CROSS REFERENCE SHEET[1]

General

1) What warranty protections exist for consumers who purchase software and other computer information products and services?[2]

> Warranties that the tangible medium is merchantable and free from defect in materials.
> Warranties that the software performs as advertised.
> Warranties that the software performs substantially in conformity with specifications.
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> *See paragraphs* 4, 5, 10, 11, 31,51,59, 63, 64 *and* 65. [3]

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

> A distinction must be made between hopes, wishes, and expectations. Consumers know that software is imperfect. Consumers and everyone who works with software periodically experience disappointment and frustration with software and other computer information. Periodic disappointment and frustration are the prices we pay for the enormous convenience that software provides. Giving consumers the right to sue for breach of warranty when they experience disappointment and frustration with software is not appropriate.
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> *See paragraphs* 4, 6, 7, 10, 11, 19-26, 42-50, 58, 63.

3) What remedies are typically available to consumers if software or other computer information products or service fails to perform as the consumer expected?

> The question assumes that consumers are entitled to have software perform "as expected". Where expectations are based on advertising or specifications provided by the supplier, the consumer has the usual panoply of remedies: remedies for breach of contract, fraud in the inducement, false advertising under Section 5 of the Clayton Act and Section 43 (a) of the Lanham Act, and remedies under parallel state laws. Where expectations are based on hopes and wishes, these remedies are neither are available nor appropriate.
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> *See answer to Question 2), above, and paragraphs* 27-31, 46-50.

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[1] This Cross Reference Sheet is attached to a Comment, which is organized along different lines from the Commission's questions. The Cross Reference Sheet is intended as an aid the Commission in finding answers to the specific questions it asked in its Notice. The cross references are approximate, not definitive. They are intended as a guide, to be read only in conjunction with and as a supplement to the full text of the Comment.

[2] To the extent the Commission's questions refer to "purchase" of "products", the implications of the nomenclature are deliberately disregarded. Software (and other computer information) is generally licensed, not purchased. Using the word "purchased" therefore assumes situations contrary to those which currently exist in the relevant market. The use of the word "product" may, to the extent that it implies a product as defined by the Magnuson-Moss Warranty Act (the "Act") also be confusing. The short answers provided may not, in each instance, point out the inapplicability of this nomenclature, but to the extent questions assume "purchase" and a reference to "products" as defined by the Act, the answers provided, either herein or in the text of the Comment to which this Cross Reference Sheet is attached, take the position that both assumptions are either unintended or not applicable and not accepted for purposes of discussion.

[3] All paragraph numbers refer to the numbered paragraphs in the Comment to which this Cross Reference Sheet is attached.

a. What warranty remedies are available to purchasers of such products and services?

See answer to Question 2) above and paragraphs 49, 59-64.

b. What remedies are supplied by state or federal law?

See paragraphs 49, 60.

c. Do consumers seek to invoke these remedies, and if so, how often are they successful?

Not discussed.

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

Sometimes.

See paragraphs 32-41, 46, 48-49, 60.

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

Apparently, yes.

See paragraphs 19-23, 28-30, 61.

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

The question assumes, as does the Magnuson-Moss Warranty Act, that software and other computer information in is either "merchantable" or "defective". That assumption is not valid with regard to software and other computer information. Software and other computer information are both "merchantable" and "defective".

See paragraphs 6-8, 11, 30-31, 50-54, 57-58.

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

UCITA; European Union Directives, including Directives on privacy and recent EU-U.S. understandings regarding electronic communications and electronic transmissions of information, particularly personal information.

See paragraphs 27, 39, 40, 61.

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

See "UCITA: Helping David Face Goliath", *submitted herewith, and paragraphs* 27, 39, 40, 61.

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

It is appropriate for the executive branch of the federal government, including agencies of that branch, to enforce the current laws, which protect consumers from false and deceptive advertising and fraud. This the federal government is currently doing by enforcing current laws, including the antitrust laws and the Lanham Act.

It is appropriate for state government, and in some cases the federal government is well, to enforce contractual obligations under current law. The adoption of UCITA will assist in this process because UCITA codifies current law and where current law is unclear or there is conflict among the states regarding resolution of a particular issue, the adoption of UCITA will resolve or eliminate such conflicts.

Consumer groups: not discussed.

Private industry will "protect" consumers because it is in the best interest of private industry to do so. Giving consumers what they want is likely to result in increased revenues. Disappointing consumers is likely to result in decreased revenues.

See "UCITA: Helping David Face Goliath", *submitted herewith, and paragraphs* 11, 61.

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

Because of the ease with which software and other computer information can be transmitted, the market for software and other computer information tends to be global. This means that competition tends to be global. When competition is global, imposition of stringent standards in one country may put suppliers in that country at a competitive disadvantage and therefore drive them elsewhere.

See in general paragraphs 6, 7, 9, 17, 19-31.

Effect of Mass-Market Licenses on Warranty Protection

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

The validity of the licensing model has been repeatedly upheld. Re-characterizing mass-market software transactions as "sales of goods" flies in the face of reality and would be enormously disruptive to the market.

See "UCITA: Helping David Face Goliath" *submitted herewith and paragraphs* 5, 6, 11, 12, 17, 19, 31, 42-50, 60, 61-64.

a. What is the rationale for such characterization?

See answer to Question 8) above.

b. What are the legal implications of this characterization?

See answer to Question 8) above.

c. How does this affect consumers?

See answer to Question 8) above.

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

See paragraphs 13-23.

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

The licensing model has worked well for software and other computer information.

See paragraphs 9-23.

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

See answers to Questions 2 and)3 above.

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

Typical licenses indicate that licensors believe that implied warranties do or may arise in the context of mass-market licenses. To avoid confusion and limit exposure, most licenses provide limited express warranties and disclaim all others.

See answers to Questions 1), 2) and 3) above.

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

See answer to Question 10) above.

12) How are consumers affected by the use of "shrinkwrap" or "clickwrap" licenses in mass-market purchases of software?

Describing the transaction as a "purchase" is generally inaccurate, as software is generally licensed.

The use and effects of "shrinkwrap" *and* "clickwrap" *are discussed at paragraphs* 24-31.

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

These licenses have repeatedly been held enforceable under basic principles of contract law. Contract provisions which are unconscionable or against public policy are not enforceable under common law principles, and UCITA makes these common law principles explicit.

See answers to Questions 1), 2) and 3) and paragraphs 13-30.

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

See paragraphs 19-23, 26, 29-30.

c. What types of license terms are beneficial to consumers? What types of terms may cause consumers harm? What legal recourse do consumers have in such circumstances?

See answers to Questions 1), 2) and 3) and paragraphs 13-30.

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

The terms of shrinkwrap licenses are generally not available prior to purchase. The terms of clickwrap licenses are generally available for software and other computer information acquired via the Internet or other electronic means.

See paragraphs 24-41.

e. What is the impact of licensed terms mandating certain types of alternative dispute resolution, such as arbitration? How frequently, if a whole, are such terms enforced by licensors?

Not discussed.

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

No. The licensing model does not discourage firms from competing on the basis of licensing terms. Terms which a licensor believes are of interest to licensees are publicized through advertising.

See paragraphs 24-41, 46-49, 60.

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

No direct role, because the Act applies only to tangible products in the value of software in other computer information lies in its intangible aspects. Licenses are, however, generally written in clear and plain language which gives users limited warranties.

See paragraphs 51-58.

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

No.

See paragraphs 4-18.

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

No. The value of software lies in its intangible aspects. Whether or not Magnuson-Moss applies to the tangible media on which software may be distributed is moot because licensors provide that in the event the tangible medium is defective, it will be replaced.

See paragraphs 4-7, 9-11, 59-65.

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

No. The act applies to tangible products, software it is licensed and not sold, and the validity of the licensing model has been repeatedly upheld. There is no evidence that the fundamental legal

structure on which a multi-billion dollar industry has been built is in need of a restructuring which would have a profound adverse effects on the industry.

See paragraphs 12, 13, 18, 24-41, 59-65.

c. Is it appropriate that software licenses be treated as "warranties" subject to the Act?

It is appropriate to enforce software licenses as contractual obligations. To the extent licenses provide warranties, it is appropriate to enforce those warranties. It is not appropriate to treat these warranties as "subject to the Act" because the Act applies to tangible goods, which are "merchantable" only if they are not "defective". Software and other computer information meets neither criterion of the Act. Software's value, and complaints about it that are not covered by current warranties, relate to its performance, that is, to its intangible aspects. Contrary to the situation contemplated by the Act, all software is "defective" and nevertheless "merchantable".

See paragraphs 4-23, 37, 40-65.

Future Trends: High-Tech Legal theories in the Low-Tech Marketplace

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

Post-sale disclosure of terms is acceptable under current provisions of UCC Article 2. Goods are frequently leased, and such arrangements are covered under UCC Article 2A. To date, discussions of revisions on UCC Article to have not included suggestions that the licensing model be imported into Article 2.[4]

Public Forum

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

See paragraph 65.

16) What interests should be represented at the Commission's initial public forum on "Warranty Protection for High-Tech Products in Services?"

See paragraph 65.

[4] I am a member of the American Law Institute's Consultative Group for the proposed Revised UCC Article 2, which is currently in the drafting process.