

September 11, 2000

Mr. Donald S. Clark
Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue NW
Washington, DC 20580

Re: High-Tech Warranty Project --- Comment, P994413

Dear Mr. Clark:

On May 11, 2000 the Federal Trade Commission published a request for comments on warranty protection for software and other computer information products and services marketed to consumers. This inquiry takes place as state legislatures are considering enacting the Uniform Computer Information Transaction Act (UCITA), a model law issued by the National Conference of Commissioners of Uniform State Laws. Consumer Federation of America,¹ Columbia Consumer Education Council,² The Center for Public Representation,³ Professor Gerald Thain,⁴ Arizona Consumers Council,⁵ Virginia Citizens Consumer Council,⁶ and the Massachusetts Consumers' Coalition⁷ are pleased to share our concerns with the FTC.

UCITA seeks to provide legal status to the computer industry practice of "licensing" software and providing warranty and contract disclosures post-sale under

¹ CFA is a pro-consumer association of 260 organizations founded in 1966 that advocates on behalf of consumers.

² Columbia Consumer Education Council is a statewide, volunteer consumer advocacy, education and assistance organization founded in 1994 in Columbia, South Carolina.

³ The Center is a non-profit public interest law firm in Madison, Wisconsin that represents consumer and other underrepresented interests in legislative, administrative and judicial proceedings at both the state and federal levels.

⁴ Professor Thain holds the chair in consumer law and a member of the faculty at the University of Wisconsin Law School, Madison, Wisconsin; he also teaches commercial code law and has served on several advisory committees to the American Law Institute concerning revision of the Commercial Code, the law of unfair trade practices, and other matters.

⁵ The Arizona Consumers Council is a statewide, volunteer consumer advocacy organization based in Phoenix, AZ, founded in 1966.

⁶ Virginia Citizens Consumer Council, founded in 1966, is a statewide advocacy and information organization, based in Richmond, VA. VCCC participates in the Virginia Joint Commission on Technology and Science study committee examining the UCITA law enacted in VA 2000.

⁷ The Massachusetts Consumers' Coalition is an association of public and private agencies to promote consumer interests.

“shrinkwrap” or “clickwrap” terms. Instead of selling software and computer services as “goods and services” subject to traditional consumer protection laws, the “licensing” of intellectual property is an attempt to fundamentally rewrite the rules that have determined the balance of equities and power between sellers and buyers in order to give more power to sellers at the expense of buyers for electronic commerce. This favors the software and computer industries at the expense of consumer expectations and confidence. In particular, by giving legal stature to post-sale disclosure of material terms such as warranties, UCITA violates a basic premise of consumer protection law.

Only Maryland and Virginia have enacted the Uniform Computer Information Transaction Act, with amendments made in both states to the NCCUSL model and with delayed implementation and further study required in Virginia. Iowa adopted an anti-UCITA law to protect its citizens from the terms of UCITA adopted in other states. UCITA has been universally opposed by consumer organizations, many state consumer protection officials, and other experts in the field of law. NCCUSL continues to amend UCITA to meet the demands for exclusion of various industry groups and to deprive consumers of the relatively stronger protections of the new federal E-Sign law (Electronic Signatures in Global and National Commerce Act, effective October 1, 2000.)

The FTC’s inquiry into the application of the Magnuson-Moss Warranty Act and other consumer protections is very appropriate and welcomed by consumer advocacy organizations. We also applaud the FTC staff’s participation in the NCCUSL deliberations.

The Magnuson-Moss Warranty Act was intended to protect consumers against highly technical warranties that disclaimed all implied warranties and were so limited as to be useless. Since 1975, warranties have had to be clear and understandable, may not disclaim or restrict consumer rights under state law, must be available prior to sale so that consumers can be fully informed when making a purchase decision, and must be honored by both sellers and manufacturers.

UCITA takes the exact opposite approach to Magnuson-Moss. Under UCITA, important warranty terms may be sealed in shrink-wrap inside a box, invisible to the consumer until after purchase, and still be considered “conspicuous” under UCITA’s unique definition of the word. These terms can be unilaterally changed after purchase. Notices can be considered “received” by a consumer who never sees messages from the software company.

Computer industry practice and UCITA are an audacious effort to deprive consumers of warranty and consumer protections in the electronic commerce market. UCITA dilutes the warranty protection for consumers of software and weakens consumers’ ability to sue software vendors or even to criticize these products. By defining software as a license instead of as the sale of goods or services, UCITA attempts to deprive consumers of protections they now have.

UCITA allows software publishers to sell software “as is.” As Forbes Magazine noted, “It’s hard to imagine even the slimiest used-car salesman sidestepping responsibility as completely as Microsoft does in licensing its Web browser....UCITA protects the industry rather than consumers, letting it impose sneaky deals at the click of an ‘I agree’ button.”⁸ UCITA validates the “As Is” disclaimer of implied warranties, even if given after the sale, something the FTC’s Used Car Rule would not permit even the sleaziest used car dealer to do.

UCITA interferes with the sale of goods law by allowing opt-in to UCITA if software is only a part of the transaction. Many goods are sold with software, including computers, cars, and cameras. By allowing the sale of these goods to be governed by UCITA by an “opt in” provision of the contract’s fine print, purchasers of these products would be deprived of expected consumer protections. For example, a car dealership in Detroit is currently using a computer program that remotely disables the vehicle when payments are missed. There is software that controls brakes, for example. By licensing computer programs in cars, sellers of cars might be able to opt into UCITA, making it more likely that remote disabling of goods would stand up in court.

UCITA also fundamentally changes consumers’ rights to be protected under state consumer protection laws and to have recourse in state courts. UCITA creates doubt about whether state laws banning unfair and deceptive practices in sales of goods and services apply, by defining consumer software contracts under state law as not involving sales or goods. A software company can declare in the contract that the consumer protection laws of the consumer’s state do not apply to the contract. Consumers can be bound by mandatory arbitration clauses. Software companies can name the state under choice of law and jurisdiction, requiring an aggrieved consumer to travel far to seek justice in unfamiliar courts.

What is the logical consequence to blessing “shrink-wrap” post-sale disclosures and turning the purchase into a “license” agreement? Competitive forces will not be brought to bear on improving the quality or features of software. By prohibiting negative reviews, consumers will not be well informed as they comparison shop for software. This is the equivalent of auto manufacturers denying Consumer Reports the right to purchase, test, and report on new vehicles. Software companies will have little incentive to offer improved consumer-friendly terms since consumers are deprived of access to that information until after the purchase is completed. By allowing software companies to pick the state laws and courts and arbitration forum that dissatisfied consumers must use, the chastening effect of adverse court decisions will not improve the quality or reliability of these products. UCITA fails to require the disclosure of known defects, favoring producers with strong support for remedy limitations and warranty disclaimers. This feature makes it hard for consumers to avoid problems.

Consumers who buy software or computer services off the shelf at retail stores or online should be protected by the state and federal consumer protection laws that apply to

⁸ Stephen Manes, “Click Here for a Bogus New Law,” Forbes Magazine, March 20, 2000 (www.forbes.com/forbes/00/0320/6507296a.htm)

the sale of goods or services. CFA et. al. believe that consumers of mass-market software and e-commerce transactions should be excluded from UCITA and should benefit from the fundamental consumer protections offered by the Magnuson-Moss Warranty Act, state Uniform Commercial Codes, and state UDAP laws. Software publishers should be expected to stand by all their statements of fact and promises as express warranties without condition or exception. This will produce consumer confidence, a necessary component for growth in electronic commerce.

As 24 state Attorneys General wrote to NCCUSL on July 23, 1999:

“The overriding purpose of any commercial code is to facilitate commerce by reducing uncertainty and increasing confidence in commercial transactions. We believe that UCITA fails in this purpose. Its rules deviate substantially from long established norms of consumer expectations. We are concerned that these deviations will invite overreaching that will ultimately interfere with the full realization of the potential of e-commerce in our states.”

CFA requests the opportunity to participate in the FTC’s public forum on October 26. Thank you for this opportunity to provide consumer comments.

Sincerely,

Jean Ann Fox
Director of Consumer Protection
Consumer Federation of America

Arizona Consumers Council
Center for Public Representation
Columbia Consumer Education Council
Massachusetts Consumers’ Coalition
Virginia Citizens Consumer Council
Professor Gerald Thain