Uniform Computer Information Transactions Act [U.C.I.T.A.]: The Consumer's Perspective

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UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT [U.C.I.T.A.]: THE CONSUMER'S PERSPECTIVE

David A. Szwak

I. INTRODUCTION

While many groups express outrage at the substance of U.C.I.T.A.,¹ the most significant group to feel its adverse effects is the collective consumer population. U.C.I.T.A. was originally drafted in anticipation of becoming Article 2B of the Uniform Commercial Code. For that to happen required the approval of the final text by the American Law Institute (ALI). However, the ALI refused to approve U.C.I.T.A. thereby preventing U.C.I.T.A. from becoming part of the Uniform Commercial Code.² Following ALI's refusal to approve U.C.I.T.A., the National Conference of Commissioners on Uniform State Laws (NCCUSL) decided to forge ahead, attempting to gain passage on a state-by-state basis.³

There has been strong opposition to U.C.I.T.A. from its inception.⁴ One-half of the states' attorneys generals signed a petition

opposing U.C.I.T.A.5 The Federal Trade Commission’s Bureau of Consumer Protection has openly opposed U.C.I.T.A., as it violates multiple F.T.C. regulations that protect consumers.6 It is widely acknowledged that U.C.I.T.A. authorizes adhesive contracts.7 With all this opposition, one must wonder who supports U.C.I.T.A.? The three principal U.C.I.T.A. lobby groups are Digital Commerce Coalition (DCC), Information Technology Association of America (ITAA), and Business Software Coalition (BSC).8 The list of members funding these lobby groups reads like a “who’s who” of the software and online community.9 Each of these entities stands to profit greatly if U.C.I.T.A. becomes law.

The potential harm that U.C.I.T.A. stands to cause the average American consumer far exceeds its impact on commercial groups. As currently written, U.C.I.T.A. must be fought, adopting a “bomb shelter”10 provision, if necessary, to prevent implementation of
U.C.I.T.A. in Louisiana. Other states are effectively enacting such "bomb shelter" provisions to prevent U.C.I.T.A. from becoming law in those jurisdictions. Following is a discussion of some of the more offensive aspects of U.C.I.T.A. and their implications for Louisiana consumers.

II. POST-SALE DISCLOSURE OF TERMS

U.C.I.T.A. was designed to validate post-payment and post-sale disclosure of terms.\(^1\) In Louisiana, a sale is perfected by an agreement or "meeting of the minds" as to a lawful object, "cause," consent and the parties' capacity to contract.\(^2\) U.C.I.T.A. effectively defeats the "consent" of the parties by permitting the vendor to impose additional terms on the consumer after the sale is completed and payment made.\(^3\) The post transaction imposition of additional terms, such as arbitration, choice of law, choice of forum, consent to personal jurisdiction for example, is an unsavory business practice and subject to widespread abuse. None of these terms need appear in the advertisement, on the package, or on the web page from which a sale is transacted. Under Louisiana law, this practice might be construed as a counter-offer or an impermissible attempt to add conditions after the sale.\(^4\) Failure to

state residents from certain licensing provisions that are possible in U.C.I.T.A.-governed contracts, particularly in click-wrap and shrink-wrap licenses found in mass-market products where the parties have not negotiated. Some of these bomb shelter laws protect licensees from choice of law provisions that attempt to make U.C.I.T.A. the law governing the contract. Other bomb shelter laws protect consumers from choice of forum provisions. See Iowa legislative activity report, available at http://www.ala.org/washoff/ucita/iowa.html (last visited Feb. 24, 2003) and Ed Foster, UCITA Running on Empty, InfoWorld, available at http://archive.infoworld.com/articles/op/xml/01/07/02/010702opfoster.xml (last visited Feb. 24, 2003) [hereinafter "Foster, UCITA"].


disclose such proposed terms in advance precludes the transaction being a conditional sale.  

Post-payment and post-sale addition of terms will hinder the development of electronic commerce in Louisiana.  

In this age of growth in online activity and where the benefits of online commerce are being realized, it is important to resist attempts by special interests, like the software manufacturing industry, to introduce laws which do more to harm commerce than they do to promote commerce. U.C.I.T.A. effectively prevents comparative shopping because the consumer is unaware of the seller’s terms until after the transaction is completed. Comparative shopping is one of the strongest benefits afforded by online shopping. A consumer should be able to easily and quickly visit competing sites and decide, based upon the disclosures, which product they want and what terms apply. Louisiana law has never permitted post-sale terms to be added, a practice that is particularly offensive in the consumer setting.

Other post-sale and post-payment disclosures such as limitation of warranty, disclaimers, transfer restrictions and comment and criticism restrictions are also built into these add-on terms. License provisions frequently limit the number of users and the length of time that the product may be used. It is easy to understand why the software industry seeks to hide these post-sale and post-payment provisions in convenient shrink-wrap and click-wrap packages. It


17. “Software” exists in many forms and is not always a complex program incorporated in an item traditionally thought of as a computer-type product. Software exists in all programmable electronic devices, capable of storing, retrieving, accessing, updating, combining, rearranging, printing, reading, processing or otherwise altering information whether such information is maintained in that device or at some other remote and accessible location. “Software” would generally include the entire set of computer programs, procedures, documentation, or other recorded instructions which guide a device or human in the operation of the device.

18. PC Magazine tested database software produced by Oracle. But because of license provisions restricting comment and criticism, PC Magazine did not publish the article containing their test results because they did not want to risk a breach of license lawsuit. The Test That Wasn’t, PC Magazine, Aug. 1999, at 29.

19. Mass marketed software is usually accompanied by a license agreement inside the shrink-wrapped package. The license is not signed by the consumer-user.
is very likely that such onerous conditions would be a factor in the decision to buy if they were made pre-sale or pre-payment.

The post-sale and post-payment imposition of "criticism and comparison" restrictions prevents trade journalists from publishing objective reviews of products and their licenses, and limits their ability to compare competing products and present criticism or commentary on competitive vendors and their products to potential consumers. This is particularly important when new software or products with embedded software are first introduced into the market. The non-criticism term restricts the free exchange of information about products and limits the ability of consumers to make informed decisions about competing goods.

III. MOUSE CLICK CONSENT

U.C.I.T.A. validates buyer consent manifested by mouse-click alone. This form of "fictional assent" assumes capacity and the identity of the buyer. Consumers often purchase products with software previously installed. For example, automobiles, computers, televisions, cameras, security systems and many other common products are all affected by this fictional assent. The product assembler, software installer and secondary programmers are not capable of providing consent to contract terms on behalf of a subsequent third party buyer of the finished product. Again, these post-sale and post-payment terms are not even known by the consumer (purchaser). In their ordinary process, the assemblers, installer and programmers prepare the product for consumer-friendly

Often these terms are shipped with the product after the purchase and payment have been made. Shrink-wrapped licensing information, either on paper or recorded on software media, get its name from the fact that retail software packages are often covered in plastic or cellophane shrink-wrap and these packages contain licenses, not previously seen by the consumer, that purport to take effect as soon as the customer removes the shrink-wrap from the package. Klocek v. Gateway, 104 F. Supp. 2d 1332, 1338 n.6 (D. Kan. 2000) (citing ProCD v. Ziedenberg, 86 F.3d 1447, 1449 (7th Cir. 1996)).


"Click wrap" terms are non-negotiated terms but usually not concealed prior to use. Nonetheless, the terms are forced upon the consumer post-sale, post-payment and post-download/post-installation. Thus, once in place, how can the consumer realistically say "no." Compare "click-wrap" with "browse-wrap" which is discussed in Pollstar v. Gigmania Ltd., 170 F. Supp. 2d 974 (E.D. Cal. 2000).
use. These workers are employed by the intermediate manufacturer and retail vendors. Occasionally they are employed or contracted by the end user or consumer. In either case, the end user is not aware of the restrictions assented to by the various intermediaries.

Worse yet, U.C.I.T.A. allows the software manufacturer to define conduct as assent for future transactions. For example, a term might provide that assent by mouse-click upon setting up your computer at home would provide assent to the terms of any future updated or revised versions of the software which might be provided later. That software license might impose even more and, surely, creative terms generally favoring the software manufacturer. U.C.I.T.A. does not even require that the new terms and conditions be reasonable. Further, U.C.I.T.A. does not require that the consumer or other purchaser reasonably expect the addition of new terms and conditions.

IV. PRECLUSION OF CONSUMER LAW BENEFITS

There is some doubt about whether U.C.I.T.A. will prevent courts from applying consumer protection laws. Proponents of U.C.I.T.A. argue that software transactions normally covered by goods-related consumer protection laws would lose that protection. U.C.I.T.A. classifies consumer software contracts as a license of computer information, not the sale of goods.21 Prior to the introduction of U.C.I.T.A., American courts treated software transactions with consumers to be sales of goods, not a license or sale of services.22 It is easy to understand that consumers consider the purchase of software to be that of a product or "good," and not a license.23

21. Computer information transactions are defined to be agreements "to create, modify, transfer or license computer information or informational rights in computer information." U.C.I.T.A. §§ 102(11), 103 (2000).


23. A "license" is generally considered to be a personal privilege to do some particular act or series of acts and is ordinarily revocable at the will of the licensor and is not assignable. A license is a transfer of rights less than the full patent. Black's Law Dictionary 919-20 (6th ed. 1999). U.C.I.T.A. defines "license" as; a contract that authorizes access to, use of, distribution, display, performance, modification, or reproduction of information, or use of informational rights, and expressly limits the contractual rights, permissions, or uses granted, expressly prohibits some uses, or expressly grants less than all rights in the information. A contract
U.C.I.T.A. conflicts with the existing legal framework governing software sales. It will affect the scope of consumer protection laws that have not been amended to harmonize with U.C.I.T.A.'s new "vendor friendly" provisions. Will laws like the federal Magnuson-Moss Warranty Act, which incorporates state law features, apply now to software transactions? Will deceptive trade practice statutes apply to these transactions? Will federal and state anti-deception statutes apply? Clearly, U.C.I.T.A. promotes deferring disclosure of terms until after the sale transaction is nominally complete. U.C.I.T.A. thus favors the software industry with a unique set of rules regarding contract formation. Other industries, especially in consumer sales, are required to provide early notice of key terms and conditions. These terms and conditions are to be prominently displayed and brought to the consumer's attention. Further, in some cases, special language and presentation are to be employed so as to assure that the consumer makes a well-informed and educated decision about the potential purchase. Consumer protection laws promote meaningful and informed consumer choice. These laws should ensure that efficiency and fairness prevail in the marketplace for all products, including software.

V. U.C.I.T.A.'S OPT-IN WILL PROTECT THOSE IN THE MANUFACTURER-ASSEMBLER-VENDOR CHAIN

Another protective measure for vendors in U.C.I.T.A. is the "opt-in" provision. Any of the parties in the manufacturing, assembling and vending chain may opt-in and receive the protections of U.C.I.T.A. If software is included in the sale (or license transfer) and if the software is a material part of the transaction, then the parties in the

may be a license whether or not the transferee has title to a licensed copy. The term includes an access contract and a consignment of a copy. The term does not include a reservation or creation of a security interest.


25. Material is defined by U.C.I.T.A. as "meaning anything more than a trivial element of the product or transaction." U.C.I.T.A. § 104 (2000). Thus, it is conceivable that any use of software would be "material" and would invoke U.C.I.T.A.'s opt-in and protections against the consumer. U.C.I.T.A. § 104 cmt.
manufacturer-assembler-vendor chain may opt-in and gain all of the protections afforded by U.C.I.T.A. In light of the pervasive use of software in consumer products, U.C.I.T.A. will apply to most consumer products. Manufacturers will thus have an incentive to incorporate superfluous software components for the sole purpose of gaining the protections of U.C.I.T.A.

Even without the opt-in provision, consumer financed purchases of software and software operated products involve consumer credit contracts. These contracts are bound to incorporate the FTC Holder Rule notice, required by 16 C.F.R. 433, et. seq. The FTC Holder Rule notice generally provides the consumer with "all claims or defenses" against the assignee which the consumer might have against the original vendor up to the cap provided by the statute.26 If the vendor is protected by U.C.I.T.A., then arguably that protection is passed along to the assignee of the credit contract thereby negating consumer rights against the holder (assignee) of the consumer credit contract.

VI. BROAD TRANSFER AND ACQUISITION RESTRICTIONS

Broad transfer and acquisition restrictions are crafted into U.C.I.T.A. to inhibit competition between new and used products and prevent a secondary market for the software goods.27 In a mass market setting, consumers expect perfect freedom to sell, transfer, acquire, donate or otherwise dispose of their property that might happen to contain software components, such as cars, computers, cameras, and video games. One must consider the implications of these transfer and acquisition restrictions in a realistic context. If a consumer owns a computer with one or more software systems, including the base operating system,28 the broad transfer and acquisition restrictions applicable to those software components will prevent the lawful transfer and acquisition of the computer unless the disposing consumer removes the software or acquires additional rights from the licensor. Legally, any transferee of the used system would be expected to pay for an additional license in order to operate the system under U.C.I.T.A. Conversely, if the disposing consumer were to remove the base operating system before transfer, it would generally render the computer useless. In fact, some computer hardware manufacturers build their physical components to require particular software in order

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2 (2000).
28. The operating system is the base operating software of a computer, such as Windows, DOS, etc.
to function at all. In this scenario a lawful secondary or used market could not exist at all. One must also consider the fact that "hardware" may be deemed to be "software" as contemplated by U.C.I.T.A. when that hardware contains programming logic permanently stored in components of the device. If so, then transfer or acquisition of the computer without software becomes impossible and would be restricted by U.C.I.T.A. Realistically, consumers would likely ignore such an illogical and unreasonable law. Thus, enforcement of the law would necessarily be selective.

Transfer and acquisition restrictions are usually vague and overly broad. In addition to being forced upon the consumer in post-sale and post-payment disclosures, these restrictions, set out in a license, prevent competition between new and used products, causing increased costs and reduced availability of products to the consumer. A healthy competitive market for new and used products would reduce prices and improve the quality of products available to the consumer.

VII. CHOICE OF LAW, CHOICE OF FORUM, AND ARBITRATION PROVISIONS

U.C.I.T.A. authorizes the use of very flexible (from a vendor perspective) choice of law, choice of forum, and arbitration clauses to the disadvantage of the consumer. Again, in a mass market setting, U.C.I.T.A. permits a person or entity in the manufacturer-assembler-vendor chain to bring an action to enforce a license provision in any United States forum. Those in the manufacturer-assembler-vendor chain would be able to select the application of a law favorable to their

29. Some examples include video drivers, print drivers, camera drivers, scanner drivers, audio drivers, and networking or connectivity drivers.
30. U.C.I.T.A. does not define "hardware." "Software" is defined broadly to include the computer program, informational content contained in the program, and any supporting information provided by the licensor. U.C.I.T.A. § 102(64) (2000). "Computer program" is defined in terms of directing a computer to bring about a certain result. U.C.I.T.A. § 102(13) (2000). U.C.I.T.A. also defines "computer" broadly as an "electronic device that can perform substantial computations, ... without human intervention during the computation or operation." U.C.I.T.A. § 102(10) (2000).
33. Possibly also in a foreign jurisdiction and forum.
view of the legal issues presented. Choice of law provisions stipulate a legal regime favorable to the drafter of the contract, which is always the manufacturer-assembler-vendor and not the consumer.\textsuperscript{34} When coupled with similarly biased terms, like mandated and binding arbitration, the consumer is left with little power or ability to litigate or contest the practices of parties in the manufacturer-assembler-vendor chain or any other aspect of the product. Arbitration has come under repeated attack as a biased and one-sided process favoring the manufacturer-assembler-vendor. Arbitration clauses usually name a particular arbitrator, who benefits from that contractual mandate of the manufacturer-assembler-vendor. Would a rational manufacturer-assembler-vendor name an arbitrator in their contracts if that arbitrator tended to rule against the manufacturer-assembler-vendor? These clauses also usually call for the consumer to pay for at least half of the arbitration costs. It is highly unlikely that the typical consumer would willingly incur such a high cost to pursue a grievance against a vendor protected by U.C.I.T.A. In practical terms, by assenting to binding arbitration, the consumer generally loses access to the courts in seeking a fair resolution of any dispute with a U.C.I.T.A. protected vendor.

\textbf{VIII. U.C.I.T.A. Weakens Article 2 Standard For Warranty By Demonstration}

Article 2 of the Uniform Commercial Code provides for a warranty by demonstration standard and establishes a framework for commercial transactions, involving the sale of goods.\textsuperscript{35} U.C.I.T.A. weakens the Uniform Commercial Code provisions by establishing that software products delivered to the consumer-purchaser need not match a demonstration.\textsuperscript{36}

U.C.I.T.A. offers the consumer no more than an "AS IS" warranty. Software publishers may sell the software with warranty restrictions and limitations allowed by U.C.I.T.A. and the consumer

\textsuperscript{34} Even if the license terms do not contain a choice of law provision, U.C.I.T.A. provides a set of rules to establish a choice of law favoring the manufacturer-assembler-vendor. If no choice of law provision is stated, then: (1) if the contract involves providing access or electronic delivery of a copy then the law of the jurisdiction where the licensor was located when the agreement was entered into; (2) if the consumer contract provides for delivery of a tangible copy then the law of the jurisdiction where the copy is or should be delivered to the consumer will be used; (3) in any other cases, then the law of the jurisdiction with the most significant relationship to the transaction governs. U.C.I.T.A. § 109(b) (2000).

\textsuperscript{35} U.C.I.T.A. § 400 (2000).

is left with essentially no warranty.37 U.C.I.T.A. promotes a "Buyer Beware" theme which is harmful to consumer confidence and trust. Used car sales involve a similar lack of warranty protection, but have given rise to legislation and case law affording consumers rights against "lemons" which inevitably turn up in the marketplace.38

IX. U.C.I.T.A. DOES NOT INVALIDATE PUBLIC CRITICISM RESTRICTIONS

One particularly offensive provision incorporated into shrink-wrap, click-wrap, and other similar software sales agreements is the condition that the consumer-user not disclose the functions and operation of the software and not publicly criticize the software. Public comment and discussion on product quality are essential to an efficient and free marketplace. U.C.I.T.A. permits comment and criticism restrictions that may well infringe important First Amendment rights of free speech. No body of codified contract law currently addresses cases where contractual provisions seek to prevent a buyer from commenting about the quality of the product purchased. It is assumed under the U.C.C. that such cases will be fact specific and that courts would invalidate terms found to violate public policy. Proponents of U.C.I.T.A argue that contractual provisions to limit comment are proper. Citing the laws governing trade secrets, trademark, and unfair competition, U.C.I.T.A proponents seek to extend this prohibition to end user licensees. Such a step is unprecedented. It appears that U.C.I.T.A proponents have attempted to wear down the public criticism provision. The National Conference of Commissioners on Uniform State Laws (NCCUSL) appear to agree with the A.B.A. working group on U.C.I.T.A that the public criticism provision must declare unenforceable a license term prohibiting public discussion about quality or performance when "any computer information . . . is placed generally into the stream of commerce."39

Other provisions found in U.C.I.T.A. seem to promote the use of onerous, unexpected and non-disclosed terms favoring the software manufacturer-assembler-vendor over the consumer. Consumers have reason to fear that U.C.I.T.A. impliedly promotes

37. U.C.I.T.A. § 406 (Disclaimer or Modification of Warranty).
manufacturers-assemblers-vendors. Even if the courts eventually find these provisions to be contra bonos mores and illegal, it will take years of continued litigation and millions of dollars in litigation costs to resolve the issues. In the meantime, such provisions would create a serious chilling effect on consumers and their willingness to discuss product defects and malfunction. Many software licenses now contain provisions prohibiting publication of articles critical of the purchased product or any aspect of its function and use. Media commentators are likely to avoid the risk of a lawsuit in lieu of the marginal benefit in publishing such articles. It is dubious public policy to prevent the sharing of product information, especially critical commentary and studies.

X. LIBRARY RESTRICTIONS

The public good generated by America’s library system cannot be overstated. U.C.I.T.A. provides for transfer and acquisition restrictions on mass market software and information products that would seriously undermine the ability of our libraries to provide information product access to their patrons. These restrictions would cause libraries to incur great expense in legally allowing public access to such products. Libraries would be forced to either seek additional public or private funding or pass the expenses on to the consumer-patron. The latter option would likely reduce the benefit and utility of the library system. It would surely increase the technology gap between the wealthy and poor. Libraries frequently supply the only access to technological advances for America’s less privileged and poor. U.C.I.T.A proponents, in an effort to quiet some of the opposition, have agreed to make some library exceptions to U.C.I.T.A. These concessions have not appeased the librarians who continue to oppose U.C.I.T.A.

XI. PERMITS EXCLUSION OF INCIDENTAL AND CONSEQUENTIAL DAMAGES

Article 2 of the Uniform Commercial Code provides key benefits to the consumer in the form of the doctrine of failure of essential

purpose of a limited remedy. However, U.C.I.T.A. seeks to preclude the benefits of that doctrine by allowing standardized terms which preserve the exclusion of incidental and consequential damages. U.C.I.T.A. goes further to enforce the exclusion of incidental and consequential damages even when an agreed exclusive remedy fails or would be unconscionable.

XII. U.C.I.T.A. DOES NOT REQUIRE DISCLOSURE OF KNOWN DEFECTS

Software testing and customer feedback are important sources of information about product defects. Under U.C.I.T.A., software manufacturers-assemblers-vendors are not required to disclose product defects to buyers. This lack of protection will lead to a lack of necessary recalls and corrective measures. Concealment of known defects simply compounds the ill effects of U.C.I.T.A.’s strong support for warranty disclaimers and remedy limitations.

XIII. EMBEDDED SOFTWARE BOMBS ARE APPROVED BY U.C.I.T.A.

Self help provisions are found in U.C.I.T.A. Software manufacturers are embedding “logic bomb,” self-help programs within their software to control the use of the software post-sale, to prevent license violations, and to insure payment terms are met. By labeling the sale of software as a “license,” software manufacturers


42. U.C.I.T.A. § 803(c),(d) (2000).


44. Security flaws purposefully designed into the software which permit back door entry by the software manufacturer and are also potential entry points for hacker intrusion. In U.S. v. Sullivan, 40 Fed. Appx. 740 (4th Cir. 2002), the court of appeals affirmed defendant’s conviction for intentionally damaging his former employer’s computer network by inserting a logic bomb thereby remotely disabling the entire system.

45. Proponents of U.C.I.T.A. suggest that self-help can only be used for “material” violations of the license. U.C.I.T.A. § 814 (2000). When coupled with complete immunity for damages and losses caused by self-help, it is difficult to believe that this self-help provision will not be openly abused.
can engage in self-help by permitting the software to terminate unless passwords are entered to reset the internal program clock or usage counter so that the software can continue to be used. If the consumer-user fails to comply with the demands of the manufacturer then the software timer expires and the software ceases to function. Any real or perceived violation of the license terms could result in remotely triggered termination. Self-help mechanisms are also used in data software which issues updated versions. Unsolicited termination of the software in order to force the consumer to purchase an updated version highlights the need to restrict, not promote, the use of software self-help programs.

Proponents of U.C.I.T.A. label these latent intentional defects as "restraints," thus trivializing the severity of this unilaterally invoked sellers remedy. It should be recalled that U.C.I.T.A. immunizes the manufacturer-assembler-vendor from any liability in the event damage or loss is suffered by the purchaser-user of the software. While there are minor limitations on the use of the self-help provisions, these limitations are very weak in comparison to the power the licensor is wields under U.C.I.T.A. U.C.I.T.A. would force consumers-users to sue for temporary restraining orders and other injunctive relief, thereby shifting the burden of proof and expense to the purchaser of the software, as opposed to forcing the manufacturer-assembler-vendor to initiate copyright and license infringement actions. It seems to be better public policy to force the party who alleges a breach to bring an action and prove that breach than to force a consumer to file a suit to enjoin a manufacturer-assembler-vendor from remotely terminating the use of the software. U.C.I.T.A. thus incorporates a presumption that the


48. Compare other self-help mechanisms, like the credit billing, credit reporting and debt collection processes. Alleged protections to stem abuse of the power structure favoring the the creditors, credit reporting agencies and debt collectors have been proven to be very limited and interpreted against the consumer. Cf. Consumer Credit Reporting Act of 1968, 15 U.S.C. §§ 1666, 1681, and 1692 (1998) and the cases reported under those statutes. The Federal Trade Commission studies and actions have shown that when an industry is afforded self-help and similar powers, those powers are frequently abused despite efforts to provide notice-based protections to the consumer. Consumers are ill-equipped to combat abuses and litigation to correct abuses have little effect to promote compliance.

49. U.C.I.T.A. is actually an effort to displace federal copyright law and to rewrite the laws of contract where these computer information transactions are involved.
licensee is in breach and is forced to sue to recover the use of the purchased software.

The inclusion of licensed computer software in various, common types of computer and software driven devices could open U.C.I.T.A. sanctioned software self-help to sellers and lenders of these computer and software driven devices. Some software vendors and lenders have already begun to embed termination programs in the software used in the automobiles that they sell. If the consumer fails to pay timely or if the lender thinks the consumer fails to meet some term of the agreement, then the auto may be remotely disabled. As autos are bought, sold and moved into Louisiana, the potential for self-help programs being used in Louisiana raises considerable legal concern because Louisiana does not permit extra-judicial self-help. In the event of a default on a car loan initiated outside of Louisiana, a lender

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50. These will likely include all forms of financed sales and leases of movables.
51. Generally, these take the form of Time Bombs, Drop Dead Devices, Disabling Devices, Termination Programs, and Stop Devices.
who elects to initiate remote deactivation of the software might do so unaware that the device is located in Louisiana.

Remote termination of the software may likewise endanger persons utilizing the software, leading to personal injury liability in addition to data and business interruption damages which are also likely to occur. It is easy to envision the use of this feature to incapacitate an auto under U.C.I.T.A. 's self-help provisions. If that auto were in use at the time, termination could result in danger to the passengers as well as other persons and property on and along the roadways. One might also expect a number of accidental terminations due to accounting errors, mis-posted payments, wrongful allegations of license breach, defects in the termination programs, and other reasonably expected unjustified or otherwise wrongful interruptions. 54

XIV. LEADING CASES

The first case to address shrink-wrap licenses was a Louisiana action. In Vault Corp. v. Quaid Software Limited, 55 the court found that a shrink-wrap license agreement was contrary to federal copyright policy and constituted an impermissible contract of adhesion under Louisiana law. The terms of the shrink-wrap license were not valid or enforceable. In fact, prior to the action, the Louisiana Legislature passed a law validating the use of shrink-wrap license agreements. 56

The next case was Step-Saver Data Systems, Inc. v. Wyse Technology, 57 where the court of appeals held that the shrink-wrap (box top) license terms that excluded warranties and limited remedies available to the software purchaser were in violation of U.C.C. Section 2-207. These exclusions were contained in the shrink-wrap license terms which had not been previously disclosed to the buyer or reseller of the software. The terms were added after the sale transaction was completed. The court found that the disclaimers were an attempt to make material alterations to the pre-existing agreement between the parties. The court invalidated the shrink-wrap license.

Following Step-Saver, the United States District Court for the District of Arizona faced a similar shrink-wrap issue in Arizona Retail

54. Louisiana law evidences a strong public policy against self-help activities as such activities tend to lead to unnecessary and wrongful damages to Louisiana residents. Price, 745 So. 2d 593.


57. 939 F.2d 91 (3d Cir. 1991).
The court upheld a shrink-wrap license agreement and liability limitation provisions contained therein, with respect to one sale to a reseller but only because the reseller had a copy of the license before the reseller agreed to purchase the product. Nonetheless, the reseller sold the product to consumers and end users who never saw the shrink-wrap license agreement and its liability limitation provisions before the product was delivered post-sale and post-payment. Of course, the court found that the shrink-wrap license agreement and liability limitation provisions were enforceable against the reseller but not enforceable against the consumers-end users because they were an attempt to add terms in violation of Section 2-207 of the Uniform Commercial Code.

In *Morgan Laboratories, Inc. v. Micro Data Base Systems*, the court refused to enforce a shrink wrap license’s forum selection clause. The court found that the contract between the parties required any modifications to be made in writing. The court found that there was no evidence that the original user license contained the forum selection clause. Defendant’s motion to dismiss for improper venue was denied. Citing *Arizona Retail Systems v. Software Link, Inc.*'s, the court noted that U.C.C. section 2-209 requires assent to proposed modifications to be express and not inferred merely from a party’s conduct in continuing with the agreement.

The first case to favor the enforceability of shrink-wrap agreements was *ProCD v. Zeidenberg*, where the vendor, ProCD, was the developer of a telephone number, name look-up and reverse look-up software product. This was a retail product made available to the mass market. The shrink-wrap license limited the use of the product to non-commercial purposes. Defendant extracted the data and made it available on a publicly accessible web site. The District Court held that the shrink-wrap terms were invalid and unenforceable. The Court noted that the terms were preempted by the federal copyright law. The court noted that the purchaser had not

60. *Arizona Retail Sys.*, 939 F.2d 91.
61. 86 F.3d 1447 (7th Cir. 1996).
62. In *U.S. Surgical Corp. v. Orris, Inc.*, 5 F. Supp. 2d 1201, 1205-06 (D. Kan. 1998), the Court found that a single use restriction contained on the product packaging was not a binding agreement and was invalid. The Court found that the sales contract concluded when the vendor received the consumer orders. The single use language on the product label was nothing more than a proposed modification under U.C.C. § 2-209 which required the express assent of the consumer-buyer. This finding was consistent with *Step-Saver*, 939 F.2d 91.
63. 908 F. Supp. 640, 655 (W.D. Wis. 1996), rev’d, 86 F.3d 1447 (7th Cir. 1996).
seen the terms prior to purchase and, therefore, did not have the ability to bargain or object to the terms or to even review them before the purchase and payment were made. The Seventh Circuit Court of Appeals reversed based upon policy reasoning, not controlling precedent.64

Courts have also begun to consider click-wrap license terms. Click-wrap terms are the electronic version of shrink-wrap terms that require the purchaser to assent by "mouse clicking" an "I agree" or similar window button before the underlying software package will install or operate. Plainly, click-wrap processes differ from shrink-wrap.

In *M.A. Mortenson Co. v. Timberline Software Corp.*,65 the court enforced a limitation on consequential damages found in a shrink-wrap agreement which accompanied the software as delivered by the reseller. This was a non-consumer case involving a contractor that submitted a bid off by $2 million due to a software error. The court found that the shrink-wrap license had been opened by the contractor's employees who tried to install the software and who ignored the license terms. The conspicuous license set forth a number of disclaimers and offered to the purchaser the right to reject the new terms in the license and to return the product for a "full refund" if the new terms were unacceptable. Use of the software constituted acknowledgment of and assent to those new license terms. The court found that Mortenson knew about the various terms in the shrink-wrap license because they had other similar software. In fact, the subject software was an updated version. The Court cited and relied upon *ProCD* and *Hill v. Gateway 2000*66 in finding that shrink-wrap licenses are generally enforceable.67 The court also rejected Mortenson's defense based on U.C.C. 2-207, commonly referred to as the "battle of the forms." The court distinguished *Step-Saver* finding that the facts in *Mortenson* did not fit the provision. Lastly, the court found that the limitation of liability clause was not substantively or procedurally unconscionable. The court found the clause to be a mere risk allocation for latent defects in the software.

64. *ProCD*, 86 F.3d 1447.


In *I.Lan Systems, Inc. v. Netscout Service Level Corp.*, the court considered whether a click wrap agreement would be enforceable under the Uniform Commercial Code. The court found that the computer company confronted the click wrap license agreement in a window box and was asked whether it agreed to the license. The license page required the user (computer company in this case) to mouse click on the "I Agree" box to proceed. The court found unequivocal assent to the terms of the license. The court thus found the click wrap license to be enforceable.

In *Register.Com, Inc. v. Verio, Inc.*, the court held that the user of an internet domain name database had manifested its assent to the database terms and license, which were prominently displayed, when the user electronically submitted queries to the database after acknowledging the terms. The court also enforced a license agreement in *Moore v. Microsoft Corp.*, finding adequate proof of assent, where the user was presented with a computer screen prominently displaying the license terms and requiring the user to click on a box marked “I Agree” before being allowed to proceed to use the software.

In *Barnett v. Network Solutions, Inc.*, the court enforced a forum selection clause in an online contract for registering internet domain names. The domain name site required the users to scroll through the terms and conditions before indicating an acceptance or rejection of the terms and conditions. Other courts have likewise enforced licenses where the terms are prominently displayed and clearly accepted by the user through active assent. Courts finding a lack of assent involved disguised terms and sites obscuring the terms.

In *Groff v. America Online, Inc.*, and *Caspi v. The Microsoft Network, LLC*, the courts enforced forum selection terms in a click-wrap license between an internet service provider and their subscriber. In the wake of these decisions, there has been a rapid growth in the use of click-wrap license terms. The click-wrap licenses are particularly troubling when used after download of software is completed or payment is already made, prior to the

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70. 293 A.D.2d 587 (N.Y. App. 2d Dept. 2002).
72. See also America Online, Inc. v. Booker, 781 So. 2d 423 (Fla. Dist. Ct. App. 1999) (upholding forum selection clause in “freely negotiated agreement” in online license).
disclosure of the terms. Again, there is no advance disclosure of the terms and no opportunity to reject or negotiate the terms, reject the software, or reject the sale and reverse the payment transfer to the licensor.

Mandatory arbitration clauses buried in shrink-wrap or click-wrap or other online acceptance means have also been the subject of litigation. In *Hill v. Gateway 2000, Inc.*, 76 *Lieschke v. RealNetworks, Inc.*, 77 *Simon v. RealNetworks, Inc.*, 78 and *Brower v. Gateway 2000, Inc.*, 79 the courts enforced mandatory arbitration clauses in click-wrap and shrink-wrap license terms involving the sale of computer hardware that included software products. Recently, in *Specht v. Netscape Communications Corp.*, 80 plaintiffs, computer users and web site provider, sued defendants, software vendor and its parent company, alleging violations of the Electronic Communications Privacy Act and the Computer Fraud and Abuse Act. Plaintiffs claimed that defendants provided free software to download and then defendants were able to cause the user’s computers to transfer very private information to defendants while that software was in use. Defendants failed to advise the plaintiffs of this deceptive, high-tech invasion of privacy. The court in *Specht* denied defendants’ motion to compel arbitration. Defendants claimed that a license agreement contained in the software downloaded provided for arbitration. The court found that the download process occurred without any act to assure that the consumers manifested assent to the terms of the license and without any indication that the consumer understood that an alleged “contract” was being formed. The Court noted that unlike some shrink-wrap and click-wrap cases, the user was not made aware that he/she was entering into any alleged contract at all.

Only one court 81 has enforced an extremely restrictive subscriber license term between an e-mail service provider and a subscriber prohibiting the subscriber’s transmission of unsolicited e-mail. While the court did not pass on the issue of whether the click-wrap subscriber terms were enforceable, the court did ultimately enter a preliminary injunction against the subscriber.

76. 105 F.3d 1147 (7th Cir. 1997).
78. *Id.* Editor’s Note—*Simon v. RealNetworks, Inc.* was consolidated with *Lieschke*, and is found at the same citation.
More recently, in *Klocek v. Gateway, Inc.*, the plaintiff sued a scanner manufacturer and vendor because of malfunctions in the scanner after the sale. The court found that the manufacturer failed to produce evidence proving that the plaintiff agreed to an arbitration clause contained in a shrink-wrap license. The manufacturer had mailed the license terms, including the arbitration clause, to the consumer inside the computer box for plaintiff’s later perusal. These terms were not available or even made known to the consumer prior to receipt of the box. Citing *Step-Saver*, the court found that the parties’ conduct evidenced a contract for the sale of a computer, the subject of Article 2 of the U.C.C. The *Klocek* court rejected *Hill’s* and *ProCD’s* conclusion that the “vendor is the master of the offer” because there was no support for that conclusion under the applicable Kansas or Missouri law, concluding instead that U.C.C. section 2-204 was applicable. The *Klocek* court found that in consumer cases, the purchaser-consumer is the offeror and the vendor is the offeree. The court went on to find that no conditional sale took place because Gateway never conditioned the sale on the non-disclosed additional terms in the shrink-wrapped package. The court found that the vendor must clearly disclose all of the terms at the time of the sale or, at a minimum, advise the consumer that additional terms exist and make the sale conditional.


**XV. LOUISIANA’S SOFTWARE LICENSE ENFORCEMENT ACT**

Louisiana enacted the Software License Enforcement Act designed to legitimize shrink wrap licenses in computer software and circumvent the law of sales in Louisiana. In Louisiana Revised Statute 51:1963, the act provides that any person who acquires

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84. 104 F. Supp. 2d at 1341 n.4.
computer software is "conclusively deemed" to have accepted and agreed to all terms of the license agreement for the software if a notice is "affixed to, or packaged with the software" in a manner so that the notice is "clearly and conspicuously visible upon cursory examination of the software and related packaging." It is further required that the notice be in "all capital letters" and in "language which is readily understandable to a person of average literacy." The notice must "clearly state" that use of the software constitutes acceptance of the terms of the license. The section proceeds to permit "[A]ny opening of a sealed package . . . in which the software or a copy thereof is contained will constitute acceptance of the terms of the accompanying license agreement." Section 1963 also provides that anyone who receives the software or a copy of the software but who does not accept and agree to the terms of the license may return the unused, unopened software or copy for a full refund. This section of the Software License Enforcement Act permits undisclosed terms to be foisted upon the consumer post-sale, under the guise of a license agreement.

Section 1964 of the act enumerates specific license provisions "deemed to have been accepted under R.S. 51:1963" if the license agreement conforms to the provisions of Revised Statute 51:1965. Section 1964 permits title retention by the licensor of the software. The licensor can prohibit copying of the software and impose limitations upon use of the software. Section 1964 also permits prohibition or restrictions on "translating, reverse engineering, decompiling, disassembling, and/or creating derivative works based on the computer software." Section 1965 of the act provides that in order for the software acquirer to be deemed to have accepted the license terms, the license agreement must be "clearly and conspicuously stated in the license agreement in language readily understandable to the person of average literacy." Further, the statute provides that the license agreement "must be attached to or packaged with the copy of the computer software." The license agreement and terms must be "susceptible to being readily examined before the act which is deemed to constitute acceptance occurs." This section reaffirms the legislature's desire to allow sales to take place before the customer learns of the license terms. The Software License Enforcement Act raises more questions than it answers. Louisiana is one of only

94. Id.
several states which have passed laws allowing software companies to impose certain contractual terms upon purchasers through the use of shrink wrap license agreements. Of course, in *Vault Corp. v. Quaid Software Limited*, the U.S. Fifth Circuit Court of Appeals held that Louisiana’s Software License Enforcement Act is preempted by federal copyright law and, therefore, unenforceable.

XVI. THE BEST SOLUTION: THE BOMB SHELTER PROVISION

Exactly what part of U.C.I.T.A. favors the consumer? None. Some states have refused to pass this special interest legislation and have begun enacting “bomb shelter” provisions to prevent the application of U.C.I.T.A. Frequently, consumers encounter shrink-wrap, click-wrap, keystroke, and mouse-click internet contractual provisions calling for an agreement to use the law of a state favoring and enacting U.C.I.T.A.

Though proponents have lobbied hard for states to pass U.C.I.T.A., to date, only two states, Maryland and Virginia, have passed versions of U.C.I.T.A. The legislation enacted by Maryland incorporated a number of changes from the model being peddled by the software industry. The Maryland legislature amended the model version to remove some of the most controversial provisions. Virginia, however, passed a version which is extremely similar to the model act.

Arizona is currently considering a significantly altered version of the model act. The City Council in the District of Columbia is considering a U.C.I.T.A. bill introduced on March 27, 2001, which has been referred to committee. Proponents suggested that U.C.I.T.A. would be introduced in Florida and Georgia in 2001 but neither was

95. 847 F.2d 255 (5th Cir. 1988).
97. State legislation might become moot if Congress decides to step in and support and pass some version of U.C.I.T.A. Federal preemption can remove state efforts to help under the guise of uniformity. Congress’ track record of protecting consumers is somewhat weak. Consider that most federal consumer protection laws are lobbied for and favor the industry rather than the consumer. However, most federal laws claiming to protect consumers are given deceptive names, for example, Fair Credit Reporting Act, Fair Credit Billing Act, etc.
introduced. In Oklahoma, New Hampshire,100 Maine,101 and Illinois, U.C.I.T.A. bills died after introduction. In Hawaii, U.C.I.T.A. was introduced in 2000 and revisited in 2001 but was ultimately tabled due to controversy. In Rhode Island, a U.C.I.T.A. bill was withdrawn due to overwhelming opposition. Two U.C.I.T.A. versions were introduced as bills in the Texas and New Jersey Legislatures in 2001 but all of the bills died.102 In 2001, U.C.I.T.A. was introduced in special session in the State of Washington. The Republican Caucus began efforts to pass U.C.I.T.A. as part of a large economic development plan in Wisconsin. It is expected that U.C.I.T.A. proponents will continue to try building alliances in the hopes of slipping this legislation into law.

On the other side of the issue, Iowa lead the charge to protect its residents and businesses by enacting a bomb shelter provision.103 The provision exempted Iowa residents and businesses from the effects of U.C.I.T.A. and specifically denies the application of another state’s law, pursuant to choice of law clause if any version of U.C.I.T.A. is the chosen law of that state.104 The original legislation, part of an Electronic Transaction Act proposal, passed with a planned expiration date of July, 2001. Even after studying U.C.I.T.A. in the interim, the Iowa Legislature renewed the bomb shelter provision thereby continuing the protections until 2002.105 Iowa’s legislation has been hailed as a valiant effort to protect its citizens from the special interests of the software industry.106 Following Iowa’s lead, West Virginia107 and North Carolina108 passed bomb shelter provisions to protect their residents and businesses from U.C.I.T.A.
Other states currently have bomb shelter provisions under consideration. New York, North Dakota, Ohio, and Oregon have such bills pending. Those bills follow the model bomb shelter language employed by Iowa and West Virginia. Only North Dakota considered a bomb shelter provision that was rejected by the legislature. Reintroduction is likely and its consideration is being pressed by business leaders. Note that some states have proposed amendments to please interest groups that oppose U.C.I.T.A.

One alternative would require the states and federal legislative bodies to re-work many existing consumer laws to specifically make them applicable to “licensees” and software “licenses.” This would be an enormous undertaking for the sole purpose of appeasing the software industry. It would involve revising thousands of consumer protection statutes, many of which interact with other statutes.

In closing, U.C.I.T.A. is an extreme measure being advanced by the software industry in the hopes of enacting at least parts of it into state law. The states should stand firm and reject the passage of U.C.I.T.A. inspired legislation, and indeed, enact bomb shelter provisions to prevent the application of foreign state’s U.C.I.T.A. derived statutes through “choice of law” provisions in software licenses. Consumer protection should take precedence over the special interests of an industry that will not play by the same rules as other vendors of goods.

110. S.B. 2429, 57th Leg. Assembly (N.D. 2001). S.B. 2429 was defeated in committee but is expected to be re-urged next session.
114. For example, the New Jersey Law Revision Commission proposed exempting libraries, a major coalition opposing U.C.I.T.A., from the effects of U.C.I.T.A. The New Jersey Law Revision Commission was charged with an extensive study of U.C.I.T.A. and drafted an amendment to try to gain the support of the library community which has been most vocal about the oppressive nature of U.C.I.T.A. See http://www.4cite.org/ (last visited Feb. 24, 2003). “Divide and conquer” seems to be the message from U.C.I.T.A. proponents.