Head: UCITA: a bad law that protects bad software

Byline: Cem Kaner and David L. Pels

OP-ED Published in Network World, Copyright (c) Network World 1999

At this point in your career, you've probably encountered more than your fair share of software that suffers from poor documentation, inadequate attention to interoperability and known bugs. If so, you need to know about the Uniform Computer Information Transactions Act (UCITA), , which software publishers are pushing in order to head off lawsuits from unhappy customers.

Under UCITA, software publishers have no duty to check their products for viruses. Furthermore, vendors can avoid paying for damage caused by a virus by including a simple disclaimer of implied warranties, which you don't even see until you've bought and installed the product. (No other industry in the U.S. gets to enforce post-sale warranty disclaimers.)

In addition, UCITA:

- Redefines "material breach of contract" to make it harder to return a defective product. Software publishers are allowed to include a clause in the contract (which you never see before the sale because it's contained within the shrink-wrapped package) that says you cannot cancel the contract and demand a refund even if the product is worthless.

- Lets software publishers charge users a non-refundable per-minute fee for tech support, even for defects that were known at the time of shipment.

- Authorizes restrictions that make it harder or impossible for customers to obtain third-party maintenance (such as for fixing Y2K-related bugs, even if the original vendor is too busy to help you in time) or to transfer packaged software (when company X is sold to company Y, Y may have to pay new license fees for each copy of each piece of software on X's machines).

- Authorizes "time bombs" that automatically shut off the software at a given date, unless a license renewal fee is paid and registered. UCITA also allows a vendor to send a message to your computer that shuts down your copy of its software, possibly shutting down your business at the same time. You can collect damages if the vendor sends the message in error, but only if you respond to a warning message from the vendor in just the right way.

For more on UCITA's impact on business customers, read the Society for Information Management's white paper (on Article 2B) at www.simnet.org/public/ucc.html.

Not surprisingly, even though a typically neutral and well-respected legislative drafting organization, the National Conference of Commissioners on Uniform State Laws (NCCUSL), is officially writing UCITA, the open-to-the-public drafting meetings have been dominated by lawyers representing publishers.

We started attending these meetings three years ago, seeking compromises to reduce customer risk without imposing hard-to-manage risks on publishers. There have been big clashes and loud debates, but often it's the little things that tell you about the people you're negotiating with. For example, in a meeting a couple of years ago, one of the 10 NCCUSL members made a comment about user errors made by "dumb customers." A lawyer representing several publishers replied, "Dumb customers? That's redundant!" Almost everyone in the room seemed to think this was hilarious.

Until recently UCITA was called Article 2B and was a proposed amendment to the Uniform Commercial Code (UCC). All amendments to the UCC are co-sponsored by the American Law Institute (ALI) and NCCUSL. Last year, the ALI called for "fundamental revisions" in Article 2B. On April 9, the ALI withdrew from the Article 2B process, so 2B cannot amend the Uniform Commercial Code. NCCUSL renamed 2B UCITA and is now carrying UCITA on its own.

The last publicly open Article 2B / UCITA drafting committee meeting was held in February. At the NCCUSL national meeting in Denver this July, ArticlUCITA will be submitted for approval. If it passes there, it might go to the state legislatures as early as October. And if UCITA passes in a few states, publishers will be able to make it the law that governs their contracts in all states.

Writing a law that makes it almost impossible to sue software publishers for defects is a poor way to manage the escalating level of software customer dissatisfaction with bad software and bad support. But without opposition from more businesses, that law will pass.

If you want to have your say about UCITA, here are some things you can do:

- Send a letter to Gene Lebrun, President of NCCUSL, P.O. Box 8250, Rapid City, SD 57709. E-mail can be sent to glebrun@lynnjackson.com. Please send a copy to kaner@kaner.com.

- Attend the national meeting of NCCUSL in Denver, July 23-30. For more information, see www.nccusl.org.

- For UCITA status reports and other suggestions, check our website at www.badsoftware.com.

Kaner is a Silicon Valley-based attorney and software development consultant. Pels heads customer operations and support for the high-technology division of a leading automotive diagnostics company. They are the authors of *Bad Software: What To Do When Software Fails* (John Wiley & Sons, 1998). They can be reached at ucita@badsoftware.com.