High-Tech Warranty Project -- Comment, P994413."

The following are certain of the questions posed on the FTC website for "Warranty Protection for High-Tech Products and Services, followed by the respondent's answers to such questions.

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

ANSWER: UCITA will affect consumers in many ways, some of which are:

a. More, if not all, software/information vendors will use shrinkwrap/clickwrap licensing as their vehicle of choice, as opposed to sale, for transactions with consumers, as UCITA makes such licenses and all of vendor's terms fully enforceable. Under current law, there is uncertainty as to whether shrinkwrap/clickwrap licenses are unenforceable as contracts of adhesion or as to what terms courts would find unconscionable.

b. Consumers will find that they have fewer rights to use, copy, modify or transfer software or computer information than they had before UCITA. One of the primary goals being sought by software vendors in UCITA was for them to avoid the consequences of and rights that are given to "purchasers" of a copy of software in §117 of the U.S. Copyright Act (17 U.S.C. §117).

c. Consumers will find that they are burdened with greater and more inequitable obligations and prohibitions, such as an obligation of confidentiality and prohibition against reverse engineering and the like. With the use of a license, software vendors may obligate consumers to keep the software in confidence, even no confidential information is disclosed to the consumer, as in the case of widely distributed, mass-market software, such as MS WORD for instance, which is known by many millions of people throughout the world.

2. What role, if any, would be appropriate for the federal government with respect to protecting consumers who purchase software or other computer information products and services?

ANSWER: The federal government should, through appropriate pre-emptive legislation, protect consumers by placing limitations on certain terms or by declaring certain terms unenforceable that would take away from consumers and other purchasers those rights they currently have under federal copyright and patent laws, as well as under existing state trade secret laws.

3. What is the impact of characterizing software and computer information as intangibles, rather than as tangible personal property or goods?

ANSWER: Because UCITA characterizes (or more properly, mischaracterizes) software and computer information as "intangibles" and not as tangible personal property, vendors are able to avoid coverage under the Magnuson-Moss Warranty Act and can therefore disclaim implied warranties in transactions with consumers.

4. What is the impact of characterizing a mass-market software transaction as a license as opposed to a sale of goods?

ANSWER: By characterizing a mass-market software transaction as a license, the vendor effectively avoids state law governing the "sale of goods;" the right to reverse engineer goods under state trade secret law; and the rights afforded an "owner of a copy" of software under federal copyright law. All of this is permitted under UCITA and enables a software vendor to, in effect, draft its own intellectual property law governing the parties' rights and obligations to the "goods" of the transaction.

5. What are the legal implications of characterization of the transaction as a license?

ANSWER: The legal implication of characterizing the sale of software as a license is that the vendor is able to avoid any and all risks on the vendor's part, while exposing the consumer to unlimited risks. At most, a vendor's only risk is the loss of a sale through a refund of the purchase price to the consumer. The consumer, on the other hand, may suffer significant money damages arising from a loss of his data or lost income and time caused by known defects in the software, all with no recourse or remedies. Also, a consumer may be held liable for the full market value of the software in the event such consumer is found to have violated an obligation of confidentiality, a prohibition against reverse engineering or the like.

6. To what extent, if any, should software transactions be treated differently from transactions involving other intellectual property, such as the sale of compact discs, videocassettes, and printed books?

ANSWER: Software transactions should be treated no differently from other transactions involving intellectual property. A consumer really has no interest in the intellectual property of the product being bought. His purpose in acquiring software is the same as with any other product. From a consumer's standpoint, software is purchased for what it does, not what intellectual property is contains or is protected by. A consumer buys software as a tool, a toy, or entertainment, the same as he would buy a hammer, a board game or a printed book.

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

ANSWER: No. A consumer would prefer to own that which he has paid for, as he does with other things he buys. A consumer is not looking to have his ability to deal which such items be more limited than those he buys. Most goods involve intellectual property of some kind, whether it be patent, trade secret or copyright. Therefore, making such a distinction is both irrelevant to the consumer and improper from any practical standpoint or under the law.

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

ANSWER: Mass market license for software typically do not contain (create) any express warranties. See the Example License attached hereto.

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

ANSWER: Implied warranties are almost universally disclaimed in mass-market licenses for software. Again, see the Example License attached.

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

ANSWER: Mass-market licenses universally disclaim express and implied warranties. I do not recall seeing one that does not disclaim such warranties.

11. How are consumers affected by the use of "shrinkwrap" or "clickwrap" licenses in mass market purchases of software?

a. How are these licenses treated under existing law - that is, to what extent are these licenses enforceable?

ANSWER: In the not so distant past, courts held such agreements unenforceable as "contracts of adhesion" or as not being part of the bargain because of not being disclosed to the buyer prior to payment of the purchase price. More recently, courts have been finding shrinkwrap and clickwrap licenses enforceable on consumers and other buyers.

b. What types of terms are typically included in a software license?

ANSWER: All of the following: 1. obligation of confidentiality; 2. prohibition against reverse engineering; 3. restrictions on transferability to another person or even another computer; 4. prohibitions against any modification or adaptation; 5. prohibition against making copies, even for backup purposes; 6. the right to electronic "self-help"; 7. the disclaimer of warranties; 8. elimination of all liability for product defects or breach of contract; 9. the

right to later amend the agreement by posting amendment on a web-site or by e-mail; and 10. no limit on consumer's liability for breach.

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

ANSWER: Terms typically are not available to the consumer or others until after the purchase. UCITA favors this approach and makes post-purchase terms readily and fully enforceable.

12. What role, if any, does the Magnuson-Moss Warranty Act play in the marketing, sale, or licensing of software or other computer information products or services to consumers?

ANSWER: The licensing of software puts software outside the purview of Magnuson-Moss Warranty Act. Therefore, it does not play any role in the marketing, sale, or licensing of software, unless a court holds the transaction to be a "sale of goods" and ignores the license.

a. Is it appropriate that software be treated as a "consumer product" subject to the Act?

ANSWER: YES

b. Is it appropriate that software be treated as "tangible personal property" subject to the Act?

ANSWER: YES

c. Is it appropriate for the typical consumer transaction to acquire software to be treated as a "sale" of software subject to the Act?

ANSWER: YES

13. Recent proposed revisions to UCC Article 2 (sale of goods) suggest that post-sale disclosure of terms may become acceptable in the sale of goods context. What would be the costs and benefits of applying a licensing model to goods covered by UCC Article 2?

ANSWER: There would be a great benefit to the seller, as he would lose fewer sales to buyers who would not buy if those terms were known to them before the sale.

14. Does this suggest the importation of a licensing model into such sales of goods?

ANSWER: I thinks so, because it has already happed. See the attached license for the :CUECAT™ READER.