

2001

The Uniform Computer Information Transactions Act: A Well Built Fence or Barbed Wire around the Intellectual Commons

Warigia M. Bowman
The University of Tulsa

Follow this and additional works at: https://digitalcommons.law.utulsa.edu/fac_pub



Part of the [Commercial Law Commons](#), [Computer Law Commons](#), [Contracts Commons](#), and the [Science and Technology Law Commons](#)

Recommended Citation

Warigia Bowman, *The Uniform Computer Information Transactions Act: A Well Built Fence or Barbed Wire around the Intellectual Commons*, 13 LBJ J. PUB. AFF. 80 (2001).

This Article is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Articles, Chapters in Books and Other Contributions to Scholarly Works by an authorized administrator of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

THE UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT: A WELL BUILT FENCE OR BARBED WIRE AROUND THE INTELLECTUAL COMMONS?

The Uniform Computer Information Transactions Act (UCITA) is a proposed state contract law developed to regulate transactions in intangible goods such as computer software, online databases and other digital products.¹ UCITA was intended to act as Article 2B of the Uniform Commercial Code (UCC). Article 2 comprises the law governing commercial transactions in the sale of goods and ensures consistent contract laws from state to state. The stated goal of UCITA is to provide clarity regarding computer information transactions.

HISTORY OF UCITA

UCITA is a response to, and an attempt to override, existing contract law. Contract law in the US has a long history, both in statutory form and in the courts. The UCC forms the basis of American commercial law and is the primary state law governing sales of goods. In other words, it forms the basis of contract law and guides all sales and purchases of products. The UCC was developed in 1942

WARIGIA BOWMAN

Warigia is a second year master's candidate at the LBJ School of Public Affairs. A 1994 graduate of the University of Texas School of Law, Warigia served as a trial attorney at the United States Department of Justice from 1995-1998. She most recently worked as policy advisor to Texas State Senator Rodney Ellis.

as a joint project of the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL)² and has been enacted in 49 states.³

There is no specific law that applies to sales of computer goods and software, rather, as information technology emerged, courts have handled software transactions under Article 2 of the UCC.⁴ Article 2, however, does not specifically address circumstances raised by information technology. UCITA's drafters' main argument in favor of their statute is that just such a specialized contract law is required to govern computer related transactions.

Initially, UCITA was to be included as Article 2B of the UCC statute specifically to regulate "computer information transactions" including licenses to use software. The drafting process for UCITA ran into trouble early on, however. On April 7, 1999, in an action unprecedented in the 50-year history of the UCC,⁵ the ALI pulled its sponsorship of 2B as a new UCC article. Breaking with the ALI, NCUSSL proceeded to advocate passage of the bill on its own without the sponsorship of ALI, and renamed the proposed legislation the "Uniform Computer Information Transactions Act."

The proposed statute is currently being introduced in each state as a stand-alone addition to each state's legal codes.⁶ Maryland and Virginia have passed the legislation and Microsoft Corporation is reportedly lobbying the Washington Legislature to introduce and pass UCITA.⁷ UCITA legislation has been introduced in Texas, Hawaii, Iowa, Illinois and Oklahoma, and is likely to be introduced into all state legislatures by 2001.

STAKEHOLDERS IN UCITA DEBATE

The primary proponents of UCITA are publishers and large software producers.⁸ Proponents assert that UCITA has been under intense review and discussion for over ten years by a variety of parties including consumer advocates, software developers, information providers, and both small and large software and information licensees.⁹ Consequently, NCCUSL has adequately balanced competing interests to create a fair and balanced statute, according to proponents.¹⁰ Opponents respond that the current draft "represents little more than the narrow commercial interests of the major software companies," and say the drafting process has been "industry-controlled."¹¹ As many as 26 State Attorneys General have indicated their opposition.¹² Library associations, state and federal consumer protection

groups, commercial customers, law professors, Federal Trade Commission senior staff, computer professionals, and a number of businesses have expressed concerns or actively opposed the enactment of UCITA.¹³

UCITA'S GENESIS AND DEVELOPMENT

A variety of factors converged to accelerate the drafting of UCITA, including the White Paper produced by the Commerce Department under the Clinton Administration in 1995. The White Paper was completed in part to respond to concerns that cyberspace threatened traditional copyright protections.¹⁴ Other major concerns have been a perceived need for certainty in the state of the law and questions regarding the validity of new and controversial types of licensing agreements. State legislatures will soon be called upon to adopt UCITA. As such, a review of the stated need for the legislation as well as a review of its promised benefits is in order.

NEED FOR STATUTORY CLARITY

At present, proponents say, there are no clear, uniform rules governing agreements for the licensing or sale of software, multimedia products, or databases, and no certainty regarding how to form enforceable contracts over the Internet.¹⁵ Proponents point out that traditional contract law, as governed by the UCC, is based on the sale of goods, whereas computer information transactions generally involve licensing agreements. Priscilla Walter, a Washington D.C. attorney who is active in the practice of cyber law, notes that Internet transactions often involve free speech issues, which can affect the enforceability of licensing agreements.¹⁶ Additionally, the lifecycle of technology and information products is extremely short. Products are frequently delivered with known bugs, which may be corrected a few months later when the software is upgraded or replaced. Software developers are also concerned that, although users can acquire software fairly inexpensively, errors in the software could cause huge losses. Developers wish to avoid liability for those losses if possible.

DUPLICATION CONCERNS

The main impetus behind the push for legislation stems from the concerns of copyright holders regarding electronic challenges to ownership. Digital files can be copied with little or no quality degradation, and exact duplicates of the original can be made with ease.¹⁷ Information and software are ex-

pensive to develop, but, once developed, can be copied and distributed at low cost by those in possession of the software.¹⁸ Copyright holders are concerned that advances in technology are making it more difficult for them to retain control over their product. They believe more control would ensure remuneration for their works.

On the other side of the debate, programmers such as Ian Clarke, creator of Freenet, openly oppose copyright law and advocate fluid, unconstrained sharing of all information.¹⁹ Opponents such as Clark note that, in the past, artists and publishers have successfully adapted to technologies such as photocopiers and magnetic tape. Clark argues that, therefore, just as authors and creators learned how to profit from those innovations, they will successfully adapt to new copying and distribution technologies as well.²⁰ Internet expert Lawrence Lessig also observes that copyright has always been at war with technology.²¹ Lessig points out that law itself is not the only remedy for perceived copyright infringement. Increasingly, software developers are pursuing technological solutions such as "worms"²² which seek out unauthorized copies on end-users' hard drives. In the meantime, however, software companies are pursuing a two-pronged approach to protect their interests. Producers are aggressively litigating and enforcing contract provisions that prevent unauthorized copying or resale of software and are simultaneously pushing for strong legislative changes to protect ownership and profit interests.²³

EVOLUTION OF "SHRINK-WRAP" AND "CLICK-WRAP" LICENSES

Software companies would like to eliminate their legal vulnerability regarding the applicability of the "first sale doctrine" to their products. The "first sale doctrine"²⁴ allows purchasers to resell, lend or otherwise dispose as they see fit of the physical embodiment of creative works such as books, or, by extension, packages of software.²⁵ For example, if you buy a book, you may subsequently choose to

resell the book to a used bookstore, or you may give the book to a friend as a gift.

Software producers, however, are uncomfortable with such an easy circulation of their product in the marketplace. As a response to this well-worn exception to copyright, software related contracts have evolved to "shrink-wrap" licenses and more recently to "click-wrap" agreements presented on consumers' screens.²⁶ "Shrink-wrap" licenses, which take the form of a contract of sort slipped beneath the clear plastic packaging and the software box, claim that ownership remains in the hands of the software publisher, not the user. Any purchaser who opens a software package is assumed to have accepted the terms of the license. Click-wrap licenses appear on computer screens when the user downloads a given software program. They require consumers

to click on an "I agree" or "I disagree" icon before moving forward. These licenses move software out of the realm of "goods" and into the realm of "licenses." If these licenses are enforceable, consumers no longer can rely on standard copyright exceptions, nor can consumers rely on being covered by the standard law of contracts as embodied in the UCC and subsequent court decisions.

Software companies assert that they are not selling their products, but are merely creating licensing agreements for the use of the program to the purchaser under the condition that users accept limitations on copying or resale of the product. Proponents of UCITA argue that legal standards on how to interpret and enforce these licenses are needed. UCITA fills this alleged gap by setting up a new "law of licenses" that will govern transactions in computer related goods.

BENEFITS OF UCITA

Proponents of UCITA argue that it will create a unified legal framework specifically tailored to transactions in computer information. The uniformity will provide greater legal certainty for ongoing transactions.²⁷ The framers hope that additional certainty will encourage the continued growth of the digital

*Twenty-six State Attorneys
General, however, have reviewed
the consumer provisions of UCITA
and found them to be insufficient
to adequately protect consumers.
In particular, they note that
UCITA actually reduces rights,
such as contract formation and
modification, which consumers
have come to rely on when
purchasing other types of goods.*

information industry. Advocates of the legislation also seek to clarify that “shrink-wrap” and “click-wrap” license agreements are enforceable.²⁸ At present, no cases have adjudicated the enforceability of the “click-wrap” license methodology.²⁹

Because software often contains bugs or glitches, it runs afoul of the provision in Article 2 of the UCC requiring delivery of goods that conform to the contract. UCITA softens this standard by allowing for substantial performance. In addition, UCITA contains a provision regarding where litigation will take place on covered products, and contains a framework for dealing with electronic commerce, implied warranties for informational content, and provisions dealing with the electronic control of the license.

POLICY IMPLICATIONS OF UCITA

Three major concerns regarding the proposed licensing rules of UCITA will have a direct impact on the average consumer.³⁰ First, legal rules embodied in UCITA may weaken consumer rights, and run counter to the “common sense expectations” of average buyers and sellers.³¹ Second, UCITA has the potential to lock citizens out of the intellectual commons of the electronic age. Finally, UCITA is premature and upsets the traditional balance of contract law.³²

UCITA AND CONSUMER PROTECTION

UCITA’s drafters state that it leaves in place basic consumer protection laws and even adds some additional protections.³³ Twenty-six State Attorneys General, however, have reviewed the consumer provisions of UCITA and found them to be insufficient to adequately protect consumers.³⁴ In particular, they note that UCITA actually reduces rights, such as contract formation and modification, which consumers have come to rely on when purchasing other types of goods.³⁵ The statute degrades long-standing consumer protection guarantees and introduces confusion regarding others.³⁶

Applicability of Consumer Protection Statutes

Currently, courts treat mass-market software transactions as “sales of goods” and evaluate them under Article 2 of the UCC. The Act, by contrast, characterizes mass-market software transactions as “licenses” of “computer information.” UCITA would codify the legal standard advanced by software companies that they are not selling “goods,” but are simply issuing licenses. Put simply, software companies are arguing that ownership of the soft-

ware remains in the hands of the software company, not the end purchaser. The end purchaser, software companies argue, is simply given permission to use the product in accordance with the guidelines set forth by the manufacturer.

Jean Braucher, a law professor at the University of Arizona and an expert in the consumer implications of UCITA, observes that most state and federal consumer protection statutes do not specifically reference licenses or computer information because they were drafted before consumer software transactions became common. Since the industry characterizes the vast majority of software as “licensed” work, UCITA throws doubt upon the applicability of existing consumer protection statutes on software transactions. Software producers and access contract providers could argue state consumer protection laws do not apply to computer transactions because they are not goods or services.

Consumer Law Disclosure Standards and Contract Changes

UCITA preempts most consumer protection disclosure requirements, including those which require a person to act with knowledge, by eliminating standards that allow consumers to learn material facts before making a purchase.³⁷ UCITA creates automatic assent when a licensee double clicks on a mouse in order to continue to use the information, even when this “assent” occurs after payment or delivery. This “pay first, see the contract terms later” approach permits license holders to withhold contract terms until after the sale, incorporating those terms into the contract if the purchaser accepts them after the sale.³⁸ Disclosures could comply with UCITA, but not be readily understood by the average consumer. At best, UCITA provides an environment where sellers will be simply unconcerned whether buyers understand what they are purchasing, and it may favor unscrupulous sellers who wish to deceive consumers. These provisions are particularly problematic for libraries whose ability to use the product may be severely abridged by contract terms that are not noted until after purchase.

Implied Warranty of Merchantability

UCITA also fails to require disclosure of known defects. Under Article 2 of the UCC, buyers automatically get an implied warrant of merchantability—a promise that the merchandise is fit for ordinary use. In order for a typical business to disavow the warranty, they must post conspicuous signs. Increasingly, software companies are placing limited warranties and licensing agreements inside

the shrink-wrapped box of their product, which often escapes a customer's attention. The customer can remain unaware that he is purchasing defective merchandise or that he has no remedies if the merchandise is flawed.³⁹

Certainty in Software Transactions

UCITA supporters state that the Act sets out clear, consistent rules, creates certainty in commercial transactions, allows users and vendors to understand and agree on their respective rights and obligations, and provides a firm foundation upon which to build the e-economy.⁴⁰ Certainty, however, is not an end in itself, and should be weighed against eroded consumer protection. State consumer law experts who have examined the law believe that UCITA fails in its purpose of "facilitat[ing] commerce by reducing uncertainty and increasing confidence in commercial transactions."⁴¹ Many assert that UCITA's rules deviate from traditional consumer expectations and may invite overreaching that could interfere with the development of e-commerce. Consumers may be better served by rules that build upon accepted notions of contract to protect their interests and expectations. Braucher believes that UCITA, as drafted, would take decades of litigation to sort out. She concurs with Lessig that consumers are better off under current law, which includes the common law⁴² of contract, UCC Article 2, state and federal consumer law, and federal intellectual property right law.⁴³

UCITA AND THE UNDERMINING OF THE FREE FLOW OF IDEAS

Through both common law and statute, our society has constructed a system in which the public has a right to access information and use creative works for noncommercial purposes in community forums such as libraries. Taken together, rules such as fair use, first sale, and the limited term of copyright give the creator significant control over the use of what he produces. These rights are balanced by giving the public some, but not complete access to information.⁴⁴ Observers call the arena of free exchange of

ideas created by these exceptions to copyright "the intellectual commons."⁴⁵ But public access to information, created by negotiation and consensus over a period of generations, may be replaced by UCITA, which creates expansive licensing agreements for software and other digital information that favor the seller or manufacturer and that displace other access rights and participation in the marketplace of ideas. Public discourse may be narrowed as the intellectual commons becomes restricted to those who can pay for access.

But public access to information, created by negotiation and consensus over a period of generations, may be replaced by UCITA, which creates expansive licensing agreements for software and other digital information that favor the seller or manufacturer and that displace other access rights and participation in the marketplace of ideas.

The Intellectual Commons

Copyright. Current United States copyright law balances the rights of authors, publishers and copyright owners to receive remuneration with society's need for the free exchange of ideas.⁴⁶ One traditional component of copyright was to protect the right of remuneration. Its primary objective, however, is not necessarily to reward the labor of authors, but rather "to promote the Progress of Science and Useful Arts" in our society.⁴⁷ Copyright encourages others to build upon the ideas and information conveyed by a work, while assuring au-

thors the right to their original expression.⁴⁸ This principle, known as the idea/expression dichotomy, is how copyright advances the progress of science and art.⁴⁹ Indeed, the Supreme Court has observed that the "very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy. . . ."⁵⁰ Thus, although copyright creates a property interest, its primary purpose is to promote the public interest by encouraging the creation and widespread availability of socially useful innovation.⁵¹ Copyright represents a delicate bargain our society has struck between commercial remuneration for original work and the need to serve the public interest by placing knowledge in the public domain.

Fair Use. To ensure the viability of this delicate balance, the law has historically placed certain limita-

tions on copyright owners. For example, "fair use" limits a copyright holder's property rights in order to achieve social goals such as free speech and the promotion of knowledge.⁵² The 1976 Copyright Act allows the reproduction of copyrighted material for criticism, comment, news reporting, teaching, scholarship, or research. Fair use and other public rights to utilize copyrighted works constitute doctrines that allow the dissemination of knowledge to society as a whole. Because these exceptions are limited, copyright protects the creative work and the economic investment of authors and publishers.⁵³

The First Sale Doctrine. The "first sale doctrine" holds that, although the author retains copyright over content, ownership of the physical book ends at the time of the first sale, thereby allowing purchasers to resell the physical embodiment of the text.⁵⁴ The copyright holder still controls the total number of books published, and, by extension, in circulation. As such, the owner retains some control over the value of each new copy.⁵⁵ Anyone wishing to duplicate the book, even by photocopying, must ask permission from the copyright holder and pay royalties. In *Civilizing Cyberspace: Policy, Power and the Information Superhighway*, Steven E. Miller notes that it is precisely this limitation on the right of the copyright holder that allows libraries to lend books to patrons, thereby allowing all citizens, regardless of income, to access our nation's intellectual capital.⁵⁶

In the information era, however, first sale doctrines could be interpreted to give the software publisher rights over the programming code while allowing the person who bought the disk full rights to resell it or lend it to someone else.⁵⁷ Software publishers are concerned that once individuals purchase or borrow a piece of software, they may legally resell or distribute copies. If these duplicate copies are resold, copyright owners fear their revenue stream will be reduced. Software owners have also expressed fears that "loaning" the use of a piece of software will slip into duplication.

UCITA'S POTENTIAL EFFECT ON THE INTELLECTUAL COMMONS

The provisions in UCITA which respond to software publishers' fears would, if enacted, likely place tight restrictions on the flow of electronic information. Section 307(b) of the Act restricts the use of information more narrowly than copyright law. Section 503(2) permits a license to prohibit transfer of software or other information. These provisions allow terms in software licenses which eliminate uses of informational resources that allow copying

for educational purposes (fair use) and sharing or lending of those resources (first sale).

Nothing in the statute appears to acknowledge the traditional limitations placed on private owners' control of information in the public interest. Some online databases already require academic libraries to sign licenses agreeing not to allow anyone except students and faculty to read the electronic versions of scholarly articles they provide.⁵⁸ Other agreements limit the number of pages of electronic materials that a library user can print. With the passage of UCITA, the public space carved out by judicial and statutory exceptions to copyright could be replaced in an instant.

The Seduction of Click-Wrap Licenses

Many software and information products are sold as shrink-wrapped packages or as products downloaded from a vendor's web site.⁵⁹ Consumers can obtain software and information products conveniently; however, that convenience cloaks increased restrictions. This is because shrink-wrap and click-wrap licenses, which UCITA would validate, demand that consumers waive rights otherwise allowed under traditional copyright law. Such licenses usually show a screen with three buttons: "print," "I accept," or "I decline." It is a reasonable assumption that most people simply click on "I accept," not realizing they have just agreed to a contract. Only later will the user engage in examining the detail, if at all. Again, the buyer does not know she has agreed to contract terms, nor is it likely the buyer has examined those terms. Pamela Samuelson, professor of information management and law at the University of California at Berkeley, observes, "Most of us do not consider ourselves bound by these agreements because we never really agreed to them."⁶⁰

Click-Wrap or Consumer Give Away?

These contracts are controversial because users have no opportunity to negotiate the terms. These terms often restrict uses which fall within the reasonable expectations of consumers, such as making a copy, lending software to a friend, reselling used software, or providing access to other users.⁶¹ Under UCITA you can redistribute a licensed copy only if you have specially contracted for the right to do so.⁶² Accordingly, if UCITA passes, libraries could no longer assume they can legally lend electronic information to library users. Nor can library patrons be certain they are allowed to quote from a work, make a copy of a portion for personal use, or use the product in a non-profit or educational set-

ting. Click-wrap licensing terms allow no time for adequate review. In traditional contract terms, scenarios which entail uneven bargaining power are known as "contracts of adhesion:" consumers unwittingly agree to conditions buried in pages of small type, with no time for adequate meeting of the minds or true negotiation.

Charles C. Mann, a writer for the *Atlantic*, has noted a number of particularly shrink-wrap and click-wrap license provisions.⁶³ For example, Microsoft Agent's license tells customers they can't "rent, lease or lend" the program or use the program to "disparage" Microsoft. McAfee Virus Scan contains a license term that no person may publish a review of the program "without prior consent," and finally, Phone Disc software states that the software cannot be used in any way or form without prior written consent of the software manufacturer. Worst of all for libraries, current licenses often forbid copying or lending intellectual property. These license terms cede protections of copyright to owners, while arguably putting a stranglehold on public access to electronic information.

The courts have yet to decide the enforceability of shrink-wrap and click-wrap licenses. In *Vault v. Quaid*, federal judges refused to enforce a Louisiana law validating shrink-wrap licenses because the terms interfered with consumer rights under federal copyright law.⁶⁴ By contrast, in a 1996 decision, *Pro-CD v. Zeidenberg*, the federal appellate Judge Frank Easterbrook authored an opinion that enforced a shrink-wrap license restriction under a contract theory.⁶⁵ Professor Samuelson notes that most judicial opinions have refused to enforce shrink-wrap licenses because consumers have not meaningfully assented to the terms.⁶⁶ UCITA would make them presumptively valid.⁶⁷ Such broad approval could allow software companies to circumvent, through non-negotiated mass-licensing contracts, traditional practices such as copyright exceptions for fair use, first sale and preservation. Consequently, the space afforded to the public by exceptions to copyright

could be displaced through the private mechanism of contract, causing the intellectual commons to shrink, and inexorably tipping the societal balance.

The implications for consumers and public libraries of validating restrictive licensing terms are immense. Increasingly, authors are choosing to publish on-line,⁶⁸ through software or in an electronic format. According to James G. Neal, dean of university libraries at John Hopkins University, libraries purchase significant amounts of elec-

tronic products.⁶⁹ Because of the insistence of software manufacturers that all users are actually licensees, not owners, libraries may have to examine the contents of mass-market contracts to evaluate what rights libraries and library patrons have.⁷⁰ Since shrink-wrap and click-wrap contracts remove some

of the negotiation power of the buyer, libraries will have to enter negotiations with numerous software companies. The additional costs this would entail may result in serious limitations regarding which electronic materials libraries may purchase, and limitations on how materials may be used once they are purchased.

UCITA Will Reduce the Free Flow of Ideas in Society
As the Supreme Court has noted, society has an interest in the free exchange of ideas. Extremely restrictive licensing laws, such as UCITA, may hinder the progress of science and useful arts by reducing public access to information. Richard Stallman, activist, programmer, MacArthur Genius Grant recipient and founder of the Free Software movement, argues that society needs information that is truly available to its citizens, freedom, and the spirit of voluntary cooperation.⁷¹ Traditionally, the United States has nurtured these values by ensuring that every citizen had access to significant amounts of information in all media at no cost through the public libraries.

The Association of Research Libraries notes that fair use, as well as the right of libraries to reproduce materials under certain circumstances, helps

Since shrink-wrap and click-wrap contracts remove some of the negotiation power of the buyer, libraries will have to enter negotiations with numerous software companies. The additional costs this would entail may result in serious limitations regarding which electronic materials libraries may purchase, and limitations on how materials may be used once they are purchased.

ensure the access of researchers, students, and the public to all types of knowledge in our society.⁷² "Free" information has always been an integral component in our society to helping people break through class barriers, assisting people to broaden their intellectual horizons, and creating a sense of community and civic spirit. These lofty goals have been assisted in a simple way by sharing of resources such as books, magazines, maps, music, films, and increasingly, software.⁷³ Information resources help create a more literate, informed and involved populace, which in turn creates a more robust, economically productive, democratic society. Information resources will increasingly include digital works such as those to be regulated by UCITA. The right of the public to access them, and the right of libraries to archive electronic materials, must be taken into account.

The balance put in place by fair use and other limitations on copyright must be maintained in the emerging electronic environment. Maintaining this balance ensures the free flow of information in American society, guarantees that information resources are made available to all parts of our society, and encourages the development of an information infrastructure that serves the public good.⁷⁴ Society should carefully consider the public policy implications of creating an environment where information resources are only available to those who are able to pay. In an era when the term "digital divide" is on every pundit's lips, policy makers should take note that statutes like UCITA will surely accelerate the existing educational polarization of our society and aggravate the problems between technology "haves" and "have-nots."⁷⁵

UCITA Disturbs the Traditional Balance of Contract Law

Lessig believes that UCITA, as it is currently drafted, fundamentally alters the traditional balance in contract law between business and consumers established through decades of court decisions.⁷⁶ Priscilla Walter, a software industry advocate, acknowledges that some critics of UCITA would like to see the balance between vendors and users fall more heavily on the side of users.⁷⁷ However, she dismisses such concerns, stating, "It is clear that software and information vendors won't agree to a law granting users significantly more rights than UCITA does. They have made that clear in the UCITA discussions and, after all, why should they agree to anything that weakens their right when existing law already protects them?"⁷⁸ The rejoinder to Walter, and to the backers of this statute, is that

the software industry should agree to keep negotiating in the interest of fairness. The purpose of statute or judicial decision is to regulate conduct in society in a way that balances all of society's interests. If software vendors will not agree to a law giving users reasonable rights, then consumers and their legislative advocates should walk away from the bargaining table.

CONCLUSION

Proponents of UCITA may argue that current laws do not neatly encompass transactions such as those governed by UCITA, and assert that this creates an urgent need for the passage of new legislation. This sense of urgency is artificial. Established principles of copyright, commercial, and contract law provide sufficient guidance for courts to develop a body of common law in the interim. Industry advocates complain that trying to figure out how to create enforceable agreements or arguing in court about whether we did so successfully is a waste of time and resources.⁷⁹

But, as Lessig points out, good law is generally the result of just such a time-consuming process of legal wrangling between different interests in society which results in established industry practice that can then be codified, such as occurred with the UCC. Lessig advocates allowing parties to write the contracts they want and letting courts test them under existing statutes and established principles.⁸⁰ After practice has been codified, drafters can look to the common law to develop a statute that balances the interests of consumers and businesses. Although waiting for this process to occur is time-consuming, it also builds stability and credibility into a system of commerce.

The process of allowing practice to develop before proceeding with codification will give the drafters of legislation ample time to develop a statute that strikes the proper balance between stakeholders. As stated in the principles of the techno-realism movement, "It is true that cyberspace and other recent developments are challenging our copyright laws and frameworks for protecting intellectual property. The answer, though, is not to scrap existing statutes and principles. Instead we must update our old laws and interpretations so that information receives roughly the same protection it did in the context of old media."⁸¹

LBJ

NOTES

1. American Library Association (ALA), *UCITA: State Contract Law Intersects Federal Copyright Law*. Online. Available: <http://www.ala.org/washoff/ucita/libraries.html>. Accessed: July 11, 2000.
2. The NCCUSL, comprised of representatives of all 50 states and territories, drafts and approves proposed legislation on issues of nationwide interest to provide a consistent framework of law from state to state. The proposed legislation is then introduced as a bill for adoption by the state legislatures.
3. Lawrence Lessig, "Sign it and Weep," *The Standard* (November 20, 1998). Online. Available: <http://www.thestandard.com/article/display/0,1151,2583,00.html>. Accessed: March 7, 2001.
4. Donald A. Cohn and Mary Jo Dively, *The Need for a More Objective Look at the Myths of the Proposed Uniform Computer Information Act*. Online. Available: <http://www.2Bguide.com/docs/myths.html>. Accessed: July 1, 2000.
5. Jean Braucher, *Proposed Uniform Computer Information Transactions Act (UCITA): Objections from the Consumer Perspective*. Online. Available: <http://www.cpsr.org/program/UCITA/braucher.html>. Accessed: July 10, 2000.
6. ALA, *State Contract Law Intersects Federal Copyright Law* (online).
7. Computer Professionals for Social Responsibility, *UCITA in the States*. Online. Available: <http://www.cpsr.org/program/UCITA/ucitastates.html>. Accessed: July 3, 2000.
8. ALA, *State Contract Law Intersects Federal Copyright Law* (online).
9. Letter from Ken Wasch, president of the Software and Information Industry Association to Virginia House of Delegates, June 6, 2000. Online. Available: <http://www.siiia.net/govt/issues.asp>. Accessed: July 12, 2000.
10. Cohn and Dively, *A More Objective Look* (online).
11. Lessig, "Sign it and Weep" (online).
12. Letter from Attorneys General of Connecticut, Idaho, Indiana, Iowa, Kansas, Maryland, Nevada, New Mexico, North Dakota, Oklahoma, Pennsylvania, Vermont, Washington and Georgia to NCCUSL, July 23, 1999. Online. Available: <http://www.badsoftware.com/aglet1.htm>. Accessed: July 7, 2000.; Letter from Attorneys General of California, Arizona, Arkansas, Florida, Minnesota, Mississippi, Missouri, New Jersey, Tennessee, West Virginia, and Wisconsin to NCCUSL, July 28, 1999. Online. Available: <http://www.badsoftware.com/aglet2.htm>. Accessed: July 7, 2000.
13. ALA, *State Contract Law Intersects Federal Copyright Law* (online).
14. U.S. Department of Commerce, Task Force-Working Group on Intellectual Property Rights, Intellectual Property and the National Information Infrastructure, *Report of the Working Group on Intellectual Property Rights*. Online. Available: <http://www.uspto.gov/web/offices/com/doc/ipnii>. Accessed: July 5, 2000.
15. Micalyn S. Harris, *Is Article 2B Really Anti-Competitive?* Online. Available: <http://www.winpro.com/articles/anti-competitive.htm>. Accessed: July 5, 2000; Priscilla Walter, *UCITA: Establishing a Legal Infrastructure for E-Commerce*. Online. Available: <http://www.siiia.net/sharedcontent/govt/issues/ucita/upgrade-may.html>. Accessed: July 5, 2000.
16. Walter, *Establishing a Legal Infrastructure* (online).
17. Steven E. Miller, *Civilizing Cyberspace: Policy, Power and the Information Superhighway* (New York: ACM Press, 1996), p. 363.
18. Walter, *Establishing a Legal Infrastructure* (online).
19. John Markoff, "The Concept of Copyright Fights for Internet Survival," *The New York Times on The Web* (May 10, 2000). Online. Available: <http://www.nytimes.com/library/tech/00/05/biztech/articles/10digital.html>. Accessed: June 25, 2000.
20. Ibid.
21. Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999), p. 124.
22. The digital worm is a bit of computer code that acts like an electronic sniffing dog, roaming through cyberspace looking for targeted digital items.
23. Miller, *Civilizing Cyberspace*, p.365.
24. As will be explained in detail later in this article, the "first sale" doctrine holds that although authors retain copyright over the content of a book, the copyright holder's ownership of the physical book ends at the time of first sale, thereby allowing purchasers to resell the physical text.
25. Miller, *Civilizing Cyberspace*, p.365.
26. A typical click wrap contract can be fairly benign, as it is in the Adobe PDF contract.
27. Cohn and Dively, *A More Objective Look* (online).
28. The Software and Information Industry Association, *Summary of Benefits: Uniform Computer Information Transactions Act*. Online. Available: <http://www.siiia.net/govt/issues.asp>. Accessed: June 30, 2000.
29. Ibid.
30. An opposing opinion by Raymond Nimmer argues that contract law will supersede copyright law in importance with regard to online transactions and asserts new property interests in transmission, extraction and access will be created. Raymond T. Nimmer, *Breaking Barriers: The Relation Between Contract and Intellectual Property Law*. Online. Available:

- <http://www.2Bguide.com/docs/rncontract-new.html>. Accessed: July 5, 2000.
31. For the purpose of discussion, sellers of software are referred to as licensors and buyers and consumers are referred to as licensees.
 32. Attorneys General letter, July 23, 1999, p. 1.
 33. National Conference of Commissioners on Uniform State Laws (NCCUSL), *Uniform Computer Information Transactions Act* (October 7, 1999). Online. Available: http://www.law.upenn.edu/bll/ulc/ucita/ucita_99.htm. Accessed: July 1, 2000.
 34. Attorneys General letter, July 23, 1999, p. 6.
 35. Exhaustive discussions of UCITA's flaws may be found in Jean Braucher, *Proposed Uniform Computer Transactions Act: Objections From the Consumer Perspective*. Online. Available: <http://www.cpsr.org/program/UCITA/braucher.html> and Cem Kaner, *Proposed Article 2B: Problems from the Customer's View*. Online. Available: <http://www.badssoftware.com/uccpart1.htm>.
 36. Braucher, *Objections from the Consumer Perspective* (online).
 37. Attorneys General letter, July 23, 1999, p. 1.
 38. *Ibid.*, p. 4.
 39. Charles C. Mann, "Information Anxiety," *The Atlantic Monthly* (September 1998). Online. Available: <http://www.theatlantic.com/issues/98sep/copy3.htm>, p. 9. Accessed: July 6, 2000.
 40. Walter, *Establishing a Legal Framework* (online).
 41. Attorneys General letter, July 23, 1999, p. 8.
 42. Common law refers to law made by judicial decision, as opposed to statute.
 43. Braucher, *Objections from the Consumer Perspective* (online).
 44. Lessig, *Code and Other Laws of Cyberspace*, p. 133.
 45. *Ibid.*
 46. Association of Research Libraries (ARL), *Intellectual Property: An Association of Research Libraries Statement of Principles*. Online. Available: <http://www.arl.org/scomm/copyright/principles.html>. Accessed: June 24, 2000.
 47. *Feist Publications, Inc v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).
 48. *Fogerty v. Fantasy, Inc.*, (92-1750), 510 U.S. 517 (1994)
 49. *Feist v. RTS*.
 50. *Ibid.*
 51. Miller, *Civilizing Cyberspace*, p. 360.
 52. *Ibid.*, p. 363.
 53. ARL, *Intellectual Property* (online).
 54. Miller, *Civilizing Cyberspace*, p. 364.
 55. *Ibid.*
 56. *Ibid.*
 57. *Ibid.*
 58. *Ibid.*
 59. Statement by James G. Neal, dean of University Libraries, Johns Hopkins University before the Maryland General Assembly's Joint Meeting of the Senate Finance Committee and the House Economic Matters Committee, February 3, 2000. Online. Available: <http://www.ala.org/washoff/Neal3.html>. Accessed: June 24, 2000.
 60. Pamela Samuelson, *Legally Speaking: Does Information Really Want to Be Licensed?* Online. Available: <http://sims.berkeley.edu/~pam/papers/acm2B.html>. Accessed: June 29, 2000.
 61. ALA Office for Information Technology Policy, *The Uniform Computer Information Transactions Act (UCITA) and Libraries*, by Carrie Russell (Washington, D.C., January 2000). Online. Available: <http://www.ala.org/washoff/ucitaotip.pdf>. Accessed: June 29, 2000.
 62. Samuelson, *Legally Speaking* (online).
 63. Mann, *Information Anxiety* (online).
 64. Samuelson, *Legally Speaking* (online).
 65. *Ibid.*
 66. *Ibid.*
 67. ALA Office of Government Relations, "The Uniform Computer Information Transactions Act (UCITA)," *Issue Brief* (May 2000). Online. Available: <http://www.ala.org/washoff/ucitaogr.pdf>. Accessed: July 7, 2000.
 68. Stephen King is an example of authors who publish online. See excerpt from King's e-book, "Riding the Bullet." Online. Available: <http://www.simonsays.com>. Accessed: June 28, 2000.
 69. ALA, *Statement by Neal before the Maryland General Assembly* (online).
 70. ALA, *UCITA and Libraries* (online).
 71. Richard Stallman, "Why Software Should Not Have Owners," *Gnu Project* (April 23, 2000). Online. Available: <http://www.gnu.org/philosophy/why-free.html>. Accessed: June 24, 2000.
 72. ARL, *Intellectual Property* (online).
 73. ALA Office of Government Relations, "UCITA" (online).
 74. ARL, *Intellectual Property* (online).
 75. *Ibid.*
 76. Lessig, "Sign it and Weep" (online).
 77. Walter, *Establishing a Legal Infrastructure* (online).
 78. *Ibid.*
 79. *Ibid.*

80. Lessig, "Sign it and Weep" (online).
81. Technorealism Overview, *Principles of Technorealism*. Online. Available: <http://www.technorealism.org/overview.html>. Accessed: July 6, 2000.

REFERENCES

American Library Association Office for Information Technology Policy. *The Uniform Computer Information Transactions Act (UCITA) and Libraries*. By Carrie Russell. Washington, D.C., January 2000. Online. Available: <http://www.ala.org/washoff/ucitaitp.pdf>. Accessed: June 29, 2000.

———. *UCITA State Contract Law Intersects Federal Copyright Law*. Online. Available: <http://www.ala.org/washoff/keyissues.html>. Accessed: July 11, 2000.

———. "The Uniform Computer Information Transactions Act (UCITA)," *Issue Brief* (May 2000). Online. Available: <http://www.ala.org/washoff>. Accessed: July 7, 2000.

Association of Research Libraries (ARL). *Intellectual Property: An Association of Research Libraries Statement of Principles*. Online. Available: <http://www.arl.org/scomm/copyright/principles.html>. Accessed: June 24, 2000.

Attorneys General of California, Arizona, Arkansas, Florida, Minnesota, Mississippi, Missouri, New Jersey, Tennessee, West Virginia, and Wisconsin. Letter to NCCUSL, July 28, 1999. Online. Available: <http://www.badsoftware.com/aglet2.htm>. Accessed: July 7, 2000.

Attorneys General of Connecticut, Idaho, Indiana, Iowa, Kansas, Maryland, Nevada, New Mexico, North Dakota, Oklahoma, Pennsylvania, Vermont, Washington and Georgia. Letter to NCCUSL, July 23, 1999. Online. Available: <http://www.badsoftware.com/aglet1.htm>. Accessed: July 7, 2000.

Braucher, Jean. *Proposed Uniform Computer Information Transactions Act (UCITA): Objections From the Consumer Perspective*. Online. Available: <http://www.cpsr.org/program/UCITA/braucher.html>. Accessed: July 10, 2000.

Cohn, Donald A. and Mary Jo Dively. *The Need for A More Objective Look at the Myths of the Proposed Uniform Computer Information Act*. Online. Available: <http://www.2Bguide.com/docs/myths.html>. Accessed: July 1, 2000.

Computer Professionals for Social Responsibility. *UCITA in the States*. Online. Available: <http://www.cpsr.org/program/UCITA/ucitastates.html>. Accessed: July 3, 2000.

Feist Publications, Inc v. Rural Telephone Service Co., 499 U.S. 340 (1991).

Fogerty v. Fantasy, Inc. (92-1750), 510 U.S. 517 (1994).

Harris, Micalyn S. *Is Article 2B Really Anti-Competitive?* Online. Available: <http://www.winpro.com/articles/anti-competitive.htm>. Accessed: July 5, 2000

Lessig, Lawrence. *Code and Other Laws of Cyberspace*. New York: Basic Books, 1999.

———. "Sign it and Weep." *The Standard* (November 20, 1998). Online. Available: <http://www.thestandard.com/article/display/0,1151,2583,00.html>. Accessed: March 7, 2001.

Mann, Charles C. "Information Anxiety," *The Atlantic Monthly* (September 1998). Online. Available: <http://www.theatlantic.com/issues/98sep/copy3.htm>, p. 9. Accessed: July 6, 2000.

Markoff, John. "The Concept of Copyright Fights for Internet Survival," *The New York Times on The Web* (May 10, 2000). Online. Available: <http://www.nytimes.com/library/tech/00/05/biztech/articles/10digital.html>. Accessed: June 25, 2000.

Miller, Steven E. *Civilizing Cyberspace: Policy, Power and the Information Superhighway*. New York: ACM Press, 1996.

National Conference of Commissioners on Uniform State Laws (NCCUSL). *Uniform Computer Information Transactions Act* (October 7, 1999). Online. Available: http://www.law.upenn.edu/bll/ulc/ucita/ucita_99.htm. Accessed: July 1, 2000.

Neal, James G. Dean of University Libraries, John Hopkins University. Statement before the Maryland General Assembly's Joint Meeting of the Senate Finance Committee and the House Economic Matters Committee, February 3, 2000. Online. Available: <http://www.ala.org/washoff/neal3.html>. Accessed: June 24, 2000.

Nimmer, Raymond T. *Breaking Barriers: The Relation Between Contract and Intellectual Property Law*. Online. Available: <http://www.2Bguide.com/docs/rncontract-new.html>. Accessed: July 5, 2000.

Samuelson, Pamela. *Legally Speaking: Does Information Really Want to Be Licensed?* Online. Available: <http://sims.berkeley.edu/~pam/papers/acm2B.html>. Accessed: June 29, 2000.

Software and Information Industry Association. *Summary of Benefits: Uniform Computer Information Transactions Act*. Online. Available: <http://www.siaa.net/govt/issues.asp>. Accessed: June 30, 2000.

Stallman, Richard. "Why Software Should Not Have Owners." *Gnu Project* (April 23, 2000). Online. Available: <http://www.gnu.org/philosophy/why-free.html>. Accessed: June 24, 2000.

Technorealism Overview. *Principles of Technorealism*. Online. Available: <http://www.technorealism.org/overview.html>. Accessed: July 6, 2000.

U.S. Department of Commerce, Task Force-Working Group on Intellectual Property Rights, Intellectual Property and the National Information Infrastruc-

ture. *Report of the Working Group on Intellectual Property Rights*. Online. Available: <http://www.uspto.gov/web/offices/dcom/doc/ipnii>. Accessed: July 5, 2000.

Wasch, Ken. President, Software and Information Industry Association. Letter to Virginia House of Delegates. June 6, 2000. Online. Available <http://www.siiia.net/govt/issues.asp>. Accessed: July 12, 2000.