

UCITA, COPYRIGHT, AND CAPTURE

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INTRODUCTION

Since its initial promulgation, the Uniform Computer Information Transactions Act (UCITA) has faced considerable opposition in state legislatures—to such a degree that adoptions of anti-UCITA “bomb shelter” provisions currently outnumber adoptions of the act itself.¹ The impact of UCITA on federal copyright law is one of many controversies engendered by the act, but a critical one in light of its effect on national information policy² as a whole. Recent amendments to the act, intended to generate forward momentum in upcoming legislative sessions, address a few narrow areas of potential conflict with copyright law but leave broader issues unresolved.

There is little disagreement that existing, goods-based commercial law is not well attuned to the particular requirements of information transactions in borderless, globally-networked markets.³ The proponents of UCITA strongly urge the need for a uni-

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¹ See discussion *infra* Part I.A. Subsequent to completion of this article, the National Conference of Commissioners on Uniform State Laws (NCCUSL) announced that, while it continues to support UCITA, it will discontinue active efforts to push adoption of the Act. See Statement by NCCUSL President Burnett to all NCCUSL Commissioners (Aug. 1, 2003), at <http://www.nccusl.org/nccusl/DesktopModules/NewsDisplay.aspx?ItemID=46>. UCITA remains influential and may ultimately be revived in some form. It is the law of Virginia and Maryland, home bases for a significant number of national information and technology companies, including America Online; UCITA will govern contractual relationships between those companies and their partners nationwide. The act has been favorably referenced by both the Federal Circuit and the Second Circuit, two of the most prominent courts in intellectual property matters, and will continue to influence judicial development of information licensing law. See *id.* Moreover, while NCCUSL will not spend time or money pushing adoption, other proponents, who include many politically powerful technology and information companies, may seek additional adoptions without NCCUSL's assistance. UCITA remains a force to be reckoned with and opponents have announced that they will continue to organize opposition to the Act. See Patrick Thibodeau, *Sponsor's Surrender Won't End UCITA Battle*, COMPUTERWORLD, (Aug. 11, 2003) at <http://www.computerworld.com/governmenttopics/government/legislation/story/0,10801,83870,00.html>.

² National information policy includes not only issues surrounding the proper scope of intellectual property entitlements, but also broader issues such as rights of access to information and privacy rights in information.

³ See, e.g., Raymond T. Nimmer, *UCC Revision: Information Age in Contracts*, 471 PLI/PAT

form set of default rules that provide some degree of certainty for parties to information transactions. Opponents of UCITA do not contest the desirability of uniformity or certainty, but rather object to the substantive provisions of the act which they find to be unduly favorable to information providers and burdensome to information users.⁴ In particular, many copyright scholars and practitioners object that the UCITA's default rules would permit information providers to contract around the "delicate balance" of public and private interests protected by copyright law by imposing license restrictions that abrogate "user-friendly" doctrines recognized under copyright law.⁵

The heated debate reflects the high stakes. A rapidly growing percentage of the nation's wealth derives from transactions in "information" broadly construed to include software and many forms of informational content that copyright law traditionally regulates.⁶ Increasingly, such information is embodied in electronic formats and transferred either in physical digital formats⁷ or across electronic networks. Information transactions in the retail market usually take the form of shrinkwrap or clickwrap agreements offered

377, 383 (1997) (discussing the salient differences between transactions in goods and those in information). *But see* Rochelle Cooper Dreyfuss, *UCITA in the International Marketplace: Are We About to Export Bad Innovation Policy?*, 26 BROOK. J. INT'L L. 49, 55 (2000) (agreeing that a uniform codification is desirable, but finding the substance of UCITA wanting).

⁴ There have been numerous articles written on both sides of the issue. On the pro-UCITA side, *see, e.g.*, Lorin Brennan, *Why Article 2 Cannot Apply To Software Transactions*, 38 DUQ. L. REV. 459 (2000); Mary Jo Howard Dively, *Overview Of Proposed UCC Article 2B*, 557 PLI/PAT 7 (1999); Robert W. Gomulkiewicz, *The License is the Product: Comments on the Promise of Article 2B For Software And Information Licensing*, 13 BERKELEY TECH. L.J. 891 (1998); Alvin C. Harrell, *UCITA: Opportunity or Obstruction?*, 25 OKLA. CITY U. L. REV. 333 (2000); Nimmer, *supra* note 3; Holly K. Towle, *The Politics of Licensing Law*, 36 HOUS. L. REV. 121 (1999). On the anti-UCITA side, *see, e.g.*, Amelia H. Boss, *Taking UCITA on the Road: What Lessons Have We Learned?*, 673 PLI/PAT 121 (2001); Cem Kaner, *Why You Should Oppose UCITA*, COMPUTER LAW, May 2000, at 20; Jessica Litman, *The Tales That Article 2B Tells*, 13 BERKELEY TECH. L.J. 931 (1998); Brian D. McDonald, *The Uniform Computer Information Transactions Act*, 16 BERKELEY TECH. L.J. 461 (2001); Pamela Samuelson & Kurt Opsahl, *How Tensions Between Intellectual Property Policy and UCITA Are Likely to be Resolved*, 570 PLI/PAT 741 (1999).

⁵ *See, e.g.*, Stephen Y. Chow, *UCITA: A 1990's Vision of E-Commerce*, 18 J. MARSHALL J. COMPUTER & INFO. L. 323, 353-56 (1999); Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111, 128 (1999); Litman, *supra* note 4, at 931; David Nimmer et al., *The Metamorphosis of Contract Into Expand*, 87 CAL. L. REV. 17, 19 (1999).

⁶ The U.S. leads the world in the creation of intellectual property. Combined U.S. copyright industries and related industries produce more than \$433 billion, 5.68% of the Gross National Product, which exceeds that of any other manufacturing sector. *See* Federal Bureau of Investigation Financial Institution Fraud Unit, Report on Intellectual Property Crimes, available at http://www.fbi.gov/hq/cid/fc/fifu/about/about_ipc.htm (last visited Oct. 13, 2003).

⁷ Physical digital formats include, for example, digital versatile disks (DVDs), compact disks (CDs), and floppy disks.

on a take-it-or-leave-it basis by information providers.⁸ UCITA makes such agreements legally enforceable. If widely adopted, the act would govern many information transactions, including retail mass-market transactions in software and informational content, and online contracts to download software or other information.⁹ UCITA would provide the contractual default rules for such transactions in the United States and could become the predominant framework globally.¹⁰

Traditionally, contract and copyright co-existed peaceably, with contract law providing the legal framework for transactions in copyrighted works. UCITA threatens that relationship by empowering providers to impose unilaterally license terms that contravene foundational copyright policies and current user expectations. The act's overall framework and specific default rules support enforcement of mass-market adhesion contracts that restrict uses of information protected by current copyright law. In response to the threat of contractual foreclosure of user rights, some commentators have observed that copyright law may, in the future, serve as a "consumer protection" law, limiting the scope of restrictive contractual provisions through judicial application of doctrines such as preemption or copyright misuse.¹¹

Copyright law is not particularly well-adapted to function in such a capacity. Recent copyright-related enactments, such as the Digital Millennium Copyright Act (the DMCA), effectively nullify most of the user-friendly provisions of the core copyright law with respect to digital information. They significantly limit the ability of courts to formulate user-friendly glosses on statutes protecting information providers. The statutory copyright law interpreted by

⁸ Shrinkwrap agreements are standard practice in sales of software embodied on physical media. The provider may place its license terms on the outside of the package, but more often places them inside the package; consequently, the licensee cannot read them before the transaction is concluded. In online clickwrap agreements, the licensee usually views the license terms on screen and cannot gain access to the information until she manifests assent to the terms by clicking on an "I agree" button. Both shrinkwraps and clickwraps are adhesion contracts in which the statement of license terms is treated as an "offer" and some action by the buyer (opening the box, clicking the button, using the information) may constitute "acceptance." Clickwraps, however, often provide prepayment disclosure of terms while shrinkwraps do not. "Browse-wraps" are a variant in which web site operators claim that mere browsing of a site constitutes agreement to its terms of use.

⁹ See discussion of UCITA's scope *infra* Part I.B.1. UCITA governs transactions in "information" regulated by numerous intellectual property regimes, including patents and trademarks. Its greatest effect, however, is on information traditionally regulated by the Copyright Act. The scope of this paper is confined to the interaction of UCITA with copyright law.

¹⁰ See Dreyfuss, *supra* note 3, at 55.

¹¹ See *infra* Part II.B.3.

the courts is subject to the same process flaws that produced UCITA—a proclivity to capture by business interests and a related failure to include or respond effectively to public interest groups, particularly those representing consumers.¹² I suggest that both processes, particularly at the drafting stage, must be altered to insure adequate representation of these parties and their interests in access to information. Moreover, the resulting provisions ultimately ought to be coordinated, with copyright law setting a limited number of nonvariable rules essential to the achievement of its fundamental policies and contract law providing consistent implementation of those policies.

Part I of this article offers a brief history of UCITA and describes its basic framework. In Part II, I discuss the interaction between UCITA and copyright law, noting the unique nature of transactions involving copyrighted works and outlining UCITA's stance with regard to copyright-related issues. Part III compares the drafting and enactment processes that produced the Copyright Act and UCITA, demonstrating their peculiar susceptibility to capture by business interests. Finally, in Part IV, I offer some preliminary suggestions for correcting the processes to assure more effective representation of affected interests and produce more balanced results in future legislative efforts.

I. UCITA'S HISTORY AND KEY PROVISIONS

This part briefly summarizes UCITA's drafting history and current status. This part also outlines central provisions of the act, focusing on those that most directly impact copyright law.

¹² The definition of the "public interest" has been the subject of considerable academic discussion. See *infra* Part III. In copyright law, the concept of the public domain encapsulates, but only partially, the public interest. The public domain includes those works that have never been copyrighted, because they predated the enactment of copyright laws or failed to meet technical requirements of those laws, or have fallen out of copyright after the expiration of the copyright term. The public domain also includes a variety of materials, such as ideas, facts, and processes, which courts have excluded entirely from the ambit of copyright protection. See Jessica Litman, *The Public Domain*, 35 EMORY L.J. 965, 976-77 (1990). The public domain constitutes a reservoir of unprotected material that authors may freely tap in order to create new works. The concept does not, however, encompass many of the access and consumption concerns involved in the conflict between copyright and contract.

For purposes of this article, references to "public interest groups" indicate organized groups who purport to represent the interests of the public at large, rather than of a particular industry with an economic stake in information. Public interest groups would include, for example, consumer advocacy groups, library associations (representing the public's interest in access to information), academic groups, and nonprofit organizations like Common Cause or the Digital Future Coalition. In contradistinction, business groups include, for example, corporate lobbyists or associations representing software companies, online service providers, publishers, or business users of information.

A. *A Short History of a Long Act*

The UCITA project began more than a decade ago in response to growing concern that Article 2 of the Uniform Commercial Code (the UCC) governing sales of goods did not provide a good fit for transactions involving software. The National Conference of Commissioners on Uniform State Laws (NCCUSL), in partnership with the American Law Institute (ALI), undertook the project at the behest of an American Bar Association (ABA) Study Committee.¹³ The drafters wrote and rewrote the provisions in conjunction with a series of contentious public meetings participated in, to different degrees, by affected industries, consumer groups, library associations, academics, and other interested parties.¹⁴

Initially, the draft legislation focused on software licensing as an integral part of the overall revision of Article 2. In 1995, NCCUSL decided to separate the software licensing provisions from the sale of goods provisions and created a new drafting committee for a separate article, designated Article 2B, of the UCC.¹⁵ The scope of the project expanded from the drafting of basic default rules for software contracts to the development of a contractual framework for a wide variety of transactions in digital information. The drafters shifted from a limited commercial focus on contract issues to a broader focus on intellectual property issues and information policy as a whole.¹⁶ The draft ultimately incorporated principles from several disciplines including commercial law, intellectual property law, and the common law relating to intangibles.¹⁷ The current version of UCITA comprises a complex set of provisions that, with commentaries, exceeds several hundred pages in length.¹⁸

The project was controversial throughout the drafting process

¹³ See Nimmer, *supra* note 3, at 384-86. The drafting history of UCITA has been thoroughly described in numerous articles. See, e.g., Boss, *supra* note 4, at 130-38; Dively, *supra* note 4, at 10-14; Thomas J. Murphy, *It's Just Another Little Bit of History Repeating: UCITA in the Evolving Age of Information*, 30 GOLDEN GATE U. L. REV. 559, 569-72 (2000).

¹⁴ See Carlyle C. Ring, Jr., *UCITA: Contract Rules for Information Commerce*, 649 PLI/PAT 45, 48 (2001).

¹⁵ See Boss, *supra* note 4, at 130-38.

¹⁶ See *id.* at 131.

¹⁷ See Towle, *supra* note 4, at 122.

¹⁸ References herein to the current version of UCITA indicate the 2002 version available as of this writing. Historical references to prior versions of UCITA should be read to include its predecessor, Article 2B of the UCC, unless otherwise indicated. For the various drafts of UCITA, see The National Conference of Commissioners on Uniform State Laws, Drafts of Uniform and Model Acts, at http://www.law.upenn.edu/bll/ulc/ulc_frame.htm (last visited Oct. 13, 2003).

and has remained so since its "final" promulgation.¹⁹ Provisions were extensively redrafted in response to pressures from a multitude of interest groups.²⁰ Major information industries, including the movie and music industries, demanded and received exceptions from the act as the price of dropping their opposition.²¹ Numerous state attorneys general expressed opposition both to the drafts and the final act.²² Consumer groups, librarians, academics, and business end users criticized the act as too heavily weighted in favor of information providers and against information users.²³ In 1999, the ALI withdrew its support for the project.²⁴ The NCCUSL thereupon renamed former Article 2B as the Uniform Computer Information Act and released it for adoption by the states as a free-standing uniform act.²⁵ The act nonetheless remains a source of contention even within the NCCUSL itself.²⁶

Legislative reaction in the states has been mixed, to put it

¹⁹ See Michael L. Rustad, *Making UCITA More Consumer-Friendly*, 18 J. MARSHALL J. COMPUTER & INFO. L. 547, 547 (1999) (describing UCITA as "the culmination of a ten-year war between the software industry, consumer representatives, the entertainment industry and other stakeholders over the fundamental rules for electronic contracts, software licensing, and Internet contracts.").

²⁰ In 2002, NCCUSL adopted almost 40 additional amendments to UCITA in response to continuing criticism. See Alorie Gilbert, *Software Licensing Act Amended*, N.Y. TIMES, Aug. 2, 2002, available at http://www.nytimes.com/cnet/CNET_2100-1023-948194.html. For description and analysis of the proposed amendments, see UCITA Standby Committee, *Report to Conference and Response to Concerns Raised in ABA Working Group Report* (May 29, 2002) [hereinafter *Standby Committee Report of 5/29/02*], at <http://www.abanet.org/ucita/standby.pdf>. The 2002 proposed amendments are available at http://www.law.upenn.edu/bll/ulc/ulc_frame.htm. [hereinafter 2002 Proposed Amendments]. The 2002 final version of the act as amended is available at <http://www.law.upenn.edu/bll/ulc/ucita/2002final.htm>.

²¹ See UCITA § 103(d) (2002) (exceptions to the scope of the act).

²² See Letter from the Attorneys General of Twenty-Four States to Gene Lebrun, President, NCCUSL (July 23, 1999), at <http://www.ucitaonline.com/docs/799agsuo.html>; see also Letter from the National Association of Attorneys General to Carlyle C. Ring, Jr., Chair of the UCITA Drafting Committee (Nov. 13, 2001), at <http://www.arl.org/info/letters/AGtoNCCUSL11.html>.

²³ See Boss, *supra* note 4, at 133-34.

²⁴ A joint press release issued by ALI and NCCUSL stated simply that "this area does not presently allow the sort of codification that is represented by the Uniform Commercial Code." Press Release, NCCUSL-ALI, NCCUSL to Promulgate Freestanding Uniform Computer Information Transactions Act: ALI and NCCUSL Announce that Legal Rules for Computer Information Will Not Be Part of UCC (April 7, 1999), at <http://www.nccusl.org/nccusl/pressreleases/pr4-7-99.asp>. However, commentators have alluded to serious substantive disagreements between the two organizations. See, e.g., Boss, *supra* note 4, at 135-37 (noting that the two organizations fundamentally disagreed over the proper scope and substance of the draft).

²⁵ See Boss, *supra* note 4, at 135.

²⁶ During the 2002 annual meeting, a petition circulated that would have downgraded UCITA to a model law, withdrawing active NCCUSL support for its passage and probably dooming any chances for widespread adoption. Consideration of the petition was deadlocked in the Executive Committee and its sponsor ultimately withdrew it on the condition that NCCUSL would reevaluate UCITA's status if it did not win significant support in 2003. See Anandashankar Mazumdar, *UCITA Partisans Waiting for Dust to Settle on Amendments Adopted at NCCUSL Meeting*, 7 BNA ELEC. COMMERCE L. REP. 810 (2002).

mildly.²⁷ The Maryland and Virginia legislatures quickly adopted the act, though the Maryland version was significantly amended and Virginia delayed the effective date of its version for a year to allow further consideration.²⁸ The Iowa legislature moved as quickly to adopt a UCITA “bomb shelter” provision that prohibits enforcement of UCITA as a choice of law against an Iowa citizen or business. To date, there have been no additional adoptions of the act, but three more states, North Carolina, Vermont, and West Virginia, have adopted anti-UCITA provisions.²⁹

The ABA, the original instigator of the project, ultimately expressed grave reservations about UCITA. The Torts and Insurance Practice Section recommended that the ABA actively oppose enactment of the uniform law, which led to creation of a Working Group to evaluate the act. The Working Group Report criticized UCITA on a number of substantive grounds, but also disapproved of its general lack of clarity, finding it overly complex and difficult to understand—the report requested a rewrite of the entire act.³⁰ Though rejecting the call for a redraft, NCCUSL’s Standing Committee on UCITA agreed with many of the ABA criticisms and proposed a series of amendments to the act,³¹ most of which NCCUSL adopted at its July, 2002 meeting. The ABA remains divided on the issues and has thus far failed to approve the amended act.³²

The 2002 amendments respond to some specific objections raised by the ABA and other critics of UCITA. Notably, they include a reverse engineering provision, public criticism and charitable transfers provisions, a provision disclaiming warranties for open source software, and a prohibition on electronic self-help in the event of contract breach.³³ The amendments do not alter pro-

²⁷ See McDonald, *supra* note 4, at 467-74.

²⁸ See MD. COM. L. CODE ANN. §§ 22-101 to -816 (2000); VA. CODE ANN. §§ 59.1-501.1 to -508.15.

²⁹ The bomb shelter provisions prevent enforcement of contractual choice of law provisions that make UCITA the law governing a transaction. For the respective bomb shelter provisions, see IOWA CODE § 554D.104.2.b.4 (2000); N.C. GEN. STAT. § 66-329 (2001); VT. H.B. 148, § 2463 (2003) (enacted); W. VA. CODE § 55-8-15 (2001). The Iowa statute contained a sunset provision but was reenacted in 2003. The provisions are discussed at more length *infra* Part III.C.2.b.

³⁰ See ABA Working Group Report on the Uniform Computer Information Transactions Act (UCITA) (Jan. 31, 2002) [hereinafter ABA Working Group Report], at <http://www.abanet.org/ucita/home.html>.

³¹ See *Standby Committee Report of 5/29/02*, *supra* note 20.

³² NCCUSL withdrew the act from consideration at the ABA’s 2003 Midyear Meeting after it became apparent that most of the ABA sections that had reviewed the act were not ready to approve it. See Press Release, NCCUSL, UCITA Withdrawn from ABA Agenda Without Action (Feb. 10, 2003) at <http://www.nccusl.org/nccusl/DesktopModules/>; see also Grant Gross, *UCITA Hits Snag with Lawyer Group*, ITWORLD.COM, Feb. 12, 2003, at <http://www.itworld.com/Man/2681/030212ucita/>.

³³ See 2002 Proposed Amendments, *supra* note 20.

visions that have significant impact on broader copyright concerns relating to fair use, the first sale doctrine, and federal preemption. Nor do the amendments affect the basic transactional framework of UCITA which, in itself, creates potential conflicts with federal copyright law.

B. UCITA's Framework

UCITA expands the power of information providers to control information use through enforcement of restrictive license terms. In essence, the act enables the pay-per-use model of information exchange welcomed by information providers, but dreaded by many information users.³⁴ Several key concepts embodied in UCITA interact to produce this effect. Those concepts include: broad coverage of "information" transfers, albeit with carve-outs for powerful industries;³⁵ characterization of such transactions as licenses rather than sales; validation of adhesion contracts in mass-market transactions, and endorsement of technological restraints.

1. Scope

Initially UCITA was to govern only software transactions. By 1995, however, its scope had expanded to cover all information licensing. In response to criticism that a single licensing law could not work for all information licensing, the scope was narrowed to "computer information" transactions,³⁶ a scope that still cuts a broad swathe through intellectual property licensing practices. Under the current scope and definition provisions, UCITA extends to any transaction involving information in electronic form capable of being processed by a computer, including all licenses of information or informational rights, copies of and documentation accompanying the information, and information access and support contracts. UCITA would cover most software transactions and database access agreements. The act covers both customized infor-

³⁴ For articles favoring the pay-per-use model, see, e.g., Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557 (1998); Mark Stefik, *Trusted Systems*, SCI. AM., Mar. 1997, available at <http://www.sciam.com/0397issue/0397stefik.html>. For arguments against it, see, e.g., Julie É. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy Of "Rights Management"*, 97 MICH. L. REV. 462 (1998).

³⁵ The Standby Committee objected to the ABA Working Group's characterization of the scope exemptions as "industry" exclusions, preferring to style them as exclusions of particular kinds of transactions. See *Standby Committee Report of 5/29/02*, *supra* note 20, at 6. It is nonetheless clear that the exclusions were invariably crafted in response to demands from powerful industries.

³⁶ See Samuelson & Opsahl, *supra* note 4, at 747; see also Boss, *supra* note 4, at 144-46 (discussing disputes over the proper scope of UCITA and its predecessor, Article 2B).

mation transactions negotiated between business partners and mass market retail transactions.³⁷

UCITA's definitions of "information" and "informational rights" include content traditionally governed by copyright law and other intellectual property regimes as well as content, notably factual compilations, explicitly excluded from copyright protection under current law.³⁸ The broad coverage of the act incited opposition by many information industries concerned that UCITA's new default rules would conflict with well-established practices in those industries. At their behest, the drafters carved out a series of exceptions.³⁹ The financial, insurance, movie, broadcast, recording, and news reporting industries all received exemptions.⁴⁰ The act remains applicable to numerous information transactions and characterizes those transactions not as sales, but as licenses.

2. License Not Sale

Under UCITA, any information transaction that transfers fewer than all rights in the information is automatically deemed to be a license, regardless of whether title to a copy is transferred.⁴¹ For example, transfer of a software program in a typical retail transaction constitutes a license, not a sale, because it does not transfer all of the transferor's intellectual property rights. UCITA adopts, for all computer information transactions, the "licensing" model which software developers created at a time when the scope of intellectual property rights in software was ambiguous, and which subsequently became a standard feature of the software market.⁴² The licensing model runs counter to both the understanding of most consumers, who believe they are buying ownership of a copy, and the conclusions of many courts, which have held that such transactions are sales, not licenses.⁴³ In the mass market, informa-

³⁷ See UCITA §§ 102(10)-(11) (2002); see also § 103. According to the Comments, UCITA does not apply to printed information, even though such information may be scannable into electronic form. See § 102, cmt. 8.

³⁸ See UCITA § 102(35) (defining "information" as all "data, text, images, sounds, mask works, or computer programs, including collections and compilations of them."). See § 102(38) (defining informational rights as explicitly including all rights created under current intellectual property laws).

³⁹ See Chow, *supra* note 5, at 334-35.

⁴⁰ See UCITA § 103(d). The movie industry, in subsection (d)(3)(A), receives a broad exemption for transactions involving the creation, distribution, and licensing of performance rights associated with movies, but remains covered by UCITA for purposes of mass market transactions—the best of both worlds.

⁴¹ See *id.* § 102(41).

⁴² See Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1241-45 (1995).

⁴³ See Lemley, *supra* note 5, at 118-19 & nn. 14-15. Lemley notes that this model abandons the traditional rule that courts should consult the totality of the circumstances in

tion providers typically present such licenses in shrinkwrap or click-wrap form and use them to limit warranties and restrict uses permitted under copyright and other intellectual property laws.⁴⁴

UCITA's adoption of the "mass market license" concept⁴⁵ represents an innovation in contract law. Previously, doctrinal lines were drawn between business-to-business contracts, conceived as being negotiated at arms' length between parties of more or less equal power, and "consumer" contracts in which sellers typically imposed standardized terms on relatively powerless individual buyers. Consumer contracts were subject to stricter judicial oversight because of the power imbalance between the parties. UCITA redraws the traditional lines to offer "consumer" status to businesses in mass market retail transactions where nonnegotiable, standardized terms are directed to the public as a whole.⁴⁶ This concept expands the class of information users⁴⁷ receiving protection under some of UCITA's provisions, such as provisions imposing warranties and requiring conspicuous disclaimers thereof. Any potential benefit to end users is, however, counterbalanced by provisions governing contract formation that validate adhesion contracts despite the absence of prepayment disclosure of terms.⁴⁸

3. Contract Formation

Under a series of interrelated UCITA provisions, a party assents to a standard form license by engaging in conduct such as clicking on an "I agree" button or simply using the information, provided that the party has an opportunity to review the contract terms prior to giving assent.⁴⁹ UCITA explicitly does NOT require that the terms be available prior to payment.⁵⁰ It does, however,

deciding whether a particular contract is a license or a sale. The distinction between licenses and sales signifies the transfer of different sets of rights in copyright law. *See infra* Part II.A.

⁴⁴ *See* Lemley, *supra* note 42, at 1242-48.

⁴⁵ *See* UCITA § 209.

⁴⁶ *See* Nimmer, *supra* note 3, at 414-21. *See* UCITA § 102(44)-(45) for definitions of mass market licenses and transactions.

⁴⁷ The conflation of individual consumers and business users under the mass market license concept creates some descriptive challenges. I use the term "consumer" herein in the traditional sense referring to individual consumers; "business users" refers specifically to business entities, and "user" or "end user" refers to the general category subsuming both individual and business users.

⁴⁸ Proponents have argued that, under the mass market license concept, licensees may be corporations larger and more powerful than licensors and that UCITA is, therefore, generous to licensees. *See, e.g.,* Towle, *supra* note 4, at 142-43. This argument, however, rests on a notion of power imbalance in negotiations between parties that becomes irrelevant when the contract at issue is enforceable without any semblance of negotiation.

⁴⁹ *See* UCITA §§ 112-114 (manifesting assent, opportunity to review, pre-transaction disclosures), 208 (adopting terms of records), 209 (mass market licenses).

⁵⁰ The ABA Working Group Report objected that there was no economic justification

require that the party subjected to the adhesion contract, usually the licensee, must have the opportunity to return the information and obtain a refund if the license terms are unacceptable.⁵¹ The right of return only arises after the contract has been formed, at a point when most consumers are unlikely to withdraw from the transaction even assuming, counterfactually in most cases, that they read and understand the license terms.⁵²

Under UCITA, most contract terms, including provisions governing choice of law, choice of forum, and implied warranties, may be varied by agreement of the parties.⁵³ Assent to a shrinkwrap license will constitute such agreement. UCITA does impose some restrictions on the kind of terms that parties may impose through a standard form, notably by adopting a good faith requirement⁵⁴ and a prohibition against enforcement of unconscionable terms.⁵⁵ These provisions may not be varied by agreement of the parties.⁵⁶

Commentators have noted that UCITA's endorsement of shrinkwrap and clickwrap contracts abandons traditional contract rules of offer and acceptance in favor of a rule decidedly favorable to the drafters of standard forms, in most instances the information providers.⁵⁷ Defenders of UCITA aver that such contracts are commonplace in traditional markets, essential to information mar-

for failing to make all of the terms available prior to payment and recommended adoption of a requirement for pre-payment disclosure. See *ABA Working Group Report*, *supra* note 30, at 18. The Standby Committee rejected this suggestion, stating that the right of review and return sufficiently protects licensees and that a pre-payment disclosure requirement would both change existing practices and impose regulatory costs on licensors. See *Standby Committee Report of 5/29/02*, *supra* note 20, at 11-13.

⁵¹ See UCITA §§ 113, 209. The right of return provisions rely on language in *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996), to the effect that shrinkwrap contracts are valid if the buyer has the right to return the product after viewing the terms. Apparently, neither Judge Easterbrook, who wrote the *ProCD* opinion, nor NCCUSL's drafters, buy their own software from retail outlets. Any consumer could have informed them that software retailers refuse to accept returns of opened software packages.

⁵² Few consumers read such terms, in part because the terms are couched in incomprehensible legalese and in part because consumers view the transaction as a sale, not a license. In light of this fact, UCITA opponents' emphasis on the lack of prepayment disclosure may be misplaced. The real crux of the problem is that users often have little or no choice as to terms in retail transactions and that the terms imposed may be onerous. A recent incident illustrated that even providers may be unaware of the terms included in their own licenses. Microsoft's licenses for Passport claimed that Microsoft owned all data processed by the system and granted Microsoft the right to do whatever it wanted with all personal data. When challenged, Microsoft claimed to be unaware of the term in its own agreement. See Farhad Manjoo, *Fine Print Not Necessarily in Ink*, WIRED NEWS, Apr. 6, 2001, at <http://www.wired.com/new/print/0,1294,42858,00.html>. Under UCITA, the term would, nonetheless, be binding.

⁵³ See UCITA § 115.

⁵⁴ *Id.* § 116.

⁵⁵ *Id.* § 111.

⁵⁶ *Id.* § 115.

⁵⁷ See, e.g., Chow, *supra* note 5, at 325; Lemley, *supra* note 5, at 120-22.

kets, and have been held enforceable in a number of recent decisions.⁵⁸ UCITA not only offers a definitive framework for legal enforcement of the terms of such contracts, but also arms providers with the power to enforce those terms through technological controls.

4. Technological Restraints

The electronic self-help provisions of UCITA proved so unpopular, particularly with business users, that the 2002 amendments rewrote the act to ban electronic self-help outright in connection with cancellation of licenses.⁵⁹ However, § 605 still permits providers to enforce use restrictions on information through “automatic restraints” if the agreement authorizes use of the restraint, and if the restraint prevents a use inconsistent with the agreement.⁶⁰ “Agreement” to the use of restraints can be imposed by the licensor through a standard form license. UCITA then empowers the licensor to use technological means to prevent the licensee from deviating from the license terms so imposed, which might, for example, preclude the making of back-up copies or prevent transfer of the user’s lawful copy of the information. The technology to enforce such proscriptions is now readily available to information providers.⁶¹

5. The Cumulative Impact

The cumulative product of the provisions just described is a transactional framework, broadly applicable to many transfers of copyrighted works, that permits information providers to enforce restrictive use conditions against information users. In a typical retail software transaction, for example, the provider would offer to the user, on a take-it-or-leave-it basis, license terms drafted by the provider and advantageous to its interests. The user might take the software home, or download it from a web site, and start the instal-

⁵⁸ See, e.g., Lois F. Wasoff, *The UCITA Revolution: The New E-Commerce Model for Software and Database Licensing*, 600 PLI/PAT 243, 248-250 (2000).

⁵⁹ See 2002 Proposed Amendments, *supra* note 20, at amend. 13 (rewriting UCITA §§ 815- 816). Business users were particularly concerned that, under former provisions allowing providers to “turn off” software in the event of contract disputes, information providers could shut down key functions of their end users, giving the providers tremendous leverage in contract disputes.

⁶⁰ An automatic restraint is “a program, code, device or similar electronic or physical limitation the intended purpose of which is to prevent use of information contrary to the contract. . .” UCITA § 605. Automatic restraints may not prevent a licensee from accessing its own information or that of a third party. *See id.*

⁶¹ See Stefik, *supra* note 34 (describing “trusted systems” capable of monitoring and charging for every use of protected information).

lation process before she could see the terms of the license. If she found the terms unsatisfactory, she could return the product and obtain a refund, assuming that another product, with more favorable terms, was available. If she clicked through a clickwrap agreement or used the software, the terms would be enforceable at law. If the software provider incorporated automatic restraints into its product, it need not resort to the legal system at all, but could simply configure the product to make breach of its terms impossible. Past experience teaches that providers are apt to impose terms that prohibit uses specifically allowed by copyright law, such as the making of archival copies, fair uses, and transfers of lawful copies.⁶²

The right of return and the unconscionability limitation impose few restraints on providers' ability to impose such terms, particularly in markets where there is little variation in the terms offered by competing products. Where one or a few providers are dominant and license terms are standardized market-wide, users will have little choice but to accept the terms imposed by providers.⁶³ Unconscionability, while a useful tool in cases of extreme overreaching, is exceedingly difficult to establish.⁶⁴

As a practical matter, one-sided imposition of use restrictions by information providers is old news. "It is almost commonplace in the history of copyright jurisprudence that when new technology establishes products or media considered incapable of being protected, copyright owners seek self-help through the unilateral declaration of expanded rights via purported contractual limitations."⁶⁵ Until recently, courts summarily rejected copyright owners' attempts to expand protection of their works through licensing.⁶⁶ The 7th Circuit's decision in *ProCD, Inc. v. Zeidenberg*,⁶⁷ holding that a shrinkwrap license prohibiting commercial use of software was enforceable and not preempted by copyright law, laid crucial groundwork for UCITA. *ProCD* notwithstanding, the legal

⁶² See Lemley, *supra* note 5, at 128-33 (describing typical license terms that contravene copyright policies).

⁶³ In the market for operating systems, for example, most PC users have no choice but to accept Microsoft's terms, unless they belong to the small minority of users sufficiently adept to switch to Linux. Similarly, Apple users must bow to the terms Apple imposes on its operating system.

⁶⁴ See E. ALLAN FARNSWORTH, CONTRACTS § 428 (3d ed. 1999). A user would bear the burden of establishing not only procedural unconscionability (flaws in the negotiation process) but substantive unconscionability (unfair or oppressive terms). This standard is very difficult to meet.

⁶⁵ Nimmer et al., *supra* note 5, at 44.

⁶⁶ The Supreme Court adopted the first sale doctrine, for example, in response to a publisher's attempt to impose a license restricting the resale price of books. See *Bobbs-Merrill Co v. Straus*, 210 U.S. 339, 350 (1908).

⁶⁷ 89 F.3d 1257 (7th Cir. 1996).

enforceability of shrinkwrapped use restrictions is not yet firmly established in the courts⁶⁸ and, until recently, providers lacked the technological ability to enforce them through code. UCITA establishes the legal foundation for consistent enforcement. Consequently, the act creates new tensions between contract law and copyright law.

II. THE IMPACT OF UCITA ON COPYRIGHT

This part briefly outlines the traditional relationship between copyright and contract law and then explores in greater depth UCITA's relationship to copyright. I conclude that UCITA adopts positions consistent with copyright when such positions favor providers, but tends to take positions contrary to copyright where copyright favors users, allowing providers to override contractually key privileges granted to users by copyright law. Overall, UCITA is significantly less "user-friendly" than traditional copyright law and

⁶⁸ A number of cases, which UCITA proponents consider the modern trend, have followed *ProCD* in holding shrinkwrap or clickwrap licenses enforceable. See, e.g., *Hill v. Gateway 2000*, 105 F.3d 1147 (7th Cir. 1997); *Brower v. Gateway 2000*, 676 N.Y.S.2d 569 (N.Y. App. Div. 1998); *M.A. Mortensen Co. v. Timberline Software Corp.*, 970 P.2d 803 (Wash. Ct. App. 1999). There is, however, significant case law, both before and after *ProCD*, holding shrinkwrap licenses unenforceable. See, e.g., *Step-Saver Data Sys. v. Wyse Tech.*, 939 F.2d 91 (3d Cir. 1991); *Arizona Retail Sys. v. Software Link, Inc.*, 831 F.Supp. 759 (D. Ariz. 1993); *Klocek v. Gateway, Inc.*, 104 F.Supp.2d 1332 (D. Kan. 2000). For a useful analysis of *ProCD*'s impact on copyright, see Michael Madison, *Legal-ware: Contract and Copyright in the Digital Age*, 67 *FORDHAM L. REV.* 1025 (1998). In the past two years, courts have reached differing conclusions as to the enforceability of such licenses. For cases enforcing shrinkwrap or clickwrap licenses, see e.g., *Bowers v. Baystate Techs., Inc.*, 302 F.3d 1334 (Fed. Cir. 2002) (assuming that a shrinkwrap license provision prohibiting reverse engineering was enforceable under contract law and finding no preemption by the Copyright Act); *Adobe Sys. Inc. v. Stargate Software, Inc.*, 216 F.Supp.2d 1051 (N.D. Cal. 2002) (shrinkwrap agreement held to be enforceable license not a sale); *Forrest v. Verizon Comms., Inc.*, 805 A.2d 1007 (D.C. 2002) (enforcing clickwrap forum selection clause); *I.Lan Sys., Inc. v. NetScout Service Level Corp.*, 183 F.Supp.2d 328 (D. Mass. 2002) (enforcing clickthrough license where terms appeared on screen prior to software installation and buyer clicked "I agree" box); *Moore v. Microsoft Corp.*, 741 N.Y.S. 2d 91 (N.Y. App. Div. 2002) (enforcing clickwrap license where terms appeared on screen and user was required to click "I agree" box before proceeding with installation). For cases denying enforcement, see, e.g., *Comb v. Paypal, Inc.*, 218 F.Supp.2d 1165 (N.D. Cal. 2002) (refusing enforcement of clickwrap arbitration clause on grounds of procedural and substantive unconscionability); *Softman Products Co. v. Adobe Sys., Inc.* 171 F.Supp.2d 1075 (C.D. Cal. 2001) (characterizing transfer of copies of software as a sale and refusing to enforce term restricting transfer of software as violative of the first sale doctrine); *Specht v. Netscape Comm. Corp.*, 150 F.Supp.2d 585 (2001) (refusing enforcement of clickwrap where review of terms was not required prior to downloading software and terms did not appear on the download page but were only accessible through a series of hyperlinks). UCITA's drafters have, somewhat disingenuously, omitted any reference to the conflicting case law in the commentaries to UCITA. See UCITA § 209 cmt. 5. In an interesting recent development, a class action filed in California against Microsoft, Symantec, and other software providers, charges that shrinkwrap licensing constitutes an unfair business practice. See *Microsoft, Symantec Sued Over Software Licenses*, *THE INQUIRER*, Feb. 11, 2003, at <http://www.theinquirer.net/>.

threatens the balance of incentives and dissemination which copyright seeks, not always successfully, to achieve.

In light of recent additions to the title containing the Copyright Act, it is necessary to define the meaning of "copyright law" prior to embarking on any discussion of its relationship to UCITA. References herein to "copyright law" indicate the core provisions of the Copyright Act of 1976, as (extensively) amended,⁶⁹ which establish the requirements and scope of copyright protection. Legislative responses to changing technologies have produced a number of specialized additions to the Copyright Act,⁷⁰ notably the Digital Millennium Copyright Act (the DMCA),⁷¹ which prohibits circumvention of copyright owners' technological protection systems. The DMCA constitutes a paracopyright law that establishes different legal standards and imposes separate penalties from those imposed by traditional copyright law.⁷² UCITA poses a significant threat to the core copyright provisions, but reflects pro-provider policies consonant with those underlying the DMCA.

A. *Traditional Symbiosis*

Traditionally, contract and copyright law coexisted in a symbiotic relationship in which contract law was instrumental to the full exploitation of the copyright owner's rights. Copyright entitlements⁷³ are divisible and the Copyright Act clearly envisions that they may be transferred by any means of conveyance,⁷⁴ including sales, licenses, leases, and mortgages.⁷⁵ State contract law provides the legal framework for contract formation, interpretation, and performance. However, copyright law trumps state contract law as to the substantive protections granted copyright owners, and, in some instances, as to procedural requirements. For example, interpretations of the appropriate scope of a copyright license or of the sufficiency of a written transfer of an exclusive license are

⁶⁹ 17 U.S.C. §§ 101-803 (1976).

⁷⁰ See, e.g., the Semiconductor Chip Act, 17 U.S.C. §§ 901-914 (1984) (protecting semiconductor chip products), and the Audio Home Recording Act, 17 U.S.C. §§ 1001-1010 (1992) (governing digital audio recording devices).

⁷¹ 17 U.S.C. §§ 1201-1205 (1998).

⁷² See Diane Leenheer Zimmerman, *Adrift in the Digital Millennium Copyright Act: The Sequel*, 26 U. DAYTON L. REV. 1, 2 (2002).

⁷³ See 17 U.S.C. § 106 (delineating the bundle of copyright entitlements: the rights to control reproduction, distribution, adaptation, and public performances and displays).

⁷⁴ See 17 U.S.C. § 201(d) (governing transfer of ownership).

⁷⁵ 17 U.S.C. § 101 provides: "A 'transfer of copyright ownership' is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license." *Id.*

deemed matters of federal copyright law, not state contract law.⁷⁶ To use the parlance employed by the UCITA drafters, copyright law establishes some “default rules” that may be varied by contract, while other rules are “nonvariable” and may not be altered by contract.

Within the traditional copyright-contract symbiosis, individual arm’s length negotiations in which parties waived their rights under copyright law were accepted practice and offered little threat to basic copyright policies. The traditional relationship also recognized that copyright owners might unilaterally impose contractual restrictions, provided the restrictions were congruent with the proper scope of copyright protection. If, however, copyright law permitted particular uses, such as fair uses or the making of backup copies, state contract law could not produce a different result.⁷⁷ UCITA alters this congruence of copyright and contract.

B. *UCITA’s Posture Regarding Copyright Law*

UCITA takes variable positions relative to copyright law.⁷⁸ It adopts a different transactional model from those previously dominant in copyright transfers. It covers much, but not all, of the same subject matter as copyright, as well as subject matter specifically denied copyright protection. UCITA’s rules defer to copyright on some points and reject it on others, but adopt a “neutral” position in particularly thorny policy areas regarding preemption and fundamental public policies. Viewed through a broader lens, however, UCITA’s consistencies and inconsistencies with copyright are informed by a systematic philosophy. UCITA adopts rules consistent with copyright provisions favorable, or at least neutral, to information providers, but rejects outright or allows contractual nullification of copyright doctrines favoring users.

1. Transactional Models

Copyrighted works exhibit a dual nature that complicates

⁷⁶ See ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT § 323-4 (6th ed. 2002). Federal courts have exclusive jurisdiction over matters arising under the Copyright Act. See 28 U.S.C. 1338(a) (2002). That jurisdiction has been interpreted to include actions requiring interpretation of the copyright statute, seeking remedies expressly granted by the act, or where a distinctive policy of the act requires that federal principles control the disposition of the claim. See *T.B. Harms Co. v. Eliscu*, 339 F.2d 823 (2d Cir. 1964).

⁷⁷ See Nimmer et al., *supra* note 5, at 24-34; Raymond T. Nimmer, *Breaking Barriers: The Relation Between Contract And Intellectual Property Law*, 13 BERKELEY TECH. L.J. 827, 830-31 (1998).

⁷⁸ Jessica Litman comments that “[UCITA’s] description of its own relationship with copyright law is at best confused, and at worst disingenuous.” See Litman, *supra* note 4, at 931.

transfers of interests. The “work” to which copyright adheres is intangible with a legal existence separate from the particular “copies” that embody the work.⁷⁹ The subject matter of a transaction may involve transfer of a copy, transfer of some or all of the rights in the work, or any combination of the two. The copyright owner may also select from a variety of legal forms of transfer. Transfers of copies may be sales or leases; title to the copy may or may not pass to the transferee.⁸⁰ Transfer of the copy does not transfer the copyright, though sale of a copy does confer on the buyer certain rights as to that copy, notably under the first sale doctrine.⁸¹ Licenses of rights, as opposed to transfers of copies, may be exclusive or nonexclusive⁸² and may implicate all or only some of the copyright holder’s rights.

Obviously, many permutations are possible. The paradigmatic exchange in the analog world, the sale of a book, is purely the sale of a copy, which confers no copyright rights on the buyer. Modern movie distribution typically involves both transfers of copies to distributors and licensing of the right to public performance. A variety of different models are currently in use with respect to mass market transfers of digital information. In offline retail software transactions, physical copies are usually transferred. In online transactions, the “copy” is transferred by the download of the information into computer memory.⁸³ Under some business models, information providers may license users to log on to the provider’s system and, for example, use spreadsheet software to produce documents—the user pays for access to the software, but never receives a permanent “copy.”⁸⁴ No copyright rights are transferred to the “buyer” in any of these mass market scenarios and exercise by the copy owner of any of the rights reserved to the copyright owner

⁷⁹ See 17 U.S.C. § 202 (distinguishing transfers of copies and transfers of rights).

⁸⁰ In a sale transaction, the transferee becomes the “owner” of the physical copy. In a lease transaction, the transferor may expect return of the physical copies at termination of the contract.

⁸¹ See 17 U.S.C. § 109(a). The first sale doctrine exhausts the copyright owner’s right to control further distribution of the sold copy. A lawful owner of a copy may dispose of that copy as she wishes, by resale, gift, or other means of transfer, provided she does not interfere with some other right of the copyright owner, for example, by making a new copy of the copy. Ownership of a lawful copy also entitles the owner to other rights, such as the right to make archival and essential copies under 17 U.S.C. § 117, and may be a prerequisite to certain fair uses, such as reverse engineering of software.

⁸² See 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §§ 10.01-10.02 (2001).

⁸³ Under present case law, downloading into RAM constitutes the making of a “copy” within the meaning of the Copyright Act. See *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518-19 (9th Cir. 1993).

⁸⁴ See Nimmer et al., *supra* note 5, at 34-37 (discussing various distribution models); see also Nimmer, *supra* note 3, at 393-96.

constitutes infringement, subjecting the copy owner to the full remedies provided by the Copyright Act.⁸⁵

Transactions in which the transferee receives unrestricted control of a copy have often been judicially construed as sales, activating the first sale doctrine and exhausting the copyright owner's control over further transfers of the copy.⁸⁶ Software licenses governing use or access rights were created with the specific intention of avoiding this effect.⁸⁷ The "license" creates a direct contractual relationship between the information provider and the end user that would not otherwise exist in transfers of information through distributors. The information provider retains all of its rights under the Copyright Act to enforce against infringement, but the creation of the direct contractual relationship confers on the provider an additional set of remedies for breach of contract.⁸⁸ The same action by the user may constitute both infringement and breach.

UCITA's transactional model, adopting the software licensing approach, falls somewhere between the "sale/lease of copy" and "license of rights" models familiar in the traditional copyright-contract relationship. Under UCITA, transfer of a copy is irrelevant to characterization of the entire transaction as a license.⁸⁹ A typical mass market license, enforceable under the act, may or may not transfer a copy, may license few or none of the traditional copyright rights, but will impose terms on the use of the information itself, whether that information is copyrighted or not. The licensing model, in part, reflects an attempt to grapple with the broad variety of "information" transactions that UCITA covers now and may be expected to cover in the future, including offline and online transactions and access and data processing contracts, as well as pure information exchanges. The model also clearly facilitates avoidance of the first sale doctrine as well as other "user-friendly" provisions of copyright law.

⁸⁵ The Act provides extensive equitable and legal remedies. *See* 17 U.S.C. §§ 502-506.

⁸⁶ The courts remain divided over characterization of such transfers as sales or licenses. *Compare, e.g.,* *Softman Products Co. v. Adobe Sys., Inc.*, 171 F.Supp.2d 1075 (C.D. Cal. 2001) (software developer's distribution of copies to its distributors was a sale, not a license) *with* *Adobe Sys. Inc. v. Stargate Software, Inc.*, 216 F. Supp. 2d 1051 (N.D. Cal. 2002) (software manufacturer's distribution of copies to its distributors was a license, not a sale).

⁸⁷ *See* Rustad, *supra* note 19, at 564 nn.131-32.

⁸⁸ *See* Nimmer et al., *supra* note 5, at 34-37.

⁸⁹ *See* Nimmer, *supra* note 3, at 390-91.

2. Specific Rules

UCITA's scope provision⁹⁰ and the definitions of computer information, information, informational content, and informational rights⁹¹ make the act squarely applicable to subject matter covered by copyright, but UCITA both protects subject matter that copyright places in the public domain and excludes major areas covered by copyright. Copyright protects only original expression and confers a limited set of rights therein.⁹² UCITA allows contractual protection of public domain information, notably compilations of facts,⁹³ and allows providers to control all uses of information. UCITA offers compilers the opportunity to "legislate" protection of their products through mass market licenses whose terms are so pervasive as to establish rights "good against the world."⁹⁴ At the same time, the exclusions for specific industries in § 103 remove from UCITA's ambit many activities of core copyright industries, such as the motion picture industry and the music industry. Moreover, all transactions involving analog information fall outside of UCITA's scope, though not outside the boundaries of copyright law.

Copyright aspires to be medium neutral; the same protections apply to the work no matter what its instantiation.⁹⁵ UCITA's dis-

⁹⁰ See UCITA § 103 (2002).

⁹¹ See UCITA §§ 102(10), (35), (37)-(38).

⁹² See 17 U.S.C. §§ 102, 106 (2002).

⁹³ The Supreme Court has held that only original components of compilations, such as selection and arrangement, are protected by copyright, but that the facts themselves belong in the public domain. See *Feist Publ'ns v. Rural Tel. Serv.*, 499 U.S. 340 (1991). *Feist* reflects the application to factual compilations of copyright's idea/expression dichotomy, which holds that copyright protects only expression, but facts and ideas belong in the public domain. Database owners have tried for years, thus far without success, to persuade Congress to adopt a new regime protecting compilations. See, e.g., H.R. 354 and H.R. 1858, 106th Cong. (1999), two warring database protection bills that ultimately died with the 106th Congress. A 2001 Standby Committee Report, responding to requests for amendments, accused library associations of attempting to use the UCITA adoption process to gain concessions that they were unable to wrest from Congress. See *Standby Committee Report of December 17, 2001*, at <http://www.nccusl.org/nccusl/UCITA-2001-comm-fin.htm>. Apparently, database owners have done precisely the same thing, but with the approval of the UCITA's drafters and considerably more success.

⁹⁴ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996), addressed the precise issue of copyright preemption of a license restriction on use of an electronic compilation of telephone listings and found no preemption in part because contracts are enforceable only between the parties, not "against the world." However, Robert Merges suggests that where the same shrinkwrap license terms are used pervasively in an industry, they amount to private legislation that should be subject to preemption. See Robert P. Merges, *Intellectual Property and the Costs of Commercial Exchange: A Review Essay*, 93 MICH. L. REV. 1570, 1613 (1995).

⁹⁵ Works must be "fixed" in a tangible medium of expression to qualify for copyright protection. In the 1976 Copyright Act, Congress intentionally revised the fixation requirement in 17 U.S.C. § 102(a) to extend to "any medium now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or

inction between analog and electronic media guarantees that a copyrighted “work” will be governed by different contract regimes dependent on the medium in which it is presented. The novel published in print continues to be subject to common law, but becomes subject to UCITA if published as an E-book. The movie made from the novel falls outside UCITA’s scope with respect to the multitude of contractual relationships involved in creating it, but is subject to UCITA as to mass market distribution of copies. UCITA adds yet another level of complexity to transactions already governed by multiple legal regimes.⁹⁶ Variances between UCITA’s terminology and that of the Copyright Act are likely to add to the confusion.

UCITA’s terminology is not always consistent with accepted copyright terms. For example, UCITA’s definition of “copy” echoes some of the language of the Copyright Act⁹⁷ but includes temporary copies as well as permanent copies, a change favorable to providers that resolves an issue still subject to debate under copyright law.⁹⁸ UCITA distinguishes between “computer programs” as operating instructions communicated to machines and “information content” as information communicated to human individuals,⁹⁹ a distinction rejected as a threshold requirement for copyright protection in early decisions on software.¹⁰⁰ As to other terms, UCITA sometimes claims that it adopts the same meanings used under the Copyright Act, but expands on those meanings.¹⁰¹ In general, UCITA’s terminology suits transactions in copies, rather than transfers of copyright rights.¹⁰² This is not surprising

with the aid of a machine or device.” *Id.* Fixation of an unauthorized copy is also required to establish infringement.

⁹⁶ The creation of alternative contractual frameworks “seem[s] inconsistent with the goal of uniformity of a contracts regime in a world of ‘converging’ modes of expression and communication. . . .” Jane C. Ginsburg, *Authors As “Licensors” of “Informational Rights” Under U.C.C. Article 2B*, 13 BERKELEY TECH. L.J. 945, 951 (1998).

⁹⁷ Compare UCITA § 101(20) (2002), with 17 U.S.C. § 101.

⁹⁸ See Litman, *supra* note 4, at 942.

⁹⁹ See UCITA, § 101(37) & cmt. 33.

¹⁰⁰ See, e.g., *Apple Computer Corp., Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1247-1248 (1983). An ABA suggestion that the two definitions should not be mutually exclusive was rejected on the grounds that UCITA usage is intentionally different from that of copyright law. See *Standby Committee Report of 5/29/02*, *supra* note 20, at 15.

¹⁰¹ See, e.g., UCITA § 103 cmt. 5 (asserting that the terms “motion picture,” “sound recording,” “musical work,” and “phonorecord” have the same meaning associated with those terms in the Copyright Act.) The comment then goes on to say that the section employs an expanded definition of “motion picture” and a new term, “enhanced sound recording,” to cover digital products that have extra elements beyond “ordinary” sound recordings; see also Raymond T. Nimmer, *Through The Looking Glass: What Courts and UCITA Say About the Scope of Contract Law in the Information Age*, 38 DUQ. L. REV. 255, 310-11 (2000).

¹⁰² See Ginsburg, *supra* note 96, at 947-48. Ginsburg describes UCITA’s nomenclature as “anomalous” with respect to copyright law. In a detailed and even-handed discussion of the impact of UCITA (then Article 2B) on authors, Ginsburg concludes that while the act’s

in an act originally created with retail software transactions in mind, but may create problems given the broader scope of the present act.

With respect to particular default rules, UCITA sometimes intentionally tracks current copyright law. For example, the act pays obeisance to copyright's "work for hire" doctrine¹⁰³ and the writing requirement for transfers of exclusive licenses.¹⁰⁴ UCITA adheres to the copyright rule denying protection to bona fide purchasers¹⁰⁵ and adopts current practices regarding warranties as to informational content.¹⁰⁶ The provision on automatic restraints explicitly references the technological circumvention provisions of the Digital Millennium Copyright Act (the DMCA).¹⁰⁷

However, with respect to transfers, UCITA adopts positions quite clearly contrary to copyright law. Section 502 states that ownership rights do not depend on title to a copy, as they do under copyright law, but rather on the terms of the license.¹⁰⁸ Section 503 adds that a term prohibiting transfers of a party's "contractual interest" is enforceable.¹⁰⁹ The cumulative impact of these provisions is that providers may, by contract, override the first sale doctrine and control sequential distributions of their information.¹¹⁰

default rules offer valuable protections to authors who transfer rights in informal agreements, its contract formation provisions could be detrimental to authors assenting too easily to detailed exploiter-written grants. *See id.*

¹⁰³ *See* 17 U.S.C. § 101 (2002) (defining a work for hire); *see also* Nimmer, *supra* note 101, at 306 (asserting that UCITA does not alter the rules relating to works for hire).

¹⁰⁴ 17 U.S.C. § 204(a) requires a signed writing for transfers of copyright ownership. UCITA provides that the requirement must be met. *See* UCITA § 201, cmt. 2 (2002).

¹⁰⁵ *See* UCITA § 506 & cmt. 3 (2002).

¹⁰⁶ *See* UCITA § 404; *see also* Nimmer, *supra* note 3, at 429.

¹⁰⁷ *See* UCITA § 605 cmt. 2. The DMCA is codified as 17 U.S.C. §§ 1201-1205.

¹⁰⁸ *See* UCITA § 502(a). Under copyright law, copy owners have certain rights that licensees do not have, including the right to sell or otherwise dispose of the copy and the right to make archival and essential copies of software programs. *See* 17 U.S.C. §§ 109, 117.

¹⁰⁹ *See* UCITA § 503(2).

¹¹⁰ The Supreme Court adopted the first sale doctrine precisely to prevent the use of contract to expand copyright owners' control over distribution beyond that permitted by the limited copyright monopoly. *See* *Bobbs-Merrill Co v. Straus*, 210 U.S. 339, 350 (1908) (refusing to enforce a publisher's "shrinkwrap" license that set a minimum resale price). However, information providers have labeled the doctrine an anachronism in electronic media where copying and distribution tend to converge; they regularly include license terms precluding or limiting subsequent transfers of the information. In electronic, networked environments, copying and distribution often occur simultaneously and copies are indistinguishable from the original, creating obvious enticements to information appropriation. The Clinton Administration recommended abandoning the first sale doctrine in electronic transactions. *See Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights*, 213-217 (Sept. 1995) (on file with author), which suggests that electronic forwarding be defined as reproduction and distribution within the meaning of the Copyright Act, effectively eliminating the first sale doctrine online. The Digital Choice and Freedom Act of 2002, H.R. 5522, 107th Cong. (2002), would have created an online "first sale" doctrine permitting subsequent transfers by the copy owner, without permission of the copyright owner, provided

3. Preemption and Fundamental Public Policy Conflicts

UCITA's explicit variances from copyright, particularly those regarding factual compilations and transfers, and its validation of use restrictions unilaterally imposed through licenses, inevitably raise issues of federal preemption¹¹¹ and public policy conflict. The intricacies of preemption analysis as it might apply to UCITA have been well-aired elsewhere.¹¹² The case law to date reflects mixed results in cases involving copyright preemption of shrink-wrap contracts.¹¹³ It suffices here to note that preemption claims must inevitably be hashed out in expensive litigation, the results of which are entirely unpredictable under current doctrine.

Even beyond the possibility of direct preemption, the divergence of UCITA from copyright highlights the different public policies implemented by the two bodies of law. Copyright is founded on utilitarian principles weighing incentives to authors against the public interest in wide dissemination of works. Copyright protections are, in theory, calibrated to provide the minimum incentive necessary to induce authors to create works while allowing maximum dissemination for the public benefit. This delicate balance is written into Congress' constitutional mandate.¹¹⁴ By design, copyright offers limited, porous protection that eventually allows works to escape into the public domain where they become raw material for new creations.¹¹⁵

UCITA offers providers the opportunity to seal off their information indefinitely from the public domain. Its framework is based on a strong public policy encouraging private ordering of information transactions through freedom of contract. Although

that the copy owner did not keep a copy of the information. The bill may be reintroduced in the 108th Congress.

¹¹¹ Section 301 of the Copyright Act expressly preempts state laws that create rights equivalent to any of the exclusive rights within the general scope of copyright as specified by § 106 in fixed works which fall within the subject matter of copyright. See 17 U.S.C. § 301(a). Supremacy Clause preemption would occur where contract terms undermine the objectives of federal copyright law. See U.S. CONST., art. VI, § 2. For a useful summary of the forms of federal preemption analysis, see Samuelson & Opsahl, *supra* note 4, at 755-62.

¹¹² See, e.g., Nimmer et al., *supra* note 5, at 40-67; Lemley, *supra* note 5, at 136-50; Samuelson & Opsahl, *supra* note 4, at 755-62.

¹¹³ Compare *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (finding no copyright preemption of a shrinkwrap term prohibiting commercial use of factual information) with *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255 (5th Cir. 1988) (invalidating, on preemption grounds, a Louisiana shrinkwrap statute that validated license restrictions against backup copying, modifying software, and reverse engineering).

¹¹⁴ U.S. CONST. art. I, § 8 confers on Congress the power to "promote the progress of science and useful arts by securing for limited times to authors. . . the exclusive right to their. . . writings." *Id.*

¹¹⁵ See Dreyfuss, *supra* note 3, at 52; see also JESSICA LITMAN, DIGITAL COPYRIGHT 78 - 79 (2001).

copyright default rules have historically been subject to contractual reordering by private parties in negotiated relationships, such private transactions had little impact on achievement of the overall copyright balance. However, UCITA's validation of shrinkwrap licenses sets few limits on the ability of providers to dictate terms in mass market transactions that impact the public at large. Consequently, UCITA cedes to information providers the right to make choices with broad implications for the public domain that may run directly counter to the policy choices inherent in copyright law. The impact of private ordering on fair use, competition, and innovation concerned UCITA's critics from the beginning. The drafters attempted to address those concerns in Section 105 regarding federal preemption and fundamental public policy conflicts.

Section 105(a) states the truism that a provision of the act preempted by federal law is unenforceable to the extent of the preemption.¹¹⁶ Given the present unsettled state of preemption analysis, this provision offers little guidance, but may be the best the drafters could do under the circumstances. Subsection (b) permits courts to refuse enforcement of contracts, or particular contractual terms, that violate a fundamental public policy, but only to the extent that the interest in enforcement of the contract is clearly outweighed by a public policy against enforcement.¹¹⁷ The fundamental public policy provision establishes two tests: a requirement that the countervailing public policy be fundamental and that it clearly outweigh the policy favoring enforcement of contracts.¹¹⁸ The comments to the section make it clear that courts should not readily exercise either exception, noting that there is

¹¹⁶ The provision does not explicitly address the situation where a particular term of a contract runs counter to federal law. The comments indicate that a contract term that varies the effect of a rule that is nonvariable under the Copyright Act is unenforceable. See UCITA § 105 cmt. 2 (2002).

¹¹⁷ UCITA, § 105(b) provides:

If the term of a contract violates a fundamental public policy, the court may refuse to enforce the contract, enforce the remainder of the contract without the impermissible term, or limit the application of the impermissible term so as to avoid a result contrary to public policy, in each case to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of the term.

Id.

The language is based on RESTATEMENT (SECOND) OF CONTRACTS, § 178 cmt. b. However, the Restatement does not require that the public policy be "fundamental."

¹¹⁸ In 1998, the NCCUSL's membership approved a provision authorizing courts to refuse to enforce terms "contrary to public policies relating to innovation, competition, and free expression." The drafting committee added the two tests curtailing the courts' discretion. See Jean Braucher, *Why UCITA, Like Article 2B, is Premature and Unsound*, at <http://www.2bguide.com/docs/0499jb.html>.

no general preemption of contract under copyright law and that courts should be reluctant to set aside contracts on public policy grounds. Indeed, the comments appear to establish a third prerequisite for a public policy override of UCITA—a showing of “significant commercial need”—a phrase that is nowhere defined but appears to set a stringent standard.¹¹⁹ The courts weighing these requirements, given the contractual nature of the cause of action, are most likely to be state, not federal, courts.¹²⁰

While Section 105 purports to take a “hands off” approach to public policy conflicts, particularly those involving innovation, competition, fair comment and fair use,¹²¹ it favors enforcement of contractual provisions by imposing several vague tests for establishment of a fundamental public policy and places the burden of proof on information users. UCITA forces information users to litigate in order to re-establish the rights granted them under copyright law. It certainly favors information providers, who are more likely to have access to economic and legal resources, over individual consumers who are likely to be widely dispersed, less financially able to pursue litigation, and less motivated to do so. Even where users are large corporations, it would seem fairer to place the burden of litigation on information providers who seek to expand their control beyond that granted by copyright than on the users whose rights are affected.¹²²

Critics, in addition to attacking the overall imbalance in treatment of providers and users, have also faulted UCITA on particular copyright-related issues, notably its adverse impact on public criticism, reverse engineering, and charitable transfers of hardware and software.¹²³ In response to such criticisms, NCCUSL recently approved amendments clearly favoring such activities rather than leaving it to the courts, under Section 105, to weigh their importance relative to policies favoring freedom of contract.¹²⁴ These

¹¹⁹ See UCITA § 105 cmts. 2 & 3.

¹²⁰ State courts usually resolve contract disputes. UCITA’s stance regarding preemption and fundamental public policy would require that state courts address issues of federal policy better left to federal courts. UCITA may ultimately govern some international information transactions, raising the distinct possibility that foreign courts would be required to address fundamental issues of U.S. information policy. See Dreyfuss, *supra* note 3, at 55.

¹²¹ See UCITA § 105 cmt. 3.

¹²² See Nimmer et al., *supra* note 5, at 71.

¹²³ A recent New York decision invalidated a license term prohibiting unauthorized public comment about the licensor’s software. See Matt Richtel, *Court Rules Against Network Associates’ Software Review Policy*, N.Y. TIMES, Jan. 18, 2003, at C2.

¹²⁴ See Proposed 2002 Amendments, *supra* note 20. Amendment 3 added § 105(c), which renders unenforceable contract provisions prohibiting lawful public discussion of the quality of performance of computer information. Amendment 6 created a new § 118 that permits reverse engineering for purposes of interoperability, applying standards which

amendments may represent a step away from the vague fundamental policy test and toward more explicit policy choices protecting users. Whether the amendments are sufficient to ensure widespread enactment remains to be seen.¹²⁵

4. The Final Balance or Lack Thereof

UCITA's drafters claim, with some justification, to defer to copyright law where copyright rules are clear but resort to neutrality in areas such as fair use where copyright rules offer only general guidelines applied by courts in case by case determinations.¹²⁶ It must be conceded that fair use is a decidedly "fuzzy" doctrine producing unpredictable outcomes when applied. However, certain fair use principles, such as those favoring reverse engineering and public comment are well established in the case law, but were nonetheless resisted by the drafters until public opposition forced the creation of exceptions. In recounting the areas where UCITA concurs with copyright law and those where it differs, UCITA clearly references copyright law favorably on points such as the work for hire doctrine, nonliability for informational content, and technological self-help. Not coincidentally, these are areas where copyright law, as expanded by the DMCA, both favors copyright owners and is explicit in its guarantees.

UCITA's approach to information transfers, on the other hand, is decidedly hostile to the first sale doctrine, which is by no means a "fuzzy" principle under copyright law. Nor does UCITA incorporate the specific, well-defined exemptions for libraries, educational institutions, and archival copies contained in the Copyright Act.¹²⁷ In fact, a proposed amendment incorporating by reference the limitations on owner control embodied in the Copyright Act was rejected by NCCUSL.¹²⁸

appear to be consonant with those of copyright law. Amendment 12 amends § 503 to permit transfers of mass market products where the transfer complies with § 117 of the Copyright Act and accompanies a gift or donation of hardware to a public school or library, or from one consumer to another.

¹²⁵ See Mazumdar, *supra* note 26.

¹²⁶ See Nimmer, *supra* note 3, at 431-33.

¹²⁷ See 17 U.S.C.A. §§ 107-117 (2002) (carving out various privileges against copyright infringement claims).

¹²⁸ The McManis amendment would have added the following language to the provision on mass market licenses (then § 2B-308): "A term that is inconsistent with 17 U.S.C. § 102(b) or with the limitations on exclusive rights contained in 17 U.S.C. §§ 107-112 and 117 cannot become part of a contract under this section." *McManis Motions* at <http://www.ali.org/ali/mcmanis.htm> (May 9, 1997). Professor McManis also offered an alternative motion addressing reverse engineering. See *id.*; see also Letter of Professor Charles McManis to Members of the American Law Institute, (May 5, 1998), at <http://www.ali.org/ali/McManis2.htm>. Neither version survived the drafting process.

UCITA, with the exception of the recent amendments, adopts explicit copyright rules that favor providers, rejects rules that disadvantage providers in digital environments, and adopts a balancing test heavily weighted in favor of providers with regard to complex public policies like fair use. On the whole, UCITA takes positions more favorable to information providers, and adverse to the interests of information users, than copyright law. Consequently, some commentators have predicted that, in a post-UCITA world, copyright law must function as a “consumer protection” statute, serving as the primary counterweight to one-sided contracts imposed by providers on their customers.¹²⁹ Judicial application of doctrines such as preemption and copyright misuse might, it is hoped, trump onerous contractual use restrictions.

While UCITA opponents must obviously rely on the tools at hand, existing copyright law is not noticeably “user-friendly.” Until very recently its strictures were designed primarily to govern business competitors; it offers only a limited analytical framework with reference to consumers¹³⁰ and other users. To the extent that existing copyright law incorporates protections for users, they are primarily court-created. Recent copyright and paracopyright legislation reflects a pro-provider bias similar to that found in UCITA and essentially overrides many of the user protections afforded by traditional copyright law. Indeed, many of the same interest groups appear to have captured the legislative processes producing both bodies of law.

III. THE PROCESSES

This part examines the legislative processes that produce copyright law and uniform laws like UCITA. Employing some of the basic insights offered by interest group theory, I conclude that the two processes display similar characteristics and suffer from similar flaws. Both are particularly susceptible to capture by powerful information providers to the detriment of the public interest. The proclivity to capture, while not new, is accentuated in technology-driven, global, disintermediated information markets.

¹²⁹ See Lemley, *supra* note 5, at 115. Lemley outlines several copyright-related doctrines that might limit contractual abuses.

¹³⁰ See Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397 (2003) (arguing that existing copyright law offers only a limited theory of the consumer that should be expanded to account for consumer interests in autonomy, communication, and self-expression).

A. *Interest Group Theory*

The “interest group” school of public choice theory offers useful insights into the legislative processes that produce both copyright law and uniform laws like UCITA. Public choice theory, in general, applies economic models to legislative activity. A primary tenet of the interest group school holds that legislation is likely to be the end result of private “rentseeking”¹³¹ by powerful special interests. The “public interest,” if knowable at all, constitutes the sum of such activities filtered through a process in which legislators are guided by their own self-interest, typically their interest in re-election, rather than any overriding public duty.¹³² In general, interest group politics favor narrowly-focused business lobbies over public interest groups. Consumer interests, for example, are less likely to be well-represented because of the collective action problem – consumers are widely dispersed and have low individual incentives for engaging in organized lobbying.¹³³ Interest group theory, then, describes legislative processes in which small, but focused, economic interests, will often prevail against the interests of the majority.

One branch of public choice theory posits that legislative outputs are the entirely random results of legislative processes, with no real connection to any defined public interest. This school of thought suggests that those who set legislative agendas largely determine outcomes and that strategic voting behavior makes it difficult, if not impossible, to determine the legislative “intent” behind any given enactment.¹³⁴

¹³¹ Rentseeking describes attempts by private interests to further their own ends without regard to the interests of others, or the public interest. In economic terms, the cost to the public often outweighs the benefit to the private interests. See Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 878 (1987).

¹³² *Id.* at 875-78. The summary of interest group theory offered herein is necessarily an oversimplification - public choice “lite” - though sufficient for my purposes. In-depth public choice studies often apply complex economic models to legislative processes. See, e.g., Allan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 596, 604 (1995) (applying structure-induced equilibrium theory to the uniform law process).

¹³³ See Kathleen Patchel, *Interest Group Politics, Federalism and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 127-28 (1993). Broad-based interest groups are more difficult to organize because there is less incentive, in the form of individual benefit, for any single member to take action than is true of smaller, economically focused interest groups where each member may benefit substantially from outcomes. Large interest groups also suffer from freerider problems and have larger organizational costs than smaller groups. These concepts derive from the work of Mancur Olson. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

¹³⁴ Arrow’s Theorem (or Paradox), a complex proof devised by Kenneth Arrow, established that no method of combining individual preferences meets minimum standards for an overall measure of social welfare. The theorem also indicates that majority rule may fail

As applied to UCITA and copyright, interest group theory predicts that broadly dispersed interest groups, like consumers, will be less successful at lobbying than narrowly focused economic interests, such as software companies, Internet service providers, or even business users. Federal legislators should be less subject to capture than state legislators, because a greater number of interest groups have a voice at the federal level than at the state level.¹³⁵ Consequently, state legislation should favor business interests more heavily than would federal legislation. One might expect, therefore, that federal copyright laws would be less biased in favor of economic stakeholders than uniform laws adopted by state legislatures. Interest group theory would also anticipate a greater likelihood of jurisdictional competition in the uniform law enactment process than in the federal copyright process.¹³⁶ An examination of the legislative processes producing UCITA and copyright or paracopyright law bears out some of these predictions, but the peculiar history of copyright legislation and the nature of modern information markets produce unexpected variations on the public choice calculus.

B. *Copyright: Negotiation Among Key Stakeholders*

In the twentieth century, Congress essentially turned the drafting of copyright legislation over to the copyright industries. Early in the century, Congress faced the task of revising a body of copyright law that was too complex and arcane to be handled through the usual legislative process. Congress and the Copyright Office

to produce a resolution where legislators are presented with a choice among three or more mutually exclusive alternatives and “cycling” of votes may occur. Control of agenda setting and legislative rulemaking that prevents majority cycling are means of avoiding the paradoxical results suggested by the theorem, but in themselves may prevent expression of the majority will. See Farber & Frickey, *supra* note 131, at 902-04.

¹³⁵ See Patchel, *supra* note 133, at 127, 143-144 (stating that political scientists have observed a tendency of state legislatures to favor business interests over consumer interests). “Special interests often find it possible to maintain a position of strength at the state level that they could not maintain at the national level where they would have to compete with a broader range of other interests and thus would have less influence.” *Id.* at 143.

¹³⁶ Jurisdictional competition occurs where one state or nation uses its laws to attract or keep desirable businesses at the expense of competing jurisdictions. If the more efficient legal rule wins this contest, jurisdictional competition may produce a beneficial “race to the top.” However, jurisdictional competition is more likely to produce a “race to the bottom” in which one jurisdiction favors its citizens at the expense of other jurisdictions, creating negative externalities. See Ted Janger, *The Public Choice of Choice of Law in Software Transactions: Jurisdictional Competition and the Dim Prospects for Uniformity*, 26 BROOK. J. INT’L L. 187, 190-91 (2000). Uniform laws attempt to avoid such competition by enforcing uniformity among states. Where the proposed uniform law is as divisive as UCITA, states are tempted to revise the law to their own liking, reducing uniformity and increasing the likelihood of jurisdictional competition. The history of enactment in Maryland and Virginia demonstrates such competition. See *infra* Subpart C.2.

jointly devised a drafting scheme that relied on negotiations among representatives of the affected copyright industries to produce compromise legislation acceptable to the major industry players. Congress mediated among the interest groups, rather than imposing its own policy solutions, then enacted the results of the compromises. This multilateral negotiation process, first employed in the drafting of the 1909 Copyright Act, became the model for subsequent revisions and amendments to the law.¹³⁷

When legislation is drafted through such a process, presence at the drafting table is critical. The key players represent their own interests to the exclusion of those not involved in the negotiation process. Industries not represented in the negotiations over prior copyright revisions, usually industries employing new technologies, were disadvantaged. Writers, composers, artists, choreographers, and other individual creators were unrepresented, except through the industries that published their works. There were few, if any, representatives of the public interest at the table in these negotiations and, consequently, the drafters paid little attention to users' interests or preservation of the public domain.¹³⁸ The usual result of these negotiated copyright revisions has been the gradual broadening of copyright owners' rights accompanied by the carving out of narrow exceptions to those rights for users.¹³⁹

Legislation resulting from such a process grows longer and more convoluted as tradeoffs and exemptions are negotiated in order to win the support of current stakeholders for proposed changes to the law. One has only to read the provisions on music

¹³⁷ The 1976 Copyright Act was drafted in a series of multi-party negotiations among interested industries over a twenty year period. Subsequent amendments and additions to the act, such as the 1989 amendments enabling the United States to join the Berne Convention, the 1992 Audio Home Recording Act, and the Digital Millennium Copyright Act, followed the same pattern. See LITMAN, *supra* note 115, at 36-69 (detailing the drafting methodology for the various copyright revisions). Litman did groundbreaking work on the legislative history of the Copyright Act in a series of earlier articles. See Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275 (1989); Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29 (1994); Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19 (1996); see also William F. Patry, *Copyright and the Legislative Process: A Personal Perspective*, 14 CARDOZO ARTS & ENT. L.J. 139, 141 (1996) ("In my experience, some copyright lawyers and lobbyists actually resent members of Congress and staff interfering with what they view as their legislation and their committee report."). Patry describes the minimal congressional review given to copyright legislation at 146-48.

¹³⁸ See LITMAN, *supra* note 115, at 46-52. Litman notes that while some groups claimed to represent the "public interest" as to certain narrow issues during the negotiations over the 1976 act, the public interest was too varied and complex to be adequately represented by such groups. *Id.* at 52. Library associations, for example, often represent the public interest in dissemination, but with a fairly narrow, if understandable, focus on dissemination through libraries.

¹³⁹ *Id.*

licensing¹⁴⁰ or cable and satellite transmissions¹⁴¹ to realize that copyright law attains a level of incomprehensibility that only a copyright lawyer could love. This is hardly surprising since many of the drafters were copyright lawyers representing the interests of those with major investments in copyrighted works.¹⁴²

Notwithstanding the dominance of the drafting process by special interest groups, the core Copyright Act does contain a number of provisions protective of the public interest, such as the provisions codifying the idea/expression dichotomy,¹⁴³ fair use,¹⁴⁴ and first sale,¹⁴⁵ which codify principles previously established in copyright jurisprudence.¹⁴⁶ Library and educational associations obtained limited exceptions enabling their primary activities.¹⁴⁷ Later enactments preserved copy owners' rights to make essential and archival copies of software¹⁴⁸ and to engage in home audio taping.¹⁴⁹ While such provisions are narrowly drawn, the inclusion of user-friendly provisions lends some credence to the view that public interest groups may successfully influence copyright policy at the national level. The most recent addition to the Copyright Act, the DMCA,¹⁵⁰ indicates, however, that the influence of public interest groups may be diminished with regard to federal legislation addressing digital information.

The DMCA prohibits circumvention of technological controls on access to copyrighted works. Copyright owners may use technological controls to abrogate virtually all of the public interest doctrines just described, denying access to information even for purposes of fair uses or use of public domain information, like ideas or facts, incorporated in protected works.¹⁵¹ The DMCA provides a paracopyright counterpart to UCITA. Like UCITA, it allows information providers to unilaterally impose conditions on access

¹⁴⁰ See 17 U.S.C. §§ 114-115 (2002).

¹⁴¹ See 17 U.S.C. §§ 111, 119.

¹⁴² See LITMAN, *supra* note 115, at 52.

¹⁴³ See 17 U.S.C. § 102.

¹⁴⁴ See 17 U.S.C. § 107.

¹⁴⁵ See 17 U.S.C. § 109.

¹⁴⁶ The Supreme Court adopted the idea/expression dichotomy in *Baker v. Selden*, 101 U.S. 99, 102 (1880), and the first sale doctrine in *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350 (1908). Justice Story originated the fair use doctrine in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C. Mass. 1841).

¹⁴⁷ See 17 U.S.C. §§ 108, 110.

¹⁴⁸ See 17 U.S.C. § 117.

¹⁴⁹ See 17 U.S.C. § 1008.

¹⁵⁰ See 17 U.S.C. §§ 1201-1205.

¹⁵¹ The "fair use" exceptions established by the Librarian of Congress in the first review period under § 1201(a)(1)(C) proved to be minimal to the point of nonexistence. Even the exemption specifically crafted for libraries and educational institutions in § 1201(d) is far narrower than the exemptions found in the base provisions of the Copyright Act.

to and uses of information, including information in the public domain. While public interest groups, notably the Digital Future Coalition, attempted to represent information users in the negotiations over the provisions of the DMCA, they ultimately had little impact on the final product because they were never participants in the behind-the-scenes negotiations among industry stakeholders.¹⁵² Technology companies, library associations, and educational institutions won some narrowly-worded exemptions, but the DMCA offers few concessions to the public at large.¹⁵³ If the DMCA represents the modern trend in federal copyright-related legislation, copyright law ultimately may offer little shelter for consumers and other users of digitized information.

The copyright process has, then, historically been more subject to capture by industry groups than interest group theory might predict for federal legislation generally. Copyright law's pro-industry bias has been markedly enhanced in recent legislative attempts to handle the side effects of the transformations wrought by electronic media and the Internet, though there are some recent indications that a backlash may be developing.¹⁵⁴ The uniform law

¹⁵² For a description of the enactment of the DMCA, see LITMAN, *supra* note 115, at 122-49.

¹⁵³ Online service providers were granted safe harbors from copyright infringement actions. See 17 U.S.C. § 512. Reverse engineering, encryption research, and security testing exceptions benefit software development companies. See 17 U.S.C. § 1201(f), (g) and (j). The encryption research exception should also benefit academic researchers, though claims have been raised that the exception is so narrow as to put their First Amendment rights at risk. The library exception is very narrowly drawn to allow libraries to circumvent technological protections only for purposes of determining whether to buy a work. See 17 U.S.C. § 1201(d). Narrow exceptions were also granted for protection of personally identifying information and protection of minors. See 17 U.S.C. § 1201(h), (i). See Lisa M. Bowman, *EFF Blasts Controversial Copyright Law*, CNETNEWS.COM (Jan. 10, 2003) at <http://news.com.com/2102-1023-980112.html>. The full EFF critique of the DMCA is available at http://www.eff.org/IP/DMCA/200330102_dmca_unintended_consequences.html (n.d.).

¹⁵⁴ Copyright owners have succeeded in placing many initiatives on the Congressional agenda. One recent proposal would require that all hardware capable of receiving and recording digital broadcasts adopt anti-copying technology; another would empower copyright owners to disrupt peer-to-peer networks. See Amy Harmon, *Movie Studios Press Congress in Digital Copyright Dispute*, N.Y. TIMES, July 29, 2002, available at <http://www.nytimes.com/2002/07/29/technology/29DIGI.html>. Overreaching by the information industries may have sparked a backlash, as evidenced by the recent formation of coalitions of high tech industries with user groups and congressional proposals for consumer rights legislation. See Declan McCullagh, *Why Telecoms Back the Pirate Cause*, CNETNEWS.COM (Aug. 27, 2002) at <http://news.com.com/2008-1082-955417.html> (describing the alliance of hardware makers, electronics manufacturers, and public interest advocates against the movie and music industries). Consumer organizations and key technology companies, including Microsoft, Intel, and Cisco Systems, recently announced the formation of the Alliance for Digital Progress, a lobbying group intended to fend off requirements for incorporation of anti-piracy technology in electronic devices. See *New Group to Oppose Proposals on Digital Piracy*, N.Y. TIMES (Jan. 23, 2003), available at <http://www.nytimes.com/2003/01/23/business/media/23LOBB.html#>. High tech industries provide the means by which consumers access information and face adverse economic impact if legislation hampers technological innovation in order to protect content providers. Internet service providers, caught be-

process, in general, has also been criticized for its pro-business, anti-consumer bias.¹⁵⁵ The UCITA process, in particular, involves many of the same interest groups and displays many of the same characteristics as the copyright process.¹⁵⁶ The end product echoes the pro-provider slant of the DMCA rather than the more balanced approach of the 1976 Copyright Act.

C. *The Uniform Law Process and UCITA*

UCITA is a product of the well-established process for the drafting and enactment of uniform laws. NCCUSL has guided that process for a century, with participation from ALI as to the UCC. The UCC has been the most successful uniform law project both in terms of legislative acceptance and general approbation from scholars and practitioners. The UCC process adopted by Karl Llewellyn encouraged active participation by interest groups in the drafting process as a means of accurately reflecting commercial practices and assuring enactment by the states.¹⁵⁷

NCCUSL acts as a private legislative body, utilizing the expertise of its commissioners to produce legislation intended to be technically superior to that which state legislatures would produce if left to their own devices.¹⁵⁸ The organization is national in scope and consists of over 300 Commissioners appointed by the states and territories. All commissioners must be members of a state bar and tend to be commercial law practitioners, state legislators, legis-

tween information providers and their own subscribers, have tried to remain neutral in copyright battles but have recently begun to mobilize against initiatives that would force them to police their subscribers. See John Borland, *ISPs Gird for Copyright Fights*, CNETNEWS.COM (Sept. 9, 2002) at <http://news.com.com/2100-1023-957023.html>.

Two recent bills would protect consumer use rights in information. The Digital Media Consumers' Rights Act would amend the DMCA to create an explicit fair use right. See H.R. 107, 108th Cong. (2003). The Digital Choice and Freedom Act of 2002, would have specifically outlined consumer use rights, created a digital first sale doctrine, and allowed circumvention of technological protection systems for purposes of making non-infringing uses of information. H.R. 5522, 107th Cong. (2002). Although this bill died with the 107th Congress, it may be revived in the 108th. See Heather Fleming Phillips, *New Bills Aim to Protect Consumers' Use of Digital Media*, SILICONVALLEY.COM (Nov. 3, 2002) at <http://www.siliconvalley.com/mld/siliconvalley/4193841.html>; Jim Hu, *Lights, Camera, Legislation*, CNETNEWS (Aug. 7, 2002), at <http://news.com.com/2009-1023-948672.html>.

¹⁵⁵ See, e.g., Gail Hillebrand, *The Uniform Commercial Code Drafting Process: Will Articles 2, 2B And 9 Be Fair to Consumers?*, 75 WASH. U. L.Q. 69 (1997); Patchel, *supra* note 133; Donald J. Rapson, *Who is Looking Out for the Public Interest? Thoughts About the UCC Revision Process in the Light (and Shadows) of Professor Rubin's Observations*, 28 LOY. L.A. L. REV. 249 (1994).

¹⁵⁶ For example, prior to adoption of the DMCA, the movie and music industries, database owners like Lexis and Westlaw, and library associations were involved in extensive negotiations over the proposed act. See LITMAN, *supra* note 115, at 126. The same players were also involved in the UCITA process.

¹⁵⁷ See Patchel, *supra* note 133, at 98-99.

¹⁵⁸ See James J. White, *Ex Proprio Vigore*, 89 MICH. L. REV. 2096-97 (1991).

lative staff, academics, or judges.¹⁵⁹ While the commissioners are appointed by the states, they do not represent the interests of their respective states nor do the states control NCCUSL's selection of subject matter or its procedures. The organization and its members have no political accountability except in the sense that their work product only succeeds if enacted by state legislatures.¹⁶⁰

After a subject is chosen for uniform law treatment, a drafting committee is chosen from among NCCUSL's membership and charged both with guiding the drafting process and shepherding the act through the state legislative process. No draft is promulgated until it has been considered by the entire Conference at a minimum of two annual meetings. Acts must be approved by a vote of a majority of the states represented at the annual meeting and at least twenty jurisdictions.¹⁶¹ UCITA followed this typical pattern.

NCCUSL's official view of its own process is that "public-spirited lawyers volunteer to resolve important legal issues in technically correct and politically uncontroversial ways; their results are embodied in . . . proposed uniform laws that courts should follow or state legislatures should enact as written."¹⁶² In fact, NCCUSL often strays into areas where there is no underlying consensus on values and mere technical expertise is insufficient to solve policy disputes.¹⁶³ Recent commentaries suggest that the private uniform law process, far from being merely neutral or technical, is as subject to interest group influence as any public legislative process.¹⁶⁴ Interest groups have significant impact on uniform laws like UCITA at both the drafting stage and the enactment stage.

1. Drafting

Critics have faulted the uniform law drafting process on a number of grounds which can be reduced to three basic categories:

¹⁵⁹ See Hillebrand, *supra* note 155, at 84.

¹⁶⁰ See Patchel, *supra* note 133, at 88-91.

¹⁶¹ See *id.*

¹⁶² Schwartz & Scott, *supra* note 132, at 604. For articles generally approving the UCC revision process from which UCITA springs, see Marianne B. Culhane, *The UCC Revision Process: Legislation You Should See in the Making*, 26 CREIGHTON L. REV. 29 (1992); Carlyle C. Ring, Jr., *The UCC Process - Consensus and Balance*, 28 LOY. L.A. L. REV. 287 (1994).

¹⁶³ See Schwartz & Scott, *supra* note 132, at 602, 609. Schwartz and Scott suggest that this tendency to stray into controversial areas underlies the failure of many uniform laws at the legislative enactment stage. They note that out of more than two hundred proposed uniform acts, more than one hundred have been adopted in fewer than ten states and over seventy have been enacted in fewer than five states. Only twenty-two uniform laws, most of them in the commercial law field, have been adopted in more than forty states. See *id.*

¹⁶⁴ See, e.g., Hillebrand, *supra* note 155, at 81-93; Patchel, *supra* note 133, at 120-25; Schwartz and Scott, *supra* note 132 at 650-52.

ries: insensitivity of drafting committee members to public interest issues; a process structure which imposes severe disadvantages on public interest representatives such as consumer advocates; and a focus on enactability which produces not the "best" solutions, but only those likely to be adopted by state legislatures. The UCITA drafting process displays these characteristics despite efforts by the drafting committee to assure broad representation of affected parties.

The NCCUSL drafters are, in theory, neutral technicians. The predominance of commercial law practitioners in NCCUSL's membership, however, may produce a pro-business bias in the drafting committees.¹⁶⁵ Critics have suggested that drafters, even with the best intentions, naturally identify with the interests of their clients and treat the drafting process as an adversarial one rather than as an objective search for the best solution to a given problem.¹⁶⁶ The political nature of the appointment process assures that commissioners are likely to be well-connected, financially secure, political players with little working or personal experience with consumer issues.¹⁶⁷ Drafters may have reputational and economic interests in drafting provisions likely to engender significant litigation for their law firms.¹⁶⁸ The Article 2B/UCITA drafting committee was, in fact, heavily freighted with commercial practitioners¹⁶⁹ and proved to be more receptive to the complaints of business interests than to the concerns of consumer and other public interest groups.

Since the drafting of the UCC through the open process advocated by Llewellyn, NCCUSL has historically made an effort to assure that all interested parties have a voice in the drafting process. The typical drafting process includes a series of open meetings, in different locations nationwide, over a period of years. Interested parties are invited to attend such meetings and express their particular positions. Binding votes by committee members are con-

¹⁶⁵ Even academics may have ties to special interest groups for whom they consult. One commentator notes that the Reporter for UCITA, Professor Raymond Nimmer, consults for Microsoft, which has been a strong UCITA proponent. See McDonald, *supra* note 4, at 480 n.114.

¹⁶⁶ See, e.g., Edward L. Rubin, *Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4*, 26 *LOV. L.A. L. REV.* 743, 748-57 (1993) (noting the tendency of lawyers representing banks to identify with their clients in the Article 3 and 4 drafting process); see also Rapson, *supra* note 155, at 256.

¹⁶⁷ See Hillebrand, *supra* note 155, at 84-86.

¹⁶⁸ See Schwartz & Scott, *supra* note 132, at 616.

¹⁶⁹ See Hillebrand, *supra* note 155, at 85. A listing of the drafting committee members can be found in the preliminary pages of the UCITA draft at <http://www.law.upenn.edu/bll/ulc/ucita/citam99.htm> (last visited Oct. 13, 2003).

ducted in open session; consequently, members' positions are known to special interest groups with whom they may have ties.¹⁷⁰ Paradoxically, the very openness of the NCCUSL drafting process may enhance any pro-business bias created by the selection of drafting committee members.

Business groups have the economic and legal resources to disproportionately influence long term, movable, open processes. Representatives of industries with financial interests in the subject at hand maintain a continuing presence throughout the drafting process, dominate the open sessions, and build ongoing relationships with the committee members.¹⁷¹ Such industry representatives can afford to attend more regularly and in greater numbers than public interest advocates.¹⁷² Business groups often also have expertise on technical issues which the drafters may need. Consumer advocates, in particular, are at a disadvantage in this process. Consumer groups cannot afford to follow the drafting committee from location to location over a period of years in order to have the same representatives at every meeting. To the extent that consumer representatives are able to attend, they necessarily do so in much smaller numbers than business interest representatives. On highly technical issues, such as those presented by digital information transactions, consumer groups may lack the technical expertise to mount an adequate defense of consumer interests.¹⁷³

The UCITA drafting process followed the typical NCCUSL pattern. The Drafting Committee actively solicited participation by a wide cross-section of interest groups and justifiably claims to have conducted the most open drafting process in NCCUSL's history.¹⁷⁴ Over a ten-year period, drafting committee meetings were held at a variety of locations and all interested parties were invited to participate in the discussions.¹⁷⁵ The Committee Reporter met with diverse industry associations and consumer groups and the Internet provided ready access to information for both proponents and opponents of UCITA.¹⁷⁶ Nonetheless, in keeping with the observations of process critics, NCCUSL's own attendance records indicate

¹⁷⁰ See Rapson, *supra* note 155, at 263-64.

¹⁷¹ Cem Kaner, a UCITA opponent who observed many of the sessions noted: "The UCITA drafting process reflected a cozy relationship between the software publishing industry and the drafters. The drafting committee meetings were dominated by lawyers representing information publishers." Kaner, *supra* note 4, at 29.

¹⁷² See Hillebrand, *supra* note 155, at 89-91 (noting that most observers come from affected industries and are given wide latitude in participation).

¹⁷³ See *id.* at 82-83.

¹⁷⁴ See Nimmer, *supra* note 3, at 385-86; Rustad, *supra* note 19, at 589.

¹⁷⁵ See Ring, *supra* note 14, at 48.

¹⁷⁶ See Rustad, *supra* note 19, at 589.

that representatives of information licensors, primarily software licensors, attended far more consistently and in greater numbers than consumer representatives. Library associations, which have a strong interest in UCITA, were even less regularly represented than consumer associations.¹⁷⁷ Authors and other creators of copyrighted works were not involved in the drafting process,¹⁷⁸ though publishers attended regularly.¹⁷⁹ Apart from law professors, the research and academic communities had scant involvement in the process.¹⁸⁰

Business licensees, as might be expected, were active participants, as were representatives of information industries who demanded exclusions from UCITA as the price of dropping their opposition.¹⁸¹ As deals were struck with some industries, others came forward demanding their own concessions. Consensus was difficult to reach because few groups came to the table prepared to compromise.¹⁸²

Because adoption of the mass market license concept and validation of shrinkwrap contracts put business users equally at risk with consumers in retail transactions, business licensees made common cause with consumers against information providers on a number of issues, such as electronic self-help and public criticism.

¹⁷⁷ Using NCCUSL's categorization of attendees, twelve licensor representatives, less than three consumer representatives, and less than one library representative attended each meeting on average. The UCITA Drafting Committee Meetings Recorded Attendance, and a list of the dates and locations of meetings, are *available at* http://www.nccusl.org/nccusl/uniformact_attendance/uniformacts-attend-ucita.asp (last visited Oct. 13, 2003).

¹⁷⁸ See Ginsburg, *supra* note 96, at 973-74. Authors are "consumers" as well as producers of information in the sense that all creators use building blocks from the public domain in the creation of new works. Similarly, researchers consume as well as produce information and sharing of research results in the scientific community historically stimulates new discoveries. While this article focuses primarily on UCITA's impact on consumptive users, authors and researchers also have interests in dissemination of information which may not always be consonant with the interests of corporate information providers.

¹⁷⁹ On average, three publisher representatives appeared at each meeting. See UCITA Drafting Committee Meetings Recorded Attendance, *supra* note 177.

¹⁸⁰ See Chow, *supra* note 5, at 329.

¹⁸¹ The financial industry, publishers, "other manufacturers" and the movie industry, for example, were consistently represented, though with variable numbers of representatives at each meeting. See UCITA Drafting Committee Meetings Recorded Attendance, *supra* note 178. At two of the 1997 meetings, movie industry representatives alone constituted fifteen to twenty percent of all attendees. *Id.* Drafters have justifiably complained that many industry representatives participated in the process only long enough to get their exclusions, but showed little devotion to the goal of creating a balanced, uniform law. Comments by Prof. Raymond Nimmer, Comments at Oklahoma City University Law School Symposium, *The Uniform Law Process: Lessons for a New Millennium*, (Jan. 25, 2002) (notes on file with author). A similar phenomenon occurred in the Virginia enactment process where movie industry representatives attended legislative advisory committee meetings until their exclusions were secure, then virtually disappeared from the process. *Id.*

¹⁸² See Rustad, *supra* note 19, at 554.

As interest group theory would predict, business interests were far more successful at winning concessions, both in the form of exclusions for their particular activities and in the form of “user-friendly” amendments, than were public interest groups acting alone.¹⁸³ This pattern held so true both in the enactment process and the ongoing amendments to UCITA that opponents have now actively adopted a strategy focusing on business user impact rather than consumer concerns.¹⁸⁴

As interest group theory would predict, the version of UCITA drafted by the NCCUSL bears the fingerprints of powerful businesses on both sides of the licensor/licensee divide. The licensing framework responds to the demands of the software industry. The scope of the act was determined by interest group opposition resulting in carve-outs for powerful industries like the financial, movie, and music industries. Even the 2002 amendments responded primarily to business objections and objections by the ABA. Public interest groups won few concessions in the drafting process.

Critics of the uniform law process have observed that NCCUSL focuses too much on drafting uniform laws that are likely to be enacted by the states and too little on drafting the “best” law.¹⁸⁵ Only uniform laws that are a product of consensus are likely to be widely adopted. A push for consensus in order to co-opt likely opposition in the enactment phase predisposes the drafting process to interest group capture because powerful business interests may block enactment if they fail to win desired concessions.¹⁸⁶ UCITA drafting clearly followed this pattern with scope revisions and exemptions tailored to co-opt opposition by key players such as the movie and recording industries.¹⁸⁷ The subsequent enactment

¹⁸³ Some business participants are rightly categorized as both licensors and licensees of information. Proponents of UCITA have argued that participation of such businesses in the process assures that UCITA is even-handed. *See, e.g.,* Towle, *supra* note 4, at 163 (arguing that software developers fall in this category); *see also* Rustad, *supra* note 19, at 589 (suggesting that many lawyers participating in the UCITA process represent both licensors and licensees, precluding the possibility that drafting was dominated only by licensor representatives). NCCUSL itself categorizes only publisher, recording industry, movie industry, and exchange representatives as both licensees and licensors. *See* UCITA Drafting Committee Meetings Recorded Attendance, *supra* note 177. However, information providers are more often licensors than licensees in the mass market, where shrinkwraps favor their interests, and have sufficient bargaining power to negotiate more favorable terms in non-mass market transactions.

¹⁸⁴ *See* Mazumdar, *supra* note 26, at 811.

¹⁸⁵ *See* Patchel, *supra* note 133, at 156; Rapson, *supra* note 155, at 280-81.

¹⁸⁶ *See* Janger, *supra* note 136, at 191-92.

¹⁸⁷ *See* Chow, *supra* note 5, at 334 (“Exclusions from UCITA were not based on principle, but upon industry objections.”).

process is itself subject to the same interest group pressures exhibited in the drafting process.

2. Enactment

If public interest groups are unable to affect the drafting of a uniform law, they are equally unlikely to win substantial changes from state legislatures. The costs and difficulties of organizing consumer groups increase exponentially where the groups must establish a lobbying presence in all fifty states; such groups organize more readily at the federal level. Business interests, on the other hand, are likely to be well represented at both the state and federal level because their top down organization is conducive to centralized direction of lobbying efforts. Additionally, NCCUSL provides support for the uniform law in the enactment process, throwing the weight of the conference behind the proposal and adding to the forces that consumer and other public interest groups must face in order to amend or defeat the proposal.¹⁸⁸

Once a draft of a uniform law like UCITA is finalized, state legislatures have several options: they may embrace the draft whole (or nearly so), modify it (thereby risking loss of uniformity), or reject it in its entirety. The goal of uniformity weights the process against amendment during the enactment process, reducing the likelihood of alterations favoring the public interest.¹⁸⁹ UCITA's enactment history to date demonstrates all three of the available responses: wholesale adoption in Virginia, modification in Maryland, and a form of preemptive rejection in several other states.¹⁹⁰ A study of the process as it unfolded in Virginia verifies the expected influence of business interests at the enactment phase.

a. *UCITA in Virginia*

Virginia was the first state to adopt UCITA, though the act was already sufficiently controversial that the effective date was postponed for a year to allow review of possible amendments. Two successive legislative advisory committees were empowered first to vet UCITA for adoption and later to hold public meetings and pass judgment on proposed amendments to the act.¹⁹¹ The delibera-

¹⁸⁸ See Patchel, *supra* note 133, at 136-37.

¹⁸⁹ See *id.* at 144. "The private and inaccessible process by which uniform laws are drafted is the method probably least likely of all to obtain input from consumer interests, and the product of that drafting process is then presented as a fait accompli for enactment by the legislatures most likely to favor business interests." *Id.*

¹⁹⁰ See McDonald, *supra* note 4, at 466.

¹⁹¹ The Joint Commission on Technology and Science (JCOTS) had oversight of these committees. The first JCOTS committee met from late fall, 1999 through early 2000 and

tions of both committees exhibited the characteristic pattern of deference to business interests.¹⁹²

Both committees were chaired by legislators with ties to the technology community;¹⁹³ they also included substantial numbers of representatives from law firms with commercial practices and from technology companies and associations.¹⁹⁴ Business users were represented, as were industries seeking exclusions from the scope of UCITA.¹⁹⁵ There was only one consumer representative on each committee.¹⁹⁶ The first committee included several representatives from the library and academic communities, but their representation declined significantly on the second committee.¹⁹⁷

From the first meeting of the first committee, it was apparent that the business representatives, particularly those from the high

was charged with reviewing UCITA and recommending whether it should be introduced in the legislature. The second committee met from June through November, 2000, and was charged with reviewing the "impact of UCITA on Virginia business, libraries, and consumers." In actual practice, this committee simply entertained proposed amendments to the act and voted them up or down. Both committees were designated "Advisory Committee 5." See JCOTS website, at <http://www.jcots.state.va.us> (last visited June 1, 2003).

¹⁹² I served on both the 1999 and 2000 Joint Commission on Technology and Science (JCOTS) committees. The following observations are based on my own experiences and materials in my possession. The chairman of JCOTS appointed advisory committee members subject to guidelines from the General Assembly. There were twenty-seven members of the first committee though typical attendance at any one meeting was roughly eighteen to nineteen members. See List of Members (on file with author). The second committee was required by the General Assembly to have two members of the Senate, two members of the House of Delegates, a representative of the Northern Virginia Technology Council, a representative of the Virginia Manufacturing Association, a representative of the insurance industry, a representative of the public libraries and a representative of the Richmond Technology Council. Additional members with a variety of affiliations were appointed for a total of twenty-seven members. See *Final Report of 2000 Advisory Committee 5*, at 2-4 (on file with author).

¹⁹³ The first committee was co-chaired by Delegates Joe May and Alan Diamonstein. May, from Leesburg in Northern Virginia, owns an electronics engineering company. A short biography is available at <http://members.aol.com/joetmay/joe/bio.html>. Diamonstein, from Newport News, is a senior partner in a law firm whose clients include holders of intellectual property and technology interests. See the Patten, Wornon, Hatten & Diamonstein firm profile, at <http://www.diamonstein.org/practices/profile.asp> (last visited June 1, 2003). The second committee was co-chaired by May and Senator Edward Schrock, a former investment broker, now a member of Congress. See biographical information at <http://schrock.house.gov/bio.asp> (last visited Oct. 13, 2003). In practice, May ran the sessions.

¹⁹⁴ Technology companies and associations were particularly heavily represented on the second committee. See *Final Report of 2000 Advisory Committee 5*, *supra* note 192, at 2-4.

¹⁹⁵ Exclusions for the movie industry and the insurance industry were still under negotiation even as the committees considered UCITA. NCCUSL proposed the movie industry exclusion as an amendment during the second committee's deliberations. The insurance exclusion was tabled by the second committee pending negotiations between NCCUSL and the industry that ultimately resulted in adoption of an exclusion. *Id.* at 62-63.

¹⁹⁶ Jean Ann Fox represented the Consumer Federation of America on the first committee and the Virginia Citizens Consumer Council on the second committee. See Lists of Members, *supra* note 192 (on file with author).

¹⁹⁷ The first committee included three librarians, two of whom were also law professors, and two additional law professors. The second committee included two librarians and one law professor. See *id.*

tech sector, were already on familiar terms with the legislators, whereas most of the public interest representatives were outsiders to the usual process. Carlyle Ring, the chair of NCCUSL's Drafting Committee, sat at the right hand of the chair in both committees, fielding questions as well as advocating in favor of UCITA, and was accorded great deference by the chairmen. Proposed changes to UCITA, minimal as they were in both committees, were only adopted when public interest representatives formed coalitions with business users around particular issues, such as self-help, which impacted both business users and the public at large. Proposals by the lone consumer representative were routinely discounted.¹⁹⁸ Throughout the working life of both committees, the complexity of UCITA's provisions made review difficult.¹⁹⁹ Even attorney members of the committees disagreed on the likely interpretations and impact of UCITA's provisions.²⁰⁰

The outcome in the first committee was never in doubt. While discussion in the committee meetings was heated, the votes were inevitably lopsided in favor of UCITA. Of particular interest for purposes of this article, proposals to amend Section 105 to clarify that contract terms inconsistent with federal law are unenforceable and to state clearly that fair use is a "fundamental public policy" failed in committee. Concerns that § 503 eliminates the "first sale doctrine" were met with flat statements by Mr. Ring that UCITA could not eliminate first sale, because federal law would preempt UCITA—a questionable conclusion at best.²⁰¹ Ultimately, the committee recommended UCITA for introduction in the General Assembly with only two minor amendments.²⁰² Nor was defeat in the legislature ever likely. Virginia is home to a powerful technology sector located in the Northern Virginia suburbs of Washington,

¹⁹⁸ Gail Hillebrand has noted, with respect to NCCUSL's drafting process, that the "imbalance of participation [by industry representatives] can create a climate in which a persistent consumer advocate raising issues at each point where the draft affects consumers will appear to be a nuisance to the process, merely because the comments all come from one person." Hillebrand, *supra* note 155, at 91. This observation was certainly true of the JCOTS advisory committee meetings. Ms. Fox's objections, in general, were briskly discarded. *Id.*

¹⁹⁹ Amelia Boss, who represented the ALI during the drafting process, notes: "Its sheer length and complexity makes UCITA a difficult act to understand even for those close to its provisions. Additionally, the technical nature of much of the material and the detailed definitions. . .combine to make reading and understanding the act a challenge." Boss, *supra* note 4, at 156-57. In Virginia, approximately two-thirds of the first 1999 committee meeting was consumed by review of the definitions section alone, with many questions about the exact meaning of provisions left unanswered.

²⁰⁰ See Letter From Concerned Committee Members To The Co-Chairs, (Jan. 4, 2000) (copy on file with author).

²⁰¹ See 1999-2000 Advisory Committee Five Final Report, at 6-9 (on file with author).

²⁰² See *id.*

D.C.²⁰³ UCITA sailed through the 2000 legislative session, with only one dissenting vote in either house.²⁰⁴

The second review committee conducted a series of public meetings at various locations in the state and entertained proposed amendments from a variety of sources.²⁰⁵ The only amendments that survived the review process were either submitted by NCCUSL itself or were submitted on behalf of powerful business interests such as Circuit City and Capital One. Some of these amendments, notably those limiting self-help in mass market transactions and protecting public criticism of products, were pro-consumer as well as pro-business user and were passed by a coalition of business representatives and public interest representatives. The committee defeated amendments favoring open source software and reverse engineering.²⁰⁶ Amendments protecting libraries were defeated by close votes in committee,²⁰⁷ though later negotiations ultimately produced a narrow library exception that proved popular neither with librarians nor with NCCUSL.²⁰⁸ No amendments proposed solely by consumers or their advocates survived the committee.²⁰⁹ Ultimately the Virginia legislature adopted a set of amendments that made very few changes to the basic UCITA framework.²¹⁰

b. *UCITA in Other States*

In spite of the lengthy review process, Virginia's legislature ultimately behaved as the NCCUSL generally prefers states to behave, adopting the act as promulgated, and subsequently considering only modest amendments.²¹¹ Such an approach promotes the goal of uniformity and may be sound if the substance of

²⁰³ America Online, Network Solutions, Inc., and numerous other technology companies are located in a hi-tech corridor near Dulles International Airport.

²⁰⁴ See McDonald, *supra* note 4, at 467; Virginia House Legislative History, H.B. 561, 2000 Leg. (Va. 2000), available at <http://leg1.state.va.us/> (last visited June 1, 2003); Virginia Senate Legislative History, S.B. 372, 2000 Leg. (Va. 2000), available at <http://leg1.state.va.us/> (last visited June 1, 2003).

²⁰⁵ See *Final Report of 2000 Advisory Committee 5*, *supra* note 192, at 4.

²⁰⁶ *Id.* at 52-57.

²⁰⁷ *Id.* at 14-18.

²⁰⁸ See Letter from Ruth Kifer to Drew Edmondson, (Apr. 6, 2001) [hereinafter Kifer Letter] (regarding the Virginia library amendment) at <http://www.4cite.org/happening.html> (last visited June 1, 2003).

²⁰⁹ See *Final Report of 2000 Advisory Committee 5*, *supra* note 192, at 11-12, 40-43. Most of the participants in the open meetings represented business interests. Only a few individual consumers presented proposed amendments all of which were either withdrawn (after close questioning by committee members) or defeated. The results in both committees suggest that control of committee membership has an effect analogous to that of control of the committee's agenda under Arrow's Theorem.

²¹⁰ See 2001 Va. Acts. ch. 763, available at <http://leg1.state.va.us/> (last visited June 1, 2003).

²¹¹ See Rapson, *supra* note 155, at 260-61.

the uniform law is well thought out and equitable.²¹² In Maryland, which competes with Virginia for high tech businesses in the Washington area, UCITA opponents were more effective and the legislature chose the modification approach. The legislature rewrote the choice of law provisions and mass-market license provisions to make them more favorable to consumers, prohibited disclaimers of warranties in mass market transactions, and limited self-help.²¹³ Maryland also added language explicitly preventing UCITA from invalidating federal copyright law.²¹⁴ These amendments, of course, made Maryland's version of UCITA nonuniform and have neither been approved by NCCUSL nor adopted elsewhere. While salutary, Maryland's amendments left the basic framework of UCITA intact so that "MCITA" remains highly favorable toward information providers. From an interest group perspective, the speed with which the Maryland and Virginia legislatures rushed to be the first to adopt UCITA seems to demonstrate a classic case of jurisdictional competition to entice technology industries to move to those states.²¹⁵

The only other states to act regarding UCITA adopted so-called "bomb shelter" provisions blocking application of the act.²¹⁶

²¹² See *id.*

²¹³ See McDonald, *supra* note 4, at 470-74.

²¹⁴ MD. CODE ANN COM LAW I. § 22-105 (a)(2) (2002) provides: "A contract term is unenforceable to the extent that it would vary a statute, rule, regulation, or procedure that may not be varied by agreement under the federal copyright law, including provisions of the federal copyright law related to fair use." *Id.*

²¹⁵ See McDonald, *supra* note 4, at 481-83 (suggesting that UCITA naturally lends itself to a race to the bottom because of the collective action problem of organizing widely dispersed consumers and the ease of externalizing costs onto other states).

²¹⁶ See IOWA CODE § 554D.104.2.b.4 (2000); N.C. GEN. STAT. § 66-329 (2001); W. VA. CODE § 55-8-15 (2001). The Iowa statute contained a sunset provision but was permanently reenacted in 2003. All three provisions were adopted as amendments to the Uniform Electronic Transactions Act (UETA), the infinitely more popular procedural companion act to UCITA, which deals with electronic signatures. These provisions do not necessarily constitute a permanent rejection of UCITA but may be protective measures adopted pending further investigation. The measures appear to have been adopted with little fanfare. Iowa is a predominantly agricultural state with few technological industries so that the legislature's constituents were more likely to be information consumers than providers. See McDonald, *supra* note 4, at 475. West Virginia fits the Iowa pattern and has additional incentive to protect its consumers against providers located in neighboring Virginia and Maryland. An insurance industry representative suggested adoption of the provision and members of AFFECT worked with state legislators to draft it, per a phone conversation with David McMahon, consumer advocate, (Feb. 3, 2003) (notes on file with author). North Carolina, on the other hand, is home to a substantial technology sector located in the Research Triangle, but has consistently opposed UCITA, voting against its promulgation in 1999. Little background information is readily available on its bomb shelter provision. According to one UCITA opponent, the provision "definitely passed under the radar and libraries and the normal opponents were not the initiators of the effort." E-mail from Carol Ashworth, UCITA Grassroots Coordinator, American Library Association (Nov. 1, 2002) (notes on file with author). Vermont passed a bomb shelter provision subsequent to completion of this article, HB 148 (2003). Massachusetts is considering such a provision.

The remaining states have, to date, taken a wait-and-see approach that may be based on their suspicions that NCCUSL's drafters were "captured" by the software industry and that the rush to adoption by Virginia and Maryland reflects a "race to the bottom" which other states should avoid.²¹⁷

As previously noted, NCCUSL has now promulgated amendments meant to make the act more palatable to information users and state legislatures and jumpstart the stalled enactment process.²¹⁸ UCITA's prospects for either widespread enactment or uniformity currently appear dim. The UCC, however, suffered from similar "enactability" problems when first promulgated, but nonetheless, was widely adopted after substantial revision.²¹⁹ The current phase of the enactment process represents merely one more round of negotiations between interested parties, with business interests dominating the negotiations on both sides.

D. *Points of Comparison*

The copyright process and the uniform law process that produced UCITA obviously diverge in some key respects. Copyright law is drafted at the federal level in multilateral negotiations among the affected industries; Congress takes the role of mediator, blessing compromises made by the key industry players. UCITA, on the other hand, was drafted by a theoretically impartial, private body, but one also subject to influence from affected industries. The enactment process for copyright laws is largely a foregone conclusion once the drafting compromises are reached. By contrast, UCITA must stand or fall in fifty state legislatures; different interest groups may dominate different legislatures.

Both processes, however, exhibit a vulnerability to interest group pressure that tends to produce broadly pro-provider legislation incorporating narrowly drawn exceptions for users of information or for industries seeking special treatment or exemptions. Capture occurs not merely at the point where legislators' votes are cast, but also well before that, during the actual drafting of the legislation. Many of the same interest groups are involved in both

See Patrick Thibodeau, *Mass. Could be Fifth State to Adopt Anti-UCITA Law*, INFOWORLD (June 4, 2003) at http://infoworld.com/article/03/06/04/Hnucita_1.html.

²¹⁷ See McDonald, *supra* note 4, at 480-84.

²¹⁸ See 2002 Proposed Amendments, *supra* note 20.

²¹⁹ The UCC was substantially revised on the recommendation of the New York Law Revision Commission, which studied the draft for several years before issuing its report. During that period, enactment of the UCC was "on hold." See Patchel, *supra* note 133, at 106; William A. Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1, 8-9 (1967).

processes and those interest groups that are not present at the bargaining table during drafting are disadvantaged by the outcomes.

Both drafting processes produce extremely complex statutory provisions which are virtually incomprehensible to consumers and nearly so even to lawyers with expertise in the subject matter.²²⁰ That complexity results from the technical nature of the subject matter and from the multilateral negotiation of interest group compromises. Such provisions may lack the flexibility essential to accommodate the rapid pace of change in information technologies.²²¹

Neither process is attuned to consumer interests. The paucity of comprehensible rules and the deference to private ordering provide consumers with few behavioral guidelines and little power to protect their interests. Given the pervasiveness of provider restrictions on information use and, in some markets, the limited number of providers, consumers and business users may lack even the power to "vote with their feet" by switching products.²²²

Somewhat surprisingly, both processes are now subject to jurisdictional competition in the enactment phase, a characteristic predicted by interest group theory in the case of uniform laws, but not necessarily expected at the federal level.²²³ The uniform law process is almost inevitably subject to such competition among the states. In the global economy, however, jurisdictional competition is also increasingly a factor at the national and international levels in the formulation of information policy. The enactment of the DMCA, for example, was engineered by the Clinton Administration through manipulation of World Intellectual Property Organization treaty negotiations and reliance on Congress' desire to keep America first among global information providers.²²⁴

On the more hopeful side, some pro-user provisions may survive, or passage of legislation may be blocked in its entirety, if business users form coalitions with public interest groups. Such

²²⁰ Jessica Litman describes the Copyright Act as "long, complicated, counterintuitive and highly specific." See Litman, *Revising Copyright Law for the Information Age*, *supra* note 137, at 23. The ABA Working Group's chief objection to UCITA was that "it is extremely difficult to understand." See *ABA Working Group Report*, *supra* note 30, at 7.

²²¹ With respect to UCITA, Amelia Boss notes that "(a)ttempts to assure enactment by placating all the affected industries also produced 'increasingly particular and detailed rules. . . In so doing the draft sacrificed the flexibility necessary to accommodate continuing fast-paced changes in technology, distribution and contracting.'" See Boss, *supra* note 4, at 136. Jessica Litman makes the same observation with respect to the Copyright Act. See LITMAN, *supra* note 115, at 57.

²²² See Cohen, *supra* note 34, at 520-23.

²²³ See Janger, *supra* note 136, at 190-91.

²²⁴ See LITMAN, *supra* note 115, at 128-31; see also *infra* Part III. D.

coalitions already actively oppose UCITA and appear to be forming in opposition to expanded protections for information providers under copyright and paracopyright laws. Public interest groups, while they have had little effect on drafting, are increasingly successful in mobilizing opposition in the enactment phase. The Internet has provided a particularly useful tool in this regard.²²⁵

Both the copyright process and the uniform law process have been in operation for close to a century and previously produced legislation that, while business-oriented, provided some protections for information users or simply left them alone. The UCC is universally viewed as a triumph of the uniform law process. The 1976 Copyright Act, while subject to technological stress, attempts to balance copyright owners' interests against the public interests and, in the process, preserves a number of important user rights. The "new and improved" models, UCITA and the DMCA, on the other hand, create frameworks that actively encourage information providers to use contract and technology to restrict users' ability to access information. In light of this aggressive approach to information control, Article 2 and the 1976 Copyright Act now appear far more "user-friendly" despite the difficulty of fitting them to new technologies and information markets. Since the same processes produced both old and new acts, why should there be such marked difference in the evenhandedness of the legislative product? The answer may lie in the convergence of several trends in information markets.

E. *Changing Information Markets*

The modern information market exhibits a number of related characteristics that enhance the prospects of interest group capture of information policymaking. Those characteristics include: high monetary stakes; a global, networked market that fundamentally alters the relationships between information owners, distributors, and users; and rapid technological change which pressures public and private legislators to act quickly, but also assures that most of them have insufficient expertise to act wisely without the counsel of experts.

Over the past twenty years, the proliferation of electronic technologies created information markets characterized by commodification of information, transnational information exchange, and the cultural colonization of the world by American information providers. While powerful interest groups undoubtedly had their

²²⁵ See LITMAN, *supra* note 115, at 123.

say in the drafting of the UCC and the Copyright Act, the multinational conglomerates now dominating information markets dwarf the corporate industries active at the time the older laws were drafted. Industries with massive investments in information and information technologies have the economic and political influence necessary to push effectively for legislation favorable to their interests, both here and abroad. Since the health of the American economy depends on the success of information enterprises, legislators may be predisposed to take protectionist positions designed to strengthen U.S.-based information providers against foreign competitors and to preserve their prerogatives against users here and abroad.²²⁶ The highly technical nature of the industries, and the complexity of the laws already governing them, bolsters that predisposition.

Public law is based on a presumption that legislators are competent to make public policy choices.²²⁷ The complexities of copyright and commercial laws, however, invite legislators to leave the drafting to experts provided by the affected industries. The negotiated drafting processes produce ever more convoluted provisions, intensifying the proclivity toward reliance on industry experts.²²⁸ Modern information technologies add additional levels of complexity. The technologies are so specialized, and change so rapidly, that relatively few legislators at the federal or state levels have relevant expertise. Public interest advocates are equally unlikely to have necessary technical expertise, limiting their effectiveness. Such asymmetry of information inevitably strengthens the hand of industry representatives as against diffuse groups like consumers, for whom the expense of obtaining the necessary technical expertise renders it infeasible. The economic power of information providers and technology companies combined with legislators' limited knowledge base favors legislative deference to industry-drafted or industry-influenced provisions at both the federal and state levels. The rapid pace of technological change also makes it more difficult for drafters or legislators to find guidance in established case law or commercial practices.

The drafters of the 1976 Copyright Act could rely on two cen-

²²⁶ Jessica Litman notes that proponents of the "copyright-as-control" model exemplified by the DMCA succeeded in convincing Congress that such protections were essential to protect our favorable balance of trade in information industries against foreigners trying to steal our "property." *Id.* at 80-81.

²²⁷ See Farber & Frickey, *supra* note 131, at 874.

²²⁸ As noted above, this pattern was equally true when the UCC and the 1976 Copyright Act were drafted. See, e.g., U.C.C. § 2-207 (2002) on the battle of the forms or 17 U.S.C. § 115 (2002) on compulsory licensing of music.

turies of judicial interpretation and well-established commercial practices. The revision process itself occurred over a twenty year period that afforded ample time for deliberation.²²⁹ Similarly, the UCC was drafted over more than a decade and intentionally crafted to reflect commercial practices which were well-established and supported by substantial case law.²³⁰ The DMCA and UCITA, on the other hand, reflect neither well-established commercial understandings nor long term judicial interpretation. Rather, they function as “patches” applied to problems created by particular technological developments. Technological change continues to churn out new commercial practices so rapidly that the law cannot keep pace.

The DMCA addresses rapidly “morphing” copying and access control technologies by ceding broad technological control to established copyright industries. The copyright industries’ fear of losing control of their content motivated a relatively hasty (in legislative terms) concoction of provisions that offered protection to key copyright industry players, a few narrowly worded concessions to technology companies, library associations, and educational institutions, but little to the public at large.²³¹ The DMCA does not reflect established copyright or commercial practices. Rather, it establishes law in relatively uncharted territory where consensus has not yet been reached as to the values law should protect or the appropriate scope of such protection.

While guidance from accepted practices and case law are as desirable at the federal as the state level, it is not surprising for Congress to strike out into new territory as part of its constitutional mandate. Uniform laws, however, theoretically represent codification by private experts of accepted practices. UCITA, nonetheless, suffers from the same tendency as the DMCA to impose solutions where commercial practices and judicial interpretation have not yet solidified.

UCITA was drafted over a longer period of time than the DMCA, but a somewhat shorter period than the UCC. During that period, information markets continued to evolve rapidly. UCITA’s approach to codification of commercial practices differs from that of the UCC in several respects. In the mass market, UCITA adopts a unilateral solution imposed by providers rather than a practice

²²⁹ See LITMAN, *supra* note 115, at 49-57.

²³⁰ See Murphy, *supra* note 13, at 564-69; Patchel, *supra* note 133, at 93-106.

²³¹ While substantial negotiations did occur among affected industries, the DMCA was enacted within a relatively short time frame (roughly three years). See LITMAN, *supra* note 115, at 122-44.

developed by commercial parties bargaining at arm's length with a mutual understanding of the nature of the transactions. The licensing model does not reflect current user expectations. The buyer of a copy of software generally assumes that she has ownership of the copy that allows her to use it more freely than the licenses often permit. UCITA adopts the current practices of information providers without taking a broader view of the advisability of those practices.²³² UCITA's software-based licensing model is actually inconsistent with pre-existing practices in many information industries; hence the rush by such industries to negotiate exemptions, leaving mass market end users holding the (shrinkwrapped) bag.²³³ UCITA's model is also based on a commercial practice, namely the physical transfer of copies, which is expected to disappear in the near future.²³⁴ Finally, rather than building on settled case law, UCITA explicitly rejects substantial case law interpreting transfers of copies as "sales" rather than licenses. Where the UCC drafters built legislation based on judicial and commercial consensus, UCITA chooses sides in still-disputed territory.

The drafters of both the DMCA and UCITA may well plead that the rapid pace of change necessitates quicker legislative responses to information issues. A growing number of commentators have suggested, however, that haste makes waste in legislative decisionmaking regarding technology and information policy. Sufficient elapsed time for market practices to stabilize and judicial interpretations to coalesce may be necessary in order to build consensus in these highly specialized fields.²³⁵ In the absence of accepted commercial practices and guidance from case law, special interest lobbying may have greater impact on legislative outcomes, tilting the process in favor of established information providers threatened by continuing technological change.

Increasingly, information providers face opposition not only

²³² See Samuelson & Opsahl, *supra* note 4, at 748.

²³³ See Chow, *supra* note 5, at 329-31.

²³⁴ The ABA Working Group strongly suggested, for example, that there is no reason in the modern networked environment for information providers to withhold terms until after payment since such terms can readily be made available on the provider's web site. See ABA Working Report, *supra* note 30, at 17-18. The Standby Committee rejected the ABA's suggestion, finding the opportunity to review and right of return model adopted by UCITA more appropriate in light of current practices. See *Standby Committee Report of 5/29/02*, *supra* note 20, at 11-12.

²³⁵ See, e.g., Suzanna Sherry, *Haste Makes Waste: Congress and the Common Law in Cyberspace*, 55 VAND. L. REV. 309 (2002) (counseling generally against rapid enactment of federal legislation regulating cyberspace in advance of judicial interpretation); Braucher, *supra* note 118 (arguing that UCITA is premature in light of rapid changes in technology and business practices).

from consumers, but also from business users and from technology companies whose products enhance consumer freedoms.²³⁶ Modern drafters of information policy face an environment drastically different from that faced by the drafters of the UCC and the Copyright Act, not only with respect to the rapid pace of technological change but also with respect to the impact of that change on market relationships. The Internet has restructured the traditional relationships between information providers, distributors, and users.²³⁷

The proliferation of digital media combined with widespread Internet access facilitates copying and redistribution of electronic information by end users to a degree not previously permitted by analog copying technology. Users now routinely possess the technological ability to make perfect copies and disseminate them to thousands of other users. While commercial piracy clearly threatens the markets of information providers, noncommercial distribution by individual consumers also poses a serious threat.²³⁸

Prior to popularization of the Internet, most serious copyright infringements involved either business competitors of copyright owners or intermediate distributors of works. Copyright enforcement against individual consumers was rare since infringements by consumers of copyrighted works were simply too difficult to detect and prosecute.²³⁹ Similarly, the UCC paid only minimal attention to consumer issues.²⁴⁰ The Internet has begun, though not yet completed, the eradication of the mass market distribution appara-

²³⁶ See McCullagh, *supra* note 154.

²³⁷ The Internet also alters the relationship between authors and their audience by allowing authors to disseminate their works without relying on publishers and other intermediaries. To date, however, no one has successfully developed a business model that provides authors with substantial enough returns to allow them to dispense with publishers. Consequently, most dissemination of works *for profit* still occurs through corporate information providers who, in most cases, have either acquired the copyright from the author or originate the works themselves (in the case of communal works such as software, databases, and the like). The focus of controversy is, therefore, the relationship between the provider and its customers.

²³⁸ The music industry, for example, has been heavily impacted by peer-to-peer file sharing. Recent surveys suggest that noncommercial file swapping by consumers has severely cut music sales. See Owen Gibson, *Web Piracy Hits Music Sales*, THE GUARDIAN (Feb. 10, 2003) available at <http://www.guardian.co.uk/onlinenews/0,12597,892820,00.html>; Jeff Leeds, *Online Music Sales Dive From 2001*, L.A. TIMES, Nov. 4, 2002, available at <http://www.latimes.com/technology/la-fi-cdsalesnov04,0,6036236.story>. But see, Forrester Sees \$2 Billion Digital Music Market by 2007, SILICONVALLEY.COM (Aug. 13, 2002) at <http://www.siliconvalley.com/mld/siliconvalley/news/editorial/3856253.htm> (reporting on a survey suggesting that the drop in music sales is attributable to other causes).

²³⁹ See Jane C. Ginsburg, *Putting Cars On The "Information Superhighway": Authors, Exploiters, And Copyright In Cyberspace*, 95 COLUM. L. REV. 1466, 1488 (1995).

²⁴⁰ Consumer protection laws were later enacted by states to cure the omission. See Fred H. Miller, *Consumers and the Code: The Search for the Proper Formula*, 75 WASH. U. L.Q. 187, 191 (1997). Miller argues that consumer protection provisions are inherently antagonistic

tus of traditional information industries, gradually replacing it with direct online relationships between information providers and users. The software licensing model responds to the problems of digital copying and the disintermediation of information transactions by creating a direct contractual relationship between the provider and the end user through which the provider hopes to enforce control over its information. One impact of the model, addressed by the mass-market license concept, is to cast business users and consumers into the same class in mass market retail transactions. Perhaps more significantly, the license relationship brings providers and consumers into direct legal and technological conflict.

The Internet's elimination of geographical restraints on provider-user interactions, combined with technologies for tracking user activities, deprive individual consumers of the anonymity that formerly shielded them from direct enforcement of license terms governing use. Information providers may monitor the use of their works, identify individual users who disregard use restrictions, and enforce those restrictions legally or technologically.²⁴¹ The end result of these developments is that legislation like UCITA and the DMCA directly impacts individual consumers in ways that the UCC and the Copyright Act did not at the time of their enactment. Legislative processes that ignored consumers may have been more viable when consumers felt their impact only indirectly and, in any event, knew little or nothing about the mechanisms behind the laws.

Until recently the drafting of uniform laws and copyright legislation was the province of specialists whose activities were unknown to non-lawyers and probably unfamiliar even to lawyers outside the affected practice areas.²⁴² The Internet now makes those activities highly visible to the public and provides opponents with a useful tool for organizing resistance to measures like the DMCA and

to commercial codes. Patchel, *supra* note 133, at 86, observes that NCCUSL rarely attempts to address consumer issues.

²⁴¹ Users may employ anonymous "handles" or rerouting services to shield themselves from discovery. Technologically savvy hackers and spammers are adept at disguising their identities. However, most ordinary users do not resort to such devices and copyright owners have proven their ability to find and target specific "offending" sites and individual users. For example, Metallica specifically identified thousands of users of Napster. See Brad King, *Napster Users Get the Boot*, WIRENEWS, May 10, 2000, at <http://www.wired.com/news/print/0,1294,36248,00.html>. A federal court recently held, in an action brought by the Recording Industry Association of America, that an internet service provider must comply with a subpoena served under the DMCA that required the Internet service provider to identify a subscriber engaged in peer-to-peer filesharing. See *In re Verizon Internet Services, Inc.*, 240 F.Supp.2d 24 (D.D.C. 2003).

²⁴² See Patchel, *supra* note 133, at 129.

UCITA. Organizations representing both individual and business information users monitor licensing practices and share information over the Internet.²⁴³ Public interest coalitions maintain active presences on the World Wide Web and both the DMCA and UCITA have been closely monitored on dozens of web sites.²⁴⁴ While the Internet does not eradicate the costs of collective action, it has reduced them sufficiently so that large groups, like consumers, may participate more effectively in the legislative process. To date, the public and their advocates have had limited impact on the drafting processes, which are more insulated from meaningful public participation, but they are increasingly effective in raising opposition in the enactment phase. Where business users and consumers find common ground for opposition, they are better able to coordinate efforts in order to derail the project. A general decrease in civility and willingness to compromise sometimes seems to be an unfortunate byproduct of Internet-enabled conflicts, which force parties to stake out public positions from which they may find it difficult to retreat. Such exposure may, however, be a necessary tradeoff for increased public participation in processes that closely affect all information users.

In summary, UCITA and the DMCA are more hostile to information users than the UCC or the Copyright Act because the legislative processes that produced all four have failed to address new challenges posed by global networks, rapid technological change, and restructured provider-user relationships.²⁴⁵ Processes that respond only to business interest groups now produce legislation that directly impacts all information users, including individual consumers. The Internet provides a convenient forum for public interest groups to publicize inequities in proposed legislation and organize resistance. In the new information environment, the drafting of significant elements of national information policy cannot remain the preoccupation of lawyer specialists too easily captured by the affected industries. Means must be found to better represent the public interest in the construction of legislative frameworks that will determine whether the public domain and

²⁴³ See Gomulkiewicz, *supra* note 4, at 898.

²⁴⁴ See, e.g., the following web sites: Americans for Fair Electronic Commerce Transactions (AFFECT), <http://www.affect.org>; the Digital Future Coalition, <http://www.dfc.org/>; the Electronic Frontier Foundation, <http://www.eff.org>; UCITAonline, <http://www.ucitaonline.com>.

²⁴⁵ These factors, unique to information transactions, may also explain why UCITA has faced such a rocky road, while the revision of Article 9, which also followed the traditional uniform law procedure, proceeded so smoothly. A complete comparison of the two processes is, however, beyond the scope of this article.

many traditional consumptive uses survive the transition from analog to digital media.

IV. ASSURING REPRESENTATION OF THE PUBLIC INTEREST

Given the pace and nature of the changes in technology and information markets, it should not be surprising that legislative processes more than a century old may require fine-tuning to better reflect new realities. That the copyright process and the uniform law process are particularly prone to capture by business interests is hardly news, but, in modern information markets, the consequences of legislative capture on user rights are more severe. Neither the DMCA nor UCITA offers anything comparable to the broader, if more amorphous, public interest protections of doctrines like fair use or the idea/expression dichotomy, with the result that the public's access to information in digital formats may be substantially more constricted than its traditional access to information in analog formats.

While UCITA was not formulated at the national level, it may, if widely adopted, have no less an impact on access to information than federal formulations like the DMCA. Critical decisions about national information policy, which ought to be formulated as a coherent whole, are actually being pieced together at two different levels, often at the behest of affected industries, and through processes overly influenced by those industries. At neither level does the end product offer clear guidelines for either providers or users. The DMCA has already sparked litigation²⁴⁶ and will continue to do so for the foreseeable future. Substantial amendments have been proposed.²⁴⁷ The complexity of UCITA's provisions and the obvious conflicts with copyright policies and practices are equally certain to produce litigation. The act is unlikely to provide nationwide uniformity as the adoption process produces state-by-state amendments or new bomb-shelter provisions. Where clarity and predictability are most needed the copyright and uniform law processes have produced legislation that offers little but uncertainty and the prospect of expensive litigation.

This part suggests that both processes should be revised to as-

²⁴⁶ See, e.g., *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d. Cir. 2001) and *United States v. Elcom Ltd.*, 203 F.Supp.2d 1111 (N.D. CA 2002) (both upholding the DMCA against claims that it violates the First Amendment and the Copyright Clause). In *Elcom*, a federal jury subsequently acquitted the defendants. See Ariana Eunjung Cha, *U.S. Clears Russian Tech Firm in E-Book Copyright Case*, WASH. POST, Dec. 18, 2002, at E01.

²⁴⁷ See H.R. 107, 108th Cong. (2003), the Digital Media Consumers' Rights Act; see also, H.R. 5522, 107th Cong. (2002), The Digital Choice and Freedom Act of 2002.

sure broader representation of all impacted interest groups—particularly consumers, but also business users and creator-users like authors and researchers. The processes should also be coordinated to produce consistent legislation, implementing coherent policies that, among other things, set the acceptable parameters for use of information and restrictions thereon.

A. *Process Revisions*

Statutory law, in some form, clearly will set the ground rules for information transactions. Recent history indicates that federal and state legislatures *will* act on these issues. Neither Congress nor the states will wait indefinitely for the courts or commercial practice to produce clear guidelines. Given the rapid pace of technological change, commercial practices may not stabilize for years. Moreover, all indications are that the courts will defer to legislative determinations on information issues and are unlikely to undercut explicit legislative directives favoring information providers. Shrinkwrap license terms blessed by UCITA are unlikely to be struck down, particularly in light of the heavy burden UCITA places on users challenging such provisions. The DMCA has already been upheld against several challenges.²⁴⁸ That being the case, correction of defects in the respective legislative processes should produce more equitable ground rules. Because the copyright process and the uniform law process display similar flaws, proposals for making them more responsive to user interests tend to be broadly applicable to both processes, though each process presents some unique concerns. Proposals for process revisions fall into several broad categories related to the timing of user participation, appropriate representation for user interests, and actual responsiveness to user concerns.

In both processes, broad representation of all affected parties, not just major industry stakeholders, should be assured *at the drafting stage*. Exclusion from the drafting process cannot be rectified at the enactment stage. Once bills as complex as the DMCA or UCITA reach a legislature for enactment, their basic framework is

²⁴⁸ With respect to federal copyright and paracopyright law, the recent Supreme Court decision in *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (extension of copyright term held valid), as well as the lower court decisions in *Universal City Studios, Inc. v. Corley*, 273 F. 3d 429 (2d Cir. 429) and *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111 (N.D. CA 2002) (DMCA held constitutional in both cases), make it crystal clear that courts are unlikely to interfere with legislative determinations in this area. With respect to contract law, as noted, *supra* note 68, a growing number of courts, possibly a majority, already enforce shrinkwrap licenses, often in the face of copyright preemption claims. Under UCITA, enforcement would be the consistent result.

unlikely to undergo significant alteration. At best, opponents may be able to force the adoption of narrow exceptions to provisions that broadly favor the industries that drafted them. Postponing representation until the enactment phase or relying on the market to sort things out *ex post facto* gives users no positive input into the rules by which they will be expected to live.²⁴⁹

Both Congress and NCCUSL should identify impacted groups and assure them a voice in the drafting process from the outset. Achieving broad representation requires more than a simple invitation to all interested parties to attend open meetings. Dispersed groups, like consumers or authors, are less likely than industries to be aware of drafting initiatives, and less able to participate in them consistently given the financial and organizational barriers to collective action. Congress and NCCUSL must reserve a place at the table for such groups. If, as seems likely, Congress continues to rely on interested parties to draft copyright law, it should, at least, establish drafting bodies whose members represent the full spectrum of affected parties, including user groups. Uniform law drafting committees should be similarly constituted to the extent possible. Selection of members of such committees may pose a challenge—who is best positioned to represent the interests of dispersed groups like “consumers,” “researchers,” or “authors,” whose particular interests conjoin to form, in significant part, the “public interest?”

Traditionally, public interest groups like library associations, Internet rights organizations, and consumer rights organizations undertook representation of the public interest. They still provide a valuable source of representation. Alliances among such groups, business users, and technology companies are certainly valuable as long as legislative processes respond primarily to pressure from business interests. However, the interests of consumers or user-creators are not in all respects coextensive with those of better-organized groups like business users or even libraries.²⁵⁰ Alliances with business interests on one issue may actually represent tradeoffs that presage opposition from those interests on others.²⁵¹ Certainly or-

²⁴⁹ See Cohen, *supra* note 34, at 517-31 (discussing the limitations on consumers' ability to influence information markets).

²⁵⁰ For example, the library amendment to UCITA accepted, with reservations, by Virginia library advocates proved unsatisfactory to almost everyone. See Kifer Letter, *supra* note 208. Jessica Litman has noted a similar tendency for library associations at the national level to settle for less than may be desirable from a public interest perspective. See LITMAN, *supra* note 115, at 126-27, 145.

²⁵¹ See, e.g., Jonathan Krim, *Entertainment, Tech Firms Reach Truce on Digital Piracy*, WASH. POST., Jan. 14, 2003, at E01 (citing a technology industry insider's comment that agreement between the entertainment and technology industries to oppose the Hollings bill

ganized user groups, like consumer advocacy groups, authors' associations, or digital rights groups,²⁵² can be tapped for representation of user interests. Academics offer a potential pool of advisors, to the extent that they do not have ties to affected industries.²⁵³ At the federal level, the Copyright Office might take a more active role as public ombudsman representing the public interest with respect to information policy.²⁵⁴

Interest group influence neither can, nor should, be excised from the drafting process as such groups provide valuable expertise to drafters and legislators. Rather, interest group representation should be more inclusive of all interested parties, not merely those industries who maintain a regular lobbying presence at the national or state levels. A broader spectrum of advisors can provide Congress, and NCCUSL, not only with essential technical information but also with assessments of the impact of proposed legislation on both providers and users.

Some balance in the degree of representation of different groups in the drafting process should also be sought. A single "consumer" representative will not adequately represent the interests of all individual information users, much less that of business users, librarians, or other classes of users. Conversely, information providers should not be allowed to stack the drafting deck in their favor through overrepresentation as they currently do in both processes. A limited number of representatives from affected provider and user groups should serve to channel each group's concerns in the drafting process. NCCUSL's current process may be more difficult to manage in this respect since NCCUSL relies on its own members as drafters, with input provided through the open meetings system. Certainly NCCUSL could seek out those commis-

requiring copy protection technology in hardware and software, which is also opposed by consumer groups, meant that technology companies would also oppose efforts to relax existing copyright laws or clarify user's digital rights).

²⁵² A number of such groups, such as Ralph Nader's Consumer Project on Technology, the Electronic Frontier Foundation, and the Digital Future Coalition actively monitor information policy and could provide representatives.

²⁵³ *But see* Schwartz & Scott, *supra* note 132, at 628-29 (observing that academics involved in the uniform law process may be less credible than interest group representatives).

²⁵⁴ Some commentators consider that the Copyright Office may be too closely tied to the copyright industries to serve as an effective representative for the public interest. *See, e.g.,* LITMAN, *supra* note 115, at 74. Litman observes that the Copyright Office staff is often drawn from law firms that represent copyright owners. The office relies on the copyright bar to protect it from budget cuts and turf incursions, such as the Clinton Administration's failed attempt to bring the office under the control of the Patent and Trademark Office. For a countering view of the Copyright Office as an evenhanded facilitator of consensus among competing interests, *see* Eric Schwartz, *The Role Of The Copyright Office In The Age Of Information*, 13 CARDOZO ARTS & ENT. L.J. 69, 78 (1994).

sioners who have experience with user interests and utilize them on drafting committees. To the extent that such experience is not available within NCCUSL itself, NCCUSL should actively seek outside advisors from all affected groups, not merely from business interests, and those advisors should be regular participants in the drafting process.²⁵⁵

All representatives, and their associated constituencies, should commit to the entire legislative process, rather than negotiating their own exemptions and then abandoning the field. Continuous participation is particularly crucial in the uniform laws process, where all representatives must be aware of the necessity to reach consensus if the goal of uniformity is to be reached. This requirement demands longer and more complete participation from all parties than many have heretofore been able or willing to provide. Broader representation of user groups will likely make for lively drafting discussions but may produce a consensus that is more palatable to all affected parties and hence less controversial than either the DMCA or UCITA.

As drafting proceeds, the drafters should create a clear track record of the policy choices made or rejected and the reasons for those actions.²⁵⁶ A more comprehensive drafting history will allow legislators to thoroughly review the legislation and exercise their independent judgment rather than merely relying on the "experts" to set the ground rules for national information policy. Drafters should serve as useful technical advisors not as ultimate decisionmakers.

While the general public cannot "participate" in the drafting process, it can certainly be consulted to a greater degree than ever before through the Internet. Drafters could outline basic proposals, in lay terms, and invite online discussions or formulate online surveys soliciting user reactions to various alternatives. Thus far, to the clear dismay of drafters, the Internet has served primarily to facilitate resistance to pro-provider legislation.²⁵⁷ In the future, the

²⁵⁵ A number of writers have proposed additional, consumer-friendly "fixes" for the uniform law process, including centralized meetings (to allow consistent consumer representation), reduced focus on enactability, streamlined drafting to reduce the length of the process, and private voting by drafting committee members. See Hillebrand, *supra* note 155, at 640-43; Patchel, *supra* note 133, at 156-61; Rapson, *supra* note 155, at 283.

²⁵⁶ See Patchel, *supra* note 133, at 157-58, regarding the uniform laws process. Patchel notes that the comments that accompany uniform laws are not, in themselves, sufficient to serve this purpose as they tend to be fairly arcane and frequently raise new issues not addressed in the text.

²⁵⁷ At a recent symposium, NCCUSL members noted that the Internet has created a hostile environment for uniform legislation. John McClagherty and Prof. Raymond Nimmer, Comments at the Oklahoma City University Law School, *The Uniform Law Process: Les-*

drafting bodies themselves could utilize the Internet more effectively to build consensus, provided that they are willing to accept and act on public feedback as well as put forth position papers.²⁵⁸ From the users' perspective, enhanced Internet communication would offer an opportunity to take part in the positive formulation of legislative provisions, rather than merely react negatively to provisions that do not address their concerns.

Whatever changes occur with respect to the representation of information users in the drafting processes, it remains important that their concerns actually be addressed in the draft legislation. Drafters and legislators in the DMCA and UCITA processes have demonstrated a strong propensity to "hear" adverse user feedback, in hearings and open meetings, without "listening" to it or acting on it until it threatens enactment of the legislation. A more balanced approach must be written into the drafts from the outset if the resulting legislation is to provide the foundation for a rational information policy.

There are several incentives for Congress and the NCCUSL to seek wider user representation and respond to user concerns. There is widespread agreement that information transfer and protection issues must be addressed in the context of modern technologies and that uniform, predictable, and enforceable rules are essential. These goals are more likely to be attained if users' concerns are addressed in the drafting processes since user compliance is critical to the success of any such scheme. From NCCUSL's perspective, inclusion of a broader spectrum of user representatives makes it more likely that legislation like UCITA will avoid opposition from user groups and achieve widespread enactment without significant amendments in state legislatures, thereby serving the goal of uniformity. Adoption of more inclusive processes by both Congress and NCCUSL might avoid the kind of public relations debacles created by the DMCA and UCITA. It should also minimize the necessity and cost of subsequent revisions of provisions that prove controversial, and may actually spark widespread noncompliance, because of their adverse impact on users. Users should be more willing to comply with rules if they have a voice in

sons for a New Millenium, (Jan. 25, 2002) (notes on file with author). Both speakers recognized that NCCUSL must seek broader and earlier involvement of impacted groups, including consumers.

²⁵⁸ The Bush Administration, for example, recently launched a website, <http://www.regulations.gov>, listing all federal regulations open for comment and inviting the public at large to state their views on such regulations. See Cindy Skrzycki, *U.S. Opens Online Portal to Rulemaking*, WASH. POST, Jan. 22, 2003, at E01. Similar initiatives might be undertaken to solicit public reaction to proposed information laws.

their formulation, thereby reducing enforcement costs. Broader public interest representation cannot guarantee that all representatives will be equally effective or that good policy choices will always be made, but, in an admittedly imperfect system, it at least improves the odds.

Assuming that structural problems regarding representation are resolved, issues remain concerning the appropriate scope of action of the respective drafting bodies and coordination of their efforts.

B. *Federal and State Prerogatives*

Basic principles of federalism have historically informed the relationship between the uniform law process and the federal legislative process. Under earlier, narrow interpretations of congressional authority under the Commerce Clause, uniform laws provided nationwide default rules in areas where Congress was unable to legislate. Under modern, expansive readings of Commerce Clause powers, the uniform law process has become a competitor of the federal process and a focus of states' rights proponents.²⁵⁹ Some issues are, however, more appropriately treated at the national than the state level, even where the uniform law process is available.

Though contract law firmly resides in the state law domain, the control of information, in the form of granting or withholding copyright and other intellectual property monopolies, has always been a matter of national concern, subject to congressional regulation under the Copyright and Patent Clause of the Constitution.²⁶⁰ With UCITA, NCCUSL stepped into a predominantly federal arena and might have been expected to seek consistency with federal law. Instead, UCITA's framework gives private contractual ordering priority over well-established federal copyright principles. That UCITA is consistent with the DMCA demonstrates the split that has developed not only between contract and copyright, but also between traditional copyright law and paracopyright laws like the DMCA, which is equally at odds with fundamental policies of traditional copyright law.

Congress and NCCUSL should reconsider the proper relationship between copyright, contract, and technology. Fundamental

²⁵⁹ See Patchel, *supra* note 133, at 157, 158; Ring, *supra* note 162, at 305.

²⁶⁰ See NIMMER & NIMMER, *supra* note 82, § 1.01 ("When the framers of the United States Constitution met in Philadelphia to consider which powers might best be entrusted to the national government, there appears to have been virtual unanimity in determining that copyright should be included within the federal sphere.").

disagreements exist as to whether conflicts between providers' entitlements and users' ability to access information are best addressed by "regulatory" schemes or "default" frameworks within which private actors create their own solutions.²⁶¹ Clearly, reconciliation of the two bodies of law as they relate to information transactions is more desirable than continued parallel development of potentially conflicting laws at the federal and state levels. Coordination of the federal process with the NCCUSL process, allowing each predominance in its appropriate sphere, could achieve such reconciliation.

It is appropriate that federal legislation set certain nonvariable rules with respect to information transactions. Congress has always had constitutional responsibility for creating the basic structure of information policy, and should do so not by abdicating responsibility to information providers but by balancing the interests of providers and users and making fair policy choices. The federal process, if made more representative, should be better suited than the uniform laws process to assure protection of the public interest. Well-established copyright doctrines like fair use and first sale, and their proper scope in digital environments, should be addressed at the federal level by legislators who are accountable to the electorate. Congress should define the appropriate scope of use rights, including rights for personal, noncommercial uses of information, a topic which current copyright law does not effectively address.²⁶²

NCCUSL should conform its contractual default rules to federal copyright law, providing an effective mechanism for implementing copyright policies through contract. While such a scheme may impose some limitations on freedom of contract, copyright has always imposed some restrictions on contract and formulation of coherent information policy requires it. NCCUSL might also abandon its historic focus on state legislation and actively participate in the formulation of national policy in this area.²⁶³

²⁶¹ It may be argued that neither copyright law nor UCITA clearly fits either pattern. Copyright law is minimally regulatory in comparison with most true regulatory schemes and has always established what might be considered default rules for information transactions; UCITA, while arguably establishing default rules, effectively encourages one-sided private regulation through mass market contracts.

²⁶² I have argued elsewhere that personal use privileges should be explicitly defined in copyright and other intellectual property laws. See Deborah Tussey, *From Fan Sites to Filesharing: Personal Use in Cyberspace*, 35 GA. L. REV. 1129 (2001); see also Liu, *supra* note 130, at 26-28 (arguing that policymakers should pay greater attention to consumer interests in formulating copyright law).

²⁶³ Llewellyn, among others, anticipated that the uniform law process might produce expertly drafted national, as well as state, legislation. However, NCCUSL has thus far refused to expand its activities outside of the state arena. See Patchel, *supra* note 133, at 161. Llewellyn suggested that NCCUSL's participation in national lawmaking would represent a

A congressional advisory commission, consisting of experts from the relevant disciplines of intellectual property and commercial law, representing both provider interests and user interests, might be an effective vehicle for formulating appropriate rules governing information transactions.²⁶⁴ That commission might be charged with recommending both the broad structure of national information policy, including relative rights of providers and users, and the default rules for implementation of that policy through contract. NCCUSL's participation in this endeavor, and the lessons learned during the formulation of UCITA, could be invaluable. Significant portions of UCITA might be revised and incorporated into a better-balanced initiative. Such an effort might produce, at last, a coherent policy with a complementary implementation scheme.

C. *General Considerations*

The preceding proposals inherently presume that UCITA, in its current form, should be shelved until a more coherent national policy regarding entitlements and user rights can be formulated. Substantial redrafting of UCITA might then be required.²⁶⁵ However, such an effort would only be well advised if the structural inequities in the federal and the uniform law processes are cured prior to its commencement. Unless user groups are fairly represented in the formulation of information policy, they may be better off under the current haphazard arrangement than they would be under a coherent scheme drafted by and for information providers.

Several goals should inform any endeavor to formulate fairer, more consistent rules for copyright and contract. Drafters must adopt some number of nonvariable rules to protect users, particularly if the validation of mass-market licenses is ultimately deemed essential to the functioning of the electronic marketplace. Those rules should be set at the federal level. As the rules are likely to be interpreted by state and even foreign courts, they should implement national information policy as clearly as possible.

recognition of state interests rather than an invasion of state's rights. See Karl N. Llewellyn, *The Needed Federal Sales Act*, 26 VA. L. REV. 558, 561 (1939-40).

²⁶⁴ CONTU, the National Committee on New Technological Uses of Copyrighted Works, provides historical precedent for creation of such a commission to tackle problems created by new technologies. CONTU was commissioned in 1976 to explore the advisability of applying copyright law to software. Congress subsequently adopted its recommendations. See NIMMER & NIMMER, *supra* note 82, § 8.08 [A][2].

²⁶⁵ UCITA opponents have, of course, raised numerous objections to the act beyond those addressed herein. One would expect that any redraft would address those concerns.

In general, drafters should generate relatively clear, concise, and comprehensible rules that can be understood, at least in broad outline, by both information providers and information users. They should strive, within reason, to articulate rules that will not require explication through extensive litigation and to offer users minimal bright line rules for behavior. In the event of litigation, simpler rules might also lend themselves more readily to judicial interpretation than the morass of complex, contradictory provisions presented by the DMCA and UCITA. Drafters should avoid, to the extent possible, vague balancing tests that are likely to be applied by courts lacking familiarity with the issues of access and expression so central to federal copyright policy. Finally, if obviously, drafters should adhere to general precepts of fairness, completeness, and consistency.²⁶⁶

With regard to substantive issues, new drafters should reconsider several key concerns. Does the software-based licensing model provide a good fit for transactions in information other than software? Does the review-and-return model of term disclosure suit evolving commercial practices in information transactions? Should the law governing information transactions be medium neutral or should different regimes apply to information in analog and digital forms? In particular, new drafters must determine whether the scope of use rights must of necessity be different in analog and digital media or whether principles like fair use should be adapted to the digital environment.

Commentators have offered a number of proposals for reconciling UCITA with copyright and assuring more balanced treatment of providers and users. Suggestions include incorporation into UCITA of basic copyright exemptions and user privileges, required prepayment disclosure of terms, addition of a public interest unconscionability provision, and election between copyright and contract remedies.²⁶⁷ Without commenting upon the particular substantive provisions which might result from more representative processes, I would expect the results to be fairer, less divisive, and more acceptable to a broad spectrum of affected parties than the provisions recently produced by existing copyright and uniform law processes.

²⁶⁶ See Steven L. Schwarcz, *A Fundamental Inquiry Into the Statutory Rulemaking Process of Private Legislation*, 29 GA. L. REV. 909 (1995). Schwarcz suggests that constraints of clarity, flexibility, fairness, simplicity of implementation, consistency, and completeness should govern the uniform law process.

²⁶⁷ See McManis Letter, *supra* note 128, at 6-8 (summarizing several possible approaches).

CONCLUSION

UCITA, in its current form, is at best inconsistent with and at worst a direct threat to traditional copyright policies that attempt to balance the relative interests of information providers and information users. It parallels a recent trend in paracopyright legislation granting extensive control to providers, which suggests that reliance on traditional copyright rules as a source of protection for user rights may be a short-lived and ultimately unsuccessful strategy. Information industries have effectively captured the drafting processes for both UCITA and federal copyright law and even the enactment processes have proved responsive only to well-organized business interests. Consumers, authors, and other public interest groups have little positive input into such legislation, but are learning to exert negative pressure by aligning themselves with business users and with technology companies whose products service the consumer market. I have suggested that revision of the drafting processes to assure user representation would produce more even-handed legislation; active coordination of the processes would produce a more rational information policy that could be consistently implemented through contract. The likelihood of such revision or coordination admittedly looks slim in view of the susceptibility of both processes to interest group pressures and NCCUSL's historic aversion to involvement with federal legislation. However, in the absence of user representation and consistency between copyright and contract law, we can expect continued wrangling over the scope of control and use rights in information. That outcome will leave information providers without the uniformity and predictability they seek in information transactions, while threatening information users with unwelcome restrictions on their ability to access and use information.