Draft Manuscript, forthcoming 2001 in the Wayne Law Review, Symposium on Unfairness and the Internet, submitted to the Federal Trade Commission on September 11, 2000.

Reference: High-Tech Warranty ProjectBComment, P994413.

[Parts of this manuscript are still in very rough form and will be revised significantly prior to publication in the Wayne Law Review.]

Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice

By Jean Braucher[*]

Introduction

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Timely, effective disclosure of the important terms of a deal is essential to prevent deception and make possible a working, competitive marketplace in which customers can shop before they make a choice of a product or service. In the information age, disclosure is cheaper than ever and could be more effective, too, using the interactive, vivid communication that is possible on line. Ironically, however, some of the biggest players in the Ainformation economy@ are trying to create a legal culture in which it is permissible to hold back important information about transactions until after customers pay. The principle of timely disclosure is under assault as a matter of industry practice,[1] in some recent case law[2] and in the Uniform Computer Information Transactions Act (UCITA).[3] The marketing practice of holding back terms in Internet transactions is most in evidence in the software industry, where disclosure is often delayed until after payment by credit card. In a survey of the 100 largest U.S. personal computer software

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[1] See text at note 4 infra referring to a survey by the author and a research assistant, described in Part IIIC2 infra.

[2] See ProCD, Inc. v. Zeidenberg, 86 F. 3d 1447 1454 (7th Cir. 1996); Hill v. Gateway 2000, Inc., 105 F. 3d 1147 (7th Cir. 1997); and M. A. Mortensen Co. v. Timberline Software Corporation, 998 P.2d 305 (2000).

[3] See UCITA, July-August 2000 NCCUSL annual meeting draft, as further amended on the floor. See http://www.law.upenn.edu/bll/ulc/ulc_frame.htm.

companies, the author and her research assistant found that 87.5 percent of those that engaged in Web transactions (56 out of the 64 that took orders on line) did not make pre-transaction disclosure of their terms, indicating prevalence of the practice.[4] Delayed disclosure is closely analogous to the deceptive practice of Abait and switch@ in its economic impactBwhich is to burden shopping heavily and thus thwart consumer efforts to find and make the best buy.[5]

Effectiveness of disclosure on the Web is also a big problem. Those businesses that do post their terms on line often use this medium to make standard forms harder to find, longer, and less readable. To reach terms on a Web site, a consumer usually has to click on a button, uninvitingly labeled Alegal@ or Aterms and conditions@ and obscurely placed, for example at the very bottom of a long Web page. Assuming the customer clicks, the terms are often presented in multi-page scroll-down formats with unreadable paragraphs of block letters and incomprehensible legalese.

[4] See Part IIIC2 infra for a description of the survey.

[5] See Part IIIA infra.

This article develops the position that marketing products to consumers on line without effectively communicating important terms before payment is both unfair and deceptive, in violation of the Federal Trade Commission Act[6] and also the states' little FTC Acts, also known as unfair and deceptive act and practice statutes (UDAPs).[7] The state UDAP theory, which typically brings with it a private right of action as well as enforcement by a state official (usually the attorney general), is a sound one as applied to consumer transactions everywhere. Some state UDAP statutes also cover business-to-business transactions.[8]

6 See 15 U.S.C. sec. 45.

7 See Jonathan Sheldon, Unfair and Deceptive Acts and Practices (1991), at Appendix A at 527 and 1994 Supp. Appendix A at 228 (digesting state statutes).

8 See Tex. Bus. & Com. Code Ann. Sec 17.41 (Vernon) and Sherman Simon Enter. V. Lorac Service Corp., 724 S.W. 2d 13 (Texas 1987). Check also Illinois, Idaho, New Jersey.

Because the businesses resisting timely disclosure have carried on their campaign by means of commercial law statutes and commercial law litigation, they have not succeeded in removing the important legal checks provided by the FTC Act and the state UDAP statutes. The primary examples of the nascent trend toward permitting delayed disclosure (one that deserves to be nipped in the bud) are the Seventh Circuit=s Hill v. Gateway[9] decision and UCITA, promulgated by the National Conference of Commissioners on Uniform State Law (NCCUSL) in 1999. UCITA was enacted in two states, Virginia and Maryland, in the first half of 2000.[10] Neither *Hill*, based on state contract and commercial law, or UCITA, a state statute, can override the FTC Act. And neither does override state UDAP statutes, as will be explained more fully in Part IV below. A third flank in the attack on timely disclosure has so far been waged to a draw in the Revised Article 2 drafting process.[11] The unfairness and deception causes of action are independent of contract or commercial law. Whether terms were or were not agreed to so as to be part of a contract, [12] a business may have committed an unfair and deceptive practice.[13] Thus, businesses would be unwise to rely either on case law deciding contract and commercial law questions or on UCITA to conclude that it is safe to hold back important terms until after

[9] See Hill v. Gateway 2000, Inc., 105 F. 3d 1147 (7th Cir. 1997).

[10] Cite Va. and Md. UCITA.

[11] See infra notes 80-85.

[12] See James J. White, Autistic Contracts, 45 Wayne L. Rev. 1693 (2000) (focusing on when a traditional contract ritual should be required for assent to terms in contract and commercial law, but not on the problem of delayed disclosure and issues under UDAP statutes).

[13] See Stewart Macaulay, Bambi Meets Godzilla: Reflections on Contracts Scholarship and Teaching v. State Unfair and Deceptive Trade Practices and Consumer Protection Statutes, 26 Hous. L. Rev. 1 (1989) (noting the tendency of contracts teaching and research to downplay the importance of statutes that displace the role of contract law).

customers pay.

In choosing to focus here on transactions entered into on line, I do not mean to suggest that delayed disclosure of terms is permissible in transactions made by other means, whether in person, on the telephone or through the mail. My argument, rather, is that because timely disclosure is so easy and cheap in electronic commerce, easier even than in face-to-face transactions, delayed disclosure in this setting is the clearest case of a violation of the FTC Act and the applicable state UDAP law. Because the case is so easy to make and the harm to consumer welfare so clear, a good place to focus federal and state enforcement resources and private UDAP challenges would be in cases where Internet merchants adopt a practice of failing to disclose important terms, including transfer and use restrictions, warranty disclaimers and limited remedies, in a timely and effective manner. Beyond enforcement, regulations to require appropriate disclosures would be desirable.

Part I. The Importance of Form and Substance

My concern in this article is primarily with formBthat is, with delayed disclosure and ineffective disclosure. This concern is currently unfashionable on both sides of the debate about consumer law. Consumer advocates are uniformly skeptical about the efficacy of disclosure regulation. They want substantive regulation, and they are particularly reluctant to trade away substantive regulation for mere disclosure.[14] I share their skepticism and agree that disclosure is

[14] See Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976) (describing the interplay of efficiency and paternalism rationales in contract and other private law).

often not enough, but I believe we need regulation of form as well as substance and should not give up on either.

Why does form matter? It bears stressing that the importance of pre-transaction disclosure of terms is not that it allows bargaining. Mass-produced contracts, where terms are nonnegotiable, are inevitable in mass-marketing. Rather than bargaining, it is shopping that provides market discipline in a mass market. The trouble with delayed disclosure is that it inhibits shopping, making it an anti-competitive practice as well as one that is deceptive and unfair. When terms are held back until after the customer pays and takes delivery, even if the customer has a right of return, there is a huge impediment to shopping. To find the best deal, a customer would have to engage in repetitive purchases, undoing one at a time and then searching for a better one, not knowing if the deal just reversed is the best available. To use economic terminology, delayed disclosure increases transaction costs dramatically. It makes shopping for the best terms so difficult that it is likely to reduce it to the vanishing point. Furthermore, delayed disclosure often goes hand in hand with merchant decisions not to compete. If merchants decide not to compete concerning certain terms (for example, if they decide to offer no warranty, as is often the case with software), they have every incentive to hold back that information until after payment so as not to drive away customers.

From industry representatives and academics retained by them,[15] one hears an initially similar argument to that of some consumer advocatesBthat pre-transaction disclosure is

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[15] See March 1999 letters from Professors Douglas G. Baird, Alan Schwartz, Randy E. Barnett, Clayton P. Gillette, Peter Alces, and Hal S. Scott, submitted to the Revised Article 2 Drafting Committee by William M. Elliott, general counsel of Gateway 2000, Inc., along with his own letter (copies available on request from the author, who received these letters as a then-member of the Revised Article 2A Drafting Committee).

unimportant. The gist of this side of the argument is that consumers understand that there will be terms in the box and that they could request them if they wanted to, but consumers choose to take their chances and proceed without reading the terms.[16] Of course it is true that most consumers do not read terms, but even a small percentage doing so and shopping for the best ones can introduce some market policing, because sellers do not want to lose the segment of the market that does shop. But let us assume for a moment that the industry argument is sound and that no one reads form contract terms or engages in shopping to avoid the worst of them. The logical implication of this line of argument is that we need more aggressive substantive regulation to correct for market failure.[17] But the opponents of disclosure oppose increased substantive review, too.[18]

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[16] See letters cited supra at note 15 (especially letter from William M. Elliott).

[17] See Jean Braucher, Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission, 68 B.U.L. Rev. 349, 365-368, 395-397 (1998) (discussing the reasons for market failure concerning complex, contingent terms in consumer contracts and the need for substantive policing as a corrective).

[18] See letters cited in note 15, supra.

To achieve both efficiency and fairness, we need timely disclosure of standard form terms *and* substantive checks on them, both as a matter of general contract law and consumer protection law, with the latter providing usable remedies in consumer transactions. Consumer protection laws have as a primary focus making enforcement and redress feasible in transactions involving small dollar amounts, by providing for public enforcement and private rights of action enhanced by remedial features such as attorneys fees, multiple damages, class actions, and the like.[19] In business to business standard form deals, pre-transaction disclosure of terms will usually be sufficient to permit market forces to police over-aggressive drafting, because shopping over terms with understanding of their implications is more common, although still far from universal. This is why, as a matter of policy, contract and commercial law should not routinely enforce key terms that have been held back until after consummation of a deal. Good faith modifications, agreed to by both parties and based on changed circumstances, would be an exception. In consumer transactions, disclosure may not be enough, but it should be retained as our first resort because it is the least interventionist approach.[20]

Though a weak tool in consumer transactions, disclosure is not worthless because it deters some of the most egregiously overzealous contract drafting and gives consumers a first line of defense to avoid a bad deal. Important contract terms need to be available before a consumer becomes psychologically committed, which at the latest means before paying. A New Yorker cartoon recently captured what is wrong with delayed disclosureBas well as the cultural resistance

[19] See Edward L. Rubin, The Code, the Consumer, and the Institutional Structure of the Common Law, 75 Wash. U. L. Q. 11 (1997).

[20] See William C. Whitford, The Functions of Disclosure Regulation in Consumer Transactions, 1973 Wis. L. Rev. 400, 470.

to it-- in a cartoon showing a bedroom scene, in which a man is unbuttoning a woman=s dress while she says, ABy breaking the seal on this dress, you accept the terms and conditions printed on my panties.@[21]

[21] See The New Yorker, p. 50, April 3, 2000.

Disclosure regulation is particularly likely to help foster competition in oligopolistic markets. Professor Whitford has described the dynamics of these markets and the effect of disclosure requirements on them.[22] Where there are only a few competitors, something that is true for a number of types of software products, producers can keep informed of each other's activities and adjust to avoid competitive disadvantage. As a result, no company can achieve an edge. Producers will know that advantageous terms that they offer to customers will be matched, so that they will get no competitive advantage. Where producers for this reason make parallel decisions not to compete, they also are likely to withhold information about the disadvantageous terms they offer because, if disclosed, these terms would convince some consumers not to make any purchase.[23]

These dynamics help to explain the lack of development of alternative choices of terms as well as the lack of voluntary disclosure in software markets. For example, in the software industry, it is common for companies to give no warranty, express or implied. Software companies that give no warranty have every incentive not to disclose that fact in advance, because disclosure might cause many consumers not to make purchases at all, shrinking the market.[24] So

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[22] See Whitford, supra note 20, at 429-430.

[23] See id.

[24] See Whitford, supra note 20, at 428, n. 100 (noting that even in competitive markets

we find a lack of warranty competition, and efforts to avoid communicating effectively with consumers to let them know they will get no warranty.

Even assuming pre-transaction disclosure, market policing of many form terms will remain too weak in consumer transactions. Shopping over salient aspects of dealsBprice and product features--is often robust in consumer markets. These elements of transactions grab consumer attention easily. Shopping is often much less common when it comes to contingent terms such as warranties, remedies, dispute forum or other terms that only matter if something goes wrong with a purchase and that are therefore secondary concerns to consumers. Use of legalese adds to the problem but can be fixed in some instances. Few consumers have any idea of the meaning of the phrases Aimplied warranty of merchantability@or Aconsequential damages,@ but these terms could be translated into plain English: AWe don=t promise that this product is fit for ordinary use,@ or AIf this product does not work as promised, we will not compensate you for lost use or damage to other property.@

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there is a disincentive to disclose information that would tend to make the product less desirable. Applied to software, this means that if all software companies decides not to offer warranties, then none of them will want to disclose that fact and will seek to bury their disclaimers, for example by holding them back until after customers have paid.)

For more obscure and complex concepts, however, effective disclosure may be impossible. A good example of a term with implications too complicated for consumers to evaluate is mandatory arbitration.[25] Another is cross-collateralization with pro rata attribution of payments, so that a balance will remain on all purchases until all are repaid in full.[26] In such cases, substantive regulation is necessary to address market failure and the consequent temptation to form drafters to load up on nasty terms.

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[25] See Jean Sternlight, Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration, 74 Wash. U. L. Q. 637, 676 (1996) (noting that even if a consumer reads an arbitration clause, the consumer is likely to lack the legal sophistication to understand its significance, such as the long odds against winning an appeal and the disadvantages of the limited discovery permitted in arbitration).

[26] See Williams v. Walker-Thomas, 350 F. 2d 445 (D.C. Cir. 1965). The final FTC Credit Practices Rule did not ban this practice. See 16 C.F.R. section 444. The proposed rule would have made it an unfair practice. See Credit Practices, Proposed Trade Regulation Rule, 40 Fed. Reg. 16,347 (proposed April 11, 1975). State law, however, sometimes requires application of payments to the first transaction made when debts are cross-collateralized. See e.g. Uniform Consumer Credit Code, Section 3.303 (1974).

Both the common law of contract and commercial law provide some mechanisms for substantive regulation. Karl Llewellyn popularized the idea that the assent a customer gives to a form contract is Aa blanket assent (not a specific assent) to any not unreasonable or indecent terms....@[27] This idea avoids the fantasy that contract parties fully assent to boilerplate. Llewellyn explained, AInstead of thinking about >assent= to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all.@

Llewellyn wanted courts to confront unfairness directly, for reasons both jurisprudential and normative. He recognized the efficiency of form contracts if drafted with some Agentlemanly restraint@[28] and wanted to rescue them from Aintentional and creative misconstruction@[29] in cases where their terms were justifiable. He favored giving judges tools to police forms openly so that they would not resort to covert methods, using misconstruction to undo Aclauses of oppression and outrage.@[30] Open policing would be more effective because it could Acumulate into ... standard techniques.@[31] So in addition to his jurisprudential, realist project, there was a clear normative one, to see that Aterms are neither in the particular nor in the net manifestly unreasonable and

[27] See Karl N. Llewellyn, The Common Law Tradition 370 (1962). Llewellyn said there was specific assent to the Afew dickered terms,@ id., but of course in many consumer contracts there would no dickered terms. Llewellyn=s idea of specific assent could safely be extended to salient terms such as price or descriptions of product features that would qualify as express warranties.

[28] See id. at 363.

[29] See id. at 365.

[30] See id. at 366.

[31] See id.

unfair.@[32] He noted the tendency of standard forms, unchecked by judicial policing, to become of Aa massive and almost terrifying jug-handled character.@[33] He rejected the choice of some courts to Adrop a word about freedom of contract, or about opportunity to read,@ and Aproceed to spit the victim for the barbecue.@[34] The law, in his view, must provide restraints on private power that Agoes easily to the head.@[35]

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[32] See id. at 371.

[33] See id. at 362.

[34] See id. at 364.

[35] See id. at 362.

A version of Llewellyn=s ideas on substantive policing of standard forms made it into the Restatement (Second) of Contracts, in Section 211 on AStandardized Agreements,@[36] which provides in subsection (3) : AWhere the other party had reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.@ Comment f. adds, AReason to believe may be inferred from the fact that the term is bizarre or oppressive, from the fact that it eviscerates the non-standard terms explicitly agreed to, or from the fact that it eliminates the dominant purpose of the transaction.@ The same comment also notes more generally that customers Aare not bound to unknown terms which are beyond the range of reasonable expectation@ and that the provision is Aclosely related to the policy against unconscionable terms and the rule of interpretation against the draftsman.@ Early drafts of both UCC Article 2B (which became UCITA) and Revised Article

[36] The Reporter=s Note to Section 211 begins with citations to Llewellyn, The Common Law Tradition, supra note 27, and to his Book Review, 52 Harv. L. Rev. 700 (1939). In his book review of Prausnitz, The Standardization of Commercial Contracts in English and Continental Law (1937), Lllewellyn had earlier discussed the problem of legal treatment of form contracts.

2 included versions of this principle,[37] but these were eliminated under industry pressure.

[37] See UCC Article 2B, May 5, 1997 Draft, Section 2B-308(b)(1) (providing that a form term creating an obligation or imposing a limitation does not become part of the agreement if Athe party proposing the form should know [the term] would cause an ordinary and reasonable person acquiring this type of information in the mass market and receiving the form to refuse the license if that party knew that the license contained the particular term....@) and UCC Revised Article 2, May 16, 1997 Draft, Section 2-206(a) (providing that in a consumer contract, a non-negotiated term is excluded from the contract if Aa reasonable consumer in a transaction of this type would not reasonably expect [it] to be in the record ... unless the consumer had knowledge of the term before agreeing to the record.@) The Arefusal terms@ formulation in Article 2B was closer to the Restatement, and the broader Areasonable expectations@ formulation of Revised Article 2 was closer to Llewellyn=s original idea.

One of the arguments against adding a concept along the lines of Section 211(3) to Revised Article 2 and UCITA was that unconscionability already provides the courts the necessary tool. It is certainly true that this doctrine is flexible enough to be used to police oppressive terms in forms.[38] The doctrine of pure substantive unconscionability is closest to the rule of Section 211(3). Compared to mixed substantive and procedural unconscionability, pure substantive unconscionability is better able to provide predictable guidance to businesses over timeBto cumulate, as Llewellyn put it.[39] An approach that looks at the particular procedural elements of each case as well as the substance leads to infinitely distinguishable holdings, on the basis of particular facts. Therefore mixed substantive and procedural unconscionability is less reliable as a method of policing.[40] If used more frequently, substantive unconscionability is a doctrine with promise. A recent New York case shows that the doctrine is alive and wellBthe court invoked substantive unconscionability to overturn Gateway=s particularly oppressive mandatory arbitration clause (in a case where disclosure was delayed, although the court

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[38] See Arthur Leff, Unconscionability and the Code--The Emperor=s New Clause, 115 U. Penn. L. Rev. 486 (1967) (finding the clause so flexible as to be vacuous).

[39] See Lllewellyn, supra note 27, at 366.

[40] See Arthur Leff, Unconscionability and The CrowdBConsumers and the Common Law Tradition, 31 U. Pitt. L. Rev. 349, 357-58 (1970).

professed to not to take that into account in its unconscionability analysis).[41]

[41] See Brower v. Gateway 2000, In., 676 N.Y.S. 2d 569 (Appell. Div. 1998).

In addition to contract and commercial law doctrines, other means of substantive regulation of form contracts are provided by FTC rule-making[42] and enforcement actions, as well as state UDAP actions, public and private, and state administrative rules in some states. The argument that delayed disclosure is a procedural UDAP under state and federal law does not mean that when pre-transaction disclosure is made, any and all terms should be permissible and enforceable.[43]

Part II: The Assault on Disclosure

Delay of disclosure of key terms until after payment and delivery has not been a major problem until recently because contract and commercial law treated disclosure of terms prior to agreement as necessary to contractual assent. Professors James J. White and Robert S. Summers, in their treatise on the Uniform Commercial Code, note that both parties must agree to a modification in order for a disclaimer of warranties made after contracting to be effective.[44] They also wrote:

> In the more common situation the buyer might be given a disclaimer at the time of the delivery of the goods. That disclaimer may be printed on a label, in an operator=s manual, or on an invoice. According to most pre-Code law, A[I]f a

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[42] See the FTC=s Credit Practices Rule, supra note 26. See also Roger E. Schechter, The Unfairness of Click-on Software Licenses, in this symposium.

[43] See id. (arguing that the substance of many mass-market software licenses, for example purporting to prohibit elements of Afair use@ under copyright law, constitutes an unfair practice).

[44] See James J. White and Robert S. Summers, The Uniform Commercial Code 427-428 (4th Ed. 1995).

bargain with even an implied warranty has once arisen, a subsequent disclaimer of warranty when the goods are delivered will not avail the seller.@ The same rule has generally prevailed under the Code.[45]

Accommodating emerging practices in the software and computer industries, however, several recent cases and UCITA have rejected that long-standing approach. This is the context in which the need for a UDAP theory as a check, at least in consumer transactions, becomes more urgent.

A. The Gateway AProblem@

1. A Critique of the Analysis in Hill v. Gateway

[45] See id. at 427.

In the Revised Article 2 revision process, the issue of delayed disclosure became known as the AGateway problem,@ a reference to the marketing practices of the Gateway Company, formerly Gateway 2000, Inc. (a direct marketer of computers). The first Gateway case was Hill v. Gateway 2000, Inc., decided by the U.S. Circuit Court of Appeals for the Seventh Circuit in an opinion written by Judge Frank Easterbrook, the former University of Chicago law professor.[46] The case involved an old-fashioned telephone order, not one made on the Internet. Although the opinion describes the facts in terms of Aa customer,@ the action was actually a class action. The court mentions that there was a RICO claim, but one has to read the district court opinion to find out that there were also claims under the Illinois and South Dakota consumer protection statutes, alleging inter alia that Gateway advertised a system with higher performance components than it delivered to hundreds of customers and that it shipped the lower grade components dressed up in the packaging of the higher performance ones, allegations that if true would mean Gateway had engaged in old-fashioned dishonest and intentional fraud. Judge Easterbrook, however, chose to characterize the dispute as merely one about Athe product=s shortcomings.@[47]

The consumer buyers in this class action ordered computer systems on the telephone and

[46] See Matthew Bender & Company, Inc. v. Jurisline.Com LLC, 91 F. Supp. 2d 677, at n. 1, (2000), referring to Judge Easterbrook=s opinion in ProCD, Inc. v. Zeidenberg, 86 F. 3d 1447 1454 (7th Cir. 1996), a predecessor case to Gateway, as decided Achiefly, it would seem, as a matter of >Chicago School ideology.= @ To the extent AChicago School@ means Athe powerful must win,@ this seems a criticism that hits its mark, but if it means concern with economics, one might respond that both Pro-CD and Hill v. Gateway are surprisingly unconcerned with the economic point that delaying disclosure inhibits the operation of market forces.

Pro-CD is not a consumer case (Zeidenberg purchased a diskette with a database of telephone numbers on it not for personal use but for redistribution on a Web site), id.. at 1450, which is why I have chosen to focus on Gateway.

[47] See 105 F. 3d at 1148.

each gave a credit card number for payment.[48] Terms shipped with the systems included a mandatory arbitration clause and stated that they would govern unless customers exercised a right of return within 30 days.[49] Customers who did not return the systems they had purchased were deemed by the Seventh Circuit to have Aaccepted Gateway=s offer, including the arbitration clause.@[50]

This is dubious contract and commercial law. The most straightforward analysis of the case is that the buyers made offers when they ordered on the phone and the seller accepted by agreeing to ship, or at any rate, by actually shipping. UCC Section 2-206(1)(b) provides, Aunless otherwise unambiguously indicated ... an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods ....@ The Seventh Circuit did not even cite this section, let alone explain how it was Aunambiguously indicated@ that the Hills= order did not invite acceptance by a promise to ship or by shipment.

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[48] See id. at 1147.

[49] See id.

[50] See id. at 1150.

Any terms shipped with Gateway computer systems should be viewed as proposals for addition to the already-formed contract, under Section 2-207(2). Under this subsection, acceptance by silence does not occur if the additions are material or if the customer is a consumer.[51] The Hills were clearly consumers, and the mandatory arbitration clause was material, so for two independent reasons new terms in the box should not have become part of the contract by silence. Judge Easterbrook concluded that Section 2-207 is Airrelevant@[52] because there was only one form, Gateway=s, as opposed to a battle of the forms. Nothing in the language of Section 2-207 supports the idea that its reach is limited to exchanges of formsBit is not limited to two-form transactions or even to forms at all. Quite the contrary, Section 2-207 refers to Aconfirmations,@ which can certainly be used by one party without the other having also sent a form and which can be drafted for the particular transaction. Section 2-207 applies to exchanges of forms, but also to other situations where a document is sent after agreement, proposing additional or different terms. Easterbrook=s analysis also ignores Comment 1 to Section 2-207, which states:

> This section is intended to deal with two typical situations. The one is the written confirmation, where an agreement has been reached either orally or by informal

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[51] See Section 2-207(2). See also James J. White, Autistic Contracts, 453 Wayne L. Rev. 1693 (2000). White emphasizes the passivity of Aacceptance@ in Gateway and the questionableness of reading inaction as manifesting assent (does a consumer who doesn=t return a computer really intend to accept the terms in the box?).

[52] 105 F. 2d 1147, 1150, citing Pro-CD, 86 F. 3d at 1452.

correspondence between the parties and is followed by *one or both* [emphasis added] of the parties sending formal memoranda embodying the terms so far as agreed upon and adding terms not discussed. ...

Relying on this comment, the federal district court in Kansas recently refused to follow Hill v. Gateway, concluding that the state courts of Kansas and Missouri would not follow Judge Easterbrook=s incorrect analysis of the UCC.[53]

Comment 2 to Section 2-207 states that subsection 2-207(2) governs the issue of whether proposed additions come into the deal. That subsection says that additional terms Aare to be construed as proposals for addition to the contract@ and provides a merchant rule, inapplicable to consumer transactions, that allows nonmaterial terms to come into a deal if not objected to. Comment 3 states that material alterations must be Aexpressly agreed to,@ a principle that applies to merchant and nonmerchant deals. Apparently, in deals involving a non-merchant, even nonmaterial proposed additions cannot come in without express agreement, but clearly non-merchants are not held to material alterations unless they expressly agree to them. Comment 4 addresses what constitutes a material alteration, indicating that deviations from background terms such as implied warranties constitute material alterations. Mandatory arbitrationBwhich means giving up the right to a day in court and to trial by jury--is of at least as much importance as a

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[53] See Klocek v. Gateway, Inc., 2000 WL 967459 (D. Kan. 2000) (quoting comment 1 to Section 2-207 as part of its analysis). Compare M. A. Mortensen Co. v. Timberline Software Corporation, 998 P.2d 305 (2000) (following Hill v. Gateway and making the same mistake of finding Section 2-207 inapplicable to a single-form case).

disclaimer of implied warranties and thus is clearly material.

In addition to ignoring the comments, Judge Easterbrook=s analysis ignores the logic of Section 2-207. It is businesses that engage in exchanges of forms, while consumers will nearly always be in one-form deals. Section 2-207(2) recognizes that even merchants should not be expected to object to material additions in order to avoid them. If businesses cannot be expected to inspect forms sent after the making of a contract and object to material terms, *a fortiori*, consumers should not have this burden.

Also not mentioned in Hill v. Gateway is Section 2-209, which addresses modifications, but that omission seems justified. A modification in good faith can be made by agreement of the parties, without consideration.[54] As comment 2 to Section 2-209 notes, however, the merchant standard of good faith applies to merchants who seek modifications. The merchant standard includes Aobservance of reasonable commercial standards of good faith,@ which may Arequire an objectively demonstrable reason for seeking a modification@ such as Aa market shift.@[55] Good faith modification, therefore, is not a sound description of the business practice of holding back terms already drafted until after the customers orders, pays and takes delivery.[56] There is no reason for

[54] See Section 2-209(1) and Comment 2.

[55] See UCC Section 2-209, comment 2.

[56] See also Restatement (Second) of Contracts, Section 89(a), providing for a modification to be binding if Afair and equitable in view of circumstances not anticipated by the

a change in termsBthere is simply a delay in disclosure of the terms the merchant seller had planned to use from the outset.

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parties when the contract was made....@ In delayed disclosure, there is no unanticipated change in circumstances to justify a modification.

In Pro-CD, Inc. v. Zeidenberg, relied upon in Hill v. Gateway, Judge Easterbrook claimed that delayed disclosure is a long-standing, accepted contract practice, citing insurance and airline tickets as examples.[57] But these are examples of regulated industries, not dependent on market discipline to prevent unfairness. In the case of insurance, regulators typically have the responsibility of reviewing and approving policy terms.[58] In addition, often state law provides for a required disclosure form setting forth key policy terms.[59] In the case of airline tickets, most of the material in the ticket is dictated by the Warsaw Pact, an international treaty.[60]

2. Hill V. Gateway and Magnuson-Moss

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[57] See 86 F. 3d 1447, 1451, discussed in Hill at 105 F. 3d 1147, 1148-1149.

[58] See Keeton and Henderson on Insurance.

[59] See id. ?

[60] Cite treaty provision.

In *Hill*, Judge Easterbrook relies in part on the availability of warranty terms upon request under the Magnuson-Moss Warranty Act to justify delayed disclosure.[61] But Magnuson-Moss=s disclosure and substantive requirements should not be conflated with the requirements of commercial and contract law. Magnuson-Moss is largely concerned with disclosure of manufacturers= warranties in distribution to consumers through retailers, to avoid deception. In this indirect marketing, the manufacturer is not in privity of contract with the buyer. A third-party manufacturer=s warranty can only add to the deal offered by the seller, not take away. Manufacturers= warranties are not typically creatures of contract (absent direct marketing, as by the Gateway Company in its telephone sales). Even so, the Magnuson-Moss regulations have elaborate rules on pre-sale availability of warranty terms, separately detailing obligations of the seller and the third-party supplier.[62] An important purpose is to minimize deceptive claims concerning manufacturers= warranties. Magnuson-Moss also has a substantive element, in that it prohibits the deceptive practice of giving a manufacturer=s warranty that promises less than fitness for ordinary use; Magnuson-Moss makes the implied warranty of merchantability the minimum standard for any written warranty.[63]

Magnuson-Moss is an overlay on Article 2 and does not displace commercial law rules applicable between parties in privity of contractBthe direct seller and buyer. Thus, in distribution through a retailer, whether or not there is a third-party manufacturer=s warranty, the direct

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[61] See 105 F. 3d at 1150, citing 15 U.S.C. sec. 2302(b)(1)(A).

[62] See 16 C.F.R. part 702.3.

[63] See 15 U.S.C. section 2308 (prohibiting disclaimer of the implied warranty of merchantability in subsection (a) but allowing limitation of its duration to the duration of a written warranty of reasonable duration in subsection (b)).

merchant seller gives the implied warranty of merchantability if it does not conspicuously disclaim it. Under a proper reading of section 2-207, there must be express consent to a material term such as a warranty disclaimer (or mandatory arbitration clause) if it is sent after order and shipment. In its direct marketing, Gateway is both a manufacturer and direct seller. Because it gives a written warranty, it is subject to the Magnuson-Moss requirement that it give the implied warranty of merchantability. But a seller who sells products made and warranted by others could escape giving that warranty. However, such a sellerBif it delayed giving the disclaimer until after the sale--would under Section 2-207(2) have to get express agreement to the disclaimer. Contrary to the Seventh Circuit=s analysis, Gateway, as a direct seller, should have had to get express agreement to any material term it did not disclose before order and shipment.[64]

[64] But express assent should not be enough to make the mandatory arbitration clause involved in this case enforceable because it was substantively unconscionable. See Brower V. Gateway 2000, Inc., 676 N.Y.S. 2d 569 (Supreme Ct., App. Div. 1998). See also infra Part IIIA at notes 125-126 discussing problems with mandatory arbitration generally.

Furthermore, even when Section 2-207(2) is properly interpreted and satisfied because a consumer expressly agrees to material additions, there could still be an unfair and deceptive practice. While it might seem unlikely that consumers would expressly agree to terms on a form in the box, express agreement might be found in software transactions where the consumer is required to click to A agree@ to a license to get access to software already paid for or to open shrinkwrap labeled to state that doing so constitutes agreement to terms.[65] As goods become increasingly Asmart,@ with the addition of embedded software, consumers may have to click to agree to form terms to get access to use of goods. For example, the computer screen on the dashboard of a car could be programmed to display a post-transaction set of terms and to prevent operation of the car until the customer clicks to agree. If this practice were adopted, it should be deemed an unfair and deceptive practice, even if UCC Section 2-207(2) is satisfied. Nondisclosure of important terms before payment or delivery, even if those terms are later expressly agreed to, inhibits shopping and misleads consumers about the nature of the deal at the crucial time, which is before pyschological commitment.

3. The Aftermath of Hill v. Gateway.

From a law in action perspective, the most interesting thing about Hill v. Gateway is not the flaws in its analysis, but rather its aftermath. What impact has the case had, on the defendant company itself and on the law more generally? Three significant observations can be made about the impact on Gateway. First, the Gateway Company does not rely on the case to hold back terms until after payment in Internet transactions. Gateway=s terms are available in full on its Web

[65] See text infra at notes .

site, prior to the registration process when customers give identifying information and prior to order. Because Gateway is an Internet merchant and makes its terms publically available on its Web site, its terms are available for all potential customers to peruse and compare with those of other computer sellers before making a purchase decision. Even customers who ultimately make purchases on the phone or in stores, with terms coming later in the box, have access to them earlier. Many consumers use the Internet to research purchase decisions even when they do not make orders on line, and this form of shopping will only grow as more and more households go on line. In addition, with terms publicly available, a computer magazine could review and compare computer deals without first paying for many computers. The availability of terms on line has the potential to help the market to work, for transaction made both on line and off, and the cost to sellers is minimal. On-line sellers must have their terms preprinted and ready to ship in the box, making it easy to put them on their Web sites.

Gateway would not be wise to rely on Hill v. Gateway to hold back terms in Internet marketing. In his opinion, Judge Easterbrook emphasized the practical difficulties of making terms available in telephone sales: AIf the staff at the other end of the phone for direct-sales operations such as Gateway=s had to read the four-page statement of terms before taking the buyer=s credit card number, the droning voice would anesthetize rather than enlighten many potential buyers.@ Again, one could quibble. Why exactly does Gateway need four pages of terms? Why can=t Gateway primarily use the background terms of the UCC, which need not be mentioned to become part of the contract? There are good arguments for disclosure of key terms even in telephone transactions. If a particular term cannot be easily explained, it may be because it is inherently too complex and unfair for a consumer to understand and knowingly assent to.

But even if one is not persuaded by these arguments, it is apparent that there are different considerations in on-line transactions, where disclosure is cheap and easy. The Hill v. Gateway case is readily distinguishable if raised to try to justify delayed disclosure on the Web, a good reason for the Gateway Company and other Internet merchants not to rely on the decision when planning on-line marketing and sales practices.

A second observation about Gateway=s behavior, however, is not positive. Unfortunately, Gateway=s disclosure of its terms on line is not effective. The terms are provided by a series of links from a button at the very bottom of a long page of product descriptions, after the copyright symbol, in small print, as part of a list of legal items, as follows:

Copyright **8** 1997, 1998, 1999, 2000 Gateway, Inc. All rights reserved.
Please see our Legal Information, Privacy Statement, Terms and Conditions of Sale and Limited Warranty.

A reader who clicks on the small print button labeled ATerms and Conditions of Sale and Limited Warranty@ is, after several more steps, linked to a form contract that prints out at 16 pages (up from the four pages mentioned by Judge Easterbrook as the length of the terms in the box). THESE PAGES INCLUDE MANY LONG PARAGRAPHS OF ALL CAPITAL LETTERS, WHICH RESEARCH HAS SHOWN ARE HARDER TO READ THAN PRINT IN UPPER AND LOWER CASE LETTERS BECAUSE PRINT IN ALL CAPITAL LETTERS HAS LESS DEFINITION.[66] A GOOD WAY TO HIDE NASTY TERMS IS WITH TYPE LIKE THIS, ESPECIALLY WHEN IT GOES ON FOR 30 LINES, AS DOES THE VERY FIRST PARAGRAPH OF GATEWAY=S TERMS AND CONDITIONS.

That first paragraph contains all upper case sentences like these:

[66] 63 Va. L. Rev. 841?

THE TERM APRODUCT@ MEANS GATEWAY-BRANDED HARDWARE DESCRIBED IN YOUR PURCHASE RECEIPT OR INVOICE. THE TERM APRODUCT@ DOES NOT INCLUDE SOFTWARE, NON-GATEWAY-BRANDED EXTERNAL HARDWARE PERIPHERALS SUCH AS JOYSTICKS, PRINTERS, SCANNERS, ETC., AND THEIR RELATED DOCUMENTATION (COLLECTIVELY AACCESSORIES@). PLEASE BE CERTAIN TO READ THE INDIVIDUAL WARRANTIES FOR ACCESSORIES CONTAINED IN THE SHIPPING CARTONS. ASERVICES@ MEANS THE [SIC] DESCRIBED IN SECTION 4 THAT YOU PURCHASED FROM GATEWAY, AS IDENTIFIED ON YOUR PURCHASE RECEIPT OR INVOICE. YOU AGREE THAT THIS AGREEMENT APPLIES TO YOUR PURCHASE OF THE PRODUCT, ACCESSORIES AND SERVICES. AFTER YOUR LIMITED MONEY BACK GUARANTEE EXPIRES, THE REMAINING PROVISION OF THIS AGREEMENT WILL CONTINUE TO APPLY. THIS DOCUMENT CONTAINS A DISPUTE RESOLUTION CLAUSE PLEASE SEE SECTION 9 BELOW. [67]

Gateway=s disclosure of its terms on line could certainly be more effective, using less obscure format and plain language.

The third observation about Gateway=s reaction to the Hill case is that the company has changed the substance of the term that was in issue in the case, to make it less outrageous. Gateway no longer provides for arbitration both remote and patently unaffordable. But while its terms have thus been toned down, they remain outrageous overall, as will be detailed here, and thus Gateway=s practices illustrate the proposition that disclosure, while important, sometimes only carries the consumer interest a short way.

[67] See http://www.gateway.com/help/support/8505295.shtml (visited July 25, 2000) (hereinafter, Gateway terms).

The nature of the arbitration clause at issue in Hill v. Gateway is never mentioned by the Seventh Circuit, but details of it were part of the analysis in another lawsuit brought against Gateway, Brower v. Gateway.[68] The Appellate Division of the New York Supreme Court followed the analysis of contract formation in Hill v. Gateway, but it went on to find the arbitration clause substantively unconscionable and thus unenforceable. The Brower case adds these facts about Gateway=s arbitration clause as of 1995Bthat the arbitration was to be conducted under the rules of the International Chamber of Commerce in Chicago, Illinois, with all documents in the case mailed to Paris.[69] The ICC Rules, the court reports, would have required the plaintiffs to pay Aadvance fees of $4,000, more than the cost of most Gateway products, of which the $2,000 registration fee was nonrefundable even if the consumers prevailed....@[70] The court also noted the costs for a New York consumer of traveling to Chicago.[71]

Even before the Brower case was decided, Gateway had changed its arbitration clause and submitted the new clause in evidence in the case.[72] The revised clause permitted consumers to choose the American Arbitration Association (AAA) as the arbitration organization and to designate any location by agreement of the parties, which Ashall not be unreasonably withheld.@[73] The Brower record did not include the fees charged by the AAA, so the Brower court remanded

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[68] See Brower v. Gateway 2000, Inc., 676 N.Y.S. 2d 569 (Supreme Ct., App. Div. 1998).

[69] See id. at 570-571.

[70] See id. at 571.

[71] See id.

[72] See id. at 574.

[73] See id.

the case for consideration of substitution of an appropriate arbitrator.[74] As of July 2000, Gateway had changed its contract to provide for National Arbitration Forum arbitration, known for being even cheaper than AAA.[75]

[74] According to the American Arbitration Association Web site, as of August, 2000, the minimum fee for AAA arbitration was $500 (for claims under $10,000).

[75] See Christin Dugas, Arbitration might be only choice, USA Today, Aug. 27, 1999, at 3B, (reporting that NAF charged a filing fee of $49 for claims under $1,000).

But Gateway=s form contract, displayed on its Web site as of July 2000, remains an appalling affair.[76] It purports to exclude liability for punitive damages and for tort and strict liability.[77] It precludes class actions.[78] It limits damages to the price paid.[79] If all these terms were enforceable, Gateway could engage in deliberate fraud, putting lower grade components in the packaging of higher grade ones, as alleged in Hill v. Gateway, and be liable only for return of the price paid to any customer who discovered the fraud. The price would be recoverable only by an individual arbitration action brought by each customer on his or her own. Disclosure is not an adequate solution to over-aggressive drafting such as this.

Another piece of the aftermath of Gateway is how Revised Article 2 has dealt with it, or more accurately, not dealt with it. Revised Article 2, as of July 2000, had pared down Section 2-207 to provide:

> SECTION 2-207. TERMS OF CONTRACT; EFFECT OF CONFIRMATION. If (i) conduct by both parties recognizes the existence of a contract although their records do not otherwise establish a contract, (ii) a contract is formed by an offer

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[76] See Gateway terms, supra note 67.

[77] See id. at Paragraph 3A.

[78] See id. at Paragraph 9 (AThe arbitration ... will be limited solely to the Dispute between You and Gateway.@)

[79] See id at Paragraph 3A.

> and acceptance, or (iii) a contract formed in any manner is confirmed by a record that contains terms additional to or different from those in the contract being confirmed, the terms of the contract, subject to Section 2-202, are:
>
> (1) terms that appear in the records of both parties;
>
> (2) terms, whether in a record or not, to which both parties agree; and
>
> (3) terms supplied or incorporated under any provision of [the Uniform Commercial Code].[80]

How might this section apply to the Hill v. Gateway facts? *Hill* might be seen as a case of formation by offer and acceptance under part (ii) or of additional terms in a confirmation under part (iii). Either way, the terms provided after payment, in the box, would only become part of the contract if Aboth parties agree,@ as provided in subsection (2). Would it, or would it not, be appropriate to conclude that a consumer buyer who did not return the goods, as provided for in the post-payment terms, agreed to those terms? Or might the case not come under Section 2-207 at all? A comment explicitly refuses to answer these questions:

[80] See Revised Art. 2, Section 2-207, NCCUSL annual meeting draft, July 2000.

> The section omits any specific treatment of terms on or in the container in which the goods are delivered. Revised Article 2 takes no position on the question whether a court should follow the reasoning in Hill v. Gateway 2000, 105 F.3d 1147 (7th Cir. 1997) (Section 2-207 does not apply to such cases; the "rolling contract" is not made until acceptance of the seller's terms after the goods and terms are delivered) or the contrary reasoning in Step-Saver Data Systems, Inc. v. Wyse Technology, 939 F.2d 91 (3d Cir.1991) (contract is made at time of oral or other bargain and "shrink wrap" terms or those in the container become part of the contract only if they comply with provisions like Section 2-207).[81]

This explicit punt on the Gateway problem came after the meltdown of the Revised Article 2 process in the summer of 1999, when the NCCUSL leadership, under pressure from a coalition of strong seller interests,[82] pulled the project from further consideration in the middle of floor debate.[83] After the resignation of the two reporters and the chair, a new chair, reporter and committee were appointed and the project was scaled back so that it makes only minor changes.[84] The comment punting on the Gateway problem is a disappointing retreat, but it may be changed by NCCUSL and ALI before they finally approve the revision, or the sponsors may ultimately kill

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[81] See comment 3 to Revised Art. 2 Section 2-207, NCCUSL annual meeting draft, July, 2000.

[82] A full page advertisement opposing Revised Article 2 appeared on page 18C of USA Today on July 23, 1999, the opening day of the NCCUSL annual meeting. It was

[83] Section 2-207(c)(3) of the summer 1999 NCCUSL Annual Meeting Draft of Revised Article 2 required express agreement in order for additional or different terms in a confirmation to become part of the contract confirmed, and section 2-207(d) provided that there is no express agreement by Amere retention or use of goods.@

the Revised Article 2 project. Assuming Article 2 is revised in the near future, a statutory section or a comment to Section 2-207 should be added to incorporate the views expressed by an ALI Council committee, that there is Ano good reason in contracts formed over the Internet why the terms could not be made available ... through links on the relevant website at the time of contracting, rather than supplied later.@[85]

Hill, *Brower* and Revised Article 2 are all interesting to examine for how they analyze questions about whether terms disclosed on a delayed basis become part of the contract. *Hill* and *Brower* both assert that delayed disclosure does not mean that terms are excluded from the contract, and the current draft of Revised Article 2, at this writing, refuses to address the issue. But commercial statutes and case law interpretations do not determine whether a business violates the FTC Act and state UDAP statutes by holding back important terms until after consumers pay. These consumer law theories are independent. That a contract was formed or that a term was agree to does not mean that there was no deception and unfairness in the process.

B. UCITA

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[84] See July-August 2000 Annual Meeting Drafted of Revised Article 2.

[85] See Memorandum of the ALI Council Ad Hoc Committee on Article 2B, December 1998. Available at http://www.2Bguide.com/ali.html#cm98. See discussion of this memorandum infra in Part IIB, concerning UCITA. Although the Council committee was writing about then proposed Article 2B, it noted that Athe issues concerning post-transaction terms do not appear to be unique to transactions within the scope of Article 2B....@ See id.

1. UCITA=s Validation of Post-Transaction Terms.

UCITA covers Acomputer information transactions.@[86] The term Acomputer information@ is itself controversial because it puts in one category many different things, from computer programs to on-line access (such as a contract with an internet service provider), from copyrightable text (such as a book on CD-ROM) to non-copyrightable information (such as a database on CD-ROM or available from a Web site).[87] Thus, UCITA sweeps in contracts for digital products, on-line services and for digital texts and information.

[86] See UCITA Section 103(a).

[87] See UCITA Section 102(a)(10) (defining Acomputer information@ as Ainformation in electronic form which is obtained from or through the use of a computer or which is in a form capable of being processed by a computer.@)

Beyond this eclectic core scope, UCITA also has a complex opt-in provision, making it possible for sellers of goods that include digital elements to opt in to UCITA by licensing those elements as part of the deal.[88] As more and more consumer products are Asmart@ goods with embedded software, UCITA could become the predominant law of goods by means of form contract provisions opting in. Under UCITA, opt in can occur by form terms first revealed after payment.[89] Article 2 could thus be robbed of much of its subject matter.

UCITA appears to give a broad blessing to the practice of holding back terms until after customers pay. Given the complexity and opacity of its drafting, however, we will not have a good idea for sure of what it permits until a body of case law emerges.

To determine UCITA=s position on post-transaction disclosure of terms, one must navigate a maze of sections, including Sections 112 (on Amanifesting assent@), 208 (on Aadopting terms of records=) and 209 (on Amass-market license@). Read together, these sections seem to provide (subject to some good contrary arguments which users will certainly make in the coming field day of litigation):

[88] See UCITA Section 104 (providing for opt-in if a Amaterial part@ of the transaction is computer information. A comment provides, AMateriality is ordinarily clear if the program is separately licensed as part of the transaction.@ See Comment 4c, Section 103, of the UCITA June 2000 AFinal Comments,@which are expected to undergo further revision.)

[89] See UCITA Section 104 (providing in its preamble for opt-in to UCITA=s contract formation rules).

1. In mass-market transactions (and consumer contracts are always mass-market transactions[90]), terms may be made available to customers for the first time as late as during the party=s initial use of or access to a product or service or other subject matter within the scope of UCITA. See Sections 209(b) and 112(e)(2).

2. In non-mass-market transactions, terms may be disclosed even later in some instances. Section 208(2).

3. Any party adopts terms disclosed after payment by agreeing to them, Asuch as by manifesting assent.@ Sections 208(1) and 209(a).

4. For there to be a manifestation of assent, a party must have had an opportunity to review the terms, but this opportunity to review can be provided after payment. Section 112(e)(3).

5. A customer is only deemed to have an opportunity to review terms first disclosed after payment if the customer has a right of return upon rejection of the terms. Section 112(e)(3). However, the right of return is supplied by law in these circumstances, Sections 209(b), so under UCITA the right of return need not be disclosed in the terms. Section 112(e)(4). Unless software companies decided to disclose the right of return despite the lack of a requirement that they do so, consumers under UCITA would not know that they could reject terms and return a product for a refund. (On the other hand, it is obviously arguable that non-disclosure of the right of return is unconscionable under Section 111, but much litigation would be necessary to establish that point.)

6. AConduct or operations manifesting assent may be proved in any manner ....@ Section 112(d).

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[90] See UCITA Section 102(a)(44)(A).

7. Manifesting assent can be by clicking. See Section 112(a)(1), which refers to the concept of authentication, defined in Section 102(a)(c) to include adopting an electronic process Awith intent to sign.@ (Thus, consumers might persuasively argue that clicking is not done with the same intent that attends signing with a pen and that only a process that involves use of a personal identifier could qualify.) Also, Amanifesting assent@ can be by intentionally engaging in conduct with reason to know that the other party may infer assent. Section 112(a)(2). If a form says that use of the product or not returning the product constitutes assent, some courts might find that sufficient. There need not be subjective intent to assent. Comment 3b, Section 112.

Although a UCITA comment claims that Section 112's concept of manifesting assent is derived from Section 19 of the Restatement (Second) of Contracts,[91] none of the examples of the operation of the concept in the Restatement involve one party drafting standard form terms and specifying certain conduct of the other party as a means of assent, nor do the Restatement=s examples involve assent after payment. Rather, the examples involve expectations based on longstanding relations (expectations of a housekeeper of many years based on the nature of the relationship, in illustration 1) or creating mistaken impressions that the other party has no reason to discount (selling a collection of books, when the seller forgets to exclude his favorite book, or sending an offer by mistake after a decision not to send it, in illustrations 2 and 3).

3. The Controversy Over UCITA=s Approach to Disclosure of Terms.

[91] See UCITA comment 3, Section 112.

UCITA is highly controversial in a number of ways, including in particular its validation of post-transaction disclosure of terms. It was originally planned as Article 2B of the Uniform Commercial Code, but the UCC=s co-sponsor, the American Law Institute, withdrew from the project in April of 1999. The National Conference of Commissioners on Uniform State Laws then turned the project into a free-standing proposed uniform state law and approved it in July 1999, with revisions in August 2000, primarily to carve out of its scope industries that did not want to have to operate within its rules.[92] Proposals to carve consumers out of UCITA were rejected.[93]

The last position paper produced by the American Law Institute before it ended its participation in the project included this key paragraph:

> The provisions on assent to post-transaction terms are inconsistent with sound contract policy and create disincentives for vendors to disclose terms at the time of the transaction. There is no good reason in contracts formed over the Internet why the terms could not be made available to the potential licensee through links on the relevant website at the time of contracting, rather than supplied later. Yet, the draft as it stands would discourage, rather than encourage or mandate, this helpful practice. In any event, the issues concerning post-transaction terms do not appear to be unique to transactions within the scope of

[92] See UCITA, Section 103(d) (stating that UCITA does not apply to a financial services transaction, an insurance services transaction, certain transactions in the motion picture and sound recording industries, news freelancing contracts and certain telecommunications transactions). (Approved in August, 2000, by the NCCUSL annual meeting.)

[93] Efforts were made in Maryland and Virginia to exclude consumer transactions from the scope of UCITA.

Article 2B and, in the case of electronic contracting, might more appropriately be dealt with by generic rules for that context (whether in the UETA, UCC Article 1, or elsewhere).[94]

[94] See Memorandum by the ALI Council Ad Hoc Committee on Article 2B, December 1998. Available at http://www.2Bguide.com/ali.html#cm98. The Council is the governing body of the ALI. All ALI projects must be approved both by the Council and the general membership.

Earlier in 1998, the ALI membership approved a motion stating that, AUCC Article 2B has not reached an acceptable balance in its provisions concerning assent to standard form records.@[95] The supporting memorandum focused on these problems with the proposed law:

> It would validate practices that involve post-purchase presentation of terms in both business and consumer transactions (using "shrinkwrap" and "clickwrap"), undermining the development of competition in contingent terms, such as warranties and remedies. It also would allow imposition of terms outside the range of reasonable expectations and permit routine contractual restrictions on uses of information traditionally protected by federal intellectual property law.[96]

The memorandum discussed the anti-competitive impact of delayed disclosure of terms in contracts for computer programs and stated, AIt is to be hoped that the industry will evolve in the direction of warranty competition, making it inadvisable to codify current practices that may stand in the way of that goal.@ The Council committee picked up this theme, raising the issue whether the project was Apremature,@ and saying, Athere is no settled practice to codify or unify as there has usually been in other fields addressed in the UCC.@[97]

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[95] See Motion by Jean Braucher and Peter Linzer, ALI Annual Meeting, May 1998, available at http://www.ali.org/ali/Braucher/htm.

[96] See id.

[97] See Memorandum of ALI Council Ad Hoc Committee on Article 2B, supra note 94.

The top consumer protection officials of 25 states, including 24 attorneys general, supported a statement to NCCUSL objecting to UCITA on a number of grounds, including the delay of disclosure of terms:

> Purchasers do not expect to be confronted with surprise terms after a purchase has been made. At a minimum, UCITA should require that prior to the formation of any enforceable contract from which terms have been withheld, notice should be given to the purchaser that additional terms will be provided in the future, and the substance of any such terms that may be material to the purchasing decision should be disclosed. For example, a term limiting the number of copies that a purchaser can make of a software product would be a material term that should be disclosed prior to the purchase.[98]

The FTC itself, through letters from its senior staff, emphasized to the ALI and to NCCUSL the importance of pre-transaction disclosure.[99] In October 1998, the FTC senior staff wrote, Awe recommend that Article 2B require pre-sale disclosure of all *material* license terms, that is, disclosure of those terms that are material to a consumer=s decision to purchase a

[98] See Letters to the President of NCCUSL from 24 attorneys general and the administrator of the Georgia Fair Business Practices Act, dated July 23 and 29, 1999. Available at http://www.2Bguide.com/docs/799ags.html and http://2Bguide.com/docs/799mags.html.

[99] See Letter to the Chair of the NCCUSL Article 2B Drafting Committee and the Director of the American Law Institute, October 30, 1998, and letter to the Chair of the Executive Committee of NCCUSL, July 9, 1999, from FTC senior staff, including the directors of the Bureaus of Consumer Protection, Competition and Policy Planning. See http://www.ftc.gov/be/v980032.htm and http://www.ftc.gov/be/v990010.htm . Note 1 of each of these letters states that the FTC authorized the staff to submit them.

product.@[100] In July 1999, the staff wrote again, this time to just NCCUSL because the ALI had already withdrawn from the project, stating AUCITA departs from an important principle of consumer protection that material terms must be disclosed prior to the consummation of the transaction.@[101]

Despite all this sound commentary from its co-sponsor and state and federal consumer protection officials, NCCUSL refused to budge and has not carried its battle to the state legislatures. Although UCITA is unlikely to be enacted in many states, it has the potential to do considerable damage to the consumer interest. [Add footnote about choice of law and choice of forum.]

3. Why Applicability of Magnuson-Moss is Only a Partial Solution.

[100] See letter cited supra in note 99.

[101] See letter cited supra in note 99.

An important question in the wake of UCITA is whether the federal Magnuson-Moss Warranty Act makes up for its flaws. There are several reasons that the answer is no. First, software licenses often do not include warranties, in that they typically state, in terms first disclosed after payment and delivery, that the software is provided Aas is, with no warranties of any kind.@ Thus, although Magnuson-Moss probably does apply to consumer software transactions provided with a Awritten warranty,@[102] such transactions are few and far between. While it is desirable that Magnuson-Moss be explicitly extended to software transactions, even when denominated Alicenses,@ this is unlikely to be a sufficient step to stimulate warranty competition. At a minimum, a prominent pre-transaction disclosure that the product is sold or

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[102] The Magnuson-Moss definition of consumer product requires Atangible personal property.@ 15 U.S.C. section 2301(1). Copies of digital code have to be tangible to be machine readable. The definition of Awritten warranty@ refers to warranties in connection with a Asale.@ 15 U.S.C. section 2301(6). Sale is not a defined term but its meaning is a matter of federal law. It is of persuasive importance, however, that in the absence of UCITA, courts have generally applied Article 2, the sales article of the UCC, to software transactions. There is nothing in the federal statute that suggests a congressional purpose to delegate to the states the power to remove transactions from the scope of Magnuson-Moss by creating a new transaction name for a transaction functionally the same as or closely analogous to a sale. Much software acquired by consumers is for perpetual use, making these transactions like sales at least in that way. Restrictions on use fall into two categoriesBthose that are akin to intellectual property law restrictions on unauthorized copying of purchased copies (a purchaser of a copy may not generally make unauthorized copies) and those that are of questionable enforceability, either under intellectual property law or public policy doctrines (e.g., restrictions on transfer and fair use). It is unfortunate, however, that UCITA may cause uncertainty about the reach of Magnuson-Moss, and clarification by the FTC or even Congress would be desirable. See 16 C.F.R. section 700.1 on AProducts covered,@ stating, AWhere it is unclear whether a particular product is covered under the definition of consumer product, any ambiguity will be resolved in favor of coverage.@ The definition of Aimplied warranty@ in Magnuson-Moss, 15 U.S.C. section 2301(7) picks up state law implied warranties in connection with sales, but because UCITA creates such warranties, if federal law interprets the meaning of Asale@ in Magnson-Moss to include consumer software transactions, the UCITA implied warranties would come within the Magnuson-Moss definition. Alternatively to treating Magnuson-Moss as covering UCITA consumer contracts, the FTC could address unfair and deceptive practices in these transactions under its general section 5 powers. See Part III infra.

licensed AAS IS/No Warranty@ should be required. A regulation along the lines of the used car rule could accomplish that.[103] In comparison to used cars, where there may be some consumer doubt about whether to expect warranties, most consumers would be surprised to learn that software companies attempt to provide these new products with no quality promises at all. Thus, there is an even stronger case for a no-warranty disclosure rule in the software context than in used car transactions.

The lack or presence of warranties is not the only sort of key term that ought to be subject to prominent pre-transaction disclosure in software transactions. This is a second reason that mere explicit extension of Magnuson-Moss to software is not sufficient to protect consumers. UCITA codifies the idea that these transactions are not Asales@ but rather licenses. Most consumers would be surprised to learn that software companies are attempting to create Alicenses@ of use rather than selling their products. The implications of calling a software transaction a Alicense@ may be so complex and surprising that Alicensing@ should be treated as meaning a Asale@ in consumer transactions. Alternatively, it might be enough to create, by statute or regulation, several standard forms of license, with some protections for transfer and fair use, so that consumers would have some hope of understanding what they are acquiring when they make a software purchase.

[103] See 16 C.F.R. section 455.2.

But most important to the disclosure focus of this article is the point that, assuming licensing to consumers is permissible at all, there is an even stronger case for requiring disclosure of that transaction type and the particulars of restricted use and transfer prior to purchase than there is for disclosure of the warranties covered by Magnuson-Moss. As noted in the discussion of Hill v. Gateway in Part IIA above, Magnuson-Moss had as a primary concern manufacturers' warranties that were misleading because they promised less than fitness for ordinary use by disclaiming the implied warranty of merchantability. To address the problem of deceptively narrow manufacturers' warranties, the Magnuson-Moss regulations require sellers to make manufacturers' warranties available prior to sale, by giving notice and providing the warranty on request,[104] and the statute itself requires that the implied warranty of merchantability be part of any written warranty.[105] Magnuson-Moss did not attempt to address contract law questions and was built on the assumption that the seller in privity with the consumer would be providing its terms before contract formation in order to get agreement to them. Under ordinary readings of contract and commercial law, this would be necessary to make the terms enforceable.[106]

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[104] See 16 C.F.R. section 702.3.

[105] See 15 USC section 2308.

[106] See infra Part IIA.

In sales of goods, a third-party manufacturer=s warranty cannot take anything away; it can only add to what the seller has provided. UCITA licenses are different. UCITA, by validating shrinkwrap and clickwrap licenses, creates privity between the software company and the end-use customer, even when there is a retailer in between them. The primary function of privity under UCITA seems to be to allow the software company to take away what would otherwise be implicitBthat the customer has purchased a copy and has the ability to transfer her copy when no longer wanted and fair use rights (ability to quote and criticize and reverse engineer to make interoperable products).[107] In direct transactions between software companies and customers, where ordinary privity is clear, if a customer pays money for software, the ordinary expectation and implicit deal is that the customer has purchased a copy. Where the customer buys through a retailer, this expectation is not different. Software companies, by putting their products into retail distribution, create this expectation. But UCITA in both direct and indirect marketing allows software companies to reach out after payment and delivery and make the deal one for licensed use, with transfer and use restrictions, thus reducing what would otherwise be the implicit deal. There is at a bare minimum a need for pre-transaction disclosure to consumers of the nature of the rights they are getting under Alicenses.@ More than extension of Magnuson-Moss, which only deals with warranty terms, is needed to accomplish this; there is a need for regulations to require appropriate disclosures concerning the license restrictions in simple, understandable format. And as already noted, substantive restrictions on licenses may be necessary to make them comprehensible to consumers.

[107] Cite copyright provisions.

Today, consumers understand a Asale,@ which has one meaning, passing of title from the seller to the buyer for a price.[108] This transaction type also carries one set of rights under federal intellectual property law.[109] Consumers do not understand a Alicense,@ and they never will if every licensor offers a different package of transfer and use restrictions, creating an infinite variety of transaction types under the same label.[110] Complexity becomes a way to obscure bad deals, causing the market to fail to police them. This is why substantive consumer protection limitations on software transfer and use restrictions will probably ultimately be needed. An analogy is the Magnuson-Moss requirement that a written warranty at least warrant fitness for ordinary use, because it would be deceptive to call something a warranty but offer less than the law would provide without an express warranty.needed.[111] Calling a transaction a Alicense,@ but limiting use more than federal intellectual property law would for sale of a copy, could be seen as similarly misleading. But starting with a project of designing primarily a disclosure regulation would help to reveal where disclosure cannot do the job of communicating the nature of software deals to consumers. The goal is to allow a competitive market to operate; where terms are too complex,

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[108] See UCC Section 2-106(1).

[109] Cite copyright law.

[110] There is a similar problem with the term Awarranty,@ which is why Magnuson-Moss created two types, AFull@ and Limited.@ See 15 U.S.C. section 2303.

[111] See 15 U.S.C. section 2308(a).

however, substantive regulation may be the only cure for market failure.

A third problem with simple extension of Magnuson-Moss to software transactions is that its pre-sale availability rules were written before the advent of the Internet, and hence they do not take advantage of this medium of disclosure. The pre-sale availability rules need to be rewritten to require on-line disclosure when the merchant engages in on-line marketing. Currently, the pre-sale availability regulation has a provision on catalog marketing that allows merchants to merely provide an address from which warranties can be requested and supply them in response to requests.[112] If the address is a mailing address, few on-line consumers are likely to make use it, whereas if there were a link for obtaining the relevant warranty, many more would be likely to access it. The pre-sale availability regulation should be updated for all consumer products marketed on line, from cars to software.

III. Delayed Disclosure as a Violation of the FTC Act

Section 5 of the Federal Trade Commission Act prohibits unfair or deceptive acts or practices.[113] Deception and unfairness are overlapping theories,[114] and in the case of delayed

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[112] See 16 C.F.R. section 702.3(c)(2)(i)(B).

[113] See U.S.C. Section 45(a).

[114] See In re International Harvester Co, 104 F.T.C. 949, 1060 (1984) (describing deception as a Asubset@ of unfairness, which would means that all cases of deception are also cases of unfairness.) For the first 25 years after the 1938 Wheeler-Lea Act added Aunfair and deceptive practices@ to Section 5 of the Federal Trade Commission Act, the Commission used the phrase as a dual standard, Aunfair or deceptive,@ without attempting to distinguish the two. See Michael M. Greenfield, Unfairness Under Section 5 of the FTC Act and Its Impact on State Law, forthcoming in this symposium, Wayne L. Review (2001).

disclosure of important terms, both types of violation can be found. These are cases of omission at the crucial time, and as such, bear analysis under both theories.

A. Deception.

Under the FTC=s Policy Statement on Deception, a violation of the FTC Act occurs when there is a representation, act or omission that is material and that is likely to mislead consumers acting reasonably in the circumstances.[115] Holding back terms can be seen either as involving a deceptive representation or a deceptive omission. The Deception Policy Statement notes that, AWhen a product is sold, there is an implied representation that the product is fit for the purposes for which it is sold. When it is not, deception occurs.@[116] ABait and switch@ cases involve a deceptive practice because the seller does not have a bona fide intention to sell the offered merchandise.[117] Again, there is an implicit representation, this time of intention to sell. In either a bait and switch or a failure to sell ordinarily fit products, according to the policy statement, the commission does not require evidence on consumer expectations and is willing to presume that

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[115] See Policy Statement on Deception at 6, in Letter to John D. Dingell, Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, Oct. 14, 1983, reprinted as app. to In re Cliffdale Assocs., Inc., 103 F.T.C. 110, 174 (1984).

[116] See id.

[117] See id.

consumers are likely to be misled.[118]

The economics of bait and switch are very similar to those of delaying disclosure until after consumers have paid and taken delivery. Both practices thwart consumers' ability to be smart shoppers by researching the best deal before initiating a purchase. In a bait and switch, a customer who responds to an advertisement for low-price goods by going to the store does not have to make a purchase of higher priced goods when the goods advertised are unavailable. But the customer has wasted the time and costs involved in going to the store unless she makes a purchase. Shopping is therefore burdened. Similarly, when a merchant delays disclosure of material terms until after payment and delivery but tries to compensate for that by giving a right of return to customers who choose to reject terms once they are disclosed, the merchant inhibits shopping. The right of return does not compensate for the wasted time involved in searching for the transaction, deciding upon it, then reversing it, and starting over to find another deal.

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[118] See id.

The Deception Policy Statement also states that Aomission of material information@ is deceptive when disclosure is Anecessary to prevent a claim, practice or sale from being misleading.@[119] Materiality of an omission is presumed when Athe seller knew, or should have known, that an ordinary consumer would need omitted information to evaluate the product or service....@[120] Generally, materiality of information is judged by whether it is Alikely to affect a consumer=s choice of or conduct regarding a product.@[121] Information pertaining to the central characteristics, purpose or cost of a product or service is presumed material.[122] Likely to be material is information on Adurability, performance, warranties or quality,@ according to the Deception Policy Statement.[123] Sometimes the commission requires evidence of materiality, which can be supplied by showing that the product would cost more with a feature that it was expressly or impliedly said to have, but does not in fact have. The same analysis could be applied to termsBwould the product cost more if warranted to be merchantable or if sold on a basis where there is liability for lost use or other consequential loss? Materiality stands in for a finding of injury,[124] which need not be independently shown in deception analysis.

The practice of selling (or Alicensing@) products on line without disclosing terms beforehand is likely to mislead consumers in various ways, depending on the content of the terms

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[119] See id. at 5.

[120] See id. at 16.

[121] See id. at 15-16.

[122] See id. at 17.

[123] See id. at 18.

[124] AInjury and materiality are different names for the same concept,@ the Deception Policy Statement explains. See id. at 18.

later disclosed. If the term held back is a disclaimer of the implied warranty of merchantability, as in many software transactions, the seller (or Alicensor@) has represented fitness for ordinary use but then refuses to stand behind that representation. A consumer would likely be more suspicious of a product sold as is and thus more likely to insist on an inspection or trial.

Software often is transferred under Alicenses@ that contain limitations on use (such as, one user, one machine) and transfer (sometimes no transfer is permitted). The commission should be willing to presume that these licenses are contrary to many consumers= expectations. Consumers are unlikely to understand what a Alicense@ is without careful, simple explanation. They are more likely to think they have bought a copy and can transfer it by giving it away to a relative or a charity or by selling it to a second-hand store, often along with the computer on which it is loaded. They may also assume that anyone in the family can use the software on any of the family=s home computers. The information about restrictions on use and transfer address central characteristics of the deal and its effective price. If a consumer planned to use the software on two machines, terms saying it can only be used on one make the product worth half what the consumer expected. If the software is not transferrable, it cannot be sold or given away when the consumer is done with it, which also reduces its value to the consumer. Transfer restrictions also could eliminate the second-hand market, reducing competition and driving up prices.

Non-disclosure of mandatory arbitration and of remedy limitations also fit into the presumed deception framework. Arbitration is a shadowy concept to consumers, who are unlikely to understand that they are giving up the right to a day in court and to a trial by jury.[125]

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[125] See Broemer v. Abortion Services of Phoenix, Ltd., 840 P. 2d 1013 (Az. 1992) (finding even a signed agreement to arbitrate was unenforceable because the agreement was contrary to reasonable expectations and not enforceable where it was not explained to the

Furthermore, even with disclosure, consumers would have a hard time understanding certain implications of mandatory arbitrationBsuch as limited discovery and inability to pursue a class action. [126] Perhaps only lawyers with knowledge of the dynamics of both litigation and arbitration can truly appreciate the difference, including the impact on leverage for a settlement of being restricted to a private forum, where the dispute is shielded from publicity and the decision-makers must look to businesses to bring them cases in the future.

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consumer that she was giving up the right to a jury trial and would have to bring all disputes, even malpractice, before an arbitrator).

[126] There are also good reasons to find pre-dispute mandatory arbitration clauses against public policy, for example when the result is an exclusive forum in an arbitration system that does not allow class actions, which federal and state consumer protection statutes recognize as necessary to make consumer redress feasible.

As to remedies, foreseeable consequential damages are recoverable unless excluded, as a matter of contract law[127] and under Article 2.[128] Therefore, it is arguable that consumers expect coverage of these losses unless they are warned to the contrary. A more realistic view is that consumers are not likely to know the law or to think about liability for consequential loss (such as lost use) when they purchase. However, since Hadley v. Baxendale,[129] the law has treated foreseeable consequential loss as part of a customer=s reasonable expectations, putting the burden on sellers to clarify otherwise. This point is reinforced by the Magnuson-Moss disclosure requirement that a warrantor of a consumer product clearly and conspicuously disclose limitations on incidental or consequential damages.[130]

Withholding information about more extreme liability exclusionsBsuch as those for strict liability in tort or punitive damagesBare even easier to fit into deception analysis. These are forms of liability that arise when there has been personal injury or intentional wrong, and terms excluding this sort of liability often unenforceable. Putting an unenforceable form in a contract is a deceptive practice, because consumers are likely to assume that businesses only put legally enforceable terms in their forms. In addition, even if enforceable, these liability exclusions would,

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[127] See Restatement (Second) of Contracts, Section 351 (1981).

[128] See Article 2, Sections 2-714 and 2-715.

[129] See Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854).

[130] See 16 C.F.R. section 701.3(a)(8).

if pointed out to consumers and explained to them, raise questions about the honesty and fairness of the merchant using them and tend to discourage transactions, suggesting that holding back such terms until after payment is both material and likely to mislead.

A right of return is not a cure-all. The Deception Policy Statement provides that, Awhen the first contact between a seller and a buyer occurs through a deceptive practice, the law may be violated even if the truth is subsequently made known to the purchaser.@[131] In a letter to NCCUSL concerning UCITA, senior FTC staff stressed the importance of disclosure of license restrictions prior to the consummation of the transaction.[132] The letter noted that money-back guarantees do not make up for misleading omissions prior to purchase.[133] The Deception Policy Statement makes the point that a money-back guarantee does not compensate the consumer for the time and expense of returning a purchase and obtaining a replacement.[134]

B. Unfairness.

Holding back important terms also meets the elements of unfairness. In its Unfairness Policy Statement, the FTC stressed consumer injury as the most important criterion of unfairness, sufficient in itself.[135] Three tests of consumer injury must be metBthe injury must be substantial, not outweighed by countervailing benefits to consumers or competition, and one that consumers

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[131] See Deception Policy Statement, supra note 115, at 12-13.

[132] See Letter to John L. McClaugherty, Chair Executive Committee, National Conference of Commissioners on Uniform States Laws, July 9, 1999, at 2, signed by the directors of the FTC=s Bureau of Consumer Protection, Bureau of Competition and Policy Planning office, among others.

[133] See id. at 2 n.5.

[134] See Deception Policy Statement, supra note 115, at 12-13.

[135] See FTC Policy Statement on Unfairness at 5; give full cite.

could not reasonably have avoided.[136] The essence of Asubstantialness@ is monetary harm.[137]

[136] See id.

[137] See id.

Congress codified the three-part test of consumer injury in the Unfairness Policy Statement in 1994.[138] The Senate Report provides that, AA consumer injury may be ›substantial= if a relatively small harm is inflicted on a large number of consumers or if a greater harm is inflicted on a relatively small number of consumers.@[139] The codification also states that established public policies may be considered in making a determination of unfairness but cannot be the primary basis.

The substantialness of the injury to consumers comes in the burden on shopping and the likelihood that consumers end up subject to more adverse terms than if shopping introduced competition. In the on-line environment, because the cost to Internet merchants of providing terms before customers order is so low, there is no difficult tradeoff question about whether nondisclosure may benefit consumers by reducing cost.[140] Finally, delayed disclosure is not something within the consumer=s control so that the consumer can avoid it easily. The established public policy in favor of competition, and against burdens on competition, reinforces the

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[138] See The Federal Trade Commission Act Amendments of 1994, Pub. L. 103-312 sec. 9, adding a new 15 U.S.C. sec. 45(n).

[139] See Sen. Rep. No. 130, 103d Cong., 2d Sess. 11 (1994), reprinted in 1994 U.S.C.C.A.N. 1787-88; see also H. Conf. Rep. 617, 103d Cong., 2d Sess. 11 (1994), reprinted in 1994 U.S.C.C.A.N. 1797.

[140] Compare Hill v. Gateway, 105 F. 3d at 1149, noting the burden of disclosing terms in a telephone call. I would argue that important terms contrary to background rules of law (e.g., disclaimers of the implied warranty of merchantability, exclusions of foreseeable consequential loss, or mandatory arbitration cutting off the right to a day in court) should still have to be disclosed at least in summary form in a telephone order situation. Alternatively, if a seller chooses not to abide by these background rules of law, it could send such material terms by e-mail, fax or regular mail and require assent before shipment. This is what a seller has to do to be sure of getting its terms in a merchant-to-merchant deal under UCC Section 2-207, and consumers should get at least as much protection against imposition by a delayed form as businesses do.

consumer injury analysis as applied to delayed disclosure of material terms.

C. Grounds for Rule-Making.

1. Authority and Legal Framework.

The Federal Trade Commission Act empowers the FTC to make trade regulation rules that Adefine with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce.@[141] The purpose of such rules may be Apreventing such acts or practices.@[142] In promulgating such rules, the FTC is charged with preparing a statement of basis and purpose that includes three parts: a statement as to the prevalence of the acts or practices treated by the rule; a statement as to the manner and context in which such acts or practices are unfair and deceptive; and a statement as to the economic effect of the rule, taking into account the effect on small business and consumers.[143]

Thus, in addition to finding violation of the FTC Act, rule-making requires a finding of prevalence of the practice addressed, discussed below, and cost-benefit analysis of the rule. It is beyond the ambition of this article to propose a specific rule for disclosure of software terms. However, the need for a rule is urgent, and generally, it should require disclosure of key terms of software licenses in a standard format, prior to payment and delivery. Ideally, it should provide for machine-readable fields in on-line marketing, to permit consumers to search more easily. Perhaps a short form of disclosure notice could be designed for software sold in boxes, with a

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[141] See 15 U.S.C. section 57a(a)(1)(B).

[142] See id.

[143] See 15 U.S.C. section 57(d)(1).

longer form required for on-line transactions.

2. The Prevalence of Non-disclosure of Software Terms by Software Companies

The author and her research assistant[144] conducted a simple survey of the Web sites of the top 100 personal computer software companies, by volume of revenue, to determine whether they provide their terms on line. As our sample, we used the 2000 Soft-letter 100, published by Soft-letter of Watertown, Massachusetts.[145] This listing ranks the top 100 personal computer software companies based on calendar 1999 revenues.[146]

We visited the Web sites of all 100 companies in July and August 2000. Of these companies, 36 did not provide for ordering of products on-line, nor did they provide their license terms on line. The remaining 64 did provide for on-line ordering, and of those, only eight provided their license agreements prior to the time that a customer must provide a credit card to proceed. Thus, for Web merchants in the sample, only one-eighth, or 12.5 percent, provided disclosure to someone not prepared to initiate an order. Conversely, 87.5 percent chose not to make pre-transaction disclosure, certainly an indicator of prevalence of the practice of delayed disclosure.

We chose not to give a credit card number and submit orders to see if terms then became available prior to completion of the transaction or prior to download or shipment. This approach

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[144] Thanks to Blair Johanson, class of 2002, University of Arizona, James E. Rogers College of Law.

[145] See the Softletter Web site at: http://www.softletter.com.

[146] This listing includes a company only if it is Aan independent, U.S.-based company (subsidiaries do not qualify) that generates at least 50 % of its revenues from personal computer software development or publishing.@

avoided taking on possible liability for payment or, alternatively, the hassle of reversing transactions. Our searches thus approximated what a Web shopper would be likely to do to comparison shop.

IV. Little FTC Acts: The Role of State Consumer Law

State consumer law can also be used to address the problem of delayed disclosure in consumer e-commerce, particularly in software transactions where the practice of holding back terms is prevalent. All states have consumer protection laws, and nearly all have statutes aimed at protecting consumers from unfair or deceptive practices. Recent interpretations of these state laws are detailed elsewhere in this symposium in an article by Professor Michael M. Greenfield.[147] The state courts do not always interpret their state laws in the same way that the FTC has interpreted the FTC Act, perhaps most significantly because the FTC Act does not provide for private rights of action.[148] The FTC has the ability to provide information about whether a practice causes substantial injury to consumers as a group that private parties may lack. But because delayed disclosure in consumer e-commerce is clearly deceptive, unfair and anti-competitive, it should be easy to make a case under virtually any state UDAP statute, however interpreted. Thus, public and private enforcement and public rule-making on the state level are all potential remedies.

An issue that is likely to arise as state-level remedies are pursued is the impact of UCITA

[147] See Greenfield, supra note 114.

[148] See id.

on these laws. UCITA should be interpreted to have little or no impact on remedies under state consumer protection laws that prohibit unfair or deceptive practices. UCITA is a commercial contracting statute, not a consumer protection law. State consumer laws are an overlay on UCITA, which UCITA itself recognizes in Section 105. Section 105(c) provides, subject to some exceptions that will be discussed, that even in the event of actual conflict between UCITA and a consumer protection statute or administrative rule, UCITA is subordinate to the consumer protection law. Most of the time there is no direct conflict because UCITA deals with making contracts, and consumer protection laws deal with unfairness and deception, which can occur whether or not a contract was made. Where UCITA provides for agreement to terms in a way that constitues an unfair or deceptive practice under state consumer protection statutes or rules, the consumer protection law still governs.

The exceptions to Section 105(c) are in Section 105(d), providing that:

> AIf a law of this state in effect on the effective date of this [Act] applies to a transaction governed by this [Act], the following rules apply:
>
> (1) A requirement that a term, waiver, notice, or disclaimer be in a writing is satisfied by a record.
>
> (2) A requirement that a record, writing, or term be signed is satisfied by an authentication.
>
> (3) A requirement that a term be conspicuous, or the like, is satisfied by a term that is conspicuous under this [Act].
>
> (4) A requirement of consent or agreement to a term is satisfied by a manifestation of assent to the term in accordance with this [Act].

These exceptions do not affect an action brought generally under unfair or deceptive practice language in state statutes, whether the action involves public or private enforcement. As to rule-making, later rules would trump even the UCITA exceptions because of the language Aa law of this State in effect on the effective date of this [Act]....@ UCITA uses the word Astatute@ when it means enactments, so Alaw@ here includes administrative rules.

Some states may have existing statutes or rules requiring particular written notices or signed consents or conspicuous disclosures, as a matter of statute or administrative rule. These could be met by electronic records and signatures, a UCITA manifestation of assent, and UCITA conspicuous disclosure.[149] But nothing in these Section 105(d) rules overrides the principle that delayed disclosure of material terms is an unfair and deceptive practice. Furthermore, as noted, later statutes or administrative rules under existing state consumer laws could override the UCITA exceptions.

A potential problem arises, however, if the state consumer protection statute is written in terms of sales of goods and services, assuming UCITA is interpreted to affect the scope of these laws by treating software contracts as Alicenses@ and as not involving Agoods.@ To deal with this issue, Maryland explicitly extended its consumer protection statute to cover UCITA transactions

[149] Note that federal e-signature law would make electronic notices and signatures effective, at any rate. Cite. The UCITA conspicuousness definition is undesirable because it arguably provides safeharbors, and the safeharbors do not provide for effective communication. See Section 102(a)(14). This definition is even worse than the pre-consumer movement definition of conspicuous in the UCC. Like the definition in UCC Section 1-201(10), if provides only for notice, not for effective communication, not an appropriate approach for consumer transactions. In addition draft UCITA comments [check final comments when they come out] suggest that examples given of conspicuous terms are effective even when do not meet the standard of notice to a resonable person.

at the time that it enacted UCITA.[150] State consumer protection officials in states with consumer protection laws referring to sales of goods should insist on this change if UCITA is enacted in their states, although rejection of the statute entirely would be more in the general public interest, including the interest of many business users of software and the interests of library patrons.[151]

More generally, it should be obvious that UCITA does not effect UDAP enforcement by state consumer protection officials, who do not enter into contracts with software licensors. The same is true, furthermore, for consumers acting as Aprivate attorneys general@ when they enforce statutes designed to protect consumers generally. Finally, businesses that market products within the scope of UCITA should not be misled by UCITA into thinking that it is legally permissible to hold back key terms until after order and payment in consumer transactions, particularly on-line consumer transactions. State and federal unfair and deceptive practice theories remain available.

Conclusion

Recent decisions under UCC Article and the enactment of UCITA do not displace federal and state law protecting consumers from unfair and deceptive practices. The UDAP theory is independent of contract and commercial law. This article also details some steps the FTC should take to address these developments in state law and the practices that underly them:

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[150] See MD LEGIS 11 (2000) (Westlaw); 2000 Maryland Laws Ch. 11 (H.B. 19), section 1, amending Md. Coml. section 13-101.1 to cover UCITA consumer contracts.

[151] See http://www.4cite.org for links to statements by business users and library organizations about the ill effects of UCITA.

1. The FTC should update the rules on pre-sale availability of warranties under Magnuson-Moss to take advantage of the Interest, specifically by requiring on-line catalogues to provide links to warranty terms, prominently labeled and placed in close conjunction with product descriptions. It should also explicitly provide that software contracts are sales of consumer products under Magnuson-Moss, even if denominated Alicenses.@ This new state law label does not change the meaning of federal law.

2. To attempt to stimulate warranty competition, the FTC should initiate trade regulation rule proceedings to require prominent disclosure in consumer software transactions if the product is offered AAS IS/No Warranty,@ and also to require standardized disclosures of other significant terms, particularly any use or transfer restrictions. To make such disclosures understandable and not misleading, it may be necessary to come up with some labels for licenses along the lines of the AFull@ and ALimited@ labels used for warranties under Magnuson-Moss. Similarly, it may be advisable to prohibit some restrictions when a software company offers a Alicense@ which sounds pleasantly permissive, rather than like a set of restrictions (which lie buried in fine print). For example, deception could be avoided by making federal first sale and fair use rights a minimum standard for a Alicense,@ as Magnuson-Moss makes the implied warranty of merchantability the minimum standard for any written warranty.