Working Behind the Scenes to Affect Legislation:

A Case Study with *UCITA*, or *UCITA*: the *Real* Lesson

Professional Perspectives — Tools and Techniques of the Trade. The Professional Development Committee encourages members to continue to explore topics after presentations at the local, regional and national levels. We welcome your comments and article suggestions. Please contact Susan Siebers at 312/902-5675 or susan.siebers@kmz.com.

Sitting in House Hearing Room D of the Virginia General Assembly Building on Jan. 9, I only half-hear the speaker's comments outlining the 2001 legislative recommendations. After six months of study, four public hearings and two rather intense negotiation sessions between representatives of the library community and the information industry, I am exhausted as the Joint Commission on Technology and Science is poised to adopt a range of amendments to Virginia's version of the *Uniform Computer Information Transactions Act.* The motion to accept the amendments to *UCITA* passes. The amendments will be adopted only six months prior to an effective date that has loomed like a black cloud over Virginia's libraries since April 2000. Indeed, it is a bittersweet moment.

An analysis of *UCITA* and its effect on contracts between publishers and libraries, access to electronic information and library services, such as interlibrary loan, has been covered by law library colleagues who are experts in intellectual property, which I am not. Despite my familiarity with the legislative process and more than a decade of working to affect public law library legislation in Virginia, this experience truly was my initiation to the political process in Virginia.

Some Background

In June 2000, I received a letter notifying me of my appointment to Technical Advisory Committee Five of the Joint Commission on Technology and Science, a legislative entity. The committee was charged with examining "the *Uniform Computer Information Transactions Act*'s impact on Virginia's businesses, consumers and libraries, and to consider possible changes to the *Act*." During the 2000 legislative session, the General Assembly had adopted *UCITA* with the proviso that a special advisory committee would be created to study the impact of *UCITA* as written. My appointment was not entirely a surprise since I addressed Virginia's passage of *UCITA* and the possible implications for our law library in my annual presentation to the Supreme Court of Virginia. As a result, the court requested representation on the advisory committee. The committee's initial meeting in June was organizational in nature, including brief introductions, discussion of the study format and procedure, and scheduling tentative dates and locations for public meetings. I introduced myself to the other librarian on the committee, as well as to individuals who had participated in the initial *UCITA* study conducted during the 2000 session. Although I felt rather confident about my library and my knowledge of specific ways *UCITA* might impact my library, I was extremely nervous about the prospect of debating copyright and intellectual property issues with the seasoned attorneys on the committee.

A simple headcount of the proponents and opponents of *UCITA* represented on the advisory committee of 27 confirmed that the members with grave concerns about *UCITA* were outnumbered. We would have to work very hard to convince the others on the committee that any library amendments and the reasons for them were worth supporting. It actually seemed possible if we could rally enough librarians to speak on behalf of our position at each of the public meetings. After all, what would be more effective than a vocal constituency with valid concerns? In addition, we had the support and expertise of the AALL Washington Affairs Office and the American Library Association Washington Office.

What Happened?

The two librarians on the committee met in Washington, D.C., in early August. Mary Alice Baish, AALL's acting Washington affairs representative, and Miriam Nisbet, ALA's legislative counsel, joined us. As veterans of the federal legislative process, they provided invaluable background information and ideas for a legislative strategy. A second strategy meeting of librarians and other *UCITA* opponents was held in Richmond, Va. We understood several procedures that would affect our strategies. The official press advisory from the joint commission noted that "[p]ersons proposing amendments must be present at the meeting and provide the exact nature of the proposed amendments, the reasons for the proposed amendment and the proposed amendment's impacts." This certainly sounded fair, yet the study procedures provided that the advisory committee would hear amendments and vote on whether the amendment should be discussed further at the committee's final meeting. If amendments were rejected, they would not be considered at later committee meetings; thus, each amendment would have one chance for review and adoption. We also decided not to introduce a "blanket" exclusion because that language had failed during the term of the first advisory committee.

We decided not to present any library amendments at the first meeting in Norfolk, Va., on Aug. 23, 2000, but rather to wait until we had a better sense of the committee process. Although the meeting in Norfolk began at 1 p.m., the committee members had considered only nine amendments by 5 p.m. There was no agenda for the meeting, and a disproportionate amount of the time at what was characterized as a "public meeting" was spent discussing amendments submitted by committee members and not members of the public. While we were successful in gathering a room full of librarians in Norfolk, many prepared to speak, the meeting was adjourned only minutes after a single librarian was provided the opportunity to speak.

At the second meeting, held in Lynchburg, Va., on Sept. 12, 2000, we introduced our two library amendments. Despite the fact that we again filled the room with librarians, several eloquently addressing the library communities' concerns, the committee rejected the primary library amendment on a narrow margin of 12-11. Our second amendment, regarding mixed transactions, failed on a vote of 9-14. Even more disheartening were the comments of a representative of an internationally

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A Desktop Learning Opportunity

known legal publisher. He used his time at the podium to share the concern that the amendments sought by librarians would permit libraries to buy one copy of everything and then "give it away" to millions of users around the world. Despite the official committee procedure, we were told our amendments might be reconsidered if we completely edited the language and "tightened up" the scope of the amendments. We went to work immediately on redrafting our language. On the bright side, an agenda had been distributed.

The meeting at George Mason University in Fairfax, Va., on Oct. 17, 2000, was truly a marathon. During the course of six hours, committee members considered 32 amendments and deferred nine amendments to the final meeting in November. After the Fairfax hearing, negotiations with representatives of AALL, ALA, the Virginia Library Association, National Conference of Commissioners on Uniform State Law and the publishing industry disintegrated as we haggled over for profit vs. non-profit libraries, tangible copy, on the premises and the implications of copyright law, including fair use. Our final revised amendment was presented at the meeting in Richmond on Nov. 9, 2000 — and failed on a tie vote. We took solace in the fact that several of the technology council members on the advisory committee not only voted in favor of our amendment but also spoke in support of it. Of 71 amendments submitted by committee members and the public during the four public meetings, only 23 were adopted at the final meeting for recommendation to the full Joint Commission on Technology and Science.

Although the term of Advisory Committee Five officially ended at the last meeting held Nov. 9, 2000, a subgroup of the initial committee continued to negotiate a compromise amendment between the VLA and the information vendors. In December 2000, this sub-group met in Washington, D.C., to work on a negotiated compromise. This group included me — not representing law libraries — the VLA representative to the advisory committee, the VLA lobbyist, an intellectual property attorney who had served as an adviser to ALA, representatives of various publishing industries, America Online and the author of the original *UCITA* draft. While this resulted in a very narrow library amendment, the negotiation was handled within the context that *UCITA* had been enacted in Virginia and would be effective in a matter of months.

By January 2001, VLA accepted the proffered amendment, stating:

> "Given that *UCITA* has already been signed into law in Virginia, the VLA believes the proposed amendment is a reasonable compromise for Virginia libraries and librarians. Both sides to the negotiation agree that this compromise is not entered into as a proposed national solution to library concerns with *UCITA* and that, except for preserving any fundamental public policy, preemption, and unconscionability defenses which may exist, the issue of online access to content was one that could not be resolved during the Virginia negotiations."

After considering a range of issues, the Virginia Association of Law Libraries could not support the final negotiated amendment. For more information about the Virginia library amendment and links to the official joint commission documents for each of the above meetings, visit the VALL Web site at http://law.richmond.edu/vall/LegAwareness.htm

What I Learned

Present your arguments as persuasively as possible, but don't be too naive about success. Good, logical reasons for statutory change that serve to benefit the public at large don't outweigh private economic concerns.

At each hearing, librarians described their mission to serve and provide access to information, no matter what the format. They were passionate about the citizens we serve and the importance of public access to information in a democratic society, yet all the flag waving and recognition of libraries' special services to our communities made no difference to most members of the advisory committee or those legislators present. Surprisingly, citing current federal copyright law proved to be of little benefit, as we were continually reminded that this was a *state* legislative amendment.

Develop and nurture alliances with colleagues from other types of libraries and other professions who are affected by proposed legislation.

As librarians from a variety of libraries and library organizations answered the call to attend meetings or speak in support of our amendments, we developed an "esprit de corps" — a team fighting the "battle" against *UCITA*. The mix of media specialists, university librarians, law librarians, virtual librarians and others provided a strong united message. There was an overwhelming volume of information, paper and people to digest. This was manageable, in part, because there were humorous moments as well. I won't soon forget war stories shared over lunches with my fellow librarian on the committee (and new friend) or the dinner crammed in a booth with some folks from the insurance industry. We learned a lot from their experiences and willingness to share lessons of success and failure.

Understand the realities of your situation. The "right" side doesn't always win.

When a state's primary elected officials have decided that legislation, such as *UCITA,* will attract and promote economic opportunities for the growing software and information industries, nothing will convince them to change their initial course. Our state elected officials are convinced that it's not only important for a state to attract new technology in this global economy, but it must retain existing corporate citizens, such as America Online.

Organize your presentations and witnesses well.

Naively, I thought an organized group of librarians representing a variety of libraries in Virginia, each presenting the same logical, well-established principles — with the support of existing copyright law — would be able to turn the vote. Perhaps I should have heeded the words of

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Sir Robert Peel in a letter to Lord Radnor in 1946, "Great public measures cannot be carried by the influence of mere reason."

Know the limitations on your time and resources, and don't underestimate the time and resources of your opposition.

My library colleague and I were "volunteers" on the committee, actively participating, yet responsible on a daily basis for the operation of our libraries. Conference calls, e-mails, and face-to-face meetings were squeezed in between working shifts at the reference desk, handling library correspondence and training new library staff. A majority of those representing the technology groups and publishers were performing a service paid for by a client; these individuals had the luxury of ample time to review and analyze each proposed amendment in-depth. There was no time to craft an appropriate response when one committee member distributed a five-page legal memorandum addressing the "constitutional infirmities" and "practical problems" of the library amendments.

Do your homework before negotiations begin.

After months of working on the committee, it was quite clear the position of America Online would be crucial in any negotiated agreement. A flurry of e-mails and telephone calls analyzing every word in the draft prepared by Professor Raymond Nimmer of the University of Houston Law Center preceded the meeting in Washington, D.C. Grateful I had taken the time to read Nimmer's 1992 article about information, I was, by this point, in a better position to defend our language and gauge his likely response. Attendance at one of AALL's preconference Legislative Advocacy Workshops would have strengthened my negotiating skills even more.

Frustrating But Valuable

My experience as a member of the advisory committee, although frustrating at times, was valuable. I learned more about the legislative process and will be better able to contribute in the future on library and information issues facing Virginia. But, I believe that the other librarian on the advisory committee and I accomplished something more. We educated some advisory committee members and some Virginia elected officials about library and information issues. We taught them that librarians were not looking at ways to "give away" publisher information, but rather we are concerned about access to information for all citizens. Our objections to this specific law, *UCITA*, dealt with what we believe is the negative impact on information dissemination and access. We also convinced some members that librarians are partners in this process, not just another group whose objections must be overcome.

My final advice: If you have the chance, get involved in the *UCITA* debate if it comes to your state. You'll learn not only about *UCITA* and its impact, but you'll learn how to become a better advocate for libraries and information access.

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Want to learn more about *UCITA* and the continuing debate in some states? Attend Program G-5, "Coming Soon to Your State? The *Uniform Computer Information Transactions Act:* A New Reality for Librarians," on Tuesday, July 17 at the Annual Meeting.