

# UCITA: A Challenge to Traditional Licensing Policy?

The Uniform Computer Information Transactions Act (UCITA) is designed to bring uniformity to a multitude of state contract law provisions that will govern transactions in computer information. Originating out of a contentious ten-year effort to revise Article 2 of the Uniform Commercial Code (UCC) governing sales of goods, UCITA is a proposed uniform law drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) for submission to and recommended enactment by the states.<sup>1</sup> States can choose to adopt UCITA, refuse to adopt it, or adopt it with amendments via the usual legislative processes. At this time, UCITA has been enacted in Virginia (although it will not become effective until July 1, 2001) and has passed both houses of the Maryland legislature. It is currently most active in Delaware, the District of Columbia, and Oklahoma.<sup>2</sup>

## Scope and Relevance of UCITA

UCITA applies to contracts and transactions in "computer information": "information in electronic form which is obtained from or through the use of a computer or which is in a form capable of being processed by a computer. The term includes a copy of the information and any documentation or packaging associated with the copy."<sup>3</sup> It covers contracts to license or buy software, contracts to create computer programs, multimedia products, and computer games, contracts to provide online access to databases, contracts to distribute information on the Internet, and the like.

As part of this broad coverage, UCITA also addresses the following: how terms of an electronic contract are established; what "conspicuous" means in this context; when an on-screen click is adequate to establish a contract; which state's law applies to an electronic contract; what the effect is of a choice-of-forum clause; what warranties attach to published information; what default rules apply for information obtained by contract online; what the rules are for performing online; how changes in ongoing contracts are made; how contract terms are decided between electronic agents; and what remedies are available for breach of contracts. UCITA's broad scope alone is enough to give pause, and the fact that such a large piece of law was created to deal with the still-emerging e-commerce environment entitles it to careful consideration.

UCITA's relevance to higher education is most apparent in four subject areas: licenses and copyright; contract formation and procurement; electronic self-help; and reverse engineering. For a much more complete treatment of these topics and UCITA, please refer to the EDUCAUSE issue paper available online at <http://www.educause.edu/policy/ucita.pdf>.

## Licenses and Copyright

UCITA validates and encourages the use of contract-based licenses for the disposition of computer information. The ease with which such contracts are formed and the lack of real negotiation may allow licensors to include contract terms that could threaten fundamental,

property-based copyright notions of information usage such as fair use, the first-sale doctrine, library archiving and preservation, and instructional exemptions such as those facilitating distance education. The higher education and library communities should consider taking the following actions:

- Work to ensure that contracts in computer information do not erode the above-mentioned fundamental copyright policies of first sale, fair use, library practices, and instructional exemptions
- Work to amend UCITA at the state level to clarify that such uses are fundamental public policies that are not subject to complete abrogation by contract (see §105)
- Work to guarantee legislation that is protective of general library and academic interests at the state level

## Contract Formation and Procurement

UCITA makes contract formation apparently very easy (allowing "opportunity to review" plus "manifestation of assent"). It would probably weaken any argument that a contract could be unenforceable as a contract of adhesion (i.e., a "contract" with no real negotiation present).

UCITA's treatment of shrinkwrap licenses—a license whereby the licensee assents to the terms before having an opportunity to review the terms—is even more controversial. Critics of UCITA argue that UCITA substantially changes the law by making shrinkwrap software licenses

enforceable. According to UCITA's proponents, however, these licenses were already enforceable. One proponent has stated, "Most courts hold that shrinkwraps are enforceable or simply enforce their terms without any contest of their enforceability."<sup>4</sup> In addition, "UCITA adopts, as uniform law, the position of a majority of the cases and adds procedural and substantive provisions for the licensee that might be inferred but are not made explicit in those decisions."<sup>5</sup>

The question about the current enforceability of shrinkwrap licenses in the context of computer information transactions appears to be an open one, with perhaps some jurisprudential tendency toward upholding these licenses. While the Federal Court of Appeals for the Seventh Circuit recently—and repeatedly—has held that shrinkwraps are enforceable,<sup>6</sup> consistent holdings by other federal circuits are not plentiful (although several state courts have upheld shrinkwraps). If and when enacted, UCITA would establish uniform law that such shrinkwrap license contracts would be enforceable. In addition, since companies (and higher education institutions) would be compelled to scrutinize licenses much more closely, opponents argue that the cost of software procurement may increase if UCITA becomes law.

## Electronic Self-Help

Although there are very few such cases, current law allows electronic self-help or remote disabling of software for a material breach of a license agreement or a breach that the agreement makes sufficient for such disabling. UCITA adds a substantial number of protections for licensees, including a fifteen-day notice period, the appointment of a representative of the licensee, the existence of a prior specific agreement between the parties that electronic self-help may be employed, and the availability of prompt court consideration for an application for an injunction against the self-help even if the licensee has agreed to its use.

## Reverse Engineering

UCITA itself does not prohibit reverse engineering (the capture of design information from the original source code). On the other hand, contracts governed by UCITA may or may not prohibit reverse engineering. Other recent legislation, such as the anti-circumvention provisions of the Digital Millennium Copyright Act, appears to have a more direct effect on reverse engineering than does UCITA, although UCITA may in fact allow the proliferation of anti-reverse-engineering clauses in license contracts.

In summary, UCITA is an important, contentious piece of recommended legislation that may fundamentally affect the nature of computer information transactions. UCITA's promotion of a contract-based licensing paradigm for computer information transactions challenges traditional, property-based copyright notions such as fair use. The expansion of a contract approach may require colleges and universities to reevaluate license-procurement practices, and it certainly calls for a close look by campus legal departments and others involved in intellectual property management.

## Notes

1. The American Law Institute, an influential organization of judges, attorneys, and law professors who worked with the NCCUSL during the initial stages of UCITA, opposed UCITA in May 1998 (at that time the act was known as UCC Article 2B): "The current draft of proposed UCC Art2B has not reached an acceptable balance in its provisions concerning assent to standard form records and should be returned to the drafting committee for fundamental revision of the several related sections governing assent."
2. See the Web page of 4CITE, a coalition opposed to UCITA: <http://www.4cite.org>.
3. UCITA §102(a)(10).
4. R. Nimmer, "Correcting Some Myths about UCITA," <http://www.2bguide.com/docs/rne.html> (accessed March 1, 2000). See, e.g., *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); *Hill v. Gateway 2000 Inc.*, 105 F.3d 1147 (7th Cir. 1997). Compare, e.g., *Vault Corp. v. Quaid Software*, 655 F. Supp. 750 aff'd 847 F.2d 255 (5th Cir. 1988).
5. C. Ring and R. Nimmer, "Series of Papers on UCITA Issues," <http://www.nccusl.org/pressrel/ucitaqa.htm> (accessed March 1, 2000), 11. See UCITA §209(b), §211.
6. Nimmer, "Correcting Some Myths about UCITA."

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