

Summary Proposed Testimony of the Digital Commerce Coalition
RE: Report to Congress Pursuant to Section 104 of the Digital Millennium Copyright Act

As a general matter, Digital Commerce Coalition (“DCC”) feels it important to emphasize the traditional and necessary distinctions under U.S. law between the federal system of copyright protection and the state role in determining agreements among private parties, including contracts and licenses. The Uniform Computer Information Transactions Act (“UCITA”) is a new model commercial law developed and approved by the same body that wrote the UCC, the National Conference of Commissioners on Uniform State Laws (“NCCUSL”). As with the Uniform Commercial Code, UCITA has been thoroughly debated and carefully crafted over a multi-year process and is intended to help facilitate the new electronic commerce.

UCITA is intentionally broad in scope. The intent is to cover all materials and information that may be the subject of electronic commerce. Thus, the Act covers “computer information,” and covers transaction for software, electronic information – including copyrighted works – and internet access. As has been traditionally the case with uniform laws in this area, UCITA sets rules governing agreements between private parties in the licensing of computer information. It does not create or alter the property interests that persons may enjoy in respect to these products. Those property interests are determined by relevant state and federal laws, including the federal Copyright Act. This careful balance is one upheld by the courts as necessary to the effective and efficient provision and use of information, and one that both the federal and state governments must strive to maintain.

In this context, DCC is concerned that the comments submitted by Digital Future Coalition (“DFC”) and the Libraries go to issues far beyond the scope of the study mandated by Congress. In so doing, they confuse the distinctions between federal copyright law and state contract and licensing statutes. Given the importance of licensing to the information industries and their customers, as well as their reliance upon contracts for flexibility and product variety, this concern is of no small moment.

DFC’s and the Libraries’ comments would lead an uninformed reader to the conclusion that UCITA ignores the supremacy of federal law. To set the record straight, Section 105 of UCITA does contain specific reference to the supremacy of federal law and does so in the context appropriate to a state-created statute governing contracts and licenses. Both DFC and the Libraries request that the study recommend amendment to 17 U.S.C. 301 that would interfere with states’ rights to govern agreements between private parties. It is a long accepted principle of American jurisprudence that parties should be free to form contracts as they see fit. Provided such contracts are not unconscionable, or illegal, UCITA – consistent with long established practice and jurisprudence – sets up rules as to when a contract is formed and lays out the respective parties rights and obligations.

With this in mind, we believe that the requests made in the submissions by DFC and the Libraries are based on anecdotal evidence and unattributed terms from contracts presumably negotiated between licensors and licensees, and that before Congress determines to override state contracting rules, concrete evidence of problems in the marketplace must be presented. To date, DCC is unaware of any such evidence. Rather, the experience of DCC members – particularly those that market to the library and university communities – demonstrates that such licensees are quite skilled in negotiating terms and conditions that allow for special uses beyond those offered in the commercial or consumer marketplace. If there is any area of uncertainty, it lies in the lack of uniformity in the default rules that states must establish to govern transactions in computer information, and UCITA will serve to establish greater certainty, so that licensors and licensees of computer information can be clear on what rights and limitations are granted under private contractual agreements.

UCITA is intended to help facilitate the new electronic commerce that is dependent on licensing of computer information – including software, electronic information and internet access. As has been traditionally the case under U.S. law, UCITA is designed to complement the provisions of federal law. This state-based law properly defers to the supremacy of federal law on issues involving fundamental public policies – including the applicability of the Copyright Act’s fair use exceptions and the latest provisions of DMCA. To do otherwise would have risked disturbing, or even destroying, the delicate but deliberate balance that U.S. law has always maintained between the federal system of copyright protection and the state role in determining agreements among private parties, including contracts and licenses. Similarly, for Congress to accede to the requests of DFC and the Libraries would undermine that same balance and introduce unjustified proscriptions that will only stifle the emerging marketplace for electronic commerce.