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***Library Journal*, September 15, 2000**

*If passed, this controversial law could disable fair use, widen the digital divide, and tap library budgets with the click of a mouse*

# The Fight Against UCITA

By James G. Neal

**A**ERICAN LIBRARIES are at war. And the battleground now reaches significantly beyond the World Intellectual Property Organization (WIPO) in Geneva and the U.S. Congress. The Uniform Computer Information Transactions Act (UCITA) has moved the confrontation to our state governments, venues where copyright traditions and subtleties are not understood, where librarians have little experience advocating on "fair use" issues, and where the interests of powerful software and content producers

often trump the interests of the education and library communities. With the introduction of UCITA, the historical balance preserved in our federal copyright law between the interests of copyright producers and the legitimate needs of our users for effective access to information has never been more threatened.

UCITA was adopted as a proposed uniform law in July 1999, the product of a ten-year effort between the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) to create a new and consistent legal framework for computer information, transactions, and software. On the surface, UCITA seeks to

legitimize a contractual and licensing basis for computer information. But major concerns have been raised about consumer protection and consumer rights, about the future relevance of copyright, which itself can be viewed as an existing national and uniform code governing the use of information in all formats, and about the increased cost of doing business in a UCITA world. It is now being introduced in state legislatures nationwide. But curiously, this is now happening without the ALI, which had major objections to the draft. In an unprecedented action, the ALI refused to participate in the further development of UCITA.

In essence, UCITA is part of a broad intellectual property revolution. As the globalization of copyright through WIPO treaty agreements strives to har-

monize national policies, this has spawned a series of significant legislative initiatives. In the United States, for example, this includes copyright term extension, the Digital Millennium Copyright Act (DMCA), the database bills, and now UCITA. Pressures to create copyright use guidelines, particularly for electronic information, have thus far been widely and successfully resisted by the library and education communities.

As licensing has expanded rapidly as the tool for individual libraries and groups of libraries to negotiate the terms of access and use for digital resources, technological controls being implemented by producers of electronic information are now advancing from passive "password or IP domain" models to more active "encryption or self-help" strategies. And challenges on copyright ownership are numerous. Writers and scholars are questioning the right of publishers to recycle their works in new electronic publications. Researchers are asserting co-ownership of their own journal articles. And college faculty are debating ownership of new academic publications, such as software and courseware.

## The problem for libraries

The priority issue for libraries is that UCITA would validate terms in shrink wrap and clickable licenses that restrict uses that are permitted under copyright law and negate provisions for fair use, first sale, and preservation. A second concern is electronic self-help. This is the process whereby a software vendor or licensor may electronically disable, remove, or prevent the use of computer information. This could be accomplished remotely through "backdoors" in the software, or hidden shutdown commands activated by phone or other mechanisms. Electronic self-help poses serious security issues and could be very disruptive to the work of a licensee's staff operations or customers.

In addition, UCITA increases the cost and complexity of doing business, by forcing organizations to negotiate more routinely and substantively on license terms. This will require more dedicated staff and more expensive expert-

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ise. It will also translate into reduced organizational benefits for the dollars invested in computer information and software. This is complicated by the inaccurate UCITA assumption of a competitive market, where users have meaningful choices among vendors that compete with each other. For some types of software and information products and databases, there is virtually no competition, and this is particularly true with many of the products marketed to educational institutions. This absence of competition would allow licensors to exploit the provisions of UCITA and to impose onerous terms that the institutions would be unable to negotiate because they would have little or no bargaining power.

### The Maryland experience

When introduced in Maryland, the copyright issue attracted the attention of legislators but took a very curious turn. The basic library community argument against UCITA is that state contract law should complement federal copyrights and not displace it. But UCITA relies on federal preemption, or the ability to prove that a license term is inconsistent with a "fundamental public policy." This is clearly bogus. The library community therefore introduced an amendment in the Maryland debates on UCITA that attempted to obviate this provision. It read: "When the licensee in a non-negotiated license under this Act is a library, archive or educational institution, a term which has the effect of restricting the provisions of 17 U.S.C. Sections 102(b), 107, 108, 109, 110, 112, 121, 512 and 1201 (a) (1) (C) and (d)-(k) shall not become part of the license." This amendment sought to preserve for mass market licenses the standard limitations contained in current copyright law. It was not accepted.

A second copyright amendment, however, was introduced and approved without library endorsement. It stated that "a contract term is unenforceable to the extent that it would vary a statute, rule, regulation, or procedure that may not be voiced by agreement under the federal copyright law." But this circular provision is meaningless, as the copyright law does not specify which of its terms may and may not be varied by contracts.

In general, UCITA is introduced in state legislatures under the auspices of an economic development imperative as states strive to achieve "new economy" advantages over regional competitors

and to attract and retain e-commerce business investment. The technology goals set by the State of Maryland for 2000 are illustrative of this:

- Protect and expand Maryland businesses by establishing a bold framework for the digital economy, encouraging growth, and preventing fraud.
- Provide security for our families with strong consumer protections, privacy guarantees, and aggressive efforts to protect our children from the potential dangers of the Internet.
- Dramatically improve customer service by making Maryland a national leader in delivering government services over the Internet.
- Enable law enforcement to fight digital crime.

Further setting the stage for the passage of UCITA, Maryland's Information Technology Board also made the following recommendation on "Enlightened Policies on Commercial Law":

Maryland should provide a legal framework that promotes and enhances the incorporation of e-commerce into everyday business operations. National model legislation has been developed to establish a level playing field for electronic commerce in every state.

Maryland passed UCITA with amendments and will be the first state to implement the measure on October 1, 2000. As we saw firsthand in Maryland, the state legislature process involves significant compromise, although in Maryland there was a focus on the "uniform" objective for UCITA. Agreements on changes typically come out of subcommittees or special work groups of legislators, but the investigative and drafting power usually rests with legislative staff. The compromise process often means that when an advocacy group achieves its priority amendments, it is asked to step aside and no longer oppose or advocate on the legislation. Thus it is important for the library community to have clear agreement on these priorities.

Industries, which might begin as part of a coalition opposing UCITA, will seek exclusion from the legislation and, if successful, drop out of the partnership. The legislative leadership is very powerful and will influence other legislators to support UCITA and seek to quiet any opposition coming from public agencies, libraries and universities, for example, especially if they are pursuing other budget or legislative objectives. The

most troubling development in the early state debates on UCITA is the attempt by advocates to portray copyright as applying to print information and UCITA to software and electronic information. This is an area where librarians must be vigilant, correcting this "misunderstanding" every time it is raised, arguing the facts of copyright as embracing all media, and citing the provisions of the DMCA as evidence.

### Copyright under assault

UCITA reflects the expanding tension over the purposes and nature of national copyright law. Copyright term extension has created what Peter Jaszi at American University calls "perpetual copyright on the installment plan." The DMCA advances anticircumvention and online service provider liability provisions. Database legislation proposes a new regime for the protection of collections of facts based on investment return rather than public interest. And now with UCITA, the public law of copyright is threatened by the private law of contract.

With so many changes, one wonders whether copyright will be relevant to the work of librarians even five years from now. All of these legislative initiatives represent a frontal assault by producers/owners/distributors of information on national information policy to set aside the decades of balance that we have achieved in federal copyright law. The results will be a reinforcement and extension of information as a commodity and not a public good, a fundamental undermining of the basic role librarians have played in reducing barriers and in adding value to information access. Is copyright focused on natural property rights, economic incentives, and reward for investment? Is copyright focused on the constitutionally based interest in the encouragement of innovation and societal advancement? Or is copyright a tool for balance, focused on public welfare and public access in a democratic and open society? As creators, distributors and consumers of information increasingly approach this trichotomy in a schizophrenic way, and roles become blurred in the digital and Internet world.

### A digital divide issue

UCITA aggravates the "digital divide" dilemma by making it even more challenging for institutions with limited financial and staff resources to negotiate favorable price and access terms in

contracts. It might even make it more difficult for the library community to bridge this divide through strategies such as resource sharing. Must "have-not" institutions rely more on inadequate public domain software and free Internet resources? Will library users in poorer communities face more constraints and poor performance in their access to computer information and electronic resources? In a UCITA world, quite possibly, yes.

Yet, because UCITA is long, complex, and unfamiliar, many legislators achieve minimal understanding of the legislation and tend to defer to their attorney colleagues. There is a clear bias toward UCITA proponents who are routinely consulted when amendments are being considered. Libraries will be portrayed as electronic information pirates and as trying to secure at the state level what they could not achieve at the federal level. Librarians must be prepared to demonstrate the significant investment we are making in electronic resources and computer software, our responsible behavior in honoring license terms, and our efforts to educate library users and staff about appropriate use of copyrighted material.

### The fight

To date, a large number of state attorneys general have opposed UCITA because of consumer protections concerns. What recourse will a consumer have in the case of software that does not perform as reasonably expected, software or access terms that become apparent only after the consumer buys the product, software that is sold "as is" without liability or warranty? Which state's law will prevail? Where the product was purchased? The home state of the consumer? The state where the corporate headquarters are located? And what will be the choice of legal forum where a contract dispute is resolved? Will consumers through contract agreements be subject to violations of privacy as their use of computer information is monitored? Or to violations of free speech as their ability to speak about or review a product is constrained? Will reverse engineering be disallowed: this is the process of examining a computer program or digital product to debug or develop interoperability or to teach students how software is constructed.

Cathy Wojewodzki, librarian at the University of Delaware and coordinator of the library opposition to UCITA in

## What You Can Do

Backed by the major library organizations, including the American Library Association and the Association of Research Libraries, 4CITE is a broad coalition of partners from the library community; the education, industrial, retail, and legal fields; and consumer groups opposed to UCITA.

To join the fight against UCITA, visit 4CITE's web site at [www.4cite.org](http://www.4cite.org). There you'll find information to help you:



- **Get Educated.** UCITA 101 provides a quick primer on the legislation, who's against it, who's for it, and what it means to your library. Read from the extensive archive of media coverage and the testimony of key players.
- **Get Involved.** Join the Rapid Response team. See a sample letter of opposition, get information on public hearings, local media, and how your voice can be heard in your state.
- **Get Organized.** The 4CITE briefing book, available online, will help you make your efforts count.
- **Get Going.** UCITA is moving quickly, and every day counts. The legislation is currently most active in Delaware, the District of Columbia, New Jersey, Louisiana, and Oklahoma. Find out what your legislature is doing.

Delaware, has offered some tactical advice. Be able to answer questions about UCITA with specifics and examples that illustrate the impact on libraries. Decide if you are prepared to compromise or if your goal is to kill the bill outright. If the former, secure dependable legal support, prepare briefing materials for legislators, and circulate proposed amendments.

Identify a point person or team that is knowledgeable about the legislation, understands the legislative process in the state, and can sustain a very flexible schedule. Vest the authority of the library community in one or a few individuals who can speak for that position at hearings and in workgroups. Identify other individuals and groups opposing

UCITA, other key parties who are or should be interested, supporters of UCITA and their strategies, legislators and lobbyists who are sympathetic with the library position, and a legislative ally who might lead a floor fight or sponsor amendments.

### The future

UCITA has been considered in 11 jurisdictions, with most states postponing its formal introduction or debate. In Iowa, legislation was passed that protects Iowa businesses and consumers from the effects of UCITA. In Oklahoma, UCITA has passed both the House and Senate but awaits interim study before consideration in the next session.

Virginia has passed UCITA but delayed implementation until 2001 pending the outcome of a study by the Joint Commission on Technology and Science. In Delaware, UCITA was actively debated but, due in part to the well-organized opposition of the library community, was tabled. And in Maryland, UCITA was passed with significant amendments and will go into effect this fall, to be monitored by a legislative commission.

The states that consider UCITA first are in many ways serving as a prototype for the nation: the changes and compromises agreed to during these early stages will significantly influence subsequent debates in other states. As a result, floods of lobbyists from the computer software and content industries have appeared in state capitals to advocate for UCITA, and the "hard-ball" political tactics are sobering for librarians.

UCITA likely will be considered in an expanding number of state legislatures during 2000 and 2001 sessions. The early experiences in several states provide us with guidance on what to anticipate in legislative behavior and on what strategies can be most effective. Copyright is very unfamiliar to state legislators, and a clear and concise educational effort from the perspective of libraries and their users can be invaluable. Because UCITA is so strongly identified with economic development in general and e-commerce in particular, legislators, at least initially, have a difficult time understanding why librarians are interested. Librarians must appreciate the economic imperative that is driving UCITA and argue that quality libraries and effective information access also contribute to economic progress. ■