THE PROBLEM WITH UCITA

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The fundamental problem with the Uniform Computer Information Transactions Act (UCITA), recently adopted in Virginia and Maryland and under consideration in several other states, is that it doesn't match the features of the primary market it serves -- the software market. It assumes a competitive market, where consumers have meaningful choices between vendors who compete with one another. This competition presumably would include competition not only over price, but also over license terms. And this competition over license terms would prevent licensors from abusing the power UCITA grants them.

Unfortunately, the market for many types of software is far from competitive. This absence of competition will allow licensors to exploit the provisions of UCITA.

The members of the UCITA drafting committee by and large had a background in general commercial law. They were not computer lawyers, and they had little familiarity with the peculiar dynamics of the software market. UCITA, for all its drafting flaws, probably would not cause great concern were it applied to markets typically encountered by commercial lawyers. Consider the following example.

Imagine that Pillsbury decided that it would boost its sales of frozen chocolate chip cookies by prohibiting consumers from using its flour for making chocolate chip cookies. Accordingly, on each bag of flour it sold, it printed the following contract: "By opening this bag of flour, you manifest your agreement not to use the flour in the baking of cookies." (In fact, to be completely analogous to UCITA, imagine that the contract was inside the bag, and visible to the consumer only after she had purchased the bag, taken it home, and opened it.) If UCITA applied to bags of flour, this contract would be enforceable. And even if the contract were enforceable, it would not seriously limit consumers' ability to bake their own chocolate chip cookies. Why? Because next to the Pillsbury flour, the consumer can find five other brands of flour. These other brands compete with Pillsbury in price and quality, and if Pillsbury were to assert its chocolate cookie restriction, these brands would compete on license terms as well. Indeed, the other brands may advertise that they encourage the use of their flour in the baking of chocolate chip cookies.

Chances are that Pillsbury would soon discover that its licensing policy was not causing consumers to buy more frozen Pillsbury chocolate chip cookies, but instead was causing consumers to buy other brands of flour. In short order, Pillsbury would abandon its licensing policy. Thus, although Pillsbury had the legal right to prohibit the use of its flour in the baking of chocolate chip cookies, the market in the long run would prevent it from doing so.

The software market is quite different from the flour market. In many niches, there is virtually no competition. Because of network externalities, the market "tips" in favor of first movers, and they gain a market position that is extremely difficult to displace, even by vendors offering better technology at lower prices. Garth Saloner, *Economic Issues in Computer Standardization*, 1 Econ, Innovation & New. Tech. 135, 140 (1990). The dominant vendor is particularly powerful relative to the consumer who has already purchased products from that vendor and is "locked-in" to that vendor's technology.

One need look no farther than Microsoft Windows to observe this phenomenon. The typical purchaser of a new personal computer has only two options for operating system environments: Windows or Macintosh. Given that he has been trained on Windows at his office and that all the computer games his children want to play run on Windows, but not necessarily on Macintosh, as a practical matter he has only one option -- Microsoft Windows. Similarly, a business that has a network of ten PCs running Windows has little choice but to buy Windows when it adds five new employees.

In short, both the individual consumer and the business user have limited alternatives. In the absence of meaningful competition, Microsoft can impose onerous terms in its shrinkwrap and click on licenses. Prior to UCITA, it was far from clear that a court would enforce these terms. But in a state which enacts UCITA,

a court would have to enforce those terms so long as they stayed one step short of unconscionability or of violating a “fundamental public policy,” whatever that is.

It is hard to exaggerate the market power exercised by dominant vendors in the software market. The findings of fact in *United States v. Microsoft* reveal Microsoft's ability to intimidate some of the world's largest companies, including IBM and Hewlett-Packard. *United States v. Microsoft Corp.*, Case No. 98-1232, Findings of Fact ¶ ¶ 64, 94-103, 115-132, 231-232 (D.C.D.C. Nov. 5, 1999) If Microsoft could impose its will on these companies, it certainly can dictate terms to business users and consumers. (Indeed, in the recent Slashdot episode, Microsoft attempted to use a shrinkwrap license to prevent criticism of one of its products.) UCITA facilitates this coercion by eliminating one line of defense the Windows purchaser now has -- that the Windows shrinkwrap "license" is not an enforceable contract.

I do not mean to pick on Microsoft; before Microsoft, IBM dominated the information technology industry, and in the future another firm probably will supersede Microsoft. Moreover, in specific application software niches, other firms exercise market power. This power is a function of the economics of the software market, not the personality of any particular software executive.

The freedom of contract is a fundamental value enshrined in the Constitution. The belief in this value blinded the UCITA drafting committee to the realities of the software market, where often one party isn't truly free.

Can UCITA be fixed? As a theoretical matter, perhaps UCITA could actually mitigate the anticompetitive nature of the software market by explicitly invalidating a list of specific contract terms in all software licenses except for joint development agreements. The EU Software Directive, for example, invalidates any contractual restriction on reverse engineering.

As a practical matter, however, UCITA will never be fixed in this manner. The software vendors who have supported the UCC 2B/UCITA effort over the past decade would never allow the project designed to increase their power to be used to diminish that power.