

The politics of the Uniform Computer Information Transaction Act (UCITA) in digital information policy development

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Abstract

The political process behind the Uniform Computer Information Transaction Act (UCITA) and the implications for higher education are described. The negotiation, acquisition, and delivery of digital information to students and faculty are core services of academic libraries. UCITA is a proposed USA state contract law intended to regulate commercial transactions of intangible digital goods, such as computer software, online databases, and other digital information resources. UCITA may weaken the ability of libraries to negotiate balanced contracts. Group theory is used as a conceptual framework for explanation and analysis. Conclusions are: higher education institutions need to be aware of their role as economic entities in public policy formation, and librarians need to educate college and university administrators regarding the significance and institutional impact of digital information public policy.

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This article describes the political process behind the Uniform Computer Information Transaction Act (UCITA) and the implications for higher education. Group theory is used as a conceptual framework for explanation and analysis. Conclusions are drawn regarding the higher education community's responses to future public policy development.

Problem statement

The negotiation, acquisition, and delivery of digital information to students and faculty are core services of academic libraries. UCITA is a proposed USA state contract law intended to regulate commercial transactions of intangible digital goods, such as computer software, online databases, and other digital information resources. UCITA may weaken the ability of libraries to negotiate balanced contracts.

Research questions

- How does UCITA affect academic libraries and what are the implications for higher education?
- How can group theory inform one's understanding of the political process behind UCITA?
- How should the higher education community respond in the future to similar public policy initiatives?

Group theory

Group theory states that politics is the struggle among various groups to influence public policy (Dye, 2002). Public policy represents the equilibrium that results from group struggle and is determined by the "relative influence of any interest groups" (Dye, 2002, p. 21). Public policy moves in the direction of the groups with the most influence. Influence is considered in terms of group size, wealth, leadership, access to decision makers, and group cohesion. Equilibrium is maintained by overlapping group membership, multiple competing

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groups, and by a "latent group" (Dye, 2002, p. 22) that supports the prevailing system. Truman (1951) noted one could only explain an individual's involvement with public policy formation, either from within formal governmental structures or as part of groups external to formal government, "in terms of the interests with which he identifies himself and the groups with which he affiliates and with which he is confronted" (Truman, 1951, p. 502).

Although group theory is used to explain political behaviour, the theory is based on an economic paradigm. Olson (1965) addressed interest group behaviour in terms of formation around economic benefit. Individuals are motivated to act collectively if the results are "benefits that can be conferred upon contributors and withheld from noncontributors" (Moe, 1980, p. 4).

One explanation of group theory as an economic paradigm is:

Government activities are viewed as a process in which wealth or utility is redistributed among individuals and groups. Some individuals and groups are effective at organising and engaging in collective action such that they are able, for example, to organise for less than a \$1 in order to procure \$1 of wealth transfers. These individuals and groups are net demanders of transfers. Other individuals and groups are in the inverse position - it costs them more than a \$1 to avoid giving up a \$1. Rational behaviour dictates that this second group of individuals will be net "suppliers" of transfers. The institutional framework of representative democracy and its agents represent the means of facilitating wealth transfers, that is, of pairing demanders and "suppliers" efficiently. There exists an equilibrium level of transfers in this theory, with deviations being mitigated through elections (Tollison, 1998).

Case study

UCITA is designed to bring uniformity to a variety of USA state law provisions that govern digital information transactions through a paradigm of contract law rather than the traditional property-based copyright paradigm (Lide, 2000). UCITA was originally drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) as a new article, Article 2B, to the Uniform Commercial Code (UCC). The UCC has been adopted in almost all states and territories of the USA to ensure

consistent rules governing contract law among the states and territories.

NCCUSL serves "to draft proposals for uniform and model laws on subjects where uniformity is desirable and practicable, and work toward their enactment in legislatures" (Uniform Law Commissioners, 2002). NCCUSL was responsible for drafting the UCC. NCCUSL membership comprises commissioners (i.e. lawyers, judges, and law professors) appointed by the states, the District of Columbia, Puerto Rico, and the US Virgin Islands. Funding of NCCUSL comes from state contributions. ALI membership consists of legal professionals and educators from all areas of the USA and some foreign countries. *Ex officio* membership consists of "the Chief Justice and Associate Justices of the Supreme Court of the United States, the Chief Judges of each United States Court of Appeals, the Attorney General and Solicitor General of the United States, the Chief Justice or Chief Judge of the highest court of each state, law school deans, and the Presidents of the American Bar Association, each state bar association, and other prominent legal organisations" (American Law Institute, 2002).

In their attempts to modify the UCC to accommodate digital information transactions, NCCUSL and the ALI found it difficult to integrate information transactions (i.e. intangible goods) with the existing Article 2 of the UCC that regulates the sale of tangible goods. As a result, ALI withdrew its support from the effort. NCCUSL decided to rename the UCC Article 2B proposal as UCITA and pursue implementation as a stand-alone addition to each state's legal codes (American Library Association Washington Office, 2001a).

Overview

The format of UCITA matches that of the UCC Article 2. The nine parts are:

- (1) general provisions;
- (2) formation and terms;
- (3) construction;
- (4) warranties;
- (5) transfer of interests and rights;
- (6) performances;
- (7) breach of contract;
- (8) remedies; and
- (9) miscellaneous provisions.

UCITA is intended to provide a series of default rules as opposed to being regulatory code. The four stated purposes of UCITA are to:

- (1) support the full potential of digital information transactions;
- (2) clarify law;
- (3) enable expanding commercial practice; and
- (4) unify laws across jurisdictions.

The key element of UCITA is to frame digital information commerce as a contract action rather than a sale of goods (Neboyskey, 2000). Contract actions governing digital information transactions tend to create licensing agreements that grant the licensee (e.g. consumer) rights to use digital content whereas a sale of goods typically transfers ownership of a product from the seller to the buyer.

Some contend that UCITA would “unravel the fair use and first sale tenets that support and stabilise the free flow of information and equity of public access to knowledge” (Auld, 2000, p. 37). For libraries, UCITA raises the possibilities of limiting fair use, widening the digital divide so that information is only available to those who can afford it, and negatively affecting library budgets (Neal, 2000).

Supporters

Proponents of UCITA cite four major benefits to both information producers and consumers: standardisation, uniformity, innovation, and modernisation (Neboyskey, 2000). Legal experts in copyright licensing, software developers, the NCCUSL membership, and legal educators all support UCITA, claiming a desperate need for legal standards. Supporters contend that electronic commerce is restricted because it is subject to varying laws across the 50 states. Also, UCITA introduces new modern and creative ways of initiating contracts through “click-on contracts, mass market licenses, electronic agents, and electronic self-help” (Neboyskey, 2000, p. 809). The concept of electronic “self-help” permits the licensor to remotely disable digital information if a violation of the contract is suspected.

Organisations that support UCITA include: the Business Software Alliance, Digital

Commerce Coalition, Information Technology Association of America, Equipment Leasing Association of America, Software and Information Industry Association, Computer Software Industry Association, and Silicon Valley Software Industry Coalition (InfoWorld Media Group, 2001). In addition, Microsoft, America Online, and Network Solutions actively support UCITA.

Group theory can explain the motivation of UCITA supporters (i.e. software producers and Internet providers such as Microsoft and AOL). Economic gain is to be realised through the use of licenses to restrict and define the limits of access, distribution, and modification. An advantage of mass-market licenses is that the licensor can include contract terms without negotiation. Because contract licensing is not a sale of goods, but only a right to use, copyright fair use and consumer protection laws can be circumvented, thus giving the licensor tighter control over the use of the product.

Opponents

Those opposed to UCITA claim that it creates a bias towards software licensors who can determine contract conditions without negotiation. Library services, such as interlibrary loan, archiving, and preservation of digital information, will be threatened under UCITA. Mass-market licenses allow for onerous terms and open the possibility of restricting activities otherwise permitted under current federal law and state consumer protection acts. Finally, UCITA could “allow software licensors to include software code that could disable software or restrict its use. A software licensor could thus prevent access to its product for any breach of an agreement and avoid responsibility for damages” (American Library Association Washington Office, 2002a) that might result. In fact, the “Microsoft antitrust case underscores the problems posed by the Uniform Computer Information Transactions Act (UCITA)” because dominant software companies will be able to “impose onerous license terms on consumers and corporate licensees” (Association of Research Libraries, 1999).

The organisations opposing UCITA are numerous and include: Association for Computing Machinery, American Committee

for Interoperable Systems, American Library Association, Computer Professionals for Social Responsibility, Consumer Project on Technology, Consumers Union, Digital Future Coalition, Electronic Frontier Foundation, Free Software Foundation, Institute for Electrical and Electronics Engineers, National Writers Union, SHARE, an information technology users' group, Society for Information Management, and Software Engineering Institute (InfoWorld Media Group, 2001).

Chronology

NCCUSL passed UCITA on July 29, 1999. In August of that year, Oklahoma was the first state to hold public hearings on UCITA. The Virginia state legislature passed UCITA into law in February 2000, with a delayed implementation date of July 2001. The Maryland General Assembly passed UCITA in April 2000, but with several amendments (American Library Association Washington Office, 2001b). More recently, some states are enacting legislation to protect their citizens from UCITA terms. These bills, known as bomb-shelter provisions, are designed to protect one from being bound by licenses drafted under UCITA (American Library Association Washington Office, 2001c). In Ohio, House Bill 287 (HB287) was introduced on June 5, 2001 as an anti-UCITA bill. HB287 was immediately referred to the House Civil and Commercial Law Committee. Testimony before the Committee on February 13, 2002 had Scott Gilliam of the Cincinnati Insurance Companies testifying that "without passage, software vendors will be able to impose UCITA on Ohioans by simply including in the contract that issues must be settled in only states accepting UCITA" (Ohio General Assembly, 2002). The bill remains in Committee as of July 6, 2002. Here again, group theory suggests that spheres of influence will be maximised in an effort to overcome the current equilibrium of economic power relevant to the UCITA issue within states and territories.

Responding to extensive organised opposition to UCITA by numerous interest groups, NCCUSL held hearings and entertained 70 proposed amendments to UCITA. As a result, in December 2001,

NCCUSL proposed 19 amendments to UCITA. The American Library Association, the Association of Research Libraries, and the American Association of Law Libraries had recommended two amendments: "that terms in mass-marketed non-negotiated licenses would not be enforceable if they prohibited activities normally permissible under federal copyright law", and "to broaden the criteria for declaring contract terms unenforceable" (American Library Association Washington Office, 2002b). These two major library-related concerns were essentially ignored in the final set of amendments proposed by NCCUSL. In rejecting the library profession's stance on UCITA, NCCUSL (2001) commented that "state contract law under UCITA is simply not the appropriate venue to predetermine what protections if any should be placed on libraries in light of the issues that these changes create".

A coalition

Americans for Fair Electronic Commerce Transactions (AFFECT) represents interest groups that have come together around the single issue of opposing UCITA represent a diverse set of approximately 100 associations and corporations, including the American Library Association, Boeing, Caterpillar, Hartford Financial Services, the Health Insurance Association of America, and Walgreen. The AFFECT mission statement reads:

AFFECT, Americans for Fair Electronic Commerce Transactions, is a broad-based national coalition of consumers, retail and manufacturing businesses, insurers, technology professionals and librarians opposed to the Uniform Computer Information Transaction Act (UCITA). AFFECT has been dedicated to educating the public and policy makers about the dangers of UCITA. AFFECT members have been following UCITA for the past decade and the coalition has been involved in every state where UCITA has been legislatively active. AFFECT supports improvements in high-quality computer and information technology and the growth of fair and competitive markets in the United States and believes that UCITA is a dangerous, anti-competitive, anti-business, anti-consumer measure that will have a negative impact on the American economy and the development of electronic commerce and new technologies. (AFFECT, n.d.)

In May 2002, AFFECT issued a point-by-point response to NCCUSL's 19 UCITA

amendments. Such a detailed response demonstrates the advantages of such a broad-based coalition. Concerns surrounding consumer issues, library interests, technical problems, contractual disputes, and business practices were articulated collectively in one comprehensive report. In summary, AFFECT and all the industries and professional associations it represents concluded that UCITA proponents "have failed to justify the need for such a sweeping and complex law that still clearly favours the software and information industries" (AFFECT, 2002, p. 5).

Case summary

What then is the role of NCCUSL, a purportedly non-political entity, in this public policy process? The following best illustrates how UCITA as public policy represents competition between interest groups:

UCITA is supported by Big Money in the software, Internet and banking industries. On the other side of the fight is Big Money in the entertainment, communications and publishing industries. Carlyle Ring Jr, chair of the UCITA drafting committee, says that NCCUSL is caught in the middle: "We are in the unenviable position of being between titans" (Allison, 1999).

NCCUSL has proposed UCITA in order to bring uniformity to a variety of state law provisions that govern digital information transactions by invoking contract law rather than relying on traditional copyright laws. UCITA is supported by software producers and opposed by a wide coalition of information consumers, including academic libraries and university presses. Only two states have attempted to enact UCITA while other states have introduced legislation to negate UCITA's impact. Responding to criticisms from interest groups, NCCUSL recently proposed 19 amendments for UCITA. These amendments have been criticised by a large coalition of corporations and professional associations known as AFFECT. UCITA represents a public policy battle between a small but extremely influential and powerful group of software producers and network providers and a wide-ranging group of information clients.

UCITA opponents, although numerous, have experienced difficulty in making UCITA

disappear from the NCCUSL agenda.

Enough pressure, especially from the American Bar Association, was brought to the controversial issue to trigger NCCUSL to draft the December 2001 amendment proposals, but even those attempts failed to appease UCITA opposition forces. NCCUSL is expected to proceed with UCITA once the proposed amendments are approved by the full membership in summer of 2002.

NCCUSL proceeds with UCITA in the belief that in the absence of a uniform act, software producers and Internet providers will lobby the US Congress directly for federal laws that will create consistent rules governing the contract licensing of digital information.

However, opponents have been successful, with a few exceptions, at keeping UCITA a low priority on the legislative agendas of the states and territories through grassroots efforts within each geographical entity.

Group theory would indicate the current state of UCITA as public policy is the result of both NCCUSL and legislative bodies responding to pressures from interest groups. The large software producers and Internet providers such as Microsoft and AOL approach the issue on the federal level through NCCUSL. Opponents are better positioned to apply pressures within their respective state and territorial legislative units. The result is the current equilibrium of UCITA as public policy in only a few states. UCITA continues to move forward with NCCUSL due to an uneven balance of influence at that level. At this point, it is not likely that NCCUSL will abandon pursuing UCITA to full implementation (i.e. enacted in all states and territories). Therefore, any change in the relative influence at the state and territorial legislative level can be expected to alter the chances for successful passage of UCITA. If supporters gain influence at the state and territorial level, then UCITA may become widespread public policy. If opponents of UCITA gain influence, more anti-UCITA bills may pass:

What may be called public policy is actually the equilibrium reached in the group struggle at any given moment, and it represents a balance which the contending factions of groups constantly strive to weigh in their favour. In this process, it is clear that blocks of groups can be defeated . . . The entire process is dynamic, not static; fluid, not fixed. Today's losers may be tomorrow's winners (Latham, 1956, p. 239).

Conclusions

A group theory analysis of the processes behind the debate surrounding UCITA reveals diverse interest groups can form unexpected coalitions when common political interests converge on policy issues. In this case, academics, insurance companies, heavy equipment manufacturers, and the entertainment industry joined into a coalition to prevent a state-by-state enactment of legislation widely opposed by these groups.

The higher education community should look to the AFFECT coalition as an example of the benefit gained from forming non-traditional alliances in order to create a plurality of interests around a given public policy. Educational institutions and their libraries "routinely negotiate contracts, and spend billions of dollars each year, for software, books and other information products" (American Library Association Washington Office, 2000). On copyright issues related to the balance between the free flow of information in a democracy and the necessary protections for capitalism, educational institutions are not alone in their concerns to see federally granted rights and privileges maintained. Unfortunately, on reviewing the full membership list of AFFECT, one will notice the absence of higher education associations. Perhaps this indicates a lack of understanding of the potential impact of UCITA on the academic institution or the perception that UCITA is only a library issue. Higher education institutions need to be aware of their role as economic entities in public policy formation. Librarians need to educate college and university administrators with regard to the significance and institutional impact of public policy such as UCITA; information policies that may not be perceived initially as being relevant to the institution. Moreover, the wide coalition membership reflected in AFFECT could serve to establish useful relationships as other policy issues come forward. For example, federal health care legislation would call for similar coalitions of diverse interest groups.

Group theory suggests that in the digital information age, interest groups (i.e. information providers) will seek to expand their economic advantage through more restrictive public policies regarding the flow and control of information as a commodity.

Other interest groups (i.e. information consumers) will seek to maximise their economic advantage by gaining greater access and rights to information resources. Resulting public policy will reflect an equilibrium between the opposing forces at any given point in time and will be subject to change when the balance of influence shifts. As a result, information consumers such as librarians and higher education administrators need to remain vigilant and actively seek to build political coalitions.

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