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UCITA Enacted in Virginia

by Sarah K. Wiant

On March 14, 2000, Governor Gilmore signed House Bill 561 and Virginia became the first state to enact the *Uniform Computer Information Transactions Act (UCITA)*. This controversial legislation will have a profound effect on library operations because it will likely be the central body of law that will govern information transactions and it will allow content providers to bypass many of the protections traditionally afforded by copyright law. Although the Virginia statute affects only Virginia law, the statute is currently being considered by several other legislatures, and is expected to be introduced in every state within the next two years.

UCITA is an attempt to conform state law relating to software licensing to a uniform national standard. Specifically, the legislation was drafted to address the problem of "shrinkwrap" software licenses, which bind consumers to their tenets as a condition of use. Often the term shrinkwrap is used generically to encompass "click-on" and "active click wrap" licenses, which accompany much of the information now found online. Unlike shrinkwrap licenses, which take their name from the plastic they are often printed on, click-on and active click wrap licenses exist only electronically. They typically appear on the monitor as a condition of accessing information or installing software. Most users agree to these conditions as a matter of course, without stopping to consider their restrictions.

While licenses such as these have become commonplace, some courts have been hesitant to enforce them. Disparate judicial treatment of these agreements led to an attempt to standardize the law relating to them. Although copyright issues are matters of federal law, contract disputes are left to the states; thus, the applicable law can vary.

UCITA began as a proposed revision to the Uniform Commercial Code (UCC). Most states have adopted the UCC or some version of it, and it is generally considered the most influential source of contract law in the United States. It is drafted by two groups, the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL). If both organizations approve

a revision, it is submitted to each state government for adoption. Each state then enacts the proposed section or selected provisions, and those enactments become the law of that state.

Initially, the ALI and NCCUSL proposed a new UCC section to cover the licensing of software and information. For more than two years, the two groups debated the merits of various proposals, but were unable to agree on a solution. In May of 1999, the American Law Institute withdrew its support after realizing that the UCITA approach was fatally flawed. Despite opposition from ALI and dozens of educational, library, and consumer groups, the NCCUSL ratified the model legislation in July of 1999. Virginia and Maryland raced to be first to pass the model legislation. Virginia was first; Maryland just passed it.

It is not surprising that the legislation had the strong backing of the governor and the Northern Virginia high-technology community: more than half of the world's Internet traffic passes through Virginia. Governor Gilmore said when he signed the bill that "This increase in electronic transactions will perpetuate the Internet revolution, promote e-commerce, and foster the growth of Virginia's technology and

manufacturing economics." The Business Software Alliance has supported the enactment. Although Virginia was first to enact UCITA, it might not be the first state to implement it. In order to get the necessary votes for enactment, legislators of the General Assembly agreed to three amendments, one of which delays the effective date of UCITA in Virginia until July 1, 2001. The second amendment requires the Joint Commission on Technology and Science (JCOTS) to "appoint a technical advisory committee to study the impact of this act on Virginia business, libraries and consumers" and to issue a report before December 1, 2000. Unlike the Advisory Committee #5 to JCOTS prior to the introduction of the legislation on which Jim Heller and Sally Wiant served, this committee is to be more balanced in representing users as well as vendors. The third amendment extended from 15 to 45 days the number of days

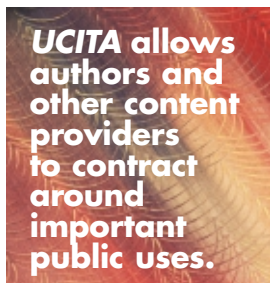
before a licensor could enable the self-help section which allows a licensor to remotely shut off access to software or digital information. Unlike the model UCITA with a complex choice of law provisions, Virginia law applies. Virginia also added to the unconscionability provisions a section from 2A of the UCC, and Virginia UCITA makes e-mail notification effective when e-mail is "properly addressed and received."

Software Licenses and Intellectual Property Law

In enacting the *Copyright Act of 1976*, Congress struck a careful balance: it granted protection to authors in exchange for certain public uses of their works. NCCUSL's proposed licensing system is quite a departure from the traditional intellectual property regime, and many canons of copyright law will be rendered moot by its adoption. UCITA allows authors and other content providers to contract around these important public uses.

UCITA would validate shrink-wrap and click-on licenses, which would allow vendors to designate transactions as "licenses" rather than "sales." It would bind a user to terms disclosed only after agreement and allow vendors to change the terms of a contract unless manifestly unreasonable. Moreover, the occasional failure to have online access is not a breach of contract. Self-help provisions

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UCITA Information Online

The draft of the UCITA proposal is available online at <http://www.law.upenn.edu/library/ulc/ulc.htm>. Many other Web sites provide useful information and commentary about the merits of the UCITA proposal and its status in the states.

- **4CITE** (<http://www.4cite.org>): comments from business, library and consumer groups opposed to UCITA
- **Badsoftware.com** (<http://www.badsoftware.com>): Cem Kaner's analysis of the shortcomings of UCITA
- **UCITA Online** (<http://www.ucitaonline.com>): comments and information from UCITA proponents

UCITA in Your State

Although only Virginia has enacted *UCITA*, many states are currently considering this legislation. Proponents hope to introduce it in every state within the next year.

Arizona: under preliminary review

Connecticut: will be considered in 2001

Delaware: introduced

District of Columbia: introduced

Hawaii: in committee

Illinois: tabled

Indiana: in committee

Maine: rejected 10/99

Maryland: passed, waiting for signature

Michigan: no action as of 3/00

New Jersey: Law review commission report

New York: under preliminary review

Oklahoma: passed Senate, in committee in House

Virginia: will take effect June 1, 2001

Washington: under preliminary review

West Virginia: not considering this term

Wisconsin: may consider this term

would allow vendors to shut down mission-critical software remotely. Non-disclosure clauses in small print can be used to block reviews without permission. Sections addressing federal preemption, the first sale doctrine, and fair use are unclear, and therefore libraries' rights to preserve, make fair use, and lend information are similarly confused. For example, Section 105 states that any provision preempted by federal law is unenforceable to the extent of the preemption. Is a *UCITA* contract with a provision limiting fair use rights enforceable? These agreements should state conspicuously limits on copying. Although fair use would remain a defense to any copyright claim, the publisher would prevail on any claim based on the contract. Publishers may also restrict fair use by limiting the ability of access software to make copies. *UCITA's* neutrality approach on preemption is inconsistent because Section 503 permits licenses to include language that would prohibit transfers. Such language would eliminate purchaser's rights under the first sale doctrine.

Many of the traditional library functions are derived from the first sale doctrine, described in Section 109 of the *Copyright Act of 1976*. This provision terminates the rights of the author in the work after its

initial sale, and allows the new owner to resell, dispose of, display, and make use of his newly purchased content. Many of these traditional library functions, such as lending, browsing, and resale which originate from this provision would be affected by *UCITA*.

Licensing will also limit the rights of consumers to sell or transfer licensed software or information. Software and information licenses, valid indefinitely for the original entity, may not transfer to the new organization should firms merge. Licenses may last only for a limited period, driving costs higher, and severely curtailing the archival function of libraries. The expiration of the license will terminate the library's access to the information, and any right to make archival copies would be limited by the terms of the license.

Librarians should actively lobby their state legislators to oppose state adoption of *UCITA* or to see that the most problematic portions of it are not passed. If states do pass the legislation, then libraries must be aware of these sections and negotiate the removal of the sections from the licenses they sign.

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