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The Uniform Computer Information Transactions Act (UCITA): Still Not Ready for Prime Time

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THE UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT (UCITA): STILL NOT READY FOR PRIME TIME

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[1] In July, 1999, the General Counsels, Vice Presidents, and other senior officers of major information industry technology companies (including Adobe Systems, Intuit, Silver Platter, Lotus, and Microsoft) wrote to the National Conference of Commissioners on Uniform State Laws (NCCUSL) urging adoption of the Uniform Computer Information Transactions Act (UCITA) at the then imminent NCCUSL meeting in Denver.[1] The executives supported the adoption of UCITA because it is true to three commercial principles: commerce should be free to flourish in the electronic age, rules should support use of new (in this case electronic) technologies, and marketplace forces should determine the form of these transactions.[2]

[2] It is hard to argue with these principles. I support an exuberant economy, but not at the expense of other important public policies such as the free sharing of information in the public domain and the rights that those who use intellectual property are afforded under the Copyright Act.

[3] I support rules that further the development of new technologies, but not at the expense of consumers and library users. I cannot endorse rules that enable vendors: (1) to hide terms in contracts that few are likely to read, (2) to change contract terms by sending an email message which one may never see, or (3) put licensees at a vendor’s mercy by threatening self-help measures.

[4] Last spring, Virginia was the first state to pass UCITA legislation. Several months earlier, Governor Gilmore indicated his support for the Act when he wrote
that "[n]othing could be more basic to a free market than the right of vendors and purchasers to negotiate their respective rights and responsibilities. UCITA underscores the right of software and information vendors, and their customers, to negotiate contractual terms."[3]

{5} The marketplace works quite well when we are dealing with goods. If I want to purchase an automobile, I can choose between a Ford, a Toyota, and a host of other automobiles. If I want to purchase a washing machine and don't want a Maytag, I can buy a General Electric. However, personal property and intellectual property are very different animals; information is not fungible. If a student, a teacher, or any citizen of Virginia wants to read a book or article written by a particular author, they want that book or that article. You cannot simply substitute someone else's work.

{6} I cannot say that everything is wrong with UCITA; much of the proposed Act is fine. UCITA, however, is fundamentally unbalanced. It tips the scales in favor of information creators and vendors at the expense of those who use information. Information, unlike cars and washing machines, ought not be treated as a commodity. I share many of the concerns expressed by twenty-six state attorney generals, the Federal Trade Commission, and the library and consumer communities who have opposed UCITA.

{7} I would like to explain some of my concerns with UCITA, beginning with validation of licenses. Our courts are divided on the validity of click or shrink-wrap licenses that create binding contracts by a click of a mouse or by merely opening a software package. UCITA validates such contracts. Furthermore, the Act permits one of the parties - which you can assume will be the publisher/licensor rather than the consumer/licensee - to define what conduct constitutes consent in future transactions. UCITA not only permits the licensor to change the standards for manifesting assent, but also permits the licensor to make changes to the contract itself.[4] In fact, an electronic message sent by the licensor to the licensee that changes contract terms may be enforceable even if the licensee never receives it.[5]

{8} I would not be concerned if the contract was really negotiated. Where choices exist, consumers can seek terms they consider fair. Vendors who must compete for business are more willing to negotiate, but under UCITA, a vendor can make an "take it or leave it" offer when the consumer has no bargaining power. This is particularly true for legal information, where the commercial market is dominated by two major publishers.[6] Terms that are negotiable in the competitive world of goods become, in a non-competitive world, de facto industry standards.

{9} Governor Gilmore and other UCITA supporters maintain that UCITA protects freedom of contract. They acknowledge that the Act permits parties to enter into contracts that define their respective rights in intellectual property.[7] This approach highlights probably the most fundamental problem with UCITA: it will likely eviscerate congressional and judicial policies that recognize important social and commercial uses of intellectual property such as fair use, the library exemption, and the first sale doctrine.[8]

{10} UCITA permits licensors to prohibit the transfer of goods from a licensee to another individual or institution.[9] Such terms would have the effect of overturning the Copyright Act's first sale doctrine. Under UCITA, individuals may be precluded from making gifts to libraries, and libraries may very well be precluded from lending many of its materials.[10]

{11} A copyright owner's right to make copies of his or her work is subject to important exceptions, most notably fair use.[11] When planning your summer vacation you may, under fair use, photocopy an article on the Shenandoah Mountains from a journal owned by your public library. Under fair use, your child may copy an article on the 2000 presidential election for her social studies class. These are well-established, long-accepted practices when the library owns an issue of
the magazine.

12) Now, what if the articles are in an electronic version of the magazine, and the license states that users who print even a small portion of an article are infringing on copyright? Presumably you and your child are bound by the license, even though neither of you had any say in its formation, and even though what you want to do is permitted under the Copyright Act. There may be problems for the library, too.

13) UCITA states that whether a party to an agreement breaches the contract is determined by the agreement, or in the absence of an agreement, by the Act. If a license expressly limits use of the information or informational rights, use in any other manner is a breach of contract. The patron's breach, then, is the library's breach. When that happens, the licensor may terminate the contract and recover the information.

14) In drafting the Copyright Act, Congress also included specific rights for libraries in what is called the library exemption. Under certain circumstances, the exemption permits a library to copy an article for a teacher, for a student, or for another library to fill an interlibrary loan request. Licenses that override these important rights will adversely affect not only teachers and students, but all citizens.

15) UCITA supporters maintain that the Act includes important safeguards because unconscionable terms are voidable. In other words, if you have a problem, go to court. However, few consumers or libraries have the resources to do so; even if they did, proving unconscionability may be difficult indeed.

16) Supporters also contend that consumers and libraries are protected under the Act's preemption and fundamental public policy provisions. UCITA states that a provision of this Act which is preempted by federal law is unenforceable to the extent of the preemption. In addition, if a term of a contract violates a fundamental public policy, the court may refuse to enforce the contract, enforce the remainder of the contract without the impermissible term, or limit the application of the impermissible term so as to avoid a result contrary to public policy, in each case to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of the term.

17) Unfortunately, these safeguards do not provide adequate protection for consumers or libraries. In addition to providing that parts of the Act that are preempted by federal law are unenforceable, UCITA also should invalidate contractual terms that are inconsistent with federal policy. In other words, Section 105(a) should read that provisions of the Act or of a contract that are inconsistent with federal law or policy are unenforceable. With this added language, contractual terms designed to negate fair use, the library exemption, and the first sale doctrine would be invalid.

18) Let me offer an example that illustrates what is wrong with UCITA. I want to provide the Committee with copies of federal statutes and court decisions relevant to the issues we are discussing. I locate relevant documents on either the Lexis or Westlaw legal databases, and, after removing any proprietary information, download the cases and laws. But I discover that the license agreement permits me only to transfer and store temporarily insubstantial amounts of downloadable data.

19) Materials of the federal government, including statutes and court decisions, are in the public domain. I could have copied laws and court decisions from print codes and print case reporters for you. However, I cannot do so using electronic versions of the same materials because their use is governed by license. Should the world of digital information, governed by license, have practices and rules so different from the world of print? Governor Gilmore apparently believes so.
this new Internet reality justifies new rules of engagement. UCITA follows that paradigm by permitting the parties to enter into contracts defining their respective rights in intellectual property. Admittedly, new rules will require businesses to modify their contract behavior and strategies but this is a natural consequence of an evolving economy. Unless and until UCITA is determined to be preempted by federal copyright law by another court, this uniform law presents the most practical approach for constructive legal reform in a technology driven economy.[21]

{20} Apparently these new rules of engagement encourage end runs around the law. For example, legislation that would protect non-copyrightable databases has been stuck in Congress for several years. Although Congress has not passed such legislation, publishers apparently can accomplish the same result by license. The Governor apparently believes that if Congress won't create new rules, the business sector should.

{21} The Governor also writes that consumers and businesses need "predictable, coherent, and uniform rules for the electronic marketplace."[22] Unfortunately, the only thing predictable about UCITA is its uncertainty. Both Virginia and Maryland passed UCITA in versions different from what may be introduced in other state legislatures later this year or next. This Uniform Law, it turns, out, is still a work in progress.

{22} At NCCUSL's summer 2000 meeting, the Conference passed some additional amendments to UCITA. Here is what they wrote:

A number of styling and clarification amendments as well as amendments required to be ratified by the Conference were part of a discussion with the following associations: Motion Picture Association of America, Magazine Publishers of America, Newspaper Association of America, National Cable Television Association, National Association of Broadcasters, and the Recording Industry Association of America. As the Conference will recall, five of these associations had concerns about UCITA and in lengthy discussions, these amendments were worked out as a package and with the adoption of these amendments by the Conference, these associations formally in writing have withdrawn their opposition to the enactment of UCITA.[23]

{23} It appears that NCCUSL promoted to state legislatures, including Virginia and Maryland, a Uniform Act that was not finished, an Act the Commissioners were willing to amend to placate special corporate interests. In their haste to lead the internet revolution, Virginia and Maryland passed a Uniform Act whose ink was not yet dry.

{24} UCITA is bad for consumers and for libraries. It allows vendors to prohibit the transfer of software from library to user, from library to library, from company to company, and from individual to individual. It binds licensees to terms disclosed only after they have paid for the software. It allows vendors to change terms unilaterally by email or perhaps even by posting to their website. It enables licensors to override legislative and judicial policy.

{25} The Uniform Computer Information Transactions Act, which began life as Article 2B of the Uniform Commercial Code, may have been nearly a decade in the making. But it still is not ready for prime time.

ENDNOTES

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Law Library at the University of Idaho, as Head of Reader Services at the George Washington University Law Library, and as Director of the Civil Division Library of the United States Department of Justice. He received a B.A. from the University of Michigan, a J.D. cum laude from the University of San Diego School of Law, and an M.L.S. from the University of California at Berkeley. He has served as President of the American Association of Law Libraries and of the Virginia and Southeastern Chapters of AALL. Professor Heller speaks widely on copyright issues, has authored several articles on copyright law and legal research, and co-authored Copyright Handbook, published in 1984 as part of the AALL Publication Series.


[2]. Id.


[5]. UCITA § 215(a) provides that "receipt of an electronic message is effective when received even if no individual is aware of its receipt." UCITA § 215(a) (1999).

[6]. Two publishing giants, the Canadian Thomson Company and British/Dutch Reed-Elsevier, acquired the West Group and Lexis, respectively, as well as numerous other American legal publishers, during the 1990s.

[7]. Gilmore, supra note 2 at ¶ 14.


[9]. UCITA § 503 provides that a term in a contract prohibiting transfer is enforceable. UCITA § 503 (1999).

[10]. The first sale doctrine of the Copyright Act permits the owner of a copy of a work to sell or otherwise dispose of the possession of the copy. See 17 U.S.C. § 109 (2000). Section 109 of the Copyright Act does prohibit the lending of sound recordings and computer programs, but makes an exception for nonprofit libraries and nonprofit educational institutions, which may perform such acts under certain conditions. Id.


[17]. E.g., § 114(c) of UCITA provides that, "whether a term is conspicuous or is unenforceable ... are questions to be determined by a court." UCITA § 114(c) (1999).

[18]. See JOHN E. MURRAY, JR., MURRAY ON CONTRACTS § 96, at 490 (3d ed. 1990) (quoting Judge Skelley Wright: "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably unfavorable to the other party." Williams v. Walker-Thomas Furn. Co., 350 F.2d 445, 449 (D.C. Cir. 1965)).

[19]. UCITA § 105(a) (1999).

[20]. UCITA § 105(b) (1999).


[22]. Id. at ¶ 7.