UCITA: Key Consumer Issues

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UCITA? Huh?

- **Uniform Computer Information Transactions Act**
- **Will govern all contracts involving software and digitally stored information.**
- **Opt-in clauses can bring in goods sold with software.**
- **Was proposed as an amendment to the Uniform Commercial Code, known as Article 2B, but American Law Institute withdrew from the drafting project after calling for "fundamental revision", knocking it out as a UCC amendment.**

Current contract law

- **Packaged software (commercial off-the-shelf software, COTS) is governed by UCC Article 2.**
- **Custom software is treated variably, sometimes under Article 2 even though the essence of the contract is a service contract.**

- **One UCITA goal (the one most of us support) is to unite goods/services law as it applies to software transactions.**

Current IP law

- **Copyright Act is federal law. Supercedes state laws that try to govern copying or distribution of original works.**
- **Copyright Act balances rights of creators / publishers and buyers.**
  - **First sale doctrine**
    - **Buyer of a copy may lend, resell, destroy, or mark up her copy. The seller's rights to that particular copy are exhausted in the sale.**
  - **Fair use rights: limited copying allowed for**
    - **reviews, parody**
    - **classroom use**
    - **reverse engineering**

Consumer issue?

- **Information technologies (software / hardware / telecom) now account for 8.4% of the US economy, up from about 6% two years ago. Software laws will impact the US as a whole.**
- **Additionally, UCITA will serve as a precedent for the upcoming revision of Article 2 (the Uniform Commercial Code's law of sales of goods). Listen to the terms of UCITA and you'll hear *lots* of tricks that traditional manufacturers want to be able to use too.**

Over-hyped software

- **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 Problems

- **200 million calls to tech support in 1996. Customer satisfaction 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.

Proponents of UCITA

- **Software publishers**
- **Database publishers (West / Lexis / NASDAC)**
- **CitiBank**
- **Daimler Chrysler**
- **National Conference of Commissioners on Uniform State Laws**

Opponents

- **See your notes for a long list. Some examples:**
  - **Consumers**
  - **Insurance companies**
  - **Librarians**
  - **Staff of the Federal Trade Commission**
  - **25 Attorneys General**
  - **American Intellectual Property Law Assoc and IP section of the NY City Bar Assoc**
  - **Motion Picture Assoc, Newspaper Assoc, Magazine Publishers**
  - **Software developers**

Software *developers* oppose UCITA?

- **Software publishers might think that UCITA is peachy but UCITA is opposed by every software developers' association that has spoken on the matter, including:**
  - **American Society for Quality Software Division**
  - **Association for Computing Machinery**
  - **Independent Computer Consultants Association**
  - **Institute for Electrical & Electronic Engineers**
- **UCITA threatens our professionalism, our drive to improve our craft and our products, and the satisfaction of our customers.**

UCITA creates disincentives for quality

- **By cost-reducing consequences of shipping bad software**
  - **Cost of support is recoverable from customer**
  - **Litigation is almost impossible**
  - **Remedies are minimal**
- **By helping publishers limit presale competitive information**
  - **Hiding terms limits presale comparison shopping**
  - **Use restrictions kill critical magazine reviews**
- **By allowing publishers to discourage competition**
  - **Eliminate competition from used software**
  - **Ban mass-market reverse engineering except for DMCA exceptions**
  - **Limit competitive use of provided information**

No accountability for known defects

- **Most defects in mass-market software are known at time of release or soon thereafter, but many are left undisclosed (let alone, unfixed.)**
  - **Vendor can exclude incidentals and consequentials. Incidentals include cost of reporting the defect and returning the product.**
  - **Vendor can charge fees for support (e.g. $5 per minute). This is an incidental expense.**
  - **Vendor can ship a known defect, then charge for support call, agree to give a refund (because of the defect) but keep the support fee and not reimburse the shipping cost.**
- **ACM / IEEE / ICCA / Nader alternative proposal: default to no consequentials UNLESS there is an undisclosed known defect, then make damages non-excludable.**

Eliminates Article 2 safeguards on remedy limitations.

- **Eliminates (see comment 6 to section 803) the Article 2 provision for a minimum adequate remedy.**
- **Eliminates the doctrine of failure of essential purpose of a limited remedy by expressly permitting boilerplate to preserve exclusion of incidental and consequential damages even when an agreed exclusive remedy fails or is unconscionable.**

Permits elimination of the right to cancel

- **Section 803(a)(1) contains language not found in Article 2 permitting a limited remedy "precluding a party's right to cancel for breach of contract." This seems to permit boilerplate to eliminate the right to refuse a tender that does not conform to the contract, thus effectively undermining the perfect tender rule supposedly established for mass-market transactions in Section 704(b). See also Section 802(d), referring to terms prohibiting cancellation.**

Narrowly defines material breaches

UCITA 701 (b) A breach of contract is material if:

(1) the contract so provides;

(2) the breach is a substantial failure to perform a term that is an essential element of the agreement; or

(3) the circumstances, including the language of the agreement, the reasonable expectations of the parties, the standards and practices of the business, trade, or industry, or the character of the breach, indicate that:

(A) the breach caused or is likely to cause substantial harm to the aggrieved party; or

(B) the breach substantially deprived or is likely substantially to deprive the aggrieved party of a significant benefit it reasonably expected under the contract.

This is allegedly based on the Restatement of Contracts.

Narrowly defines material breaches

Compare UCITA to the Restatement (Second) of Contracts § 241 (1981), which lists five factors:

1) **the extent to which the injured party will be deprived of the benefit he or she reasonably expected;**
2) **the extent to which the injured party can be adequately compensated for the benefit of which the party will be deprived;**
3) **the extent to which the party failing to perform or to offer to perform will suffer forfeiture;**
4) **the likelihood that the party failing to perform or to offer to perform will cure the failure, taking into account all the circumstances, including any reasonable assurances; and**
5) **the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.**

UCITA creates disincentives for quality

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Validates post-payment disclosure of terms

- **Permits "pay first, see the contract terms later"** even for such key terms as warranty disclaimers and remedy limitations**: UCITA defines "opportunity to review" in such a way as to provide that a customer who doesn't see terms until after he or she has paid and taken delivery of the information is deemed to have an opportunity to review those terms. Section 112(e)(3). There is no exception for terms required to be conspicuous, so that a term is "conspicuous" even when first disclosed after payment or delivery. See Section 406 for conspicuousness requirement as to warranty disclaimers.**
- **This flies in the face of nearly a century of jurisprudence on post-sale presentation of disclaimers of warranties. (Finding the disclaimers ineffective in industry after industry).**

Validates post-payment disclosure of terms

- **This makes comparison shopping (one of the great potential benefits of on-line shopping to consumers) impractical. Delay of disclosure of terms until after a customer is psychologically committed to the deal is the approach used in UCITA for all terms—even important elements of the deal such as warranty disclaimers, remedy limitations, transfer restrictions, prohibitions on criticism of the product, and the key feature of a license—the restrictions on the number of users and the length of time that use is authorized.**
- **Post-payment disclosure also makes it hard for journalists to gather information about the best available deals and present comparative information**

Validates post-payment disclosure of terms

- **UCITA contains no requirement that terms of the contract be made available before payment is accepted and delivery is made, even when it would be easy to do so.**
- **Instead, UCITA gives the licensor (or the seller of a combination of goods and software) unfettered discretion to decide to provide the customer with the terms before or after the customer pays and receives shipment. Section 112(e)(3).**

Probably eliminates coverage of software by goods-related consumer protection laws

- **Statutes like the California Song-Beverly Act and the federal Magnuson-Moss Warranty Act apply specifically to sales of goods.**
- **Courts typically treat mass-market software transactions as sales of goods. UCITA recharacterizes these transactions as "licenses" of "computer information." Section 102(a)(40) and (10). Licenses are intangibles, not goods, and therefore goods-specific laws will no longer apply.**
- **Note Fred Miller's comment, in UCC Bulletin, that Mag-Moss was never intended to apply to software.**
- **Therefore, the supposed preservation of consumer protection law in Section 105(c) is misleading.**
- **UCITA should provide that consumer protection laws that apply to sales of goods also apply to licenses of software in the mass market.**

Right of return is illusory

- **The right of return touted by UCITA's sponsors evaporates the moment the consumer double clicks on the "I agree" screen. Section 209(b). Many software companies have included this right of return in the absence of UCITA, and they know that a return right is rarely invoked by customers who have already paid or taken delivery, and who are anxious to get access to the product and must click to do so.**
- **Additionally, UCITA's right of return disappears if the licensee has any opportunity to review the license before becoming obligated to pay. Section 209(b).**
- **A genuine right of return would allow the consumer to install the product and evaluate it for a limited but reasonable time, with a right to return the product either because of obvious defects or because of (in the context of the perceived quality of the product) the contract terms.**

ALI withdrew from UCC 2B

- **The authors of a May 1998 ALI resolution (Braucher and Linzer) wrote in their supporting memo:**
  - **"The Draft reflects a persistent bias in favor of those who draft standard forms, most commonly licensors. It would validate practices that involve post-purchase presentation of terms in both business and consumer transactions (using "shrink-wrap" and "clickwrap"),** undermining the development of competition in contingent terms**, such as warranties and remedies. It would also allow imposition of terms outside the range of reasonable expectations and permit routine contractual restrictions on uses of information traditionally protected by federal intellectual property law.** A fundamental change of approach is needed."

Fundamental conflict with UDAP disclosure policies

- **Another problem with UCITA is that it conflicts with the approach of statutes prohibiting unfair and deceptive practices. Many cases and regulations apply these statutes so as to require early disclosure of key elements of transactions—early and prominent disclosure of key terms is crucial to an efficient marketplace based on meaningful consumer choice.**
- **By specifically authorizing post-payment disclosure of terms, UCITA would have one of two effects: misleading producers into thinking that this approach is legally protected, or watering down anti- deception laws by influencing interpretation of them to permit delayed disclosure.**

Weakens the Article 2 standard for warranty by demonstration.

- **Permits a product to fail to fully conform to a sample, model, or demonstration even when that sample, model, or demonstration was part of the basis of the bargain and created an express warranty: Under Section 402(a)(3), the actual product need only "reasonably conform" to the sample, model, or demonstration**
- **Eliminates some express warranties created by a display or description of a portion of the information: Under UCITA, a display or description of a portion of information doesn't create an express warranty if the purpose was: "to illustrate the aesthetics, market appeal, or the like, of informational content." In other words, the licensor can show or describe the information, but the information doesn't have to fully live up to that display or description. Section 402(b)(2). No similar restriction is found in UCC Article 2**

Allows unreasonable use restrictions

- **102(a) (19) "Contractual use term" means an enforceable term that defines or limits the use, disclosure of, or access to licensed information or informational rights, including a term that defines the scope of a license.**
- **307(b) If a license expressly limits use of the information or informational rights, use in any other manner is a breach of contract.**

Allows restrictions on public discussion of product flaws.

- **UCITA explicitly validates use terms, explicitly mentioning nondisclosure restrictions.**
- **We already see software licenses that purport to ban publication of critical articles; at least one trade journal has stated that it decided not to risk being sued under these terms.**
- **Even if the courts eventually ruled that such restrictions on mass market software are against public policy, this will take years to settle through repeated litigation and the effect in the meantime will be to chill public comment on bad products.**

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Validates transfer restrictions in the mass market

- **UCITA Section 503(2) permits a license to prohibit transfer of software or other information, even if the licensee keeps no copy.**
  - **No more donations to libraries, churches, other charities**
  - **No more gifts of used software to friends and family**
  - **No more used software market**
  - **Consumer who wants to give away or sell a used computer with the operating system can be prohibited from doing so.**
- **This is an example of a contract term that will be valid even though it conflicts with normal consumer expectations (UCITA has no reasonable expectations test for contract terms.)**

UCITA creates other problems too

- **Electronic commerce rules are unfair**
  - **Message delivery**
  - **Notice**
  - **Writing requirements**
  - **Security of electronic signatures**
  - **"Self-help" disabling of customers' software and systems**
- **Choice of law, forum are wide open to the seller**
- **Compulsory arbitration fits in the framework.**
- **MANY other problems for small business.**

Makes messages effective under unreasonable circumstances

- **Information is received (by definition) (102(a)(52)(B)) when it hits the consumer's ISP.**
  - **If the message is lost, corrupted or filtered between receipt at ISP and failed delivery to consumer's computer, too bad.**
- **Information is received (by definition) even though it arrived at a system from which a customer cannot access it, as long as the sender does not know that the customer cannot access the information. Section 102(a)(52)(B)(ii)(II).**
- **Message is effective even if alleged recipient is not aware of receipt. (215)**
  - **Many consumers have e-mail accounts that they do not check regularly.**

Creates severe risks for consumers who filter out incoming junk e-mail

- **Many consumers use filters to screen out spam, such as advertisements of pornography. A reasonably configured filter may delete a message because of its originating ISP, or because of key phrases in the heading, even though that particular message is a legal notice.**
- **Section 102(a)(52) makes it clear that these messages have been received and so are effective even though the consumer will never have seen them.**

Section 105(d) interferes with state consumer protection policy in 4 specific areas:

- **State consumer protection statutes or administrative rules which require that a term, waiver, notice, or disclaimer be in writing are displaced by a record. (UCITA defines a record to include even a recorded phone call. See 102(a)(54).)**
- **Requirements for an actual signature are displaced by an authentication.**
- **Any otherwise applicable state definition of conspicuous is displaced by UCITA's weak per se definition of conspicuousness.**
- **State statutory requirements of consent or agreement to a term are displaced in favor of UCITA's approach that assent is manifested by clicking a mouse after payment or delivery.**

Defines notice to have been given when it has not been received

- **UCITA defines "notify" and "give notice" to have been accomplished when reasonable steps are taken, even if the notice is not, in fact, given or received. Section 102(a)(48). This applies, for example, to the requirement under Section 304(b)(1) that a licensor "notify" a licensee of changes in term**

Validates fictional assent

- **Validates fictional assent (e.g., double clicking a mouse to get access to a product after you've paid for it) and even allows one party to define any conduct as assent in future transactions, without requiring that form terms meet consumers' reasonable expectations**

Choice of law and forum in mass-market transactions

- **Allows vendor to choose any US forum (and possibly a foreign one) for its convenience. Will deprive many consumers of a forum they can afford by requiring suits to be brought in a remote location**
- **The boilerplate restriction is enforceable even if the specified forum is unjust or (exclusive or) unreasonable. Section 110.**
- **Comment 3 provides that a choice of forum "is not invalid simply because it adversely effects one party, even in cases where bargaining power is unequal."**

Compulsory consumer arbitration

- **Not a UCITA case, but applies UCITA reasoning**
  - **Hill v. Gateway 2000, 105 F.3d 1147 (7th Cir. 1997).**
    - **Computers (not software, just goods).**
    - **Broadly approves enforcement of terms presented post-sale.**
    - **Allegations of consumer fraud, racketeering**
    - **Post-sale contract term (enforced) required arbitration of all disputes, under expensive (ICC not AAA) circumstances.**
    - **Why would this not apply to arbitration of products liability, if it applies to fraud?**
  - **Boyd v. Homes of Legend, 981 F. Supp. 1423 (M.D. Ala. 1997) applies Gateway reasoning to Mobile Homes**

Requires balancing test when a contract term violates fundamental public policy:

- **UCITA limits the common law discretion of a court to refuse to enforce a contract or a portion of a contract when the contract violates public policy. This doctrine is limited in UCITA to cases where the court finds that the public policy is "fundamental," and then only "to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of the terms." Section 105(b).**
- **If a term violates a fundamental public policy, should the court also have to engage in a process of balancing the interest in enforcing that term against the public policy? The Restatement (Second) of Contracts, in Section 178, calls for balancing, but does not require that the public policy be "fundamental." A further objection to this provision is that it will require decades of litigation to find out what sort of license terms are unenforceable.**

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 focused on software quality and project management. Since 1976, he has been 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.

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