DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

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UCITA — "It's Finally At Your Doorstep"

After ten years, and millions of words - spoken, written or electronically transmitted, and several attempted "revisions" to the Uniform Commercial Code, a body of rules to accommodate electronic transactions and transactions in software and databases is finally at our doorstep — the Uniform Computer Information Transactions Act or UCITA. Indeed, as of the writing of this article the Maryland and Virginia legislatures have each passed versions of UCITA. Both enactments closely follow the UCITA model act, propounded by the National Conference of Commissioners on Uniform Laws.

UCITA is truly a comprehensive and voluminous undertaking. It borrows heavily from Article 2 of the Uniform Commercial Code. But UCITA's reach extends well beyond the confines of the UCC's text, Reporter's Notes and caselaw. UCITA envelopes the licensing of software, development of computer programming, "renting" of records and lists on magnet media, access to the Internet, beta testing relationships, and beyond. The ambitions of this paper are much more modest. We will consider some rather preliminary areas: a word about the definitions used in UCITA; identification of the vertical industries that have been excluded from the purview of UCITA; a look at the "opt-in" and "opt-out" provisions of UCITA; the numerous magic words that need to be kept in mind when navigating UCITA.

As is common in statutes, the definitions employed in the legislation are important and no less so with UCITA. Anyone practicing in Information Technology (IT) should take time to walk through UCITA's definitional section. It is helpful to recognize and have a firm grasp on the meanings of words, commonly used in the UCC and otherwise, which may have particular (and in some instances, peculiar) definitions when used in UCITA. Some of the terms used in UCITA come directly from the UCC - "merchant", "reasonable time" or "reason to know", "unconscionable", and adopt UCITA definitions generally familiar to most commercial lawyers. However, "information", "informational content", "informational rights", "compulsory licenses", "electronic agent", "electronic mistake" and "record", to name just a few, are terms whose definitions need to be well understood by the practitioner before working with UCITA. The Reporter's Official Comments are particularly helpful in grappling with UCITA and its definitions. The Comments are available at www.law.upenn.edu//bll/ulc/ucita300.htm.

Having dispensed with those few preliminaries, lets start by understanding where we clearly do not need to be concerned with UCITA. UCITA covers

"transactions in computer information" (most commonly, licensing digital technology and data, and gaining access to Internet related services). The model UCITA, however, expressly exempts from coverage certain transactions. "Financial services transactions" are not regulated by UCITA, these being core banking, payment and financial services transaction which are already subject various federal and state financial regulatory schemes (like Regulation E on funds transfers). Also excluded from UCITA coverage are transactions in audio or visual programming that is provided by broadcast, satellite or cable (as defined under federal statute and regulation), motion picture, sound recording, musical work, digital music recording, phonographic record or digital motion picture recordings, as well as any "compulsory license" (a license that is based on federal copyright law). Finally, most employment contracts are not expressly removed from coverage by UCITA's express terms.

UCITA also attempts to demarcate its coverage from coverage under Article 2 of the UCC, as the latter is left behind by the digital age. UCITA adopts a mixed contract approach. To the extent that the transaction or a portion of it falls under UCITA, UCITA applies. To the extent that the transaction does not fall under UCITA, the UCC or other statutory or common law, as applicable, would apply.

To be clear, UCITA obviously applies to the licensing of software and the licensing of rights in databases. Moreover, and possibly equally obviously, it applies to patent licensing, software creation and support, Internet contracts, bulletin board contracts, Beta agreements, channel distribution agreements to the extent that informational rights are being put through the channel. The sweep of UCITA is broad, and expanding as the IT world and the new economy bleed into every nook and cranny of our collective, commercial existence.

An obvious extension to the foregoing is UCITA's opt-in/opt-out dimension. In short, parties to a contract can agree to have UCITA apply to their entire transaction (assuming appropriate subject matter), part of the transaction or none of the transaction. Further, UCITA clearly adopts the principle of freedom of contract, allowing the parties to fashion their own contract by selecting, modifying or declining to include in their own agreement particular provisions of UCITA. However, it is worth noting that if the parties opt for UCITA coverage, there are various mandatory provisions — such as mandatory warrantee disclaimer provisions and mandatory duties based on good faith or unconscionability — that are automatically included whenever UCITA applies. Wholesale opt-in or opt-out is clearly envisioned under UCITA. For the more adventuresome, partial opting out and provision selection need to be done surgically.

UCITA seems particularly fond of magic words — phrases that are expressly highlighted in the model and which are designed to provide safe harbors. For example, a grant of rights that uses the phrases "all possible rights and for all media" or "all rights and for all media now known or later developed" will give the draftsperson some decent level of assurance that all intellectual property rights concomitant to the IT in question should come along with the bargain. (Section 307(F)(1)).

If an exclusive license to IT is contemplated by the parties, then UCITA instructs them to include in their agreement's granting clause those precise words - "exclusive license". (Section 307(F)(2)) In this way the scope of the use rights in the IT licensed can be best assured.

The reasonable person standard is alive and well in UCITA. Performance owed to a party will be held to the standard of a reasonable person in the recipient's position. If the recipient wants performance to adhere to its own, subjective satisfaction the agreement must expressly provide so; under UCITA use of the phrase "sole discretion" should lead to that result. (Section 311(b)(1))

There are several sets of magic words in the treatment of warrantees and their disclaimers. Unless a warranty disclaimers specifically warns that "there is no warranty against interference with your enjoyment of the information or against infringement", an implied warranty of title and quiet enjoyment may not be avoided. (Section 409(D))

As is the case under the UCC, to disclaim an implied warrantee of merchantability, the agreement must mention "merchantability" or "quality" in its disclaimer. To disclaim or modify an implied warranty of informational content, the disclaimer must mention "accuracy". To disclaim or modify the implied warranty of fitness for the licensee's purposes, the disclaimer must mention that "there is no warranty that this information, our efforts, or the system will fulfill any of your particular purposes or needs". (Section 406(B)

Language is sufficient to disclaim all implied warranties if it individually disclaims each implied warranty or, if it is conspicuous and states "except for express warranties stated in this contract, if any, this information/computer program is provided with all faults, and the entire risk as to satisfactory quality, performance, accuracy, and effort is with the user", or similar words. (Section 406(B)(3))

Further, unless the circumstances indicate otherwise, all implied warranties are disclaimed by expressions like "as is" or "with all faults" or similar words that in common understanding call the licensee's attention to the disclaimer of warranties and makes plain that there are no implied warranties. (Section 406(C))

All of the magic words that temper or disclaim warrantees should be appear in a "record" (tangible or intangible agreement or notice) and should be conspicuous. Although UCITA allows for use of "words of similar import" to the magic words identified in the model, common sense might dictate otherwise.

The law has never left the practitioner without a challenge. With the confluence of technology and commerce, the breath and scope of UCITA will maintain that tradition for the foreseeable future.