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Competition and Consumer Protection in the 21st Century Hearings, Project Number P181201

Topic 2: Competition and consumer protection issues in communication, information, and media technology networks

The Uniform Law Commission (ULC) respectfully submits the comments here in response to the Federal Trade Commission's request for comments at 83 Fed. Reg. 38307 (Aug. 6, 2018), specifically to Topic 2(d): **unique competition and consumer protection issues associated with internet and online commerce.**

The ULC was established in 1892 as an organization comprised of States, the District of Columbia, the U.S. Virgin Islands and Puerto Rico. For 127 years, the ULC has provided its members with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law. (See www.uniformlaws.org.)

- The ULC strengthens the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states.
- ULC statutes are representative of state experience, because the organization is made up of representatives (referred to as commissioners) from each state, appointed by state government.
- The ULC keeps state law up-to-date by addressing important and timely legal issues.
- The ULC's efforts reduce the need for individuals and businesses to deal with different laws as they move and do business in different states.
- The ULC's work facilitates economic development and provides a legal platform for foreign entities to deal with U.S. citizens and businesses.
- The ULC's deliberative and uniquely open drafting process draws on the expertise of commissioners, but also utilizes input from legal experts, and advisors and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.

Throughout U.S. history, state common law principles of agency, contracts, property, torts and trusts have been applied by state and federal courts and agencies to new relationships and contexts. From time to time these applications have been codified by state legislatures – and certain new legal

rules have been harmonized by the ULC, when harmonization is timely, efficient and in the interest of the states.

Three of the ULC's most adopted products demonstrate this synthesis:

- The Uniform Commercial Code (UCC), a joint project of the ULC and the American Law Institute, synthesized common analysis and procedures for commerce that facilitated interstate sales contracts, leases payments, and lending (particularly lending secured by goods).
- The Uniform Electronic Transactions Act (UETA), reflected in the federal Electronic Signatures in Global and National Commerce Act (ESIGN), adapted common law and UCC principles to support and enable use of electronic records in the new internet context without being bound to a particular technology.
- The Uniform Trade Secrets Act (UTSA), recently grafted by Congress in its Defend Trade Secrets Act onto its Economic Espionage Act, is rooted in state unfair competition law where protection of "secrets of trade" was recognized in the nineteenth century as a justification for covenants restricting competition after employment or sale of a business.

Although the ULC does not typically address business competition *qua* competition, it has thoughtfully reached consensus in statutes such as UTSA, the lesser known Uniform Deceptive Practices Act, and many more specialized statutes to provide contours for business competition acceptable to the States with due regard for their general citizenry for which "consumer" is a proxy.

Some of the ULC's consensus balancing of interests that is germane to the Commission's Topic 2(d) of "unique competition and consumer protection issues associated with internet and online commerce" is reflected in ULC's products of the Internet Era:

- Uniform Electronic Transactions Act (1999) – balancing of business interest in certainty of their electronic transactions (integrity, non-repudiation) with consumer interests including notice while being technology-neutral going into the future.
- Uniform Electronic Legal Materials Act (2011) – balancing of public access to and assurance of integrity of important state documents in electronic form with state administrative practicalities.
- Uniform Fiduciary Access to Digital Assets Act (2015) – balancing of individual expectations (including privacy) and state estate administration law and practices with specific legal and operational concerns of internet repositories of individual "digital assets," including information needed to access other individual assets.
- Uniform Employee and Student Online Privacy Protection Act (2016) – balancing of employee and student privacy and employer, school and public interest in coerced disclosure of access credentials for private online accounts.

- Uniform Regulation of Virtual-Currency Businesses Act (2017) – balancing of consumer protection, business interests in innovation, and governmental interests such as prevention of money-laundering.
- Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act (just approved by the ULC at its 2018 Annual Meeting) – balancing remedies for harm to individuals with appropriate burden on individual violators and First Amendment rights of online interactive platform operators.

Issues of online consumer privacy may also be raised in some of the current ULC drafting projects:

- Management of Funds Raised Through Crowdfunding Efforts
- Tort Law Relating to Drones
- Electronic Registry for Residential Mortgage Notes
- Electronic Wills
- Highly Automated Vehicles

These issues likely will also be considered for the following potential future projects:

- Event Data Recorders
- Data Breach Notification
- Online Privacy Protection

The ULC invites the Commission to consider ULC's product balances among business, consumer and governmental interests in efficient and safe online transactions as may be helpful for the Commission's deliberations. These include particular applications of state common and statutory law of contracts and privacy as well as unfair competition and deceptive trade practices.

The ULC also invites the Commission to observe and provide input on ULC's current drafting and study projects. We value a relationship of cooperative federalism which preserves important roles for both the federal and state governments in ensuring the well-crafted and balanced legislation that inures to the benefit of the public.

Finally, the ULC would reserve a place at the 2018-19 hearings as appropriate.

Respectfully,

Anita Ramasastry
President