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To: FTC.SERIUS("software-comments@ftc.gov")
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Subject: High-Tech Warranty Project -- Comment, P994413

Before I start answering some of the questions posed by the Forum request for comments, I would like to thank the Commission for recognizing the limbo in which software licensing currently resides. Almost all programs "sold" to consumers today are in fact written as licenses. Most consumers ignore these "shrinkwrap" licenses, and in fact have no recourse once the license is purchased - it is hard to return opened software. Tech-savvy users in the industry also tend to ignore these licenses, because they have been told that the terms are un-enforceable; however, this appears to be changing with the gradual introduction of UCITA (formerly UCC 2B). Although the current state of licensing is not detrimental to most consumers, the future appears to be bleak for the rights of people caught in this tangle.

You asked the following questions (which I have answered in-line):

> General
>
>1. What warranty protections exist for consumers who purchase software
> and other computer information products and services?

Most shrinkwrap and clickwrap licenses disclaim all express and implied warranties. Online services such as banking and purchasing for the most part do not currently prominently display any warranty disclaimers except when attention has been placed upon the site by external agency; they fault of these agencies is limited in that they are often under pressure to build a functional site in a timeframe dictated by a rapidly progressing field.

If a warranty exists, it is usually limited to a period of paid technical support defined under the terms of the license; this is usually true only of high-end commercial products.

>2. What expectations do consumers have about reliability of software
> and other computer information products and services?
> Are these expectations met?

Consumers initially entering into the world of computers often have high expectations for the reliability and functionality of software. Most realize after some time that software is not as reliable (bug-free) as they would like, but in most cases the software still fulfills its

functionality promises. However, this is not always true, and often the software manufacturer often charges more money for the upgrades which provide the functionality implied by the earlier version.

>3. What remedies are typically available to consumers if software or
> another computer information product or service fails to perform
> as the consumer expected?
> a. What warranty remedies are available to purchasers of such products
> and services?
> b. What remedies are supplied by state or federal law?
> c. Do consumers seek to invoke these remedies, and if so, how often
> are they successful?

Most software licenses limit remedies to a refund of the price of the software (which also terminates the user's license - in essence, a buyback of the software). In instances where the license does provide remedy, those remedies are almost always designated by the licenses to a specific jurisdiction and/or mediation procedure. In some instances obtaining a remedy is even more difficult. For example, Microsoft Windows operating systems on new computers: although you receive and must follow the terms of the Microsoft license, the terms of that license dictate that the computer manufacturer - not Microsoft - is the licensor and responsible for all remediation. This clause exists in several other packages as well.

The consumer can of course file a complaint with his or her state consumer affairs bureau, which can choose to act on the complaint in accordance with their Consumer Protection Act (or equivalent); however, due to the limbo in which these licenses exist, such a remedy is not guaranteed. Consequently, I do not believe that many consumers avail themselves of either the express remedies of the licenses or of the state/federal procedures in place for generalized consumer complaints.

>4. Are consumers able to comparison shop for different computer
> information products or services based on the terms of warranty
> coverage?
> Are consumers interested in doing so?
> Do manufacturers or sellers of software and other computer
> information products and services compete with each other
> on the basis of warranty coverage?

The answer to this is "no, no, and no". Since licenses for shrinkwrap software are generally included inside the package, consumers may not currently compare terms of warranties. Additionally, unless the license terms can be clearly seperated from any warranty terms, the consumer

will probably continue to ignore such text, even if it is placed on the outside of the box - it's just too long and technical. Manufacturers compete on sales only under conditions where the other terms of the license (redistribution, derivation, etc.) are important to the work of the buyer; this tends to occur only on high-end software where the competition is otherwise on equal footing (i.e. not very often at all).

>5. Do the current protections encourage efficiency in the timing,
> selection, and amount of detail in information conveyed to
> consumers?

Only in that consumers do not get to examine any detail until after their purchase has been made, and therefore do not waste time reading endless lines of license on each package before deciding which product to purchase.

>6. Do existing laws and industry practices protect consumers in
> the event that software and other computer information products
> or services are defective?
> How often does this occur?

There is no reason that existing consumer laws could not apply to computer software or services. AOL was in fact fined for lack of service some years back under these statutes. However, my opinion is that many software firms hide between the legalities of software as a Copyright object (you can't really complain about a crappy book) and software as a functional object (subject to "rental" terms and other restrictions otherwise prohibitted by Copyright). Also there is a tendency to hide behind the "software isn't perfect" disclaimer. Therefore, few actual instances of remediation actually take place, and most are outside of existing law.

>7. What developments are underway by private or public entities
> at the international, national, state, or local levels that
> would have an impact on consumers's rights in the context of
> transactions involving software or other computer information
> products and services?

> a. How would the proposed Uniform Computer Information Transactions
> Act (UCITA) affect consumers?

UCITA would be a horrible blow to consumer rights as currently written. Among other things:

* It legalizes the terms in post-purchase shrinkwrap/clickwrap

licenses, no matter how silly they may be.
* It allows the publisher access to personal property (PCs) in order to control/disable the software purchased by the consumer.
* It criminalizes the act of observing or reverse-engineering software in all cases, contrary to Copyright law. (The user would be performing an illegal act in determining that the software being used was spying on him.)
* It acknowledges that the consumer does not in fact own his copy of the software (as is appropriate under Copyright law), but is merely licensing it.

> b. What role, if any, would be appropriate for the federal government
> with respect to protecting consumers who purchase software or
> other computer information products and services?
> What role, if any, would be appropriate for state and local
> government? Consumer groups? Private industry?

Since it appears that the courts have not yet received a case on which to rule on these matters, I would suggest that the FTC or Congress act to clarify the applicability of the Warranty Act to computer software and services. Additionally, Congress needs to act to clarify the status of software licensing, as it is related to Copyright and therefore in the federal jurisdiction. State governments may also act along the lines of UCITA, if UCITA were thrown out and replaced with something reasonable.

> c. Are there international developments prompting uniformity of
> software or other computer information products and services?

The EU appears to be the major force in the development of uniform software practices. I know of the following items:

* Prohibition against periodic licensing: Many high-end software packages in this country are licensed for periods (normally yearly) after which they cease to function. Under EU law, software must be sold as permanently functional, although maintenance contracts for that software may still be written on a periodic basis.

* Privacy guidelines: The EU has strict data privacy guidelines with regards to personal information. This policy is in direct conflict with the apparent goals of many US-based information services. Additionally, it appears that this policy may be counter to recent bankruptcy proceedings allowing the sale of collected information to offset debt.

* ISO9001 standardization: The EU requires all companies doing business

in the EU to be ISO process certified. There appears to be an exemption for non-profit groups such as the free software movement.

US companies are likely to/have already run against these policies. The licensing and privacy statutes are definitely models to which the US should look for leadership (having been through the ISO process twice, I believe it is less functional than it purports, and therefore less critical from a US policy perspective).

>Effect of Mass Market Licenses on Warranty Protection

>8. What is the impact of characterizing a mass-market software
> transaction as a license as opposed to a sale of goods?
> a. What is the rationale for such a characterization?

The only rationale which makes any sense is that under a license scheme, the consumer is merely using the publisher's product, rather than owning a copy.

> b. What are the legal implications of this characterization?

* The obvious: the ability to revoke the license. This may be used both in an offensive manner (if you don't * I'll revoke your license) and in a defensive manner (they may find something out soon, better revoke their license before they do).
* There is the possibility that a software firm could choose to express the software product as a service instead of a product in a legal proceeding; the ambiguity around a license may allow that.
* Licenses are also an attempt to bypass Copyright user rights.

> c. How does this affect consumers?
> d. To what extent, if any, should software transactions be treated
> differently from transactions involving other intellectual
> property, such as the sale of compact discs, videocassettes, and
> printed books?

None, except to the extent that a software product also provides functionality and thus needs to be subjected to consumer rights regarding functional products. Also note that the motion picture industry will be watching this forum closely; DVDs are distributed under licensing terms rather than under Copyright Act rights, and any expansion of licensing powers to the software industry will be claimed by the motion picture companies (this has already occurred in the guise of the DMCA, which according to Judge Kaplan's interpretation the other

week prohibits fair use, uninhibited access, etc.).

I suppose this is as good a time as any to note the additional problem of the US Patent Office issuing software patents. Because of the dual nature of computer code, software publishers are racing towards the strongest legal protections they can find for their code, while running away from the legal burdens under which that same protection would place them. In my opinion, the USPTO has been issuing many patents on obvious software concepts - I'm sure that by now I have violated someone's software patent in my day-to-day work. UCITA, the DMCA, patents, and most software licenses attempt to complicate this situation in ways the drafters of the Copyright and Patent laws could not contemplate. A concise definition needs to be made which protects consumers and programmers from the forced consolidation of IP into a small number of wealthy companies able to affect legal rulings and obtain IP rights.

> e. Are some types of products involving intellectual property better
> suited to be distributed to consumers in license transactions as
> opposed to a sale of goods? Why?

Only in instances where a temporary service is implied. IP is defined in the Constitution as a temporary grant to the IP creator, to be used in promoting public advancement of IP. In the event that IP is licensed, it should be denied Copyright or Patent protection, but rather be placed under Trade Secret law; under such circumstances, I would guess that publishers would prefer the stronger but more limited-term protection of Copyright.

>9. To what extent, if any, do mass market licenses for software
> typically create express warranties?

Most licenses specifically deny express warranties except under the terms of a support contract.

>10. To what extent, if any, do implied warranties arise in the context
> of mass market licenses for software?

Most licenses also attempt to deny any implied or state-imposed warranties except where the law explicitly demands them.

>11. To what extent, if any, do mass market licenses for software
> typically disclaim express or implied warranties?

See above - almost all the time unless the product is meant for a critical function (nuclear reactor control software, etc.)

>12.How are consumers affected by the use of "shrinkwrap" or "clickwrap"
licenses in mass market purchases of software?
> a. How are these licenses treated under existing law - that is, to
> what extent are these licenses enforceable?
> b. What types of terms are typically included in a software license?
> c. What types license of terms are beneficial to consumers?
> What types of terms may cause consumer harm?
> What legal recourse do consumers have in such circumstances?

The enforceability of shrinkwrap licenses is almost an urban legend. The common view appears to be that they are largely unenforceable due to clauses in state UCC codes which prohibit post-sale terms of contract.

As for the terms typically included:

* Prohibition against reverse-engineering, sniffing, or otherwise dissecting the code or operation of software. Copyright law allows reverse-engineering for compatability or research (though the DMCA ruling the other week may change this fact for the worse).
* Prohibition against resale. Copyright law allows the puchaser to sell his copy of a work to another.
* Prohibition against review. Many software packages include terms prohibiting benchmarking or other review without the permission of the publisher.
* License revocation. Although the terms differ between packages, most licenses have a revocation clause. Such clauses almost never include re-imbursement terms. UCITA would add to this problem by allowing publishers access to personal computer resources to disable a software package remotely, without the prior knowledge of the customer.
* Disclaimer of fitness and reliability. Most licenses present software "as-is" with no guarantees as to product effectiveness or reliability. For software provided gratis (e.g. Open Source software contributed by the community), this is a necessary clause - this development method would fail without it. However, for commercial code, some level of accountability is expected (and this goes for commercial distributions of Open Source software as well, in my opinion). It cannot be reasonably expected that software be bug-free; however, with an exchange of money one would expect that some level of support be given. This is not normally true in the software industry - normally, customers must pay a further fee to access customer support, and sometimes pay an upgrade fee to correct bugs in the program. This practice needs to be carefully reviewed; most consumer products are subject to "lemon laws" and enforced recalls, and consumers expect this from all

of the products they purchase.

> d. To what extent are the terms of shrinkwrap or clickwrap licenses
> currently available to interested consumers prior to purchase?

Almost never.

> e. What is the impact of license terms mandating certain types of
> alternative dispute resolution, such as arbitration?
> How frequently, if at all, are such terms enforced by licensors?

Due to the current legal limbo of shrinkwrap licenses, there may not be any current examples of dispute resolution to survey, and I have not heard of any such enforcement efforts.

> f. Do shrinkwrap or clickwrap licences discourage firms from competing
> on the basis of licensing terms? If so, which terms would be more
> likely to change if there were full prior sale disclosure? Why?

If consumers actually read through the multiple-page agreements which usually comprise a shrinkwrap agreement, then some of these terms *might* change. However, because they all seem to be designed around a similar template, it might be difficult to find an alternate license with less-restrictive terms.

>13. What role, if any, does the Magnuson-Moss Warranty Act play in the
> marketing, sale, or licensing of software or other computer
> information products or services to consumers?
> a. Is it appropriate that software be treated as a "consumer product"
> subject to the Act?
> b. Is it appropriate that software be treated as "tangible personal
> property" subject to the Act?
> c. Is it appropriate for the typical consumer transaction to acquire
> software to be treated as a "sale" of software subject to the Act?
> d. Is it appropriate that software licenses be treated as a
> "warranties" subject to the Act?

As I noted above, the Warranty Act *should* apply to software; however, a clear statement needs to be made as to the exact status of software with respect to consumer rights. Software is sold as a consumer product, and as such should be expected to behave as a consumer product. It is also subject to Copyright law according to traditional interpretation, and therefore subject to personal property law appropriate to books, music, and video. These two statements lead to the conclusion that software should be sold - certainly the consumer

thinks she is buying the software when she picks it off of a shelf. As currently written, software licenses are a combination of Copyright restrictions (legal), warranty statements (legal and subject to the Act), and pure wishful thinking on the part of the publisher (illegal).

To clarify these terms to the consumer:

* Warranty information needs to be placed on the outside of the box in accordance with the Act.
* Copyright restrictions do not need this placement - any grants given to the purchaser beyond those granted by the Copyright act are not expected by the purchaser. These terms *do* need to be disclosed before purchases by a business intending to use the software as a basis for further development (i.e. open source licenses or purchase of proprietary code source for further development).
* Terms which violate Warranty or Copyright law, and those which are just fanciful (remote revocation of license, etc.) need to be removed from the license/warranty terms; failure to do so should result in penalties under these laws.

>Future Trends: High-Tech Legal Theories in the Low-Tech Marketplace

>14. Recent proposed revisions to UCC Article 2 (sale of goods) suggest
> that post-sale disclosure of terms may become acceptable in the
> sale of goods context. What would be the costs and benefits of
> applying a licensing model to goods covered by UCC Article 2?
> Does this suggest the importation of a licensing model into such
> sales of goods? If so, what effect, if any, will this have on
> consumers?

I do not believe the licensing model has no place in this world, but such terms need to be disclosed in big, bold, isolated text prominently displayed: "This package contains a license to use the product and does not confer ownership of a copy of the product." If so, complete licensing terms also need to appear in understandable text on the outside of the box. However, I do not believe that most software packages need to fall under this category; software companies have been inventing new terms of sale under the current lack of standards for some time, and I believe that it would be best for the consumer to force mass-market software sales into a "sale" method rather than a "license" method. Software publishers have not gained any extra protection against consumer misuse by the shrinkwrap license scheme, and would not lose any if their products were sold in the same light as videos or books.

>Public Forum

>15. What should be the primary focus and scope of the Commission's
> initial public forum on "Warranty Protection for High-Tech
> Products and Services?"

* Definition of the terms of software sales/licening
* Repudiation of UCITA - it is already passed in two states, and needs to
be stopped before severe damage is done to consumer rights
* Enforcement of external labelling of warranty terms

>16. Which interests should be represented at the Commission's
> initial public forum on "Warranty Protection for High-Tech
> Products and Services?"

* Consumer rights - this is mostly about the consumer
* Computer programmers and administrators - they often have different uses for programs, and have a different level of understanding
* Software publishers - although I believe that their ways must change, they also need to be a part of the discussion. They should not be a majority of the group.
* State government - UCITA and the UCC in general are under their control
* Congress - some of this likely needs to be made into law

In summary, I congratulate the FTC for looking into this matter. The software industry and the computer profession in general tend to want as little to do with government as possible. However, it is exactly this lack of government interest which has lead us to this point. If UCITA is allowed to become law in the fifty states, and if clarifications to the terms of sale of software are not made, the consumer will have very limited recourse to recover damages from poorly-designed software or computer services in the future. And it seems likely that if the current trend in software licenses is allowed to continue, then the movie (and eventually audio and print) industries is likely to move under the blanket of protection afforded to software firms. After all, a DVD recording is not too far from a computer program, and book publishers are already looking towards limiting the lifespan of on-line materials through programming - we cannot afford a further erosion of consumer's IP rights. Also, more and more consumer devices contain complex programming in many of the mechanisms employed (e.g. car engines) - should we allow these devices to also fall under the license

scheme currently used by the software industry? Please stop this before it goes too far.

Thank you,

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Les Barstow | e-mail: lbarstow@vr1.com
System Administrator |
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