
Why Tech Council of Maryland Should Work to Repeal UCITA

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*This presentation contains the views of the author and does not indicate
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Bottom Line

- **MD UCITA law is a bad anti-business, anti-consumer law**
 - Created to benefit a few large software companies
 - MD modified, but still left *many* dangerous clauses
 - Widely opposed: 26 State Attorneys General, ACM, IEEE, AFFECT, Boeing, Walgreen, Perdue Farms, ...
 - 4 anti-UCITA (“bomb shelter”) states, 2 UCITA states
 - Abandoned by its promulgator
- **Harmful to software companies & business users, e.g.:**
 - Can be used to forbid criticism/benchmarks
 - Can be used to forbid reverse engineering-even for security!
 - Terms easily changed by vendor (inc. via patches)
 - Cannot transfer; mergers can cause expensive relicensing
 - Many other problems
- **Hi-tech council should work to repeal UCITA**

What's UCITA & Its History?

- **UCITA = Uniform Computer Information Transactions Act**
 - Originally to update Uniform Commercial Code (UCC) for shrinkwrap software sales, by National Conference of Commissioners on Uniform State Laws (NCCUSL) & American Law Institute (ALI)
 - 1999: ALI withdrew development. Unprecedented – Uniform laws usually by NCCUSL, ALI, & ABA
 - 2000: Pitched to states as a “new econ” law. Passes in VA & (modified) MD; Iowa 1st to pass anti-UCITA
 - 2001: WV & NC pass anti-UCITA (“bomb shelter”)
 - 2002: American Bar Association (ABA) says: redraft!
 - 2003: NCCUSL discharges UCITA Standby Drafting Committee, announces it'll stop promoting UCITA.
 - 1999-2004: 26 states considered, only 2 passed

Maryland Version of UCITA

- Originally UCITA was supposed to be same in all states
- UCITA so bad that Maryland legislature made many changes, due to large number of egregious clauses
- Passed as “Maryland Uniform Computer Information Transactions Act”, House Bill 19 (2000)
- Still a bad bill
 - Start with odious law, change few things, still bad

UCITA Opponents

- **33 Attorney Generals (22 State AGs) signed in 2001**
 - "UCITA is so flawed that any amendments which could reasonably be expected . . . would not significantly ameliorate UCITA's negative impact on consumers or on the marketplace"
... now grown to 26 State Ags oppose
- **Businesses**
 - Boeing, Walgreen, Perdue Farms, Caterpillar Inc., Principal Financial Group / Principal Life Insurance Company, Prudential Life, Security Mutual Life, ...
- **Professional Software Developers & Consultants**
 - ACM, IEEE-USA, Software Engineering Institute, Independent Computer Consultants Association (ICCA), Association of IT Professionals (AITP)
- **"UCITA Bomb Shelter" States: IA, NC, VT, WV**
- **AFFECT (www.ucita.com)**
- ***Many others***

MD UCITA Enables Forbidding of Criticism & of Benchmarks

- In UCITA, nearly any vendor licence term is enforceable
 - Extremely high legal bar: “Unconscionability”, “fundamental public policy”; little incentive for sw vendors self-restraint
- Reviews/criticism/benchmarks of software necessary
 - Users (inc. Businesses): Give insight for selection
 - SW Vendors: Enable better products to demonstrate it
- Typical clause “can't report unless we approve it”
 - MS Windows Server 2003: “Disclosure of the results of any benchmark test of the .NET Framework component of the Software to any third party without Microsoft's prior written approval is prohibited” (*not* relaxed for users)
 - Others: Oracle, Network Associates, ...
 - Oracle refused PC Magazine permission to benchmark

MD UCITA Enables Forbidding of Reverse Engineering

- In UCITA, nearly any vendor licence term is enforceable
 - “No reverse engineering” is common clause, though usually unenforceable, to scare away competition
 - 2001 amendment allows reverse engr for interoperation... *not* for finding/correcting security flaws
- “Reverse Engineering”: Examining product/behavior to determine how it works
 - *Critical* for business users, to enable businesses to integrate software products
 - *Critical* for software vendors, so can interoperate
 - *Critical* for independent security evaluation
 - *Critical* for novel uses (for innovation)
 - Considered a fundamental right in the EU
- Companies may need to move from MD so they can perform⁷ software security analysis (a MD specialty)

MD UCITA Enables Arbitrary Relicensing Via Upgrades/Patches

- In UCITA, nearly any vendor licence term is enforceable
- True for upgrades & patches, too
 - Would you like this security upgrade? Here, agree to whatever we tell you...
 - Many companies *cannot* easily switch software after selection; extortion opportunity
- Vendor can simply change via website post
- Original UCITA even worse; license valid, even if customer never saw it (!)
- Creates new business risk

MD UCITA Enables Expensive, Unnecessary Relicensing

- **Usually shrinkwrap software sales considered sales**
 - **"Walks like duck"**
- **UCITA redefines a software sale as a license, not a sale**
 - **Vendor can forbid donation, transfer, resale of software**
 - **Even in a merger/acquisition: Unnecessary relicensing after merger/acquisition can cost MD businesses \$millions or \$billions**
 - **Increases business costs & risks: Inability to resell unused software if doesn't work out or no longer needed**
- **Vendors *are* interested in exploiting this kind of loophole**
 - **Microsoft filed objection to 2002 Kmart sale of Bluelight.com to United Online, saying relicense needed**

Other UCITA Problems

- **Original UCITA has many other dangers:**
 - **“Self-help”:** Vendor can disable software remotely without due process, warning, or recourse
 - Security threat; Enables extortion/extreme vendor responses
 - NCCUSL removed 2002; kept “automatic self-restraint” (~)
 - MD version permits for non-mass-market
 - License enforceable even if can't be viewed until after sale, or imposed in required patch/upgrade
 - License can be changed by vendor without notification (other than posting at vendor site)
 - No warranty (arguably okay for OSS: can review it thoroughly, fix self, and redistribute fixes; *not* okay for proprietary!)
- These clauses show UCITA is business-unfriendly
- MD legislature tried to remove some problems, but the starting point was too flawed to fix

MD Should Repeal UCITA

- Hi-tech council should work to repeal UCITA
 - Originally pitched as a law that would *become* country-wide and encourage hi-tech industry
 - *Not* country-wide, and never will be; more anti-UCITA than UCITA states
 - *Discouraging* local hi-tech industry
 - Particularly harmful to SMEs & OSS vendors
 - Harmful to security companies (a MD specialty)
 - *Not* encouraging rest of industry
 - Creates difficulty in learning truth about potential products, barriers for internal integration, excess costs (esp. during mergers/acquisitions), mgmt risks
 - Now abandoned by NCCUSL, its supporter
 - Experiment that didn't work