UCITA Update

As many have detailed, there are state-based efforts underway to develop a new uniform legal framework for computer information transactions. The Uniform Computer Information Transactions Act, or UCITA, as the legislation is called, is in different stages of consideration in many states and is expected to be introduced in more states soon. UCITA has been approved by the state legislatures of Virginia (effective 1 July 2001 following a review process with possible amendments) and Maryland (with some changes). This follows the 29 July 1999 approval by the National Council of Commissioners on Uniform State Laws (NCCUSL). The effects of UCITA's passage are very significant for the library and educational communities.

Based on discussions with the ARL community and beyond, ARL is working with member libraries to develop state-based responses to UCITA. [1] *ARL's role includes providing educational materials, key contacts, and other necessary information. ARL, with others in the public and private sectors, is seeking changes to UCITA via the 4CITE coalition < http://www.4CITE.org>.*

The following article is an excellent discussion of UCITA. Originally developed for the Maryland community, it is showcased here because it also provides a useful context for understanding the implications of UCITA to the higher education and library communities in other states.

Digital Information: UCITA Offers a New Legal Framework

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In the U.S., the latest policy debate regarding copyright has moved from the halls of Congress to the legislatures of the various states. The Uniform Computer Information Transactions Act (UCITA) is the result of a 10-year effort to craft a new legal framework for transactions in computer information. UCITA is being introduced in all 50 states in an effort to create a uniform approach to contracts as they relate to computer software, online databases and resources, and Internet services. The bill is controversial because of concerns that it does not adequately protect consumers and it will permit contract law (instead of federal copyright law) to govern transactions for digital information.

The state of Virginia is the first to pass UCITA, although they have delayed implementation until 1 July 2001 and will spend the next year reviewing the bill to make amendments as necessary. The state of Maryland has also enacted a version of UCITA this past legislative session that will go into effect on 1 October 2000. The Maryland Senate's version of the bill includes several key amendments that address a majority of the concerns of the consumer protection division of the State Attorney General's office. However, amendments offered by the library and education communities have been rejected as unnecessary because of the belief that federal copyright law will trump state contract law.

For many legislators, UCITA is primarily about extending the Uniform Commercial Code (UCC) provisions to "computer information." If it were as simple as updating the UCC, the proposal before the Maryland General Assembly would have been the original Article 2B language, but even the national legal authorities could not agree on its provisions. The 10-year process to draft Article 2B--standard rules for regulating licenses of information products and intellectual property--started as a joint effort of the National Conference of Commissioners on Uniform State Laws (NCCUSL) and American Law Institute (ALI). The original idea was to adapt the UCC's provisions for "goods and services" to also apply to "computer information," especially computer software. The ALI did not find the proposed changes to the UCC to be fair and reasonable and withdrew from the process; thus, NCCUSL had to abandon its effort to introduce legislation under the UCC and offer it instead as a stand-alone uniform law. [2]

The University of Maryland community would have been far more comfortable with UCITA had it focused narrowly on "computer software programs" and attempted to deal with some of the more problematic aspects of "shrinkwrap" license terms, including the University's interest in preserving our ability to fulfill our teaching and research missions, which is jeopardized by software license terms that prohibit "reverse engineering" and "criticizing software products." We could have come to some reasonable compromise on these issues. However, UCITA's provisions reach far beyond computer software, and we should not take the public policy implications lightly.

UCITA's broad language will have significant implications for the core mission of the nation's universities: the creation and dissemination of knowledge. Knowledge flourishes in an environment where access to information is "free" (not necessarily without costs, but void of unreasonable constraints on access and preservation). As has been said numerous times throughout the deliberations in the state of Maryland, copyright law has provided a legal and public policy framework for balancing the rights of creators and users. Copyright law over the years has also refused to protect facts and ideas--protecting only the "expression" of those ideas. "Facts and ideas" (whether in digital form or not) should be freely available (this time I mean without cost or constraint) if we wish to encourage innovation, competition, and the creation of new copyrighted expressions; however, UCITA will now achieve a protection for facts and ideas (at least in their digital form) that the proponents have been unsuccessful in convincing Congress to provide under federal copyright law.

According to the chair of the Maryland House of Representatives workgroup (speaking on the House floor), "information" in digital form will now be subject to a new legal framework that will be governed by contracts and license terms; he also argued on the floor that "fair use" is no longer appropriate when the information is "digital." He further summarized the four factors of "fair use" such that "nature of the material used" means whether it is digital or not. That is precisely why many of us who have followed the development of UCITA believe that it undermines copyright law and endangers the fundamental mission of our research universities.

Some have also argued that higher education can continue to protect its interest through the negotiation of computer information agreements. However, my experience leads me to wonder if software vendors and commercial publishers will act to preserve (through license terms) the balance and fundamental fairness that higher education has enjoyed under the framework of federal copyright law. We can already point to clear evidence of that assertion by examining the anticompetitive, anti-innovation language of existing "shrinkwrap" license terms. Are we overestimating the goodwill of information distributors and the bargaining position of nonprofit entities, including libraries and universities, to assume that UCITA will maintain a "level playing field"? One only has to look at who has been at the table the past several weeks in support of this bill (Microsoft, AOL, Elsevier Publishers, Lexis-Nexis, and NASDAQ) to be very skeptical about its intended results. Furthermore, the extension of UCITA principles beyond computer software to include online databases, electronic books and journals, and contracts for Internet services carries with it significant public policy implications.

I am greatly troubled by UCITA. My role in an information technology division causes me to recognize the need for a uniform and predictable legal environment for the facilitation of e-commerce in the states. However, UCITA as it is conceived and as the debates over the past several weeks in Maryland have demonstrated is not a law that will lead to uniform and predictable results. In fact, UCITA is likely to have the opposite effect. Creators and users of copyrighted materials now look to a singular source of law for the protection and regulation of information, i.e., the United States Copyright Act of 1976.

Despite several years of updating the 1976 Copyright Act to address the digital environment, namely the Digital Millennium Copyright Act (DMCA), UCITA proponents claim that greater protections are needed for digital information. The result intended by the drafters of UCITA could be a disastrous dual

system of protections where some information items (i.e., analog materials) will remain covered by the federal copyright statute whereas other items (i.e., digital materials) will be covered under a new, untested law (i.e., UCITA) that governs contracts. Furthermore, since the contract terms offered by licensors of computer information are likely to vary among vendors and the nature of contract negotiations will result in terms and conditions that will vary from one information license to the next, the communities that rely upon access to the information that we acquire will be subject to multiple agreements.

Most importantly, UCITA has the potential to undo the fundamental public policies that have been carefully considered and developed under federal copyright jurisprudence for over two centuries. The U.S. Constitution first embraced intellectual property protection "to promote the progress of Science and the Useful Arts," and Congress has made numerous revisions to federal copyright law over the years to create a framework that effectively balances the rights of creators and users of copyrighted works. Furthermore, copyright proprietors and the educational community have engaged Congress over the past decade to address the challenges brought forth by digital technologies, resulting in the strengthening of the 1976 Copyright Act in 1997 (No Electronic Theft "NET" Act) and again in 1998 (DMCA). UCITA has the purpose and effect of displacing the carefully considered federal copyright system and its corresponding public policy considerations with a new contract regime that has the potential to exclusively favor proprietors of copyrighted information.

The digital age in which we live and work presents new challenges and opportunities. The difference between buying information and licensing information is significant; it is also an inevitable direction given the efficiencies of online access to information products. The new economy demands that we rethink existing policies, practices, and even laws. However, the strategies that UCITA seeks to implement are far reaching and have the potential to disrupt one of the most exciting and successful economic booms ever experienced in this country. It seems that the information economy is thriving despite UCITA.

Endnotes

1. James G. Neal, Dean of University Libraries, Johns Hopkins University, testified before the Maryland General Assembly on 3 February 2000; his testimony is available at <http://www.arl.org/info/frn/copy/nealstmt.html>.

2. For background on the debates within NCCUSL and ALI and the issues at stake for the educational community, see Laurel Jamtgaard, "Licenses and Information Policy: An Update on UCC Article 2B," *ARL: A Bimonthly Newsletter of Research Library Issues and Actions* no. 198 (June 1998): 1-4, also available at <http://www.arl.org/newsltr/198/ucc2b.html>.

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