

Law Will Govern Information Transactions

Virginia is Focal Point of UCITA Debate

by Sarah K. Wiant

On March 14, 2000, Governor Gilmore signed Senate Bill 372 into law at a special ceremony near America Online's Dulles, Virginia, headquarters. By this action, Virginia became the first state to enact the Uniform Computer Information Transactions Act (UCITA). Although its provisions will not take effect until July 1, 2001, this controversial legislation will soon have a profound effect on information consumers, businesses and libraries. UCITA allows content providers to bypass many of the protections traditionally afforded by copyright law, and may soon replace it as the central body of law governing information transactions.

UCITA is an attempt to conform state law governing software and information licensing to a uniform national standard. Specifically, the legislation was drafted to address the problem of "shrinkwrap" software licenses, which bind consumers to their tenets as a condition of use. This term often generically encompasses "click-on" and "active click wrap" licenses that accompany much of the information found online. Unlike shrinkwrap licenses, which take their name from the plastic they are often printed on, click-on and active click wrap licenses exist only in electronic form. They typically appear on the monitor as a condition of accessing information or installing software. Due to their transitory nature, most users agree to their conditions as a matter of course. Although these licenses have become commonplace, many courts hesitate to enforce them. The disparate judicial treatment afforded these agreements led to an attempt to standardize the law.

UCITA began as a proposed revision to the Uniform Commercial Code (UCC). For more than two years, the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL) debated the merits of various proposals but were unable to agree on a solution. In May 1999, the ALI concluded that the UCITA approach was fatally flawed and withdrew its support. Despite opposition from dozens of educational, library, and consumer groups, NCCUSL sent the model legislation to the states in July of 1999 over the objections of the ALI. Maryland subsequently adopted its version of UCITA which became effective October 1, 2000.

Software Licenses and Copyright Law

The Copyright Act of 1976 struck a careful balance, granting protection to authors in exchange for certain public uses of their works. UCITA enables authors and other content providers to contract around the important public uses guaranteed by copyright. If widely enacted, UCITA will likely supersede copyright law as a matter of practice.

The first sale doctrine is described in Section 109 of the Copyright Act of 1976. This provision terminates the rights of the

author after the initial sale of the work, allowing the new owner, such as a library or business, to browse, display, use, lend and resell newly purchased content. UCITA allows authors and publishers to license their works rather than sell them. If no sale occurs, the protections afforded under the first sale doctrine never ripen.

In the absence of a sale, the right to sell or transfer licensed information remains with the author or his designee. The author of the work may impose restrictions on lending or reselling the information. Licenses last only for a finite period, driving costs higher as consumers repeatedly pay for the same information. The archival function of libraries will be severely curtailed: the expiration of the license will terminate access to the information, and any right to make archival copies will likely be limited by the terms of the license. In the absence of copyright, consumers will have to bargain and pay a premium for the protections previously afforded under the 1976 Act.

Even core values such as fair use are threatened by UCITA. The advent of click-thru licenses allows vendors to condition access to information on acceptance of an agreement. To access information, end-users may have to agree not to reproduce the material. Although fair use would remain a defense to any copyright claim,

UCITA Information Online

The draft of the UCITA proposal is available online at <http://www.law.upenn.edu/bl/ulc/ucita/ucita92900.htm>
Many other Web sites provide useful information and commentary about the merits of the UCITA proposal.

4CITE—Comments from business, library & consumer groups opposed to UCITA <http://www.4cite.org>

Badsoftware.com—Cem Kaner's analysis of the UCITA Proposal <http://www.badsoftware.com>

UCITA Online—Comments and information from UCITA proponents <http://www.ucitaonline.com>

JCOTS Advisory Committee #5—Contains proposed amendments, meeting summaries, and the text of the Virginia act http://jcots.state.va.us/adv_coms/2000/00_AC_5.htm

FTC—Federal Trade Commission UCITA symposium page <http://www.ftc.gov/bcp/workshops/warranty/index.html>

the publisher would prevail on contract claim, mooted the copyright defense. Traditional First Amendment principles such as fair comment are also called into question. Access to software or information may be conditioned on an agreement not to review or critique the material. Although such a defense could be presented, fair use is not a defense against a contract claim.

Beyond Copyright

UCITA language will affect more than copyright law: it will fundamentally change the way consumers interact with software and information vendors. It will have a profound effect on the way you do your job and conduct your affairs. Several provisions of the statute illustrate how the relationship between consumers and vendors will change under the version of UCITA adopted by the Virginia General Assembly.

- Section 59.1-503.4 allows vendors to unilaterally modify the terms of a contract during its operation. Such a modification is accepted by the continued use of the software or information. Courts will enforce the modified contract unless it is “manifestly unreasonable.”
- Section 59.1-506.11(b) states that the occasional failure to provide service does not constitute a breach of contract. This leaves businesses, libraries and other subscribers to online databases or other software without a remedy when these services are inaccessible to their patrons.
- Section 59.1-504 immunizes software and information providers from liability when the software they provide is “flawed.” Other sections afford similar protection for inadequate or incorrect documentation. Many consumer warranties as, Virginia knows them, are unavailable.
- Section 59.1-508.15(b) is known as the self-help provision. It allows software or content providers to remotely disable your software if they have reason to believe that you are in violation of your license agreement. Although this provision currently appears in the Virginia statute, NCCUSL recently removed it from the model act for mass-market transactions, and the provision may ultimately be removed from the Virginia statute.
- Finally, UCITA recognizes e-mail for the purposes of contract and legal notice. A laudable goal, the statute fails to require actual notice to the addressee. Electronic mail notification is recognized if the message is properly addressed and received. Messages thwarted by full in-boxes or buggy e-mail are just as effective as messages properly delivered.

Joint Committee on Science and Technology (JCOTS)

In order to obtain the necessary votes, the legislators of the General Assembly agreed to postpone the effective date of UCITA until July 1, 2001. This allowed a post-hoc advisory committee to consider the effects of the statute on Virginia businesses, libraries

and consumers. JCOTS Advisory Committee #5, charged with studying the impact of this revolutionary legislation, recently held hearings to consider potential revisions and amendments to present to the legislature in January.

Many public interest and industry groups proposed amendments to the legislation. Submissions ranged from those modifying the rights of the motion picture industry to proposals requiring lease and warranty provisions to be available online. Particularly noteworthy was the library associations’ amendment, which nullified terms in mass-market licenses that restricted the operations of libraries, educational institutions, and archives beyond the limits set by existing law. Although the committee was deadlocked, the proposal was defeated by the vote of the chair at the September 12 meeting. Most of the consumer-oriented amendments suffered a similar fate. One amendment accepted by the committee provides that in a mixed transaction such as a book with a CD-ROM, UCITA would apply only to the CD-ROM and not to the text as well.

FTC

The Federal Trade Commission also has taken an interest in UCITA. After soliciting public comment on warranty and consumer protection issues, it convened two days of public hearings on UCITA in late October. Comments were filed by many consumer and library organizations, including the American Association of Law Libraries, the Consumer Federation of America, and the Magazine Publishers Association. The findings are to be released in the near future.

Conclusion

It is not surprising that Virginia has become the focal point of debate for UCITA. The legislation enjoys strong support among large software and Internet companies, many of which have recently relocated to Northern Virginia. However, the statute is opposed by a diverse coalition of groups from across the nation. The debate has been spirited on both sides, and will continue as many states consider UCITA this year. Due to our reliance on information software, this legislation will have a disproportionate effect on the legal community. Attorneys, librarians, and consumers would be well served to keep abreast of developments in this area. 📖

Sarah K. (Sally) Wiant is the director of the law library and professor of law at Washington and Lee University School of Law.