UCITA: Why Consumers Should Read The Fine Print

Fundamentally, the sale of goods differs from the license of information: when a good is sold, title passes and the buyer owns the item exclusively. Not so with content - the transactional framework is typically non-exclusive, the licensor retains a number of rights, and there are limitations to the uses a licensee can make of the information. A further consequence of non-exclusive content licensing is that so-called "mass market" licenses are typically non-negotiable and are presented to consumers on a take-it-or-leave-it basis. The Uniform Computer Information Transactions Act ("UCITA" or "the Act"), which parallels existing commercial laws for the sale of goods, was recently passed to accommodate the changed world of software licenses, online database agreements, multimedia interactive products and website use contracts, and to attempt to level the playing field between licensors/service providers and users.

UCITA provides a contract framework from formation, to terms and performance, and remedies for breach of an agreement. Some view UCITA as consumer protection legislation: a number of contract provisions cannot be waived, including those related to fairness, good faith, diligence, reasonableness, limitations on enforcement of unconscionable agreements, fundamental public policies, and certain standards of care. But UCITA is largely a default model. That is, the specific terms of an agreement will govern a transaction, and UCITA is only triggered if the agreement does not address an issue, or a court cannot fill in the blanks by referring to a course of dealing or past performance.

Mass Market Licenses:

Because mass-market agreements present consumers with little choice, UCITA retains existing consumer protection laws and adds some limited additional protections. And under the Act, "consumers" may even include larger businesses, depending upon the nature of a transaction. Presumably, larger consumers have more leverage and may even be able to renegotiate some terms or possibly an entire agreement. Smaller users, though, do not have this power, and often compound their weaker position by not even reading their agreements.

Consumers generally assent to the terms of a mass-market agreement through the shrinkwrap or clickwrap mechanisms. The former refers to the plastic seal that surrounds the jewel case containing, for example, a software program. A user agrees to the terms contained on the packaging, by breaking the seal and accessing the content. Alternatively, a licensee may accept the terms of an agreement by clicking the "I Accept" button that usually comes up on a computer's start-up screen, prior to accessing actual content.

Under UCITA, such licenses are enforceable, but only if: 1) the terms are readily available to the licensee, and 2) the licensee has been provided with appropriate time to review the terms of the agreement. If a consumer does not like the agreement, he or she may return the object containing the information to the vendor for a full refund, plus reasonable expenses. Significantly, this right of return may not be waived or disclaimed.

Access Contracts:

Access agreements, which are generally also not negotiated, permit users to enter the computer of another to get information or use an information system for specific purposes. Examples include Internet service provider ("ISP") agreements and Web-based content agreements. Importantly, the Act specifically excludes these agreements from the definition of mass-market transactions, so that consumers do not get any corresponding UCITA benefits.

Moreover, information licensors are not required to provide support contracts or service contracts for corrections of performance problems. If they do provide such agreements, though, they are bound by the express terms of such contracts, or if an issue is not addressed in the contracts, by what is reasonable in light of ordinary standards of business, trade or industry.

Consumer Problem Areas:

A particular problem area for access agreements involving continuing performance (e.g. ISP or content supply agreements) is that vendors, assuming that the parties have agreed on a reasonable procedure for making and notifying users of changes to the agreement, can unilaterally modify their contracts. Consider the following scenario: The posted terms and conditions of your several thousand dollar per year Web content agreement conspicuously state that the terms of service can be changed by posting notice to a particular location on the licensor's website. Most users do not have the time or inclination to spend precious time continuously reviewing the website to monitor any changes to the agreement. Thus, significant, though probably permissible changes (like decreasing the scope of content or changing the agreement to an automatic renewal scheme) may fundamentally change the basis of your bargain with the licensor. Though you may still rely on state consumer protection laws, is it really cost-effective or time-effective to sue to enforce your rights?

Another problem area for consumers is the licensor gets to choose the applicable law and forum. This refers to the state or country's law that will apply to your contract and the site where you will have to sue to enforce your rights. Under UCITA, a vendor can choose any law, so long as it is not unconscionable, does not violates a fundamental public policy or would not alter a consumer protection law that would otherwise apply. The vendor's choice of forum will be valid unless it is unreasonable and unjust. If you live in Maryland, then, would you fly to California to enforce your rights under a $195 ISP agreement against a service provider headquartered there? I wouldn't.

The default rules are far more equitable. Where there is no agreed choice of law, the state of the licensor's principal place of business applies. Alternatively, where a tangible product is delivered, the law of the state where that product is sent governs - for example, the consumer's residence or where the transaction physically occurs. Finally, in other cases, the law of the state with the most significant relationship to a transaction applies.

A Consumer Checklist:

1) Duration: check how long the contract runs and make sure that it expires and does not automatically renew, unless you have an established relationship with a licensor.

2) Number of users: make sure that the license permits all the users that you will need. Under UCITA, silence implies a reasonable number of users, but is better to have clearly identified parameters.

3) Perfect Tender: applies in mass-market transactions involving a single tender of a copy. This means you can reject a copy that is not perfect. Otherwise, you cannot cancel a contract if the vendor substantially performs its obligations. For less than a material breach, then, you can only collect damages

4) License Transfers: vendors may prohibit transfers of licenses, even within a licensee entity. If you are a business entity, do not assume that you can assign rights to your affiliates and subsidiaries, unless that right is clearly spelled out in your agreement.

5) Warranties: under UCITA, statements in advertising and product documentation that form the basis of a bargain constitute express warranties, and licensors can disclaim all implied warranties. As a form of consumer protection, then, warranties are probably largely illusory for at least two reasons: (i) lawyers carefully review licensors' advertising copy to ensure that there are no loose factual statements that could form an express warranty, and (ii) since product documentation is generally available only after the purchase of a license, it seldom forms the basis of any bargain with the licensor.

6) Electronic Self-Help: this is one area where consumers actually are protected. UCITA narrowly limit the licensor's right of self-help (i.e. cutting off user access to the licensor's content). A licensor can only exercise this right if a) the licensee expressly agrees to a self-help clause; then b) the licensor can only use the remedy if the licensee cancels the contract; and c) even if self-help is permitted in an agreement, it may not be exercised if it poses a substantial risk to public health or safety or a grave harm to third parties; and d) the licensor must give the licensee 15-days notice of the licensor's intention to exercise the remedy and the licensee's right to an expediting hearing.

Conclusion:

With the growing number and complexity of electronic content and service agreements, it has become essential to have an attorney review your contracts. For even if you have little or no negotiating power, it is better to understand what you are agreeing to and consciously accept or decline the terms, rather than sign away significant rights or obligate yourself to an expensive, long-term agreement. For larger users, with more leverage, careful contract review and negotiation often separates good from bad deals.