

UCITA endorses a license model for "computer information transactions."⁽³⁾ For example, under UCITA a license to use software (rather than the sale of the software itself) would allow the licensor to limit or control how the licensee uses the software, even where the software has been mass-

By doing so, this could upset the delicate balance between intellectual property and competition policy, which has been carefully calibrated to recognize certain limits on intellectual property so as not to stifle competition or innovation. By allowing licensors of computer information to expand their rights, there is a possibility that these state-enforced contracts could restrain trade in violation of the antitrust laws, constitute misuse of intellectual property, and/or violate state trade secret statutes. As a result, UCITA may not have a neutral effect on competition policy.

In sum, we question whether it is appropriate to depart from these consumer protection and competition policy principles in a state commercial law statute, especially since many of these same principles are now being included as core elements in international e-commerce discussions. UCITA proposes these changes based on the implicit assumption that there is something unique about the technology involved (software and information access) that necessitates this departure from the traditional law of sales. If this is the case, we believe it would be more appropriate to seek a change to the underlying laws that are deemed to be inappropriate to software and other UCITA products. If a license model is deemed most appropriate nonetheless, the FTC staff in its October 30, 1998 letter recommended a number of changes to an earlier draft of UCITA which would help alleviate the staff's concerns.

It is our hope that the NCCUSL membership will consider the issues raised in the attached letter during deliberations over whether to adopt UCITA.

Respectfully submitted,

Joan Z. Bernstein, Director
Adam G. Cohn, Attorney
Division of Marketing Practices
Bureau of Consumer Protection

William J. Baer, Director
David A. Balto, Assistant Director for Policy and Evaluation
Bureau of Competition

Susan S. DeSanti, Director
Michael S. Wroblewski, Advocacy Coordinator

