Introductory Notes on Objections

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Overview

- UCITA imposes a licensing framework on transactions that are essentially sales
- UCITA invents a post-sale structure for presentation of material terms
- UCITA approves of virtual elimination of accountability of the vendor to the customer
- UCITA will probably result in greater accountability of the small consulting firm or programming group to the large customer
Licensing vs. Sales

**Licensing tradition**
- Non-anonymous contracts
- Often, signed contracts, sophisticated parties
- Disclosure and use restrictions
- Examples:
  - Technology license
  - Evaluation license

**Sales tradition**
- Anonymous contracts
- Form contracts
- No restrictions on use or disclosure. Key doctrines:
  - Alienation
  - First sale
  - Exhaustion
  - Fair use
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.

(58) “Scope”, with respect to terms of a license, means:

(A) the licensed copies, information, or informational rights involved;

(B) the use or access authorized, prohibited, or controlled;

(C) the geographic area, market, or location; or

(D) the duration of the license.
Some of the Licensing Consequences

- Restrictions on reverse engineering
  - Current law: enforceable in traditional licenses, never enforced in anonymous contracts

- Restrictions on disclosure (ban publication of benchmark test results or reviews)
  - McAfee Viruscan license
  - Oracle license, Microsoft SQL Server License

- Restrictions on transfer
  - Wipe out market for used software, library use
  - Enormously complicate sale of a used computer or merger / sale of a business
Post-Sale Contracting

- UCC Article 2 dealt with form contracts.
  - Terms not specified at time of contracting were filled in with defaults
  - Terms specified after the agreement were "modifications" and could be rejected by the other party.
  - A party could reject material modifications and insist on performance of the original contract.

- UCITA creates a post-sale clickwrap structure
  - Terms need not be specified until after payment and delivery. These are original terms, not modifications. Fully enforceable.
  - Comparison shopping and comparative reporting of quality-related terms (warranty, service policy) become impractical
Post-Sale Contracting: 
Contrast with UCC and Consumer Protection Laws

- Under U.C.C. 2-314, a warranty that goods are merchantable is implied in a contract for their sale.

  - **Merchantability** requires that the program do what a reasonable customer would expect it to do (and that it be salably packaged).

  - The seller can exclude the warranty, but it must be done correctly.

  - California Civil Code 1792.4 (a) *No sale of goods . . ., on an “as is” . . . basis, shall be effective to disclaim the implied warranty of merchantability . . . unless a conspicuous writing is attached to the goods which clearly informs the [consumer], prior to the sale, in simple and concise language.*

  - Federal Magnuson-Moss Act *requires disclosure of key contract terms pre-sale and bars disclaimer of implied warranties when there is a written warranty.*

- These rights vanish under UCITA (merchantability is disclaimed post-sale)
Key issue is "self-help." Under carefully restricted circumstances, a vendor may remotely and unilaterally shut down a customer's use of the software. ("self-help" = no need for court order.)

Vendor may not exercise self-help without "agreement" in the contract

Problems

- Vendor will insert self-help enabling code
- Unlikely to compile out this code (and therefore completely retest the software) under contract to not use self-help. Can meet this by never doing a remote shutdown.
- No remedies if third parties exploit the self-help enabling code.
Examples of Rejected Proposals

- Give customers access to terms prior to sale (e.g. on vendor / publisher website)
- Give non-disclaimable warranty that the documentation accurately describes the product ("express warranty" of UCC 2)
- Give non-disclaimable warranty that all known defects have been disclosed (no liability for disclosed defects or defects unknown at time of sale; capped damages for undisclosed known defects)
- Explicitly ban restrictions on disclosure in mass-market products
- Allow vendor accelerated access to courts, customer pays vendor's legal fees if the court issues an injunction.