

Licensing Digital Information: Policy Debates Hit the States

by **Rodney J. Petersen**

Just when you thought digital technology was going to make distributed learning a reality and networked information more ubiquitous, it suddenly got a whole lot more complicated by the passage of a little-known law—the Uniform Computer Information Transactions Act (UCITA). UCITA (pronounced u-see-ta) has passed the Maryland and Virginia state legislatures and will be debated in states across the country in the coming months. UCITA has the potential to radically transform (and threaten) higher education's ability to acquire, access, and preserve digital information.

Electronic commerce activity is at an all-time high, and states hope to capitalize on the information economy by attracting more high-tech industries. The proponents of UCITA maintain that its passage is an essential ingredient for states to be viewed as "technology friendly." In Maryland UCITA was included among the governor's "12-point Information Technology Package," which included legislation to promote e-government, combat Internet crime, ensure privacy protections for consumers, and recognize the validity of digital signatures for consummating contracts. Virginia, in an attempt to appease America Online and its other resident Internet companies, quickly passed UCITA with a provision that would delay implementation until July 1, 2001, to allow time

for further study of this complex and lengthy bill.

UCITA provides a framework for contracts or transactions in computer information. Since contract law is a matter of state common law (resulting in the potential for different treatment and standards among the various states), the National Conference of Commissioners on Uniform State Laws (NCCUSL) has proposed that states adopt UCITA as a uniform approach to contracts for computer information. The closest parallel to

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UCITA is the Uniform Commercial Code (UCC) that governs the sale of goods and services. In fact, NCCUSL had been working for more than 10 years with the American Law Institute (ALI) to adapt the UCC to address transactions in computer information (formerly known as the proposed Article 2B). However, the ALI withdrew from the process earlier last year complaining that Article 2B was flawed in both process and substance. Subsequently, NCCUSL transformed the

proposed Article 2B into what is now known as UCITA and voted last July to send it to the states for enactment.

Controversial Provisions

There are several controversial provisions in UCITA. The complaints most relevant to higher education and the information technology community include its scope, insufficient attention to consumer protections, use of license terms to replace the balances provided under federal copyright law, legal recognition to "shrink-wrap" or "click-through" license terms, and use of "self-help" for breach of a license term.

"Computer information" includes computer software programs, library databases, digital books and journals, and access contracts including agreements with Internet service providers. UCITA also provides the means by which facts compiled in databases can be licensed, essentially undermining higher education's efforts at the federal level to prevent the extension of copyright law protections to databases that contain factual information.

Twenty-six states' attorneys general have opposed UCITA because of its inadequate consumer protections. The proponents argue that it provides greater protections than exist under common law. However, the attorney general from the Maryland consumer protection division argued vehemently throughout the process that the protections were less

EDUCAUSE Issue Paper on UCITA Available Online

EDUCAUSE has released an issue paper on UCITA examining this act, clarifying some points of its general traits, calling attention to some of the most potentially problematic areas, and suggesting provisions or concepts that might be opposed or amended at the state level. The paper focuses on topics of particular interest to the academic community: licenses, copyright and fair use, contract formation, electronic self-help, and reverse engineering. It also includes a section that provides a rundown of state action with regard to UCITA with a list of states whose attorneys general oppose it. EDUCAUSE's online UCITA resources include:

- An executive summary of the issue—www.educause.edu/policy/ucita.html
- The full paper as a PDF file—www.educause.edu/policy/ucita.pdf (The paper will be updated as new information becomes available.)

than those provided under existing Maryland law. Consequently, the Maryland legislature adopted a majority of the attorney general's proposed amendments, including a prohibition against self-help (also known as electronic repossession) in consumer transactions. Of course, if UCITA is amended extensively by the various states (there are no less than 12 pages of amendments to the Maryland bill), one wonders how uniform the law will be when all is said and done.

It is likely that license terms for computer information will supersede the federal copyright law, which of course provides significant exemptions that benefit higher education including fair use. Since the "first sale doctrine" of the federal copyright law (which entitles the owner of a lawfully obtained copy to sell, lease, or distribute the copy without restriction) is premised on "ownership of a copy," it is unlikely that the provisions of first sale will hold true in the era of licensing computer information. The shift from buying information to licensing information is dramatic and could tremendously alter the balance of rights between creators and users of intellectual property that we have come to

know and appreciate. While colleges and universities may be able to preserve through license negotiations some of the uses and exemptions under copyright law, we can be guaranteed that those concessions won't come easily and are unlikely to be the default provisions that will increasingly define the rights of our institutions and their users.

There is a trend in the case law to recognize the enforceability of shrink-wrap or click-through licenses, although most people rarely read them or understand the consequences of opening the shrink-wrap or clicking "I agree." UCITA brings legal recognition to the enforceability of those licenses, even while the courts are still sorting out whether or not such unilateral contracts should be binding. It is increasingly common for faculty and staff, often with institutional procurement cards, to purchase computer software or other forms of computer information directly from the distributor—increasingly via the Internet. These mass-market transactions will obligate them (and their employer) to the terms of whatever standard license agreement the licensor puts before them, likely including restrictions on

transferability, fair use, and reverse engineering. While UCITA proponents maintain that terms against "fundamental public policy" are unenforceable (possibly including some forms of reverse engineering for interoperability), the Maryland legislature amended the bill to forbid terms that prohibit "innovation or competition."

While the Maryland legislature eliminated the use of self-help for consumer transactions, the possibility remains that a negotiated license term can provide conditions by which computer information can be remotely disabled or deactivated by technological means. The reasons for which self-help can be administered go far beyond the non-payment of license fees—a typical scenario under which an automobile or office equipment is repossessed. Furthermore, placing a back door into computer systems for self-help purposes is a security risk that should not be underestimated.

While there are many more UCITA issues, the summary above is intended to highlight the most significant areas that are likely to affect the higher education community. Although UCITA has been passed by two states, there are others that have refused to be among the first to take it up. Nonetheless, the issues and challenges that it represents are likely to be with us for some time.

What Can Your Campus Do?

At the University of Maryland we are beginning to assess what life in the academy will be like after UCITA. At a minimum it is clear that we must aggressively represent our interests in negotiations for computer information. The principal proponents of UCITA in Maryland (Microsoft, AOL, Lexis-Nexis, NASDAQ, Dun & Bradstreet, and Elsevier) are likely to eagerly exploit its many loopholes. At the same time we must now evaluate our practices as they relate to

mass-market purchases. We also know we need to educate state government officials to help them better understand how necessary to our core mission is preserving the balance of protections provided under federal copyright law. Finally, this experience reinforces the importance of educational programs and campus policies that encourage ethical behavior and compliance with federal copyright law.

If UCITA is headed your way (and it probably is if your institution is located anywhere other than Virginia or Maryland), you should take the following steps as soon as possible:

- Educate yourself and identify resources that can help you better understand the intent of this legislation and its broad implications.
- Meet with your government relations staff and key administrators to ensure that they understand the importance of this bill to your campus community.

- Discuss the impact for your organization among faculty and campus staff (including libraries, information technology, procurement, and legal counsel).
- Develop your education and lobbying strategies. (Beware of the political ramifications when institutions, especially those dependent on the state for funding, oppose the bill when legislative leadership supports it.)
- Explore the benefits (and costs) of legislative visits and letter-writing campaigns both to educate and advocate educational interests. *e*

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Preparing Your Campus for a Networked Future

Mark Luker, Editor

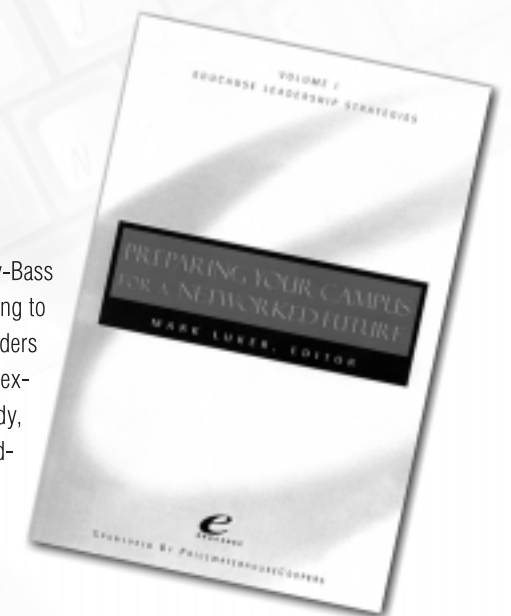
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