UCITA: A New Way to Promote Social Irresponsibility

Computer Professionals for
Social Responsibility
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The Talk's Two Points

- In its zeal to protect the worst publishers from consequences arising from their worst products, UCITA will change the economics of mass market software publishing as a whole.
- Despite its protection of established publishers, UCITA will make business tougher and more hazardous for independent software developers and consultants.

UCITA?

- Will govern all contracts for the development, sale, licensing, support, maintenance, leasing, and use of “computer information” including computer programs, electronically stored data (books on disk), and probably most computers.
- Formerly known as proposed Uniform Commercial Code Article 2B.

The Economics of UCITA

- Mass-market product economics involve risks to sellers of defective products:
  - Customer Support Costs
  - Legal Costs
  - Lost Sales (esp. lost to competitors)
- As industries mature and sell their products to a broader and broader market, customer expectations rise and customers get angrier about defects. (Read Moore's *Crossing the Chasm.)*

Customer Support Costs

- 200 million calls to tech support in 1996. Customer dissatisfaction with software support had dropped for 10 straight years.
- About $25 cost per call to publishers, billions of dollars wasted.
- Software provides longest complaint hold times, across industries. 3-4 billion customer-minutes wasted on hold.
- BBB complaint list ranked computer S/W and H/W #8 in 1995, above used car dealers. *(Progress! In the next year, we went up to #7!)*
- **The BBB's data for 1997 merged computing with consumer electronics, making comparisons with the 1995 and 1996 data difficult. The combined totals yield higher ranks (more complaints), of course.**

Over-hyped

- The Canadian government recently completed a study of the claims made on the packaging of consumer software:

  Incorrect (and "potentially false or misleading") claims were made by 65% of all the software titles tested.

- **Study by Industry Canada's Competition Bureau. For the full study, go to http://strategis.ic.gc.ca/FBP and search for "software".**

Customer Support Costs

- In mass-market software, most defects reported by customers were known at time of sale.
- Published estimates -- thousands of known defects in Microsoft and Apple software; my experience with other publishers tells me that the MS / Apple products are not out of line.

Customer Support Costs: Blaming the Victim

- How many of these calls reflect defects in the product?
  - Estimate attributed to Bill Gates: 2%
  - Other tech support experts: 5-20%
  - Apple / Borland data summarized as 33%
- David Pels and I tried a different approach: looked at cost to prevent calls.
  - Estimated that 50% of calls could be prevented with “cheap fixes” to code, docs, packaging, support files (such as drivers)
  - After a year of fixing and changing (including new code, new bugs), call costs dropped by over half.

UCITA to the Rescue on Customer Support Costs

- Charge customers for support, even for known defects.
- No implied warranty (in practice). Reverses 100 years of legislation / court cases that make it hard to disclaim warranties.
- Takes software outside the scope of Magnuson-Moss Act and state consumer protection statutes based on goods. (Software Publishers' Association's own guide to contracts says that Mag-Moss Act probably applies to consumer software.)
- Reduces right to a refund (limits the perfect tender rule).

Legal Costs and Article 2B

- Nearly impossible to sue
  - Choice of law is almost unrestricted
  - Choice of forum is almost unrestricted
- Virtually no remedies
  - No refund for incidental expenses, such as charges for telephone support
  - No reimbursement for damage by known bugs
  - Eliminates principle of minimum adequate remedy
  - Even a you-cannot-cancel-this-contract clause

Lost Sales: Competitive Effects

- Enforces hidden terms (no competition on these terms). This was a key issue in UCITA's development.
  - UCITA was UCC Article 2B, co-authored with American Law Institute.
  - ALI demanded "fundamental revision" of 2B, especially in treatment of hidden terms. Example: Make publishers who sell products on the net provide a link to their license terms, so customer see them before she pays for the product.
  - Drafting Committee refused ALI's demand, ALI withdrew support and 2B stopped being a proposed UCC amendment. NCCUSL went forward with 2B under the new name, UCITA.

Lost Sales: Competitive Effects

- Section 102(a) (20) defines “contractual use restriction” as “an enforceable restriction created by contract which concerns the use or disclosure of, or access to licensed information or informational rights, including a limitation on scope or manner of use.”
- Section 307(b) states that “If a license expressly limits use of the information or informational rights, use in any other manner is a breach of contract.”
- These two provisions allow companies to prohibit:
  - Criticism of their mass-market products
  - Reverse engineering of their mass-market products.

Nondisclosure and Competition

- I downloaded these on July 20, 1999 (ViruScan, a mass-market product)
  - "The customer shall not disclose the results of any benchmark test to any third party without McAfee's prior written approval."
  - "The customers will not publish reviews of the product without prior consent from McAfee."
- If there are no strong critical reviews, won’t people buy the best-advertised, most established product?
- These clauses are enforced in the negotiated-contracts market. What makes us sure that they won’t be enforced (given UCITA) in the mass market?

Reverse Engineering & Competition

- A ban on reverse engineering is just another use restriction that publishers can impose.
- Negotiated-contract bans are enforceable, but no such bans have been enforced in the mass market. UCITA makes them presumptively enforceable.
- Federal law, such as Digital Millenium Copyright Act, limits the scope of the ban to some degree, but competitive, educational, and investigative uses of reverse engineering will still be banned unless federal courts rule otherwise, someday, after much expensive litigation.

You'll Hear Them Say . . .

- UCITA takes away no consumer protections.
- UCITA is neutral on reverse engineering.
- UCITA doesn't allow publishers to limit critical speech in the mass market.
- UCITA is good for the small developer and consultant.

24 Attorneys General Said

- UCITA's "prefatory note and reporter's comments incorrectly present the proposed statute as balanced and as leaving 'in place basic consumer protection laws' and 'adding new consumer and licensee protections that extend current law.' . . . [I]n instances in which provisions are described as new consumer protections, such as the contract formation and modification provisions discussed below, consumers actually have fewer rights than they do under present law."
- UCITA's "rules deviate substantially from long established norms of consumer expectations. We are concerned that these deviations will invite overreaching that will ultimately interfere with the full realization of the potential of e-commerce in our states."

Now, let’s think about a small software developer or consultant and a larger software customer.

The larger customers were well represented at UCITA meetings. They made little progress against large publishers and consultants, but they did make some overall progress—the draft changed remarkably over the years in ways that disadvantaged small service providers.

(This is part of the reason that ICCA and NWU gradually shifted position from neutrality to opposition.)

Impact on the Little Guys

- Under UCITA, service contracts are subject to the implied warranties of merchantability and fitness for use.
- These warranties applied to goods (UCC Article 2) but not to services (not covered by Article 2).
- Merchantability:
  - 403 (a) (1) ***the computer program is fit for the ordinary purposes for which such computer programs are used;***
  - OK, but how does this play out for custom software that is not fit for such purposes but that does meet the customer's specification? What if the specification is from unwritten discussion?

Think About *This* Rule

- Section 405 (a) Unless the warranty is disclaimed or modified, if a licensor at the time of contracting has reason to know any particular purpose for which the information is required and that the licensee is relying on the licensor's skill or judgment to ***select, develop, or furnish*** suitable information, the following rules apply:
  - (1) Except as otherwise provided in paragraph (2), ***there is an implied warranty that the information is fit for that purpose.***
  - (2) If from all the circumstances it appears that the licensor was to be paid for the amount of its time or effort regardless of the fitness of the resulting information, the implied warranty is that the information will not fail to achieve the licensee's particular purpose as a result of the licensor's lack of reasonable effort.

Impact on the Little Guys

- Remedy limitations and warranty disclaimers are easy to sneak into shrink-wraps, but nightmares for low-total-price service contracts.
  - Reseller (licensor) of a product is not protected by the product's warranty disclaimers. If you provide a copy of a product, install and support it, you are liable unless you get your own disclaimer.
  - Current law is fuzzy on this point. I would currently expect to make arguments based on reasonable customer expectations. UCITA kills this defense.

Impact on the Little Guys

- ACM, ICCA, IEEE-USA, Ralph Nader (through Todd Paglia) and I proposed instead:
  - No consequential damages for unknown defects or known documented defects.
  - Consequentials are non-excludable (but can be capped) in the event of harm caused by a known, hidden defect.
- The drafting committee, repeatedly rejected this proposal.
  - *Seen as contrary to interests of some large publishers:* It subjects them to liability for some known defects, whereas today they can avoid liability altogether;
  - *Seen as contrary to interests of some large customers:* It limits the liability of their consultants for unknown and for known, documented defects.

But Wait, There's More

- There are many, many more problems.
  - I've almost completely skipped the intellectual property issues. The American Intellectual Property Law Association (10,000 copyright, patent and trademark lawyers) opposed UCITA because it goes beyond current federal law in creating and protecting publishers' rights. (The Committee of Copyright and Literary Property of the Association of the Bar of the City of New York reached the same conclusion.)
  - Think of UCITA as copyright on steroids, without the counter-balancing public interest provisions underlying the Copyright Act.
- And then there's "self-help" which allows publishers to put a back door in the code that lets them remotely shut down the software. ***What happens when 3rd parties discover that back door?***

And Not Just For Software

- Article 2 (UCC Law of Sales) is under revision (needs updating after 50 years).
- Several non-software manufacturers want the new rights that software publishers get under UCITA. (They'd like to do post-sale contracting too. Compulsory private arbitration, choice of law and forum, easy warranty disclaimer and liability limitation—none of these is special to software.)
- New Article 2 (rejected these additions) was approved by ALI after about 12 years of work, but was dumped by NCCUSL leadership in a way that resulted in immediate resignation of the two lead authors. If UCITA passes in the states, the new Article 2 drafting committee will probably give us something closer to UCITA.

References

- Kaner & Pels, Bad Software: What To Do When Software Fails, John Wiley & Sons, 1998.
- www.badsoftware.com (mainly my stuff)
- www.2bguide.com (primarily a publisher's-side site, lots of docs from both sides) (but misses some interesting customer-side docs)
- www.law.upenn.edu/bll/ulc/ulc.htm
- www.nccusl.org
- www.infoworld.com (Ed Foster, Gripeline)
- Stay tuned for www.ucita.com.

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Cem Kaner's legal practice is focused on the law of software quality. He recently published BAD SOFTWARE WHAT TO DO WHEN SOFTWARE FAILS (with David Pels. John Wiley & Sons, 1998), which Ralph Nader called "a how to book for consumer protection in the information age."

Kaner also heads a consulting firm (kaner.com) focused on software quality and project management. He has worked with computers since 1976, doing and managing programming, user interface design, testing, and user documentation. Kaner is senior author of TESTING COMPUTER SOFTWARE, the best selling book in the history of that field and the founder and co host of the Los Altos Workshops on Software Testing.

Kaner holds a B.A. in Arts & Sciences (Math, Philosophy), a Ph.D. in Experimental Psychology (Human Perception & Performance), and a J.D. (law degree). He is Certified in Quality Engineering by the American Society for Quality.