



Internet/Technology

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UCITA Raises Serious Concerns Licensors

The Uniform Computer Information Transactions Act (UCITA) was designed to provide both certainty for businesses and protection for consumers involved in software licensing and computer information transactions. Since its creation, however, it has been the cause of much debate because of its inherent tensions. In its earliest form, the act was envisioned as an entirely new legislation. Later, it was thought to fall under the auspices of the Uniform Commercial Code (UCC), a notion that ultimately was rejected because in a typical transaction, the distribution of software and other information is structured as a license rather than as a sale. Finally, a new version was drafted, ultimately named the UCITA, and was approved by the National Conference of Commissioners on Uniform State Laws. The next step is for the UCITA to be presented to each of the states' legislatures. As of this writing, the UCITA has been signed into law by Maryland and Virginia, with most other states beginning the law-making process.

Like the UCC, UCITA is a set of default rules that apply when an agreement is silent. However, the UCITA generally does not apply to goods; rather, it governs the entire transaction in which the primary subject matter is computer information. The UCITA applies to contracts for purchasing, licensing, or creating software, as well as contracts to access online databases and distribute information via the Internet. When a transaction involves more than computer information, such as goods, the UCITA applies to that portion of the trans-

action containing computer information, while the UCC governs the portion pertaining to the goods. When the UCITA conflicts with the UCC, the UCC prevails.

There are certain exemptions in the UCITA, including those for sound recording and motion picture distribution, the traditional publishing industry, and specific financial transactions. The UCITA covers not only standard contract issues, such as offer and acceptance, but also transfers of interest, rights and remedies, warranties, self-help, and issues relating particularly to electronic contracts, such as mass market licenses.

Warranties

As every practitioner will attest, a bold disclaimer of warranties is standard practice when licensing computer information such as software. The reason for this precaution is clear; after all, many consumers consider the fact that a program functions at all to be nothing short of a miracle. Most of the warranties contained in the UCITA follow those contained in the UCC. The UCITA specifically addresses the implied warranty of merchantability, the warranty for fitness for a particular purpose, a warranty of system integration, and the warranties of noninterference and noninfringement. The UCITA also contains a new warranty that focuses on the licensee's reliance on the licensor. This new warranty requires the licensor to exercise reasonable care in performing the terms of the contract to ensure that the data provided by the licensor is accurate. It does not apply to published informational content or to a person who acts as a mere conduit of the content. The UCITA also mandates that an ex-

press warranty may arise when the licensor affirms a fact or makes a promise to the licensee, including through advertising, that becomes the basis of the bargain.

With the exception of an express warranty, which is difficult to delete once created, a licensor may disclaim the warranties. However, specific language is required and the circumstances under which the warranties will not be given must be conspicuous, as must be the disclaimer. The express language required and specific guidelines are set forth in Part Four of the UCITA.

Self-Help Limitations

Self-help is available under the UCITA, but only in the event that a license is cancelled.

Cancellation is allowed only if there is a material breach of the license, when the breach has not been cured or waived, or if the agreement provides for cancellation in the event of a breach. Prior to exercising self-help, a licensor must give reasonable notice that describes the breach. Access contracts are treated differently; the rights of access may be cancelled without notice.

The licensee may recover direct, incidental, and consequential damages that are caused by improper use, as long as the licensee notifies the licensor about the possibility of the damages, or the licensor has reason to know about them. Disclaimers in the license itself cannot eliminate the licensee's right to damages. Self-help may not be used at all if the licensor has reason to believe that there is a substantial risk of grave harm to a third party or to public safety or health. Finally, even if a licensee has agreed to the licensor's use of self-help, a court must give prompt consideration to an application for an injunction against self-help.

Mass Market Licenses

A mass market license (MML) is a standard form used in a retail transaction with the general public. The form provides substan-

tially the same terms for the same information or informational rights, and the licensee acquires that information or informational rights. Items not considered MMLs under the UCITA include: contracts for the redistribution, public performance, or public display of a copyrighted work; customized licenses (other than minor customization); site licenses; and access contracts.

The MML provisions of the UCITA protect consumer licensees who, at the time of contracting, intend the information or informational rights they license to be used primarily for personal, family, or household purposes. [UCITA § 102(15)]. Under an MML, general contracting principles apply. The MML must be available for the licensee to review and to assent to its terms prior to payment or

the licensee is entitled to a return. Similarly, if the licensor does not have the opportunity to review the terms proposed by the licensee prior to the delivery of information and the terms are not agreeable to the licensor, the licensor is entitled to a return.

An MML is limited so that if its terms violate a fundamental public policy or are unconscionable, they are not enforceable. Additionally, terms that conflict with a term to which the parties have actually agreed also are unenforceable. For example, if the parties agree that 24 computers are covered by a license but the actual license specifies only four computers, that term of the license is unenforceable. Problems of proof seem inevitable under this limitation, because in most cases, the four corners of the

agreement will document the understanding of the parties rather than any previous discussions.

The UCITA is the result of 10 years of careful construction and represents a balance of interests. In any jurisdiction where it is enacted, practitioners should undertake a careful examination of its provisions to ensure that appropriate measures are taken to duly protect their clients.

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