

## OBJECTIONS TO UCITA

(Cem Kaner)

1. Widespread opposition: Software development professional societies, 14 attorneys general, intellectual property lawyers (AILPA), small customers, large customers, retail federation (1 in 5 american workers), librarians, freelance writers, music publishers, photographers, entertainment industry, news media. Widely criticized in the trade press (even press funded by large software and computer companies). APPARENTLY, SEVERAL COMMISSIONERS ARE UNAWARE THAT THE THREE ALI MEMBERS OF THE UCC 2B COMMITTEE REFUSED AN INVITATION TO JOIN THE UCITA COMMITTEE AND STATED THAT THEY DID NOT THINK THAT UCITA SHOULD GO FORWARD.
2. The scope of this act is unintelligible. *There are now, and have been for years, legitimate good faith disagreements over the scope of UCITA / 2B. Not just over what the scope should be but over what it actually is. This level of unclarity will yield non-uniform decisions by judges.*
3. To the extent that this act applies to goods, by virtue of an opt-in based on a mixed transaction, the act will be applied to areas that were intentionally never considered during the UCITA drafting. *No one knows whether these will be good rules or bad rules, when they are applied outside of software.*
4. Confounds different strands of intellectual property law into a law of "informational rights" that doesn't fit any of them. For example, there should be a different implied warranty for copyright and patent rights. This criticism was raised in detail at the Berkeley conference and is one of the themes underlying the American Intellectual Property Law Association's decision to oppose UCITA.
5. Provides no mechanism for assuring that customers (and journalists) who want to be able to see and compare terms before a sale will be able to do so.
6. Introduces use restrictions and transfer restrictions to mass-market software *and information products* that will harm libraries.
7. Validates the use of transfer restrictions in the mass market that conflict with normal customer expectations and with the long established first sale doctrine.
8. Introduces use restrictions that will interfere with the normal process of engineering. *Even if the courts ultimately rule that UCITA-based use restrictions cannot be used to ban reverse engineering of mass-market software, UCITA's approach to use restrictions will take years to deal with in court and will chill innovation by small companies that lack the wealth to litigate.*
9. Validates fictional assent (*e.g. 2 clicks instead of 1*) and even allows one party to define any conduct to equal assent in future transactions.
10. Introduces use restrictions on "disclosure" that appear to be applicable in the mass market. *Even if the courts eventually rule that such restrictions are against public policy, this will take years to settle and the effect in the meantime will be to chill public comment. We already see software licenses that purport to ban publication of benchmark tests and critical magazine articles. UCITA appears to make these enforceable.*
11. Takes software transactions out of the scope of goods-related consumer protection laws, such as the Magnuson-Moss Act and the California Song-Beverly Act by defining consumer software as non-goods. *Even the Software Publishers Association's own (1993) SPA Guide to Contracts and the Legal Protection of Software" states "It is reasonable to assume that software purchased for home computer use would be covered by the [Magnuson-Moss] Act."*
12. Weakens the Article 2 standard for warranty by demonstration. *The user interface of the demonstrated product need not match the interface of the one delivered to the customer under UCITA. And the extent to which the delivered product must live up to the behavior of the demo is subject to a reasonable expectations test, i.e. an issue of fact that must be tried rather than being easily demonstrated for summary judgment purposes.*
13. Validates post-sale warranty disclaimers. *No published opinion (and no unpublished one that I am aware of) in this century has upheld a post sale warranty disclaimer in a consumer or mass market type of*

*transaction. Many cases have rejected disclaimers that the customer (business or consumer) could not see until after she paid for the product and took it away. Remember that the Magnuson-Moss Act restores implied warranties in almost all consumer transactions.*

- 14.** Implied warranty of merchantability is narrower than Article 2 and runs from vendor's perspective instead of consumer's.
- 15.** Validates post-sale remedy limitations. *Several states require that remedy limitations be disclosed before or at the time of the sale, especially if the buyer is a consumer or farmer. UCITA will make post-sale presentation appropriate in almost all states.*
- 16.** Eliminates the Article 2 principle of a minimum adequate remedy. *Expressly preserves exclusion of incidental and consequential damages even when an agreed exclusive remedy fails or is unconscionable.*
- 17.** No remedy for known defects. *With the strong support for remedy limitation and warranty disclaimer in UCITA, what happens in the event of defects that the software publisher knew about when it sold the product but chose not to disclose? **This is not fraud if there is no false representation.** If the publisher doesn't say "Won't erase your hard disk" then there is no fraud if the product does inappropriately erase your hard disk. Just damages arising from a product that is unfit for use. UCITA excludes all of those damages, making it trivially easy for publishers to give nothing more than a rescission.*
- 18.** People will "agree" to receive notices by electronic mail by clicking on a shrink-wrapped license. They will then be accountable for mail that never reaches them (*it hits their ISP but not them -- there is no way to rebut the presumption of receipt*), that they cannot read (*can't read that format, or the file was corrupted*), or that their anti-spam or anti-pornography filter automatically deletes. Consumers who are just learning about electronic mail can hardly be considered to have the sophistication to know how to protect themselves against the risks created by Section 218.
- 19.** Transfer restrictions will make mergers and acquisitions more costly.
- 20.** Self-help allows vendors to create a back door in software they license. This back door is a significant security risk. *What happens when licensor's disgruntled former employee commits extortion by threatening send a shut down message to licensor's customers? Or some hacker figures out how to shut the system down. Yes, this conduct is illegal. But it is possible because of a fundamental hole in the customer's system. Relying on the police to catch these crooks is a poor security system. **It is better to lock your door than to have a cop standing at your door (needed there because your door is unlocked.)** Section 816 says to businesses that they can't lock their door.*
- 21.** Choice of law / forum is too flexible in mass-market products. Will deprive many consumers of a forum