

2000

E-BUSINESS, E-COMMERCE & THE LAW

John F. Rudin

Follow this and additional works at: <http://scholarship.richmond.edu/jolt>

 Part of the [Banking and Finance Law Commons](#), [Commercial Law Commons](#), and the [Internet Law Commons](#)

Recommended Citation

John F. Rudin, *E-BUSINESS, E-COMMERCE & THE LAW*, 7 Rich. J.L. & Tech 13 (2000).

Available at: <http://scholarship.richmond.edu/jolt/vol7/iss2/8>

This Symposium Information is brought to you for free and open access by UR Scholarship Repository. It has been accepted for inclusion in Richmond Journal of Law and Technology by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.



Volume VII, Issue 2,

Fall 2000

E-BUSINESS, E-COMMERCE & THE LAW

UNIVERSITY OF RICHMOND

by John F. Rudin(*)

Cite As: John F. Rudin, *E-Business, E-Commerce & the Law*, 7 RICH. J.L. & TECH. 13 (Symposium 2000), at <http://www.richmond.edu/jolt/v7i2/rudin.html>.

TABLE OF CONTENTS

I. INTRODUCTION

II. HOW IS THE BALANCE SHIFTED?

III. UCITA TOP PROBLEMS

I. INTRODUCTION

{1}Advocates argue that UCITA (Uniform Computer Information Transactions Act) provides rules of the road for the technology highway much like the Uniform Commercial Code (UCC) has done with our commerce system for several decades. However, the UCC provides a level playing field where businesses and customers are aware of the rules prior to conducting business. Among its many shortcomings, UCITA lacks the notice and disclosure features of the UCC. A simple double click of a mouse with the cursor on an icon that reads "I accept" binds the customer to a contract that has not been reviewed prior to purchase. The exposure for businesses and large organizations is significant as violation by any employee can result in

litigation, and we are all aware of the "deep pockets" approach.

{2} Advocates argue that the terms of UCITA are negotiable and that businesses and customers can opt out of the UCITA provisions. Irrespective of the presence of corporate bargaining power, how realistic is it to think that a company could convince a software provider to opt out of UCITA when it is Virginia law? We suggest it would occur with the same frequency that a motorist could successfully negotiate with a police officer to opt out of a posted speed in exchange for the one he was driving.

{3} We are told that a uniform law for dealing with the licensing of computer information is necessary to enable growth of the "new" information economy. That is a reason why the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) labored for several years to produce UCITA. Have you checked the news or the stock markets lately? It is not apparent that there is any constraint to growth in the information technology sector. Similarly, there is an inference that the UCC and other existing laws are inadequate. Yet, there is little evidence cited about the problems that UCITA is supposed to resolve. That is why the ALI withdrew support in 1999. It felt the act is not balanced and has many flaws. In the words of ALI's former executive director, "The statute is a mess. It's badly drafted. It uses terminology that's unintelligible. It creates all kinds of problems. The American Law Institute backed out because we thought it was technically not well formulated, and that substantively it had a lot of problems. I've never understood why the Conference (NCCUSL) pushed it."

{4} The heart of the problem with UCITA is that it stacks the deck in favor of software companies and information service providers. It is an act that originally aimed at protection for software licensors, but expanded scope over the drafting years until it now impinges heavily upon the rights of all users of "computer information." Even the definition of computer information is overly broad and includes printed information that, of course, is regularly scanned into computers.

{5} How does UCITA stack the deck? Many of the certainties that proponents claim are an advantage versus present law are really protections for the software companies that appear carefully designed to shift economic bargaining power from a level playing field to the side of the software companies and computer information licensors.

II. HOW IS THE BALANCE SHIFTED?

{6} UCITA validates terms held back until after payment and delivery, presented in so-called "shrinkwrap" or "clickwrap" contracts. This opens the door for elimination of warranties and "as-is" sales as well as many other devious terms and conditions.

{7} With no requirement to disclose terms in advance of sale, the software publisher can avoid liability for defects and poor quality. Computer software is inherently defective and UCITA provides a framework that will shelter publishers rather than provide incentives to improve quality. As a result, businesses and consumers will continue to bear the cost and aggravation of dealing with defects.

{8} The "self-help" provisions of UCITA can be launched solely by the software vendor. Court intervention is not required in advance of disabling your network or critical systems. If your deadline on submitting a bid or completing a project is halted by triggering the "self-help" in your computer system, millions of dollars could be lost. Litigation is time consuming and costly so your opportunity to be made whole is highly unlikely. For decades, the court system has provided a vehicle to litigants who face irreparable harm: an injunction. UCITA circumvents the courthouse and judicial oversight with its self-help.

{9} The mere threat of invoking self help provisions may be enough for many licensees, who have legitimate disputes, to give up rather than face the cost and time in seeking judicial relief or, worse, risk substantial

damage to business operations if critical systems are shut down.

{10}Once the favorable definitions and terms become law as a result of UCITA passage in the states (even only a few states will be sufficient), there will be little incentive for software publishers to negotiate different terms or separate agreements at all.

{11}Proponents claim that UCITA would bring clarity to an area of the law that has been confused. In fact, this area of the law is quite clear, as evidenced by the dearth of cases on point. Furthermore, business licensees have begun to see a shift in the contract negotiating postures taken by large software manufacturers. Many of the vendors say they want to move to a business paradigm under which they will refuse to negotiate the terms of a contract - all licenses will essentially be shrink wrapped. UCITA will enable them to achieve this goal by providing them with more ammunition to support a standard take-it-or-leave-it licensing model.

{12}UCITA has two prominent features. First, it validates terms held back until after payment and delivery, presented in so-called "shrinkwrap" or "clickwrap" contracts. Second, it recharacterizes software and digital content contracts as "licenses" of use, rather than sales of copies, raising two issues that will require a great deal of litigation to resolve. The first issue is whether consumer protection laws applicable to "sales" of goods and services apply to these transactions. The second is whether software and digital content providers can use license terms to rewrite users' basic intellectual property deal, for example, by taking away the right to transfer a copy, criticize a product or quote content.

{13}Both of these features are harmful to consumer welfare. Post-payment presentation of terms inhibits consumer shopping for the best terms. At a minimum, terms should be available online when products are marketed online. The advantage of computer technology is its ability to store and retrieve vast quantities of information, and the law should make use of this technology to promote market competition in terms.

{14}Characterization of these transactions as "licenses" means use of an obscure legal category that consumers do not understand. Furthermore, today there is little doubt that consumer protection statutes, written so that they cover "sales" of goods and services, apply to contracts for software and online services, but under UCITA this would be put in doubt. Also, if UCITA succeeds in providing a technical end-run around federal intellectual property law, consumers will lose the benefits of doctrines of first sale (allowing transfer of a copy) and fair use (allowing quotation and criticism).

{15}Far from creating greater legal certainty, UCITA will require decades of litigation to sort out its meaning. Its primary effect is to give licensors new arguments to use in that long, wasteful process. UCITA, if it becomes effective nationally, will reduce competition and legal incentives to improve software quality. Consumers of software, online services and digital content would be much better served by certain rules straightforwardly protecting their reasonable interests and expectations. In the absence of such an approach, consumers are better off under current law, which includes the common law of contract, UCC Article 2, state and federal consumer law and federal intellectual property law.

III. UCITA TOP PROBLEMS

{16}1. Validates post-payment disclosure of terms. This would provide a poor model for electronic commerce, making comparison shopping (one of the great potential benefits of online shopping to consumers) impractical. Delay of disclosure of terms until after a customer is psychologically committed to the deal is the approach used in UCITA for all terms, even important elements of the deal, such as warranty disclaimers, remedy limitations, transfer restrictions, prohibitions on criticism of the product, and the key feature of a license--the restrictions on the number of users and the length of time that use is authorized. Post-payment disclosure of terms also makes it hard for journalists to gather information about the best available

deals and present comparative information.

{17}2. Validates fictional assent (e.g., double clicking a mouse to get access to a product after you've paid for it) and even allows one party to define any conduct as assent in future transactions, without requiring that form terms meet consumers' reasonable expectations.

{18}3. Creates doubt about whether software transactions are covered by goods-related consumer protection laws, such as the California Song-Beverly Act, the federal Magnuson-Moss Warranty Act (which incorporates features of state law), or state laws banning unfair and deceptive practices in sales of goods and services. UCITA does this by defining consumer software contracts under state law as not involving sales of goods, but rather as "licenses" of "computer information." In the absence of UCITA, most courts have treated mass-market software transactions as sales of goods. While creating confusion about the scope of existing consumer laws, UCITA fails to extend analogous consumer protection to mass-market software contracts that are functionally like other consumer product transactions, despite new legal labels. Most consumers think that they are buying a consumer product when they pay money for software.

{19}UCITA is also objectionable because there is a fundamental conflict between its approach, providing legal protection for holding back terms, and that of state and federal anti-deception statutes and regulations, which provide that early and prominent disclosure of key terms is crucial to an efficient marketplace based on meaningful consumer choice.

{20}4. Interferes with sale of goods law by allowing opt-in to UCITA for computer sellers who also provide software and for sellers of any goods if software is also provided and is a "material" part of the transaction. "Material" is described in a comment as meaning anything more than a trivial element of the deal. Because many goods are sold with software, from cars to cameras, UCITA would create a lot of uncertainty about its reach and would govern many transactions that are predominantly sales of goods.

{21}5. Validates the use of transfer restrictions in the mass market that conflict with normal customer expectations. These license restrictions would interfere with the market in used goods that contain software (potentially, video games to cars). They would also prevent consumers from legally transferring or acquiring used software or digital works (whether buying or selling second-hand or making or receiving gifts). The effect would be reduced competition between new and used products and higher prices.

{22}6. Authorizes too flexible choice of law and forum in mass-market transactions, allowing choice of any U.S. forum (and possibly a foreign one) for the convenience of the producer. Will deprive many consumers of a forum they can afford by requiring suits to be brought in a remote location.

{23}7. Attempts to override consumer protections for use of electronic records provided for in the Federal Electronic Signatures in Global and National Commerce Act. Although this attempt will probably be unsuccessful, litigation will be necessary to establish that UCITA cannot displace the federal consumer protections without supplying any measures as effective or more effective to protect consumers.

{24}8. Fails to take a clear position invalidating restrictions on public discussion of product flaws. Even if the courts eventually ruled that such restrictions are against public policy, this will take years to settle through repeated litigation and the effect in the meantime will be to chill public comment on bad products. We already see software licenses that purport to ban publication of critical articles; trade journals have stated that they decided not to risk being sued under these terms. UCITA would increase this sort of chill on disseminating product information.

{25}9. Approves use and transfer restrictions on mass-market software and information products that will harm libraries. These features of UCITA would limit the access of consumers as library patrons to

information and have the ripple effect of driving up prices in the marketplace. The result would be to increase the technology gap between rich and poor.

{26}10. Eliminates the key benefit of the Article 2 doctrine of failure of essential purpose of a limited remedy. Expressly permits boilerplate to preserve exclusion of incidental and consequential damages even when an agreed exclusive remedy fails or is unconscionable.

{27}11. Fails to require disclosure of known defects. A lot of problems with software wouldn't happen if producers disclosed defects they know about. But UCITA does not require them to do so. With its strong support for remedy limitations and warranty disclaimers, even after a customer pays, UCITA is more concerned with protecting producers than with giving customers a chance to avoid problems.

{28}12. In "electronic regulation of performance" section, it allows vendors to shut down software when they terminate a contract for various reasons. The vendor could use this right to threaten to turn off a software-driven product. This is already being tried in Detroit in used car deals made on credit. By licensing computer programs in cars, sellers of cars might be able to opt into UCITA, making it more likely that a practice of remote disabling of goods will stand up in court.

ENDNOTES

[*]John F. Rudin retired from Reynolds Metals Company on June 1, 2000. In his previous position as Vice President, Chief Information Officer, he was responsible for the company's information technology systems, communications and related strategies in support of business operations.

Mr. Rudin joined Reynolds in 1966 as an accountant at Reynolds Aluminum Supply Company (RASCO) in Park Ridge, IL. He served in various administrative and management positions prior to becoming RASCO national sales manager in 1986. He was named President of RASCO in 1989 and was elected to Corporate Vice President in April, 1995. He was promoted to the post of Chief Information Officer for Reynolds Metals Company in August, 1995.

Elected as a Director of the National Association of Aluminum Distributors (NAAD) in 1990, Mr. Rudin served as president of the 100-member company trade organization until November 1995. He is past Chairman of the Specialty Metals Division of the Steel Service Center Institute (SSCI).

Mr. Rudin serves on the Information Technology Steering Committee and Board of Directors of the Greater Richmond YMCA. He also serves on the Board of Directors of the Greater Richmond Technology Council. He is a past member of the Society for Information Management (SIM) and served on the Advanced Practices Council. He has served the City of Richmond as a member of the Department of Information Technology Policy Committee and the Commission to Re-engineer City Government.

The Greater Richmond Technology Council recognized Mr. Rudin as a finalist for the 2000 leadership award. In 1999, he was presented with the IT Education Achievement Award by Virginia Commonwealth University and the Greater Richmond Technology Council for contribution to the advancement of IT education in the Richmond area.

A native of Chicago, Mr. Rudin attended the University of Illinois and received an M.B.A. from the University of Richmond. He served as petty officer in the Naval Air Reserves.

[Return to this Issue's Index](#)

[Return to *The Journal's* Home Page](#)

[© Copyright 2000 Richmond Journal of Law & Technology](#)