EXTENDING WARRANTY PROTECTION TO CYBERSPACE[1]

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§1.0: Introduction

Congress passed the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (hereinafter "Magnuson-Moss") to respond to the problem where manufacturers were providing anti-warranties to consumers. The Magnuson-Moss Act was a response to the "developing awareness that the paper with the filigree border bearing the bold caption 'Warranty'…was often of no greater worth than the paper it was printed on."[4] However, it is unclear whether the Magnuson-Moss Act applies to computer software transactions or information products. In this comment, we argue that the Magnuson-Moss Warranty Act should be extended to govern mass-market software licenses. agreements governed by the recently approved Uniform Computer Information Transactions Act ("UCITA"). The extension of the Magnuson-Moss Act to software licenses is consistent with the reasonable consumer expectation that they are purchasing software.

The software industry experienced a phenomenal 25% growth per year during the late 1990s. Software and services expanded at a rate many times that of hardware during the 1990s.[5]

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[1] This comment draws upon Michael L. Rustad, "Making UCITA More Consumer-Friendly," 18 J. Marshall J. of Computer & Info. Law 547 (1999) which is also submitted to the Commission.
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[4] H.R. REP. NO. 93-1107 (1974).
[5] *Id*. (noting that by 1992 software services was expanding at a rate of two to three times that of hardware).

The software industry is now America's third largest industry,[6] with worldwide revenues of hundreds of billions of dollars per year. Software is divided into mass-market and non-mass market software. Mass market software includes consumer contracts or any information offered to the public under the same terms.[7] Shrinkwrap, clickwrap, webwrap and a host of other mass market licenses have evolved in recent recents.

Shrink-wrap licenses were the first mass-market license agreements which were first developed in the mid-1980s. Shrinkwrap is the plastic or cellophane tightly wrapped around packages, such as the wrapping on packages of meat in supermarkets, cassettes, and CD's in music shops. Increasingly, software licensors market their retail software packages covered in shrink-wrap. One example of a shrink-wrap license is a license agreement on the outside of a package covered in shrink-wrap that contains a diskette. These contracts are seldom, if ever, negotiated and marketed to the public under the same terms for the same information.[8] UCITA makes shrink-wrap, click-wrap, and other mass-market license agreements broadly enforceable. A mass-market license is a standard form agreement where the terms are offered to the general public on a "take it or leave it basis."[9] Non-mass market transactions are negotiated agreements such as software development contract where the parties may be represented by counsel.

The typical online license agreement generally begins with a legal notice, disclaimer, or terms of use. The typical web site agreement of Real Networks, for example, conditions access and use of its Web site on acceptance of its terms and conditions. Professor Mark Lemley notes that the purpose of such a clause in mass-market agreements is to create a "reverse unilateral

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[6] Carolyn Van Brussel, "Mobile PCs: '90s Their Decade, Speaker Claims," 18 *Computing Canada* 14 (June 22, 1992).
[7] UCITA, §102(a)(44) (NCCUSL Draft for Enactment, July 1999).
[8] *See* U.C.I.T.A. § 102(a)(46)(b)(i).
[9] U.C.I.T.A. § 102(a)(45)—(46).

contract."[10] "Vendors intend that, by opening the plastic wrap and actually using the software, customers will bind themselves to the terms of the shrink-wrap license."[11] Adobe Systems license, for example, provides that the customer's downloading of software from the site signifies agreement to its terms and conditions.[12] A pundit states, "by unwrapping a software package or downloading a demo, you've agreed to a thickly worded contract that may result in enslaving your first-born child to Bill Gates for all you know."[13]

UCITA was approved by the National Conference of Commissioners on Uniform State Laws in July of 1999.[14] UCITA is a statute that has the possibility of bringing greater uniformity and certainty to the Internet and other online contracts as well as software licenses. UCITA will govern a variety of software contracts, web-wrap "terms of service" agreements, electronic access contracts and a host of other consumer contracts. UCITA closely parallels UCC Article 2 for the sale of goods but it is unclear whether the Federal Trade Commission could apply the Magnuson-Moss Warranty – Federal Trade Commission Improvement Act to software or online licenses. Magnuson-Moss applies to "written warranties on tangible personal property which is normally used for personal, family, or household purposes"[15] but it is unclear whether it also applies to the licensing of consumer software.

The Magnuson-Moss Warranty Act was adopted on January 4, 1975, a decade before the rise of the software industry and two decades before the rise of the World Wide Web. The

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[10] Mark A. Lemley, *Intellectual Property and Shrink-wrap Licenses*, 68 S.CAL. L. REV. 1239, 1241 (1995).
[11] *Id*.
[12] *See* Adobe Systems, Inc., *CustomerFirst Support* (visited Feb. 1, 1999) <http://www.adobe.com/supportservice/custsupport>.
[13] Margie Wylie, *Shrink-Wrapping the Social Contract* (Apr. 23, 1997) (visited Mar. 10, 1998) <http://www.news.com/Perspectives/mw/mw4_23_97_a.html>.
[14] National Conference of Commissioners on Uniform State Laws, Uniform Computer Information Acct (UCITA) (hereinafter
[15] 16 C.F.R. §700.1 (defining what products are covered by the Magnuson-Moss Act).

Magnuson-Moss's goal of making "warranties on consumer products more readily understandable and enforceable"[16] should be extended to the online world.

§1.1: Extending the Magnuson-Moss Act to Cyberspace

[A] Benefits to Consumers

[1] Non-Disclaimability of Implied Written Warranties

UCITA permits implied warranties to be disclaimed which leaves consumers without a minimum adequate remedy. If Magnuson-Moss Act was extended to the online world, there would the implied warranty of merchantability would not be disclaimable.[17] The Magnuson-Moss Act provides that a supplier may not disclaim or modify any implied warranty to a consumer if the supplier makes any written warranty to the consumer or if, at the time of the sale or within the next 90 days, the supplier enters into a service contract with the consumer regarding the product.[18] If only a limited warranty is given, any implied warranty may be limited to the duration of the limited written warranty, provided that its duration is conscionable, that it is set forth in clear and unmistakable language, and that it is prominently displayed on the face of the warranty.[19]

If the Magnuson-Moss Act was extended to computer information transactions, it would provide a remedy in cases involving "repeated failures to pass agreed upon acceptance tests," and cases where failure to provide deliverables, such as source code, caused the licensee to withhold payment. There should be, in effect, a "lemon law" for computer software, which permits attorney fees and costs to be recovered. Under a lemon law, it would be presumed that a licensor had only a reasonable number of attempts to fix computer software.

If the Magnuson-Moss Act is extended to software licenses, the UCITA provides a methodology for licensors to modify or disclaim all implied warranties.[20] The extension of the Magnuson-Moss Act to the licensing of intangibles will benefit consumers chiefly because of the

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[16] Ventura v. Ford Motor Corp., 180 N.J. Super. 45, 433 A.2d 801 (1981) (citing Note, 7 Rutgers-Camden L.J. 379 (1976)).
[17] *Id.* The implied warranty of merchantability is not disclaimable if goods are used for personal, household, or family purposes.
[18] *See* 15 U.S.C. § 2308(a)(1) – (2).
[19] *See* 15 U.S.C. § 2308.
[20] UCITA, §406 (NCCUSL Draft for Enactment, July 1999).

Act's prohibition against disclaiming implied warranties in consumer transactions. If the Magnuson-Moss Act applied to web-wrap, click-wrap, and other online contracts, the licensor would not be able to "disclaim or modify…any implied warranty as to a consumer."[21] President Clinton signed the Electronic Signatures in Global and National Commerce Act that treats electronic records with the same validity as "paper or pencil" writings.[22] If the Magnuson-Moss Act was extended to cyberspace, courts would have little difficulty in extending the concept of written warranties to digital records or web site agreements.

[2] Clear Disclosure of Warranties

Consumers would also benefit from the federal minimum standards for warranties required by the Magnuson-Moss Act.[23] The Magnuson-Moss Act requires written warrantors to "clearly and conspicuously designate warranties" in a prescribed manner.[24] UCITA does not provide prescribed language for labeling warranties but if Magnuson-Moss applied to intangibles, all written warranties would be either "full or limited." UCITA does not require mass-market licensors to designate their software as either full or limited.. The Magnuson-Moss Act provides minimum standards for the terms and conditions of warranties. Consumers would benefit by an array of new rights and remedies that would apply to defective software.

At present, UCITA has no requirement that warranties describe what a consumer must do and expenses they must bear in case of software defects. The FTC requires warranties to be written in "simple and readily understood language."[25] The Magnuson/Moss Act requires the written warranty to describe what the warrantor does in the "event of a defect, malfunction or

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[21] Id.
[22] Sam Costello, Clinton Signs Digital Signature Bill," FCW.COM (visited September 10, 2000) http://www.civic.com/civic/articles/2000/0703/web_lesign-07-03-00.asp.
[23] 15 U.S.C. §2304 (stating federal minimum standards for warranties in Section 104 of the Act).
[24] 15 U.S.C. §2033(a) (stating designation of written warranties in Section 103 of the Act).
[25] 16 C.F.R. §701.3(a).

failure to conform with the written warranty."[26] The Act requires clear and conspicuous disclosure of the warranty duration[27] and a "step-by-step procedure to follow" to obtain "performance of warranty obligations."[28]

[3] Remedies for Bad Software

Consumers have no UCITA remedy for "lemon software." Magnuson-Moss sets federal minimum standards for full warranties including a refund or replacement if a supplier cannot remedy defects after a "reasonable number of attempts."[29] Few, if any suppliers, offer full federal warranties. There has been a market failure when it comes to full or limited warranties because few, if any sellers offer "full warranties." The extension of the refund or replacement remedy should apply to all software licenses, whether offered as full or limited written warranties.

The Magnuson-Moss Act encourages product "warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settle [disputes] through informal dispute settlement mechanisms."[30] The pre-sale availability of written warranty terms is required by UCITA.[31] The Magnuson-Moss Act requires the placement of warranties to be so that they are "reasonably calculated to elicit the prospective buyer's attention."[32] The extension of the pre-sale availability rules to online contracts would result in virtual stores doing more to advise licensees of warranties.

UCITA requires the parties to bear their own legal expenses including attorney's fees. The extension of the Magnuson-Moss Act to UCITA would give consumers a right to litigate

[26] 16 C.F.R. §701.3 (a)(3).
[27] 16 C.F.R. §701.3(a)(4).
[28] 16 C.F.R. §701.3(a)(5).
[29] 15 U.S.C. §2304(4) (describing federal minimum standards for warranties under Section 104 of the Act).
[30] 15 U.S.C. §2310 (describing remedies in consumer disputes in Section 110 of the Act).
[31] UCITA, §112 (NCCUSL Draft for Enactment, July 2000).
[32] 16 C.F.R. §702.3(a)(1)(2).

deceptive warranty cases in federal district courts.[33] Prevailing consumer would also be able to recover the cost and expense of bringing suit including attorneys' fees.[34] The practical reality is that consumers do not have the resources, inclination to litigate defective software cases unless costs, or attorney's fees may be recovered. The Magnuson-Moss Act would also reallocate the cost of returning bad software from the consumer to the software licensor.[35] Magnuson-Moss makes it possible for the consumer to obtain redress for defective software not found in UCITA's remedies.

[B] Why Magnuson-Moss Warranty Should be Extended to UCITA

Software licensees, like the buyers of goods, are offered standard form contracts where there is no bargaining over terms, and the consumer is offered the contract on a take-it-or-leave-it basis.[36] Some software companies require the user to provide a credit card to pay for a call to technical support when the software does not function as it is promised, and the purchaser seeks to correct this.[37] Software vendors go even further than the telephone company: they do not even bother to answer the telephone, placing the customer on hold.[38] The Magnuson-Moss Act would help redress the balance by providing for online warranties which have a greater probability of being understood and enforced.

Consumers are increasingly entering click-wrap agreements in which their access to web sites is conditional upon their agreement to the policies, terms and conditions of the licensor.

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[33] 15 U.S.C. §2310 (describing Section 110(c)(1)).
[34] 15 U.S.C. §2310 (describing Section 110(d)(1)(B)(2))/
[35] See, Federal Trade Commission, Software Warranty Project (visited Sept. 9, 2000) <http://www.ucitaonline.com/ftc.htm (comparing the Magnuson-Moss Act to UCITA §209(b)(1)).
[36] W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971).
[37] Network Acssociates-McAfee offers (after 30 days) for its Internet Guard Dog a "pay-per-minute," where the caller pays $2.50 per minute (the first two minutes are free) for product support, or the caller can use the "pay-per-incident" where the caller is charged a flat fee of $25.00 per "incident" which provides technical support "until the issue is resolved."

The reasonable consumer expectation is that they are purchasing goods when they buy mass-market software online or at a retail store. There is no principled reason for giving mass-market licensors a safe harbor from Magnuson-Moss warranty obligations. A consumer purchasing software should have the same rights and remedies as when they purchase software. Courts have long applied Article 2 by analogy to software transactions.[39] The structure and function of UCITA borrows extensively from Article 2 in its definition, formation rules, warranties, construction, performance, and remedies. There is a strong policy justification to provide software consumers with the same protection as if they were purchasing tangible goods.

Mass-market licenses are offered to consumers on a "take it or leave it" basis without any possibility of negotiation. Mass market licensors typically disclaim all express or implied warranties except the warranty that that the diskette is free from defects. The software industry's universal practice of disclaiming all implied warranties leaves consumers without sufficient protection in software purchases and in cyberspace. Congress enacted the Magnuson-Moss Act to redress the imbalance in power between consumer buyers and sellers. Consumers in cyberspace also require understandable and enforceable warranties.

Mass-market license agreements rarely take the form of offer, acceptance and consideration, which is the staple of first year contract courses. Standard form contracts have largely replaced the negotiated contracts in American contract law. Professor Slawson wrote in 1971, that "[t]he contracting still imagined by courts and law teachers as typical, in which both

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[38] *See* CEM KANER & DAVID PELS, BAD SOFTWARE: WHAT TO DO WHEN SOFTWARE FAILS 28, 29 (1998) (citing Software Publishers Association Study that the average hold time for a software service call is 12.2 minutes).
[39] See generally, Bonna Lynn Horovitz, Note, "Computer Software as a Good Under the Uniform Commercial Code: Taking a Byte Out of the Intangibility Myth," 65 B.U.L. REV. 129 (1985).

parties participate in choosing the language of their entire agreement…" is a legal fossil.[40] What does it mean to contract as we move to a new millennium?

The commercial reality is that most consumer contracts in our post-industrial economy are adhesive contracts where all rights and remedies are contracted away without even the possibility of negotiation.[41] When was the last time a consumer bargained with an airline, an insurance company, a car rental company, and the gas company? The take-it-or-leave-it nature of consumer contracts was lampooned in the 1970s by *Laugh In*'s Lily Tomlin: "We're the phone company. We don't care; we don't have to."[42] Software vendors are as likely to offer an implied warranty of merchantability in a software contract as a documented sighting of Elvis. Software vendors invariably disclaim all implied and express warranties and limit all exposure to consequential damages. The only warranty typically given is that the diskette or CD-ROM be free of defects.

The first mass-market software licenses were in the form of shrink-wrap licenses sometimes referred to as box top licenses. The consumer may be given notice that by breaking open the plastic shrink-wrap, terms and conditions bound them in the license agreement inside the box. . In many software contracts, the licensee does not even learn about the terms until after payment. The shrink-wrap licenses have been adapted to the online world in the form of a click-wrap or web-wrap agreement. Web site purchasers are required to mouse click for agreement to the terms and conditions of the licensors in order to download software. It is a

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[40] W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971).

[41] Edwin Patterson first formulated the concept of the "contract of adhesion". *See* Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919). Friedrich Kessler further developed this concept of the adhesion contract. *See* Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

[42] Lily Tomlin as Ernestine, the Telephone Operator from Hell, *Lily Tomlin Quotes* (visited Dec. 6, 1999) <http://members.aol.com/earthwest/mquotes.html>.

legal fiction to characterize shrink-wrap, click-wrap, or mass-market licenses as part of a "free-market, contract-choice economy."[43]

UCITA broadly validates mass-market licenses so long as "the party agrees to the license, such as by manifesting assent, before or during the party's initial performance or use of or access to the information."[44] UCITA's view is that an adequate objective manifestation of assent consists of a mere opportunity to review the record coupled with an affirmative act such as clicking an icon or tearing open shrink-wrap plastic on boxed software. "If a licensee does not have an opportunity to view a mass-market license or a copy of it before becoming obligated to pay, and does not agree, such as by manifesting assent to the license after having that opportunity, the licensee is entitled to a return."[45]

Congress passed Magnuson-Moss in 1975, as a federal statute that governs warranties for the sale of consumer goods. [46] Magnuson-Moss applies to "tangible personal property which is distributed in commerce, and which is normally used for personal, family, or household purposes."[47] Software may reside on a physical medium such as a CD-ROM or diskette. The value of software however, consists of the intangible rights. By extending the protection afforded under Magnuson-Moss, consumers will have remedies at law to protect purchases of software and information.

§1.3: UCITA's Warranties

UCITA does not presently afford consumers with mandatory terms that guarantee a "minimum guaranteed" remedy. UCITA divides warranties into two types: warranties of authority or non-

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[43] See Carlyle Ring and Ray Nimmer, SERIES OF PAPERS ON UCITA ISSUES, paper made available at the NCCUSL Conference in Denver, July 23-30, 1999) (noting that "UCITA creates background rules [that reflect] "a free-market contract-choice economy.").
[44] U.C.I.T.A. § 210(a).
[45] U.C.I.T.A. § 210(b).
[46] 15 U.S.C.A. §§ 2301-2312.
[47] 15 U.S.C. §2301 (2000).

infringement; and performance-based warranties of quality. Section 401 is the chief warranty, where the licensor has the authority to license computer information. Section 401 governs the obligation of enjoyment and non-infringement, paralleling Article 2's warranty of title.[48] As with Article 2, there are special merchant rules imposing a higher duty on professional licensors.[49] A merchant licensor warrants that information is delivered free of claims of infringement or misappropriation.[50] Section 401(b)(2) deals with intellectual property infringement claims. The general duty is that licensed informational rights are exclusive and valid.[51] A quiet enjoyment warranty arises out of the acts or omissions of the licensors. The quiet enjoyment warranty that the licensor will not interfere with licensee's enjoyment of its interest lasts for the duration of the license agreement.[52]

[A] Warranties of Quality

[a] Express Warranties

UCITA's express warranty provisions for computer information transactions are functionally equivalent to the express warranties under Article 2 "Affirmations of fact" made by the licensor to its licensee in any manner, may create express warranties."[53] UCITA express warranties are created by licensors in its web sites, banner advertisements, sales literature, online catalogues, and advertisements.[54] Express warranties are created when the affirmation of fact relates to software or other information and becomes part of the "basis of the bargain."[55] As with UCC Article Two, a licensor need not use formal words such as "warrant" or "guarantee" to state a specific intention to make a warranty."[56] Mere puffery or statements of opinion constitute seller's talk rather than the "basis of the bargain." Models or demonstrations of software or other products may also create an express warranty. The description of

[48] UCC, §2-312's warranty of title needs to be adapted to licensing where title does not pass to the licensee.
[49]Merchant/licensors are those who "regularly deal in information of the kind." UCITA, §401(a) (NCCUSL Draft for Enactment, July 1999).
[50] UCITA, §401(a) (NCCUSL Draft for Enactment, July 1999).
[51] UCITA, §401(b)(2)(B) (NCCUSL Draft for Enactment, July 1999).
[52] UCITA, §401((b)(1) (NCCUSL Draft for Enactment, July 1999).
[53] UCITA, §402(a)(1) (NCCUSL Draft for Enactment, July 1999).
[54] UCITA, §402(a)(1) (NCCUSL Draft for Enactment, July 1999).
[55] Id.
[56] UCITA, §402(b) (NCCUSL Draft for Enactment, July 1999).

technical specifications of software or information will frequently go to basis of the bargain and be an actionable representation.[57]

[b] Implied Warranties of Merchantability

Implied warranties of quality for computer information extend UCC Article 2's implied warranty of merchantability to computer information transactions. Implied warranties of quality for computer information are tailored for the different commercial realities of licensing. Article 2's implied warranty of merchantability has its parallel in UCITA §402, "Implied Warranty: Merchantability of [a] Computer Program."[58] UCITA's implied warranty is that "the computer program is fit for the ordinary purposes for which such computer programs are used."[59] Computer-based information must be adequately packaged, labeled, and multiple copies must be "of even kind, quality, and quantity."[60] A computer program need not be the most efficient, but acceptable under general industry standards to meet the standard of merchantability. UCITA does not create informational content warranties as to "aesthetics, market appeal, accuracy, or subjective quality."[61] Unless disclaimed or modified, implied warranties "may arise from course of dealing and usage of trade."[62]

[c] Implied Warranty of System Integration

UCITA's implied warranty of system integration is the functional equivalent of UCC §2-312's "fitness for a particular purpose." UCITA's systems integration is tailored to the licensing of intangibles. Implied warranties for information or computer software may arise from course of dealing or usage of trade.[63] This warranty applies where the customer relies upon the software licensor's expertise to make computer information suitable for a particular computer system.[64] The licensor must know of "any

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[57] UCITA, §402, Reporter's Note #4 ((NCCUSL Draft for Enactment, July 1999).
[58] UCITA, §403, (NCCUSL Draft for Enactment, July 1999).
[59] UCITA, §403 (a)(1) (NCCUSL Draft for Enactment, July 1999).
[60] UCITA, §403((a)(2)(A)(B) (NCCUSL Draft for Enactment, July 1999).
[61] UCITA, §403(B)(3)(c) (NCCUSL Draft for Enactment, July 1999).
[62] UCITA, §403(2)(B)(3)(b) (NCCUSL Draft for Enactment, July 1999).
[63] UCITA, §403(b)(NCCUSL Draft for Enactment, July 1999).
[64] UCITA, §4015 (NCCUSL Draft for Enactment, July 1999).

particular purpose for which the information is required, and that the licensee is relying on the licensor's skill or judgment to select, develop, or furnish suitable information."[65]

d] Warranties for Information Content

UCITA, unlike Article 2, devises an implied warranty for informational content.[66] "The warranty focuses on data conveyed in a relationship of reliance" recognizing "an implied assurance in such contracts that no data inaccuracies are caused by a failure of reasonable care."[67] This special warranty applies to merchant licensors that transfer information without exercising reasonable care. The warranty for informational content does not arise for published content, or when the licensor is merely acting as an information transfer conduit without providing editorial services.[68] Section 405 is based upon reasonable care and this warranty may be disclaimed despite UCITA's general prohibition against disclaiming reasonableness and care.[69]

[e] Disclaiming & Limiting Liability

UCITA permits the parties to disclaim or modify all implied warranties by words or conduct just as in Article 2.[70] Unlike Art 2 that is supplemented by Magnuson-Moss, UCITA has no supplemental statutes affording consumers protection against warranties that are in effect, "anti warranties." UCITA validates the universal practice of the software industry to offer software or other computer information on an "as-is" basis without warranties. Software warranties are "anti-warranties" in that the typical license makes no warranty of any kind. Microsoft, for example, disclaims all express or implied warranties for its software products. Microsoft expressly disclaims any warranty in the following clause:

"THE SOFTWARE PRODUCT AND ANY RELATED DOCUMENTATION IS PROVIDED "AS IS" WITHOUT WARRANTY OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OR MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NON-INFRINGEMENT. THE ENTIRE RISK ARISING OUT OF USE OR PERFORMANCE OF THE SOFTWARE PRODUCT REMAINS WITH YOU."[71]

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[65] UCITA, §405(a) (NCCUSL Draft for Enactment, July 1999).
[66] UCITA, §404 (NCCUSL Draft for Enactment, July 1999).
[67] UCITA, §404, Reporter's Note #1 (NCCUSL Draft for Enactment, July 1999).
[68] UCITA, §404(b)(1)(2) (NCCUSL Draft for Enactment, July 1999).
[69] UCITA, §404(c)(NCCUSL Draft for Enactment, July 1999).
[70] UCITA, §406 (NCCUSL Draft for Enactment, July 1999).
[71] Microsoft, Inc., "End-User License Agreement for Microsoft Software," clause 8 (stating "limitation of liability").

Content providers typically do not make warranties as to the adequacy or accuracy of information. NEXIS/LEXIS, a leading legal information company, and McGraw-Hill (M-H) make the following limited warranty:

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A licensee may require that a licensor warrant or represent that it has the authority to enter a license agreement and perform its obligations. UCITA's disclaimers or limitations liability must be conspicuously displayed in a record. UCITA disclaimers and liability limitations are subject to state and federal consumer law and common law, and equitable doctrines such as the covenant of good faith and fair dealing and unconscionability.

Many web sites will place a notice that they seek disclaimers "to the full extent permissible by applicable law."[73] Amazon.com follows the methodology of UCITA disclaiming "all warranties, express or implied, including but not limited to, implied warranties of merchantability and fitness for a particular purpose. As with Article 2, a written disclaimer of the implied warranty of merchantability must mention "merchantability" or "quality."[74] To disclaim the warranty of fitness, the exclusion must be by a written and conspicuous statement.[75]

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[72] LEXIS-NEXIS Services Supplemental Terms for Specific Materials, July 1, 1998 (visited Feb., 9, 1999) http://www.lexis-nexis.com/incc/about/terms.htm.
[73] *Id.*
[74] UCITA, §406(b)(1)(A) (NCCUSL Draft for Enactment, July 1999).
[75] UCITA, §406(b)(1)(2) (NCCUSL Draft for Enactment, July 1999).

No particular language form is necessary to disclaim UCITA warranties.[76] However, to disclaim or modify the warranty of accuracy, the record must mention "accuracy" or similar words.[77] Amazon.com follows UCITA's methodology in disclaiming damages of all kind and mentions that it disclaims all damages "not limited to direct, indirect, incidental, punitive and consequential damages."[78] A UCITA contract may disclaim all liabilities with language such as that the information "is provided with all faults, and the entire risk as to satisfactory quality, performance, accuracy, and effort is with the user" or similar words.[79] If Magnuson-Moss were extended to UCITA consumer transactions, the licensor could not entirely disclaim the implied warranties.

Mass-market licenses are so controversial because the software industry is unwilling to provide implied warranties of quality. One can read hundreds of click-wrap, Web site, shrink-wrap, and other mass-market transactions and be hard-pressed to find a single example of a software licensor willing to provide any warranty for its software, software products or services. The mass-market license agreement provides no warranties of any kind. Adobe Systems, for example, is typical in disclaiming all warranties and damages:

> DISCLAIMER OF WARRANTIES: YOU AGREE THAT ADOBE HAS MADE NO EXPRESS WARRANTIES TO YOU REGARDING THE SOFTWARE AND THAT THE SOFTWARE IS BEING PROVIDED TO YOU 'AS IS' WITHOUT WARRANTY OF ANY KIND, ADOBE DISCLAIMS ALL WARRANTIES WITH REGARD TO THE SOFTWARE, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE, MERCHANTABILITY, MERCHANTABLE QUALITY OR NONINFRINGEMENT OF THIRD PARTY RIGHTS.[80]

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[76] U.C.C. §2-316(2) (noting that "language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify an implied warranty of a warranty of fitness the exclusion must be by a writing and conspicuous).
[77] UCITA, §406(b)(1)(B) (NCCUSL Draft for Enactment, July 1999).
[78] *Id.*
[79] UCITA, §406(b)(1)(3) (NCCUSL Draft for Enactment, July 1999).
[80] See Adobe Systems, Inc., Customer First Support, Id.

The warranties offered in mass-market transactions are in effect anti-warranties. These warranties require the user to waive all rights to a remedy if the software or computer contract fails. The licensor makes no express or implied warranties with respect to the software, product or services. This is the type of anti-warranty that Magnuson-Moss encompasses. Magnuson-Moss, if extended to cover software, would fill the void in consumer protection that these anti-warranties create.

§1.4: Conclusion

If the Magnuson-Moss Act is extended to computer transactions, UCITA will fairly balance the interests of licensees and the software industry. Section 105(a) of UCITA provides that provisions of the Act are unenforceable to the extent of they is preempted.[81] However, the Magnuson-Moss Act creates warranties on consumer products, not intangibles. A "supplier" is defined as any person engaged in the business of making a consumer product and may not encompass the licensor of information, software, or other intangibles. UCITA also defers to any consumer protection statute or regulation that applies to a given transaction.[82] NCCUSL's Advisor and UCITA's Reporter contend that UCITA retains "all consumer protections from Article 2 and extends them to many new transactions."[83] To achieve this result, the Magnuson-Moss Act should be expanded to apply to software licenses, web site agreements and rapidly evolving cyberspace licenses.

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[81] UCITA, §105(A) (NCCUSL Draft for Enactment, July 2000).
[82] UCITA, §105(C) (NCCUSL Draft for Enactment, July 2000).
[83] Carlyle C. Ring, Jr. and Raymond Nimmer, Series of Papers on UCITA Issues (revised version of a document made available to NCCUSL delegates at the annual conference in Denver, July 23-30, 1999).