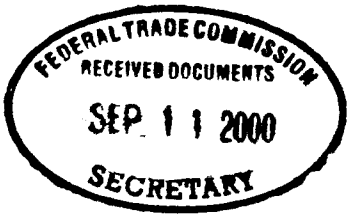

Before the

Federal Trade Commission

In the Matter of High Technology Warranty Project

FTC File No. P994413

Comments of

NetAction

Computer Professionals for Social Responsibility

CompuMentor

September 8, 2000

SUMMARY

- Computer program and other computer information product suppliers often make warranty and other material terms available only after consumer payment or initial use.
- Courts generally have held that computer program and computer information product contracts are governed by Uniform Commercial Code Article 2: Sales.
    - Some hold that the terms do not become part of the contract, at least in the absence of agreement to their addition.
    - Others hold that terms first made available after payment or initial use become part of the contract and are enforceable.
    - Continuing conflict is epitomized by a divided court in a recent state court decision and the most recent federal court decision which questions enforceability.
- The Uniform Computer Information Transactions Act validates industry practice and rejects cases that hold that such terms are not part of the contract.
- The Magnuson-Moss Consumer Product Warranty Act and its requirements for pre-contract disclosure of warranty terms, should be interpreted to apply to individual copies of computer program and other computer information products that are distributed in a tangible medium and are normally used for consumer purposes.
- An FTC Trade Regulation Rule should establish reasonable pre-contract disclosure requirements for warranty and other material contract terms for computer program and other computer information products that are distributed, or accessed for use, online and normally used for consumer purposes.
- The Trade Regulation Rule should be made applicable to computer programs and other computer information products fixed in a tangible medium and normally used for consumer purposes:
    - if the Commission determines that such products are not covered by the Magnuson-Moss Warranty Act; and
    - otherwise to assure comparable treatment irrespective of distribution mode, *e.g.*, for any pre-contract disclosure requirements for non-warranty terms.

BACKGROUND

Consumer Law and Policy: Standard Form Contracts and Terms

The use of standard forms and terms in consumer and many other transactions is cost-reducing and inevitable. It also has potential for overreaching and inefficiency. The latter has inspired regulation of actual or potential abuse of drafter-supplier control over terms. Measures range from statutory and administrative regulation of terms and their effects to occasional denial of judicial enforcement. State regulation of insurance contracts and their terms is a prominent example of the former. Judicial refusals to enforce standard form warranty and related terms written to shift the risk of harm resulting from manufacturing defects from mass production manufacturers to individual end-users exemplify the latter. Similarly, as credit became more generally available to consumers, and then aggressively marketed in aid of expanding consumer goods markets, legislatures, courts and the Commission responded to calls for relief from the strictness of standard form terms that strengthened creditor rights and remedies and curtailed those of consumers.[1]

Consumer Law and Policy: Warranty and Other Information Disclosure Mandates

Consumer credit and product warranty laws enacted by Congress and state legislatures during the 1960s and 1970s favored information disclosure and only limited regulation of contract terms. Many, like the Magnuson-Moss Act, were a consensus product of a process initiated by proposals to regulate contract terms and remedies.[2] During the same period and after, FTC Trade Regulation Rules and unfair and deceptive practices remedies emphasized information disclosure for the twin purposes of better informing consumers and promoting competition. The common feature of these measures is that they require disclosures be made in advance, in writing, and in a clear and conspicuous manner.

The disclosure solution embraces a market model premised on consumers' informed exercise of choice. Its premise is that consumers are entitled to know cost, warranty, rights, remedy, and obligation terms before entering into a contract. It reflects also the view that to not timely disclose known information that is material to and not known by the other is a form of deception.

Pre-contract disclosure enables a consumer to choose not to enter into a contract, and more generally to compare market alternatives. It is not assumed that disclosure would lead all or even most consumers to more carefully consider and act. The expectation, or at least hope, is that informed exercise of consumer choice by at least some consumers will stimulate contract term competition among suppliers.

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[1] Credit Practices Trade Regulation Rule, 16 C.F.R. Part 444; American Financial Services Assoc. v. F.T.C., 767 F.2d 957 (D.C. Cir. 1985), *cert. denied* 475 U.S. 1011.

[2] The road to enactment usually was long, as epitomized by the original Federal Truth in Lending Act and the Magnuson-Moss Consumer Product Warranty Act. Ultimate passage of each signified that enabling consumers to be better informed market participants was not a position with which opponents could credibly argue in principle. The history of the Consumer Product Warranty Act, beginning with studies conducted by the Federal Trade Commission in 1965 (automobiles) and presidential Task Force on Appliance Warranties and Service (1968-1969) through the introduction and action on bills that were the precursor to the Magnuson-Moss Consumer product Warranty Act is reviewed in House Report 93-1107, 93rd Congress, 2d Sess. 3-10 and Donald P. Rothschild, *The Magnuson-Moss Act: Does It Balance Warrantor and Consumer Interests?*, 44 George Washington L. Rev. 335, 353-354 n. 151 (1976).

The Magnuson-Moss Act and other federal and state warranty laws and regulations adopt this model and its transactional, market and fairness premises.[3] Specific to the Magnuson-Moss Act, Congress stated that its purpose was "to improve the adequacy of information available to consumers, prevent deception, and promote competition in the marketing of consumer products".[4]

Consumer Law and Policy: Post-Agreement Rejection of Contract

Consumer legislation also has created post-commitment contract avoidance or cancellation rights, typically by creating a "cooling off" period within which a consumer was free to cancel without penalty and with full refund.[5] This protects against overselling, and particularly creditor or credit-seller inducing consumers to undertake long-term payment obligations secured by real or personal property without an opportunity to compare possible competing offers, including offerors' reputations and their price, credit and other terms.[6]

"Cooling off" rights often work together with disclosure laws, but are not focused on the practice of providing terms only after payment or initial use. In that sphere, several recent court decisions and UCITA adopt an "opt-out" model under which standard form terms deliberately made available only after payment or initial use are valid and enforceable unless the consumer timely rejects the whole contract.[7] Others reject this view and hold the terms either unenforceable or proposals for new terms to be added to the contract.[8]

Warranty Protection and Its Terms

Warranty, whether express or implied, is a product of a contract. Disclosure laws operate in this sphere in two ways. The first is to make warranty terms known to a consumer prior to entry into a contract containing those terms. The second is to make clear in the contract any contractual limitations on warranties or remedies for their breach.[9] State law provides the

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[3] Some of these laws and regulations, ranging from the California Song-Beverly Act which is of general application through state statutes and federal regulations governing mobile home warranties, are discussed in J. SHELDON *ET AL*, CONSUMER WARRANTY LAW (1997 & Supp. 1999) and in David A. Rice, *Product Quality Laws and the Economics of Federalism*, 65 Boston Univ. Law Rev. 1 (1985).

[4] 15 U.S.C.A. § 2302(a).

[5] *See* 15 U.S.C.A. § 125 (Consumer Credit Protection Act) and Federal Trade Commission Door-to-Door Sales Trade Regulation Rule, 16 C.F. R. § 429.1.

[6] The measures require prominent written notice of the right and means for its exercise, and the delivery and receipt of that information must be attested by the consumer's signature. Failure to make required credit term or other statutory disclosures before signing is an independent ground for avoidance, and more often than not for the recovery of statutory damages and a public agency enforcement action.

[7] ProCD, Inc. v. Zeidenberg, 86 F.3d 1257 (7th Cir. 1996)(applying Wisconsin law); Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997)(applying South Dakota and Illinois law); Brower v. Gateway 2000, Inc., 246 A.D.2d 246, 676 N.Y.S.2d 569 (App. Div. 1998)(applying New York law); M.A. Mortenson Co., Inc. v. Timberline Software Corp., 140 Wash.2d 568, 998 P.2d 305 (2000).

[8] Step-Saver Data Systems, Inc. v. Wyse Technology, 939 F.2d 91 (3d Cir. 1991); Arizona Retail Systems, Inc. v. Software Link, Inc., 831 F.Supp. 759 (D.Ariz. 1993) (applying Arizona law); Klocek v. Gateway, Inc., 104 F.Supp.3d 1332 (D.Kan. 2000)(applying Kansas and Missouri law, and questioning *ProCD v. Zeidenberg* in ruling on preliminary motion); Novell, Inc. v. Network Trade Center, Inc., 187 F.R.D. 657 (D.Utah 1999).

[9] The dual purposes are discussed in William C. Whitford, *The Functions of Disclosure Regulation in Consumer Transactions*, 1973 Wisconsin Law Review 400.

substance of warranty law except as the Magnuson-Moss Act provisions on written warranties provide a federal law overlay.[10]

Consumer Remedies for Breach of Warranty

The ultimate problem for consumers is a lack of effective remedies for breach of warranty or other obligations. This has been long-recognized.[11] The Magnuson-Moss Act responds to this by providing for a successful consumer litigant's recovery of reasonable attorneys fees and costs.[12] In the states, the problem is most often addressed by court decisions which hold that breach of warranty, or at least refusal to honor a warranty, is actionable under state "Little FTC" and Unfair or Deceptive Practices (UDAP) statutes.[13] State motor vehicle "lemon laws" address it in statutes enacted to provide adequate remedies for truly material breach.[14]

COMMENTS ON STATED QUESTIONS

The following Comments are directed to legal points. Response to questions which are best answered with empirical data is limited.

QUESTIONS 1-7: EXISTING LEGAL PROTECTIONS

Question 1. Computer and Computer Information Product Warranties

Courts uniformly have held that the warranty provisions of Uniform Commercial Code Articles 2 and 2A govern sales and leases of computer programs, computers, and computer information products. In rare instances, it has been held that general contract law applicable to services contracts controls,[15] but the UCC governs if the performance of services is incidental or not predominant.[16] This is recognized even in cases such as *ProCD v. Zeidenberg.*[17]The state law warranty protections that might exist are:

- express warranty, written or oral, created by affirmation of fact or promise with respect to the subject matter, or created by description or sample (UCC § 2-313);

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[10] The Magnuson-Moss Act provision governing the limitation or exclusion of implied warranties, a prominent feature of the statute, in fact depends on whether state contract law creates an implied warranty in the first instance. 15 U.S.C.A. § 2308. A valuable review of and commentary on state warranty statutes other than the Uniform Commercial Code is Professor Donald F. Clifford, Jr. in *Non-UCC Statutory Provisions Affecting Warranty Disclaimers and Remedies in Sales of Goods*, 71 North Carolina L. Rev. 1012 (1993).

[11] Thomas L. Eovaldi & Joan E. Gestrin, *Justice for Consumers: The Mechanisms of Redress*, 66 Northwestern Univ. L. Rev. 281 (1971); David A. Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 Boston Univ. L. Rev. 559 (1968).

[12] 15 U.S.C.A. § 2310(d).

[13] *See* JONATHAN SHELDON *ET AL*, CONSUMER WARRANTY LAW §§ 11.1.3 & 11.1.4 (1997 & Supp. 1999).

[14] *See* JONATHAN SHELDON *ET AL*, CONSUMER WARRANTY LAW § 13.2 (1997 & Supp. 1999).

[15] Micro-Managers, Inc. v. Gregory, 147 Wis.2d 500, 434 N.W.2d 97 (Wis.App. 1988) (agreement predominantly for consultant or contract services in creation, testing and installation of computer program customized to specifications/needs).

[16] *See e.g.* Drier Co., Inc. v. Unitronix Corp., 218 N.J.Super. 260, 927 A.2d 875 (App.Div. 1986).

[17] ProCD, Inc. v. Zeidenberg, 86 F.3d 1257 (7th Cir. 1996)(applying Wisconsin law); Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997)(applying South Dakota and Illinois law); Brower v. Gateway 2000, Inc., 246 A.D.2d 246, 676 N.Y.S.2d 569 (App. Div. 1998)(applying New York law); M.A. Mortenson Co., Inc. v. Timberline Software Corp., 140 Wash.2d 568, 998 P.2d 305 (2000).

- implied warranty of merchantability, *e.g.*, fitness for ordinary purpose, pass without objection in the trade under contract description (UCC § 2-314);
- implied warranty of fitness for a particular purpose, a "special facts" warranty not common in consumer transactions (UCC §2-315).

Although the question is not clearly settled, the Magnuson-Moss Act also likely applies.[18] This is a matter addressed by the Commission's request for comments, and further discussed *infra*.

Question 2. Consumers' Product Reliability Expectations

We can offer no empirical evidence concerning consumer expectations. Anecdotal evidence indicates that consumers believe that they are justified in expecting a stable and reliable product, yet recognize computer programs and other computer information products often are very complex and imperfect. Most certainly expect that a product will perform in accordance with externally visible "features representations" set forth on a product's package. Most likely accept that performance of some functions may prove more difficult or slower than expected. It also is generally understood that some "bugs" may not have been identified and eliminated, or even that a program or other computer information product may prove to be inferior to a competing product even though both are "fit for ordinary purpose. This is no different than in the case of many other consumer products, *e.g.*, motor vehicles and computer equipment.

Known "bugs" merit particular consideration. In essence, they are product characteristics or features. The most significant include incompatibility with hardware or other software that is intended or reasonably expected to be compatible, and faults in the performance or execution of functions which are features of the program. Some "bugs" are known to the supplier before copies of a computer program or other computer information product are commercially distributed. Developers of related application programs, computer equipment manufacturers and end users identify, and often report, other "bugs" in the course of actual use. While its is generally understood that some "bugs" may not have been discovered or eliminated, consumers are misinformed at the point of exercising choice to the extent that significant known "bugs" are not disclosed.

Question 3. Consumer Remedies Under State and Federal Law

1. Legal remedies

Consumer remedies under the UCC range from the right to cancel a contract, return the product and obtain a refund to a right to recover damages for breach.[19] These remedies exist where an express or implied warranty can be shown to exist and that the computer program or other computer information product fails to meet that warranty. Further, the right to cancel and to return the product for a refund is limited. While nominally unqualified if

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[18] *See* L.J.KUTTEN, COMPUTER SOFTWARE § 10.03[3];Cem Kaner, *Software Engineering and UCITA*, 18 John Marshall J. Comp. & Inf. Law 435, 459-62 (1999; David A. Rice, *Computer Products and the Federal Warranty Act*, 1 (#8) The Computer Lawyer 13 (Sept. 1984); Michael Rustad, *Making UCITA More Consumer Friendly*, 18 John Marshall J. Comp. & Inf. Law 547, 587-88 (1999).

[19] State statutes that enhance UCC remedies for consumers are discussed in Donald F. Clifford, Jr., *Non-UCC Statutory Provisions Affecting Warranty Disclaimers and Remedies in the Sale of Goods*, 71 North Carolina L. Rev. 1011, 1041-1053 (1993).

exercised prior to acceptance of a tendered performance,[20] a seller may in some circumstances attempt to make a conforming cure.[21] Post-acceptance, the right exists only where the nonconformity substantially impairs the value of the computer program or other computer information product to the consumer and certain other conditions are met, *e.g.*, difficulty of discovery before acceptance.[22]

2. Cost barriers

A principal difficulty is that remedy enforcement often is costly. Under the UCC, a consumer litigant's recovery does not include reasonable attorneys fees and costs incurred in enforcing a warranty and obtaining a remedy for its breach.[23] This is ameliorated in the many states where a "Little FTC" or Uniform Deceptive Acts and Practices (UDAP) statute covers breach of warranty, or at least refusal to honor a warranty.[24] Such statutes usually permit a successful consumer (or sometimes business) litigant to recover reasonable attorney's fees and other litigation. The Magnuson-Moss Act also provides for recovery of reasonable attorney's fees and costs,[25] thereby reducing the cost barrier irrespective of state law for federal and state law claims actionable under the federal statute.[26]

The cost of seeking and obtaining a remedy is, in any event, high relative to the market price of most products used by consumers. This is a formidable barrier to assertion of even a strong claim.[27] The right to recover attorneys fees and costs facilitates seeking a remedy when the subject matter of the transaction is an automobile or expensive home entertainment center. It is not likely to do so when the item is a computer program or other computer information product that cost $100-$300 or, at most, $500.

Resort to local small claims court, and its informal and inexpensive dispute resolution, is not likely to be a useful alternative where a complaint or demand has not been resolved to a consumer's satisfaction. While subject matter and personal jurisdiction may exist, most computer software and other computer information product contracts include choice of law and choice of forum terms. The latter may state that the parties agree to arbitrate all claims.[28]

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[20] UCC 2-601.

[21] UCC 2-508.

[22] UCC 2-608.

[23] Recovery of reasonable attorneys fees and litigation costs in breach of warranty cases is provided for by specific statute in a small number of states. *See* JONATHAN SHELDON, ET AL. CONSUMER WARRANTY LAW § 10.8 N. 383 (1997 & SUPP. 1999).

[24] JONATHAN SHELDON, ET AL. CONSUMER WARRANTY LAW § 11.1.3 & 11.1.4 (1997 & SUPP. 1999).

[25] 15 U.S.C.A. § 2310(d)(2).

[26] The Magnuson-Moss Act permits limitation of the duration, but not disclaimer, of state law implied warranties and provides a cause of action for their breach. 15 U.S.C.A. §§ 2308 & 2310(d)(1). *See* Walsh v. Ford Motor Co., 807 F.2d 1000 (D.C. Cir. 1986), *cert. denied* 482 U.S. 915; Rothe v. Maloney Cadillac, Inc., 119 Ill.2d 288, 518 N.E.2d 1028 (1988). *See generally* JONATHAN SHELDON, ET AL. CONSUMER WARRANTY LAW § 11.1.4 (1997 & SUPP. 1999) and David A. Rice, *Product Quality Laws and the Economics of Federalism*, 65 Boston Univ. L. Rev. 1, 31-35 (1985).

[27] *See* Thomas L. Eovaldi & Joan E. Gestrin, *Justice for Consumers: The Mechanisms of Redress*, 66 Northwestern Univ. L. Rev. 281 (1971); David A. Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 Boston Univ. L. Rev. 559 (1968).

[28] Enforceability of computer program and computer-related product arbitration clauses were the subject of litigation in Hill v. Gateway 2000, Inc, 105 F.3d 1147 (7th Cir. 1997) (enforceable) and Brower v. Gateway

Determination of the enforceability of such terms is not the usual fare of small claims court, and the cost of litigating these threshold issues is itself a substantial barrier to seeking local redress under a consumer's local law.[29]

An effective remedy may exist when a product is purchased by use of a credit card. The Consumer Credit Protection Act empowers a consumer to direct the card issuer to not make payment to a merchant as means of asserting a defense arising out of the credit card transaction.[30] This is subject several conditions. The statute requires that the consumer has first made a good faith effort to obtain satisfactory resolution of the problem or dispute from the party to whom the credit card was given as a means of payment, the amount of the initial transaction was greater than $50, and the place where the transaction occurred was within the consumer's state or not more than 100 miles distant from the consumer's mailing address. Quite apart from the good faith effort condition, this remedy has decreasing significance as execution of transactions on the Internet increases and supplants traditional in-store, local shopping.

3. Actual use and efficacy

Whether, or how often and with what success, consumers resort to existing remedies under either state or federal law is uncertain though not much in doubt. There are no reported decisions or discovered news reports of any case decided under the Magnuson-Moss Warranty Act.[31] Published court opinions, or even news reports, of consumer litigation of computer program or computer information product warranty -- or even "Little FTC" act -- claims are rare. The extent to which consumers have used the credit card "stop payment" remedy is unknown. However, common report and some studies indicate substantial dissatisfaction with computer program and other computer information product quality and performance, and even more so with responses received when consumers seek problem solutions.[32]

Question 4. Comparison Shopping -- Warranty Coverage Terms

Warranty term comparison shopping is, at the very best, extremely difficult. Terms provided with a packaged computer program and other computer information product usually are contained within the box, or on the digital media contained within the box. Warranty terms for products distributed online sometimes are not available for review online prior to purchase. In other cases, provision is made for scrolling review, but printing or downloading is made difficult if not impossible. Other online suppliers, and even distributors, make it possible -- directly or though links -- to review online, print or download.

2000, Inc., 246 A.D.2d 246, 676 N.Y.S.2d 569 (App.Div. 1998) (generally enforceable, but term of particular provision unconscionable and therefore not enforceable); Westendorf v. Gateway 2000, Inc., 2000 WL 307369 (Del Ch. 2000) (third party beneficiary bound by standard form arbitration clause).

[29] Federal prohibition against disclaimer of implied warranties by a supplier that makes a federal written warranty does not apply unless state law creates an implied warranty in the transaction in question. 15 U.S.C.A. § 2308. Limitations or disclaimers not effective under the federal law are ineffective for purposes of state law. 15 U.S.C.A. § 2308(c).

[30] 15 U.S.C.A. § 1666i.

[31] A claim was asserted but not adjudicated in Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997).

[32] *See* Cem Kaner, *Software Engineering and UCITA*, 18 J. Marshall J. Computer & Information Law 435, 452-55 (1999) and sources cited therein.

The UCC Article 2B (predecessor to UCITA) Drafting Committee rejected, in November 1998, a Committee member's motion to require that contract terms be made available online where a computer program or computer information product is offered for purchase online. Rejection was at the urging of computer program and other computer information product publishers who argued that compliance was not possible or, at the very least, so costly that it would the price to consumers.[33] This is a familiar argument, an echo of one regularly made in opposition to consumer protection information disclosure statutes and regulations.

Question 5. Warranty and Other Rights Disclosure Efficiency

Efficiency in timing, selection and amount of detail disclosed requires consideration of consumer, not just product suppliers' marketing and cost-reducing interests. Product suppliers and others who commend *ProCD v. Zeidenberg,* and incorporation of its view of contract law in UCITA, emphasize that on-package or external pre-contract disclosure consumes finite available space and reduces the ability to present product feature information desired by consumers. They argue that a right to return a product for a full refund if terms made available inside the package or upon initial use are objectionable is sufficient as a matter of disclosure timing and preservation of consumer choice.

This approach insures against pre-contract comparison of terms. Post-purchase return-and-refund is a model that dictates linear comparison. It requires active undoing and redoing based on a prospect that better terms can be obtained for a competing product that was not initially preferred on features and price terms alone.[34]

Disclosure regulation principally addresses consumers who are aware or concerned about their rights.[35] The active shopping behavior of such consumers is predicted to promote contract terms competition. The UCITA model compels such consumers to incur increased search costs and postponement of actual availability-for-use of a functional product to meet the needs that prompted market entry as a consumer. Information that could have been provided must be hunted, one supplier to another. Information search costs are not internalized in product price, but externalized onto only diligent consumers.

In the usual case, inertia will prevail. A purchase is made because a solution is needed or wanted. Conflict is inherent in electing to undo an initial decision or choice based on product features and price. Consumers know that all suppliers use standard forms and terms. Under the circumstances, most might expect that undoing and redoing – and its search and delay costs – will not likely gain significantly different terms on the particular point of concern. All favors keeping the product, not exercising the freedom of choice to reject the contract and obtain a refund. Further, difficulty of making a return for a refund to a retailer that refuses to accept return of an opened package for a refund imposes additional costs and strongly discourages active assertion of rights and continued term shopping.

Timing efficiency has a further dimension. Computer program and other computer information product suppliers contend that contract terms only become significant or material information if, based upon on-package or other information, a consumer believes

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[33] FTC Staff attended this meeting as observers. The impossibility/cost argument was disputed by several independent computer program and Internet website developers.

[34] Alternatively, it may be undoing and *attempted* redoing through search to locate a competing product not originally identified with only a hope or prospect of also finding more acceptable terms.

[35] It also seeks to educate others to become aware.

that a product is sufficient to her needs. In that view, product information is the first priority and disclosure of terms after a product is chosen, but before an initial commitment is irrevocable, is sufficiently timely.

Like most arguments, this has a substantial counter. Product selection is an active step toward product use for its intended purpose. "How to" information on printed material inside the package or presented on-screen at initial use has far more immediate interest than a statement of contract terms for most consumer and even business users.[36] It bridges from on-package product information to actual use, from features description to experiential use. Contract terms, seldom so engagingly presented, are not similarly instrumental. The timing with which they are made available makes them something to put aside. The effect is a bit like not providing packaged breakfast cereal nutrition information on the box, but on a product insert first seen at first opening for use.

The *ex post* disclosure model also is intended to have significant legal consequences based on timing and selection of terms disclosure. These are considered in the discussion of Question 7a.

Question 6. Efficiency of Protection in Event of Defect

The effectiveness of existing laws as protection for consumers against computer program and other computer information product defects is generally addressed in responses to Questions 1-5.

More particularly, it is industry practice to exclude implied warranties of merchantability and fitness for a particular purpose. Express warranties typically are limited to freedom from defect of the product storage medium, not the product itself. Many standard forms make clear that, except for this express warranty, the product is provided on an "as is" basis and state, for example, that "the entire risk as to the results and performance of the product is assumed by you".[37] Liability is limited, in any event, to the amount actually paid for the product.

Cases holding that such terms are not part of the contract and enforceable if provided only after payment or initial use nominally provide substantive protection against defects.[38] Cases following *ProCD v. Zeidenberg* give legal effect to such terms when made available after payment or initial use.[39]

Even so, most reported decisions involve businesses as plaintiffs. Litigating liability under a warranty generally is too costly for consumers. It is an added risk and cost to litigate

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[36] *See* John A. Burke, *Contract As Commodity: A Nonfiction Approach*, 24 Seton Hall Legisl. J. 285 (2000)(discussing New Jersey Law Revision Commission's proposed standard forms contracts statute, and studies indicating that business, not just consumers, typically do not read standard form terms).

[37] Quotation is from Corel warranty for WordPerfect Suite 8.

[38] Step-Saver Data Systems, Inc. v. Wyse Technology, 939 F.2d 91 (3d Cir. 1991); Arizona Retail Systems, Inc. v. Software Link, Inc., 831 F.Supp. 759 (D.Ariz. 1993) (applying Arizona law); Klocek v. Gateway, Inc., 104 F.Supp.3d 1332 (D.Kan. 2000)(applying Kansas and Missouri law, and questioning ProCD *v. Zeidenberg* in ruling on preliminary motion).

[39] *See e.g.* Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997)(applying South Dakota and Illinois laws in absence of definitive state court ruling); M.A. Mortenson Co., Inc. v. Timberline Software Corp., 140 Wash.2d 568, 998 P.2d 305 (2000)(applying Washington law); Westendorf v. Gateway 2000, Inc., 2000 WL 307369 (Del Ch. 2000) (third party beneficiary bound by standard form arbitration clause); Rinaldi v. Iomega Corp., 1999 WL 1442014 (Del. Super. 1999).

whether terms made available after payment or initial use are effective to negate on-package representations of fact as express product performance and quality warranties. The added risk and cost is a substantial additional deterrent to remedy-seeking based on a claimed product defect for an item that cost $100-$300, and rarely as much as $500.

Question 7a. Effects of UCITA on Consumers

1. Terms Provided After-Payment or Initial Use: Exclusion of On-Box and On-Screen Representations of Fact as Warranties

UCITA affects consumers, and others, most directly by making terms disclosed after payment or initial use a part of the contract. In fact, it safeguards against on-package or other pre-sale factual representations about product features and performance becoming express warranties. It is in this context that it has significant efficiency information disclosure selection and timing effects.

On-package or external description of product features, and graphical or other comparison with those of competing products,[40] is sufficient under Uniform Commercial Code § 2-313 to create express warranty by either representation of fact or description.[41] The same information is the benchmark for an implied warranty of merchantability under UCC Article 2.[42] Facially, the express warranty result would be the same under UCITA § 401 except where the product is "published information content",[43] and UCITA implies warranties generally comparable to those implied under UCC Articles 2 and 2A.

UCITA follows UCC Articles 2 and 2A by permitting parties to contractually limit or disclaim implied warranties, define express warranty obligations, and agree upon the remedies that will be available in the event of breach.[44] These warranty-related terms are, with very rare exception, set forth in a record.[45]

UCITA § 406(1) prescribes that words or conduct relevant to creation of an express warranty and warranty-limiting terms contained in a record shall be construed as consistent to the extent reasonable. Where interpretation as consistent is not reasonable, terms that negate or limit are inoperative. This tracks § 2-316(1), except that UCITA expressly makes the stalemate-breaking rule subject to the UCITA § 301 parol evidence rule. This conduces to exclude extrinsic representations, including those made on the outside of the product package from introduction into evidence and from the contract where an inside-the-box record contains an integration or merger clause.[46]

The implication is that UCITA sanctions the exercise of state legislative power to support the strategic behavior of making fact representations to induce mass market purchases, and

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[40] Such on-box comparison is common, though not universal, in the marketing of computer program and other computer information products.

[41] UCC § 2-313(1)(a) (representation of fact) and (1)(b) (description).

[42] UCC § 2-314(1) & (2).

[43] UCITA § 401(c). "Published informational content" is defined in UCITA § 102(a)(51).

[44] The UCITA provisions governing the creation and disclaimer/limitation of express and implied warranties are found in §§ 401-406. UCITA § 803 permits contractual limitation of remedies. The provisions are similar to those of UCC Article 2, although they differ in some particulars not immediately relevant.

[45] "Record" is a relatively new term intended to include a writing and its electronic equivalent. *See, e.g.* Uniform Electronic Transactions Act (UETA) § 2(13) and UCITA § 102(a)(54).

[46] The point applies equally to the on-box equivalent in click-wrap transactions

then disclosing at the time least propitious for exercise of choice that a supplier does not stand behind those representations. Viewed in more familiar contract law light, UCITA establishes the enforceability of merger-clause-in-a-box.[47] Considered in the different light of 15 U.S.C.A. § 45(a) and state "Little FTC" acts, it encourages deception.

2. "Mass Market License"

a. Appearance of Substance

UCITA is presented as specially protecting consumers and a certain few others in standard form transactions that come within the definition of "mass market license".[48] In reality, the protections are limited. A record may disclaim or limit express and implied warranties[49] and remedies for breach.[50] The applicable rules principally serve as formulaic guides for limitation of legal responsibility.[51] Unconscionability[52] and violation of fundamental public policy[53] are the principal grounds for invalidation of any contract term, including one in a mass market license.[54] Unconscionability has not been an effective check to date under UCC Article 2.

UCITA makes the rights and remedies limitations enforceable even though the supplier knows the terms in advance and chooses to not make them available until after payment or initial use.[55] It encourages suppliers to delay disclosure of warranty and remedy terms until after payment or initial use by making the terms part of a contract unless a consumer reads

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[47] Similarly, it establishes enforceability of merger-clause-on-a-screen in the case of click-wrap licenses, most of which are presented within a small frame in which terms can be scrolled a few lines at a time.

[48] UCITA § 102(a)(43) defines "mass market license" to mean a standard form used in a "mass market transaction", a term which is defined in relevant part in UCITA § 102(a)(44) to mean a transaction that is

> (A) a consumer contract; or
>
> (B) any other transaction with an end-user license if:
>
> (i) the transaction is for information or informational rights directed to the general public as a whole, including consumer, under substantially the same terms for the same information;
>
> (ii) the licensee acquires the information or informational rights in a retail transaction under terms and in a quantity consistent with an ordinary transaction in a retail market ...

Unlike the Magnuson-Moss Act, which applies to "consumer products" regardless of the purpose for which they actually are purchased, UCITA defines "consumer" in terms of actual end use of "primarily for personal, family or household purposes". UCITA § 102(a)(15).

[49] UCITA § 406.

[50] UCITA § 803.

[51] This was well described some time ago by a person who was an active observer-participant in the UCITA drafting process. *See* Robert A. Feldman, *Warranties and Disclaimers in Computer Contracts*, 8 (#2) The Computer Lawyer 1 (Feb. 1991).

[52] UCITA § 111.

[53] UCITA § 105(b).

[54] UCITA § 209.

[55] The fact of foreknowledge and conscious choice to disclose is clear from the definition of a mass market transaction as one in which a licensor uses a standard form record in which a product is generally made available to the public on the same terms. UCITA § 102(a)(44). *See also* UCITA §102(a) (60) (definition of "standard form").

them and chooses to "opt-out", *i.e.*, rejects the contract and seeks a refund under the rules of UCITA § 209.[56]

b. Return-for-Refund: Substitution of "Opt-Out" for "Opt-In"

UCITA proponents present the return-for-refund right as a UCITA innovation which substantially enhances consumer protection.[57] It is not. Every person, whether or not a consumer, to whom warranty terms are disclosed prior to purchase or initial use has an earlier opportunity and freedom under general contract law and the UCC to reject proffered standard form terms. This also is the premise of the Magnuson-Moss Act and other contract terms disclosure statutes and regulations. In practical terms, the "opt-in" opportunity provided under existing law is more complete and timely than the UCITA "opt-out" opportunity. It comes prior to making an initial self-commitment to a product, and it does not require deal-undoing action.

c. Return-for-Refund Meets Retail Market Realities

Return-for-refund "opt-out" is an illusory right if retail distributors of shrink-wrap and click-wrap packaged products will not accept the return of an opened package or down-loaded copy. A mass market transaction is, by definition, a consumer or other qualifying retail transaction.[58] The physical or online retail source of a product is the most obvious place to seek the refund promised by Section 209. Yet computer program and other computer information product retailers generally follow a policy -- often posted -- of return-for-refund only for unopened shrink-wrap packages.

The apparent alternative is to ship the opened package or send the used copy to the product's original publisher in exchange for a refund check that will arrive at some future time. This creates an added reason to resign oneself to the terms first made available after payment or initial use. Mail-in or other return to a remote supplier for a refund adds an out-of-pocket economic penalty to engagement in linear comparison shopping, UCITA's information search model. A consumer who chooses to "opt-out" and who still has a need to be met by a product of the same type is required to be at least temporarily out-of-pocket the market price of the original and the next-chosen product. This is especially burdensome, and exerts pressure to forego even the limited option provided by UCITA, in the case of not-affluent consumers.

d. "Opt-Out": Discouraging Consumers' Market Discipline

If a consumer is sufficiently term-sensitive to opt-out despite previously described incentives to not exercise that right, there is a distinct prospect of her serial or repeated opting-out. Pre-contract disclosure statutes and regulations encourage just such term-sensitive consumers to compare terms not solely for their benefit, but to exercise choice in a way that expresses market demand for contract terms. It is this that has potential for promoting competition among suppliers.

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[56] It bears noting that licensor "opt-in" is required if a licensee provides terms in a record which a licensor in a mass market transaction does not have an opportunity to review before delivery or becoming obligated to deliver. The terms are characterized as "proposed terms" and do not become part of the contract unless the licensor affirmatively "opts-in" in a record. UCITA § 209(c).

[57] Micalyn S. Harris, Helping David Face Goliath, 18 John Marshall J. Computer & Tech. L. 365, 379-80 (1999); Jeffrey Dodd, *Time and Assent in the Formation of Information Contracts: The Mischief of Applying Article 2 to Information Contracts*, 36 Houston L. Rev. 195, 249-50 (1999).

[58] UCITA § 102(a)(43) & (44).

The UCITA model increases the information costs of term-shopping for any consumer with the commitment to compare offers and to exercise choice with knowledge of market alternatives. Contrary to what pre-contract disclosures ultimately seek to promote, this conduces to a race-to-the-bottom effect in standard form contract terms, and in protection of consumer expectations. Diminished producer concern for setting and meeting high product quality standards, the ultimate consumer and competitive market adversity, is the obvious corollary.[59]

e. "Consumer" in Larger Perspective

The Commission's immediate focus is consumers and their protection. Yet the contract terms and product quality implications of UCITA and the model it embraces are far greater and within the Commission's broader market and competition purview.

UCITA is presented as offering consumers protection substantially greater than what it offers others. Those others include small, medium and even large business end users. Also included are developers of other computer program and computer information products, computer system integrators, and important public and private not-for-profit institutions such as libraries, museums and educational institutions. The vast majority acquires copies subject to standard form contracts of the product supplier,[60] though many do not obtain them in retail transactions that qualify as mass market transactions under UCITA. Representatives of those interests, not consumer organizations, have been the most persistent and sharpest UCITA critics.

Individually, some members of these groups will have bargaining power sufficient to command negotiation of some risk-related terms. The original "contracting-out" or "contracting-from" position established by UCITA concerning terms disclosure is far less significant for those actors. Generally, however, the UCITA approach and its collateral effects on product quality standards are significant for the vast majority -- the others.

"Consumer", in economic terms, is not limited to the occasional retail end-use purchaser for personal, family or household purposes. The Commission should take into account as part of its broader consideration of Internet, e-commerce and related issues that the protections of UCITA discussed above and found wanting are its exceptions, its most "consumer-friendly" treatment which is limited in its application to a strictly-bounded retail end-use purchaser subset.

Question 7b. Role of Federal and State Government; Others

NetAction and other public interest organizations are participating in the Commission's Public Forum as a means for making known its, and its members, views and concerns. Like other organizations, NetAction works to better inform its members and the public about issues such as those under consideration by the Commission. This compliments, but is not a substitute for, strategic and limited government intervention as facts and circumstances may require to assure fair and efficient functioning of the market.

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[59] The argument is made strongly by a UCITA drafting process observer-participant who is a software design, manufacturing and support quality professional as well as a software developer and a lawyer. *See* Cem Kaner, *Software Engineering and UCITA*, 18 John Marshall J. Computer & Information Law 435 (1999).

[60] *See* John A. Burke, *Contract As Commodity: A Nonfiction Approach*, 24 Seton Hall Legisl. J. 285 (2000) (detailing prevalence of standard form contracts).

The federal government, and the Federal Trade Commission in particular, must be active in assuring that the interests of consumers and competition are not compromised in the course of facilitating and promoting development of an ever-increasingly important economic sector. This Public Forum, together with others which the Commission has sponsored, is an essential but initial step toward assuring that the interests of the other one-half of a fast-growing market -- consumers, broadly defined -- are adequately and fairly considered. Determination of what is in the interest of consumers, and how that interest will be served, should not be delegated to those for whom the primary interest is maximizing profits by, in part, minimizing disclosure responsibilities and product quality and performance risks.

Question 7c. International Developments

The borderless character of the Internet suggests that incentives exist for developing uniformity of contract law applicable to computer programs and other computer information products and services. The perceived need for such uniformity is the central premise of UCITA.[61] Movement toward greater international and community harmonization of intellectual property, and related, legal protection of digital information content already is evident and substantial. Development of model law for conduct of electronic transactions by the United Nations Commission on International Trade Law (UNCITRAL) shows the importance attached to development of uniform contract law rules.

It is beyond the scope of these comments to assay cognate consumer law in other jurisdictions. UCITA, its development and its progress in the states has been closely followed in at least some other countries and most certainly by foreign lawyers engaged in computer program and other computer information product licensing transactions. Some commentaries indicate that certain of UCITA's provisions, including those concerning enforceability of terms made after payment or initial use and others permitting contractual limitation of consumer rights and remedies, are at odds with those embodied in various European Union Directives and national laws of many countries.[62]

Questions 8-12.

Various preceding comments substantially address Questions 8-12. Attention is directed to those comments instead of restating their content. Those most relevant to Questions 8-12 are the comments discussing how UCITA protects suppliers who consciously choose not to disclose, or to affirmatively withhold, warranty and other standard terms until after a mass market purchaser/licensee has committed to the supplier's product not just by selecting it, but by making payment or commencing use. Others of particular importance concern failure to disclose known "bugs", disclaimer in post-payment terms of express or implied warranty

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[61] This was the reason for its original development as a new Article 2B of the Uniform Commercial Code under joint sponsorship by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, the organizations co-responsible for the UCC and its revision. The ALI withdrew from the project in March 1999 and the NCCUSL thereafter proceeded alone with the project, with the proposed statute retitled as the Uniform Computer Information Transactions Act.

[62] *See, e.g.*, Samuel; E Marumba , *The Emerging Law of the Digital Domain and the Contract/IP Interface: An Antipodean Perspective*, 26 Brooklyn J. Int'l Law 91 (2000); Tsuneo Matsumoto, *Article 2B and Mass Market Contracts: The Japanese Perspective*, 13 Berkeley Tech. L. J. 1283 (1998); Hilary Pearson, *E-Commerce Legislation: Recent European Community Developments* in PLI 20TH ANNUAL INSTITUTE ON COMPUTER LAW (2000).

liability for even harm caused by known but undisclosed "bugs", and the lack of effective means by which to obtain redress.

Question 13.

1. Magnuson-Moss Act in Practice

Major suppliers of computer programs and other computer information products write their standard form contracts and terms with an eye to the Magnuson-Moss Act. Its applicability is not conclusively determined, but it is generally expected.[63]

The principal practice is to give a written Limited Warranty which, by its terms, undertakes only that the digital storage media in which the program or other product is reproduced is free from defects. The Limited Warranty typically provides that monetary damages not exceeding the price paid is the sole remedy available for breach of this warranty, or any non-excludable state law implied warranty.

The very nature of digital information products, the combination of the product itself and a physical storage medium, make Magnuson-Moss Act compliance a quite extraordinary risk limitation tool. There is something in the deliverable that can be made the subject of a written Limited Warranty, and making a written Limited Warranty with respect to it establishes a statutorily recognized foundation for express exclusion any computer program or computer information product quality or performance warranty.

Like UCITA and UCC Article 2 and 2A warranty creation and limitation rules the Magnuson-Moss Act thus best serves in the particular product context as a standard form drafter's template for contractually shifting product quality and performance risk. Still, Magnuson-Moss differs in important respects. It treats warranty and related terms as material and requires their pre-contract disclosure. It regulates, in at least some instances, the effectiveness of attempted disclaimer of state law implied warranties. It attempts to make its remedies effective by assuring that a successful plaintiff in an action brought under the statute will be reimbursed for reasonable attorneys fees and costs incurred in holding a defendant to its obligations. In addition, it requires that consumers be informed before purchase rather than later that the supplier's contract requires the user, not the producer, bears all risk for any quality or performance failure of the supplier's computer information product

2. Magnuson-Moss Act: Application Issues

a. Questions 13a and 13b -- Software as a "Consumer Product" and "Tangible Personal Property"

A principal argument for creating new uniform state law governing computer programs and computer information products, and contracts dealing with underlying intellectual property rights, is that the products have become commodities.[64] Interpretation of the Magnuson-

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[63] *See* L.J.KUTTEN, COMPUTER SOFTWARE § 10.03[3]; Cem Kaner, *Software Engineering and UCITA*, 18 John Marshall J. Comp. & Inf. Law 435, 459-62 (1999; David A. Rice, *Computer Products and the Federal Warranty Act*, 1 (#8) The Computer Lawyer 13 (Sept. 1984); Michael Rustad, *Making UCITA More Consumer Friendly*, 18 John Marshall J. Comp. & Inf. Law 547, 587-88 (1999).

[64] Acceptance of the characterization is attested by a recent law review symposium being titled "Software as a Commodity: International Licensing of Intellectual Property", 26 Brooklyn Law Review #1 (2000). This argument assumes, and is supported by additional arguments, that the nature of the subject matter and transactions concerning each, and together, justify adoption of contract rules distinct from those governing sale

Moss Act as applying to computer programs made generally available in the market to the public, including for use by consumers, was first urged in the 1980s.[65] What has changed since then is that standard design and manufacture computer programs and other computer information products have become even more so mass market products. A consensus has emerged during that time that a computer program is a consumer product.[66] This is reflected in that fact that most licenses for computer program and other computer information products normally used for personal, family or household purposes contain terms drawn to the requirements of the Magnuson-Moss Act as interpreted by the Commission.

The Magnuson-Moss Act defines "consumer product" as "any tangible personal property ... which is normally used for personal, family, or household purposes".[67] The more challenging question is whether it is appropriate to treat computer software as tangible personal property? This difficult question has been answered in different ways depending on context[68], but it has been consistently treated by the courts in the product distribution context as a "moveable", UCC Article 2's nearest analogue of the Magnuson-Moss Act's "tangible personal property", and especially so where the product is of standard design and production.[69] The Magnuson-Moss Act is remedial in character, and therefore of a type that is to be liberally construed consistent with its basic purposes rather than technically administered

Both the lessons from the courts and the principle of statutory interpretation should lead the Commission to include rather than exclude computer programs and other computer information products from Magnuson-Moss Act coverage. Still difficulty may occur as technology increasingly shifts distribution from traditional in-store or mail order to on-line download and remote access-per-use. Full copy download, as discussed *infra*, in fact changes the analysis very little. Access-per-use perhaps presents greater problems for application of the statutory language. It is important, however, that the law in this area is technology neutral and this result can be accomplished through Commission exercise of its authority to adopt a Trade Regulation Rule that more generally applies rules originally specific to the Magnuson-Moss Act.

b. Question 13c -- Consumer Software Transactions as a "Sale"

Consumers and other end users of mass market computer programs and other computer information products view their in-store or on-line transaction as a purchase of a copy in

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of goods and/or personal property leases. *See, e.g.*, Raymond T. Nimmer, *Images and Contract Law – What Law Applies to Transactions in Information*, 36 Houston L. Rev. 1 (1999).

[65] *See, e.g.* David A. Rice, *Computer Products and the Federal Warranty Act*, 1 (#8) The Computer Lawyer 13 (Sept. 1984).

[66] *See* L.J.KUTTEN, COMPUTER SOFTWARE § 10.03[3];Cem Kaner, *Software Engineering and UCITA*, 18 John Marshall J. Comp. & Inf. Law 435, 459-62 (1999; Michael Rustad, *Making UCITA More Consumer Friendly*, 18 John Marshall J. Comp. & Inf. Law 547, 587-88 (1999)

[67] 15 U.S.C.A. § 2301(1).

[68] Within personal property tax and some other contexts, there is in fact inconsistency within the context itself. If treated as an intangible, personal property tax on the value of inventory does not apply. If treated as tangible personal property, a state tax may have to be paid.

[69] Although differing on UCC Article 2 is to be applied, the view is shared in cases ranging from Step-Saver Data Systems, Inc. v. Wyse Technology, 939 F.2d 91 (3d Cir. 1991) to ProCD, Inc. v. Zeidenberg, 86 F.3d 1257 (7th Cir. 1996).

exchange for payment of a unit price: a "sale". It would be a rare person who bought a program for "personal, family or household use"[70] that understood that the program could not be used in a small new family business. Similarly, most would be aghast at the suggestion that the supplier still owned the copy and that the consumer was merely authorized to use it subject to certain conditions.

"Sale" versus "license" is a debate with a long history. It is a technical debate, albeit one with substantial significance. Use of the "license" label borrows from intellectual property law, though UCITA makes quite clear that a mass market transaction involving a copy of a computer program or other computer information product does not convey any interest in underlying intellectual property.[71] The initial purpose was to license use subject to restrictions rather than sell copies free of restriction as a means to secure protection which intellectual property law did not yet clearly provide for embodied technology.[72]

"License" rather than sale has grown to serve other purposes. Most importantly, it provides a means for protecting the content of database products, a substitute for protection which copyright law denies. In terms of UCITA, it has been a signal and justification for creating contract rules that differ from those of UCC Articles 2 and 2A.

It undoubtedly will be urged in this Public Forum that the Magnuson-Moss Act should not apply to computer programs and other computer information products because it is industry practice to license the use of copies rather than to sell them. Even the strongest UCITA proponents concede, however, that an end-user mass market transaction in which a single copy is distributed at retail in exchange for a single payment is the equivalent of a sale in most respects. Professor Raymond Nimmer, the UCITA Reporter, has expressed this view in his treatise and in judicial proceedings.[73] Indeed, it is generally accepted by commentators and industry practice that the Magnuson-Moss Act applies to single copy, mass market computer program licenses as if the transaction was a sale.

c. Question 13d -- Software Licenses as "Warranties"

The question is novel, and important.

The terms in a mass market -- and most any other -- computer program copy license effectively describe what a licensee has acquired. Contract terms defining permitted and prohibited uses employ contract to define what it is that the consumer or other end user

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[70] UCITA § 102(a)() (definition of "consumer"). "Consumer" is a key term in definition of "mass market" and "mass market" transaction. *See* UCITA §§102(a)(43) & (44).

[71] UCITA § 501(b) states "Transfer of a copy does not transfer ownership of any informational rights". *See* UCITA § 102(a)(38) (definition of "informational rights" as those created under, for example, copyright, patent, trademark and trade secret law which, independent of contract, give a right to control or preclude another's use).

[72] *See*, Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. Cal. L. Rev. 1239 (1995); Michael HJ. Madison, *Legal-Ware: Contract and Copyright in the Digital Age*, 67 Fordham L. Rev. 1025 (1998); David A. Rice, *Licensing the Use of Computer Program Copies and the Copyright Act First Sale Doctrine*, 30 Jurimetrics J. 157 (1990).

[73] Professor Nimmer was quoted and relied upon on this point in the U.S. District Court decision in DSC Communications Corp. v. Pulse Communications Inc., 976 F.Supp. 359 (E.D.Va. 1997), *rev'd in part, aff'd in part and remanded*, 170 F.3d 1354 (4th Cir. 1999), *cert. denied* 120 S.Ct. 296 (mem.). He was on the brief for Appellee, the party favored by the District Court's reliance on Professor. Nimmer, in the appeal filed with the Fourth Circuit.

acquired. Traditionally, this is the very essence of product warranties: description, specifications, representations of fact, and promises., Those terms also are the benchmarks for definition of the minimum average quality and performance from a commercially distributed product of that description and kind, the meaning of the implied warranty of merchantability in the particular transaction.

An article authored by Robert Gomulkiewicz, Senior Attorney for Microsoft and an active observer-participant representing the Business Software Alliance in the UCITA/2B drafting meetings, establishes a strong basis for treating mass market computer program and other computer information product licenses as Magnuson-Moss Act warranties.[74] Gomulkiewicz, like the late Professor Arthur Allen Leff in his 1970 article *Contract As Thing*,[75] shifts the focus from the copy as a product to the license as the true subject matter of the transaction. The copy is one of many mass-produced copies, its features not subject to dickering or customization. What one acquires in return for payment is a contract, and the right to possess and use a particular copy is just one of its terms.[76]

Further, Gomulkiewicz and other commentators urge the importance of contract as the product when discussing cases such as *ProCD v. Zeidenberg*. Judge Frank Easterbrook emphasized in *ProCD* that contract terms defining the scope of permissible use must be enforced in order to make it possible for suppliers to price discriminate by type of user in the distribution of copies which are otherwise identical in information content or program functionality.[77] This permits making the product available to consumers at an affordable price while charging business users a higher price in light of the more extensive, intensive, and revenue-related use and value of the product to such users.[78]

The fact that most computer program and other computer information product contracts limit or exclude conventional express and implied warranties can be seen to not make the terms empty, but to direct attention to other license terms, and the whole. There one finds the real source of transaction subject matter definition, the equivalent of that which is the very essence of traditional sale or lease of goods warranties.

The definition of subject matter in this instance consists of license terms which, each and as a whole, authorize particular uses and expressly prohibit certain others. Those terms define and shape product with particularity. This perspective presents two possibilities for consideration. The first is that warranty term disclosure law should be applied in a manner

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[74] Robert W. Gomulkiewicz, *The License is the Product: Comments on the Promise of Article 2B for Software and Information Licensing*, 13 Berkeley Tech. L. J. 891 (1998). *See also* Jeffrey Dodd, *Time and Assent int eh Formation of Information Contracts: The Mischief of Applying Article 2 to Information contracts*, 36 Houston L. Rev. 195, 211-214 (1999).

[75] Arthur Allen Leff, *Contract As Thing*, 19 American Univ. L. Rev. 131 (1970).

[76] The difference from 1970 to 2000 is that Professor's primary illustration was the automobile, about which he emphasized that one can dicker only over standard options or variations and a bit over the price. In the year 2000, it is possible to acquire different combinations of standard programs in, for example, Standard or Deluxe or Professional editions of a product suite. If anything, however, the features dickering opportunities usually are fewer than those identified by Professor Leff.

[77] 87 F.3d at 1449-50.

[78] Id. (discussing price discrimination and what is required in order to make it work). *See also* Raymond T. Nimmer, *International Information Transactions: An Essay on Law in the Information Society*, 26 Brooklyn J. Int'l Law 5, 11-12 (2000).

that requires pre-contract disclosure of all material use restrictions and other product-defining terms, not just traditional warranty terms. The second is that the contract, like any other product, must meet certain minimum quality standards. The second is precisely what the New Jersey Law Revision Commission proposes for standard form contracts.[79]

Treatment of computer program and similar licenses as warranties for purposes of the Magnuson-Moss Act or other disclosure measure is a topic that should be on the Public Forum agenda. Even its discussion has the potential to direct focus toward defining what it is that is most important to disclose to consumers at particular times for the twin purposes of protecting consumers and efficient operation of the market. The usual subject matter of Magnuson-Moss warranties are important in any imaginable market, but may be part of a different and changing composite as a result of technological change more so than contract label or distribution methods change.

Question 14. Future Trends

Recent proposals to revise UCC Articles 2 and 2A to conform them to the UCITA standard form contracting model have been controversial, particularly within the American Law Institute and among legal scholars. Adoption of a licensing model, or a substantially mixed licensing and sale model for the growing number and variety of products, is a prospect that seems far more likely than UCC Article 2 and 2A wholesale incorporation of UCITA concepts and principles.

The purpose and focus of our decision to submit written comments is to contribute to the Commission's inquiry and to the Public Forum with emphasis on warranty-related consumer interests in the market for computer programs and other computer information products. It is beyond the scope and our present capability to respond further to this much larger question, although it seems clear that it is one of importance and suitable for further Commission consideration.

We urge that its consideration not be made a topic, and certainly not be made the focus, of the Public Forum scheduled for October. Other more topical and immediate questions should be the agenda.

RECOMMENDATIONS

Magnuson-Moss Act

The Commission should interpret the Magnuson-Moss Act with emphasis on its market-directed purposes rather than particularistic definition of words and labels attached to transactions by others for unrelated purposes. Its focus should be on market realities with emphasis on adequate protection of consumers as transacting parties and on competition among suppliers on the basis of terms offered.

Labeling a mass market transaction a "license" for purposes not relevant to the aims and application of the Act should not lead to creation of an exception for this increasingly expanding and important product market. The market reality for consumers is that the transaction is fundamentally a sale of a product to the consumer, not a license of intellectual

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[79] *See* John A. Burke, *Contract As Commodity: A Nonfiction Approach*, 24 Seton Hall Legisl. J. 285 (2000){discussing New Jersey Law Revision Commission's proposed standard forms contracts statute). In some respects, the proposed statute applies an approach that can be fit within the more theoretical framework recently advanced by Professor Edward L. Rubin, a leading contracts and consumer law scholar. Edward L. Rubin, *Types of Contracts, Interventions of Law*, 45 Wayne L. Rev. 1903 (2000).

property rights. Indeed, its relative newness and rate of change makes it a market about which the Commission should have heightened concern for adequacy of information disclosure content and efficiency in timing.

A point not addressed in prior responses to specific questions concerns computer program and computer information product support services. Many suppliers operate on-line and telephone technical support services. It is common to charge consumers an additional fee, either through subscription or per use, for services provided after the expiration of a stated time period following initial installation and use. The Commission should consider whether such service terms or agreements are subject to the Magnuson-Moss Act as "service contracts".[80]

Trade Regulation Rule

Computer programs and other computer information products distributed on-line, or accessed on-line per use, arguably are not "tangible personal property" subject to the Magnuson-Moss Act. As stated above, however, a copy distributed on-line differs only in terms of the means of distribution. It becomes no different than a copy distributed in a box, differing only as to means by which it comes to be a program recorded in a tangible medium in possession of and used by the end user. Applications accessed on-line for remote use on-line may present a different case, and this is an issue of fact and law, which the Commission should address.

The authority of the Commission to adopt trade regulation rules of general application [81] presents a means by which it can assure adequate protection and promote competition in a manner that is technology neutral. It is beyond these Comments to present a full legal analysis of the Commission's substantive authority, but the Commission frequently employs information disclosure as a remedy for deception. Information adequacy and quality also are a central concern under the Commission's market-oriented unfair acts and practices jurisprudence.[82]

The Commission should adopt a Trade Regulation Rule sufficient to assure that consumer and market concerns are addressed in the same, even-handed manner irrespective of whether a transaction is literally governed by the Magnuson-Moss Act. The purposes and requirements of information disclosure should be realized irrespective of differences in distribution or means. The Trade Regulation Rule approach offers the additional opportunity

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[80] 15 U.S.C.A. § 2301(8)('service contract" defined) & § 2306 (provision governing service contracts).

[81] 15 U.S.C.A. 57a. *See* American Financial Services Assoc. v. F.T.C., 767 F.2d 957, 967-68 (D.C. Cir. 1985), *cert. denied* 475 U.S. 1011 (discussing rulemaking authority of Commission). The borderless character of cyberspace and the indifference of Internet transactions to the existence of state boundaries are circumstances which indicate that any Commission initiative should be through rulemaking, not case-by-case adjudication. *See* Ford Motor Co. v. F.T.C., 673 F.2d 1008 (9th Cir. 1982).

[82] The source, history, and development of the Commission's authority to separately define and regulate unfair acts and practices is extensively discussed in American Financial Services Assoc. v. F.T.C., 767 F.2d 957, 966-72 (D.C. Cir. 1985), *cert. denied* 475 U.S. 1011. The court recognized that Commission authority reaches practices involving the withholding of material information, and additionally that it is not limited to "situations involving deception, coercion, or withholding material information". Id. at 978-79. The court distinguished FTC regulation of deception and unfairness, stating that "a practice is deceptive when the consumer is forced to bear a larger risk that expected (e.g., the consumer is misled) whereas a practice is unfair when the consumer is forced to bear a risk larger than an efficient market would require". Id. at 981, n. 27.

to ascertain and deal appropriately with any important terms or contracting practices that do not come within the definitions of "written warranty" and "service contract".

Industry contracting practice and related UCITA provisions implicate and present concerns about standard form contract allocation of post-purchase consumer rights. Although different in subject matter, the Credit Practices Trade Regulation Rule and other Commission actions have addressed the same phenomenon.[83] It is well-established that exercise of unfairness authority is appropriate in situations where standard form contracts and their terms cause consumer injury which is substantial, not outweighed by countervailing benefits of the practice to consumers or competition, and not reasonably avoidable by consumers themselves.[84] Such exercise of authority may preempt inconsistent state law.[85]

This Comment is not directed toward identifying and suggesting particular terms on which the Commission ought to focus, or to proposing specific regulations. Its purpose is to urge the Commission to evaluate all Comments with a view to making a preliminary determination if terms other than those traditionally characterized as "warranty" or "service" should be considered as it defines its future role in assuring adequate protection of consumers and promotion of competition in computer program and other computer information product markets.

PUBLIC FORUM

Participants

NetAction and public interest organizations particularly concerned with the Internet, information technologies are interested in participating and should be invited to participate. Representatives of more traditional consumer organizations, most notably Consumers Union, have been active participants in the UCITA/2B as well as the UCC Article 2 and Uniform Electronic Transactions Act drafting processes, and their participation and contributions are essential.

It is important that some computer program development community and professional organizations involved in the UCITA\2B drafting process are included. Examples include library associations, the IEEE, Computer Professionals for Social Responsibility, independent developers, and software resellers.

Professor Raymond Nimmer, the Reporter for UCITA, and Carlyle C. Ring, the chair of the UCITA Drafting Committee, quite obviously ought to be invited. Prominent industry members and trade organizations surely will self-identify their interest in participating. It is

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[83] Id at. 979-982

[84] Id. at 971 (citing and discussing 1980 FTC Policy Statement on Unfairness). *See also* Neil Averitt, *The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Act*, 70 Georgetown L. Rev. 225 (1981); Jean Braucher, *Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission*, 68 Boston Univ. L. Rev. 349 (1988); Richard Craswell, *The Identification of Unfair Acts and Practices by the Federal Trade Commission*, 1981 Wisconsin L. Rev. 107; David A. Rice, *Consumer Unfairness at the FTC: Misadventures in Law and Economics*, 52 George Wash. L. Rev. 1 (1984); and David A. Rice, *Toward a Theory and Legal Standard of Consumer Unfairness*, 5 J. Law & Commerce 111 (1984).

[85] Id. at 989-991.

significant that some diversity of views exists and the Commission should endeavor to identity and invite representatives whose very differences may be illuminating.

Finally, the Commission should continue to seek engagement by academics with particularly relevant expertise in Magnuson-Moss Act and other consumer product warranty, computer program and other computer information products contracts, and Federal Trade Commission consumer protection law. It might be valuable to include one or two who are knowledgeable about United States law and have related expertise in applicable contract and consumer law of the European Community and Japan, or another Pacific Rim nation.

Agenda

The questions posed by the Commission establish a good framework, but emphasis should be on those questions most important to effects of industry practices, developing law, and changes in technology and business methods on protection of reasonable consumer expectations, opportunity for informed exercise of choice, and market efficiency. Particular attention should be given to the Magnuson-Moss Act and a potential Trade Regulation Rule.

The most difficult, but potentially most important, subject that might be discussed is whether the nature of the technology and the particular uses and terms of contract have led, together or singly, to the transformation of shrink-wraps and click-wraps from contracts that merely warranty provisions into a warranty-like adjunct to the basic exchange of a price for a product. It is our view that this should be a principal topic for the meeting, but as a preliminary to further Commission consideration. The topic is so substantial that it requires the development of analyses and position papers, and their advance distribution for study, before being made a focal topic of a subsequent Public Forum. Meanwhile, other important and more manageable questions beg immediate consideration and, therefore, should be the primary focus of the Public Forum.

NetAction
601 Van Ness Ave., #631
San Francisco, CA 94102

By Audrie Krause
Audrie Krause, Executive Director

Date: September 8, 2000

Computer Professionals for Social Responsibility
P.O. Box 717
Palo Alto, CA 94302
By Corelee Whitcomb, President

CompuMentor
487 Third Street
San Francisco, CA 94107
By Phil Ferrante-Roseberry, Executive Director

Counsel for Preparing Comments
David R. Rice, Professor of Law
Roger Williams University School of Law
Ten Metacom Avenue
Bristol, RI 02809
PH: (401) 254-4623 drice@world.std.com