



Copyright CORNER copyright corner

Whither UCITA?

by Charles Cronin

Introduction

Last July, while we were still rustling through sacks of goodies from our convention in Washington, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved, by a vote of forty-three to six, the draft of the *Uniform Computer Information Transactions Act (UCITA)*—a proposed uniform law governing licenses of electronic information.

What, one may well ask, is to be done now that *UCITA* is out of the barn and galloping unbridled towards the state capitol? The following paragraphs sketch a brief history of the proposed *Act*, discuss how its terms raise troubling concerns for consumers of electronic information and librarians in particular, and suggest where to learn more about *UCITA* and what to do to arrest its progress, or at least influence how states implement it.

NCCUSL's stated objective in drafting *UCITA* is to provide to judges, lawyers, and electronic information industry players in general, a set of rules that clarify current law governing commercial transactions involving electronic information. The enlightening force of *UCITA* will, according to its proponents, save money that would otherwise be spent on litigation before judges who are befuddled by the tangle of state and federal contract and copyright law currently applied to these transactions. A lofty goal, but a closer look suggests that a hidden—or at least obscured—double-pronged agenda of *UCITA* is to provide software developers and publishers of electronic information a new means at law by which to protect their

intellectual investments and thereby provide states a piece of ready-made legislation that might attract these industries to them.

We know about the mercurial nature of digital information, and the near-frantic efforts on behalf of publishers to control their investments in it in the face of what many consider a porous and namby-pamby federal copyright law (insider traders may be sent up the river for improper use of information, but who's heard of a copyright infringer serving jail time?). In spite of copyright law's finely calibrated balance between authors and consumers and the purported tractability of the copyright statute to copyrightable expression that employs new media, publishers and software developers are dubious about copyright's ability to guard their interests, and are turning to other modes of protection, including technological means. (This is particularly apparent in the music recording industry, whose major players have circled their wagons in hopes of stanching revenues lost from the

hastiness of the venture in the face of minimal caselaw guidance. Pulling out of the partnership with NCCUSL, ALI stated that it would serve only as an advisor—a role that several ALI members emphatically declined. Undeterred by ALI's retreat, NCCUSL reverted to its original plan of drafting a freestanding act. It is now offering to state legislatures the recently approved draft of *UCITA* that, along with its UCC 2B predecessor, has prompted a torrent of criticism. Along with scores of copyright scholars, other academics, and librarians, 25 state Attorneys General, and the Federal Trade Commission have registered strong opposition to *UCITA* because of its potential collision with consumer protection laws, copyright law, and first amendment rights.

What's Wrong with UCITA?

In *ProCD v. Zeidenberg* (1996), Judge Frank Easterbrook of the Seventh Circuit Court of Appeals enforced the terms of a shrinkwrap license that permitted only home use of ProCD's telephone directory.

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insouciant exchange of MP3 files on the Web, and who have recently collaborated to establish a standard that will make it difficult to consume pirated digital recordings on the Internet.) *UCITA*, from a publisher's perspective, is a statute that legitimizes, and provides means of enforcing, use restrictions that potentially run afoul of federal copyright law.

UCITA's History

An ABA subcommittee originally studied the legal issues surrounding electronic information transactions and proffered to NCCUSL the idea of drafting a uniform law to govern these contracts. The NCCUSL assumed the project, and originally conceived *UCITA* as a freestanding act, which it is now. The American Law Institute (ALI) later joined the drafting effort as a co-sponsor of the *Act* that then became a proposed addition to Article 2 of the Uniform Commercial Code. Last April ALI became queasy about the pro-licensor tilt of proposed UCC Article 2B and unnerved by the

The spirit of this opinion is reflected in *UCITA*, which broadly validates terms of licenses for electronic information, and in particular for non-negotiated mass-market licenses, unless they are "unconscionable." Under *UCITA*, all but unconscionable restrictions on use of a product (that are embedded in the license mumbo-jumbo we zip by on our way to the "I Agree" button) are potentially binding as long as the licensee—i.e., we, the consumers, the librarians—had an opportunity to review these restrictions before completing the transaction with a couple of left clicks. The mild *frisson* of anxiety that attends our consummating information licenses using a mouse has the potential under *UCITA* to become, to borrow from Jane Austen, "a thrill of horror." With shrink-wrap licenses, terms restricting use of the product may not be accessible until after we've paid for it and opened the package. If you don't like what you find, your recourse under *UCITA* is to seek a refund by returning the product.

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Librarians need to be chary of rogue license terms *UCITA* would validate, especially those that attempt to restrict uses of information that are now protected by copyright law, that establish choice of law in the event of dispute, and that provide licensor termination and electronic self-help that might undermine our ability to archive and transfer information sources. Let's take a closer look at these issues.

Suppose I work with Kenneth Wood to create an electronic version of *Law for the Horse Breeder*. We plan to expand the treatise by including full-text collections of caselaw and statutes dealing with tax and insurance issues relating to horse breeding. Using WESTLAW, I can handily download electronic texts of these materials and create text files that I can fold into the digitized treatise. To avoid potential liability for copyright infringement, I eliminate from the WESTLAW documents star pagination, keynumbers, and commentary. But I'm still not in the clear: the WESTLAW User Agreement I signed years ago (which I've yet to see a user read) permits me only to "transfer and store temporarily

insubstantial amounts of downloaded data." It also prohibits sharing or transferring my license to use WESTLAW, as well as attempting to "reverse engineer, decompile, disassemble or otherwise attempt to discern the source code" (as if I could!). In sum, the terms of my WESTLAW license prohibit me from copying—and sharing or transferring my ability to access—information that may be freely duplicated and shared when obtained through other sources.

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Should copyright law, which expressly excludes Government publications like statutes from its protective ambit, override the restriction on use of these publications that is embedded in my WESTLAW agreement in 10-point font? *UCITA*'s vague preemption provision (section 105: "A provision of this *Act* which is preempted by federal law is unenforceable to the extent of the preemption") doesn't

sound like the guarantee that librarians need to provide patrons meaningful use of their electronic resources: that license terms that attempt to restrict uses that are granted under copyright law will not be binding. Copyright law's fair use, first sale doctrine and library reproduction rights (section 108) reflect established and essential tenets on which libraries rely to build, maintain, and share their information resources. Librarians need to maintain these rights by shunning license provisions that attempt to curtail them.

We should also be watchful for terms in access licenses that establish the applicable law in the event of a dispute between the licensing parties. Absent an agreement otherwise, section 109 of *UCITA* would apply the law of the licensor's state to access contracts. Librarians at state universities need to be especially wary of *UCITA*'s gap-filler role in this matter, as state law may require that any disputes arising from licenses involving state funds be governed by the law of that state.

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We would need to be suspicious too, of license terms dealing with the enforcement of termination provisions. A basic function of research libraries is to preserve a broad range of information resources for the longest period possible given constraints of space and resources. *UCITA* sections 618 and 814–816 on termination and electronic “self-help”—i.e., licensor as repo man—have the

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potential to undermine this effort by promulgating terms that would leave with the licensee mere memories of the information source they had licensed. Likewise, libraries could find their ability to enhance collections through donations and exchange of electronic information resources stymied by license terms forbidding transfer of title.

We should also be aware that while *UCITA* requires that the licensor disclose restrictive terms like transfer prohibitions, under *UCITA*'s weaselly definition of “conspicuous” such restrictions need not be overt. Indeed, mere use of italics or capital letters will suffice for shrink-wrap licenses; for Internet transactions the requirement for disclosure is even weaker.

What's to Be Done?

UCITA critics might take heart—or solace, at least—from the fact that the preponderance of serious commentary on this *Act*—and its UCC 2B incarnation—has been negative and dismissive of the consumer protection provisions it supposedly contains. Carol Kunze has collected a great quantity of useful information about *UCITA* at

www.2bguide.com/ that includes statements by its proponents and detractors. You might also read more generally about the overarching tensions between copyright law and contractual restrictions on use of information in Jonathan Franklin and Jerome Reichman's impressive piece in last April's *University of Pennsylvania Law Review* (Franklin is a member of AALL's Copyright Committee).

Librarians, and law librarians in particular, are a well-organized group, and a force to be reckoned with by the publishing and software industries. Write your governor and representatives about the potential for diminishment of the “public commons” that is latent in *UCITA* provisions that abet commodification of information. If we don't prevent state legislatures from passing *UCITA*, we run the risk of making reality of Barnes & Noble's now-preposterous advertising slogan: “If we don't have your book, no one does.”

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