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NOTES

UCITA: UNIFORMITY AT THE PRICE OF FAIRNESS?

*Ajay Ayyappan**

“At the development’s start, both the insight and experience necessary to create a statute are lacking. A statute passed under such circumstances is a far greater misfortune than any misstep taken by a case law court.”¹

INTRODUCTION

Fifty years ago, Karl Llewellyn and others drafted the Uniform Commercial Code (“UCC”).² The UCC was initially adopted to reflect the transition of the American economy from one based on agrarian production to one centered on the sale of goods.³ The UCC’s primary goal was to simplify the law governing commercial transactions and to make that law uniform.⁴ In this respect, the UCC has been hailed a success.⁵ All fifty states have adopted it to varying degrees.⁶

The UCC, however, is beginning to show its age as the American economy has again evolved.⁷ The modern American economy is

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1. Karl Llewellyn, *The Case Law System in America* 67 (Paul Gewirtz ed., Michael Ansaldi trans., Univ. of Chicago Press 1989) (1933).

2. John M. Breen, *Statutory Interpretations and the Lessons of Llewellyn*, 33 *Loy. L.A. L. Rev.* 263, 267-68 (2000) (noting Llewellyn’s role in the development of the UCC).

3. Raymond T. Nimmer, *Images and Contract Law—What Law Applies to Transactions in Information*, 36 *Hous. L. Rev.* 1, 17 (1999); see also Pratik A. Shah, *The Uniform Computer Information Transactions Act*, 15 *Berkeley Tech. L.J.* 85, 85 (2000) (discussing the original role of the UCC).

4. Maureen A. O’Rourke, *Progressing Towards a Uniform Commercial Code for Electronic Commerce Or Racing Towards Nonuniformity?*, 14 *Berkeley Tech. L.J.* 635, 646 (1999).

5. *Id.* at 647.

6. *Id.* at 647 n.46.

7. Raymond T. Nimmer, *UCITA: A Commercial Contract Code*, *Computer Law.*, May 2000, at 3, 3 [hereinafter Nimmer, *UCITA*] (“Our economy today has

primarily centered around information and information services.⁸ Computer information transactions constitute a crucial part of the new economy. These transactions involve service contracts and the licensing of intangible goods, areas the UCC's antiquated provisions are ill-equipped to address.⁹ For example, the UCC fails to cover common situations such as the licensing of software¹⁰ and the enforceability of shrink-wrap licenses.¹¹ This legislative gap has forced courts to apply the UCC to transactions it was never meant to address.¹² The following hypothetical illustrates the current dilemma:

You walk into a retail store and purchase the latest word processing program for your computer. After bringing the software home, you tear off the shrink-wrap and open the box. Inside there is a piece of paper written in a font so small you can barely see it and in language so dense you can barely understand it. Tossing the paper aside, you proceed to install the program. Shortly thereafter, you are interrupted by a screen prompt asking you to agree to various terms that resemble those on the paper. Seeking to use the program immediately, you click through all the prompts. A few days later, while using the software, it malfunctions and your files are corrupted.

What are your warranty rights in this situation? Will the software company fix your files and replace the program? If the files contained crucial data for your small business can you sue for damages? Are you bound by the terms in the shrink-wrap and click-wrap licenses? Unfortunately the answers to these questions cannot be found in the UCC. The UCC warranty provisions have been inconsistently applied to software transactions.¹³ Indeed, some courts and commentators argue that the UCC itself is wholly inapplicable to these transactions.¹⁴

The Uniform Computer Information Transactions Act ("UCITA") is a legislative attempt to remedy these situations. Originally proposed as Article 2B of the UCC, UCITA was intended to be a link between the UCC and the new information economy.¹⁵ During the drafting process, however, serious disagreements arose regarding

experienced another fundamental change: the information revolution. Information and information services are now the center of the economy.").

8. *Id.* (noting that "[a]mong the changes [in the economy] that this causes is a wildly diverse array of methods of distributing and tailoring digital information to form information products and resources that fit the modern marketplace").

9. *Id.* ("Article 2 works well for sales of manufactured goods, but was developed 50 years ago for goods, not for commerce in computer information.").

10. *See infra* notes 33-46 and accompanying text.

11. *See infra* notes 261-81 and accompanying text.

12. Unif. Computer Info. Transactions Act, Prefatory Note (July 1999 Draft) [hereinafter UCITA].

13. *See infra* Part I.

14. *See infra* notes 38-74 and accompanying text (discussing the controversy over whether software is a good for the purposes of UCC coverage).

15. Michael L. Rustad, *Making UCITA More Consumer Friendly*, 18 J. Marshall J. Computer & Info. L. 547, 547-49 (1999).

several of the proposed provisions.¹⁶ Much of the criticism concerned what many groups believed to be the anti-consumer/pro-industry stance of the statute.¹⁷ Eventually, the American Legal Institute (“ALI”) withdrew its support of UCITA because of its pro-industry stance, and the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) proceeded on its own.¹⁸ The project was then renamed UCITA.¹⁹

UCITA suffers from the same criticism that plagued Article 2B.²⁰ The statute’s warranty provisions have come under particular scrutiny.²¹ Opponents of the statute charge that these provisions give too much power to software publishers and weaken existing consumer protection laws.²² For example, these critics assert that UCITA’s language makes it easier for software publishers to escape liability from express warranties by demonstration.²³ Additionally, they have attacked UCITA’s disclaimer provisions as being too liberal and thereby allowing vendors to disclaim warranties without providing adequate notice to the consumer.²⁴ Furthermore, critics contend that UCITA removes software transactions from existing consumer protection statutes.²⁵ Finally, they also note that UCITA’s scope is overbroad and thus threatens to extend its unfavorable terms to transactions normally governed by the UCC and other existing statutes.²⁶

Proponents of UCITA argue that its opponents misunderstand the statute’s provisions.²⁷ They first point out that UCITA was not intended to be a piece of consumer protection legislation,²⁸ rather the statute’s primary purpose is to facilitate computer information transactions by removing the ambiguities in the current law.²⁹ Consumer protections, they argue, should be left to statutes specifically drafted for that purpose.³⁰ Furthermore, UCITA’s proponents note that its warranty provisions reflect a necessary change that addresses the commercial realities in the new economy.³¹

16. Cem Kaner, *Why You Should Oppose UCITA*, Computer Law., May 2000, at 20, 20.

17. *See id.*

18. *Id.*

19. *Id.*

20. See Rustad, *supra* note 15, at 547-49 (noting the transition from 2B to UCITA and that both statutes have been the subject of extensive criticism).

21. *See infra* Part II.B.

22. *See infra* Part II.B.

23. *See infra* notes 383-404 and accompanying text.

24. *See infra* notes 405-13 and accompanying text.

25. *See infra* notes 419-26 and accompanying text.

26. *See infra* notes 427-33 and accompanying text.

27. *See infra* notes 455-96 and accompanying text.

28. *See infra* notes 455-70 and accompanying text.

29. *See infra* notes 455-71 and accompanying text.

30. *See infra* notes 455-71 and accompanying text.

31. *See infra* notes 497-99 and accompanying text.

Finally, proponents assert that the current lack of uniformity in the law necessitates UCITA's passage.³²

This Note will argue that the UCITA's warranty structure provides inadequate protection for consumers and invites regulation. Part I presents the existing law regarding software and information service warranties by discussing the current application of the UCC and the Magnuson-Moss Warranty Act to computer information transactions. Part II examines the arguments regarding UCITA's warranty structure. Finally, Part III of this Note argues that states should modify the UCITA to remedy areas where it falls short in protecting consumer interests. Part III also advocates for the creation of a federal consumer protection statute that specifically addresses computer information transactions.

I. THE CURRENT WARRANTY LAW FOR COMPUTER INFORMATION TRANSACTIONS

This part will first discuss the scope of the UCC with respect to computer information transactions. Second, it will explain the various UCC warranties and their applicability. Finally, this part will discuss the Magnuson-Moss Warranty Act and its relevance to the world of computer information transactions.

A. Scope of the UCC

Article 2 of the UCC deals with "transactions in goods."³³ The subject matter of the transaction therefore determines whether the UCC will govern in the event of a lawsuit. Section 2-105(1) of the UCC defines "goods" as "all things . . . which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action."³⁴ In any computer information transaction, therefore, the applicability of the UCC hinges on whether a computer transaction involves the sale of goods.³⁵ Hardware³⁶ clearly meets the above definition of goods and is governed by the UCC.³⁷ Software,³⁸ on the other hand, presents a much thornier issue.³⁹

32. See *infra* notes 497-99 and accompanying text.

33. U.C.C. § 2-102 (2000).

34. *Id.* at § 2-105(1).

35. See Marc S. Friedman, *Year 2000 Crisis and the Uniform Commercial Code: The Statute as a Sword and a Shield*, *Computer Law*, Sept. 1998, at 1, 3.

36. Kerry M. L. Smith, Comment, *Suing the Provider of Computer Software: How Courts are Applying U.C.C. Article Two, Strict Tort Liability, and Professional Malpractice*, 24 *Willamette L. Rev.* 743, 744 (1988) ("Hardware is the part of the computer that can be seen and felt. Hardware is the equipment that prepares, inputs, computes, stores, and outputs data.").

37. Joseph P. Zammit, *Special Problems in Computer Program and System Warranties in the Retail Environment*, in *PLI Course Handbook, Computer Law Institute 1986*, available at WL 230 PLI/Pat 99, 106; see also Friedman, *supra* note 35,

Absent an agreement by the parties that Article 2 shall apply to the transaction, courts must determine whether software is a “good” subject to the UCC’s provisions.⁴⁰ Unlike hardware, a computer program is not entirely tangible.⁴¹ Software is a type of intellectual property that is separate from the physical medium that contains it.⁴² In this respect, software is similar to a record album or compact disc (“CD”).⁴³ The music and the record or CD are two separate things.⁴⁴ Furthermore, most software transactions are structured as licenses,⁴⁵ not sales.⁴⁶

Although software has many qualities not typically associated with goods, some of its attributes suggest that it is a “good.”⁴⁷ For example, software can be “identified, moved, transferred, and sold” like other products classified as goods.⁴⁸ This ability to exist in dual planes initially caused considerable judicial uncertainty regarding the UCC’s applicability to software transactions.⁴⁹ Within the last decade,

at 3 (“Courts have consistently held that computer hardware is a ‘good’ under the UCC.”).

38. Bonna Lynn Horovitz, Note, *Computer Software as a Good Under the Uniform Commercial Code: Taking a Byte out of the Intangibility Myth*, 65 B.U. L. Rev. 129, 131 (1985) (“Software consists of a computer program or programs embodied in a physical medium such as paper, magnetic tape, cards, or discs.”).

39. *See id.* at 132; *see also* Smith, *supra* note 36, at 747 (noting that software has characteristics that are both tangible and intangible).

40. Smith, *supra* note 36, at 748.

41. *Id.* at 749.

42. Horovitz, *supra* note 38, at 132 (“When a program becomes software, no aspect of the intellectual product is altered, and it continues to exist apart from its encoding medium.”).

43. *Id.* at 150 (noting support for the proposition that software is “analogous to records, cassettes, tapes, and books”).

44. *See id.* at 150-51.

45. Michael D. Scott, *Computer Law* § 6.20 (4th ed. 1989) (noting that “a software license is a contract by which the licensor grants to the licensee permission to use the software in certain ways subject to certain restrictions. Under such an arrangement, the licensor not only retains full ownership of the software, but can restrict the licensee’s use of the software in many critical respects”); *see infra* notes 200-03 and accompanying text.

46. Jean Braucher, *Some Basics of Software Contracting, Without Draft UCC Article 2B*, in ALI-ABA Course of Study, *The Emerged and Emerging New Uniform Commercial Code* (1998), available at WL SD30 ALI-ABA 475, 479 (“A sale is a transfer of title for a price Software licenses typically do not convey ownership of intellectual property rights”); Zammitt, *supra* note 37, at 112 (“Most personal computer software is purportedly licensed rather than sold (pursuant to so-called ‘shrink-wrap’ licenses.”)); *see also* Mark A. Lemley et al., *Software and Internet Law* 439 (2000) (“Typically, computer software vendors claim that their wares are licensed rather than sold.”).

47. Horovitz, *supra* note 38, at 149.

48. *Id.* at 152.

49. Douglas E. Phillips, *When Software Fails: Emerging Standards of Vendor Liability Under the Uniform Commercial Code*, 50 Bus. Law. 151, 157-58 (1994).

however, the vast majority of courts have reached a judicial consensus that software is a good for the purposes of the UCC.⁵⁰

The court in *RRX Industries, Inc. v. Lab-Con, Inc.*,⁵¹ for example, held that software is a good covered by the UCC.⁵² In *RRX*, the parties entered into a contract for the sale and maintenance of a medical software system.⁵³ Soon after delivery, the system developed defects that the defendant Lab-Con was unable to remedy.⁵⁴ In determining what law to apply, the Ninth Circuit used the predominate factor test⁵⁵ to hold "the sales aspect of the transaction predominates," and therefore the system was a "good."⁵⁶ The court found the service and maintenance portion of the contract to be incidental to the sale of software.⁵⁷ Interestingly, the court did not discuss whether software was a good; instead it recited the UCC definition and relied on the predominant factor test.⁵⁸

In *Advent Systems Ltd. v. Unisys Corp.*,⁵⁹ the Third Circuit court extended the *RRX* court's reasoning by explicitly stating that computer software is a good covered by Article 2 of the UCC. In arriving at its decision, the court analogized software to recorded music.⁶⁰ The court noted that music itself was not a good, but when fixed in a tangible medium it becomes merchantable.⁶¹ The court ultimately held that software becomes a good once it is contained within a floppy disk.⁶²

50. Raymond T. Nimmer, *UCC Revisions: Article 2 in the Information Age*, in PLI Course Handbook, Intellectual Property Law Institute: 1995, available at WL 416 PLI/Pat 1005, 1009-10 [hereinafter Nimmer, *Information Age*] ("The count is five to one in terms of a decision that holds a software contract to be within Article 2 (the five count) or not within Article 2 (the one in ratio)."); Phillips, *supra* note 49, at 157-58.

51. 772 F.2d 543 (9th Cir. 1985).

52. *See id.* at 546-47.

53. *Id.* at 545.

54. *Id.*

55. *Id.* at 546; *see also* Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974) (holding that the "predominant factor . . . is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom)"). The predominant factor test determines whether to apply the UCC based on which part of the transaction dominated. For example, if goods comprise the majority of the transaction then the UCC applies, however, if services comprise the majority of the transaction then the UCC does not apply. *See id.*

56. *RRX Indus., Inc.*, 772 F.2d at 546 ("In determining whether a contract is one of sale or to provide services we look to the essence of the agreement. . . . When a sale predominates, incidental services provided do not alter the basic transaction.").

57. *Id.*

58. *Id.* (discussing what constitutes a 'good' by noting that "[t]he California Commercial Code defines a good as 'all things'").

59. 925 F.2d 670, 672 (3d Cir. 1991).

60. *Id.* at 675 (noting that an "analogy can be drawn [between a] compact disc recording" and a computer program).

61. *Id.*

62. *Id.*

A twofold rationale fuels the majority consensus that software is within the scope of the UCC.⁶³ First, the software in these cases is delivered through a tangible medium.⁶⁴ This focus on the medium of delivery is problematic, however, in that technology can, and to a certain extent has, made physical transfers obsolete.⁶⁵ Second, courts have favored the uniformity of the UCC over the uncodified, non-uniform, common law rules.⁶⁶ This preference is understandable in that uniform laws are fixed and certain compared to their common law brethren whose provisions can vary from jurisdiction to jurisdiction.

Although most courts have held that software is a good covered by the UCC, courts in a small minority of cases have determined that software transactions are outside the purview of the UCC.⁶⁷ For example, in *Data Processing Services, Inc. v. L.H. Smith Oil Corp.*,⁶⁸ the court found that a contract between a computer programmer (DPS) and an oil company to create a computer program was not a sale of goods covered by the UCC.⁶⁹ Instead, the court held the parties had entered into a service contract.⁷⁰ The court reasoned that although the end result of the transaction would be a "physical manifestation", the actual contract was for DPS's skill and knowledge.⁷¹ The court distinguished this case from the decision in *RRX* by noting that in *RRX* there was an actual pre-packaged product, whereas the present issue involved no such item.⁷² Irrespective of *Data Processing* and its few companion cases,⁷³ however, courts have generally reasoned that software falls within the UCC's scope.⁷⁴ The following discussion illustrates how the various warranties found within the UCC have been applied to computer information transactions.

63. Nimmer, *Information Age*, *supra* note 50, at 1010.

64. *Id.*

65. *Id.* (describing how a focus on delivery "will be increasingly problematic as electronic systems move forward and displace a need to transfer tangible copies of software").

66. *Id.*; *Advent Sys.*, 925 F.2d at 676 ("The importance of software to the commercial world and the advantages to be gained by the uniformity inherent in the U.C.C. are strong policy arguments favoring inclusion.").

67. Nimmer, *Information Age*, *supra* note 50, at 1009-10.

68. 492 N.E.2d 314 (Ind. Ct. App. 1986).

69. *Id.* at 318 ("[T]he facts found by the trial court do not support a conclusion DPS sold goods to Smith.").

70. *Id.*

71. *Id.* at 318-19.

72. *Id.* at 319.

73. *See, e.g.*, *Geotech Energy Corp., v. Gulf States Telecomm. & Info. Sys., Inc.*, 788 S.W.2d 386, 389 (Tex. App. 1990) (holding that the essence of the contract was for services); *Micro-Managers, Inc. v. Gregory*, 434 N.W. 2d 97, 100 (Wis. Ct. App. 1988) (holding that contract was for services and therefore did not fall under the UCC).

74. Nimmer, *Information Age*, *supra* note 50, at 1010.

B. UCC Warranties

The UCC contains four warranties.⁷⁵ Of these, the express warranty, implied warranty of merchantability, and implied warranty of fitness for a particular purpose are the most important.⁷⁶ The following discussion will examine the application of the above UCC warranties to the computer information context.

1. The Express Warranty

Under UCC § 2-313, express warranties can be created in a variety of ways.⁷⁷ An oral or written affirmation made by the seller is probably the most typical form of express warranty,⁷⁸ and it usually involves a statement of fact or promise relating to the goods in question.⁷⁹ The seller does not need to use the word "warrant" for his statements to fall under section 2-313.⁸⁰ All statements made by the seller, however, do not automatically become express warranties.⁸¹ For example, the UCC recognizes the practice of "puffing,"⁸² which refers to statements by the seller that are merely his opinion or commendation.⁸³ The delineation between puffing and warranties is difficult to draw.⁸⁴ Courts often rely on factors such as whether the statement is oral or written, the specificity of the statement, and the context in which it is spoken to determine whether it is merely puffing or an express warranty.⁸⁵

75. See James J. White & Robert S. Summers, Uniform Commercial Code § 9-1, at 478 (4th ed. 1995).

76. *Id.* (explaining the relative importance of the UCC warranties).

77. See U.C.C. § 2-313 (2000) providing in relevant part:

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or the model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

78. See White & Summers, *supra* note 75, § 9-4, at 486.

79. *Id.*

80. *Id.* at 487.

81. U.C.C. § 2-313(2) (2000); White & Summers, *supra* note 75, § 9-4, at 487.

82. White & Summers, *supra* note 75, § 9-4 at 487.

83. *Id.* (quoting U.C.C. § 2-313(2) (1995)).

84. *Id.*

85. See *id.* (comparing different types of statements and whether they can be

Moreover, express warranties are not limited to verbal representations by the seller.⁸⁶ Advertisements, samples, and models can also create a warranty.⁸⁷ For an advertisement to become a warranty the buyer must show he read and relied on it before making the transaction.⁸⁸ In general, whenever a seller places an item on display as a sample or model of the actual product, he creates an express warranty⁸⁹ because the consumer expects that the qualities of the sample will be the same as the qualities of the actual product.⁹⁰ Expert testimony about trade usage determines whether the actual goods are similar enough to the sample/model.⁹¹

Once the court determines that the seller has made an affirmation of fact or promise relating to the goods, the seller must prove that the statement became part of the "basis of the bargain."⁹² Prior to the UCC, the buyer had to prove reliance on the seller's affirmation to recover on an express warranty claim.⁹³ The UCC, however, makes no reference to reliance.⁹⁴ Consequently, courts and scholars have had difficulty interpreting the meaning of this phrase.⁹⁵ Some courts have ruled that "basis of the bargain" means the buyer must demonstrate reliance on the seller's affirmations,⁹⁶ while other courts have ruled that reliance is not required by the term.⁹⁷ Arguably, the

construed as express warranties).

86. *Id.* § 9-6, at 499.

87. *Id.* § 9-5, at 494-95; § 9-6, at 499; *see, e.g.*, *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc.*, 831 P.2d 724, 731 (Wash. 1992) (holding that a brochure purporting building would be of "highest quality" created an express warranty).

88. *White & Summers, supra note 75*, § 9-5, at 495 (explaining how a plaintiff must show he relied on the "advertisement in making the purchase"); *see also Ciba-Geigy Corp. v. Alter*, 834 S.W.2d 136, 146-47 (Ark. 1992) (noting that a farmer who had not read the advertisement could not use it as a basis for creation of an express warranty and stating "[w]hen a buyer is not influenced by the statement in making his or her purchase, the statement is not a basis of the bargain").

89. U.C.C. § 2-313 cmt. 6 (2000).

90. *See White & Summers, supra note 75*, § 9-6, at 499-501.

91. *Id.* § 9-6, at 502 (explaining that because "no sample or model is truly a literal reproduction of the good itself . . . it will take at least some expert testimony . . . to enable the court or the jury to make a judgment").

92. *Id.* § 9-5, at 491-92.

93. *Id.* § 9-5, at 491 (contrasting the law under the Uniform Sales Act with the "basis of the bargain" requirement under the UCC).

94. *See U.C.C. § 2-313* (omitting mention of the term reliance).

95. *White & Summers, supra note 75*, § 9-5, at 491-93; John E. Murray Jr., "Basis of the Bargain": *Transcending Classical Concepts*, 66 *Minn. L. Rev.* 283, 283-84 (1982).

96. *See, e.g., Bigelow v. Agway, Inc.*, 506 F.2d 551, 554 (2d Cir. 1974) (reversing directed verdict for seller on grounds that evidence tending to prove reliance could be inferred by a jury).

97. *See, e.g., Lutz Farms v. Asgrow Seed Co.*, 948 F.2d 638, 645 (10th Cir. 1991) (noting that reliance is not required); *Unified Sch. Dist. v. United States Gypsum Co.*, 788 F. Supp. 1173, 1177 (D. Kan. 1992)(same); *see also White & Summers, supra note 75*, § 9-5, at 493 n.3 (discussing how "the extent to which prior law has been changed by 2-313 . . . is unclear").

language of UCC § 2-313 creates a presumption that the seller's affirmations create an express warranty.⁹⁸

Express warranties do not arise differently in computer related transactions than they do in other contracts.⁹⁹ The majority of computer law cases finding a breach of an express warranty involve statements made by the seller concerning the performance of the computer system.¹⁰⁰ For example, a seller might make assertions concerning the speed of a computer, or the capabilities of a software program.¹⁰¹ These statements then form the basis for an express warranty.¹⁰² The typical express warranty in a computer contract provides that "hardware is 'free from defects in material and workmanship.' . . . [and] that software 'performs substantially in accordance' with . . . functional specifications."¹⁰³

While the formation of express warranties in computer contracts remains, relatively unchanged in relation to regular contracts, enforcement of these warranties presents unique problems in the computer information context.¹⁰⁴ Due to the complicated nature of computer hardware and software, it is difficult for the buyer to prove that a malfunction constitutes a breach of warranty.¹⁰⁵ Courts have not yet come to a consensus as to whether the buyer must prove a relationship between the malfunction and a warranty to prove his claim.¹⁰⁶ The difficulty in proving any such relationship depends on the specificity of the seller's statement. For example, if the seller warrants that a computer system will be "free of defects" for ninety

98. See White & Summers, *supra* note 75, § 9-5, at 493.

99. See Friedman, *supra* note 35, at 4 (describing where express warranties have been found in computer law decisions and explaining that an "express warranty may be created orally as well as in writing Express warranties relating to specific performance standards or to the general suitability of the computer system are often found in advertising brochures and literature, and vendor's proposals"); see also Dennis S. Deutsch, *The "Demo" as the Basis of the Fraud and Breach of Contract Claim*, Computer Law., May 1991, at 22, 22 (explaining how a seller's demonstration of a computer product can give rise to an express warranty).

100. See Friedman, *supra* note 35, at 4.

101. See *id.* (claiming vendor's statements of "performance specifications" are the basis of express warranties).

102. *Id.*

103. Diane Wilkins Savage, *Performance Warranties in Computer Contracts*, Computer Law., Dec. 1991, at 32, 32.

104. Barbara Chretien-Dar, Note, *Uniform Commercial Code: Disclaiming the Express Warranty in Computer Contracts-Taking the Byte Out of the UCC*, 40 Okla. L. Rev. 471, 483 (1987) ("Although the Code provides for the relatively uncomplicated creation of express warranties . . . the computer vendee will often encounter serious impediments in attempting to prove . . . breach of warranty.").

105. See *id.* (describing how it is difficult to locate the problem and show a connection to the warranty). One commentator noted, "[a]s users become more sophisticated . . . the evidentiary problem of proving causation may become hopelessly confusing." *Id.* at 484.

106. *Id.* at 483-84 (discussing the contrasting positions in *Bruffey Contracting Co. v. Burroughs Corp.*, 33 U.C.C. Rep. Serv. 1269 (D. Md. 1981), and *Carl Beasley Ford, Inc. v. Burroughs Corp.*, 361 F. Supp. 325 (E.D. Pa. 1973)).

days, such a statement would encompass a broad array of possible malfunctions.¹⁰⁷ A narrower warranty, however, stating that the software would only be free of defects affecting the material (e.g., the floppy disk containing the software) and not the actual functions of the program, would exclude many potential problems from its coverage.

A second area in which computer cases have received disparate treatment is the disclaimer of express warranties.¹⁰⁸ In general, courts have held that express warranties cannot be disclaimed,¹⁰⁹ and this interpretation of the Code stems from the language of section 2-316(1).¹¹⁰ In relevant part, UCC § 2-316 provides that when the terms of an express warranty conflict with those of a disclaimer, the disclaimer will be unenforceable.¹¹¹ The official comment to the Code explains that “[e]xpress’ warranties rest on ‘dickered’ aspects of the individual bargain, and go so clearly to the essence of that bargain that words of disclaimer in a form are repugnant to the basic dickered terms.”¹¹²

Express warranties that conflict with disclaimers, however, have been treated differently in computer related cases.¹¹³ In these cases, courts have taken the opposite interpretation and allowed disclaimers of express warranties.¹¹⁴ *Investors Premium Corp. v. Burroughs Corp.*¹¹⁵ provides one of the earliest examples in this line of cases.¹¹⁶

107. *See id.* at 482 (explaining how the phrase “free of defects” was construed by a court as warranting “that the equipment would operate properly”).

108. *Id.* at 488 (discussing how courts have allowed express warranties to be disclaimed in computer-related cases, but not in non-computer cases).

109. *N. States Power Co. v. ITT Meyer Indus.*, 777 F.2d 405, 412-13 (8th Cir. 1985) (holding that disclaimer of warranties is ineffective because it conflicts with an express warranty created by buyer specifications); *Transamerica Oil Corp. v. Lynes, Inc.*, 723 F.2d 758, 762 (10th Cir. 1983); *Chretien-Dar*, *supra* note 104, at 488; *see also* Friedman, *supra* note 35, at 6 (“Most courts have held that it is nearly impossible to disclaim an express warranty.”); Phillips, *supra* note 49, at 160 (stating that “if the writing contains express warranties . . . and also contains a blanket disclaimer of the express warranties, the disclaimer is invalid”); *Savage*, *supra* note 103, at 33 (noting that courts are unlikely to enforce disclaimers that attempt to invalidate express warranties).

110. *Chretien-Dar*, *supra* note 104, at 486-87.

111. U.C.C. § 2-316(1) (2000) provides in relevant part:

Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

112. U.C.C. § 2-313 cmt. 1 (2000).

113. *Chretien-Dar*, *supra* note 104, at 488.

114. *Id.* Although the following cases concern hardware transactions, their decisions are not based solely on that fact. *See infra* note, 115-25 and accompanying text.

115. 389 F. Supp. 39 (D.S.C. 1974).

116. *Id.*; *see also* *Bakal v. Burroughs Corp.*, 343 N.Y.S.2d 541, 543-44 (N.Y. Sup. Ct. 1972) (noting that all warranties whether express or implied may be disclaimed in a

In *Investors*, the plaintiff Investors Premium Corp. entered into a contract for computer hardware and later sued on a breach of warranty claim.¹¹⁷ The plaintiff asserted that the hardware manufactured and sold for use in its business did not perform as warranted by the defendant.¹¹⁸ The defendant, however, relied on a disclaimer, which conflicted with the express warranty.¹¹⁹ The court acknowledged that the defendant had made an express warranty.¹²⁰ Nonetheless, the court refused to enforce the warranty and based its ruling in part on the contract's broad disclaimer clause, which it found to supersede any warranty made by the defendant.¹²¹ The court also rested its decision on the presence of a merger clause¹²² within the contract, which under the parol evidence rule¹²³ invalidated statements made by the seller prior to the written agreement.¹²⁴ The dual basis of the *Investors* decision makes it difficult to discern if the court was actually allowing the disclaimer of an express warranty or simply enforcing a merger clause.¹²⁵

Although the reasoning of *Investors* is unclear, other courts have cited it for the proposition that express warranties can be disclaimed.¹²⁶ For example, in *APLications Inc. v. Hewlett-Packard Co.*,¹²⁷ APLications Inc. was in the business of adapting and reselling computer systems to end-users (retail customers).¹²⁸ APLications Inc. acquired a system based on assertions made in Hewlett-Packard's

written contract).

117. *Investors*, 389 F. Supp. at 41-42.

118. *Id.* at 42.

119. *See id.* at 44-45.

120. *Id.* (noting there was an "express written warranty under which plaintiff took the equipment from defendant.").

121. *Id.* at 46 (discussing how the breach of warranty claim must fail).

122. E. Allan Farnsworth, 2 Farnsworth on Contracts § 7.3, at 223 (2d ed. 1998) (noting that a merger clause (also known as an integration clause) "'merges' prior negotiations into the writing. A typical clause includes a recital that the writing 'contains the entire agreement of the parties.'").

123. *Id.* at 215 ("The parol evidence rule is best understood in light of its purpose: to give legal effect to whatever intention the parties may have had to make their writing at least a final and perhaps also a complete expression of their agreement."). Thus, if the parol evidence rule is applicable the court may disregard any agreements made prior to the contract that are not contained within that document. *See id.*

124. *Investors*, 389 F. Supp. at 44 ("That plaintiff cannot have recourse to supposed representations or warranties . . . is elemental; the terms of such a contract cannot be varied by parole evidence.").

125. Chretien-Dar, *supra* note 104, at 488-89 (explaining the difficulty in concluding the court allowed the disclaimer).

126. *See, e.g.,* Earman Oil Co. v. Burroughs Corp., 625 F.2d 1291, 1298 (5th Cir. 1980); Jaskey Fin. and Leasing v. Display Data Corp., 564 F. Supp. 160, 163 (E.D. Penn. 1983); APLications Inc. v. Hewlett-Packard Co., 501 F. Supp. 129, 133 (S.D.N.Y. 1980); Westfield Chem. Corp. v. Burroughs Corp., 21 UCC Rep. Serv. 1293, 1295 (Super. Ct. Mass. 1977).

127. 501 F. Supp. 129 (S.D.N.Y. 1980).

128. *Id.* at 131.

brochures.¹²⁹ Upon installing the system, APLications discovered that the computer was inadequate for its needs.¹³⁰ Subsequently, APLications brought an action against Hewlett-Packard based on a breach of warranty claim.¹³¹ The court held that the disclaimer of warranties in the contract effectively negated any express warranties.¹³² In doing so, the court treated the disclaimability of implied and express warranties the same in the computer transaction context.¹³³ Similarly, the court in *Westfield Chemical Corp. v. Burroughs Corp.*,¹³⁴ held that a contractual waiver of implied and express warranties was valid.¹³⁵ The court based its decision on statutory requirements of conspicuousness.¹³⁶ Both the *APLications Inc.* court and the *Westfield* court cited to *Investors Premium* to justify their decisions.¹³⁷

A small minority of courts have followed the general disclaimer rule¹³⁸ by holding that express warranties in computer information transactions are undisclaimable.¹³⁹ For example, in *Consolidated Data Terminals v. Applied Digital Data Systems, Inc.*,¹⁴⁰ the buyer sued on a breach of express warranty claim based on written specifications and promotional literature it had received from the seller.¹⁴¹ The seller argued that parol descriptions did not survive the disclaimer in the final contract.¹⁴² The court instead found the disclaimer to be invalid, despite the contract's disclaimer and integration clauses,¹⁴³ and it

129. *Id.* ("Responding to H-P's announcement and accompanying brochures APLications contacted H-P about using APL/3000 . . .").

130. *Id.*

131. *Id.* at 132.

132. *Id.* at 133 ("[P]laintiff contends that an express warranty was created by defendant's descriptions of the computer. The agreement excludes this warranty as well." (citation omitted)).

133. Chretien-Dar, *supra* note 104, at 490 ("[S]atisfied that the disclaimer complied with the Code requirement for disclaiming implied warranties, the court determined that the [a]greement excludes this [express] warranty as well [as any implied warranty]." (alterations in original) (citations omitted)).

134. 21 UCC Rep. Serv. 1293 (Super. Ct. Mass. 1977).

135. *Id.* at 1295 ("I also find that the disclaimer is valid and effective so as to disclaim all warranties express or implied pursuant to GLc 106, § 2-316 . . .").

136. *Id.* The UCC requires that disclaimers of warranties be in conspicuous language. U.C.C. § 2-316(2) (2000).

137. *APLications*, 501 F. Supp. at 133-34; *Westfield*, 21 UCC Rep. Serv., at 1295. *APLications* and *Westfield* also cited to *Bakal v. Burroughs Corp.*, 343 N.Y.S.2d 541 (N.Y. Sup. Ct. 1972). *APLications*, 501 F. Sup. at 133-34; *Westfield*, 21 UCC Rep. Serv. at 1295.

138. *See supra* notes 109-12 and accompanying text (explaining that the general rule is that express warranties cannot be disclaimed).

139. Chretien-Dar, *supra* note 104, at 496-97 (noting that the rejection of disclaimers against express warranties in computer cases is a minority position).

140. 708 F.2d 385 (9th Cir. 1983).

141. *Id.* at 388-89.

142. *Id.* at 391.

143. *Id.* at 391-93. The court in *Consolidated* reached the opposite conclusion of the court in *Investors* on similar facts (in both cases the seller's defense was based on

reasoned that the disclaimer could not “be permitted to override the highly particularized warranty created by the specifications [T]hus we conclude that the express statements . . . prevail over the general warranty disclaimer.”¹⁴⁴ Similarly, in *L.S. Heath & Son, Inc. v. AT & T Information Systems, Inc.*,¹⁴⁵ the court held that a contractual disclaimer combined with an integration clause does not automatically invalidate prior oral and written warranties in computer transactions.¹⁴⁶ Even though the court did not make a final determination on the issue,¹⁴⁷ it did conclude that a merger clause was not necessarily determinative of the parties’ final intent.¹⁴⁸ Furthermore, the court noted that the seller relied upon the disclaimer provision in the contract and cited to UCC section 2-316 in holding that “a warranty disclaimer inconsistent with an express warranty is inoperative.”¹⁴⁹

The reasons for this discrepancy in the handling of computer cases versus unrelated cases are unclear. A common thread running through these cases, however, is their treatment of the parol evidence rule.¹⁵⁰ In several of the cases previously discussed, the warranties relied upon by the plaintiffs were either made orally or based on advertisements.¹⁵¹ According to UCC section 2-316(1), parol evidence of a warranty can be set aside by “a writing intended by the parties as a final expression of their agreement.”¹⁵² Computer transactions are often conducted using standard form contracts that include by default disclaimer and integration clauses.¹⁵³ Therefore, the effect of such arrangements in jurisdictions following the majority rule in computer transactions is that a buyer who has relied on parol representations made by the seller prior to the contract is precluded from asserting a warranty defense.¹⁵⁴

a broad disclaimer clause and a merger clause). *See id* at 391-92.

144. *Id.*

145. 9 F.3d 561 (7th Cir. 1993).

146. *Id.* at 570 (“We . . . find that AT & T’s statement . . . may amount to an express warranty.”).

147. *Id.* at 571. The court was deciding an appeal of a summary judgment motion and held that “on the breach of express warranty claim, we believe that the district court’s decision . . . must be reversed and remanded.” *Id.*

148. *Id.* at 569 (noting that the mere presence of a merger clause was not in and of itself evidence of a complete agreement) (citing *Sierra Diesel Injection Serv. Inc. v. Burroughs Corp.*, 890 F.2d 108, 112 (9th Cir. 1989)).

149. *Id.* at 570.

150. Chretien-Dar, *supra* note 104, at 493-96 (discussing the importance of the parol or extrinsic evidence rule).

151. *See supra* notes 115-37 and accompanying text.

152. U.C.C. § 2-316(1) (2000) (referring to UCC section 2-202).

153. Chretien-Dar, *supra* note 104, at 495 (discussing the effect of “standard contract clauses that combine merger clauses and disclaimers into one section”).

154. *Id.* at 496 (explaining the effect of the parol evidence rule and merger clauses).

The seller's immunity under the parol evidence rule is limited by two factors.¹⁵⁵ First, parol evidence contradicts a written agreement if the court determines that the writing is not intended as the final expression of the parties' agreement.¹⁵⁶ Second, even if the writing was intended as the final agreement, parol evidence may still be introduced if the writing is not completely integrated.¹⁵⁷

2. The Implied Warranty of Merchantability

Of the remaining two warranties provided by the UCC, the implied warranty of merchantability, described in section 2-314 of the UCC, is most important. Because the implied warranty of merchantability has the potential to apply to all transactions, regardless of any statements made by the seller,¹⁵⁸ its scope is potentially much broader than both the express warranty¹⁵⁹ or implied warranty of fitness for a particular purpose.¹⁶⁰ Unlike the express warranty, the implied warranty of merchantability attaches itself to a contract by "force of law",¹⁶¹ and does not require the parties to make any specific statements.¹⁶² Rather, it reflects assumptions based on the nature of the transaction itself.¹⁶³

To succeed on a claim for breach of warranty under section 2-314, the buyer must prove that the seller is a merchant and that there was a contract for the sale of goods.¹⁶⁴ Normally, these requirements will not be difficult to meet.¹⁶⁵ The true hurdle imposed by section 2-314 is proving that the seller's product deviated from the standard of merchantability.¹⁶⁶ The UCC provides a list of factors to aid in the

155. White & Summers, *supra* note 75, § 12-4, at 627-28.

156. *Id.* at 627.

157. *Id.* at 627-28; 2 Farnsworth, *supra* note 122, § 7.3, at 216 (explaining the significance of a completely integrated document: "If the agreement is only partially integrated, however, evidence of prior agreements or negotiations is admissible to supplement the writing though not to contradict it. If the agreement is completely integrated, not even evidence of 'a consistent additional term' is admissible to explain the writing.").

158. See U.C.C. § 2-314 (2000). Section 2-314 provides in relevant part: "(1) Unless excluded or modified (under Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind."

159. See *supra* notes 99-103 and accompanying text.

160. See *infra* notes 223-28 and accompanying text.

161. Joel R. Wolfson, *Express Warranties and Published Information Content Under Article 2B: Does the Shoe Fit?*, in *PLI Course Handbook, The UCITA Revolution: The New E-Commerce Model for Software and Database Licensing* (2000), available at WL 600 PLI/Pat 317, 328 [hereinafter *The UCITA Revolution*].

162. *Id.*

163. *Id.*

164. White & Summers, *supra* note 75, § 9-7, at 510-11.

165. *Id.* at 511-13 ("In the normal case, proving the existence of a 'contract for sale' will pose no problem . . . Only rarely will one have occasion to wonder whether a potential defendant is a 'merchant.'").

166. *Id.* at 510-11 (noting what the plaintiff in a merchantability action must prove).

definition of merchantability, stating that “[g]oods to be merchantable must be at least such as: pass without objection in the trades under the contract description; and in the case of fungible goods, are of fair average quality within the description; and are fit for the ordinary purposes for which such goods are used.”¹⁶⁷

These criteria illustrate that merchantability is based in large part on whether the product compares favorably to other brands in the marketplace.¹⁶⁸ The majority of section 2-314 litigation centers on the “fit for ordinary purposes” standard found in subsection 2(c).¹⁶⁹ This concept is best illustrated by the following examples. “A pressure gauge which did not measure pressure building up in an expansion joint”¹⁷⁰ or “[a] haystacking machine which caught fire on the first day the buyer used it”¹⁷¹ were held “to be unfit for ordinary purposes and unmerchantable.”¹⁷² A furniture set with minor defects, however, was not deemed unfit.¹⁷³ The furniture set is considered fit for ordinary purposes because the merchantability standard does not require the product to be perfect.¹⁷⁴

Another standard that has found wide judicial acceptance in implied warranty cases is that the goods must “pass without objection in the trade.”¹⁷⁵ This requirement is similar to the “fit for ordinary purposes” inquiry but focuses more on trade usages.¹⁷⁶ The determinative issue under this standard is whether the product in question can be sold without drawing complaints that similar brands would not receive.¹⁷⁷ Cases based on this standard often compare several brands to determine what are acceptable practices.¹⁷⁸

Just as in express warranty cases,¹⁷⁹ the courts have had difficulty applying the UCC’s implied warranty of merchantability to computer transactions.¹⁸⁰ Software publishers routinely disclaim the implied warranty of merchantability.¹⁸¹ Additionally, courts have been

167. U.C.C. § 2-314(2)(a)-(c) (2000).

168. White & Summers, *supra* note 75, § 9-8, at 519.

169. *Id.* at 521.

170. *Id.* at 522 (citing Bernard v. Dresser Indus., 691 S.W.2d 734 (Tex. App. 1985)).

171. *Id.* (citing Nerud v. Haybuster Mfg., 340 N.W.2d 369 (Neb. 1983)).

172. *Id.*

173. *Id.* (citing Pronti v. DML, 103 A.D.2d 916 (1984)).

174. *Id.* at 522-23.

175. *Id.* at 523 (“[C]ases litigated under the pass-without-objection requirement demonstrate its wide applicability.”).

176. *Id.*

177. *See id.* at 523-24 (illustrating the point through examples in various cases).

178. *See id.*

179. *See supra* notes 104-57 and accompanying text (discussing the difficulty in applying the express warranty to computer information transactions).

180. *See infra* notes 181-86 and accompanying text.

181. Robert W. Gomulkiewicz, *The Implied Warranty of Merchantability in Software Contracts: A Warranty No One Dares to Give and How to Change That*, 16 J. Marshall J. Computer & Info. L. 393, 393 (1997) (“Software publishers disclaim the implied warranty of merchantability because they do not know what they might be

relatively hesitant to construe the warranty in software transactions.¹⁸² For example, in *In re Franklin Computer Corp.*,¹⁸³ the court refused to enforce the implied warranty of merchantability where a DOS-based computer represented as being Apple-compatible failed to perform accordingly.¹⁸⁴ The plaintiff, Wolsten, alleged that the implied warranty of merchantability was breached when the computer failed to run Apple software.¹⁸⁵ The court noted that there were thousands of Apple programs that could potentially run on the computer and that Wolsten could not offer proof of incompatibility beyond the programs he himself had run.¹⁸⁶

Although few courts have discussed the application of the UCC's implied warranty provisions in computer transactions, many commentators argue that the implied warranty should not be utilized in that context. With respect to computer software contracts, critics have attacked the application of the implied warranty of merchantability as being out of step with emerging technology.¹⁸⁷ The arguments against applying the warranty can be distilled into four main sets. First, one critic asserts that software falls outside the scope of the UCC.¹⁸⁸ As previously mentioned,¹⁸⁹ the UCC applies only to transactions in goods.¹⁹⁰ Although most courts have held that software is a good,¹⁹¹ some critics claim the UCC was never intended to apply to intangibles.¹⁹² They argue that "[i]ntangibles are fundamentally different from traditional goods,"¹⁹³ and also note that the Article 2 definition of goods specifically refers to movable

promising if they give it."); see also *infra* notes 187-221 and accompanying text (discussing why the implied warranty of merchantability should not be applied to computer information contracts).

182. See Gomulkiewicz, *supra* note 181, at 397-98 (explaining how the similarity between software transactions and services has hindered the application of the warranty).

183. 57 B.R. 155 (Bankr. E.D. Pa. 1986).

184. *Id.* at 157-58.

185. *Id.* at 157.

186. *Id.* at 157-58.

187. Edward G. Durney, *The Warranty of Merchantability and Computer Software Contracts: A Square Peg Won't Fit in a Round Hole*, 59 Wash. L. Rev. 511, 521 (1984) ("The warranty of merchantability cannot usefully be applied by analogy to computer software transactions . . ."); Gomulkiewicz, *supra* note 181, at 399 ("Such a warranty logically cannot apply to new inventions still in the experimental stage, or custom-made or unique products. Software frequently qualifies for all of these adjectives."); Jeffrey C. Selman & Christopher S. Chen, *Steering the Titanic Clear of the Iceberg: Saving the Sale of Software from the Perils of Warranties*, 31 U.S.F. L. Rev. 531, 560 (1997) ("The implied warranty of merchantability is meaningless when applied to computer software.").

188. Durney, *supra* note 187, at 514 ("A warranty of merchantability should not be applied directly in software transactions . . . because software is an intangible.").

189. See *supra* notes 33-46 and accompanying text.

190. U.C.C. § 2-102 (2000).

191. See *supra* note 50.

192. See e.g., Durney, *supra* note 187, at 515-16.

193. *Id.* at 515.

objects.¹⁹⁴ They reason that movability is a characteristic of physical objects, and therefore refers only to tangibles.¹⁹⁵ Software is, technically speaking, an intangible that can neither be moved nor handled,¹⁹⁶ and thus movability has no meaning for software.¹⁹⁷

The second argument against applying the warranty of merchantability in software cases rests on a reading of the UCC definition of the "sale" of goods.¹⁹⁸ Section 2-106 defines sale as "the passing of title from the seller to the buyer for a price."¹⁹⁹ Software programs, however, are usually licensed and not sold to the purchaser.²⁰⁰ A license, unlike a sale of title, grants limited nonexclusive rights to the purchaser.²⁰¹ In licensing arrangements the buyer cannot make copies of the software for sale or distribution.²⁰² Critics therefore argue that because a license is a more restricted form of transfer than the passing of title, it does not meet the definition of a sale under section 2-106.²⁰³

Third, other critics contend that the warranty of merchantability cannot meaningfully be applied to software²⁰⁴ because the measures of merchantability described above rely on comparisons between similar goods.²⁰⁵ Software, however, is unlike other goods.²⁰⁶ For example, it is difficult to determine what a software program's "ordinary purposes" are²⁰⁷ because there are many different types of computer programs, and therefore an ordinary purpose does not exist for software as a whole.²⁰⁸ These critics further contend that it is meaningless to draw categorical distinctions between programs because qualitative comparisons are difficult to make.²⁰⁹ Essentially, they argue that computer programs are a collection of ideas that cannot effectively be compared to one another.²¹⁰ In this respect,

194. *Id.* at 515-17; U.C.C. § 2-105(1) (2000).

195. Durney, *supra* note 187, at 517 ("Movability is a physical, spatial quality. Consequently, it only makes sense in reference to tangibles, which have physical qualities.").

196. *See id.*

197. *Id.*

198. *See* U.C.C. § 2-314(1) (2000) ("[A] warranty that the goods shall be merchantable is implied in a contract for their sale . . .").

199. *See id.* § 2-106(1) (2000).

200. Durney, *supra* note 187, at 518; Zammit, *supra* note 37, at 112 (noting that most software is licensed).

201. Durney, *supra* note 187, at 518-19 (describing the differences between a transfer of title and a license).

202. *Id.* at 518.

203. *Id.* at 519-20.

204. Selman & Chen, *supra* note 187, at 560.

205. *See supra* notes 166-78 and accompanying text.

206. *See* Durney, *supra* note 187, at 522.

207. *Id.*

208. *Id.* at 522-23 (noting the diversity of software programs).

209. *Id.* at 523; Selman & Chen, *supra* note 187, at 561.

210. Durney, *supra* note 187, at 523; Selman & Chen, *supra* note 187, at 561.

software programs are akin to services.²¹¹ A service, unlike a good, is unique and not resalable,²¹² and this uniqueness makes qualitative comparisons inappropriate.²¹³ Without the ability to compare, it is impossible to determine what would “pass without objection in the trade” or what the “ordinary purposes” for a service are.²¹⁴ Thus, these critics contend that the implied warranty of merchantability is inapplicable to software contracts.²¹⁵

The fourth and final argument that critics make against applying the UCC’s implied warranty of merchantability to computer transactions is that it stifles innovation in the industry.²¹⁶ This argument stems from the idea that there is no meaningful standard of merchantability with respect to software.²¹⁷ With no such standard in place the enforcement of the warranty would be arbitrary.²¹⁸ Industry analysts fear that courts will tend to err on the side of the consumer,²¹⁹ which would force software publishers to make their product “virtually perfect.”²²⁰ In turn this would create enormous liability for producers, and thus force them to curtail development of new products.²²¹

The preceding discussion²²² points out that there are numerous conceptual difficulties in applying the implied warranty of merchantability to computer information transactions. The implied warranty of fitness for a particular purpose, however, presents fewer difficulties.

3. The Implied Warranty of Fitness for a Particular Purpose

The third and final warranty this Note will discuss concerning computer information transactions is the UCC implied warranty of fitness for a particular purpose. This type of warranty is narrower in scope and has more requirements than the warranty of merchantability.²²³ Even if a good meets the merchantability

211. Durney, *supra* note 187, at 523.

212. *Id.*

213. *Id.*

214. *Id.* at 523 n.54 (quoting *Axion Corp. v. G.D.C. Leasing Corp.*, 264 N.E.2d 664 (Mass. 1971)).

215. *Id.* at 523.

216. *Id.* at 524 (“Imposing a warranty of merchantability upon software producers discourages innovation and development in the software industry [C]ourts will tend to allow recovery for any damages caused by any defect. The standard of merchantability will thereby become one of virtual perfection”).

217. *Id.*; *see also supra* notes 204-15 and accompanying text (discussing why the implied warranty of merchantability cannot be applied to software).

218. *See Durney, supra* note 187, at 524.

219. *See id.*

220. *Id.*

221. *Id.* at 524-25.

222. *See supra* notes 181-221 and accompanying text.

223. *White & Summers, supra* note 75, § 9-10, at 527-28 (“Sections 2-314 and 2-315 make plain that the warranty of fitness for a particular purpose is narrower, more

requirement, there is no guarantee that it will meet the requirements of the fitness warranty.²²⁴

For the buyer to establish a claim for breach of the fitness warranty, the seller must have reason to know of the buyer's particular purpose, offer advice on those goods, and the buyer must rely upon that advice.²²⁵ To prove the seller had reason to know of the buyer's purpose, the circumstances must indicate that the seller was put on notice.²²⁶ In the majority of cases this is accomplished when the buyer relays his purpose and particular needs to the seller.²²⁷ Furthermore, the "relative state of the knowledge of the two parties" is used to determine if there has been reliance in a particular case.²²⁸

The implied warranty of fitness for a particular purpose most often applies to business-to-business transactions.²²⁹ Typically, this warranty arises when a business buys specific goods that must be specially manufactured or assembled.²³⁰ For example, in *Hollingsworth v. The Software House Inc.*,²³¹ Hollingsworth, the buyer, was a small manufacturer of electrical parts²³² that purchased a software program to manage its inventory.²³³ Hollingsworth wanted to purchase a program that would facilitate a "single-entry system."²³⁴ It purchased the system from The Software House based upon assurances that the system could perform single-entry inventory.²³⁵ After purchasing the program, Hollingsworth discovered that the software lacked this capability.²³⁶ Hollingsworth subsequently sued and claimed a breach of the implied warranty of fitness for a particular purpose.²³⁷ The

specific, and more precise.").

224. *Id.* § 9-10, at 528.

225. U.C.C. § 2-315 (2000) states:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

226. *See* White & Summers, *supra* note 75, § 9-10, at 529.

227. *Id.*

228. *Id.* § 9-10, at 530-31 (noting that where the buyer is more knowledgeable than the seller, the seller may be able to prove a lack of reliance).

229. *Id.* § 9-10, at 529; *cf.* Selman & Chen, *supra* note 187, at 546-47 ("[C]onsumers rarely require that a software product perform anything other than its ordinary purpose. As a result, consumer litigation under the implied warranty of fitness for a particular purpose is sparse.").

230. White & Summers, *supra* note 75, § 9-10, at 529 (noting that the "most common circumstance" in which the warranty applies involves a business buying specially manufactured goods); *see* Selman & Chen, *supra* note 187, at 546.

231. 513 N.E.2d 1372 (Ohio Ct. App. 1986).

232. *Id.* at 1373.

233. *Id.*

234. *Id.*

235. *Id.* at 1374 (stating that the defendant's employee "testified that he initially believed that the system . . . would perform the single-entry inventory function").

236. *Id.*

237. *Id.* at 1375.

court upheld Hollingsworth's claim and found that a fitness warranty had been made and subsequently violated.²³⁸

Although critics have attacked the application of the warranty of merchantability to software transactions,²³⁹ these same critics support the application of the fitness warranty.²⁴⁰ These critics approve of this warranty in the software context because the seller controls the terms of any given fitness warranty.²⁴¹ For example, a computer program governed by the warranty of merchantability is automatically subject to a requirement that it is "fit for . . . ordinary purposes."²⁴² A fitness warranty, however, will not be implied except when the seller knows or should know of the buyer's expectations.²⁴³ In this respect, the fitness warranty is similar to the express warranty.²⁴⁴

A discussion of the UCC's warranty structure is not complete without an examination of its disclaimer provisions. These provisions control the method for repudiating any of the aforementioned warranties. The following section will discuss the various requirements for the disclaimer of the implied warranties and the difficulty courts have in applying those provisions to computer transactions.

4. Disclaimers Of Implied Warranties

UCC section 2-316(2)-(3) governs the disclaimer of implied warranties.²⁴⁵ A cursory examination of 2-316(2) leads to the conclusion that disclaimer provisions do not require very specific language to be enforceable.²⁴⁶ There is, however, more here than

238. *Id.* at 1377 ("Competent, credible evidence in the record supports the trial court's finding that there was an implied warranty of fitness for a particular purpose . . .").

239. *See supra* notes 187-221 and accompanying text.

240. *See Selman & Chen, supra* note 187, at 546-47 (noting positive attributes of fitness warranty); *see also Durney, supra* note 187, at 530 (same).

241. *See Durney, supra* note 187, at 530.

242. *See supra* notes 204-15 and accompanying text; *see also* U.C.C. § 2-314(2)(c) (2000) (stating the "fit for ordinary purposes" standard).

243. Durney, *supra* note 187, at 530 ("[T]he warranty would not be implied except when the seller knows that the buyer expects software of a certain quality."). Thus, the seller is more likely to be aware of any potential warranty claims against him.

244. *Id.* (noting that the "underlying policy [of the fitness warranty] is similar to that of [the] express warranty").

245. U.C.C. § 2-316(2) provides that:

Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

246. *See id.*

meets the eye.²⁴⁷ Subsection (2) states that the disclaimer clause must mention merchantability.²⁴⁸ In fact, the majority of disclaimers do mention merchantability, and therefore some courts require the term to be present.²⁴⁹ Subsection (3), however, states that a disclaimer need not mention merchantability and language such as “as is’ [or] ‘with all faults’” will suffice.²⁵⁰ Ambiguities aside, most drafters heed suggestions to include the word merchantability in disclaimer provisions.²⁵¹ The following is an example of a typical disclaimer clause: “EXCLUSIONS OF WARRANTIES, NO WARRANTIES. The implied warranties of MERCHANTABILITY and fitness for a particular purpose and all other warranties, express or implied, are EXCLUDED from this transaction and shall not apply to the goods sold.”²⁵²

Importantly, section 2-316 requires that the disclaimer be conspicuous.²⁵³ The meaning of the term “conspicuous” has been the subject of extensive litigation.²⁵⁴ The UCC provides a definition of the term in section 1-201(10),²⁵⁵ which states that “the test is whether attention can reasonably be expected to be called to it.”²⁵⁶ Courts have identified several requirements necessary to constitute conspicuousness,²⁵⁷ such as “capitalization, typeface, and color methods” which are cited as examples in UCC section 1-201(10).²⁵⁸ Additionally, courts have ruled that the location of the disclaimer within the document is an important factor.²⁵⁹ It is also important to

247. White & Summers, *supra* note 75, § 12-5, at 632 (“It is comparatively easy to draft a disclaimer that complies with 2-316(2); to draft a disclaimer that a court will enforce is something else.”).

248. U.C.C. § 2-316(2) (2000).

249. White & Summers, *supra* note 75, § 12-5, at 631.

250. U.C.C. § 2-316(3)(a).

251. White & Summers, *supra* note 75, § 12-5, at 631-32 (suggesting drafters include warranty of merchantability).

252. *Id.* § 12-5, at 633.

253. See Bernard F. Kistler, Jr., Comment, *U.C.C. Article Two Warranty Disclaimers and the “Conspicuousness” Requirement of Section 2-316*, 43 Mercer L. Rev. 943, 944-45 (1992).

254. See generally White & Summers, *supra* note 75, § 12-5, at 634-38 (noting that several different interpretations of conspicuous have been advocated).

255. U.C.C. § 1-201(10) (2000) provides in relevant part:

“Conspicuous”: A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is “conspicuous” if it is in larger or other contrasting type or color.

256. U.C.C. § 1-201 cmt. 10 (2000).

257. See generally White & Summers, *supra* note 75, § 12-5, at 634-38 (discussing the different interpretations courts have taken as to what constitutes conspicuousness).

258. *Id.* at 634.

259. See *Office Supply Co. v. Basic/Four Corp.*, 538 F. Supp. 776, 784 (E.D. Wis. 1982); see also White & Summers, *supra* note 75, § 12-5, at 635-36 (discussing *Massey-Ferguson v. Utley*, 439 S.W.2d 57, 59 (Ky. 1969), where the court held a disclaimer to

note that even though the purpose of disclaimer requirements is to put the buyer on notice, many courts state that it is not necessary for the buyer to have actual notice of the disclaimer.²⁶⁰

One area of computer disclaimer law that has received considerable attention by courts and academics is the validity of "wrap" licenses.²⁶¹ Unlike disclaimers in regular contracts, the terms of a wrap-license are generally presented post-sale.²⁶² These agreements come in three flavors: shrink-wrap,²⁶³ click-wrap,²⁶⁴ and web-wrap.²⁶⁵ Courts are increasingly scrutinizing wrap-licenses,²⁶⁶ and three cases particularly stand out for their inconsistent decisions concerning the enforceability of these agreements.²⁶⁷

In *Step-Saver Data Systems, Inc. v. Wyse Technology*,²⁶⁸ the Third Circuit held that shrink-wrap licenses were invalid based on the application of UCC section 2-207.²⁶⁹ Section 2-207 governs whether differing terms in an acceptance constitute enforceable terms in a contract.²⁷⁰ The court found that the clause in the shrink-wrap license purporting to make the terms of the license binding was not part of

be invalid because the clause was located on the back of the document).

260. White & Summers, *supra* note 75, § 12-5, at 637-38 (noting that a "reasonable-person standard" is employed to gauge the effectiveness of a disclaimer).

261. See David A. Einhorn, *Shrink-Wrap Licenses: The Debate Continues*, 38 IDEA 383, 383-84 (1998) (discussing the practice of using shrink-wrap licenses); Charles R. McManis, *The Privatization (or "Shrink-Wrapping") of American Copyright Law*, 87 Cal. L. Rev. 173, 173-75 (1999); Zachary M. Harrison, Note, *Just Click Here: Article 2B's Failure to Guarantee Adequate Manifestation of Assent in Click-Wrap Contracts*, 8 Fordham Intell. Prop. Media & Ent. L.J. 907, 907-14 (1998) (discussing click-wrap licenses).

262. See Einhorn, *supra* note 261, at 383.

263. Margaret Jane Radin, *Human, Computers, and Binding Commitment*, 75 Ind. L.J. 1125, 1134 (2000).

There are two different species of shrink-wrap license. In the first kind, the terms are presented before purchase of the software, on the box or plastic shrink-wrap that covers the box. [Breaking] . . . the shrink-wrap . . . signifies that you have agreed to the terms and a license contract is formed. In the second kind of shrink-wrap license, the terms are not presented . . . before you buy; instead, the outside of the box informs you that there are terms inside that you will see later

Id.

264. Harrison, *supra* note 261, at 909 ("Click-wrap contracting involves the text of an offer for computer software, presented on a computer screen along with the license terms. A computer user manifests his acceptance of the offer by clicking an on-screen box").

265. J.T. Westermeier, *Web Agreements*, in PLI Course Handbook, Representing the New Media Company (1998), available at 505 PLI/Pat 321, 326 ("The Web-wrap agreements require the purchaser to accept the license terms before the information products or other products are transferred.").

266. See Harrison, *supra* note 261, at 912-13.

267. See *id.* at 918-19.

268. 939 F.2d 91 (3d Cir. 1991).

269. *Id.* at 103.

270. U.C.C. § 2-207 (2000).

the contract between the parties.²⁷¹ It held that the defendant “did not clearly express its unwillingness to proceed with the transactions unless its additional terms were incorporated.”²⁷² Similarly, the court in *Arizona Retail Systems, Inc. v. Software Link, Inc.*,²⁷³ on facts similar to those in *Step-Saver*, found the shrink-wrap disclaimer to be invalid.²⁷⁴ The *Arizona Retail* court held that a contract was formed once the defendant agreed to ship goods to the plaintiff,²⁷⁵ and its terms could not be varied by a license agreement that appeared after shipping.²⁷⁶

Unlike the *Step-Saver* and *Arizona Retail* courts, the Seventh Circuit held that shrink-wrap licenses were enforceable in *ProCD, Inc. v. Zeidenberg*.²⁷⁷ Judge Easterbrook found that “unless their terms are objectionable on grounds applicable to contracts in general” these licenses were valid.²⁷⁸ To buttress its decision, the court pointed to other types of transactions where terms are delivered post-sale²⁷⁹ and found no reason why software should be treated differently.²⁸⁰ The court decided that it was reasonable to enforce shrink-wrap licenses as long as the consumer had notice and an opportunity to get a refund.²⁸¹

Currently there is no judicial or scholarly consensus on the issue of wrap-license enforceability. The decisions in *Step Saver* and *ProCD* illustrate the two general approaches. Whether a wrap-license will be enforced depends upon a court’s view as to when the contract was formed.²⁸² If the court treats the wrap-license as a “new or additional term[]” it will most likely not enforce the license.²⁸³ If, however, the court views the sale “as conditioned on assent” to the wrap-license, the disclaimer will likely be enforced.²⁸⁴

A survey of the enforceability of disclaimers and the validity of warranties in computer transactions cannot be limited to a discussion of the UCC.²⁸⁵ For example, various consumer statutes can also influence the effectiveness of a contractual disclaimer.²⁸⁶ These

271. *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d at 103.

272. *Id.*

273. 831 F. Supp. 759 (D. Ariz. 1993).

274. *Id.* at 764 (“This court reaches the same result as the *Step-Saver* court . . .”).

275. *Id.* at 765.

276. *Id.*

277. 86 F.3d 1447, 1449 (7th Cir. 1996).

278. *Id.*

279. *Id.* at 1451 (analogizing the impracticability of placing the entire license on the box top to airline tickets and warranties in sales of goods).

280. *Id.* at 1451-52.

281. *Id.* at 1452-53 (discussing U.C.C. § 2-204 and 2-206).

282. Harrison, *supra* note 261, at 926-27.

283. *Id.*

284. *Id.* at 927.

285. See Zammit, *supra* note 37, at 103-104 (discussing the variety of statutes that can apply to retail computer transactions).

286. *Id.*

statutes are found on both the federal and state level,²⁸⁷ and their primary purpose is to provide standards to govern the “form and content of consumer warranties.”²⁸⁸ The federal consumer protection legislation is known as the Magnuson-Moss Warranty Act (“Warranty Act” or “Act”).²⁸⁹

C. *The Magnuson-Moss Warranty Act*

Congress passed the Warranty Act in 1975 “to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products.”²⁹⁰

The responsibility for the creation of interpretive legislation and the enforcement of the Warranty Act lies with the Federal Trade Commission (“FTC”).²⁹¹ The Warranty Act governs all written consumer product warranties.²⁹² A consumer product is defined as “tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes.”²⁹³ Additionally, the federal regulations promulgating the Act state that if it is unclear whether a product meets the above definition “any ambiguity will be resolved in favor of coverage.”²⁹⁴

The Warranty Act does not require a seller to provide a written warranty.²⁹⁵ Furthermore, the Act is inapplicable if the seller chooses to give an oral warranty.²⁹⁶ A seller who gives a written warranty, however, must comply with the provisions of the Warranty Act.²⁹⁷

The Warranty Act generally requires warrantors or sellers to meet three basic requirements.²⁹⁸ First, the warrantor must designate the warranty as either “full” or “limited.”²⁹⁹ In order to be classified as

287. Robert T. Daunt, *Warranties and Mass Distributed Software*, 1 Santa Clara Computer & High Tech. L.J. 255, 279 (1985).

288. *Id.* A discussion of each state’s consumer statutes is beyond the scope of this Note.

289. 15 U.S.C. § 2301 (1994).

290. *Id.* § 2302(a).

291. Daunt, *supra* note 287, at 279-80.

292. Zammit, *supra* note 37, at 151.

293. 15 U.S.C. § 2301(1) (1994).

294. 16 C.F.R. § 700.1(a) (2000).

295. Understanding the Magnuson-Moss Warranty Act, at <http://www.ftc.gov/bcp/online/pubs/buspubs/warranty/undermag.htm> (last visited on Nov. 27, 2000) [hereinafter *Understanding*] (noting that the Act does not require businesses to provide written warranties).

296. *Id.* (explaining that “the Act does not apply to oral warranties. Only written warranties are covered”).

297. *Id.*

298. *Id.*

299. 15 U.S.C. § 2303(a) (1994) provides:

Any warrantor warranting a consumer product by means of a written warranty shall clearly and conspicuously designate such warranty in the following manner, unless exempted from doing so by the Commission . . . :

(1) If the written warranty meets the Federal minimum standards for

“full,” the seller’s warranty must satisfy section 2304 of the Warranty Act,³⁰⁰ which states that if the warranty does not meet the statutory requirement then it must be designated a “limited” warranty.³⁰¹ This bifurcation presumably allows buyers to better distinguish between warranties.³⁰² Because of the broad liability attached to full warranties, most vendors will likely favor limited warranties.³⁰³

Second, section 2304 of the Warranty Act sets minimum standards for consumer product warranties.³⁰⁴ Subsection (a)(1) provides that the warrantor must remedy a defective product within a reasonable amount of time and do it free of charge.³⁰⁵ This requirement is not problematic for software vendors because it is usually the “minimum defensible standard . . . to use in designing a warranty policy.”³⁰⁶ Section 2304(a)(2) limits the vendor’s ability to restrict the duration of the UCC’s implied warranties,³⁰⁷ while section 2304(a)(3) and (a)(4) prohibit the warrantor from excluding consequential damages³⁰⁸

warranty set forth in section 2304 of this title, then it shall be conspicuously designated a “full (statement of duration) warranty.”

(2) If the written warranty does not meet the Federal minimum standards for warranty . . . then it shall be conspicuously designated a “limited warranty.”

300. *Id.*

301. *Id.*

302. See White & Summers, *supra* note 75, § 9-15, at 547 (“Apparently the Congress believed that consumers’ perceptions of the substance of written warranties would be sharpened by forcing all sellers to fit within one of the two categories.”).

303. Daunt, *supra* note 287, at 280-81 (noting that “software vendor[s] would [not] want to give a full warranty because of the various damage and remedy considerations [M]ost software warranties intended for consumers should be clearly titled ‘limited warranty.’”).

304. 15 U.S.C. § 2304(a) (1994) provides:

In order for a warrantor warranting a consumer product by means of a written warranty to meet the Federal minimum standards for warranty—

(1) such warrantor must as a minimum remedy such consumer product within a reasonable time and without charge, in the case of a defect, malfunction, or failure to conform with such written warranty;

(2) notwithstanding section 2308(b) of this title, such warrantor may not impose any limitation on the duration of any implied warranty on the product;

(3) such warrantor may not exclude or limit consequential damages for breach of any written or implied warranty on such product, unless such exclusion or limitation conspicuously appears on the face of the warranty; and

(4) if the product (or a component part thereof) contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy defects or malfunctions in such product, such warrantor must permit the consumer to elect either a refund for, or replacement without charge of, such product or part (as the case may be).

305. *Id.*

306. Daunt, *supra* note 287, at 283.

307. See 15 U.S.C. § 2304(a)(2)-(3).

308. 3 Farnsworth, *supra* note 122, § 12.9, at 204-06 (defining consequential damages as “loss other than *loss in value*, and the party is also entitled to recovery for this Consequential damages include such items as injury to person or property

unless such waivers or disclaimers are conspicuous and grant the consumer a refund if a product cannot be repaired.³⁰⁹

Third, section 2308 of the Warranty Act voids any disclaimer of the implied warranty of merchantability or warranty of fitness for a particular purpose.³¹⁰ Obviously, this is contrary to UCC § 2-316's relatively liberal allowance of implied warranty disclaimers.³¹¹ The Warranty Act does, however, allow the vendor to limit the duration of the implied warranties to a "reasonable" time, with the caveat that the limitation must be "conscionable."³¹²

Significantly, no cases squarely address whether the Magnuson-Moss Act covers software transactions.³¹³ The few software cases that involve a claim under the Warranty Act simply assume the Act's applicability without discussion.³¹⁴ For example, in *Microsoft Corp. v. Manning*,³¹⁵ Manning brought a claim under the Warranty Act for breach of express and implied warranties.³¹⁶ Microsoft had released a version of its DOS operating software that contained a disk-

caused by the breach." (emphasis in original)).

309. 15 U.S.C. § 2304(a)(4).

310. *Id.* § 2308 provides:

(a) Restrictions on disclaimers or modifications

No supplier may disclaim or modify (except as provided in subsection (b) of this section) any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer [p]roduct, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.

(b) Limitation on duration

For purposes of this chapter (other than section 2304(a)(2) of this title), implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.

(c) Effectiveness of disclaimers, modifications, or limitations

A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this chapter and State law.

311. See Daunt, *supra* note 287, at 285; see also *supra* notes 245-60 and accompanying text (discussing the various ways implied warranties can be disclaimed under the UCC).

312. 15 U.S.C. § 2308(b).

313. Kaner, *supra* note 16, at 28 ("There are no published court rulings that have settled the question of the applicability of the Magnuson-Moss Act to software . . ."); Zammit, *supra* note 37, at 155 (stating that "[n]o cases exist on the issue").

314. See, e.g., *Stuessy v. Microsoft Corp.*, 837 F. Supp. 690, 692 (E.D. Pa. 1993) (noting the case was dismissed for jurisdictional purposes but that no question of Magnuson-Moss Act's applicability was raised).

315. 914 S.W.2d 602 (Tex. App. 1995).

316. *Id.* at 605.

compression utility³¹⁷ called DoubleSpace.³¹⁸ After the product's release, customers complained it was faulty and had caused their machines to lose data.³¹⁹ Manning brought suit alleging that the deficiencies in the program violated the Warranty Act.³²⁰ Microsoft had provided a limited warranty³²¹ with the software and disclaimed all other warranties in its license agreement.³²² Nonetheless, the court applied the disclaimed implied warranties,³²³ presumably based on the Warranty Act's prohibition of disclaimers of implied warranties.³²⁴

Although courts have not explicitly stated that the Warranty Act applies to computer transactions, most commentators have stated that software comes within the scope of the Warranty Act in the consumer context.³²⁵ They reason that software sold in a retail environment is a consumer product because it "is directed for distribution to the class of people the Act is designed to protect."³²⁶

Although the Warranty Act apparently applies to ordinary consumer computer transactions, it remains questionable whether the Act protects small businesses as well. Section 2301 of the Act defines consumer products as those sold for "personal, family, or household purposes."³²⁷ The Federal Trade Commission's rules interpreting the statute, however, cast a much wider net,³²⁸ for they clearly note that "the use to which a product is put . . . is not determinative" of whether it is a consumer product.³²⁹ Rather, the use of that type of product controls whether it is within the scope of the Warranty Act.³³⁰ Thus, word-processing software would be considered a consumer product

317. *Id.* ("[D]isk compression software . . . compresses the data on a hard disk, thereby increasing a computer's storage capacity . . .").

318. *Id.*

319. *Id.*

320. *Id.* at 606.

321. *Id.* at 609.

322. Kaner, *supra* note 16, at 28 & n.60-61.

323. *See* Manning, 914 S.W.2d at 609-10 (explaining that the court held for the plaintiffs).

324. Kaner, *supra* note 16, at 28 ("Apparently, the court accepted the applicability of the Magnuson-Moss claim because, despite Microsoft's disclaimer, the Manning court applied the disclaimed warranty . . .").

325. Daunt, *supra* note 287, at 292-93 (arguing that ambiguity should favor inclusion within the Act); Kaner, *supra* note 16, at 28 (noting that courts would rule software falls under the Act); Zammit, *supra* note 37, at 155 ("Most commentators take the position that at least some types of software would be considered consumer products under the Act.").

326. Zammit, *supra* note 37, at 155.

327. 15 U.S.C. § 2301(1) (1994).

328. 16 C.F.R. § 700.1(a) (2000) provides in relevant part:

[t]his means that a product is a 'consumer product' if the use of that type of product is not uncommon. The percentage of sales or the use to which a product is put by any individual buyer is not determinative.

329. *Id.*

330. *Id.*; *see, e.g.*, *Balsler v. Cessna Aircraft Co.*, 512 F. Supp. 1217, 1220 (N.D. Ga. 1981) (holding that a \$3 million private jet was not a product "normally used" for personal, family, or household purposes).

within the province of the Warranty Act whether it is used at home or in the office, but custom designed software for a commercial entity would not be a consumer product even if it is used by consumers in their own homes.³³¹

A party will encounter various inconsistencies when bringing a UCC warranty claim involving a computer information transaction. For example, depending on the jurisdiction, software may not be considered a good for the purposes of UCC coverage,³³² the disclaimer of express warranties may or may not be enforceable,³³³ and the implied warranty of merchantability may or may not be applicable to computer information transactions.³³⁴ The uniform codes are supposed to prevent exactly this kind of ambiguity in the law. The UCC, however, was not drafted to cover the computer information transactions of our modern economy.³³⁵ The current disarray in this area of the law necessitates uniform legislation drafted specifically to deal with computer information transactions. UCITA has presented itself as the “statute for the job.” Part II of this Note will evaluate the efficacy of that statement.

II. THE UCITA CONTROVERSY

As Part I outlined,³³⁶ warranty law for retail transactions in computer information is currently in a confused state. The passage of UCITA will provide a uniform set of laws governing computer information transactions. This part will discuss those changes and their potential impact. Part II provides a brief overview of UCITA’s warranty provisions and summarizes the arguments both for and against passage of the statute.

A. *The UCITA Statute*

The Uniform Computer Information Transactions Act was designed to bring uniformity to the world of computer information transactions.³³⁷ Its drafters sought to remove the uncertainty regarding whether and to what extent Article 2 of the UCC, common law principles, and the Warranty Act should apply to computer information transactions.³³⁸ Thus, UCITA would, ideally, do for

331. Daunt, *supra* note 287, at 292.

332. *See supra* Part I.A.

333. *See supra* notes 108-57 and accompanying text.

334. *See supra* notes 180-86 and accompanying text.

335. U.C.I.T.A., Prefatory Note (2000 Draft).

336. *See supra* Part I.

337. Nimmer, *UCITA*, *supra* note 7, at 5 (discussing the uncertainty in the current law).

338. U.C.I.T.A. Prefatory note; Nimmer, *UCITA*, *supra* note 7, at 5.

computer information transactions what the UCC did for the sale of goods.³³⁹

In July 1999, the NCCUSL approved UCITA for adoption by the states. It is now up to the individual state legislatures to consider the proposed statute and decide whether and in what form it should be passed.³⁴⁰ Currently, UCITA has been signed into law in both Maryland and Virginia.³⁴¹ It has also been introduced for consideration in the state legislatures of Arizona and New Jersey.³⁴²

The scope of UCITA is confined to transactions in computer information.³⁴³ This includes all transactions where “the subject matter includes information that is in, or is to be provided or created in, a form directly capable of being processed in or received from a computer.”³⁴⁴ UCITA, therefore, does not apply to sales of goods that would normally be covered by the UCC.³⁴⁵ For example, the sale of a car or television set would not fall within the statute’s scope.³⁴⁶ If, however, a computer program were embedded within these goods and the purpose of the transaction was to obtain the program, UCITA would apply to the sale.³⁴⁷ UCITA currently provides the following warranties: Noninterference and Non-infringement, Express Warranty, Implied Warranty of Merchantability of a Computer Program, Implied Warranty of Informational Content, and the Implied Warranty of Fitness for the Licensee’s Purpose and System Integration.³⁴⁸

In most circumstances, express warranties under UCITA arise in circumstances similar to those under the UCC.³⁴⁹ The proposed

339. U.C.I.T.A. Prefatory note.

340. NCCUSL – About Us, at <http://www.nccusl.org/aboutus.htm> (last visited March 15, 2001). The NCCUSL can only propose model laws and uniform statutes to the states. The final determination on whether to enact such laws remains with the individual state legislatures. *Id.* Furthermore, the state legislatures need not adopt the proposed statute “exactly as written;” they are free to modify it as they see fit. *Id.*

341. UCITA Online, What’s Happening to UCITA in the States, at <http://www.ucitaonline.com/whathap.html> (last updated Feb. 6, 2001).

342. *Id.*

343. U.C.I.T.A. Prefatory note.

344. Nimmer, *UCITA*, *supra* note 7, at 6.

345. *Id.*

346. *Id.*

347. *Id.*

348. U.C.I.T.A. §§ 401-405 (2000).

349. See U.C.I.T.A. § 402. Section 402 provides, in relevant part:

(a) Subject to subsection (c), an express warranty by a licensor is created as follows:

(1) An affirmation of fact or promise made by the licensor to its licensee, including by advertising, which relates to the information and becomes part of the basis of the bargain creates an express warranty that the information to be furnished under the agreement will conform to the affirmation or promise.

(2) Any description of the information which is made part of the basis of the bargain creates an express warranty that the information will

UCITA rules governing models and demonstrations, however, differ significantly from their UCC counterparts.³⁵⁰ The UCC rule simply states, “[a]ny sample or model which is made part of the basis of the bargain creates an express warranty.”³⁵¹ Under UCITA, however, several restrictions are placed on the creation of the warranty. For example, UCITA uses a reasonable person standard and requires that the model or demo be of a final product.³⁵²

UCITA also expressly addresses published informational content within the context of express warranties.³⁵³ Published informational content (“PIC”) refers to material ordinarily intended to be used by a human being.³⁵⁴ It is the “electronic equivalent of books, magazines, art, and the like.”³⁵⁵ UCITA does not create any express warranties with respect to PIC.³⁵⁶

The UCITA’s Implied Warranty of Merchantability of a Computer Program is somewhat analogous to the UCC’s section 2-314 warranty of merchantability.³⁵⁷ The UCITA section retains the “fit for ordinary

conform to the description.

(3) Any sample, model, or demonstration of a final product which is made part of the basis of the bargain creates an express warranty that the performance of the information will reasonably conform to the performance of the sample, model, or demonstration, taking into account differences that would appear to a reasonable person in the position of the licensee between the sample, model, or demonstration and the information as it will be used.

Id.

350. Compare *id.* § 402(a)(3), with U.C.C. § 2-313(1)(c) (2000) (illustrating the inclusion of new language within UCITA concerning the “basis of the bargain” test).

351. U.C.C. § 2-313(1)(c).

352. See U.C.I.T.A. § 402(a)(3) (2000); see also *infra* notes 389-95 and accompanying text (discussing the effects of UCITA’s changes to the express warranty language).

353. See U.C.I.T.A. § 402(a)(3).

354. Nimmer, *UCITA*, *supra* note 7, at 9 (discussing the relevance of “published informational content” (emphasis omitted)).

355. *Id.*

356. *Id.* (“For express warranty law, under UCITA, express warranties are created (or not) for informational content under the same standards as apply today.”).

357. U.C.I.T.A. § 403, provides in relevant part:

(a) Unless the warranty is disclaimed or modified, a licensor that is a merchant with respect to computer programs of the kind warrants:

(1) to the end user that the computer program is fit for the ordinary purposes for which such computer programs are used;

(2) to the distributor that:

(A) the program is adequately packaged and labeled as the agreement requires; and

(B) in the case of multiple copies, the copies are within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved; and

(3) that the program conforms to any promises or affirmations of fact made on the container or label.

(b) Unless disclaimed or modified, other implied warranties with respect to computer programs may arise from course of dealing or usage of trade.

(c) No warranty is created under this section with respect to informational

purposes" test, but makes it specific to computer programs.³⁵⁸ Similarly, the UCITA requires that programs abide by any "promises or affirmations" on their labels or containers.³⁵⁹ In contrast to the UCC, however, UCITA does not require that computer programs pass without objection in the trade.³⁶⁰ Finally, section 403 does not create any warranties "with respect to informational content."³⁶¹

Unlike the UCC, section 404 of the UCITA provides an Implied Warranty for Informational Content.³⁶² In contrast to PIC, this material is not intended for "recipients generally, or to a class of recipients, in substantially the same form."³⁶³ Informational Content is material intended to be used "by an individual in the ordinary use of the information."³⁶⁴ Section 404 of UCITA protects informational content from inaccuracies caused by the "merchant's failure to perform with reasonable care."³⁶⁵ A buyer cannot avail himself of this protection, however, unless he has a "special relationship of reliance" with the licensor.³⁶⁶

Another new warranty provided by UCITA is the Implied Warranty of Fitness for the Licensee's Purpose and System Integration.³⁶⁷ It provides that an implied warranty arises if the

content, but an implied warranty may arise under Section 404.

See also supra notes 158-63 and accompanying text (discussing section 2-314 of the UCC).

358. U.C.I.T.A. § 403(a)(1); *see also supra* notes 168-74 and accompanying text (discussing the "ordinary purposes" test under the UCC).

359. U.C.I.T.A. § 403(a)(3); U.C.C. § 2-314(2) (2000).

360. *See* U.C.I.T.A. § 403. For a discussion of the UCC requirements, *see supra* notes 166-78 and accompanying text.

361. *Id.* § 403(c).

362. Section 404 provides in relevant part:

(a) Unless the warranty is disclaimed or modified, a merchant that, in a special relationship of reliance with a licensee, collects, compiles, processes, provides, or transmits informational content warrants to that licensee that there is no inaccuracy in the informational content caused by the merchant's failure to perform with reasonable care.

(b) A warranty does not arise under subsection (a) with respect to:

(1) published informational content; or

(2) a person that acts as a conduit or provides no more than editorial services in collecting, compiling, distributing, processing, providing, or transmitting informational content that under the circumstances can be identified as that of a third person.

Id. § 404.

363. *Id.* § 102(a)(52) ("Published Informational Content").

364. *Id.* § 102(a)(37) ("Informational Content").

365. *Id.* § 404(a).

366. *Id.* This language acts to limit the applicability of the Implied Warranty for Informational Content. *See infra* notes 440-42 and accompanying text.

367. U.C.I.T.A. § 405 provides in relevant part:

(a) Unless the warranty is disclaimed or modified, if a licensor at the time of contracting has reason to know any particular purpose for which the computer information is required and that the licensee is relying on the licensor's skill or judgment to select, develop, or furnish suitable information, the following rules apply:

“licensor at the time of contracting has reason to know” the licensee has a particular purpose, and the “licensee is relying on the licensor’s skill.”³⁶⁸ This warranty applies in two situations: (1) where the licensee is seeking computer information for a particular purpose;³⁶⁹ and (2) where the licensee is seeking “a system consisting of computer programs and goods.”³⁷⁰

Section 406 of UCITA governs warranty disclaimers and modifications in computer information transactions.³⁷¹ In general, the UCITA’s language is very similar to UCC section 2-316.³⁷² Indeed, subsection 4 explicitly states that a disclaimer of an implied warranty of merchantability sufficient under Article 2 of the UCC is sufficient under UCITA.³⁷³

(1) Except as otherwise provided in paragraph (2), there is an implied warranty that the information is fit for that purpose. . . .

(c) If an agreement requires a licensor to provide or select a system consisting of computer programs and goods, and the licensor has reason to know that the licensee is relying on the skill or judgment of the licensor to select the components of the system, there is an implied warranty that the components provided or selected will function together as a system.

368. *Id.* § 405(a).

369. *Id.*

370. *Id.* § 405(c).

371. *Id.* § 406 provides in relevant part:

(a) Words or conduct relevant to the creation of an express warranty and words or conduct tending to disclaim or modify an express warranty must be construed wherever reasonable as consistent with each other. Subject to Section 301 with regard to parol or extrinsic evidence, the disclaimer or modification is inoperative to the extent that such construction is unreasonable. . . .

(b)(1) Except as otherwise provided in this subsection:

(A) To disclaim or modify the implied warranty arising under Section 403, language must mention “merchantability” or “quality” or use words of similar import and, if in a record, must be conspicuous. . . .

(2) Language to disclaim or modify the implied warranty arising under Section 405 must be in a record and be conspicuous. It is sufficient to state “There is no warranty that this information, our efforts, or the system will fulfill any of your particular purposes or needs”, or words of similar import.

(3) Language in a record is sufficient to disclaim all implied warranties if it individually disclaims each implied warranty or, except for the warranty in Section 401, if it is conspicuous and states “Except for express warranties stated in this contract, if any, this ‘information’ ‘computer program’ is provided with all faults, and the entire risk as to satisfactory quality, performance, accuracy, and effort is with the user”, or words of similar import.

(4) A disclaimer or modification sufficient under [Article 2 or 2A of the Uniform Commercial Code] to disclaim or modify an implied warranty of merchantability is sufficient to disclaim or modify the warranties under Sections 403 and 404. A disclaimer or modification sufficient under [Article 2 or 2A of the Uniform Commercial Code] to disclaim or modify an implied warranty of fitness for a particular purpose is sufficient to disclaim or modify the warranties under Section 405.

372. See *id.* cmt. 4.a; see also *supra* notes 247-60 and accompanying text (discussing U.C.C. section 2-316 in general).

373. *U.C.I.T.A* § 406(b)(4).

Although section 208 of UCITA is not a warranty provision, it controls how terms become part of a contract and therefore can affect whether a warranty or disclaimer is valid.³⁷⁴ Paragraph 2 of section 208 essentially codifies the holding in *Pro CD*,³⁷⁵ by allowing for the enforceability of post-sale licenses.³⁷⁶ Section 208 states that the inclusion of the terms in a contract is determined by “manifesting assent.”³⁷⁷ Section 112 defines manifesting assent as:

[A]ssent to a record or term if the person, acting with knowledge of, or after having an opportunity to review the record or term or a copy of it: (1) authenticates the record or term with intent to adopt or accept it; or (2) intentionally engages in conduct or makes statements with reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term.³⁷⁸

With respect to warranties, this would allow a seller to introduce warranty and disclaimer language that the consumer could only view after purchasing the product.³⁷⁹ Thus, a post-sale disclaimer would be presumptively valid.³⁸⁰

Many of UCITA’s proposed changes to computer warranty law have met strong resistance from members of the legal community.³⁸¹ Opponents of UCITA allege that the statute favors software publishers at the expense of consumers.³⁸² The arguments against adopting UCITA can be grouped into two basic categories: (1) UCITA weakens existing warranty law by making it easier for vendors to escape liability; and (2) UCITA makes the application of warranty law needlessly confusing. The following section details the views of UCITA’s opponents.

374. § 208, provides in relevant part:

(1) A party adopts the terms of a record, including a standard form, as the terms of the contract if the party agrees to the record, such as by manifesting assent.

(2) The terms of a record may be adopted pursuant to paragraph (1) after beginning performance or use if the parties had reason to know that their agreement would be represented in whole or part by a later record to be agreed on and there would not be an opportunity to review the record or a copy of it before performance or use begins. If the parties fail to agree to the later terms and did not intend to form a contract unless they so agreed, Section 202(e) applies.

Id. § 208.

375. See *supra* notes 277-81 and accompanying text for a discussion of the *ProCD* case, which held that shrink-wrap licenses are enforceable.

376. U.C.I.T.A. § 208(2).

377. *Id.* § 208(1).

378. *Id.* § 112(a).

379. See *id.* § 208(2).

380. See *id.*

381. Rustad, *supra* note 15, at 560-61.

382. See *id.* at 555-56 (noting the dissatisfaction opponents have with mass market licenses and UCITA’s emphasis on private ordering).

B. *The Opponents' View*

1. UCITA Weakens Existing Warranty Law

One of the proposed changes UCITA would make to warranty law is to modify the requirements for the creation of an express warranty by demonstration.³⁸³ The UCC made the creation of such a warranty simpler because it was not subject to as many restrictions.³⁸⁴ UCITA provides that the product must “reasonably conform” to the performance of the demonstration,³⁸⁵ while the old rule under UCC section 2-313 requires that the “goods shall conform.”³⁸⁶ The insertion of the word “reasonably” acts to limit the application of the warranty.³⁸⁷ Thus, UCITA’s language lends itself to a more restrictive application of the express warranty by demonstration.³⁸⁸

UCITA also states that the creation of express warranties must take into “account differences that would appear to a reasonable person in the position of the licensee between the sample . . . and the information as it will be used.”³⁸⁹ This caveat further releases the vendor from liability by allowing him to argue that the consumer should have noticed any differences between the model and the actual product.³⁹⁰

Furthermore, the language in section 402(a)(3) limits the application of the warranty to “final” products.³⁹¹ This suggests that the vendor will be able to show preliminary or prototype versions of a product, but avoid the creation of an express warranty.³⁹² Thus, even if the consumer believes he is viewing the actual product, no warranty is formed.³⁹³ As long as the vendor is not intending to mislead the consumer, there is no fraud.³⁹⁴

Section 402 of UCITA would also provide that no warranty is created by “a display . . . to illustrate the aesthetics, appeal, suitability to taste, subjective quality, or the like of informational content.”³⁹⁵ Hypothetically, if a consumer makes a purchase based on the appearance of the product on the store’s computer or website and

383. See U.C.I.T.A. § 402(a)(3).

384. See Kaner, *supra* note 16, at 28-29.

385. U.C.I.T.A. § 402(a)(3).

386. U.C.C. § 2-313(1)(c) (2000).

387. See Kaner, *supra* note 16, at 28.

388. See *id.* at 28-29.

389. U.C.I.T.A. § 402(a)(3).

390. Kaner, *supra* note 16, at 28 (“UCITA provides an additional defense for the vendor to take to the jury, the ‘differences’ that should be noticed by a ‘reasonable’ customer.”).

391. U.C.I.T.A. § 402(a)(3).

392. See Kaner, *supra* note 16, at 28.

393. *Id.*

394. *Id.*

395. U.C.I.T.A. § 402(b)(2).

receives a product that is "less appealing," he cannot make a warranty claim.³⁹⁶ UCITA's exclusion of aesthetics is especially troublesome in the computer graphics context.³⁹⁷ A licensee in this field would make a purchase based on the appearance of the characters in a video game or the look of a website.³⁹⁸ The licensee's decisions, therefore, are inescapably linked to the product's aesthetics.³⁹⁹ Under UCITA, a licensee could be thwarted in these situations.⁴⁰⁰

UCITA's critics note that this discussion is not merely academic.⁴⁰¹ Due to the complexity of software, the performance of models/samples is often a decisive factor in a consumer's decision about whether to make a purchase.⁴⁰² These consumers will expect vendors to honor the representations made in product demonstrations.⁴⁰³ Furthermore, evidence suggests that a vendor's reliance on legal arguments, such as the distinction between final and prototype or what a reasonable person should have assumed, will do little to vindicate aggrieved licensees.⁴⁰⁴

UCITA's disclaimer provisions have also been criticized as too liberal.⁴⁰⁵ Section 406 requires that disclaimers of implied warranties must be conspicuous,⁴⁰⁶ which is similar to the UCC requirement.⁴⁰⁷ The UCITA definition,⁴⁰⁸ however, weakens the language and would allow terms to "not be disclosed clearly."⁴⁰⁹ For example, the UCITA definition does not consider the context in which the disclosure is given.⁴¹⁰ Therefore, a disclaimer within "boilerplate license text or . . .

396. Michele C. Kane, *The Great Software Acquisition Race: The Perilous Journey of Licensees in the Land of UCITA*, in *PLI Course Handbook, PLI's Sixth Annual Institute for Intellectual Property Law* (2000), available at WL 617 PLI/Pat 655, 687-88 [hereinafter Kane, *Great Software*]; Kaner, *supra* note 16, at 29.

397. See Kane, *Great Software*, *supra* note 396, at 687.

398. *Id.* at 687-88.

399. See *id.*

400. See *id.*

401. Kaner, *supra* note 16, at 28 (noting impact of UCITA on consumers).

402. *Id.* (noting that "[s]oftware products are complex. Customers often buy them in reliance on demonstrations made by sales[]people at stores and trade shows.").

403. Cem Kaner & David L. Pels, *Before the Federal Trade Commission, In the Matter of High Technology Warranty Project*, FTC File No. P994413 (Sept. 11, 2000), <http://www.badsoftware.com/ftc2000.htm>.

404. See *id.* (noting that customers "express disbelief, distrust, or anger" when confronted with legal excuses for software failure).

405. See Kaner, *supra* note 16, at 27 (noting that UCITA would allow the enforcement of post-sale disclaimers).

406. U.C.I.T.A. § 406(b)(1)(A) (2000).

407. See U.C.C. § 2-316(2) (2000).

408. U.C.I.T.A. § 102(a)(14).

409. See Letter from Bureau of Consumer Protection and Competition and the Policy Planning Office of the FTC, to John L. McClagherty, Chair, Executive Committee of the National Conference of Commissioners on Uniform State Laws (July 9, 1999), at <http://www.ftc.gov/be/v990010.htm>.

410. *Id.* at n.6.

printed on one of . . . [several] leaflets enclosed within a software box" would be conspicuous under UCITA's liberal provisions.⁴¹¹

Furthermore, UCITA's authorization of post-sale licenses means that the disclaimer will not be conspicuous at the time of purchase.⁴¹² Simply put, the conspicuousness requirement only extends to the actual document containing the disclaimer; the consumer will be unaware of the disclaimer until after the sale.⁴¹³

Critics also argue that UCITA's right of refund is illusory.⁴¹⁴ Section 112(e) provides that if the licensee does not agree to the terms of a shrink-wrap license he can return the product for a refund.⁴¹⁵ Opponents note that the average consumer will not read the terms and even if he did, he would not try to get a refund.⁴¹⁶ Additionally, the majority of consumers believe the transaction ends at the time of sale.⁴¹⁷ Thus, the existence of a refund right becomes a moot point.⁴¹⁸

UCITA would also remove software from the reach of the Warranty Act by defining a transaction in computer information as a license.⁴¹⁹ The Warranty Act applies to written warranties on tangible personal property.⁴²⁰ Therefore, if a software purchase is really only the purchase of a license, a consumer has not acquired a tangible good.⁴²¹ Currently, no clear consensus exists regarding the Warranty Act's application to software.⁴²² The trend, however, has been to recognize its applicability in software transactions.⁴²³ It would seem that UCITA bypasses this emerging consensus by defining software transactions as licenses.⁴²⁴ The impact of such a reading would be harmful to consumers.⁴²⁵ For example, consumers would not enjoy the Warranty Act's provisions requiring warranty terms to be presented pre-sale or its prohibition of disclaimers of implied warranties.⁴²⁶

411. *Id.*

412. Kaner, *supra* note 16, at 27.

413. *Id.*

414. Stephen Y. Chow, *Proposed Uniform Computer Information Transactions Act: Critical Structural Flaws and Policy Issues*, at <http://www.2bguide.com/docs/CITmemW.doc> at 2.1.

415. U.C.I.T.A. § 112(e)(3) (2000).

416. Chow, *supra* note 414, at 2.1.

417. *Id.*

418. *See id.*

419. Kaner, *supra* note 16, at 28.

420. Zammit, *supra* note 37, at 151-52.

421. Kaner, *supra* note 16, at 28.

422. *See supra* notes 313-26 and accompanying text.

423. *Id.*

424. Kaner, *supra* note 16, at 28.

425. Kaner & Pels, *supra* note 403 (discussing impact of classifying software outside the scope of Magnuson-Moss).

426. *See* 15 U.S.C. § 2308 (1994).

UCITA's opt-in clause would also extend the statute's unfavorable warranty terms to transactions normally outside of its scope.⁴²⁷ Section 104 provides that a vendor can opt-in to UCITA if a material part of the transaction involves "computer information."⁴²⁸ Computer information is defined as "information in . . . a form capable of being processed by a computer."⁴²⁹ UCITA, therefore, could be extended to cover the sale of a computer system that would normally be classified as a sale of goods within the purview of Article 2 of the UCC.⁴³⁰ Other more mundane goods could also find themselves taken out of Article 2's scope and placed within UCITA's purview.⁴³¹ For example, "cars, television sets, cameras," etc., could all possibly be brought within UCITA's pro-industry warranty structure.⁴³² All that is required for UCITA to be opted into is that computer information comprises some part of the transaction.⁴³³ This would allow commercial entities to apply the consumer unfriendly UCITA provisions to transactions currently governed by other statutes such as the UCC and the Warranty Act.

2. UCITA Will Make The Application of Warranty Law Confusing

Critics also assert that the addition of new warranties and terms in UCITA only serves to make the application of warranty law needlessly confusing.⁴³⁴ First, UCITA does not provide for an implied warranty of merchantability for the informational content in a computer program.⁴³⁵ Informational content is "information that is intended to be . . . perceived by an individual in the ordinary use of the information."⁴³⁶ Critics charge that this definition is vague, and will lead to uncertainty in distinguishing between what is a computer program and therefore warranted, and what is merely informational content.⁴³⁷ For example, if a consumer uses an online navigational

427. Letter from members of the Working Group on Consumer Protection, American Bar Association Business Law Section, Committee on the Law of Cyberspace, Subcommittee on Electronic Commerce (Co-chairs Jean Braucher and Mark Budnitz), to President Gene Lebrun and Other Commissioners of the National Conference of Commissioners on Uniform State Laws, Chicago, Illinois (June 10, 1999) [hereinafter Lebrun] at <http://www.2bguide.com/docs/jbmb699.html>.

428. U.C.I.T.A. § 104 (2000).

429. *Id.* § 102(a)(10).

430. Lebrun, *supra* note 427, at § 3 ("This provision threatens to swallow up the law of goods and undermine Revised Article 2.").

431. *Id.* (noting that any transaction if it involves computer information could potentially be opted-in to UCITA).

432. *Id.*

433. *Id.*

434. See generally *infra* notes 435-52 and accompanying text (discussing the ambiguities presented by the UCITA language).

435. U.C.I.T.A. § 403(c) (2000).

436. *Id.* § 102(a)(37).

437. See Michele C. Kane, *When is a Computer Program Not a Computer Program? The Perplexing World Created by Proposed U.C.C. Article 2B*, 13 Berkeley

program the warranty of merchantability would not extend to the information he can see.⁴³⁸ Additionally, if the animation of the characters in a video game seems jerky, whether the defect was part of the program or in the informational content would become a dispositive question for the trier of fact.⁴³⁹

UCITA does offer an implied warranty of accuracy for informational content in section 404.⁴⁴⁰ This warranty, however, applies only to licensees who have a special relationship of reliance with the licensor.⁴⁴¹ Thus, the average consumer who buys “mass market or other off-the-shelf software” will be unable to avail himself of this warranty’s protection.⁴⁴²

UCITA’s distinction between informational content and published informational content is also troublesome. PIC is defined as informational content that is “prepared for or made available . . . to a class of recipients[] in substantially the same form.”⁴⁴³ Typical examples of PIC are “digital newsletters, multimedia encyclopedias, and on-line databases.”⁴⁴⁴ This information is generally protected in print media from tort liability.⁴⁴⁵ UCITA extends this protection to PIC that makes its way into computer information transactions.⁴⁴⁶ No implied warranties arise with respect to PIC.⁴⁴⁷

This exemption from warranty coverage is “potentially overbroad.”⁴⁴⁸ For example, this exclusion could be used to shield “user manuals . . . upon which customers must rely” from liability.⁴⁴⁹ In addition, even basic components of a computer program, such as the user interface, may be classified as PIC.⁴⁵⁰ Because the user interface in an off-the-shelf program is presented to all recipients in substantially the same form, it is arguably PIC.⁴⁵¹ Consequently, the

Tech. L.J. 1013, 1017 (1998) [hereinafter Kane, *Perplexing World*]; see also Kane, *Great Software*, *supra* note 396, at 688 (noting the difficulty in distinguishing the informational content from the program itself).

438. Kane, *Great Software*, *supra* note 396, at 688.

439. Kane, *Perplexing World*, *supra* note 437, at 1018.

440. U.C.I.T.A. § 404(a).

441. *Id.*

442. Kane, *Perplexing World*, *supra* note 437, at 1019.

443. U.C.I.T.A. § 102(a)(52).

444. Shah, *supra* note 3, at 95.

445. *Id.*

446. *Id.*

447. See U.C.I.T.A. §§ 403, 404(b)(1), 405(b)(2).

448. Shah, *supra* note 3, at 96.

449. Kane, *Perplexing World*, *supra* note 437, at 1019-20.

450. See *id.* at 1018 (explaining that a reasonable interpretation of PIC could include any perceivable portions of a computer program); Letter from Barbara Simons, Association for Computing Machinery, to Uniform Law Commissioner, (July 12, 1999) at <http://www.acm.org/usacm/copyright/usacm-ucita.html> (arguing that user interfaces may be included under PIC and that such a reading would be a mistake).

451. See Kane, *Perplexing World*, *supra* note 437, at 1019.

PIC exemption may be used as a means to avoid liability for product defects.⁴⁵²

Although many critics argue that UCITA should not be enacted for the above-mentioned reasons, others support UCITA and believe that it should be ratified. Two main groups are pressing for the adoption of UCITA⁴⁵³—industry insiders and, naturally enough, the statute's drafters.⁴⁵⁴

C. *The Proponent's View*

The arguments for adopting UCITA can be grouped into two basic categories: (1) opponents of the statute misunderstand its provisions; and (2) the reasons for enacting UCITA necessitate its passage.

UCITA proponents commonly contend that the statute was not intended to be a piece of consumer protection legislation.⁴⁵⁵ It is instead a commercial code,⁴⁵⁶ modeled after the UCC, that acts as a gap-filler.⁴⁵⁷ Therefore, the statute provides a background for contractual agreements, but does not mandate their outcome.⁴⁵⁸ Thus, proponents argue that complaints from critics concerning the statute's perceived lack of consumer protections are misplaced.⁴⁵⁹ Furthermore, they argue that the variations in state consumer protection laws make it difficult to design a uniform law.⁴⁶⁰ The responsibility for updating and clarifying consumer protection laws "on a uniform or on a local basis is a task that transcends computer information commerce and should be addressed on that broader basis."⁴⁶¹

Arguably, the Magnuson-Moss Warranty Act is such a piece of legislation. In response to criticism that UCITA removes computer information transactions from the scope of the Warranty Act, Reporter Ray Nimmer has argued that UCITA cannot alter the reach of federal consumer law.⁴⁶² Indeed, he contends that whether the Warranty Act applies to computer information transactions is a "federal law question."⁴⁶³ Thus, if a court were to determine that the

452. Shah, *supra* note 3, at 96.

453. David A. P. Neboyskey, *A Leap Forward: Why States Should Ratify The Uniform Computer Information Transactions Act*, 52 Fed. Comm. L.J. 793, 808-13 (2000) (discussing the sources of support for UCITA).

454. *Id.* at 808-11.

455. Nimmer, *UCITA*, *supra* note 7, at 14.

456. *Id.*

457. *Id.* at 4-5.

458. *Id.*

459. *Id.* at 14-15.

460. *See id.* at 15.

461. *Id.*

462. *Id.* (explaining that "the scope of consumer law is defined by that law; UCITA does not alter that scope").

463. *Id.*

Warranty Act applies to software pre-UCITA, then it would apply to software post-UCITA.⁴⁶⁴ Other proponents have argued that the Warranty Act was never meant to cover computer information transactions at all and therefore should not be extended to UCITA's realm.⁴⁶⁵

UCITA's proponents have also argued that the cost of additional statutory consumer protections is more than the market is willing to bear.⁴⁶⁶ They charge that supplementing UCITA with provisions that provide broader rights and warranties will force vendors to sell their products at a higher cost.⁴⁶⁷ This, they argue, will make software inaccessible to those who cannot afford the higher prices.⁴⁶⁸ They further contend that increased liability will also force small developers who cannot afford the additional costs out of business, thus decreasing innovation and competition within the computer industry.⁴⁶⁹ Additionally, applications that are not profitable at higher prices will stop being sold.⁴⁷⁰ Thus, UCITA's proponents argue that the increased rights and protections lobbied for by UCITA critics will harm, not help, consumers.⁴⁷¹

The criticisms of UCITA's express warranty provisions have focused mainly on changes made to the creation of warranties by demonstration.⁴⁷² UCITA advocates respond that these changes are necessary to update the law to reflect the new business environment.⁴⁷³ In a non-computer information transaction, the demonstration of a product can have a higher correlation with the end result.⁴⁷⁴ For example, a taste sample of cheese in a grocery store gives a reliable indication of what the rest of the cheese will taste

464. See *id.* (noting that the scope of the Warranty Act is determined by the courts and thus cannot be changed by UCITA).

465. Fred H. Miller (Executive Director of the NCCUSL), *Speaking Frankly About UCC Article 2B*, 37 UCC Bulletin 1 (Mar. 1999) ("These laws all were developed for a far different form of subject matter, and a good fit is more chance than wisdom.").

466. Micalyn S. Harris, *Is UCITA Worthy of Active Support?*, at <http://www.2bguide.com/docs/mh1099.html> (last visited on Dec. 1, 2000).

467. *Id.*

468. *Id.*

469. *Id.*

470. *Id.*

471. *Id.*

472. See *supra* notes 383-94 and accompanying text (discussing the insertion of restrictive language like "reasonable person" and limiting warranties to "final" products).

473. Nimmer, *UCITA*, *supra* note 7, at 16 ("Although some have argued that this reduces customer protections, a reasonable reading of the reported cases would show that they follow this same, common-sense approach."); see also Jeff C. Dodd & Brian Martin, *A Preliminary Analysis of Certain Default Rules in the Uniform Computer Information Transactions Act*, in *supra* note 161, The UCITA Revolution, at 379, 403 ("So, with information products courts should be especially mindful of what is truly and fairly being illustrated.").

474. Dodd & Martin, *supra* note 473, at 403 (contrasting a test sample in a grocery with the demonstration of an "intricate application program").

like.⁴⁷⁵ A demonstration of a computer program, however, may only illustrate the “general functionality” of the program, “not its capacity or performance.”⁴⁷⁶ Reporter Ray Nimmer gives the example of “a demonstration of a database system using 10 files for that purpose creates an express warranty, but the performance that is to be expected when the system handles 1 million files may not be the exact same as the demonstration.”⁴⁷⁷

With respect to implied warranties, UCITA’s critics charge that the statute makes the application of the law confusing by introducing concepts like PIC.⁴⁷⁸ UCITA’s proponents respond that the distinction drawn between PIC and the rest of a computer program is necessary to support freedom of speech.⁴⁷⁹ Unlike normal sales of goods, computer information may involve First Amendment issues.⁴⁸⁰ For example, software is composed of lines of code that enable it to run and process information, but it also contains information intended to be perceived by the user, which is therefore the equivalent of books and magazines.⁴⁸¹ The information in books and magazines is usually only subject to liability under tort law.⁴⁸² If the entire computer program were subject to the same warranty laws, publishers would have to extend warranty protection to information that normally would not receive it,⁴⁸³ which would create an excessive risk of liability and potentially hamper the computer industry’s development.⁴⁸⁴ To prevent this, UCITA provides that PIC is not subject to implied warranty laws.⁴⁸⁵ Instead, liability is based on rules found in tort law principles.⁴⁸⁶

In response to accusations by critics that UCITA makes it easier to disclaim warranties, proponents have pointed out that UCITA retains many of the protections provided by the UCC.⁴⁸⁷ For example, UCITA follows Article 2 by requiring that disclaimers of implied

475. *See id.*

476. *Id.*

477. Nimmer, *UCITA*, *supra* note 7, at 16.

478. *See supra* notes 443-52 and accompanying text.

479. Nimmer, *UCITA*, *supra* note 7, at 9 (noting that computer information “call[s] into play political and social values associated with free speech interests”).

480. *Id.*

481. *See id.*

482. *Id.* (describing that a common law tort cause of action exists in most states with respect to informational content).

483. *Id.*

484. Carlyle C. Ring, Jr. & Raymond T. Nimmer, Series of Papers on UCITA Issues, at http://www.nccusl.org/uniformact_qanda/uniformacts-q-ucita.htm (last visited on Dec. 1, 2000).

485. *Id.* UCITA does, however, provide an implied warranty for informational content if the licensor and licensee have a special relationship of reliance. *See* U.C.I.T.A. § 404 (2000).

486. Nimmer, *UCITA*, *supra* note 7, at 9 (“UCITA adopts the rule under common law in most states with respect to printed forms of this type of information content.”).

487. *Id.* at 16.

warranties be conspicuous and that express warranties generally cannot be disclaimed.⁴⁸⁸ Furthermore, in response to the argument that shrink-wrap licensing essentially defeats the purpose of the conspicuousness requirement, UCITA proponents note that the customer is still protected from unreasonable terms.⁴⁸⁹ If the terms of a shrink-wrap license are oppressive, UCITA provides courts with the power to invalidate those terms through the doctrines of unconscionability, good faith, and public policy.⁴⁹⁰ Additionally, the consumer is provided the right of a refund if he decides not to accept the terms of the license.⁴⁹¹ Finally, UCITA proponents note that shrink-wrap licenses are a normal part of business that are accepted by the courts.⁴⁹²

In response to criticism that UCITA's opt-in provision would remove normal Article 2 transactions (e.g., the sale of hardware, televisions, cars) from existing consumer protection statutes (state laws and Magnuson-Moss), UCITA proponents argue that critics have overstated the threat. First, they note that section 104 places several restrictions on UCITA's ability to supplant other law.⁴⁹³ For example, entering the contract into UCITA cannot alter the applicability of a consumer protection statute or any other rule that normally cannot be varied by agreement.⁴⁹⁴ Additionally, the entire transaction would still have to withstand the legal doctrines of unconscionability, fundamental public policy, and good faith.⁴⁹⁵ As to the claim that the opt-in provision would "swallow up the law of goods and undermine Revised Article 2," UCITA advocates note that the statute is inapplicable unless there is computer information in the transaction, and that information is a material purpose of the transaction.⁴⁹⁶

Many of the people who have criticized UCITA agree that some sort of uniform law is required. As previously noted, the current law governing computer information transactions is a loose combination of common law and UCC.⁴⁹⁷ Proponents of the statute argue that this uncertainty is a compelling reason for UCITA's passage.⁴⁹⁸ The

488. *Id.* at 17.

489. Donald A. Cohn & Mary Jo Dively, *The Need For a More Objective Look at the Myths of the Proposed Uniform Computer Information Transactions Act*, at <http://www.2bguide.com/docs/myths.html> (last visited Dec. 1, 2000).

490. *Id.*

491. U.C.I.T.A. §§ 208, 202(e) (2000).

492. Cohn & Dively, *supra* note 489; Ring & Nimmer, *supra* note 484.

493. Letter from Members of the Subcommittee on Information Contracting of the Uniform Commercial Code Committee of the American Bar Association Section of Business Law, to President Gene N. Lebrun and other Commissioners, NCCUSL, at <http://www.2bguide.com/docs/7899bls.html> (July 8, 1999).

494. *Id.*

495. *Id.*

496. *Id.*

497. Nimmer, *UCITA*, *supra* note 7, at 5.

498. *Id.* at 5-6.

alternative, they point out, is contract law that impedes instead of supports commerce.⁴⁹⁹

UCITA, however, will not properly address the current ambiguity in the law unless further changes are made to it that will provide consumers greater protection. The following part presents a possible solution to the UCITA controversy in the form of modifications to UCITA and new federal legislation.

III. A THIRD WAY

This part argues that UCITA, in its current form, is unable to meet the demands of the new economy because the statute does not take into account consumer needs. As such, this part suggests that: (1) individual state legislatures should amend the statute to provide greater protection of consumer interests; and (2) Congress should create *sui generis* legislation with respect to consumer protection issues in computer information transactions.

Even if we are to believe all of the arguments articulated by UCITA's proponents,⁵⁰⁰ the interpretive problems that will almost certainly arise due to UCITA's often ambiguous language should cause state legislatures to pause before deciding whether to pass the statute. While the statute's stated purpose is a laudable one—to bring uniformity to the law of computer information transactions—the cost in terms of endless litigation between parties contesting UCITA's often ambiguous language may be too high a price to pay.

In comparison to the meticulous drafting of the UCC, UCITA's drafting process was an example of blitzkrieg legislation.⁵⁰¹ The UCC was a synthesis of more than seventy years of business practices and case law.⁵⁰² Unfortunately, UCITA's relatively quick compilation may result in the codification of bad law. Furthermore, the computer information industry is subject to constant and rapid changes.⁵⁰³ Thus, rules that seem practical now may quickly cease to be useful and may possibly become a hindrance to commerce.

Ideally, the statute should be sent back for further drafting or modification to resolve the myriad problems identified by UCITA's opponents. Because the legislation has already been passed in two states and introduced in several others, however, it is likely that UCITA, in one form or another, will eventually become law. A potential compromise would be for the individual states to amend the

499. *Id.* at 6.

500. *See supra* Part II. C.

501. Thomas J. Murphy, Comment, *It's Just Another Little Bit of History Repeating: UCITA in the Evolving Age of Information*, 30 Golden Gate U. L. Rev. 559, 573 (2000).

502. *Id.* Waiting until the law is settled avoids the problem of codifying sub-optimal practices and case law. *See id.*

503. *Id.* at 574.

statute and remedy deficiencies when and where they arise.⁵⁰⁴ This would allow for the creation of a relatively uniform body of law, but would still address consumer protection concerns.

To date, only Virginia and Maryland have passed UCITA.⁵⁰⁵ The Virginia legislature adopted UCITA without making any substantive changes to its provisions.⁵⁰⁶ They delayed, however, enforcement of UCITA until July 2001.⁵⁰⁷ Conversely, Maryland's version of UCITA has been effective law since October 1, 2000.⁵⁰⁸ The Maryland version of the bill has undergone several modifications,⁵⁰⁹ many of which were praised by consumer groups for addressing some of their concerns.⁵¹⁰ The most important of these changes, and most significant to this Note, is the invalidation of disclaimers of implied warranties in consumer contracts.

The Maryland legislature's modifications to UCITA represent a model for other states to follow when adopting UCITA. Maryland's approach, however, is only a beginning. States should go further in exercising the considerable discretion left to them. For example, state legislatures should amend several of UCITA's provisions to create a distinction between consumer transactions and business to business transactions with respect to warranties.

Distinguishing consumer transactions from other types of commerce makes sense for several reasons. A commercial statute that deals with both consumers and businesses the same way requires drafting rules that "apply with equal facility—and equal justice—to this wide range of transactions."⁵¹¹ Situations exist, however, where an undifferentiated rule may be unadvisable. For example, the extremely liberal disclaimer of implied warranties might be welcomed in business transactions,⁵¹² but this change would be less welcome in the "consumer context."⁵¹³ Because of these compromises, the resulting legislation may be inadequate for both consumers and businesses.

Additionally, distinguishing between consumers and businesses would avoid later legal ambiguities. For example, consumer status, even if not recognized by statute, is often an important factor in

504. S. Keith Mouldsdales & Steven E. Tiller, *UCITA Spells Controversy*, 33 Md. B.J. 23, 25-26 (2000) (noting that the version of UCITA passed by the Maryland legislature underwent several changes, many of which were related to consumer protection issues).

505. *Id.* at 23.

506. *Id.*

507. *Id.*

508. *Id.*

509. *Id.*

510. *Id.*

511. Kathleen Patchel & Amelia H. Boss, *Consumer Transactions and the Code: Some Considerations*, 51 Bus. Law. 1343, 1353 (1996).

512. *Id.* at 1354.

513. *Id.*

judicial opinions.⁵¹⁴ In these situations, statutory language is manipulated to achieve the desired result in the interests of justice.⁵¹⁵ Unfortunately, this judicial manipulation can cause uncertainty when "it is unclear to what extent the court's decision is based on the consumer nature of the transaction."⁵¹⁶

Once a distinction is made, provisions that consumer groups find objectionable can be shifted to affect only business transactions. An example of this approach can be found in the proposed revisions to Article 2 of the UCC, which attempts to incorporate consumer provisions in addition to business to business provisions.⁵¹⁷ Article 2 has been in a revision process for more than a decade now.⁵¹⁸ Originally slated to be released in 1997,⁵¹⁹ the statute has been repeatedly delayed. Consumer issues have proven to be a rather large obstacle. The Article 2 drafters realized that if the statute was to "have a chance of rapid and uniform enactment" it would have to include consumer protective provisions.⁵²⁰ UCITA's authors would have done well to follow their careful approach.

A necessary first step in this direction would be to make the implied warranty of merchantability undisclaimable in the consumer context. Several reasons support this action. First, unlike sophisticated commercial entities, consumers are unable to negotiate the terms in typical computer information transactions.⁵²¹ Consumers, instead, are presented with adhesion contracts,⁵²² which are, by definition, "take it or leave it" propositions.⁵²³ For example, the typical mass-market software transaction between a consumer and publisher involves the consumer buying a ready-made product with terms attached to it that

514. *Id.*

515. *Id.*

516. *Id.* at 1355.

517. Fred H. Miller (Executive Director of the NCCUSL), *Consumer Provisions in the Revised UCC*, 53 Consumer Fin. L.Q. Rep. 95, 95 (1999).

518. Edith Resnick Warkentine, *Article 2 Revisions: An Opportunity to Protect Consumers and "Merchant/Consumers" Through Default Provisions*, 30 J. Marshall L. Rev. 39, 79 (1996) (noting that the original process began in 1987).

519. *Id.* at 39.

520. Miller, *supra* note 517, at 95 (showing that "earlier efforts" in New York and California, presumably with fewer consumer protections, demonstrated the need for favorable provisions).

521. See Sandra J. Levin, Comment, *Examining Restraints on Freedom to Contract as an Approach to Purchaser Dissatisfaction in the Computer Industry*, 74 Cal. L. Rev. 2101, 2121-23 (1986).

522. Batya Goodman, Note, *Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract*, 21 Cardozo L. Rev. 319, 335 n.97 (1999) (noting that consumers in software transactions are usually presented with adhesion contracts).

523. Joseph M. Perillo, Corbin on Contracts § 1.4, at 13-14 (1993).

cannot be varied.⁵²⁴ A commercial entity, on the other hand, can negotiate with the software publisher for more favorable terms.⁵²⁵

To a certain extent, adhesion contracts are necessary because it would be infeasible for businesses to negotiate individual contracts with each and every consumer.⁵²⁶ The cost (manpower, increased price of product, etc.) would quickly outweigh any benefit.⁵²⁷ It is possible, however, to make the standard contract that consumers receive more protective. In this respect an undisclaimable warranty of merchantability would be advisable. Because the warranty of merchantability forces publishers to meet a certain standard of quality in their products,⁵²⁸ its mandatory inclusion in consumer computer information purchases would provide a minimum "floor" below which products will not be able to sink.

The average consumer is likely oblivious to the existence of these warranties and probably does not notice whether the warranties come with the software being purchased. Consumers, however, regardless of their knowledge of the law, do expect the products they buy to meet certain standards.⁵²⁹ In this respect, computer information transactions are no different from transactions involving other products.⁵³⁰ Customers, therefore, will expect software to have the same warranty rights they have come to expect from other products.⁵³¹

UCITA's warranty structure fails to meet these reasonable consumer expectations. With respect to the implied warranties, it allows for liberal disclaimer,⁵³² and because it makes no caveat for consumers, the disclaimer effectively limits a right that consumers currently enjoy.⁵³³ Furthermore, because it is unclear both whether the Warranty Act applies to software⁵³⁴ and whether UCITA actually pulls software out of the scope of the Warranty Act,⁵³⁵ consumers may be unable to avail themselves of that statute's protections.

UCITA's lack of protection in this regard becomes more troubling because software is routinely shipped with known defects ("bugs").⁵³⁶

524. Goodman, *supra* note 522, at 335 n.97.

525. Levin, *supra* note 521, at 2121-22.

526. Perillo, *supra* note 523, § 1.4, at 15.

527. *Id.*

528. *See supra* notes 166-78 and accompanying text.

529. *See* Kaner & Pels, *supra* note 403.

530. *Id.*

531. *Id.*

532. *See supra* notes 371-80 and accompanying text.

533. *See supra* notes 405-13 and accompanying text (noting that the UCITA provisions are weaker than existing law).

534. *See supra* notes 313-26 and accompanying text.

535. *See supra* notes 419-26, 462-65 and accompanying text (noting the conflicting views on the applicability of the Warranty Act to computer information and whether UCITA and the Warranty Act are mutually exclusive).

536. Cem Kaner & David L. Pels, *Article 2B and Software Customer Dissatisfaction: Prepared for the UCC Article 2B Drafting Committee*, at

The nature of computer software makes it impossible to “test a program completely” before shipping it.⁵³⁷ The presence of bugs in a computer program, therefore, is not in and of itself indicative of poor manufacturing processes.⁵³⁸ Manufacturers should, however, be incentivized to limit the presence of such bugs. As previously mentioned, the UCC implied warranty of merchantability requires sellers to ensure that their products are “merchantable”⁵³⁹ and would “pass without objection in the trade.”⁵⁴⁰ The threat of the ensuing litigation if software fails to meet this standard would encourage software publishers to improve the quality of their products, and thus force them to limit the amount of software bugs.

Regarding the express warranty, UCITA’s weakening of the warranty in the demonstration/model context will only serve to frustrate consumers. The following scenario illustrates the problem: A consumer enters a store (either virtual or real) to buy a software program. In the store, the consumer observes the live demonstration of that program. Impressed with the software’s abilities he buys the program. In this scenario, the consumer has made his purchase based on representations made by the publisher. Under UCITA, however, the circumstances under which these representations led to the creation of an express warranty have been severely limited.⁵⁴¹ If the consumer relies upon the demonstration, UCITA introduces a myriad of obstacles to the creation of an express warranty.⁵⁴² Consumers, however, rightfully expect manufacturers “to stand behind statements of fact that their representatives make at trade shows or in other face-to-face product demonstrations.”⁵⁴³

UCITA’s express warranty by demonstration should be modified to follow the UCC’s Article 2 provisions. This change would remove the restrictions currently in place and provide consumers with greater certainty in their purchases. The objections from UCITA’s proponents’ that removing the restrictions will cause excessive liability are misplaced. Reporter Ray Nimmer refers us to the example of a demonstration for a database system that can handle ten files being subverted into a warranty for a system with a one million-file capacity.⁵⁴⁴ The proponents, however, have overstated their case.

<http://www.badsoftware.com/stats.htm> (May 27, 1997); Levin, *supra* note 521, at 2101.

537. Kaner & Pels, *supra* note 536.

538. *See id.*

539. *See supra* notes 164-74 and accompanying text (discussing the merchantability requirement).

540. *See supra* notes 175-78 and accompanying text (discussing the pass without objection in the trade standard).

541. *See supra* notes 383-404 and accompanying text (discussing how the UCITA provisions have weakened the express warranty).

542. *See supra* notes 383-404 and accompanying text.

543. Kaner & Pels, *supra* note 403.

544. *See supra* note 477 and accompanying text.

Even the current UCC Article 2 provisions, which are far more consumer friendly than UCITA's provisions, would not allow for the kind of abuses Professor Nimmer discusses.⁵⁴⁵ If the database is being presented as one that can adequately handle 10, 100, or 1000 files, then that is the warranty being made by the manufacturer. Unless the manufacturer misleads the consumer into believing the database system can actually handle more files than were being demonstrated, there is no reason to believe the express warranty would be extended.

UCITA's lack of consumer protection is especially troublesome considering the rising consumer dissatisfaction with the computer industry. In 1995, "computers and software ranked #8 in the Top 10 list for complaints to the Better Business Bureau, outdoing such historically reputable businesses as used car dealers."⁵⁴⁶ Consumers often express dissatisfaction over the presence of bugs in their software programs or the duplicity of manufacturers who make "sky-high claims in their advertising," but fail to back up those assertions with warranties.⁵⁴⁷ UCITA's pro-vendor provisions will worsen this already egregious situation. For example, disclaimable implied warranties and watered down express warranties represent a step backwards in consumer rights in an industry that has historically mistreated consumers.

When state legislatures consider adopting UCITA, they should amend the statute to ensure that at the very least, its effects on consumers are no more unfavorable than the law that preceded it. Unfortunately, states by themselves will be unable to fix all of UCITA's present ambiguities. Even if they could, the resulting document would have undergone considerable change that would compromise the statute's uniformity. It is in this regard that UCITA's case is strongest; the disarray in the status quo begs for uniformity. As an increasingly interconnected global nation moves into an information economy, it is unacceptable for computer information transactions to be governed in different ways in multiple jurisdictions. For example, depending on where one currently makes a software transaction, such a transfer may or not be considered a good covered by the UCC,⁵⁴⁸ express warranties are or are not disclaimable,⁵⁴⁹ and merchantability may or may not be an applicable standard for computer information.⁵⁵⁰ The threat of non-uniformity, however, should not hold state legislatures hostage when considering the

545. See White & Summers, *supra* note 75, § 9-6, at 509-10 (describing how not all representations create an express warranty and that "[w]hether something is a model depends partly upon the words spoken by the parties to the transaction").

546. Kaner & Pels, *supra* note 536.

547. Levin, *supra* note 521, at 2101-02.

548. See *supra* notes 40-74 and accompanying text.

549. See *supra* notes 113-57 and accompanying text.

550. See *supra* notes 187-222 and accompanying text.

adoption of UCITA. In evaluating the statute, the legislatures' first concern must be UCITA's impact on their consumer constituencies.

In addition to the changes state legislatures should make to UCITA, Congress should adopt consumer protection legislation specifically drafted for computer information transactions. Legislation at the federal level avoids the rancor and strife associated with coordinating "uniform" laws in fifty different jurisdictions. It has been suggested that the Magnuson-Moss Warranty Act should be extended to computer information transactions.⁵⁵¹ Currently, the Warranty Act extends to all written consumer product warranties.⁵⁵² The uncertainty in the status quo stems from the Warranty Act's definition of consumer products as "tangible personal property."⁵⁵³ To broaden the Warranty Act's scope, the definition of consumer products must be expanded by either defining tangible personal property to include computer information or by making computer information a separate category covered by the Act.

Both of these options are unattractive⁵⁵⁴ because they would extend legislation that was drafted almost thirty years ago to situations it was never designed to address. The changes in the economy require a federal consumer protection statute that encompasses computer information transactions to be *sui generis*. To that effect, such federal legislation should contain the following warranty provisions:

1. This Act will extend to computer information transactions that are intended primarily for personal, family, or household purposes. [*This provision would restrict the Act's applicability to consumers. Businesses would remain free to negotiate terms under UCITA's provisions.*]
2. Computer information transactions shall include but not be limited to the sale of computer information and the licensing of computer information. [*This provision allows the*

551. Rustad, *supra* note 15, at 588 (arguing for the extension of the Warranty Act to computer information transactions); see also Cem Kaner, *Software Engineering and UCITA*, 18 J. Marshall J. Computer & Info. L. 435, 459-62 (1999) (noting UCITA pulls software outside the scope of Magnuson-Moss and that this is undesirable).

552. See *supra* note 292 and accompanying text.

553. See *supra* note 293 and accompanying text. The uncertainty in the tangibility requirement is similar to the earlier discussion about whether software is a good. See *supra* notes 40-74 and accompanying text.

554. For example, even if the Magnuson-Moss Warranty Act was extended to computer information transactions, the problem of UCITA's watered down express warranty by demonstration would still exist, because the Warranty Act only applies to the seller's written statements. See, e.g., 15 U.S.C. § 2301(6)(A)-(B) (1994). Furthermore, the Warranty Act's express warranty provisions are less encompassing than the UCC. White & Summers, *supra* note 75, § 9-15, at 546 ("[W]hat may be an express warranty under 2-313 is not necessarily an express warranty under the Magnuson-Moss Act."). Thus, merely extending the Warranty Act would not solve the problems associated with UCITA.

legislation to adapt to methods of transacting computer information that have not yet been created.]

3. This Act will apply only to those computer information transactions that contain a written warranty from the manufacturer. In the event the transaction in question does not contain any such warranty this Act shall not apply, however, the manufacturer must indicate the absence of such warranties in conspicuous (using the UCC definition of the term) and unmistakable language. *[This provision would enable a manufacturer to avoid compliance with the Act, but only if it did not issue any warranty whatsoever. Furthermore, the provision would force the manufacturer to give notice of the absence of warranties to the consumer.]*
4. Computer information intended to be used by a consumer as a software program must perform as stated in the supplier's advertising and or product packaging. Such advertising and packaging creates an express warranty. For the purposes of online transactions the product descriptions supplied by the supplier shall be considered advertising. *[This provision forces manufacturers to stand behind the claims they make in product advertising.⁵⁵⁵]*
5. Any demonstration of a product by a supplier or its licensed dealer creates an express warranty based on that demonstration. *[This provision would avoid UCITA's harsh modifications⁵⁵⁶ to the express warranty by demonstration.]*
6. No manufacturer or publisher may disclaim or modify any implied warranties with respect to a computer information transaction if the transaction is covered by this Act. *[This provision ensures consumers, at a minimum, will have the protection of any implied warranties.⁵⁵⁷]*
7. The implied warranties shall extend to informational content but not published informational content. UCITA provides no warranties for PIC. This Act will retain that limitation. Thus, the express warranties and undisclaimable implied warranties provided above do not apply with respect to PIC. *[This provision ensures PIC will not be subject to any additional liabilities beyond those already imposed by tort law.⁵⁵⁸]*

555. See *supra* notes 401-04 and accompanying text (discussing consumer dissatisfaction with software publishers).

556. See *supra* notes 383-400 and accompanying text (explaining the effect of UCITA's modifications on the express warranty by demonstration).

557. See *supra* notes 521-27 and accompanying text (discussing why the implied warranty of merchantability should be disclaimable).

558. PIC raises First Amendment considerations that are beyond the scope of warranty law. See *supra* notes 479-86 and accompanying text for a discussion of why

Federal warranty law that contains the above provisions would mitigate many of UCITA's harsher aspects with respect to warranty law. State legislatures, however, should also modify UCITA before ratifying it to ensure it adequately addresses consumer needs. By making these changes at both the state and federal level, the government could bring some badly needed uniformity to the law of computer information transactions while also protecting consumer interests.

CONCLUSION

Consumers make purchases on a daily basis and often comparison shop based on features, price, reputation, or other factors. One factor, however, that almost never enters a consumer's mind (even a legal mind) is whether the product has express or implied warranties and what the terms of those warranties are. Nonetheless, consumers expect manufacturers to stand behind their products and claims. Thus, warranty provisions, though they go unnoticed, are an important part of commercial transactions.

Similarly, uniformity in the law is also an important factor in commercial transactions. From either a business or consumer viewpoint, uniformity is favored because it avoids uncertainty, decreases transaction costs, and makes for a more stable business environment. Computer information transactions is an area of the law badly in need of such uniformity.

America's transition from an industrial to an information economy necessitates legislation that reflects this change. Unfortunately, UCITA sacrifices fairness to consumers in its warranty provisions in favor of achieving uniformity, which is a price that is too high to pay. It remains to be seen both whether UCITA will be adopted by the remaining forty-eight states and in what form it will pass. Regardless of its ultimate fate, the UCITA controversy highlights the uncertain nature of computer information transactions law and the need for new legislation that effectively balances the need for uniformity with consumer interests.