DAVID M. MIRCHIN
VICE PRESIDENT AND GENERAL COUNSEL
SILVERPLATTER INFORMATION, INC.
100 RIVER RIDGE DRIVE
NORWOOD, MA 02062
davidm@silverplatter.com
TEL: 781-769-2599
FAX: 781-769-8763

September 11, 2000

Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: High-Tech Warranty Project—Comment, P994413

1. SilverPlatter Information, Inc. submits these comments in response to the Federal Trade Commission's Public Forum on Warranty Protection for High-Tech Products and Services, published in the Federal Register on May 11, 2000.

2. Summary.
SilverPlatter wishes to make the following points in these comments:
   A. Electronic licenses provide benefits for licensees.
   B. The method of license acceptance is not the critical issue in licensee and consumer protection, but rather the substance of the license terms. There is nothing negative for a licensee because the method of acceptance is clickwrap or shrinkwrap, rather than a signed license.
   C. With regard to the substance of licensing terms, market forces, at least in the library market in which we license our products, do indeed prevent unreasonable terms. The market forces have led to numerous revisions of license terms, which favor licensees.
   D. Current law overwhelmingly favors enforceability of clickwrap, shrinkwrap and "in the box" licenses.
   E. Despite the fact that current case law benefits licensors, we believe the Uniform Computer Information Transactions Act ("UCITA") is beneficial for all parties by providing clear rules for enforceability of computer information licenses and individual terms of those licenses.
   F. UCITA provides additional consumer protections which the current law does not afford.

3. SilverPlatter's business.

SilverPlatter Information, Inc., based in Norwood, Massachusetts, is an electronic publisher of reference databases. We publish about 225 databases consisting of abstracts and full-text of articles on medical, scientific, humanities, and general reference topics. We deliver the products over the internet, and on optical media, such as CD-ROM and DVD-ROM. Examples of our products include:

- *Medline*, a database of over 9 million medical articles culled from over 4,000 journals;
- *PsycINFO*, a database of psychology literature; and
- *EconLit*, a database of economics articles and books.

4. Our primary customers are university libraries, medical libraries and, to a lesser extent, corporate and governmental libraries. The majority of our customers are located outside the United States. We employ about 175 people.

5. We do not do the abstracting ourselves; rather, we license this information from organizations which perform the abstracting and indexing. These organizations include professional associations, such as the American Psychological Association and American Geological Institute; private companies, such as Bell & Howell Information & Learning; and U.S. government agencies, such as the National Library of Medicine.

6. Licensing Agreements and Benefits to Licensees and Individual End-Users.

SilverPlatter has over 50,000 annual subscriptions to our databases, spread among 10,000+ institutional customers worldwide. We have customers in virtually every country in the world. We strive to distribute our databases and software pursuant to standardized license terms presented in an electronic "click-wrap" license. The click-wrap license provides that a customer clicks an “I ACCEPT” button to accept the terms. Licensing our products in this way keeps the transaction costs to our customers down to the lowest possible level. Furthermore, it delivers the products to our customers in as rapid and hassle-free a method as possible. We formerly delivered our databases pursuant to signed license agreements. Based on an internal study we performed in the mid-1990s, it took us an average of 22 days to receive a signed license back from customers. This delayed the customers receiving their initial database for those 22 days. With the electronic licensing, customers can access the databases immediately.

7. If our electronic licenses were not enforceable, we would be required to obtain signed license agreements for each of our 50,000 subscriptions. For us, this would be an overwhelmingly expensive administrative burden, and for our customers, this would raise the cost of their subscriptions and would significantly delay delivery of the products to them.

8. Furthermore, if clickwrap licenses were not enforceable, we would be unlikely to deliver our products to individual user-subscribers. One of SilverPlatter’s future goals is to make high-quality, reference information available to individual

professionals, by driving down prices to utility-like rates. In furtherance of that goal, several years ago, we tried an experimental "Search by Search" service. That allowed an individual search of one or more databases at a cost of about 50 cents per search. This price contrasted with the typical annual subscription fee to an institution of several thousand dollars per year. If we had not been able to govern the "Search by Search" transaction by an electronic license, we would probably never had been able to experiment with this service. That is because, as a practical matter, an individual user who wishes to do a single literature search wants the answer immediately, and would not bother with a signed agreement. *The big loser would be the individual professionals. Rather than protecting individual users, any rules which undermined the enforceability of clickwrap agreements would harm their interests.*

9. The form of the license is not relevant for licensee protection.

To the extent that the FTC's questions in their Request for Comments imply that the form of the license agreement—clickwrap or shrinkwrap—creates the problems for consumers, we disagree. Just as reasonable warranties and other terms can be in a clickwrap agreement, and unreasonable warranties and terms can be in a signed license agreement. It is not the form of the agreement's acceptance which are the issue. It is the substance of the warranties and other terms which are the most important for a consumer and licensee.

10. Market forces in SilverPlatter's market result in warranty provisions which our customers demand, and other reasonable license terms.

The goal of SilverPlatter's legal department is to facilitate our business. If our license agreement contained unreasonably narrow warranties or other terms deemed unreasonable by our customers, we would be forced to negotiate those terms, slowing down our product sales. This has a significant negative impact on our business. Accordingly, whenever a particular customer objects to a warranty or other license term, we determine whether the changes we make for that customer should be incorporated as a global change to our license agreements applicable to all customers. By that process, we have revised our standard license agreement more than a dozen times over the last few years alone, to revise provisions which were unacceptable to customers.

11. For example, when we first distributed our databases over the internet we provided the following warranty for our Internet Service:

"Like any Internet-related service, the SilverPlatter Internet Service (the "Service") experiences both scheduled and unscheduled downtime. SilverPlatter warrants that total downtime directly attributable to SilverPlatter during the first ninety days of your subscription will amount to less than the equivalent of three full days per calendar month. In the event that the total downtime during this period directly attributable to SilverPlatter exceeds the equivalent of three full days per calendar

month, you may cancel your subscription and receive a pro-rata refund. It is your responsibility to diagnose and rectify any downtime problems attributable to your network or to intervening Internet service providers."

12. Due to comments from customers, we have significantly strengthened our warranty over time in the following important ways:

A. Duration. Our warranty was formerly limited to the first 90 days of a subscription. We now warrant our internet service forever--throughout the entire initial year-long subscription and any annual renewals.

B. Substance of Warranty. We formerly warranted downtime would not exceed three days per month. We now provide that downtime will not exceed one day per month. (Note that although the current warranty speaks of "unplanned" downtime, our "planned" downtime is currently limited to the summer months, when we typically plan no more than four hours per month of downtime. During the academic year, we usually have no planned downtime.)

Our current internet warranty provides as follows:

"If the Customer has paid to access the Database via the Internet, SilverPlatter warrants to the Customer that the total unplanned downtime directly attributable to the software developed by SilverPlatter for providing access via the Internet (the "Internet-Access Software") will amount to less than the equivalent of twenty-four hours per calendar month. In the event that the total unplanned downtime during the subscription period directly attributable to the Internet-Access Software exceeds the equivalent of twenty-four hours per calendar month, the Customer may cancel the subscription and receive a pro-rata refund. This warranty does not apply to unplanned down-time that results from improper or unskilled use of the Internet-Access Software." The entire license is available at http://www.silverplatter.com/license/

13. Ironically, it is the internet itself which provides the means for our customers to easily talk to each other and to inform each other of unacceptable warranty provisions or license terms. Moreover, they use the internet to announce changes which they were able to negotiate. An active listserv, entitled "LibLicense", moderated by a Yale University librarian, has ongoing licensing discussions among many of our customers--reference librarians.

14. As an example, this listserv provides examples of model licenses, and provides commentary on these licenses. For example, one recent submission to this listserv referred subscribers to http://www.licensingmodels.com/academic.htm, which provides model licenses and commentary. The warranty provision for the database licensed to an academic institution was as follows:

"The Publisher warrants to the Licensee that the Licensed Materials used as contemplated by this Licence do not infringe the copyright or any other proprietary or intellectual property rights of any person. The Publisher shall indemnify and hold the Licensee harmless from and against any loss, damage, costs, liability and expenses (including reasonable legal and professional fees) arising out of any legal action taken against the Licensee claiming actual or alleged infringement of such rights. This indemnity shall survive the termination of this Licence for any reason. This indemnity shall not apply if the Licensee has amended the Licensed Materials in any way not permitted by this Licence."

15. As another example, I have linked to listserv postings in which a librarian objected to a license provision which held an institution liable for any violations of the agreement by their patrons.
http://www.library.yale.edu/%7Ellicense/ListArchives/9801/msg00001.html

A librarian from the University of North Carolina responded that they would not sign such an agreement and that they have been successfully able to substitute language that they "will make reasonable efforts to prevent" violations.
http://www.library.yale.edu/%7Ellicense/ListArchives/9801/msg00004.html

Similarly, a librarian from Rutgers University stated that they have been able to negotiate this provision out of the agreement.
http://www.library.yale.edu/%7Ellicense/ListArchives/9801/msg00005.html

Finally, the Associate Executive Director of the American Meteorological Society wondered why publishers would include such unreasonable terms in their agreements, "given the time and effort it must take the publishers to negotiate all these modifications."
http://www.library.yale.edu/%7Ellicense/ListArchives/9801/msg00007.html

16. I particularly wish to emphasize that these comments are compiled in a searchable archive so that any customer wishing to negotiate any terms may refer to years of comments and suggestions.

17. Another section of the LibLicense website analyzes contract terms and marks with a bold "caution" road sign provisions which the librarians, our customers, believe are unduly burdensome.
http://www.library.yale.edu/~llicense/table.shtml
Particular sections provide guidance and suggestions for librarians.
http://www.library.yale.edu/~llicense/warrcls.shtml#warr
In summary, the listserv discussions and continually updated website advice show how market forces, at least for our products, really do prevent abusive license terms. SilverPlatter has competitors, and overreaching license terms would simply push our customers to obtain these products from our competitors.

18. SilverPlatter believes that federally mandated warranties are not necessary. Our experience has shown that our customers renew their subscriptions at a very high rate, and are not demanding new warranty protection. If they were, we would

respond in the way that we have in the past—adjusting our license terms, including warranties, to meet market needs.

19. Current law overwhelmingly favors enforceability of clickwrap, shrinkwrap and "in the box" licenses.

Courts which have reviewed clickwrap, shrinkwrap and "in the box" license agreements over the past few years have considered the equities of these contracts. These courts, beginning with the Seventh Circuit decision in ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996) have overwhelmingly found these licenses enforceable, including their warranty provisions. These cases have dealt with license agreements for software, hardware and information in both mass market and institutional contexts. They represent both state courts and federal courts in jurisdictions across the United States, and in Canada. These extensive judicial findings should be given appropriate deference.

I have listed below cases upholding the enforceability of clickwrap, shrinkwrap and "in the box" licenses include the following. In addition, I have provided a short description of some of the cases where the warranty clause was at issue:

A. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996).

B. Hill v. Gateway 2000, Inc. 105 F.3d 1147 (7th Cir. 1997), cert. Denied, 522 U.S. 808 (1997).

C. Green Book International Corporation v. InUnity Corporation, 2 F.Supp.2d 112 (D. Mass. 1998).

D. TI Brower v. Gateway 2000, Inc., 246 A.D.2d 246, 676 N.Y.S.2d 569 (N.Y.A.D. 1998).

E. CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996).

F. Hotmail Corporation v. Van$ Money Pie, Inc., 47 U.S.P.Q.2d (N.D. Cal. 1998).

G. Groff v. America Online, Inc., 1998 WL 307001 (R.I.Super.)

H. Storm Impact, Inc. v. Software of the Month Club, 1998 WL 456572 (N.D. Ill., July 31, 1998).

I. M.A. Mortenson Company, Inc. v. Timberline Software Corporation, (970 P.2d 803, Wash. Crt. App., Feb. 1, 1999), affirmed Wash. Supr.

Ct., May 4, 2000.) http://www.courts.wa.gov/opinpage/ The court upheld a limitations of liability clause in a shrinkwrap agreement.

J. Kaczmarek v. Microsoft Corporation, 39 F.Supp.2d 974 (N.D. Ill, E. Div., March 16, 1999). Plaintiff Ruth Kaczmarek, a software developer, alleged that Microsoft's FoxPro was defective because it had a latent Y2K defect. She claimed that the software violated Microsoft's express and implied warranties. The court reviewed the shrinkwrap license which provided that FoxPro will perform substantially in accordance with the user manual. It permitted a 90-day rejection period. The court cited ProCD with approval, and held that the software did indeed perform as the manual stated that it would and that the plaintiff did not avail herself of the 90-day return period.

K. Caspi v. The Microsoft Network, 323 N.J. Super. 188, 732 A.2d 528 (Sup.Ct. NJ, App. Div, July 2, 1999).
http://lawlibrary.rutgers.edu/courts/appellate/a2182-97.opn.html

L. Stomp, Inc. v. NeatO, LLC, 61 F.Supp.2d 1074 (C.D. Cal, So. Div., Aug. 6, 1999).

M. Rinaldi v. Iomega Corporation, 1999 WL 1442014 (Del. Super., Sept. 3, 1999). This was a proposed class action against Iomega, a manufacturer of zip drives. The plaintiffs alleged that the defect, known as the "Click of Death", causes irreparable damage to the removable magnetic media storage disks on which the drives store data. On summary judgment, the court dismissed one of plaintiff's claims, that Iomega breached its implied warranty of merchantability, since it found Iomega's disclaimer to be "conspicuous." The plaintiffs had claimed that the disclaimer, located inside the packaging of the product, could not be called to the attention of the consumer until after the sale had been made, thus rendering the disclaimer not "conspicuous" as a matter of law. The court disagreed, citing ProCD v. Zeidenberg with approval. As with ProCD, the court here said the "commercial practicalities of modern retail purchasing make it eminently reasonable for a seller of a product such as a Zip drive to place a disclaimer of the implied warranty of merchantability with the plastic packaging." As with ProCD, the court said the key was that the consumer could reject the contract after the consumer opens the package and reviews the contract.

N. Rudder v. Microsoft Corp., No. 97-ct-046534CP (Ontario Superior Ct., October 8, 1999). http://aix1.uottawa.ca/~geist/microsoft.htm Plaintiffs sought to bring a class action suit in Ontario courts against Microsoft, representing 89,000 Microsoft Network users across Canada, on claims of breach of contract and breach of fiduciary duty. Microsoft moved to dismiss the suit on grounds that the clickwrap member agreement provides for exclusive jurisdiction and venue in Washington State. The court upheld the enforceability of the clickwrap agreement, and the exclusive jurisdiction clause, and dismissed the case.

O. Management Computer Controls, Inc. v. Charles Perry Construction, Inc., 743 So.2d 627 (Fla. Ct. App., 1st Dist, October 27, 1999).

P. Westendorf v. Gateway 2000, Inc. 2000 Del. Ch. Lexis 54 (Del. Chancery Ct., March 16, 2000).

20. Clickwrap agreements have also been implicitly approved by the Securities and Exchange Commission. Companies have been delivering "road shows" which precede a public offering over the internet. In two No-Action letters, the SEC stated that it would not bring an enforcement action against Net RoadShow, Inc. if it distributed the roadshow over the internet with certain safeguards. In its letter, Net RoadShow stated that any potential viewer would be advised of, and "must agree" to certain safeguards, such as:

"The copying, downloading or distribution of any road show material is not permitted.
The Internet road show does not constitute a prospectus, in whole or in part…. These securities may not be sold nor offers to buy be accepted prior to the time the registration statement becomes effective."

The letter went on to provide: "In the event the viewer does not agree to the above, the viewer will be denied access to the road show."

Although the SEC did not comment specifically on the issue of clickwrap, this was a key element in Net RoadShow's plan, and the SEC needed to have believed that the clickwrap was enforceable. If the clickwrap were not enforceable, then there would be no way to say that two important securities laws principles would be effectively communicated:
(a) road show material will be distributed only to qualified investors; and
(b) securities may not be sold prior to the effectiveness of the registration statement. (See SEC Release 33-7856, Use of Electronic Media, April 28, 2000. See www.cybersecuritieslaw.com.

Net RoadShow, Inc. No Action Letter, available September 8, 19997; and *Net RoadShow, Inc*. No Action Letter, available January 30, 1998.

In the SEC's April 28, 2000 Release, it implicitly endorsed the concept of a clickwrap contract for online-only brokers. It discussed consent to receiving documents electronically. At footnote 27, it states:

"We recognize that some brokerage firms require accounts to be opened online and all account transactions to be initiated and conducted online. In these instances only, the opening of a brokerage account may be conditioned upon providing global consent to electronic delivery."

21. The Electronic Signatures in Global and National Commerce Act, signed into law by President Clinton in June, 2000 provides that transactions will not be denied legal effect because the contract or signature is electronic. Of particular note is Sec. 101(c)(1), which relates to consumer protection. If a law or regulation requires that information be made available to a consumer in writing, it may be provided electronically if the consumer "consents electronically, or confirms his or her consent electronically, in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent."

This consent implies the enforceability of clickwrap agreements, even if the clickwrap is not considered an electronic signature.

Based on the definition of "electronic signature", a clickwrap agreement would be enforceable. Sec. 106(5) provides: "Electronic signature" means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record." Clicking "okay" next to an agreement is a "process" logically associated with a license.

22. Despite the fact that current case law benefits licensors, we believe the Uniform Computer Information Transactions Act ("UCITA") is beneficial for all parties by providing clear rules for enforceability of computer information licenses and individual terms of those licenses.

UCITA in many ways codifies the current law, which is to permit parties the freedom to contract, subject to unconscionability and violation of fundamental public policy. Nevertheless, there are still questions under current case law. For examples, some cases have commented favorably on using two clicks (Groff v. AOL). Is this necessary or not? In order to answer these and other questions, we believe that UCITA provides appropriate guidelines for both licensors and licensees. UCITA reflects half a decade of discussion and compromise among various consumer and trade groups. We believe that it is balanced, and reduces costs for all parties by providing a clear road map.

23. UCITA provides additional consumer protections which the current law does not afford. Finally, and most relevantly for the FTC's purposes here, UCITA provides additional protections for consumers and licensees in mass market contexts. The general principle of UCITA, set forth in Section 105(c), is that if UCITA or a term of a contract conflicts with a consumer protection statute, the consumer protection statute governs.

More specifically, the following sections are some consumer protections which are incorporated into UCITA:

A. Unconscionability. Sec. 111

B. Violation of a Fundamental Public Policy. Sec. 105
   i. innovation
   ii. competition
   iii. fair comment
C. Non-Waivable Choice of Law. Sec. 109(b)(2)
D. Consumer Error. Sec. 214.
E. Consumer Right to Terminate Future Performance. Sec. 304(b)(2)
F. Consumer Protection Statutes Not Altered. Sec. 105
G. Limitation of Damages for Personal Injury Unconscionable. 803(d)
H. No Reduction in Statute of Limitations Permissible. Sec. 805(b)(2)

24. Conclusion. In summary, SilverPlatter Information believes that our actual experience in the market shows that market forces provide an adequate incentive for licensors of software and information to provide warranties which meet licensee and consumer needs. We have over time provided a significantly strengthened warranty when our customers requested this. Customers can easily exchange information on warranties and other licensing issues in many ways, including listservs such as LibLicense. Additional federal requirements for disclosures here are simply not necessary. Providing our warranty protections through clickwrap agreements provides benefits to both licensors and licensees in quicker delivery of product, at lower cost and with less hassle. This is beneficial for everyone. Finally, we do support UCITA's passage because we believe it represents a balanced approach and provides certainty to electronic commerce transactions.

If you have any questions or concerns, please do not hesitate to contact me.

Respectfully,

David Mirchin
Vice President & General Counsel
SilverPlatter Information, Inc.
100 River Ridge Drive
Norwood, MA 02062
Dmirchin@silverplatter.com
Tel: 781-769-2599, x235
Fax: 781-769-8763