, whichever is greater.

(e) Notwithstanding any other provision of law to the contrary, in addition to any damages awarded to a person or entity under part (d) of this subsection, such person or entity may be awarded reasonable attorney's fees and court costs.

§ 59.1-501.13. Variation by agreement; commercial practice.

(a) The effect of any provision of this chapter, including an allocation of risk or imposition of a burden, may be varied by agreement of the parties. However, the following rules apply:

(1) Obligations of good faith, diligence, reasonableness, and care imposed by this chapter may not be disclaimed by agreement, but the parties by agreement may determine the standards by which the performance of the obligation is to be measured if the standards are not manifestly unreasonable.

(2) The limitations on enforceability and the scope of damages to be awarded imposed by unconscionability under § 59.1-501.11 and fundamental public policy under § 59.1-501.5 (b) may not be varied by agreement.

c. *Proponent's Reasons for the Proposed Amendment*

Section 59.1-501.11 recognizes that a shrink-wrap or click-wrap licensing agreement may contain terms that are unconscionable or that conflict with fundamental public policy, and it clarifies that such terms shall not be enforceable. However, obtaining the protection of this and related sections will likely necessitate bringing a case to court. Because a determination that something is unconscionable or is against public policy is a very high standard, most consumers and small businesses may not be successful in obtaining relief without an attorney's assistance, especially if they are compelled to litigate in a foreign jurisdiction. Even with the assistance of an attorney, it will be difficult to prove actual damages for this type of violation. For example, if a software product contains a known bug that erases all information on a consumer's hard disk, but the licensor deliberately withholds that information from the consumer, yet simultaneously includes a term agreeing that the company shall have no liability for any losses associated with its product, regardless of the circumstances, this might constitute an unconscionable provision. However, how will the consumer prove the value of his or her lost personal information? Valuation of damages under such circumstances would be extremely difficult.

For these reasons, including a minimum damages clause and a clause awarding attorneys fees to litigants who are successful in challenging a term under this subsection is important. Otherwise, individuals and small businesses will be unable to afford to litigate even clearly unconscionable provisions because of the expenses of litigation. Simultaneously, this provision will encourage attorneys to take on meritorious cases due to the expectation that attorneys' fees may be awarded should they prevail. Most importantly, these provisions are necessary to effectively deter licensors from including such unconscionable provisions in their contracts that consumers may believe they will be required to abide by.

The Virginia Consumer Protection Act, which prohibits fraudulent and deceptive trade practices, generally provides for minimum damages and the awarding of attorneys' fees at the court's discretion for violations of its provisions. These violations need not include willful conduct on the part of the violators; in fact, the court is entitled to increase damages should it find that the conduct was willful. See subsection (A) of § 59.1-204 of the Code of Virginia.

The above provisions generally track the language of the penalty provisions of the Virginia Consumer Protection Act. The proposed amendment provides a minimal damages award and availability of attorneys' fees for a litigant who shows that a specific contract, provision or term is unconscionable or against fundamental public policy. In particularly egregious cases, the court is given the discretion to award treble damages or a higher minimum damages award that parallels the penalty provision for willful conduct under the Virginia Consumer Protection Act. See subsection (B) of § 59.1-204 of the Code of Virginia.

In addition, the clause contained in § 59.1-501.13(a)(2) is intended to prevent software manufacturers from evading the intent of the unconscionability provisions by making it clear that they cannot simply add a term to their licensing agreements waiving or modifying consumer rights in this regard. The above modification simply clarifies that this paragraph also covers the additional subsections (d) and (e) added above.

d. Committee Action

Motion to accept. Motion failed on a 7-13 vote by show of hands. Proposed amendments not accepted.

No further action was taken.

2. Amendment 2

a. Nature of the Proposed Amendment

Modifies § 59.1-508.16 regarding electronic self-help.

b. Statutory Text with the Proposed Amendment

§ 59.1-508.16. Limitations on electronic self-help.

(g) In situations where electronic self-help is not permitted, whether by statute or by agreement, no licensor may disclaim liability for consequences arising from a security vulnerability caused by an electronic self-help mechanism.

c. Proponent's Reasons for the Proposed Amendment

An amendment has been proposed by the National Conference of Commissioners on Uniform State Laws (NCCUSL) (see Amendment #5 of August 23, 2000, proposed by Carlyle C. Ring, Jr.) that would prohibit use of "electronic self help" in mass market transactions and reinforce the requirement of manifest agreement by the parties to authorize resort to "electronic self help."

This amendment is an excellent measure. However, it does not protect consumers from the deliberate inclusion of "back doors" in mass market software (perhaps because the software licensor does not wish to take the time to remove them from software sold to non-mass-market customers) that may then be misused by others to wreak havoc upon the consumer. Security holes can cause major problems to consumers, even if the software licensors themselves do not utilize the "self help" capabilities that caused these holes. Software licensors must not be allowed to disclaim liability for damages that result from the deliberate inclusion of electronic self-help mechanisms in situations where such self-help is not permitted. (This provision also clarifies that should the licensor itself utilize such a back door when not permitted to do so, it may not disclaim liability for its actions.)

d. Committee Action

Motion to accept. Motion failed on an 8-12 vote by show of hands. Proposed amendment not accepted.

No further action was taken.

3. Amendment 3

a. Nature of the Proposed Amendment

Amends § 59.1-502.9 regarding copy of mass-market license.

b. Statutory Text with the Proposed Amendment

§ 59.1-502.9. Mass-market license.

(a) A party adopts the terms of a mass-market license for purposes of § 59.1-502.8 only if the party agrees to the license, such as by manifesting assent, before or during the party's initial performance or use of or access to the information. A term is not part of the license if:

(3) The term is not available for viewing before and after assent:

(i) in a printed license; or

(ii) in electronic form that:

1. Can be printed or stored for archival and review purposes by the licensee; or [is made available by a licensor to a licensee, at no cost to the licensee, in a printed form on the request of a licensee that is unable to print or store the license for archival and review purposes.]

2. Is made available by a licensor to a licensee, at no cost to the licensee, in a printed form on the request of a licensee that is unable to print or store the license for archival and review purposes.

c. Proponent's Reasons for the Proposed Amendment

This amendment ensures that the licensee is able to receive a copy of the license agreement specifying the terms that are agreed upon and enforceable between the parties to the transaction. Having a copy of the license terms is an issue of fundamental fairness and will enable a consumer to readily determine or refer to the terms agreed to in the event of a dispute. This amendment was approved by Maryland in its UCITA Law (see § 21-209(a)(4) of Maryland Enrolled House Bill 19).

d. Committee Action

Motion to amend the amendment by striking the rest of the subparagraph after "; or" subsection (3)(ii)(1). The language to be stricken (in brackets in above text) is identical to subsection (3)(ii)(2). Motion carried on a voice vote (1 nay).

Motion to accept the amendment as amended. Motion carried on a 12-7 vote by show of hands. Amendment accepted as amended.

e. JCOTS Action

This amendment was adopted by a unanimous vote.

H. PROPOSED AMENDMENTS SUBMITTED BY DAVID B. MCMAHON ON BEHALF OF NATIONAL CONSUMER ORGANIZATION

1. Amendment 1

a. Nature of the Proposed Amendment

Amends § 59.1-504.6 regarding warranty provisions.

b. Statutory Text with the Proposed Amendment

§ 59.1-504.6. Disclaimer or modification of warranty.

(h) The provisions of subsections (a) through (g) of this section do not apply to a consumer contract for a computer program.

(i) (1) Any oral or written language used by a manufacturer, licensor, merchant or seller in a consumer transaction for a computer program, which attempts to exclude or modify any implied warranties of merchantability of a computer program created under § 59.1-504.3, or exclude or modify the consumer's remedies for a breach of those warranties, is unenforceable.

(2) A merchant may recover from a manufacturer or a licensor any damages resulting from the breach of implied warranties of merchantability that could not be disclaimed or modified under this section.

(j) Any oral or written language used by a manufacturer or licensor in a consumer contract for a computer program which attempts to limit or modify a consumer's remedies for breach of a merchant's, licensor's, or manufacturer's express warranties is unenforceable unless the merchant, licensor, or manufacturer provides reasonable and expeditious means of performing the warranty obligations.

(k) the provisions of §§ 59.1-504.3 and 59.1-504.5 do not apply to:

(1) computer information provided for no fee, unless the information/computer program is provided in conjunction with the sale, license or lease of goods, services, or another information/program; or

(2) an information/computer program provided as a beta test or similar experimental version of the information/computer program.

c. *Proponent's Reasons for the Proposed Amendment*

This provision is parallel to a modification that the Maryland Legislature made when it enacted UCITA. It provides that new software cannot be sold (or the license sold) "as is". Selling products "as is" means there is no warranty at all. If it does not work or work right, the consumer cannot get any money back. Currently under UCITA software can be sold "as is," without any warranty at all -- the way cheap used cars are often sold to consumers. The only difference is that the used car salesman has to tell the consumer that there is no warranty before the consumer buys the used car. Under UCITA the consumer will not find that out about the new software until later.

UCITA does provide an option that only occurs after the consumer buys the software, takes it home, unpacks it, starts loading it on the consumer's computer, sees a window with the option to read the "license" and discovers for the first time that the software is being sold "as is." UCITA states that the consumer can then pack up and return the software for a refund, which the software publisher knows consumers, having gotten this far, are very unlikely to do. But, once the consumer clicks "OK" to that window with an "as is" license provisions, the consumer loses all rights to sue if the software does not work, works wrong, or loads a virus. Technically this means that software must be sold with the "implied warranty" that the computer program is "fit for the ordinary purposes for which such computer programs are used." (See UCITA § 403, enacted in Virginia as § 59.1-504.3.)

Differences between Maryland's non-uniform amendment and this one are:

- The word "license" was added to (k)(1) to close a loophole that would have applied the provision only to software that was "sold" rather than licensed.
- This amendment is limited to the warranties of "computer programs" and does not generally apply to on line services.
- This amendment does not prohibit the seller from disclaiming the warranties of "fitness for a particular purpose" or "system integration" from being disclaimed. Maryland's amendment included these additional warranties which cannot be disclaimed.

d. *Committee Action*

Motion to Reject. Motion carried on a voice vote. The proposed amendment was not accepted.

No further action was taken.

2. *Amendment 2*

a. *Nature of the Proposed Amendment*

Amends § 59.1-502.9 regarding mass-market licenses.

b. Statutory Text with the Proposed Amendment

§ 59.1-502.9. Mass-market license.

(a) A party adopts the terms of a mass-market license for purposes of § 59.1-502.8 only if the party agrees to the license, such as by manifesting assent, before or during the party's initial performance or use of or access to the information. A term is not part of the license if:

- (1) the term is unconscionable or is unenforceable under § 59.1-501.5 (a) or (b) ; or
- (2) subject to § 59.1-503.1, the term conflicts with a term to which the parties to the license have expressly agreed; or
- (3) the term is not available for viewing, without condition, on a public web site or other similarly available and accessible forum, and any physical packaging and any download site contains sufficient information to enable a reasonable person to locate and view the term.

c. Proponent's Reasons for the Proposed Amendment

This amendment guarantees that an industrious consumer or other software/computer information purchaser can see the terms of the sale of the license to use any software/computer information. Thus, the buyer can shop around before deciding which product to select.

Competition is the backbone of our free market system. One of the most important areas of competition is contract terms, with warranties as a particular example. Sellers of other products, like tools, appliances and cars, often compete with one another by offering longer warranties, or warranties that cover more aspects of what is for sale, and so on. One by-product of this competition is better warranties. A more important by-product of this warranty competition is better quality. If sellers have to compete by offering better warranties, they have to offer better products so they do not lose money living up to the warranties. This provision assures that consumer can shop around and look at the warranties before selecting what software or other computer information to purchase simply by going "on-line".

In order for shoppers to be able to compare competing warranties they need to be able to see the warranties before they choose the item to purchase. There is a conflict in the cases and authorities. UCITA settles the conflict by saying that it is okay for the seller/licensor to hide the terms of the warranty until after the selection has been made, the money paid, and the installation of the software begun.

This provision was opposed by the proponents of UCITA as too costly. It costs from \$10 to \$100 a page to script text on to a web site. Most licenses are a couple pages. All companies selling software have web sites. If they do not, the typical ISP would provide, for \$25 a month, enough web space for the terms of dozens of licenses.

d. Committee Action

Motion to reject. Motion carried on a voice vote. The proposed amendment was not accepted.

No further action was taken.

I. PROPOSED AMENDMENTS SUBMITTED BY DAVID NIEMI, SALLIE MAE

1. Amendment 1

a. Nature of the Proposed Amendment

Amends definition of "mass-market transaction"

b. Statutory Text with the Proposed Amendment

§ 59.1-501.2. Definitions.

(a) As used in this chapter:

(44) "Mass-market transaction" means a transaction that is:

(A) a consumer contract; or

(B) any other transaction with an end-user licensee if:

(i) the transaction is for information or informational rights directed to the general public as a whole, including consumers, under substantially the same terms for the same information;

(ii) the licensee acquires the information or informational rights in a retail transaction under terms ~~and in a quantity~~ consistent with an ordinary transaction in a retail market; and

(iii) the transaction is not (a) a contract for redistribution or for public performance or public display of a copyrighted work; (b) a transaction in which the information is customized or otherwise specially prepared by the licensor for the licensee, other than minor customization using a capability of the information intended for that purpose; (c) a site license; or (d) an access contract.

c. Proponent's Reasons for the Proposed Amendment

The original definition risks excluding retail purchases in large quantities, although the licensee has no more ability to negotiate license terms than a consumer purchasing a single copy. This change ensures that the circumstances and terms of the transaction, rather than the quantity, will

define a mass-market transaction. This particular amendment was also adopted by Maryland, and is also recommended by 4CITE, for the same reason.

d. Committee Action

Motion to accept. Motion carried on a 15-8 vote by roll call (YEAS--Newman, Byron, Bailey, Blanchard, Donnellan, Furr, Kifer, Leaman, Learmonth, Niemi, Rudin, Schweiker, Stanley, Tussey, Warren; NAYS--May, Nixon, Dengler, Coleman, Mohr, Oakey, Riley, Ring). The proposed amendment was accepted.

e. JCOTS Action

This amendment was adopted by a unanimous vote.

2. Amendment 2

a. Nature of the Proposed Amendment

Amends § 59.1-502.15 regarding electronic messages by inserting "by the destination address indicated by the receipt," after the words "establishes that the message was received".

b. Statutory Text with the Proposed Amendment

§ 59.1-502.15. Electronic message; when effective; effect of acknowledgment.

(a) Receipt of an electronic message is effective when properly addressed and received.

(b) Receipt of an electronic acknowledgment of an electronic message establishes that the message was received by the destination address indicated by the receipt, but by itself does not establish that the content sent corresponds to the content received.

c. Proponent's Reasons for the Proposed Amendment

Electronic acknowledgements are sometimes sent by a messaging system before the system actually attempts to deliver the message to its final destination. The system name and delivery address indicated by the receipt should be inspected to verify that they are consistent with the intended delivery address.

d. Committee Action

Motion to reject. Motion carried on a unanimous voice vote. The proposed amendment was not accepted.

No further action was taken.

3. Amendment 3

a. Nature of the Proposed Amendment

Amends the definition of "conspicuous".

b. Statutory Text with the Proposed Amendment

§ 59.1-501.2. Definitions

(a) As used in this chapter:

(14) "Conspicuous," with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. A term in an electronic record intended to evoke a response by an electronic agent is conspicuous if it is presented in a form that would enable a reasonably configured electronic agent to take it into account or react to it without review of the record by an individual. ~~With respect to a person, conspicuous terms include (i) a heading in capitals in a size equal to or greater than, or in contrasting type, font, or color to, the surrounding text, (ii) language in the body of a record or display in larger or other contrasting type, font, or color or set off from the surrounding text by symbols or other marks that draw attention to the language, and (iii) a term prominently referenced in an electronic record or display which is readily accessible or reviewable from the record or display.~~ With respect to a person or an electronic agent, conspicuous terms include a term, or reference to a term, that is so placed in a record or display that the person or electronic agent cannot proceed without taking action with respect to the particular term or reference.

c. Proponent's Reasons for the Proposed Amendment

The original language implied that certain specific typographical methods would provide a safe harbor with respect to conspicuousness, regardless of whether the context of the term would make it likely to be noticed by a reasonable person. Furthermore, the typographical methods indicated are likely to become obsolete by changes in technology in the future. This definition would remove this unnecessary and potentially harmful language.

d. Committee Action

Motion to defer action to a later meeting. Motion carried on a unanimous voice vote.

Proposal withdrawn. Proponent withdrew the proposed amendment from the Committee's consideration. Committee took no action on this proposed amendment. The proposed amendment was not accepted.

No further action was taken.

4. Amendment 4

a. Nature of the Proposed Amendment

Amends the definition of "goods".

b. Statutory Text with the Proposed Amendment

(33) "Goods" means ~~all things that are movable at the time relevant to the computer information transaction. The term includes the unborn young of animals, growing crops, and other identified things to be severed from realty which are covered by § 8.2-107. The term does not include computer information, money, the subject matter of foreign exchange transactions, documents, letters of credit, letter of credit rights, instruments, investment property, accounts, chattel paper, deposit accounts, or general intangibles~~ movable, tangible items (as opposed to realty, services, financial assets, or other intangibles). For purposes of this title, the term does not include computer information. However, for purposes of other statutes, computer information may be considered to be a good or a service as defined or implied therein.

c. Proponent's Reasons for the Proposed Amendment

The original language could imply that computer information would not be considered as a good for purposes of other statutes, such as the Virginia Consumer Protection Act of 1977 (§ 59.1-196 et seq.). The new language removes this implication, and simplifies aspects of the definition which are not relevant to UCITA.

d. Committee Action

Motion to defer action. Motion carried on a unanimous voice vote.

Proposal withdrawn. Proponent withdrew the proposed amendment from the Committee's consideration. Committee took no action on this proposed amendment. The proposed amendment was not accepted.

No further action as taken.

J. PROPOSED AMENDMENTS SUBMITTED BY RICK OLSON ON BEHALF OF CAPITAL ONE

1. Amendment 1

a. Nature of the Proposed Amendment

Amends restrictions on electronic self-help

b. Statutory Text with the Proposed Amendment

§ 59.1-508.16. Limitations on electronic self-help.

(a) In this section,

(1) "electronic self-help" means the use of electronic means to exercise a licensor's rights under §59.1-508.15(b), and

(2) "wrongful use of electronic self-help" means use of electronic self-help other than in compliance with this section.

(b) ~~On cancellation of a license,~~ Electronic self-help is not permitted, including on cancellation of a license, except upon agreement of the parties as provided in this section.

(c) If the parties agree to permit electronic self-help, a licensee shall separately manifest assent to a term authorizing use of electronic self-help. To "separately manifest assent to a term", the parties must take affirmative action with respect to the term itself. A general assent to a license is not sufficient to manifest assent to a term authorizing the use of electronic self-help. The term must:

(1) provide for notice of exercise as provided in subsection (d);

(2) state the name of the person designated by the licensee to which notice of exercise must be given and the manner in which notice must be given and place to which notice must be sent to that person; and

(3) provide a simple procedure for the licensee to change the designated person or place.

(f) Even if the licensor complies with subsections (c) and (d), electronic self-help may not be used if the licensor has reason to know that its use ~~will~~ may result in ~~substantial~~ injury or harm to the public health or safety, ~~or grave harm to the public or the public interest substantially affecting or potential harm~~ to third persons not involved in the dispute.

(g) A court of competent jurisdiction of the Commonwealth shall give prompt consideration to a petition for injunctive relief and may enjoin, temporarily or permanently, the licensor from exercising electronic self-help even if authorized by a license term or enjoin the licensee from misappropriation or misuse of computer information, as may be appropriate, upon consideration of the following:

(1) ~~grave~~ harm of the kinds stated in subsection (f), or the threat thereof, whether or not the licensor has reason to know of those circumstances;

~~(i) This section does not apply if the licensor obtains possession of a copy without a breach of the peace and the electronic self help is used solely with respect to that copy.~~

c. Committee Action

Proponent requested that the Committee defer its action. Proponent proposed substitute amendments. The Committee took no action.

No further action taken.

2. Amendment 2

a. Nature of the Proposed Amendment

Creates a new section regarding interpretation of UCITA.

b. Statutory Text with the Proposed Amendment

§59.1-509.3. Interpretation of this Chapter

In interpreting the provisions of this chapter, the Official Commentary to the Uniform Computer Information Transactions Act published by the National Conference of Commissioners on Uniform State Laws (NCCUSL) shall be given primary consideration.

d. Committee Action

Proponent requested that the Committee defer its action. Proponent proposed substitute amendments. The Committee took no action.

No further action taken.

3. Amendment 3

a. Nature of the Proposed Amendment

Amends § 59.1-508.16 regarding assent to electronic self-help.

b. Statutory Text with the Proposed Amendment

§ 59.1-508.16. Limitations on electronic self-help.

(c) A-If the parties agree to permit electronic self-help, a licensee shall separately manifest assent to a term authorizing use of electronic self-help. In accordance with § 59.1-501.12(c), a general assent to a license containing a term authorizing use of electronic self-help is not sufficient to manifest assent to the use of electronic self-help. The term must:

c. *Proponent's Reasons for the Proposed Amendment*

Self-help is an extraordinary remedy. The drafters of UCITA, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") recognized this fact, and, at least in their commentary, made it clear that self-help must not be hidden in a contract, but must be a separate provision that is agreed to separately between the parties:

Under this Act, electronic self-help is not permitted unless a term of the license expressly authorizes it and the licensee manifests assent to that term. Assent to the term requires that there be action with respect to the term itself, not merely general assent to the license. The requirement thus ensures that the term will be brought to the attention of the licensee. The licensee, of course, is free to refuse to consent to the term and this refusal or absence of a term, in itself, precludes electronic self-help. *NCCUSL Official Comments to Section 816.*

This interpretation is one of the keys to Capital One's support of UCITA. The fear among all licensees of software is that self-help will be stealthily inserted into contracts that do not receive proper internal legal review, and that as a result, mission critical software will be subject to the whims of the suppliers. By requiring that a self help provision must separately be assented to, it would help companies such as Capital One identify that self-help is being sought by a supplier and allow us to take appropriate action in the contracting process. Unfortunately, UCITA as presently adopted is not clear that a separate assent is required. The amendment that we propose writes the NCCUSL commentary into the law. It makes it clear that in a contract or license containing a self-help provision, a separate signature (or mouse click) is needed to effectuate the provision. Thus, "stealth" contracts would not be effective to grant self-help.

d. *Committee Action*

Motion to accept Amendments 1, 2B, and 3 in a block. Motion carried on a unanimous voice vote. Proposed amendments accepted.

e. *JCOTS Action*

Upon first review, the Commission rejected this amendment because it believed the amendment to be redundant. The proponent asked for reconsideration and the Commission reconsidered this amendment at its final meeting of the 2000 interim on January 9, 2001.

This amendment, if included, will lead to the interpretation that manifestation with respect to a specific term (§ 59.1-501.12(c)) and separate manifestation (§59.1-508.16(c)) are two different things. After some discussion, the parties determined that such an interpretation may be appropriate in some circumstances and does not present a problem.

The staff withdrew its objection and this amendment was adopted by a unanimous vote.

2. Amendment 2A

a. *Nature of the Proposed Amendment*

Amends § 59.1-509.16 regarding the harm of electronic self-help to the third parties.

b. *Statutory Text with the Proposed Amendment*

§ 59.1-508.16. Limitations on electronic self-help.

(f) Even if the licensor complies with subsections (c) and (d), electronic self-help may not be used if the licensor has reason to know that its use will result in:

(1) substantial injury or harm to the public health or safety;

(2) grave harm to the public interest; or

(3) substantially affecting harm to third persons not involved in the dispute who have contractual relationships with the licensee, which relationships are primarily for personal, family or household purposes.

c. *Proponent's Reasons for the Proposed Amendment*

The aspect of self-help that most concerns companies with millions of customers (such as Capital One), or for that matter, small companies with relatively few customers, is that a relatively minor piece of software that happens to be in the position of supporting a large customer service infrastructure will be shut down by a vendor as a result of a licensing dispute, causing the company to be unable to service its customers. The customers, of course, are innocent parties to the dispute, but their lives could be substantially affected. For example, if Capital One or any other bank were suddenly and unexpectedly unable to service its deposit customers, a customer attempting to withdraw funds from his account to make a mortgage or rent payment might not be able to do so, and could suffer serious consequences as a result. That is a result that occurred to NCCUSL, but was probably not given the thorough consideration that it deserved:

There can be no electronic self-help where a breach of the peace would result or where there is a threat of foreseeable damage of personal injury or physical damage to property other than the licensed information. In addition, under subsection (f), electronic self-help is barred if there is reason to know its use will result in substantial injury or harm to the public health or safety or grave harm to the public interest substantially affecting third parties not involved in the dispute. For example, **self-help cannot be used where the licensed software is integral to the funds transfer or payment systems of a banking institution.** *NCCUSL Official Comments to Section 816, emphasis added.*

Capital One's position is that NCCUSL, in translating this idea to the statute, set the bar too high. For instance, "grave" is defined by Webster's as "likely to produce great harm or danger." Substantial harm to individual customers most likely does not rise to the level of harm to the

“public interest” or the “public health and safety.” We believe that the protection of consumers’ interests and welfare should not be limited to cases of great harm or danger to the public at large or the public health and safety. Additionally, limiting that protection to only those cases where the “public health or safety” or “public interest” is harmed would not effectuate the NCCUSL example of self help being prohibited where the funds transfer or payment system of a bank are affected. Therefore, the Capital One amendment to this section is designed to completely prevent harm to innocent members of the public.

d. Committee Action

Motion to accept. Motion failed on a 10-14 vote by show of hands. Proposed amendment not accepted.

No further action was taken.

3. Amendment 2B

a. Nature of the Proposed Amendment

Amends § 59.1-508.16 regarding "harm."

b. Statutory Text with the Proposed Amendment

§ 59.1-508.16. Limitations on electronic self-help.

(g) A court of competent jurisdiction of the Commonwealth shall give prompt consideration to a petition for injunctive relief and may enjoin, temporarily or permanently, the licensor from exercising electronic self-help even if authorized by a license term or enjoin the licensee from misappropriation or misuse of computer information, as may be appropriate, upon consideration of the following:

- (1) ~~grave~~ harm of the kinds stated in subsection (f), or the threat thereof, whether or not the licensor has reason to know of those circumstances;

c. Proponent's Reasons for the Proposed Amendment

This amendment further effectuates the purposes of our Amendment number 3, and, in fact, eliminates a redundancy. Moreover, as this section sets out one of the criteria that a judge would use in deciding a temporary restraining order or preliminary injunction motion brought by a licensee pursuant to this section, all of the revised factors in Capital One’s amendment to Section 59.1-508.16(f) should be considered.

d. Committee Action

Motion to accept Amendments 1, 2B, and 3 in a block. Motion carried on a unanimous voice vote. Proposed amendments accepted.

e. JCOTS Action

This amendment was adopted by a unanimous vote.

4. Amendment 3

a. Nature of the Proposed Amendment

Amends § 59.1-508.16 regarding physical possession of a copy.

b. Statutory Text with the Proposed Amendment

§ 59.1-508.16. Limitations on electronic self-help.

(i) This section does not apply if the licensor obtains physical possession of a copy without a breach of the peace and the electronic self-help is used solely with respect to that copy.

c. Proponent's Reasons for the Proposed Amendment

UCITA defines "copy" as "the medium on which information is fixed on a temporary or permanent basis and from which it can be perceived, reproduced, used, or communicated, either directly or with the aid of a machine or device." The commentary elaborates by stating that "[Copy] refers to the medium containing the information. The medium can be tangible or electronic." Seemingly, a "copy" refers to a floppy disc, CD-ROM, or some other such transient medium. However, the definition is not so limited. A single set of software code contained in the permanent memory of a computer system would also, under the definition, be a "copy." Thus, absent the clarification, sub-paragraph (i) would negate all of the protections contained in § 59.1-508.16 with respect to all self-help and all licenses or contracts.

d. Committee Action

Motion to accept Amendments 1, 2B, and 3 in a block. Motion carried on a unanimous voice vote. Proposed amendments accepted.

e. JCOTS Action

Upon first review, the Commission rejected this amendment because obtaining physical possession of a copy using electronic self-help is impossible. The proponent asked for reconsideration and the Commission reconsidered this amendment at its final meeting of the 2000 interim on January 9, 2001.

After discussion with the parties, it became apparent that this section was unclear. It attempted to state that if a licensor obtains possession of a copy through non-electronic means, the licensor could use electronic means to disable that copy. UCITA has two definitions for electronic self-help (a means of possession and a means of disabling).

With the consent of the proponents, this amendment was amended prior to being reintroduced to the Commission. It was proposed to the Commission as:

- (i) This section does not apply if the licensor obtains physical possession of a copy without a breach of the peace and ~~the electronic self help is used solely with respect to that copy without the use of electronic self-help; in which case, a lawfully obtained copy may be erased or disabled by electronic means.~~

The staff withdrew its objection and this amendment was adopted by a unanimous vote.

K. PROPOSED AMENDMENTS SUBMITTED BY MARK PRUETT

1. Amendment 1

a. Nature of the Proposed Amendment

Exempts free software from mass-market transaction.

b. Statutory Text with the Proposed Amendment

§ 59.1-501.2. Definitions.

(a) As used in this chapter:

(32) "Free software license" means a license that permits the licensee of a computer program to copy, distribute, or modify the program or derived products, with no payment of license fees.

(44) "Mass-market transaction" means a transaction, which is not for a free software license, that is:

c. Proponent's Reasons for the Proposed Amendment

Free software licenses are fundamentally different from mass-market computer information licenses. In particular, no license fee is required, and hence revenue flow from the licensees to the licensors does not exist.

If responsibility for warranties and support are misdirected to the licensors of free software (as would happen with the current inclusion of free software as mass-market computer information), two very undesirable effects would accrue:

1) creators of free software, many of whom write the software pro-bono, would become responsible for providing implied warranties, and in some cases, may be liable for defects in software that they had provided to the public for free. This would have a chilling effect on the production and release of free software, at great harm to the public.

2) Licensees of free software will be misdirected to the licensors of the software for warranty and support, hurting all three affected parties: licensors, who will bear a greater burden for warranty and support inquiries that they cannot satisfy; the public, who will have greater difficulty in obtaining same; and commercial free software ventures who gain revenues by providing service and support for free software products.

There is an existing large body of free software available to the public, and it cannot practically or legally be withdrawn and re-licensed so as to adapt to UCITA's licensing framework for mass-market software (e.g. disclaiming implied warranty). Furthermore, it is a practical impossibility in the near term for the tens of thousands of free software authors to solicit legal advice in order to amend their existing license terms. Hence the default terms under which free software is placed by UCITA are of very grave importance and must differ from traditional proprietary mass-market software.

For example, the Apache web server is available at no charge on the Internet under a free software license. Apache powers more than 60 percent of all servers on the web (according to a Netcraft survey of October 2000). This computer program has been the engine behind much of the innovation on the Web in the past five years. Apache is maintained by the Apache Software Foundation, a volunteer-based, not-for-profit organization. Anyone worldwide can contribute to the project, and anyone can use, redistribute, and inspect the computer program.

Similarly, many universities maintain computer-programming projects that fall under free software licenses. Students, faculty, and volunteer programmers work on these projects, extending computer science research and spurring innovation.

These computer programs are freely available and can be freely redistributed. In most cases, the licensor does not charge any license fee. Developers of free software should not be liable for a program they provide freely, and that can be inspected and modified by the licensee.

d. *Committee Action*

Motion to reject. Motion carried on a voice vote (1 nay). Proposed amendment not accepted.

No further action was taken.

2. Amendment 2

a. Nature of the Proposed Amendment

Amends § 59.1-502.9 regarding reverse engineering.

b. Statutory Text with the Proposed Amendment

§ 59.1-502.9. Mass-market license.

(d) To the extent that a term in a mass-market license prohibits or restricts reverse engineering of a computer program for purposes of interoperability or other analysis of computer software, such term is unenforceable, unless these activities by the licensee are prohibited by other law or are prohibited by other applicable license terms that preclude the creation or distribution of a derived or copied product.

c. Proponent's Reasons for the Proposed Amendment

A term that precludes the user from reverse engineering a program could effectively prevent the licensee from using the program with their existing computer systems. For example, Samba is a free software computer program that lets Microsoft Windows operating systems inter-operate with Unix operating systems. The Samba program, running on a Unix computer, communicates with a Microsoft Windows computer by emulating a Microsoft network protocol, in effect "speaking the same language" as the Windows computer.

The Samba software makes it possible for computer owners to use a variety of operating systems together. This provides more efficient use of computer resources, and allows businesses to reduce their operating costs.

A license restriction preventing reverse engineering hinders the creation and use of computer programs that let businesses inter-operate their existing computers in a cost-effective manner.

Additionally, without an amendment allowing reverse engineering of computer programs, legitimate development of interoperable products will have to occur outside of Virginia. This will force software companies who produce such software to develop it elsewhere, or to cease development altogether.

d. Committee Action

Motion to reject. Motion carried on a 12-9 vote by show of hands. Proposed amendment not accepted.

No further action was taken.

L. PROPOSED AMENDMENTS SUBMITTED BY MARK PULLEN ON BEHALF OF THE INSTITUTE OF ELECTRICAL AND ELECTRONICS ENGINEERS-UNITED STATES OF AMERICA (IEEE-USA)

1. Amendment 1

a. Nature of the Proposed Amendment

Amends § 59.1-502.9 by adding a provision on computer security and privacy.

b. Statutory Text with the Proposed Amendment

§ 59.1-502.9. Mass-market license.

(a) A party adopts the terms of a mass-market license for purposes of § 59.1-502.8 only if the party agrees to the license, such as by manifesting assent, before or during the party's initial performance or use of or access to the information. A term is not part of the license if:

(1) the term is unconscionable or is unenforceable under § 59.1-501.5 (a) or (b); or

(2) subject to § 59.1-503.1, the term conflicts with a term to which the parties to the license have expressly agreed; or

(3) the term seeks to disclaim liability for security vulnerabilities programmed into the software for self help purposes.

c. Proponent's Reasons for the Proposed Amendment

The "electronic self-help" provisions of UCITA (see §59.1-508.16(a)) allow software publishers to embed security vulnerabilities and other functions in their software design to allow remote access, and to disclaim liability for harm caused by negligent use or misuse of those functions. Without liability as an incentive to ensure careful programming and proper utilization of the "electronic self-help" right by the licensor, UCITA will inadvertently facilitate "denial-of-service" attacks (remote disablement or destruction of the software and/or theft of data) either by accidental triggering or purposeful exploitation of these functions by malicious intruders. Computer security and the privacy of data are of critical importance to public acceptance of E-Commerce and the continued growth of the Internet, which is an important driver of Virginia's economy.

IEEE-USA notes an amendment proposed by the NCCUSL (see Part IV, J, 6 above) that would prohibit use of "electronic self help" in mass market transactions and reinforce the requirement of manifest agreement by the parties to authorize resort to "electronic self help." IEEE-USA welcomes this proposed narrowing, but notes that it does not solve the basic problem addressed by our amendment, which concerns accountability for the actual design of security vulnerabilities into the software. Under the NCCUSL amendment, a software vendor would still be allowed to insert a "back door" into the software for prospective "electronic self-help"

purposes, and disclaim liability for any resulting damage, even if there was no authorization or actual utilization of that "electronic self help" capability by the software publisher. In short, security holes could still be a serious problem even if consumers are not directly subjected to "electronic self help" by the software publisher.

d. Committee Action

Motion to Reject. Motion carried on a 12-9 vote by show of hands. The proposed amendment was not accepted.

No further action was taken.

2. Amendment 2

a. Nature of the Proposed Amendment

Amends § 59.1-502.9 regarding mass-market licenses.

b. Statutory Text with the Proposed Amendment

§ 59.1-502.9. Mass-market license.

(d) In a mass-market transaction, a term which has the effect of forbidding or restricting any of the following rights or abilities of licensees of computer information is unenforceable to the extent these rights or abilities are not prohibited by other law:

(1) Analysis and Reverse Engineering. Analysis of Computer Information for purposes of:

(A) privacy protection;

(B) security or compliance verification;

(C) academic research or instruction;

(D) reporting or remediation of flaws;

(E) system integration or creation of documentation; or

(F) reverse engineering for creation of interoperable or compatible products

(2) See amendment 3 below.

(3) See amendment 4 below.

c. *Proponent's Reasons for the Proposed Amendment*

As originally passed in Virginia, UCITA would permit licensors to enforce contracts of adhesion which eliminate the ability of licensees to independently verify the claims of licensors, to effectively utilize computer information in secure and complex systems, to effectively diagnose and report bugs in software, or to independently create compatible products. This amendment preserves these abilities for licensees of mass-market computer information provided that the licensees follow all applicable law.

The ability of licensees to analyze mass-market computer information is crucial to the maintenance of a fair, competitive, and innovative technology marketplace. Licensees frequently need to analyze software and other computer information in order to better understand how to utilize it and to fill in the gaps in the licensor's documentation and support; to verify the security and privacy characteristics, and validate compliance with usage requirements. Because of their vested interests, the licensors and their closest allies cannot be expected to provide such analysis in an independent and objective manner.

Finally, the ability to legally and cleanly reverse engineer proprietary protocols and file formats is needed to enable the development of innovative new products that are compatible with those that dominate the installed base of today. Lawful reverse engineering must generally be performed on retail copies of software, because dominant vendors do not wish to help their competitors gain compatibility with their products. Permitting licensors to preclude reverse engineering of mass-market computer information is a recipe for a lack of consumer choice, poor interoperability between products, and stagnation of the entire technology industry.

Existing computer information licenses already attempt to impose restrictions on analysis and reverse engineering by licensees of mass-market computer information; however, without UCITA, such terms of these "contracts of adhesion" are not universally enforceable. This amendment shelters analysis of mass-market computer information provided it is done in a manner which is legal under copyright, patent, trade secret, and all other applicable law.

Lawful reverse engineering of software promotes the advancement of scientific learning, technological improvements and enhances the public interest. Lawful reverse engineering of computer programs is also fundamental to the development of programs and software-related technology. The term 'reverse engineering' means the discovery by engineering techniques of the underlying ideas and principles that govern how a machine, computer program, or other technological device works. Engineers use this information for many purposes, including making other products inter-operate with the target product that is the subject of the reverse engineering. These practices have been recognized by the courts to be consistent with Federal intellectual property law and in no way can be equated with any form of "piracy."

This amendment does not shelter licensees who illegally copy products or who engage in any other unlawful form of reverse engineering or analysis. Unlawful abuses by licensees would be actionable both under the other law and under UCITA as a breach of contract under this amendment.

d. Committee Action

Motion to reject. Motion carried on an 11-9 vote by show of hands. The proposed amendment was not accepted.

No further action was taken.

3. Amendment 3

a. Nature of the Proposed Amendment

Amends § 59.1-502.9 regarding mass-market licenses.

b. Statutory Text with the Proposed Amendment

§ 59.1-502.9. Mass-market license.

(d) In a mass-market transaction, a term which has the effect of forbidding or restricting any of the following rights or abilities of licensees of computer information is unenforceable to the extent these rights or abilities are not prohibited by other law:

(1) See amendment 2 above.

(2) Public Commentary. Public disclosure of a description, criticism, comparison, or evaluation of the computer information or its license terms.

(3) See amendment 4 below.

c. Proponent's Reasons for the Proposed Amendment

Existing mass-market computer information licenses already attempt to impose restrictions on the free speech rights of licensees and of journalists, but such terms are not generally enforceable without UCITA. This amendment restores the ability for a free press and an informed consumer base to publish objective and independent reviews of computer information products.

The proposed revision only applies to computer information that is itself already generally available to the public under the terms of a mass-market license. It would therefore in no way interfere with standard industry practices such as negotiated non-disclosure agreements, restrictions on public disclosure concerning "beta test" software, or special terms which apply to "pre-release" computer information.

d. Committee Action

Motion to accept. Motion carried on a 12-9 vote. The proposed amendment was accepted.

e. JCOTS Action

This amendment was adopted by a unanimous vote.

4. Amendment 4A

a. Nature of the Proposed Amendment

Amends § 59.1-502.9 regarding mass-market licenses.

b. Statutory Text with the Proposed Amendment

§ 59.1-502.9. Mass-market license.

(d) In a mass-market transaction, a term which has the effect of forbidding or restricting any of the following rights or abilities of licensees of computer information is unenforceable to the extent these rights or abilities are not prohibited by other law:

(1) See amendment 2 above.

(2) See amendment 3 above.

(3) Use With Competing Products. Use of the computer information in conjunction with any other computer information, products, services, or goods of the licensee's choosing, regardless of whether the other products compete with a product provided by the licensor.

c. Proponent's Reasons for the Proposed Amendment

Without this amendment, dominant computer information licensors would be able to use UCITA to eliminate any possibility for competition by precluding the use of new, innovative, products from other sources in conjunction with their dominant products.

d. Committee Action

Proposal withdrawn. Proponent withdrew the proposed amendment from the Committee's consideration, proposed a substitute amendment (see Amendment 4B below). Committee took no action on this proposed amendment. This proposed amendment was not accepted.

No further action was taken.

5. Amendment 4B

a. Nature of the Proposed Amendment

Amends § 59.1-502.9 regarding mass-market licenses (modification of Amendment 4A).

b. Statutory Text with the Proposed Amendment

§ 59.1-502.9. Mass-market license.

(d) In a mass-market transaction, a term that has the effect of forbidding or restricting any of the following rights or abilities of licensees of computer information is unenforceable to the extent these rights or abilities are not prohibited by other law:

(1) See amendment 2 above.

(2) See amendment 3 above.

(3) Use With Competing Products. Use of a computer program in conjunction with any other computer information, products, services, or goods of the licensee's choosing, regardless of whether the other products compete with a product provided by the licensor.

c. Proponent's Reasons for the Proposed Amendment

Without this amendment, dominant computer software licensors would be able to use UCITA to eliminate any possibility for competition by precluding the use of new, innovative computer programs from other sources in conjunction with their dominant products. This amendment has been narrowed to encompass only license terms regarding "computer programs" as defined by UCITA in order to address concerns raised by Advisory Committee members on Sept. 17 that computer information licensors be able to use license provisions to protect intellectual property rights in data collections.

d. Committee Action

Motion to reject. Motion carried on a 15-3 vote by show of hands. Proposed amendment not accepted.

No further action was taken.

6. Amendment 5

a. Nature of the Proposed Amendment

Amends § 59.1-508.3 regarding contractual modification of a remedy.

b. Statutory Text with the Proposed Amendment

§ 59.1-508.3. Contractual modification of a remedy.

(d) Consequential damages and incidental damages may be excluded or limited by agreement unless the exclusion or limitation is unconscionable. Exclusion or limitation of consequential damages for personal injury in a consumer contract for a computer program that is subject to this chapter and is contained in consumer goods is prima facie unconscionable, but exclusion or limitation of damages for a commercial loss is not unconscionable. In a mass-market license, any limitation on incidental damages and any limitation on consequential damages to less than \$500 is unconscionable where:

(i) the damage is caused by a defect that was known to the licensor at the time of licensing; and

(ii) the defect was not revealed to the licensee in a way that the licensor would reasonably expect to be understood by a typical member of the market for this product; or the notice of defect does not provide sufficient and specific enough information to enable a licensee who read and understood it to be able to use the product in such as way as to avoid the defect or to mitigate the damage caused by it.

c. Proponent's Reasons for the Proposed Amendment

The intent of this amendment is to provide a strong incentive for disclosure, in support of competition and risk reduction for customers. It is not to punish software publishers for honest mistakes or for things that they do not know about. Testing for all of the defects that might be in his products is impossible for a software publisher; however, some publishers release products with serious defects that they know about. IEEE-USA believes that significant known defects should be disclosed to the customer. This enables the customer to choose between products, to avoid using a product in a way that triggers a failure, or to minimize the impact of a failure after it has happened.

Customer knowledge is particularly important under UCITA because UCITA grants licensors of mass-market software so much leeway to define the warranties and remedies they provide to customers. Unfortunately, if only one company discloses its known defects, less ethical competitors can use the disclosed information as a competitive weapon, attacking the quality of the honest company's software without disclosing the (perhaps much lower) quality of their own.

This amendment provides an incentive for disclosure by all mass-market licensors. It does not force accountability on the licensor who simply does not know about a defect. Nor does it force software licensors to disclose all of their defects. If a defect causes no losses, the licensor who does not disclose the defect will not incur any liability. However, if the licensor expects that a defect may cause losses, his best course is disclosure. The licensor can avoid paying damages for losses caused by any disclosed defect, but will have to reimburse up to \$500 per customer for losses caused by a known but undisclosed defect.

The amendment also provides a standard for disclosure. The language is intended to be favorable to the honest licensor who attempts in good faith to write a good disclosure. The disclosure is sufficient, under this amendment, if the licensor reasonably believes that it would be informative and useful to someone who the licensor reasonably believes would be a typical member of the market.

d. Committee Action

Motion to reject. Motion carried on a 13-7 vote by show of hands. The proposed amendment was not accepted.

No further action was taken.

M. PROPOSED AMENDMENTS SUBMITTED BY CARLYLE C. RING, JR. ON BEHALF OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

The National Conference of Commissioners on Uniform State Laws (NCCUSL) held its annual meeting in July 2000. During this meeting, NCCUSL adopted amendments to the model UCITA. The General Assembly of Virginia had already enacted several of these amendment during its 2000 Session. Carlyle C. Ring, Jr., one of Virginia's Commissioner to NCCUSL, proposed the remainder of the NCCUSL amendments on behalf of NCCUSL.

1. Amendment 1

a. Nature of the Proposed Amendment

Amends the definition of electronic agent.

b. Statutory Text with the Proposed Amendment

§ 59.1-501.2. Definitions.

(a) As used in this chapter:

(27) "Electronic agent" means a computer program, or electronic or other automated means, ~~used by a person~~ independently to initiate an action, or to respond to electronic messages or performances, on the person's behalf without review or action by an individual at the time of the action or response to the message or performance.

c. Committee Action

Motion to accept. Motion carried on a unanimous voice vote. The proposed amendment was accepted.

d. JCOTS Action

This amendment was adopted by a unanimous vote.

2. Amendment 2A

a. Nature of the Proposed Amendment

Amends UCITA's scope over insurance transactions.

b. Statutory Text with the Proposed Amendment

§ 59.1-501.3. Scope; exclusions.

(d) This chapter does not apply to:

(1) a financial services transaction;

(2) an insurance services transaction;

(h) As used in this section, "insurance services transaction" means an agreement between the insurer and the insured that provides for, or a transaction that is, or entails access to, use, transfer, clearance, settlement, or processing of (i) an insurance policy, contract, or certificate; or (ii) a right to payment under an insurance policy, contract, or certificate.

c. Committee Action

Motion to defer action. Motion carried on a unanimous voice vote.

Proposal withdrawn. Proponent withdrew the proposed amendment from the Committee's consideration. Committee took no action on this proposed amendment. The proposed amendment was not accepted.

No further action was taken.

3. Amendment 2B

a. Nature of the Proposed Amendment

Amends UCITA's scope over motion pictures.

b. Statutory Text with the Proposed Amendment

§ 59.1-501.3. Scope; exclusions

(a) This chapter applies to computer information transactions.

(b) Except for subject matter excluded in subsection (d) and as otherwise provided in § 59.1-501.4, if a computer information transaction includes subject matter other than computer information, the following rules apply:

(1) If a transaction includes computer information and goods, this chapter applies to the part of the transaction involving computer information, informational rights in it, and creation or modification of it. However, if a copy of a computer program is contained in and sold or leased as part of goods, this chapter applies to the copy and the computer program only if:

(A) the goods are a computer or computer peripheral; or

(B) giving the buyer or lessee of the goods access to or use of the program is ordinarily a material purpose of transactions in goods of the type sold or leased.

~~(2) If a transaction includes an agreement for creating or for obtaining rights to create computer information and a motion picture, this chapter does not apply to the agreement if the dominant character of the agreement is for creating or obtaining rights to create a motion picture. In all other such agreements, this chapter does not apply to the part of the agreement that involves a motion picture excluded under subsection (d) (2), but does apply to the computer information.~~ Subject to subsection (d)(3)(A), if a transaction includes an agreement for creating or for obtaining rights to create computer information and a motion picture, this chapter does not apply to the agreement if the dominant character of the agreement is for creating or obtaining rights to create a motion picture. In all other such agreements, this chapter does not apply to the part of the agreement that involves a motion picture excluded under subsection (d)(3), but does apply to the computer information.

(d) This chapter does not apply to:

~~(2)(3)~~ an agreement to create, perform or perform in, include information in, acquire, use, distribute, modify, reproduce, have access to, adapt, make available, transmit, license, or display:

(A) a motion picture or audio or visual programming that is provided by broadcast, satellite, or cable as defined or used in the Federal Communications Act and related regulations as they existed on July 1, 1999, or by similar methods of delivering that programming other than in (i) a mass-market transaction or (ii) a submission of an idea or information or release of informational rights that may result in making a motion picture or a similar information product; or

(B) sound recording, musical work, or phonorecord as defined or used in Title 17 of the United States Code as of July 1, 1999, or an enhanced sound recording, other than in the submission of an idea or information or release of informational

rights that may result in the creation of such material or a similar information product;

~~(C) a motion picture, other than in a mass market transaction or a submission of an idea or information or release of informational rights that may result in making a motion picture or a similar information product.~~

(7) unless otherwise agreed in a record between the parties:

(A) telecommunications products or services provided pursuant to federal or state tariffs; or

(B) telecommunications products or services provided pursuant to agreements required or permitted to be filed by the service provider with a federal or state authority regulating these services or under pricing subject to approval by a federal or state regulatory authority.

~~(6)~~ (8) subject matter within the scope of Titles 8.3, 8.4, 8.4A, 8.5A, 8.6A, 8.7, or 8.8A.

(e) As used in subsection ~~(d)(2)(B)~~ (d)(3)(B), "enhanced sound recording" means a separately identifiable product or service the dominant character of which consists of recorded sounds but which includes (i) statements or instructions whose purpose is to allow or control the perception, reproduction, or communication of those sounds or (ii) other information so long as recorded sounds constitute the dominant character of the product or service despite the inclusion of the other information.

(f) As used in this section, "motion picture" means:

(1) "motion picture" as defined in Title 17 of the United States Code as of July 1, 1999;
or

(2) a separately identifiable product or service the dominant character of which consists of a linear motion picture, but which includes (i) statements or instructions whose purpose is to allow or control the perception, reproduction, or communication of the motion picture or (ii) other information so long as the motion picture constitutes the dominant character of the product or service despite the inclusion of the other information.

(g) As used in this section, "audio or visual programming" means audio or visual programming that is provided by broadcast, satellite, or cable as defined or used in the Communications Act of 1934 and related regulations as they existed on July 1, 1999 or by similar methods of delivery.

c. Committee Action

Motion to accept. Motion carried on a unanimous vote. The proposed amendment was accepted.

d. JCOTS Action

This amendment was adopted by a unanimous vote.

4. Amendment 3

a. Nature of the Proposed Amendment

Technical amendment to correct the cross-reference in § 59.1-501.4 and to clarify subsection (1) of § 59.1-501.4 by inserting "statute" after "applicability of any".

b. Statutory Text with the Proposed Amendment

§ 59.1-501.4. Mixed transactions; agreement to opt-in or opt-out.

The parties may agree that this chapter, including contract-formation rules, governs the transaction, in whole or part, or that other law governs the transaction and this chapter does not apply, if a material part of the subject matter to which the agreement applies is computer information or informational rights in it that are within the scope of this chapter, or is subject matter within this chapter under § 59.1-501.3 (b), or is subject matter excluded by § 59.1-501.3 (d) (1) or ~~§ 59.1-501.3 (d) (2)~~ § 59.1-501.3 (d) (3). However, any agreement to do so is subject to the following rules:

(1) An agreement that this chapter governs a transaction does not alter the applicability of any statute, rule or procedure that may not be varied by agreement of the parties or that may be varied only in a manner specified by the rule or procedure, including the Virginia Consumer Protection Act of 1977 (§ 59.1-196 et seq.). In addition, in a mass-market transaction, the agreement does not alter the applicability of a law applicable to a copy of information in printed form.

c. Committee Action

Motion to accept. Motion carried on a unanimous voice vote. The proposed amendment was accepted.

d. JCOTS Action

This amendment was adopted by a unanimous vote.

5. Amendment 4

a. Nature of the Proposed Amendment

Creates new subsection (g) under § 59.1-501.12 regarding providers of online services.

b. Statutory Text with the Proposed Amendment

§ 59.1-501.12. Efficacy and commercial reasonableness of attribution procedure.

(g) Providers of online services, network access, and telecommunications services, or the operators of facilities thereof, do not manifest assent to a contractual relationship simply by their provision of these services to other parties, including but not limited to transmission, routing, or providing connections, linking, caching, hosting, information location tools, or storage of materials at the request or initiation of a person other than the service provider.

c. Committee Action

Motion to accept. Motion carried on a unanimous voice vote. The proposed amendment was accepted.

d. JCOTS Action

This amendment was adopted by a unanimous vote.

6. Amendment 5

a. Nature of the Proposed Amendment

Amends the restrictions on electronic self-help.

b. Statutory Text with the Proposed Amendment

§ 59.1-508.16. Limitations on electronic self-help.

(a) In this section, "electronic self-help" means the use of electronic means to exercise a licensor's rights under § 59.1-508.15 (b).

(b) On cancellation of a license, electronic self-help is not permitted, except as provided in this section. Electronic self-help is prohibited in mass-market transactions.

(c) ~~A~~ If the parties agree to permit electronic self-help, a licensee shall separately manifest assent to a term authorizing use of electronic self-help. The term must:

(1) provide for notice of exercise as provided in subsection (d);

(2) state the name of the person designated by the licensee to which notice of exercise must be given and the manner in which notice must be given and place to which notice must be sent to that person; and

(3) provide a simple procedure for the licensee to change the designated person or place.

c. *Committee Action*

Motion to defer action. Motion carried on a unanimous voice vote.

Action not necessary. This amendment was incorporated in Mr. Schweiker's Amendment 5, which has been accepted.

No further action taken.

7. *Amendment 6.*

a. *Nature of the Proposed Amendment*

Creates new § 59.1-509.3 regarding the relationship of UCITA to Electronic Signatures in Global and National Commerce Act (ESIGN).

b. *Statutory Text with the Proposed Amendment*

§ 59.1-509.3. Electronic Signatures in Global and National Commerce Act.

The provisions of this chapter governing the legal effect, validity, or enforceability of electronic records or signatures, and of contracts formed or performed with the use of such records or signatures conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act Public Law 106-229, and supersede, modify, and limit the Electronic Signatures in Global and National Commerce Act.

c. *Committee Action*

Motion to defer action. Motion carried on a voice vote.

Proposal withdrawn. Proponent withdrew the proposed amendment from the Committee's consideration. Committee took no action on this proposed amendment. The proposed amendment was not accepted.

No further action was taken.

8. *Amendment 7.*

a. *Nature of the Proposed Amendment*

Creates new § 59.1-503.10 licenses to nonprofit libraries, archives or educational institutions.

b. Statutory Text with the Proposed Amendment

§ 59.1-503.10. Licenses to nonprofit libraries, archives or educational institutions.

(a) To the extent that the conduct is not otherwise unlawful or restricted under the Copyright Act, 17 U.S.C. § 101 et seq., or other law, in a standard form contract for the use of a tangible copy of informational content to a licensee that is a nonprofit library or archive or a nonprofit educational institution, the licensee may, without any purpose of direct or indirect commercial advantage:

- (1) make the tangible copy available to library or archive users, including but not limited to reserving the copy for a course and lending that copy to users in accordance with ordinary practices of nonprofit libraries or archives;
- (2) make a copy of the tangible copy for archival or preservation purposes;
- (3) engage in inter-library lending of tangible copies of the copy; and
- (4) make classroom and instructional use of the tangible copy.

(b) The provisions of subsection (a) may be varied by a term in a standard form contract only if:

- (1) the term varying the provision is conspicuous;
- (2) the nonprofit library, archive or educational institution specifically manifests assent to the term pursuant to subsection c of 59.1-501.12; and
- (3) where the term is not made available to the nonprofit library, archive or educational institution before it orders the tangible copy of the computer information:
 - (i) the nonprofit library, archive or educational institution knew or had reason to know that terms would follow when it ordered the copy; and
 - (ii) the nonprofit library, archive or educational institution is given the right to return the copy in the event that it refuses the contract and the right to be reimbursed for any reasonable expenses incurred in complying with the licensor's instructions for returning or destroying the computer information, or in the absence of such instructions, the reimbursement of expenses incurred for return postage or similar reasonable expense in returning the computer information.

(c) Nothing in this section shall be construed to:

- (1) alter the burden of proof in an infringement, contract or other action;
- (2) deal with making the informational content available on a computer network server or other system for simultaneous access and use by multiple users; or

(3) limit any defense that a term of a contract violates a fundamental public policy pursuant to § 59.1-501.5 including any such policy under the federal copyright law.

(d) For purposes of this section, the terms "nonprofit library, archive or educational institution" have the same meaning as used in sections 108, 109 and 110 of the Copyright Act, 17 U.S. C. §§ 108, 109, and 110.

c. Commission Action

This amendment was proposed to the Commission after discussion among the Virginia libraries, NCCUSL, the publishers and other interested parties. The Commission adopted this amendment by a unanimous vote.

N. PROPOSED AMENDMENTS SUBMITTED BY RICHARD S. SCHWEIKER, JR., ON BEHALF OF THE OFFICE OF ATTORNEY GENERAL OF VIRGINIA.

1. Amendment 1

a. Nature of the Proposed Amendment

Amendment to provide that to the extent UCITA or a term of a contract under UCITA conflicts with a consumer protection statute, rule or regulation, the consumer protection statute, rule or regulation governs with certain limited exceptions. Amendment makes this provision consistent with UCITA as approved by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). Amendment makes references to statutes, rules and regulations consistent throughout UCITA.

b. Statutory Text with the Proposed Amendment

§ 59.1-501.5. Relation to federal law; fundamental public policy; transactions subject to other state law.

(c) Except as otherwise provided in subsection (d), if this chapter or a term of a contract under this chapter conflicts with a consumer protection statute, rule or regulation, including but not limited to the Virginia Consumer Protection Act of 1977 (§ 59.1-196 et seq.), the Virginia Consumer Protection Act consumer protection statute, rule or regulation governs.

c. Proponent's Reasons for the Proposed Amendment

When UCITA was introduced in Virginia, this section was changed from the model language approved by NCCUSL. NCCUSL's model provided that if UCITA or a term of a contract under UCITA conflicts with a consumer protection statute or rule, the consumer protection statute or rule governs with certain limited exceptions. The Virginia legislation narrowed this general reference to consumer protection statutes or rules to a very specific reference to the Virginia Consumer Protection Act of 1977. While this narrowing may have been inadvertent, it is

important to restore the broader language that was approved by NCCUSL. NCCUSL's Official Comments to UCITA (which now appear in Michie's Virginia Code Annotated) clearly indicate that it was NCCUSL's intent to have any applicable consumer protection statute or rule govern over UCITA. The change made in the Virginia legislation, however, limits this provision to only one specifically named consumer protection statute – the Virginia Consumer Protection Act of 1977. Because there are many other statutes that provide consumer protections to Virginians, this section should be amended to include a broader reference to consumer protection statutes.

General references to “statutes, rules and regulations” should be consistent throughout UCITA. While there is no apparent intent or basis to treat statutes, rules or regulations differently under UCITA, UCITA does not refer to these terms in a uniform manner. In some sections, UCITA refers to “rule;” in another section UCITA refers to “statute or rule;” and in another section UCITA refers to “statute, . . . rule, regulation.” Because one section in UCITA uses all three terms, Va. Code § 59.1-506.15(a)(2), it is important to use all three terms elsewhere in UCITA so that no unintended meaning will be inferred by the failure to refer to “statute” or “regulation” where “rule” is used. In addition, it should be noted that the Virginia Code generally uses both the terms “rule” and “regulation.” See e.g., Va. Code § 9-6.14:4 et seq. (Administrative Process Act). Accordingly, all three terms should be referenced together in the statutory text of UCITA to avoid any confusion or misinterpretation.

d. *Committee Action*

Motion to adopt Amendments 1 through 5 in a block. Motion carried on a unanimous vote by show of hands (24 total). Proposed amendments accepted.

e. *JCOTS Action*

This amendment was adopted by a unanimous vote.

2. *Amendment 2*

a. *Nature of the Proposed Amendment*

Amendment to provide that an agreement that UCITA governs a transaction does not alter the applicability of any statute, rule or regulation, including a consumer protection statute, rule or regulation, that may not be varied by agreement. Amendment makes this provision consistent with UCITA as approved by the NCCUSL. Amendment makes references to statutes, rules and regulations consistent throughout UCITA.

b. *Statutory Text with the Proposed Amendment*

§ 59.1-501.4. Mixed transactions; agreement to opt-in or opt-out.

The parties may agree that this chapter, including contract-formation rules, governs the transaction, in whole or part, or that other law governs the transaction and this chapter does not

apply, if a material part of the subject matter to which the agreement applies is computer information or informational rights in it that are within the scope of this chapter, or is subject matter within this chapter under § 59.1-501.3(b), or is subject matter excluded by § 59.1-501.3(d)(1) or § 59.1-501.3(d)(2). However, any agreement to do so is subject to the following rules:

(1) An agreement that this chapter governs a transaction does not alter the applicability of any statute, rule, regulation or procedure that may not be varied by agreement of the parties or that may be varied only in a manner specified by the statute, rule, regulation or procedure, including but not limited to the Virginia Consumer Protection Act of 1977 (§ 59.1-196 et seq.) and other consumer protection statutes, rules or regulations. In addition, in a mass-market transaction, the agreement does not alter the applicability of a law applicable to a copy of information in printed form.

c. Proponent's Reasons for the Proposed Amendment

When UCITA was introduced in Virginia, this section was changed from the model language approved by NCCUSL. NCCUSL's model included a general reference to a consumer protection statute or rule. The Virginia legislation narrowed this general reference to consumer protection statutes or rules to a very specific reference to the Virginia Consumer Protection Act of 1977. While this narrowing may have been inadvertent, it is important to restore the broader language that was approved by NCCUSL. NCCUSL's Official Comments to UCITA (which now appear in Michie's Virginia Code Annotated) clearly indicate that it was NCCUSL's intent to refer to consumer protection statutes or rules generally. The change made in the Virginia legislation, however, unnecessarily limits the language of this provision to only one specifically named consumer protection statute – the Virginia Consumer Protection Act of 1977. Because there are many other statutes that provide consumer protections to Virginians, this section should be amended to include a broader reference to consumer protection statutes.

General references to “statutes, rules and regulations” should be consistent throughout UCITA. While there is no apparent intent or basis to treat statutes, rules or regulations differently under UCITA, UCITA does not refer to these terms in a uniform manner. In some sections, UCITA refers to “rule;” in another section UCITA refers to “statute or rule;” and in another section UCITA refers to “statute, . . . rule, regulation.” Because one section in UCITA uses all three terms, Va. Code § 59.1-506.15(a)(2), it is important to use all three terms elsewhere in UCITA so that no unintended meaning will be inferred by the failure to refer to “statute” or “regulation” where “rule” is used. In addition, it should be noted that the Virginia Code generally uses both the terms “rule” and “regulation.” See e.g., Va. Code § 9-6.14:4 et seq. (Administrative Process Act). Accordingly, all three terms should be referenced together in the statutory text of UCITA to avoid any confusion or misinterpretation.

d. Committee Action

Motion to adopt Amendments 1 through 5 in a block. Motion carried on a unanimous vote by show of hands (24 total). Proposed amendments accepted.

e. JCOTS Action

This amendment was adopted by a unanimous vote.

3. Amendment 3

a. Nature of the Proposed Amendment

Amendment to clarify that the choice of law by the parties to a transaction governed by UCITA may not vary a statute or regulation that may not be varied by agreement under Virginia law. Amendment makes references to statutes, rules and regulations consistent throughout UCITA.

b. Statutory Text with the Proposed Amendment

§ 59.1-501.9. Choice of law.

(a) The parties in their agreement may choose the applicable law. However, the choice is not enforceable in a consumer contract to the extent it would vary a statute, rule or regulation that may not be varied by agreement under the law of Virginia.

(b) In the absence of an enforceable agreement on choice of law, the contract is governed by the law of Virginia.

c. Proponent's Reasons for the Proposed Amendment

General references to “statutes, rules and regulations” should be consistent throughout UCITA. While there is no apparent intent or basis to treat statutes, rules or regulations differently under UCITA, UCITA does not refer to these terms in a uniform manner. In some sections, UCITA refers to “rule;” in another section UCITA refers to “statute or rule;” and in another section UCITA refers to “statute, . . . rule, regulation.” Because one section in UCITA uses all three terms, Va. Code § 59.1-506.15(a)(2), it is important to use all three terms elsewhere in UCITA so that no unintended meaning will be inferred by the failure to refer to “statute” or “regulation” where “rule” is used. In addition, it should be noted that the Virginia Code generally uses both the terms “rule” and “regulation.” *See e.g.*, Va. Code § 9-6.14:4 (Administrative Process Act). Accordingly, all three terms should be referenced together in the statutory text of UCITA to avoid any confusion or misinterpretation.

d. Committee Action

Motion to adopt Amendments 1 through 5 in a block. Motion carried on a unanimous vote by show of hands (24 total). Proposed amendments accepted.

e. JCOTS Action

This amendment was adopted by a unanimous vote.

4. Amendment 4

a. Nature of the Proposed Amendment

Amendment to clarify that an attribution procedure established by a regulation is effective for transactions within the coverage of the regulation. Amendment makes references to statutes, rules and regulations consistent throughout UCITA.

b. Statutory Text with the Proposed Amendment

§ 59.1-502.12. Efficacy and commercial reasonableness of attribution procedure.

The efficacy, including the commercial reasonableness, of an attribution procedure is determined by the court. In making this determination, the following rules apply:

(1) An attribution procedure established by law is effective for transactions within the coverage of the statute, rule or regulation.

c. Proponent's Reasons for the Proposed Amendment

General references to “statutes, rules and regulations” should be consistent throughout UCITA. While there is no apparent intent or basis to treat statutes, rules or regulations differently under UCITA, UCITA does not refer to these terms in a uniform manner. In some sections, UCITA refers to “rule;” in another section UCITA refers to “statute or rule;” and in another section UCITA refers to “statute, . . . rule, regulation.” Because one section in UCITA uses all three terms, Va. Code § 59.1-506.15(a)(2), it is important to use all three terms elsewhere in UCITA so that no unintended meaning will be inferred by the failure to refer to “statute” or “regulation” where “rule” is used. In addition, it should be noted that the Virginia Code generally uses both the terms “rule” and regulation.” *See e.g.*, Va. Code § 9-6.14:4 et seq. (Administrative Process Act). Accordingly, all three terms should be referenced together in the statutory text of UCITA to avoid any confusion or misinterpretation.

d. Committee Action

Motion to adopt Amendments 1 through 5 in a block. Motion carried on a unanimous vote by show of hands (24 total). Proposed amendments accepted.

e. JCOTS Action

This amendment was adopted by a unanimous vote.

5. Amendment 5

a. Nature of the Proposed Amendment

Amendment to prohibit the use of electronic self-help in mass-market transactions.

b. Statutory Text with the Proposed Amendment

§ 59.1-508.16. Limitations on electronic self-help.

(a) In this section, "electronic self-help" means the use of electronic means to exercise a licensor's rights under § 59.1-508.15(b).

(b) On cancellation of a license, electronic self-help is not permitted, except as provided in this section. Electronic self-help is prohibited in mass-market transactions.

(c) ~~A~~ If the parties agree to permit electronic self-help in a transaction that is not a mass-market transaction, a licensee shall separately manifest assent to a term authorizing use of electronic self-help. The term must:

- (1) provide for notice of exercise as provided in subsection (d);
- (2) state the name of the person designated by the licensee to which notice of exercise must be given and the manner in which notice must be given and place to which notice must be sent to that person; and
- (3) provide a simple procedure for the licensee to change the designated person or place.

c. Proponent's Reasons for the Proposed Amendment

At this time, it appears most appropriate to prohibit the use of electronic self-help in mass-market transactions. Many of the concerns regarding UCITA that have been voiced by consumers have involved UCITA's electronic self-help provisions. During its summer 2000 meeting, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") approved amending UCITA to prohibit the use of electronic self-help in mass-market transactions. This amendment is consistent with NCCUSL's recommendation. This amendment includes some additional language in § 59.1-508.16(c) to avoid any inference that parties to a mass-market transaction can agree to permit electronic self-help.

d. Committee Action

Motion to adopt Amendments 1 through 5 in a block. Motion carried on a unanimous vote by show of hands (24 total). Proposed amendments accepted.

e. JCOTS Action

The Commission amended this amendment to read:

§ 59.1-508.16 (b). On cancellation of a license, electronic self-help is not permitted, except as provided in this section. "Notwithstanding any provision to the contrary, electronic self-help is prohibited in mass-market transactions."

§ 59.1-508.16 (c). A If the parties agree to permit electronic self-help, in a transaction that is not a mass market transaction, a licensee shall separately manifest assent to a term authorizing use of electronic self-help.

This amendment was adopted by a unanimous vote. The proponent does not object to the Commission's changes.

6. Amendment 6

a. Nature of the Proposed Amendment

Amendment to provide that a contractual choice of an exclusive judicial forum is not enforceable if it is unreasonable or unjust. Amendment also provides that a contract term specifying an exclusive judicial forum must be conspicuous.

b. Statutory Text with the Proposed Amendment

§ 59.1-501.10. Contractual choice of forum.

(a) The parties in their agreement may choose an exclusive judicial forum unless the choice is unreasonable ~~and~~ or unjust.

(b) A judicial forum specified in an agreement is not exclusive unless the agreement expressly and conspicuously so provides.

c. Proponent's Reasons for the Proposed Amendment

By permitting a contractual choice of an exclusive judicial forum unless the choice is unreasonable and unjust, UCITA arguably narrows the limitations on the enforceability of such terms under current Virginia law. Current law does not require showing that such a term is both unreasonable and unjust. In Paul Business Systems, Inc. v. Canon U.S.A., Inc., 240 Va. 337, 342, 397 S.E.2d 804, 807 (1990), the Supreme Court of Virginia ruled that "contractual provisions limiting the place or court where potential actions between the parties may be brought are prima facie valid and should be enforced, unless the party challenging enforcement establishes that such provisions are unfair or unreasonable, or are affected by fraud or unequal bargaining power." Similarly, the *Restatement (Second) of Conflict of Laws* § 80 provides that "[t]he parties' agreement as to the place of the action will be given effect unless it is unfair or unreasonable." Because of the significant

effect that a forum selection clause can have upon a party – particularly in the context of a consumer transaction – and because this effect may not be fully appreciated until a dispute arises, such clauses should be conspicuous.

d. Committee Action

Motion to amend the proposed amendment by inserting ", in a mass-market transaction," after "and" and before "conspicuously." Motion carried on a 15-7 vote by show of hands.

Motion to accept the proposed amendment as amended. Motion carried on a unanimous vote by show of hands (24 total). Proposed amendment accepted.

e. JCOTS Action

The Commission amended this amendment to read:

§ 59.1-501.10 (b). A judicial forum specified in an agreement is not exclusive unless the agreement expressly ~~and, in a mass-market transaction, conspicuously~~ so provides and, in a mass-market transaction, expressly and conspicuously so provides.

This amendment was adopted by a unanimous vote. The proponent does not object to the Commission's changes.

7. Amendment 7

a. Nature of the Proposed Amendment

Amends the Virginia Consumer Protection Act to clarify that it applies to consumer transactions involving computer information or access contracts.

b. Statutory Text with the Proposed Amendment

§ 59.1-198. Definitions.

As used in this chapter:

"Business opportunity" means the sale of any products, equipment, supplies or services which are sold to an individual for the purpose of enabling such individual to start a business to be operated out of his residence, but does not include a business opportunity which is subject to the Business Opportunity Sales Act, Chapter 21 (§ 59.1-262 et seq.) of this title.

"Consumer transaction" means:

1. The advertisement, sale, lease, license or offering for sale, ~~or lease or license~~, of goods or services to be used primarily for personal, family or household purposes;

2. Transactions involving the advertisement, offer or sale to an individual of a business opportunity that requires both his expenditure of money or property and his personal services on a continuing basis and in which he has not been previously engaged;

3. Transactions involving the advertisement, offer or sale to an individual of goods or services relating to the individual's finding or obtaining employment; and

4. A layaway agreement, whereby part or all of the price of goods is payable in one or more payments subsequent to the making of the layaway agreement and the supplier retains possession of the goods and bears the risk of their loss or damage until the goods are paid in full according to the layaway agreement.

"Goods" means all real, personal or mixed property, tangible or intangible, and includes but shall not be limited to "computer information" and "informational rights" in computer information as defined in § 59.1-501.2.

"Person" means any natural person, corporation, trust, partnership, association and any other legal entity.

"Services" includes but shall not be limited to ~~work~~ (i) work performed in the business or occupation of the supplier, ~~or~~ (ii) work performed for the supplier by an agent whose charges or costs for such work are transferred by the supplier to the consumer or purchaser as an element of the consumer transaction, or (iii) the subject of an "access contract" as defined in § 59.1-501.2.

"Supplier" means a seller, ~~or lessor~~ or licensor who advertises, solicits or engages in consumer transactions, or a manufacturer, ~~or distributor~~ or licensor who advertises and sells, ~~or leases~~ or licenses goods or services to be resold, ~~or leased~~ or sublicensed by other persons in consumer transactions.

c. Proponent's Reasons for the Proposed Amendment

Because UCITA addresses computer information transactions as "licenses" of "computer information" as opposed to "sales" of "goods" or "services," some have been concerned that UCITA's terminology could support an interpretation that computer information transactions are not covered by the Virginia Consumer Protection Act ("VCPA"), which generally applies to consumer transactions involving the "sale" or "lease" of "goods" or "services." Moreover, for purposes of UCITA, the term "goods" is expressly defined not to include computer information. See Va. Code § 59.1-501.2(a)(33). While the broad terms and definitions of the VCPA should be construed in a manner that would encompass all consumer transactions that are within the scope of UCITA regardless of the terminology used in UCITA, it is appropriate to amend the definitions used in the VCPA to remove any doubt or ambiguity. Because the substantive prohibitions of the VCPA found in Virginia Code § 59.1-200 utilize the terms "consumer transaction," "goods," "services," and "supplier," it is necessary to make changes to the

definitions for all of these terms. The proposed amendments should ensure that consumers involved in computer information transactions will continue to have the substantive protections afforded by the VCPA.

d. Committee Action

Motion to recommend the proposed amendment to the Joint Commission on Technology and Science as a separate bill. Motion carried on a unanimous voice vote. Amendment accepted.

e. JCOTS Action

The Commission adopted a proposal incorporating these amendments by a unanimous vote.

O. PROPOSED AMENDMENTS SUBMITTED BY CHRISTIE VERNON ON BEHALF OF VIRIGNIA CITIZENS CONSUMER COUNCIL (VCCC)

1. Nature of the Proposed Amendment

Amends UCITA to exclude mass-market transactions from UCITA's scope.

2. Statutory Text with the Proposed Amendment

§ 59.1-501.2. Definitions.

(a) As used in this chapter:

(17) "Contract" means the total legal obligation resulting from the parties' agreement as affected by this chapter and other applicable law.

(a) "consumer transactions" means the sale, lease or license or offer for sale, lease or license, when primarily for personal, family, or household purposes, of

(i) computer information

(ii) an access contract; or

(iii) a computer information transaction.

(b) A consumer transaction is consumer goods or consumer services for purposes of this chapter.

§ 59.1-501.3. Scope; exclusion.

(d) This chapter does not apply to:

(7) a consumer transaction or consumer contract.

3. *Proponent's Reasons for the Proposed Amendment*

Consumers should be exempted from UCITA's provisions until the legislature has had ample opportunity to see how it works in business to business transactions. The implications of many of UCITA's interlocking provisions will need to be determined both in practice and in the courts. As VCCC stated to JCOTS and the General Assembly, UCITA undermines consumer confidence in electronic commerce and computer information markets.

Why UCITA undermines consumer confidence:

The introduction of credit cards is a great illustration of how to win consumer confidence in new technology. Consumers were afraid of unlimited liability should they lose their cards. Congress passed a law to limit consumer liability should a card be lost or stolen. Consumer got the right to charge back faulty transactions. Clear cost disclosures are required in marketing and billing for cards. As a result of these protection, consumers are comfortable using credit cards. Adequate consumer protections results in consumer acceptance and confidence.

UCITA takes the opposite approach for the software and computer information market. It confounds consumer expectations for full disclosure of key information before sale, upsets the balance of power between seller and purchaser, and is too convoluted to understand.

UCITA allows software publishers to sell software "as is," just as junker used cars are sold with now warranty that it works right.

UCITA allows notices from a software publisher or on-line service to be "received" by a consumer if the notice is only posted on a website. That is the equivalent of putting up a billboard in Memphis and expecting that a consumer in Norfolk has "received" the information.

UCITA allows the software publishers or Internet service to name almost any state in the United States as the state where a consumer's law suit has to be brought, not where the consumer can easily go to court.

UCITA blesses "shrink-wrap" disclosures where consumers are trapped into agreeing to this deal AFTER the consumer buys the software or on-line service. Under UCITA, terms of sale may be placed in the boilerplate fine print that the consumer sees for the first time only after the consumer buys the software in the mall and takes it home or downloads it, unwraps the box, puts the disk in the computer and starts loading the software. Only then can consumer click on a window to review contract provisions that the court will enforce.

UCITA allows the software license to say that the software cannot be reviewed by a magazine or newspaper without the publisher's permission unless and until he courts find such a provision to be unenforceable. That is similar to saying that General Motors can have a contract clause that prevents Consumer Reports from testing and reporting on the car.

UCITA turns a mass-market purchase of computer information into a license. Consumers know how to buy goods and services. We are clueless on the ramifications of purchasing a license to use computer information. The Virginia General Assembly, having enacted UCITA with a delay clause and opportunity for further study, should exempt out consumer transactions. If not, then there will need to be a lengthy set of further amendments to correct the more egregious defects of the model act.

Major commercial industries now excluded from the Virginia-enacted version of UCITA:

- Financial Services Transactions
- Motion Picture Industry
- Newspaper and magazine publishers
- Music Recording Companies
- Telecommunications

During the Virginia deliberations last year and at the 2000 session of the General Assembly, most of these industries negotiated exclusions from UCITA. When Maryland enacted UCITA, in addition to the Virginia exclusions the insurance industry negotiated partial exclusion from UCITA's scope in the Maryland version. At NCCUSL's summer meeting, the uniform version of UCITA was amended to add the exclusions negotiated by industry groups in Virginia and Maryland.

4. *Committee Action*

Motion to reject. Motion carried on a 15-9 vote by show of hands. The proposed amendment was not accepted.

No further action was taken.

P. PROPOSED AMENDMENTS SUBMITTED BY GAIL WARREN ON BEHALF OF THE SUPREME COURT OF VIRGINIA

1. *Nature of the Proposed Amendment*

Amends § 59.1-501.4 regarding mixed transactions.

2. *Statutory Text with the Proposed Amendment*

§ 59.1-501.4. Mixed transactions; agreement to opt-in or opt-out.

(4) A copy of a computer program contained in and sold or leased as part of goods and which is excluded from this chapter by § 59.1-501.3 (b) (1) cannot provide the basis for an agreement under this section that this chapter governs the transaction. If the parties agree that this title governs a mixed transaction, this title shall apply only to the computer information within the transaction, and not to other subject matter of the transaction.

3. *Proponent's Reasons for the Proposed Amendment*

This amendment is intended to make certain that in mixed transactions, such as the purchase of a print title accompanied by a disk, UCITA applies only to the computer information in the transaction, and not other subject matter. Otherwise, the scope of UCITA could be extended far beyond computer information, allowing publishers to place restrictions on print materials not now allowed under the fair use provisions of copyright law. Librarians are especially concerned about this provision as increasing numbers of titles from many disciplines, such as law, medicine and science, are shipped with a disk or CD-ROM in the back of the book containing supplemental information, tables, forms and practice exercises.

4. *Committee Action*

Motion to accept. Motion failed on a 9-14 vote by roll call (YEAS--Newman, Byron, Kifer, Leaman, Niemi, Rudin, Schweiker, Tussey, Warren; NAYS--May, Nixon, Bailey, Blanchard, Dengler, Donnellan, Furr, Koelemay, Learmonth, Mohr, Oakey, Riley, Ring, Stanley). The proposed amendment was not accepted.

No further action was taken.

Q. TECHNICAL AMENDMENTS TO RECOMMENDED BY STAFF

1. *Nature of the Proposed Amendment*

Strikes a cross-reference to a repealed Code section. Strike subsection (e) of § 59.1-501.5.

2. *Statutory Text with the Proposed Amendment*

§ 59.1-501.5. Relation to federal law; fundamental public policy; transactions subject to other state law.

~~(e) If this chapter conflicts with Chapter 39 (§ 59.1-469 et seq.) of this title, Chapter 39 governs.~~

3. *Proponent's Reasons for the Proposed Amendment*

Chapter 39 of Title 59.1, which is referenced in subsection (e) of § 59.1-501.5 was repealed during the 2000 Session.

4. *Committee Action*

Motion to accept. Motion carried on a unanimous voice vote.

e. *JCOTS Action*

This amendment was adopted by a unanimous vote.

V. CONCLUSION AND RECOMMENDATIONS

A. In concluding the study on UCITA, Advisory Committee 5 makes the following recommendations:

1. That a bill amending provisions of UCITA, in accordance with the proposed amendments that have been accepted by the Advisory Committee and forwarded to JCOTS, be introduced.

2. That a separate bill amending the provisions of the Virginia Consumer Protection Act, as outlined in Mr. Schweiker's proposed amendment, be introduced.

B. The Commission makes the following recommendations:

1. That the legislative draft amending provisions of UCITA in accordance with its decisions made on November 16, 2000 and January 9, 2001 be introduced.

2. That a legislative draft amending the provisions of the Virginia Consumer Protection Act in accordance with its decisions made on November 16, 2000 and January 9, 2001 be introduced.

APPENDIX 1. SENATE JOINT RESOLUTION 239

2000 SESSION

SENATE JOINT RESOLUTION NO. 239

Directing the Joint Commission on Technology and Science to study the impact of the Uniform Computer Information Transactions Act on Virginia businesses, libraries and consumers.

Agreed to by the Senate, March 9, 2000

Agreed to by the House of Delegates, March 9, 2000

WHEREAS, the National Conference of Commissioners on Uniform State Laws has promulgated the Uniform Computer Information Transactions Act (UCITA), and it is now available for consideration for adoption by the several states; and

WHEREAS, the UCITA is major legislation that would govern transactions of computer information, thereby significantly impacting all Virginians who use computers; and

WHEREAS, the UCITA presents a significant policy decision to be made by the General Assembly; and

WHEREAS, the voluminous pages of the UCITA contain highly technical language and a legal scheme which even legal professionals may have trouble understanding; and

WHEREAS, the Commonwealth may be one of the first states to consider this major legislation and other states may be looking to the Commonwealth for guidance in considering the UCITA; and

WHEREAS, the Commonwealth is the leader in technology and relevant laws and it must be responsible in leading other states; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That the Joint Commission on Technology and Science be directed to study the impact of the Uniform Computer Information Transactions Act on Virginia businesses, libraries and consumers; and, be it

RESOLVED FURTHER, That the Joint Commission on Technology and Science (JCOTS) shall study the impact of this act on Virginia businesses, libraries and consumers. JCOTS shall appoint a technical advisory committee to advise the Joint Commission on its work. The members of the technical advisory committee shall include, but not be limited to, the following: two members of the Senate, two members of the House of Delegates, a representative of the Northern Virginia Technology Council, a representative of the Virginia Manufacturers Association, a representative of the insurance industry, a representative of the Virginia Library Association, and a representative of the Richmond Technology Council.

All agencies of the Commonwealth shall provide assistance to the Joint Commission, upon request.

The Joint Commission shall report its findings to the Governor and the General Assembly on or before December 1, 2000.

All agencies of the Commonwealth shall provide assistance to the Commission, upon request.

The Joint Commission on Technology and Science shall complete its work in time to submit its written findings and recommendations by December 1, 2000, to the Governor and the 2001 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

APPENDIX 2. STUDY PROCEDURE

2000 Advisory Committee 5 (Uniform Computer Information Transactions Act)

Study Procedure

- 1) Proposing Amendments to UCITA
 - a) During the preliminary meetings, members of the public and members of the Advisory Committee may propose amendments to UCITA.
 - b) The preliminary meetings will be held throughout the Commonwealth, including Northern Virginia, Southwest Virginia and the Hampton Roads area.
 - c) Persons proposing amendments to UCITA must:
 - i) Be present at one of the preliminary meetings and present the proposed amendment to the Advisory Committee.
 - ii) Provide the section number of the provision being proposed to be amended. The section number should refer to Chapter 43 (§§ 59.1-501 et seq.) of Title 59.1 of the Code of Virginia (appears in 2000 cumulative supplement of the Code of Virginia, House Bill 561 of 2000 Session, and Senate Bill 372 of 2000 Session).
 - iii) Provide the exact nature of the amendment. For example, "On § ____, strike *language to be stricken* and/or add *language to be added*."
 - iv) Provide reasons for the proposed amendment and its impact.
 - v) Be ready to answer questions regarding the proposed amendment.
 - d) After a proposed amendment has been presented, the Advisory Committee will vote on whether the amendment should be discussed further at the Committee's final meeting.
- 2) Final Meeting of the Advisory Committee
 - a) After all the preliminary meetings have been held, the final meeting will be held in Richmond.
 - b) The purpose of this meeting will be to determine the final recommendations to the full Commission.
 - c) During this meeting, the Advisory Committee will discuss and vote upon all the proposed amendments that passed the initial vote at the preliminary meetings.
 - d) The full Commission will be advised of the proposed amendments that pass the final vote of the Advisory Committee.
- 3) Additional Information Regarding Proposing Amendments
 - a) Commission staff will attempt to widely distribute meeting notices. To ensure that you receive a meeting notice, please sign up on the Commission's mailing list (by filling out the form on the Commission's website or by contacting the Commission staff if you do not have access to the Internet).
 - b) Please submit the proposed amendment and a statement explaining the amendment to the Commission staff at least one week prior to the preliminary meeting during which you intend to present the proposed amendment. Electronic files are preferred.

- c) Advanced submission of the proposed amendment and the statement are preferred but not required. You may present the proposed amendment and your statement at the time of the meeting. If you do, please bring enough paper copies (at least 35 copies). Also, please bring an electronic copy on a floppy diskette (IBM PC compatible) or send it to the staff via electronic mail within a few days following the meeting.
- d) Once submitted or presented, the proposed amendment and your statement will become a part of public records and will be posted on the Commission's website.

Please direct any comments or questions to:

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APPENDIX 3. DELEGATE BENNETT'S DISSENTING OPINION

Transferability Amendment, Page 26

TO: Members of the Joint Commission on Technology and Science
FROM: W.W. (Ted) Bennett, Jr.
DATE: November 17, 2000
SUBJECT: Objection to Section 59.1-505.3(2) of the proposed Virginia UCITA,
Adopted October 17, 2000.

In keeping with my objections, and the concerns I expressed, during the JCOTS meeting yesterday, I hereby set forth by way of memorandum, the concerns of those companies who sell software containing trade secrets resulting from their development of intellectual property and who hold copyrights and patents thereon.

This memorandum is filed as a minority report to the committee's action approving the set of amendments proposed to UCITA.

My concern, and that of the companies referenced, center on the amendment allowing transferability of leases of property or equipment without the lessor's opportunity to negotiate new terms and conditions and the serious harm engendered thereby to the owners of the copyright or patents which would ordinarily protect the them under federal law.

The amendment in question is a new Subsection (c) to section 59.1-505.3(2), which reads as follows (emphasis added):

(2) Except as otherwise provided in paragraph (3) and § 59.1-508 (a) (1) (B), a term prohibiting a transfer of a party's contractual interest is enforceable, and a transfer made in violation of that term is a breach of contract and is ineffective to create contractual rights in the transferee against the nontransferring party, *except to the extent that:*

...

(c) The transfer is in connection with a merger or the acquisition or sale of a subsidiary or affiliate involving the licensee and another person and is made to :

(1) Preserve the integrity of information and information processing systems used by the licensee; or

(2) Ensure computability of information and information processing systems among the parties involved in the merger, acquisition, or sale.

We seek reconsideration and elimination of the amendment for the following reasons.

1. Subsection (c) would appear to be *non-variable*, thus even the most sophisticated commercial parties could not achieve a different result by contract. There is no justification for this interference with contract between commercial parties. No other Virginia law of which we are aware, including Article 2 of the UCC, imposes an analogous, non-variable rule on commercial parties.

2. Subsection (c) will seriously handicap protection of trade secrets. Software contains trade secrets. A primary reason licenses restrict transfer is to protect those trade secrets. Under Subsection (c), a licensee may transfer those trade secrets with the software and the licensor may do nothing about it. The licensor cannot even contract for a different result. Once a trade secret is disclosed, it is gone. Trade secret law no longer protects it.

3. Subsection (c) cripples licensor pricing structures. Assume that a licensor grants a license to a company with 10 employees and charges the “small company” license fee; the license prohibits transfer. Small company then merges, participates in an acquisition or otherwise becomes affiliated with a multi-national corporation with 100,000 employees, all of whom proceed to use the software under Subsection (c) without paying the “large company” license fee. This should not be mandated, let alone countenanced, by the State of Virginia. Such a rule also violates federal policies for intellectual property:

As a practical matter, free assignability of patent licenses might spell the end to paid-up licenses such as the one involved in this case. Few patent holders would be willing to grant a license in return for a one-time lump-sum payment, rather than for per-use royalties, if the license could be assigned to a completely different company which might make far greater use of the patented invention than could the original licensee.

Everex Sys., Inc v. Cadtrak Corp. (In re CFLC, Inc), 89F.3d 673,678-80(9th Cir.1996).

4. Subsection (c) denies the licensor its intellectual property right to control the identity of its licensees and persons who have access to its protected works. Assume Software company #1 is not willing to license its software to fierce competitor software company # 2. Instead, #1 licenses to X with a prohibition against transfer. X then merges, participates in an acquisition, or sells a subsidiary or “affiliate” (an undefined and boundless term) to fierce competitor and, under Subsection (c), transfers the license. This is contrary to federal law and policy which is designed to foster creativity by allowing the licensor to protect its work by, among others, controlling the identity of the transferee:

Allowing free assignability – or, more accurately, allowing states to allow free assignability – in a non exclusive patent license would undermine the reward that encourages invention because a party seeking to use the patented invention could either seek a license from the patent holder or seek an assignment of an existing patent license from a licensee . . . And while the patent holder could presumably control the absolute number of licenses in existence under a free-assignability regime, it would lose the very important ability to control the identity of its licensees. Thus, any license a patent holder granted – even to the

smallest firm in the product market most remote from its own, - would be fraught with the danger that the licensee would assign it to the patent holder's most serious competitor, a party whom the patent holder itself might be absolutely unwilling to license. Id. at 678-80.

5. Subsection (c) voids legitimate commercial practices and mandates a statutory, pecuniary benefit to licensees. In commercial loan contracts, lenders routinely state that a loan obligation may not be transferred by the borrower without payment of a fee to the lender. That is and always has been legal. The same is true for commercial license contracts: frequently they are not transferable unless a fee is paid. Subsection (c) allows the licensee to avoid payment of that fee.

6. Subsection (c) tilts the balance of UCITA too far. UCITA already risks preemption by federal law by reversing the rule for intellectual property: the federal rule is that copyrights and patents are *not* transferable *unless* a contract says they are. See e.g., *In re Patient Educ. Media, Inc.*, 210 B.R. 237 240 (Bankr. S.D.N.Y. 1997) (“ . . . nonexclusive license is personal to the transferee . . . and the licensee cannot assign it to a third party without the consent of the copyright owner”). Section 59.1-505.1 says that licenses *are* transferable unless the contract says they *are not*. Thus UCITA already provides an advantage to the licensee. Subsection (c) takes that advantage and then pushes it farther. That is inappropriate in a statute designed to provide balance between licensors and licensees.

7. Subsection (c) invites federal preemption and attendant litigation. Under federal law, a nonexclusive patent license is personal and non-assignable. *Id. Everex*. The same is true under copyright law. *Id. In re Patient Educ. Media*. Subsection (c) ignores this policy and thus invites preemption and litigation.

In summary, Subsection (c) is at odds with federal law and policy and creates material, non-variable harm to licensors. The amendment interferes with exclusive rights of copyright owners to control use and distribution of their intellectual property. Computer information providers will not be able to assure that their trade secrets are not revealed without their authority, particularly if the licensee is sold to or merged with a competitor of the licensor. The amendment would harm particularly small and medium sized businesses in the Commonwealth. Under this language the licensor would not be able to negotiate additional payment or new restrictions on use when the licensee is sold or merged with another, potentially larger entity. If the licensors know that they cannot have a chance to establish new contract terms and conditions, including additional fees for greater use, then the licensors would have to charge higher prices at the outset to the small and medium sized businesses in the Commonwealth. Further, Subsection (c) is at odds with federal law and policy and creates material, non-variable harm to licensors. This is not justified under any law or policy, including those of the Commonwealth of Virginia. I respectfully request reconsideration and removal of Subsection (c).

Thus, I ask that this memorandum be filed as a minority report to the committee's adoption of this amendment.

Respectfully submitted, I remain

Yours very truly,

William W.(Ted) Bennett, Jr.