Problems Presented by the New State Uniform Computer Information Transactions Act (UCITA) Respecting the Use of Electronic Resources

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On October 1, 2000, Maryland became the first state in which the provisions of the Uniform Computer Information Transactions Act (UCITA) became effective. Virginia was actually the first state to pass UCITA but delayed its implementation until July 2001 ostensibly in order to provide time to study its potential effects. So-called "uniform laws" have been proposed and adopted throughout the United States in regard to a variety of legal concepts and issues over the years, but essential to their efficacy is their widespread adoption; a proposed uniform law must be adopted by each state legislature before it can become the law in that state, and for a law to become truly "uniform" it must be generally adopted throughout the country. At least six states' legislatures currently have versions of UCITA introduced and before them for consideration, and it is expected that over the next 18 months or so UCITA legislation will be introduced into most of the state legislatures (plus the District of Columbia, Puerto Rico and the U.S. Virgin Islands). Thus, UCITA is not a theoretical, abstract proposal but a real "flesh and blood" contender for the attention not only of legislators, who may not understand its implications, but of librarians, who must become both knowledgeable about it and aware of its many implications for the library community.

UCITA was formally proposed for state approval in July 1999 by the National Conference of Commissioners on Uniform State Laws (NCCUSL), an entity that has taken up the task of developing uniform laws generally. UCITA is an attempt to bring uniformity to the laws dealing with software and database licensing issues that involve contracts having to do with computer software, documentation, electronic databases, Web sites, e-books, digital recordings and so forth, and is reflective of perceived inadequacies in application of the law of sales and commercial transactions to the new forms of electronic information retrieval.

As such, UCITA is not really "new" since the basic ideas in UCITA have been discussed in regard to a proposed but

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ultimately unapproved amendment (Article 2B) to that portion of the Uniform Commercial Code (UCC) regarding sales transactions, which amendment was first considered as early as 1992. The UCC is itself a lengthy set of uniform state law provisions governing commercial transactions between buyers and sellers, lenders, borrowers and businesses generally, and has been widely adopted in basically consistent form throughout the United States, reflecting the fact that much business today is conducted across state lines and that uniformity of governing law is an important consideration to the efficient carrying out of commercial transactions. Proposed changes and amendments to the Uniform Commercial Code are studied and approved by both the American Law Institute (ALI) and the NCCUSL, and such was the case with proposed UCC Article 2B, which was intended to govern electronic business sales transactions.

But not every uniform law proposal ultimately sees the light of day, and in the end it was the ALI that refused to adopt UCC Article 2B as part of the Uniform Commercial Code due to the proposed article's perceived controversial nature and the inability of the commissioners to work out acceptable compromises to the proposed law. At that point, with inclusion in the UCC having become uncertain at best, the NCCUSL went ahead on its own and approved most of UCC Article 2B's provisions as the provisions of the newly-christened UCITA in July of 1999, no longer to be considered for inclusion in the Uniform Commercial Code, but proposed as a new uniform state law.

UCITA, like most commercial law statutes, is a detailed, complex and somewhat convoluted document. Because it plows new ground, this also means that there will now come into existence many new provisions of law that will have never been construed by any court and will therefore have to be hashed out over the years. Even something as seemingly basic as the scope of UCITA is presently the subject of a range of often conflicting interpretations. In addition many of the perceived potential problems with the areas covered by UCITA that will be discussed below are not necessarily inherent in the text of the proposed law itself, but derive rather from various UCITA provisions that appear to legitimize (and perhaps legalize) a number of objectionable contract clauses software providers have been habitually inserting into their license agreements, providing those clauses and their advocates with a potentially strong legal footing that they have not heretofore enjoyed.

What Does UCITA Cover?

"Computer Information," as the proverbial middle name of UCITA and the proposed act, defines computer information very broadly, *i.e.*, as "information in electronic form which is obtained through the use of a computer or which is in a form capable of being processed by a computer."[1] With the current trends in publishing involving the provision of more and more materials in electronic form, clearly UCITA is going to apply to an increasing proportion of the new acquisitions of all types made by libraries. Just for example, before the advent of e-books, it might have appeared to many that the computer information concept would apply mostly to reference and journal literature, but the new materials are proliferating rapidly and now even popular fiction titles are being made available as e-books.

Extrapolating from the above-quoted definition contained in the proposed law to the field of library acquisitions, UCITA applies to contracts to license or buy software, contracts to create computer programs or computer games, contracts for online access to databases, and contracts to distribute information over the Internet. The relevance of the new law is obvious.

Most librarians are familiar with the long-standing (at least since the early 1980s) use by software and electronic information providers and publishers of lengthy printed materials within which are enclosed or sealed software disks, which printed materials purport to contain the binding terms of the contractual relationship between seller and library in respect of the materials in question. Typically, the provisions contained in these materials are quite one-sided and attempt to push all responsibilities on to the purchaser. Fortunately, the ability of publishers to enforce all of these so-called "shrink-wrap" contract terms has at least been questionable, with court decisions coming down in favor of each side. For instance, in *Mortenson v. Timberline Software Corporation, et al.* (No. 67796-4, May 4, 2000), the Supreme Court of the State of Washington upheld a lower court ruling that validated a shrinkwrap software license. The Washington court had to distinguish, however, based on the course of the parties' dealings, the older case of *Step-Saver Data Systems, Inc. v. Wyse Technologies*, 939 F.2d 91 (3d Cir.1991),[2] where the Circuit Court of Appeals, utilizing a standard Uniform Commercial Code analysis, had found the terms in a shrink wrap license not to be controlling. Likewise, and more recently, in *Ticketmaster Corp., et al. v. Tickets.com, Inc.* (C.D.Cal., March 27, 2000), U.S. District Court Judge Harry L. Hupp, in denying a preliminary injunction sought by Ticketmaster to prevent use of factual information obtained from its site through the use by Tickets.com of webcrawler and spider technology, noted that "Many web sites make

you click on 'agree' to the terms and conditions before going on, but Ticketmaster does not. Further, the terms and conditions are set forth so that the customer needs to scroll down the home page to find and read them. Many customers instead are likely to proceed to the event page of interest rather than reading the 'small print.' It cannot be said that merely putting the terms and conditions in this fashion necessarily creates a contract with any one using the web site."[3]

Under current legal principles, it would appear that the facts of each case, the actual texts used, the ease of the "click-through" etc., are all factors to be considered by the courts in determining whether the provisions of these fine print agreements will be binding on a purchaser. UCITA on its face would appear to seek to change the approach to be taken in these cases and make such agreements valid regardless of the facts of each particular situation – a one size fits all solution favorable to the publishers. So, if and when UCITA is passed in your state, shrink-wrap licenses and click-through licenses will clearly have the force of the new law behind them and the court-made legal protections and those embodied in conventional UCC and common law contract principles may no longer be adequate to ward them off.

It is important to note that since its approval by NCCUSL and subsequent availability to the states, UCITA has been criticized or opposed by a number of different kinds of organizations, and not just by organizations related to libraries. Professional organizations that represent computer programers, such as the Institute of Electrical and Electronics Engineers (IEEE) and the Association of Computing Machinery (ACM), are a couple of examples of such organizations that have raised serious concerns regarding UCITA. Additionally, no less august an agency than the Federal Trade Commission, as well as the Attorneys General of 26 states have also weighed in negatively respecting the proposed act. Large software consumers, such as the Prudential Insurance Company, as well as many magazine and newspaper publishers, are also among UCITA's most vocal opponents.[4]

Licensing versus Copyright Law

Once one has possession of a resource, whether in the form of a book, journal issue, e-zine, CD-ROM, or on-line access, the question naturally arises in the library context of by whom and to what extent may the material be used. Traditionally, librarians have looked to the provisions of the copyright laws to determine both the rights of the library and those of its patrons in regard to resources acquired by the library. But there are several basic differences between the licensing regime to be permitted under UCITA and traditional copyright law approaches to the use of the intellectual property contained in electronic formats that will doubtless become critical to librarians as UCITA becomes law.

As an initial point, it is important to remember that UCITA, when and where it is adopted, will be a manifestation of state-based contract law, while the copyright laws, by contrast, are federal law. Also, because UCITA must be separately passed by each state's legislature in order to be effective in that state, and because such passages cannot reasonably be expected to occur at the same time, it is likely that many of UCITA's provisions (unlike those of the federal copyright laws) may actually tend to vary somewhat from state to state as individual legislatures, and the NCCUSL as well, tinker with the proposed law's provisions in attempts to address perceived problems, make technical corrections, etc.

The current U.S. copyright laws grant copyright holders the exclusive rights over: reproduction, adaptation, publication, performance and display of their copyrighted works.[5] A limited, but nevertheless important in the library context, exception to the exclusivity of these rights is the so-called "first-sale doctrine," under which a person who legitimately acquires ownership of a copy of a work has the full authority to "sell or otherwise dispose of the possession of that copy" so acquired without additional permission from the copyright holder.[6] (This is one of the main legal premises that allows a library, without running afoul of the copyright laws generally, to loan the materials it regularly acquires for its collection and thus function as libraries typically do today.) The upshot of all of this is that, if a particular transfer of some item of intellectual property is deemed to be a sale, then the owner of the copyright with respect to that property will have lost all control over that particular ***copy*** of that work.

This distinction is important. By contrast, if a work is ***licensed***, no copy of the work has in fact been sold, but instead mere permission to ***use*** the work has been granted, and that use may be restricted within whatever specified conditions or guidelines happen to be established in the agreement of the parties pursuant to which the license was granted. Since most electronic materials are today licensed rather than sold, the library "acquiring" these materials does not own the materials but rather simply has the right to use them within such confines as the licensor may specify. For instance, the license agreement may contain prohibitions respecting some customary uses of the material in a

library setting, such as provisions forbidding interlibrary loan, restricting use of materials to the library building, restricting use to a particular computer and so forth. The impact of UCITA here could be enormous in view of the proposed act's endorsement of click- through and shrink-wrap contract terms. Today, many libraries are unaware of the license terms contained in the long thrown away shrink-wrap of the software they thought they "owned" under the provisions of many state's court decisions that protected them from the hidden terms of such licenses, but if UCITA becomes the law, it seems clear that these acquisitions will in all cases be treated as licenses and not purchases.

General Concerns Respecting UCITA That May Affect Libraries

One of the most important issues raised by UCITA is that software publishers will in almost all cases be allowed to take the traditional "terms inside the box" approach denying customers the opportunity even to review the terms before they purchase the product, and enforce those terms even in the case of online sales where providing the terms would be fairly easy. Resistance to this approach can force lengthy negotiations once a product has already been purchased and the problem only belatedly discovered—sometimes taking so long that the product will have become out of date before it is ever used by the library.

Another associated problem with shrink wrap and click-through licenses becoming fully enforceable under UCITA is that here is no way of knowing who actually broke the shrink-wrap or clicked the "agree" button. For example, should the library be bound by the restrictive terms of a license if it is the custodian who broke the shrink-wrap or a 7-year old who clicked the "agree" button? UCITA simply does not seem to recognize this as being a problem (it should be noted that various "due authorization" and other provisions of agency law would likely protect a library in the case of a putative but unintentional purchase by the unauthorized custodian or a minor, but UCITA does not make it clear that these concepts necessarily apply to electronic licensing, though they certainly should). In any event, while in the case of the click-through license, the software company could identify the IP address of the machine used to download their software, it nevertheless appears beyond question that there is no way to know just who it was who was using the computer when the license terms were "agreed" to.

Another major criticism of UCITA is that the proposed act would allow software companies to restrict not just use of their products but also information about their products. Several companies include this restriction currently as part of their licensing agreements, but UCITA would give this questionable practice a firm legal grounding by actually authorizing companies to prohibit criticism of their products. The insertion of a clause in licensing agreements such as "The customer will not publish reviews of the product without prior consent from AAA Software Company" will likely become a commonplace. Such a clause could effectively bring most software reviews to an end unless freedom of speech concerns ultimately hold sway.

So-called electronic self-help is another of the provisions of UCITA that has given rise to some of the most virulent criticism made of the proposed act. Providing even a limited right of software publishers to electronically "repossess" software poses major security issues for most users. Whenever a software company can get into your library's server through a "backdoor" in its software, it obviously increases the risk that a hacker could do the same thing. In August of 2000, an amendment[7] was added to the draft of UCITA that appears to effectively prohibit self-help activation respecting mass-market software sold through retail channels, but the amendment would allow such provisions to continue effective for sales to corporate or other "non-consumer" users so long as both parties agree to the vendor's use of electronic self-help. Where a library falls in this new "consumer-nonconsumer dichotomy is unclear, and again the ease of obtaining the library's agreement with a click-through license makes the situation even more problematic

Another provision that could conceivably affect many libraries is UCITA's prohibition regarding transfer of ownership. Shrink wrap license terms frequently specifically prohibit the transferring of ownership, possibly forcing libraries to repurchase software if a library system is restructured. Sometimes this prohibition extends even to the level of the particular computer upon which the software is initially loaded.

Implications for Libraries and Information Centers

Copyright law has always contained fair use exceptions for educational use, research use, and criticism, and opponents of UCITA fear the extinction of such rights if UCITA should become the law of the land. Proponents of UCITA argue that copyright laws will take precedence over UCITA, but it should be noted that, as a general matter federal copyright law does not necessarily preempt contractual provisions. In fact, the general rule is that a particularly negotiated contract is not overruled by copyright. It is thus pos-

sible to sign a contract that takes away all rights granted under the copyright laws, except in a few limited situations (*e.g.*, music residuals and a several similar instances). In non-negotiated contract situations, such those involving shrink wrap and "click through" licenses to which a user has agreed by clicking on the "ok" or "agree" button when the license is displayed on the screen (usually in ultra-small type most of which is not viewable from the window provided.), as indicated earlier, the courts have previously split on this issue, but this will not likely continue to be remain the situation under UCITA.

If one of the results of enactment of UCITA is that fair use becomes a thing of the past for electronic materials, this will definitely impair the ability of libraries to provide electronic resources to their users. In many ways, without the availability of fair use, there may be little reason for the existence of the library. Looking down the road, if everyone must purchase materials on a sort of pay-per-view basis, the whole traditional function of the library as a middle layer between publishers and users vanishes—and providing access to resources on a purely pay-per-view basis would likely be beyond the capacity of most academic and public libraries to absorb the costs.

Another important area of concern is in regard to library materials that come in a mixed format, for example, a printed book that is accompanied by a CD-ROM. Although UCITA applies only to computer information when such information is "primary," who is to say how a mixed resource will be viewed by the vendor. If the CD-ROM is interpreted as the primary item, then it is conceivable that the license could be construed so as to make the book itself legally impossible for a library to loan.

Distance education via the web is another complicating factor for academic libraries. Restrictive licenses could make some electronic resources effectively unavailable to a growing segment of the student population who may never actually set foot upon the campus. Many librarians are today busy building digital and virtual libraries intended to make our resources much more widely available, but are running into what seem like concrete barricades in the twin forms of copyright and licensing restrictions. UCITA will only make this worse.

A final vital concern for libraries involves preservation efforts. Restrictive license agreements could hamper or even prevent preservation efforts, such as the archiving of back-up copies or the storing of electronic materials on a library server in order to ensure availability for future use.

What to Do When UCITA is Introduced in Your State

As a knowledgeable, concerned librarian you do what you usually do best—provide information to those who need it. Remember that most legislators will not have much idea about the subject matter of UCITA, possibly knowing only that it is a uniform law recommended for passage by NCCUSL. Make sure that your legislators know that UCITA is unusually controversial and that those few states that have adopted it already have not adopted the latest version. Let them know how important the fair use concept is to libraries, and by extension, to the legislators' constituents.

Second, question the need for immediate action. Emphasize that as matters develop in other states, there may become available proposed revised provisions that may not be as bad as those contained in the current draft and that delay is therefore prudent in order to await developments and avoid the necessity of addressing the issue yet again in a future legislative session. It is also vitally important to get in there early—before supporters of UCITA can grab the undivided attention of legislators. In Virginia and Maryland, where UCITA was passed quickly, opponents did not have a lot of time to mount an effective opposition. Getting to legislators with your views first is always helpful rather than having to play catchup once proponents have already made their case.

To prepare for a successful lobbying effort it is imperative that you actually read UCITA. It is a long document with significant amounts of commentary, but to be truly effective you do need to know the proposed legislation. Be sure to determine which version of UCITA has actually been introduced in your state. For example, during the summer of 2000 certain amendments were made by NCCUSL to UCITA that do serve to protect consumers to some degree, as noted above. But there is no guarantee that the legislation that may be introduced in a particular state legislature is necessarily the most recent version, as sometimes older versions may be introduced.

Let the legislators know that the library/academic community are not the only ones interested; as noted above, many important business groups are concerned about UCITA's provisions as well. UCITA is broader than simply a library issue. Take steps to align yourself with these groups, such as insurance companies, banks, etc. They may be more influential with legislators as they typically have other interests actively at stake in the legislative session and they also can do more to assist the individual legislator in his efforts at re-election. Print publishers and small software publishers in your area may also be opposed to many

of UCITA's provisions and should be enlisted in the effort. In all events, try to show as broad an opposition in your state as possible.

Finally, always consider compromise, as this is what the lawmaking political process is really all about, and it is what legislators always dearly want to see happen. That is, they want to pass something that they can say pleases ***all*** their constituents, at least to some degree. Target what you see as UCITA's worst abuses and suggest removal of them or modification of them as a method of overcoming opposition. If necessary, look to changing the wording to eliminate the problems as well as can be done, and be sure the legislators know you are not intransigent—this will be especially helpful if the other side seems unwilling to compromise. You can thereby be seen as being more reasonable and will be perceived as more helpful by legislators in working out a compromise, which is what they naturally want to do.

If UCITA is Enacted in Your State

Because UCITA provides that "click-on" or "click-through" agreements as well as shrink wrap agreements have the endorsement if not exactly the force of law, library staff will need to read the "fine print" carefully, with any click-on or shrink-wrapped products. Acquisitions and processing staff who receive or check-in software, cd-roms, and other shrink wrapped materials will have to examine carefully the license terms that may be included in the packaging. These licenses will need to be kept and examined for appropriate language. Before the product is used someone from the library or legal counsel for the organization may need to enter into negotiations with the vendor to ensure that the library can live with the license terms. Information technology staff who load new software will need training so that they can be on the lookout for and understand terms included in the "click-on" license agreements. These terms may include important information such as the length of the contract, copying privileges or the use of "electronic self-help."

It is important for the library to have copies of all the software and database product licenses that have been agreed to and to make a conscientious effort to see that these terms are adhered to by library staff and library users. As it is sometimes difficult to get back to "click-on" licenses, be sure to print them out as you go. The library should also establish a procedure for and means of organizing access to these licenses for future reference.

Conclusion

Widespread adoption of UCITA will create new layers of costly procedures for libraries in the United States as more time and money will necessarily be needed to educate library staff, negotiate licenses, track use of materials, and investigate the status of materials donated to libraries. Since UCITA's provisions more or less by default favor licensors, libraries (and businesses) will be finding themselves having to negotiate from a weaker position and will need to conduct expensive reviews of all their shrink-wrapped licenses.

UCITA is something about which all libraries need to be concerned and to carefully monitor events in their state. There exist within its lengthy text grave threats to your library's fair use rights if UCITA is adopted in your state. Get to your legislators early to express your concerns, as otherwise proponents will likely have already had an impact on how legislators view the legislation. Strong and effective advocacy is needed to convince legislators of the controversial nature of UCITA and to prevent its enactment in its present form that is so potentially detrimental to libraries.

Notes

1. *Uniform Computer Information Transactions Act*, Section 102 (a) (10). The text and commentary on UCITA is available at: http://www.law.upenn.edu/bll/ulc/ucita/ucita200.htm
2. The case may be found at http://cyber.law.harvard.edu/property/alternative/step.htm.
3. Judge Hupp's opinion, having been rendered in respect of a preliminary matter, is not officially published. It can be obtained at: http://www.gigalaw.com/library/ticketmaster-tickets-2000-03-27.html.
4. See, for example, http://www.ieeeusa.org/FORUM/POLICY/1999/99july20.html—letter to National Conference of Commissioners on Uniform State Laws urging them not to approve UCITA, from Paul J. Kostek, President, IEEE-USA; http://www.ftc.gov/be/v990010.htm—letter to NCCUSL from Federal Trade Commission expressing reservations; and http://www.4cite.org/101docs/prin1.html—statement from Principal Financial Group and Prudential Insurance Company of America opposing UCITA.
5. Title 17 United States Code, beginning at Section 106.
6. Title 17 United States Code, Section 109(a).
7. *Amendments to Uniform Computer Information Transactions Act*, Section 816. Available at http://www.law.upenn.edu/bll/ulc/ucita/ucitaAMD.htm.