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The Adoption of UCITA in Maryland: A View from the Trenches

by Harvey K. Morrell

In the December 1999 issue of *AALL Spectrum*, Charles Cronin provided a fine overview of the *Uniform Computer Information Transactions Act (UCITA)* and its potential impact on libraries. As he indicated, the National Conference of Commissioners on Uniform State Laws (NCCUSL) offered *UCITA* to several state legislatures for consideration, with Maryland and Virginia vying to become the first state to enact it. Virginia, whose legislative session began a couple of months before Maryland's and whose process did not allow much opposition, was first across the line. However, one amendment, included near the end of the process, delayed implementation of the Act until 2001.

Maryland passed an amended version of *UCITA* on the very last day of the regular legislative session. The bill was signed by Governor Glendening on April 25 and will take effect October 1, 2000. (You can see the final version online at: <http://mlis.state.md.us/2000rs/billfile/hb0019.htm>. Scroll down to near the end and click on "enrolled.") The legislature in Maryland did seem more open to addressing some of the consumer protection concerns expressed by the Attorney General's office and other consumer groups. Law librarians were involved in the working groups dealing with these issues. While we were not successful in convincing the legislators of the merits of all our argument on *UCITA*'s potentially devastating effect on copyright and the free flow of information, we did gain valuable experience. In this article I'll offer a brief synopsis of the process in Maryland as well as some suggestions to librarians who may be engaged in opposing *UCITA* in other states.

UCITA was introduced in both the Senate and House of Delegates on January 12, 2000, and referred to the Senate Finance Committee and the House Economic Matters Committee. Because the Act was offered as a departmental bill, the Attorney General's office was not allowed to oppose it even though it was one of the original opponents to *UCITA*. It was allowed to offer amendments, however. The main focus of the Attorney General's office was on consumer issues. It was joined in its efforts by 4Cite, a broad-based coalition of end-users and developers of computer and information technology, which includes the library and education communities (AALL's Associate Washington Affairs Representative, Mary Alice Baish, spent countless hours in Maryland and was instrumental in coordinating our efforts). Some consumer amendments even found their way into the final bill.

From the first joint hearing on the two bills it was obvious that *UCITA*'s proponents had the advantage. It was being pushed by the Governor, the leaders of both houses of the General Assembly, the Maryland representative to the National Conference of Commissioners on Uniform State Laws, AOL, Microsoft, and a raft of businesses powerful enough to have exempted themselves from *UCITA*'s more odious provisions, such as the banking and entertainment industries. Their testimony in support of the Act took almost three hours. It was also obvious that there was serious opposition to *UCITA*; legislative working groups were set up by the Senate and House committees in an effort to address some of our concerns.

As has been reported in a number of articles published in *AALL Spectrum*, one of the main concerns librarians have with *UCITA* is its effect on copyright. *UCITA* redefines computer software and information transactions as a licensing transaction rather than a sale. This means that a vendor can wield more control of the subsequent use of the product, including the right to prohibit the transfer of computer information. (See *UCITA* section 503.) This has a potentially chilling effect on fair use and the first sale doctrine, not to mention the right to transfer materials through interlibrary loan, through mergers, or through a gifts and exchange program. Because competition is so limited in the marketplace for computer information products, libraries will be left with few rights and very little bargaining power under *UCITA*.

The library community tried to convey these concerns to the Senators and Delegates in the legislative working groups. We even proposed several amendments, the last of which read:

A term of a non-negotiated contract to which a library, archive, or educational institution is a party is unenforceable to the extent that it restricts the ability of the library, archive, or educational institution to engage in archiving, reserve lending, interlibrary lending, classroom use, distance education, or preservation activities that otherwise are permitted by state or federal law.

While this amendment still would require that we act to preserve our interests in negotiated agreements, we felt we that this amendment would address most of our concerns.

Unfortunately, the legislators disagreed, stating over and over that "copyright will trump *UCITA*." What the *UCITA* proponents failed to understand is that federal copyright law does not necessarily preempt contracts. In fact, the general rule is that a negotiated contract is not overruled

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by copyright. In non-negotiated contracts—such as shrink wrap and "click-on" licenses, to which a user has agreed by opening and using the product or by clicking on "ok" when the license agreement is displayed on the screen (usually in extra-small type most of which is not viewable from the window provided)—the courts have split on the issue.

The Senate committee did attempt to appease the library and education committees by adopting an amendment that reads:

A contract term is unenforceable to the extent that it would vary a statute, rule, regulation, or procedure that may not be varied by agreement under the federal copyright law, including provisions of the copyright law related to fair use.

Of course, the provision "varied by agreement" renders the remainder of this

amendment useless because nearly every provision of the copyright law (with a handful of exceptions not relevant to our concerns) can be varied by agreement.

Once the library community's amendment was rejected, we began an e-mail and letter-writing campaign in order to let the other members of the Senate and House know our position. It was at this point that the proponents began to mischaracterize our arguments and claim that our amendment would leave them vulnerable to piracy by libraries and educational institutions. The Reed-Elsevier-LEXIS representative even went so far as to claim that our amendment might allow librarians to pirate the entire *Maryland Code* from one of his company's databases! (This statement was made at the Senate Finance Committee working session on March 23, 2000.)

This mischaracterization of the library and education community's intentions continued in the floor debates in both the Senate and the House. In both houses of the General Assembly, arguments were made that libraries and educational institutions were not concerned with the rights of copyright holders; that we were interested in giving computer information away. Proponents

added that technological advances have made copying easier than ever before.

In the end, *UCITA* was passed without an amendment to protect library interests, although Senator Kelley, in her speech

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in support of *UCITA*, mentioned that she would be willing to support a library/educational institution amendment in the future if the community could come up with specific instances where *UCITA* has adversely affected our mission.

Suggestions for those of you who'll be fighting *UCITA* in the future:

1. Develop a coalition of all the various library groups in your state as well as other groups opposed to *UCITA* and develop an action plan. This should be done as early as possible, preferably before *UCITA* is officially introduced.

2. Set up a mailing list to keep members apprised of current developments and to send action alerts. These action alerts should have "ready made" form letters, so that members merely have to forward them to the appropriate legislator.

3. Develop a list of concrete examples of how *UCITA* will adversely affect libraries and institutions. Legislators usually have no grasp of copyright and arguing in the abstract just does not work. You need to come up with real life examples of adverse licensing terms and how they will affect libraries under *UCITA*.

4. If money permits, hire a lobbyist. Lobbyists are familiar with the vagaries of their state's legislative process and the major players. Knowing whom to contact, and how, can make a big difference.

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