WARRANTY PROTECTION FOR HIGH-TECH
PRODUCTS AND SERVICES

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P R O C E E D I N G S

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MS. HARRINGTON: Good morning. First of all, there have been questions about the transcript and when it will be available, and I understand that it will be available very quickly, like within a couple of days, maybe a week, and we will be putting the transcript up on the FTC website in the area with the other information about this project.

I thought for myself that yesterday was a very helpful day-long learning exercise. As we said at the outset yesterday, the FTC staff is holding this symposium so that we have an opportunity to read in advance of the symposium very thoughtful observations and comments in response to the questions that we published in the Federal Register notice, and I think that the written body of submissions is extremely helpful to us, as well as the presentations yesterday and the sequence of those presentations which took us through a discussion of the business models, I found that to be very, very helpful, and I thank the presenters from that panel particularly.

Very good discussions about issues around licensing, the Magnuson-Moss Warranty Act, very good background on that. Following that, again, a very good

discussion on whether consumers can make meaningful agreements in shrinkwrap or clickwrap transactions, and then late yesterday we got into UCITA with a very good panel that I think gave some good background information on the process and the evolution of what has now emerged as UCITA.

So, that brings us this morning to a discussion that I'm sure will be lively of UCITA itself and what it means in the context of the concerns that we've raised in the Federal Register notice and in comments about consumer protection and how consumer protection law fits with the UCITA model.

We have a very good panel representing different interests and a variety of points of view. We have two state law commissioners, members of the drafting group who don't agree on some of the fundamental issues. We have a law professor, a thoughtful academic, who is I think a consistent critic of the UCITA model from the perspective of consumer protection law.

We have a very distinguished member of the Maryland House of Delegates and sponsor of the legislation in Maryland who has given a great deal of consideration to this model and how it applies in the marketplace, and as a Marylander myself, I welcome you

particularly. Oh, nice tie, yeah.

And we have an attorney from Sun Microsystems who can speak from that company's perspective, and I also in the interest of full disclosure should tell you that Adam used to work here and was very interested in these issues when he was a staff attorney at the FTC.

So, I think this will be an interesting and lively panel, and I am going to kick it off. I would ask that the panelists give us about 10 to 12 minutes initially on issues that you would like to present or discuss. I think that we have a good opportunity to hear some good discussion among the panelists and some reaction from panelists to what other presenters are saying.

So, if you could watch the clock for me, try to condense your initial remarks, you will have a lot of opportunity in the discussion to supplement those initial observations. We are just going to take this in the order that the agenda lays out. So, our first presenter this morning is Stephen Chow, who is an attorney in Boston, and while he's getting to the podium, I can tell you that he has just a million degrees in all sorts of interesting things, not just law, and lots of honors, too. So, thank you very much for joining us, Stephen, and take it away.

MR. CHOW: Good morning.

Thanks for asking me to participate on this panel. I will have to admit that I am actually doing some penance here, because I initiated the idea of the UCC 2-B about 1989, and at that time it was quite interesting because the reporter of UCITA, Ray Nimmer, was looking around for a new project, and part of it was to produce a uniform software licensing act. At that time the hardware industry was essentially controlling most of the software, and in essentially he was going to places like the Computer and Business Equipment Manufacturers Association, and they were saying to him, get out of here, ain't broke, don't fix it, this is a solution looking for a problem.

By 1992, things had changed. One was the Stepsaver decision that said that basically software wasn't good, period, and another thing that happened was the mass market software business began to come into being. Windows 3.1 started making major inroads into people's personal lives in many ways, and the -- at that time, Ray got to be technology reporter on the then new revised Article 2 project, and most of the other things that occurred were mentioned by Mary Jo Dively yesterday as well as Amy Boss.

I take this on somewhat as a crusade, because I

started off with the statute that was addressing the licensing of intellectual property and wound up with something that's a -- somewhat of a hybrid that I'll talk about. I also want to actually express my admiration to Commissioner Ring who has been just a bulldog in getting this legislation through and, you know, I'm sorry we have to be on opposite sides of this whole business.

Let me take off from what people talked about yesterday. Again, I say don't fix what ain't broke. Licensing of intellectual property rights has existed well with sales for many, many years, and we have had a generation of treatment of off-the-shelf software performance under Article 2, and during and over that period of time, there has been major software growth.

I started working -- I programmed computers back in the mid and late sixties, and I've certainly been licensing computer technology since 1976, even before the new Copyright Act, and I've known a lot of the decisions that we've made about whether we were sublicensing or whether we were jumping over into many areas, and these issues have been discussed over a long time, and it has not been a problem. There is no market failure. There is not one case that's been cited by anybody that says that this case is

detrimental to the industry.

The idea is that functional software, as distinguished from other kinds of information, and I think that I -- with Professor Reitz yesterday, we talked about that. He wanted to treat pure information but eventually said that if it was functional, it really was part of the good, because software is -- has tangible results. In the patent area, which I practice in, there are decisions that say software has tangible, concrete results, so that's certainly one view of it.

Under products liability law, the American Law Institute in its restatement of products liability, which was actually viewed as fairly pro-industry, said that software was quite likely to be a product, although it left that for further consideration. It distinguished the idea that other kinds of information would not be part of products liability.

My view of e-sign and ETA are appropriately addressed to issues such as the clickwrap model, and I think that among my small developer clients -- and I tend to generally represent telecommunications and computer equipment manufacturers and systems providers as well as service providers, the ASP model as we've talked about, but a lot of these folks are small developers.

I think that the idea is that some of them want to be sure their contracts work, but I think the position taken on each side annually, there was let's wait until technology develops, let's not pin ourselves to what's not important.

Let's talk about the network considerations. I heard yesterday atoms are not bits. I agree with that, but atoms are probabilistic, and bits are completely deterministic. In other words, digital copies make perfect goods. Perfect goods are those that if you use them, they continue to be just as viable, as opposed to being exhausted, as what are called physical atom-based goods, but the kind of issues that the network affects incompatibility, buggyness, stuff like that, these are really many -- really our choices.

General Electric and Motorola have six sigma manufacturing, and they don't have imperfect software. The component -- the software component manufacturers, they don't have buggy software. A lot of the desktop models that are pushed to the marketplace, that has been the issue.

The internet was developed by public standards, not by proprietary interfaces. I spent the 1980s and most of the 1990s representing Digital Equipment Corporation and saw them go from proprietary buses to

nonproprietary buses and back, and frankly, the ones that were open were the ones that tended to work best, such as ethernet, which is part of the underlying part of -- portion of the internet itself.

The maintenance and performance standards advances the networked economy. In other words, if you start being lax about performance standards, you wind up having things that don't fit together, which is exactly what happens when we talk about expectations about very large computer programs with lots of bells and whistles and that grow from half a meg one year to two megs the next year and, you know, requires you get a faster computer and another operating system, I suppose.

The performance standards are important, and they are provided on a -- I think an appropriate level under UCC 2, that is, it's neutral as to hardware standards or software standards, and in many ways even the service model approaches this. As I draft application service provider program -- provisions or either on the licensor side or the licensee side, we are providing levels of service and guaranteeing, you know, that this will be available 99 percent of the time or 99.9 or 999, and at some cost we can certainly get to those levels of performance.

The problem in a lot of what we're talking about is taking information and putting it into some other statute such as UCITA, whether it's UCITA or not, is that UCC 2 poses the wrong questions for content. So, in that sense UCITA burdens innovation, because it's based on Article 2. You know, we talk about how this is good for the internet economy.

The fact is that we started in 1996 on a UCC 2 model, the same questions, slightly different answers, but still, we brought a lot of people who were never in the Article 2 space into Article 2 or the Article 2 framework, and this is a problem for some of the people I represent, universities, basic research institutions. They -- you know, for -- and these people are included, because if you -- if one of the major proponents of this statute, the stock markets, to protect their stock quotations, are included, stock quotations have a whole lot of value even if they not in complete form, but the empirical research side of things, if you're talking about seismology or biotech, all of that has to be part of -- has to be in computer form.

So, the application of the product-oriented implied warranties for the things that we've been talking about have never been applied to university contracts, and what this does is it invites lawsuits

where they have never been there before. Maybe the implied warranties are there. In fact, the reporter Ray Nimmer says that yes, service contracts have warranties, though they are a little bit different from product warranties, but they are there to begin with, but putting it in a statute certainly invites litigation, and it changes the bargaining baseline.

Right now, if under a university license someone comes and says to me, look, I want a warranty that this does not infringe, and the university doesn't have a clue. So, you have to go out and do the research and charge extra for that sort of thing. Now you've changed the baseline. You start at a different point. It may not be a big burden, but it is a burden.

Creating direct privity between the producer and the end user is a very interesting concept that is done here. People have avoided this in the producer community for a hundred years. We still avoid that in Article 2 provision, but does this, in fact, open the path back up to change on products liability? Does it open it up against component manufacturers and others? Does it open it up against the publishers themselves?

I mean, right now, the Illinois Brick defense of indirect purchasers not having standing to sue has been used as a defense in antitrust class actions.

Does this weaken that? Perhaps it does.

But UCITA balances the licensor and licensee interests by favoring the publisher in both roles, and that's one of the issues that I have. There are many deals here that deal with -- the recent deal of the MPAA talks about an idea submission. Now, in my practice, we do a lot of nondisclosure agreements by people who don't have any products, they have ideas, they have data, they have other things, but again, the New York State case that this principle came from addressed the very simple ones, much like, gee, I have a great idea to make you profitable, buy low, sell high, but when you start putting this in a statute, you look at, well, what is confidential, concrete, novel? To me, these standards are perhaps higher than the standards set for the licensor in the transactions that UCITA looks at.

I'm going to speed through this, again, to try to finish this up, but UCITA hurts small developers. Electronic self-help has been justified on repo grounds. See, well, if you secure many people, then why can't we? But as you heard from Mr. Johnson, automobiles are self-contained. They don't have network effects. That's why it's very different.

In addition, the damage to the vendees and to

third parties, the UCITA compromise actually hurts small developers in my view, because when it's authorized and a state says you can do this, well, then the standard is that it can be done, even if you have to jump through some hoops, and the rational purchaser will say, well, my protection is consequential damages.

Well, that means they should never hire someone who can't answer the consequential damages or they must post a bond. So, inherently this I think hurts the economy of any state that adopts UCITA, certainly on the small developer side.

I think a lot of this will be talked about by some of the intellectual property property people who follow me. The traditional intellectual property license granted a license, but it talked about this in terms of the intellectual property rights. In copyrights it's the right to reproduce, the right to distribute to the public, to displace publicly, to make derivative works. People have been a little bit lazy about this, and they put other kinds of use restrictions on their contracts.

Traditionally, this meant that if you exceeded the scope of the grant, you could go for an infringement action, usually in federal court, you would get a fair use defense. On the other hand, if

it's a breach of condition and it is not a -- doesn't rise to the level of misuse, then that may lead to cancellation of the license. It may be an infringement action then, but certainly a contract action.

The UCITA license may be a simple naked restraint. By clicking you agree not to use this for something. This in a sense allows some recapture perhaps of public domain information, and this traditionally is viewed as against the intellectual property policies certainly of the nation, where you give something to the public that is complete disclosure in return for some limited monopoly, according to the Constitution.

The violation of restraint here may lead to a contract action with consequential damages in state court, and you are only subject to the defense of unconscionability or violation of fundamental policy of the UCITA state. Unconscionability has only been found in 40 cases maybe a dozen times in 50 years, so unconscionability is not that great effects compared to the number of times you see fair use defenses succeeding.

The mass market licenses I call IP ultra. IP licenses typically are personal. They do not -- are not transferable, because you are giving someone a

license saying, please develop my technology, and you don't want to give that to competitors. You don't want that to wind up in competitor hands. The difference here is that when we're talking about transfers to more than the personal market, and this happened in the past where, as I said, sales and licensing have co-existed, and we have had first sale rights, we have had exhaustion, there are a number of doctrines that apply to this.

Here we have a situation where the mass market is totally anonymous. I think it may come through a retail situation, someone may actually -- the producer generally, unless you register or buy directly, has no idea who the purchaser is. So, the interest of keeping this personal to the mass market licensees is not really there. So, if everything else were equal, there probably should have been a strong presumption against restraints of alienation, perhaps a special notice on the package saying that you may not -- you may get this, this is for your personal use only, and you may not transfer it, but at least some warning, and there might have been a strong presumption that this is merchantable because it's -- you assume that someone has tested these things. This is quite different from the situation where you do custom-developed software.

Instead we have internal justification. It's interesting that if you read UCITA carefully that it says in -- basically in 209 -- right, in 208, it says that it -- that the right to refund can be satisfied by a legal requirement, and that legal requirement is UCITA itself. So, automatically it will say in mass market licensing you have a right to refund. There is a right to refund under UCITA, therefore this -- and that was built in there I think for a particular purpose.

The basic problem and the very subtle problem I have had with UCITA is it really shifts the balance fundamentally. The recipient of the product is always charged with reading the terms. On the other hand, the provider of the product can be excused from even looking at their purchase order or whatever as long as it supplies some term in the product delivered that is materially different.

What that does is it defeats the possibility of having a contract at that time. This is contrary to UCC 2 and Carl Llewellyn's idea of -- his idea of blanket assent and saving the deal. The deal only happens when someone clicks, and then the upshot of that is that if I'm advising a client, I'd say, if you really want to have the last shot, you should always

put something that's materially different in your product. That way, there's no contract that's formed before, and the only contract that would be formed is when you click.

I find there's something wrong with that, and I think that this is -- this shift in regulation is in favor of the provider of a product.

MS. HARRINGTON: Steve, can we move through?

MR. CHOW: Okay.

MS. HARRINGTON: Thank you.

MR. CHOW: Some of these I think Jean Braucher may talk about, and I will certainly put these slides up and we can raise these. The assent issue is -- continues to be an important one. UCITA in my view exacerbates the opacity of the software industry. We have talked about cognitive issues yesterday. The fact is that a loading dock worker will probably not sign something, but an IT staff person almost invariably will click through, even type in XYZ Corporation. So, this opens the -- some question marks for businesses generally and consumers, as well.

I think other people will cover this, I think, UCITA defeats the first sale doctrine. I just want to point -- call your attention to some of the cases. DSC Communications is listed right in the introduction of

UCITA as being an exemplary case. If you look carefully at the case, though, the open market transaction is treated differently, and for the reason that it's not negotiated, and under UCITA, you may buy a CD and you may own it, but when you click, you divest yourself of that ownership of the disk.

Just some recent cases, these are pro-shrinkwrap, these are sort of in between, and these three are actually -- the know Novell case and the Mendoza case are suggestive that there is some question about shrinkwraps.

In summary, I think I agree with Professor Kobayashi that we need competition, but we don't need to give those with market power additional contracting power, and we don't need to establish a climate burdening innovation, disfavoring small developers, and we need a critical mass of informed consumers. So, we may require some pretransaction availability, at least, on the net or otherwise.

These things -- I don't want to ask the FTC for any rulemaking. I think some clarification is probably good for at least a start, but I want to recognize that there are barriers to exit, that is, you don't just walk the site on your feet, you have an e-mail address, you have -- you are a community and your instant

messaging, your buddy system, whatever, and it's hard to change.

Finally, I think retaining UCC 2 is applicable to software, especially in those jurisdictions that may or may not adopt UCITA in the future, and many of us may adopt UCITA if it has appropriate amendments, but at this time we think that having UCC 2 applies to this important area. Thanks.

MS. HARRINGTON: Thank you very much.

Turning now to Delegate Barve, Maryland is the first state to have implemented UCITA --

MR. BARVE: Right.

MS. HARRINGTON: -- and Delegate Barve, could you talk to us about your view that this is a positive development for the citizens and consumers of Maryland.

MR. BARVE: Sure. Do you mind if I sit here since I've spread stuff out?

MS. HARRINGTON: Not at all.

MR. BARVE: I tend to have lower back problems if I stand for too long.

First of all, thank you for inviting me. My name is Kumar Barve, I represent Gaithersburg and Rockville, which is sort of the IT corridor, high-technology corridor for the State of Maryland, hopefully won't be the only high-technology corridor in

the State of Maryland, and that is changing, so that's a good thing.

Let me begin -- I suspect there is going to be a lot of talk about the specifics of the NCCUSL package and perhaps there will also be specifics about the law that we passed in Maryland. Let me set the context of how we operated in the State of Maryland so that you understand this. First of all, let me just say that I'm a Democrat. I'm traditionally thought of as being a liberal to moderate Democrat. I'm the chair of the Subcommittee on Science and Technology, which had eight active members, and our membership spanned everything from liberal Democrats to a very conservative Republican.

Most people were sort of to the left of the center of the spectrum. Most of the members of my subcommittee are people who made their careers beating up on HMOs and kicking the butts of businesses generally. So, this is not a group of people who are normally very sympathetic to the business community in our legislature.

We had a great deal of public hearing on this matter. To begin with, I think the first public hearing was a three-hour event, which had opponents and proponents of the bill. We then -- what I chose to do

is I took the piece of legislation and broke it down into 10 or 11 basic parts, and we had I think eight two-hour work sessions that typically began at 8:00 in the morning and went on until 10:00 in the morning to look at each of these issues individually, and as the discussion proceeded on the House side -- by the way, the Senate had a similar amount of public hearing, and then when the bills came out of the two houses, they were different, and we had -- we spent about three hours officially and maybe a couple more hours unofficially in the conference committee process.

A couple of things began -- a couple of points of view among my colleagues in the subcommittee began to emerge. Primarily we saw a couple of problems with UCITA as it was drafted by the Uniform Law Commissioners. We felt that it wasn't up to the consumer protection standard that we in the State of Maryland have. We reacted very negatively to electronic self-help, especially in the consumer setting. We began to come to the conclusion that allowing a software manufacturer to use a shrinkwrap license agreement to protect his or her intellectual property was a fundamentally sound public policy. We had no problem with that.

The very idea of upholding a contract -- I'm

not an attorney, but I learned all sorts of neat terms, like contracts of adhesion. The idea of upholding the idea of a contract of adhesion in a software setting ultimately seemed to be a pretty reasonable thing to us. We heard, of course, first and immediately from the very largest software companies in the United States, software companies like Microsoft and Adobe and others like that, but then later we began to hear from smaller software companies. I began to hear from my friends who wrote software in Gaithersburg, Sequoia Software in Howard County, Maryland, U.S. Internetworking, which I think was smaller then than it is now, and we began to coalesce -- our opinions coalesced around a couple of things.

First of all, as I said, we decided that a shrinkwrap license agreement or a clickwrap license agreement wasn't any more of a problem than this little warranty agreement here with your -- I bought a garden claw, which is supposed to help you cultivate your lawn; in fact, it's really good at throwing out your lower back. And the only reason anyone should tolerate this thing that nobody reads that's inside the box is because in Maryland and at the federal level we have a lot of consumer protections. So,.

We came to the conclusion that we were

perfectly happy to allow software manufacturers to protect their intellectual property with contract language if we took away from them the ability to disclaim or modify warranties of merchantability, informational content or system integration, and that's essentially what we attempted to do in the Maryland version of UCITA.

We took away from software manufacturers the ability to disclaim those kind of -- disclaim or modify those type of warranties. So, it's our hope that after October 1st, if you bought software as a consumer or as a small business under certain circumstances and the software doesn't work, you can go back to the manufacturer or back to the retailer and demand a refund, just as you can get a refund for a tangible good that doesn't work.

We came to the conclusion, also, and I don't know what the federal effect is, because I don't know federal law, but we came to the conclusion that Maryland consumer laws do not really apply to software. Maryland's consumer laws clearly apply to consumer goods, things that you buy and then you own them. Most software, when you buy it, you don't own it. You're getting a license. We wanted to make absolutely certain that in the State of Maryland, when you

purchase the right to use Quickbooks or Microsoft Office, that you would have the same Maryland consumer protections that would apply to you if you bought a shovel. That was our intent.

MS. HARRINGTON: Let me ask you one question on that, if I may. The little FTC Act in Maryland --

MR. BARVE: I'm sorry, the what?

MS. HARRINGTON: The Maryland unfair and deceptive practices statute requires or favors presale disclosure, and UCITA permits post-sale disclosure. How did you deal with that inconsistency, if you did?

MR. BARVE: Well, you know, the way -- as a practical matter, what we -- the perspective we took is that virtually everything you buy nowadays if it's electronic or complex has at the bottom of the box underneath the styrofoam a piece of paper which has terms and provisions which normal people do not bother to read, and those terms and conditions are binding on the sale of the thing that you buy, and the perspective we took was that clickwrap license agreements were fundamentally undifferent, and this was not a problem, but that what we wanted to make absolutely certain was that while it's true you buy a VCR, there's a piece of paper at the bottom of the box that says something that nobody reads, that's okay as long as you have consumer

protections in the State of Maryland.

We felt that it was impractical to have, as with most complex electronic components that you buy and with software, you know, we thought that prenotification was impractical for two -- well, for the main reason that the consumer isn't going to read it. I mean, think for a moment about all the pieces of paper you have to sign when you're buying a car or buying a house.

In the House Economic Matters Committee, we every other year include another notification to consumers, and, you know, I just know they don't read it. So, to me the primary issue is do the consumers have the legal protections when things go wrong down the road? To me, that's the primary thing, because nobody reads notifications, okay? So, that's the way we -- that's the way we processed that thought -- that issue area.

Let's see, where was I going to go to next? Self-help, we just flat prohibit it in the consumer market, and we say in the nonconsumer market that we basically apply a great deal of -- to begin with, we -- if I remember correctly -- Connie, how many days notice do you have to give, is it 45 now --

MS. RING: Thirty days in Maryland.

MR. BARVE: Yeah, 30 days in Maryland, it's been a while since I've looked at the bill, but what we do say is that you cannot by contract lower the number of days. We say that the -- if you invoke -- want to invoke self-help, you have to give notice and notification to the consumer so that they have an opportunity to remedy the accused breach of contract. If you wrongly invoke self-help, you are, as the creator of the software who invokes self-help, liable to virtually -- you're liable to an enormous amount of liability, and as a business person, I would be very hesitant to invoke self-help in Maryland given the provisions that we've put into our law.

Choice of law and choice of forum was an issue that was very, very hotly debated. Essentially what we say with respect to -- obviously Maryland consumer law trumps any agreement, so Maryland consumer law under the original version of UCITA and under our version of UCITA is a controlling factor in the consumer forum.

Choice of forum is something that will be adjudicated by a Maryland court. If you're a consumer and you download software from a Utah software manufacturer and you live in Montgomery County, you go to the courthouse in Rockville, and the judge is going to decide what the reasonable choice of venue is going

to be. If it's software -- if it's a software company like Microsoft or Corel WordPerfect, you know, the Corel Corporation, which is a Dublin, Ireland corporation, I think a court of competent jurisdiction is probably going to find they have an adequate nexus in the State of Maryland to have that case adjudicated in the State of Maryland.

On the other hand, if it's a Utah software manufacturer, you didn't -- you downloaded the software, so there wasn't a tangible medium that was delivered to your place of residence, and they're a small company in Utah and they say their choice of law and choice of forum is Utah, chances are that Maryland judge is going to say, choice of law, choice of forum is Utah.

Some people in Maryland General Assembly were concerned that Maryland judges would be applying consumer laws of the state of Virginia or the state of Utah or the state of Alaska. Hey, it happens all the time right now, at least that's what my girlfriend the attorney tells me.

We amended the Maryland long-arm statute to make it clear that Maryland would have legal ability in the case of computer information transactions to have -- to claim jurisdiction over a contract from out of

state.

Let's see -- so, essentially, I mean, without going into a great deal of detail, I see my ten minutes are just about up. So, let me just say that in the end, the conclusion that we came to unanimously, as a subcommittee, was that we were comfortable with -- oh, there was -- excuse me, let me interrupt myself.

Another very contentious issue was the effect of UCITA on the libraries, and I see some of my friends from the University of Maryland system and elsewhere are here, Hopkins I think also, are here. They strongly objected to the notion that -- in their view, of course, the fair use doctrine in the U.S. copyright laws could be very quickly evaded by contract language, and that may be -- you know, we felt that it is better to give software manufacturers the ability to protect the fruits of their labor.

If there are abuses in the system, we can always come back and write a specifically crafted law to address that abuse. We've done it many times, and just about every law we pass, every major law we pass, has some unintended consequence, and that's why we meet every year.

It's interesting, because actually my girlfriend teaches a business law class at Prince

George's Community College, and she had me teach the section on -- they went a little bit into UCITA, and these are -- you know, these are bright people, a variety of ages, and I put it to them, should a book and a piece of software be handled, aside from what the law is, should a book or a piece of software fundamentally be handled in exactly the same sort of way? Should you be able to buy a book? You can buy -- the library can buy a book and loan it out to somebody and they return it. Should you be able to buy a piece of software and loan it out to people?

And it took them less than ten seconds to come to the correct conclusion, no, you shouldn't, because they're fundamentally different things. You can't download a book into your computer and e-mail it to 50 of your friends. You can download software into your computer and e-mail it to 50 of your friends. They are physically, tangibly and practically different things.

It is completely reasonable -- we felt unanimously that it was completely reasonable to give software writers the ability to protect the fruits of their labor through a clickwrap license.

Now, if Britannica or Groliers or somebody begins to muscle in on our University of Maryland system and our Hopkins or our Montgomery County library

system, I have no doubt that we will be able to quickly command a majority in both houses to fix the problem if they begin to transgress, because we very much value our library systems and our University of Maryland, which by the way, Maryland and Hopkins are part of the reason we're leaders in biotechnology in Maryland, and we're not going to do a damned thing to endanger that.

So, let me summarize -- I've gone over my ten minutes. Let me summarize my saying that we fundamentally had no problem with contracts of adhesion in the software environment as long as there was adequate consumer protection for the people in the State of Maryland.

The final thing I want to say is that we have a joint House-Senate Technology Oversight Committee which is going to meet in December, and we're going to continually meet on issues relating to UCITA which went into effect I guess 27 days ago. It's too early to tell what the impact of UCITA is going to be yet, but essentially we spent a lot of time on this. This is the most complex issue since electric deregulation that Maryland has faced, and, of course, I'm biased, I think we did a good job.

MS. HARRINGTON: Thank you very much, Delegate Barve.

Professor Braucher?

MS. BRAUCHER: Yeah, I want to start by going back to some process questions that came up yesterday in the first panel on UCITA where Mary Jo -- is it Dively or Dively? -- Dively talked about some appearances by the Consumer Project on Technology and Consumers Union at the Article 2-B and later UCITA process.

You should know that both of those organizations strongly oppose UCITA. In fact, Consumers Union sent a letter to NCCUSL objecting to representations being made about their participation and input without noting in addition that they oppose UCITA.

NCCUSL does not do this to business groups that show up at some meetings and then say we're not satisfied with the product. They don't then go around and say, you came, so you had your shot. And one effect of this is actually to discourage consumer participation in the process, in the NCCUSL process, to go around saying, oh, they had their shot because they came to the meetings, that means somehow that confers approval.

As Delegate Barve can I'm sure tell us, that industries were quite vociferous, the industries that

were unhappy with UCITA in the Maryland process, and they negotiated some deals -- this was for the movie industry, sound recording, telecommunications, you had all those folks show up, right?

MR. BARVE: And insurers.

MS. BRAUCHER: And insurers, but they are not happy with what they got, they still oppose UCITA.

MR. BARVE: They are too busy denying claims to their HMO customers.

MS. BRAUCHER: Anyway, the industry deals there were then put back in the uniform version of UCITA. The few consumer gains were not put back into the uniform version. For example, there's an important amendment that was made in Maryland to try to save the Consumer Protection Act by explicitly saying that UCITA transactions, even if they're denominated licenses, will be covered by the Consumer Protection Act in Maryland.

Well, that ought to be as a suggestion part of the uniform text of UCITA, that there ought to be something that says if your state consumer laws are put in terms of sales, you should, just to make sure there's no issue, say that that consumer act applies to UCITA licenses, but NCCUSL didn't do that, right? You see that the consumer gains don't get put back into the

process.

Similarly, Maryland did something significant in making implied warranties of merchantability nondisclaimable. That didn't go into uniform UCITA. It didn't even go in as an option, which is one format that NCCUSL uses, they call bracketed provisions. There are eight states, eight or nine states, that have this approach in the law of goods. It should have been a bracketed provision, if you do this for goods, you should do it for software if you're going to consider software something other than goods. So, this is a process that is not hospitable to incorporating consumer protections.

Now, I want to raise a few issues that maybe we'll get a chance to come back to, and I'll try to go over them very lightly here. Again, Mary Jo Dively talked about warranties in UCITA. Basically what UCITA does is it provides a roadmap for disclaimer of warranties, and Mary Jo talked about, well, then, you know, the point of having these warranties in UCITA is then when they're disclaimed in the first document you get from the licensor, you can go back -- and these were her words -- and bargain to get those warranties.

Well, we all know that doesn't happen in the consumer context, which is why it's a good idea to have

the approach that Maryland does in making these nondisclaimable.

I should add that that doesn't really restrict freedom of contract, because all it ends up meaning is that you need a bolder disclosure, that you can't say that this is word processing software. What you can say is that this is buggy software that may or may not do word processing, you know, that you have to make that kind of bold redescription of the goods in order to get out of if it was for ordinary purposes.

All right, other issues, there's a fundamental public policy provision in Section 105-B of UCITA. This is touted as sort of the solution to all of the problems of information and competition policy under UCITA. Well, this provision is actually weaker than the restatement section of contracts public policy provision. The restatement doesn't use the word "fundamental," so that what you've done is you've raised the standard in UCITA from what it would otherwise be under the common law of contract. Section 178 of the restatement does not require a fundamental public policy.

Another provision that's sometimes touted as important is there's a consumer error provision in Section 214. Well, this is eliminated if the seller or

the so-called licensor has a confirmation process. So, even though the licensor has done nothing to fill your order and you call them up and say, I made a mistake, this provision will do you no good if they had a confirmation process. So, really all it does is it forces a confirmation process, but it's not as good as the common law of mistake. If it's an apparent mistake, you have an individual ordering, you know, a hundred copies, the common law of contract would treat that as something that the person on the other side should reasonably realize is a mistake before they start sending that to an individual.

The right of refund in UCITA, much touted as a new consumer protection. Well, this is a right, as Steve Chow had mentioned, this is a right that it's not required under UCITA be disclosed. Well, this is not a consumer protection statute. You have a right of return, but you're not told about it?

Now, I think probably most licensors will tell consumers about it, but that should have been put in the statute. They will probably tell them because there's an argument that it's unconscionable not to. Well, there we get, again, into unconscionability is supposed to be the solution to all the consumer protection problems here. Unconscionability is not a

usable theory because it's so fact-sensitive. It's very expensive to litigate an unconscionability case. That's why we have consumer protection laws that give attorneys' fees, multiple damages, class actions. You need those sorts of things, and unconscionability is just not a good theory. You know, it was called "The Emperor's New Clause" when it was put into the UCC, and now suddenly it's, oh, this will solve all your problems.

The right of refund also is not a new consumer protection if you think about ordinary contracting norms that one has a right to review the terms and opt in, decide then, do I want to exercise my freedom to go into this contract? But what this does is say you make the contract first in any sort of practical sense in that you've paid for it, you've taken delivery, and now you get a chance to opt out, and that's called a new consumer protection? I don't think so. It's a carve -- it's a cut-back from what you would have under ordinary contracting principles.

The conspicuousness definition in UCITA, it's based on -- it starts with the more than 50-year-old preconsumer movement definition in the UCC, and the UCC case law is actually better than UCITA; that is, it says you have to meet the general standard in

conspicuousness of notice, that a reasonable person would have noticed this. Well, UCITA instead in the comments builds in a notion that there are some ways of doing conspicuousness that are safe harbors, for example, contrasting type, and as a result the placement doesn't matter.

Well, if the so-called conspicuous term is way down at the bottom of a website in contrasting type, that doesn't do much good if nobody would notice it, and nobody will when it's placed in that way.

Now, the UCC standard itself ought to be improved upon in light of all of the expertise that's been developed over the last 50 years and particularly since the sixties. Placement is important, it's very important. These days you can empirically test whether people are accessing a disclosure; that is, you can keep track of whether they're clicking. That ought to be built into UCITA, that if you have information that people are not accessing this, that you have to change how you're disclosing it.

There should have been a requirement of plain language, of readability, of prominence, the idea of -- and here's the other problem, if you have a definition of conspicuous, but what we're talking about is post-payment disclosure that's conspicuous? What good

does that do? It needs to be before you pay that you get the disclosure.

Now, you know, I think fortunately we have the Federal Trade Commission Act. Maybe we'll eventually get some kind of overlay of you can pick a few key terms that ought to be disclosed prior to payment and that have to pop up on the screen and the person would have to click to, something like that might start to address some of the problems caused by UCITA.

Let me see, I just want to touch a couple of other issues. There's this future changes provision in 304 of UCITA. What this entails is you put a boilerplate provision in inconspicuous language, and it says we can keep changing the contract simply by notice, and then notices and methods of receipt are defined in UCITA so that you could post the changes to your website so you can be increasing the price on, say, an internet service provider agreement by posting to the website, and this is all authorized by some fine print provision at the outset.

Now, luckily, again, we have the Federal Trade Commission Act that's probably going to say that that's an unfair and deceptive practice, but UCITA didn't take that into account. In fact, it creates the problem with this Section 304.

Another issue that was listed as one that you were interested in for this topic is the relationship between e-sign and UCITA. There's a new section in UCITA as of this past summer, and I don't think this made it into Maryland, so you have a chance to fix something in Maryland, it's Section 905 is the new provision, and it says we're superceding and overriding e-sign.

Now, I don't think this will pass muster under e-sign, because I don't think UCITA is consistent with e-sign in that it doesn't have the consumer consent provisions to electronic disclosure that e-sign has, but what states should do, rather than what NCCUSL is suggesting in 905, to override the consumer protections in e-sign or at least create an issue about that, is that states should put in language that says nothing in this act is intended to modify, limit or supersede the provisions of Section 101-B through E of the Federal Electronic Signatures and Global Electronic Commerce Act to explicity preserve the federal consumer protections.

I mean, we have a very disturbing effort here by NCCUSL to try to override federal consumer protections, and I don't think it will work, but why put everyone to a lot of effort in litigating that?

MS. HARRINGTON: Professor, could you wrap up?

MS. BRAUCHER: Yeah, let me just mention a couple things.

Self-help, which was brought up before, unfortunately I think you attempted to eliminate self-help in Maryland, but I don't think you succeeded, because there's another section, Section 605, which is electronic regulation or performance, and under 605-B-3, that permits a disabling after the expiration of a stated duration.

Now, this becomes a roadmap for how, you know, Mel Farrar in Detroit can do his disabling of leased vehicles. You license some software in the vehicle that would allow you to shut down the car, you do it on a weekly duration, and if you don't pay your bill, we shut your car down, and that's a way to use UCITA to get a right that Article 9 does not permit. Article 9 does not permit remote disabling of cars, of consumer goods, but UCITA through this tricky provision of 605 is a roadmap for that kind of sleazy practice. I don't think you probably realized that when you did this.

MR. BARVE: No, we knew what we were -- but I didn't know that -- we didn't consider shutting down a car but shutting down a piece of software, yeah.

MS. BRAUCHER: Yeah, shutting down a car is

permissible now, because you can opt into UCITA for the whole transaction if you license a piece of software as part of the transaction. So, that's what you've enabled here, remote shut-down of cars.

MR. BARVE: That we'll have to look at.

MS. BRAUCHER: Yeah, I think you should.

Then there are provisions on -- could I just mention two more?

MS. HARRINGTON: Sixty seconds.

MS. BRAUCHER: Okay, choice of law and choice of forum. The default rule on choice of law in electronic delivery is the licensor's place of business. So, it's a remote law for the consumer. And in addition, even worse is that there's a choice of forum provision in UCITA that uses an admiralty case from the Supreme Court that is essentially a test -- the test that's used in this choice of forum provision is unlimited choice, even in consumer transactions.

The UCC doesn't even have a provision authorizing choice of forum. So, this is going way beyond the UCC. It's not as consumer friendly as the UCC. In many ways UCITA is like that.

MS. HARRINGTON: Thank you. And we're really getting into the weeds here, this is very rich. Let me just pose a question that really is a rhetorical

comment of interest from Carol Kunze. It's a question for Professor Braucher, but I'll just read the question, and I don't know that it needs discussion, but the point is -- do you want discussion? -- Consumers Union criticized software licenses for including terms which Consumers Union itself uses in its contracts. Why is it fair for Consumers Union to impose New York laws and forum on consumers but not a software developer?

MS. BRAUCHER: Well, let me start by saying I don't represent Consumers Union.

MS. HARRINGTON: Right.

MS. BRAUCHER: I'm an independent person here. I have my own views on this, but I think it's important to realize that Consumers Union, which is a licensor, opposes UCITA, and they say we are very happy to live with a model of pretransaction disclosure, because that's in the consumer interest.

Now, the specific provision that's always raised is the one that was brought up yesterday about they try to protect their trade name by restricting use of their endorsements for -- in commercial advertising. My understanding is that that's actually been upheld in some court cases, that they can do that, and I don't know the basis, but, you know, it's -- the trotting out

of this example over and over also seems to be a way to try to silence Consumers Union in their participation in the process.

MR. CHOW: I want to make one comment about that statement. Most of what Consumers Union does is content as opposed to software, which I personally think they are much more akin to goods. So, I think there may be different rules between those two.

MS. HARRINGTON: Thank you.

Connie Ring is also a state law commissioner and chaired the NCCUSL drafting committee on UCITA.

MR. RING: Thank you very much for the opportunity to be here. I'm a volunteer. All of the commissioners on uniform state laws are in that category. We volunteer a lot of time for improvement of the law.

The NCCUSL is 110 years old. We do a lot of different uniform law projects. If you have a donor designation on your license plate, that's because of the Uniform Anatomical Gift Act. If you are involved in transfers to minors, that's a uniform act, the Partnership Act, the Inter-Family -- Interstate Family Support Act, they go after delinquent parents for not paying support, they are all acts of the conference. We are very proud of what we do. We think we improve

the law in many respects.

One of the areas that we had spent a lot of time on, of course, is commercial law, and I think that if you think about it it is very clear that there needs to be uniform rules in connection with the new energizing element of the information age. It's a transformation that is equivalent to the industrial revolution which transformed our economy from an agricultural farming economy to an industrial economy. It is the engine that is driving our economy.

And the illustration that I like to give is I'm sitting in an airplane with my laptop open, I'm tapping into a database. I don't know where the other party on the other side is located. The party with whom I am dealing and with whom I am contracting for that information in obtaining a license doesn't know what state I'm flying over. It is a faceless and orderless kind of contract. It is different than the experience that I have had most of my paper world contracting life where I have been dealing face to face across the table with the other party with whom I am negotiating.

I know that they have authority. I know that they have understood the terms. We initial each page of the paper, and we each sign the agreement, but when I am dealing in that airplane, no one knows where the

other party is, and it creates an intolerable situation if you think about it for a moment that if I happen to be flying over State X, I've got a valid contract, but if I'm flying over State Y, I don't have a valid contract or a contract term.

Now, there are two ways to achieve uniformity. One is by virtue of enactment at the state level of a uniform set of rules. The other way is by federal enactment. Generally contract law has been state law. Indeed, much of my career has been in government contracting, and you will have repeated cases in the federal courts in which they say we have no federal contract law, and therefore, they have to appeal to state law in order to be able to interpret or apply a rule that may apply to a particular government contract.

And so the appropriate accommodation and integration of contract law really is at the state level, and therefore the reason for the conference to undertake a project, to try to bring about some common rules to this exciting new era of the information age.

Let me point out that there are a number of projects at the conference, one which is underway, one which was consumer credit code, where we had very actively engaged in trying to spell out rules that

relate to consumer protections. It has been difficult, because the policies of the various states do vary, and it's difficult to achieve uniformity in connection with consumer protections. And therefore, in connection with Article 2, for example, Article 2-A and Article 9 of the Uniform Commercial Code, in effect, what the code does is defer to local consumer protection laws, and it is the same policy that has been adopted in connection with UCITA as a uniform act.

In the current version of the Act, after 105, there is a legislative note in italics very prominently after the black letter which reads as follows:

"The purpose of subsection C is to make clear that this Act does not alter the application to computer information transactions of the substantive provisions of a state's consumer protection rules or statutes, including rules about the timing and content of required disclosures, and does not alter the application of the state statutes given regulatory authority to a state agency such as the Office of the Attorney General.

"It may be appropriate for purposes of clarity in subsection C to cross-reference particular statutes, such as a state's Unfair Deceptive Practices Act, by inserting 'including, cite the statute.'" And the

purpose of that is to make very clear that on a state-by-state basis, they need to do exactly what was done in Maryland and as being done in Virginia, which is to make sure that there is a synchronization between the consumer statutes of the state and the operation of this general policy statement in subsection C, that there is an intent that consumer protection rules of the state will trump any provision that may be in the UCITA contract.

So, we did, in fact, put this clarifying statement in in order to make our intent clear --

MS. BRAUCHER: Are you advocating that in Virginia?

MR. RING: We certainly are.

MS. BRAUCHER: All right, I hope you will.

MR. RING: And there is an amendment that the Attorney General's Office is putting forward in that regard.

MS. HARRINGTON: Connie, let me ask a question about the comments and the notes and how they relate to the text, and one question that comes up is why more of what is in the comments and the notes isn't in the plain text and what's the legal effect of -- do you think of the notes?

MR. RING: Well, the tradition in the

conference is and has been similar to the idea of the Constitution of the United States, that you can't envision all the factual circumstances in which a particular general principle will apply. For example, due process of law. It has a lot of meaning, it has developed over a period of time, but if you try to specify every circumstance where there may be a violation of due process, you might not catch them all, and so you have in the Constitution and in many statutes a general statement.

The official comments are sort of to flush that out a little bit and give examples. Under the Uniform Commercial Code and other instances, attorneys and their clients, when they're in litigation, frequently will look to the official comments and cite them; however, the Court is guided by the black letter, not the official comments, and the official comments are simply to hope to give some guidance to the Court so that there is more uniform application of the general principles. That is done in the Uniform Commercial Code, it is done in this Act, and it is also done in many of the other uniform acts of which I spoke.

In connection with the special provision in Maryland, one of the purposes here is to have equity between all kinds of commerce, and in Maryland,

contrary to the situation in virtually all the other states, there are a few other states that follow Maryland but not many, you can disclaim with respect to tangible goods, implied warranties --

MR. BARVE: Cannot?

MR. RING: Excuse me?

MR. BARVE: Did you say cannot?

MR. RING: That you can disclaim.

MR. BARVE: Okay.

MR. RING: However, in Maryland, there has been on the books since I think it's 1984 an amendment which provides as an added consumer protection that you can dis -- cannot disclaim with respect to goods certain implied warranties. Therefore, all commerce in Maryland with the amendment that was put in by the committee that Chairman Barve chaired are subject to the same rules, whether it's goods or whether it's an intangible. And when I first spoke at the first hearing and this issue came up, I said if that's a part of the consumer protection rules with respect to Maryland, that certainly we probably could come up with language that would deal with that, and, in fact, the committee did.

I think that they perhaps did not do it perfectly, because you heard the issue earlier

yesterday in connection with open source code. There was an effort to try to accommodate that as an exception in Maryland. I'm not quite sure whether the words accomplish the objective, but the objective was clearly to provide that if it's cost-free software with a source code, that then you could disclaim it.

Let me speak about a few other things. I am sure I am not going to cover everything that I would like to, but I would like to mention specifically implied warranties. There was certain development of that theme before, but I want to point out what the current law is. The restatement of contracts, which was an effort by the ALI to restate the common law, is silent, not one word about implied warranties. And the reason for that is very clear, that that is a statutory development. Implied warranties are basically statutory in nature.

Therefore, there has been a question in connection with software, do you have implied warranties at all? Now, there have been some cases in connection with software where it's on a tangible product, a diskette, in which it has been held that the employed warranties of Article 2 do apply, but as you heard yesterday, increasingly the trend is going to be without a physical medium, and therefore, in fact, you

are going to have downloading that has all electronic components or a service kind of element.

We think that it was a substantial advance in the law to include implied warranties, including the the new implied warranties that Mary Jo Dively indicated.

The second thing that I want to make clear is that express warranties are still there. Express warranties under Article 2 and also under UCITA are not easily disclaimed. In fact, it's almost impossible to disclaim them. I say that from a lot of experience in regard to both litigation on behalf of Atlantic Research and our experience in that regard.

If you make a representation in your literature and in your advertising, you can't disclaim that express warranty, and therefore, in many instances, what might be an implied warranty or even encompassed within an implied warranty and disclaimed is going to be covered by an express warranty, and the express warranty can't be disclaimed under ordinary circumstances, and therefore, it still is binding upon the licensor.

In connection with the mass market, we thought that this likewise was an advance in the law. I think if you were to survey the federal law and also the

state law, you would find almost always that special protections are extended to the consumer only, and basically we were concerned and felt that it was appropriate to provide the same protections when someone is dealing in the same marketplace with the consumer, even though it may be a Dupont or Atlantic Research, in having the same protections that are extended to the consumer. Therefore, it was born the concept of the mass market. We think that's an advance in the law.

I'm going to speak very quickly about inadvertent assent. We think that unlike e-sign and unlike even the companion product in the conference, UNITA, there is very little guidance and very little protections in the context of inadvertent assent, and we think we made very substantial improvements and expansion in that regard.

Let me start off by pointing out that there are three -- at least four standards or hurdles you have to go through when you're in this faceless environment. First, you have to show that there's an intent to sign, an intent to authenticate, and the burden of persuasion is upon the party who is trying to enforce that, and that means that simply because I may have put in some kind of symbol, there has to also be a clear showing by

burden of persuasion that, in fact, there was an intent to authenticate, hurdle one.

Hurdle two, if I click, I agree. There has to be intentional conduct for that to occur. And again, the burden of persuasion is upon the party who is trying to establish the contract. We do provide that there is a way in which you can give -- have a presumption, and that is that if first it comes up, here is the agreement, I click through it, and then it says "I agree," I have a nervous hand in my old age, I click "I agree" really not intending to say that.

A second screen comes up, and the second screen says, "You have just entered into an agreement. Would you like to read the terms? You can click here to read the terms. If you want to confirm your agreement to purchase software at such and such a price, please say yes, or if not, no."

If you had that second confirmation, then it's pretty clear that it wasn't a nervous twitch. It was, in fact, an intentional engagement in conduct that would infer that I am agreeing to the contract.

The third thing that UCITA does that we think is an improvement in connection with assent is that there must be an opportunity -- a clear, reasonable opportunity to read the contract before I have become

bound. That means whether I paid or did not pay in advance, until I have an opportunity to actually review the terms, I do not have a contract under UCITA.

The fourth element is that if I -- under 208, and Bill Ashworth mentioned this the other day, under 208, if I do not have notice that later terms are coming, then under UCITA, those later terms, whether they're in the box or on the disk, are treated as a proposed modification to the contract and which can be accepted or rejected, and the original terms, whatever they may be, are the ones that govern the contract.

So, parties are very clearly under the obligation under UCITA to give notice that later terms are coming if, in fact, they're not put up front. This gives a very strong economic incentive to put them up front if the pattern and the nature of the distribution is one which enables you to put the terms up front. There are certain circumstances, and Carol mentioned them, when that would be very difficult or impossible to do, and therefore, the flexibility is provided, but adds some risk if you don't give that notice.

The last thing I'll mention, and I would like to comment on everything that has been said, and I think you can assume that I do have some responses, even though I'm not going to get to them. The fourth

thing that you need in connection with assent under UCITA is attribution; that is, how do you know that, in fact, the anonymous person in the airplane is really the person who is going to be bound by the agreement? And under that, there must be a security device or system under UCITA that is efficacious and commercially reasonable in order to establish that I, Connie Ring, on behalf of Atlantic Research, in fact, have authority to bind Atlantic Research to the contract which I made in the airplane on the license while I was flying over either State X or State Y.

Obviously there are going to be differences of opinion in connection with a new law. At some point you have to start. You start and you have to start putting some provisions on the table. We think we have done a reasonably decent job. This is a human product. What human product do you know of that is perfect? We are not perfect. We've worked very hard. We came up with what we think in toto is a very good product that has many excellent features and which should be given serious and thoughtful consideration.

MS. HARRINGTON: Thank you, Connie.

As we turn finally to Adam Cohn from Sun Microsystems, let me ask you a question, and let me remind you that our paralegals will pick up your

question form or give you one to fill out if you have a question for any of the panelists or for all of them, and questions that we don't get to here are going to be posted, and we hope to get written responses from panelists and also have some kind of ongoing sort of chat room type discussion. We have to set that up. So, it may take a little while for that part to be in action.

But let me ask you a question, Connie, about this example of the purchase consummated via the internet from an airplane. How is this different from a telephone purchase that's made from an airplane? What evidence is there that current law is inadequate to handle these kinds of situations? And ultimately, is it your contention that the growth of e-commerce has been impeded by the lack of UCITA and a UCITA type framework?

MR. RING: There are really two questions there. Obviously many of the elements of telephonic communication are also there. My experience in dealing with L. L. Bean is that very frequently they will indicate to you that your message is being recorded, and therefore, they have evidence that, in fact, it's your voice, and if they get into litigation, they, in fact, can play the tape and identify whether or not it

was my voice that was over the telephone.

There are other security devices and encryption that really have to be done in connection with attribution in connection with software, and that is part of the reason for requiring a commercially reasonable standard for those and giving the flexibility of that to evolve and develop as the industry moves along.

Secondly, it's hard to give you any specific statistical information, although I can tell you that among many businesses that have been before us, they strongly believe that there is an impediment to the growth of the industry, although this isn't quite on point, because it isn't always in connection with information products. I can tell you that my wife was scared to death to do business over the internet in e-commerce and buying goods for various reasons, and part of it is related to the uncertainty of what are the consequences of her giving out, for example, credit card information over the internet.

MS. HARRINGTON: Steve, a very quick comment on that, and then I am going to go to another question.

MR. CHOW: Just a quick comment on the airplane analogy. The technology certainly exists today to identify where a message came from and where a message

is going to if that were important. I think up to now that has not been an issue, that these -- just think about your faxes. You may put your originating fax return message on. If there are requirements for this sort of thing, then it will be an issue, but there has not been a market breakdown that's required any of this.

MS. HARRINGTON: Adam, are we set?

MR. COHN: I think we're set, yes.

MS. HARRINGTON: Certainly we would like to stop and look at the Golden Gate Bridge for a moment.

MR. COHN: It's even nicer in real life.

Well, first of all, I want to thank the FTC staff for inviting me back. I'm very glad to be here. I have certainly learned a lot in the last day and this morning. I actually listened with great interest and a little bit of -- well, actually a lot of concern hearing about how the matter was considered in Maryland, because I found it very surprising that it sounded like the Maryland Legislature assumed the conclusion that licenses dropped in the box were binding in other contexts, which I don't really believe to be the case, and if that's the premise from which Maryland started, I think that's kind of a weak starting point.

I also found it very interesting to hear that the Maryland Legislature spent a great deal of effort, it sounds like, and a lot of brain power on the issue of fair use and what the proper level of IP protection for different software is and how to balance the needs of consumers' need to use IP, intellectual property, and versus the rights that authors of intellectual property have. I found that interesting because the Constitution says that that's a Federal Government issue, and it's interesting that UCITA seems to be bringing that to the states.

I just --

MS. HARRINGTON: Well, there are a couple of subtle points launching your presentation, Adam.

MR. COHN: Well, I want to start by asking the general question, you hear this all the time, do we need a new law or not? The common response you'll hear is, well, we have a new economy, so of course we need new laws. You can't sell word processing programs using the same -- or databases using the same laws we use to sell toasters. This is the information age, you know, get with it, of course we need new law. That doesn't really answer the question for me.

I want to know why a new law. Why isn't it okay for a law that applies to toasters -- why can't

you apply that to a database or to anything else? After all, information has been around for a long time. Books have been for sale for centuries. We had telephone, telegraph, I mean, these are all old technologies. Why is it -- and we know that there is a new economy now, I'm not denying that, but what is it about the new economy? It's not information. I argue that it's technology that's different.

The new economy is different because of technology, not because of information. The technological revolution that drives the new economy is I think twofold. One is digital. You hear a lot about how easy it is to make copies today of information. That's one of the major differences in why people feel that there's a need for a new law, a very good point. You can make an enormous if not an infinite copy of -- a number of perfect copies.

There is also the network revolution, you have the internet, which basically makes it possible to share those copies with the entire world instantaneously at very low cost. So, in other words, there have always been information transactions. When you hear UCITA, Uniform Computer Information Transaction Act, it's not about information transactions; it's about the fact that they're digital

and they're over a global network that really makes it a new economy.

What problems does this technology bring that might require a new law? Well, you hear the same ones over and over again, and I think these are both very good points. Problems with the first sale doctrine, what happens if you sell a copy of software or some service to a consumer, an individual consumer, for $1, and then you want to sell that same piece of software, that same IP, to a company where 20,000 employees are going to use it and you want to charge the company $20,000 for the same copy?

What happens if the individual sells her or his copy to the company? Well, the software vendor really has a problem there, and licenses are one way that have been -- or UCITA is one way to fix that problem.

Another problem that you hear all the time is the database issue, not protected by copyright law. ProCD case is a very stark case, obviously very favorable case to the company that was making the database. It would be horribly unfair to let someone put so much effort into a database and not give them some opportunity to protect it. So, the conclusion that people reach is that you need UCITA.

Well, another issue that the global networked

economy of digital sharing of information brings up is the choice of law/choice of forum issue. You know, if you have one small company in, you know, Lubbock, Texas selling software and they put it out on the web, to what extent are they going to be called into court all around the country? I mean, these are very important issues that need to be dealt with. UCITA deals with it by basically giving the software vendor the right to choose those unilaterally.

I think UCITA is an unbalanced solution to these legitimate problems. Each computer information transaction under UCITA comes with its own miniature law, the license. Reacting to a gap in the intellectual property law, the gaps that I pointed out, UCITA replaces that law with a license. UCITA solves the so-called choice of law problem with a revolutionary approach by just supplying its own law. Don't worry if you have to apply Texas law or Maryland law or any other law. Just look at the license. It's attached to the product itself.

I want to go into -- I'm going to just -- I'm going to go into each of these in more detail, so rather than run down it here, I have the top six myths about UCITA that if you have been involved in the debate you hear over and over again.

Myth number one, and I think this is probably the biggest one, UCITA is about freedom of choice and freedom of contract. The corollary to this is that you always hear opponents of UCITA want the government to restrict your freedom of choice and your freedom of contract, and the government has to be there to protect you from yourself, from your own choices.

Well, UCITA is not contract law. If it were contract law, we would not be here. It abandons -- in the mass marketing provisions, at least, it abandons the core concepts of contracts, meeting of the minds. If anyone was here yesterday, one of the panelists said -- pro-UCITA panelists said, you know, if -- well, if you think that contract means a meeting of the minds, well, then, UCITA will present a problem for you. I think that it means meeting of the minds and UCITA presents a problem for me.

Under UCITA, you can agree to something you didn't read. So, you hear all the time, well, if the consumer agreed to it -- well, that's not "agree" in the way that consumers think that that means. It's a UCITA agree. It's conspicuously disclosed if it's in all capital letters and in a contrasting text. It can be a thousand page license. Under UCITA, you can supply an infinite number of terms, and, you know, one

of those terms can be capitalized in the middle there, and that's conspicuous according to UCITA, and, you know, I have here -- I don't know if you can read that, but it says -- it's in capital letters, so it is conspicuous, whether or not you can read it or -- but by failing to clap at the end of this presentation, you agree to a hundred dollars to me. So, those of you who believe in UCITA's premise, you can send a hundred dollars.

Another myth is UCITA merely reflects development of current law and brings uniformity and clarity. I don't agree with that. UCITA does accurately reflect the practices of certain segments of the new economy, some software publishers. I do think that that's accurate. I don't think it reflects the law, because it leaves out 50 percent of the transaction in the mass market context, at least, and does not reflect consumer expectations.

Everybody involved in the process admits that consumers ignore these. Nobody believes -- no consumers really believe that, you know, that a large software vendor can come in and do all the things that it says in the license if they bother to read it.

I think that UCITA is a radical departure from contract law, as I said, you know, I think it departs

from the concept of the meeting of the minds. First of all, it's not uniform. It does not bring a uniform law. Under UCITA, every single software application comes with its own law with thousands of terms that govern the warranty, limitations, arbitration provisions, tort liability limitations, choice of law and so on. I really would hate to be the owner of a small business buying software, you know, off the shelf or downloading it. Do you get your lawyer to come in to install that or do you get your IT person? If UCITA is passed, you better get your lawyer to do it, because you have to agree to those terms.

And UCITA does not bring clarity. Read it for yourself. And even a pro-UCITA panelist yesterday said, "The meat of UCITA is in the comments," which really baffles me. You would think that the meat would be in the text, as Eileen asked that very question earlier.

In the comments, as it was noted earlier, they do contradict the text. I don't care that the comments -- I think they put forth in many situations a portrayal of what the text says that's not clear to me on the face of the text.

I think that UCITA really hides the ball. What we're really dealing with here are gaps in copyright

law and intellectual property law that leave software vendors feeling exposed, perhaps legitimately so. I think those issues should be debated on the merits and not put forth as an issue of contract. UCITA basically says let's not debate those issues. Let's not have the government come in and decide what should be protected and what shouldn't be protected. Let's just limit it to freedom of contract. But as I noted before, freedom of contract is not the issue.

Myth number three, UCITA protects consumers, we have heard a lot about that. UCITA doesn't become consumer friendly just because consumer group were involved in the process, that it was ten years long, that there were complex issues involve, and the official comments say some positive things about consumer protection.

Look at the text of UCITA and ask yourself, what would really happen in the real world? Consumers don't read these licenses, everybody admits, that's unanimous. Lawyer -- everybody -- every lawyer in here knows that you're going to stuff every possible disclaimer you can into a license that no one's going to read, because it's not going to affect sales, because no one's going to read it. If these licenses are enforceable against consumers in the mass market

context without presale disclosure, I think consumers are in big trouble, but 105-B is here to save us. That's the provision that's going to make sure that nothing bad happens to consumers.

You hear from the people against UCITA saying, well -- people supporting UCITA said, well, 105-B is going to prevent these bad things. It's not going to allow tort law to be preempted. It's not going to allow fair use of consumers to be preempted. It's not going to permit reverse-engineering and stifle the internet economy and, you know, and so on and so forth.

Well, read the text of 105-B. I don't want to spend too much time, but here it is, and essentially if you read it carefully, even if a term is found to violate a fundamental public policy, the Court does not have to strike out that term. The Court has discretion. They may refuse according to UCITA.

And the Court also has to make the judgment that the interest in enforcement is clearly outweighed by public policy. Even after they have made the determination that it's a fundamental public policy, by the way.

I think 105-B makes promises that are not delivered. The official -- they always say look at the official comments. Well, here are, you know, here's

the line that I think is the strongest in the official comments that says that, you know, 105-B will protect innovation and fair comment and fair use. It says, "The offsetting public policies most likely to apply are those regarding innovation."

Well, that's -- that doesn't really convince a judge. I mean, it's not telling the judge what to do. That would be the black letter, but the black letter doesn't say anything about fair use. It doesn't protect fair use, doesn't protect fair comment, doesn't protect competition. It just says in the comments judges will probably do this. I don't think that's very convincing, but ask the obvious question, why doesn't the text include these policies? The answer we always hear is, well, you know, it's like the Constitution, we want to get it general, not too specific.

Well, a lot of laws have specific and general. I mean, you can have both. If everyone has these very strong concerns about it, I think some specific provisions, such as protecting fair use, protecting reverse engineering, need to be put in there.

Another myth is presale conspicuous disclosure in terms is impractical. It can't be done. There are too many terms. I always say, this really mystifies

me, because here we have an interactive technology, that's the greatest advance in mass communication in our lifetimes, you can interact with the mass audience. I mean, it's incredible. Disclosure should be the easiest it's ever been. I mean, you can really get an understanding of the consumer -- you can get an understanding over to the consumers.

The answer you hear is that there's too many terms to disclose them conspicuously. So, even if you use technology, you can't disclose them conspicuously. You should always ask next, why are there so many terms? I think the reason is because they are putting terms in there that are not necessary or relevant to the problems that are discussed, the multiple use versus single use problem and the database protection issue. Pretty simple, those are pretty straightforward, you can fix those with a few terms. You don't need to put stuff in there about tort liability or anything else or speaking out on a product.

I think the multiple use provisions are often, and in many situations, I'm thinking in free software, shareware, for example, that it's a red herring, because no one really cares, I don't think, if you don't disclose good things about the product. If

copyright law says that you can't make more than a certain number of copies for fair use of this and the license gives you more than that right, I don't think any consumer group is going to get up in arms that you're not disclosing that fact in advance, that you're giving the world the right to copy your product an infinite number of times. That's not the issue here. It's always where you're taking away rights that are otherwise granted by the background law.

Myth number five, this is a little bit wordy here, you always hear that UCITA opponents are these ivory tower, tree-hugging, big government academics that don't understand the new economy. Well, you read this, for example, in Ray Nimmer's comment to the FTC. Some academics allege, as if it's some sort of, you know, we're on trial, that software is within and expected to be within Article 2, the sale of goods, but this is a political position of persons who have agendas other than those centered on facilitating an economy that benefits all, including consumers.

That doesn't help me evaluate UCITA, and I hope it doesn't help you. Sun Microsystems, who I have the pleasure of working for, does not support UCITA. Sun understands the new economy, and they don't support UCITA. So, you should ask, you know, is it the

tree-hugging, you know, liberal intellectuals that are doing it or is it the practical people who understand the new economy and don't want something locked in like UCITA?

The other myth, final myth, is that there is no other way to do this. Mass market licensing I think was a stopgap measure really to fill in the gaps when new technology came around. I think the best way to fix the problem is to do something more permanent, more in line with what we have always had in the past, not a private intellectual property right.

Why fill in the gaps with giving software vendors a unilateral right to draft their own copyright law? If licensing is appropriate, on the other hand, why not set some default terms in UCITA and then if you have to depart from those default terms, give some clear disclosure? It's very easy. Other laws take that approach.

I think the last points that I want to make, in considering UCITA, are that there are victims to the UCITA mass market license other than the consumers that click on these. The average consumer is not going to care that they can't reverse engineer a product. So, you might have, you know, 10 million people buy the product. Four of those people, some of them who might

work at my company, care about reverse engineering issues.

Well, you know, the market is not going to solve -- those tens of millions of people who are buying the product are not going to call the software vendor and demand that they change the license to allow reverse engineering. So, the market is effective, and competition is stifled even if all the consumers know from disclosure even on the outside of the box, for instance, that their fair use rights and their reverse engineering rights are impeded.

UCITA does not provide explicit protections for reverse engineering. You hear all the time that it's going to protect it, but it doesn't protect it. If they really wanted to protect it, it's very easy to put that in the text of UCITA. It's not in the text of UCITA/, even after intense, intense pressure and debate, it's not there, and you have to ask why. I think it really raises some red flags.

Finally, I think you have to worry about locking in the future. I mean, this was a ten-year process, and we have heard yesterday that UCITA itself "transmorphed," if that's a word, over the time that it was being written because the software market really changed from an over-the-counter purchase of a disk to

something that you download over the internet.

Well, if UCITA wasn't workable in its first incarnation because we now shifted to a new economy where we're downloading stuff, why would we want to lock into something that locks us into what we have now? We don't know what the future is going to be. We don't know whether people are going to be downloading software every time, buying a computer with no software on it, downloading it. Maybe they'll be buying computers as appliances that will have all the software installed already. We don't know what the future is going to hold.

I think the current law is working very, very well for most circumstances. There are a few gaps that I pointed out, but, you know, we have a really good economy, and we don't have UCITA, and there are big companies that are not tree-hugging, you know, intellectuals that are worried about what UCITA would do and that it would hurt the economy, and, you know, I think you have to really ask yourself whether or not locking into what we see in the software world now, among a few big vendors of software, is really the way to go.

I mean, the internet is about openness and open sharing of information. That's what's caused the boom,

that there's interoperability, there is the sharing of information. That's what's caused the boom. You've always had information. Do you really want to pass a law that gives all of the incentive to the creator of the intellectual property to give themselves rights that are not provided in the copyright law?

The Constitution gives the Congress the duty of balancing the rights, the needs of people to use and share information versus the right of the intellectual property owner. Courts have dealt with the fair use issue for decades and balanced those issues out, and I think those issues need to get reevaluated in a context of digital economy, but let's not give unilateral power to one side to determine what those rights are.

MS. HARRINGTON: Thank you, Adam.

Quick question for you. Are you speaking on behalf of yourself or Sun today?

MR. COHN: I think we have another Sun person in the audience, Lowell Sachs, who can probably answer that better than I can, but I think it's safe to say that Sun does not support UCITA. They have some strong concerns especially with the reverse engineering. Sun is in favor of open systems and does not follow the model that is put forward in UCITA that is really a proprietary, closed model to software, closed system.

Sun is a believer in open systems and has strong concerns about it because of that.

I don't know how much of, you know, what else I said would be endorsed by, you know, the chairman, but I think it's safe to say he would probably agree with a lot of it.

MS. HARRINGTON: Thank you.

Okay, a question -- here's what we are going to do. Although there is a break built in during the next 15 minutes, we are going to make it sort of a private, personal break. If you want to take a break, go ahead and take a break, but we are going to use these 15 minutes for discussion among these panelists, okay?

MS. MAJOR: This panel is scheduled to 11:00.

MS. HARRINGTON: Well, the agenda is a little confusing. It says the panel goes to 11:00, but it also says there's a break from 10:45 to 11:00. So, I am going to say, if you want to have a break, have a break, but I want to hear more discussion from these panelists. So, we are going to keep this rolling, and here's a question for Professor Braucher and really probably all of the panelists if you want to chime in.

Granted that UCITA allows sellers to take advantage of consumers in a variety of ways, how big a practical problem is this? In a competitive

environment, won't virtually all sellers behave themselves and not exercise all of the powers that UCITA grants them for fear of seeing their customers take their business elsewhere?

MS. BRAUCHER: You know, this is a very interesting argument to me. I teach contracts from a law in action perspective, and I make this point all the time, that business reputation is the most important factor in relationships between businesses and between businesses and nonbusiness customers, but that doesn't mean that contracts don't matter at all.

I mean, is that what the point of the question is, that -- they matter at the margin. They matter when for some reason the relationship no longer matters to one party. You know, you don't start litigating unless the relationship has broken down, and that's the point at which you need to rely upon legal rights.

So, I mean, I don't know, is the point of this that we would have a regime of no contracts and everything would just depend on business reputation? It's an interesting proposal.

MR. BARVE: Let me just say that in the State of Maryland, the attitude we take is that we want strong consumer laws to supplement a competitive market, and that's the way we wrote our law, which by

the way specifically mentions that a term is unenforceable after weighing fundamental public policies, including fundamental public policies concerning competition and innovation, which I will admit did not go far enough for the opponents of the bill, but it went far enough for us.

MS. HARRINGTON: Steve and then Adam?

MR. CHOW: Okay, I think a lot of this was addressed yesterday in terms of if you have competition and if you have at least some critical mass of consumer involvement in information, then you can have whistle-blowers and other people come out and allow market forces to work, and I think one of my problems with UCITA is that it doesn't promote that, and if I'm counseling my client from the software vendor side, I would not counsel disclosure. The incentive is not to disclose.

Most of my small software developers typically just copy other people's shrinkwrap licenses, not believing they are enforceable, but they copy them because they figure someone else spent hundreds of thousands of dollars in attorneys' fees to do it, so we get to the least common denominator, just sink right to the bottom.

MS. HARRINGTON: Also Connie wanted to say

something on this point, so Adam and then Connie.

MR. COHN: So, I guess the question was, you know, about whether market forces would solve the problem, and I guess the point that I would want to make is that, you know, a lot of the people that are injured by this are not in the market. As I made the point just a few minutes ago, that people in favor of reverse engineering are not going to have enough market power to tell the mass market, you know, you have got to negotiate for -- or you have got to, you know, harm the reputation of this company until they open up their software license to allow that fair use.

MR. RING: I mentioned that I was general counsel for Atlantic Research Corporation, a significant defense contractor but also in the market for developing air bags, and so we're in commercial markets, as well.

Our reputation was extremely important, and I can tell you that the top management all the way down through the the legal staff was very sensitive to writing fair contracts, because we are going to be judged on that basis, and our long-term ability to compete in the -- both the governmental and the commercial market depends upon our satisfying our customers, whether they're government kinds of

customers or others.

That doesn't mean, however, Jean, that the contract is unimportant; quite to the contrary. The contract is important, and generally well-managed companies that want to maintain their reputation are going to generally include fair terms within their contracts simply because it's good business. That doesn't mean that you are not going to have some renegades out there that are putting out terms that are inappropriate.

That's part of the reason for including such standards as good faith and the enforcement of provisions and in the definition of good faith, fair dealing. Fair dealing is a very comprehensive term. Unconscionability is another safeguard. Fundamental public policy is another.

Jean is quite correct in saying that "fundamental" was inserted, and if you read the comments, which were written I believe by your father, they -- because he was the reporter for that, the word "fundamental" is used in the official comments, because basically what you are looking at is the weighing of competing policies.

Let me give you free speech and privacy, two important fundamental public policies, and a particular

term may raise a concern about privacy and may raise a concern about free speech, and I've got to weigh those two fundamental policies against one another to decide which one of them I am going to follow, and therefore, the language of the restatement does use the weighing standard and is an exact quote from that.

In connection with reverse engineering, the official comments say that as a matter of fundamental policy, reverse engineering in certain circumstances may well be fundamental public policy that is important, particularly in connection with interoperability, but let me give you again a personal experience.

We license, Atlantic Research, licenses its technology to suppliers. We don't want that supplier then competing with us in terms of supplying that same part to others, and so we put in a restriction, that our trade secrets, and licensees of patents, occasionally may include copyrighted material, but usually first use in our business, we put a restriction on reverse engineering, and I think under the circumstances that's quite appropriate, because the confidentiality of dealing with that particular supplier is that they are going to supply us and they are not going to supply our competitors.

MS. HARRINGTON: But that circumstance isn't a mass market license.

MR. RING: The mass market license is one where we say in the comments where you do not have the same relationship between the two, then the fundamental policy which may go against the contract term is to be given more consideration. In that regard, I should say that the comment was very carefully worked over and approved specifically by Professor Pearlman as being an appropriate articulation of what we were gathering, and drafts went back and forth.

Now, Professor Pearlman is not an advocate of UCITA, and I would disclose that, but on this particular matter, we very carefully crafted the language, and much of the language is actually Professor Pearlman's language.

MS. HARRINGTON: Jean?

MS. BRAUCHER: Yeah, a couple of quick points.

It occurs to me on the original question that the argument here is essentially like saying if we flipped it around from the consumer perspective, most consumers pay their bills because they want credit in the future. Therefore, we don't need enforcement of the payment obligation. I mean, that's the gist of the argument but flipped around.

The second point about the fundamental public policy provision, you've still got the weighing language in there, and then you load on, you know, you weigh -- and Adam put that language up -- you weigh the fundamental public policy against the interest of enforcing. So, you have got the weighing test, and then you have added on a word to sort of suggest that --

MR. RING: The weighing is, again --

MS. BRAUCHER: -- the weighing is in the restatement; the fundamental is not. The second --

MR. RING: Well, the weighing of enforcement must be considered.

MS. BRAUCHER: The third point is -- well, I'm glad to see in the legislative note in 105, and I have to say I did miss that language in the September 29 draft, I guess that's when that went in about the Unfair and Deceptive Practices Act, and I'm glad to see that. I wish when the new revisions of UCITA came out you redlined them, then we'd catch the good things you put in, and I keep asking the NCCUSL office to do that, because it's a 90-page statute, and they keep coming out with new versions. It's supposed to be done, but they keep coming out with new versions.

The final point, I thought maybe there was

another good thing I had missed, and I just went back to check UCITA, and that's on this business of you have to give notice that terms are coming if you are not going to give them in advance. This is a very complex area, but you need to track through 112, which starts by saying, unfortunately, explicitly that you can keep the terms back until after payment, but you have to give the customer an opportunity to review, but we're talking about an opportunity to review that comes after you have already paid and taken delivery.

Then you go to Section 209, the mass market assent provision, and it says that the customer can adopt the terms before or during a party's initial use. And then finally you go to 208, which you mentioned, Connie, and that talks about adopting the terms after beginning performance or use. So, the idea is not even at the point where you first start to use but later you could be adopting terms if there was reason to know the terms would come that much later, and the reason to know doesn't have to be by notice. I think the comment suggests that prior transactions will give you reason to know.

So, I put this all together. I wish there was a requirement of notice if terms are coming later, although I still don't think that's good enough, and I

talked about that yesterday, to just say that this is license terms in the box. The question is, well, what are the terms in the box? You know, how can you make a meaningful choice?

Now, I think this idea that disclosure doesn't matter at all that I heard from Delegate Barve --

MR. BARVE: Because people don't read it.

MS. BRAUCHER: Well, if people don't read it, we need massive regulation of terms. We have got market failure. The first line of intervention should be make sure the terms are available so we can get market competition going.

We had the professor yesterday from George Mason talking about assumptions of knowledge and competition. You need to have knowledge, you need to have competition in order to have a working market. If we don't have that, the FTC ought to be writing these contracts, you know, disclosure is how you get a market going.

MR. BARVE: Or you need really good consumer protection laws.

MS. BRAUCHER: Well, that's what we're talking about, consumer protection laws.

Now, I think some substantive regulation, what you're saying is dictating terms the way Maryland has,

is not a bad solution for certain kinds of terms. That is, a mandatory implied warranty of merchantability; a mandatory prohibition on predispute arbitration, which consumers can't understand; a mandatory set of terms that says, you know, you have to have first sale rights, fair use as a minimum. Those would be great ideas. I'd love to see that.

But I'm saying, look, let's do the more conservative thing and try to get a market going, not impose a lot of substantive regulation first.

MS. HARRINGTON: All right, we are going to have one last question, and I have to say that I have been corrected. The agenda that I'm looking at is apparently incorrect. The break is at 11:00. So, if you have been having your own private break, you can have a public break in a few minutes with everyone.

Last question, is the right to a return the same as a right to a refund? The comment in Section 112 states that failure to provide a right to return when required does not invalidate the agreement. How then is a right to return really a right for consumers?

There's several questions in there, and I would invite any of the panelists -- Connie, you first, Adam then.

MR. RING: With respect to consumers, Section

209 is the applicable section, and it clearly provides that if you get the terms after payment, then under those circumstances you have to assent to those terms, and if you don't assent to those terms, then you're entitled to a cost-free refund, which is composed of three elements, the return of the price, the return of the incidental costs of returning it, and if you -- in order to read the terms and review the terms, put it up on your computer and it had any impact upon your database, any restoration costs of restoring your system is included in that cost-free refund.

Again, this was put in to make it very clear that in a consumer context and a mass market context that if it is in any way possible to disclose the terms in advance that you will have a strong economic incentive to do that.

Now, let me give you one instance where you might have a legitimate business model, that's the telephone illustration that you called. I call up a discount house and say I want to order Windows 2000 and I get a discount price on that particular disk, and it's significant enough so that I want to do that. If they had to disclose those up front, one of two things would have to be done. Either they'd have to send the terms to me so I could read them, or they would have to

read them over the telephone.

I'm not likely to ask for either one, because I really would like Windows 2000. So, I'm better served under the circumstances where I can get the disk at the discount price, put it up and then read the terms, and if I don't like the terms, I'd get a complete, cost-free refund.

MS. HARRINGTON: Adam?

MR. COHN: I guess I'd just like to say two things. One, I think that the right of return in my opinion is a fiction, because as I was mentioning earlier, I think that the thing driving the economy, the new economy, is the fact that you have digital and the fact that you can, you know, you can make copies that are perfect, an infinite number, and that you can distribute it worldwide instantly.

In that environment, if we're creating a law to protect against those two things, does anyone really think that a right of return makes sense? You have the product on your computer, I mean, you have got it already. They can't really ask you to return it, because there is no "it." It's a -- it's the bits that you've already copied and downloaded on your computer.

The CDROM can be -- how do you return something that you downloaded off of a web page? You just send

them an affidavit that says you erased it from your computer? I mean, maybe there's a technological fix for that, maybe it's possible --

MS. BRAUCHER: There is.

MR. COHN: But the thing is that I think it's sufficient, also, and maybe Jean wants to talk about that, in the terms of UCITA itself. You don't really, I believe under UCITA, don't really have the right of return. You can get out of the right of return, don't have to require that very, very easily. I think that's fiction.

MS. HARRINGTON: Jean, we will give you a quick last word on that.

MS. BRAUCHER: Well, you know, I understand that Microsoft has had this for some time, and I'd like to know how often it's been exercised. There was a wonderful story that was put up on the web about somebody who did try to exercise it, and it took them about a month of correspondence, and ultimately they said forget it, even though they had the term. So, I think it was so surprising that anyone actually tried to exercise it that this was the result that you got.

So, that's the sense in which it's meaningless, that once somebody's already paid, got the software on their machine, the idea that they're going to now say,

well, I'm going to take this back for a refund is just -- it's not going to happen. It's -- it's -- I mean, I compare this to the economics of bait and switch, you know, that you get the terms later, finding out it's a license rather than a sale. I mean, assuming people understood that, they're now -- you know, to go try to find some other set of terms, they have to take it back, start over, not know until they got home again.

It's a terrible burden on shopping to say you don't get the terms until after you've paid and gotten the product. The point at which you want to shop is before you pay, right, and on the web, it should be easy to shop, to be able to go and look at terms for a number of different products and decide this is the one I want, but instead you have to order one, download it, you know, after giving your credit card, upload it, try to get a refund on your credit card. You know, it's just no way to set up shopping.

MR. BARVE: Well, wait a minute, let's distinguish a couple of issues here.

First of all, if want you to return a piece of software because it doesn't work and you live in a state that has an aggressive Attorney General like we do, then you go to the Consumer Protection Division, the Maryland Attorney General, and they go and kick

butt, and they do. Andthey have done a very good job against AOL and others, and they have been effective.

MS. BRAUCHER: I am talking about terms, not enforcement.

MR. BARVE: I had a public hearing last night where I had 65 opponents against the intercounty connector, so I am not going to be interrupted.

In any case, there is another issue, though, and that is whether you object to the software because of provisions in the license term as opposed to the actual workability of the software.

Now, the workability issue is something that you can handle with consumer laws and a good Consumer Protection Division and, of course, that varies from state to state, but with respect to -- let's say you happen to be the 0.01 percent of consumers who reads license terms because you don't like buying a software package that has a nonreverse engineering provision in it. Well, you know, that's a completely different set of circumstances, and that's a set of circumstances that have to be -- you know, the whole issue of whether you have the right to return or -- we, at least in Maryland, understood that there are two -- those are two completely different circumstances under which a person might want to return software.

And -- oh, one other thing, the gentleman from Sun Microsystems made a comment about federal law. We in Maryland didn't wait for the Federal Government to blow away preexisting condition limitations in 1993. We don't feel we have to wait for the Federal Government for anything if we have a better solution.

MS. HARRINGTON: Now, that is going to be the last word, because Delegate Barve kept within my initial ten-minute restriction request, and he wanted to know what his prize was, and it is he gets the last word, although we will be discussing the intercounty connector for those of you who live in Montgomery County.

We're going to take a break until 11:20, and then we'll start up our last panel. I want to thank each of these presenters for very, very excellent presentations this morning. Thank you.

(Applause.)

(A brief recess was taken.)

MR. SALSBURG: As we sit in this room at the FTC and we look out these windows, which unfortunately the shades are drawn, we look out at the Capitol, it seems appropriate to shift the focus of what we have been talking about these last two days to what should be the government's role in ensuring that markets for

high-tech products are efficient and fair to consumers.

To help us explore this issue, we are pleased to be joined by two legal scholars. First on my right is Larry Ribstein. He is a professor at George Mason University Law School. He has authored dozens of articles on a variety of legal issues and is the co-editor of the Supreme Court Economic Review.

On my far right is David Rice. David Rice is a professor at Roger Williams University School of Law. He also has authored dozens of articles, including articles concerning UCITA and proposed article 2-B of the UCC.

We have asked Professors Ribstein and Rice to give comments on this issue, and after their comments, we will have a brief question and answer period, and once again, we will be using the question and answer format that we have used throughout this symposium. If you have a question, just raise your hand and an FTC staffer will hand you a card to write the question on and it will be passed up to the front.

So, why don't we turn to Professor Ribstein.

MR. RIBSTEIN: Well, I thank the FTC for inviting me today, and I'm here because I wrote some articles with Bruce Kobayashi of my faculty and along with some others on uniform laws in general, specific

uniform laws and choice of law, one of which was an article on UCITA that was published in the George Mason Law Review, and I have some general comments, as Mr. Salzburg said about, the government's role here.

In general -- and my colleague Mr. Kobayashi was here yesterday, and I don't want to repeat anything he said, although I am going to refer to some of his comments.

In general, we believe that the appropriate way to get to regulation here is through state law, that we can get efficient regulation through competition among diverse state laws. I'm not going to talk about at length any specific proposals here, including UCITA, although I will be referring to UCITA.

In general, as my colleague Mr. Kobayashi said yesterday, we agree with at least some of the approach in UCITA in terms of enforcing shrinkwrap and clickwrap contracts. We do think that consumers are able to handle these kinds of dealings.

I want to correct something that I think Jean Braucher said in the last session. We don't think that every single consumer in the market is sophisticated and informed. Our position is, and this is consistent with the work of Schwartz and Willoughby and others, that all you need is a fair number of sophisticated

consumers in the market. We don't have any conceptions that all consumers are sophisticated and that all consumers read every disclosure.

So, in general we believe that contracts work, and to the extent that UCITA recognizes that, we support UCITA; however, as I'm going to talk about in a few minutes, I don't want that to be construed as an unqualified endorsement of UCITA.

Now, the focus, as I said, of my comments is on the government's role here and specifically on what role state law can play. Now, there's been a couple of I think broad criticisms of state law in this kind of area, and I'll characterize those criticisms as what I call the vacuum problem and the chaos problem.

The vacuum problem is that if you leave regulation at the state law, you are going to have a regulatory vacuum because state law will end up being a race to the bottom, that lax regulation will rule and people will be unprotected. There will be a regulatory vacuum.

The chaos problem almost goes the other way, which is that strong state regulation will apply far beyond state borders. This is the problem that's been often mentioned in the borderless internet and the difficulty of state law regulators in that context.

So, you will have chaos.

You will have the State of Maryland, say, regulating internet transactions all over -- regulating internet transactions regardless of what law people hope to be applied to just because there's some tangential connection with the State of Maryland. I am going to address those problems with state law as I go through my remarks.

First of all, about UCITA, now, a lot of my writings and my writings with Professor Kobayashi have been critical of the products of the National Conference of Commissioners on Uniform State Laws, and I certainly am not appearing here today as an advocate of NCCUSL products, and in fact, I think a lot of the criticisms that I've heard of UCITA match what our general theory would predict would be problems with a NCCUSL-created law, that basically it's a compromise process. It attempts to mesh all kinds of point view -- points of view into a single hole. So, what you get when you get something like UCITA, if you put Adam Cohn, Jean Braucher, Connie Ring and all of that, you put them almost into a blender, and the result is the final act. Some of the problems have to do with the problem that was discussed in the last session of the law being in comments rather than in text. That's part

of the compromise process.

But in any event, I want to point out that UCITA is not a uniform law. I mean, I'm sure this is obvious, but maybe it deserves some emphasis. It's been adopted so far in two states, and it's only effective in one, and even in that one state, Maryland, there was discussion in the last session that, in fact, Maryland made some significant changes to UCITA, and one would expect that as UCITA gets floated around the United States that changes will be made.

I would say at most UCITA's going to end up as a kind of template for state laws that are then changed as much as you would change, say, a word processing template. Maybe a few provisions would remain as uniform, but I would think that it's extremely unlikely based on Professor Kobayashi's and my survey of the adoption history of uniform laws in general, it's extremely unlikely that UCITA will be adopted widely, that the widely adopted laws are laws of the Uniform Commercial Code in general, with a few additions to that, and UCITA I think lost a lot of adoption potential when it was dropped off the UCC project.

So, in general, state law is a process here. State law is not UCITA. State law is a process in which UCITA will play some kind of marginal role. So,

one alternative here is federal law. You know, I've mentioned the problems of chaos and vacuums of state law. I've mentioned that UCITA is not going to solve these problems, it's not going to be adopted uniformly. So, one logical alternative is some sort of federal regulation.

And I don't want to -- I don't think I need to reiterate but I want to mention or at least refer to some of the comments that were made in the last hour about the problems of locking in existing technologies, that there are all kinds of technologies on the horizon. How do we know what the world's going to look like in the future?

Federal law would, in fact, achieve uniformity. It would get rid of any chaos of state law that might exist, but it's going to lock in the present. And I know you've heard references, for instance, to the open source problem. Well, I suppose that right now any federal law that's passed could deal with the open source problem, but how do we know that some other developments, and Adam Cohn referred to this in the last session, how do we know that there are not other developments lurking on the horizon that could not be dealt with in a federal law and that, in fact, would be prevented by any federal law that locks in the current

technological system?

So, we think there's a better way, and that way is by enforcing choice of law and choice of forum agreements, and I know that this position has been vilified before, and I want to try to defend it as well as I can.

Focusing specifically on certain law provisions, look at Sections 109 and 110 of UCITA, and I would say that we do not endorse the limitations that are in Section 109. In other words, we don't think that Section 109 of UCITA goes far enough in enforcing contractual choice of law, because it's subject to any mandatory provision of state law, and therefore, you could at best in a contract to simply choose contractual provisions. We think that you ought to be able to choose a state and including the entire regulatory structure of that state, including mandatory laws that override, and then whatever other rules would be supplied by the default choice of law rules.

However, we would agree more strongly with the approach in Section 110 of UCITA referring to contractual choice of forum, and I know that there were some negative comments about Section 110 in the last session. I want to point out that although the Supreme Court's efforts in this area might be shunted off to a

little corner of admiralty law, the fact is that the Supreme Court has consistently in many different respects and whenever it can endorsed contractual choice of forum, even in cases where say the contract was on the back of a cruise ticket or heavily regulated areas where we're talking about arbitration under the securities laws or under the discrimination laws, labor laws. So, there is quite broad recognition of contractual choice of forum.

We believe that's appropriate, especially in internet law, where you are going to have problems about remote forum no matter what you do because of the national and international scope of the law and transactions in this area, and so choice of forum is important just to kind of organize what forum is going to apply.

Now, I referred to the vacuum problem, and here I want to address the problems of state law that I referred to a couple minutes ago and how they will be worked out under a contractual choice of law/ contractual choice of forum regime. And again, I referred to the vacuum problem, the regulatory laxity that you might get from a race to the bottom, and this kind of gets back to a point that I made towards the beginning, that consumers as a whole are not the

helpless dupes that I think are characterized in some of the comments and some of the literature that I've read.

Again, the point is not that every single consumer is going to open up a license and read the fine print and understand it but that we have a very active market out there, especially in the internet context, of information, of consumer interaction and so forth. There are many mechanisms by which sophisticated consumers can make information available. There are magazines that are posted on the internet. There is Davis Publications. There is a lot of sources of information that consumers have where they can be alerted to specific problems that might arise in designations of excessively lax regimes.

So, if we start seeing, for instance, the designations of Alaska law in contracts and it turns out that Alaska law says that consumers have absolutely no rights and vendors have all rights, I would suggest that that's the kind of detail -- that's more than just the detail, but it's the sort of thing that's going to be widely broadcast and will come to the attention of even passive consumers.

I know in researching myself on the internet, I have -- and researching products, I've seen far more

obscure details of products that get far more play, get a lot of play than -- of the sort that I think contractual designation of lax regime would get. We heard some talk in the last session about the role of vendor reputation, and vendor reputation has been an important aspect, a very important aspect in building markets on the internet. Do vendors want to get the reputation of designating lax regimes in their contracts? I don't think so. And I think reputational incentives are very important.

This is not a case of, well, if we have reputation, therefore, we don't need contracts. This is if we have -- as long as we have vendor reputations, we don't need regulation beyond contracts. So, this -- I think there's a -- it's important to distinguish between those two concepts.

Okay, another factor I think that cuts down on what I've been referring to as the vacuum problem here, that is, the problem of excessively lax regulation, is the fact that a contract for choice of law is not like any other kind of contract provision. Any other kind of contract provision, say one of those myriad provisions in a detailed license, the vendors are choosing from an infinity of possible terms out there, but all we're advocating is that vendors be able to

choose from one of the 51 U.S. jurisdictions.

We don't right now have a proposal on the table that they be able to choose any law that's out there. I have seen bizarre suggestions made that may deserve to be on the table at some point, but you could start an oil drilling platform somewhere, and, of course, people have tried to do this, and designate the law of that jurisdiction. Okay, maybe that's out there in the future, but right now we're talking about being comfortable with our 51 states, all operating under the U.S. Constitution and all operating under U.S. federal law.

We're just talking about designating one of those states. Each of those states operates under political structures. The politicians of all of those states, the regulators of all of those states are responsive to the citizens of those states, and I don't think you're going to get remarkably stupid or vapid laws from any of our states, and I think that's something that prevents a vacuum, a regulatory vacuum on the horizon.

Now, I referred to the chaos problem, and in the choice of law area what that translates into is no state is going to have the incentive to regulate in this area because of the problem that whatever

regulation it comes up with, even if some companies select that regulation in the contract, the regulation is then going to be circumvented, because a consumer in some remote jurisdiction is going to be able to have that remote jurisdiction's law apply instead of the law selected in the contract, and so therefore contractual choice of law just won't matter; that again, consumers, irrespective of the law designated in the contract, they'll be subject to whatever their local law is, which will override the law designated in the contract.

A couple of problems with that. One is I've already referred to extensive enforcement of choice of forum clauses. Courts recognize this, they understand that the Supreme Court enforces this in cases where the Supreme Court has jurisdiction, that choice of forum clauses are widely applied, and choice of forum clause is a way of getting the case tried in the state that will enforce the contractual choice of law.

Another is that, you know, we have heard talk about the borderless internet and about the chaos that results when any state can exercise jurisdiction over an internet transaction. That's simply not true. If you look at the jurisdictional cases and commentaries, there has to be some form of deliberative veiling of the jurisdiction.

It's true that the law on jurisdiction over the internet is in the process of being settled. There was a lengthy article by the ABA Committee on Cyberspace Law in the current issue of the Business Lawyer that proposes I think some sensible limitations on jurisdiction in cyberspace that would include limiting it to, one, headquarter states; two, states where internet vendors target consumers; and three, in transactions that actually give rise to the transaction, that that transaction be directed to a state.

It talks about good faith efforts to exclude transactions or prevent transactions from being made in states and the relevance of those good faith efforts. Obviously we have technologies that are being developed, that can be developed, to block access or at least make a good faith effort for vendors to block access in remote jurisdictions. If you put all these things together, that is, limitations on jurisdiction and choice of forum clauses, and I think those things make viable contractual choice of law, despite the arguments that have been made about the borderless internet.

And the fact is that what law is applied depends to a significant extent on the jurisdiction

that a vendor deliberately avails itself of, has its headquarters in, has significant operations in, those things are going to matter, and states that want to attract internet vendors are going to have an incentive to have favorable laws.

Now, of course, one could make the race to the bottom argument; that is that, oh, yeah, they'll have laws that are favorable only for the vendors, not for consumers, but that goes back to the point that I made a couple of minutes ago that, again, consumers aren't helpless. Even if it's true that each individual consumer doesn't read every last detail in the license, it's a sophisticated market on the whole. That's referring back to comments that my partner Bruce Kobayashi made yesterday.

So, what we're envisioning here is a law that's provided by state competition rather than by the competition of interest groups that basically -- I guess it's a law that you could say where consumers vote with their mouses or mice or whatever, the old Tiebout Axiom about voting with your feet, but I think we can see it coming where consumers vote on the law with their mouse.

Now, there are those who would that say that this business about having all these states with their

designated choice of law provisions is going to lead to myriad standards, that what we really need is uniformity and this is what UCITA provides us with, but I want to point out that there's various different ways to get standards and uniformity, and they don't all have to be provided by a uniform law.

Now, one is that standard could be provided by a single state, and I haven't mentioned corporate law yet, but, of course, Delaware provides a standard in corporate law, and there is always the possibility for an internet Delaware to emerge, and I know that Maryland and Virginia, at least, would like to have it in their minds that maybe they would like to be in the running for that position.

And also it's possible for a multi-state uniformity to emerge but not necessarily by the actions of NCCUSL. Mr. Kobayashi and I have studied the process of spontaneous uniformity where uniformity emerged even without a uniform law in the business association area, and it's quite possible that that could happen in the internet area. In fact, it's even more likely, because the internet is a far more effective coordinating device than anything that's available with respect to business association law.

Now, what role is left then for federal law

under this scheme? Well, possibly some, I don't want to omit all possible roles for federal law. I do want to emphasize that I think it's very important to avoid proposing locking in substantive standards at this point, but federal law might shore up the enforcement of contractual choice of law and choice of forum clauses. If it's believed that notice is a problem here, that is, notice of the selected law or surprise provisions in the selected law, then perhaps some regulation of notice of what the law selected is, surprise provisions of that law.

I'm a little skeptical that surprise is a problem here, because the worse that state law could do is say that the contract is enforceable. The worst from a consumer standpoint is to say that a contract is enforceable, and that doesn't set up for me a particular problem of surprise.

And then finally there are -- well, actually, a third suggestion is possibly announce a hands-off policy, that maybe one good result of this hearing is that state law will be given a chance, and I think possibly some of the -- one possible reason why we've only seen two states jump into the frey so far is out of fear that whatever they do is going to be overridden by federal action, and that would be a good result of

this hearing in that we get a clear signal to the contrary.

Finally, there are federal laws in many other areas that don't specifically relate to the contracting process. Obviously intellectual property law, and I'm not commenting right now on all the possible provisions that might be enacted there.

I'll stop at that point.

MR. SALSBURG: Thank you.

Professor Rice?

MR. RICE: I regret I wasn't able to be here yesterday because I did have something to say about warranties generally. I'm tempted to say a lot about UCITA, because I generally do, but I will try and simply make some tapestry to look at what I consider to be possible roles of the government, particularly the Federal Government, because I think that's what we're here for, is to talk a little bit about what we think the FTC ought to be thinking about, and maybe things that they ought not go be thinking about, and I think that we can learn some things, too.

We're dealing with contexts in which we have computer software, information products. They are numerous, growing, changing, changing in character, changing in means of distribution and delivery.

They're changing in that sense in responses to changes in technology as well as to the marketplace. They feature standard form contracts and standard form terms, but that's true of 90 percent of the contracts that are entered into in this country or more.

One of the things that's interesting is that this market has not been stifled or held back to date by the courts actually using UCCC Article 2 and lawyers drafting contracts with UCC Article 2 and 2-A in mind, and indeed many of the contracts that are well drafted have Magnuson-Moss Act in mind.

These are sources that attorneys, courts, have looked to today, and in some cases, particularly the UCC, it's been applied directly, in some cases it's perhaps a little bit less directly, even though not by what we would call analogy, but I think in some cases in particular there's some appreciation or sensitivity to the fact that we have different subject matter, and that's a common law like process.

Now, states function and make law in a lot of different ways. Some of it's through the courts, some of it's through the interpretation of statutes enacted by the Legislature that are general in form, and I think UCC has been quite a great success, and the courts and legislatures I think have done something to

accomplish that. It's a public law like process even though with a statutory underpinning.

Why change it? And I think that's probably what Mr. Cohn was asking, you have to make the affirmative case for change and particularly for radical, extremely detailed, highly articulated rules reinterpreted in extensive comments change before you simply go down that road.

And for that reason I have had my reputation as an opponent of UCITA or simply an opponent of UCITA as it's been presented, and I think I've been miscast as being an opponent of new law to respond to new situations. That's very convenient, and it's also a nice way to dismiss academics as tree-huggers, but let's take a look at where this has come from.

Fifteen years ago -- and it's kind of a nice convergence here, we talk about convergence these days -- I published the first and only exclusively, in terms of subject matter, article that's ever been published on the Magnuson-Moss Act and consumers and computer software in the first volume of The Computer Lawyer. It's also the year I published an article called "Product Quality and Laws and the Economics of Federalism" in which using Tiebout and another type of analysis looked at a whole range of different types of

laws that regulate consumer product quality, and essentially reached the conclusion that by various routes the states, in fact, reached a fairly common place for most purposes, and there really wasn't too much cross-subsidy between states due to differences in their state laws.

So, maybe we ought to allow the UCC to continue to develop and be applied and then look at what kinds of things are the other realities in the marketplace and what is the role of government in looking at those realities? And this means I'm going to skip over a great of what I was going to talk about, but not entirely.

Beginning back in the 1960s, there were proposals for regulation of consumer contracts, and almost all of those proposals, including Truth in Lending and Magnuson-Moss Warranty Act, started out as proposals to mandate certain terms in a contract, prohibit other terms in a contract, regulate the terms in a contract, say if you're going to include them, you can only do it in a certain way, and almost every one of those statutes ended up being a disclosure statute, and that's probably a process of political compromise more than anything else.

But essentially what we said in all of those

statutes was at a bare minimum, consumers are entitled to know the material terms of a contract before they enter into the contract, and one of the things, of all of the studies that were done, and they were done by people in marketing research, advertising research, consumer psychological research, said is timing is all-important. The two things that are important are timing and material.

You identify what is material, and it is required disclosure only of that. You don't get into "disclosuritis," which is why we have the Truth in Lending Simplification Act. The judges interpreting the Truth in Lending Act got into saying you have got to disclose absolutely everything to the point that now, again, Adam's example, you can have five pages of all caps, and it's all, therefore, conspicuous and it's all, therefore, not process, because there is nothing that has a contrast or any kind of a distinction, okay?

So, you have to focus on what's material, and I'm not here to say which term is material other than to say I think that those terms related to the warranty are material, and if I buy what Bob Donald Cravitz writes, which is, in fact, a shadow of what Art Left wrote back in 1970, saying contract as thing, Bob Donald Cravitz said you aren't getting software or a

database, what you're getting is a license, then you ought to be disclosing what that license is before people make the choice to enter into it.

The bait and switch analog, if you get into it and then have to opt your way and work your way back out of it, is not possible, and the reason that we prohibit bait and switch is to say you don't want to take somebody down the road and then say, oh, yeah, there's a fraud cause of action and you can litigate that and that will take you five years and $50,000, and you can have the same thing under UCITA, you can do the same thing, you can have the term declared unconscionable, after five years and $50,000 investment in the litigation of the term in a piece of software that you bought for $100 or $150, and you can do the same thing about -- but it is not enforceable because it's a violation of public policy.

All they have to do is say, no, it's not unconscionable, sue me. No, it's not unenforceable because it violates public policy, sue me. And that's, of course, after you've entered into a contract, but your point is what happens -- think about me going to get something off the shelf, just for the usual example. I look at packages, I look at everything that's written on the outside, and I select one of

them, and I take it to the counter and I pay for it and I walk out.

Now, why did I go to the store? Just for the hell of it? Because I wanted a software package that would do certain functional things for me or database, okay. So, now I take it home, and I've consumed time, I've made -- I've consumed mental process, I've put money on the counter, and I get home, and what UCITA tells me is now when you open up the package, you can look at the terms, and if you don't like the terms, you can take it back and get a refund and you can start all over again.

This is what I call linear comparative shopping. That isn't what consumer protection laws, the focus on adequacy of information for the efficient functioning of the marketplace, talk about, and that's not what Alan Schwartz wanted to talk about either.

If you say standard forms are enforceable -- and you have to, it's a reality, you can't have the modern marketplace without them -- then there has to be an emphasis, at least, on those things that are still there that deal with the freedom to contract or to not contract, and that's the information about what the contract is.

Otherwise, what we've done is we've basically

said, the drafters have freedom with contract, they can do anything they want with it, and they know that inertia, a number of other factors, the immediate sense of having a product because I got it for the satisfaction of a particular need, it's going to be terribly burdensome for me to go through six of these transactions to finally find a license that has the terms that I like, I better just take it. They know that's what happens.

And not just simply because people don't read the terms, but even if Alan Schwartz picks out the person who says this is the one who's going to read the contract, who's going to read it when they get back home, and then they are going to do a benefit-cost analysis as to whether it's worth taking that contract back to try and get a refund, and the Commission is very concerned about benefit-cost analysis in terms of thinking about how law works, including, I think, the law of the contract.

The benefit-cost analysis can come out every time, or almost every time, I'm not going to take it become back. Hey, you know what happens when you take it back? I'm on several list serves, as a matter of fact, and it turns out that some of the lawyers who are very intelligent people and who are very concerned

about some of the kinds of things about contracting and copyright and other kinds of things of that sort, have said, you know, I tried to take something back, and this has happened several times, and they take it back to the retailer, and the retailer says, oh, no, you opened the box. I won't take that back for a refund.

Then what they try to do is to contact the software distributor, and the software distributor ends up being no different in terms of the difficulty of getting a refund. How long are you going to keep your money out there on that table and at the same time take more money out of your pocket to say, okay, I am going to go out and buy a competing product in the market see what their license is like, and maybe I'll use their product, maybe I won't, and this is absurd.

Now, what are we really trying to say? I'm not saying that the FTC ought to be in the market and regulate the terms of the contract. I think the Magnuson-Moss Act can be interpreted in terms of the off-the-shelf software products to apply. My comments that I filed in writing on behalf of Net Action and CPSR and CompuMentor cover that. I would have talked about that yesterday; I'm not going to do it today.

The real point is the FTC is concerned with the efficient functioning of the marketplace in two ways.

One, making sure the consumers have that opportunity to make an informed choice at the right time, at the significant time; and second, that they have the terms which are material available to them in that time and manner in order to be able to do it, and this is not simply to protect a bunch of tree-huggers. It's to make the market work, it's to make competition happen, it's to keep the market competitive instead of everybody going into the hole of putting their terms in the contract and saying, hey, it costs -- and this is what I heard in the UCC 2-B meetings -- it will cost us money to do that, and therefore, it can't be done.

The second part of it is in reality, we want to be able to use everything on the outside of the box or on the screen to be able to tell them how wonderful this product is, what its specifications are and what its performance characteristics are, and we want to be able have them go inside to that contract that they finally get and to have to click here and say, by the way, the only thing that you have is an express warranty that the medium on which this is recorded is not defective, and in the event that it is, you may return the whole thing for a refund. There are no other express warranties, express or implied.

Now, what does that do? That's a cute piece.

That says -- that statement qualifies as a Mag-Moss 1061 written warranty, and so long as a Mag-Moss 101 -- yeah, 1016 warranty says -- I'm flipping things around -- you know, warranty is sufficient under the statute and is adequately disclosed, you're inside Mag-Moss, and one of the things you can do inside Mag-Moss is except as state law would prohibit you from disclaiming an implied warranty, you can disclaim everything else.

So, Mag-Moss right now, as it's being used in those contracts, is being used to exclude responsibility for product quality, for the product that you really went to get, but you didn't go to get a discount. You went to get a computer software program. You went to get a database program.

It's a problem I think the FTC has to look at in terms of how -- not whether Mag-Moss is being -- is really applicable but, in fact, how the Mag-Moss model is being used to say on the outside of the box, here are all these wonderful things. This product can beat the comparative terms, in comparison to its competing products, this way, this way, this way, this way, and once you get inside the box, that's all gone. It doesn't exist. And they can't put on the outside of the box something that sounds, perhaps, like this:

The license agreement contained in this package legally denies you any and all right to rely on or treat as true any factual representation or specification we have set forth on the outside of this package. Common decency says if you're going to take it away inside, tell them on the outside; common decency, common sense. The essence of disclosure law says the consumer ought to know at the right time what it is that they're buying. It says you ought to.

Now, I think the other piece in terms of simply making a side comment on UCITA, I don't think we ought to be getting into FTC regulating the terms of the contract any more than we ought have state law developed through NCCUSL essentially regulating the terms of the contract in such a way that the defaults are all set in one direction, and you have to litigate your way out, which is absolutely cost-prohibitive, but I think that the FTC ought to be looking not just at the warranty terms but at other material terms and saying the deception prevention mission of the Commission and the competition promotion mission of the Commission leads us to conclude that there ought to be affirmative, timely disclosure of selected material terms, and let the market then

compete.

MR. SALSBURG: Thank you. Thank you, both, Professor Rice, Professor Ribstein. We are going to be breaking for lunch now and reconvening at 1:15.

(Applause.)

(Whereupon, at 12:05 p.m., a lunch recess was taken.)

AFTERNOON SESSION

(1:15 p.m.)

MR. STEVENSON: Okay, why don't we get started.

We are now looking on the international front. The issues in this workshop that have been raised, a couple of them overlap quite a bit with issues that have been discussed in the area of international consumer protection in a number of fora, both domestically and internationally, in particular the issues that were actually talked about in the last panel, the pretransaction disclosure, choice of law in a consumer contract, choice of forum, and we heard about these issues in the previous panel, and here we can think about how those same issues play out on the international level, and they do I think as you'll see in a number of ways.

Since we're talking about international things, I nevertheless want to offer two American examples in starting off about thinking about things international. One is just to share with you a Dilbert comic that some of you may be familiar with. Dilbert says to Dogbert, "I didn't read all of the shrinkwrap license agreement on my new software until after I opened it. Apparently I agreed to spend the rest of my life as a towel boy in

Bill Gates' new mansion." And Dogbert says, "Call your lawyer." And Dilbert says, "It's too late. He opened the software yesterday."

I share that as an example. I don't want it to be interpreted that Dilbert was on the UCITA drafting committee at all, but I felt it was relevant to some of the issues we've talked about here.

The second sort of example, hypothetical, I'll use in thinking about this is a box of Cracker Jacks, where you have the caramelized corn and then there's a prize inside, you don't know what it is until you open it, of course, or maybe the box says there's a prize inside or terms may be included inside, and let's suppose to vary the hypothetical that instead of a toy it's a piece of paper that says that all interpretation and enforcement of contractual disputes regarding this product will be heard and decided in the courts of Brussells in Belgium pursuant to Bulgarian law or in Canada pursuant to Camaroon law or Austria pursuant to Australian law or the Netherland-Antilles pursuant to North Korean law.

Are those prospects appetizing to consumers, and does it matter if the product is software instead of sweets and does it matter if the software is delivered over the internet as opposed to in a box?

Well, with that to start, we turn to our first speaker, Susan Grant from the National Consumers League. Susan has, I should note, also participated both in the Trans-Atlantic Consumer Dialogue, along with other U.S. and European organizations, and has also participated in a number of meetings as the consumer representative on the delegation to the OECD Consumer Policy Committee in connection with its drafting of consumer protection guidelines in connection with e-commerce.

Susan?

MS. GRANT: Thank you.

Thank you very much for inviting me to speak this afternoon. I'm sorry that I wasn't able to be here yesterday and today, I was tied up with other things, and I'm sure I would have benefitted greatly from the discussion, so I hope what I have to say will fit in with what you've been talking about.

For me and for consumer advocates around the world, things like UCITA raise consumer issues that are universal, the fairness of contracts, the adequacy of disclosures, the fairness of competition and the adequacy of consumer recourse. These are issues that are addressed by consumer statutes and regulations, some better than others, in countries throughout the

world.

What we're seeing now is alarming to me, the attempt by some powerful corporate interests to create a new cyber-marketplace that has even weaker rules than exist in the physical world and where businesses dictate how consumers will be treated. This is perhaps understandable, but it's inevitably short-sighted, for the rules that protect consumers and ensure fair competition generate confidence in the marketplace. When the rules are too weak or absent altogether, that confidence and the marketplace itself are harmed.

In the Trans-Atlantic Consumer Dialogue, which as Hugh mentioned is comprised of consumer organizations from the U.S. and European Union countries and was formed to provide input to our governments about cross-border trade issues, the e-commerce working group has considered these and other issues carefully, and we've developed several policy resolutions that speak to them. All of them can be found on the www.tacd.org website under electronic commerce.

While there's no policy paper specifically on UCITA, the concerns that it raises are reflected in many of the resolutions. For instance, in the first one on consumer protection and electronic commerce, it

says that advertising should be truthful and provide complete information necessary to make an informed choice. It recognizes that the goals for a consumer protection framework in global electronic commerce should be to foster justified consumer confidence, fair competition and economic development around the world, and it says that consumers should be able to expect at least the same level of protection in the virtual marketplace as they have in the real marketplace.

Other TACD resolutions go on to describe in more detail how our vision of the electronic marketplace should work, including minimum disclosure standards, core consumer protection principles, intellectual property rights and how those should be dealt with and unfair contracts. The unfair contracts text is worth reading in the context of UCITA. It says, and I quote, "Disputes over jurisdiction in cyberspace have led to increased interest in the role of contracts to define rights and transactions involving sellers and consumers; however, policy makers should be wary of measures that permit sellers to enforce unreasonable contract terms. Various click-on type contracts used in web pages today are often one-sided measures that unfairly would limit consumer rights in a wide range of areas, including the rights

to benefit, print exceptions and limitations of copyright, the rights to criticize products, the right to offer competing products, the right to seek redress for defective products or service, and many other important consumer rights."

There are also papers from TACD on jurisdiction and alternative dispute resolution that strongly state our view that consumers must not be asked to waive the rights that they have in the laws of their respective countries and must retain the right to resort to their own courts.

Of particular concern to TACD members are described by seller approaches in the development of electronic commerce. Consumers do not and never will have parity with businesses. They lack the sophistication, the knowledge of law and the resources that businesses have. They can make informed choices only to the extent that they have information that is accurate, that's complete, that they can reasonably comprehend and where they fully understand the consequences.

We, at least here in the U.S., generally don't allow consumers to waive their rights to vital disclosures, protection from defective or dangerous products or legal recourse because we recognize that

this is socially inappropriate and counterproductive to a healthy business environment.

Consumers should support e-tailers that offer them the best value, that they are not in a position to make decisions such as choice of law, nor should they be obliged to sacrifice other basic rights in order to get the products or services that they want.

While TACD members appreciate the need to create good alternative dispute resolution systems for e-commerce given the very global nature of it, we oppose contract terms that require mandatory ADR for consumers and binding arbitration that deprives them of their legal rights and recourse.

Consumer organizations around the world believe that as we develop electronic commerce, universal consumer protection and fair competition principles must be viewed as part of the solution to making it work and work well, not as obstacles to be circumvented by hiding information, binding consumers to unfair terms and denying them appropriate recourse.

I would encourage everyone involved in creating this new marketplace to keep in mind that consumers fuel the engine of commerce. If they are treated unfairly, the engine could sputter to a stop. Measures like UCITA are inherently unfair and will ultimately

cause that engine to backfire.

In contrast, offering consumers the best products and services at terms that are transparent and attractive, along with providing outstanding customer service and options for dispute resolution will combine as the premium gasoline that makes that engine purr.

I think I'll stop with the car analogies and with my remarks at this point. Thank you.

MR. STEVENSON: Thank you, Susan. We will roar ahead now to Dawn Friedkin, and Dawn has come to us from Paris. She is formerly on the general counsel's staff at the Department of Commerce and is now working at the Consumer Policy Committee for the OECD, and she's going to tell us a little bit about that organization and what's happened there.

MS. FRIEDKIN: First of all, I'd just like to thank the Federal Trade Commission for giving me a good reason to come back home for a couple days. It's always nice to cross the Atlantic when you know the final destination is home.

I know it's late in the afternoon, you've all been here for two days, we've learned a lot and heard a lot. I'm going to give you a little bit of a background of the organization for which I work, the Organization for Economic Cooperation and Development,

and then talk specifically about the consumer protection guidelines we adopted last fall or last December and specifically about some principles you might find interesting in your conversations here domestically.

The OECD, which that's who I represent today , is an intergovernmental organization comprised of 29 member countries. The best way at least in Washington to think about it is as a Paris-based supergovernmental think tank, if that's not a mouthful.

The OECD is a forum for discussion of economic and social policy. We focus and have expertise in legal, technological and a policy history and expertise in electronic commerce, especially in the areas of privacy, consumer protection, security and authentication. We're best known for the guidelines we've created over about the past ten years beginning with in 1980 the privacy guidelines; 1992, security and information systems guidelines; 1997, the cryptography guidelines; and in 2000, the consumer protection guidelines.

What works about the OECD is that we do not offer a single model but recognize and work to bridge different cultural approaches, laws and policies. Our framework ensures that national efforts compliment and

reinforce each other and that experience is what works and what does not work are widely shared.

I am going to go ahead and skip over this because it's probably not of much interest to you, but it gives a background of what we've done and how we've developed the e-commerce policies over the last three years.

This also gives you a background of the different areas in e-commerce that we work. The group that I particularly work in does most privacy protection, consumer protection, authentication and security. I'm sorry, I need a bigger desk or a smaller computer.

I'm going to get right down to it, which I think is probably why I'm here, is really to talk about the guidelines for consumer protection in the context of electronic commerce. We have this cute little book that you can buy from our website or, in fact, just download the guidelines themselves.

The history of the guidelines is they were adopted last December, and the purpose for the guidelines really was developed -- it was based on the fact that as we moved into a global environment, consumer protection laws, as you all know we've been talking about, are really based on state and -- excuse

me, national borders and, in fact, in the United States on state borders. So, the goal here was to come up with a more global approach, which is what the OECD is known for its work, and the guidelines really represent existing legal protections available to consumers from more traditional forms of commerce. We weren't trying to recreate the wheel but, in fact, find more consensus among the wheels.

And really, with the key focus of the guidelines being that they were designed to help ensure, as you can see here, that online consumers are no less protected when shopping online than when buying from their local store or from a catalog, as Susan talked about earlier, that they really shouldn't lose protections just because they have chosen to go online.

The guidelines focus in eight main areas, which are clearly displayed here, transparent and effective protection, fair business, advertising and marketing practices, principle 3, which is bolded, because I think you'll find it one of the more interesting ones in the context of our discussions of the last two days, online disclosures relating to the information about the business, the goods and services and the transaction. It should be a transparent process for the confirmation of transactions.

Secure payment mechanisms and information on the level of security. Dispute resolution and redress, which actually contains the applicable law and jurisdiction and choice of forum section. Privacy protection, education and awareness.

If I could pull out for a moment the two sections really that we'll focus on, 3 and 6, obviously the guidelines have much stronger principles under each one of those, but I -- rather than burying you through all of them, I invite you to take a look at the OECD website and see that and really just to focus on the principles we're talking about now.

Online disclosures, the text of the guidelines, when I went to law school, they taught me the one thing that you don't do is paraphrase a statute, so I'm not even going to try to do that, and I think we'll just look right at the language of the guidelines.

Again, I remind you that the 29 countries worked to consensus on this language. It probably doesn't look like great brain power here went behind this, because you're used to laws like this, but for some of these countries, it was very new, and for some of them it was old hat, and they really understood it this, but it was really a long process to make this happen, and a lot of those at the FTC were very

involved in it, and we're pretty grateful for all their work.

But the principle on online disclosures really leads into the fact, and I've underlined this section, but generally provides that businesses engaged in electronic commerce with consumers should provide accurate and easily accessible information describing the goods or services offered sufficient to enable consumers to make an informed decision about whether to enter into the transaction. You can read that if you want.

The next line, which is really about the transaction itself, again, very similar language, and again, with the same sort of language, to make an informed decision about whether to enter into the transaction.

And it continues on in this section, where such information should be clear, accurate, easily accessible and provided in a manner that gives consumers an adequate opportunity for review before entering into the transaction, and such information should include available warranties and guarantees.

Now, I should have made this statement earlier which I think I forgot in my small desk space here, but the OECD has actually not worked in the area of

high-tech warranties for goods and services, so that the things that I'm excerpting here were really based on the work that we did to develop these guidelines, which were really based on business-to-consumer transactions. To the best of my knowledge, and I invite anyone from FTC or David Fares from USCIB, who were also involved in the process, to correct me if I'm wrong, but there was not that I remember any specific conversation on the topic we've been talking about for the last two days, but I thought that these principles on online disclosures you might find interesting being that they were developed in an international context.

In the area of -- excuse me, on choice of law and forum, really the tack that we took in this area, as you can imagine, as you might be aware, it's a very difficult area in the international context, which I think other folks here might go into a little bit later, but under the section of dispute resolution and redress in the guidelines was the applicable law and jurisdiction section, and it reads as follows:

Business-to-consumer cross-border transactions, whether carried out electronically or otherwise, are subject to the existing legal framework on applicable law and jurisdiction.

E-commerce poses challenges to this existing

framework, so there's a recognition of the framework obviously, and therefore, consideration should be given to whether the existing framework for applicable law and jurisdiction should be modified or applied differently.

So, a recognition of review, but again, not too much consensus in a substantive way on which way to go. We struggled with the rule of origination and rule of destination.

Again, this section also -- sorry, continued on, and in the consideration it gave guidance, the recommendation gave guidance for when we are reviewing the frameworks, the legal frameworks, of things that we should consider, which are probably not surprising to most of you, which really result around fairness on both the consumer and business side.

Another issue I thought you might find interesting that is contained in the guidelines is language. The gentleman from Silver Platter yesterday, I believe, was mentioning how they have their terms and conditions available on the website in a variety of different languages. This was actually a very important discussion we had at the OECD trying to figure out what was appropriate in recommending to businesses engaged in online commerce with consumers,

and it just really enforces the fact that if you're starting a transaction in one language, all the related terms for that transaction should be available in that same language.

So, in conclusion, I just want to sum up with what I was talking about earlier about my little minor disclaimer and the fact that we really haven't worked in this area and that the guidelines themselves are not intended specifically for this area, but they were, in fact, intended for global electronic commerce between business and consumers, but that you can take from my presentation, I think, and from the language of the guidelines that they do provide specifically that businesses engaged in electronic commerce should provide consumers the information necessary to make an informed decision about whether to enter into the transaction.

And with that, I end my presentation, welcome questions, and welcome Carina all the way from Brussels.

MR. STEVENSON: Thank you, Dawn, I appreciate that.

I don't know whether people who were involved have a memory of this in connection with the guidelines, and perhaps you do, Susan, I seem to

remember that there were some discussions about the transactions involving software in connection with the drafting of the guidelines.

MS. GRANT: Yes, certainly were, right.

MR. FARES: I don't recall specific conversationS about that, but I could be -- it was a long period, and it could be escaping me.

MS. FRIEDKIN: And I guess I could say I wasn't at the OECD at the time during the drafting, I was, in fact, part of the U.S. delegation.

MR. STEVENSON: Thank you, Dawn.

Well, we have just in time our next speaker who we're delighted to have here, Carina Tornblum from the European Commission, the Consumer Protection Directorate, who we have the pleasure of dealing with on a number of subjects, and we thought it would be helpful to hear a little bit about the European Commission's perspective on some of the issues that we've been talking about here, choice of law, choice of forum and transaction disclosures.

Carina?

MS. TORNBLUM: Thanks. Thank you, very much, and I'm terribly, terribly sorry I'm late, because I would like to have listened to the former speakers, as well, but there you are. Not easy to travel from

Europe to here, lots of obstacles on the way.

Well, I'm very pleased to be here and to be able to also I hope listen and learn a lot from you, because I think in my experience the consumer problems that we will have in Europe already exist, especially in this area, the high-tech area, and issues concerning to the internet.

Looking at the European situation, I'd like to just clarify one thing, and that is that we do not have any legislation on community level that specifically deals with these particular issues that we are addressing today, and these kind -- the kind of warranties that cater to this kind of product, and that is perhaps a bit of a -- will be a bit of a problem for us in the future, might be, and that remains to be seen, learning from you.

But we do have two directives that -- well, could cover or partly covers these problems and where we can also then get into how we would treat the choice of law and the forum. We have, for instance, quite a recent directive that is called the Directive on Certain Aspects of Sale of Consumer Goods and Associated Guarantees, and that directive by some is said to cover partly these problems.

And I mean, it depends on how you look at

software, if it's considered a tangible, movable item, and it certainly would be if you were to take -- to buy the product in a shop and physically bring it back, but there are also some that interpret this to cover also a product like this where you have the -- that you have actually -- have transferred to you electronically, because then it exists physically in your PC.

I don't know, and actually, it remains for the European Court to settle these issues, and we don't have any cases, because this directive will not come into force until January 2002, and then it will be implemented into the national legislation.

Also -- so, I think -- well, we have also another directive, and that concerns the distant selling of services and goods, and there are some exemptions where it -- that are not interesting today, so I will not go into that, but that directive actually caters to the right of the consumer to have information and to have the information at the specific moment. All the more important information should be given to the consumer prior to the delivery of the goods but at the latest at the delivery of the goods.

But on the other hand, the consumer has seven days to actually cancel the contract as a cooling-off period. So, if you were to receive the information

when the service or the goods is delivered to you, you find out that it doesn't meet what you expected, then you can actually just free of charge get out of the contract, and that might be a good solution.

And then, of course, we have the problem with the choice of law and jurisdiction, and also that is -- in Europe, that still is the Brussels Convention concerning jurisdiction and the rule concerning the choice of law, and these are now, as I'm sure several of you in this room know, are now being amended and -- well, not amended but negotiated and are now in what we call the Brussels regulation in the future, and this is all part of the discussion that is taking place in The Hague, The Hague Conference, where we are talking about this on a more international level, global level.

Anyway, what you can say is that the consumer is well protected because it's actually, if you look at it and try and summarize it, in the end, if the consumer doesn't agree to anything else, it will be that the law and the forum of the consumer that will be applied, but it is possible for the consumer to make another choice, and if the company would in a contract try to make, for instance, the consumer waive these rights, it would not be valid as a contract term.

I think that about sums it up, the situation we

are in at the moment, but still, as I said, this particular directive concerning guarantees remains to be interpreted, and it might very well turn out that we don't have the actual legislation that caters to the consumer interests in the end.

MR. STEVENSON: Carina, thank you very much, we appreciate that.

Our fourth speaker before we turn to a few questions is David Fares, who comes to us on behalf of the USCIB and is a frequent and very articulate spokesman on their behalf, and we appreciate him coming from New York, as we appreciate Dawn coming from Paris and Carina from Brussels and Susan I guess from --

MS. GRANT: Down the street.

MR. STEVENSON: -- down the street, yeah.

David.

MR. FARES: Thanks, Hugh.

I just want to tell you briefly how I fit into this and how the organization I work for, the U.S. Council for International Business, fits into this whole dialogue. We serve as the U.S. affiliate to both the International Chamber of Commerce, which is the world business organization, the only business organization that represents global business across all sectors; and secondly we serve as the U.S. affiliate to

the Business and Industry Advisory Committee to the OECD, which is the official voice of business into the OECD. So, we were actively engaged in participating in the development of the OECD consumer protection guidelines.

Most of my remarks today are going to focus on the choice of law and choice of forum issue, but there is one point that I would like to point out that comes directly from the OECD consumer protection guidelines, as well, and that is from the first general principle, which is transparent and effective protection.

The guidelines state that governments, businesses -- excuse me, consumers who participate in electronic commerce should be afforded transparent and effective consumer protection that is not less than the level of protection afforded in other forms of commerce. The rationale behind that provision in the guidelines -- an earlier provision was equivalent protection -- but the reason for level of protection is because protections that exist in the offline world are not necessarily transferable directly to the online world, but over and above that, there are some consumer empowering mechanisms that exist in the online world that don't exist in the offline word.

So, you have to look at the totality of the

circumstances, the totality of the protections in the empowering mechanisms that exist to ensure that consumers receive an adequate level of protection that is based on -- as they do in other forms of commerce.

I'm now going to move to the choice of law and choice of forum provision, and as stated in the consumer protection guidelines which Dawn referred to, in the choice of law and forum provision, it recognizes that electronic commerce poses challenges to the existing framework for choice of law and choice of forum. I'm going to focus -- and this is in the context of business-to-consumer transactions, obviously.

I'm going to be focusing on some of those challenges so that we can understand where the business community is coming from. In general, when it comes to choice of law and choice of forum, the business community supports the country of origin principle, which is the principle that the law and the courts where the seller resides is the law that should be applied and the courts that should have jurisdiction to hear a case.

The reason for this is that it is extremely difficult, if not impossible, for businesses to comply with the laws of all the countries around the world

from which their website can be accessed, in particular because there are laws that actually conflict with one another among countries. This is especially difficult for small and medium-sized enterprises that probably do not have a physical presence in any country outside of the country in which they're established -- one single country where they're established.

Therefore, they could be subjected to all these conflicting laws or sometimes contradictory laws, and as we know, small and medium-sized enterprises are often the engine of the economic growth that the United States is experiencing. So, we don't want to hinder their ability to go online and to have a global marketplace from the outset, from when they put their website online.

There are also uncertainties about where a consumer resides if a transaction is completed online and the product is delivered electronically. You don't necessarily know where the consumer resides in those types of circumstances. This is complicated even more if a consumer is using some sort of information intermediary to try and preserve their anonymity. There is no way at that point that a business can determine where the consumer resides. Therefore, a business would never know what laws they're subjecting

themselves to.

What we've seen in some circumstances is businesses are actually limiting on their websites the jurisdictions in which they will conduct business, because of some of the uncertainties created by conflicting laws, et cetera. I think that this is an unfortunate circumstance for consumers, because it reduces choice available to consumers, thus reducing competition, which ultimately reduces prices for consumers and offers them greater choice, as I said before.

I would also like to just pose a question. Often times consumer representatives advocate the country of destination as the appropriate law and forum such that it's wherever the buyer or the consumer resides. The question I ask is, does this actually provide a strong protection for consumers? And the reason I ask that is for several reasons.

First of all, often times in online transactions, the case in controversy is fairly small, when at the same time, to bring a judicial proceeding, it's fairly expensive and time-consuming. So, a consumer, if they feel aggrieved, brings an action in a court, expends a lot of money and a lot of time because they're bringing the case in their courts with their

law being applicable.

The problem is there's no treaty to enforce foreign judgments right now. So, they've expended all this time and all this energy, and they are not ultimately going to be able to get the remedy that they were seeking because they're not going to be able to have their enforcement -- their judgment enforced in another country.

Business does recognize the difficulties that exist in this area, the complications that electronic commerce poses and the challenges it poses in the context of choice of law and choice of forum; the cost issue, which I just brought up, it's expensive to bring a case in a court; the lack of enforceability of foreign judgments; and the difficulty, as well, for consumers to be able to know what all the laws are around the world so that they can make a decision as to whether they're willing to buy a product from a company that is not established in the country where they reside.

That's why business, like the Trans-Atlantic Consumer Dialogue, supports the development of effective online dispute resolution mechanisms and is working very hard to develop that, and they're flourishing in the United States. We see all sorts of

online ADR mechanisms, some that are solely online, some that are flexible, and some that have adapted more formal and more traditional means of dispute resolution to the online environment.

Online ADR is cost-effective, which is appealing to consumers, and it's much more efficient. Neither party necessarily has to travel beyond their country or beyond -- outside of their country to have their case heard through the online alternative dispute resolution mechanism. And more importantly, it's flexible. The parties can try and resolve their disputes in a way that reflects their concerns. So, the business community is working hard to promote the effective online ADR, and in that regard, the International Chamber of Commerce is co-sponsoring a workshop with the OECD in The Hague conference on online ADR in December at The Hague.

That concludes my presentation. Thank you, Hugh.

MR. STEVENSON: David, thank you, very much.

Let's follow up on the choice of forum issue that David ended with, which is a very interesting issue, it's been addressed in a number of contexts, and David mentions the possibility of ADR mechanisms.

Putting that aside, however, would you agree

that in my hypothetical, is it fair for or right or appropriate as a matter of public policy for the term to provide that the Cracker Jack software disputes can only be resolved in the courts of Belgium, in my example, for a consumer located let's say in Maryland?

MR. FARES: Well, I think you need to look -- like I said, Hugh, and within the guidelines, I think you need to look at the totality of the circumstances, and I think that what we hope in the context of online disputes is that -- well, first what you see is effective consumer satisfaction mechanisms that companies have internally will resolve most disputes. If they don't and you go to online ADR, the ADR mechanism will resolve those disputes.

One of the panels in The Hague conference that the OECD and ICC are co-sponsoring is the last resort principle, but hopefully the consumer satisfaction mechanisms and the ADR mechanisms will reduce the number of claims that need to go to court so much that it's much less relevant in that circumstance, and what I think we need to do is evaluate fully and at an international level how we go about resolving the choice of law and choice of forum issue, because as you know, business support the court of the country of origin, most consumer advocates support the country of

destination, and we need to find solutions somewhere, and ADR I think is our best choice in that regard.

MR. STEVENSON: In terms of finding solutions somewhere, do you think a good place to have those solutions is in state law statutes?

MR. FARES: As I said, I think we need to have a dialogue at the international level to figure out what the best mechanisms are, and hopefully ADR will continue to -- as ADR grows and becomes more common place, it will become less relevant for us.

MR. STEVENSON: Anybody else want to comment on the taking your dispute to Belgium?

Carina?

MS. TORNBLOM: I'd like to say only that, I mean, of course, we in Europe have taken a very firm standpoint on the choice of law and that it should basically -- that in consumer contracts, it should be the court and the law of the consumer basically that applies. We do understand the problems for a smaller company. I mean, it is not as if we are totally insensitive, but I think the common problems are both for consumers and small companies alike, could even be for bigger companies, are the costs of going to court and the time that that consumes.

I mean, it's just too much for an ordinary

person, and it also depends on the money you -- that are at stake here. So, I mean, the ADR is what the commissioner, Mr. Byrne, is actually pushing as much as he can, and since it's -- I mean, this is a problem within the member states of the European Union for a person that makes a contract at a distance. It's a problem within the European Union if you -- because we do have different legislation, I mean nationally still, with only basic principles that we have agreed on.

Then if you look at the internet, it is a global trade, that's what it is. So, we need to find a solution, and we are absolutely set on finding solutions on ADRs and preferably online ADRs where consumers, regardless of where the company and the consumer are actually located, that they can be solved.

But it's not only to have the system as such to work, but you have to have better administrative cooperation between member states. I mean, since you are a true, I mean, union here and you have -- even if you are states within the U.S., I mean, you have come further than we have. So, we are basically starting out, and we need to make our authorities of the public agencies and the different member states in Europe to agree to enforce any decision that is made and first and foremost to cooperate on these ADR system and for

the countries that actually don't have these policies to create them.

MR. STEVENSON: Susan?

MS. GRANT: Including those kinds of clauses in contracts are an extreme and wrong-headed reaction to the globalization of commerce. There are much more constructive approaches, not only the development of ADR, which we at the National Consumers League and at other consumer organizations are actively involved in, but also avoiding disputes to begin with.

The purpose of the OECD guidelines was to encourage governments and businesses not only in the member countries but around the world to look at the necessary consumer protections in electronic commerce and incorporate those into their laws, into their business models, into their corporate policies and so on.

To the extent that governments and businesses do that, you'll find a couple of things happen. It may take a while, but you will find fewer differences in law between various countries, and you'll also find probably fewer disputes, because if companies follow the guidelines, there will be less potential for consumers having problems to begin with.

However, it's absolutely crucial to preserve

the ability of consumers and those who represent them to take legal action in the courts of the consumers' domains under the consumers' laws in situations where that is the appropriate remedy for a problem.

MR. STEVENSON: Susan, let me follow up with a question that someone had posed to you.

Could you discuss the issues raised by David Fares regarding the interests of small entrepreneurs in selecting the law and forum of their own jurisdiction to apply?

I'm understanding this question to focus on the concerns of the small and medium enterprises.

MS. GRANT: I do think that that's quite a valid concern, especially since in electronic commerce anybody can hang up a shingle in cyberspace and do business. I do think that the private sector can be of considerable assistance here. There are trade associations who give advice to their members. They tend to have high barriers to entry in some cases in terms of the cost of participating. Perhaps that could be looked at in terms of sliding scales, or advice could be put out there for people -- and it is already out there in a number of ways through the OECD website and other places, to help businesses, even small and medium-sized businesses, know what they can do to

reduce the potential for consumer complaints and know what systems they might be able to participate in in order to provide online mechanisms for redress.

Of course, all companies, large and small, can resolve consumer complaints themselves without it having to go any further, but in situations where for one reason or another that's not possible because the consumer is unreasonable, which is certainly the case sometimes, or where the business is or where there's a valid difference of opinion about what happened or what should be the result, then there are systems that are being developed that hopefully will be cost-effective for businesses to participate in as well as consumers.

MR. STEVENSON: Thank you, Susan.

Let's switch from choice of forum to choice of law, but just to follow up on I think something both David and Carina referred to, there is under negotiation a convention on judgment recognition and jurisdiction, which I believe it's fair to say may be over by a little bit, that it does at least in its draft form have in its provision choice of forum but not, I believe, choice of law.

Let's talk about choice of law for a moment, and I want to just both read a line from the comments in UCITA and then one of the questions we got. This is

in the section on choice of law, 109, and the comments say that this subsection A here does not follow UCC 1-105, blah-blah-blah, requires that the selected state have a "reasonable relationship" to the transaction. Is it reasonable to require a reasonable relationship, or is it reasonable to have an unreasonable relationship? And if it's an unreasonable relationship, then is there anything that prevents the law of North Korea, the Netherlands, Iran, India, applying?

And I guess I'll follow up that question with this one I received from an inquiring mind in the audience. I'm trying to understand the license restrictions on my use of WordPerfect Clip Art. Can any of you international legal experts tell me what "scandalous" means under Irish law? But keep it clean.

Does anyone have any thoughts on that?

MS. GRANT: I would bet that it's different than U.S. law, just knowing how conservative a place Ireland is.

MR. STEVENSON: Any other bets?

MR. FARES: I'm risk-averse.

MR. STEVENSON: Okay, risk-averse. Is our -- go ahead.

MS. TORNBLOM: I'm not sure if I understood the

question correctly, but it was about not being able to understand the instructions and the language of whatever it was in the contract, was it?

MR. STEVENSON: Well, I guess this goes -- as I understand the provision, and I hope I don't have this wrong, that the UCITA provision does not rule out applying the various systems of laws to a contract. Now, I should say that 109 has other provisions in it that -- well, like everybody else, I advise you to read yourselves, but I guess I was trying to get at whether even that basic proposition as suggested in the comments is something people agree with or not.

MR. FARES: I mean, I am going to disclaim the fact that I am not representing a consensus position of my organization, but just speaking about some theories that have been thrown out about the choice of law that have been discussed by some legal experts, and the first one is the deference analysis. Some U.S. attorneys came up with this concept, that what you could do is evaluate the consumer protections that exist in different countries, and if they're fairly similar, that the court would defer to the law of the country as specified in the contract. So, there's some sort of analysis as to the effectiveness of the law.

Another idea that has been discussed is to

create some sort of mechanism by which there's a minimum level of consumer protections that exist, and if those consumer protections exist at the same time -- I mean, it's similar to the deference analysis but may be a more formalized agreement by which states would sign up to an agreement that if a choice of law provision calls for the law of, let's say, Spain and Spain is a part of this agreement, that they would apply the laws of Spain.

So, there are some theories out there about how you can deal with the choice of law, and that's both for the choice of law and choice of forum. So, those are just some ideas that have been proposed by the legal community and some people in the business community, as well.

MR. STEVENSON: Go ahead.

MS. TORNBLOM: Yeah, I would like to refer back to this Rome Convention, the European way of dealing with this. I mean, basically the consumer can enter into a contract also deciding on another applicable law than that of his own country, but whatever he has done, he will never be deprived of the rights of consumer protection that exist in his own home country. So, if they are good, they will remain there, whatever has been, you know, decided upon, because some consumers

may think that they will win and that they will gain something by entering into a contract agreeing to another applicable law than that of their own home country, and if that was -- I mean, it might very well be true, but if it isn't, they still have the protection of their own home country, and which is good in the sense that at least that is what a consumer is supposed to know. I mean, we are supposed to expect at least that level of protection.

MR. STEVENSON: Okay, if I could follow that up with another question we received, is there a distinction in the Brussels or the Rome regulations between goods that are delivered electronically versus physically?

MS. TORNBLOM: No. To be very, very honest here, I am not an expert of these conventions, they are quite tricky, and you need to know a lot of case law in order to see how they are interpreted, but as far as I know, no, there isn't, but I mean, of course, in practice it's so difficult to decide actually on these contracts, because if you enter into anything that is in cyberspace, that is why we are now discussing any kind of other solutions to the problems in order to avoid ending up in discussions where we find that the result is that it is not the consumer's legislation

that applies. I mean, trying to find practical solutions to this theoretical legal discussion.

MR. STEVENSON: Right. To follow up on that point, UCITA makes some distinction between goods delivered electronically and goods -- or, I'm sorry, goods -- when there's a delivery of a copy on a tangible medium or not and as to what the default rules should be.

Does it make sense just as a matter of policy to make that kind of distinction between a contract that requires delivery of a copy on a tangible medium and one that involves downloading, for example, software over the internet?

MS. FRIEDKIN: I guess my comment comes much more from a logical point of view. I'm not sure that I have the answer when there should be a distinction, because I'm not sure I know the nuances of the different treaties and different policies that are in the legal framework, but I think as a general matter, I think the identification of where a consumer is is much more difficult if you're downloading information versus sending a package via mail with an address.

So, I think in that general sense, it just complicates it more, and I think that's why, again, at the risk of sounding like a broken record, most people

involved in the international discussion are really looking for other ways to ensure we get redress, because e-commerce is out in the marketplace already and moving fast, and people are engaging in it, and we want to make sure it continues, but we also want to make sure people are protected in getting the redress they deserve.

MS. GRANT: I want to echo what Dawn said. It's a distinction without a difference, and it's unnecessary -- you know, UCITA itself is not necessary and it's not the right way to try to resolve the valid issues that e-tailers have.

MR. STEVENSON: Okay, we have another question for David Fares, and this is picking up on the ADR theme.

Is there an accreditation process or way of verifying reputable online ADR services?

MR. FARES: I don't know right now if there are accreditation schemes. What I can tell you is that the Global Business Dialogue on Electronic Commerce recently issued a set -- they had their CEO conference in September in Miami, and they issued a set of principles that ADR providers should be following. So, their business best practices.

At the same time, there were some conversations

at the European level about confidence in electronic commerce and in ADR mechanisms. The International Chamber of Commerce, of which we're the U.S. affiliate, is also doing some work in the area of online ADR and probably in December will be launching a program at the workshop where they will be addressing some of these issues.

MR. STEVENSON: Okay, Carina?

MS. TORNBLOM: Yeah, I'd like to confirm that there are at least discussions taking place now in Europe, because our commissioner, he has an approach which contains three steps. One, and that coincides with what you said, you have to have a proactive approach. You can't make it too complicated for consumers to know whether to buy or not to buy from a certain seller. So, you need what we call a trust mark.

And to get this trust mark, there is an ongoing discussion now within an interservice group in the Commission where we are discussing the possibility of a system for accreditation, because I mean there should be criteria involved, and if you are to have this trust mark as a company, you have it on your website, there must be a real quality control behind that. Otherwise, consumers will be disappointed, and not only with that

company but perhaps with buying things on the internet as a whole, and that is not good.

Now, the second step is what you already have in your legislation and which we don't have in Europe, because our banks can't handle this yet, and that's the system for chargeback. That's a very important thing, because whatever right chargeback -- so, if you want your money back because the contract is null and void, you've changed your mind, remember I said we have a seven-day cooling-off period?

Well, if you happen to have paid before that for any reason, in advance or any other way, then it's very well to be able to cancel the contract, but then you want your money back, and then you end up in a dispute with someone far out, far away in cyberspace somewhere, and that is not easy, and we don't have the possibility to just say to our banks, I want the money bank, and they handle it. That's not the way it works, unfortunately, yet in Europe. So, that is a very, very important thing. In some member states it does but not in Europe as a whole, and that's a big risk for a consumer. We need to settle that. That's the second thing.

And also the ADR system that we are gradually building, what we call the EUJNet, European Union

Judicial Network, and hopefully that will be online, and we will see what we can do to cooperate with you in the U.S. in the future, but these are not self-evident steps, because things are not as developed in some ways and in some of the member states in Europe as things -- we are not at the same level here.

MR. STEVENSON: David, quickly, last word?

MR. FARES: Dawn, did you want to say something?

MS. FRIEDKIN: Yeah, if I could add quickly first, I guess one thing to talk about when you talk about accreditation, I think there are a lot of notions that get spread that we'd all like to see happen, but e-commerce is moving so fast and changing that I think a lot of people involved in the debate, especially at the international level, are trying to find, as I say, kind of interim solutions that become bigger, broader, more robust solutions in the end.

One thing, when the U.S. held its workshop this past summer on ADR, one of the things that I tend to quote quite often is that the ADR providers at the workshop were arguing about who had been in business longer, and they were talking about months. They weren't talking about years or decades. So, it's new.

So, I think talking about accreditation makes

sense in the concept of -- as an intellectual pursuit, but I think as a practical matter, we're moving in directions of that, but I think it's early for that.

One thing in our workshop that we're going to be doing is talking about the variety of different principles that have been set out there for effective ADRs, like the Global Business Dialogue and the TACD and the Commission, and then principles that weren't officially probably found from the U.S. workshop but that you can glean from the work that they did.

In talking about the differences of these principles, not necessarily for the purpose of accreditation but to understand what effective ADR is, and I think we're moving in that direction, but I think everyone probably agrees that, you know, what we decide tomorrow may not be good in a month, and so we want to make sure that we're doing this well but also providing the redress that we need now.

MR. STEVENSON: Great.

We will give you the last word -- actually, I will give myself the last word, better idea.

If you like this discussion, you will love our publication, Consumer Protection in the Global Electronic Marketplace, which I just mention because a number of these issues have been, as everyone has

suggested, the source of ongoing dialogue in a number of places, and I'd like to thank our panelists again for being here today.

Thank you.

(Applause.)

MS. MAJOR: Let's take a two-minute break, there are cookies and refreshments out there, and give the next panel a chance to set up, and we will start right away.

(A brief recess was taken.)

MS. MAJOR: Okay, we are going to get started now, even though everybody's still getting settled. I want to first acknowledge the software and information industry association for kindly and generously providing the coffee and pastries this morning, and I'm sure you all appreciate that very much, and also the Business Software Alliance again this afternoon provided the cookies and sodas that you're all enjoying right now. So, I very much thank them for offering to do that for us.

This panel, we have heard a number of times throughout today and yesterday the intellectual property issues that have been alluded to, and this panel is dedicated to discussing the IP issues that arise associated with computer information

transactions, and I have the honor to introduce our distinguished panelists.

First, Charles McManis. He is a professor at Washington University in St. Louis, where he teaches torts and several intellectual property courses and IP courses that are related to international trade. Professor McManis is a member of the American Law Institute and the International Association of Teachers and Researchers of Intellectual Property, and Professor McManis has published numerous articles in this area.

Next to him, on his right, is Professor Reichman. Professor Reichman teaches at Duke University, and he teaches in the field of contracts and intellectual property law, as well. Before coming to Duke, he taught at Vanderbilt, Michigan, Florida and Ohio State Universities, and also at the University of Rome in Italy. Professor Reichman has written and lectured widely on all aspects of intellectual property law, and his most recent writings have focused on the ongoing controversies about IP rights and data and the appropriate contractual regime for online delivery of computer programs and other information goods.

Lorin Brennan, who will be sitting next to -- well, actually, is on the other side of Professor Cohen, Lorin Brennan we're pleased to have with us

today is a California attorney specializing in international intellectual property licensing. He is a principal in a software development firm called Grey Matter, which he co-founded in 1999. The firm develops automated contracting and rights management software for intellectual property licensing, and Mr. Brennan has written several articles, as well, about intellectual property.

And finally, Professor Julie Cohen, who teaches at Georgetown University Law Center, and Professor Cohen teaches and writes about intellectual property law, data privacy law, with particular focus on computer software and digital works and on the intersection of copyright, privacy and First Amendment in cyberspace, and I am just truly delighted to have all four of them with us today, and we will start with Professor McManis.

MR. McMANIS: Thank you, April.

I'm delighted, indeed relieved, to be here inasmuch as ever since UCITA was finalized by NCCUSL, I have been hoping the Federal Trade Commission will step in and begin to reformulate or formulate a federal policy in this matter.

I'll spend my 15 minutes of fame responding as briefly as I can to five specific questions the FTC has

asked this panel to address; however, because I view the first two questions as variations on one question and the last two questions as variations on another and the one that most interests me is the one right in the middle, I will quickly dispose of the first two and then get on to the last three.

As to the first two questions, whether intellectual property law adequately protects computer programs and whether software should be treated differently than other intellectual property, I'd simply note that many IP academics and practitioners have argued that computer software does not fit easily into the existing categories of intellectual property protection, such as federal copyright protection, which in some respects overprotects and in other respects underprotects computer software.

Indeed, my co-panelist, Professor Reichman, has rather cogently argued that what's needed is a sui generis form of intellectual property protection that he calls portable or constructive trade secret protection, a kind of limited lead time protection for software.

For the moment, however, the debate over both of the first two questions is essentially moot as the United States Congress in its wisdom has made it

unmistakably clear when it amended the Copyright Act in 1980 that federal copyright law is to be the principal means of intellectual property protection for computer programs and that computer programs are to be protected like any other copyrighted work, except where the Copyright Act makes special provision for software.

Given that basic policy determination by Congress, it;s essentially the role of the courts, and I would add the role of such agencies as the Federal Trade Commission, to engage in such interstitial law making as is necessary to ensure that this basic congressional policy works as intended.

This, then, brings me quickly to the third question posed by the FTC, whether licensing agreements can preempt federal law and particularly federal copyright law. Unfortunately, the question is ambiguous. If the term "preempt" is being used in its technical legal sense, then the answer, of course, is obviously no. Neither state law nor contracts created pursuant to state law may preempt federal law.

To the contrary, the case law decided pursuant to the Supremacy Clause of the United States Constitution makes it abundantly clear that in case of conflicts between state and federal law or between federal law and contracts created pursuant to state

law, the federal law is supreme and preempts state law.

If, on the other hand, the term "preempt" is being used in a looser, nontechnical sense, and the question is simply whether contracts made enforceable by state law can, in effect, contract around or contractually abrogate certain privileges that the federal copyright law creates for users of copyrighted works, then we have arrived at the heart of the federal preemption question that UCITA poses, and the answer depends both on the type of contract and the particular user's privilege involved.

The provision of UCITA that poses the most serious preemption issue is, of course, the mass market licensing provision contained in UCITA Section 209. Indeed, the mass market licensing provision raises three distinct federal preemption issues, and I'll talk about each one.

First, whether all or certain classes of these licenses create rights equivalent to federal copyright and subject matter protectable by federal copyright law, in which case they would be preempted under the express statutory preemption test contained in Section 301 of the Copyright Act itself. This is so-called statutory preemption.

Number two, whether the use of mass market

licenses to contractually extinguish various users' privileges contained in the federal Copyright Act would, in effect, set at naught the paramount policies of federal copyright law and would thus be preempted under the supremacy clause itself. This is so-called implied preemption of state law as articulated by the United States Supreme Court in the Sears Compco cases and their progeny.

And third, and most intriguing from this panel's perspective, whether mass market licenses made enforceable under UCITA, even though the terms are disclosed only after the consumer has paid for the information product, constitute unfair or deceptive acts or practices within the meaning of the Federal Trade Commission Act and would thus be subject to federal administrative preemption by the Federal Trade Commission.

While the first preemption issue, express statutory preemption, is exclusively for the courts to decide, the third is obviously well within the jurisdiction of the Federal Trade Commission, and certain aspects of the second issue may also be appropriate for Federal Trade Commission consideration.

I will briefly address each of these preemption issues in turn and in the process respond to the last

two questions that the panel has been asked to address.

First, express statutory preemption. With respect to express statutory preemption, proponents of UCITA generally cite the proCD versus Zeidenburg case, which held that federal copyright law does not preempt enforcement of shrinkwrap licenses that prohibited a purchaser from making commercial use of a product that he then proceeded to make commercial use of. The Court reasoned that, "A copyright is a right against the world. Contracts, by contrast, generally affect only their parties. Strangers may do as they please. So, contracts do not create exclusive rights."

And by way of illustration, the Court noted that someone who found a copy of ProCD's information product on the street would not be affected by the shrinkwrap license. Well, now, I confess, I scoured the streets on my way home and coming down here this morning to see if I could find any free software and was unsuccessful.

But even conceding the point, suppose that the shrinkwrap license in ProCD had instead been a clickwrap license embedded in the sequence of the startup of the database itself, requiring the user to agree to the license terms in order to get access to the software or database. By ProCD's own logic, such a

license would seem to be a contract to which there could be no strangers, a contract creating the functional equivalent of rights against the world. And under 301, it would seem those contracts would be preempted.

I don't raise that illustration to suggest they ought to be preempted but simply to illustrate that the express statutory preemption test of 301 is a rather blunt instrument to try to deal with the nuanced question that we face, and indeed its whole purpose was simply to preempt common law copyright and not deal with the problem that we're confronting.

Thus, even if mass market licenses are not preempted under the express statutory preemption test contained in 301 of the Copyright Act, they might nevertheless be preempted under the implied preemption test if they are deemed to set at naught, to undermine, some paramount policy of federal copyright or, I might add, competition law.

This brings me to the fourth and fifth questions that the panel has been asked to address; namely, whether the first sale doctrine should apply to software and whether a licensor should have the ability to restrict reverse engineering or limit the fair use of software.

The short answer to the fourth question is that under the express terms of Section 109 of the Copyright Act, the first sale doctrine does apply to software but only where a user of the software is the owner of the particular copy being used. And for those who don't revel in such matters as the first sale doctrine, I suppose I should tell you what the first sale doctrine is.

Section 109 of the Copyright Act says that the owner of a particular copy of a copyrighted work is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy. So, if you go to your friendly neighborhood mega-bookstore and buy a book, you can sell it or give it away, even though you don't have any copyrights in the book, you just own the particular copy of the work.

Section 109, by limiting the first sale doctrine to owners of a particular copy, permits the first sale doctrine to be contractually abrogated by the simple expedient of the copyright owner deciding to lease or rent copies of the copyrighted work rather than sell. So, in this respect, I would say 109 specifically permits contractual abrogation of the first sale doctrine.

But suppose in a mass market transaction, which

to all outward appearances is a sale, a mass market license nevertheless states that the consumer is not actually the owner of the copy that the consumer has paid for and perhaps has even paid a sales tax on, but only apparently a perpetual lessee who may not sell or otherwise dispose of the copy without permission of the copyright owner.

Can a mass market license by Fiat transform the character of the transaction? I would suggest that whether one is an owner or not is not a matter of the contract; it's a matter of federal copyright law as to whether one is an owner and therefore entitled to dispose of a copy of a copyrighted work.

Is it a matter of indifference to federal copyright and competition policy that UCITA will, in effect, extinguish an entire category of transactions in the mass market for computer programs and other digital information? Is federal copyright law unaffected when public libraries across the country discover that they cannot be said to own a particular copy of a digital work that they may wish to add to their collection?

Even if federal copyright or competition law does not preempt this mass extinction of an entire species of transactions on the mass market, it bears

pointing out by way of answering the fifth question the panel has been asked to address, that unlike the first sale doctrine recognized in Section 109 of the Copyright Act, the fair use privilege recognized in Section 107 of the Act is not limited to owners of a particular copy of a copyrighted work but extends apparently to any user of the work.

Indeed, as amended by Congress in 1992, the only amendment that has been made to the fair use privilege, Congress amended the fair use privilege to explicitly point out that it extends to unpublished as well as published works. The legislative history of this 1992 amendment is particularly instructive with respect to the question we are faced with, as the House Report on the amendment cites with approval the case of Wright v. Warner Books, Incorporated, a Second Circuit case, which held that a contractual term purporting to prohibit the publication of unpublished library archived manuscripts "in whole or in part, unless the publication is specifically authorized by the archive, should not be construed in such a way as to prohibit a biographer from using the manuscript for scholarly purposes, as," in the words of the Court, "it defies common sense to construe this agreement as giving scholars access to manuscripts with the one hand but

then prohibiting them from using the manuscripts in any meaningful way on the other."

The Wright case itself, quoted with approval from the trial court opinion in Salinger vs. Random House, Incorporated, which stated that, "To read restrictions agreed upon as a condition for obtaining access to the unpublished manuscripts in a library archive as absolutely forbidding any quotation, no matter how limited or appropriate, would severely inhibit lawful scholarly use and place an arbitrary power in the hands of copyright owners going far beyond the protection provided by law. Thus, both cases refused to enforce terms in an access contract that purport to bar the fair use of an unpublished work."

As my time is short, I will leave it to other panelists to address more fully the question whether a software licensor should have the ability to restrict reverse engineering or otherwise restrict fair use of software, and federal courts have held that certain reverse engineering of software is a fair use, and rather, I will conclude my remarks by posing the third preemption issue raised by UCITA's mass market licensing provision; namely, whether mass market licenses made enforceable under UCITA, even though the terms are disclosed only after the consumer has paid

for the software, constitute an unfair or deceptive act or practice within the meaning of the Federal Trade Commission Act and can thus be preempted by the FTC as a matter of federal administrative law.

In her written submission to the FTC, Professor Jean Braucher has already presented cogent arguments for precisely that proposition. I would simply add that from the perspective of the law of unfair competition, mass market licensing terms made enforceable under UCITA, even though the terms are disclosed only after the consumer has paid for the software or other digital information, arguably constitute the worst possible form of bait and switch.

Not only must consumers incur the onerous search costs, for which UCITA's right of return provision really does little to offset, to discover the true nature of the transaction being proffered, but unlike most victims of bait and switch that at least are notified before the sale of what is being switched, consumers victimized by post-transaction disclosure of mass market terms will learn of the true nature of the transaction only after they've entered into it. This isn't just bait and switch; this is plain old passing off.

I would conclude by noting that while the FTC

may not exercise authority over states as sovereigns unless that authority is unambiguously granted to it by statute, the FTC has been held to have authority to preempt contractual terms conflicting with its enforcement efforts under the FTC Act itself. I would thus urge the FTC to exercise that authority by adopting rules prohibiting as an unfair and deceptive practice the delayed disclosure of mass market licensing terms, at least where it's possible to present the terms prior to the transaction.

Further, I would urge the FTC to carefully consider what impact UCITA's capacity to extinguish an entire species of transactions in the mass market for information products and to restrict forms of reverse engineering of computer software that have been judicially determined to constitute a fair use, what impact these effects will have on consumers and the competitive process and to take such preemptive federal action as it deems necessary to protect both.

Thank you.

MS. MAJOR: Thank you, Professor McManis.

Professor Reichman?

MR. REICHMAN: Well, thank you for inviting me to speak to this important forum.

I'm not going to discuss the issue of whether

intellectual property law adequately protects computer information and how software should be treated. My general position is that all forms of subpatentable innovation today, including biotech, today meaning the post-industrial age, are essentially inadequately protected. What has happened is not that our patent and copyright laws have broken down, but our trade secret law has broken down, so you don't get enough natural lead time, anyone can copy anything, and this gives special interest the opportunity to want to multiply exclusive property rights, when what we need is a new type of liability regime that would follow some artificial lead time and encourage follow-on innovations by requiring payment for use of small-scale innovation.

I have recently developed this theme in I think a pretty cogent argument, a new paper of "Green Tulips and Legal Kudzu; Repackaging Rights in Subpatentable Innovation." This will appear in the November issue of the Vanderbilt Law Review Symposium on Law and Economics of Intellectual Property Rights. You can have an advanced copy by writing me. I have one or two copies here.

I will instead speak about UCITA, and I will first discuss its underlying philosophy and then

explain how that philosophy adversely affects intellectual property rights and what maybe we can and cannot do about it. Forgive me, I will certainly call it "Ucita" at some point. I grew up in Italy, and it is spelled like "ucita." "Ucita" means exit, and because I think we should exit as fast as possible, I'm easily confused.

Another reason for talking about the philosophy of it is that I have an article on this topic called "Privately Legislated Intellectual Property Rights," reconciling a feeling of contract with public good uses of information, with my co-author, a very promising young scholar, Jonathan Franklin, in the University of Pennsylvania Law Review last year, and the philosophy part is drawn from the third part of our article. It's a very long article, and because nobody ever gets to the third part, I thought I would take the opportunity to develop it. You are welcome to have some copies of this, take these if you're interested.

The worst thing in my mind from a philosophical point of view about UCITA is that it pretends to derive from Article 2 of the Uniform Commercial Code, which was a profound revolution in modern contracts law aimed at giving effect to the real intentions of the parties. I teach Article 2. I consider it a scientific

revolution of dramatic proportions, the most refined, assent-driven paradigm ever formulated and the most refined set of default rules ever formulated.

UCITA instead, by jointly mimicking some of the language some of the time and then changing the variables, UCITA is instead a quintessential -- addresses a quintessentially post-modern problem, the nonassent-driven mass market contract. It gives us adhesion contracts valid against the world and defended by technological fences that cannot be decrypted and reinforced by underlying intellectual property rights that convert effectual monopolies into legal monopolies that will last forever and that will not recognize public interest exceptions.

It has nothing to do with mutual assent, as does Article 2 of the UCC. It is about contracts imposed by fear, without mutual consent, and under contracts that have the potential to severely restrain trade and free competition. It is not a set of default rules in the sense that we talk about default rules in the academy in the theoretical sense. A set of default rules arise when the parties negotiate or are conceived of negotiating in a set of zero transaction costs to a set of rules that both sides could live with.

Article 2 of the UCC is a perfect set of

default rules. It is what buyers and sellers are presumed to negotiate to a negotiated middle ground in the absence of transaction costs.

In contrast, UCITA deals with a dictated adhesion contract, a one-way standard form contract that embodies sellers' ideal list of clauses and minimize buyers' interests. It is a buyers' and consumers' nightmare. How this came about and how the drafting committee was captured by special interest that only looked in one direction I can't take the time to tell you, and if you don't know it by now, it's probably too late.

Article 2 of the UCC was a magnificent move away from tort law to the perfection of individual autonomy in contracts law. UCITA, instead, is a massive move away from contracts based on individual autonomy, and therefore, it necessarily takes us back towards tort law, because only government can regulate the public interest nationwide under nationwide adhesion contracts, especially adhesion contracts that impinge on intellectual property rights and affect access to the building blocks of knowledge.

Now, having said that and having identified the need for regulation, let me be the first to say, and we say it in this article, that regulation has to proceed

with a great deal of caution, because over-drastic regulation or premature regulation could interfere with this fast pace of innovation and appropriate investment.

Let me first examine the impact of UCITA on IPRs for a moment, and then let's think about some of the things we can do about it. What UCITA does, to understand it philosophically, it restores the power of the two-party deal that was lost when Guttenberg invented the printing press. As soon as the printing press is invented, you can no longer tie up people by contract. Anybody who gets a copy can make other copies.

So, because the publishers needed help from the state, they re-arrived at a very wonderful set of default rules known as copyright law; however, because the state was needed to provide a portable fence in the area of the Guttenberg, these default rules are balanced. They balance public and private interests, and this balance of public and private interests that's evolved over a hundred years and matured over a hundred years is in my view responsible for the success of innovation under the Industrial Revolution and for the successful beginning of the information revolution.

However, the new information technologies now

make it possible to reimpose two-party deals on the rest of the world. You put it in a contract, you put your stuff online, you surround it by nonencryptable stuff which the law will prohibit anybody from encrypting and then you have a click-on license at the gateway.

So, the classic adhesion contract can do all of the things that you couldn't do in intellectual property. You can prohibit the reverse engineering of trade secrets by lawful means. You can override fair use in copyright law. You can prohibit scientific and educational uses of noncopyrightable databases that were customary or traditional. If you think about it, all hard problems today in the scientific community are addressed by the -- the first act is to accumulate and assemble a massive, complex database from existing sources. You can do that because data, raw data, is not protected in copyright law.

You can override this by contract under UCITA. You can thus exclude access to information that has always been in the public domain and even information that was, in effect, generated at public expense. You can dictate the modes of research.

In recent testimony before the National Academy of Sciences, we were confronted by a foreign database

in biotech where having granted a license and having allowed American scientists to use the database, it imposes methods of research that are totally different from what our biotech community can use, even though you've paid for access to this database. So, you're creating barriers to entry, you're creating barriers to innovation, barriers to scientific and intellectual progress and barriers to the kind of follow-on innovation that gives us our Silicon Valleys.

We are told that these are private agreements and that government should keep out. The truth is, these are not agreements. There is no mutual assent in the way the term is used in Article 2. They are privately legislated intellectual property rights.

Nevertheless, they depend on the public power. That's why we're here. If state legislatures and the state police powers don't enforce them, they will not get enforced, and this is a reason why they must bow to the higher needs of the state to protect the public interest.

Now, once we say that, once we recognize that from a contracts angle, we are moving back towards tort law here, from an intellectual property angle, we are also creating opportunities for private entrepreneurs to override the public interest and displace the public

domain that has been the basis and the foundation for all future innovation up to now, as well as for free competition.

This new nonassent-driven paradigm of contracts and intellectual property law requires strong and direct government regulation, but here again, I sound a note of caution. How to regulate it is very difficult, because if we go too far in the opposite direction, we will then restrain honest and legitimate innovation.

So, how can we approach this problem? In our article, we think the logical point of departure is to think about the concept of misuse or abuse, both of intellectual property rights and of these quasi-intellectual property rights that we're talking about. Our problem is that we only know what worked in the past. We know that fair use has worked. We know what kinds of public interest exceptions have worked in the past, but we're not sure how the past applies to the future in information technology.

We know that reverse engineering of trade secrets by lawful means is pro-competitive, we know that fair use is pro-scientific and pro-educational and pro-competitive, and we know that maintaining access to noncopyrightable data in the public domain is the basis of all our inputs into the knowledge information

economy, but we must also not undermine genuine expressions of freedom of contract, and we must not disrupt investment in innovation.

So, our solution proceeds from our -- one of our proposed solutions proceeds from basically three concepts. If you think about it, Professor Llewellyn's assent-driven paradigm of contract formation in Article 2 is founded on the notion of a negotiated middle ground, a negotiated middle ground to which buyers and sellers would reach, and then in your individual transactions. So, we proposed the concept of the non-negotiated middle ground for these type of adhesion contracts, standard form contracts, because whether we like standard form contracts or not, whether we get UCITA or something better, we're going to have to learn to live with the standard form contracts in the information age.

So, we are going to have to find a way that will regulate them without impeding innovation and without destroying it on the other side. So, we proposed a non-negotiated middle ground as the standard from which we can evaluate reasonable terms and conditions that would be automatically validated.

The second concept, however, is the doctrine of abuse that sits astride intellectual property law,

contract law and licensing law. We propose a robust doctrine of abuse or misuse that would allow courts directly to invalidate nonstandard solutions imposed under standard form contracts that have the effect of unduly impinging upon the federal intellectual property system or the public interest in access to information.

And the third concept which implements this concept is a specific contracts doctrine, over and above preemption, over and above the public policy exception, but a specific doctrine to implement this standard of abuse. For lack of a better name, we have called it public interest unconscienability. Another way to think about it is a Sword of Damaclese clause. What do I mean by a Sword of Damaclese clause? It means that as long as you do the right thing and don't try by standard form contracts to deviate, impinge, distort the customary practices under intellectual property law, your contract should be valid from the point of view at least of intellectual property.

If instead you start to impose standard form contracts that override fair use, that distort the ability to reverse engineer in general, you will have a problem. You'll have to justify that.

Let me give you some language and then give you an example. The language is up there, but it didn't

come out so well. The general Sword of Damaclese -- thank you -- the general Sword of Damaclese clause that we propose would be item number one, all mass market contracts, non-negotiable access contracts and contracts imposing non-negotiable restrictions on uses of computerized information goods must be made on fair and reasonable terms and conditions with due regard for the public interest in education, science, research, technological innovation, freedom of speech and the preservation of competition.

Now, that sounds like an attack, but, in fact, it would validate 90 percent of all contracts, because if you did not interfere with any of those things, then you have a clean bill of health and you don't have to worry about anything, and even if you do do some of those things but you do it in an affirmatively negotiated way, the second clause gives you a presumption of validity.

Example: If you're dealing with another firm in delicate negotiations investing a lot of money in software, you may have very good reason to prevent the firm that you're licensing your software to from reverse engineering your innovation. There's nothing wrong with that. You should affirmatively get that clause up there, and that would be validated by our

second clause.

On the other hand, if you start putting clauses that prohibit reverse engineering of computer programs by the whole world, then that would trigger clause three. Whenever non-negotiable terms are challenged on any of the grounds set out in 1, the party proposing the form or the record in question bears the burden of establishing that the private benefits accruing outweigh the public harm.

Let me just shoot ahead here and remind you that -- put it this way: Over time, we think that this would actually become quite simple to implement. We would -- we call it the basket approach. We would develop three baskets to facilitate transactions of this kind. You would have a red basket of clearly invalid mass market provisions. You would soon get a green basket of clearly valid provisions. And you would have a yellow basket of borderline clauses which would depend on the facts, if you use these borderline provisions, you have to be prepared to hear them challenged.

Let me just conclude with some long-term implications -- let me also note that actually our proposal was taken to the ALI by Harvey Pearlman, and in effect it was voted up by the ALI 90 to 60, but the

drafters didn't buy it, and Harvey tried to negotiate with them. It was a losing negotiation, and what you get is the paled 105 that we don't really think does the job.

The long-term implications of this are really very great. One of the biggest fallacies underlying this and other initiatives is to ignore the dual nature of data and information in the information economy. On the one hand, data are inputs into the information economy, the raw material. Then, later on, data become bundled into products, information products, sold on the market which logically attract intellectual property rights, patents, copyrights and so on.

What we're doing is collapsing the two, and by one means or another, in this forum or other forums, certain interests are trying to get exclusive property rights, legal monopolies, in the upstream flow of data where they would normally enter the public domain.

If we allow this, we will vulcanize the public domain. We will make it as difficult to get access to the inputs, the basic building blocks of knowledge, as it once was, to send goods down the Rhine River or goods from Milan to Genoa with 150 gatekeepers' hands out there demanding a toll, and if we do that, we could kill our national system of innovation.

Our wonderful hegemonic national system of innovation is not the product of some salon. It grew out of a series of circumstances, led by the cold war, but its basic genial features is that we spend a lot of taxpayers' money to gin up a lot of data and information which flushes through the system, everyone can use it, no one can make it exclusive, until you bundle it into a downstream product. If we block that, if we make it impossibly difficult to get to upstream data for competitive or educational or scientific purposes, I do believe that some archaeologist or philosopher in the future will look back and say, gee, they really had it going, and it was this tinkering with this goose that lays the golden eggs of innovation that killed the whole thing. So, I think we have to be very careful. A lot is at stake.

Thank you.

(Applause.)

MS. MAJOR: Thank you, Professor Reichman.

Go ahead, Mr. Brennan.

MR. BRENNAN: While we are trying to get this to work, I'm proud to say I've made my first online agreement with the FTC. I said this diskette I had to translate at the hotel, so it may have a virus, I give no warranty. They said, don't worry about it, if you

put it in our computer, you may get a virus youfself. I'm proud to say it didn't work for either one of us, so let's see if I can get the machine to work.

We are going to see right now whether or not -- we got it sort of to work. Oh, okay, I -- it worked. Okay, so our first deal was a success, whew, that's great.

Okay, so I have to -- I am here to talk a little bit about the benefits of copyright. I am an attorney, but I am also probably the only one here who is actually a software developer. I try to make my living writing code. I wish I could tell you I was a rich software developer, but I don't think that that's going to happen soon. Good news for me in the stock market, though, I don't have to worry about that IPO.

So, I am going to talk a little bit about why we need to reconcile copyright and commerce. We have a burgeoning economy in information products, and we need to bring copyright and commerce together, and to do that I want to talk about three things, the fundamental principal of copyright, sounds important; how first sale really works; and then what UCITA is trying to do on this matter.

So, let me talk with the fundamental principal of copyright. I lost the mike? Scream louder.

Okay, and that's it, simple concept, a copy is not a copyright. When you acquire a software package, two events happen; the copy and the right to use the copy, and they're separate, and Congress said this specifically in the Copyright Act in Section 202, as a matter of preemptive federal law, preempting all state law, ownership of a copy is different from ownership of a copyright.

And if I can give you a little silly example here that kind of illustrates the difficulties, I had a colleague of mine who said the producer walked into his office one day, and he said, I own all of the Isaac Asimov books. I own them all. We have got to make these into movies. They said, that's great, let's go make a movie about I Robot, it would be terrific.

The next day the producer came in and said we ran a copyright report, and you don't own any of the rights. He said no, I went to the bookstore and I bought the books. He bought the books; he didn't buy the rights. It's a silly example, but it illustrates our point.

Okay, I thought it was 15 minutes. Ah, I see. Oh, okay. I get it now, I get it now, this was the undisclosed term, right?

MS. MAJOR: There you go.

MR. BRENNAN: All right, I have it right now. Wait a second, I have the media action. I'm safe at last.

Okay, and Congress, of course, said that this is a fundamental principle of the Copyright Act, we know that, and the result is simple. If you don't have a -- if we don't have a license, we don't have any rights in the copyright, and the reason for this is what they call the freerider problem. You see, unlike physical goods, when I remanufacture a toaster, it's the same cost to remanufacture that toaster, but the cost of copying works goes down dramatically. So, I as a software proprietor need to control copying so that I can earn the royalties that I need to live on so I can make more work. So, that's the whole purpose of copyright, to give creators the money to make new works.

Voltaire said this exactly. He said God has given us the power to create, but nature has constrived it that in order to do so, we must eat, three times a day, and that's why copyright owners need royalties. It's kind of basic here, I wish this was like really exotic law stuff, but it's pretty obvious.

Let's talk about the first sale doctrine, because we have asked about that, and the rule is very

simple. When you get a copy, a copyright law gives you certain privileges to use that copy without an infringement. There's a lot of them in the Copyright Act, but let's look at the first sale doctrine. It's pretty straightforward.

It basically says the owner of a copy can resell it, okay? Not difficult. But there are certain exceptions here. It only applies to the authorized owner of a copy, okay? You have to own it. It only affects the distribution right. You don't have a right to make new copies. You don't have a right to publicly perform it. The owner is not required to make a first sale, we heard that already, and there is a rental right for software independent of first sale that Congress has given to software proprietors, and this is all fairly obvious.

Let me give you a simple example. If I sell you my car, you can loan it to your teenaged son to joyride all you want, it doesn't matter, but if I loan you my car, I don't think I gave you the right to let your teenage son joyride in it. You know what I mean? That's the point.

And, of course, we see this all the time. Here is my American Express Goldcard. I don't own this, they rent it to me, and this happens all the time in

business. We are not too worried about this, it's not a big deal. And that's how the first sale doctrine works.

The important point about first sale, however, is this: Remember state law cannot compel a copyright owner to sell its works. That's an exclusive right given to the copyright owner. If they elect to make a sale, then the first sale doctrine says, of course, the user can resell it, but by the same token, the first sale doctrine is insufficient for many, many uses, and here's the difference with software.

You see, right now when we take information, we're usually passive recipients, we just read it, but when we go to use software, we want to reutilize it, we want to make new copies, we want to exercise more rights under the copyright, and that's where the issue comes in, and that's why we need to deal with what we did in UCITA.

The problem is we have to get the commercial law and the copyright law groups to start talking to each other, and unfortunately it seems like poor UCITA is in the center, and we get hit from both sides, but without trying to put the discussion together. If we take a commercial law view only about what happens in the mass market, we say, well, use the Article 2 sale

of goods paradigm, but there's a problem with that, and it's very simple.

It only deals with the copying, and we've already seen that federal law says we have to deal with the copyright, as well. That's an intangible. And the terms in Article 2 don't apply to intangibles.

We have heard a lot about the preemption issue right here, but if we're going to be intellectually rigorous, we have to take all the preemption analysis we've heard and apply those provisions to the default rules in Article 2 and ask ourselves, are the default rules in Article 2 consistent with the default rules in the Copyright Act?

I've taken the liberty of doing that. I've just submitted here and I'll publish next month in Duquesne an article in which I take all of the default rules in Article 2, compare them with all the default rules in the current Copyright Act, and we get to the conclusion that Article 2 is not compatible. It doesn't work.

If Article 2 doesn't work and we have our preemption arguments that we've heard before, what law does apply to transactions in the mass market? We're left with the old general law of contract. And what does that mean? The last shot rule. Every court,

every court has said when that shrinkwrap license arrived with the goods, that is the counteroffer by the supplier that is a last shot, and when you utilize the software, you have accepted the shrinkwrap on all of its terms. Every court says that. The Stepsaver case says that, and they all agree that those are enforceable, okay? We're talking about contract law.

The other thing we can do is take a copyright-only view, and then we say certain things like, well, all mass market licenses should be enforceable -- unenforceable, but we have problems with that, because if there is no license, we risk making consumers infringers. Let me show you an example.

Here we have a shrinkwrap book. Yes, it's shrinkwrap. This is the license, right here. This is the most popular book now on Java programming. I don't know if any of you bother to read books on Java programming, I have to, but this was originally published on the net electronically. It was so popular that he made it available in a hard cover version, and when I go into the store at Borders yesterday and bought this, two transactions happened.

Transaction number one, Borders sold me a copy, but transaction number two was I had a license with Bruce Eckel to do more than just read the book. I

wasn't the passive consumer of information. I was reading this book, and I wanted to take the code samples in the book and copy them into my software, but that's a copyright infringement unless the license authorizes me to do it.

And since that's a deal between me and Bruce Echols, and if we read the license he says, you can do that, but since I, Bruce Echols, am in the business of doing education, you can't use my book and my code samples for education without giving attribution to me, and that's what we're talking about here. If we blow off this license, then all of the computer books in the business right now who authorize you to make copies are copyright infringers.

Not only that, but if I took this Java programming, took his code, made a Java uplink, you download it on your web page, you have made an unauthorized copy, too, and there is no good faith purchaser defense to copyright infringement. We risk making massive people infringers if we say these licenses are unenforceable. So, we can't do that. We have to figure out a way to deal with it.

The second thing is, sometimes we say, okay, well, mass market licenses are enforceable only if they're negotiated. Well, that brings us this problem:

Here's this. I have 2000 programs on this. They're web retailer programs. They allow me to take these and utilize them. There's no way I could read or would want to read 2000 licenses before I bought the diskette.

This cost me $5. I'm a small developer right now. There's no way I can get shelf space in CompUSA unless -- with a big package, I need to put them in here, like thousands of other developers. This is a component source.

Software today isn't written by starting from scratch. You take preexisting components, you put them together like you assemble a prefab house, and you turn the switches off and on. There are a thousand programs on here. If we say that you have to read the license on each one of these, all of these small developers and innovators don't have a way to get their products to the marketplace.

So, if we want to support innovation, we have to have a way to deal with this that prevents them from being copyright infringers, and this is what UCITA tried to do.

We don't want to impose the commercial friction of forcing consumers to read licenses to buy a $5 product. It doesn't make any sense. But at the same

time, we need to empower the innovators to come to the market.

So, here's what UCITA said. We want procedural fairness and substantive freedom. In a commercial transaction, if you tell people terms are coming, then you can negotiate in layers with heads of agreements and deal memos. We do this all the time. And in the mass market transaction, you've got to tell what the license terms are at least when you access it. So, when I take these 2000 programs home and I load them one at a time and I see the one I want, a license pops up, and it tells me these are my terms, and if you don't like it, you can turn it off, and if I want to send it back, I suppose I could send it back for the five bucks, but this is a package. This isn't the product. This is like the box that your toaster comes in. It's not the product.

Let me talk about a couple things so I don't run out of time here. We talked about transfer rules and UCITA. UCITA says almost nothing about this. This is very simple. A party's contractual interest may be transferred unless it's prohibited under law. What's that all about? Federal law says you cannot transfer a nonexclusive license without permission of the copyright owner. Why? It's exactly what I told you

about the car example. I don't necessarily say if I give it to you, your teenage son can drive the car. UCITA doesn't say whether that's true or not, but it says if it is true, then we're going to follow federal law, and then it adopts the rule in current Article 2, that if it materially changes the duty of a party, you can't transfer it. This is not particularly exciting or revolutionary.

Let's talk a little bit about fair use. Fair use, UCITA expressly refers to preemptive federal law. So, if federal law says you can't contract around fair use, UCITA agrees. Now, I happen to disagree on whether or not you can contract around fair use. I think you can, and I want to give you examples where we do it.

I have a customer list. I say that's my proprietary list, you won't disclose it. No problem, that's called trade secret law. We do that all the time. I give you my private consumer data, and I say, you can only use my data for a particular purpose. We don't disagree with that. That's privacy law right now.

So, in all of these ideas, I would say in Wright vs. Warner Books, that's a great case, I would cite it for the same reason, because the Court said the

contract is enforceable, but we don't interpret it as prohibiting fair use. My answer is fine. If federal law actually preempts the rule, UCITA doesn't disagree. It says fine, you can preempt. But if it doesn't preempt, UCITA is not going to force the states to adopt a rule at the state level that the feds haven't done, because remember we said copyright law is a balance. So, we can't change balance at the state level that Congress has left open, and if we disagree or promise to change it, and that's all UCITA says.

What about the terms that allows a court not to enforce a term contrary to public policy? No problem, but there is one thing UCITA doesn't do, and that's this, it does not permit courts to usurp the legislative job of deciding how to balance public policies, and this is the problem I have with what Professor Reichman proposed. It was discussed extensively, I wrote an extensive law review article about the problems with that proposal, and what it does is it basically says you, courts, are to choose one public policy over another, and we don't give you any standards for doing it.

That's not how our system works. We're in a national election now to elect legislators in Congress. They decide how to balance competing public policy.

Let me give you an example. There is nothing in that motion about protecting consumer privacy. Does that mean somebody can do science on my private medical records and I have nothing to say? That's a balance that the legislature has to effect.

Let's take another example. We talked about contracting around fair use right now, or the balance between fair use and copyrighting, but the Supreme Court has already ruled that the fair use provision totally accomodates that. That was a holding in Harpers & Rowe.

So, right now we don't -- we can't draft a state law that says irrespective of what we've said in Harpers & Rowe, state courts under some standard are supposed to undo what copyright law was going to do. That's exactly what UCITA says. We are going to allow courts to apply public policy, but it's the legislative job to balance those policies.

I want to finish up talking about something that's really interesting to me -- am I done yet?

MS. MAJOR: About one or two minutes, please, thanks.

MR. BRENNAN: What interests me and where I work now is this idea of frictionless commerce. What we want to do is try to empower consumers and empower

people to make their own contracts. We've never had this chance before, but the net allows feedback, and I wish that this conference would have had a chance to talk about this.

For example, the P3P proposal allows consumers to create their own standard form, has a privacy contract, and impose that on the supplier. I would urge people who think that UCITA is -- remember, UCITA specifically allows consumers to do this, to write their own standard forms, and it says if the consumer writes it and then imposes it on the manufacturer, it's enforceable, too.

Why doesn't somebody who wants to have consumer protections do what the open source movement did? Write a consumer protection contract, write as many as you want, maybe the FTC will make them all available on their site, and the businesses can then sit down and say -- consumers can say, well, I want to do a deal using this standard form contract, and the businesses can then decide, well, yes, I'll do the deal with you, or no, I won't, or I'll do it on these terms.

The second thing is, we're writing electronic agents to do this electronically. IBM just finished their second conference in which all the tech people are writing agents that will bargain for you. We know

about these shopping bots that go out on the net and they find you the best prices. Well, the next technology is to allow them to negotiate for you if you want, but that demands using standard form contracts, that demands using automated transactions, and those transactions will empower consumers to deal with other sources.

Now, and ultimately, maybe consumers as a group will get together and say, I have 10,000 consumers, this is our form contract for our group, which merchant wants to supply us? Now, there may be antitrust problems there with consumers, I don't know.

So, let me -- am I done now?

MS. MAJOR: Yes.

MR. BRENNAN: Okay.

MS. MAJOR: I have a question for you actually.

MR. BRENNAN: Well, thank you. My conclusion is, we need to reconcile commerce and copyright. I think UCITA meets that goal.

MS. MAJOR: Thank you. Thank you very much.

I'm somewhat confused about the analogy you made with the license that was in the Java book and the software licenses that we're seeing. My impression was that that type of license is a license that would actually extend more rights to you as the purchaser of

that book, whereas licenses that are given with software are licenses that actually take away intellectual property or copyright protection.

MR. BRENNAN: When you say extend and take away, all of these things are a balance in an entire transaction. In some cases, software licenses extend. In some cases, they may restrict, but it's part of the balance.

I have a -- our group is a software developer, we are a beta test shop for Cybase. We get a license from Cybase for their beta test software that says don't criticize our software. In a sense that has restricted my fair use right, but there's a reason for it. They don't want me to go running and running benchmarks of their software in the press because then you deceive the public by running beta test software against complete software.

So, does that restrict my rights? Yes, but it also empowers me to get new beta test software that I wouldn't otherwise see that we can comment on, because that's part of our job.

MS. MAJOR: Professor Cohen, did you want to make a comment about that?

MS. COHEN: No.

MS. MAJOR: Okay.

MR. BRENNAN: I'm sorry, I didn't want to take your time. I'm done.

MS. MAJOR: Okay, thank you very much.

MS. COHEN: I'm in the somewhat awkward position -- actually in two somewhat awkward positions. The first is that I never got the letter with the five questions, so I'm like the Evil Son at the Seder who doesn't even know what the questions are, let alone what they mean, and the second is this chair makes me feel like I'm about two feet tall. So, I will peer over the table and try to say what I was going to say before I knew what the five questions were.

You've probably all heard the example or the joke about the UCITA car that comes from a big three auto manufacturer, or what used to be a big three auto manufacturer before they all merged with the European manufacturers, and it comes with a license. When you buy the car, you can't criticize the car. And even when you test drive the car, you have to sign a little form that says you can't criticize the car, and there are lots of other terms: You can't install the radio, you have to go to an authorized service shop, you can't really install any equipment other than what came from the original manufacturer.

Or think about a UCITA lamp, comes with a

little contract that says you can only use it eight hours a day, you can't use unapproved light bulbs, and you can't use it to throw light for more than one person at a time. And if we can tell that you're doing that, because we have a little sensor in it, and if we see there's more than one person there, that's a use inconsistent with the terms in the contract, so we can just disable the lamp.

These are things that are funny, people are chuckling, except these are things that UCITA allows for software, particularly Section 209, the mass market license section, section 605, the automatic regulation of performance section, section 816, the electronic self-help section. And in the context of software, these are not just funny ha-ha, how could anybody ever do this to consumers. These are intellectual property issues.

Let's think first about reverse engineering of software, say you want to, you know, reverse engineer the UCITA car to make some equipment that would go with it. Click-up contracts, obviously we have heard already today, can and usually do bar a person from reverse engineering lawfully acquired the software. Now, this runs contrary -- we have also heard to the general rule that you can reverse engineer a lawfully

acquired unpatented product, it's fair use under copyright law, because copyright doesn't allow the use of copyright law to protect uncopyrightable ideas and functional principles unless the person has a patent on them.

And trade secret law also allows the reverse engineering of publicly available products. To do that is considered misappropriation of trade secret unless there's a contract, mutually negotiated contract. So, the wholesale distribution of mass market licenses that prohibit reverse engineering and then result in treating a mass marketed product as a trade secret subject to a mutually negotiated contract.

Now, some might say that this does not invert the normal ruling of intellectual property law. The Supreme Court has said in a case called Kewanee Oil vs. Bicron, trade secrecy law is not preempted, and that reasoning was based on two assumptions. First, that that trade secret law is interstitial, is a gap-filler that will not be the preferred form of protection; and secondly, that when people invent something good, they will try to get patent protection for if they can. And you might also toss in a third assumption, the ordinary rule that copyright can't be used to protect ideas for functional principles.

In fact, if every mass marketed software subject to a license that bans reverse engineering, these assumptions and the world view that they reflect is inverted, so that trade secrecy law comes to predominate every copy of a software program that is now subject to trade secret law, even though it's mass marketed, and this -- this radically subverts the premises that the court was relying on, which was that all else being equal, the premises of disclosure and freedom to reverse engineer that are at the core of the federal intellectual property system will prevail, will predominate, will be the form of protection that most people choose.

And this is not a question as to which it's the legislature's job to balance. On the one hand, the benefit you might get from disclosure under the federal system and on the other hand the advantages that you get from trade secret. There's a balancing, but it's not the legislature's job. The policies are constitutional.

The Supreme Court has held that the intellectual property clause in the Constitution requires that you can't remove information from the public domain, you can't use copyright law to do it, you can't use patent law to do it by giving patent

protection to nonobvious, subpatentable inventions, and that's what happens here when you have a mass market regime that extends trade secrecy law everywhere by barring reverse engineering. You have de facto patent protection. It's not the job of any legislature constitutionally to implement such a regime.

And once you have a regime like that in place, Jerry Reichman has written persuasively how it frustrates technological process and competition, it's worth thinking about some other things that can be frustrated. If you can prohibit reverse engineering and prohibit perhaps any criticism that someone might wish to make once they reverse engineer the product and discover there are problems with it, you can subvert not only the ordinary process of competition and the ordinary process by which consumers seek to find out which products are best suited to their needs, you can subvert some other things that are fairly important.

Think about public standards setting processes. There was a much publicized brouhaha a couple months ago in which the Microsoft Corporation developed an implementation of the Kerberas security standard. It's a publicly agreed standard by a publicly accessible standards setting process that is run by members of the computer industry, and Microsoft wrote its own

implementation of this standard, and then some folks started to say, gee, this isn't just an implementation of the publicly agreed standard, this MS Kerberas makes important changes, and so if you get MS Carberose, then you have to have Microsoft server software, and it's a way of co-opting, if you will, this publicly agreed standard.

Gee, Microsoft, we would like to know that you haven't done that. Would you please publish your specifications so we can see whether you've done that or not? So, they did a wonderful thing. It's kind of cute. They put the specification -- Microsoft put the specification on the web, but they wrapped it up in clickwrap, and in order to get through the UCITA specification, you had to agree that everything you would see was Microsoft's proprietary trade secret information, and you couldn't tell people.

So, you could go ascertain for yourself maybe whether you thought that Microsoft was adhering to this standard or co-opting or corrupting it, but you couldn't share the information with others in a meaningful way that would enable them to determine whether you could substantiate that or not.

And an organization or a bulletin board called Slashdot, which is a haven for Microsoft critics,

published or allowed some members to post the specifications in violation of the clickwrap license agreement, and then they refused to take them down, and there was a big dispute, and Slashdot held fast, but if Slashdot had been intimidated into taking down these posts or if everybody had felt constrained by the license agreements in the first place, then all of a sudden you have a world in which yes, you can criticize, but you can't substantiate your criticism by sharing any of the facts that would allow people to make a reasoned evaluation for themselves as to whether you're full of hot air or not, and it's quite easy to set at naught these very important industry practices for setting technical protocols and standards, and I think this would be a bad thing for consumers, and I've gone on record as saying that.

Let's take another example. Let's think now about privacy and let's think about the UCITA lamp that reports to the manufacturer whether you've been using it to light up the desk for more than one person at a time or whether you've been using it for more than eight hours a day. UCITA allows a regime like this to be put in place, and Section 605 of UCITA allows a so-called electronic regulation on performance.

It says it's just to prevent breach and not to

repossess, but that distinction is rather meaningless, because what Section 605 lets you do is back up an express contract term, first of all, with functionality that will disable the software, and it also allows you to incorporate functionality that will prevent you from being inconsistent with the agreement. Sounds kind of like a repossession to me. Maybe you don't lose complete use of the software, but you step over the line, and it's disabled. And you can also use electronic regulation or performance to prevent use after termination of a stated term or event in the contract.

Now, let's contrast this, again, with the way intellectual property law works. As Lorin Brennan told you, copyright law protects the work, not the chattel embodied in the work, but what he got wrong is that copyright doesn't give a right to control how you use your copy. In fact, copyright law is riddled with exceptions that give users of work substantial autonomy over how they use their copies, and they're there, if you will, as default terms in presenting a public policy judgment that copyrights should not control how you use your copy.

Copyrights should not interfere, among other things, with strong property and privacy traditions

that allow people to exercise control over chattels in their possession, and if you go back again to the origins of the intellectual property clause and the early history of copyright, copyright was not remotely associated with use. Copyright was a right to publish, a right to publish copies and sell them commercially, and that's all it was at English law, and that's all it was at first under United States law. Copyright doesn't let you protect use; patent law lets you protect use. Patent law lets you prohibit other people from using your invention, but if you haven't qualified for patent protection, then that's not a right that federal intellectual property law gives you.

Now, if we replace that default regime, which I might add also is substantially privacy protective, with Section 605, we can regulate performance, and implicitly the notion that some information can be collected that will allow you to regulate performance. This substantially constrains the freedom to use chattels in your possession, substantially invades privacy to the extent that the information is collected, substantially threatens individuals' control over intellectual property that they create themselves if access to it can subsequently be disabled, maybe substantially threatens business consumers' trade

secrets if information about how to use the software would reveal some sort of trade secret about how that business itself does business, how that business itself operates, and flies in the face, of course, of other intellectual properties that you've already heard about, such as the fair use doctrine, such as the idea expression, distinction and the notion that one cannot use copyright to protect or prevent use of uncopyrightable public domain building blocks and prevents resale under the first sale doctrine and, indeed, expressly allows the licensor to guard first sale, prevents you maybe from making a backup copy of software.

Instead, Section 614 in UCITA puts the risk of loss of a copy on the licensee, not the licensor. You can just go down the list of copyright default rules that allow latitude to use one's copy as one sees fit and find -- and check them all off, that UCITA would allow them all to be vitiated.

Now, here again, this isn't a place where it's the legislature's job to set this balance. A lot of these exceptions go back to the historical and constitutional roots of United States copyright law, and we can't so cavalierly say that it's simply a job for the legislature. The courts have a role, and the

legislature is constrained. It cannot make the full range of decisions that otherwise might be open to it.

A final -- how am I doing, by the way?

MS. MAJOR: Fine. One more minute?

MS. COHEN: Okay.

Let me say something also about libraries. Some of these restrictions that have been spoken about, clickwrap restrictions, can prevent libraries from exercising rights that Section 108 of the Copyright Act gives them to make copies for patrons or to make archival copies, and to the extent that fair use would authorize other library copying, clickwrap provisions and automatic enforcement of performance can prevent that, as well.

Similarly, if access to a work expires or is withdrawn, Section 605 says the licensor can automatically disable access to the work, and then, oh dear, I'm like in a world where at least you have access once you terminate your subscription to back issues of journals for which you've already paid, you lose it all. You lose even the back issues that were covered while your subscription was valid, as well as any new information that you've decided you no longer want to pay for, and fine, maybe you shouldn't have access to that, but that hardly justifies taking away

the whole ball of wax.

And it bears noting here, also, that some of these resources include things like government documents that are in the public domain, information that has been purchased for public libraries and public university libraries with public money, access now completely yanked away, and that this -- even if you don't go all the the way back to the historical and constitutional bases of copyright law, certainly frustrates some of the important public policy functions that libraries serve.

So, can the fundamental public policy language somehow make all this go away and restore all of these copyright default rules back to where they started? I somehow doubt that's what the drafters of UCITA intended. Otherwise, why bother? So, one more concretely fundamental public policy is a term of art that's been around in contract case law for over 200 years, that you can go back and find 150-year-old cases in which one term or another was invalidated and violative of the fundamental public policy, and what you learn if you go look at those cases is that there's a long tradition of having that exception and construing it incredibly narrowly.

So, I leave that up to you to decide whether

you think that would get us back to copyright default rules, but I can't say I leave it up to you to decide whether the states can just wholesale abandon all these copyright default rules, because the Constitution does not permit that sort of regime.

MS. MAJOR: Thank you very much, Professor Cohen.

We have a few questions from the audience, but since we have only a couple of minutes, I will defer to these questions and go to my own. This is directed to Mr. Brennan.

If a disk contains 200 license terms that you aren't in a position to read, doesn't Professor Reichman's idea of standard default license terms make sense?

MR. BRENNAN: No, because if they're all from different vendors under different sources, everybody has their own business models, some of these things here are right now provided on a shareware basis. Share it, use it, if you don't like it, send it back, please pay me. Others are provided on a license term up front. Pay your license terms now before you can use it. Others are provided on a 30-day test notice. Default terms means that every business must adopt the same model, and that's not valuable for these

businesses.

MS. MAJOR: Professor Reichman?

MR. REICHMAN: No, absolutely not. It's amazing to me as Lorin spoke how much we agreed on and then how much he leaps away to the exact opposite conclusion. We agree that in individual cases you can contract around failures. We agree that you can contract around the prohibition on reverse engineering, and you should. You have two ways to do it. You can either negotiate it up front, as he does with his privacy rules, or you develop a standard form contract that respects the federal intellectual property balance, and you won't have any trouble.

When he says that the legislature has to speak, the legislature has spoken. The legislature has given us all these copyright default rules. The role of the court is to evaluate the conflict between the way you are applying your private interests and the way the federal disposition and policies exist.

Now, if there's a conflict, first of all, the judges will say there's a conflict, and this contract is invalid, so don't use this type of rule. Now, what will happen? Not only will we have the baskets that we had before, but the people who are dissatisfied will go to the legislatures, and they will say, we don't think

this is a good -- that this should be in the green basket, not the red basket, and slowly the legislatures will decide which rules are good and which are bad, and we will develop an information policy based on actual cases and not speculation and not jumping to the conclusion to give one side the right to dictate the terms.

MS. MAJOR: I'm going to ask one more question even though I realize it's time for a break, if anybody wishes to get up and excuse themselves, please feel free to do so, but I think this topic is important enough to go into our break time.

One more question directed to Mr. Brennan. How can anyone shop online and compare, as you say, when you need to purchase prior to seeing the terms?

MR. BRENNAN: Well, the first thing is, we keep talking about this purchase prior to seeing the terms, and the problem is we're having the wrong image in our minds. We think right now that you are buying software when you buy this disk. You're not. You're buying a copy. Bruce Echols says in his book, when you buy the book, there's a separate relationship between you and I, because the copy is separate from the copyright.

So, when you say that you are shopping and purchasing online, you've got to remember, in these

transactions, there are two components, and this is required by federal law. When you go and you shop online and compare terms right now, you can look at the software, see whether or not there's a license there, and examine its terms. One of the things that we're doing now with shopping bots is to create electronic agents that not only bargain on the price but that bargain on the terms.

IBM has created a new program called Common Rules. It is a list of how you disclose offers and acceptances and the terms of contracts that electronic agents can see and understand and bargain for, and I think that's where the technology is going.

MS. MAJOR: Are we though, in fact, even buying a copy, as you just said? You know, we're not buying. You used the word "buying." We're licensing, aren't we?

MR. BRENNAN: Fine, let me answer this. You have now put your foot on the third rail. Do you buy a copy of software online? Professor Reichman will want to add that he and I spent a month in Geneva debating this issue. If you are transmitting a copy online, then the intra -- and the telephone company and the ISP is also transferring a copy, as well, and in the sales law, that means that they are liable for interim

contracts, which means they're liable for default warranties and default rules. The ISPs in the Geneva conference and the DMCA went nuts over this, and the compromise was at least in the international area was you are not selling a copy, you are making it available.

I won't categorize what I think that is in U.S. law. I think the copyright practitioners treated these that they are making available a public performance right. UCITA deliberately does not step on the third rail. We don't take a position, the statute doesn't, on whether or not there is a sale of a copy online. So, all I can say is that is a major issue that I think somebody has to address before you just assume that you are purchasing software online.

MS. MAJOR: Professor Cohen?

MS. COHEN: I think it's a little irresponsible to imply that if we can't have UCITA, we won't have shopping bots and P3P and all these other lovely things. They are really two entirely separate questions. Are we going to have some set of default contractual rules that govern these type of transactions and are we going to have this particular set that we're here arguing about?

It is entirely possible to say, and I think

that Professors Reichman and McManis have also been saying, that it's certainly feasible to have a set of contractual rules that govern transactions in software and information. It doesn't have to be this set. And it's also worth noting that consumers may want to use shop bots and P3P and other lovely things and that consumers will presumably be licensing that technology or be entering into contracts based on that technology, and wouldn't it kind of be a drag if you couldn't find out some basic things about how this technology that's automatically spending your money online is working? I think that's pretty basic information that consumers need to know.

MR. BRENNAN: Can I --

MS. MAJOR: Sure, you may respond.

MR. BRENNAN: Just one thing on that, we talk about that we should explain all the software, one of the issues that comes up right now is we have the love bug virus precisely because Microsoft makes all of their products interoperable, so you can get in and see how they work, and one of the things we have to balance is when we talk about opening up the software, there is a need for encryption technologies, as well.

MS. MAJOR: Go ahead.

MR. REICHMAN: I just have a question, small

question, I didn't have time to write it down for Lorin, I remember your car analogy.

My question was, if I lend you my car for 100 or 1000 years, have I also sold it to you or not, and if not, what's the difference?

MR. BRENNAN: You know, I don't want to talk about Article 2. I'm not an expert on 2. What you're asking me is a different question. If your question is whether or not a transfer of ownership in perpetuity constitutes a sale, the federal circuit already addresses that in the DSC case, and they said that the fact that you transfer a copy in perpetuity is not necessarily an indication of a sale. You might recall that Ray Nimmer was on the opposite side of that and lost that argument. What constitutes an indicia of a sale? There's a whole volume on that, and I'm not an expert on 2-A, Article 2-A.

MR. McMANIS: Lorin, you're getting caught in your own attempt to clarify. If I transfer to you in perpetuity a copy of a copyrighted work, that is a sale of the copy, though it is not a transfer of the copyright.

MR. BRENNAN: Sure, sure, but I think I just said that. Whether or not a transfer of a copy in perpetuity is a sale, you have to look at the

difference in 2-A. I don't know. I do know that DSC said that that was alone not enough to make a sale. What else does? You'll have to look at the individual circumstances.

MS. MAJOR: On that note of perpetuity, we will take a five-minute break and reconvene.

(A brief recess was taken.)

MR. SALSBURG: Okay, we are going to get started.

For this final panel of the FTC's High-tech Warranty Products and Services Public Forum, we are stepping away from the law. As you undoubtedly have noticed over the the past day and almost two days now, almost everybody that you heard from has been a lawyer.

Well, we figured that we should end the public forum on another note, and --

UNIDENTIFIED SPEAKER: Except one.

MR. SALSBURG: -- and let's step back now and realize that everything that we've talked about in the last day and a half may be stale a couple hours from now, and to figure out if that is the case, we have asked two preeminent computer scientists to come join us today, and what we have asked them to do is to put on their thinking caps, something that we lawyers may not be able to do at times, but to put on their

thinking caps and come up with some technological solutions to some of the problems that we've been discussing here.

The two computer scientists are, first of all, on my right, Dr. Shirley Becker. Dr. Becker is a professor of computer science and software engineering at the Florida Institute of Technology where she is the co-director of FIT's Software Engineering Research Center, and her research includes web usability and testing, web enabling technologies and database systems, and we're thrilled to have her here.

The second computer scientist here is Dr. Ben Shneiderman of the University of Maryland's Department of Computer Science. He is the founding director of the University of Maryland's Human-Computer Interaction Laboratory, and his pioneering work on hypertext user interfaces contributed to the formation of the worldwide web, and I know we have heard that about somebody else, but with Dr. Shneiderman, we know it's true.

So, with that, Dr. Shneiderman, why don't you take it away.

MR. SHNEIDERMAN: Thank you. Thank you to Dan Salsburg, April Major and the FTC for giving me to opportunity to speak here and thank you all for staying

the course here late in the day in the second day.

My two apologies are that I couldn't join you until later this morning, and I've enjoyed these sessions and the lively conversation and the congenial atmosphere in spite of a highly contentious issue.

I guess in that light it's important to repeat that I am not a lawyer and that -- but I'm learning as fast as I can, and the invitation to join today -- hello -- there we go, okay -- and just to give you a perspective about where I come from is as a professor of computer science and for 17 years leading this interdisciplinary group of computer science and psychology mainly in trying to study in a more rigorous and scientific way how people use computers, and the group in recent years has been combined with information studies and education as other units.

The basic pitch here is to make a scientific approach to get past the arguments, my system is more user friendly than yours, and to study specific classes of users for specific tasks and make a theory-driven hypothesis and testing approach to it so that we might measure the time it takes for a specific user to accomplish a specific task.

For example, reading a license online in a small dialogue box, just to choose an example, and then

monitering their retention over time as affected by the design barrier.

We have also -- I didn't want to -- let me clarify that these are, you know, performance-based measures on human subjects, and in addition, we do have preference and subjective satisfaction, we've developed a standardized questionnaire for user interface satisfaction that's been licensed to more than a hundred users around the world, and so we do try to understand both the subjective preferences as well as the objective performance on a variety of tasks.

Also, understanding the range of individual differences, how much would an experienced lawyer, you know, how long would it take for an experienced lawyer to read a contract as opposed to a novice user without the legal skills? So, those would be distinctions that we would, you know, be interested in finding out about.

The whole story is in this kind of book, and again, my credentials are the third edition of this book, so this field has been emerging, first it was in '86, by now this is '98, and so it lays out the territory of this emerging new discipline of human-computer interaction, as it's often called in academic circles, and its practitioner's point of view, often called usability engineering, which is emerging

as a separate discipline. Independent professional societies have emerged in each of these areas, and possibly about a dozen journals that cover these topics on the academic side and on the professional side, as well.

In addition to our own book, there's lots of web resources that have materials, there's hcib.org, has more than 20,000 articles, full text abstracts, so there's a substantial literature in this area. In fact, in order to respond to the question of Daniel Salsburg and April Major, which was to look specifically at the question about the difficulty users might have in reading on the screen in a small text box scrolling window, I have brought you a little bit of a bibliography for you about readability on screens that may be useful for you.

And I think the basic issue is not going to be surprise and shock you, but that larger boxes do reduce the cognitively disruptive scrolling and reorientation. It's a result that's been found in many different circumstances, although not to my knowledge has anyone studied the reading of legal licenses, but here, this was a quickly available result from a student project in my class, which is on the web of this class, as well, and you can read it out there, that if you have a

large window for this task, it took nine seconds, on average, and standard deviations are shown there, as well. With a medium-sized window, it dropped to eight seconds and -- I'm sorry, the time dropped to eight seconds, and with a large window, the time dropped further to six seconds. There are accuracy results, and I could go on at length.

There are other papers that I brought along that, you know, basically confirm those kinds of results, that the size of the fonts are a factor. Small fonts are harder to read. Contrast matters, as well, and so often these license boxes will be small, black fonts against a gray or, worse, a dark gray background, which further degrades the reading.

Now, you know, in a legal point of view, does that prohibit reading? No, it only slows down and disrupts the reading by 20, 30, 40 percent, let's say, and so it might make it more difficult for someone to go through a document. And certainly the small screen size and the constant interruption of having to scroll disrupts the cognitive processes of understanding the content and reviewing and returning to earlier passages to understand definitions.

So, the narrow question that you've asked me, I do want to bring support, and the simple technological

aspect to that would be to, you know, provide larger windows and make it easier to study the document. But I wouldn't say that would be a remedy for the problems that you're addressing here, and so I will broaden the circle to say, you know, more familiar terminology and simplified phrasing would enable more users to understand the content.

Now, you know, here is a printed document of a software product, and, you know, in black bold letters it says, "If you do not have a valid license for da da da da da, you are not authorized, double negatives, to install a copy or otherwise use these components," and it goes on in, you know, fairly complex language and technical terms to describe that.

Others, you know, that I printed from websites, and I will cover the name of the company, but, you know, it just goes on page after page, proprietary rights, fees, terminations, high-risk activities, et cetera, and it's just not clear to me that most users of mass market software with capacity to comprehend the implications of it, and so although I'm not familiar with the legal doctrines, it's not clear that they're entering in a proper agreement if they can't understand the terms of those agreements.

So, simplified phrasing, better terms, would

enable more users to understand the content, and, you know, another kind of technological fix would be a requirement of a usability test of the contract. What number of a typical sample of readers have understood the terms in this contract? And a sample might be taken, as is done for the normal software, and then you would have some sort of assessment, and you might want to set a standard that's -- and report that 19 of 20 typical users were able to read this contract and answer basic questions about it.

The capacity to copy, print and send the licenses to others would enable consideration and consultation. That would also open it up and make it a lot easier for people to assess these. Some of the contracts are only readable in that document window at the time of opening, and I asked several people, and maybe I should ask those with laptops here, can they find the license for the software they're currently using? I don't -- we did after some effort, but if you look in common software, you'll find it difficult, if not impossible, to find the license agreement that goes with it. So, that might be another area, again, of making accessibility more possible.

Did I see a hand?

UNIDENTIFIED SPEAKER: It took an amendment to

ensure that it's available after you click.

MR. SHNEIDERMAN: Okay, so available and in ways that would be customary with other documents that people could copy them, print them, review them, share them with others, ask for legal advice from others and join in the discussion of those.

So, again, I'm focusing here on the narrow response to what you're saying, and these would be, I think, things that would be helpful. But if I broaden it out, I am standing here before you because I think we can do a great deal more to improve the quality of mass market software, and I bang on tables and say it's time to get angry about the quality of software and that I think efforts to improve the quality of software would reduce the tension in this very, you know, this contentious area, the lively battle over this license issue to me is symptomatic not only of the legal issues but that the fact that so many people are so frustrated, confused, anxious and troubled in the use of their software.

One survey of 6000 users reported that on average 5.1 hours per week were wasted in trying to figure out their software. That's more time than is spent on the highways and, you know, in traffic, and that makes it a national priority and a concern for

every one of us, because as we talk about innovation and increased productivity, we might suggest, also, that we are restricting the creativity of people and their efforts and their productivity because the quality of the software leaves them, again, confused and frustrated and anxious about using the software, that they underutilize features that are available.

And so, my primary argument to you is to improve the quality of software and that might reduce some of the conflicts that appear here. I was quite sympathetic to some of the earlier suggestions of having gradations of conflict resolution, and that would also help sort things out.

The second is increasing access to customer support might create more sympathetic environment. The studies show 200 million calls to customer support lines and average wait time to get beyond acceptable so that most users don't even bother to call, and so we have an environment in which the consumers feel further frustrated, therefore further angry at the supplier, and I think the suppliers would be the greatest beneficiaries of improvements to the quality and improvements to the service.

Then, more provocative things, more accurate reporting on user experiences might clear the air and

speed improvement. Now, maybe things are better than I suggest, and I would love to have the data. I have inquired, pushed and prodded manufacturers and other sources, but I have not been able to collect the information about the rate of failures, the struggles that people have and the problems that appear. We just don't know how bad it is.

Now, in other disciplines, like airlines, we expect public reporting of the -- you know, the airline delays and the frequency of delays. We'd like to have the same kind of reporting for software. Which software tools are doing great? Which ones are not so good? Which parts of those tools are giving the most trouble?

And it's been my suggestion, which the journalists like but the manufacturers think is outrageous, which is that every time you get a dialogue box that you don't understand or you're confused, there's a little button that you click, I don't understand, and an e-mail is sent to the manufacturer who then logs that, you know, that point, and you get to know where the problems are.

And I suggested that consumers receive a nickel every time they're confused, and possibly -- and, you know, towards purchase of new software from

the manufacturer. I think it would be great. And every time the software crashes, you get $1.

Now, we expect that from ordinary restaurants, where I had a waiter to spill some soup on my pant's leg, and they offered to pay my dry cleaning bill and gave free desserts to everyone -- to the four of us at the dinner table, and we expect certain rules of help from airlines if we're delayed, and there are compensation strategies, and I think if we have raised that expectation of compensation for frustration, loss of time, in an orderly way that protects the needs of manufacturers, as well, and it could be, again, as a credit towards future software purchases, we would begin to get the data about where the problem is and how much progress is being made to improve it.

Now, this is a very courageous thing for manufacturers to do, but I think this would win the public trust and would make the -- and would make the software better.

Ultimately, that's what we're after, right? And I think the dual things of making the public's experience superior would also benefit the manufacturers where customers would be more willing to use more of the products, more willing to upgrade more rapidly, because their trust is so shaken and so poor

that they're unwilling to go along too quickly with what the manufacturers supply.

So, the compensation for failures, again, restricted, limited ones, but clear ones, not ones that damage the company, but that satisfy and respond to the needs of the consumers. They might encourage customer loyalty and decreased litigation.

There's a very nice study in marketing of laptops which showed that consumers who had a problem with their laptop which was serviced promptly and correctly were more loyal in their next purchase of those software -- you have seen that study, too, right? And I think we might expect the same kind of attitude and presentation from software vendors.

Now, my, you know, circles of interest are growing here, and the more broad thing I want to suggest here is the forgotten users and the people who are so disturbed by what they get that they do not even participate or they can't participate. The usual community is the disabled users, and the Americans with Disabilities Act has done some effort to make that better -- to make a better situation for disabled users, but I suggest that the problem of user frustration and remorse is a very large one and that there are many disaffected, forgotten and nonusers,

while the Census Bureau's recent study shows continuing increase in use of the internet and computers. Just last week they reported about the digital divide falling to the net. The recent report shows progress in this country, there is a discouraging disparity between well educated and poorly educated and rich and poor in this country, and so it's my claim that there are three challenges that the developers of software should face boldly in terms of making their so-called every-citizen interfaces, the title of a National Academy of Sciences report, and if we're going to consider the idea of electronic voting and electronic government services, as the State of Maryland is rapidly pushing to do, then I think these issues must be directly addressed.

The first is technology variety of supporting a broad range of hardware and software to make it possible for users with -- to allow them an access to support greater diversity in who the users are, and then the tough one of bridging the gaps between what users know and what they need to do.

So, a quick slide on each of these themes. The dark side of Moore's Law is that if you're a software developer using the latest machine, most of your users have a machine that's eight or ten times slower than

yours, and how do you design for that environment? That if you're sitting on a ten meg bit per second line, how do you design for a 56K or slower delivery? And it is my firm belief that you can produce a good, not identical, but a good and successful experience at slow band widths and slower processor speeds.

Similarly, we see the sort of benefits of dealing with a wide range of screen sizes, from -- I visited IBM Yorktown two weeks ago, and there's a 640 by 480 watt size display, which, you know, will be the kind of tools many people will use, but certainly palm devices, laptops or larger displays will provide a range, and we should ensure that both on the high end and the low end that the -- we have a sufficient plasticity at this in the interface designs to accommodate the growing range of technology, and as you suggest, things are changing very rapidly. And, also, to have software version accommodation.

My sister who's an English professor, received an e-mail from a colleague, and they had the same word processor. She made some changes to the document and e-mailed it back to her colleague, who could not open that file. After a couple of days of their exchanges, my sister sent me the old version, the new version and all the correspondence, two or three days later, after

I found out which version, who got what and what was going on, it was clear that although it was made by the same manufacturer and was the same icons on the screen, it was a slightly later version, and the later version saved it in a different file format, the old version could not open it. Nobody got any messages that clarified what was happening, and, so, they were stuck, and the three of us had spent three days and six to eight hours trying to resolve something that shouldn't have happened.

And we have lots of these anecdotes or stories of things that shouldn't have happened, and every technology person can provide you a solution, yet we just don't see those being implemented sufficiently widely.

The diversity issue is a growing concern as we try to satisfy the demands of crossing the digital divide, of people with low reading skills, of people with low computing skills, and possible poor English skills, with young and old, et cetera. We need to better understand how to serve these diverse communities.

And, finally, the great challenge, which is to bridge the gap between what users know and what they need to know. Certainly, an appropriate issue in the

understanding legal documents, but in every field, as we were trying to understand managing our retirement accounts with a well-known broker, we could not understand the terminology they were asking to issue a trade, we could not get the information out of their online glossary, and we had to struggle with those kinds of things.

So, here I'm asking for further research and development, and to my dismay, there's actually a drop in research on these topics in the last ten years. It was a livelier topic earlier, in -- in the early 1990s, but we've seen less satisfying developments recently.

So, I close with this inspirational quote from Thomas Jefferson. "I feel an ardent desire to see knowledge so disseminated through the mass of mankind that it may reach even the extremes of society, beggars and kings."

He would have been trying to cross the digital divide, and we have got about seven or eight years to satisfy the 200th anniversary of this quote to try to make him an honest man.

So, I invite you to join the conference here in Washington, I have a few copies that I'm organizing chair of, on universal usability and develop these strategies and technologies and come visit us at the

University of Maryland to see what we've been doing. Thank you for your time and attention.

(Applause.)

MR. SALSBURG: Thank you.

MR. SHNEIDERMAN: Should I take questions?

MR. SALSBURG: Why don't we have Dr. Becker go ahead and do her presentation, and then we will take a few questions.

MR. SHNEIDERMAN: Okay.

MR. SALSBURG: I'd offer assistance, but I assume your background --

MS. BECKER: This is what happens when you don't bring your own machine.

Last week I was out at the jet propulsion lab kicking off a project with scientists out there, and though we were in the same room speaking English, we had some difficulty with terminology, and so I feel somewhat the same way here today, and I would like to apologize if I use some terms incorrectly, but hey, I'm a techie, what can I say?

So, what I would like to talk to you today about is what we call web usability issues, and we'll take a look at them in association with warranty information. Let me explain a little bit about this talk today.

We have an e-commerce concentration at Florida Tech, and I'm the director of our e-commerce research team, and, of course, the students cleverly came up with this title of E3 and we're the Power of E, so we have gone out and done quite a few commercial usability -- web usability assessments for companies. We continue to do that. We also have some large commercial grants to continue our work in web usability.

So, with that said, I just wanted to briefly show you this model that we use in the sense that when we look at a website, we evaluate a lot of usability factors, and they range at the top from design layout, navigation, design consistency, all the way down to information content, performance and accessibility, and in 20 minutes, I certainly can't address all of these, but I am going to talk about them from our survey of what's out there on the web.

Last but not least, before I go on, I just want to point out that in this model, whenever we do a usability assessment, we take into account the target user, and so you see in the corner there that the user profile is typically considered in the results of this usability assessment, and Dr. Shneiderman also alluded to that fact, that we need to take into account that

we're in a global marketplace, as well as we have lots of differences in terms of ages, gender, computer skills and such.

Okay, so, let's just jump right in here and talk about some of our informal findings on web usability when it came to looking at warranty information on the web, and we each took a look at these five usability factors. Though I will try to isolate them somewhat in this talk, you will find out very quickly that they are very integrated. So, when I show you one usability factor, for example, design consistency, it also could relate to information content.

So, design layout takes into account typically the web objects that you find on a page, and that means that when you go to a web page, that you can find what you're looking for. It's very identifiable, it's easy to find, and we evaluate things such as font size, good use of white space, those kind of things, when we look at the design layout.

Design consistency really relates to the look and feel of each page across pages and then across websites. So, when we're talking about warranty data, we would like to take a look at some consistency factors associated with the look and feel of websites.

Navigation just relates to going back and forth throughout a website, and we will take a look at an example of that.

Information content is a biggie. We want the user to be able to understand what is found on a particular web page, and here's a little trivia for you from creative good.Com, they do quite a few commercial evaluations of e-commerce websites. In the business-to-consumer world, which is primarily what I'll focus on today, users spend typically seconds on a page and minutes on a website and typically the user cannot find what he or she is looking for, they're out of there, and -- he or she is out of there. And I think you know what I've mean, because you've done that. You've gone to a website, looked for your information, or it's unfriendly, whatever, you're not going to stick around, okay? So, we know that's the case, and yet when we look at warranty information, hmm, we certainly haven't taken that into account.

And last but not least is accessibility. Typically accessibility relates to not only all of us but it expands into individuals that are visually impaired and such, and though I won't address that today, it is important to know that warranty information should be readily accessible for all

individuals using the web.

So, with that said I'm just going to start out by pointing out some aspects of what we found, and let's start out with design layout. Now, this might be pretty obvious to you, that when you look at this type of information on the web that we use upper case and italicized text as if that's going to make a difference in our world. It's overused.

The other thing that's come up before is the microfont text that those of us that are somewhat visually impaired and even those that aren't can't really read it. So, those are pretty obvious. But more importantly, it gets back to how long we're willing to be on a particular web page, and informal studies have shown that when we go to an e-commerce site, and again relate to your own experience when you go to amazon.Com, there is a lot of textural information that you don't look at. If it's not right there, concise, clear and easy to access, many of us won't read it.

Information content. I took out this little one-sentence licensing agreement information, and this gets back again to design layout, that has to be meaningful and readily accessible to the visual. I highlighted some of the words that I thought, when we

talk about solutions, I highlighted some of the words that I thought many consumers would not understand, and they would want to perhaps be able to look them up and get information about, well, what the heck does nontransferable mean anyway?

Information accessibility. Many of the sites that we visited, it was virtually impossible -- and I say virtually impossible, because we don't hang around a website very long, but it was very difficult to find the information, and so, basically, what we do is we might look for it for a little while, and then we just leave -- or we'll purchase a product and rely on the way we shop physically, and that is to buy the product, bring it home and open it up.

It's interesting that we've talked about how this notice is typically in sealed packages, and it occurred to us how easy it would be to put this online so that we would be aware that before we opened the product that we would be bound by the terms.

Here's another thing to consider, when we talk about costs associated with online shopping, this hasn't come up from the talks that I've heard, what about the cost of returning the product? So, if you purchase product online and you decide you don't want to live with the licensing agreement terms and you

return it, guess what? You're not going to be reimbursed for the postage.

So, these sites that I'm showing you are business-to-consumer, that simply means that you all have access to these sites on the web, and so for illustrative purposes, I've picked Egghead.com. I actually picked Egghead because it was one of the few sites that actually showed us warranty information, so we were very impressed.

If you take a look over in the column, see we have warranty under more information, so it looks very promising. So, I clicked on warranty, and let's see where we go with it. Here's page 2, and it says on the top, oh, it's a warranty -- it's Egghead.com's warranty, and I need to keep going, I'm going to click here for manufacturer warranty information about this IBM -- I'm sorry, Microsoft product that Egghead's selling. So, I'm going to go ahead and click on that. Oh, my goodness, I'm on page 3, and you don't see Microsoft's -- the product I'm looking at here, because I wanted to show you the top of this page, but basically I can call the manufacturer or I could continue on, and some of these have links, and Microsoft had a link, so I clicked on it. Page 4, here I am at Microsoft's website. Do you see warranty

information anywhere? Hmm.

So, I continued on, but needless to say, many consumers won't, and after a few more sites, I actually gave up and didn't find the warranty information following this path, though it is available.

Design consistency was quite interesting, because websites vary extensively in the availability, the location and the contents of warranty information. Let me just point out quickly that I did go to one website and decided to use their real chat box to ask them if I could obtain Microsoft's warranty information.

So, this was a business-to-consumer website that was selling other vendor products, such as Microsoft's millennium products that we saw here, and so I sent off a message, and the first time the chat box crashed, but the person really didn't know what I was talking about. So, the next time I got the real chat box again, keyed it in, said could I get more key information about Microsoft's product, I would like to know about it before I purchase it, and they sent me Microsoft's toll-free number. So, that was the end of that real chat.

So, we take a look, for example, at some screen layouts, this one is IBM's, and I just want to point

out IBM, too, has a space here for warranty information, if you notice on the bottom. It actually almost provides us information about the manufacturer's warranty, and it's almost too bad, because the design of this table is very clear and easy to read, and if we did have some links, this would be very user friendly.

Here we're at Oracle. Now, Oracle is a bit different, in a sense that Oracle is selling Oracle products, and the others that I showed you were selling other vendor's products. Now take a look at this. I wanted to download one of Oracle's database systems, so here I am looking at these license terms, and they are kind of scary, actually, but I have to check all the boxes, but oh, yeah, I can do that, and then I couldn't fit it all on one page, so I'll show you here.

By the way, I thought this was an interesting question, what happens when I check all these boxes? Where does that information go? Is anyone storing that information about me? Gee, I don't know.

And here's a second page. This is a scrollable box, and one of the team members pointed out that you could go in and edit this box, or so you think. So, I did go in and cut out all the terms that I don't really like. Now, it doesn't go anywhere. It visually shows it cut out. It doesn't change the terms, but it let's

me do that, and then I can click "I accept" or "I don't accept," but what terms did we accept? I don't know.

That's a lot of jargon, a lot of terminology, that I really would like to look up, and there is nowhere to go. Here I'm back at -- I'm just -- I'm sorry, I can't remember this website, but I just wanted to show you that the design inconsistency, again, here we have components, highlighted headers, and then instead of clicking on buttons, I am clicking on links.

So, now I am going to talk about suggested improvements, so I hope you keep in mind that I am a techy, and my research team, we are all techies, and we view the world perhaps simplistically, but we view it through our technology eyes, and that includes redeveloping e-commerce sites in our classes, so that includes database technology as well as all the technology that we see here.

So, we were thinking, gee, wouldn't it be nice if since we are database people and we like building databases and, in fact, we do databases as relatively simple tools in technology to use, why not store warranty information in one place?

Now, vendors might complain, Egghead or buy.com might complain that if they had to store all that vendor information that it might be a hardship for

them, and, in fact, it might be redundant, and it could quickly get out of date. Well, heck, then, let's link to Microsoft and Microsoft could store their warranty information, but the link would go directly to the warranty information, and we could design the website so I come back. I forgot to point out earlier that when I went to Microsoft's website, I left Egghead.com, and I don't think Egghead.com would really like me to leave their website, but I did. So, we could get around that very easily.

And the other things that we thought would be very interesting is to have a database of terminology that we could link to so if we did highlight some of those words or if you told the user there was a glossary of terms, then we could go to a centralized database where we could look up some of these terms, and that would simplify some of the wording on these licensing agreements in the sense that we could go look them up.

We also thought that we could come up with a set of standardized license types. Now, what I mean by that is, as we went out and looked at various license agreements, as you would expect, they vary in complexity, and we thought that perhaps there could be just templates of types of licenses so that we all as

consumers could start to get to know those types in a very general sense.

You know, in technology, we have to be mutually beneficial all the time. We have lots of protocols, and we figured out how to do it in communications, in using these web browsers, in almost every aspect of technology, we have come together, and we have standardized HTML and many other things, and in that sense, it becomes very mutually beneficial. So, we're just thinking why we couldn't do that here.

So, continuing on, we had considered the food industry not so long ago was in an uproar about simplifying packaging information that was provided on the outside of the food product, and you know what, it's become an implied standard for all of us, and we all use it. It took a while, but we use it.

So, would it be difficult? We looked at IBM's table format. Could we provide certain information in an easy and meaningful way to present on a website? And we could always provide a longer version, if necessary. So, if we went that route -- this is really a super long run-on sentence because legally it was important, then we could make that available, too.

So, here's just an example from Egghead.com, again, they have provided a minimal amount of licensing

agreement information, and so this is just food for thought. Why couldn't we use something like this and just come up with some templates that the consumers would start feeling comfortable reading and using. Well, this is actually -- it continues on.

And here I didn't have time -- I couldn't find any little computer icon, but we even thought we could take it a step further and maybe come up with some standardized icons. You know, when we go to your web browser, we all know what the back button means. There is no ambiguity there. So, could we perhaps, because a consumer spends seconds on a particular web page, could we perhaps think of some common icons that would represent, for example, multi-user licenses versus a single user license?

Could we come up with some standard headers? Perhaps we could come up with some standard buttons or agreeing or disagreeing with the terms. Navigation I think is pretty obvious, that we need to get that information and make it available with as few a links as possible.

And last, but not least, we found this demo site of a company that I thought was pretty innovative, and if you notice in the middle there it says -- maybe I marked it -- no, I didn't. In the middle it says,

good-bye -- let see, good-bye to time wasted trying to order and receive licenses via traditional means. Hello sanity. And if you go here, they use icons to represent the companies, and you can go and make an informed buying decisions by linking to the software licensing product information, and when you click on that, guess what? You get information in a meaningful way about each kind of product.

Now, I'm only showing you Microsoft here, but if you notice, it gives you information about the license agreement in terms that are pretty understandable, and though I don't show it on the bottom, I ran out of space, notice on the bottom they are showing some options. So, the goal here is to be able to compare products by licensing agreements instead of the traditional way where you compare products first and then maybe you have information available about licensing agreements. So, this is a different search mechanism and a whole different way of viewing buying software products.

And last but not least, we felt that though this is beyond the scope of the talk today that we have all become very insensitive to warranty information. In fact, one of my students was telling me that she downloaded Gnapster and then she said, oh, please don't

tell the forum about this, but I'll tell you anyway.

If you download Gnapster, and this is true of other sites, they will give you the licensing agreement box, and they think by forcing you to scroll all the way down before -- before you click an "okay" that you're going to read it. In fact, if you try to skip scroll all the way down and click "I agree," it tells you you didn't scroll all the way down to the bottom.

So, I asked my students in e-commerce class, I said, well, how many of you actually scrolled down and looked at the text? Oh, none of us, we just scrolled down that scroll bar and clicked I agree. So, I am going to end on that note to that. I think we have all got to the point where we just pretty much ignore warranty information when it isn't made available to us.

Thank you.

(Applause.)

MR. SALSBURG: Dr. Becker, if a consumer were to see the warranty information, is there a way to ensure that that information would still be available on the web later when something went wrong, that the link that they looked at hadn't changed?

MS. BECKER: You know, we talked about this back and forth about where should this information be

stored. Should the -- for example, Egghead.com be responsible for storing information about whether the consumer agreed to the product or -- the terms of the product or not, and we concluded that on the shopping cart page, it's just one little flag field that you would store with that shopping cart page saying, Yes, I ordered this product, and I ordered a quantity of three, and yes, I checked I agree to the licensing agreement information. It's that simple. I mean, it's my technology that's saying -- my technology brain saying it's that simple. And I think that's where you would store that information. You wouldn't go back to the original vendor, such as Microsoft, and require them to store it. It just doesn't make sense to do that.

You'd also want to store it on the site selling the product, because if the product is returned, then you would have that information available to you, and as Dr. Shneiderman pointed out, we have an opportunity now to start gathering this historical information about why did individuals return the product. Did they return it because of the licensing agreement? And believe it or not, people do return products because of the licensing agreement, maybe not very often, because not many of us are reading it, but it does happen.

MR. SALSBURG: How expensive would it be for a webber to maintain the information about the warranty that any particular consumer would have agreed to?

MS. BECKER: From my perspective, it would be just minimal, minimal. The design implications on the front end would be minimal. I mean, we're talking about adding a field and some textural information to be displayed. That cost is minimal. We're talking about altering a very small component of the underlying database, the impact is minimal. Is that specific enough for you?

MR. SALSBURG: Sure.

Dr. Shneiderman, we had a couple questions come up here that are along the same theme, and what the questions ask essentially is there are people that have claimed that software is inherently buggy and therefore is different than other types of goods, and so warranty -- the cost of a warranty doesn't make as much sense. Is that something you subscribe to?

MR. SHNEIDERMAN: I think some software is buggy, and certainly when something is announced as being beta that, you know, then I would expect different levels of expectations, and so we might have that made more explicit in the law, that early versions of new software get one form of protection, but then

things that are mass marketed, we have a right to expect a higher level of performance and disclosure about problems and openness about it. So, making a multiple level approach is reasonable.

I do not accept the idea that software is inherently buggy. I mean, it's -- software can be complex. There may be some minor problems. There may be a lot of different issues there, but I think, you know, making those issues more public and having a higher quality for the mass market materials should be an expectation that consumers have.

MR. SALSBURG: Do most software manufacturers currently disclose known bugs?

MR. SHNEIDERMAN: I don't know. I don't know. Most software -- I would say probably not, probably not. You can find fixes for the things that they have identified and patches and replacements and they'll inform things -- inform you about things that are available, but not for the things that they know about but haven't prepared a fix for them.

MR. SALSBURG: Well, thank you both for a wonderful presentation.

(Applause.)

MS. HARRINGTON: Well, we've reached the end or that's what you think, but we actually wanted to keep

you here for another few hours. We have phantom panelists in the hall. No, thank you all very, very much for coming, for listening, for thinking, for providing so much material for us to now pour through and digest. This last panel was terrific. I am really delighted that we ended with the tech people, and I'm a lawyer, so I can say that I was listening and I thought, maybe we just need to bypass the law on this entirely and get with some of the people who are working in applications and practical business here to come up with some models and see if we can promote them. At the same time that we are trying to ponder the legal issues and come to the right conclusion.

Many of you have asked over the last couple of days of those of us on the FTC staff, well, you know, so what's going to happen next? And the answer to that is, well, I don't know. We are very -- we're being very candid when we say that we asked you all here, we asked you to make submissions so that we can learn, and that is what we are doing.

We are studying this vast amount of material that many of you have helped us to accumulate. We will be reviewing this transcript probably synthesizing it for our own purposes. We will continue to be very interested in how the development of different state

law models relates to federal warranty law and very interested in how the development of products, mass marketed consumer products in this area raises questions about the adequacy of federal warranty law, and we will be, as we see these issues, certainly coming back to many of you to help us think through whether there is something that the Federal Trade Commission should be doing or not. We really don't know that there is a next other than continued thinking and studying.

So, thank you very, very much for coming. I want to also thank April and Dan and Carol, who have done such a wonderful job of putting this framework together for us to study and learn and to all the folks here at the FTC who have helped in many, many ways over the last weeks to get ready and have this seminar. So, thank you very much, thank you for coming, and please call us if we ever can be of any assistance to you. You certainly have been of great assistance to us.

Thank you.

(Applause.)

(Whereupon, at 4:52 p.m., the conference was adjourned.)

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C E R T I F I C A T I O N O F R E P O R T E R

DOCKET/FILE NUMBER: P994413

CASE TITLE: HIGH-TECH WARRANTY FORUM

DATE: OCTOBER 27, 2000

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: 11/8/00

SUSANNE BERGLING, RMR

C E R T I F I C A T I O N O F P R O O F R E A D E R

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

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