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**UCITA: Still Crazy After All These Years, and Still Not Ready for
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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, SilverPlatter, Lotus, Novell, 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. The executives wrote that they supported 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; marketplace forces should determine the form of these transactions."^[1]

{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 those who use intellectual property are afforded under the Copyright Act, such as fair use.

{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 to hide terms in contracts few are likely to read or change contract terms by sending an email message one may never see, or that put licensees at a vendor's mercy by threatening self help measures.

{4} In the spring of 2000, Virginia was the first state to pass UCITA legislation. Governor Gilmore reiterated 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."[\[2\]](#)

{5} The marketplace works quite well when we are dealing with goods. I can choose between a Ford, a Toyota, and a host of other automobiles. If I don't want a Maytag washer I can buy a General Electric. But 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. But UCITA is fundamentally unbalanced. It tips the scales in favor of information creators and vendors at the expense of those who use information. Unlike cars and washing machines, information ought not be treated as a commodity. I share many of the concerns expressed by twenty-six state attorney generals, by the Federal Trade Commission, and by the library and consumer communities who have opposed UCITA.

{7} Let me explain some of my specific 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 changes to the contract itself.[\[3\]](#) In fact, an electronic message changing contract terms may be enforceable even if the licensee never receives it. [\[4\]](#)

{8} I would not be concerned if the contract was truly negotiated. Where choices exist, consumers can seek terms they consider fair. Vendors who must compete for business are more willing to negotiate. But a vendor can make a "take it or leave it" offer to a consumer with no bargaining power. This is particularly true for legal information, where the commercial market is dominated by two (or arguably three) major publishers.[\[5\]](#) 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, and acknowledge that the Act permits parties "to enter into contracts defining their respective rights in intellectual property."[\[6\]](#) 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.[\[7\]](#)

{10} The first sale doctrine of the Copyright Act permits the owner of a copy of a work to give or sell the copy to another person or to an institution, such as a library.[\[8\]](#) UCITA permits licensors to prohibit the transfer of goods from a licensee to another individual or institution. Such terms would essentially overturn the first sale doctrine, precluding individuals from making gifts to libraries, and libraries from lending many of their materials because they no longer "own" them, but

instead have possession of them only as licensees.

{11} A copyright owner's right to make copies of his or her work is subject to important exceptions, most notably fair use.^[9] 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 controversy surrounding the 2000 presidential election for her social studies class. These are well-established and long-accepted practices when the library owns a print copy of the magazines.

{12} But what if the articles are in an electronic version of the magazine, and the library's license prohibits printing of even small portions of an article? 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.^[10] "If a license expressly limits use of the information or informational rights, use in any other manner is a breach of contract."^[11] The patron's breach, then, is the library's breach. And if the library breaches the licensing agreement, the licensor may terminate the contract *and* recover the information.^[12]

{14} In drafting the Copyright Act, Congress also included specific rights for libraries in what is called the library exemption.^[13] Under certain circumstances, the exemption permits a library to copy an article for a teacher or 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.^[14] In other words, if you have a problem, go to court.^[15] But few consumers or libraries have the resources to do so; even if they did, proving unconscionability may be difficult indeed.^[16]

{16} Supporters also contend that consumers and libraries are protected under the Act's "preemption" and "fundamental public policy" provisions. UCITA states that any of its provisions which are preempted by federal law are unenforceable to the extent of the preemption.^[17] In addition,

"[i]f 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."^[18]

{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, or the first sale doctrine would be invalid.

{18} At the final meeting of Advisory Committee #5 of the Joint Committee on Technology and Science -- the group tapped to study UCITA in Virginia both before and after the General Assembly passed Virginia's version of UCITA last year -- the Virginia Library Association (VLA), proposed an amendment that more specifically addressed the activities of educational institutions, libraries, and archives. VLA's proposed section 59.1-501.5(f) read:

In a non-negotiated agreement, a term which has the effect of restricting the ability of a library, archive, or educational institution to engage in circulation, course reserves, and interlibrary lending services; classroom and other fair uses; distance education; or archiving and preservation, is unenforceable to the extent those activities are not prohibited by other law.[\[19\]](#)

{19} VLA pointed out that the scope of constitutional preemption under UCITA was uncertain, and that the provision on fundamental public policy[\[20\]](#) was "too vague to provide certainty to libraries and educational institutions that rely on fair use and other copyrighted exceptions."[\[21\]](#) This proposed amendment certainly had much merit. (However, I would have preferred that the amendment not include the initial words "in a non-negotiated agreement." As noted earlier, I am not convinced that we licensees have much bargaining power when we negotiate with information providers). Unfortunately, the Advisory Committee rejected the proposed amendment with an 11-12 vote.

{20} Let me offer an example that illustrates what is wrong with UCITA. Imagine that a member of Advisory Committee #5 wanted to provide the members of the Advisory Committee with copies of federal and state statutes and court decisions relevant to the issues it is discussing. The member located relevant documents on either the Lexis or Westlaw legal databases, and, after removing any proprietary information, downloaded the cases and laws. But the member discovers that the license agreement permitted her only to "transfer and store temporarily insubstantial amounts of downloadable data."

{21} Works of the federal government, including statutes and court decisions, are not protected by copyright.[\[22\]](#) (Although state statutes are not in the public domain by virtue of the Copyright Act, decisional law also places them in the public domain). The committee member could have copied selected laws and court decisions from print codes and print case reporters. However, she cannot do so using electronic versions of the same materials because their use is governed by license.

{22} 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.

[T]his 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.[\[23\]](#)

{23} Apparently these new rules of engagement encourage end runs around the law. For example, "database protection" legislation that would protect non-copyrightable databases has been stuck in Congress for several years.[\[24\]](#) Although Congress has not passed such legislation, publishers can accomplish the same result by license. The Governor apparently believes that if Congress won't create "new rules," the business sector should.

{24} The Governor also writes that consumers and businesses need "predictable, coherent, and uniform rules for the electronic marketplace."[\[25\]](#) Unfortunately, the only thing predictable about UCITA is its uncertainty. Both Virginia and Maryland (the latter being the only other state that has passed UCITA as of February, 2001), passed UCITA in versions different from what will be introduced in other state legislatures. This Uniform Law, it turns out, is still a work in progress.

{25} At NCCUSL's summer 2000 meeting, the Conference passed some additional amendments to UCITA. Here is what it 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 American, 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.[\[26\]](#)

{26} It appears that NCCUSL promoted to state legislatures, including Virginia and Maryland, a Uniform Act that was not finished, and one which the Commissioners were subsequently willing to amend to placate certain industries. In their haste to lead the Internet revolution, Virginia and Maryland passed a "Uniform Act" whose ink was not yet dry.

{27} Indeed, the JCOTS Advisory Committee #5 met several times from June-November 2000 "to study UCITA again during the interim [the period between the spring 2000 passage of UCITA in Virginia and its July 1, 2001, effective date] and report to the General Assembly and the Governor by December 1, 2001."[\[27\]](#) As part of its study, the Committee held several public meetings at which members of the public and members of the Committee could propose amendments to the Virginia UCITA legislation.

{28} The Committee received dozens of proposed amendments from the business community (e.g., Circuit City and Nationwide Insurance), from trade associations (Institute of Electrical and Electronics Engineers), from public interest groups (the Virginia Citizens Consumer Council and the Virginia Library Association), from Virginia government (the Supreme Court of Virginia, the Virginia Attorney General's Office, and JCOTS staff), and from the National Conference of Commissioners on Uniform State Laws (proposing the amendments to UCITA accepted by NCCUSL at its July, 2000, meeting), rejecting approximately thirty, and accepting twenty-three.[\[28\]](#) In addition to the amendments proposed by JCOTS, the General Assembly is considering other amendments to UCITA during the 2001 legislative session.[\[29\]](#)

{29} UCITA is bad for consumers and for libraries. It allows vendors to prohibit the transfer of information in digital format 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 e-mail or perhaps even by posting to their website. It enables licensors to override existing legislative and judicial policy.

{30} More than a decade ago the National Conference of Commissioners on Uniform State Laws, the American Law Institute (ALI), and the Permanent Editorial Board of the UCC decided to undertake a revision of Article 2 of the Uniform Commercial Code. From 1995 to 1999, NCCUSL and the ALI worked together developing a new article of the UCC-2B. Because of considerable opposition within the ALI to the proposal, Article 2B was not brought up for a vote at the ALI's Annual Meeting in May, 1999. NCCUSL decided to move forward on its own, and at its July, 1999 meeting, it redrafted 2B as a stand-alone uniform act - the Uniform Computer Information Transactions Act -- taking it outside of the UCC and obviating the need for approval by the ALI.

{31} After all these years -- even after "final" approval in 1999 -- NCCUSL continues to tinker with UCITA. The Uniform Computer Information Transactions Act, more than a decade in the making, has taken many crazy paths and turns. But after all these years, it's still not ready for prime time.

ENDNOTES

[*]. James Heller is Director of the Law Library and Professor of Law at the College of William and Mary School of Law. He formerly served as Director of the 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 U.S. Department of Justice. Professor Heller has a B.A. from the University of Michigan, a J.D. from the University of San Diego, and an M.L.S. from the University of California at Berkeley. He has served as president of the American Association of Law Libraries (AALL), and has chaired AALL's Copyright Committee several times. Professor Heller speaks widely on copyright issues and has authored several articles on copyright law.

[1]. Letter from Colleen M. Pouliot, et. al to Gene LeBrun, President, National Conference of Commissioners on Uniform State Laws (July 13, 1999), *available at* <http://www.2bguide.com/docs/71399gcs.html> (on file with The Richmond Journal of Law & Technology).

[2]. James S. Gilmore, *Uniform State Contract Law Facilitates Information Revolution*, Legal Backgrounder, July 14, 2000, available at LEXIS, News Group File, Most Recent 60 Days.

[3]. UCITA § 112(f) (2000).

[4]. UCITA section 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) (2000).

[5]. Two publishing giants, the Canadian Thomson Company and British/Dutch Reed-Elsevier, acquired the West Group and Lexis respectively during the 1990s, as well as numerous other American legal publishers. In January, 2001, West announced its purchase of Findlaw.com, a free Internet site. Dutch Wolters-Kluwer owns CCH, Aspen Publishing, and most recently, Loislaw.com, a low-cost electronic legal research site.

[6]. Gilmore, *supra* note 2.

[7]. 17 U.S.C.A. § 107 (1996); 17 U.S.C.A. § 108 (1996 & Cum. Supp. 2001); 17 U.S.C.A. § 109 (1996 & Supp. 2001).

[8]. 17 U.S.C.A. § 109 (1996 & Supp. 2001).

[9]. 17 U.S.C.A. § 107 (1996).

[10]. UCITA § 701 (2000).

[11]. UCITA § 307(b) (2000).

[12]. UCITA § 618; UCITA § 814 (2000); UCITA § 815 (2000).

[13]. 17 U.S.C.A § 108 (1996 & Supp. 2001).

[14]. UCITA § 111 (2000).

[15]. *See e.g.*, UCITA § 114(c) (2000) (providing that whether a term is conspicuous or is unenforceable are questions to be determined by a court).

[16]. *See e.g.*, John E. Murray, Jr., *Murray on Contracts* § 96 (Michie 1990). Murray quotes the following statement from Judge Skelley Wright in the well known case, *Williams v. Walker-Thomas Furn. Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965): "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."

[17]. UCITA § 105(a) (2000).

[18]. UCITA § 105(b) (2000).

[19]. Joint Commission on Technology and Science Advisory Committee 5 (Uniform Computer Information Transactions Act), Final Report, at 17 (2000). The Joint Commission on Technology and Science was created by the General Assembly in 1997 as a permanent legislative commission charged to study all aspects of technology and science and to promote the development of technology and science in the Commonwealth through sound public policies. The Advisory Committees, co-chaired by members of JCOTS, were formed to study specific topic areas. For more information on JCOTS and the Advisory Committees, see <http://jcots.state.va.us>

[20]. UCITA § 105(b) (2000); VA CODE ANN. § 59.1-501.5(b) (Michie 2001).

[21]. Proposed amendment to the Uniform Computer Information Transactions Act: Hearing Before The Joint commission on Technology and Science, available at <http://jcots.state.va.us/handouts/00-09-12-ac5/kifer.pdf> (Statement of Ruth Kifer).

[22]. 17 U.S.C.A. § 105 (1996).

[23]. James Gilmore, *supra* note 2.

[24]. H.R. 354 and H.R. 1858, 106th Cong. (1999); H.R. 2652 and S. 2291, 105th Cong. (1997); and H.R. 3531, 104th Cong. (1995).

[25]. Gilmore, *supra* note 2.

[26]. National Conference of Commissioners on Uniform State Laws, *Amendments to the Uniform Computer Information Transactions Act*, Meeting in its One-Hundred-and-Ninth Year, St. Augustine, Florida, July 28-August 4, 2000.

[27]. "During the 2000 Session the General Assembly of Virginia enacted UCITA (Senate Bill 372, Patron-Senator Edward Schrock; House Bill 561, Patron-Delegate Joe T. May). Final Report, Joint Commission on Technology and Science, Advisory Committee 5 (Uniform Computer Information Transactions Act) (November 16, 2000). Perhaps not surprisingly, the patrons of UCITA legislation in the General Assembly - Senator Schrock and Delegate May - co-chaired Advisory Committee #5.

[28]. Amendments accepted by the Advisory Committee were proposed by individuals representing a variety of interests, including Circuit City, Nationwide Insurance, Capital One, IEEE, Sallie Mae, the Attorney General's Office, and JCOTS staff. The Advisory Committee did not accept any amendments proposed by consumer or library groups.

[29]. H.D. Bill 2412, 2001 Leg., 2001 Regular Sess (Va.) (proposing an amendment to VA. CODE ANN. section 59.1-503.10 (Michie 2001) regarding licenses to nonprofit libraries, archives, or educational institutions). The amendment, supported by the Virginia Library Association but not by the Virginia Association of Law Libraries, addresses only "a tangible copy of informational content to a licensee." This presumably means that it applies to CD-Roms (soon to be a relic in libraries), but not to Web-based information -- librarians format of choice for digital information -- because information over the Internet is not "tangible." In addition, because the amendment applies only to nonprofit libraries, it diminishes rights that libraries in the for-profit sector now have under federal copyright law, especially the library exemption (17 U.S.C. § 108).

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