Santa Clara University School of Law

Santa Clara High Technology Law Journal

January 1993

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SELF-HELP REMEDIES FOR SOFTWARE VENDORS

Henry Gitter†

The rapid growth of the computer industry has created a new operating environment for business. Many firms are now completely dependent on computers to conduct their business affairs. This dependence requires that disputes between software vendors and their clients be resolved quickly and with no disruption to the client's computer system.[1] Recently, a software vendor used what it characterized as "self-help repossession" to resolve a dispute with one of its clients. Such action raises issues that must be examined before this remedy can be sanctioned for use in this novel application.[2] This article examines self-help repossession within the context of computer software contracts, and asserts that its use should be confined to a limited set of facts.

The first part of this article describes the October 1990 *Revlon* case where self-help was used to repossess computer software.[3] The article then discusses the background and rationale underlying self-help repossession. Part II reviews the Uniform Commercial Code's (U.C.C.) support of self-help repossession and the weaknesses inherent in the U.C.C.'s provisions as they apply to software disputes. Part III outlines other legal doctrines containing self-help provisions that fail to support software repossession. Finally, Part IV proposes the use of self-help repossession in a limited set of circum-

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    1. Software disputes can arise under two sets of circumstances. The most common scenario is when the client and vendor disagree on the performance of the software and the client refuses to pay for it. Less common is when the client flatly refuses to pay for the software despite agreeing that it performs as expected.

    2. Among the techniques used by software vendors to repossess software are preplanted time bombs. A time bomb is a software device that, if not deactivated by the vendor, will cause the software to stop functioning. The vendor may also gain access to the client's system and shut down the software.

    3. Revlon Group, Inc. v. Logisticon, Inc., No. 705933 (Cal. Super. Ct., Santa Clara Cnty., complaint filed Oct. 22, 1990).

stances and explores other forms of self-help that do not rely on repossession.

I.   REPOSSESSION: PAST AND PRESENT

A.   Revlon v. Logisticon

A dispute between the Revlon Group (Revlon) and one of its software suppliers thrust the issue of software repossession into the headlines.[4] Logisticon, Inc. (Logisticon) agreed to develop and install software for Revlon's warehouse inventory system.[5] The contract called for development in stages with milestone payments for successfully completed phases. Logisticon obtained dial-up access[6] to Revlon's computer system in order to develop and test the software. The first phase was installed but Revlon was dissatisfied with the software's operation. After Logisticon attempted to remedy the problems, Revlon informed them that it would withhold a portion of the first payment and cancel the remainder of the contract. Logisticon responded by dialing into Revlon's computer system and disabling its software. The firm advised Revlon that the software would be restored upon payment and that none of Revlon's data was affected.

Disabling the software disrupted Revlon's two main distribution centers, closed operations for three days and caused $20 millon in product delivery delays. Revlon brought suit against Logisticon alleging misappropriation of trade secrets as well as contract claims. The suit settled out of court, and the settlement terms remained undisclosed.[7]

B.   *Self-Help Repossession and the U.C.C.*

Self-help[8] is action taken to enforce or protect one's rights without resort to the legal system.[9] Records show that self-help was available to would-be plaintiffs as far back as Greek jurisprudence.[10]

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4.   Andrew Pollack, *Revlon Accuses A Supplier Of Sabotaging Its Software*, N.Y. TIMES, October 25, 1990, at D1, col. 1.

5.   *See* Jeffery B. Ritter, *Disabling Software Devices: 'Revlon' Inspires Contracting Strategies*, COMPUTER LAW STRATEGIST, January 1991, at 1-2 for the facts of *Revlon*.

6.   Dial-up access allows someone to access a computer from a remote location using a modem and a telephone line.

7.   *"Repossession" by Disabling Software In User's Warehouse Spurs Suit, But Parties Settle*, THE COMPUTER LAWYER, December 1990, at 34.

8.   For an excellent overview of the history of self-help repossession see James R. McCall, *The Past as Prologue: A History of the Right to Repossess*, 47 S. CAL. L. REV. 58 (1978).

9.   BLACK'S LAW DICTIONARY 1220 (5th ed. 1979).

10.   *See* McCall, *supra* note 8, at 63-75.

English common law recognized self-help, after years of suppression, due to concerns that violence would result from its execution.[11] The self-help remedy quickly gained recognition in American courts,[12] and was later codified into such diverse areas of the law[13] as commercial,[14] tort and nuisance,[15] self-defense[16] and landlord/tenant law.[17] The U.C.C. limits self-help to repossession within the commercial law arena and regulates its use against debtors.[18] A secured creditor may repossess its collateral from a debtor in default without judicial intervention.[19] This remedy is not without rules, as creditors are forbidden from using violence or the threat of violence to repossess their collateral.[20]

C. *Rationale for Self-Help In Commercial Disputes*

1. Consumer Debtors

The arguments supporting self-help repossession for consumers focus on efficiency. Proponents contend that self-help repossession offers a two-fold economic benefit. Self-help repossession increases the amount of credit available to consumers while decreasing the cost of credit.[21] In addition, judicial efficiency is increased by reducing the caseload of overburdened courts.[22]

The arguments opposing self-help repossession extend beyond purely economic terms. Those opponents of self-help repossession focus on the unfair advantage that creditors have over debtors. The Supreme Court responded to these concerns in cases such as *Fuentes v. Shevin*,[23] by imposing due process requirements when state

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11. *Id.* at 68.

12. *Id.* at 73. *See also Right of Conditional Seller To Retake Property Without Judicial Aid*, 55 A.L.R. 184 (1991) for a collection of early self-help cases.

13. For a complete discussion of self-help in "non commercial" settings see Douglas I. Brandon, et al., *Self-Help: Extrajudicial Rights Privileges and Remedies in Contemporary American Society*, 37 VAND. L. REV. 845 (1984).

14. *See* U.C.C. §§ 2A-525, 9-313(8), and 9-503.

15. For a complete discussion of self-help in tort and nuisance cases see Jon K. Wactor, Note, *Self-Help: A Viable Remedy for Nuisance? A Guide for the Common Man's Lawyer*, 24 ARIZ. L. REV. 83 (1982).

16. *Brandon et. al., supra* note 13, at 878.

17. *Id.* at 937.

18. JAMES J. WHITE & ROBERT S. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 25-11 at 1063, § 26-6 at 1094-1102 (1980).

19. *See* U.C.C. § 9-503.

20. *Id.*

21. James J. White, *The Abolition of Self-Help Repossession: The Poor Pay Even More*, WIS. L. REV. 503, 522-523 (1973).

22. *Brandon et al., supra* note 13, at 849.

23. 407 U.S. 67 (1972).

action was used to enforce a creditor's self-help remedies. The Court held that due process requires a creditor to seek a writ of possession from a judge and hold an immediate hearing after repossessing a debtor's goods.

Opponents further disparage self-help repossession because it encourages unethical practices by creditors.[24] Among the practices criticized are the use of violence and the excuse of a minor breach to justify repossession. These and other unscrupulous repossession practices diminish public respect for law.

2. Business Debtors

The issues raised by self-help repossession in business are similar to those in the consumer world. Proponents contend that it is more efficient to seize the collateral rather than litigate the dispute. This lowers the cost of doing business, in turn allowing sellers to offer lower prices. Self-help repossession also protects business by ensuring that their goods are not destroyed by the debtor.[25] Opponents to self-help repossession in business raise the same arguments as those in the consumer realm. In response, Professor Gilmore states that repossession causes little trouble in the business world.[26]

II. SOFTWARE REPOSSESSION AND THE U.C.C.

A. *Applicability of the U.C.C. to Software*

The current trend in computer law is to treat software as goods under the U.C.C.[27] This allows vendors to rely on the U.C.C.'s self-help provisions in contract disputes with their clients. Both custom and "off the shelf" software[28] have been deemed goods, although not all courts have agreed with this viewpoint.[29] In contrast, courts have agreed that ancillary services (such as training) are not consid-

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24. *See* Thomas D. Crandal, *Proposal For Consumer Credit Reform: A Definition Of Default, A Right To Cure, And A Right To Notice And An Opportunity For A Hearing Before Repossession,* 13 GONZ. L. REV., 11, 31-33 (1977). *See also* GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY, § 44.1 at 1212 (1965).

25. Soia Mentschifkoff, *Peaceful Repossession Under the Uniform Commercial Code: A Constitutional and Economic Analysis,* 14 WM. & MARY L. REV. 767, 779 (1973).

26. *See* GILMORE, *supra* note 24, at 1212.

27. RRX Industries v. Lab Con, Inc., 772 F.2d 543 (9th Cir. 1985). The court held that software would be treated as goods under the U.C.C. so long as the sales aspects of the transaction predominated.

28. "Off the shelf" software has already been developed and is sold to buyers ready to use.

29. *See* H/R Stone, Inc. v. Phoenix Business Systems, Inc., 660 F. Supp. 351 (S.D. N.Y. 1987) (hardware and custom software are not goods under the U.C.C.).

ered goods.[30]

Once software is classified as goods, then there are two areas within the U.C.C. that vendors can rely on to repossess computer software: secured transactions and leases.[31] The following sections present arguments that both sides can use when litigating the use of self-help repossession in software disputes. Attorneys counseling their clients should carefully consider these arguments before resorting to self-help.

B. *Secured Transactions and the U.C.C.*

1. Article 9

U.C.C. Article 9 governs transactions in instances where a creditor retains a security interest in the goods held by the debtor.[32] Section 9-503 allows a secured creditor to repossess its collateral when the debtor defaults,[33] unless otherwise specified in the security agreement. Repossession may proceed so long as neither the creditor nor the debtor breaches the peace.[34]

Breach of peace is a term of art describing the prohibition against violence or threats of violence by the two parties against each other.[35] It requires that the creditor gain the consent of the debtor before entering his property to repossess the collateral.[36] Consent is revoked by any objection raised by the debtor, even if the repossession occurs in a public place.[37] In turn, creditors may resort to skillful deception in order to obtain a debtor's consent to repossession.

Apparently the deceptive creditor appeals to judges, as courts

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30. *RRX*, 772 F.2d at 546.

31. *See* U.C.C. § 2A-525, § 9-313(8), § 9-503.

32. WHITE & SUMMERS, *supra* note 18, § 26-6 at 1094-1102.

33. U.C.C. § 9-503 provides:

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9-504.

34. *Id.*

35. For an in-depth discussion of what the term "breach of peace" means see Eugene Mikolajczyk, Note, *Breach of Peace and Section 9-503 and the Uniform Commercial Code - A Modern Definition for an Ancient Restriction*, 82 DICK. L. REV. 351 (1978).

36. WHITE & SUMMERS, *supra* note 18, § 26-6 at 1095.

37. *Id.*

have found consent where the creditor has misrepresented his purpose in entering and taking the debtor's property. For example, in a nineteenth century case, consent by misrepresentation was upheld in the repossession of a piano by creditors who posed as "piano tuners."[38] On the other hand, consent by misrepresentation is barred when state action or the color of state action is involved.[39]

2. Secured Transactions and Software

Secured transactions are used in intellectual property to provide capital to firms by using their software as collateral.[40] In addition, software development contracts can be structured as secured transactions.[41] Upon default, a creditor with a valid security interest may use judicial or non-judicial action to stop the debtor from using the secured intellectual property.[42]

An effective security interest requires that the creditor reserve its rights to the software in order to transfer ownership upon repossession.[43] These rights include ownership of the copyright in the source code, object code and documentation.[44] The creditor must also reserve the rights in the software storage media[45] and any licenses or contracts affecting the software.[46]

3. Breach of Peace

Self-help repossession in computer transactions requires an examination of the breach of peace doctrine within the software environment. Under breach of peace doctrine a creditor may not enter the locked premises of the debtor without consent.[47] In computer systems, the locked door is replaced by the mechanisms that limit

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38. Mikolajczyk, *supra* note 35, at 368.

39. *Id.* at 369.

40. *See generally* G. Larry Engle & Mark F. Radcliffe, *Intellectual Property Financing for High-Technology Companies*, 19 U.C.C. L.J. 3 (1986).

41. *See* Raymond T. Nimmer & Patricia A. Krauthaus, *Secured Financing and Intellectual Property Rights*, 2 HIGH TECH. L.J. 195 (1987).

42. *Id.* at 218-220.

43. A recent case has held that a security interest in a copyright needs to be filed with the Copyright Office, rather then with the state. *See* Peregrine Entertainment, LTD v. Capital Federal Savings & Loan Ass'n, 116 B.R. 194 (C.D. Cal. 1990).

44. Engle & Radcliffe, *supra* note 40, at 29.

45. These are the devices the software is stored on and include tapes and disks.

46. Engle & Radcliffe, *supra* note 40, at 29.

47. *See* Mikolajczyk, *supra* note 35, at 359, where courts have held that a creditor's entry onto locked premises constitutes a breach of peace when repossessing his property. But see Cherno v. Bank of Babylon, 282 N.Y.S.2d 114 (Sup. Ct. 1967); *aff'd*, 228 N.Y.S.2d 862 (2d Dept. 1968) where the court upheld a creditor's entry onto the debtor's business premises using a key obtained without the debtor's consent.

access to authorized users. The arguments surrounding breach of peace in the computer environment depend on whether the vendor is characterized as an authorized or unauthorized user.

Opponents can employ two arguments to oppose software repossession by unauthorized users. First, a creditor gaining access to a computer system without a valid access code is breaching the peace. Entry to a "locked" computer system without consent is similar to a creditor breaking through a locked door. Second, federal computer crime statutes bar unauthorized access to computer systems.[48] These statutes reinforce the characterization of unauthorized systems access as the equivalent of entry through a locked door. A creditor wishing to repossess software, without authorized access, is prohibited by both the breach of peace doctrine and federal law. Creditors, however, have other means at their disposal to repossess software, without relying on unauthorized access.

In the more common scenario, as in *Revlon*,[49] the vendor is authorized to access a client's system, but abuses that access by using it to repossess the disputed software. One can draw an analogy between consent by misrepresentation and a creditor's use of its authorized access to repossess software. A client gives a software vendor consent to access its system to develop and test software. The vendor obtains consent by misrepresentation when it enters a client's system under the guise of software development to repossess its software.

As stated earlier, consent by misrepresentation is allowed except where state action or the color of state action is involved. Accordingly, vendors engaged in self-help will argue that their access is merely consent by misrepresentation and therefore no breach of peace occurs. On the other hand, clients will argue that the use of common carriers (*e.g.*, a telephone company) regulated by the government should be included under the definition of state action. Under this rationale, a creditor breaches the peace when it uses a common carrier while gaining a client's consent to enter its system by misrepresenting its purpose. The client's argument fails, however, due to a Supreme Court ruling that privately owned utilities, though heavily regulated, do not function under state action.[50]

Any argument opposing self-help repossession on breach of

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48. *See* 18 U.S.C.A. § 1030(a) (West Supp. 1991) which prohibits unauthorized access to computer systems.

49. Revlon Group, Inc. v. Logisticon, Inc., No. 705933 (Cal. Super. Ct., Santa Clara Cnty., complaint filed Oct. 22, 1990).

50. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

peace grounds fails because its underlying rationale is no longer ap-
plicable.[51] The ban against breaching the peace is meant to discour-
age violence. In the software environment, unlike consumer and
business repossessions, the chance of violence is minimal since re-
possession is possible without human contact. As a result, arguing
that repossessing software is a breach of the peace is difficult to
sustain.

Clients may yet have the final word under Federal law. In ad-
dition to barring unauthorized use, the Computer Crime Act pro-
hibits a computer user from exceeding its authorized access.[52]
Clients can argue that they give their vendors access to their sys-
tems strictly for software development and testing purposes. A ven-
dor's use of that system to repossess its software exceeds its
authorization and is therefore illegal.[53]

4.   Consequential Damages

Neither the U.C.C. nor the traditional self-help doctrine allows
a debtor to recover the consequential damages of the creditor's re-
possession.[54] These damages include the loss of earnings due to the
disruption of the debtor's business. The rationale behind this is eas-
ily seen: a debtor brings the loss on himself by defaulting on his
debt. The increased consequential damages due to software repos-
session require that we reconsider self-help in light of computer
technology.

In the past, the small business owner was better able to foresee
the ramifications of not paying for its goods. In today's more com-
plex arena, a small business may be unsophisticated both legally and
technically. Accordingly, the business owner may be unaware that

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51.   Mikolajczyk, *supra* note 35, at 352. The prohibition against breaching the peace is
used to prevent violence.

52.   18 U.S.C.A § 1030(a)(4) (West Supp. 1991) defines a violation of the Act as "know-
ingly and with intent to defraud . . . exceeds authorized access and by means of such conduct
furthers the intended fraud and obtains anything of value, unless the object of the fraud and
the thing obtained consists only of the use of the computer. . . ." Further, 18 U.S.C.A.
§ 1030(e)(6) (West Supp. 1991) defines exceeding authorized access as accessing "a computer
with authorization and to use such access to obtain or alter information in the computer that
the accesser is not entitled so to obtain or alter. . . ."

53.   The district court in Minnesota rejected a similar argument made by two agricul-
tural dealers who leased computer hardware and software. The court found that the vendor's
access to deactivate the software was authorized under the terms of the contract. The lessees'
had defaulted on payment triggering the contract's cancellation clause. American Computer
Trust Leasing v. Jack Farnell Implement Co., 763 F. Supp. 1473 (D. Minn. 1991).

54.   There are, however penalties for a creditors' willful repossession. *See* 35 A.L.R. 3rd-
4th, 1041 (1991) for a collection of these cases.

the contract allows the vendor to repossess his software.[55] It is doubtful that the contract will make specific reference to self-help remedies, even if it indicates the vendor may rely on any U.C.C. remedy. In a dispute about software performance, the buyer, not realizing the consequences of its action, may withhold payment rather than seek legal action. The vendor, taking advantage of the client's innocence, is able to render the business helpless by repossessing its software. Large businesses are often protected against this practice because of their ability to access legal and technical resources easily.

The large business computer user presents an additional set of issues. Computer software is unlike the usual class of repossessed collateral. Interconnected computer networks are the new highways that transport information just as highways move goods. A network links many separate computers allowing data to flow around the country and the world. As in *Revlon*,[56] software repossession can disable a local system as well as cripple an entire network. The results can be widespread, not only disabling the intended business, but also damaging other businesses that are part of interconnected computer networks. The AT&T telephone outage in January 1990 is an example of what can happen when a critical piece of software fails.[57] The losses resulting from a failure due to software repossession can easily exceed the value of the disputed computer system. As a result, one can argue that creditors should not be allowed to wield such power unchecked by the judicial system.

Despite these arguments, self-help repossession is not restricted, even if it causes a business to fail. Clients, therefore, should insist that self-help repossession be specified in the contract or barred as a remedy.[58] This would remove the element of surprise in software repossession and limit consequential damages.

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55. A vendor can structure a software contract as a secured transaction in order to take advantage of the self-help repossession provision in the U.C.C.

56. Revlon Group, Inc. v. Logisticon, Inc., No. 705933 (Cal. Super. Ct., Santa Clara Cnty., complaint filed Oct. 22, 1990).

57. *See* Edmund L. Andrews, *Telephone Techology Questioned After Failures*, N.Y. TIMES, June 28, 1991, at A16, col. 1 for an example of how a single software failure affected most of the phone lines on the East Coast.

58. One Court issued an injunction against a software vendor using a drop-dead device, without disclosing it to the client. Frank & Sons v. Information Solutions, Inc., No. 88-C-1474-E (N.D. Okla. 1988). *See also* Clayton X-ray Co. v. Professional Systems Corp., 812 S.W.2d 365 (Mo. Ct. App. 1991), where the court assessed punitive damages against a programmer who used a "lockeys" device to enforce his/her contract with the client. *See also* Werner v. Lewis, New York Law Journal, Aug. 4, 1992 (N.Y. Civ. Ct. N.Y. Cnty, Aug. 4, 1992). *But see* American Computer Trust Leasing v. Jack Farwell Implement Co., 763 F.

C. *Fixtures*

1. Traditional Fixture Doctrine

Fixture doctrine[59] is another area within secured transactions permitting creditors to repossess their collateral. Fixtures are goods so attached to the particular real estate that the property owner may have an interest in them under local real estate law.[60] A conflict arises when a creditor lends money to a debtor to purchase goods and the real propety holder asserts a priority over them. In turn, creditors can use a fixture filing to assert their priority over the real estate holder.[61]

The repossession provisions under U.C.C. Sections 9-503 and 9-313(8) are similar in that a secured party must adhere to the breach of peace provision. Neither section allows the debtor to collect damages for lost business revenues or consequential damages due to the repossession.[62] Debtors gain a measure of protection as creditors are liable for conversion upon seizing other property of the debtor. Unlike section 9-503, there are instances when a creditor must give notice prior to repossessing its collateral. In addition, repossession is allowed despite "material damage" to the premises, but the creditor must reimburse the property owner for any physical damage to its real property.

2. Software as a Fixture

In software repossession, both parties may use the U.C.C. fixture provisions to support their positions. To take advantage of the provisions, computer software must be considered a fixture. The definition of a fixture varies from state to state. However the U.C.C. refers to "readily removable office machines" when discussing fixtures. White & Summer's inclusion of small computers within this category takes no great leap of faith, but its expansion to encompass computer software has not been considered by the

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Supp. 1473 (D. Minn. 1991), where the court upheld deactivation of software as a remedy in a vendors dispute with its clients.

59. WHITE & SUMMERS, *supra* note 18, § 25-11 at 1054-1064.

60. American Law of Property defines as goods so related to the property that a disinterested observer would consider it part of the property. *See* AMERICAN LAW OF PROPERTY § 19.1, at 3-4 (A. James Casner et al. eds., 1952). *See also* U.C.C. § 9-313(1)(a).

61. Creditors can use one of two methods to protect security interests in fixtures. The creditor can file in the real estate record before the mortgage creditor. The second method allows a creditor to obtain a purchase money security interest in the goods if the mortgage creditor has filed first. *See* U.C.C. § 9-313(4)(a)(b).

62. *See* U.C.C. § 9-313(8), comment 9.

courts and arguments in its favor may be difficult to sustain.[63]

Those seeking to characterize software as a fixture might do so in a number of ways. First, software supplied with the hardware at the time of sale may be considered part of the hardware and therefore a fixture. Independently supplied software may be characterized as part of a fixture once it is loaded onto the computer, and finally, a creditor may use a fixture filing to cover the software.

Under the fixture provisions of the U.C.C., a debtor can avoid being surprised by a creditor's repossession. Section 9-313(8) forces a creditor to seek the permission of the real estate holder who has priority over the creditor, before repossessing the collateral. Where the client owns the computer site, a software vendor seeking to repossess his software can be prevented from carrying out the repossession. In the alternative, a vendor may have to contact the owner of the computer site, who in turn may give notice to the client.

While fixture doctrine may pre-empt the surprise of repossession, the argument against granting consequential damages to the client becomes stronger. Section 9-313(8) also states that no compensation is allowed for "loss of business" due to repossession. Clients may argue that the consequential business damage due to software repossession is more analogous to physical damage than to real property, and therefore business losses should be compensated. This argument would appear to be difficult to sustain.

D.   *Leases - Article 2A*

In the computer industry many software contracts are written in the form of a lease. Article 2A of the U.C.C. is a new provision that was written to regulate leases.[64] To date at least eighteen states have adopted Article 2A.[65] Section 2A-525 allows the lessor to disable or remove the leased goods upon default by the lessee.[66] Similar to Article 9, the lessor may undertake self-repossession so long as the peace is not breached.[67]

Article 2A may give software vendors their most powerful argument in support of software repossession. It allows a creditor to

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63. WHITE & SUMMERS, *supra* note 18, § 25-11 at 1060.

64. For a history of Article 2A see Amelia H. Boss, *History of Article 2A: A Lesson For Practitioners and Scholars Alike*, 39 ALA. L. REV. 575, 579 (1988).

65. *See* GUIDE TO COMPUTER LAW (CCH) § 7230 (1991).

66. *See* U.C.C. § 2A-525(c) which provides that "the lessor may proceed under subsection (2) [repossession] without judicial process if it can be done without breach of the peace. . . ."

67. *Id.*

disable the leased item upon the lessee's default.[68] This language follows the rationale underlying section 9-503, allowing a secured party to disable its goods if repossession is impossible or impractical.[69] Vendors can argue that physical repossession of computer software is impractical because the client can retain a copy of the software and continue to use it. As a result, disabling the software is the vendors only recourse if the client withholds payment. There has been little litigation under Article 2A, although commentators have noted that it may be applicable to software leases.[70]

III.   NON-U.C.C. PRINCIPLES

Self-help repossession is limited to U.C.C. Articles 2A and 9 even though computer disputes are litigated under other legal theories. In the areas of replevin, lien, licensing and bankruptcy, self-help repossession of computer software is barred. Despite these limitations, examining the impact of these theories on self-help repossession raises interesting arguments for practitioners.

A.   *Replevin*

Replevin actions allow sellers to repossess their goods from defaulting buyers.[71] Actions to replevy goods require that the creditor file and post a bond with the court before repossessing its collateral. Some states allow a debtor to post a higher bond in order to recover the goods until the issues in dispute are heard.[72] The Supreme Court limits on self-help repossession[73] are also applicable to replevin actions.

In computer disputes, replevin may be a useful alternative to self-help repossession as vendors may reclaim their software under judicial authority.[74] Replevin actions also allow clients to air their

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68.   U.C.C. § 2A-525(b) provides that "without removal the lessor may render unusable any goods employed in trade or business. . . ."

69.   *See* U.C.C. § 9-503 and comment. The comment uses heavy equipment as an example of collateral that cannot easily be repossessed.

70.   *See* Edwin E. Huddleson, *Old Wine in New Bottles UCC Article 2A - Leases,* 39 ALA. L. REV. 615 (1988).

71.   *See generally* DAN B. DOBBS, REMEDIES § 513 at 399 (1973).

72.   *See* Honeywell Information Systems v. Demographics Systems, Inc, 396 F. Supp. 273, 278 (S.D.N.Y. 1975).

73.   *See* Fuentes v. Shevin, 407 U.S. 67 (1972).

74.   F. & M. Schaefer Corp. v. Electronic Data Systems Corp., 430 F. Supp. 988 (S.D.N.Y. 1977); *aff'd,* 614 F.2d 1286 (2d Cir. 1979). *Also see* the following cases where replevin was used in computer cases: Computer Leasing Co. v. Computing & Software, Inc., 306 N.E.2d 191 (Ohio Ct. of Com. Pleas 1973) and Honeywell Information Systems v. Demographics Systems, Inc., 396 F. Supp. 273 (S.D.N.Y. 1975).

consequential damages in an appropriate forum. These arguments will have little effect on courts since they have held that, absent contract provisions to the contrary, the vendor's breach generally does not give the client the right to default on the contract.[75] As a result, computer software may be replevied, while the client must sue for damages caused by a vendor's breach of warranty.

The court in *F. & M. Schaefer Corp. v. Electronic Data Systems Corp.*,[76] discussed the good faith defenses that clients might use when arguing against a replevin action.[77] These defenses would allow a buyer, when faced with a breach by the seller, to withhold payment without automatically being subject to replevin. The court rejected all of Schaefer's defenses, but gave the most weight to their fraudulent misrepresentation argument. Future courts may discourage replevying a computer system from a defaulting buyer based on a vendors intentional misrepresentation of the system's capabilities.

B. *Liens*

Lien theory is another area that permits a creditor to use self-help.[78] A lien is an encumbrance on a debtor's property for the payment or discharge of a particular debt. The property acts as security until the debt is satisfied, and can be sold by the court to enforce the lien. The authority to place a lien arises under both common law and specific statutes.

Certain classes of professionals are allowed liens on property held for their client, to ensure payment for rendered services. An attorney can choose between two types of liens to collect a debt owed by a client. A charging lien allows the attorney to be reimbursed out of any judgement obtained for the client.[79] An attorney may instead enforce a retaining lien, permitting him to hold his client's papers until the debt is satisfied. The right of an attorney under a retaining lien extends solely to those documents in the attorney's possession.[80] Unlike charging liens, retaining liens require no judicial action to enforce.

There are two other major classes of professionals that can

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75. Honeywell Information Systems v. Demographics Systems, Inc, 396 F. Supp. 273, 278 (S.D.N.Y. 1975).

76. 430 F.Supp. 988 (S.D.N.Y. 1977); *aff'd*, 614 F.2d 1286 (2d Cir. 1979).

77. *Id.*

78. *See* 51 AM. JUR. 2D *Liens* § 1 (1991).

79. *See* 7 AM. JUR. 2D *Attorneys At Law* § 315 (1991).

80. For a collection of cases discussing which of the client's property is subject to an attorney's lien see 70 A.L.R. 4th § 18 at 827 (1991).

place liens on their client's property. Accountants' liens, like attorneys' liens, allow them to keep their client's papers until the debt is paid.[81] Architect liens allow them a statutory right for unpaid services provided on real estate.[82]

A software developer seeking to enforce a lien can draw an analogy between himself or herself and a professional. The software developer and the professional both provide unique services for financial gain. In both cases the client can withhold payment. As a result, vendors will argue that they can repossess their client's software in order to enforce a professional lien for services they provided but for which they were not compensated.

Lien doctrine fails to support this argument as common law requires that the vendor already possess the software in order to enforce a lien. Statutory liens allow a vendor to enforce a lien without possession, but no statutes exist explicitly giving a software vendor this right.

Vendors may argue that they "possess" the software (by continuing to hold title) due to the client's breach and that they can therefore enforce a lien under common law. The client can respond by arguing that the vendor holds only a security interest in the software. Accordingly, self-help repossession is not available to the vendor unless its security interest is perfected under Article 9 of the U.C.C.

Software vendors may also argue that their case is analogous to a professional lien where the final work is held back until payment is completed. This argument fails because disabling software requires an affirmative action as compared to the passive nature of a professional lien.

C. *Licenses*

The Copyright Act allows authors to license their works. Vendors can license software to their clients through either a site license or a one copy per machine basis. A vendor may impound the software of a client that violates its license provisions. Courts have held that the Copyright Act's impoundment provision does not go so far as to authorize self-help repossession.[83]

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81. *See* 1 AM. JUR. 2D *Accountants* § 11-12 (1991).

82. *See* 5 AM. JUR. 2D *Architects* § 20-22 (1991).

83. *See* Warner Bros., Inc. v. Dae Rim Trading, Inc., 877 F.2d 1120 (2d Cir. 1989).

D. *Bankruptcy Proceedings*

The "automatic stay" provisions of the 1978 Bankruptcy Code prevent secured creditors from using self-help repossession when a debtor files for bankruptcy.[84] The stay applies during the entire bankruptcy proceeding unless lifted by the court, although a creditor can apply to the court for an exemption. As a result, the Bankruptcy Code does not permit self-help repossession by software vendors.[85]

IV. ACCEPTABLE FORMS OF SELF-HELP

Self-help repossession should be barred in the majority of software disputes. The danger lies when its availability is not delineated in the contract and it is used without warning. The subsequent consequential damages caused by disabling the client's computer systems can be disproportionate to the value of the disputed software. Despite these drawbacks, self-help repossession should be allowed in software disputes in some limited situations.

Software repossession can be justified when the client is in a more powerful position than the vendor and can afford extensive litigation. In this instance, one can argue that a small vendor's only leverage is self-help repossession. Although attractive on its face, the consequences to the small vendor may be self-defeating. Upon reasoned reflection, it should be clear that any "victory" achieved through self-help repossession will indeed be short-lived. The damage to the vendor's reputation can sour relations between old clients and make new business difficult to obtain.[86]

Allowable self-help alternatives do exist and are used in the software industry. There are vendors who display a warning message on the client's computer screen indicating that the software will be disabled if payment is not received after a trial period. Other vendors automatically disable a demonstration version of software after a fixed period of time. These methods allow a software vendor to supply a client with software while maintaining a measure of control.

A vendor may argue that resorting to self-help repossession is justified because litigation is unwieldy and expensive. Alternate dispute resolution processes (ADR) are available to the parties so that

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84. *See* 11 U.S.C.A. § 362 (West Supp. 1991).

85. *See generally* Terence W. Thompson, *Software Suppliers Rights in Clients Bankruptcy*, 3 SOFTWARE L.J. 1, 14 (1989).

86. RICHARD A. POSNER, THE ECONOMICS OF CONTRACT LAW 179-180 (1979).

software disputes can be resolved without employing self-help repossession.[87] ADR encompasses a broad range of dispute resolution processes, including negotiation, mediation and arbitration, with the advantages of lower cost than litigation and faster resolutions. Disadvantages of ADR include the inability to appeal a decision and a lack of provisional remedies. Vendors may be hesitant to use ADR because preliminary relief may be unobtainable to stop use of disputed software. Despite these disadvantages, ADR remains an attractive alternative as shown by IBM and Fujitsu's use of ADR to resolve their dispute.[88]

When deciding whether a software vendor may use self-help repossession, the following issues should be considered. Does one party have an unfair advantage (economic, legal or technical) over the other? Was the contract structured as a secured transaction or lease so that self-help is available under the U.C.C.? Did the contract specify repossession as a possible remedy or was a boilerplate provision (*e.g.*, all remedies under the U.C.C. are available) used? Did the client's business and type of software make widespread consequential damages reasonably foreseeable? Were any other means used to resolve the dispute before self-help was employed? These questions allow a starting point for analysis, although specific circumstances may require consideration of other factors.

V. CONCLUSION

High technology is making computers and software available to an increasing market. This growth will spawn an increasing number of disputes involving software. Following in Logisticon's footsteps, vendors may see self-help repossession as an attractive option to litigation.

Self-help has historically been condoned as a means of resolving disputes. Starting with Greek jurisprudence, continuing through English common law and by its acceptance into American law, self-help is a viable alternative to the legal process. The U.C.C. provides for self-help by allowing secured creditors and lessors to repossess their property upon default by the debtor. Society imposes a measure of restraint by barring creditors and debtors from engaging in violence during the process. Replevin, liens, licenses and bankruptcy are areas of commercial law that also place limits

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87. *See* Brian T. Nash, *Analysis of Alternate Dispute Resolution in Computer Disputes*, 2 SOFTWARE L.J. 29 (1987).

88. *See* N.Y TIMES, November 11, 1991, at A1, col. 5 for a full description of the dispute between IBM and Fujitsu as well as its eventual settlement.

on self-help repossession. These doctrines, as well as the U.C.C. provisions, were formulated before the explosion in technology. The authors of these doctrines and provisions could not foresee self-help's application to computer software. Accordingly, traditional issues that surrounded self-help repossession must be reviewed within the arena of computer software.

Self-help repossession of software should not be allowed in the majority of software disputes for two reasons. First, it can cause consequential damages that are disproportionate to the disputed software. These damages can extend from the intended target business to affiliated businesses whose only connection to the creditor is through a computer network. Second, the circumstances under which self-help repossession are employed may be fundamentally unfair to the naive client. They are afforded little opportunity to take measures to protect their computer systems and business interests.

The circumstances surrounding the use of self-help repossession in software disputes must be closely examined and alternate means of dispute resolution considered before the use of this remedy is sanctioned.