

Tutorial: Issues in Commercial Law of Interest to Software Engineering Educators

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Abstract

Sweeping changes are being proposed for commercial law as it governs computer-related transactions. For example, the Uniform Computer Information Transactions Act (UCITA) has been adopted in two American states and will be proposed in most others. The Uniform Electronic Transactions Act (UETA) has been adopted in most states, and the federal E-SIGN law governs in the non-UETA states. The Copyright Act has also been amended (Digital Millennium Copyright Act) in ways that change the rights of buyers of computer software. UCITA is particularly controversial and will have the greatest effect on commercial law as it applies to computers and software.

This tutorial considers commercial law from the viewpoint of a software engineering teacher in an American university. With starkly conflicting rules across the states, what should students learn? (NOTE: This is a U.S.-centric discussion because the legislation is specifically American. There have been conflicting speculations about international implications of the law but these have yet to materialize.)

The author is an outspoken critic of UCITA. However, this tutorial's goal is not a critique of UCITA, but instead a presentation of the commercial law context of UCITA, UETA, and E-SIGN as they apply to large and small software vendors, developers, and customers.

1. The relevance of commercial law.

When our students enter into contracts to buy, license, support, develop, sell, document, teach, or maintain software, they are interacting with commercial law. Commercial law defines the responsibilities of sellers and service providers to their customers, including their warranties, the ways that contracts can be formed (such as the legal validity of click-through contracts and digitally signed contracts), and the terms that “everyone knows” are in a contract even though those terms are not explicitly written down.

Students are more likely to hear about other areas of law, such as copyright, products liability, and malpractice--but the body of law that they will interact with every day as working professionals will be commercial law.

In my experience, American computer science students have little knowledge of commercial law and many misconceptions. For example, they are often surprised that:

- Many (but not all) of the terms in click-through software licenses are enforceable, just as if they had signed a written contract.

¹ Cem Kaner is an attorney, licensed in California. He has published extensively on UCITA, including a book, *Bad Software: What to Do When Software Fails*. His computer law papers are available at www.badsoftware.com. In recognition of this work, Kaner was elected to the American Law Institute, one of the two bodies that co-authors the Uniform Commercial Code.

- Companies are accountable to their customers, even if the contract makes it appear as though they are not.
- Authors of open source and free software make warranties (legally enforceable promises that can cost them money) to their “customers” (even if they don’t intend to) unless they are very careful to limit their liability.

2. A revolution in the making

Just a few years ago, click-through contracts (the kind you get with packaged software) were considered fundamentally unfair and unenforceable. Now the question is not whether they will be enforced, but to what extent. Can software companies *really* get away with shipping products with serious known defects and then charge customers when they call tech support to report the bugs? Can companies *really* prohibit customers from writing critical reviews of their products, from letting their friends play their computer games, or from reverse engineering and studying the code? Can they *really* say that when you go to a store and buy a word processor, all you’re buying is the right to use it for a year and then it can shut itself off? Software companies are claiming they have these and many other rights and maybe they do.

Most courts have ruled that the Uniform Commercial Code’s law of sales and the usual consumer protection laws governed sales of mass-market software. This under attack. Some consumer protection laws may not apply to software. And two states adopted the Uniform Computer Information Transactions Act, which replaces the law of sales for software. Several other states are considering this law. Supported by companies like Microsoft and AOL, opposed by most libraries and consumer protection agencies, this law makes far-reaching changes to contracts that involve software, digitally-stored information, and many devices (such as computers) that come with embedded software. *What are those changes and how will they affect your students as software developers, employees, customers and researchers?*

UCITA isn’t the only new law changing the rules.

- Under the Uniform Electronic Transactions Act, contracts that are signed electronically are enforceable. Contracts, products and legal notices can be “delivered” electronically and may have been successfully delivered (from the law’s viewpoint) even if the message never reached the person it was sent to or reached that person’s computer in an unreadable format. *Under what circumstances is this reasonable?*
- The Digital Millennium Copyright Act also lays out restrictions that can impact our ability to do reverse engineering and other security-related research. *This bill has been vilified in the professional community. What problems was it intended to solve?*

3. Design Characteristics of Commercial Law

Commercial laws operate together to form a system. New laws are incorporated into, and change, the system. As we look at new laws under development, like UCITA, it is interesting to ask whether there are design objectives for commercial laws (most lawyers would agree that the essential objective of commercial law is to facilitate commerce), and to what extent the proposed laws advance those objectives.

4. Workshop Materials

This tutorial is supplemented by a discussion group, [teachingcomputerlaw](http://teachingcomputerlaw.com), at www.yahogroups.com.