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

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LEGAL ISSUES

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Legally Speaking

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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.¹ 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.² 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 that 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.³

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 article for the **Uniform Commercial Code (UCC)** which would be known as "UCC article 2B."⁴ 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.⁵ 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 law-makers. According to the

NCCUSL, "where it would be helpful to have... uniformity where enacted, Acts on such subjects are promulgated as Model Acts."⁶ An example is the **Model Business Corporation Act** prepared by the **Committee on Corporate Laws** of the **American Bar Association**.⁷

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**.⁸ The first draft was completed in 1951. In 1953 Pennsylvania was the first state to adopt the Uniform Commercial Code as law. Since that time the UCC has been adopted with only a few variations by every state, as well as District of Columbia, Guam, and the Virgin Islands.⁹ Only Louisiana¹⁰ and Puerto Rico¹¹ 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 2(B)**

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(hereafter referred to as UCC2B). **Raymond Nimmer**, an expert in intellectual property and professor at the **University of Houston Law Center**, was named Reporter of the UCC Article 2B drafting committee.

C. Objections to the proposal and withdrawal of the American Law Institute: 2B or not 2B (that is the question)

As the drafting process began, a number of objections were voiced by legal analysts. The **American Law Institute** itself began to have doubts about UCC2B. The main areas that the **ALI** was concerned about were the provisions dealing with shrink-wrap licenses.¹² Groups such as the **American Association of Law Libraries** were opposed to the language of the proposal.¹³ On May 10, 1999, the **ALI** received a letter of opposition from a broad coalition made up of 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 the **Magazine Publishers of America**.¹⁴

Finally, in April 1999, the **American Law Institute** ended its sponsorship of UCC2B.¹⁵ Since new amendments to the **Uniform Commercial Code** require the adoption of both the **ALI** and the **NCCUSL**, this withdrawal by the **ALI** meant that the new amendment would not be a part of the **UCC**. According to attorney **Cem Kaner**, "ALI is a very conservative organization. In many ways, it IS the Establishment in American law. UCITA represents a radical change in contract law. The **ALI** called for fundamental revision of UCITA (Article 2B), and the drafting committee refused. The fact that **ALI** walked away underscores the extent to which UCITA is biased against customers."¹⁶

D. UCITA rises from the ashes

Once the **ALI** withdrew from the drafting process, UCC2B was finished. However, like the phoenix that rises from its ashes, the **NCCUSL** took the final draft of UCC2B and proposed it in substantially the same form as a uniform law under the name "**Uniform Computer Information Transactions Act**."¹⁷ Many supporters of UCC2B threw their support behind the new Act,

reasoning that "the UCITA still offers the promise of a consistent approach to fundamental legal issues, which is necessary to facilitate e-commerce."¹⁸

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 law¹⁹ as is the **Association for Computing Machinery**.²⁰ In addition, the **Attorneys General** of 25 states sent letters to **NCCUSL** opposing the adoption of UCITA.²¹

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.²² Now the legislatures of each state and territory will individually consider the proposed law and decide whether or not to enact it.²³ 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."²⁴

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 obtain 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."²⁵

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 (and 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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Endnotes - PART I

¹ Uniform Computer Information Transactions Act (Draft for Approval, July 23-30, 1999) <http://www.law.upenn.edu/bll/ulc/ucita/citam99.htm>.

² Kaner, Cem, "In my Opinion: Objections to the Proposed Uniform Computer Information Transactions Act," 4 *Cyberspace Lawyer* 14 (1999).

³ 14-15, 1999, Practising Law Institute Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series, p. 351, 355.

⁴ Hudgins-Bonafield, Christy, UCC 2B: The New Law of Shrink-Wrap, Network Computing, April 19, 1999 <http://www.networkcomputing.com/1008/1008flside5.html>.

⁵ *Id.*

⁶ "Uniform and Model Acts," *Martindale-Hubbell Law Digest*, Part IV, Appendix (1995).

⁷ "Model Business Corporations Act, Committee on Corporate Laws, Section of Corporation, Banking and Business Law, American Bar Association." In *Uniform and Model Acts*. *Martindale-Hubbell Law Digest*. p. UMA-8 (1995).

⁸ Schnader, William A. (Chair of the Commercial Code Committee, National Conference of Commissioners on Uniform State Laws), "Introductory Remarks to the Uniform Commercial Code," November 1, 1967. Reprinted in *Uniform Commercial Code*, *Martindale-Hubbell Law Digest Uniform Commercial Code*, p. UMA-62 (1995).

⁹ Schnader, William A., "Introductory Remarks to the Uniform Commercial Code," November 1, 1967. Reprinted in *Uniform Commercial Code*, *Martindale-Hubbell Law Digest Uniform Commercial Code*, p. UMA-62 (1995).

¹⁰ Louisiana has adopted several portions of the Uniform Commercial Code, but with substantial changes. See, *Louisiana Law Digest Commercial Code*, *Martindale-Hubbell Law Digest*, pp. LA8-9 (1995).

¹¹ *Puerto Rico Law Digest Commercial Code*, *Martindale-Hubbell Law Digest*, p. PR-4 (1995).

¹² Fiscus, James W., "American Law Institute Withdraws Sponsorship of UCC Article 2B," *The Bulletin*, Summer, 1999. <http://www.sfw.org/news/2b.htm>.

¹³ Letter from Robert L. Oakley, Washington Affairs Representative, American Association of Law Libraries, and Jim Heller, Chair, American Association of Law Libraries Copyright Committee, to Professor Raymond Nimmer, Reporter, UCC Article 2B Drafting Committee, March 27, 1997.

¹⁴ Sandburg, Brenda, "UCC2B is Dead—Long Live UCITA: Supporters face a big battle to pass a uniform information licensing law for the Internet," *The Recorder/Cal Law*, May 27, 1999. <http://www.lawnewsnet.com/stories/A1807-1999May26.html>.

¹⁵ Kaner, Cem, "In My Opinion: Objections to the Proposed Uniform Computer Information Transactions Act," 4 *Cyberspace Lawyer* 14 (1999).

¹⁶ Fiscus, James W., "American Law Institute Withdraws Sponsorship of UCC Article 2B," *The Bulletin*, Summer, 1999. <http://www.sfw.org/news/2b.htm>.

¹⁷ Sandburg, Brenda, "UCC2B is Dead—Long Live UCITA: Supporters face a big battle to pass a uniform information licensing law for the Internet," *The Recorder/Cal Law*, May 27, 1999. <http://www.lawnewsnet.com/stories/A1807-1999May26.html>.

¹⁸ "Electronic Commerce Legislation: Gaining Momentum and Changing Direction," *ITEC Law Alert*, June 1999. <http://www.mbc.com/newsletters/itec/itec699.htm>.

¹⁹ Letter from Duane E. Webster, Executive Director, Association of Research Libraries, to Gene N. Lebrun, President, National Conference of Commissioners on Uniform State Laws, July 12, 1999.

²⁰ Letter from Barbara Simons, President, Association for Computing Machinery, to the National Conference of Commissioners on Uniform State Laws, July 12, 1999. <http://www.acm.org/usacm/copyright/usacm-ucita.html>.

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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."²⁶

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 product. 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" and "The customer will not publish reviews of the product without prior consent from McAfee."²⁷ 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 li-

brary 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.³¹

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 generalized rules for online and off-line goods sales (laid out in UCC Article 2) apply to information technologies."³² On the other hand, some vendors believe that the current laws don't go far enough to protect those who create software.³³

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.³⁴

The biggest objection that the media has to the proposed law is the way 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."³⁵ According to a letter written by the **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 plates, 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.'"³⁶

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?³⁷ 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 the **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.

Bryan M. Carson is the Coordinator of Reference and Library Instruction at Western Kentucky University in Bowling Green, Kentucky. Bryan is a member of the Kentucky and Ohio Bars. He received his Bachelor of Arts in Economics from Adrian College, earned a Juris Doctor degree from the University of Toledo, and obtained a Master of Information and Library Studies from the University of Michigan. Prior to working at Western Kentucky University, Bryan worked at Hamline University Law Library and the New York Public Library. He coordinates reference services and Library Instruction for the libraries and his liaison and collection development responsibilities include Philosophy, Religion, and Russian/Eastern European Studies.

Endnotes - PART II

²¹ On July 23, 1999, the Attorney General of Oklahoma wrote a letter of opposition to Gene Lebrun, the President of NCCUSL. The Attorneys General of Connecticut, Idaho, Indiana, Iowa, Kansas, Maryland, Nevada, New Mexico, North Dakota, Pennsylvania, Vermont, Washington, and the Administrator of the Georgia Fair Business Practices Act signed this letter. Letter from W. A. Drew Edmondson, Attorney General of Oklahoma, to Gene Lebrun, President, National Conference of Commissioners on Uniform State Laws (July 23, 1999). <http://www.badsoftware.com/aglet1.htm>.

On July 23, 1999, the Attorney General of Oklahoma sent a second letter indicating that the Attorneys General of California, Arizona, Arkansas, Florida, Minnesota, Mississippi, Missouri, New Jersey, Tennessee, West Virginia, and Wisconsin agreed with the principles stated in the July 23, 1999 letter and were united in their opposition to UCITA. Letter from W. A. Drew Edmondson, Attorney General of Oklahoma, to Gene Lebrun, President, National Conference of Commissioners on Uniform State Laws (July 23, 1999). <http://www.badsoftware.com/aglet2.htm>.

²² Copyright and Intellectual Property News, Association for Computing Machinery Website. <http://www.acm.org/usacm/copyright/>

²³ Foster, Ed, "What is UCITA?" *Info World Electronic*, August 30, 1999. <http://archive.infoworld.com/cgi-bin/displayStory.pl?features/990531ucital.htm>.

²⁴ E-mail from James Love, Director, Consumer Project on Technology, to "mailto:ecommerce@essential.org" May 28, 1999. <http://lists.essential.org/random-bits/msg00104.html>.

²⁵ E-mail from David A. Rice, Professor, Roger Williams University School of Law, to "mailto:cni-copyright@CNI.ORG" June 1, 1999. <http://www.cni.org/Hforums/cni-copyright/1999-02/0424.html>.

²⁶ Kaner, Cem, "Article 2B is Fundamentally Unfair to Mass-Market Software Customers," October, 1997 (Submitted to the American Law Institute for its Article 2B review).

²⁷ Kaner, Cem, "Why Writers Should Actively Oppose the Uniform Computer Information Transactions Act (UCITA)," June 19, 1999 <http://www.nwu.org/pic/ucita2.htm>.

²⁸ Uniform Computer Information Transactions Act 103(2)(b) Reporter's Notes (Draft for Approval, July 23-30, 1999). See also, id, 102(12); id 102(69). <http://www.law.upenn.edu/bll/ulc/uctia/citam99.htm>.

²⁹ Gates, Bill, *The Road Ahead*, Viking Press (1995).

³⁰ Kaner, Cem, "Why Writers Should Actively Oppose the Uniform Computer Information Transactions Act (UCITA)," June 19, 1999. <http://www.nwu.org/pic/ucita2.htm>.

³¹ *Id.*

³² Hudgins-Bonafield, Christy, UCC2B: The New Law of Shrink-Wrap, Network Computing, April 19, 1999. <http://www.networkcomputing.com/1008/1008fside5.html>.

³³ Mirchin, David, "Online Contracts," Third Annual Internet Law Institute, New York City, June 14-15, 1999, Practising Law Institute Patents, Copyrights.

³⁴ Sandburg, Brenda, "UCC2B is Dead—Long Live UCITA: Supporters face a big battle to pass a uniform information licensing law for the Internet," *The Recorder/Cal Law*, May 27, 1999. <http://www.lawnewsnet.com/stories/A1807-1999May26.html>.

³⁵ Hernandez, Debra Gersh, "Newspaper, Magazine Associations Oppose Plan to Regulate States' Licensing of Computer Information," Newspaper Association of America Press Release, (August 1999). http://www.naa.org/about/news/08_ucita.html.

³⁶ Letter from the Working Group on Consumer Protection, American Bar Association Business Law Section, Committee on the Law of Cyberspace, Subcommittee on Electronic Commerce to Gene Lebrun, President, National Conference of Commissioners on Uniform State Laws, June 10, 1999. <http://tao.ca/wind/rre/0713.html>.

³⁷ Towle, Holly K. "Drafting and Updating Online Contracts and Website Disclaimers," Third Annual Internet Law Institute, New York City, June 14-15, 1999, *Practising Law Institute Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series*, p. 427, 435.