

National Conference of Commissioners on Uniform State Laws

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June 29, 1999

MEMORANDUM

TO: Article 2 Drafting Committee; UCITA Drafting Committee.

FROM: Larry Bugge; Connie Ring; Dick Speidel; Linda Rusch; Ray Nimmer

RE: Scope re computer programs contained in goods.

During the past week, the reporters and chairs of the two committees met by teleconference with Gene LeBrun, John McClaugherty, John McCabe, and Barry Evenchick to discuss mutual language treating scope as it relates to computer programs contained in goods. During that meeting and at a later conference call meeting, we reached agreement on the language presented in the errata sheet (Attachment 1 to this memorandum) and recommend adoption of this language by the two committees. The language follows that previously approved by the committees with non-substantive edits made for clarity.

In addition, we discussed another possible alternative approach to scope. This approach would adopt a bright line test applicable to both acts. This bright line standard is described in Attachment 2 for consideration, but is not presently recommended for adoption.

Attachment 1

Errata Sheet 1

UCITA

(1) If a transaction involves computer information and goods, this [Act] applies to the computer information. However, if a copy of a computer program is contained in and sold or leased as part of goods, this [Act] applies to the copy 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 computer program is ordinarily a material purpose of transactions in goods of the type.

Article 2

(b) If a transaction involves computer information and goods, this article applies to the goods but not to the computer information. However, if a copy of a computer program is contained in and sold or leased as part of goods, this article applies to the copy unless:

- (A) the goods are a computer or computer peripheral; or
- (B) giving the buyer access to or use of the program is ordinarily a material purpose of transactions in goods of the type.

Definitions

(--) Computer information means information in electronic form that is obtained from or through the use of a computer, or that is in digital or equivalent form capable of being processed by a computer. The term also includes a copy of the computer information and any documentation or packaging associated with the copy.

(--) Copy means 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.

ATTACHMENT 2

UCITA

(-) This [Act] applies to computer information transactions, but does not apply to goods that are not a copy of the computer information, its packaging or documentation.

Article 2

(-) This article applies to transactions in goods, but does not apply to computer information.

Note:

This would eliminate the complexity of attempting to separately treat cases where programs contained within ordinary goods should be treated as goods and cases where the program has a separable existence.

Under this simplified approach, comments to UCITA and Article 2 would point out that, in mass market contexts, the standards developed by the two bodies of law with respect to computer programs are parallel. In most real world cases, vendors disclaim implied warranties and the focus of any dispute is on express warranties, which are recognized in both statutes. Also, the comments would make clear that this exclusion/ inclusion language does not alter the definition of goods for purposes of other law, such as for consumer protection rules or product liability concepts. They could also point out that courts routinely deal with various bodies of law when considering claims regarding goods (in suit over a defective automobile hood ornament, any aspects of trademark law will be considered by courts they do not take an all or nothing approach and only use goods law or trademark law).