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WHY WRITERS SHOULD ACTIVELY OPPOSE THE UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT

National Writers Union Annual Delegates Assembly

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Summary

The Uniform Computer Information Transactions Act will harm us as writers and as software and computer customers.

As writers, it hurts us in the following ways:

- It subjects us to uncertain law. A single contract, covering a single book or article, will be interpreted and enforced under different laws depending on whether the publication is electronic or in hard copy.
- It reduces publishers' duty to actively market our work. Those of us who earn royalty-based income have a vital interest in the level of this marketing, but this bill gives us even less power to influence it.
- Makes it easier for editors to refuse payment for competently written, contracted-for books or articles.
- Makes it easier for a company to refuse payment for ideas that you submitted to it under a contract.
- Lets publishers breach their writers' transfer restrictions. If the National Writers Union wins its case (Tasini v. New York Times) on appeal, the victory will be hollow because UCITA will supercede this case and throw back the rights to the New York Times (and its peer publications).

UCITA hurts us as customers by:

- Approving the practice of hiding the most offensive terms of a contract from the customer until after the customer has paid for the product and started using it.
- Allowing publishers to avoid accountability and even charge for support for known defects.
- Allow publishers to evade lawsuits by choosing a favored state or country's law, by mandating arbitration, and by specifying the location (state or country) in which the customer's complaint will be heard.
- All publishers to eliminate the market in used software by forbidding us from lending, selling or even giving away software that we have bought, paid for, and finished with.
- And by giving publishers dozens of other goodies that, collectively, have caused every consumer advocacy organization that has studied the matter and many other organizations to recommend that this legislation be abandoned.

Introduction

The Uniform Computer Information Transactions Act (UCITA) is a proposed new law that will govern all transactions in software, including contracts for sale, licensing, documentation, maintenance and support of computer software. It will also govern contracts involving electronic information (movies, music, text that you download or buy on a CD) and, at the vendor's option, can govern sales of computers and some other devices that are sold in conjunction with software.

Until recently, UCITA was proposed as an amendment to the Uniform Commercial Code, and was called Article 2B. However, the American Law Institute (ALI), one of the two organizations that must approve all changes to the UCC, recently withdrew from the Article 2B project. The other organization, the National Conference of Commissioners on Uniform State Laws (NCCUSL), decided to rename the bill to the Uniform Computer Information Transactions Act and go forward with it.

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SIDEBAR

The American Law Institute has declined to say why it withdrew from the Article 2B project. However, their withdrawal was not a surprise.

In its May 1998 Annual Meeting, the ALI passed the following resolution: “The current draft of proposed UCC Article 2B has not reached an acceptable balance in its provisions concerning assent to standard form records and should be returned to the Drafting Committee for fundamental revision of the several related sections governing assent.”

The authors of the ALI resolution (Braucher and Linzer) wrote in their supporting memo that “The Draft reflects a persistent bias in favor of those who draft standard forms, most commonly licensors." (Companies that publish or sell software are licensors under 2B.)

Additionally, in December 1998, an ALI Council ad hoc committee formed to review Article 2B submitted a memorandum to the full Council stating that it was unlikely that an acceptable draft could be prepared in time for the ALI Annual Meeting in May 1999. The memorandum raised questions about whether the project is premature in light of rapidly changing technology and business practices. It also noted the lack of consensus about the need for Article 2B and the opposition to it from many affected interests. The memorandum described the drafting of key provisions as “opaque” and “difficult to comprehend.”

For more details, see Braucher, 1999.

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NCCUSL will vote on UCITA at its annual meeting, July 23-30, 1999 in Denver. There will be a final UCITA drafting committee meeting on July 22, 1999 in Denver. For details on the meeting, contact me at kaner@kaner.com or check www.nccusl.org.

If you read a copy of this article before July 22, 1999, I urge you to write a letter to the members of NCCUSL from your State, asking them to oppose UCITA. You can find the list of members at my website, www.badsoftware.com. If you prefer, then in the July 20-30 timeframe, you can send an e-mail letter to me (in Microsoft Word format) and I will see that it is printed and reaches the NCCUSL members from your state. After July 30, send opposition letters to your state representatives.

Why We Should Actively Oppose UCITA

UCITA is objectionable to writers in two ways:

- First, it reduces and confuses our rights as when we sign contracts as writers.
- Second, it reduces our rights as software customers.

Reducing Our Rights as Writers

Here are some of the problems that UCITA creates:

- **Subjects writers to mixed or uncertain law**

  If you write a book and it is published electronically (e.g. on CD or on-line) and in hard copy, then your rights as to the electronic publication will be governed by UCITA and your rights as to the hard copy publication will be governed by existing (non-UCITA) contract law. The same words, in the same contract, about the same book, will be interpreted differently based on the medium of publication. Contract reviews and negotiations will be twice as complex.

- **Reduces publishers' duty to actively market a work**

  "UCITA 309(c) An agreement by a licensee to be the exclusive distributor of information imposes on the licensee an obligation to use good-faith efforts to promote the information commercially if the value received by the licensor substantially depends on that performance."

  "Good faith" is the lowest standard available. Basically this means that the publisher has a duty to follow its usual procedures for promoting a book like yours, and it can't falsely promise to do more promotion than it intends to do. In most industries, the duty of an exclusive distributor of a product is "best efforts", which means that the distributor must go so far that it risks taking a loss on its efforts. We (NWU) pushed hard for a "reasonable commercial efforts" rule, that would at least allow us to present evidence in court (or in arbitration) that the publisher was not acting reasonably, for example not doing as much promotion as a reasonable publisher under the same circumstances would do. In the face of lobbying from the movie industry, the UCITA / Article 2B drafting committee rejected this, even though one book publisher spoke in favor of it and none of the other book publishers' lawyers spoke against it.

- **Makes it easier to refuse payment for competently written, contracted-for books or articles**

  SECTION 311. AGREEMENT FOR PERFORMANCE TO PARTY'S SATISFACTION'.
  (a) Except as otherwise provided in subsection (b), an agreement that provides that the performance of one party is to be to the satisfaction or approval of the other requires performance sufficient to satisfy a reasonable person in the position of the party that must be satisfied.
  (b) Performance must be to the subjective satisfaction of the other party if:
  (1) the agreement expressly so provides, such as by stating that approval is in the "sole discretion" of the party, or words of similar import; or

  (2) the agreement is for informational content to be evaluated in reference to aesthetics, market appeal, subjective quality, suitability to taste, or similar characteristics.

  Under current law, if you contract to write something, you have met your obligation if you submit an original work that is of "reasonable" quality, i.e. that would satisfy a reasonable editor. If the

publisher wants a greater right (to reject the work no matter what), then the publisher has to negotiate that and put it in the contract.

But UCITA changes this in 311(b)(2). Even if your contract doesn't say this, your work can be rejected, and your contract cancelled, even if you submit a competent piece of work, just because a particular editor doesn't like it. This gives the editor much more bargaining power at the end of the process. As a particular example, publishers who want to back out of a publication agreement will often pay a kill fee even if it is not provided for in the contract. Under the new law, they will have less incentive to do this. Speaking as a Grievance Office in the National Writers Union, I can say that this provision will reduce my power as a negotiator with publishers.

- **Makes it easier to refuse payment for ideas submitted under contract.**

  "UCITA 209 (b) An agreement to disclose an idea creates a contract enforceable against the receiving party only if the idea as disclosed is confidential, concrete, and novel to the business, trade, or industry or the party receiving the disclosure otherwise expressly agreed."

  Under current law, if you agree under a contract to submit an idea and you do, then you are entitled to payment if your submission is within the terms of the contract. Here, UCITA adds a silent but critical term. *Unless your contract says otherwise, you will not be paid for an idea (a book proposal or a story outline) that you submit in good faith, even if the contract says you will be paid, unless your idea is confidential, concrete, and novel.*

- **Lets publishers breach their writers' transfer restrictions**

  UCITA Section 503(2) A term prohibiting transfer of a party's interest is enforceable, and a transfer made in violation of that term is a breach of contract and is ineffective except to the extent that:

  (A) the contract is a license for incorporation or use of the licensed information or informational rights with information or informational rights from other sources in a combined work for public distribution or public performance and the transfer is of the completed, combined work;

  SECTION 308. DURATION OF CONTRACT. (2) The duration of contractual rights to use licensed subject matter is a time reasonable in light of the licensed informational rights and the commercial circumstances. However, subject to cancellation for breach of contract, the duration of the license is perpetual as to the contractual rights and contractual use restrictions if:

  (B) the license expressly granted the right to incorporate or use the licensed information or informational rights with information or informational rights from other sources in a combined work for public distribution or public performance.

  This is the legislative counterpart to the *Tasini v. New York Times* lawsuit. Tasini (the President of the National Writers Union) sued the Times for reprinting his article electronically and allowing third parties to redistribute it electronically. At the end of a trial, the federal judge ruled in favor of the Times, saying that the Times could reprint copies of the entire work (such as the entire July 1 issue of the paper), and that it could license other publishers to do this reprinting and

reselling. This decision is under appeal. But even if the Union wins its case in court, it will lose under UCITA because UCITA adopts the trial court's ruling in Section 503.

UCITA has a remarkably wide range of restrictions against transferring (lending, selling, giving away) copies of software or information content. For example, even if you own a copy of a computer game, as a consumer, the publisher of that game can tell you that it you can't give it or sell it used or lend it to your sister without paying a new "fee" to the publisher. This flies in the face of the First Sale Doctrine of the U.S. Copyright Act. But despite this broad enforcement of limits on transferability, *UCITA will void a contract term that specifically protects a writer's right to prohibit transfer of the right to publish her work from a primary publisher to a secondary republisher.Additionally, Section 308 says that the publisher has the right to reprint (and license) perpetually.*

Reducing Our Rights as Consumers

Here are some of the ways that UCITA cuts consumer rights. (References are to the July, 1999 draft of UCITA.)

- All of the terms of the contract except the price can be hidden from the customer until after the sale. By "hidden", I mean that the customer has no way to obtain the terms until after paying for the product. (Section 112, 210-213.)
- The implied warranty of merchantability (which provides that products will be reasonably fit for ordinary use) will be trivially easy to disclaim (to refuse to provide), and the disclaimer can be hidden from the customer until after the sale. (Sections 112, 210-212)
- By defining software transactions as licenses (which are intangibles) instead of sales of copies of the software (Section 102(a)(42)), UCITA takes these transactions out of the scope of the Magnuson-Moss Warranty Improvement Act and of state consumer protection statutes that are based on sales of goods go away. Consumers thereby lose warranty rights.
- The publisher gets to charge customers for support, even for known bugs. For example, if you buy a program for $50, the publisher might charge you $3 per minute for a support call. Suppose that you run into a (known) defect, call the publisher, talk for 30 minutes ($90), realize that you're not getting anywhere, and demand a refund. The publisher says OK, you send back the product (at your expense), the publisher sends you $50 and keeps your $90. It would have been much cheaper to throw the defective product away. (Section 803(a)(1) or 803(c).)
- A publisher's contract to support its software will not require it to fix all defects. (Section 612(a)(1)(B).)
- In a contract dispute, the publisher can sometimes use “self-help” to shut down the operation of the program without court approval. (Section 816.)
- The publisher will have the same or (probably) greater power to restrict customer’s right to maintain the publisher's software or to contract for 3rd party support for the software. . (This is achieved via contractual use restrictions on modification or 3rd party use of the product, see Section 102(a)(20) and 701(a).)
- When the buyer rejects a defective product because of obvious defects, the publisher can demand "a full and final statement in a record of all defects on which the refusing party proposes to rely." (Section 702(c)(2).) If you don't find and report a bug in response to this, you can't complain about it when it bites you later.
- It is much harder under UCITA than under current law (UCC Article 2) to prove that a warranty was created by a demonstration of a product. (Section 402(a)(3) and 402(b)(2)). A publisher can more easily get away with making misleading product demonstrations at trade shows.
- Business customers lose their right to reject a product for obvious defects. (Section 704(b) restricts the centuries old "perfect tender rule" to mass market contracts, repealing it for the rest.)

- Except for mass-market software in the first day or so of use, you cannot cancel the contract (and return the software) unless there is a "material breach" (a very serious defect or group of defects). (Section 601, 704(a), 802(a).) The definition of material breach (Section 701) is more seller-friendly than the current definition, as laid out in the *Restatement of Contracts*. And finally, the publisher can specify that you cannot cancel the contract even if there is a material breach. (Section 803(a)(1).)
- Even if it is proved that the product is defective and the seller has materially breached the contract, the seller is liable for almost no remedies (payments to the customer). For example, the publisher doesn't have to reimburse callers for incidental expenses (such as the cost of phone calls to the publisher or of returning the product) or consequential losses (such as the cost of restoring lost data) caused by the product's defect. (Section 803(d).) UCITA eliminates the principle of the "minimum adequate remedy" developed in UCC Article 2 (the current law of sales, which governs contracts for packaged software today -- See Reporter's Note 6 to Section 803: "This Act does not give a court the right to invalidate a remedy limitation because the court believes that the imitation does not afford a "minimum adequate remedy" for the aggrieved party.").
- The publisher can easily set up a waiver of liability (you "agree" to not sue the publisher for defects that you have complained about) by including the waiver in the click-wrapped "license" that comes with a bug-fix upgrade that the publisher sends you. (Section 702(a).)
- The contract can specify what state or country's law will govern this transaction and what court (in what country, state, city) you have to go to in order to bring a suit against the publisher. Forget about bringing a case in small claims court against a publisher who sells you a defective consumer product. Unless the software is very expensive, or the suit is brought as a class action, you probably won't be able to afford to bring such a lawsuit because of the added travel and legal research expenses. Additionally, the publisher will probably have written into the contract the state whose laws and courts are most favorable to it. (Sections 109, 110, and many debates and resolutions during the 2B drafting meetings.)
- UCITA will let companies prohibit publication of criticisms of their product. For example, with VirusScan, you get the restrictions, "The customer shall not disclose the results of any benchmark test to any third party without McAfee's prior written approval" and "The customer will not publish reviews of the product without prior consent from McAfee." These are restrictions on disclosure. Section 102(b)(20) defines a "contractual use restriction" as "an enforceable restriction created by contract, which restriction concerns the use or disclosure of, or access to licensed information or informational rights, including a limitation on scope or manner of use." Therefore, on their face, these terms are enforceable. Section 105 provides some limitations on these clauses. A clause can be thrown out if federal law specifies that it can be thrown out or if the customer can jump through a remarkable set of litigation hoops to prove that the clause violates a fundamental public policy or if (Section 111) a judge rules that the clause is unconscionable. These decisions are made on a case by case basis, so it will probably take many years, many trials, and many appeals before we have a clear understanding of which restrictions are enforceable and which are not. In the meantime, publishers of defective products will be able to intimidate people who can't afford to be sue, by quoting their nondisclosure terms in their contracts and threatening to sue if the person publishes a critical article. (Such threats *have* been made.)
- UCITA will let publishers ban reverse engineering. This is just another contractual use restriction (102(a)(20)). See the discussion of these in the point above. There are many legitimate reasons for doing reverse engineering, such as figuring out how to make one product compatible with another, figuring out how to work around the defects in a product, and figuring out how to fix the product's defects. (See Kaner, 1998, for discussion and a list of other examples.)

Finally, by making it easy for publishers to hide the terms of their contracts until after the sale is made, UCITA makes it hard for customers to compare several types of terms. For example, when you buy a program, do you know whether that publisher's warranty is better than its competitors'? What does the publisher charge for support, compared to its competitors? What are your rights to arrange for 3rd party maintenance of the product? Can you write critical reviews of it? These terms might all affect your buying decision, but not if you can't find them until after you've paid for the product.

What We Can Do

- Write letters to the head of NCCUSL, Gene Lebrun, <GLebrun@LYNNJACKSON.COM>. (Please send me a copy so that I can distribute them to the rest of NCCUSL at the annual meeting in July, 1999. It is unlikely that a letter to Gene will go further, and he strongly supports UCITA.)
- Write letters to the NCCUSL members in your state (contact me, kaner@kaner.com, for their names, etc. or check my website, www.badsoftware.com).
- Write letters to your state legislators and state governor. (This is a state law issue; members of Congress don't count.)
- Write letters describing defects that were badly handled and examples of deceptive or dishonest or unfair conduct by software publishers to Adam Cohn <ACOHN@FTC.GOV> of the Federal Trade Commission. Adam will of course be interested in fully detailed (names, dates, etc.) letters. You can also send him a letter that deliberately disguises the people/companies/products, that is sent to him only to educate him about the types of practices in the industry. Tell him, in these letters, that this is what you are doing and (if you want) tell him that I suggested that he would find these educational-purposes-only letters useful. These are valuable because the FTC is in an awkward position regarding UCITA. Federal agencies rarely comment on state law, but the authors of UCITA are making claims about the status and content of consumer protection law in the USA, and the FTC has significant expertise in this area. The FTC wrote one long letter commenting on Article 2B (see www.ftc.gov/be/v980032.htm) but has to decide whether to write another and which issues are important to address.
- Write letters and op-ed articles for your local newspaper. I can help you a bit with this.
- Encourage your professional societies and any other organizations you belong to, to take a stand and to write some letters of their own.

THE NCCUSL VOTE IS JULY 30 OR 31. I WILL BE AT THE NCCUSL MEETING FROM JULY 22 ONWARD. YOU CAN REACH ME AT THAT MEETING BY EMAIL TO KANER@KANER.COM.

BY ACTING BEFORE (OR, AT THE LATEST, DURING) THE NCCUSL MEETING, WE INCREASE OUR CHANCE OF KILLING THIS BILL WITHIN NCCUSL. THIS WILL BE MUCH CHEAPER AND MUCH MORE LIKELY TO SUCCEED THAN A STATE-BY-STATE FIGHT OVER UCITA.

PLEASE HELP US DEAL WITH THIS ***NOW***.

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SOME ORGANIZATIONS THAT OPPOSE UCITA

- fifty intellectual property law professors (www.2BGuide.com/docs/1198ml.html)
- American Association of Law Libraries (www.arl.org/info/letters/libltr.html and www.arl.org/info/letters/Wright_ALI_letter.html)
- American Library Association (www.arl.org/info/letters/libltr.html and www.arl.org/info/letters/Wright_ALI_letter.html)
- American Society of Media Photographers (www.nwu.org/pic/uccasmp.htm)
- Association for Computing Machinery (www.acm.org/usacm/copyright/usacm-ucc2b-1098.html)
- Association of Research Libraries (www.arl.org/info/letters/libltr.html and www.arl.org/info/letters/Wright_ALI_letter.html)

- Consumer Federation of America (www.cptech.org/ucc/sign-on.html)
- Consumer Project on Technology (Ralph Nader) (www.cptech.org/ucc/sign-on.html)
- Consumers Union (www.2BGuide.com/docs/cu1098.html)
- Independent Computer Consultants Association (unpublished)
- Institute for Electrical & Electronics Engineers (IEEE) submitted specific criticisms of 2B but not final opposition. See www.ieee.org/usab/FORUM/POLICY/98feb23.html and www.ieee.org/usab/FORUM/POLICY/98oct09.html.
- Magazine Publishers of America (www.2BGuide.com/docs/v9-98.pdf)
- Motion Picture Association of America (www.2BGuide.com/docs/v9-98.pdf and www.2BGuide.com/docs/mpaa1198.html)
- National Association of Broadcasters (www.2BGuide.com/docs/v9-98.pdf)
- National Cable Television Association (www.2BGuide.com/docs/v9-98.pdf)
- National Consumer League (www.cptech.org/ucc/sign-on.html)
- National Music Publishers Association (unpublished)
- National Writers Union (www.nwu.org/pic/ucc1009a.htm)
- Newspaper Association of America (www.2BGuide.com/docs/v9-98.pdf)
- Recording Industry Association of America (www.2BGuide.com/docs/v9-98.pdf and www.2BGuide.com/docs/riaa1098.html)
- Sacramento Area Quality Association (unpublished)
- Society for Information Management (www.2BGuide.com/docs/simltr1098.html)
- Software Engineering Institute (hard copy letter on file)
- software-test-discuss (this is the Net's largest e-mail discussion forum on software quality control)
- Special Libraries Association (www.arl.org/info/letters/libltr.html and www.arl.org/info/letters/Wright_ALI_letter.html)
- United States Public Interest Research Group (www.cptech.org/ucc/sign-on.html).

Most of these letters are brief. After consultation with some other consumer advocates, I submitted a detailed letter with a section-by-section call for consumer-side revisions (www.badsoftware.com/kanerncc.htm). The Society for Information Management's letter details the concerns of large software customers (www.2BGuide.com/docs/simltr1098.html).

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In Closing

UCITA is a 350 page power grab on behalf of software publishers and other large corporations. It will hurt us all, as writers and as ordinary Americans. If you want more details, or if you can offer some help, please write me (kaner@kaner.com).

References

Braucher, J. (1999) "Why UCITA, Like UCC Article 2B, is Premature and Unsound", forthcoming in the *UCC Bulletin*, July 1999. Available at http://www.2BGuide.com/docs/0499jb.html.

Kaner, C. (1996), "Quality cost analysis: Benefits and risks", *Software QA*, Volume 3, #1, p. 23, www.kaner.com/qualcost.htm.

Kaner, C.(1998), "Article 2B and reverse engineering", *UCC Bulletin*, November, p. 1, ww.badsoftware.com/reversea.htm. See also "The problem of reverse engineering", *Software QA,* www.badsoftware.com/reveng.htm.