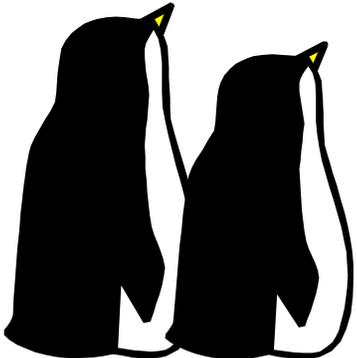# UCITA
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Introductory Notes on Objections

Cem Kaner, J.D., Ph.D.
Professor of Computer Sciences

Florida Institute of Technology

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

Licensing Consequences

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.

➔ <u>Merchantability</u> 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)

Security Issue: Self-Help

- 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.