

## COMMENTARY

By Neil Gross

# THIS LAW IS USER-UNFRIENDLY

**O**n Mar. 14, Virginia Governor James S. Gilmore III took a bold step down a dangerous path. He signed a law called the Uniform Computer Information Transactions Act (or UCITA), which decrees that software and other forms of digital information are fundamentally unlike conventional goods and services. The law—now in a 13-month review period—bestows some astonishing new rights and privileges on publishers of digital information. And it creates a radical new framework for settling disputes about who owns the information and how it is used.

Whether you are clicking on a mouse to install a new Web browser, downloading a music CD, or signing a large computer consulting contract, you may soon find yourself under this bill's magic spell. In coming months, nearly every state in America will have to decide whether or not to follow in Virginia's footsteps. The bill is now moving quickly through the Maryland legislature. Delaware and the District of Columbia could be next.

**DILUTION.** Software vendors love this complicated, densely worded legislation. But UCITA is setting off alarms with many software users, consumer advocates, and technology trade associations. For months, sponsors of the bill have been fielding critical letters from the Association for Computing Machinery, the Institute of Electrical & Electronics Engineers, the American Library Assn., the Consumers Union, directors of the Federal Trade Commission, and a long list of state attorneys general (table, page 98).

After studying various drafts of this legislation, most of these organizations have concluded that UCITA will dilute the warranty protection that customers receive under software licenses. It will also weaken their ability to sue software vendors



## The Uniform Computer Information Transaction Act grants extraordinary rights to software makers

whose programs are riddled with bugs.

And that's just the tip of a growing list of complaints. If computer hackers cripple your company—after exploiting a security hole in a software program that you have licensed—the software supplier will have no liability. (Never mind if the supplier knew about the hole.) What's more, in principle, a license could forbid you to sell—or give away—software or digital books you no longer need. And

forget about bad-mouthing software on the Net: The license may bar you from ever publishing your gripes.

Under UCITA, software vendors may also have the right to monitor your use of their products. If you abuse the terms of the license, as they see it, they may issue a warning, and then reach into your computer remotely to switch the program off. "In court, this law will give software publishers far too much leeway," says Vergil Bushnell, an e-commerce policy analyst at the Consumer Project on Technology, a group associated with Ralph Nader. Charles B. Shafer, professor of consumer law at the University of Baltimore Law School, agrees: "[UCITA] is a green light for all sorts of misleading, deceptive, and unfair conduct."

Proponents of UCITA say that consumer advocates have misunderstood

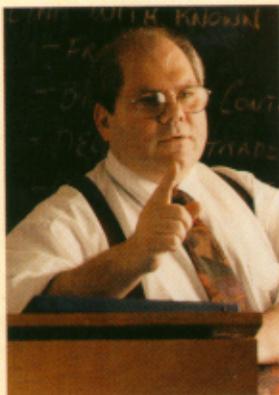
the legislation. This bill, they say, is not an open invitation for software makers to ignore quality or mistreat customers. Indeed, it is very much in sync with the status quo, says Raymond T. Nimmer, a law professor at the University of Houston who helped draft the bill.

In courts today, Nimmer points out, software disputes are handled under the Uniform Commercial Code—a set of laws that take roughly the same form in most states. Under this code, a new product that comes from a merchant automatically has “warranty of merchantability,” which says that the product is reasonably fit for ordinary use and that the statements on the package are correct. The new law preserves this, Nimmer says:

“Under UCITA, there is an implied warranty of merchantability. Realistically, you can’t argue that UCITA reduces legal [protections] for consumers.”

But other legal experts have reached different conclusions. Since 1996, lawyer and consultant Cem Kaner has been attending meetings of the National Conference of Commissioners on Uniform State Laws, which is charged with drafting UCITA. Point by point, says Kaner, now a professor of software engineering at Florida Institute of Technology in Melbourne, Fla., “the law has been crafted to advance the interests of large software companies, often at the expense of consumers, independent software developers, and small businesses.”

**“NO WARRANTY.”** State governments think that by passing UCITA, they will attract high-tech businesses. But over the long term, they risk alienating voters, who are treated fairly well under today’s laws. Warranties of merchantability give consumers basic rights, which is why eight states don’t allow disclaimers on them. In other states, you can disclaim the warranty only by posting conspicuous signs, such as a “No Warranty”



## The law advances the interests of large manufacturers—at the expense of consumers, says a software engineering instructor

ACTIVIST: PROFESSOR KANER

notice at a used-car lot, or a “Seconds” sign on a clothing rack.

Additionally, under a federal act called Magnuson-Moss, vendors cannot disclaim an implied warranty if they give any written guarantees. But in the case of digital “content,” UCITA could change all that. “By defining software as ‘non-goods’—as the transfer of the right to use intellectual

until after you pay for the product and start to install the program. Regular consumers can get their money back if they don’t like the license terms—as long as they return it before actually running the program. Business users don’t get any such privileges, even if they object to the license terms.

And by the way, don’t get too attached to those terms in the contract. Baltimore University’s Shafer and others say that UCITA, in theory, permits vendors to change the terms after the product is licensed. These changes could be posted on the vendor’s Web site, and it will be the user’s responsibility to check the site from time to time, just in case. At the very least, says Shafer, the law could

oblige vendors to use the Net’s power to broadcast the changes and otherwise educate customers. “If you are designing a new law for the 21st century, why not take advantage of technology?” he asks.

How will all the complaints about UCITA finally get resolved? Critics of the bill have several different agendas. The FTC says it can live with the bill if consumer protections are strengthened. Others, including Cem Kaner, believe UCITA should be scrapped and replaced with a more balanced piece of legislation.

Indeed, the goals embraced by UCITA may be too ambitious ever to be achieved: “In many ways, this is like rewriting the laws of patent, copyright, sales of merchandise, licensing of intellectual property, choice of law, and a fair bit

of electronic contracting,” says Kaner, “all in one little 120-page package. The scope is breathtaking.” As an intellectual exercise, UCITA may be impressive. As a law to live by, it comes up short on almost every score.

*Gross writes about science and technology.*

### WHO IS FIGHTING UCITA?

**4CITE** Broad coalition of companies and associations opposed to UCITA

**CONSUMERS UNION** Nonprofit publisher of Consumer Reports magazine

**CONSUMER PROJECT ON TECHNOLOGY** An advocacy group started by Ralph Nader in 1995

**FEDERAL TRADE COMMISSION** Bureaus of Consumer Protection & Competition have criticized UCITA and suggested pro-consumer changes

**AMERICAN LIBRARY ASSN.** Represents 59,000 libraries and librarians in the U.S.

**ASSOCIATION FOR COMPUTING MACHINERY** Represents 70,000 U.S. computing professionals

**INSTITUTE OF ELECTRICAL & ELECTRONICS ENGINEERS** Boasts 234,000 members in the U.S.

**ELECTRONIC FRONTIER FOUNDATION** Activists for freedom of speech on the Net

**SOFTWARE ENGINEERING INSTITUTE** Prestigious research institute dedicated to boosting software quality and productivity

property—UCITA declares that software is not covered by laws like Magnuson-Moss,” Kaner says.

Under current law, if you buy a computer in a store, you can insist on seeing the warranty before you hand over any money. But with UCITA in place, the store can treat the programs you buy for that PC differently. You won’t see the warranty or license