

[Libraries & You](#)[Education & Careers](#)[Awards & Scholarships](#)[Our Association](#)[Issues & Advocacy](#)[Professional Tools](#)[Events & Conferences](#)[Products & Publications](#)[News](#)
[Home](#) → [Washington Office](#) → [Issues](#) → [Copyright Issues](#) → [UCITA](#)

Washington Office

- ▶ [Events](#)
- ▶ [Issues](#)
 - [Civil Liberties, Freedom and Privacy](#)
 - [Copyright Issues](#)
 - ▶ [Anti-Piracy Legislation](#)
 - ▶ [Broadcast Flag](#)
 - ▶ [Complete Copyright Education](#)
 - ▶ [Copyright Articles](#)
 - ▶ [Copyright Court Cases](#)
 - ▶ [Copyright Legislative Agenda](#)
 - ▶ [Database Protection Legislation](#)
 - ▶ [DMCA: The Digital Millennium Copyright Act](#)
 - ▶ [DRM: Digital Rights Management](#)
 - ▶ [Distance Education and the TEACH Act](#)

	<h2 style="margin: 0;">UCITA 101 & 102</h2>
Home Impact News Flash States Tools Library WO	

- **UCITA 101**
 - [What is UCITA?](#)
 - [What does UCITA do?](#)
 - [The UCITA controversy](#)
 - [The UCITA drafters](#)
 - [UCITA "bomb-shelter" legislation](#)
 - [2002 Amendments to UCITA](#)
 - [UCITA and the American Bar Association](#)
 - [Opponents of UCITA](#)
 - [Proponents of UCITA](#)
 - Basic UCITA facts [factsheet.pdf](#)
- [UCITA 102](#) (Proposed UCITA-Related Legislation)

Last Update: 6 Feb

What is UCITA?

The **Uniform Computer Information Transactions Act** (UCITA) is a proposed state contract law designed to standardize the law and provide the default rules for licensing software and all other forms of digital information. UCITA is applicable to "information in electronic form" including computer software, on-line databases, electronic journals, e-books, CD-ROMs, and videos. UCITA has become law in only two states so far (Maryland and Virginia). [http://www.law.upenn.edu/bll/ulc/ulc_frame.htm]

[\[top\]](#)

What does UCITA do?

Producers of computer information products have developed a business model that relies on licenses or contracts to govern the user's "access to " and "use of " a product. In the world of electronic commerce, people purchase but do not own

- Fair Use and
- ▶ Electronic Reserves
- Fair Use
- ▶ Legislation
- International
- ▶ Copyright Legislation
- ▶ Flash Reports
- Open
- ▶ Access to Research
- Orphan Works
- Related
- ▶ State Legislation
- ▶ **UCITA**
- Federal
- ▶ Library Programs
- ▶ Funding
- Government
- ▶ Information
- Pre-
- ▶ Disaster Mitigation
- Technology, the
- ▶ Internet and Telecommunications
- FLLAN (Fed. Library
- ▶ Legislative & Advocacy Net.)
- ▶ Publications
- OITP (Office for
- ▶ Information Technology Policy)
- OGR (Office of
- ▶ Government Relations)
- ▶ Contact WO
- News
- ▶ (ALAWON)
- LBA (Library
- ▶ Business Alliance)

the software in the same sense that they would own other types of goods like books, cars, or toasters. Some licenses are *negotiated* and the final terms result from the traditional "meeting of the minds." Many libraries are able to negotiate the terms of the licenses that govern the use of databases or online journals, for example.

However, libraries, like most businesses, rely on millions of dollars of mass-market retail computer information products. These products use *non-negotiated or standard form* licenses in which the licensor or vendor determines the terms without input from the licensee. Often called "shrink-wrap" or "click-wrap" licenses, these agreements accompany products that are sold in "shrink-wrap" packaging or online products that are accessed by clicking "I agree" to activate the license. Such licenses are not UCITA inventions but, under the Act, licensors or vendors of the software product would have more latitude in establishing and enforcing the terms.

Questionable or unfair terms in "shrink-wrap" and "click-wrap" licenses may be challenged by licensees in court but in recent years, the courts have more often than not enforced the terms in "shrink-wrap" contracts. UCITA takes a leap forward in validating the terms of this kind of license.

[\[top\]](#)

The UCITA controversy

At two hundred pages in length, UCITA is technically complex, ambiguous and overly broad in scope. The proposed law has evoked criticism from experts in commercial, consumer, and intellectual property law. Vigorous debate has followed UCITA throughout the decade of its drafting by the **National Conference of Commissioners on Uniform State Laws (NCCUSL)** and since its approval in 1999 as a "uniform law" that potentially might be enacted in all the states. Libraries and other opponents maintain that UCITA favors the interests of software vendors and is so fundamentally flawed that it should be completely re-drafted. UCITA was further amended in 2002 but the changes do not sufficiently address the issues libraries and other opponents have identified.

AFFECT (Americans for Fair Electronic Commerce Transactions), the national coalition of over sixty businesses and non-profit organizations, including libraries:

[\[http://www.affect.ucita.com\]](http://www.affect.ucita.com)

❑ In 2002, the American Bar Association (ABA) Working Group on UCITA stated that UCITA "is a very complex statute that is daunting for even knowledgeable lawyers to understand."

❑ Proponents say UCITA provides clear and uniform guidelines that are much needed in the rapidly changing digital world.

See the ABA report: [\[http://www.abanet.org/leadership/ucita.pdf\]](http://www.abanet.org/leadership/ucita.pdf)

❑ Even though thirty-eight amendments to UCITA were approved in 2002, AFFECT, continues to oppose UCITA.

❑ Proponents describe the amendments as "substantive" and claim that they respond to critics of the act.

❑ Five major library associations have consistently **argued** that



UCITA will continue the trend of whittling away at the carefully balanced doctrines of federal copyright law.

☐ Proponents claim UCITA provides ample protections for libraries.

☐ Most consumer protection advocates have opposed UCITA and continue to contend that UCITA allows contract terms that are harmful to consumers:

[http://www.affect.ucita.com/what_reasons.html]

☐ Proponents claim UCITA is consumer-friendly.

☐ In a letter to the UCITA Standby Committee of NCCUSL in 2001, thirty-three state attorneys general agreed "UCITA is fundamentally flawed in its scope and approach" and contended that "UCITA is so flawed that any amendments would not significantly ameliorate UCITA's negative impact on consumers or the marketplace in general."

[<http://www.affect@ucita.com/pdf/>

[Nov132001_Letter_from_AGs_to_Carlyle_Ring.pdf](#)]

☐ Businesses including insurance companies, retail and manufacturing concerns and software developers claim UCITA would be detrimental to their businesses because it would allow contract terms that pose security risks and could result in millions of dollars in increased costs.

[http://www.affect.ucita.com/what_cost.html]

☐ Proponents claim UCITA will benefit commerce and is needed to promote an e-economy.

☐ UCITA passed in Maryland and Virginia in 2000, the only two states to do so since it was released by NCCUSL to the state legislatures in 1999. Since then over twenty states have considered introducing it but many have not done so because they have been reluctant to take on such a controversial act. In 12 other states where it was introduced, it was killed. (Follow UCITA in state legislatures - go to the "Your State" section.)

☐ Since 2000, three states have passed UCITA "**bomb-shelter**" legislation, which specifically protects consumers and businesses in their states from some far-reaching provisions of UCITA that could affect citizens in states where UCITA is not law.

[[top](#)]

The UCITA drafters

The **National Conference of Commissioners on Uniform State Laws** (NCCUSL) [<http://www.nccusl.org>] is responsible for creating UCITA. The organization is comprised of lawyers, judges, and law professors appointed by each state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.

NCCUSL's mission is to draft uniform and model laws and work toward their enactment in state legislatures. The Uniform Commercial Code (UCC) is the most well known body of uniform law. UCITA was originally drafted as an amendment to Article 2 of the UCC and was known as "UCC 2B." Once NCCUSL approves a proposed uniform law, state NCCUSL commissioners promote its passage in their

home states.

NCCUSL and the **American Law Institute** (ALI) [<http://www.ali.org/>] collaborate on the development of uniform laws. NCCUSL and ALI spent almost ten years attempting to amend the Uniform Commercial Code to include rules that would govern computer information transactions on the Internet and elsewhere. The two organizations could not reach consensus about the scope and wording of the amendments to UCC Article 2. After ALI withdrew from the process in 1999, NCCUSL approved the proposals and released them for adoption, renaming the proposed state law the Uniform Computer Information Transactions Act (UCITA).

The process of drafting UCITA has been unusual and controversial. Usually, the ALI and NCCUSL work together to make changes to the Uniform Commercial Code. In this case, however, ALI withdrew its consideration of the UCC2B language after it failed to find consensus among its own membership of law professors, lawyers and judges.

[\[top\]](#)

UCITA "bomb-shelter" legislation

A software license includes a provision that specifies which law governs the contract. In UCITA this *choice of law* provision enables contracting parties to select Virginia or Maryland law (i.e. UCITA) to govern a software or access contract entered into by residents and businesses anywhere in the country. This means that a business or consumer in a state that has not passed UCITA could still be subject to it. In the case of "shrink-wrap" or "click-wrap" licenses, the licensor unilaterally determines the terms and could include such a term regardless of whether the licensor or the licensee have any relationship to Virginia or Maryland. UCITA also broadly allows *choice of forum* clauses that might choose Virginia or Maryland as the state where any litigation or arbitration regarding a dispute in the contract would take place.

UCITA "Bomb-shelter" Legislation one page brief

[<http://www.affect.ucita.com/pdf/UCITABombShelter.pdf>]

Consequently, some states have developed "defensive legislation" to protect their residents. Iowa, West Virginia and North Carolina have passed such laws, often referred to as "bomb-shelter laws." In most cases, this legislation narrowly states that such a *choice of law* or *choice of forum* term is unenforceable in that state.

- **Iowa:** Iowa HB 2205 (UETA) see Sec. 4 for bomb-shelter provision [<http://www.legis.state.ia.us/GA/80GA/Legislation/HSB/00200/HSB00214/Current.html>]
- **North Carolina:** SB 1023 - bomb-shelter bill (passed 2001) [<http://www.ncga.state.nc.us/html2001/bills/AllVersions/Senate/S1023vc.html>]
- **West Virginia:** SB 204 [http://www.affect.ucita.com/pdf/sb204_introduced.pdf]

[\[top\]](#)

2002 Amendments to UCITA

In August 2002, NCCUSL approved thirty-eight amendments to UCITA.

[\[http://www.nccusl.org/nccusl/ucita/UCITA_Standby_Comm.htm\]](http://www.nccusl.org/nccusl/ucita/UCITA_Standby_Comm.htm)

These amendments attempt to respond to criticisms voiced at hearings held in 2001 and to recommendations made earlier in the year by the American Bar Association (ABA) working group on UCITA. Although the amendments respond to many issues raised by the ABA, they do not address some important consumer protection issues. Moreover, the amendments still do not substantially improve UCITA. Although an amendment related to libraries has been approved, the amendment was not originally proposed by the libraries and does not address the fundamental concerns that libraries have voiced about UCITA.

AFFECT Response to NCCUSL Commentary on the 2002 UCITA Amendments, December 4, 2002

This is a detailed analysis that responds to comments issued by NCCUSL on August 23, 2002.

<http://www-affect.@ucita.com/pdf/AmendmentAnalysisFinal.pdf>

Summary of AFFECT Response to 2002 UCITA Amendments

This is a three page summary of the key points of the longer analysis.

<http://www-affect.@ucita.com/pdf/AFFECTResponseRevision.pdf>

AFFECT challenges recent amendments to UCITA (one page)

This is a one page document that highlights the deficits in the amendments relating to key issues.

<http://www-affect.@ucita.com/pdf/AFFECTChallenges.pdf>

AFFECT continues to oppose UCITA (one page)

This one page document is a convenient reference summarizing the major reasons for opposition to UCITA by libraries, businesses and consumers.

<http://www-affect.@ucita.com/pdf/AFFECTOppose.pdf>

Library amendment

Libraries received a small concession to their concerns in an amendment, originally proposed in late 2001, that would permit the transfer or donation of computer software to public libraries, and public elementary and secondary schools, even if the terms in a shrink-wrap contract indicate otherwise. However, the proposed amendment would apply only to computer software that is transferred in a computer. Moreover, the drafting committee rejected library proposals that would have affirmed the primacy of federal copyright law in determining the enforceability of terms in "shrink-wrap" and "click-on" contracts. The committee's report showed either a complete misunderstanding or a misinterpretation of the library arguments regarding UCITA.

Library Response to NCCUSL Amendment Proposals, January 2002:

[\[libresp.pdf\]](#)

[\[top\]](#)

UCITA and the American Bar Association

The impetus for a uniform law relating to information technology transactions came from the American Bar Association (ABA). The ABA usually reviews proposed uniform laws and approves their readiness for introduction in state legislatures. However, UCITA was not submitted for review to the ABA in 1999 and did not actually come under ABA scrutiny until the end of 2001.

The Working Group did an extensive review of UCITA and issued an internal report on January 30, 2002. {item below}

At the February 2003 ABA Midyear Conference, NCCUSL submitted a resolution to the ABA House of Delegates that recommended that the ABA "approve" UCITA as appropriate for consideration by state legislatures. The resolution was withdrawn before a vote could be taken when it became apparent that the resolution was likely to fail. Prior to the meeting, six ABA sections and two committees had considered the resolution and all failed to vote for passage.

{ALA Press Release of Feb. 11, 2003, Headlines page}

[<http://www.abanet.org/leadership/ucita.pdf>]

January 30, 2003:

Open Letter from the American Library Association, the American Association of Law Libraries, the American Association of Research Libraries, the Special Libraries Association, the Medical Libraries Association and the American Association of Universities letter to the American Bar Association House of Delegates.

[[ABAtr30jan03.pdf](#)]

2002 American Bar Association Working Group Report on UCITA

In an internal report released on January 30, 2002 to the ABA Board of Governors, the ABA Working Group assigned to review UCITA issued a report with eighteen recommendations for changes.

[<http://www.abanet.org/leadership/ucita.pdf>]

Some of the working group's suggestions were addressed to some degree in the amendments that were approved by NCCUSL in August 2002. The report states that UCITA "is a very complex statute that is daunting for even knowledgeable lawyers to understand and apply." The first recommendation stated, "UCITA should be redrafted to make it easier to understand and use." The ABA has not issued any statement regarding the recent amendments.

[[top](#)]

Opponents of UCITA

Opposition to UCITA has been consistent and contentious throughout the life of the Act. The **Americans for Fair Electronic Commerce Transactions** (**AFFECT**)-formerly known as 4CITE- formed in 2000 and is leading the nationwide opposition. AFFECT is a broad-based coalition of over sixty retail and manufacturing businesses, consumers, financial services institutions, technology professionals and libraries. Libraries were founding members of AFFECT which has been active in every state in which UCITA has been considered.

[[top](#)]

Proponents of UCITA

UCITA is supported primarily by software publishers and some technology firms: Microsoft, AOL, LexisNexis, Reed Elsevier, the Business Software Alliance, the Information Technology Association of America, Software and Information Industry Association.

[\[top\]](#)

UCITA 102

Proposed UCITA-Related Legislation

While UCITA is increasingly being perceived as a failed attempt to modify the law to meet the demands of the Digital Age, other more narrow efforts to modify the Uniform Commercial Code (UCC) have been simultaneously underway. Libraries and other UCITA opponents are concerned that certain proposed amendments to UCC Article 1 and Article 2, if adopted, would create changes to the law that would negatively impact business and consumer transactions and create fertile ground for a renewed interest in UCITA in the future. AFFECT has followed these issues for several years and the coalition has filed comments with both NCCUSL, the American Law Institute (ALI), the American Bar Association and several state legislatures. Libraries will continue to join with their partners in AFFECT to oppose the adoption of these proposed amendments in state legislatures.

Proposed Amendment to UCC Article 1-Section 301: Choice of Law [<http://www.ucita.com/Legislation.htm#one>]

Proposed Amendments to UCC Article 2
[<http://www.ucita.com/Legislation.htm#two>]

[Track](#) the introduction of proposed Article 1 and Article 2 amendments.

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