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The paper is a critique of the Uniform Computer Transactions Act, or UCITA. Specifically, the history of the development of UCITA, various provisions of UCITA and its ramifications upon passage are examined. Although UCITA has the potential to impact most businesses and consumers in both public and private arenas, the focus of this paper will be on UCITA's effect on the interaction between businesses and consumers from the library perspective in the dawn of the Information Age.

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UCITA

UCITA: AN ACT OF PROMISE OR PERIL?
A CRITIQUE OF THE UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT

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UCITA: An Act of Promise or Peril? A critique of the Uniform Computer Information Transactions Act

Introduction:

What is information, who owns information and how should information be accessed? These are three timeless questions whose answers evolve with each technological advance by society. An in-depth examination of the information conundrum is beyond the scope of this paper; nonetheless, portions will be discussed as applicable.

Information is no longer the provenance of the town gossip or local law enforcement. Information is an asset and as such development and conveyance of information has become big business – an industry in its own right. “According to the U.S. Dept. of Commerce, by 2006, almost half of the U.S. workforce will be employed by industries that are either major producers or intensive users of information technology products and services.”¹ Naturally the “information industry” is now seeking legal protection for its “assets” particularly the conveyance of digital information or computer information transactions.

Technology has always evolved faster than the law. Consequently, legislators and other entities charged with making law usually prefer to amend or add to existing law rather than begin with a fresh slate for each technological advance. The field of intellectual property is a prime example. Witness the number of amendments/revisions to the Federal copyright law, expanding that law’s coverage from its original “writings” to

“works of authorship”, which eventually was held to include aspects of computer software programs.

The Uniform Computer Information Transactions Act, hereinafter UCITA, began life 10 years ago. A subcommittee of the American Bar Association "concluded that there was a compelling need for clarity and certainty in licensing transactions of computer information and recommended that the National Conference of Commissioners on Uniform State Laws, or NCCUSL, draft a uniform act".² NCCUSL is a national organization consisting of representatives from the 50 States, the District of Columbia, Puerto Rico and the United States Virgin Islands. Although there are several representatives for each geographic unit – indeed the total membership in NCCUSL is over 300 - each state, defined as "a State of the United States, the District of Columbia, Puerto Rico, or the United States Virgin Islands, receives only one vote."³ The representatives are legislators, judges, lawyers and law professors usually appointed by their respective governor.

Although the initial plan was to create a new uniform act, the decision was made early on instead to amend the state level Uniform Commercial Code – the largest source of contract law. There is no Federal level contract law. The explicit advantage of uniform state laws is their uniformity – if adopted without modification. The Uniform Commercial Code, or UCC, is one of the few uniform state laws drafted by NCCUSL, and the American Law Institute, or ALI, to be adopted “in whole or substantially by all states”.⁴ The UCC was considered the best choice for an amendment concerning computer information transactions because the existing law in Article 2 already covered

basic business transactions such as sales of goods, bank deposits, and investment securities, as well as a proposed amendment covering leasing of goods.

However, drafters realized in 1995 that the targeted Article 2 of the UCC would need significant revisions and the decision was made to develop a new section – Article 2B – under the UCC for computer information transactions.⁵ After 16 open and public meetings over four years, numerous revisions and debate, ALI decided that it could not support Article 2B as drafted by NCCUSL on April 7, 1999.⁶ "ALI withdrew its support based on scope, public policy issues, clarity and coherence of model legislation."⁷ The split between ALI and NCCUSL on Article 2B was historic as this was the first time in their half a century working history that the two organizations "prematurely ended a UCC drafting project".⁸ NCCUSL opted to proceed by "redrafting Article 2B as a stand-alone uniform law and renaming it UCITA".⁹ Proponents of UCITA laud the separation of UCITA from the UCC prognosticating "just as the UCC has been the backbone of commercial law in the manufacturing age, so will UCITA be the backbone of commercial law in the information age".¹⁰ On July 29, 1999, NCCUSL voted 43 to 6 to allow presentation of UCITA to the State Legislatures.¹¹ The six States "voting against were: Alaska, Iowa, Minnesota, Nebraska, North Carolina and Utah" and "two abstained".¹²

Virginia became the first State to study UCITA, in September 1999, and subsequently the first State to pass UCITA into law, in February 2000.¹³ However, Maryland became the first State to actually implement UCITA, passing the Act into law in April 2000 to be effective in October 2000.¹⁴ Although Maryland passed the Act with several key amendments in place, Virginia delayed implementation of its law until July 2001 to allow for further discussion of possible amendments.¹⁵ In March 2001, Virginia

did pass a few amendments to UCITA. One state, Iowa, in effect implemented a one year prohibition to UCITA by tacking on a "bomb shelter" provision in another bill, which "invalidates for any contract to which an Iowa resident is a party, any attempt to provide for" any state other than Iowa to be choice of law".¹⁶ Although introduced in a number of other states, as of November 2001, UCITA has not been passed into law except for Virginia and Maryland. Specifically, UCITA was introduced and then tabled, delayed or otherwise neglected in Arizona, Arkansas, Delaware, the District of Columbia, Hawaii, Illinois, Maine, New Hampshire, New Jersey, Oklahoma, Oregon and Texas between the legislative sessions of 2000 and 2001.¹⁷

In August 2001, NCCUSL voluntarily agreed "not to push" UCITA in state legislatures until after a meeting with the American Bar Association, to be held in late November 2001.¹⁸ The Tort and Insurance Practice Section of the American Bar Association had prepared a recommendation that read:

"Resolved, that the American Bar Association opposes the adoption of the present version of Uniform Computer Information Transactions Act (UCITA) by any state or territory. Further Resolved, that the American Bar Association recommends to the National Conference of Commissioners on Uniform State Laws (NCCUSL) that UCITA be withdrawn and extensively revised to more adequately reflect the current state of the law concerning the licensing of intellectual property with due regard for basic rights of consumers and the protection of Licensees from unwarranted unilateral actions of the Licensor."¹⁹

Instead of voting on the Tort and Insurance Practice Section recommendation, the full American Bar Association "called off plans to adopt the resolution" and "will instead form a task force to examine the strengths and weaknesses of the legislation" to work with NCCUSL.²⁰ However NCCUSL's self-imposed lobbying restriction does not commit other proponents from "curtailing their efforts".²¹

No single UCITA resource exhaustively lists the proponents and opponents of the legislation. However, two websites, one pro-UCITA and one con-UCITA provide a substantial sampling of those who share their respective perspective. The pro-UCITA website of the Digital Commerce Coalition (DCC), lists its members in part as "AOL Time Warner, American Electronics Association, Adobe Systems, Autodesk Inc., Business Software Alliance, Dell Computer Corporation, Intel, Lotus Development Corporation, Microsoft, National Association of Securities Dealers, Novell, Reed Elsevier Inc., Silver Platter Inc., Software & Information Industry Association and Symantec".²² The con-UCITA website of Affect (Americans for Fair Electronic Commerce Transactions, formerly 4Cite), lists over 96 members including "Alliance of American Insurers, American Association of Law Libraries, American Library Association, Anheuser-Busch.com, Association for Computing Machinery, Boeing, Caterpillar Inc., Computer Professionals for Social Responsibility, Consumer Federation of America, Electronic Frontier Foundation, Georgia Pacific Corporation, Infoworld, Principal Financial Group, Sun Microsystems, Inc., and Walgreen Corporation.

The purpose of this paper is to discuss selected aspects of UCITA with appropriate pro and con commentary. An examination of each and every issue in UCITA will not be provided not only because the act is over 350 pages in length but also because many provisions are not individually controversial. Although UCITA has the potential to impact most businesses and consumers in both public and private arenas, the focus of this paper will be on UCITA's effect on the interaction between businesses and consumers from the library perspective in the dawn of the Information Age.

What is Information?

Information is not easy to define. As with beauty or pornography, the individual feels readily capable of identifying it but defining it proves more elusive. Throughout human history, information has been synonymous with communication, knowledge, enlightenment and intelligence not because these words are interchangeable but rather because the attainment of one can and frequently does lead to the other. Thus the focus on information has been on its character as a bridge, gateway or foundation for further effort rather than its own worth. The only in-depth attention given to information itself has been as an examination of its veracity or lack thereof as it related to the method of use. "It is only in the past two decades that we have come to realize that information has taken on a new character, that it has passed from being an instrument through which we acquire and manage other assets to being a primary asset itself."²³ The contemporary importance of information can perhaps be best described by its elevation as an adjective for our time i.e. information industry, information economy, and information age.

The drafters of UCITA underscore the importance of information by touting UCITA as "the first uniform contract law designed to deal specifically with the new information economy."²⁴ However, the drafters appeared to experience familiar difficulties in defining information in view of the fact that multiple information terms are provided. First, information is literally defined as follows: " 'Information' means data, text, images, sounds, mask works, or computer programs, including collections and compilations of them".²⁵ In the Official Comments section following the definitions, the drafters initially acknowledge the breadth of this definition then proceed to offer examples, which further enlarge the actual definition. Specifically,

"This term embraces a wide range of subject matter, but as used in this Act it is limited to transactions within the scope of the Act. "Information" is not limited to subject matter in which informational property rights exist. It includes, for example, factual data if subject to a contractual relationship. As used here, "data" refers to facts whether or not organized or interpreted. A "mask work" is defined in federal law; it refers to a representational technology used in creation of semiconductor products."²⁶

The Official Comments are to operate as UCITA's legislative history, meaning that although Judges can take this information into account when applying a ruling, and can consider the text as evidence of the drafters' intent, there is no obligation to do so.

Second, UCITA drafters attempt to differentiate between types of information such as that which may be found in/used by a computer program and "separately identifiable informational content".²⁷ Informational content is literally defined as "information that is intended to be communicated to or perceived by an individual in the ordinary use of the information, or the equivalent of that information."²⁸ In this instance, use of the Official Comments section is required to understand this term never mind the discussion of limiting or further broadening the definition. The drafters do provide some examples in the Official Comments section explaining

"This is information whose ordinary use involves communication of the information to a human being (individual). It is information that humans read, see, hear and otherwise experience. For example, if an electronic database includes images or text and a program enabling display of or access to them, the images are informational content while the search program is not. A Westlaw search program is not informational content, but the text of the cases is. The term applies even if the person creating the informational content does not intend to reveal it to others; this is because preparation involves an intent that the information be perceivable at least by its creator. Informational content need not actually be communicated; it merely must be information that in ordinary use is communicated to individuals. For example, stock quotes are informational content even if an investor uses an electronic agent to make orders and never reads the actual quotes themselves. However, the term does not include computer program instructions in object code that merely control interaction of a computer program with other programs or with a machine or device."²⁹

The drafters further differentiate "informational content" itself by providing a definition of "published informational content". Primarily,

"published informational content' means informational content prepared for or made available to recipients generally, or to a class of recipients, in substantially the same form. The term does not include informational content that is: (A) customized for a particular recipient by one or more individuals acting as or on behalf of the licensor, using judgment or expertise; or (B) provided in a special relationship of reliance between the provider and the recipient."³⁰

The Official Comments section simply expounds upon the literal definition but notes that the term does include the fact that "this is the type of information most closely associated with free expression".³¹

Finally, UCITA's very name implies a particular type of information – "computer information", which is defined as "'Computer information' means 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."³² On its face, the computer information definition appears more limited, and is perhaps the most efficient definition concerning information that can be found in UCITA. However, in the Official Comments section, the drafters again contribute to the information conundrum by both broadening and limiting the scope of the definition. Specifically,

"this term covers information that is in electronic form and that is obtained from, accessible with, or usable by, a computer; it includes the information, the copy of it (e.g., a diskette containing the information), and its documentation (including non-electronic documentation). As defined, "electronic" includes digital information or information in another form having similar capabilities. This covers analog and future computational technologies, eliminating the possibility that the Act might be limited to current technology. The term does not include information merely because it could be scanned or entered into a computer; it is limited to electronic information in a form capable of being directly processed in a computer. "Computer information" does not generally include printed information or other non-electronic formats of information."³³

Proponents of UCITA make clear that the Act is meant to exist for some time, clarifying that "in today's technology, 'computer information', is digital information but UCITA will continue to apply even if new forms of computers are created."³⁴ The reality of this definition is that "anything digital" can "fall within UCITA's jurisdiction. Electronic books, music, movies, computer software, on-line magazines, web sites, anything that might be used within the broad definition of a computer".³⁵ Although legislation writers of any ilk should be commended for attempting to foresee the future and draft legislation accordingly, broadening the scope of a definition to account for current and future technology is zealous at best but purposefully overreaching in all actuality. Consider libraries, which currently enjoy no exemption from UCITA, " from these two definitions (information and computer information) alone, you can see that UCITA will likely address every type of information that a library could acquire."³⁶ UCITA's breadth might be palatable if it were static, but "considering the current trends in electronic delivery...UCITA is clearly going to apply to more and more information resources as time goes on. And therein lies a significant part of the controversy surrounding UCITA".³⁷ Not only is UCITA broad in terms of information encompassed, but also in terms of industry impact. "'Transactions in information' affect more than just software companies and IT venture capitalists: UCITA will affect the music industry, public and private information providers –including libraries, data processing centers, publishers, online data providers, XSPs (ASP, ISP, MSP and so on), and consumers alike."³⁸

An acceptable, or more sanguinely, universal definition of information is unlikely to be developed for some time, if ever. The necessary contextualization of information requires a chameleon-like interpretation of the term. Nevertheless, once information has

been defined, however poorly, the next step is to focus on what or who the definition impacts.

Who owns information?

Who owns information appears to be an elementary question. Although, "what seems to be a simple question about who owns information really is not. Most often, the answer from the players in this field is that they simply don't know, while the courts, scrambling to fashion solutions to daily problems, typically answer that 'it depends'"³⁹. In trying to answer such a "simple" question, complex issues and more questions concerning ethics, privacy, and protection, are inevitable raised. For purposes of discussing UCITA, only the latter will be examined, as the other issues are complete subjects in of themselves.

Protection is the impetus for UCITA. One industry in particular is the driving force behind the development of UCITA – the software industry. The character of software, similarly to the character of information, has changed, "when computers first appeared, in the 1950's, the software was sold as a part of the total package of equipment, including installation and maintenance of an operating system. Little attention was paid to the separate value of the software at this early state of development".⁴⁰ Part and parcel purchases, that of computers and customized software, were "the subject of negotiated agreements".⁴¹ Such agreements provided the guidelines for any dispute resolution. Therefore, there was no separate legal protection for software. "Today, software is a commodity, and comes 'off the shelf', and is typically not customized".⁴²

The new character of software is complicated by the fact that it is arguably neither a "good" nor a "service", both of which enjoy substantial settled legal protection under

the widely adopted Uniform Commercial Code. The legally accepted definition of tangible is "having or possessing physical form; capable of being touched and seen; perceptible to the touch; tactile; palpable; capable of being possessed or realized; readily apprehensible by the mind; real; substantial".⁴³ A good is a tangible item such as a book, a grocery item, a piece of machinery, a piece of furniture and/or an item of clothing. A service is also a tangible item usually a personal service of labor, mental and/or physical, for another person or entity. On the other hand, software is considered "an intangible transferred on tangible media...when a buyer receives a program on a computer disk, it is not the disk that is valuable, but rather it is the information – the computer program – on the disk which has the value."⁴⁴ Proponents of UCITA readily agree that the average consumer, who is among those affected by the Act, does not easily make this distinction, "indeed, an individual who goes to a store, picks up a box containing software on compact disks or floppy disks, and pays for it at a cash register probably does not consider the transaction to be much different than buying a bag of sugar"; however, "by the terms of the software contract itself, the purchase of the disk package is, in reality, a purchase of the *license to use* the software."⁴⁵ The word "license" is at the core of most UCITA disputes – goods and services are sold whereas software is licensed. There is very little controversy about the tangible/intangible differential between software and goods or services. The divergence arises from a desire to protect tangible and intangible items differently.

Opponents of UCITA question "having one system for traditional print and tangible materials and one system for intangibles" indicating that it is "not a wise public policy decision".⁴⁶ Essentially, "UCITA pulls software out of the scope of sales of goods

law by defining the transaction as a license. Under UCITA, you are buying an intangible, a license, not goods."⁴⁷ Proponents of UCITA answer that the current system for goods and services is not adequate or "viable" for "software licenses in many important areas" explaining that "Article 2 [of the Uniform Commercial Code] centers on questions of title and delivery and the remedies which flow from breach of obligations in connection with these, and recognizes little if any continuing relationship between the parties".⁴⁸ Software or computer information transactions are different because "title to the information does not pass; instead there is a transfer of a limited bundle of rights to use the information and typically there is a continuing relationship between the parties."⁴⁹ Proponents further claim that the law for intangibles pre-UCITA has been a hodgepodge of common law, state law, and periodic federal law application with inconsistent rulings the primary result. Essentially, that "until UCITA, there has been no contract law that provides clear, consistent uniform rules for the intangibles subject matter involved in computer information transactions in Internet and elsewhere and no uniform law developed to provide substantive guidance for these transactions".⁵⁰ Opponents view UCITA in two ways. First, as "an end-run" around previous legislative enactments with the result an Act for the states that could not be passed on the Federal level.⁵¹ Second, as a replacement of "the public law of copyright with the private law of contract".⁵² Essentially in either case, that "UCITA is an attempt to conform state contract law governing software and information licensing to a national uniform standard".⁵³ Again, the license aspect of UCITA is the main problem. According to one opponent, IEEE (Institute of Electrical and Electronics Engineers), "by changing what would otherwise be considered a sale into a licensing transaction, UCITA permits software publishers to

enforce contract provisions that may be onerous, burdensome or unreasonable, and places on the purchaser the burden and cost of proving that these provisions are unconscionable or 'against fundamental public policy'.⁵⁴ NCCUSL responds that UCITA "is simply a commercial contract, dependent wholly on the parties' ability to enter into a normal commercial contract, just as a contract of sale or lease is simply and wholly a commercial contract" and "not fundamentally rooted in intellectual property law such as patent or copyright law".⁵⁵ NCCUSL and proponents of UCITA further insist that UCITA is a framework for current practices, that "UCITA does not originate licensing contracts" but "was developed to provide basic, recognizable default rules for the existing licensing activity that goes on and expands as commerce in computer information expands".⁵⁶ Regardless of the viewpoint, there is no doubt that UCITA is complex and touches on many legal concepts.

What is the scope of UCITA?

Luddites aside, computers and accompanying technology are going to continue permeating our society. Currently, "there is hardly an aspect of modern life that does not depend heavily on computer software".⁵⁷ Computers and software are essential building blocks with software "used extensively in the development of technology in other industries" and computers "essential to recent advances in biotechnology, communications, transportation, manufacturing, and virtually every other field of study".⁵⁸ Therefore, the scope of UCITA is important, as "improperly protecting computer programs will thus have ramifications far beyond the perimeters of the software industry".⁵⁹

Proponents of UCITA believe that the Act is narrow in scope because it "focuses on computer information".⁶⁰ As previously discussed, UCITA applies to a range of items now, with the capability of encompassing new technologies later as they are developed. Specifically, the "computer information transactions" UCITA applies to include "licenses or sales of software, licenses or sales of computer games, contracts for multimedia products, contracts for online database and information systems, and other forms of computer information transactions".⁶¹ At first blush, the laundry list of items that are excluded from UCITA bolster the narrow scope contention. Among other items listed over three pages in the Act, "UCITA does not apply to print books, magazines or newspapers, or to transactions creating traditional records or motion pictures...goods, such as television sets, cars, desks, or computers. If a computer program is embedded in goods, UCITA does not apply to the program unless the goods are a computer or peripheral, or obtaining the computer program is a *material* purpose of the transaction".⁶² Furthermore, UCITA "expressly excludes insurance services contracts and financial services contracts".⁶³ Upon closer examination, the scope of UCITA cannot be considered narrow for at least two reasons.

First, the embedded issue has been glossed over. Quite simply, "off the shelf software is increasingly showing up in non-desktop devices. In the next few years, software will be embedded in everything from pagers to SUV engines".⁶⁴ NCCUSL's attempt to define the line that divides an integrated good that still falls outside the scope of UCITA from one that falls within the scope of UCITA is naïve. A commercial designer and professor of embedded system design states "every attempt I've seen in UCITA or Article 2 language to make a desktop/embedded distinction can be easily

circumvented by an engineer who has been ordered to make sure a product falls under UCITA – in other words, gratuitously building an embedded system to be a UCITA 'computer' just to gain UCITA protection".⁶⁵

Second, by making the "traditional" versus "digital" distinction for the type of information UCITA covers, a more important issue is eclipsed. Specifically, since most information products are migrating towards a digital or electronic environment, eventually all information products will fall under UCITA as there will be very few if any "traditional" models of information left. Narrow is certainly not the proper adjective to describe UCITA's scope and proponents obviously recognize this when stating, "UCITA applies to the core of the modern digital information economy".⁶⁶

What is the impact of UCITA upon libraries and other information entities?

All manner of information entities are affected by UCITA – academic, public, corporate and special libraries, educational institutions of all levels, court systems at most levels (the United States Supreme Court is still rather antiquated in terms of technology usage) as well as the individual information broker. In a nutshell, "UCITA has the potential to radically transform (and threaten) higher education's ability to acquire, access, and preserve digital information".⁶⁷ Each point of debate surrounding UCITA can be applied to the information entity environment with "the complaints most relevant to higher education and the information technology community including its scope, insufficient attention to consumer protections, use of license terms to replace 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".⁶⁸

The specific impact of UCITA will be better understood by examining select topics in more detail. The topics are licensing, copyright, reverse engineering, First Amendment, digital divide, self-help, and consumer protection/liability. For purposes of simplification, libraries will be the operational term understood in this instance to encompass similar information entities. A technical services librarian at the Colorado Law Library, Rob Richards, prepared a presentation on UCITA, which capsules librarian concerns about UCITA.⁶⁹ Rearranged, certain items on his list provide succinct starting points for each of the topics.

Topic #1 – Licensing

- *UCITA requires libraries to spend large amounts of time and money negotiating every license*⁷⁰

Although libraries are and will continue to be repositories of traditional print information, "as information has moved to electronic environments licensing has become the standard by which we [libraries] acquire access".⁷¹ Licenses in the abstract are not viewed negatively; however, "while some licenses may have advantages (e.g. providing more rights that are normally available under copyright), their use as a model for distribution of information raises a number of concerns, particularly the potential for an adverse impact on public access".⁷² Essentially, "libraries do not believe that quality = content but that quality = content + functionality" and are therefore, "concerned about the information licenses plus what users can do with it".⁷³ UCITA proponents insist that while a license can "give less rights than a buyer would get in a sale of a copy" that "much more often, the license gives greater rights e.g. the right to make copies for use by all people in a business, the right to make public displays, the right to distribute copies commercially etc.".⁷⁴ Although the issue of whether UCITA allows rights to be given or

taken away via the negotiated license is important, the overarching result of UCITA is that these licenses will have to be negotiated, which translates into time and expense.

UCITA cannot be blamed for the fact that traditional information is migrating to a new format. Nevertheless, UCITA will affect the bottom line of any library budget.

Librarians "must now be adept at negotiating with publishers, setting policy for using online material, and building consortia to increase their economic clout".⁷⁵

➤ *It [UCITA] validates shrinkwrap and clickable licenses*⁷⁶

Shrinkwrap license is a term of art that "refers to a contract that you do not see until after you initially agree to acquire a product and receive it"⁷⁷ and "takes its name from the plastic they are often printed on" whereas "click-on and active click wrap licenses exist only electronically."⁷⁸ Although the terms differ in physical location, the end result is the same in that no negotiation between the software producer and the end user takes place.

Courts are still analyzing the legality of shrinkwrap/clickable licenses and while both sides can claim favorable decisions, the final verdict has not yet been rendered. UCITA claims to honor freedom of contract principles and then offers legalization to licenses that allow no negotiation. UCITA proponents claim that the issue is "not that this is a standard form to which the licensor does not allow negotiation...it is the presentation of terms after the product is received".⁷⁹ Proponents further claim, "by far, the largest part of the computer information industry does not involve shrinkwrap contracts".⁸⁰

However, libraries have two concerns with shrinkwrap licenses. The first is that although "libraries have been negotiating customized electronic product contracts with vendors for years, supplements or updates to these products often come with non-negotiated 'click-through' licensing agreements or 'shrinkwrap' licensing agreements".⁸¹ The second is that

" UCITA may bind companies or libraries to license terms in software acquired by employees (or library users) without prior authorization".⁸² UCITA's influence cannot be underestimated. Concepts that are similar to shrinkwrap licenses, End User License Agreements (EULA) or Terms of Service (TOS), are being drafted, thanks to UCITA, with "far more restrictive language. Some agreements let the software maker perform highly invasive scans of the user's system. They may limit the methods by which consumers can resolve disputes, or even restrict customers from complaining publicly about a product".⁸³ One example is pertinent to those libraries that are circulating electronic book readers:

"Last December, when Adobe released its free Glassbook reader software, it included a free copy of Lewis Carroll's Alice in Wonderland". The software had been available for only a few days when a careful reader, Art Medlar, noted that the EULA accompanying the book prohibited users from reading the famous children's tale aloud. Customers complained, and within a day, Adobe reworked its license agreement. Now, it permits reading the story aloud privately, but still prohibits users from selling admission to a public reading"⁸⁴

- *UCITA establishes by default the vendor's state law as governing law of the license*⁸⁵

UCITA proponents are quick to point out that UCITA is merely a framework that provides default rules, which the parties can negotiate. The reality is that default provisions often become the actual provisions. However, a number of libraries around the country are state supported and such an "institution may not be able to sign a contract that would designate another state as the forum for litigation".⁸⁶

Topic #2 – Copyright

- *In non-negotiated licenses, libraries and their users can lose rights under copyright, such as fair use, first sale, lending, and inter-library lending rights*⁸⁷

Copyright is a major concern for libraries under both negotiated and non-negotiated licenses. Explanation of, the rulings of, and the debate about the ramifications of copyright law are properly the purview of legal experts and their multi-volume treatises. For purposes of critiquing UCITA, there are a few basic aspects that need to be understood. First, American copyright law originated in England, where during the 16th and 17th centuries, "copyright was more a matter of censorship inhibiting publication than a matter of protection for author's rights".⁸⁸ English copyright law continued to evolve, and America eventually imported the idea of author's rights (or at least copyright holder's rights) protection. Copyright is a subset, along with patent law and trade secrets, of intellectual property law. "In principle, intellectual property law was intended to provide incentives to innovators to release their work products to the public in exchange for limited monopoly interests. Copyright law was established to grant monopolies to 'authors' for original expression and patent law to 'inventors' of innovative ideas with commercial value".⁸⁹ American copyright is first addressed in the United States Constitution, Article 1, Section 8, Clause 8, giving Congress the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries".⁹⁰ Additional copyright legislation and court rulings have led to the premise that "in neither patent nor copyright law is the 'sweat of the brow' important. Regardless of the amount of human labor invested, it is only the offer for sale of 'copies', the payment of the license fee for use of the 'invention', or the execution of a contract for sharing of a 'secret' that triggers legal protection for intellectual property."⁹¹ Through the same copyright legislation and court rulings, various defenses and privileges with respect to copyright infringement were

established, which defenses/privileges are more widely known and understood by the general public at times than the portion of the copyright law that has been violated. Fair use, one of the defenses to copyright infringement, "means that you have copied a work, but that Federal law insulates your copying from infringement liability".⁹² Among other things, fair use "established libraries' loosely defined rights to lend materials for scholarly purposes, as long as nobody profited from the transaction".⁹³ The first sale doctrine allows the author to pass title to a particular copy to the purchaser, without relinquishing other rights, allowing the purchaser to lend, sell and/or otherwise transfer the item to a third party.⁹⁴

The concern with non-negotiated licenses is that copyright privileges will be eliminated. What is to prevent a licensor from enforcing "a contract that restricts a licensee's use of computer information that would otherwise likely be a valid use under public policy doctrines favored by copyright law, including: 1) fair use, 2) the first sale doctrine, 3) library uses such as archiving and preservation and 4) instructional exemptions, including those related to distance education".⁹⁵ The concern with negotiated licenses is that "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".⁹⁶ Proponents of UCITA insist that copyright is unchanged under the Act, that " there has always been a supportive relationship between contract and property law e.g. copyright...UCITA does not change that relationship – it could not change rights conferred by federal copyright, trademark, or other laws conferring intellectual property rights".⁹⁷ In essence, UCITA's

proponents believe that copyright law would still prevail over or preempt the terms of UCITA. There are two problems with the preemption argument. First, "it should be noted that federal copyright law does not necessarily preempt contracts that restrict usage or provide for exceptions to rights generally granted under copyright law, except in very few instances...in fact, the general rule is that a negotiated contract is not overruled by copyright law".⁹⁸ Second,

"for a licensee to establish that a particular use of computer information is permissible because of the preeminence of fair use or first sale policies, or to establish that a particular contract term should not be enforced because it 'violates a fundamental public policy', requires litigation. No matter the strength of the argument, the prospect of litigation exerts a powerful disincentive for licensees to contest even the most unreasonable contract restrictions on otherwise legitimate uses".⁹⁹

The tensions uncovered between UCITA and copyright law are not just the product of comparing the Acts. There is an undercurrent of tension in copyright law itself - compensation. Also, UCITA is not the sole obstacle to copyright, combine UCITA and current copyright legislation "with upcoming technologies – including systems built right into hard drives intended to foil pirating – and it's getting more difficult to share information even for legitimate purposes".¹⁰⁰ The software industry is simply seeking protection via compensation, indeed "an information economy revolves around the compensated use of information assets".¹⁰¹

Proponents of UCITA believe that compensation for digital information is threatened by fair use and first sale doctrine. Opponents believe that fair use and first sale doctrine privileges are threatened by UCITA under the guise of compensation. Why? Because there is a little bit of truth in both beliefs and a single culprit – technology. First, there is the advent of "replication techniques that facilitate the wide distribution of information clones, often almost indistinguishable, from the originals in terms of

legibility and utility: computer disks, CD-ROM's, videocassette records, digital audio, audiotapes, and facsimile transmissions".¹⁰² Second, "the proliferation of the personal computer and certain of its common accoutrements – such as the modem and the fax card – has rendered every one of us a potential user, publisher, or distributor of information products".¹⁰³ Third, the ease with which digital information can be accessed and manipulated e.g. electronic texts upon which, "it is easier to make copies of copyrighted work, to appropriate portions of text without crediting the author, and because electronic text is easily changed by each reader, it is more difficult to validate a text as belonging to a particular author".¹⁰⁴ The resolution of the dichotomy between copyright law privileges and UCITA hinges on license flexibility. In an effort to prevent full restriction of information, an environment where information needs to be distributed but does not have to be shared, "distribution without the right to save and/or print" can be utilized.¹⁰⁵ In other environments, agreements about the "printing and copying that researchers and teachers need has...started to include flexibility about making copies of articles for reserve desks, or sometimes even for publication in course packs".¹⁰⁶ In this manner, aspects of fair use currently enjoyed under copyright law could also be enjoyed under UCITA. However, one feature of copyright law, permission for libraries to make preservation copies has no counterpart in UCITA and may even be complicated by the Act.¹⁰⁷ Even if a provision allowing a preservation copy to be made could be agreed upon, the "trend toward licensing means that digital information is in some ways becoming a service rather than a product...buy a book and you own it forever; pay for access to a digital book and when the period of service is over, you often retain

nothing...this is acceptable in a variety of circumstances but can be problematic for archival purposes".¹⁰⁸

According to opponents, not only does UCITA delete benefits enjoyed under copyright law, but it also operates in reverse, by extending protection for items not currently covered by copyright law. Specifically, "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".¹⁰⁹

Finally, the first sale doctrine is gravely impacted under UCITA. The ability to transfer a legitimate copy of an item under UCITA, by sale and/or donation can be prohibited under §503(2), and the consequences are far reaching for both libraries and ordinary companies. For libraries under §503(2), "a consumer who buys a copy of an encyclopedia cannot donate the used CD to his or her library...used bookstores and used record stores will no longer be able to sell used software. The marketplace in used software is eliminated by UCITA".¹¹⁰ For companies under §503(2), "buyers cannot sell or transfer software or licenses to third parties, forcing you or your buyer to renegotiate contracts with the software vendor if your company is sold or merged with another".¹¹¹ The consequences of this provision for companies, when spelled out in detail, are almost incomprehensible, because "the selling company will have to either wipe out the hard disks or inventory of each computer, finding every program, every piece of clip art, clip music, and downloaded data, and get permission of the original licensor to transfer the item to the buying company. The transaction costs of this will be enormous".¹¹²

Topic #3 - Reverse Engineering

- *UCITA allows vendors to prohibit reverse engineering*¹¹³

Reverse engineering is a process whereby a computer program is examined to determine how it was written. The reverse engineering debate, which was polemical before UCITA, triggers the issue of copyright on two levels. The first is that for most reverse engineering projects to take place, a copy of the actual computer program must be made. The second is the understanding that copyright is not a protection for an idea but for a particular fixed expression of the idea. Courts are reluctant to ban reverse engineering if that is the only method to gain access to the underlying ideas of the computer program, and there is a legitimate reason for gaining such access in the first place.¹¹⁴ Naturally, software developers are not anxious to have their products reverse engineered and generally protest that there are no legitimate reasons. Mark Pullen, a Professor at George Mason University School of Information Technology and Engineering, disagrees, stating that

"reverse engineering can be used for a wide number of legal practices, like making sure things are compatible. It is also done to analyze for security purposes and system integration issues. Naturally, if you have a piece of software that's popular, you'll do everything you can not to let people create software that can look at your files, because you'd like to do any additional software yourself. We think there's a benefit if someone else can make something that works with a popular program instead of letting one company monopolize all aspects of the market".¹¹⁵

Proponents claim "UCITA does not alter existing law".¹¹⁶ Proponents declare that UCITA is neutral because on the one hand, "if reverse engineering can be precluded by contract before UCITA, that same rule continues after UCITA"¹¹⁷, and on the other hand that "UCITA does not change copyright law in which current cases support reverse engineering in limited circumstances as a fair use".¹¹⁸ Opponents acknowledge that

UCITA may even not be the main obstacle to reverse engineering because "other recent legislation, such as the anti-circumvention provisions of the Digital Millennium Copyright Act, appears to have a more direct potential effect on reverse engineering than does UCITA".¹¹⁹ The fact remains though that UCITA through license negotiation, and in cases of shrinkwrap – no negotiation, would allow licensors to prohibit or significantly restrict any reverse engineering.

Topic #4 – First Amendment

- *UCITA allows vendors to prohibit customers' publishing reviews or studies of the licensed product*¹²⁰

Few subjects, not even copyright and reverse engineering, raise the tenor of debate like fundamental First Amendment rights. UCITA proponents insist "nothing in UCITA alters the ability of parties to contract about quoting or commenting about something".¹²¹ Furthermore, proponents adamantly point to that fact that "UCITA creates a unique statutory rule that fundamental public policy, such as free speech and fair comment, control when they outweigh policies favoring enforcement of contracts"¹²², blithely missing the point again. With UCITA, the software industry is simultaneously taking advantage of negotiators who, for whatever reason i.e. inexperience, overburdening etc., miss the initial implications of a provision which requires consent of the product developer for any review and then count on the economics of the situation to force unhappy licensees to go along with the provision in the face of timely and costly litigation. Moreover, the contention that a few companies pre-UCITA may have included such provisions in their licensing agreements ignores the fact that "UCITA would give this practice a solid legal grounding" not currently enjoyed.¹²³

Libraries, often considered a bastion of First Amendment rights, frequently "share a great deal of information about the quality and performance of products".¹²⁴ This sharing has and will continue to grow in response to the proliferation and expense of digital information, which economically has made libraries develop extensive collaborative ties through consortia licenses. UCITA creates a no-win situation for libraries – either keep silent, don't share and undercut the economic benefits of collaboration or share and face the economic consequences of litigation. The impact of UCITA does not rest with libraries. Journalists, perhaps the main visible advocates of First Amendment rights received a rude awakening as to the influence of UCITA. Vergil Bushnell, an e-commerce analyst for the advocacy group Consumer Project on Technology relates the following narrative:

"in March, journalists were stunned to discover a EULA clause accompanying Network Associates' latest version of McAfee VirusScan that challenges free speech. The EULA contains two clauses which contain language that would presumably prevent users –or journalists—from publishing benchmark tests or reviews of the software without prior permission from the software publisher".¹²⁵ In that case, "one publication declined to review the product".¹²⁶

Topic #5 – Digital Divide

- *Many commentators believe that UCITA would have a substantial negative impact on low-income consumers, and would thus widen the 'digital divide'*¹²⁷

Some libraries are non-profit and/or have no affiliation with big pockets such as research universities. These entities could suffer under UCITA because "limited resources to pay for access to information and limited expertise in terms of negotiating" translate into restrictions on the "amount of information that can be made available and the quality in terms of access and use".¹²⁸ The consequences of that suffering would be "a contribution to the aggravation of the digital divide".¹²⁹ Even those libraries that are

on the "have" side of the digital divide could see their costs raised when trying to provide access under UCITA.¹³⁰

The digital divide is not some mythic boogeyman trotted out to make big business feel bad. In 1999, the National Telecommunications and Information Administration (NTIA), "found that two distinct groups of 'haves' and 'have nots' remain, and that in many cases, this digital divide has widened in the past year".¹³¹ NTIA reports that minorities, low-income and rural residents are the most affected by the digital divide¹³² in many cases, the very individuals who in part to overcome the divide, become patrons of libraries. The NTIA report prognosticates that for those who "continue to lack technology access" as well as "the requisite proficiency in the technology to find and organize the desired information...the digital divide may become a digital chasm".¹³³

Topic #6 – Self-Help

- *UCITA permits electronic self-help under certain circumstances*¹³⁴

Self-Help is not a new concept as "individuals have employed self-help, as a private, non-judicial remedy since the dawn of civilization".¹³⁵ Indeed, there are self-help provisions in many pieces of legislation including the UCC, whereby, "self-help repossession is an acceptable private, non-judicial remedy, provided the repossession is accomplished without a 'breach of the peace'".¹³⁶ The average individual is familiar with the concept of self-help in relation to cars – repossession of the automobile for lack of loan payment. However, an argument has been made that "the interests a software company seeks to protect through the use of self-help are far different from the interests a car dealer seeks to protect. The software company does not want to repossess the item itself... rather, the software company simply wishes to prevent the customer from using

the software after failing to fulfill a contractual obligation such as making a timely payment".¹³⁷ That differential argument really has no merit in that the bottom line for both car dealers and software companies is collecting payment. Indeed the compensation issue may be more serious for small software companies or those who choose to "devote their time and resources to a single software product that represents an overwhelming majority of their revenue and business" because in that case, "any material breach of a software agreement by a customer can potentially cripple or even destroy the software company's business".¹³⁸

The debate about self-help was fierce during the drafting of UCITA, and proponents are quick to report that two financial giants, Citibank and the Federal Reserve of New York, "who were concerned about any availability of a self-help alternative and who participated extensively in the UCITA debates, have expressed their belief that the Act fairly balances the interests of the parties".¹³⁹ NCCUSL did relent in the face of continued debate and amended one portion of the self-help provision in August 2000. Specifically, the self-help provision for mass-market software was ended although, "the provision remains in effect for other types of software, such as customizable applications purchased by companies".¹⁴⁰ Still, proponents of UCITA make two additional points. First, they accurately note, "the self-help provisions of UCITA do not grant software companies an absolute right to employ electronic self-help. Rather, companies may only use self-help under limited circumstances that adequately ensure the protection of consumers".¹⁴¹ Second, they boast, "UCITA provides far more safeguards and restrictions on the use of electronic self-help than currently exist in the law".¹⁴²

In response, opponents note that just because "electronic self-help is theoretically permissible under current case law does not mean that a ratification of it by UCITA is necessarily advisable".¹⁴³ Furthermore, opponents invoke the adage give an inch take a mile stating that "as a practical matter, when self-help is included in the license as an option and assented to by the licensee, it will tend not to be limited to a material breach of the license. Under UCITA, the licensor can contractually decide when and what sort of license breach will be sufficient for it to invoke electronic self help".¹⁴⁴

A software company accomplishes self-help electronically in one of three ways: "1) logic (or time bombs), 2) termination by remote access, and 3) the removal of source code".¹⁴⁵ Even if opponents were successful in drafting a favorable self-help provision there are two risks. The first risk involves "a defect in the vendor's software" that would "produce a shutdown by accident. (UCITA regards software defects as inevitable, so surely we can expect some defects in the parts of the software that govern self-help)." ¹⁴⁶ This risk is multiplied if the defective software is running a medical device treating human life. UCITA's ballyhooed §816(f), which mandates that "electronic self-help may not be used if the licensor has reason to know that its use will result in substantial injury or harm to the public health or safety or grave harm to the public interest substantially affecting third parties not involved in the dispute. UCITA essentially eliminates the likelihood that electronic self-help would pose a risk to human life"¹⁴⁷ falls apart under a defective software scenario.

The second risk is that even though the self-help provision was eliminated after negotiation that the "capability is still being built into the system...it's another level of risk that we didn't have to worry about yesterday".¹⁴⁸ The concern for licensees is best

expressed by Cem Kaner, an attorney and computer science professor at the Florida Institute of Technology in Melbourne, who said "it's the potential for vendors to open up security holes in corporate systems through self-help mechanisms...UCITA imposes no liability on the vendors...they create a hole in your security at no risk to themselves."¹⁴⁹ The financial ramifications are enormous, for example, Nationwide Insurance Co., who has estimated that UCITA "could boost its costs" states that "45% of the projected \$20 million dollar estimate will be for the security issue raised by self-help".¹⁵⁰ Libraries are not immune to this concern as security issues are a major portion of most technical service budgets.

Finally, self-help will remain an issue not only because of the concerns expressed above, but also, because any new technology, which UCITA purports to cover, will cause the issue to be revisited.

Topic #7 – Consumer Protection/Liability

- *UCITA lacks adequate consumer protection laws & UCITA allows vendors to avoid liability for damages caused by known defects*¹⁵¹

An in-depth discussion about consumer protection under UCITA is beyond the scope of this paper. However, a few salient arguments from both sides provide a glimpse into this debate. UCITA proponents acknowledge that while "some think that more consumer protection should have been included, UCITA was based on the view that there is too much state-by-state variation on what are appropriate consumer protections to support a uniform law".¹⁵² UCITA proponents do provide a laundry list of why consumers are better off under UCITA, which include " UCITA prevents a choice of law contract from changing any mandatory consumer rule, requires clearer language to disclaim a warranty, gives consumers a right to avoid consequences of errors on-line,

prevents shortening the statute of limitations for consumers, and creates a right to a cost free refund if a consumer rejects license terms it did not see until after it received the software".¹⁵³ Opponents simply point to two facts. First, that "a large number of attorney generals voiced concerns about UCITA because of consumer protection issues".¹⁵⁴ Second, that one of only two states to even pass UCITA significantly amended the consumer protection provisions.¹⁵⁵

Liability is always a sticky legal issue. Both sides acknowledge defects are part of the software experience, but that is the end of agreement. UCITA proponents believe that "the complexity of software products makes them inherently imperfect...in fact, the idea of perfect software is a goal or aspiration not presently attainable, at least not without exorbitant costs that would drive many thousands of small companies out of business".¹⁵⁶ Opponents say its not the complexity but "software-industry business decisions" that create the defects, harshly charging that software companies are too "intent on stocking Best Buy's shelves with newer and newer versions of their products, manufacturers often shortchange engineering 'best practices'. Programs regularly ship before they've been cleansed of myriad major flaws, from backdoor passwords to logic gaffes to viruses. Software firms also churn out dreck by loading products with bells and whistles or issuing 'improved' versions that lure consumers into paying for pointless updates...In short, glitch-ridden software is prevalent because companies insist on including baroque digital flourishes, not because creating good coding is an impossible task".¹⁵⁷

However, the presence of defects may be moot if a decision in a Washington State Supreme Court for "M.A. Mortenson Co., Inc. v. Timberline Software Corp." case, which seems to favor licensors, becomes standard. Briefly, the case dealt with a licensee who used the software, relied on the software which had a bug that caused a \$1.95 million dollar error, sought to recover damages from the licensor particularly after discovering that the licensor knew about the defect which caused the error, but lost because the court

viewed the license, which disclaimed all liability, as ironclad and ruled against the licensee.¹⁵⁸ This case is a definite feather in the cap of the software industry seeking to "secure a unique privilege: zero liability, no matter how negligent a program's design or implementation."¹⁵⁹ The law on software defects and resulting liability is far from settled with or without UCITA.

Conclusion

UCITA is a mammoth piece of legislation both literally and figuratively. Proponents loftily consider UCITA a "statute for our time".¹⁶⁰ Opponents vehemently consider UCITA to be "a mind-numbingly complex – and some would grumble, sloppily written – document" upon which "even the brightest legal minds can't agree on all its implications".¹⁶¹ Essentially there are four options with UCITA and they are 1) to keep it and pass it as currently written, 2) to keep it but modify it, 3) to keep it but craft pertinent exemptions such as one for libraries or 4) to kill it and start again.¹⁶²

The first option is not likely in the face of the opposition – both in terms of depth and number. One of the most vocal opponents, the American Library Association, "reported recently that UCITA has had 'a rocky reception everywhere that it has been considered' in 2001" and "in perhaps the most telling sign of a successful opposition, a growing number of states, including North Dakota, Oregon, and New York, are introducing laws that would protect residents from the effects of UCITA".¹⁶³

The second option is certainly more viable in light of the fact that both of the states that have adopted UCITA have attached amendments to the Act. The concern here, is that "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".¹⁶⁴ Although uniformity is a major goal of UCITA, proponents themselves have been "negotiating with the outgoing and incoming presidents of the National Association of Attorneys General" seeking palatable amendments that would satisfy the opposition.¹⁶⁵ Opponents are also very wary of depending on the state legislatures to agree to all the necessary amendments. Chris Brantley, director of government relations and operations at the IEEE-USA, points out that "the nature of state legislatures, which meet and act during a short time frame... rely heavily on lobbyists" and that until recently, "opponents were having a tough time counteracting the focused lobbying efforts of the software industry".¹⁶⁶

The third option is not likely in part for the same reasons as for option two. Unfortunately, libraries with their empty pockets, lack of legislative experience (not in all cases but in enough to matter), portrayal by proponents as "pirates who want everything for free", will fare even less well than fellow opponents in lobbying the legislature.¹⁶⁷ Additionally, the drafters did exclude some industries and will more than likely be unwilling to exclude any other entities for fear of enacting a document with no legal teeth.

The fourth and final option is the most viable. By and large, opponents do not dispute the need for a UCITA, rather it is this particular UCITA that is the problem. UCITA, in its current form, is not a practical piece of legislation because the Act "does not adequately acknowledge the asymmetric nature of most contract negotiations for computer information. It encourages licensors to include in a contract whatever terms they can, while recourse is mostly to be found in expensive litigation after the fact".¹⁶⁸ Proponents run the risk of sounding like the mythical chicken little when confronted with

the notion of scrapping UCITA, trying to invoke fear by describing the lack of UCITA as a "void that can either be filled by UCITA with its integration into existing state contract law" or and here comes the scary part, we can wait for Congress "to impose uniform rules but likely without adequate provision to coordinate with, and integrate into, existing state law (reminding us that there is no comprehensive Federal contract law).¹⁶⁹ Individually the problem provisions of UCITA appear surmountable; however, taken collectively, the problem provisions self-destruct the entire Act.

NOTES

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²⁶ Ibid, Part 1, Official Comments (31), p. 32.

²⁷ Ibid, Part 1, §102(a)(12), p. 7.

²⁸ Ibid, Part 1, §102(a)(37), p. 12.

²⁹ Ibid, Part 1, Official Comments (33), p. 32.

³⁰ Ibid, Part 1, §192(a)(52), p. 16.

³¹ Ibid, Part 1, Official Comments (46), p. 36.

³² Ibid, Part 1, §102(a)(10), p. 6-7.

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