



## Uniform Computer Law – The Dirty Side of Legislation

*By John Yates, Special To LTW*

**Editor's note: John Yates, who chairs the Technology Group of the law firm Morris, Manning & Martin, writes weekly for LTW.**

ATLANTA - State legislatures in the Southeast have acted slowly to adopt legislation favorable to technology companies. At least in Georgia, the current legislative session seems to be on track for another lackluster effort to promote entrepreneurship. Other Southeastern states are not doing much better (but let me know if you are aware of legislative proposals in your Southeastern state that are supportive of entrepreneurs).

I've never really understood legislative politics. I have learned, however, that our elected officials spend much of their time focused on the wrong issues. For example, consider the legislation recently proposed in Georgia to make it a misdemeanor *not* to serve *sweet tea* in restaurants in the state. Some Georgians have proposed that sweet tea be adopted as a state drink!

Another burning issue in our state's legislature is the Georgia flag. Georgians can only hope that our General Assembly will find something more productive to debate during this session (more on the flag issue and its impact on technology companies in a later column).

The most interesting state legislation for tech companies is found in a draft model act – the Uniform Computer Information Transactions Act (known as UCITA).

UCITA was presented years ago as a proposed set of laws designed to address the licensing and procurement of software and related intellectual property in the computer arena. The model act has been debated, rewritten, modified and criticized for many years.

The author of UCITA is the National Conference of Commissioners on Uniform State Laws (NCCUSL). The American Bar Association in conjunction with NCCUSL has been working to modify the model act, reviewing over 30 amendments proposed by a wide group of interested parties including consumers, librarians, retailers, non-software manufacturing businesses, financial institutions and software development professionals. The critics of the model act have also formed their own group – Americans For Fair Electronic Commerce Transactions (AFFECT).

Despite these challenges, UCITA has been adopted in a few states – most notably Virginia -- and is under consideration in other states.

The issues surrounding UCITA are complicated. While there are problems with the proposed law, there are important issues for the Southeastern technology community relating the legislation.

**Multi-State Transactions:** Most computer transactions involve vendors and customers in multiple states. As a result, each party to the transaction may desire to apply the law of its own jurisdiction. Often, the "Governing Law" section of an agreement becomes hotly debated – the

vendor wants to apply its own state law; the customer prefers its own law (and usually prevails); and the parties may compromise on the law of a third state.

The applicable governing law can be significant. Different states apply laws to computer contracts in varying ways. Some states are pro-customer, and others may impose special requirements for the contracting parties to satisfy in order to obtain certain legal rights.

A uniform law like UCITA would help to solve this problem – since every state would have adopted a common set of laws governing computer transactions.

**Application of the UCC:** The UCC or Uniform Commercial Code has been adopted in most states. Unfortunately, many states have modified the UCC resulting in a lack of uniformity on all provisions from state to state. Therefore, an attorney must be retained to make sure the agreement conforms with state law and any variations of the UCC in the law of the governing state.

UCITA would help to solve this problem. If the model law were adopted by the states, several benefits would result:

- The UCC would be replaced by a set of laws specifically designed for commercial transactions involving technology.
- Tech companies would have greater certainty regarding the terms of their transactions with customers – and less likelihood that the courts would rewrite their agreements.
- The number of court decisions would be reduced because lawyers would not be fighting over whether the UCC applied to a technology transaction (since UCITA would govern such deals).

**Warranties and Disclaimers:** A key section of UCITA provides uniformity with regard to warranties that are applied to technology transactions. Each year, hundreds (probably thousands) of lawsuits are filed relating to warranty claims and the scope of warranty coverage. The widespread adoption of UCITA would provide greater certainty with regard to the scope and coverage of warranty protection in technology transactions.

In addition, disclaimers of warranties have posed a problem for tech companies over the years. With differing versions of the UCC in the various states, companies are plagued with having to follow special rules to disclaim warranties and limit liability. UCITA would go far to create a uniform method of specifying the types of warranties and disclaiming all others:

- **Shrink Wrap Agreements:** The debate continues regarding the enforceability of shrink wrap and click wrap agreements – contracts created by tearing open a software package or clicking on a “yes” button on a computer screen. This issue has been debated, briefed and tried in hundreds of courts across our country. Why not adopt a model law like UCITA to prescribe that such agreements are enforceable if properly structured?

- Remedies: Remedies present another area of confrontation between computer vendors and users. What remedies are available to a user if a technology product doesn't work? Can a software vendor access its customers' computer system without approval?

A model law could address these questions and provide some degree of certainty with regard to available remedies for a breach of contract. UCITA was an attempt to move in this direction.

(Interestingly, early versions of UCITA set forth a process for allowing technology companies to exercise self-help by "turning off" a customer's computer system for nonpayment. This controversial section was revised in later versions of the model act.)

The fate of UCITA may have already been sealed. Recently, UCITA effectively received the death penalty as a result of the lack of support from influential sectors of the legal and technology communities.

In the face of widespread opposition to UCITA, the group responsible for model laws (the National Conference of Commissioners on Uniform State Laws) withdrew its proposed resolution to the American Bar Association in support of the model act. This may be the death sentence for UCITA, at least for many years to come.

Despite these failures, we can expect new efforts in the future to provide uniformity in the computer contracting area. Unfortunately, the final results may not be enacted into law in our lifetime.

*John C. Yates Chairs the Technology Group of the law firm Morris, Manning & Martin, LLP, which has offices in Atlanta, Charlotte and Washington, D.C. He can be reached at [jyates@mmlaw.com](mailto:jyates@mmlaw.com) or (404) 504-5444.*

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