



UCITA

SUMMARY AND IMPLICATIONS FOR LIBRARIES AND HIGHER EDUCATION

Summary

The Uniform Computer Information Transactions Act (UCITA) is a proposed state law that seeks to create a unified approach to the licensing of software and information. Two states—Maryland and Virginia—have passed UCITA, and it will be under consideration in many other states in the near future. UCITA's broad scope and focus on software and information requires that the research, education, and library communities understand what the adoption of UCITA will mean for the mission, operation, and core values of the higher education and library communities.

Background

UCITA has been under development for many years by the National Conference of Commissioners on Uniform State Law (NCCUSL). It is a very complex proposal, which makes difficult the full appreciation of all of the implications for the library and education communities. Throughout the drafting process, UCITA and its predecessor UCC2B (Uniform Commercial Code 2B)—the original effort to develop a new uniform legal framework in computer information transactions—were highly controversial to many diverse groups. Along with these other groups, the library community raised its concerns repeatedly during the drafting process. Unfortunately, the drafting committee did not address these concerns and UCITA remains problematic to many both in the commercial and non-profit sectors. Indeed, the American Law Institute, which initially collaborated with NCCUSL in the drafting of this uniform law, concluded that the law was so flawed that it abandoned its participation in the process. Furthermore, the attorneys general of 24 states signed joint letters raising serious substantive concerns with the potential adverse impact of UCITA on users of software and other information products. Similarly, the Federal Trade Commission filed comments critical of the proposal.

Notwithstanding these concerns, NCCUSL approved UCITA in July 1999 with the expectation that states would rapidly enact it uniformly, without modification.

UCITA has moved ahead in a number of states. Following extensive discussions and prior to passage, the Maryland General Assembly made some helpful changes to UCITA. Virginia passed UCITA, but delayed implementation to consider possible revisions to the statute. Several states began deliberations of UCITA, but decided it was too complex and controversial to enact this year. At the other end of the spectrum, the Iowa legislature passed a law designed to protect Iowa citizens from UCITA's provisions. Thus, because of local attempts to deal with the extensive concerns with UCITA, there is the strong possibility that there will be no uniform practice.

All facets of the research, education, and library enterprise rely upon software and information to create and disseminate knowledge. Indeed, members of these communities are both users and creators of these products and services and are among the largest consumers of information and software. Historically, the research, education, and library communities have looked to copyright law as the policy framework for balancing competing interests of the creators, publishers, and users of copyrighted works. UCITA will dramatically change this framework. Indeed, as with other recent intellectual property and copyright measures, the approach taken in UCITA will be a template for harmonization globally.

Legal Context

As noted in a letter to members of the Maryland General Assembly from leading intellectual property faculty,

"until recently, federal copyright law and contract law have co-existed in relative harmony. Effectively, only copyright law governed works generally distributed to the public, while works with limited distribution could receive both copyright and contract protection. More recently however, software companies began distributing their products to the general public subject to shrinkwrap licenses."

As the use of shrinkwrap licenses by publishers grew, a subtle but important legal shift occurred. Courts previously skeptical of shrink-wrap or click on licenses became more supportive. UCITA codifies this growing, but not universal, acceptance by legalizing the use of click-on, non-negotiated licenses. The potential result will be the displacement of the uniform system under federal copyright law (that seeks appropriate balances between creators, users, and publishers) with a contract-based system that will operate under the flawed assumption that there is a level-playing field between licensors and licensees. This will not be the case for shrinkwrap licenses, also referred to as contracts of adhesion, where the licensor unilaterally sets the terms.

Since the inception of the digital environment, copyright has applied to digital works and the Internet. Moreover, in 1998, the U.S. Congress enacted the Digital Millennium Copyright Act (DMCA) to update selected sections of the Copyright Act to address the challenges of the digital environment. Proponents of UCITA claim that there is a need to provide a new legal framework to address digital issues, completely ignoring the DMCA and existing copyright case law. UCITA thus represents an end-run around the DMCA and the Copyright Act as interpreted by the federal courts. UCITA is a means to implement on a state level what UCITA proponents have not achieved on the federal level. UCITA creates a very different approach to intellectual property protection with no exemptions and fair use defenses for the research, education, and library communities.

Mission

A number of problems arise concerning the ability of institutions to carry out their missions under UCITA. In particular, UCITA has adverse impacts with respect to copyright, mixed transactions, and reverse engineering.

- **Copyright:** Copyright law has served as the primary legal and policy framework for balancing the interests of users and owners of copyrighted works in both the print and electronic environments. It is within this framework that libraries and educational institutions create and disseminate knowledge and information. UCITA represents a shift away from copyright law to contract law as well as a movement away from societal interests to a focus on economic interests. The rights and statutory exemptions that libraries and educational institutions are entitled to under copyright law, e.g. fair use, reproductions for class room use, preservation, and interlibrary loan—those provisions that balance the interests of owners and users—are likely to be prohibited through contract language enforceable as a result of UCITA. In addition, UCITA will lead to further erosion of the ability of these institutions to negotiate terms of use even in negotiable contracts. Increasingly, use will be more narrowly defined by the licensor in a climate of licensor control. This significant change has profound implications for how members of the library and education communities will be able to achieve their core missions.
- **Mixed Transactions:** Libraries and educational institutions purchase, license, and manage information resources in multiple formats—print, electronic, and microfilm. Some of these information resources may be mixed media, a book accompanied by a CD-ROM, for example. In a state where UCITA has been adopted, a publisher could extend license terms on the CD-ROM to the book. That could limit legitimate uses of the copy owned by the library. For example, the license may prohibit the library from lending of the sort clearly permitted under the first sale doctrine under federal copyright law. Or the license could prohibit the library from making a preservation copy of the book permitted under section 108 of the Copyright Act. The transparency that libraries increasingly seek to provide to users in working with a myriad of resources will no longer be possible.
- **Reverse Engineering:** University faculty, students, and IT professionals engage in reverse engineering for currently permissible purposes such as research and teaching, debugging, ensuring interoperability between systems, and security testing. Provisions in license agreements that prohibit this otherwise legitimate use of software would be enforceable under UCITA.

Operations

UCITA will likely increase the cost and complexity of doing business for libraries and educational institutions with regards to electronic self-help, the mass market license, and liability for known defects.

- **Electronic Self-Help:** Electronic self-help is the process whereby a licensor may electronically disable, remove, or prevent the usage of computer information or software. This may be done via "back doors" in the software that provide access to hidden commands that may be activated to disable it. Self-help presents numerous problems to libraries and educational institutions. First, these back doors pose significant security issues for the institutions. They enable hackers to access the institutions' network and this could cause serious damage. Secondly, mission critical software could be disabled if the licensor unilaterally decided that the institution was breaching any term of the contract under UCITA. Finally, self-help provides the licensor with the ability to monitor the use of the resource in the institution. As noted below, this raises significant privacy concerns.
- **Mass Market Licenses:** Licensing agreements that are "mass market" are not negotiated, such as click-on or shrinkwrap licenses. Under UCITA, when an individual acquires a piece of software and clicks on the "I agree" icon, she is bound by the terms of the license agreement. As we see with click-on licenses already, these terms more often than not prohibit or restrict fair use, reverse engineering, transferability, copies for preservation purposes, and more. The implications for the library and education communities are enormous. Increasingly, institutions provide faculty and staff with procurement cards, allowing decentralized purchasing of software and information from the distributor. A member of the faculty or staff could, by clicking on the license, waive the privileges and rights available to the individual and/or the institution under copyright law. To protect themselves, libraries and educational institutions may need to re-centralize the procurement function. Moreover, contract officers will have to scrutinize each shrinkwrap license to determine what conditions the licensor is trying to impose on the institution. Transaction costs, therefore, are likely to increase substantially.
- **Liability for Known Defects:** UCITA would allow software firms to waive liability for known defects in their software that they failed to disclose to their customers. This discourages software firms from exercising quality control, and could leave institutions without legal recourse for the damage caused by these known defects.
- **Choice of Law, Choice of Forum:** If a consumer decides to sue a licensor in a state that has adopted UCITA, the licensor, not the user, may choose the venue for the suit to be heard. The licensor may also choose the state law that applies. This is certainly not a level playing field between the consumer and the licensor. It presents significant economic barriers to the consumer and provides the licensor with much more clout concerning which court in which state will hear a case. Moreover, for negotiated contracts, a licensor may choose a state that has enacted UCITA, thus potentially limiting the ability of the institution to negotiate more favorable terms and conditions in the license. Finally, these provisions would be applicable to U.S. and Canadian institutions.

Values

Respecting the privacy of an individual and exercising the right to comment upon another's work are core values of the research, education, and library community. If adopted, UCITA is likely to pose serious challenges to upholding and maintaining these values in the library and education communities, indeed, in all sectors.

- **Privacy:** Electronic self-help permits a vendor to access the network or computer of the licensee as well as to monitor use of the software or information resource to ensure compliance with the terms and conditions of the license. The licensor performs this monitoring in order to track whether a use is allowed under the terms and conditions of the license. The ability to monitor and track use of information resources is at odds with the long-standing principles in libraries and educational settings concerning privacy and confidentiality.
- **First Amendment:** An important tenet of the research, education, and library communities is the ability to critique another's work, be it a software product or journal article. Under the UCITA framework, a term in a license agreement that prohibits public criticism or comment is presumed to be enforceable unless a court rules otherwise. It is unlikely that non-profit entities, including libraries and educational institutions, will have the resources or resolve to challenge outrageous license terms of this nature.

Conclusion

In sum, these concerns directly impact the ability of institutions to carry out their missions, to effectively manage operations, and to preserve and apply community values in the daily work of the institution. For faculty, library users, students, and staff the complexity of managing and accessing information will grow. Libraries and educational institutions are likely to pay more and get less. The costs of doing business will increase because staff in the library or elsewhere on campus will have to review each and every license to see what is and is not permitted. This will pull budgetary and staff time away from acquiring new resources because of the need to develop and manage license mechanisms, permissions, and the like. Thus for publicly funded institutions, UCITA will result in fewer public funds supporting public library and education programs.

Furthermore, one primary means to achieve greater parity is through enhancing access to information. Thus bridging the "digital divide" or resolving equity issues will be difficult at best in a UCITA environment. Under the terms and conditions of UCITA licenses, resource sharing will be significantly undermined or even prohibited. Moreover, soaring license fees along with the inherent costs in retaining the necessary expertise for license negotiations is likely to diminish the available pool of resources normally devoted to acquisition of materials available for access and use by the library and education community.

Links to UCITA Resources

- [The Association of Research Libraries' UCITA index](http://www.arl.org/info/frn/copy/ucitag.html)
<http://www.arl.org/info/frn/copy/ucitag.html>
- [The American Library Association's Washington, D.C. office](http://www.ala.org/washoff/ucita.html) offers basic information on UCITA
<http://www.ala.org/washoff/ucita.html>
- [The most recent version of UCITA](http://www.law.upenn.edu/bll/ulc/ucita/citam99.htm), courtesy of Penn Law School
<http://www.law.upenn.edu/bll/ulc/ucita/citam99.htm>
- [Rodney Petersen on Licensing Digital Information and UCITA](http://www.educause.edu/ir/library/pdf/eq/a002/eqm002b.pdf)
<http://www.educause.edu/ir/library/pdf/eq/a002/eqm002b.pdf>
- [4CITE, an organization dedicated to lobbying against UCITA](http://www.4cite.org/HotNews.html), tracks latest news on its debate
<http://www.4cite.org/HotNews.html>
- [Letter from 38 professors of Intellectual Property law at various universities, opposing UCITA](http://www.arl.org/info/letters/profs_ucita.html)
<http://www.arl.org/info/letters/profs_ucita.html>
- [Statement by James Neal, Dean of the Johns Hopkins University Libraries, on UCITA](http://www.arl.org/info/frn/copy/nealstmt.html) before the Maryland General Assembly
<http://www.arl.org/info/frn/copy/nealstmt.html>
- [A Spring 2000 UCITA update from Rodney Petersen of the University of Maryland](http://www.arl.org/info/frn/copy/petersen.html)
<http://www.arl.org/info/frn/copy/petersen.html>
- [Computer consultant James Huggins on UCITA, NCCUSL, and uniform state laws](http://www.jameshuggins.com/h/tekl/ucita.htm)
<http://www.jameshuggins.com/h/tekl/ucita.htm>
- [Joint Statement on UCITA from several library associations](http://www.arl.org/info/letters/FTC091100.html) to the Federal Trade Commission
<http://www.arl.org/info/letters/FTC091100.html>
- [Five Reasons Consumers Oppose UCITA](http://www.nclc.org/ucita/index.html), from the UCITA Consumer Advocates
<http://www.nclc.org/ucita/index.html>
- [Problems posed by UCITA for business users of software](http://www.arl.org/info/frn/copy/keyprobs.html), as defined by the Principal Financial Group
<http://www.arl.org/info/frn/copy/keyprobs.html>
- [The letter signed by 24 state Attorneys General](http://www.arl.org/info/frn/copy/agopplr.html), opposing UCITA
<http://www.arl.org/info/frn/copy/agopplr.html>
- [Joint Letter from library associations to Gene Lebrun](http://www.arl.org/info/frn/copy/ucitasum.html), the President of NCCUSL

<<http://www.arl.org/info/letters/Lebrun7.12.html>>

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