SELF HELP UNDER UCITA

The new self-help provisions are a praiseworthy attempt at a serious compromise, but they don't work. They are subject to three serious problems:

- *For vendors who legitimately need self-help, the 15 day delay is far too long.*

- *For customers, the back door into their system (the one the vendor uses to shut them down) is a security risk.*

- *For independent programmers (small licensors most likely to need to resort to self-help), the rules are so technical that they will probably get into trouble even if they act in good faith.*

Comparisons to Article 9 are inapposite because self-help in the computer case does so much collateral damage. When you repossess a car, it is unlikely that the result will be that the customer's garage falls down. But these kinds of side effects (and much worse) are natural risks when part of a software system is shut down. The behavior of the rest of the system might do anything. (Take out accounts payable, and who knows what you'll do to the rest of the accounting system, for example).

Introduction: A Fine Effort

Self-help for software is a complex issue. The UCITA drafting committee has tried a staggering number of alternative approaches to self-help, looking for a proper balance between the rights of the vendor, the customer, and the innocent third parties who might be affected by a shutdown of the software.

The current draft of Section 816 provides important restrictions on the use of self-help. It is not accurate to say that a vendor can unilaterally shut down a customer's system without reasonable notice and reasonable opportunity to respond.

This is probably the best compromise language that can be developed to deal with this difficult problem. The UCITA drafting committee deserves high praise for its hard work on Section 816.

Unfortunately, this compromise draft does not meet the legitimate needs of licensors or licensees.

Licensors Sometimes Need Self-Help

If a licensee uses a product without paying the fee, or allows too many of its employees to use the product, or uses it beyond the license period, self-help is a useful tool but not an essential one. The licensor can obtain an injunction and then damages without using self-help.

But sometimes an injunction doesn't meet the need. Here are some examples:

- The licensee refuses to abide by the injunction and is in a foreign jurisdiction that will not readily enforce the injunction.

- The licensee is misusing the licensor's product in a way that can cause personal injury, property damage, or serious harm to the licensor's reputation. A fifteen day wait under a self-help notice period. *Example. Suppose that you develop a program to do mass mailings of e-mail. You carefully contract with your customer, and have clear use restrictions against spamming. Despite the restrictions, your customer uses the product to do unsolicited mass mail (rather than mailing to an*

existing customer base or an opt-in list). Your company's name appears on the header of every message and this will soon do irreparable harm to your reputation. Over a 15 day waiting period, the spammer-licensee will send out and estimated 100 million mail messages (with your product name on every one).

When you want to shut them down NOW, you can't. Not under Section 816. The 15-plus day delay in exercising self-help drastically diminishes its value.

Licensees Need Secure Systems

People whose systems are being trashed by the Back Orifice program (which exploits a security hole from Microsoft) have learned the hard way that application software can carry unintended security risks that can be exploited by third parties.

When a licensor leaves a back door in its code, something that allows them to shut the software down with a single message:

- Sometimes, a bug in the vendor's software will produce a shutdown by accident. (The inevitability of such bugs is the basis for UCITA's gentle treatment of vendors vis-a-vis remedy limitations.)

- Sometimes, a third party will discover how to shut systems down this way. (For example, the third party might by a former employee of the licensor.) Such a person might shut systems down for the fun of it or he might engage in extortion, either of the licensor or the licensee. *You might say, yes, there are criminals who do these things, but they are beyond our control. But in this case, the criminal is exploiting a security hole that is authorized by Section 816. If self-help were banned, this risk would not exist.*

Independent Programmers Need Simple Procedures

The procedures in Section 816 are highly technical. No rational person (except for independent programmers) would exercise self-help without involving an attorney throughout the warning and shut-down process.

The press coverage of Section 816 is not going to walk readers through all of the safeguards and notice details and contingencies of the section. Nor will the how-to-be-an-independent-consultant books. The book publishers would edit out the details as unintelligible, in the unlikely event that the author understood them well enough to describe them in the first place.

Imagine a contract for $20,000 in software services, resulting in modifications to your system. One of the modifications (not one you expect) will be a back door. (Didn't see it conspicuously in the contract? The contract was a handshake deal? Ooops, the programmer should have talked to a lawyer. Oh, well.) Later, you receive an e-mail saying "Pay me for my work or I shut you down tomorrow." (Insufficient notice? Ooops, the programmer really should have talked with a lawyer.)

The fact that the programmer will have to pay you damages after inappropriately shutting down your system is no consolation. The shutdown costs you $50 million. You get to repossess his pick-up truck, his dog, and his spare computer. And the $500 in his bank account.

Complex procedures are a trap for the unwary, and independent programmers who do small contracts (less than $50,000) are usually unwary.

Conclusion

UCITA Section 816 is probably the best shot that the drafters of NCCUSL can take at being neutral. It is laudable, but it doesn't work. The drafting committee will have to take a side.

We recognize that taking a side will be unfair. However, we see no alternative. Therefore we recommend that you take the approach that will do the least harm. In particular, we recommend that:

- Self-help be banned
- A party wishing to terminate use of its software can proceed by injunction and can recover attorney's fees. The availability of attorney's fees goes a long way toward making it possible for a small licensor to be able to afford to obtain the injunction.

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