Legally Speaking-The Uniform Computer Information Transactions Act: 2B or not 2B

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Introduction

In today's world of computerization, software and databases are an important segment of the economy. Software companies such as Microsoft, Corel, and Proquest are contemporary versions of IBM or Ford. Some legal analysts feel that the current laws covering software, databases, and Websites are sufficient to protect the rights of publishers but need to be expressly applied to software and databases. Other analysts are concerned that the existing laws are not sufficient to protect vendors and publishers.

The Uniform Computer Information Transactions Act is an attempt to codify current practices and to add protections that some vendors and publishers feel are necessary. However, even those who believe a new law is necessary find certain provisions of the proposed law unpalatable. Almost everyone agrees that we need to standardize the laws concerning software, databases, and Websites. The problem is that no one agrees on how to do it. The scope of this article will be the background of the Act and some of the objections that have been raised to its implementation, particularly those concerns relating to libraries.

A. What is UCITA?

The Uniform Computer Information Transactions Act (UCITA) is a proposed new law dealing with software and database licensing issues. The scope of this proposed law is to cover contracts involving computer software, documentation, databases, Internet sites, digitized books, movies, and audio recordings. UCITA is intended to codify and standardize the laws concerning the practice of using signed licenses, shrink-wrap licenses, and "click-through" licenses on software, databases, and Websites. The shrink-wrap license allows the vendor to set the terms of the license without any input or negotiation from the licensee. This license becomes effective as soon as the plastic shrink-wrap over the installation disk is broken, or when Website users click a button that says they (Agree) with the license terms.

Shrink-wrap licenses are used by software and database vendors for a variety of reasons. According to database producers, shrink-wrap licenses allow producers to get the software to the end user more quickly, without the hassle of obtaining a signed licensing agreement. This process also saves money for both the vendor and the licensee. In addition, "Click-through" licenses give Internet Website vendors the ability to issue a license at the time the product is needed. In the early years of computing, software was usually created by programmers working for large organizations. If a company needed a word processing program, one was created. These programs did not require any special changes in the law. With the advent of the PC era, however, the production and sale of software for the mass market has developed into a big business. Software producers and database vendors became concerned that the existing laws were not sufficient to protect their business. As a result, the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL) began working on a proposed new law called the Uniform Commercial Code (UCC) which would be known as "UCC article 2B." The framers of the article wanted all the states to be "on the same page." Almost everyone agrees that we need to standardize the laws on software and databases; the problem is that no one agrees on how to do it. And librarians are caught in the middle.

B. Uniform Laws

There are two types of standardized laws that are routinely proposed: Model Acts and Uniform Laws. Model Acts contain sample language that can be used to help state legislatures draft the statutes for their states. Organizations such as the American Law Institute, the National Conference of Commissioners on Uniform State Laws, or the American Bar Association will draft model laws in order to help lawmakers. According to the NCCUSL, "where it would be helpful to have... uniformity where enacted, Acts on such subjects are promulgated as Model Acts." An example is the Model Business Corporation Act prepared by the Committee on Corporate Laws of the American Bar Association. On the other hand, Uniform Laws are proposals on topics of such great importance that the NCCUSL urges enactment in identical form in every state and territory. Uniform Laws are routinely proposed, but are not effective until passed individually by each state legislature. Sometimes part but not all of a uniform law is adopted by a state. However, a uniform law is more likely to be passed than a Model Act.

The Uniform Commercial Code is the most successful uniform law. Beginning in 1943, the Uniform Commercial Code was created as a joint venture between the American Law Institute and the National Conference of Commissioners on Uniform State Laws. The first draft was completed in 1951. In 1952 Pennsylvania was the first state to adopt the Uniform Commercial Code as law. Since then the UCC has been adopted with only a few variations by every state, as well as District of Columbia, Guam, and the Virgin Islands. Only Louisiana and Puerto Rico have not adopted the Code. Before a change or amendment to the UCC can become effective, the change must be approved by both the American Law Institute and the National Conference of Commissioners on Uniform State Laws. For many years, the UCC has been the basis of commercial law in the United States in important areas such as secured transactions, commercial property, and contracts. Article 2 of the UCC deals with contracts.

When the push began to clarify the laws relating to software and database licensing, the Uniform Commercial Code seemed to be a logical place for the new laws. As a result, the National Conference of Commissioners on Uniform State Laws and the American Law Institute began working on an amendment to the Code covering the topics of contracts for computer software and databases. This amendment would be known as Uniform Commercial Code Article 2B.
reasoning that “the UCITA still offers the promise of a consistent approach to fundamental legal issues, which is necessary to facilitate e-commerce.”

UCITA has the support of many software and database vendors. However, there are still a number of outspoken critics. The American Library Association, Association of Research Libraries, American Association of Law Libraries, Special Libraries Association, and the Medical Library Association are united in their opposition to the proposed law as is the Association for Computing Machinery. In addition, the Attorneys General of 25 states sent letters to NCCUSL opposing the adoption of UCITA.

UCITA was approved by the NCCUSL’s delegates in July 1999 by a vote of 43 to 6 with delegates from 2 states abstaining. The delegates voting against the bill represented Alaska, Iowa, Minnesota, Nebraska, North Carolina, and Utah. Now the legislatures of each state and territory will individually consider the proposed law and decide whether or not to enact it. According to James Love of the Consumer Project on Technology, “The fight pits several industries against each other... and will be played out before the 50 state legislatures in the fall. At stake is whether laws for Internet transactions will be uniform in all states or will become a hodgepodge of regulations that differ depending on the jurisdiction.”

Some experts believe that it does not matter whether all the states adopt UCITA, as long as at least one state does. “Any one state will do, and the ability of a state’s Uniform Law Commissioners to enact enactment in her or his state is far more important than industry prominence. If having a presence is of importance to other states’ courts in deciding whether to give effect to a choice of law clause, a major player will simply move a substantial business unit to the enacting jurisdiction.”

E. Objections to UCITA

So why are the opponents of UCITA so upset? Critics of the Act have cited a variety of reasons. These criticisms include:

- Allowing the vendor to choose which court it can be sued in (under what law).
- Allowing the producer to make significant changes to the product, without allowing the licensee to cancel the contract.

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- Giving software manufacturers the right to disclaim all warranties of sale.
- Providing immunity from lawsuits for defects in the program, even if the manufacturer knew about the defect but declined to fix the problem.
- Intellectual property issues.
- Restrictions on lending and transferring of software and databases.
- Legalization of "self-help" procedures.
- Determination of the type of products that are covered by UCITA, i.e. the scope of the term "information." 25

One criticism of UCITA is that the proposal would allow software companies to restrict information about the product. Several companies do this currently as part of their licensing agreement, but UCITA would give this practice a legal grounding. For example, UCITA would let companies prohibit publication of criticisms of their products. According to one critic of UCITA, McAfee VirusScan includes the following restrictions: "The customer shall not disclose the results of any benchmark test to any third party without McAfee's prior written approval." 26 Many writers and librarians are rankled by the thought that they might not be able to write product reviews because of these restrictions.

Another issue of importance to librarians is that the license can restrict lending of the items. 28 Suppose for example that you had purchased a copy of Bill Gates' book The Road Ahead. 29 This particular title (like so many others) comes with a CD-ROM. If you lend a patron the book with the CD-ROM, you may have just violated the terms of your licensing agreement. Lending the CD on interlibrary loan may also be a violation.

UCITA allows the publisher to restrict lending by libraries, but there are many gray areas that will take years of litigation to work out. For example, suppose that The Road Ahead comes with a license stating that use of the CD-ROM means that the user accepts the license for both the CD and the book. If you lend this book to a patron or send it through interlibrary loan, have you violated the license? Only time (and the courts) will tell.

Another gray area not addressed by UCITA directly is the situation in which software is kept on reserve. If you check out software to a patron for use in a database, have you loaned the software? Again, there is no way to tell at this time, since the proposed law is not specific.

If you violate your license under UCITA, the software/database vendor is allowed to use "self-help" procedures to deal with the violation. This means that you could have your database taken away or deactivated summarily without warning. 30 Under the old system, the database producer would have to notify the library of the violation and then give the licensee a chance to correct the violation. However, under the provisions of UCITA, the product can be deactivated without notice.

One question that many businesses and consumers ask is whether software should be treated differently from other products.

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Commissioner Stephen Y. Chow "would like to see the more general-ized rules for online and offline goods sales (laid out in UCC Article 2) apply to information technology." On the other hand, some vendors believe that the current laws don't go far enough to protect those who create software.13

The motion picture industry has been outspoken in its opposition to UCITA. The proposed legislation includes movies on DVD, sound recordings on CD, and similar types of products. Hollywood legal analysts believe that these controversial provisions are changing laws that have worked well for many years. In effect, they contend that UCITA is attempting to fix what is not broken.14

The biggest objection that the media has to the proposed law is the term "Information" is defined in UCITA. According to John F. Sturm, President and CEO of the Newspaper Association of America, "If UCITA is passed by the state legislatures, what we'll see are different sets of rules governing our print and online products—despite the fact that both the content and the means by which we acquire the right to publish them are the same."15 According to a letter written by members of the Working Group on Consumer Protection of the American Bar Association:

"Section 103(e) allows a seller of goods to opt into UCITA if the transaction involves 'information.' Information is a term defined in section 102(1)(37) to include data, text and images. Any goods with text or images, from books and magazines to t-shirts and posters, would qualify under this language, permitting opt-in to UCITA. When asked about use of the term 'information' in this subsection on the floor of the American Law Institute annual meeting in May, the drafting committee chair and reporter indicated that 'computer information' was the term intended. But the NCCUSL annual meeting draft continues to use the term 'information.'"16

One final bone of contention with UCITA is that there is no way to know who broke the shrink-wrap or clicked the [Agree] button. For example, is a corporation or a library bound by a license if the custodian broke the shrink-wrap, or a 5-year-old clicked the [Agree] button?17 These are issues that need to be addressed before any licensing laws are passed.

Conclusion

The Uniform Computer Information Transactions Act and its predecessor, the proposed Uniform Commercial Code Section 2B, are attempts to clarify the laws pertaining to computer software, databases, and Websites. Code Section 2B are attempts to clarify the laws pertaining to computer software, databases, and Websites. Publishers and vendors believe that these changes are necessary in order to protect their business interests. Librarians are concerned with the intellectual property issues surrounding shrink-wrap licenses and "click-through" licenses. Groups such as the Motion Picture Association of America, the Recording Industry Association of America, the Newspaper Association of America, the National Association of Broadcasters, the National Cable Television Association, and Magazine Publishers of America oppose the law, as do the major library associations and the Attorneys General of 25 states. Most publishers, vendors, librarians, and lawyers agree that it is necessary to codify and clarify the laws regarding software and databases. There are, however, significant objections to provisions of UCITA. We all need to work together to develop a law that will satisfy everyone.18

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Endnotes - Part II


25 E-mail from David A. Rice, Professor, Roger Williams University School of Law, to "mailto:cnr-copyright@CNLORG" June 1, 1999. http://www.cnlor.org/Forums/cn-copyright/1999-060424.html.

26 Kaner, Cam, "Article 2B is Fundamentally Unfair to Mass Market Software Customers," October, 1999 (Submitted to the American Law Institute for its Article 2B review).


31 Id.


