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Why You Should Oppose UCITA

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The Uniform Computer Information Transactions Act (UCITA)[2] is being actively considered in several states and might soon become law in some of them. I am one of the bill's critics. Taking the side of software customers and independent software developers, I've been attending meetings of the Drafting Committee and NCCUSL, to identify and point out strengths and weaknesses in UCITA (then Article 2B) since the second Article 2B Drafting Committee meeting, in early 1996.

The Drafting Committee's responses to criticism has been disappointing. Proponents of UCITA dismiss criticisms, speaking of them as "fabricated or uninformed claims of opposition."[3] Even in the drafts of UCITA itself, we see: "[M]any public statements have been made about the effect of Article 2B on consumer protection. Most are political efforts to mislead."[4]

As a proposed revision to the Uniform Commercial Code, Article 2B, was co-developed by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI). At its May 1998 annual meeting, the ALI membership approved a motion stating that Article 2B "should be returned to the Drafting Committee for fundamental revision."[5] The revisions were not made, and the ALI withdrew from the Article 2B process in 1999.[6] The ALI co-authors all revisions to the UCC. Without its support, NCCUSL renamed Article 2B as the Uniform Computer Information Transactions Act, UCITA.

This article looks at some of the key criticisms of UCITA. There are many other significant problems with UCITA. These are just examples, chosen to get across the point that there are big problems with this bill, in a short article.

Opposition to UCITA

The first thing to realize about the Uniform Computer Information Transactions Act (UCITA) is that it lacks the support of the software industry.

Oh, sure. Software publishers like UCITA. And software publishers are important players in the software industry. But if West Publishing supports a bill, does that mean that the bill has the support of the legal industry?

The Association for Computing Machinery opposes UCITA.[7] So does the Institute for Electrical and Electronic Engineers.[8] These are the two main professional societies in the field. Software Engineering, by the way, is a licensed profession in Texas, Ontario, and British Columbia.[9] The American Society for Quality opposes UCITA, at the encouragement of its Software Division.[10] The Independent Computer Consultants Association, which represents individual software developers and small software service providers, sent a representative to several UCITA / Article 2B drafting committee meetings, proposed changes (which weren't adopted) and eventually came out in opposition to UCITA.[11] The Free Software Foundation, which supports the development of open source software products like Linux, opposes UCITA.[12] The Software Engineering Institute, which was formed by the U.S. Department of Defense to further the state of software practice, and which is highly influential in the field, opposes UCITA.[13] These are substantial organizations. They are not wild-eyed consumer advocates. They are major players in the software industry. They all, along with several other developers' groups, oppose UCITA.

Proponents of UCITA have suggested that the primary opposition to UCITA comes from consumers.[14] Certainly, consumer advocates oppose UCITA.[15] As do the Attorneys General of Arizona, Arkansas, California, Connecticut, Florida, Idaho, Indiana, Iowa, Kansas, Maryland, Minnesota, Mississippi, Missouri, Nevada, New Jersey, New Mexico, North Dakota, Oklahoma, Pennsylvania, Tennessee, Vermont, Washington, West Virginia, Wisconsin and the Administrator of the Georgia Fair Business Practices Act.[16] The staff of the Federal Trade Commission have written two reports that are highly critical of UCITA.[17]

But the opposition to UCITA is much broader than this. Many intellectual property specialists oppose UCITA, including 50 intellectual property law professors,[18] the American Intellectual Property Law Association,[19] and the Committee on Copyright and Literary Property, the Communications and Media Law Committee and the Entertainment Law Committee of the Association of the Bar of the City of New York.[20] The press oppose UCITA.[21] The libraries[22] oppose UCITA. The entertainment industry opposes UCITA.[23] And so do large commercial software customers.[24]

Unreasonable, Surprising Terms

During the UCITA drafting process, lawyers representing large corporate customers said repeatedly that UCITA would force them to change their business practices. Their concern is that software contracts contain remarkably aggressive terms. They don't think that they would be bound by the worst of these terms in mass-market contracts under current law, but these terms certainly seem enforceable under UCITA, no matter who pays for them or who installs them on their company's computer system. Therefore, these corporate counsel said, they think that they will have to get involved in a review of every software acquisition and installation made by their companies.

Here is an example of the problem. Go to Intel's website, at www.intel.com/home/funstuff/webapplets/album2/album2.htm. If the page is the same as it was on December 19, 1999, this page advertises the Intel Photo Album II applet. It says,

> "Use the Photo Album II applet to add high-tech image transitions to your Web pages. Origami, Unseen Wind and Brush are just a few of the effects that will surprise and delight your viewers."

The product category appeals to consumers, to relatively junior designers of websites, and to other people who would not normally have much power to bind a corporation to significant contracts. This product is free. No one has to sign a cheque or a purchase order to get it. It can be obtained and used at a company with no review by anyone involved with the management of that company.

Intel's page provides two sets of samples of use of the product:

- the Lincoln High School Student Activity Center and
- TransWorld Travel

Neither organization (Lincoln High School or TransWorld Travel) would be classed as a consumer under UCITA.

Buried in the license agreement (at www.intel.com/cpc/webapplets/album2/agreement.htm), starting 577 words into a 1228 word document, is the following text:

> "Licensee agrees that all works of authorship, inventions, improvements, developments making use of the Applet or any portion of the Applet, solely or in collaboration with

others, as well as all patents, copyrights, trade secrets, trademarks and other intellectual property rights therein and thereto (collectively, "Developments"), are the sole property of Intel. Licensee agrees to assign (or cause to be assigned) and does hereby assign fully to Intel all such Developments."

The next section puts licensees under a duty of disclosure to Intel.

Suppose that you are the corporate counsel in a company that has a public web site and an internal site that includes a password-protected section that presents new technical ideas and specifications for your advanced product's group review. The ideas presented are valuable trade secrets.

Unfortunately, one of your company's technical staff downloaded the Intel Photo Album II applet, didn't read or understand all of the legal terms, and used it on the public web site and to create the New Ideas presentation. If Intel's license clause is enforceable, Intel now owns part of your public site, and your secret presentation.

In early versions of Article 2B, a clause like this might have been knocked out. In Section 2B-308 (12/12/96 draft), Article 2B, said:

> "A term does not become part of the contract if the term creates an obligation or imposes a limitation which: (1) the party proposing the form should know would cause an ordinary and reasonable person acquiring this type of information and receiving the form to refuse the license if that party knew that the license contained the particular term."

Unfortunately, even this weak exclusion of surprising, material terms is not part of UCITA. Had you reviewed the license, you would probably have rejected this term immediately and told the staff member not to use Photo Album II for any purpose inside your company. But you didn't review the terms, and. So if they used the product, how can you protect your company's work products and secrets from Intel?

You might try arguing that the term is unconscionable under UCITA Section 111, but courts are rarely receptive to a business' plea for relief from a contract term on grounds of unconscionability.[25] You might try arguing that this term should not be enforced because something about it violates a fundamental public policy, [26] but I'm not sure which one you would cite.

Clearly, before allowing your company to use any piece of software, clip art, downloaded information, or anything else that can be construed as computer information, you must review each and every associated license, even for products that cost nothing or only a few dollars. Otherwise, the intellectual property of your company is at risk.

E-Mail Receipt Rules

UCITA 102(a) (53) defines "receive" as taking receipt and 102(a)(52) (II) defines "Receipt" to mean "in the case of an electronic notice, coming into existence in an information processing system or at an address in that system in a form capable of being processed by or perceived from a system of that type by a recipient, if the recipient uses, or otherwise has designated or holds out, that place or system for receipt of notices of the kind to be given and the sender does not know that the notice cannot be accessed from that place." Under Section 215(a) "Receipt of an electronic message is effective when received even if no individual is aware of its receipt."

This definition creates serious problems.

- It leaves you defenseless in situations in which you never had access to a message that was sent to you, because you "received" that message, but you never got it or could never read it.

- It creates serious risks for anyone who uses filters to automatically purge pornography, get-rich-quick schemes, and other trash from their electronic mail.
- It creates significant costs and risks for corporations who receive electronic mail.

Defenseless Against Non-Receipt

Suppose that your e-mail address is yourname@YourISP.com. And suppose that you engaged in an electronic transaction (such as downloading software from a web site) and that the associated non-negotiable, visible-only-after-the-sale license specified in the fine print that all legal notices could be sent to you by e-mail to yourname@YourISP.com. By clicking OK to that license, you have designated your internet service provider (in this case, YourISP) as the place or system for receipt of such notices. When the other party sends a message, UCITA says that the message has been received by you when it reaches yourisp.com in good shape.

The fact that the message reached YourISP.com does not mean that it will reach you. There can be a problem at YourISP's server (they lose your messages) or a transmission problem (the message gets corrupted or lost en route to your machine) or the message might be corrupted at your computer (maybe by a virus or by a bug in your mail program). In any of these cases, you don't see the message, but UCITA says that you have received it.

Note the difference between this situation and the mailbox rule. Under the mailbox rule, we create a presumption that a letter has been received with a certain time after it is sent. But that presumption is refutable. In this case, even though the message has never reached any screen that lines up with your eyeball, UCITA says that as a matter of law, you have seen it.

You Can't Filter Your E-Mail

The second issue is the filtering issue. According to a recent article in the Boston Globe,[27] a huge proportion of circulating e-mail is spam, unsolicited junk mail. For example, 15-30% of the e-mail received by America Online is spam. The article quotes estimates that pornographers are the source of 30.2 percent of the spam on the Internet, followed by get-rich-quick and work-at-home schemes (29.6 percent of spam). People who receive a lot of electronic mail often use filters, programs that detect spam and erase it before they ever have a chance to notice it.

Suppose that you use a filter that wipes out any message that originates from the domain, SpamSender.com. Someday, someone might send you a legal notice via SpamSender.com. If your filter wipes out messages from that source, you will never see the legal notice. But under UCITA, that notice will have full legal effect because it reached your system, even though it stood no chance of reaching your eyeball.

Under UCITA, anyone who engages in electronic commerce (such as electronic banking) will probably end up with e-mail notification clauses in their contracts. If they filter the junk out of their electronic mail, they risk being held accountable for having received messages that their computer completely hid from them (as it was supposed to do). A risk-averse person will not and should not use spam filters because of the risks of filtering that are imposed on them by UCITA. Under UCITA, these people will have to hand filter every offensive piece of pornography that is dumped to their system.

Corporate E-Mail

UCITA's mailbox rule creates challenges for the corporation as well. Corporations receive a lot of spam. Today, in many companies, much of this spam is filtered (identified and deleted) as it comes into the system. The corporate computers identify the spam as having a traditional title or as originating from an internet service provider that routinely hosts spammers. As they filter, some legitimate mail is inevitably lost. So, imagine yourself as corporate counsel. Do you tell your company they can continue to automatically filter mail? Or, because of the UCITA-imposed risks on filtering, do you say that they have to stop filtering and actually inspect / read every message? How much of your company's time are you willing to waste on this? How much of their time are they willing to let you waste?

Another problem is the difficulty of finding skilled network and system administrators in the current job market. Under UCITA, mail sent to employee@Corporation.com has been received when it reaches Corporation's server, but if Corporation is having trouble breaking in a new system administrator, a lot of mail might never reach any of Corporation's employees. Lost e-mail is not like lost letters that go to the wrong person but can be rerouted back. Losing a day of e-mail is like sending all of your company's mail to the shredder. It's gone. And if you just lose a percentage of it, you might not even realize that you have a lost mail problem until your company is held accountable for notices that no one ever actually had the opportunity to read.

Known Defects

One of the fundamental assumptions of UCITA is that "The complexity of software products makes them inherently imperfect."[28] "Minor flaws ("bugs") are common in virtually all software."[29] "In fact, the idea of perfect software is a goal or aspiration not presently attainable, at least not without exorbitant costs that would drive many thousands of small companies out of the business."[30]

This is a straw man. In the Article 2B/UCITA meetings, the debate about accountability for defective software was not about whether software should be perfect. As an expert on software quality control, I wrote a memo for the UCITA / 2B drafting committee explaining in detail that it is impossible to exhaustively test software products or to prove by testing that a product is defect free.[31]

But what about known defects? It might be impossible to find all the defects, but that issue doesn't apply to the defects that were actually found. In mass-market software, a large proportion of defects (often the vast majority of them) that reach customers are discovered and intentionally left unfixed by the publisher before the product is released.[32] Several representatives of the software engineering community, and Ralph Nader's representative (Todd Paglia) and I repeatedly proposed that software companies should be held accountable for defects that they knew about at the time of sale and chose not to disclose.[33] These proposals typically barred consequential damages for defects that were unknown or that were revealed to the customer in the product documentation (which makes it possible for customers to avoid or mitigate losses caused by known defects). Additionally, we suggested that damages for known defects in mass-market products could be limited to demonstrable out-of-pocket expenses and capped, perhaps at $500 per customer. These proposals were rejected.

One of the arguments made by UCITA proponents was that failure to disclose a known defect should be dealt with under the law of fraud.[34] Sometimes, such a failure might be fraudulent—as when the seller knowingly makes a false statement about the product. But to the best of my knowledge, in the sale of goods, mere failure to mention a known defect, even a material defect, does not give rise to fraud liability. We didn't ask for fraud liability. We asked that software publishers be held accountable for *breach of contract* if they knowingly delivered a defective product without revealing the defect.

Our proposal grew out of the special recognition in UCITA that software companies need a break because of the alleged inevitability of defects. Some of the details of that break include the de facto elimination of the requirement that warranty disclaimers and damage limitations be conspicuous and made available to the customer before the sale, elimination of the principle of minimum adequate damages, the adoption of a rule that excludes incidentals and consequentials for defects even when the agreed remedy fails, and the adoption of a more seller-favorable definition of material breach. Our proposal was a tradeoff—let the new law reduce publisher risk for losses caused by previously undiscovered defects or defects that were disclosed to the customer, but reduce the customer's risk of losses caused by defects that were known and left hidden.

I believe that within the current state of software engineering, it is usually commercially unreasonable to attempt to create a defect-free software. Based on that belief, I have no objection to limiting the liability risk of publishers and other software developers for defects that they didn't know about or that they were honest enough to disclose, even if those defects cause substantial losses. But what if the state of the art improves?

Watts Humphrey raised this issue at several meetings of the UCITA / 2B drafting committee. Professor Humphrey is a former vice-president of IBM, author of seven books on software engineering, and widely respected in the field. He presented data to the drafting committee that showed that new development methods were succeeding in producing very large, very complex products that were nearly defect free.[35] Humphrey's comments at the drafting committee meetings were largely ignored. Ultimately, his points were reiterated by the Director of the Software Engineering Institute, Stephen Cross, who wrote,

> "The Article 2B draft assumes that software products are inherently defective and that the current quality practices in the industry will not improve. The history in other fields demonstrates that as a technology matures, the marketplace becomes more sensitive to quality issues. In fact, software quality is a growing concern to the user community, and software quality is an active current area of study. Considerable progress is being made. . . . The Article 2B proposal makes no technical sense. We feel that it would inhibit natural market forces, damage users, and ultimately limit the health and growth of this industry. While we appreciate the efforts that have been made to produce the UCC-2B draft, we must urge you to oppose its adoption."[36]

Obvious Defects and Material Breach

Under current law, contracts for packaged software (products that are delivered to the customer without extensive customization) are governed by Article 2 of the Uniform Commercial Code. Article 2 allows the customer to reject a product for any failure to conform to the contract that is detected during a relatively brief inspection period.[37] This is the perfect tender rule.

UCITA retains the perfect tender rule for mass-market software but eliminates it for most business software transactions.[38] To reject the product under UCITA, the business must prove a material breach of contract. (Even then, under Section 803, the contract can specify that the customer simply has no right to cancel.) The elimination of perfect tender undermines the credibility of a customer's threat to cancel the contract unless obvious defects are fixed. It reduces the bargaining power of the customer.

After the initial inspection period has passed, the mass-market customer can cancel the contract only if the breach is material.[39] For most defects, the consumer or business customer will have to show a material breach in order to prove entitlement to a refund.

UCITA creates a new, more seller-friendly definition of "material breach." Here is the definition under UCITA:

> 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, and 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.

In contrast, here is the definition of a material breach from the Restatement of Contracts Second, Section 241:

> In determining whether a failure to render or to offer performance is material, the following circumstances are significant:
>
> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
>
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
>
> (e) 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.

A Hypothetical on Material Breach

To see the difference between the two material breach standards, imagine that you are an attorney representing a customer of a packaged software product with a non-negotiable click-through license. (This might but need not be a mass-market product.) Suppose further that the software had a defect that your client considers serious. The vendor does not yet have a fix for this defect and has made no promise as to when (if) it will be fixed. Your client wants a refund for the software. The vendor (who published the software) has refused to give the refund. You have discovered that the defect was known to the vendor at the time of sale. It was not documented or revealed to the customer.

Under UCITA and under the Restatement, your customer is entitled to a refund if she can prove a material breach of contract.

Under UCITA, Section 701(b)(1), the breach is material if the contract says it is. The contract was written by the vendor, and so for the vendor, the UCITA standard for material breach *by the customer* is whatever the vendor's contract says it is. However, there's probably nothing in the vendor-written contract that will be useful for the customer.

Under Section 701(b)(2), the breach is material if it is a substantial failure to perform a term that is an essential element of the vendor-drafted agreement. It's unlikely that the vendor would write a contract that contains, as an essential term, a requirement that the product do something that it cannot do. This won't help your client either.

That leaves UCITA's Section 701(b)(3), which allows your client to recover for substantial harm or for being substantially deprived of a significant benefit. How much harm is enough to be called "substantial"? How significant does the benefit have to be before it is "significant" and how badly must the program misbehave before that benefit is "substantially" gone? These are questions of fact that will often leave the vendor with room to argue that a problem is not significant or substantial enough.

The Restatement analysis will be much more favorable to your client. Under the Restatement, your client's case will be evaluated under five factors:

(a) *the extent to which your client is deprived of the benefit.* This is like the UCITA standard except that if the other factors are favorable to the client, a breach can be material with a less substantial deprivation of a less significant benefit.

(b) *the extent to which your client can be adequately compensated*. If the vendor won't pay incidental or consequential damages and won't quickly fix the defect, a customer might reasonably and legitimately expect a refund (so that she can go buy something that works) rather than a partial refund.

(c) *the extent to which the party failing to perform will suffer forfeiture.* A vendor who sells many copies does not suffer a forfeiture when one customer cancels the contract for one copy.

(d) the likelihood of cure. The vendor isn't making any promises.

(e) The extent to which the behavior of the party failing comports with standards of good faith and fair dealing. You can reasonably argue that the vendor's delivery of known, undisclosed defects fails to reflect good faith and fair dealing.

Lack of compensation, lack of cure, no risk of forfeiture, and sharp practices by the seller are a common combination in the industry. It speaks strongly to the bias of UCITA that these are taken out of the equation.

Restrictions on Speech

UCITA Reporter Ray Nimmer complained of "distortions" in the debate on UCITA, identifying as a "misrepresentation" "that UCITA allows licensors to prevent licensees from commenting about the products. This allegation makes nice copy and superficial impact, but is simply untrue. You can scroll through the UCITA draft and will not find any such provision."[40]

Opponents quickly point to UCITA section 102(a) (20), which 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." Under the statute's own definition, a nondisclosure clause is a contractual use restriction. Under Section 307(b), such a restriction is enforceable.

These provisions may keep vital information from the marketplace. Consider the following restrictions, downloaded (July 20, 1999) from www.mcafee.com, the website for VirusScan, a mass-market software product, on July 20, 1999.

> "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."

Clauses like these are enforceable in traditional, negotiated licenses, and they are used to block magazine reviews.[41] UCITA arguably extends the enforceability of such clauses even in mass market products. Perhaps they will eventually be found to conflict with public policy but until then, the plain language of UCITA will have a chilling effect on criticism of mass-market products.

Security Problems Caused by Self-Help

UCITA section 816 allows software vendors to place disabling codes in software and to activate them remotely (such as by sending an e-mail) to shut down a customer's use of the product.

Such disabling codes create a hole in the customer's system security. 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 defects in the vendor's software will produce a shutdown by accident. (UCITA regards software defects as inevitable, so surely we can expect some defects in the parts of the software that govern self-help.)
- 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 software publisher.) Such a person might shut systems down for the fun of it or he might engage in extortion, either of the vendor or the customer. *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.*

UCITA section 816 remedies for wrongful use of such codes are probably not triggered if the software is shut down accidentally or by a third party (such as a cracker who learns the code or a disgruntled former employee of the vendor).

Self-help was portrayed in the UCITA meetings as something essential to protect the interests of small licensors. However, the only group attending the UCITA meetings that represents only small licensors, the Independent Computer Consultants Association, urged NCCUSL to ban self-help. Instead, ICCA recommended that a party wishing to terminate use of its software should be allowed to proceed by injunction and 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. This proposal was rejected by the drafting committee.[42]

Transfer Restrictions

Under UCITA, almost all software-related transactions will be licensing transactions. When a consumer buys a copy of Microsoft Word and a copy of a book about the program, the software transaction would be a license while the book transaction is a sale, even if the two items were side by side, the customer bought them both from the same cashier, and the software license was not available to the customer until after she paid for the product and took it away. Under UCITA 102(a)(42) a transaction can be a license even if the licensee is given title to the transferred copy.

This is a shift from long-established treatment of intellectual property in the mass market. To see the history of this issue in copyright law, shepardize *Jewelers' Mercantile Agency v. Jewelers' Pub. Co*., 155 N.Y. 241 (1898) (rejected the fiction of a lease offered to all comers that restricted transfer of the book and use of information in it); *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908) (rejected a restrictive notice on a book that prohibited the buyer from reselling the book for less than a minimum price. Under the first sale doctrine, publisher lost its property interest in an individual copy of a book once it sold that copy. The restrictive notice could not transform a sale into a license); *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86 (2d Cir. 1940) (Licensing language on record albums could not convert a mass-market sale into a license.) For patent law, look at the doctrine of exhaustion, starting with *Motion Picture Patents Co. v. Universal Film Manufacturing* Co. 243 U.S. 502 (1917).

According to an article by the Connie Ring, Chairman of the UCITA drafting committee. "UCITA is intended neither to avoid nor to contradict the large body of existing federal intellectual property law."[43] Others vigorously disagree. For example, the American Intellectual

Property Law Association[44] protested to NCCUSL that UCITA "eliminates the 'first sale' doctrine" (which allows the owner of a copy to sell it or give it away). Under UCITA 503(2),

> "a term prohibiting transfer of a party's interest is enforceable, and a transfer made in violation of that term is a breach of contract and is ineffective."

A vendor who puts a no-transfer clause in the license achieves a market-wide restriction--equivalent to elimination of the first sale doctrine. By allowing vendors to enforce such restrictions in the mass-market, UCITA allows them to evade the federal balancing of private and public rights in intellectual property.[45]

UCITA 503(2) has several consequences. For example in the face of such a restriction:

- A consumer who buys a computer game cannot lawfully give the game to his sister after he gets tired of playing with it. (Don't confuse this with giving the sister a copy, which is already banned under the Copyright Act. 503(2) says that the consumer cannot erase any local copy on his machine, put the original disk back in the original box, and then give that disk and box to the sister.)
- A consumer who buys a copy of an encyclopedia on CD cannot donate the used CD to her local library.
- Used bookstores and used record stores will no longer be able to sell used software. The marketplace in used software is eliminated by UCITA.
- A business that sells substantially all of its assets to a second business cannot transfer its software to the second business, not even the mass-market software that came pre-loaded on the computers bought by the business.[46] The selling company will have to either wipe the hard disks or inventory each computer, finding every program, every piece of clip art, clip music, and downloaded data, and get permission of the original licensor to transfer the item to the buying company. The transaction costs of this (the cost of inventorying, finding all the licensors, getting all the permissions) will be enormous.

Consumer Warranty Protection

Among the most important ways that UCITA affects consumers are its revisions to warranty law. I think that the three most important effects are these:

- UCITA eliminates the longstanding requirement that warranty disclaimers be conspicuous and available to the customer at or before time of purchase.
- UCITA pulls consumer software transactions out of the scope of the Magnuson-Moss Warranty Improvement Act and of other consumer protection statutes whose scope is specified as sales of goods.
- UCITA pulls the teeth out of the express warranty by demonstration, making it much harder to hold publishers' accountable for their staffs' product demonstrations at trade shows, retailers, and so on.

Warranty Disclaimers

Under Article 2-314 of the Uniform Commercial Code, a seller can exclude the implied warranty of merchantability by conspicuously[47] disclaiming it. The exclusion clause in a shrink-wrapped software contract might be conspicuous on its page if it is set apart from the rest of the text by being in all capital letters. But such a disclaimer cannot be considered conspicuous at time of sale (except for people with X-ray vision) because it is inside the box and not available for viewing by the customer.

Over the past century, courts have consistently refused to enforce post-sale disclaimers of the implied warranty of merchantability.[48] Under UCITA,[49] such disclaimers are fully enforceable in a click-through or shrink-wrapped license even if they are completely unavailable to the customer before or at the time of the sale.[50]

Magnuson-Moss Act

The Magnuson-Moss Warranty Act[51] provides consumers with additional warranty rights, beyond the Uniform Commercial Code. For example, under the Act, a seller who provides *any* written warranty with a consumer product or who sells you a service contract (such as extended technical support) for the product may not disclaim implied warranties.[52]

The Magnuson-Moss Act applies to all consumer goods. Consumer goods are those which are "normally used for personal, family, or household purposes."[53] This is a broad definition, and under current law, it almost certainly includes personal computers and most of the types of software that you'd buy in software stores.

According to the Federal Trade Commission[54]

> "The Act applies to written warranties on tangible personal property which is normally used for personal, family, or household purposes. This definition includes property which is intended to be attached to or installed in any real property without regard to whether it is so attached or installed. This means that a product is a `consumer product' if the use of that type of product is not uncommon. The percentage of sales or the use to which a product is put by any individual buyer is not determinative. For example, products such as automobiles and typewriters which are used for both personal and commercial purposes come within the definition of consumer product. Where it is unclear whether a particular product is covered under the definition of consumer product, any ambiguity will be resolved in favor of coverage.

The Software Publishers Association's *Guide to Contracts*[55] considered the applicability of the Magnuson-Moss Act and concluded that "It is reasonable to assume that software purchased for home computer use would be covered by the Act."

There are no published court rulings that have settled the question of the applicability of the Magnuson-Moss Act to software, but it is generally believed that courts would rule that the Act applies to consumer software. Two related lawsuits, *Stuessey v. Microsoft*[56] and *Microsoft v. Manning*[57] included a claim for violation of the Magnuson-Moss Act. In these cases, because of compression-related problems "about three in 1,000 [people] lost data after using MS-DOS 6.0" (*Manning*, p. 606). In these two suits, customers sued for consequential damages (*Stuessey*) or for a free upgrade to DOS 6.2 (*Manning*). Microsoft had disclaimed the implied warranty of merchantability[58] but the Magnuson-Moss Act voids the disclaimer and reinstates the implied warranties.[59] Apparently, the court accepted the applicability of the Magnuson-Moss claim because, despite Microsoft's disclaimer, the *Manning* court applied the disclaimed warranty, saying that "the software was not fit for the ordinary purpose for which software is used."[60]

UCITA pulls software out of the scope of sales-of-goods law by defining the transaction as a license. Under UCITA, you are buying an intangible, a license, not goods[61]. This pulls software outside of the scope of the Magnuson Moss Act[62] and of analogous state laws,[63] while allowing proponents of UCITA to claim that UCITA does not change consumer protection laws. (It doesn't, in this case. It merely takes software outside of their scope.) For the first two years that I pointed this out, proponents told me that I was misrepresenting the effect of UCITA (Article 2B). These days, they say instead that the Magnuson-Moss Act was never intended to apply to software.[64]

Warranty By Demonstration

Software products are complex. Customers often buy them in reliance on demonstrations made by salespeople at stores and trade shows.

The Uniform Commercial Code recognizes that customers rely and demonstrations. Under Article 2-313(1) (c) "Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model."

UCITA gives vendors two ways to give demonstrations that would create warranties under Article 2 but that do not create warranties under UCITA.

- First, Under Section 402(a)(3)

  > "Any sample, model, or demonstration of a *final* product which is made part of the basis of the bargain creates an express warranty that the performance of the information will *reasonably* conform to the performance of the sample, model, or demonstration, *taking into account differences* that would appear to a reasonable person in the position of the licensee between the sample, model, or demonstration and the information as it will be used." (Italics mine.)

  If the vendor uses a preliminary "demo" version instead of a final version, then no warranty is created even if the customer thinks she is looking at the final version. Note that this is not fraud if the vendor does not intend to mislead the customer. Also, UCITA substitutes the simple requirement of conformance with "reasonable" conformance. A bright line test becomes an issue of fact for the jury. Under current law, a customer can know with certainty that there was a warranty and it was breached, but under UCITA, the customer cannot. UCITA provides an additional defense for the vendor to take to the jury, the "differences" that should be noticed by a "reasonable" customer.

- Second, under Section 402(b)

  > "[A]n express warranty is not created by: (2) a display or description of a portion of the information to illustrate the aesthetics, appeal, suitability to taste, or the like of informational content;

  People buy products on the basis of their user interface. If a vendor demonstrates a product or publishes pictures of the product's screens, but delivers a different version that is less appealing, less visually pleasing, harder to use, etc., the customer has no claim for breach of warranty. Such a situation might or might not be fraudulent, depending on whether the publisher intended to mislead people. Independently of the fraud question, under Article 2 this would be a breach of contract. Under UCITA, it is not.

In Closing

This article reviewed a few of the problems with UCITA. There are many others.

The UCITA drafting process reflected a cozy relationship between the software publishing industry and the drafters. The drafting committee meetings were dominated by lawyers representing information publishers. During the drafting process, the Reporter wrote a book with a lobbyist for the Software Publishers Association[65] and he accepted at least one consulting contract (on an allegedly unrelated matter) with Microsoft.[66]

The UCITA bill is a sweetheart deal for software publishing corporations, for database access providers (West and Lexis played significant roles in UCITA and will benefit from their increased ability to restrict your right to use court cases that you download from them), for computer manufacturers (who can bring their machines under UCITA), and maybe for some other goods vendors (UCITA-like provisions are being pushed at the UCC Article 2 revision committee.)

The level of bias of UCITA is not appropriate to a commercial statute.

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[2] All references to UCITA are to the November 1, 1999 draft at www.law.upenn.edu/bll/ulc/ulc_frame.htm. I have also reviewed proposed amendments circulating in a file named CITA100AM.DOC. This file is not yet posted at the University of Pennsylvania web site. These proposed amendments don't change the substance of the present article. References to the Comments to UCITA are to the October 15 draft comments posted at www.law.upenn.edu/bll/ulc/ulc_frame.htm.

[3] Ray Nimmer, *UCITA: A Commercial Code for the New Commerce,* UCC BULLETIN Dec. 1999, 1, 2.

[4] July 24-31, 1998 draft, prepared for the 1998 Annual Meeting of the National Conference of Commissioners on Uniform State Laws, available at www.law.upenn.edu/bll/ulc/ucc2b/ucc2bamg.htm. This quote comes from the Prefatory Remarks, in the subsection headed "Consumer Protection Rules."

[5] A copy of the memorandum in support of this motion is available at www.ali.org/ali/Braucher.htm. An industry website, www.2BGuide.com/ali.html#98m, gives a good synopsis of the supporting memorandum.

[6] American Law Institute and National Conference of Commissioners on Uniform State Laws, *NCCUSL to Promulgate Freestanding Uniform Computer Information Transactions Act*, Joint Press Release, April 7, 1999, http://ali.org/ali/pr040799.htm. American Law Institute, *Article 2B Is Withdrawn from UCC and Will Be Promulgated by NCCUSL as Separate Act,* ALI Reporter, ali.org/ali/r2103%5Fart2b.htm, "The Council of the [American Law] Institute continued to have significant reservations about both some of its [Article 2B's] key substantive provisions and its overall clarity and coherence." Jean Braucher, *Why UCITA, Like UCC Article 2B, is Premature and Unsound,* UCC BULLETIN July, 1999, 1, www.2bguide.com/docs/0499jb.html.

7 Barbara Simons, Letter to NCCUSL, July 12, 1999, www.acm.org/usacm/copyright/usacm-ucita.html; Barbara Simons, *From the President: Melissa's Message*, 42 COMM. ACM June, 1999, 25.

[8] Paul J. Kostek, President, IEEE-USA, Letter to NCCUSL, July 20, 1999, www.ieeeusa.org/forum/POLICY/1999/99july20.html.

[9] Steve McConnell & Leonard Tripp, *Professional Software Engineering: Fact or Fiction?* IEEE SOFTWARE, November/December 1999, 13, 16.

[10] American Society for Quality, *ASQ Opposes Law on Computer Software Transactions*, www.asq.org/articles/publicaffairs/072699state.html.

[11] Sharon Marsh Roberts, Independent Computer Consultants Association, unpublished letter to Article 2B drafting committee, October 5, 1998.

[12] Free Software Foundation, *Help defeat UCITA,* http://commons.somewhere.com/rre/1999/RRE.campaign.against.abu.html.

[13] Stephen E. Cross, Director, Software Engineering Institute, *Letter to the NCCUSL Commissioners*, June 1, 1999, www.badsoftware.com/sei.htm.

[14] Carlyle C. Ring, H. Lane Kneedler & Gail D. Jaspen, *Uniform Law For Computer Info Transactions Is Offered*, NAT'L L.J., August 30, 1999 at B07; Carlyle C. Ring, Jr., Raymond T. Nimmer, *Series of Papers on UCITA Issues*, www.nccusl.org/pressrel/UCITAQA.HTM.

[15] For example, see Consumer Federation of America (www.cptech.org/ucc/sign-on.html); Consumer Project on Technology (Ralph Nader) (www.cptech.org/ucc/sign-on.html, www.cptech.org/ucc/ali3-10.html, and www.badsoftware.com/alidec97.htm) Article 2B protest page: www.essential.org/cpt/ucc/ucc.html; Consumers Union (1999 www.2bguide.com/docs/cu699.html, 1998 www.2BGuide.com/docs/cu1098.html, 1997 www.ali.org/ali/hillga.htm, 1997 www.2bguide.com/docs/a.html; National Consumer Law Center (www.4cite.org/members.html); National Consumer League (www.cptech.org/ucc/sign-on.html); United States Public Interest Research Group (www.cptech.org/ucc/sign-on.html).

[16] Letter from Attorneys General to NCCUSL, July 23, 1999, www.badsoftware.com/aglet1.htm; Letter from 11 additional Attorneys General to NCCUSL, July 28, 1999, www.badsoftware.com/aglet2.htm.

[17] *See* Joan Z. Bernstein, Adam G. Cohn, William J. Baer, David A. Balto, Susan S. DeSanti, Michael S. Wroblewski, Letter to NCCUSL, July 9, 1999, www.ftc.gov/be/v990010.htm.

[18] Letter from 50 IP professors to NCCUSL and ALI, November 17, 1998, www.2bguide.com/docs/1198ml.html.

[19] Margaret A. Boulware, American Intellectual Property Law Association, *Proposed Uniform Computer Information Transactions Act (UCITA)*, July 16, 1999, www.2bguide.com/docs/799aipla.html.

[20] Committee on Copyright and Literary Property of the Association of the Bar of the City of New York (co-sponsored by the Communications and Media Law Committee and the Entertainment Law Committee), *Report on a proposal of the National Conference Of Commissioners on Uniform State Laws to adopt a proposed Uniform Computer Information Transactions Act.* June 21, 1999, www.2bguide.com/docs/Copy.Comm1.pdf.

[21] National Association of Broadcasters, Newspaper Association of America, Magazine Publishers of America, letter to NCCUSL, May 10, 1999, www.2bguide.com/docs/coalit5.html; National Writers Union, *NWU Memo to UCC 2B Drafting Committee*, October 9, 1998, www.nwu.org/pic/ucc1009a.htm; American Society of Media Photographers, Letter to the Article 2B drafting committee, July 14, 1998, www.nwu.org/pic/uccasmp.htm. Also, InfoWorld and International Communications Association are members of the 4CITE coalition opposing UCITA, www.4CITE.org.

[22] American Association of Law Libraries, American Library Association, Association of Research Libraries, Medical Library Association, Special Libraries Association, several letters www.arl.org/info/letters/libltr.html, www.arl.org/info/letters/lebrun7.12.html, www.arl.org/info/letters/Lebrun_NCCUSL_letter.html and www.arl.org/info/letters/Wright_ALI_letter.html. The American Association of Law Libraries, American Library Association, Art Libraries Society of North America, Association of Research Libraries, Special Libraries Association and the Virginia Association of Law Libraries are members of the 4CITE coalition opposing UCITA, www.4CITE.org.

[23] Motion Picture Association of America, National Association of Broadcasters, and the National Cable Television Association, several letters, www.2BGuide.com/docs/v9-98.pdf, www.2bguide.com/docs/1298mpaa.html, www.2bguide.com/docs/coalit5.html.

[24] The Society for Information Management, Circuit City, several insurance companies, and Caterpillar, Inc., are members of the 4CITE coalition opposing UCITA, www.4CITE.org.

[25] James J. White & Robert S. Summers 1 UNIFORM COMMERCIAL CODE, 4th Ed. § 4.9 (1995).

[26] UCITA Section 105 (b) "If a term of a contract violates a fundamental public policy, the court may refuse to enforce the contract, enforce the remainder of the contract without the impermissible term, or limit the application of the impermissible term so as to avoid a result contrary to public policy, in each case to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of the term."

[27] Simson Garfinkel, *Declaring war on spam: Internet service providers and consumers battle electronic junk mail problem*, BOSTON GLOBE December 9, 1999, available via www.boston.com/globe/search.

[28] Carlyle C. Ring, Jr., Raymond T. Nimmer, *Series Of Papers On UCITA Issues*, section on Perfect Tender/ Material Breach of Substantial Performance, www.nccusl.org/pressrel/ucitaqa.htm.

[29] Carlyle C. Ring, Jr., Raymond T. Nimmer, *Series Of Papers On UCITA Issues*, Footnote 10, www.nccusl.org/pressrel/ucitaqa.htm, state "An A.B.A. Software Contract Task Force recommended that the perfect tender rule be abolished with respect to software contracts because of the complexity of the software product and the fact that minor flaws ("bugs") are common in virtually all software." UCITA, 1/20/97 Draft, Reporter's Note 8 to § 2B-108."

[30] Carlyle C. Ring, Jr., Raymond T. Nimmer, *Series Of Papers On UCITA Issues,* section on Perfect Tender/ Material Breach of Substantial Performance, www.nccusl.org/pressrel/ucitaqa.htm.

[31] Cem Kaner, *The Impossibility of Complete Testing*, 4 SOFTWARE QA #4, 28 (1997). www.kaner.com/imposs.htm

[32] Cem Kaner, David L. Pels, BAD SOFTWARE, (1998) at 23.

[33] Cem Kaner & Todd Paglia, *Consumer Issues and Article 2B*, submitted to the ALI, December 5, 1997, www.badsoftware.com/alidec97.htm; John R. Reinert, IEEE-USA President, Letter to NCCUSL, February 23, 1998, www.ieeeusa.org/FORUM/POLICY/1998/98feb23.html; Barbara Simons, *From the President: Melissa's Message*, 42 COMM. ACM June, 1999, 25; Sharon Marsh Roberts, *Position Statement of the Independent Computer Consultants Association*, circulated at the 1998 NCCUSL Annual Meeting.

[34] Carlyle C. Ring, Jr., Raymond T. Nimmer, *Series Of Papers On UCITA Issues*, www.nccusl.org/pressrel/ucitaqa.htm, state "Is it true that UCITA takes away protections that I have under current law where the licensor knows that the software contains serious defects? No. Under Article 2, common law, and UCITA, that problem, when it exists, is a question of whether the licensor committed fraud. UCITA has the same rules as Article 2 on this issue. The law of fraud is not changed by UCITA."

[35] Pat Ferguson, Watts S. Humphrey, Soheil Khajenoori, Susan Macke, and Annette Matvya, *Results of Applying the Personal Software Process,* 30 IEEE COMPUTER, May 1997, 24; Watts S. Humphrey, *Comments on Software Quality*, circulated to the Annual Meeting of the National Conference of Commissioners on Uniform State Laws, July 25 – August 1, 1997, www.2bguide.com/docs/whsq.html.

[36] Stephen E. Cross, Director, Software Engineering Institute, *Letter to the NCCUSL Commissioners*, June 1, 1999, www.badsoftware.com/sei.htm.

[37] UCC Article 2, Section 601.

[38] UCITA 601(b)(2), 704.

[39] UCITA 601(b)

[40] *Correcting Some Myths About UCITA*, http://www.2bguide.com/docs/rne.html

[41] *The Test That Wasn't,* PC MAGAZINE, August 1999, 29. According to that article, Oracle "formally declined to let us [PC Magazine] publish any benchmark test results."

[42] Sharon Marsh Roberts & Cem Kaner, letter on self-help to NCCUSL and ALI, December 21, 1998, www.badsoftware.com/selfhelp.htm; Roberts, S.M. & Kaner, C. *Self-Help Under UCITA*, Circulated at the Annual Meeting of the National Conference of Commissioners on Uniform State Laws, July, 23, 1999, www.badsoftware.com/shelp.htm.

[43] Carlyle C. Ring, H. Lane Kneedler & Gail D. Jaspen, *Uniform Law For Computer Info Transactions Is Offered*, NAT'L L.J., August 30, 1999 at B07.

[44] Margaret A. Boulware, American Intellectual Property Law Association, *Proposed Uniform Computer Information Transactions Act (UCITA)*, July 16, 1999, www.2bguide.com/docs/799aipla.html.

[45] Robert P. Merges, *Intellectual Property and the Costs of Commercial Exchange: A Review Essay*, 93 MICH. L. REV. 1570, 1613, 1995; Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111,1999, http://papers.ssrn.com/paper.taf?abstract_id=98655. Committee on Copyright and Literary Property of the Association of the Bar of the City of New York (co-sponsored by the Communications and Media Law Committee and the Entertainment Law Committee), *Report on a proposal of the National Conference Of Commissioners on Uniform State Laws to adopt a proposed Uniform Computer Information Transactions Act.* www.2bguide.com/docs/Copy.Comm1.pdf

[46] In fact, because the computer sales are probably also governed by UCITA, it is questionable whether the first business can transfer the computers themselves to the second business.

[47] UCC Section 1-201(10) "'Conspicuous': A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals . . . is conspicuous. Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color . . ."

UCC Section 2-316 requires that written exclusions be conspicuous.

[48] For citations and a long discussion, *see* Cem Kaner & David L. Pels, BAD SOFTWARE: WHAT TO DO WHEN SOFTWARE FAILS, (1998) Chapter 7, especially footnotes 40 to 44 and the surrounding text.

[49] UCITA Sections 208 and 209

[50] One widespread marketing practice in winter of 1999 / 2000 has been the offering of $400 rebates to buyers of computers, so long as they sign up for 3 years of service from a specific Internet service provider. CompuServe is one such provider, and it lays out the terms of the deal at www.compuserve.com/gateway/promo/default.html. Here is an excerpt from those terms:

> The $400 . . . Rebates require (1) the purchase of any eligible computer; and (2) . . . a contract commitment to a 3-year (36 months) subscription . . . to CompuServe 2000 Premier Internet service at $21.95 per month. Full prepayment of the contract amount . . . is possible during your first month of service. . . . Offer subject to . . . your acceptance of CompuServe's Terms of Service. Membership termination prior to contract commitment term requires payment of a cancellation fee plus rebate repayment.

I have searched CompuServe's website for these Terms of Service and cannot find them. I have sent e-mails to CompuServe asking for a copy of the Terms of Service but have not received them. I downloaded a copy of the CompuServe 2000 software and started to install it, hoping to get to a display screen, but I stopped installation at the point that the software requested my credit card number. This request came several screens after the start of installation, but before any link to a screen showing the Terms of Service.

The CompuServe transaction is an access contract. Under UCITA Section 102(a)(44)(b)(IV), this is not a mass-market transaction. Therefore, under UCITA's Section 112 (e)(B), once you pay for the CompuServe service, you have no right to cancel it (no "right to return") if you object to the CompuServe terms of service. Section 112(e) states:

> "However, a right to a return is not required if: (B) in a case not involving a mass-market license, the parties at the time of contracting had reason to know that a record or term would be presented after performance, use, or access to the information began . . ."

Additionally, look at UCITA Section 304 (b) "

> If a contract provides that terms may be changed as to future performances by compliance with a described procedure, a change proposed in good faith pursuant to that procedure becomes part of the contract if the procedure: (1) reasonably notifies the other party of the change."

If the CompuServe Terms of Service provide that CompuServe can change the terms whenever it wants, then even if the original Terms of Service don't disclaim warranties, a subsequent disclaimer will be enforceable as a change of terms, so long as CompuServe reasonably notifies you of the change. If this was a mass-market contract, then under Section 304(b)(2) you could cancel it in the face of this change, rather than accept the disclaimer, but this is an access contract, not a mass-market contract, so you would not have that right.

Additionally, even if CompuServe never disclaims the implied warranty, under UCITA 803(a)(1) it may include a clause in the Terms of Service that preclude "a party's right to cancel for breach of contract." Sharp practices like this are more feasible under UCITA because you have no right to a minimum adequate remedy (Section 803 Comment 6. "*Minimum Adequate Remedy.* An agreed remedy provision does not fail because the court believes that it does not afford a "minimum adequate remedy." *Comments to Uniform Computer Information Transactions Act, draft of October 15, 1999*).

Compare this to UCC Article 2 (Official Comment 1 to Section 2-719): "[I]t is the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequences that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract."

[51] 15 USC 2301

[52] 15 USC 2308(a) says, "No supplier may disclaim or modify (except as provided in subsection (b) of this section) any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product." (Subsection (b) allows only one type of modification--a shortened time limit.)

[53] 15 USC 2301(1).

[54] 16 CFR 700.1 (a)

[55] Thomas J. Smedinghoff, THE SOFTWARE PUBLISHERS ASSOCIATION GUIDE TO CONTRACTS AND THE LEGAL PROTECTION OF SOFTWARE, 1993, 88.

[56] *Stuessey v. Microsoft Corp.,* 837 F. Supp. 690 (E.D. PA, 1993)

[57] *Microsoft Corp. v. Manning* 914 S.W. 2d 601 (Texas Ct. App., 1995).

[58] I have a copy of the *Microsoft MS-DOS 6 User's Guide*. DOS 6 was sold in OEM versions, in upgrade versions, and possibly in other ways--I don't know what manual or license terms were supplied in all of these cases. But in *my* copy (Appendix E, p. 300), there is a disclaimer of implied warranties: "MICROSOFT DISCLAIMS ALL OTHER WARRANTIES, EITHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO IMPLIED WARRANTIES OF MERCHANTABILITY."

[59] Microsoft had warranted that MS-DOS 6.0 would "perform substantially in accordance with the accompanying Product Manuals for a period of 90 days from the date of receipt". (*Microsoft v. Manning* at 609). In the event of a written warranty, the Magnuson-Moss Act reinstates implied warranties.

[60] *Microsoft v. Manning* at 609

[61] As a "senior corporate attorney for Microsoft Corporation" titled a recent article of his, "The License *is* the Product: Comments on the Promise of UCC Article 2B for Software Licensing.", Robert W. Gomulkiewicz, PROCEEDINGS OF THE CONFERENCE ON THE IMPACT OF ARTICLE 2B, UC Berkeley, April 23-25, 1998.

[62] Similarly, software is taken outside of the scope of some state-level consumer protection laws, such as the Song-Beverly Act, CAL. CIV. CODE Section 1790 et seq.

[63] Such laws can be stricter than the Magnuson-Moss Act. For example, under California's Song-Beverly Consumer Warranty Act, “Any waiver by the buyer of consumer goods of the provisions of this chapter, except as expressly provided in this chapter, shall be deemed contrary to public policy and shall be unenforceable and void." CAL. CIV. CODE Section 1790.1. The Act voids disclaimers that don't strictly compliance with its requirements. CAL. CIV. CODE Section 1792.3 The buyer must be informed of a warranty disclaimer "prior to the sale" and in writing. CAL. CIV. CODE Section 1792.4(a). If a sale is by mail order, the catalog must show the warranty disclaimer, for each item that is sold with a warranty disclaimer. CAL. CIV. CODE Section 1794(b). These provisions are in direct conflict with UCITA’s rules that allow post-sale presentation of disclaimers.

[64] Fred H. Miller, *Speaking Frankly About UCC Article 2B*, UCC BULLETIN, March 1999, 1.

[65] Robert A. Feldman & Raymond T. Nimmer, DRAFTING EFFECTIVE CONTRACTS: A PRACTITIONER’S GUIDE, 2nd Ed. (1999).

[66] Ed Foster, *UCITA Author Does Some Moonlighting For Money, Courtesy of Microsoft.*INFOWORLD, October 11, 1999, www.infoworld.com/articles/op/xml/99/10/11/991011opfoster.xml.