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FEDERAL TRADE COMMISSION WORKSHOP

WARRANTY PROTECTION FOR HIGH-TECH SERVICES

MATTER NO. P994413

THURSDAY, OCTOBER 26, 2000
WASHINGTON, D.C.

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

P R O C E E D I N G S

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MS. BERNSTEIN: Good morning, everybody.

There's Adam Cohn. Good morning, Adam. Adam used to be with us. He is still with us in spirit, aren't you, Adam?

MR. COHN: Very much.

MS. BERNSTEIN: Well, I'm Jodie Bernstein. I'm the Director of the Bureau of Consumer Protection, and my role here this morning is first of all, most of all, is to welcome you to what I think is going to be a terrific forum for today and tomorrow, and I always have the great pleasure really of getting to introduce these forums that we have, and I do so not only with pleasure but also with confidence, because I know that our very superb staff, whom most of you have met, I think, in preparation work have done such an excellent job of putting together an agenda and getting it ready so that we will have a productive session.

I also wanted to just thank all of you who have come to this session and come to others, because you've been so generous with your time and with your energy to help us inform and educate ourselves. So, nothing could be more important, I think, to government decision-making than to have the opportunity to meet

1 with the private sector, with consumer advocates and
2 others who are engaged in producing these new services
3 and new products that are so critical not only to
4 consumers and to the benefit of consumers but to the
5 marketplace, as well.

6 So, we come together once again for purposes of
7 educating ourselves -- what, I'm not being heard? I
8 thought I was being heard -- for educating ourselves
9 and hopefully in the end arriving at places where we
10 can jointly agree that either more work needs to be
11 done or we're close to arriving at some decisions about
12 what further work and effort needs to be made.

13 Nothing could be more important in this new
14 marketplace, I think, than the issue of what
15 information consumers will have, need to have prior to
16 purchase. That's one of the critical issues for us and
17 critical issues for the industry, as well. So, that's
18 our exploration today. I hope to participate as much
19 as I can, at least to listen throughout the day, and
20 I'm confident you will have a productive and
21 interesting day.

22 So, with that, our seminar is underway, and
23 I'll turn it over to Eileen Harrington.

24 MS. HARRINGTON: Thank you, Jody, and welcome
25 all of you. I want to make a couple of process

1 comments, and then we'll get right into the substance.
2 We intend to stick very strictly to the schedule that's
3 on the agenda, and each panel slot will allow 15
4 minutes for questions, questions and answers. If you
5 have questions, we ask that you write them on a card,
6 and we have one of our paralegals here somewhere -- in
7 the back, stand up, everyone turn around -- with
8 question cards.

9 If you want a card during the discussion, if a
10 question occurs to you that you would like to hear
11 discussion on, just raise your hand right up during the
12 session, and he will come to you with a card, and you
13 can write the question down, and that way by the time
14 our panelists have completed their presentations, we
15 will have collected your questions and can get right
16 into the questions and answers.

17 Is everyone clear on how we're going to do
18 that? I need to see -- I need you all to look up from
19 your laptops and nod yes or no if you understand what
20 I've just said. Thank you.

21 This first panel I think is quite important,
22 and let me also say that by way of introduction that we
23 often at the FTC have workshops, and we use those
24 workshops to foster discussion among stakeholders on
25 various issues where there is a good base of

1 information that already has been established and that
2 is commonly understood among the discussants.

3 We're not using that format for this set of
4 issues, and the reason is that we really have much to
5 learn. We, as the staff of the FTC, certainly don't
6 feel yet that we have a deep enough grasp of all of the
7 different points of view that exist around high-tech
8 warranty issues, and so we are conducting this not as a
9 workshop where people who know quite a bit can sit
10 around and discuss and challenge one another's views,
11 but rather, we are holding this seminar to learn, and
12 so we come to this with open minds and open ears and
13 articulated concerns, you've heard Jody refer to them,
14 questions, but certainly not with conclusions.

15 I think that this first panel is a very
16 important and useful one for us as we educate
17 ourselves, because what we're asking our panelists to
18 talk to us about is the business models that are
19 implemented and that from the comments, at least,
20 businesses believe make necessary a licensing model.

21 So, with that, I'm going to turn this over, I
22 am going to ask each of the panelists to watch your
23 time so that I don't, but if you don't, I will, because
24 we want to make sure that we've left time for questions
25 and answers and any questions and answers and

1 discussion among the panelists or from the moderator.

2 All right, let's begin, and our first presenter
3 is Bill Ashworth, who is counsel for technology policy
4 of the American Electronics Association.

5 Bill?

6 MR. ASHWORTH: Can I go down there to address
7 the audience?

8 MS. HARRINGTON: Yes, you may. Bill, there is
9 a portable microphone you can use right there,
10 handheld, if you don't mind.

11 MR. ASHWORTH: Oh, sure.

12 MS. HARRINGTON: We are videotaping this
13 seminar, and we also have a stenographer who's making a
14 record of the seminar, and you can order that directly
15 from the reporting service if you want.

16 MR. ASHWORTH: I'm just waiting for them to
17 come up.

18 MS. HARRINGTON: Must be defective software.

19 MR. ASHWORTH: Must be the operating system.
20 He's told me it takes a while. Okay, and we're off.

21 Good morning, everyone. My name is Bill
22 Ashworth, and I'm counsel for technology policy at the
23 American Electronics Association, and I thought what I
24 would try to do this morning is just to sort of give
25 everyone a general overview of some of the existing

1 business models for the distribution of computer
2 information, as well as some of the economic and legal
3 justifications for end user licensing agreements.

4 I guess the first thing that I would just like
5 to point out is really the success of the existing
6 business model. In a recent edition of the AeA
7 Cyberstates Report, they compiled employment data from
8 1993 to 1998 on the high-tech industry, and what that
9 data indicated was that the software service
10 industry -- employment in that sector of high-tech
11 industry doubled from 890 to 1.8 million jobs from 1993
12 to 1998, and the employment projections through 2008
13 show that the software and computer-related service
14 sector of the high-tech industry will create 1.7
15 million new jobs through 2008. That is half of all the
16 new jobs created from the high-tech industry. I think
17 needless to say this is a very vibrant, successful,
18 dynamic component of the high-tech industry, and it's
19 creating excellent jobs for millions of Americans.

20 I think one of the reasons that it has been so
21 successful is the business model that we use, the
22 predominant business model, which is the license, and I
23 know in the next two days the FTC is going to be
24 hearing quite a bit of testimony on how exactly do we
25 characterize these transactions. I mean, should we

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1 characterize them as a sale or as a license? And our
2 opinion is that they are properly characterized as a
3 license for a few reasons.

4 First of all, standard form contracts for
5 computer information type transactions have been used
6 for years. Dun & Bradstreet has been -- enforced use
7 restrictions on the redissemination of their credit
8 reporting information since the turn of the century,
9 that's just one example. Licenses are clearly
10 contemplated under the Copyright Act, and the license
11 is very well suited to this changing economic paradigm
12 as our economy moves from a goods-based economy to an
13 information and computer services economy.

14 That sort of goes into some of the reasons and
15 the economic justifications for the end user licensing
16 agreements and contracts and licenses in general.
17 Contracting provides flexibility in my transactions.
18 What it allows me to do is I can individually tailor
19 each transaction to fit multiple user environments
20 while reaching millions of consumers, and what that, in
21 fact, does, it promotes the live distribution of these
22 goods and services at very low transaction costs.

23 I mean, one of the benefits of a license is
24 that it really is a mechanism to overcome what would
25 otherwise be very high transaction costs if I had to

1 individually negotiate each particular transaction or
2 license that I entered into with the end user. And one
3 of the other really important benefits of the licensing
4 business model is that it creates new products and
5 allows me to enter into new fields of commerce, and the
6 way that I do that is distinguishing upon different
7 types and levels of use among my users.

8 I mean, some licenses will give a user very
9 restricted use rights, while other types of licenses
10 will give the end user actually the ability to
11 reproduce the product that I'm licensing to them.
12 Other licenses are just geared towards consumer use,
13 they only permit consumer use, while other licenses
14 permit commercial use of the product, and other
15 different licensing terms for software, information
16 goods, vary according to their levels and grant
17 different time periods of use of the product.

18 I thought that perhaps a good way to
19 demonstrate this is to review some of, you know, the
20 differing types of ways that I could license a piece of
21 software, and just for purposes of this hypothetical,
22 I'll call it WordBob, for example, and these are all
23 the different types of business models and transactions
24 that I can enter into with my end users.

25 As you can see from each of them, it really

1 sort of addresses the needs of narrow, different,
2 particular market segments. So, let's start at the
3 top.

4 Let's say I've just developed WordBob, and I
5 want to sort of enter the market. So, what do I do?
6 Well, I write a license granting the user a free 90-day
7 trial version. Okay, so, they use it free for 90 days,
8 they can't redisseminate it. If they like it, they can
9 negotiate a license for longer term use. If they don't
10 like it, they can send it back to me and tell me what
11 they didn't like about the product.

12 Let's say that I think that there are a number
13 of users out there who really, they don't have a
14 computer at home, they don't want to go out and spend a
15 hundred dollars on a piece of software, they are really
16 just only engaged in a one-time type of, you know, word
17 processing document that they have to work on. Maybe
18 they just want to rent WordBob for \$5 an hour at
19 Kinkos. So, what I'll do is I'll license a piece of
20 WordBob to Kinkos and I'll give them the right to rent
21 out WordBob for \$5 an hour to those particular users.

22 Again, they don't want extensive use of the
23 software. They don't even want to buy a copy of the
24 software. They just want to use it once or twice and
25 be done with it.

1 I can license a \$25 light shareware version.
2 If you read a lot of the trade publications, there is
3 something called the 80/20 rule, which says that 80
4 percent of the software users use only 20 percent of
5 the functionality. So, let's say I take WordBob and I
6 really sort of pare back -- you know, I just stripped
7 it down, and I take out all of the, you know, high-end
8 functionalities and I just make it just a basic word
9 processing program, just for those people who want
10 nothing more than just to create documents and print
11 them out. That will be another market segment I can
12 address through a contract.

13 Fifty dollar academic edition, it's used all
14 the time. Instead of selling a hundred dollar standard
15 version to students, I can license them a cheaper
16 version of the exact same software and limit their use
17 of the software for just in the academic environment
18 and settings. That gives them a, you know, an
19 affordable piece of software, and it gives them the
20 same piece of software that they would otherwise have
21 to purchase at Best Buy, for example, in the hundred
22 dollar standard version example.

23 Seventy-five dollar integrated piece into a
24 suite of products, let's say, again, this is sort of a
25 marketing business model, if you will. Let's say that

1 someone's interested in obtaining a piece of -- you
2 know, obtaining WordBob, and I say to them, okay, I'll
3 license it to you for \$75, but I'd also like you to try
4 these other types of products that I've been working
5 on. Maybe I want to integrate WordBob with a personal
6 planner piece of software or WordBob Office, and I'll
7 say I'd like you to try these other products, and for
8 your trouble, I'll license you a copy of WordBob for
9 only \$75. There may be some people who may be
10 interested in that type of product.

11 I've talked real quick about the \$100 standard
12 version, and again, that would be your typical
13 shrinkwrap version that you would walk into Best Buy
14 and buy off the shelf.

15 I could also license WordBob as a \$200 private
16 label version, and let's say that I really don't have
17 much marketing expertise, but I really think that
18 WordBob could be marketed to different, you know,
19 sectors of the professional business community, like
20 doctors, dentists, lawyers, et cetera. What I would do
21 is I would license WordBob to a middle man who has
22 marketing expertise and has contacts in those
23 particular market sectors, and he or she would add,
24 let's say, a tool bar to WordBob that would make the
25 software very attractive to dentists, make it very

1 attractive to dentists in their day-to-day business.
2 That would be another use I could make of the product.

3 The third type would be or the next type would
4 be a \$300 customized version of WordBob. A lot of
5 times customers would come to me and say, Bill, I
6 really like your product. What I'd like you to do is
7 customize it for my particular business, and let's say
8 a law firm, for example, comes to me and says, can you
9 write a version of WordBob that will work in my big
10 downtown D.C. law firm? I'll say, sure, I'd be happy
11 to do that, and I'll tell you what I'll do, I'll give
12 it to you for \$300 if you agree not to transfer it to
13 another law firm in D.C. And usually they will say,
14 yeah, that's okay with me. I will abide by that use
15 restriction if I can get a discounted price on the
16 software.

17 Another type of model is the developer edition.
18 I will basically give another party full derivative use
19 rights of my software, and they will be able to add
20 more substantive functionalities to that software to
21 market it to some higher-end users in the market.

22 And the final example that I used is the \$500
23 site license. I can charge someone \$500 for a copy of
24 the software and allow them to use that software at all
25 the different desktops in their office.

1 Again, the point of the slide is that the
2 beauty of licensing is I'm able to tailor my individual
3 contracts based upon the need of each different user,
4 and I can charge them exactly for the use that they
5 need. And, you know, again, the example of the student
6 having to just rent the software instead of having to
7 purchase the \$100 standard version sort of shows the
8 benefits of licensing

9 The next thing I wanted to talk about real
10 briefly, excuse me, then I'll finish up, one of the
11 characteristics of a lot of the transactions, the
12 licenses that I just discussed is that some of those
13 licenses give users less rights than they would have in
14 the event of a sale, and some of those licenses give
15 users more rights than they would have if we otherwise
16 characterized the transaction as a sale.

17 Under the Copyright Act, authors receive a
18 bundle of rights, and some of the licenses curtail
19 those rights or give buyers those rights. Some of
20 those licenses curtail some rights; other licenses give
21 more rights.

22 The first example that I'd like to use is the
23 database software through the shrinkwrap/clickwrap
24 model, and the characteristic of that transaction is
25 that usually the database product or the software is

1 distributed online or in the retail environment, like
2 Best Buy. One version is for educational or personal
3 use. Another version of the software would be for
4 commercial use. The educational/personal use would go
5 for \$1,000; commercial use, I would charge \$75,000.

6 The benefits of that is that the publisher of
7 the software can respond to two different markets with
8 the huge cost savings to the educational/personal user.
9 I mean, what I do is through use restriction, I say to
10 the educational user, you agree to obtain or, you know,
11 you agree to the terms of this license, and I'll charge
12 you \$1,000 for the use of the software, and you agree
13 not to disseminate the software or transfer it to
14 commercial users and charge them less than I would
15 charge commercial users.

16 The beauty is that both markets, the commercial
17 user market and the educational market, get the same
18 high quality software, but the educational sector gets
19 it for a much lower price, because I'm able to prevent
20 arbitrage.

21 Here's some other examples of computer
22 information transactions that I took from the internet
23 actually. The first one is a New York Times web
24 content agreement that you'll find on the New York
25 Times website, and what the Times does is it prohibits

1 downloading or copying the content of its web page,
2 except for personal use. It says that the contents are
3 intended for your personal, noncommercial use, and you
4 may not modify it, publish, transmit or in any way
5 exploit any of the content.

6 The reason that the Times does that -- well,
7 because it helps them to avoid potential liability
8 risks for giving business advice and because it's able
9 to avoid that potential liability and risk through
10 restrictions on the dissemination of its information,
11 it's able to provide this free service and give
12 customers and consumers unlimited personal use of their
13 vast database of information.

14 Another example of a restrictive use license
15 would be the Consumers Union no-commercialization
16 policy that you will find on their web page, and what
17 that says is that neither the ratings nor the reports
18 nor any other information of Consumers Union can be
19 used in advertising or for any other commercial
20 purpose, including any use on the internet. And
21 there's a very good reason why Consumers Union
22 restricts the dissemination of their information. That
23 is because they want to protect the good will and
24 credibility of their publication.

25 I mean, think about it. If Ford, for example,

1 was able to take the product ratings that Consumers
2 Union distributes online and use it in their
3 advertising, that would call into question or could
4 potentially call into question the objectivity of
5 Consumers Union's reports and rating procedures, and
6 the people would say, well, is it worth paying for this
7 information, and if they are paying for these product
8 ratings, you know, is Consumers Union really being
9 objective in how they're evaluating the product? By
10 limiting the dissemination of the information,
11 Consumers Union is able to protect its objectivity and
12 its good will.

13 Okay, some quick examples of expansive uses of
14 end user licensing agreements where the user is granted
15 more rights than they would otherwise have if we
16 characterized this as a sale. The example that I like
17 to use is the word processing software that you can
18 purchase in the retail setting. One type of use would
19 grant the user a single-use license. User can make a
20 backup copy into a single-user machine and can transfer
21 the copy if user destroys all the copies that they have
22 made to their system.

23 And the other type of license for the same
24 product that I could use would be a computer network
25 license, where I give the user the right to use the

1 software or to make copies of the software to use
2 throughout the network. Now, clearly under the
3 Copyright Act, the user may not have the ability to
4 make multiple copies of the software if we
5 characterized this as a sale, but since we've
6 characterized it as a license and I grant additional
7 uses to the end user, the end user is able to use the
8 software at multiple desktops throughout his office
9 without having to worry about copyright infringement.

10 Some other examples of expansive uses of
11 licenses. Clip Art, right? I mean, the Clip Art
12 license allows the user to make, display and distribute
13 images of the Clip Art for use in public presentations.
14 Again, those are rights under the Copyright Act that
15 are reserved to the author. In a sale, there would
16 probably be a question as to what the extent would be
17 or what use I could make of the Clip Art without the
18 license.

19 A distribution license is where I give a master
20 to a retailer with a license to distribute multiple
21 copies. As more people order copies of the software,
22 the retailer can make copies off of a master. Again,
23 this goes to the copy issue. Under the Copyright Act,
24 arguably, there would be a limitation on how many
25 copies I could make of that software. The license

1 grants the retailer the ability to make as many copies
2 as he needs to make based upon demand for the product.

3 Client server products I already went over. I
4 give one copy of low-priced server software to my
5 customer. As the business grows -- this is sort of
6 just like the example I just used -- as the business
7 grows, the customer can negotiate with me for
8 additional access licenses to use the software and to
9 make additional copies on more desktops throughout his
10 company.

11 MS. HARRINGTON: Bill, I want to make sure that
12 we leave plenty of time for Mark and Carol, and so if
13 you --

14 MR. ASHWORTH: Yeah, this is my last slide.

15 MS. HARRINGTON: Oh, great, perfect, thank you.

16 MR. ASHWORTH: That was my last slide.

17 MS. HARRINGTON: I'm sorry, I made you lose
18 your last slide.

19 MR. ASHWORTH: That's okay.

20 The final point I was just going to make were
21 legal justifications for the end user license
22 agreement, and I think I've tried to make most of them
23 in the presentation. The first is the policy argument,
24 that it promotes the wide dissemination of goods. The
25 second argument is the freedom of contract argument

1 that a lot of the cases have relied on for enforcing
2 these type of end user shrinkwrap agreements. That is,
3 that if we have offer and acceptance and there is no
4 sort of defect in the formation process, there is no
5 allegation of fraud, duress or unconscionability, that
6 contract should be enforced.

7 The court is probably going to find that
8 consent was implied if the use restriction was
9 reasonable, and due to that extra element of implied
10 consent, that is going to take it out of the preemption
11 analysis under the Copyright Act, and so therefore it
12 wouldn't be preempted by federal contract law.

13 I'll take any questions.

14 MS. HARRINGTON: Remember on the questions, if
15 you have a question, raise your hand and our paralegals
16 will bring you a card, and I know that we had some
17 hands up during the first session.

18 Thank you, Bill, that was excellent.

19 MR. ASHWORTH: You're welcome.

20 MS. HARRINGTON: Let's move now to Mark
21 Bohannon, please. And speakers, if you are going to go
22 down to the laptop and you are using the handheld mike,
23 could you use it as a mike and not a pointer? When you
24 move it around, it causes kind of a rattle in the room.
25 We are trying to get a lapel mike.

1 MR. BOHANNON: Did you speak from your diskette
2 or did you copy it up?

3 MR. ASHWORTH: No, they copied it up to the
4 desktop for me or the laptop for me.

5 MS. HARRINGTON: Randy, could you help Mr.
6 Bohannon?

7 It was so much easier when we had handouts.

8 MR. BOHANNON: Thank you very much, Eileen.
9 Fifteen minutes, is that what you want?

10 MS. HARRINGTON: Fifteen-twenty, please.

11 MR. BOHANNON: I'm not sure this is working,
12 but --

13 MS. HARRINGTON: Yes, it is.

14 MR. BOHANNON: It's a pleasure to be here
15 today. I want to thank Eileen in particular for her
16 comments she made when she opened the panel. Having
17 participated in a number of the ongoing workshops that
18 the FTC has done in regard to looking at the question
19 of consumer protection in the online and the high-tech
20 environment, I think we have almost done everything
21 including from looking at existing FTC guidelines to
22 issues of international jurisdiction to alternative
23 dispute resolution.

24 I think that in many ways this area is very
25 unique and in contrast to those, and I very much

1 appreciated her comment that we are, in fact, all at a
2 learning stage and a learning stage that involves a set
3 of business models, a set of economic presumptions, a
4 set of consumer demands, quite frankly, that I think
5 are changing on a really fast basis.

6 The Software & Information Industry Association
7 comes here as a principal trade association of software
8 developers and distributors as well as those who
9 provide information content on the internet. We are
10 involved in a variety of business markets, everything
11 from commercial software education, consumer users, as
12 well as the enabling of the internet.

13 Much of what I will talk about today can be
14 found in a report that we released this summer called
15 Trends 2000, which talks about fundamental changes, the
16 changes, the trends, the demands in the software
17 industry and the information content industry, which
18 you can find at www.trendsreport.net.

19 As we talk about business models and as we, I
20 think, begin a two-day process of I think what at times
21 will often be a very technical, very complex discussion
22 for which there are, in fact, diverging views about
23 what should be done, I think we should just sort of
24 step back for a second and realize that the discussion
25 from the point of those who are in the business of

1 information exchange and who are in the business of
2 software development really are responding to I think
3 some shifts in the economy that are fairly fundamental.

4 This is not an abstract discussion for our
5 business enterprises, our members, or those who depend
6 on the internet and electronic exchange. In many ways
7 it reflects I think a shift that began occurring that
8 is reflected in what happened in the 1930s and what is
9 the basis for our current commercial code, which was
10 fundamentally reshaped by the dominance, the emergence
11 of manufacturing, manufacturing as opposed to an
12 agrarian-based economy, an agrarian-based economy that,
13 in fact, relied heavily on individual case law
14 developed rules, which did not have usefulness in the
15 context of mass production of tangible products.

16 And so the result was, I think, during the
17 1930s, we saw what is now today the commercial code
18 coming out of, in fact, that change, that the old
19 models didn't really fit, didn't really address the
20 risks, didn't really address any of the consumer needs,
21 much less the business enterprise needs that were
22 coming out of the manufacturing sector.

23 In many ways, we're seeing that same shift,
24 from wares to the networked economy, and let me sort of
25 highlight I think some of the important contrasts

1 between what I believe are some of the key elements of
2 a goods/wares-based economy and a networked economy.

3 In the industrial economy, the value is found
4 in the good itself. What you buy is, in fact, inherent
5 and fairly unique to that particular product. The
6 legal theories that surround the basis of commercial
7 transactions are rooted in personal property. The risk
8 management is in the context of very traditional
9 vendor-supplier-buyer relationships. And the focus is
10 really on the end product and what its usefulnesses are
11 as a product in and of itself.

12 In the networked economy, the value --
13 incidentally, this is very important -- the value is
14 actually separable from the means or the manner by
15 which it is supplied. Bill's presentation, I think,
16 got into that a little bit. The legal framework,
17 rather than rooted in personal policy, is, in fact, a
18 very complex mix of a number of different areas,
19 including intellectual property, access questions, the
20 use of intangibles and services.

21 Rather than a traditional vendor-supplier-buyer
22 relationship, there is, in fact, a dynamic distribution
23 and user environment, and rather than just the sale of
24 an end product, there is fundamental in this context an
25 ongoing transactional relationship between users,

1 intermediaries and original developers.

2 The problem, though -- and I think this is
3 important to keep in mind as you hear the discussions
4 in later panels -- is that our language is still rooted
5 in the metaphor of goods. That is, we think we go to a
6 store and buy a box and that all the boxes are the
7 same, and, in fact, what is really going on here and
8 part of the concern that has led to the development of
9 the legal frameworks or proposed legal frameworks that
10 we are going to hear today, is that that goods metaphor
11 does not adequately address the risks, the actual
12 commercial relationships or, in fact, what is the
13 expectations of all the stakeholders in the
14 transaction.

15 The difference is it's services more than
16 hardware -- hardware is really not always relevant to
17 this, services are key but not determinative, and yet
18 what is, in fact, part of the transaction is a very
19 integrated set of digital supplies involving software,
20 information, access and security.

21 There are, in fact, a -- the software industry
22 is, in fact, not just one industry but several
23 industries. It is, in fact, an industry that enables
24 commercial exchange, it enables applications, and it
25 enables personal use, as well.

1 In a North American context -- and before I get
2 into some of the specific model discussions, let me
3 sort of walk through some of the numbers and some of
4 the economics of the industry.

5 In the North American context, there are -- and
6 these figures are about a year old -- there are over
7 10,000 publishers. The average size revenue is around
8 \$3 million. Many of them are very small, they have 27
9 employees. The average company generally has a small
10 set of products with usually a leading product
11 providing more than half of its revenue. Many are, in
12 fact, privately held or single entrepreneurs. About a
13 year ago, less than 20 percent, around 15 percent,
14 were, in fact, being publicly traded.

15 Whether they are small companies or whether
16 they are large companies, the value of the company and
17 the software is its intellectual property as well as
18 its value-added services, compared to, in fact, the
19 physical medium by which they provide the results of
20 their work, being, in fact, a value of less than \$1.

21 Research and development is a much larger share
22 of expenses in the software information and content
23 industry than most other industries, rivaled probably
24 only by pharmaceuticals.

25 The financing of this industry requires

1 substantial periods of outside capitalization in order
2 to get market growth, market penetration and to build a
3 customer base over the long term. And at the heart of
4 this industry is the potential that a single copy, a
5 single result of their work and their capitalization
6 can, in fact, reach millions of people over the
7 internet, and so the management of risk and economic
8 return is quite fundamental to this industry.

9 Let me sort of diagram and leave with you some
10 impressions that I hope can get you out of this
11 language, this box, of thinking about software and
12 information content as goods, and I say this with a
13 caveat, that the only thing more dangerous than having
14 an economist talk about economic models is having a
15 lawyer talk about economic models. So, please bear
16 with me and I will try to walk through some of these
17 diagrams, which I think hopefully help understand both
18 why the metaphor of goods doesn't work and why the
19 models here are evolving over time.

20 In the traditional model of the information
21 content or the software industry, there is a
22 publisher/developer who invests time, research effort,
23 often the relationship or the result is managed through
24 a distributor, who then works with a wide variety of
25 resellers, and to provide to end users the result.

1 In a larger enterprise, these two boxes are, in
2 fact, one in the same, but from a smaller developer,
3 meaning smaller software information and content
4 developers, there are, in fact, two separate
5 relationships, each of which represents a transaction
6 in the economy, but the traditional model, which is
7 still out there -- it has not completely disappeared --
8 I'm getting another technological tool to manage as I
9 speak -- thank you -- now if I could only twirl
10 something on my head, that would be even better.

11 But again, the model which is still out there
12 in many contexts, pick up the box at the store, take it
13 home, load it into the computer, or, in fact, you buy a
14 computer with the software and information content
15 already preloaded.

16 What the internet did initially was change, in
17 fact, the reseller relationship. We had a
18 publisher/developer who worked with an online store who
19 then, in fact, has a similar relationship with the end
20 user. For those of you who may recall Egghead
21 Software, they, in fact, were the example of having
22 moved from the physical reseller to the online store.

23 What changed in this model is that in addition
24 to being an online store, there began to be a new
25 element incorporated here, which is electronic software

1 dissemination, which still said that there was a single
2 purchase of something, but it's, in fact, in the form
3 of an electronic -- rather than having -- ordering it
4 online and having it physically shipped, you can, in
5 fact, have it delivered to your desktop through the
6 electronic software dissemination. Again, the
7 relationship between the publisher/developer,
8 electronic software dissemination, then going down,
9 again, to the end user, the change being that rather
10 than having it physically delivered, you could, in
11 fact, have it delivered over your desktop. But the key
12 here is that the sale model is a one-time sale of
13 software and information content in this model.

14 The next stage I want to try to make sure you
15 understand, and this is still an evolving area, is
16 that, in fact, these models are now becoming more
17 diverse and new and that we are now starting to see
18 changes in the way that end users have relationships,
19 conduct transactions and, in fact, the way that
20 publishers and disseminators interact.

21 A number of factors here are contributing to
22 this. The existence of greater bandwidth and speed
23 permits software and content publishers to host and
24 manage applications for users. There is a change in
25 how we see our desktop or local server. There is also

1 a change in the way we see web listing companies. In
2 short, what is happening is that's there's a shift in
3 the business model away from traditional shrinkwrap
4 products to software and information content as a
5 service and facilitation of information transactions.

6 So, if we take our traditional players here, we
7 have a publisher/developer, we have an end user. The
8 new element in this model is that you have a
9 third-party applications service provider. That
10 applications service provider, in fact, has a
11 relationship with a publisher/developer, often a series
12 of contractual relationships. The third-party ASP then
13 manages with the end user an ongoing set of
14 relationships. It is not a single sale of a piece of
15 software or a piece of information content.

16 In fact, it is ongoing, and this is what's I
17 think part of trying to explain what is happening and
18 why some of the context for the session that you are
19 going to hear today and tomorrow is so important. It
20 is not a one-time sale. It is, in fact, an ongoing
21 subscription of a service relationship.

22 MS. HARRINGTON: Mark, can you give me an
23 example of something that operates that way that I
24 might --

25 MR. BOHANNON: I have one that's going to come

1 up in just a second.

2 MS. HARRINGTON: Great, great.

3 MR. BOHANNON: It is also important to
4 understand, again, at the risk of being a lawyer and
5 trying to explain economic models, the
6 publisher/developer, depending on the size of the
7 products, can also fulfill the same functions as the
8 third-party applications service provider.

9 What you just saw was a single deal, and that
10 as we look at the networked economy, what we have, in
11 fact, seen is that it is a multiple set of
12 relationships here, a variety of developers, a variety
13 of application service providers and a variety of
14 users, and here I want to make sure that everybody --
15 that the new elements here, whereas that in the
16 networked economy, one does not, in fact, know where
17 some of the users are, the application service
18 providers can, in fact, be anywhere, and that the
19 developers are, in fact, having different
20 relationships.

21 Again, not a good base model for economic
22 transactions. Rather, service, provision of digital
23 content, and ongoing relationships that require, in
24 fact, different market environments, that there be
25 fairly universal but yet appropriate contractual

1 contexts to each of these relationships.

2 One example, and there are different examples
3 coming out of different sectors, but for those of you
4 who do things like file your taxes using software, do
5 different kinds of personal finance mechanisms -- and
6 here I want to make sure I'm not representing any
7 particular company but giving you a model for how that
8 happens --

9 MS. HARRINGTON: Well, let's just say I use
10 Quicken, okay? Let's name names. I need to put this
11 in terms that I can kind of understand from my own
12 experience. So, at the risk of offending, I use
13 Quicken. Can we use that as the example here?

14 MR. BOHANNON: You can use that as the example.

15 MS. HARRINGTON: Okay, I'll use that.

16 MR. BOHANNON: What, in fact, you are doing is,
17 in fact, relying on a combination of the software that
18 has been provided to you. You are, in fact, not, per
19 se, downloading that entirely to your desktop. You
20 are, in fact, using its application which is being
21 hosted in a third area. The transactions, which are
22 both individual when you put in information as well as
23 what you ultimately do with the information, is being
24 managed in a continuous transaction process that is not
25 a one-time sale of anything. It's an ongoing

1 relationship that is a culmination of the enabling
2 software that allows you to do -- fill in the form, do
3 the calculations, provides you with data storage for
4 ultimately what you are doing, provides you with
5 security to ensure that you are, in fact, confident
6 that what you are doing will not be seen by others or
7 that it will not be changed as the transaction goes on,
8 and that, in fact, it's a combination of many of the
9 elements we described that are fundamentally different
10 in the networked economy than in the goods economy.

11 So, I use that as an example. The one you cite
12 is one example, there are others. But certainly -- in
13 fact, for the kind of companies that you're talking
14 about who do that, this has been a fundamental change
15 in the way they do business.

16 You used to go into a brick and mortar store
17 and buy it. Now -- and, in fact, sales have increased
18 and, in fact, demand is getting better, because as you
19 address the wide variety of consumer demands for what
20 they want and need to ensure their confidence, this
21 model I think is now becoming one way in which those
22 consumer demands are being met in a very effective way.
23 So, this is one example. There are other examples, but
24 I use this one because it's a fairly popular one.

25 I will leave this one for your further -- this

1 is a similar example of an ASP in the education or
2 training environment. And Carol will talk a little bit
3 -- someone at the FTC staff had asked me to sort of
4 diagram, and I will leave it to Carol to critique
5 whether this is, in fact, the model, but, in fact, the
6 open software model operates on a little bit different
7 assumptions. It is a very open environment in which a
8 variety of developers are working together in a common
9 way, and then the relationship between what the results
10 of that collaborative work are, then get down to a
11 variety of end users, again appreciating that here in
12 this diagram, end users are not just one but, in fact,
13 scalability to a variety of them.

14 So, as we hear the discussion today and
15 tomorrow and talk about the legal framework for the
16 networked economy, it's important to understand we are
17 still going to be stuck in the language of goods. I
18 mean, I think it's going to be a discussion and a
19 challenge that we have for quite some time, although,
20 in fact, what is really going on in the networked
21 economy is a culmination of services and dissemination
22 of information content, all of which produce, in fact,
23 a very complex web of transactions that require a focus
24 on an appropriate framework that deals with that, in
25 fact, unique aspects of the networked economy, the

1 lines of contractual solutions.

2 I think it's very, very hard in this dynamic
3 environment to think about very specific regulatory
4 guidance in this area, but ensuring that, in fact, the
5 risk management, the user needs, the interests of the
6 particular developers and intermediaries are all
7 appropriately dealt with in the context of transactions
8 and to try to come up with solutions.

9 So, with that, I'll be glad to answer any
10 questions or leave it, but I think this is a way to
11 start thinking about how, in fact, the context we are
12 talking about will, in fact, be affected by what are,
13 in fact, very diverse and changing models for the
14 software, information and content industry.

15 Thank you, very much.

16 MS. HARRINGTON: We're collecting questions,
17 and while Carol gets set up -- and is Randy here to
18 assist Carol?

19 Let me throw a question that's come from the
20 audience. Are copies of your presentations going to be
21 available? Have we considered that? If the presenters
22 would make their copies available to us, can we put
23 them on the website for the conference?

24 MR. SALSBURG: We would have to check the Power
25 Point license agreement.

1 MS. HARRINGTON: We would have to check the
2 Power Point license agreement. That's a joke.

3 We will do our best to -- if the presenters are
4 willing to give us the presentations and make them
5 available --

6 MR. BOHANNON: What I assume I would do is just
7 e-mail it to April or to the organizers.

8 MS. HARRINGTON: Right.

9 Now, Carol, whenever you're ready -- Randy,
10 could you please assist?

11 Okay, here's a question from Mark. With regard
12 to the Quicken ASP model, is this transaction a license
13 and what benefits does the license model provide?

14 MR. BOHANNON: Unfortunately, I don't have my
15 diagram, so I'll have to remember it from heart.

16 Remember I think it was useful, I think Bill
17 laid out in his presentation how a license can
18 accommodate unique user environments, even as
19 potentially millions of individuals are using and being
20 involved in the transaction. License then is a basis
21 for -- in a personal finance model, for example, there
22 may, in fact, be a period where you have a free use for
23 a while to test to see whether you like the system,
24 whether, in fact, it's providing a service that you
25 want. You then, based on that, can then redefine into

1 other areas.

2 A very small business, you will probably want a
3 site license, and Bill's I think very useful chart that
4 outlines the variety of ways in which similar digital
5 content can, in fact, be adapted to different user
6 models, allows that flexibility to manage both the risk
7 in terms of who the user is, the expectations of the
8 user in business. So, there is not a one-size-fits-all
9 depending on who, in fact, your customer base is and
10 providing personal finance information.

11 So, I think that the license, rather than a --
12 maybe sort of prescriptive rules, that, in fact, may
13 inhibit meeting user needs really is the appropriate
14 model to address a situation like that.

15 MS. HARRINGTON: Okay, thank you.

16 Carol, ready?

17 MS. KUNZE: Okay, my name is Carol Kunze. I
18 represent open source and free software interests. I
19 submitted comments to the Federal Trade Commission --

20 MS. HARRINGTON: I'm sorry, Carol, your mike
21 may not be on. There's a button on the bottom of it.

22 Randy?

23 MS. KUNZE: My name is still Carol Kunze. I'm
24 still representing open source and free software
25 interests. I submitted comments to the Federal Trade

1 Commission in advance of this forum on behalf of Red
2 Hat, the Open Source Initiative, TurboLinux, a very
3 small developed called Crynwr Software --

4 MS. HARRINGTON: Carol, can I interrupt? We
5 made special arrangements to have Pennsylvania Avenue
6 jack-hammered up during your presentation this morning.
7 Could you speak up?

8 MS. KUNZE: I understand that. And
9 MandrakeSoft. Twenty minutes is not a lot of time to
10 talk about open source. Our business model is very
11 different, so this could be a little quick.

12 There are four main points that I want to make
13 today. Can we turn off the volume?

14 MS. HARRINGTON: Pardon?

15 MS. KUNZE: Can we turn off the volume?

16 MS. HARRINGTON: Randy?

17 MS. KUNZE: I want the animation; I don't want
18 the sound.

19 MS. HARRINGTON: If we can't make a quick fix,
20 I could hum during that sound and create a more
21 pleasant sound, if you like.

22 MS. KUNZE: All right, the first point is that
23 licensing is critical for open source and free
24 software.

25 There's no way to turn that off, really? Isn't

1 there a mute? Believe me, you will get really tired of
2 this.

3 MS. HARRINGTON: Oh, we're okay with it. We'd
4 rather hear your presentation than --

5 MS. KUNZE: I'm tired of it.

6 MS. HARRINGTON: Okay. Well, we will just have
7 a pause here and listen to the jack-hammer sound on
8 Pennsylvania Avenue, which is so much better.

9 Let me ask another question while we're doing
10 that. This is a question that is not particularly on
11 point for our concerns, but it's a question that much
12 discussion is devoted to, and that is this:

13 In the old economy, we had sales taxes on goods
14 to finance government services. In the new economy,
15 will there be services taxes? Yes or no.

16 Anyone?

17 Sorry, Drew, I think we don't want to do taxes
18 today.

19 All right, are you ready?

20 MS. KUNZE: Well, I hope so.

21 So, licensing is critical.

22 The second point, we have to be able to embed
23 the terms of the license in the product.
24 Pretransaction disclosure just doesn't work. You'll
25 come to realize why that's the case.

1 The third point is there are no license fees to
2 support a warranty system.

3 The fourth point, warranty disclaimers are
4 fundamental to the existence of the open source and
5 free software system.

6 So, let's talk about what it is. Open source
7 and free software, technically the definitions are not
8 identical, but they are basically equivalent for our
9 purposes. Those terms will be used interchangeably.

10 Now, let me make a point about the term "free
11 software." The reference to "free software" does not,
12 in fact, refer to the price. As Richard Sullivan of
13 the Free Software Foundation likes to say, you should
14 think free speech, not free beer; however, you will
15 come to realize in the presentation that, in fact, the
16 software is free. So, I think that should be to think
17 free speech and free beer.

18 Generally open source and free software, these
19 are the points that they have in common, is software
20 for which the user is granted rights in the license to
21 have the source code. Ordinarily this is not something
22 that you get with software. If you want it, you have
23 to pay a lot of money for it. Not only does open
24 source and free software give you the source code, they
25 give it to you for free.

1 Second point, you can freely copy the product.
2 You can make as many copies as you want. There is no
3 limit.

4 Third point, you can modify it, and you can
5 make derivative works.

6 And the fourth point, you can redistribute it
7 in original or in your modified derivative work form.

8 So, four points, but what do they mean in
9 practice? Well, number one, as I said, there are no
10 license fees for use of the software. In fact, how can
11 you charge a license fee when basically anybody can
12 copy it and give it away to a friend?

13 As I said, anyone can copy and redistribute the
14 product. Let me give you an example of that. What I
15 have here is a product, plain paper envelope. I sent
16 away for it -- actually, I got it off the internet.
17 Inside, what it says is, "Linux Install CD Number 1."
18 This is a product of a website known as CheapBytes, and
19 on this disk it says, "Containing Red Hat Linux Number
20 7."

21 Linux is the most popular open source program.
22 Red Hat is one of the people that I'm representing
23 today. What they have done is they have taken Red
24 Hat's Linux product, and they have copied it, and they
25 are also redistributing it.

1 Now, let me show you another form of
2 redistribution. I just took that product, and I gave
3 it away to someone else -- actually, I am going to ask
4 for that back -- and that is another perfectly
5 legitimate form of redistribution. I could have
6 uploaded that product to my desktop, and then I could
7 have given that to Carol and said, why don't you try
8 this product? I think it's fabulous. So, anybody can
9 copy and redistribute the product.

10 Derivative works are distributed under the same
11 license terms. So, what this means is that if a
12 company like Red Hat, TurboLinux, MandrakeSoft,
13 basically makes some improvements in Linux, when we
14 distribute that product, we also distribute the source
15 code, which means anybody can take our improvements and
16 put those improvements in their own product.

17 And finally, warranties are universally
18 disclaimed on open source products. Warranty liability
19 on uncontrolled distribution would basically be
20 unlimited, and as I mentioned, there are no software
21 license fees that are going to pay for a warranty
22 system.

23 So, who writes open source software? Well,
24 it's basically written by a community of people who own
25 it, who write it, who maintain it. It's essentially a

1 collaborative effort, and particularly in the case of
2 Linux, it represents the work of hundreds of authors,
3 in the case of Linux from all over the world. So, what
4 this means is there is extensive peer review before a
5 product actually gets released in what is known as an
6 official version.

7 One of the persons who wrote into the FTC in
8 advance of this forum said, "Open source and free
9 software are subject to intense peer review. This peer
10 review is a very strong system by which to assess the
11 quality of software. The peer review system is not in
12 the hands of an elite minority of experts -- it is in
13 the hands of an enormous group of programmers."

14 Let's talk about the licenses. Licenses for
15 open source and free software are public documents.
16 They're published. You can find them posted on
17 numerous locations all over the internet. They are so
18 well known that they have names and they have
19 nicknames. There is the GPL, that's the free software
20 foundation for new product. GPL stands for general
21 public license, but everyone calls it the GPL.

22 There is the BSD license, that's the Berkeley
23 software distribution license. There's the artistic
24 license. All of these licenses are publicly available.
25 And, in fact, if you want to write a new open source

1 license, your license is going to get discussed, it's
2 going to get criticized, basically it gets written in
3 published -- sorry, in public, or sometimes it gets
4 written after consultation with the community. This is
5 what Netscape did when they decided to release the
6 source code for their Netscape browser. They went,
7 they talked to the community about what terms the
8 community would find acceptable.

9 Now, in formal terms, if you want to write a
10 new open source license, what you might do is submit
11 that to the Open Source Initiative for their approval.
12 The terms go up on a public list serve. Anyone can be
13 on that list serve. People on the list serve review
14 the terms. People on the list serve criticize the
15 terms. People on the list serve try and persuade you
16 to change the terms. They usually do get changed.

17 What happens most often is people on the list
18 serve try to persuade you to use an open source license
19 that has already been approved and to stop trying to
20 write your own.

21 The Free Software Foundation also contains a
22 list of software that it considers to meet its
23 definition of what free software is. Again, that's
24 very similar in practice to what an open source license
25 would be. It also has a list of licenses which it

1 considers to be compatible with its own GPL license.
2 So, what happens is a company like Red Hat, TurboLinux,
3 MandrakeSoft, they do not write the licenses for the
4 software. In fact, they do not write the software at
5 all. The software is written by a community, the
6 licenses are public documents, and to some extent the
7 community ends up writing the licenses.

8 So, what are the benefits? Well, there are
9 quality benefits. Because of the process of peer
10 review, you get stable, very high-quality programs.
11 Because you have so many people looking at your
12 software, they identify bugs earlier, they're fixed
13 earlier. So, any particular release has a much higher
14 percentage of bugs that have already been eliminated.

15 Another major benefit is that the user actually
16 has control over the software, not the supplier. The
17 reason I say that is because the user is free to modify
18 the software in any way they want to meet their
19 particular needs. What's more, if they find a problem,
20 they can diagnose that problem, they can remedy that
21 problem, because they have the source code, and they
22 have the license to make derivative works.

23 But there are also competitive benefits.
24 Again, because you have the source code, what this
25 means is that anybody can service the product. It

1 doesn't have to be the supplier. And anyone can write
2 companion software. You don't have to worry about
3 getting the source code. The source code is publicly
4 available.

5 And finally, there's a price advantage. Open
6 source and free software is basically free or you end
7 up paying a very low cost for the media.

8 Now, let me give you an example of the Red Hat
9 download product versus Red Hat CDs versus the
10 CheapBytes version, which I think, Carol, you still
11 have. You can download the Red Hat product off their
12 website for free from their FTP site.

13 Now, their FTP server gets very, very busy, so
14 as a convenience, what they have done is they have
15 listed mirror sites around the world that have taken
16 the Red Hat product, copied it and are now making that
17 product available. I counted up these various mirror
18 sites, there's 70 in North America alone, interestingly
19 three of those are government sites. There's 69 mirror
20 sites in Europe, and there are more in Africa, Asia,
21 South America and Australia. So, there are probably
22 more than 200 sites where you can get Red Hat's product
23 for free.

24 Now, let's compare that -- well, first of all,
25 let's compare that with the Red Hat product that you

1 get directly from Red Hat. You want the basic program,
2 you want printed documentation and you want technical
3 support services, you can buy this for \$29.95 directly
4 from Red Hat.

5 Now, if you don't want the printed
6 documentation and the services, you can get the product
7 from CheapBytes. So, you can get the product -- let me
8 take that back -- that Carol had briefly, you can get
9 the source CD, and as a matter of fact, you can get
10 documentation on the CD, you can get an additional
11 document with 300 software applications that Red Hat
12 also makes available, get that CD for \$1.99. So, you
13 add all these up, documentation, install CDs, source
14 CDs and those 300 software applications, this cost me
15 \$7.49. Just as a comparison factor, the shipping cost
16 was \$8.25.

17 So, that's sort of how open source works. You
18 basically get the product for free. What Red Hat is
19 selling is Red Hat is selling books and Red Hat is
20 selling services. That's what you end up selling in
21 the open source and free software market.

22 So, where do you get open source software?
23 Well, there are various different sources for it. The
24 first one, let's take a look at some of the large
25 companies. These include Red Hat. In 1996, Red Hat

1 was a very young company, still being run out of an
2 apartment. In 1999, Red Hat went public, now a
3 multinational company, has locations abroad.

4 There is there is TurboLinux. TurboLinux is
5 also multinational. They operate in the same fashion.
6 They are very strong in Asia.

7 There is MandrakeSoft, another large company.
8 MandrakeSoft started out in France. And there are more
9 companies.

10 Look at smaller develops, one of which is
11 Crynwr Software. This is a small development who
12 writes open source and free software who gives it away
13 for free. What he does is he sells services to help
14 people interface that software with other software they
15 might already have.

16 Now, there are various clearinghouses, like
17 collab.net, source exchange, open source developer
18 network. These are websites where open source
19 developers get together with people who are looking for
20 software solutions. They get together, they come to an
21 arrangement, the developer writes the software, they
22 decide what license it's going to be published to the
23 public under, and that is the way a lot of this gets
24 done. There are many, many individual programs and
25 developers who operate that way.

1 Now, there are also nonprofit organizations
2 that write and distribute open source and free
3 software. One of the best known is the Free Software
4 Foundation. They are responsible for the GNU products.
5 The second one is Devian. Devian has a very popular
6 Linux distribution product. And there are various
7 other nonprofit organizations that do the same thing.

8 Now, traditional companies are also starting to
9 distribute a single or a couple open source software
10 products. They are embedding open source software
11 products into their hardware or they are, for instance,
12 as Oracle does, they port one of their databases to the
13 Linux operating system. So, who are these companies?
14 Well, it includes Netscape, Intel, Oracle, HP, IBM and
15 Sun, and that's just to name a few.

16 Now, let's take a look at what the Federal
17 Government has recently -- well, not the entire
18 government, but at least one advisory committee
19 recommended, the President's Information Technology
20 Advisory Committee just last month in their report on
21 high-end computing recommended the adoption of a
22 research strategy that uses open source software
23 development as the new model for answering America's
24 high-end computing software needs.

25 Now, a topic that we're very worried about,

1 Magnuson-Moss and open source/free software. Why are
2 we worried about Magnuson-Moss if there are no license
3 fees, so there is no "sale" of the product, and nobody
4 provides a written warranty, because Magnuson-Moss Act
5 applies to written warranties?

6 Well, there are a number of things we're
7 concerned about. Number one, open source/free software
8 is distributed on disks with printed documentation,
9 with installation or other services, and a price is
10 charged for all of that. Now, Magnuson-Moss doesn't
11 have any mechanism by which we can segment that price
12 to say, ah, but the software is really free.

13 The second point we're concerned about is the
14 software -- open source and free software often
15 provides written warranties on the disks.
16 Magnuson-Moss says that implied warranties cannot be
17 disclaimed if there is a written warranty. Now, you
18 might think it's something of a stretch to say, well,
19 an express warranty on a disk can be bootstrapped into
20 an implied warranty on the software, and I would
21 certainly agree with you on that, but actually, in the
22 first agenda that the FTC had for this forum, there was
23 one question that caused me a great deal of concern,
24 and that was the question as to whether it was -- it
25 would be considered an unfair and deceptive act to make

1 a distinction between the warranty on the disk and the
2 warranty on the software. So, I think we have at least
3 some cause to be concerned about that.

4 And finally, open source software is frequently
5 distributed in conjunction with a service agreement.
6 In fact, this is how people make money on open source
7 software. And under the Magnuson-Moss Act, you cannot
8 disclaim implied warranties if you have a service
9 contract.

10 So, what happens if you apply Magnuson-Moss to
11 open source and free software, basically you get a
12 disaster. Because of the fact that everybody has to
13 provide services on the product, you can't really
14 disclaim implied warranties, which means Magnuson-Moss
15 would in effect impose mandatory warranties on open
16 source and free software. The result is going to be
17 that you have financial and legal risk, but you do not
18 have license fees to support either one.

19 And for the consequence, let's look to the
20 words of Bruce Parrins. Bruce Parrins is an open
21 source/free software developer. He wrote the open
22 source definition. What he said in 1999, "If free
23 software authors lose the right to disclaim all
24 warranties and find themselves getting sued over the
25 performance of the programs they've written, they'll

1 stop contributing free software to the world. It's to
2 our advantage as users to help the author protect this
3 right."

4 Now, there are a lot of open source and free
5 software developers and users who wrote in to the FTC
6 in advance of this forum to express their views. Let
7 me give you just a little taste of what a couple of
8 them said.

9 One said, "If I personally have to add a
10 warranty whenever I add a feature to Linux, I will not
11 be able to afford to improve Linux."

12 Another said, "There are many software packages
13 which would no longer be distributed if the author were
14 required to issue a warranty."

15 A third said, "Any attempt to require all
16 software to carry real warranties would crush the open
17 source software movement."

18 Now, that's just a taste of what they said.
19 There were many, many comments that were written in all
20 by people saying please don't impose warranties on open
21 source and free software.

22 Now, there was another issue that was raised by
23 a commentator. There was actually what I thought was a
24 brilliant submission by someone named Steve McDougall,
25 so before I conclude my main points, let me just

1 mention this particular issue and also the First
2 Amendment issue.

3 What he said to the FTC was that basically
4 warranties just don't make sense for software. His
5 point was that manufactured goods are subject to
6 defects in materials and workmanship. These occur
7 essentially at random. Software is not a manufactured
8 good, and it's not subject to manufacturing defects,
9 which is what warranties were intended to address.
10 Each copy of a software product is, by definition,
11 identical. That's the URL for his submission.

12 So, I was actually disappointed not to see this
13 on the agenda today, because I really think it is a
14 threshold critical issue. Warranties for goods had a
15 particular purpose. Software is extremely different.
16 Nobody actually gives a warranty on software; they give
17 a warranty on the disk. So, the question is, have we
18 actually thought about whether warranties on software
19 make any sense whatsoever?

20 MS. HARRINGTON: Carol, let me stop you and
21 challenge that in just one factual --

22 MS. KUNZE: Well, please remember, I'm not
23 arguing that. I'm saying that's a point that should be
24 looked at.

25 MS. HARRINGTON: Well, let me discuss that,

1 then, in looking at it.

2 Certainly we've seen historically that
3 manufactured goods can have defects that may initially
4 occur randomly but then they occur in all of the
5 mass-produced goods until the defect is corrected.
6 There may be a design flaw that results in a defect.

7 How is that different than a defect in a
8 program that is made widely available and that occurs
9 then each time the program is used? What's the
10 difference? I'm not getting this difference, if you
11 can go back to that slide that you had up.

12 MS. KUNZE: I think the point that Steve
13 McDougall was making is that when you make -- because a
14 good is a physical good, you can have basically
15 manufacturing errors in it. When you make software,
16 it's all identical. What you're talking about is some
17 type of design error?

18 MS. HARRINGTON: With software.

19 MS. KUNZE: So that the product doesn't
20 function?

21 MS. HARRINGTON: But we see that same thing
22 occur with manufactured goods, that there's a design --
23 let's take the case of a mass-produced automobile
24 that --

25 MS. KUNZE: I agree that that's a slightly

1 different issue, but again, I think that needs to be
2 addressed. Whether warranties, as we apply them to
3 goods, make sense on software is a question that needs
4 to be addressed. When you get into the issue of what
5 the implied warranty of merchantability is, it's
6 essentially that the product has to be fit for the
7 ordinary purposes for which it is used. I think we
8 have a question here as to what that even means for
9 software.

10 So, I'm not trying to necessarily make a
11 statement today, but I'm saying that's a critical
12 threshold issue. Do warranties as we know them make
13 sense for software?

14 MS. HARRINGTON: Well, I think, though --

15 MS. KUNZE: Maybe the answer will be yes, but
16 the answer could be no.

17 MS. HARRINGTON: Sure.

18 MS. KUNZE: But it's an issue that needs to be
19 looked at.

20 MS. HARRINGTON: Agreed, and I just want to
21 make a distinction between how it is that the defect
22 can occur and then be present in every application,
23 whether it's an automobile or a software --

24 MS. KUNZE: I appreciate that, but --

25 MS. HARRINGTON: -- versus the end use. You're

1 making a distinction really on the use end, not on the
2 production side, I think.

3 MS. KUNZE: Yes, I think so, but then you also
4 get into the question with software, what's a defect?
5 Is a bug a defect? A lot of bugs are innocuous. So,
6 even the language, the terminology that we had for
7 goods, when we try to apply software, doesn't even make
8 any sense. You simply can't take the old law and apply
9 it to new technology, because we might find we simply
10 don't understand it.

11 All right, I'm almost through here.

12 First Amendment, now, there was some general
13 comments that were made in the submissions to the FTC
14 that indicated that there might be First Amendment
15 implications. We know from the encryption cases that
16 source code can be speech and that it can be entitled
17 to First Amendment protection.

18 Let me just read you what an open source
19 developer wrote in to the FTC. "If, in order to
20 distribute software, Adam would have had to provide a
21 warranty of some sort, Adam is likely never to have
22 distributed the software, because his intention was not
23 to make a profit but rather to make available his
24 ideas. Software that is distributed in an open and
25 free manner encourages the exchange of ideas."

1 And I think that gets us to the question of are
2 mandatory warranties, which is what you would have if
3 you imposed Magnuson-Moss on open source and free
4 software, are they an impermissible burden on the
5 expressive function of software? Now, again, I'm not
6 saying yes. I'm saying that's an issue that we should
7 at least take a look at.

8 Now, let me return to my four points.
9 Licensing is critical. Suggestions that software
10 should be sold instead of licensed basically give open
11 source and free software users nothing that they don't
12 already have, and it denies them the very things that
13 they want from software, which is a license, a license
14 to copy, a license to modify, a license to
15 redistribute.

16 The ability to embed a license in the product
17 is critical. When you have informal distribution, you
18 really can't require that somebody hand over a paper
19 license or some other form of license before they hand
20 over the disk. It's the only practical way to grant
21 license rights when there are many licensors on one
22 disk and when one disk represents so many different
23 products.

24 The software itself is free. There are no
25 license fees to support a warranty. So, even when Red

1 Hat sells the product for \$29.95, what they're really
2 selling is they're selling books, they're selling
3 documentation, they're selling services, because you
4 can get the same product for the price of the medium
5 somewhere else, and you can get the same product for
6 free from Red Hat in the download version.

7 Finally, because of the distribution of
8 development model, imposing warranties threatens the
9 existence of open source and free software. Without
10 the ability to disclaim warranties with a minimum of
11 risk, the open source and free software development and
12 distribution models simply don't work.

13 Questions?

14 MS. HARRINGTON: I have a bunch of them, if you
15 want to come back up here.

16 One obvious question, Carol, that I'd like you
17 to think about as you walk back up to take your seat is
18 why not just offer no written warranty on the disk? If
19 the trigger here for the imposition of Mag-Moss
20 requirements is the written warranty on the disk, you
21 know, bringing the rest of the software under the
22 warranty act, then why not offer no warranty on the
23 disk?

24 And I'd like you to hold your answer to that as
25 you come back up and we are going to try another

1 question in the meantime.

2 MS. KUNZE: So, you are suggesting we shouldn't
3 warranty the disk, so if the disk breaks, we don't
4 offer to replace it? You know, that --

5 MS. HARRINGTON: That's the question. I'm not
6 suggesting anything. I'm reading you a question.

7 MS. KUNZE: I think that open source and free
8 software developers would like to offer their users
9 free replacement if for some reason this manufactured
10 disk is defective.

11 The other problem is that the other hook for
12 Magnuson-Moss is, of course, the provision of services.

13 MS. HARRINGTON: Here's a question for all of
14 the panelists or actually a question for Mark.

15 With regard to the ASP distribution model, you
16 mentioned various benefits that the consumer derives,
17 such as security, functionality, et cetera, yet nearly
18 all commercial end user licenses disavow all legal
19 responsibility for actually providing such
20 functionality.

21 Given this state of affairs, how can a software
22 user have confidence that the thing they pay to license
23 will provide the functionality advertised by the
24 company?

25 MR. BOHANNON: That is a very convoluted

1 question, so let me try to parse it out, to use a
2 current phrase.

3 Actually, I disagree with the assumption. In
4 fact, I think the very nature of the relationship, in
5 fact, suggests quite concrete deliverables and
6 relationships between an end user and a service
7 provider, and quite frankly, if they don't work, then
8 you need to find another service provider. I mean, the
9 notion that that is the only way in which this can be
10 addressed I think is a misnomer.

11 Nonetheless, there are, in fact -- even if one
12 disavows warranties, there are still obligations. I
13 mean, this is -- I think the warranty question is one
14 that needs further discussion in the context of
15 networked economy. It does come out of the goods
16 framework, which I think everyone now here has
17 articulated pretty well, and the question is what
18 really -- if we are going to stick with a warranty
19 model, and I think that's the question, what really is
20 appropriate in the context of a service -- networked
21 economy model where the transaction is, in fact, one
22 that is not a tangible good but information content in
23 a service-related model?

24 So, I think we're sort of stuck in this
25 discussion that its either/or, and really I think it's

1 a broader discussion, which I think we're starting to
2 begin today, which is about the broader legal framework
3 in which everyone can have confidence in the
4 transaction and the benefits of the net.

5 MS. HARRINGTON: Okay, thank you.

6 Next question -- here's one that's not
7 convoluted:

8 Why should you be able to conceal the terms of
9 a shrinkwrap agreement from the purchaser until after
10 the sale?

11 I think that's a basic question that critics of
12 this model have.

13 MR. BOHANNON: Yeah, I -- it may be not
14 convoluted, but I also think it's a loaded question,
15 and I am not going to address that here, because I
16 think that the discussion here has -- again, my goal
17 was to outline what I think are or what we believe and
18 see are different emerging models for the delivery of
19 digital supplies in a networked economy.

20 MS. HARRINGTON: So, perhaps we save that
21 question for one of the later panelists.

22 MR. BOHANNON: Yeah, and I think -- I have my
23 own view about this issue. I think to have that answer
24 without a good discussion, background discussion, about
25 the ongoing discussions I think is really misplaced and

1 does not serve this workshop as well.

2 MR. ASHWORTH: I would actually like to try and
3 address that question, Eileen.

4 MS. HARRINGTON: Okay.

5 MR. ASHWORTH: I can think of a couple of
6 reasons. First of all, from an efficiency standpoint,
7 I could certainly, you know, take -- well, actually,
8 no, I couldn't. The license is very complex. There
9 are a lot of terms in the license, and frankly, from a
10 practical standpoint, I just don't know if the entire
11 license could fit on the outside of a box, a shrinkwrap
12 box.

13 Secondly --

14 MS. HARRINGTON: What if it were made available
15 in notebook or some other fashion as warranties are
16 for, you know, electronic goods when you go to Best
17 Buy?

18 MR. ASHWORTH: Well, under -- well, let me give
19 two answers to that question. Egghead tried that, and
20 they're out of business now.

21 MS. HARRINGTON: Is that why they're out of
22 business?

23 MR. ASHWORTH: No, I didn't say that's why
24 they're out of business, that's not what I said, but
25 presumably consumers are screaming for those type of

1 notices, and yet that apparent competitive advantage
2 didn't work for Egghead in the retail setting. I'm not
3 saying that that's why they failed, but consumers
4 weren't streaming to Egghead even they offered that
5 benefit.

6 MS. HARRINGTON: Interesting point.

7 MR. ASHWORTH: Yeah. The other point that I
8 would make is that UCITA actually encourages presale
9 disclosure. If you read 209 and 208 in conjunction
10 with each other, it says that a mass market license is
11 enforceable if the consumer had reason to know that
12 terms were going to follow. Now, "reason to know" can
13 be defined as usage of trade. You know, is it
14 reasonable for someone who's a high-tech geek to expect
15 that terms are going to be in the box after payment? I
16 think for most people, yeah, it's reasonable to say
17 that I have reason to know that those terms are going
18 to follow.

19 But the point is what if I'm selling software
20 through a shrinkwrap to my grandmother who's 80 years
21 old? She may not have reason to know. I guess my
22 point is that there's a market lever there for me to at
23 least put something on the outside of the box that
24 says, "Terms may be inside." You don't need to
25 regulate that. You don't need to say what the font has

1 to look like, what the type has to look like, where it
2 has to appear, because UCITA creates that incentive for
3 software developers to make sure the consumer has
4 reason to know.

5 MS. HARRINGTON: Okay, we --

6 MS. KUNZE: Could I just respond to that?

7 MS. HARRINGTON: Sure.

8 MS. KUNZE: We really need to embed the license
9 terms in the product. There is just too much informal
10 distribution going on. When anyone can copy and
11 redistribute your product, there is no way that you can
12 enforce any kind of pretransfer disclosure of the
13 license terms.

14 The other point that I want to make is if you
15 take a look at this disk, this is Red Hat's Linux Power
16 Tools. There are about 300 software applications on
17 this. Now, I haven't taken a look to see how many
18 licenses are on this disk, but I do know that it is a
19 lot.

20 Somehow requiring that all those licenses be
21 available in some other medium or somehow beforehand,
22 particularly when I hand this disk off to my friend
23 Carol here, is just really not going to work. So, the
24 only practical way for us to deal with this situation
25 is to say, well, the licenses are there in the disk for

1 each particular product. If you want to exercise your
2 license right to copy, to redistribute, you really need
3 to know what you can do, you must take a look at the
4 license, but it's just not practical to have 300
5 software licenses handed to you along with this single
6 disk.

7 MS. HARRINGTON: All right, we are over, and we
8 are not going to have time to discuss more questions
9 right now before we take our break, which is going to
10 be an abbreviated break, but I am going to give you --
11 I want to -- we will make these questions that we've
12 collected part of the record, and I want to give you a
13 flavor as you head off into the break for what some of
14 them are so you can discuss among yourselves.

15 If it's not practical to put a license on a
16 box, what is the barrier to presenting the terms by
17 means of a hyperlink on a website prior to the sale
18 where the sale is online?

19 Isn't it possible to simply promise consumers a
20 replacement of the diskette if it breaks without
21 further giving a written warranty per Mag-Moss on the
22 computer information? Surely the two are separable.

23 There are other questions about why can't the
24 transaction be segmented, software in one segment
25 versus books and written materials.

1 Let's see, if we are now selling -- well,
2 here's another question, how does Red Hat make money?
3 If it makes money, why can't it afford to honor
4 warranties?

5 Isn't there a fundamental difference between a
6 license which purports to give consumers more rights
7 than they might have under copyright law versus a
8 license which seeks to limit the rights that consumers
9 have under the Fair Use Doctrine?

10 Now that music and books can be extracted from
11 their original physical medium and widely distributed
12 by the internet in the same way that is true of
13 software, is it the panelists' position that they
14 should be licensed instead of sold, as well?

15 And that's a flavor, I think, of the
16 discussion.

17 These have been excellent, thoughtful
18 presentations, and I want to thank these presenters
19 both for the thought and the care and the clarity with
20 which you made your presentations and also for being
21 willing to jump out first and break the ice as we head
22 into a very complicated two days of presentations. So,
23 I want a special hand for these presenters.

24 (Applause.)

25 MS. HARRINGTON: Dan Salzburg is the next

1 moderator. Dan, I'm really sorry I chewed into nine
2 minutes of the break time. Do you want to begin
3 promptly at 10:45? I would recommend that.

4 MR. SALSBURG: I would like that.

5 MS. HARRINGTON: Okay, we will begin promptly
6 at 10:45, six minutes.

7 (A brief recess was taken.)

8 MS. HARRINGTON: Before we start the next
9 panel, let me say that we are going to create a
10 mechanism for continued discussion of questions that
11 were posed and other questions that we didn't get time
12 to discuss with the last set of panelists. We are
13 hoping that all of our panelists and presenters will be
14 willing to -- and Carol, this is of particular interest
15 to you -- to respond in writing to some of the
16 questions that were asked, and we will set up some sort
17 of a chat room or list serve or something post-seminar
18 so that we can have ongoing discussions on some of
19 these issues and questions.

20 So, we will take all of the questions that we
21 collected that we didn't get a chance to pose or
22 discuss and pose them in writing to the panelists and
23 ask for their responses, and we will post all of that
24 and then figure out a way to extend to have some sort
25 of online discussion of those questions, because there

1 were very, very good questions collected and posed that
2 we did not get to.

3 All right, we have our next panel ready to
4 roll, and I will turn it over to Dan Salzburg.

5 MR. SALSBURG: Thanks, Eileen.

6 This next panel is appropriately titled, "Is
7 licensing appropriate?" We have just seen from the
8 previous presentations that licensing has become the
9 model of choice for the software industry, no matter
10 what the business model is, whether it's software that
11 people are paying for or open source.

12 So, what we hope to look at in this panel, is
13 the license paradigm appropriate, and what are the
14 implications of the licensing paradigm on the purchase
15 of software. To help us grapple with these pretty
16 heady issues, we have four people to help us with that.

17 The first one is Robert Holleyman, who is the
18 CEO of the Business Software Alliance, and the BSA is a
19 trade association that represents software makers.

20 The second panelist is David Mirchin. David is
21 the vice president and general counsel for Silver
22 Platter, Inc. Silver Platter is an internet publisher
23 of data bases and computer graphic information. I
24 think Midline is one of your products?

25 MR. MIRCHIN: Yeah, yes.

1 MR. SALSBURG: Jean Braucher is here today,
2 also. Jean is a professor of law at the University of
3 Arizona, and she's the co-chair of the American Bar
4 Association's Working Group on Computer Protection and
5 E-commerce.

6 Finally we have here Phil Koopman. Dr. Koopman
7 is a professional of electrical and computer
8 engineering at Carnegie Mellon University, and he is
9 the embedded and reliable information systems thrust
10 leader at Carnegie Mellon's Institute for Complex
11 Engineering Systems.

12 We have asked each of the panelists to give a
13 20-minute presentation, and we will be using the same
14 question and answer procedure that we used in the last
15 session. So, if you have a question at any time, just
16 raise your hand, and one of our staff people will come
17 around and give you a card, and we will collect it with
18 your question on it, it will be brought up here, and
19 hopefully we will have time to answer a number of these
20 questions at the end of the presentations.

21 So, why don't we begin with Robert Holleyman.

22 MR. HOLLEYMAN: Thank you.

23 I very much appreciate the opportunity that the
24 FTC has provided for us to be able to talk about these
25 issues today and for me to be able to speak on behalf

1 of the members of the Business Software Alliance. Our
2 companies are the leading software publishers in the
3 world. The issues that are being discussed today are
4 extremely important to us and to our customers.

5 I'd like to really address two topics today, if
6 I might. First, the fundamental question for this
7 panel, which is the reason why licensing is critical to
8 our industry; and secondly, to talk about some of the
9 rapid changes that we're seeing in licensing models and
10 how those are adapting in the marketplace and examples
11 of how these licensing models are changing,
12 particularly because first of network proliferation,
13 and two, now the growth of the internet.

14 On the first topic, I think a key point we
15 learned from the earlier panel is that licensing is the
16 business paradigm that has fueled the growth of the
17 software industry and the use of software by customers
18 all around the world, and we think that licensing is
19 not only appropriate for this industry but critical to
20 the continued innovation and development of new
21 software products.

22 Why is that? Because unlike a sales model,
23 licensing allows software publishers to protect their
24 intellectual property rights and at the same time it
25 allows businesses and consumers to use that

1 intellectual property in the most flexible and
2 cost-efficient manner.

3 As we all know, software is a digital product.
4 It's not a tangible product like a car or a toaster.
5 It's extremely easy to copy and distribute. And
6 therefore, it demands the type of intellectual property
7 protection that licensing facilitates and provides.
8 Yet licensing also allows software to be bundled in
9 different ways, for different businesses and consumers
10 in an extremely cost-efficient manner.

11 Let me give you just one example recognized by
12 the courts. In the ProCD case, rather than trying to
13 recover the cost of a \$10 million database by charging
14 a single price, the company in that case provided a
15 consumer license for \$150 and a commercial license at a
16 much higher price.

17 Here's what the Seventh Circuit concluded: If
18 ProCD had to recover all of its costs and make a profit
19 by charging a single price, it would have to raise the
20 price substantially over \$150. The ensuing reduction
21 in sales would harm consumers. If the only way to make
22 a profit turned out to be a price attractive to
23 commercial users alone, then all consumers would lose
24 out, and so would commercial clients who would have to
25 pay more for the listings because ProCD could not

1 obtain a contribution towards costs for the consumers.

2 I think in the first panel we had a very good
3 description of a hypothetical program that would be
4 marketed to different ways, whether it was consumers or
5 whether it was students or a large enterprise, and how
6 that same product through the licensing mechanism is
7 tailored to and priced according to those needs.

8 I agree completely with the Court, with the
9 Seventh Circuit in the ProCD case. Licensing allows
10 the packaging of software in ways that make it
11 affordable to the consumer. It also gives the consumer
12 options. Modifying a Clip Art or copying it a hundred
13 times for a fundraising letter would subject a consumer
14 to an infringement action absent a license to make
15 derivative works and multiple copies. The reality is
16 that licensing is the way that software has been and
17 will continue to be distributed, and there have been
18 enormous benefits that have been reaped by users and
19 businesses as a result of this.

20 Let me just describe a couple of the principal
21 licensing models we see and also why they're important
22 in the software industry where we don't rely simply on
23 today's software package to be the one that consumers
24 and businesses will use a year or three or five years
25 from now, but, in fact, we have a process by which

1 software is regularly upgraded, and a huge amount of
2 our time goes into new innovations in products, and the
3 shelf life, if you talk to any major software
4 developer, the shelf life for software now is shorter
5 than ever before, and the licensing model really
6 facilitates that sort of evolutionary product.

7 There are five principal type of software
8 licensing models, and I think just to set the framework
9 today, it's useful to discuss those.

10 One's a concurrent use license, and a
11 concurrent use license limits the number of
12 simultaneous users. This is also referred to as a
13 floating network license, and it describes the fact
14 that though the number of users is fixed, usage may
15 float among the terminals.

16 Secondly, there's a per-seat license, probably
17 the simplest type of license to understand, because
18 it's extended to a dedicated machine, a user or use,
19 while a per-server license applies to a network server.

20 We also have site licenses. Again, this is all
21 an evolutionary process, and I've seen rapid change in
22 licensing models. Site licenses became -- came into
23 existence roughly eight or nine years ago as a
24 principal form by which users get the right to use that
25 software at a particular site, and it often includes

1 some sort of quantity discount, the right for users to
2 make copies and a cap on a licensee's ability to make
3 unauthorized copies.

4 So, if I have an office, for example, in
5 Washington, D.C., rather than a per-machine license or
6 a concurrent use license that would allow 25 users in
7 my office to use it potentially on 50 machines, a site
8 license would mean that everyone within my enterprise
9 at this particular location could use that software.

10 An enterprise license is the next evolution,
11 which is extended to all sites within a particular
12 company. So, if I have an office in Washington, I have
13 an office in London, as I do, or an office in
14 Singapore, it's an license that would allow all my
15 users in all of our sites throughout our enterprise to
16 use that software according to license terms.

17 And finally, there's shrinkwrap licenses, which
18 typically exist if I were to go into a store, buy a box
19 of software in a cellophane wrapper or order it online
20 and have it delivered to me, and those licenses tend to
21 have agreements that are effective when someone tears
22 open the packaging and reads that license. So,
23 shrinkwrap license, which is described when you get the
24 box from a store, and if you get the same software
25 product online, it would typically be a clickwrap

1 license.

2 So, the five principal forms of licensing we
3 see are concurrent use licenses, per-seat licenses,
4 site licenses, enterprise licenses and shrinkwrap
5 licenses, and the combination of these different
6 licensing models have allowed publishers to draft
7 comprehensive licensing agreements that depend upon the
8 specific nature of the technology and of the individual
9 licensee's own needs.

10 There are two principal forms in which the
11 license agreements are then provided. One would be an
12 end user license agreement, a EULA, and that affords
13 the user specific rights to use that software, it
14 defines the scope and definitions of use, the terms
15 applicable to copies and conditions, often times for
16 home use of software that someone may have in their
17 office. It gives you the right to make the backup copy
18 consistent with the copyright law, and there are also
19 other terms that may apply to the intellectual
20 property, the payment, limitation of liability,
21 termination of clauses, export terms and others that
22 typically form the end user license agreement.

23 At present, some software publishers, primarily
24 companies that make and distribute specialized or
25 customized products that have a limited market, and

1 their customers are most often large businesses,
2 stipulate in their licensing agreement that the license
3 itself may not be transferred, but most publishers do
4 not restrict transferability.

5 The second principal theme in addition to end
6 user licenses would be the volume licensing plan.
7 Again, these typically accommodate large enterprises
8 with multiple locations, and so those are the two
9 principal types of plans that we see.

10 Another key aspect of this, and I won't repeat
11 what the earlier panel did, because I think they did a
12 very good job of describing some of the new
13 developments in technology and distribution, but I
14 think that it's important to know that the licensing
15 terms have been changing to reflect changes in
16 technology, initially with use of a network within an
17 enterprise and now through use of the internet.

18 The application service provider model that was
19 discussed in the earlier panel is clearly a new
20 development in technology in terms of distribution, and
21 that is affecting software licensing, and software
22 licensing terms are accurately reflecting those changes
23 in the marketplace.

24 We also see through the Open Source Licensing
25 Group how that process of creating derivative works

1 occurs and what sort of -- and the type of benefits
2 that those will provide, and licensing terms are
3 appropriately reflecting those changes in the
4 marketplace.

5 I think that overall we can say that earlier in
6 the last decade, the growth of networks, and in the
7 latter portion of the last decade and now, the use of
8 the internet, has been the single biggest thing that
9 has changed the distribution and licensing models for
10 software.

11 I'd like to give you one concrete example,
12 because it's a product that's widely used, and I think
13 it shows how the internet is facilitating these new
14 licensing models, and it's utility software. A number
15 of the leading publishers of utility software are
16 members of the BSA, I'll use one example, Norton
17 Utilities, which is created by Symantech, and that's a
18 product that is widely used, because we all want to
19 ensure the security of our computer systems, and that
20 product is increasingly distributed via the internet,
21 and there are license agreements that will provide you
22 the ability to get regular updates of that program via
23 the internet.

24 So, you can set your preference to check it
25 daily, to check it weekly, to check it monthly, but

1 over the course of often a one-year subscription
2 agreement, I find every Monday morning my computer is
3 set to say that I go out on the internet and download
4 the latest information from Symantech about the new
5 viruses that will be added to the profile for Norton
6 Utilities, and I think it's a good example of both how
7 the internet is providing new means of distribution of
8 products, but the sort of upgrades in areas like
9 antivirus protection that are important, and licensing
10 really facilitates that.

11 Let me simply conclude by noting that this is a
12 rapidly changing marketplace. Customer needs are
13 changing, technology is changing, the development of
14 software is changing. We believe that the licensing
15 model is integral to this type of change and
16 development and that they have served the needs of
17 vendors of software and huge adoption in the use of
18 software by customers all around the world.

19 There's a broad array of licenses that are in
20 place, more coming online as the internet growth
21 changes. It's certain that there will be further
22 changes in the future, but we believe that this balance
23 has worked, and it's worked well, and I appreciate the
24 opportunity to be able to talk about it this morning.

25 Thank you.

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1 MR. SALSBURG: Sure, thank you.

2 Let me just, before we move on to the next
3 panelist, let me throw a couple questions at you.

4 Would it be fair to say that in mass market
5 licenses that are aimed at consumers, the main purpose
6 of using the licensing paradigm is to prevent the
7 unauthorized copying of a program?

8 MR. HOLLEYMAN: I think that is one of the
9 principal purposes, but I don't think it's the sole --
10 it's certainly not the sole purpose.

11 MR. SALSBURG: Okay. Well, if it is one of the
12 important purposes, could that purpose be met still
13 through the sale of goods context, but if there were
14 technical innovations such as limitations on copying of
15 the software that you put into a disk or embedded into
16 the programming on the internet that could be
17 downloaded?

18 MR. HOLLEYMAN: I don't think that that would
19 -- I don't think that that would address the
20 fundamental benefit of a licensing arrangement, which
21 is it allows you to have products, even in products
22 that are mass marketed, that are tailored for the
23 different uses of that customer.

24 For example, as I was outlining the five
25 principal types of licenses, those are all licenses

1 that are applicable to mass market products, and one of
2 the key reasons why we have those licensing is not only
3 to ensure that there are protections against copying but
4 also to enable the flexibility for the user depending
5 on the needs of their organization.

6 MR. SALSBURG: All right. I --

7 MR. MIRCHIN: Can I also add something on that?

8 MR. SALSBURG: Sure, David Mirchin.

9 MR. MIRCHIN: You know, with regard to the
10 copying in the consumer context, I mean, any time I get
11 some software on CD or floppy, I am going to want to
12 copy it onto my hard drive typically. So, the idea of
13 whether it's helping consumers to prevent copying would
14 be a huge problem. I mean, we want to allow them to
15 copy onto it.

16 MR. SALSBURG: Right. I think what the gist of
17 my question is, are there limitations technically that
18 could be put on the copying, for instance, that would
19 allow a certain number of copies to be made, that would
20 allow you if you're selling the program to a company
21 where you want it to be able to be installed on X
22 number of computers, that there's a technical
23 limitation that you would put in the code that would
24 allow that but would still enable it to be considered a
25 sale of goods?

1 MR. HOLLEYMAN: Well, again, in terms of
2 whether there could be technical limitations, there can
3 be. There are two major exceptions to that. One is
4 that most companies have not done that because
5 consumers -- in earlier years of software, it was more
6 widely done, but consumers, customers, preferred not to
7 have those limitations.

8 And secondly, because a big part of our
9 business is antivirus, I can say that there is not a
10 technical protection that I've seen that is fully
11 effective. I mean, as quickly as you can go out on the
12 internet and look at, you know, various ware sites and
13 other -- and crack sites where you can find things
14 posted, serial numbers that help you defeat those copy
15 protections. I've probably logged 2 million miles of
16 flight time, most on United Airlines on that over the
17 past ten years, and I can say that there -- for every
18 solution I've seen that would try to prevent copying,
19 there are very ingenious people out there who are
20 trying to find ways to defeat that.

21 MR. SALSBURG: Thank you.

22 David Mirchin?

23 MR. MIRCHIN: Okay, so, here we are -- is this
24 the microphone?

25 MR. SALSBURG: Yeah, if you hold it closer to

1 your face, it would be better.

2 MR. MIRCHIN: So, here we are, okay, we are
3 already into sort of the middle of the presentations in
4 the morning, and you're sort of wondering, you know, is
5 it really worth hanging in there for this, you know, I
6 could go out and get a cappuchino, you know, they are
7 taping it, so I don't really even have to see it live,
8 so I just wanted to share with you that I was recently
9 giving a talk, and there were fewer people in the
10 audience than now, there were actually only nine people
11 left, but fortunately I had a camera that I was able to
12 get pictures of them, and I thought I would just share
13 that with you.

14 So, I won't say if you stay here for the next
15 20 minutes or so that you will benefit the same way
16 like these nine people did, but hopefully what you will
17 get out of it the following: You will learn a little
18 bit about what Silver Platter information does, why we
19 license rather than sell our products, that our market
20 genuinely works to impact the terms of those licenses.
21 I know the FTC is a little bit worried about clickwrap
22 and shrinkwrap licenses. I want to tell them about why
23 we switched over from signed license agreements to
24 clickwraps.

25 The benefits to the licensors and the licensees

1 from those clickwrap agreements, and also on the
2 consumer protection issue, to say that it's my opinion
3 that the focus should be really on the substantive
4 terms of the license and not on its form.

5 So, first of all, what does Silver Platter do?
6 We are a small but locally oriented electronic
7 publishing company. We are founded in 1985, and we
8 have used licenses since that point. We employ about
9 175 people worldwide, mostly soft developers,
10 librarians, database designers, marketers, a lawyer.
11 Our main office is in Norwood, Massachusetts, which as
12 we say, there are many charming villages in New
13 England, and then there's Norwood. And we also have
14 offices in London, Amsterdam, Paris, Bologna, Sydney,
15 Hong Kong, and I work in Norwood.

16 Okay, so, we publish about 225 reference
17 databases in electronic format on CD-ROM, a little bit
18 on DVD-ROM and over the net, and typically they are
19 abstracts of articles or full text of articles in areas
20 such as medicine, humanities, sciences. We do not
21 actually sort of do the abstracting, that would
22 actually be hard work, we license them from
23 professional associations like the American
24 Psychological Association, the database PsychInfo has
25 millions of abstracts of articles on psychology topics,

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1 or from private companies like Bell & Howell,
2 Information Learning, which does dissertation
3 abstracts, or the government, like the National Library
4 of Medicine, Medline.

5 Our primary markets are university medical
6 libraries, and then our smaller markets are research
7 libraries and corporations like biotech companies,
8 engineering companies and the like. So, that's sort of
9 what we do.

10 Now, why do we license our databases and
11 software? So, I just want to sort of go back to
12 basics, which is under the Copyright Act, we have five
13 exclusive rights for our information and our software,
14 reproduction, distribution, derivative works, public
15 display and performance. So, the question is, why --
16 you know, why can't we rely sufficiently on the
17 Copyright Act, and why do we use licenses? So, one
18 possibility is that it gives lawyers like me a lot to
19 do, but there is even a better reason why we use
20 licenses.

21 First of all, it provides versatility and
22 flexibility to our customers, and what do I mean by
23 that? Let's take the example of a university that
24 licenses a database from us like the psychology
25 database and they decide, okay, I'm just going to buy a

1 single user license. We, by the way, do use a
2 concurrent user license, which is if you want to have
3 four simultaneous users accessing at any time, you pay
4 us a certain price; if you want eight, you pay us more;
5 and you can go up to unlimited, okay?

6 So, let's say they start out on a single
7 machine, and then over time they find, hey, Silver
8 Platter products are really good, and we want to
9 upgrade that to an unlimited use license. If -- what
10 allows them to do that? It's the license. It's the
11 term that says, oh, you want to go from, you know, to
12 take that single copy of the database and now network
13 it, allow unlimited use throughout the organization,
14 it's the license that allows them to do that.

15 Even if we sold -- let's take the other
16 alternative, we sold them a copy. So, even if we sold
17 them a copy, networking would not be permissible under
18 fair use. So, they say, right, I'd like to network
19 this throughout my entire university, all the campuses,
20 I -- they couldn't do that under fair use, they
21 couldn't do it under first sale. They would need a
22 license to permit them to copy it onto their network.

23 So, what are the other alternatives? Let's say
24 they say, fine, we want to distribute it to our two --
25 you know, 1000 computers in all our libraries. So, the

1 alternative is an incredibly inefficient model which is
2 somehow, you know, giving a copy -- you know, sending
3 1000 copies of the database. It just doesn't make
4 sense.

5 And I think this model or the thought is that
6 it's the license that really controls is really what
7 information and software is all about. It's use, what
8 can I do with the thing? The box, the goods that it
9 comes in, if it even comes in a good, because a lot of
10 our stuff is just downloaded over the net or accessed
11 over the net, is useless. I mean, you know, if my kids
12 say, okay, what am I going to do with that CD-ROM now
13 that I've installed it? You know, they use it for
14 frisbees, they use it for -- to prevent, you know,
15 watermarks on our plastic table tops, or to aim at each
16 other's heads, but basically they say the good is
17 useless. That's not what the thing is about in
18 information and software.

19 And really that's sort of another way of saying
20 is that the product is the license. When Bill Ashworth
21 talked earlier today about Word, I mean, one copy of
22 Word in a single user on my computer is -- this isn't
23 actually my computer -- on the FTC's computer is
24 fundamentally a different product than something that
25 says here's that single copy, but anyone in the FTC,

1 whether they are located here or in any office can use
2 it worldwide, it's a fundamentally different product.
3 So, the product is the license.

4 So, for example, in our license we talk about
5 you can use it for internal use, you can make for
6 databases the information available, you can use it in
7 hard copy, and we also address the fair use issue.

8 What are some other reasons why we use the
9 license? One, it's to protect noncopyrighted material.
10 So, the example is you have the publishers that have
11 been slaving away in dimly lit basements since 1912
12 producing their products. Someone comes along and
13 wants to copy word for word their database. They
14 scream, but can they do anything about it? No. And
15 the reason is because in the United States, after the
16 1991 case of Fice versus Rohm Telephone, finding that
17 uncopyrightable, factual information is not protectible
18 under copyright. The most significant way that
19 companies could protect their noncopyrightable
20 information is through contract.

21 Now, the European Union saw the problem with
22 that, and they passed the European Union Database
23 Directive, which does prevent unauthorized extraction
24 or re-utilization of noncopyrightable databases, but in
25 the States that's not the law. So, the result is

1 contract is a good way to protect noncopyrightable
2 information.

3 So, what are we talking about,
4 noncopyrightable? It could be an example of Pratt's
5 Guide to Venture Capital, which has a listing of all
6 the venture capitalists in the world, their offices,
7 their primary investments, you know, where are they
8 located, and if someone comes along and copies that
9 word for word, they wouldn't be protected. So, that's
10 the idea of what I'm talking about there.

11 Other reasonable use licenses could control
12 liability, so, for example, in our license we provide
13 certain warranties. We provide the software disks, if
14 you're getting it on disk, will be free from defects,
15 or that the disks on which the databases are loaded
16 will be free from defects. We provide that unplanned
17 internet downtime is no more than 24 hours a month and
18 that we also have the right to license the product to
19 you.

20 We disclaim other warranties, and we limit
21 damages to the product price, in this case which is if
22 you don't like the product, that's fine, you can get
23 your money back, but we are not your insurance company.
24 And finally, we also do choice of law, and we have a
25 nonexclusive choice of forum, that we want at least

1 Massachusetts to be one place where we can sue.

2 So, the question is why won't we sell -- why
3 don't we sell? And the main thing is that a digital
4 product is not a book. What I mean by that is which is
5 on the upside, we want to permit uses that are not
6 permitted if you just sold it like a book. So, copying
7 to a network is not permitted by the Copyright Act,
8 even in a sale, so that's why we need a license, and
9 other things that make it different from a book is that
10 digital products are real easy to copy and distribute,
11 they are free to copy and distribute, and it could
12 erode our entire market.

13 So, take the example of a university has our
14 product, they have it on a network, and they say, you
15 know, we are going to make it available to every other
16 person who wants to dial in or access our product.
17 That would erode our entire market. So, there's a --
18 and so that's something that would create a huge
19 problem, if someone could just say, well, I'm just
20 going to upload it for free.

21 Okay, the third topic is we switched from
22 signed license agreements, which we did use until about
23 maybe three or four years ago, to shrinkwrap licenses
24 and clickwrap licenses. Why did we do that?

25 First of all, the case law overwhelmingly

1 supports the enforceability of shrinkwrap licenses,
2 which is what we first went to, and then clickwrap, and
3 it also provides benefits to the licensors, us, and our
4 information providers and to licensees. So, real
5 quickly, some of the cases, you're all familiar --
6 should be familiar, if you're not, ProCD versus
7 Zeidenburg, a Wisconsin case where this grad student in
8 computer science uploaded ProCD, which is about a
9 hundred million residential and business listings to
10 the internet, and the Court said -- and he bought that
11 at Egghead or some computer store for \$19.95, and the
12 Court said the shrinkwrap license is enforceable.

13 Really quickly, some other cases like Rinaldi
14 versus IOmega, which was in Delaware last year, where
15 there was a disclaimer in the box, and there was a
16 class action brought, and the Court dismissed the
17 proposed class action claim. IOmega makes these ZIP
18 drives, you may know that, so the plaintiff said this
19 was the click of death, that there was certain clicking
20 going on in his computer destroying stuff. Anyway, so,
21 the Court dismissed the proposed class action claim
22 that IOmega breached their implied warranty on
23 merchantability.

24 What did the Court say? It was a conspicuous
25 disclaimer, and if you didn't like the terms, you could

1 get a refund, and focused on that, and that's a theme
2 that really goes throughout a lot of these cases
3 starting with ProCD.

4 Finally, the Court did say, listen, there are
5 commercial practicalities. You have a disclaimer. It
6 comes in the box. If you don't like the terms when you
7 get it, you have 30 days to return it. If you don't
8 like it, then that is a reasonable way to do business.

9 Finally, I just want to talk about Nortonson
10 versus Timberline. These other cases, ProCD and
11 Rinaldi, are consumer cases. I just want to point out
12 that Nortonson versus Timberline is a shrinkwrap
13 license in a very expensive context. It was software
14 for doing construction bids, and what was -- and the
15 Court upheld the shrinkwrap license. They are -- I
16 think the important thing from there is the Court said
17 there was -- it was originally a 1999 case and just
18 affirmed a couple of months ago in the Washington State
19 Supreme Court.

20 The Court said, listen, in this day and age, it
21 is inconceivable that some -- I should say that
22 Nortonson claimed that they didn't know there was a
23 license. They said it's inconceivable in this day and
24 age that someone wouldn't know that there is software
25 that's being delivered without a license. That's just

1 not a claim that we are going to accept.

2 On the clickwrap license, these have also been
3 held enforceable almost uniformly since 1996.
4 CompuServe versus Patterson, Sixth Circuit case, and
5 just some other cases really briefly which cover forum
6 selection clauses, and the Court said these are
7 reasonable in clickwrap agreements.

8 So, what has been our experience in going from
9 a signed license agreement to a clickwrap? I think it
10 can sort of fall under the category of the good, the
11 bad and the ugly. So, first of all, what's the good?
12 We get our products to customers a lot more -- a lot
13 quicker. We did a study, and in general it took us
14 about 22 days to get a signed license back from the
15 customers, because we were selling to places like Papua
16 New Guinea, Botswana, Worcester, Massachusetts, and it
17 created a big problem, and this is 22 days where the
18 customers didn't have the product, and obviously for
19 us, we're losing -- if you're a subscription model, we
20 license our products for annual subscriptions, that's
21 22 days of revenue we have lost forever.

22 It's a lot less hassle for us, a lot less
23 hassle for the customer, they are not like running
24 around saying, you know, who has that license
25 agreement, you know, fax it back, oh, it's stuck in

1 legal, which is always everyone's biggest complaint
2 about everything.

3 Another good thing is that -- a local language,
4 that we now, if you go onto our website, you'll see
5 that our license is not just in English, but we also
6 have it in Portuguese, Spanish, Italian, German,
7 French. You can also do that with a signed license
8 agreement, but it's a lot more complicated, especially
9 if you have offices all around the world. It's -- you
10 know, if you're updating the license all the time, to
11 have stacks of it all over the place, you know, you are
12 going -- you will get as a practical matter, you know,
13 the French license going to Poland and that sort of
14 thing. It is just going to happen.

15 What's the bad? Well, the bad is that the
16 marketing department -- there's a constant tension in a
17 clickwrap license between the marketing department on
18 one hand and the legal department on the other hand.
19 Paper licenses you can sort of stick in the box or
20 whatever, but a clickwrap license is really there on
21 the website at all times. So, the result is your
22 marketing people would be really happy if no one ever
23 saw a license. In the legal department, we want to
24 make sure it's available, that everyone sees it. So,
25 no matter how good your relationship with your

1 marketing department, there is this constant battle
2 between the two departments, and I just want to say,
3 even if you have a really good relationship, you will
4 always be seen to be meddling in their business.

5 Now, what are some other bad things, which is
6 -- now, from the consumers or the licensees, this is
7 actually a good thing; from us, we don't really like
8 this too much, but before we went to a clickwrap
9 license in '98, we had 38 negotiated licenses during
10 the course of the year. When we went to a clickwrap
11 agreement, it did go up to 51 negotiations, and our
12 thought is that going from a shrinkwrap to a clickwrap
13 is to some extent for the consumers and the end users
14 something that's a little more visual, it's clear, they
15 feel like they're taking an actual action to accept the
16 license.

17 I mean, this is speculation, I can't tell you
18 exactly why they decided to do it, but my sense is that
19 with a clickwrap, there is a sense of I'm actually
20 accepting a license, I'm going to take it a little more
21 seriously. Now, so, I would say that's not so --
22 that's bad news for us, but maybe for the consumer it's
23 not so bad.

24 Finally, the ugly, which is our software
25 developers, the key here, you know, if you're going to

1 do a clickwrap license is that you really need to be
2 dealing constantly all the time with the new product,
3 the new software release as it comes out, and that
4 actually does relate to the issue of, you know, can you
5 always have your license up there with your product?
6 And I think there really is a genuine problem, because
7 it's not always so easy to attach a bigger license on
8 the software or make sure it's always the most recent
9 version, and I'll get back to that later.

10 Okay, so, what if clickwraps were not
11 enforceable? Now, first of all, after e-sign
12 legislation, this may not be an issue anymore, but what
13 would we have to do? We would have to go back to
14 those, you know, the stone age when you need to obtain
15 a signed license from every customer. The
16 administrative and cost burden for all parties, we have
17 more than 10,000 customers worldwide, and it would be
18 enormous.

19 And finally -- and that's a cost that has to be
20 borne by somewhere. I mean, that can't just be
21 completely absorbed by us. It will reflect itself in
22 the price.

23 And finally, there are a lot of things that
24 we've experimented with, like distributing our products
25 to individual professionals. So, for example, we were

1 licensing to individual doctors for a while. So, the
2 thought was if we had to get a signed license, that --
3 we were charging them like 50 cents a search. We were
4 saying if we had to get a signed license, we are never
5 going to do this. So, who would lose out? It's the
6 docs. I mean, they would not be able to get access to
7 our product in this way if we had to get a signed
8 license. We would just have never even experimented in
9 that market.

10 So, finally, you might say, you know, does the
11 market really work to impact the license terms? So, I
12 want to say first of all, the philosophy of our legal
13 department is we want to be responsive to the
14 customers' interests, and the result of doing that is
15 so if someone has a legitimate complaint with their
16 license agreement, we're going to address it, and the
17 result is that we actually have addressed it. We have
18 revised our standard agreement over a dozen times in
19 the last couple years.

20 And I think it also relates to one of the
21 questions of, well, why couldn't you just have these
22 license agreements, you know, in a store as, you know,
23 at -- you know, with copies? Well, the problem is
24 every time you revise a license agreement, now there's
25 a cost to need to sort of send that out again, every

1 store or every place needs to sort of download it, put
2 it in the books. It becomes a huge problem. If you
3 are going to be responsive to your market and actually
4 change your license, there is this other impact to
5 having all the time those licenses out there.

6 And we've -- also in areas that we haven't
7 changed, that you won't actually see in our license, we
8 provide flexibility. So, for example, we still provide
9 governing law in Massachusetts. If someone says,
10 listen, by our law, we're a state institution in Iowa,
11 we have to have Iowa governing law, we will change it.

12 Now, the reasons for doing this are business
13 reasons. We are not really good -- well, we are really
14 good guys, but it will reduce the transaction costs,
15 which is if someone has a legitimate problem with our
16 license, we want to change that, because we know that's
17 getting in the way of doing business, and secondly, it
18 gets the sale done quicker. That's sort of what we're
19 all about.

20 Okay, so what has been the evolution of
21 warranties, just to take one section in our license,
22 sort of relevant for this hearing, which was in 1991,
23 the only warranty we provided is an as is -- that we
24 have the right to do this, which is we warrant that we
25 have the complete right to enter into this agreement

1 and deliver the products, okay?

2 In '92, we added a warranty for defective
3 disks. We said if the disk is defective, we will
4 replace it free of charge.

5 In '94, when we started delivering over the
6 net, we said we will provide our warranty is no more
7 than 30 days downtime in the first 90 days. So, if you
8 have a problem with our internet service, fine, in the
9 first 90 days, then you can get a refund.

10 And we strengthened that in '98-'99 time
11 period, we strengthened it in two ways. One is
12 duration, which is now that internet warranty extends
13 forever, so if you're licensing your products from us
14 for ten years, you can always get that internet service
15 warranty. And second, the substance of the warranty
16 got better, which is going down from three days
17 downtime to no more than 24 hours downtime in any
18 month.

19 So -- and there are a lot of other provisions
20 that we have revised to benefit our customers over
21 time, for example, who may use the products. Our
22 customers are mostly libraries, so we provide like
23 walk-ins and anyone who the library decides to permit
24 to use the facilities can use it, how to access it, you
25 can access it remotely, you can do correspondence

1 courses, and a cancellation for breach, we used to say
2 if you breach, we can cancel, and now we provide, you
3 know, only if it's not cured during the cure period.

4 So, why do we do this? Is it because we were
5 good or just felt guilty? And here's a picture of my
6 mom. When I thought of guilt, she was the first thing
7 that came to mind.

8 So, what are the reasons why we did this? The
9 first is librarian malpractice, which is librarians out
10 there, they sort of feel like if they don't actually
11 negotiate this thing, it is going to be malpractice.
12 So, this was on one of the list serves, they said I
13 attended an ARL, Association of Research Libraries --
14 those are the big research libraries in the States --
15 seminar recently. The presenters put the fear of God
16 into me about signing off on licenses that leave the
17 college vulnerable to breach of contract lawsuits
18 and/or don't give the college its full rights under
19 fair use guidelines. The presenters impressed upon us
20 that the best way to make sure that a license is -- and
21 I love this as a lawyer -- is to have the university
22 lawyer and librarian both review it, thereby we are
23 putting a system in place just to do that. Our finance
24 and administration officers are now noticing that
25 lawyers time doesn't come cheap, so I have two

1 questions: How does your institution handle the
2 negotiation, and do you have any lawsuits?

3 Okay, so a couple days later, from SmithKlein
4 Beecham, a librarian responds saying, well, there was a
5 recent article in the Philadelphia Inquirer, where
6 Temple University had to pay a hundred thousand
7 dollars, I think it was actually Bob's group that did
8 this enforcement, to two claims that unlicensed
9 software has been installed on their campus. Temple
10 has not admitted to copyright infringement but is
11 paying the fine to avoid the time and expense of
12 protracted litigation, which is what we always say when
13 we settle.

14 In our corporate environment, we routinely have
15 a lawyer review that to verify, among other things,
16 permitted uses -- okay, what are some other reasons?

17 MR. SALSBURG: David, I'm really enjoying this,
18 but time is starting to run short.

19 MR. MIRCHIN: Okay, two minutes?

20 MR. SALSBURG: Sure.

21 MR. MIRCHIN: So, other reasons if people went
22 to the list serve of LibLicense, they have model forms
23 of licenses and they go through each one of the terms.
24 So, they say on warranty, here's what you should look
25 for, and they have big caution signs there.

1 Okay, the third thing, just a typical
2 conversation that you would see on one of these list
3 serves, and these are our customers, they are ganging
4 up in a conspiracy, so they are providing things like
5 librarian objects to a provision, other librarians
6 respond, hey, we got that out, we negotiated this. So,
7 the point is that there really is a market.

8 And finally, there are seminars that get put on
9 all the time by the Association of Research Libraries
10 saying here's the things you ought to look for. So,
11 there is a market out there. That's why the terms are
12 changing.

13 And it occurred to me that actually I was on a
14 panel with Mary Case from the ARL, and she said you
15 should have a cure period in your license, and I said
16 that's a good idea, so that's how that got into the
17 license.

18 So, in conclusion, I believe there is no need
19 to impose new mandated restrictions. We have a high
20 renewal rate because our products meet the market
21 demand, and on the licensing side we've negotiated
22 amended licenses over time and revised our standard
23 licenses. The clickwrap agreements provide benefits
24 for us and our licensees, and the real issue is whether
25 -- not -- whether the terms are onerous and not the

1 form of the agreement.

2 When we changed from a signed to a shrinkwrap
3 and clickwrap, we didn't change any of the terms. So,
4 I feel like UCITA does a good job in saying let's look
5 at the actual terms, unconscionability, violation of
6 fundamental public policy, and in our market we have
7 significantly strengthened the warranties, and the key
8 thing throughout, and this is my last point, is that
9 customer cancellation is really key. We do provide a
10 30-day right to refund, and just to show you the
11 importance of the refund right, let's say you're
12 getting that (sound effect), so you're getting that cow
13 at home, and it sounds a little like this, you know,
14 the refund right isn't all that important, but (sound
15 effect) the refund right is really important.

16 Thanks very much.

17 MR. MIRCHIN: David, before Jean Braucher
18 begins, I have a couple of questions for you.

19 It sounds like the licensees who are getting
20 the information from Silver Platter are pretty
21 sophisticated. These are people who have sumo
22 wrestlers in their legal department, they have list
23 serves that they bounce license terms off of each
24 other, and that is what is helping modify the terms in
25 your license. Is that right?

1 MR. MIRCHIN: Certainly that -- yes, that's
2 absolutely one of the reasons, yeah, that people
3 comment on license, and we take a look at them, right?

4 MR. SALSBURG: Do you think the same market
5 forces apply in mass market licenses to consumers?

6 MR. MIRCHIN: I think a lot of the same issues
7 are there. So -- because what are the things that we
8 don't like are the same thing that mass market
9 licensors don't like. For example, bad publicity is
10 something that would be enormously bad. So, how do
11 they get the bad publicity? There are these list
12 serves, also, for the mass market software and
13 information.

14 So, someone says, you know, these are
15 ridiculous terms, this is something that doesn't work
16 well, you have consumer -- you have columnists, you
17 have the press who will comment on both the products
18 and the license terms, and that's something I think in
19 a mass market that also is there, and also, by the way,
20 our products actually do impact the end user, so they
21 are somehow a reflection of the end users. It's the
22 people using the library that's relevant.

23 So, I think a lot of these same terms, these
24 gripe sites, these complaint sites which you have
25 probably seen, you know, Silver Platter has made it to

1 the big time, we actually have a gripe site, too, you
2 know, those things, also -- so, it's very easy in the
3 internet to have, you know, customer information,
4 customer communication. So, I think a lot of those
5 same things really are there. So, it would affect the
6 mass market.

7 MR. SALSBURG: And the last question I have for
8 you, I noticed you mentioned that you post your license
9 terms on your website. Is that a costly endeavor?

10 MR. MIRCHIN: It's actually not that costly for
11 us to post our license terms. Having said that, we
12 have had it translated into about five or six different
13 languages, that is a meaningful cost, and every time we
14 revise it, we also need to revise those other
15 languages. So, you know, that -- that is a cost.

16 I think the bigger issue is that -- is that
17 license agreement always up there? You know, basically
18 we're allowed -- our web masters typically get plucked
19 by other companies after a period of like every four
20 months or so, so we are continually having to have new
21 people come in, and you do need to keep educating them
22 about, you know, here's where the license goes, and
23 every month when you are redoing your website, trying
24 to make clear that you have to have a license up there,
25 it has to be before they can download the product.

1 It is a problem. There are a lot of times when
2 we go up there, and maybe we're just not as good as we
3 could be, but you find like old licenses up there, you
4 find the license isn't where it's supposed to be. So,
5 there is a lot of problem, FTP site, there's sometimes
6 problems about whether you can have a license there.
7 It's not -- you can't really hyperlink in the same way.
8 So, there are a lot of technical issues that are not as
9 easy as to say, well, gosh, the license is up there and
10 should always be there.

11 MR. SALSBURG: Is the license presented before
12 somebody has to tender payment or give a credit card
13 number or anything like that?

14 MR. MIRCHIN: First of all, we don't charge for
15 the software, so you could actually get the software
16 for free. So, in a clickwrap situation where they are
17 actually downloading the software from the net, yes.
18 In our company, remember, we are only distributing our
19 own software. So, therefore, in our case, yes, before
20 you download it, you have to click "okay," that you
21 agree to the license terms.

22 I think it might be different for other
23 companies if you're a retail situation where you're
24 distributing 10,000, you know, 10,000 different
25 versions of software, to always make sure that you do

1 have that license right before someone downloads it I
2 think is a much more complex process than for us.

3 In our shrinkwrap situation, however, the
4 license is not there, because you can still get it on
5 disks if you want. We don't have a license on the
6 outside. Again, how are we going to put 25 pages of --
7 I mean, English and all the other languages on the
8 outside of a little jewel case? It just is not
9 practical. It doesn't work.

10 MR. SALSBURG: Do you say anywhere on the
11 shrinkwrap that license can be found at the following
12 HTTP site?

13 MR. MIRCHIN: Yeah, we say you can find it,
14 but, of course, they have gotten the product before --
15 let's say a trade show is a typical place that people
16 get the software. So, it's not even in a store. So,
17 the question is, you know, they are not necessarily
18 going to go online before they take the box.

19 MR. SALSBURG: Thank you.

20 MS. BRAUCHER: Will this work if I don't pick
21 it up?

22 MR. SALSBURG: I think it's a lot better if you
23 hold it closer to your mouth.

24 MS. BRAUCHER: Well, it's what, 11:34 this
25 morning, and I guess it's time for another point of

1 view. I want to start by thanking the FTC, the
2 Commissioners themselves and the staff for the
3 opportunity to present my views, and also I want to
4 thank them for paying attention to the public interest.

5 There are two interrelated problems that I want
6 to talk about in software -- I have to pick it up? --
7 there are two interrelated problems in software
8 licensing practices. One is delayed disclosure of
9 contract terms, and the other is the use of an obscure
10 legal category not familiar to consumers, licenses.

11 The category itself is surprising and often
12 deceptive, and the use of the license at a minimum
13 heightens the need for transparency, for disclosure
14 before their psychological commitment to a deal.

15 I say at a minimum we need disclosure for two
16 reasons. Disclosure may not be enough to avoid
17 misunderstanding, and secondly, disclosure may not be
18 enough to achieve desirable information policy.

19 Well, first, on disclosure, this should
20 certainly be the first thing tried, but it may turn out
21 that it is not possible to effectively disclose the
22 myriad of terms in a way that consumers can understand.
23 We have had a lot of talk so far this morning about
24 complexity of licenses. Well, complexity is an enemy
25 of understanding. I think as a rule of thumb, if you

1 can't fit the terms on the outside of a box, it's too
2 long to be understood by a consumer.

3 We're probably going to need standardization of
4 language and of concepts in order to educate consumers
5 over time to this transaction type, and we may need
6 minimum standards for licenses to avoid deception.

7 Now, the second reason that disclosure may not
8 be enough is for purposes of information policy.
9 Software licensing to end users represents a producer
10 effort to improve upon the monopoly protection provided
11 by federal intellectual property law, and database
12 licensing is an attempt to create a monopoly in data
13 not permitted under federal law. And the social
14 contract involved in intellectual property law is a
15 grant of a monopoly in certain inventions and
16 expression but not in the information itself in return
17 for rights saved for users and the public generally,
18 and when we talk about the public generally, we're not
19 talking about parties to contracts.

20 Now, it may be that the courts will find that
21 federal law preempts the use of state contract law in
22 mass market situations to eliminate the user and public
23 interest side of the social bargain involved in
24 intellectual property law. We'll hear more about that
25 tomorrow from the intellectual property experts, I'm

1 sure, and I'm going to focus instead on really what's
2 my expertise, which is disclosure, disclosure of terms
3 such as warranties and remedies, as well as disclosure
4 of license restrictions on use and on transfer, for the
5 moment assuming that these are otherwise permissible,
6 that these license restrictions are not preempted when
7 they're used in the mass market context.

8 I haven't heard yet this morning any
9 justification for why these industries can't make their
10 terms available before consumers make a deal. We heard
11 about freedom of contract. Well, freedom of contract
12 entails choice, and meaningful choice means you have to
13 know what you're choosing.

14 Now, because of the Federal Trade Commission
15 Act, and we haven't heard that mentioned yet today, and
16 similar state laws, contract and commercial law do not
17 have the last word on the question of whether
18 pretransaction disclosure is required, but contract law
19 is part of the background, and I've been teaching
20 contracts for 20 years, so I'll say a few words about
21 that.

22 It is not the norm that our state law of
23 contract recognizes terms first presented after payment
24 and delivery. One can find plenty of cases refusing to
25 enforce terms on the back of tickets, on other

1 documents sent after the fact, and Article 2 in a
2 section that always seems to be ignored, 2-206, not 7,
3 2-206, says that an order by a customer is an offer,
4 and it is accepted by delivery, so that terms that come
5 later are not part of the contract unless they are
6 agreed to, and merchants are not expected under 2-207
7 to read and reject material terms sent in a
8 confirmation or other after-the-fact document.
9 Consumers are protected even against nonmaterial terms
10 sent after the fact.

11 Now, we have had a few cases ignoring 2-206,
12 missing the point of 2-207, but that doesn't change the
13 basic picture about contract law. And by the way,
14 ProCD is not a consumer case. That was a case of
15 redistribution for a price, and Nortonson is not a
16 consumer case.

17 Now, I believe the common law of contract would
18 eventually get this right, and it's I think worth
19 noting that on the consumer side of these issues you
20 often do not have the lawyer power that you have on the
21 producer side, and that's why it would take the common
22 law a while to get to the right solution, and UCITA
23 tries to shut down that necessary process of sifting
24 the law way prematurely.

25 UCITA's model of contracting, which involves

1 validating terms held back until after payment and
2 delivery, is dubious under contract law norms, but we
3 don't have to just rely on contract law when it comes
4 to consumer contracts. It's unfair and deceptive and
5 anticompetitive to burden the market for terms by
6 holding back key terms so that they're not generally
7 available when customers are shopping, and the
8 possibility of making the best buy not only in terms of
9 price but in terms of terms requires this availability.

10 Furthermore, when a company markets its
11 products or services online, it's particularly easy to
12 provide the terms in advance. It's easier than in a
13 store. And I think we can expect that software -- and
14 this has been said this morning -- is going to be
15 primarily marketed online. So, web sales will be my
16 focus, and I think they ought to be all of our focus.
17 We ought to be thinking about that context.

18 Now, under the Federal Trade Commission Act,
19 deception occurs when there's a representation or
20 omission that is material and misleading. When
21 products are sold, they are implicitly represented to
22 be fit for ordinary purposes, and when money is paid
23 for a product, it is implicit that it is being sold.
24 So, let me use a couple of examples to illustrate the
25 disclosure needed to avoid deception.

1 Let's say we've got a software company that's
2 offering a product with no warranty in its online
3 store, on its website. It should have to prominently
4 display a legend next to the product description that
5 says, "As is, no warranty," the same way used car
6 dealers have to. We need something like a used car
7 rule.

8 Now, it's sad, I think, that software companies
9 seem to want to be less forthcoming than used car
10 dealers, and I think the question arises, can foreign
11 competition be far behind with this kind of practice?

12 Now, the "as is, no warranty" disclosure is
13 even more important for software than it is for cars,
14 for used cars, because I think consumers may understand
15 that there may be no warranty with used cars. I think
16 it would come as a great surprise to most consumers to
17 find out that software products are being sold with no
18 quality promise, a new product, and I don't believe
19 that open source should have any problem with
20 disclosure of no warranty. What we heard is that
21 everyone understands there's no warranty in open source
22 software.

23 Now, as open source gets mass marketed, there
24 may be more misunderstanding, because right now you
25 tend to have sophisticated parties involved in that,

1 and I think it will be important where open source
2 products are being sold -- that is, where they're being
3 distributed for a price -- that there be a disclaimer
4 before the price is charged, but I don't see that as a
5 big problem, and I think that model ought to be
6 accommodated because it's really the one source we have
7 now of pressure for higher quality in software in light
8 of this sort of general practice of disclaiming minimum
9 warranties.

10 Now, let me give you my second example, which
11 is let's say that a software company wants to license
12 the product and let's say it's a license for one user,
13 one machine with no transfers permitted, and I've
14 certainly seen that as I've been surfing through and
15 looking for transaction types.

16 Now, if what we're talking about is licensing
17 for one user, one machine and no transfers, it's not
18 very useful to have a disclosure that simply says,
19 "This product is licensed." We heard the phrase
20 before, which I first heard from a Microsoft lawyer,
21 that the license is the product. Well, if this is so,
22 the customer needs to know what the product is before
23 making a decision to acquire it.

24 So, if you were planning to acquire software
25 for two machines at home and it turns out once you get

1 it home or download it that it's actually only good for
2 one machine, it's worth half as much to you. This is
3 material information, right?

4 Now, another problem with the simple disclosure
5 of "this product is licensed" is the obscurity of the
6 idea of licensing products. I have never heard an
7 ordinary person say, "I need to license some new
8 software." Richard Epstein, who submitted a lot of
9 letters as a consultant for the Digital Commerce
10 Coalition, argues that consumers know what licenses are
11 because they have driver's licenses and hunting and
12 fishing licenses. I think these examples actually
13 reinforce the need for full disclosure.

14 If you had a statement that "this product is
15 licensed" on the outside of the box or before you
16 download, many consumers might think that that was some
17 kind of government license, because that's the only
18 license that they know.

19 Furthermore, when someone gets a driver's
20 license or a hunting or fishing license, they're
21 unlikely to think that they own the road or the forest
22 or the stream. Consumers think they're buying
23 software. They talk that way. Computer magazines talk
24 that way. Software companies talk that way. I spent
25 the summer surfing websites of software publishers, and

1 they have buttons that say "buy," right, and they have
2 protocols for purchases where the first step is "accept
3 the conditions of sale," and then you look at the
4 terms, and it's a license.

5 Now, assuming licenses should be permissible at
6 all in end user transactions and that the information
7 policy objections fail, there's a huge lack of
8 understanding of the transaction type, but software
9 companies are going to have to overcome if they want to
10 use this. I heard the figure that these have been used
11 for nine years. Well, you know, that's a very short
12 time.

13 I don't think it has come through to consumers
14 yet that that's what these transactions are, and we're
15 probably going to need standardization of disclosure
16 and of key features in order for understanding to
17 occur.

18 Some of the kinds of terms that we've heard
19 about here may be too complex and surprising for
20 disclosure to work, to effectively communicate them to
21 consumers. Fair use, first sale rights, maybe these
22 need to be minimum standards, and a license could give
23 you more than that, but if you're going to distribute
24 it, that that's the minimum required, and it would be
25 surprising that you couldn't transfer a computer

1 program when you give away your computer to your
2 favorite charity or that you couldn't criticize the
3 product as some licenses have been saying.

4 So, we're going to need, you know, duration,
5 use restriction categories, transfer restrictions, all
6 these would have to be spelled out in simple terms, and
7 it may be just too hard to do that for people to
8 understand and be able to shop between products.

9 I want to just say a couple words about
10 licensing of embedded software, and here the potential
11 for misunderstanding just increases dramatically, and I
12 guess Professor Koopman's going to talk more about the
13 technology side of this, but focusing on the legal
14 side, it's just going to be very hard to get through to
15 consumers that some software or digital element
16 embedded in goods or on a card that you stick into
17 goods is somehow separate from the goods subject to a
18 whole different legal regime.

19 Most manufactured goods are soon going to have
20 embedded software, many do already, from ovens to cars
21 to home thermostats, and you have digital programming
22 of these goods on chips or on cards that you stick into
23 the goods.

24 Well, let's think about the thermostat. You
25 know, if the thermostat comes with a license that says

1 you can't transfer the software that operates it, then
2 what does that mean? The next homeowner has to go and
3 get a new license? Can there be a warranty for the
4 thermostat but not for the software that operates it?
5 You know, the distinction between goods and software
6 becomes ever more unworkable.

7 Think about cars. I mean, this is the monster
8 example. By the way, cars, the raw materials that go
9 into cars are a few hundred dollars. So, the idea that
10 software is the only place where most of it has to do
11 with services is just wrong.

12 Anyway, cars now all have in them a computer, a
13 diagnostic computer. Can the software in that computer
14 be licensed while the car is sold? Can you shut down
15 the licensed software which shuts down the car? How
16 are you going to explain this to consumers? It's too
17 clever by half to have two separate legal regimes for
18 the car and something that operates the car, and this
19 legal regime is already on the drawing books, you know,
20 on the legal drawing books.

21 When goods are sold with digital components or
22 digital components are necessary to the functioning of
23 the goods in some way, it makes no sense to have
24 different rules governing one part and other rules
25 governing another.

1 Luckily, we have the Federal Trade Commission
2 Act which applies to all of this and requires
3 disclosure, requires effective communication of
4 material terms, and I don't see that has yet been
5 achieved. So, I think we have a massive violation of
6 the Federal Trade Commission Act going on. I don't
7 even have the sense that the industry is aware of that
8 requirement, of meaningful disclosure.

9 All right, that's it.

10 MR. SALSBURG: Thank you.

11 Well, while we're waiting to have the computer
12 loaded up, I will do some of the questions.

13 Here's one addressed to David Mirchin. It is,
14 how can you say that mass market customers can comment
15 to each other on products when existing licenses and
16 likely many future license terms under UCITA prohibit
17 publication of benchmarks and reviews?

18 MR. MIRCHIN: First of all, I would say that
19 UCITA does not prohibit criticism. I would say that
20 it's clearly, you know, UCITA talks about provisions
21 that would be unconscionable or violations of
22 fundamental public policy. So, to the extent that
23 there's a provision there that says, for example, you
24 can't criticize this product or its license terms, I
25 think on the comments on Section 105, it clearly says,

1 you know, that's the type of thing that we're not going
2 to allow under UCITA, which is that's a violation of
3 the First Amendment right of free speech and certainly
4 impacts innovation and competition, and so I think
5 something like that would get thrown out under UCITA.

6 MR. SALSBURG: Dr. Koopman.

7 DR. KOOPMAN: Hi, I'm Phil Koopman. I'm here
8 to talk about embedded software licensing. I am not a
9 lawyer, that makes me a distinct minority in this room.
10 I'm an engineer. I have been building embedded systems
11 for about 20 years. Most of you own software that I've
12 designed.

13 Anyone here drive a GM product? You know,
14 Buick, Olds, Cadillac? You know that thing you press
15 the button, it opens your doors? Anyone have one with
16 them? Okay, I designed the cryptographic codes in that
17 and worked with another engineer to build the software,
18 so even though I work at the university, I have real
19 world experience.

20 MS. BRAUCHER: These little things you mean?

21 DR. KOOPMAN: Yep, that's it, that's my design.

22 So, my experience is I've been a naval officer,
23 I've been an embedded CPU designer, I've been a
24 commercial applications R&D engineer as well as
25 designer, I have done some work with next-generation

1 cell phone services, and I do research and teaching in
2 embedded systems. So, I'm a hard core embedded system
3 guy.

4 What I'm going to talk about is, I tend to be
5 rather blunt, I'm a techy, not a lawyer, embedded
6 software licensing is just going to be a huge mess, and
7 this talk is going to explain why I think that's the
8 case. The problem is that most of the wording was
9 written by people who were thinking desktop, and it
10 doesn't work. It doesn't extend, because the world is
11 changing.

12 There are three parts to the talk. I'm going
13 to first talk about embedded, then I'm going to talk
14 about software, then I'm going to talk about licensing,
15 rather a straightforward organization.

16 Here's the way the world used to be. Embedded
17 systems are things not in a computer equipment space,
18 not in a machine room, now we have them on desktop, and
19 you all know what kind of computers I'm talking about
20 there, and if you are not on a desktop or not in a
21 machine room, then you usually had custom software,
22 single purpose, usually if the computer made a mistake,
23 something got broken, people died, mission critical,
24 that's what we call it.

25 The computers were added to products to enhance

1 functionality. There are lots of products that don't
2 require a computer to do what they do, but we put the
3 computers in because it makes more functions on top of
4 it. So, there are plenty of things that you use on
5 computer that you may have even not realized it had
6 that inside because you can build them either way, and
7 the products were expected to work. When you buy
8 something that's a consumer good, you expect it to
9 work. Somehow software is different. This is the
10 argument. I'm not talking about desktop software, it's
11 hard to say what that is, but, you know, Microsoft
12 Word, things like that, this is not what I'm talking
13 about here.

14 MR. SALSBURG: Are you talking about something
15 like a thermostat that would have --

16 DR. KOOPMAN: Thermostat is a good example, and
17 I will bring that up in a second.

18 So, general purpose computers in office
19 buildings, they run UNIX, they run Windows, and
20 increasingly the reality is they don't work 100 percent
21 of the time. Now, if this were the world we lived in,
22 then building UCITA and revising CCR 14 and all that
23 stuff, that would be just fine, but that's not the
24 world we live in. The world we live in is embedded
25 systems are becoming computers, and computers are

1 becoming embedded.

2 So, you have a cell phone with a built-in web
3 browser. Is that embedded or is that a computer? It
4 does the same thing as the handheld computer next to it
5 does. We have car computers that function to help your
6 air bag deploy, sounds like a computer. We have a
7 thermostat that can send e-mail and service web pages.
8 I've seen one of these things. Do you have the
9 internet microwave oven? Yes, that's real, I'm not
10 making it up. It's been on sale in Japan for about a
11 year now, and you have this thing Windows CE, consumer
12 electronics, for embedded, but also I have a handheld
13 computer that runs that. So, you know, what does it
14 mean to be embedded?

15 On the computer side, you have home PCs
16 controlling household appliances. You have this thing
17 called the Auto PC, which is a real computer
18 permanently installed inside of a car. So, if you
19 license some desktop software, install it in your car,
20 when you sell your car, you might not be able to put
21 the computer -- the computer software in your car in
22 the sale, you have to pull it out, and it gets very
23 confusing. That's a permanent part of the vehicle.

24 And you have embedded Windows NT. That's
25 Windows NT, the desktop operating system, slimmed down

1 for embedded. That's going to go into embedded
2 products. And you have PCs used for embedded
3 applications. This is very prevalent in industry.
4 They are all over the place in industry. And it's just
5 a matter of time before that sort of thing shows up as
6 consumers goods.

7 As the slightest eye reads through the UCITA
8 comments, several of the examples given are just plain
9 inaccurate. They give an example of this is clearly an
10 embedded computer, when, in fact, the people building
11 it take a PC and slap a front panel on it. It's a very
12 confused world out there.

13 Now, UCITA -- I have read UCITA, I have read
14 all the wording, I did say I am not a lawyer, I'm an
15 engineer, but I believe I can read English, and the
16 wording of UCITA does not exclude embedded computers.
17 The definition of "computer" in UCITA clearly, very
18 unquestionably, to anyone with technical knowledge in
19 this area, means every single thing that has a
20 computer, period, done, end of discussion. And there's
21 some phrases that try and take it out, but the phrases
22 just don't work, and they're not going to work, and
23 they may be impossible to make work. It's going to be
24 difficult.

25 And even if you can make all these phrases

1 work, it's trivial for an engineer to work around them,
2 and I have had a lot of experience as the engineer
3 looking at the laws saying, okay, this is what we can
4 do, this is what we can't do, and the UCITA wording is
5 easy to work around.

6 Now, I am not going to go into an extended
7 comment about the details of the UCITA wording, that's
8 something I'm working on in the longer term, but I
9 expect folks to have something to say about that. I'm
10 just trying to warn you that if an embedded system
11 technical expert goes after this wording, the wording
12 is not going to stand up in my opinion.

13 Okay, so, which one of these is a computer, the
14 web server on the left or the web server on the right
15 or are they both computers? What if the web server on
16 the left is in your thermostat? This is how confusing
17 it is. Those are quarters. This one is smaller than
18 the quarters, and the one on the right is the one I --
19 I actually have software services that I have on my web
20 service, so I know both sides of this game.

21 They are both computers, even if one's in a
22 thermostat. Computer, web server, how could that not
23 be a computer under the UCITA definition?

24 So, my conclusion for this section of the talk
25 is the term "embedded" isn't going to be useful,

1 because it is just too blurry, and the world is going
2 to be more blurry over time. It's going to get
3 blurrier, not clearer.

4 Let's move on from embedded to software.
5 Software isn't just spreadsheets, and I know you know
6 that intellectually, but you may not realize just how
7 complicated this gets. So, operating systems are going
8 to go everywhere. Operating systems, clearly those are
9 software. UNIX and Windows, sounds like desktop
10 software, but pretty soon every car, every embedded
11 system is going to have something that smells like one
12 of these separating systems built into it, because the
13 world is going to off-the-shelf operating systems.

14 And a separate point, it's easy to migrate
15 hardware functions to software. If you have a piece of
16 software -- hardware and you want to evade Mag-Moss
17 protection by saying, oh, it's software, it's
18 different, you can actually take hard -- the same piece
19 of functionality and put it in a hardware or a software
20 as you choose. There are automated tools that do this
21 for you. This is called -- one of the things it is
22 called is hardware-software co-design where you design
23 hardware, you design software, and you make trade-offs
24 to move some things into hardware, some things into
25 software. This is an existing technology.

1 So, if you want to do something in software
2 except the very basics, it's pretty easy to do in
3 software. In fact, it tends to move more towards
4 software.

5 How do you know software is embedded? Should
6 it matter if the same software is running inside a PC
7 or a dishwasher? How can you possibly deal with the
8 language that comes with that software if a person
9 selling the software doesn't know how it's going to get
10 used? It sounds very messy to me.

11 Let me give you an example of the system I
12 worked on. This is a soldier in Bosnia, and he's
13 carrying a realtime English-to-Croatian speech
14 translation, this technology is about three years old.
15 You speak into a microphone in English, and Croatian
16 comes out. It was field trialed in Bosnia, and it was
17 for medical applications. A doctor would carry it and
18 say, "Where does it hurt?" And it would come out in
19 Croatian, "Where does it hurt?" It only does one
20 thing. It's a piece of software. There is no
21 keyboard. You speak into it. It gives the answer.
22 So, this sounds embedded, right? Well, it was
23 implemented using Windows 95 and off-the-shelf speech
24 software, and the prototypes all run on desktop PC.
25 So, is it embedded, is it not embedded? Hard to say.

1 Arguing that software is different, I reserve
2 comment on the desktop, because I'm here to talk about
3 embedded. If you argue software is different from
4 embedded, what you will do is force people doing
5 embedded development to go towards software to seek
6 greater coverages if software is afforded greater
7 coverage under the law. I mean, any responsive
8 corporation trying to maximize profits is going to do
9 this, and they are going to make their engineers do it
10 whether the engineers want to or not. I find that
11 scary personally.

12 What about licenses? Well, the current
13 protection on embedded systems is based on patents, and
14 patents work pretty darn well in embedded systems,
15 because embedded systems aren't about software.
16 Embedded systems are about functionality. If there's a
17 gismo, the gismo does what it does or it doesn't. It
18 doesn't matter whose software or hardware is inside,
19 either it has a functionality or not, and the patent
20 system is very good at protecting functionality.
21 That's what embedded systems are about.

22 It doesn't matter how you get there, and to a
23 large degree, hardware and software are equivalent
24 anyway. So, functionality works, the patent system
25 works. I have been involved in patent cases where it

1 worked quite well, thank you, and the licenses to the
2 patents were enforced and the world utilized all these
3 things and it worked great.

4 Software can be patented, too, by the way, I
5 have heard that, but if you need to protect
6 functionality, that's another avenue available to you.

7 Now, I'm concerned that encouraging embedded
8 software licensing is potentially dangerous because
9 right now embedded software is not special. The
10 embedded products work or they don't, and you're not
11 allowed to claim, oh, sorry, that embedded system has
12 software in it, so it's okay if it doesn't work, which
13 from an engineering point of view is the net result of
14 some of these laws I see proposed.

15 Now, do you really want your car to be as
16 robust as your desktop software? You do? Would you
17 drive a car in which the software is provided as is
18 with all faults, the entire risk as to satisfactory,
19 quality performance, accuracy and effort, including
20 lack of negligence, is with you. Would you drive a car
21 like this?

22 This wording came from an embedded operating
23 system that very likely will be in cars very, very
24 soon. So, would you drive a car like this? You will.

25 So, I did a little survey myself. I went out

1 and looked at several embedded system companies that
2 offer operating systems, and I'm not putting the
3 company names up here, because the company names aren't
4 important. What's important is that they are all going
5 to do this, and if the law protects them and sanctions
6 this, of course they're going to do it.

7 So, company A, the license wording is available
8 on the web, they had no problem giving it on the web,
9 that's great. Any use of the product constitutes
10 agreement. No warranties, as is, et cetera, et cetera.
11 User of any product in which it's a component must
12 agree, reverse engineering prohibited. So, if this
13 operating system is in a small piece in a car and that
14 piece goes into the car, then by turning on the
15 ignition switch, the way I read this, you agree to that
16 license, and it very specifically says this license
17 must be passed on to the end user. You can't absorb it
18 as a middle man.

19 Now, the middle man, according to the wording,
20 assumes all responsibility if there's a suit, that's
21 what the wording is for, but, in fact, the license must
22 be exposed the user, the user agrees to it, there is no
23 way to encapsulate it.

24 Company B, the license wording is available on
25 the web, same as the above in general terms, plus you

1 can't lease it, you can't sell it, you can't leave the
2 country with it. This is a car, remember? Bugs are
3 likely, it says that, but it actually warrants it will
4 work for six months per documentation, which is good,
5 because company A doesn't warrant that.

6 Company C flatly refused to give me their end
7 user license agreement. I had e-mail correspondence
8 with them.

9 And company D, not up here, they are still
10 going back and forth. I don't know if I will get the
11 license from them or not.

12 So, if this is the way it is today, I don't see
13 it changing unless there's forces to change it, and
14 this is what every one of you is going to find inside
15 your products within a couple years. This is where
16 you're going to end up.

17 Are consumers going to have choice? One of the
18 theories of all of this -- of the exposing license
19 before sale, which I think is a great idea, is that the
20 consumers can pick the appropriate license and pick the
21 product, you know, if you don't -- if you don't like
22 the license terms, you don't have to buy the product,
23 okay.

24 Well, there are a lot of components inside a
25 car. I know, I've made some of them, and there are

1 lots more that I haven't made, and all it takes is one
2 vendor to decide to put this type of license in their
3 component and another vendor to put a similar license
4 on a different component, and it doesn't take very long
5 before it is possible to impossible to buy a car that
6 doesn't have one of these licenses with it, because
7 there is thousands of components.

8 Where did consumer choice go? Well, okay, now
9 the choice is you can either buy a car or not. It is
10 not where you buy your car from.

11 Embedded software, they are just everywhere.
12 There are hundreds of processes in cars, soon to be
13 thousands. The computer, this laptop I'm using, do you
14 think it has one processor? No, it has a processor in
15 the keyboard, processor in the disk drive, processor
16 for the display, in addition to the normal processor.
17 These things are everywhere, and most people don't
18 really understand just how many there are, but as soon
19 as one of them, in conglomeration, comes with a
20 license, now that license tags along with the product,
21 and it's inevitable that one of these licenses will get
22 sucked into most products, just because there's so many
23 components.

24 Even if nonembedded software is somehow
25 different than desktop software, which UCITA is

1 apparently attempting to do in the wording but not
2 succeeding from a technical point of view, even if it's
3 different, all you've done is given embedded system
4 companies huge incentive to make their embedded systems
5 look like desktop systems so they do follow UCITA, and
6 that's pretty straightforward, too.

7 So, my conclusion of this part is current
8 approaches in software licensing are very likely to
9 jeopardize consumer protection and choice for embedded
10 systems. Now, do I say it's unfixable? I'm not sure,
11 but on the current course that people are pursuing, I
12 see it being a big problem.

13 So, my conclusion, there are some fundamental
14 problems. Embedded computers and computers, whatever
15 computers are, whatever embedded computers are, they're
16 converging. They are going to be the same thing very
17 soon. You hear people talking about computers embedded
18 in your clothing, they're not joking, and there's no
19 reason those won't run desktop software, and it's just
20 going to be one computing space over an amount of time,
21 and this artificial distinction between desktop and
22 embedded is just not going to hold up. By the time the
23 laws are actually passed, it will already be obsolete.
24 It doesn't sound like a good plan for a new law.

25 Even if that didn't happen, I think it will,

1 but let's say it didn't happen, if there is strong
2 legal protection for making things look like desktop
3 software, then an engineer is going to do that is make
4 their embedded systems look like desktop software.
5 It's very straightforward to do in most cases. Even if
6 there were a clear definition, which there isn't in the
7 current laws, it's going to happen. The incentive will
8 be there.

9 The concept of saying software is different is
10 dangerous, especially in the embedded space. It's not
11 hardware, it's not software, it's complexity that is
12 the issue. Items of high complexity are hard to get
13 perfectly right. You can do a lot better than is done
14 in the desktop software world, that's very clear,
15 that's part of my research goals, is I have ways of
16 measuring how close people get to that, but saying it's
17 different in embedded system means that, well, gee, if
18 I build it in hardware and it has to work or I can
19 build it in software and it doesn't have to work, and
20 my company gets put out of business if we get sued if
21 it doesn't work, gee, I think I'll put it in software,
22 and that's exactly the trade-off the current set of
23 proposed laws is providing to engineers, and they will
24 have no choice. They will have to do it in software,
25 and then they'll get caught in the same cycle, the same

1 trap that desktop providers are caught in.

2 The desktop software providers are caught in
3 this we have to ship a new release, that's our business
4 model, we have to provide usable functionality, and I
5 can't pass judgment on that. That's just the way it
6 is. But if you put the embedded system people in that
7 same loop, in that same problem, you're going to find
8 the same sorts of problems occurring inside embedded
9 systems instead of inside your desktop computers. I
10 find that scary.

11 I'm concerned, very concerned, consumers are
12 going to be hurt by licensing of embedded software.
13 I've made the arguments already, but everything's going
14 to come with a license, there's not going to be a lot
15 of consumer choice, and these licenses are going to be
16 different in that before common items you just bought
17 at the department store were supposed to work, and
18 that's not going to happen. That's not going to be
19 true anymore under the new software licenses if those
20 actually make it all the way to market and to
21 consumers.

22 It's already happening. We saw that the
23 embedded operating system vendors are all on that train
24 already. I don't see any exceptions. So, that's where
25 we're going.

1 Trying to fix this is going to be difficult.
2 The UCITA and UCC wording is seriously broken from a
3 technical point of view. I am not going to speak for
4 the legal aspects, but any engineer reading those words
5 can say clearly this is not going to work, clearly it
6 is easy to evade, clearly the definitions very clearly
7 and unambiguously, with no doubt whatsoever, say things
8 opposite to what the comments are saying, and gee, if
9 you could at least get that part of the wording so that
10 they agree, that's something I'd like to see.

11 So, even if embedded is excluded from UCITA,
12 which it's supposed to be from everything I hear, and
13 certainly the wording sort of tried to do that but
14 doesn't get there, there's still companies that will
15 make things that would be normally embedded
16 nonembedded, and that's an additional problem that has
17 to be solved. Both those problems have to be solved.

18 MR. SALSBURG: Thank you. Let me ask you a
19 question before I turn to the stack before our lunch
20 break.

21 One of the rationales for the licensing model
22 for software that's been advanced is that it places
23 limitations on unauthorized copying and so it helps
24 protect the licensor of the software. Does this
25 rationale apply with embedded software? Is there a

1 difference between the ease of copying embedded surface
2 versus freestanding software?

3 DR. KOOPMAN: It depends which specific kind of
4 embedded software you're talking about, but in general,
5 if you have a chip embedded inside a product, you can
6 get at it if you want to, but the average high school
7 student doesn't have the technical means to do this.

8 If you have software loaded into embedded
9 systems dynamically over the internet, which will
10 happen, then from a copying point of view, you can do
11 that, but of course, think about it. Who cares if you
12 copy a piece of software if you don't have the gismo
13 that it makes work? It's sort of irrelevant. It's the
14 functionality of the gismo, but it isn't pure
15 functionality. You have to have the gismo to put it
16 inside for it to make sense. So, it is somewhat of a
17 different category in that respect.

18 MR. SALSBURG: Thank you.

19 Well, let's turn to the questions for about
20 five minutes. Professor Braucher, here's one addressed
21 to you:

22 MS. BRAUCHER: Okay.

23 MR. SALSBURG: Why advocate and perpetuate the
24 legal fiction that consumers will view warranty terms
25 at the service desk? Doesn't actual provision of terms

1 of the --

2 MS. BRAUCHER: I'm sorry, I couldn't hear you.

3 MR. SALSBURG: I'm sorry.

4 Why advocate or perpetuate the legal fiction
5 that consumers will view warranty terms at the service
6 desk? Doesn't actual provision of terms with the right
7 to reject by returning the software provide the
8 consumer with a more meaningful right than does posting
9 the terms on a website?

10 MS. BRAUCHER: Well, we have got two different
11 settings in that question, and let me stick with the
12 web setting. I would be the first to say not all
13 consumers read warranties. If we really have a
14 situation where no one's reading these things, we have
15 massive market failure, and we need, you know, a really
16 rigorous regulatory system. So, I think disclosure is
17 the first thing you try to try to make the market work,
18 and I think the research on this is that if you have
19 some percentage of consumers shopping, that that will
20 get some competitiveness into the market.

21 The idea of holding back the terms on the web
22 is particularly weird. I mean, the easy thing is to
23 just put them up there and let people decide whether
24 they want to opt in, not say, okay, you buy it, now you
25 can opt out, that you have a -- it's much easier to

1 shop if what you're trying to do is get competition and
2 terms, if you have the terms first, before you make a
3 decision rather than having to go through serial
4 transactions in order to shop for the best terms.

5 MR. MIRCHIN: Can I say also, businesses, like
6 Silver Platter, we want to make those terms available
7 before someone downloads it. So, if there's a question
8 of, you know, you're limited to X concurrent users if
9 you -- as long as you pay the fee, we want to make
10 those terms available, that we have no incentive to
11 hold back any terms. I mean, I think that is
12 important.

13 The reality is software gets distributed in so
14 many different ways that it's not -- or information
15 that it's not always available to have it. If Silver
16 Platter is, you know, distributing its own information
17 on its website alone, that is easy to do, but we have
18 150 distributors around the world, you know, and are
19 they always going to have the terms on the website?
20 No. I mean, so, at the point of download is often not
21 the case. At the point of installation of software is
22 something -- or information where it is much more of a
23 possibility.

24 DR. KOOPMAN: I would like to make a
25 distinction here based on my own experience. There is

1 a distinction to be made between making it impossible
2 to get the terms and just that whether or not an
3 average user can get them. I was successfully able to
4 get these operating system license terms without ever
5 contacting the vendors from the website. Was it posted
6 on every single e-commerce site, no, but it didn't take
7 very, very many keyword search terms to find them.

8 So, in my mind the issue is whether it's
9 impossible to get the materials before sale, and if
10 it's impossible, that's clearly a big difference
11 between whether it's merely inconvenient or not.

12 MR. SALSBURG: Well, I think that brings us to
13 lunchtime, so enjoy your lunch, and we will be
14 returning here at 1:30, and thank you to all the
15 panelists.

16 (Applause.)

17 (Whereupon, at 12:15 p.m., a lunch recess was
18 taken.)

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1 AFTERNOON SESSION

2 (1:34 p.m.)

3 MR. HILE: If we could please take our seats, I
4 would like to resume. The topic for this afternoon,
5 the first panel here, is the role of the Magnuson-Moss
6 Act. This is a topic that has been touched on by some
7 of the earlier presentations. I think that we will be
8 going into it in a good deal more depth here.

9 We have on our panel Professor Donald Clifford
10 of the University of North Carolina School of Law and
11 Professor Curtis Reitz from the University of
12 Pennsylvania School of Law.

13 Professor Clifford, I turn it to you.

14 MR. CLIFFORD: Thank you.

15 We were, of course, supposed to have a third
16 panelist with us today, David Rice. Regrettably, he is
17 unable to be us today. He will be here tomorrow on
18 another panel, so perhaps you will have a chance to
19 hear some of his views that would have touched on this
20 subject.

21 I can also commend to you his -- the paper he
22 submitted on behalf of Net Action and also in his own
23 name. It is among the list of pre-workshop commentary
24 that are available on the website.

25 We are going to -- instead of each of us making

1 a long presentation, we decided we would make a
2 relatively brief presentation and have some discussion
3 between us, and, of course, that will also make it
4 amenable to questions, which we are going to at least
5 consider if not answer.

6 We might just start by taking a look at the
7 larger context within which the Magnuson-Moss Act
8 operates, and then we will get into some of the
9 nitty-gritty of the Magnuson-Moss Act and address some
10 of the specific issues over which concern has been
11 expressed, and finally we will give particular
12 attention to the problem of hybrid transactions, so
13 embedded software and the like, the subject that was
14 heavily featured at the end of the last panel
15 discussion.

16 Now, at the outset we thought it was
17 appropriate to deal in a larger context, because I
18 think sometimes people consider the Magnuson-Moss Act
19 to be a sort of a maverick that came out of nowhere and
20 has specific rules that are simply statutory in nature,
21 and perhaps even from the perspective of some, a bit
22 peculiar.

23 In fact, if you look at the chronology of the
24 passage of the Magnuson-Moss Act, it came during a
25 period of considerable both federal and state

1 legislative work addressing consumer issues and in some
2 respects for the first time. The addressing of
3 consumer law is a very late-comer in the law, in part I
4 suppose because consumers didn't have counsel, there
5 were no statutes that provided for attorney fees, and
6 there was no legal aid to provide counsel for
7 low-income consumers, but whatever the reason, there
8 wasn't much, if anything, in the way of statutes
9 relating to consumers.

10 In the sixties, there began -- there was a
11 wave, and, of course, in a sense I suppose the
12 beginning of the wave was the federal consumer credit
13 legislation, starting, of course, with the Truth in
14 Lending Act in 1968. Now, what possible relevance
15 could that have to the Magnuson-Moss Act? Well, look
16 at the approach taken in the federal Truth in Lending
17 Act.

18 In order to overcome the lack of competition in
19 the marketplace about interest rates, with the lack of
20 competition caused in part because of confusion with
21 the different language that was used by offerors of
22 credit, the federal Truth in Lending Act decided there
23 had to be disclosure and that there ought to be a
24 common currency, namely the annual percentage rate,
25 that could provide a basis for comparison on the part

1 of credit shoppers in the community.

2 Secondly, I suppose you could say as an overall
3 contribution to this process, the Truth in Lending Act
4 recognized that consumers did not have the wherewithal
5 to hire lawyers and do battle, and therefore the Act
6 removed an obstacle to redress of consumer grievances
7 by providing for attorney fees and also, of course, in
8 the specific case of the Truth in Lending Act, with
9 statutory penalties as well as the possibility of
10 actual damages. So, we have a disclosure-oriented
11 statute.

12 It left to state law a lot of regulatory
13 features, such as, for example, the amount of interest
14 rate that could be charged, but federal law required
15 that there be a disclosure of the annual percentage
16 rate. This federal law, of course, was followed over
17 the next decade with other matters of consumer credit,
18 but we need not get into those.

19 At the state level, there followed very shortly
20 thereafter the Uniform Consumer Credit Code or the UCCC
21 as it is occasionally called, and which actually was
22 not enacted in very many states, as such, but it had a
23 considerable influence on the wave of change in state
24 retail installment sales acts.

25 Now, this was not regarded as consumer friendly

1 enough, and the National Consumer Law Center,
2 therefore, in 1969 drafted what was called at first the
3 National Consumer Act. It originally addressed -- it
4 principally addressed consumer credit issues but also
5 went over a little bit into the warranty context in
6 some significant ways that I'll touch on in just a
7 moment.

8 The second wave of statutory, then going beyond
9 the consumer credit context, came in the form of the
10 encouragement by the Federal Trade Commission in the
11 sixties for states to adopt statutes to deal with
12 unfair and deceptive practices. The Federal Trade
13 Commission, of course, took the appropriate view that
14 its staff was inadequate to deal with everything, plus,
15 of course, it was established there was no private
16 cause of action for violation of Section 5 of the
17 Federal Trade Commission Act, which proscribed unfair
18 and deceptive practices, so that FTC encouraged states
19 and engaged in a collaborative effort with the Council
20 of State Governments to draft what are now called
21 little FTC Acts.

22 Of course, the little FTC Acts dealt with
23 matters of disclosure, if you will, by virtue of the
24 proscription against deception and unfairness. It
25 also, like the federal Truth in Lending Act, recognized

1 impediments to consumer redress by providing for
2 attorney fees and in some cases, in fact, for multiple
3 actual damages. So, that's part of the larger picture.

4 Another arena of activity was that dealing with
5 warranty legislation. Now, I mentioned that the
6 National Consumer Act had been promulgated by the --
7 had been -- well, promulgated I suppose by the National
8 Consumer Law Center in 1969, and though it principally
9 focused on consumer credit matters, it also had some
10 warranty provisions, and these warranty provisions, as
11 was true of the consumer credit things, acknowledged
12 that consumer redress required availability of attorney
13 fees and enforcement of statutory actions, but went
14 further, and in a sense it went further in the area of
15 deception by saying that it was deceptive for
16 warrantors to provide a very small, express language in
17 very large language and in small language to withdraw
18 the protection of implied warranties, and the position
19 that the Act took was a strong one. Warrantors of
20 consumer products were not and were prohibited from
21 disclaiming implied warranties.

22 The National Consumer Act was adopted in one
23 form or another in nine states. In California, the
24 Song-Beverly Act was enacted, and all this took place
25 before Magnuson-Moss, and the Song-Beverly Act in

1 California had even more disclosure provisions in it.
2 It did permit some limitation on the disclaimer of
3 implied warranties. You could limit it to the duration
4 of an express warranty if you did so in an extremely
5 conspicuous kind of a way and followed a very laborious
6 kind of a process, but there was also sort of a
7 statutory limitation on a minimum for the express
8 warranties and implied warranties, but very much a
9 disclosure statute.

10 The statute also expressly provided for
11 enforcement of manufacturer warranties by ultimate
12 consumers. This helped -- as did actually the National
13 Consumer Act. This helped overcome the deficiency in
14 the Uniform Commercial Code which dealt only on its
15 face with relations between buyers and their immediate
16 sellers, and the drafters of the UCC simply decided not
17 to take on the consumer -- the industry, I guess, on
18 consumer issues and just stayed neutral on these
19 matters.

20 The Song-Beverly Act and some of these other
21 acts provided for direct enforcement of warranties.
22 All of this is important background for the
23 Magnuson-Moss Act. It helps I think explain the thrust
24 of the Act.

25 Of course, before we get into -- the

1 Magnuson-Moss Act, of course, provided that
2 pretransaction disclosure of warranties would be
3 required. This was for the purpose of opening the
4 marketplace up to competition, and this provision in
5 the Act, of course, is in accord, as Professor Braucher
6 pointed out this morning, with the general FTC
7 standards of deception and unfairness under Section 5
8 of the Federal Trade Commission Act.

9 In aid of that disclosure, a common currency to
10 an extent was adopted, following, as I suggest, in a
11 sense from the folks at the federal truth in lending,
12 but instead of coming up with a single common currency,
13 they came up with a benchmark of the full warranty to
14 provide a steady benchmark comparison point for
15 warranty obligations; against that were all other
16 warranties, namely the limited warranty.

17 Provision was made for the enforcement and
18 disclosure of manufacturer warranties. To aid the
19 consumer in obtaining redress, a federal cause of
20 action was provided, as was the availability of
21 attorney fees, following again in the line of much
22 consumer legislation of the period.

23 Finally, there was a ban on the total
24 disclaimer of implied warranties following in a sense
25 the Song-Beverly Act, the Act provided one could limit

1 the duration of implied warranties to that of a written
2 warranty, provided the written warranty was of
3 reasonable duration and conscionable, but one could at
4 least limit the duration of implied warranties in the
5 so-called limited warranty. In a sense, the ban on
6 total disclaimer is -- well, is a prominent feature of
7 the Act and one which is -- has been expressed as a
8 concern in several panels today.

9 But the overriding approach -- standards of
10 deception and unfairness of the Federal Trade
11 Commission I think remain extremely important. In
12 fact, the used car rule as referred to earlier today.
13 It was promulgated pursuant to a specific provision in
14 the Magnuson-Moss Act, but the FTC's statement of basis
15 and purpose in promulgating the rule also expressly
16 noted that the jurisdictional basis on which it stood
17 was not simply the federal legislation in the
18 Magnuson-Moss Act but the general unfairness criteria
19 of the FTC that had evolved over the years.

20 For example, the report stated, "Failing to
21 disclose warranty terms and as-is disclaimers before
22 the bargaining process begins causes substantial injury
23 to consumers. Consumers who overestimate the extent of
24 warranty protection are likely to pay significantly
25 more for the cars than they would if this information

1 had been disclosed." That's in line with the general
2 approach.

3 Now, very recently, a year ago, the Federal
4 Trade Commission had a workshop entitled Dot.com
5 Disclosures. Now, this was an attempt -- this was a
6 response after a series of comments to hold a public
7 workshop to deal with issues pertaining to the
8 application of FTC standards to marketing or
9 advertising in the internet milieu, and if you read the
10 report, which is available outside, it's also available
11 online but without the pretty pictures and the purple
12 cover, if you read the Dot.com Disclosures publication,
13 you will see, again, an overriding affirmation of the
14 standard of unfairness and deception as it applies to
15 internet activity and the strong affirmation there that
16 material information should be made available to
17 consumers before either payment of the price or
18 concluding the transaction, this in the context of
19 advertising.

20 It is also of particular interest because much
21 focus is placed on the method of making a clear and
22 conspicuous disclosure in the context of a website, and
23 I commend the report and also the transcript of the
24 workshop for your reading on that point.

25 Finally, and I didn't really mean to take up

1 that much time here, but finally, I point out again in
2 April of last year the Federal Trade Commission issued
3 a report, part of its continuing work in periodically
4 reviewing and evaluating its rules and regulations, and
5 it did that with respect to the Magnuson-Moss Act and
6 affirmed after reviewing public commentary that the
7 current regulations were appropriate at this time and
8 place and rejected the proposal of one or two
9 commentators who had specifically suggested that the
10 FTC abandon this free disclosure nonsense and that the
11 FTC go to Congress to convince Congress to legislate it
12 out of the Magnuson-Moss Act, and the FTC report of
13 1999 re-affirmed the viability and the advisability and
14 desirability of that provision and also said that those
15 industry commentators who had participated in the
16 commentary had expressed favor.

17 Now, I concede that the commentators, those who
18 provided public comments, were not software people;
19 they were goods people. I don't think the public
20 commentary was restricted to goods people, but it --
21 that was the thing. So, that's a larger background I
22 think for consideration.

23 I think the larger background is particularly
24 important for considering what to do about internet
25 products and services, because though Curtis and I are

1 going to address the question of whether the
2 Magnuson-Moss Act requires action, there is the further
3 consideration that if it does not, what should be done,
4 and I simply suggest in the course of these comments
5 that we have a whole history of approach toward
6 consumer issues that could be brought to bear on it.
7 With that, I finish my little diversion there.

8 All right, now, let's turn to the subject
9 matter, I guess, the specific subject matter of the
10 panel, which has to do, of course, with technical
11 issues. Does the Magnuson-Moss Act apply to software
12 issues? And here, of course, we get into scope issues
13 of the Act and the like.

14 I suppose one of the first issues to consider
15 is is software a "consumer product"? The scope of the
16 Magnuson-Moss Act is not limited to the sale of
17 consumer goods. The word "goods" is not used in the
18 Act. The scope provisions of the Act apply to consumer
19 products, which are defined to mean, "any tangible
20 personal property which is distributed in commerce and
21 which is normally used for consumer purposes," et
22 cetera.

23 Now, as a technical matter, then, the issue is
24 raised, can you say that software is tangible personal
25 property? The issue is joined for some. Some of the

1 consumer advocates take the position, of course, that
2 it is tangible personal property, and I allied myself
3 with that group. What could be tangible about
4 software? Well, obviously the disk. Is the disk
5 enough? Well, there's an English case that says yes,
6 if there's the disk, that makes it enough to constitute
7 a sale of goods, but you immediately have to go beyond
8 that to consider, well, what if it's distributed over
9 the internet? There isn't any disk. Can there be
10 tangible personal property? My answer still is yes.

11 The differentiation it seems to me is between
12 intangible rights, like the ideas underlying the
13 software and the inventive genius that goes into it,
14 and the product. Pure thought doesn't move over the
15 internet. There has to be some physical manifestation,
16 and I argue that that physical manifestation is
17 sufficient to make this a consumer product.

18 MR. HILE: So, you think that a data stream
19 is --

20 MR. CLIFFORD: Well, I am persuaded by David
21 Rice and some others that the data stream is
22 sufficient. That is a physical manifestation. This is
23 -- intangible interests like franchises and business
24 opportunities are included from Magnuson-Moss.
25 Copyrights are excluded. Intellectual rights are

1 excluded. They are not tangible products.

2 Software is a product in a common sense and the
3 like, but I think Curtis has some disagreement with
4 this notion, so let me turn to my esteemed colleague.

5 MR. REITZ: Thanks, Don.

6 We are both addressing software first here, but
7 I think it might make sense to pause a minute because
8 of this morning's presentation to recognize that what
9 we're talking about in a larger sense is the
10 distribution of information, the information age
11 consequences that are impacting the consumer
12 marketplace.

13 Software is only one way in which information
14 is being put into the marketplace. That very
15 entertaining, I thought very entertaining presentation
16 by David Mirchin this morning, who was another kind of
17 information age transaction that is becoming
18 increasingly important and valuable, that's the access
19 to database that most of us lawyers would recognize
20 from way back as the Westlaw or Lexis database system
21 but is now opening up to a much wider set of
22 transactions in which information is being compiled and
23 organized and presented in a way that can be accessed
24 online.

25 As David Mirchin said, there is a software

1 component to that, but it's a very marginal component
2 to simply the medium through which one gets access to
3 the database. Database transactions involve almost
4 inevitably some period of time. They are not a spot
5 transaction. They exist over a period of time, and
6 they generally involve some kind of subscription to the
7 process.

8 The third kind of transaction which was also
9 talked about this morning and we are going to come back
10 to here is information that is embedded in what
11 everybody would accept is a tangible personal product.
12 So, we have the software issues, which are themselves
13 notable. There's a notion -- I think one thing I
14 learned from Phillip Koopman this morning is that
15 there's usually no satisfactory definition of what is
16 software. It could be used operationally to make
17 things run along, but the notion of a transaction in
18 which the only thing happening is the transfer of what
19 UCITA calls computer information.

20 I take it, Don, is what you have in mind as the
21 first question, does Magnuson-Moss as currently written
22 address that, and the first technical issue that arises
23 under Magnuson-Moss with that is the tangible personal
24 product issue.

25 "Tangible" is a word that lawyers have used for

1 a long time. It's something you can touch, something
2 you can hold. If we have any Article 2 scholars here,
3 you'll know that there has at least in the past been
4 some controversy about whether a contract between an
5 electric company and a user of electricity have an
6 Article 2 contract, whether that is goods, but the
7 issue under Article 2 is whether there is goods, and
8 the issue in Magnuson-Moss, as Don said, is not whether
9 it's goods; it's whether it's a tangible personal
10 product. In my view, that is an insurmountable
11 statutory problem to applying the Magnuson-Moss Act as
12 it's presently written to a transaction which is
13 dealing only with a transfer of software.

14 There are, of course, other problems with
15 Magnuson-Moss that go even beyond the definition of
16 consumer product. In order to come within
17 Magnuson-Moss, you have to have a transaction that is
18 in connection with a sale. As we heard this morning,
19 for a variety of reasons and for many purposes,
20 information transactions that take the form of
21 transfers of software, whatever that definition is,
22 saying that something -- the core meaning of that for
23 most people are licenses, not sales, and for a variety
24 of very good reasons, some of which were described this
25 morning.

1 There is a major problem when you're in the
2 business of moving information for money, where this is
3 a commercial transaction. Unlike goods, unlike
4 tangible personal property, the recipient has the
5 capacity to multiply the number of end users rapidly
6 and with no loss of use to himself or herself. In the
7 goods transaction, if you want a second user of goods,
8 you lose the goods to the extent the second user has
9 them, but with information you can multiply the
10 product, and as I think again, David Mirchin said, you
11 could end up totally destroying the market for that
12 product by giving it away, and the ProCD case is, of
13 course, the paradigm of that problem.

14 So, the license transaction with respect to
15 information is imperative for people who are selling --
16 properly marketing information for money. The notion
17 that you would sell it in the sense of conveying title
18 to it in the Article 2 sense makes no sense and never
19 will. So, it's a world in which the restriction, the
20 kinds of restrictions on end use, the number of end
21 users, place of end use, it seems to me are essential
22 to that marketplace, and Magnuson-Moss deals with
23 warranties that arise in connection with a sale of a
24 tangible personal product.

25 The third problem, technical problem, major

1 problem in this field is that the Magnuson-Moss Act
2 does not apply to all warranties of tangible personal
3 products. It doesn't apply to all sales of tangible
4 personal products. The Magnuson-Moss Warranty Act does
5 not apply at all to any transaction unless the
6 warrantor or service provider enters into a transaction
7 voluntarily that contains a written warranty or a
8 service contract. Those are well-defined terms in the
9 Act.

10 They are the kind of provisions which may or
11 may not currently exist in the marketplace for
12 software, whatever that is, but are not the kind of
13 things you ordinarily get with tangible personal
14 property of durable consumer goods, the automobile
15 transaction that almost inevitably contains a written
16 warranty; most consumer electronic products; most
17 appliances come with written warranties.

18 So, the reach of the Magnuson-Moss Warranty
19 Act, the paradigm on which it was built, was, of
20 course, the automobile transaction, and the notion that
21 you could somehow take that language and apply it in a
22 different marketplace with a different kind of product
23 seems to me to be not a plausible reading of the Act.

24 MR. CLIFFORD: All right, the response I've
25 seen in some -- well, there is no -- I'm not making a

1 large response, but one small segment of response to
2 one of the points of Curtis that this is not a sales
3 transaction is, of course, made with respect
4 specifically to mass market software, where certainly
5 as is indicated several times in panels today from the
6 perspective of consumer purchasers looks like a sale,
7 feels like a sale, and if you put a sign on it that
8 says it's not a sale, it still feels like a sale
9 transaction.

10 It is functionally like a sale, and there is
11 not much Magnuson-Moss jurisprudence on the point, but
12 there is at least one lease transaction where the Court
13 said it was so functionally like a sale that it was
14 covered by the Magnuson-Moss Act, and one can make the
15 same argument. I think it's a little harder argument
16 to make than whether this constitutes tangible property
17 in my view.

18 MR. REITZ: One point.

19 MR. CLIFFORD: Yes.

20 MR. REITZ: The sale is not a defined term in
21 Magnuson-Moss, but it is, of course, a defined term in
22 Article 2, and it's transfer of title for a price. The
23 notion of transfer of title to information is a concept
24 that is just bewildering in its breadth. In the
25 information world that we're talking about, the notion

1 that someone who buys a piece of software has bought
2 the right to sell that to anybody else in the world is
3 a notion -- the retransfer issue is a notion that goes
4 with title.

5 When you own something, you can sell it. That
6 is the critical meaning of "title." You can do a lot
7 of other things with it. You can rent it. You can do
8 many other things with something to which you have
9 title. The notion that you have title to that
10 information runs so contrary to the core notions, I
11 think, of the market for this kind of information that
12 I don't see how you can do it.

13 MR. CLIFFORD: All right, well, Curtis as usual
14 draws the issues very well.

15 Let me turn to another issue under -- as a
16 technical matter under Magnuson-Moss, and it's one that
17 I have not seen raised very often, which is do
18 e-tailers -- are e-tailers subject or may they comply
19 with Magnuson-Moss by satisfying the so-called catalog
20 rule under Magnuson-Moss? Now, I raise this actually
21 not simply in the software context but for e-tailing
22 generally.

23 The presale disclosure rules of Magnuson-Moss
24 apply different to catalog -- so-called catalog and
25 mail order sellers. The rules provide that a catalog

1 seller can comply either by disclosing the full text of
2 the warranty or by indicating that the written warranty
3 can be obtained free upon specific written request and
4 indicating the address where such warranty can be
5 obtained.

6 Now, I've noticed in doing some of my own
7 surfing on the web, a number of e-tailers do that both
8 for software and for hardware purposes. Does the
9 catalog rule apply? Well, look at the definition of
10 the catalog rule. It is one which does, "not require a
11 personal visit to the seller's establishment."

12 Well, what is the seller's -- what is the
13 e-tailer's establishment? Is it not the virtual store?
14 They certainly make it look like a store, they have
15 shopping carts, checkout counters, and is it the only
16 place that you can go in which purchase, and therefore,
17 the way that you purchase is making a personal visit
18 over the internet to the catalog store. This is the
19 virtual world.

20 It seems to me very clear that the catalog rule
21 does not apply. If it doesn't apply, then the
22 pretransaction disclosure rules apply at least with
23 respect to products that are covered by the
24 Magnuson-Moss Act.

25 Curtis, do you have any --

1 MR. REITZ: I think that's a very interesting
2 evaluation of the rule that the FTC had promulgated.
3 My sense would be that there might be multiple ways in
4 which an e-tailer, as you call it, could satisfy the
5 Magnuson-Moss rule, but it doesn't strike me that
6 e-tailing is in any fundamental way that different from
7 mail order catalog transactions, and there wouldn't be
8 a tremendous difficulty in bringing the two kinds of
9 transactions into some similar harness legally.

10 MR. CLIFFORD: Of course, the difference in a
11 sense is that presumably the catalog seller, at least
12 one selling a number of items, would have to use up too
13 much space in the catalog to set forth the text, and
14 the e-tailer at least has web storage and links to take
15 care of that.

16 MR. REITZ: True.

17 MR. CLIFFORD: So that the compliance would be
18 a little bit easier.

19 All right, let's see, one other small point
20 with respect to arbitration, I found it of interest
21 that some of the leading cases raising questions about
22 whether Article 2 applies to software or actually to
23 computers are cases in which the underlying issue is
24 whether the arbitration clause, mandatory arbitration
25 clause, is a part of the contract.

1 I read the FTC report of last April, I think it
2 was, a 1999 report, as I say, which reviewed -- it was
3 the periodic review of rules and regulations. In it,
4 the report specifically states in response to some
5 commentary about the mandatory arbitration provision,
6 the commentary that specifically states that in 1975,
7 when promulgating the informal dispute settlement
8 mechanism rule, the Commission considered the issue of
9 whether mandatory arbitration was permissible and
10 concluded that it was not in light of both the
11 statutory language and the legislative history.

12 Last year, in the final report, the Commission
13 reiterated its view that that conclusion was correct.
14 It would appear as if that issue had been raised --
15 actually, there were several cases on that point, not
16 all of them agreeing with the Commission, but I haven't
17 seen the Commission argument raised directly in the
18 cases. So, that's one other point.

19 But let's turn to the mixed goods or the mixed
20 transaction. Curtis, I'll let you --

21 MR. REITZ: In my view, this is the most
22 interesting and difficult question that faces the
23 application of the Magnuson-Moss Warranty Act and the
24 issues that I think the FTC and the staff are I hope
25 weighing.

1 We heard this morning in several of the panels
2 how the market is changing with this -- what is -- what
3 was called embedded software. I would call it embedded
4 information rather than getting into the software, but
5 we are getting more and more smart goods in the
6 marketplace, goods in which the function of what
7 everyone would concede is the tangible personal
8 property is dependent upon a component that is driven
9 by a computer and information.

10 That kind of product was not as prevalent when
11 the Magnuson-Moss Warranty Act was enacted and when the
12 rules that were promulgated in 1975 were drafted, but
13 it is a fair and I think open question of the extent to
14 which the Magnuson-Moss Warranty Act will apply to a
15 transaction in which there is clearly some element of
16 hard, tangible, personal property and information,
17 where the two are combined.

18 Now, that kind of transaction ranges from a
19 whole spectrum of things that are now happening in the
20 marketplace, not to say, as Dr. Koopman was saying,
21 things that are about to happen very soon in the
22 marketplace as the information thing, hybrid, is
23 rapidly being transformed.

24 At the one extreme end is the transaction which
25 I think Don mentioned and others have mentioned before,

1 information that is transferred in the form of a
2 diskette or a CD or a tape. There's clearly a physical
3 component to that. I think Carol talked about that
4 this morning. No one would deny that the tape and the
5 CD or the disk are tangible personal property. The
6 information that is on them is being transferred in a
7 single transaction. That's one paradigm where the
8 physical property, the tangible property, is almost of
9 de minimus value.

10 At the other extreme is, of course, the
11 transactions that Dr. Koopman was talking about, the
12 Mercedes, the Cadillac that are now being described
13 with this incredible amount of information that is
14 being built into information systems, being built into
15 the automobiles. The latest version that I read about
16 in the current issue of Newsweek, I believe, are these
17 remarkable gadgets that are being constructed to be
18 inserted into the bumpers so that the car will
19 automatically know how close it is to vehicles in front
20 of it. If an impact is coming, the direction from
21 which the impact is coming so the air bags will deploy
22 in a different way, depending upon the speed and
23 direction from which the collision is being directed.

24 Here we clearly have a -- these Cadillacs and
25 Mercedes are products that are clearly Magnuson-Moss

1 products. There is no doubt that they are being
2 marketed with written warranties, they have been
3 marketed with written warranties now for 50 years, and
4 that is not going to change any time soon as far as I
5 can tell. The manufacturers are going to put these
6 into the marketplace with that kind of a warranty
7 attached to them.

8 Microwave ovens --

9 MR. HILE: Does that override the license in
10 the embedded parts?

11 MR. REITZ: Well, I asked Dr. Koopman about
12 this. He gave us a couple of examples with unnamed
13 companies of transactions in which the information
14 component, the information system that is being
15 embedded into these automobiles, is being licensed.
16 None of those, as far as when I asked him at the end of
17 the morning, none of those has yet to be communicated
18 to a single consumer as far as I know. He said he had
19 to search the web to find them.

20 I don't know what the point of the lawyers who
21 are writing that stuff is at the moment, but the notion
22 that there is somehow currently any separate licensing
23 of the information component of a Mercedes or a
24 Cadillac or anything like that, I haven't seen, and I
25 will be -- you know, I understand because at one stage

1 of the Article 2 revision debate, I tried -- I floated
2 an idea at one point of trying to solve the scope
3 issues of Article 2 with the notion that it's licensed
4 information that matters, not the stuff that is coming
5 as part of the product, and Jean and others instantly
6 said they will simply start licensing the information.

7 I don't know whether that's true or not. It's
8 not happening now to the best of my knowledge. There
9 is no example that I'm aware of in the marketplace of
10 any major consumer durable good upon which there is a
11 written warranty in which the information system in the
12 good is being separately licensed. If it happens, it
13 -- you know, I can't say it's not going to happen, but
14 I will be surprised if it happens, and I don't think
15 it's going to be -- it won't fit what David Mirchin
16 called the battle between the marketing department and
17 the lawyers. The marketing department is not going to
18 let that happen.

19 MR. HILE: How do you think the courts would
20 likely treat this, if there's a situation where there's
21 a claim under a written warranty and a company defends
22 on the basis of its license terms? Do you think the
23 Court is likely to say, your license is really a
24 fiction in this context, and the warranty claim is a
25 good one, or do you think that they'll give credence to

1 the license?

2 MR. REITZ: Well, the issue -- you're assuming
3 there is such a license, and --

4 MR. HILE: Well, they told me that there would
5 be such a thing, and that's what -- I'm just assuming
6 that from the earlier --

7 MR. REITZ: You're talking about something that
8 doesn't yet exist in the marketplace but might come.

9 MR. HILE: Right.

10 MR. REITZ: And would it -- Magnuson-Moss as
11 it's presently written, as it was drafted, allows for
12 unbundling a product and to have different kinds of
13 warranties for different parts of a single product.
14 That was done, as I understand it, at the time with the
15 notion in mind that automobiles, which were the
16 paradigm, were carrying -- some of them were carrying
17 manufacturer's warranties on most of the product, but
18 sub-suppliers' warranties on things like tires, and now
19 some of the electronic gear that was being put in as
20 far as radios and the like were being separately
21 warranted.

22 The automobile manufacturers themselves at that
23 stage were giving separate kinds of warranties on the
24 power train or on the exterior finishes when the rust
25 problem was causing a lot of consumer concern, and so

1 they were breaking up the warranties on components.
2 So, the way Magnuson-Moss is presently written, I can
3 conceive of someone using the statute in its present
4 form to give a different warranty on the information
5 system, assuming it can be identified and separated
6 from the rest of the product, like the tires can, and
7 the thing as a whole.

8 But if you have something that's built in like
9 the sophisticated systems that I understand now have
10 replaced carburetors, those information systems are
11 essential to that car being a car. It couldn't be a
12 car without -- a car without a way to get the fuel into
13 the engine and burn it is not a car. It's a -- it may
14 be a statue, but it's not a car.

15 So, I think it may depend to a large extent on
16 what kind of system you're talking about. The fact
17 that it is licensed I don't think is a relevant
18 question. The question is what is the warranty terms
19 that are going to be put onto the information system.

20 Now, one of the things UCITA has done -- UCITA
21 has gotten a lot of bad press, and I think deservedly
22 so in many regards, but one of the thing UCITA did,
23 which Article 2 with respect to goods never did and
24 which the drafting committee revising Article 2 refused
25 to do, was to declare in statute that a remote provider

1 of computer information by law is creating an implied
2 warranty of merchantability to the end user.

3 Article 2 never said that, never said that with
4 respect to goods. There's nothing in Article 2 that
5 says that manufacturers of the Mercedes or the Cadillac
6 must give or gives any kind of implied warranty to an
7 end user, nothing, and as I say, the drafting committee
8 revising Article 2 deliberately said we are not going
9 to even put such a provision into the draft, much less
10 defend it.

11 What was put into the revision of Article 2 was
12 a lot of express warranty material on manufacturer's
13 warranties to end users, some of which is still very
14 controversial, but UCITA put this in on computer
15 information. So, any state that adopts UCITA at least
16 from the consumer perspective gets something that is
17 better as a matter of state law than the current level
18 of good.

19 Now, once that implied warranty on information
20 is created, then the question is under UCITA, is it
21 effectively disclaimed, can it be -- it can be
22 disclaimed, and like all of these Magnuson-Moss
23 questions, once you have a written warranty on
24 something, what is the reach of Section 108-A with
25 respect to everything else in the transaction?

1 Now, my view is that the statute allows
2 unbundling of the written warranty, you could have a
3 written warranty on part of the product, and the
4 inclusion of disclaimers of implied warranties in 108
5 would go only so far as the written warranty went, so
6 that under my reading presently of Magnuson-Moss, the
7 seller of the goods is in command of how wide or narrow
8 the written warranty will be on the product, and the
9 inclusion of disclaimers in 108 follows from whatever
10 the manufacturer or the provider has elected to do with
11 respect to the scope of the written warranty.

12 So, in the transaction you're imagining, if
13 there's a written warranty that does not go to the
14 information system and can in some reasonable way be
15 divorced from the rest of the product --

16 MR. HILE: What you are saying is you have got
17 a real snarl --

18 MR. REITZ: You've got a real snarl.

19 MR. HILE: -- just like the engineer said.

20 MR. CLIFFORD: Could I disagree briefly,
21 though, with the last point, and Carol Kunze mentioned
22 this issue earlier today about if you give a warranty
23 on the disk, can you disclaim all warranties with
24 respect to the software, or does Section 108-A preclude
25 that disclaimer? There's some logic to the notion that

1 since the Act says you can give one kind of warranty --
2 you can warrant just a single part of the product, but
3 the language in Section 108-A says that no supplier may
4 disclaim any implied warranty with respect to the
5 consumer product if such supplier makes any written
6 warranty to the consumer with respect to such consumer
7 product. So, that's the language that Carol is
8 concerned about, and it looks on its face to be
9 troublesome.

10 MR. HILE: But that's what -- that depends on
11 whether you consider the disk to be the product or if,
12 like you, you accepted the data and --

13 MR. CLIFFORD: Well, in my mind it doesn't make
14 any difference, but even if you say the disk is the
15 product, you can't disclaim the implied warranty.

16 Now, that doesn't -- the conclusion, though, is
17 not necessarily that you have an Article 2 warranty
18 unless you take the view that the underlying
19 information is a tangible product. The warranty
20 involved could be, as was held in an English case, a
21 common law implied warranty with respect to software,
22 or if UCITA were in operation, it would be I suppose
23 the UCITA version of the implied warranties.

24 MR. HILE: Professor Reitz, I have a question
25 here from --

1 MR. REITZ: Could I just say one more thing?

2 MR. HILE: Sure.

3 MR. REITZ: I would hope that one of the things
4 that the FTC staff takes away from this is the possible
5 mission to draft a new rule dealing with this question
6 of embedded information systems in products under
7 Magnuson-Moss. I think it's a fair and open question.
8 I think there are a variety of readings of the Act that
9 could be made, and I think it would be extremely
10 helpful in my view if the Bureau of Consumer Protection
11 would take on as a mission, fairly prominently, an
12 attempt to direct a rule that would deal with this
13 issue, a rule interpreting Magnuson-Moss, including the
14 language in Section 108-A that Don talked about,
15 because there are two things happening.

16 First of all, this is an enormously important
17 issue for both the sellers and the buyers of these
18 consumer durable products, and it's just going to get
19 more important as time goes by. This is not something
20 you need to wait for to see coming down the road. It's
21 here. It's here, it's a legal problem, it should be
22 solved, and I think the FTC with its rulemaking power
23 could do a lot to set the framework in which the scope
24 of Magnuson-Moss to these products is clarified, and I
25 would hope that's one thing that -- one important thing

1 that comes out of this hearing.

2 MR. HILE: Here's a question from one of the
3 audience:

4 Doesn't the concept of embedded computer
5 information and the fact that it will be
6 indistinguishable from the good itself cause it to be
7 covered under Magnuson-Moss? Does it make sense to
8 apply Magnuson-Moss to the case which holds the
9 embedded software but not to the embedded software
10 itself? Wouldn't this nullify Magnuson-Moss altogether
11 since all goods will have embedded software?

12 That's a complete end run around Magnuson-Moss,
13 right?

14 MR. REITZ: I don't think there is a clear
15 answer to that. There are some things, like I said,
16 the system that controls the fuel going into the engine
17 is I think impossible to detach from the system, but
18 the new systems that are going to hard wire radios into
19 -- radio system, satellite systems, into cars, I think
20 that's a system that is probably capable of being
21 thought of as independent of and detachable from the
22 core product of the car.

23 We're getting -- the whole world of access to
24 information in vehicles, for example, is exploding in
25 different ways, and some of it involves the use of

1 human intervention to make it work. So, I think there
2 are information systems that are going to be
3 incorporated in and sold as a part of a large product
4 that still retain enough separate identity, like a tire
5 -- I mean, that's the old-fashioned example, the tires,
6 some of the other components that retain their identity
7 even at the consumer level I think can and probably
8 should be treated as subject to different regimes.

9 But this is the issue I think on which a
10 rulemaking could help, to define the core and periphery
11 or to define the principles of what is the core and
12 what is the periphery on these products. You know, my
13 current view in the state law game, Article 2 and UCITA
14 are battering about scope, my current view in the state
15 law game is it ought to be the buyer's perception that
16 governs. If the buyer perceives this as a unitary
17 product, it's a unitary product. If it's sold as a
18 unitary product, it's a unitary product.

19 But if it is marketed in a way that the
20 ordinary consumer can perceive that these are Firestone
21 tires or Goodyear tires and they are not Michelin
22 tires, and there's a separate warranty on those tires
23 as a product, that's enough in my view to communicate
24 to the ordinary consumer that this is a product that
25 can be characterized into some of its components, but

1 the test of when you can do that I think is a very
2 difficult one to draw. I've been trying to write it
3 down for a year or so, sporadically I sit down at my
4 computer and say I'm going to draft this definition of
5 embedded software, and what I come back to is the old
6 pornography test, I know it when I see it, but I can't
7 find a formula that always works to say when it is an
8 indivisible thing and when it's a thing with parts.

9 MR. HILE: Here's another question from the
10 audience. This is for you, Professor Reitz.

11 Don't you distinguish between functional
12 software and informational content as in a book or an
13 e-book? Functionality involves determinative effects.

14 MR. REITZ: I think so. I think that question,
15 as I understand it, at least, goes to what I've just
16 been saying. If the information is important to the
17 functioning of a thing, if the thing can't function
18 without it, then the two are not separable.

19 I'll tell you or I'll confess to you where I
20 have struggled from an early concession in my own mind
21 that I have not backed off from yet clearly, I was
22 convinced early on in the UCITA debates that the
23 desktop and the software could be treated -- could be
24 unbundled, that the things you load into a computer are
25 different from the computer. I kind of bought that.

1 Then I realized that that computer, without
2 some information system, is absolutely worthless. You
3 have got to have some information in the -- and the
4 thing, the clear thing, that keyboard and that monitor
5 and the rest of the gadgetry is worthless except as a
6 nice paperweight, not even a nice paperweight, is
7 worthless without some kind of information system that
8 will make it work, the operating system.

9 The second problem, of course, there's a lot of
10 stuff that's being routinely loaded into those
11 computers now that are not essential to the operation
12 of the computer. When I look at what Dell and Gateway
13 are doing in their marketplace and the way they're
14 working with software providers, they're loading an
15 incredible amount of software into computers, selling
16 it for a single price. You don't pay separately for
17 anything, a single price, and you get this computer
18 plus all this other stuff, some of which is essential
19 to make the computer work at all and some of which is
20 stuff to get on e-mail, Microsoft, Netscape and who's
21 going to have the browser, who's going to have the most
22 visible browser on the screen when the computer comes
23 up.

24 So, they're loading software in there for lots
25 of reasons other than ordinary transfer of information.

1 There is a lot of attempt to control other marketing
2 processes that are going on. So, these computers,
3 these things, these tangible things are coming with
4 lots of information, and I'm backing away from my
5 notion, and Dr. Koopman kind of this morning added to
6 my concern, that I'm not sure you can at this point
7 clearly separate the things which the major sellers of
8 computers are loading in to their products that are not
9 totally essential to making it work at all.

10 MR. HILE: So, that would be -- in that
11 instance, would the software that makes the computer
12 run, would that be covered in a Magnuson-Moss warranty?

13 MR. REITZ: I would think so. I would think
14 so.

15 Where this comes up in another way, much
16 outside of the consumer marketplace, there's a huge
17 amount of industrial equipment, robot, robotic stuff
18 that is now being sold, and it's not Magnuson-Moss, not
19 consumer products, but it's got the same legal problem.
20 Without the information base to make that equipment
21 work, that equipment is worthless, cannot be used, and
22 I know it's not the consumer protection issue, but it's
23 to me the same intellectual problem of how do you
24 decide when you can unbundle the information from the
25 tangible, physical, aluminum, plastic, steel, glass

1 that is the product?

2 MR. HILE: Here's another one that picks up on
3 your concept that the buyer's perception governs.

4 If the buyer's perception governs, then isn't
5 this a blurry distinction since the maker of the
6 component could change the buyer's perception? The
7 example is Intel Inside, which advertises its
8 processor. Would you say the Intel processor is a
9 separate component?

10 MR. REITZ: In a consumer product, no. I think
11 the -- I'm not sure what the Intel strategy is,
12 obviously a major part of it is to sell their products
13 to the manufacturers of the computers to use their
14 chips, but -- and like a lot of other manufacturers --
15 component suppliers, they are -- Dupont sells a lot of
16 cloth that it has -- textile stuff that it's invented,
17 and the end user of manufactured goods frequently says
18 it uses -- some Dupont product is being used in the
19 goods.

20 I don't think that makes the -- does anything
21 to divide the product. The product is still a sofa
22 with a certain kind of cover on it, and it either does
23 or it does not resist stain or fire or whatever it's
24 supposed to do.

25 The Intel -- you know, I think the Intel thing

1 is a marketing thing, not an attempt to separate the
2 chip from the rest of the product.

3 MR. HILE: Here's another one that goes back to
4 your view that software is a not a tangible product.

5 It says, since copyright law requires
6 expression of an idea that is fixed in a tangible
7 medium, wouldn't it be fair to say that if the software
8 or computer information is eligible for copyright, it
9 is eligible for regulation under Magnuson-Moss because
10 it's tangible?

11 MR. REITZ: I thought the debate was over on
12 whether software could be copyrighted. I think it can
13 be both copyrighted and patented, and I don't know
14 whether you know, but you can license a patent as well
15 as license a copyright. So, whether you call it a
16 patent or a copyright doesn't matter.

17 It is not my feeling -- intellectual property
18 is not my field, but I have accepted the notion that if
19 you have a certain kind of product, information
20 products, you can get a copyright on it or perhaps a
21 patent on it. It's also clear, as in some of the
22 database cases that have been litigated, that unless
23 the information is original, you cannot get a copyright
24 on it. There's -- and we heard discussion this morning
25 about the database providers dealing in information

1 that cannot be copyrighted, or at least somebody else
2 wasn't copyrighting, marketing that database and
3 controlling that market by contract, but I have no
4 doubt in my own mind that software can be copyrighted
5 and in many instances patented as well.

6 MR. HILE: You point out several I think good
7 reasons why there's some room to doubt whether
8 Magnuson-Moss covers software, because it's not -- may
9 or may not be a tangible property, and it may or may
10 not be a sale. So, let's put aside those obstacles and
11 look at the point of Magnuson-Moss, which is to
12 preserve a consumer's right to a remedy in the event
13 something goes wrong, or number two, to make sure that
14 the consumer knows that before it becomes committed.

15 Do you favor some regime like that that would
16 fit the software context better than Magnuson-Moss
17 does? In other words, do you think the concepts, the
18 underlying concepts and concerns of Magnuson-Moss
19 transfer?

20 MR. REITZ: I have, you know, enjoyed the
21 argument that's been made, and it's not been made this
22 morning, at least I didn't hear it this morning, but it
23 has been made in some of the written submissions to the
24 Commission that somehow information is different from
25 things and that because of some inherent characteristic

1 about information, quality is not controllable, you
2 cannot have assurances of quality.

3 I find that argument unpersuasive in the
4 extreme. I see absolutely no reason to differentiate
5 the ability of a purveyor of goods, old-fashioned
6 goods, from a purveyor of information from providing
7 suitable assurances to the customers that there is a
8 basic quality guarantee in the product.

9 The notion early on in custom designed
10 information systems, which were not computer stuff, but
11 when some of the early companies were selling
12 business-to-business transactions where they were
13 giving businesses a computer system to do what had been
14 done with green eye shade work, a lot of those custom
15 designed systems turned out to be extremely hard to
16 design, and many of them failed, failed badly, with
17 disastrous results for the buyers.

18 That was unfortunate, but you can read a lot of
19 goods cases where people say I will build for you an
20 oven that has never been built before to weld products
21 that have never been welded before. People enter into
22 those goods transactions where they are pushing the
23 envelope of technology in the physical world, and they
24 make warranties, and sometimes the products fail and
25 the warranties are invoked.

1 So, I see absolutely no reason in the abstract
2 to see information systems or information products as
3 being somehow properly outside the pale of any
4 assurance of quality, especially in the consumer goods,
5 which are likely to be mass produced and mass marketed
6 rather than customized.

7 Now, would I favor a legal regime to intervene
8 in the market now? I certainly favor a legal regime to
9 enter into the market now on the embedded software
10 question, and I think that urgently needs a solution.
11 Is the marketplace out there on pure information
12 systems somehow -- have they either divorced from the
13 goods or are sold in a more or less pure information
14 way, do they need regulation? I think they probably
15 do.

16 What worries me not so much as the license or
17 all the stuff that was being talked about this morning,
18 about end use restrictions, how many people can use it,
19 what can be done with the product, what troubles me
20 enormously what the lawyers are doing, not the
21 information providers, in writing into these contracts,
22 what are called license contracts, what I think of as a
23 abusive provisions dealing with what happens when the
24 product fails.

25 Now, those lawyers are worried about two

1 things, one of which was not mentioned this morning
2 that I think ought to be considered. Any lawyer for a
3 major provider of a product in the consumer world today
4 worries about class actions. Class actions are the
5 anathema of providers. It's the -- it is the vehicle
6 -- and Magnuson-Moss, of course, has its failed class
7 action provisions, but class actions are a way in which
8 you can somehow make it possible that the dispute
9 resolution system can be balanced enough that the
10 people who have bought something have enough at stake
11 to marshal the resources to go after those who have
12 provided them. Class actions are going to be designed,
13 and there are problems almost inevitably, but if I were
14 representing a provider of anything, I would worry
15 about class actions.

16 Now, one way to get rid of a class action
17 problem is to write a mandatory arbitration clause into
18 the contract. There is no mandatory class action. So,
19 if your buyers can never get to court, they can never
20 combine into a class action, and I think that's
21 abusive.

22 Some of those terms have been put in, those
23 arbitration clauses, are outrageous. I mean, the ICC
24 clause that was in calling for arbitration under rules
25 where you have to pay \$4,000 up front to even get into

1 the arbitration system, that's just unbelievable. I
2 can't believe anyone would put that into a consumer
3 transaction, but it was in. That's one form.

4 The other is the concern that Don rightly
5 raised, I think, and that I hope the FTC will raise of
6 the possible mismatch between the promise and the
7 performance. Anybody who's going to market anything
8 would like to try to create the gleam, the shine,
9 whatever is going to attract customers, and --

10 MR. HILE: Sell the sizzle, not the steak?

11 MR. REITZ: Right. They are going to sell
12 something that is going to make it look like this is
13 worth your money. If they simultaneously write
14 contracts in which you have no protection when it
15 fails, it is the classic problem which is what led to
16 Magnuson-Moss and all the other stuff to begin with.
17 There's got to be I think a reasonable match between
18 the promise and the performance, and, of course,
19 lawyers drafting documents can very much take away a
20 lot of the possibility of remedies, including what
21 worries me most in arbitration clauses, but they can
22 take away the -- they can disclaim the remedies or they
23 can say the -- if you alter the box, the warranty
24 expires, the old jokes about the 90-day car warranties,
25 which I thought were pretty funny, and they were being

1 still sold in the 1960s, but that's what led to
2 regulation.

3 People were putting into the market things,
4 they were attracting -- the marketing department was
5 attracting people with representations that were
6 grander than the reality, and if people don't stand
7 behind their products, there may be a need for
8 regulation.

9 MR. CLIFFORD: Let me make a comment or two on
10 behalf of our absent colleague David Rice, who I know
11 would be interested in answering this particular
12 question, and I think his response, and I concur, is
13 that if software is not covered by the Magnuson-Moss
14 Act, that doesn't leave the Commission without the
15 legal authority to take action. They are not confined
16 by the terms of the Magnuson-Moss Act as long as they
17 have the general jurisdiction under the broad standards
18 of unfairness and deception, which operate even outside
19 of Magnuson-Moss to deal with matters such as
20 pretransaction disclosure of material terms, and that
21 the Commission in pursuit of those standards should
22 also be considering things like the approach toward the
23 common currency achieved in the Truth in Lending Act
24 for the annual percentage rate and the sort of weaker
25 cousin in the form of a full warranty that provides the

1 benchmark in the Magnuson-Moss Act.

2 I thought of that this morning as Carol Kunze
3 was discussing the transaction types that have existed
4 and are posted on the web with respect to open software
5 terms, that there are licenses that are understood
6 within the community having standard terms that are
7 even referred to in the trade with acronyms.

8 Jean Braucher this morning mentioned the
9 possibility of trying to define transaction types and
10 even perhaps coming up with some minimal standards for
11 these kinds of contract situations that are analogous
12 but not controlled by the Magnuson-Moss Act, and I know
13 that's a strong interest of David's, and I thought it
14 appropriate to mention it.

15 MR. HILE: Thank you very much.

16 I think that we're going to break this now and
17 give everybody a little bit longer break than we had
18 originally thought. I think that there is some coffee
19 out in the lobby, and we will reconvene at 3:15.

20 Thank you very much, Professor Reitz and
21 Professor Clifford.

22 (Applause.)

23 (A brief recess was taken.)

24 MS. MAJOR: Okay, let's get started.

25 This next panel is going to talk about the

1 concept of meaningful agreements in the context of
2 computer information transactions. In other words,
3 when a consumer clicks on the "okay" button or the "I
4 accept" button or does not exercise a right of return
5 when they purchase software at the bricks and mortar
6 store, is this, in fact, meaningful assent?

7 Let me introduce our speakers, who I'm
8 delighted have agreed to join us this afternoon.
9 First, to my immediate right is David Johnson. David
10 Johnson is a partner at Wilmer, Cutler & Pickering
11 where he focuses primarily on electronic commerce
12 issues, including privacy, domain names, internet
13 governance issues, jurisdiction, intellectual property,
14 taxation, electronic contracting, encryption,
15 defamation and regulatory matters. Mr. Johnson has
16 published a number of seminal articles in this area,
17 and we are delighted to have him with us today.

18 To his right is Brian Dengler. Brian Dengler
19 is the vice president and associate general counsel of
20 America Online, and let me take a moment to thank
21 America Online, since he's sitting here with us, for
22 providing the coffee and pastries this morning, and
23 this afternoon, Business Software Alliance provided
24 those great cookies that are sitting out there, and
25 America Online provided the soda, and we thank them

1 very much.

2 Mr. Dengler manages government and legal
3 affairs for AOL subsidiary CompuServe Interactive
4 Services and is also a key participant in AOL's
5 strategy in promoting uniform legislation for
6 electronic and online contracting. Thank you very much
7 for joining us today, Mr. Dengler.

8 Next we have Professor Kobayashi, who is a law
9 professor at George Mason University. Professor
10 Kobayashi received his Ph.D. in economics from the
11 University of California at Los Angeles and has
12 previously served as an economist at the Antitrust
13 Division of the U.S. Department of Justice and as a
14 senior economist at the Federal Trade Commission.
15 Thank you very much for being here today.

16 And finally, we have Professor Hillman and
17 Professor Rachlinski, who are both from Cornell Law
18 School. Professor Hillman has authored six books and
19 over 40 articles and book reviews in the area of
20 contracts and commercial law, and Professor Rachlinski
21 has a Ph.D. in psychology and a law degree, both from
22 Stanford University, and he also teaches at Cornell.

23 So, with that, let's get started. Thank you
24 all so much for being here. We're delighted to have
25 you.

1 Mr. Johnson?

2 MR. JOHNSON: Thank you, April.

3 I'm a little bit mystified at the question
4 presented here, can consumers make meaningful
5 agreements in shrinkwrap or clickwrap transactions, but
6 my answer is yes, and I actually will get to an
7 explanation of what I think the agreement is really and
8 why it's meaningful, but I want to start by talking
9 about some issues that were discussed in the earlier
10 session and which are best summarized by a question
11 raised by a quote that -- in The Legal Times today by
12 you, and that is, why is software different from a
13 toaster or is software different from a toaster, and I
14 think it's critical to this area to focus on exactly
15 why there is a difference, even between a smart toaster
16 and software as usually experienced in the online
17 environment.

18 A toaster operates on the toast in a pretty
19 uniform way, and it does so in a context that is pretty
20 predictable, and it at least for the most part it
21 doesn't deal with other pieces -- even if it's a smart
22 toaster, it doesn't deal with other pieces of software.

23 The inherent nature of a program, of a set of
24 bits, is that it interacts with other bits in ways that
25 are inherently very difficult to predict and in a

1 context that may differ radically from one situation to
2 another. Even if you were imagining, for example, a
3 preloaded web browser in a piece of hardware designed
4 only to browse the web, the likelihood is it would
5 interact with some Java script or some other code
6 coming down into the computer in a way that the
7 provider of the software would find very difficult to
8 predict and very expensive to ensure the end user's
9 experience or to provide some guarantee or warranty of
10 some kind as to quality.

11 And it really does come back to the proposition
12 that the CD is not the song, and the song is not the
13 CD, and even though it's necessary to encode a piece of
14 software in a tangible media of expression in order to
15 claim copyright rights, the fact remains that the bits
16 only have utility and meaning in the world insofar as
17 they interact with other bits in a process, and a
18 process, unlike a product, has to be contracted about
19 in a context that takes into account the highly
20 unpredictable context in which it operates, the very
21 different meanings that quality might have in that
22 context.

23 We turn to whether there's a meaningful
24 agreement in a clickwrap context. We can't say that
25 it's meaningful by virtue of individualized bargaining.

1 The online services have to have uniform terms, and
2 software suppliers have to insist on certain management
3 of the intellectual property rights, and there are many
4 other reasons. So, perhaps the question has to be
5 restated, is there a way to give consumers satisfactory
6 agreements, if you will, or satisfactory consumer
7 experiences in the context of clickwrap agreements?

8 And I think there is, but it's not really
9 because of a detailed review of the terms and
10 conditions in advance. Really the reality of the
11 marketplace is that the branding associated with an
12 online space or a piece of software and the continuous,
13 repeating nature of the relationship between the
14 consumer and the supplier of the software or online
15 data or online space is what provides the protection,
16 and it is required to do that because, again, of the
17 market reality that every consumer is one click away
18 from another relationship and can easily leave the
19 relationship.

20 One way to think about this problem is in terms
21 of two different theories of what a contract is. I
22 mean, if you think of it as a meeting of the minds, and
23 there are other panelists who are more expert on this
24 than I, then, of course, the lack of a negotiation, the
25 fact that no consumers ever read the terms and

1 conditions, would be troubling, but if you view the
2 terms and conditions as part of the product, then
3 you've come to a very different question. I think it's
4 the question that has to do with unconscionability or
5 fraud or deception, which is whether there are certain
6 kinds of products that ought not to be allowed to be
7 offered in the marketplace.

8 Really, it's not a question I think of whether
9 something should be a license or a sale. We have heard
10 this morning many reasons why software has to be
11 dispensed by license, but just if you focus on the
12 difference between the CD and the song, between atoms
13 and bits, it really doesn't make any sense to talk
14 about selling bits. What you're really doing is
15 granting the right to copy the bits in a context in
16 which they interact with other bits in unpredictable
17 ways. So, it seems to me that the only way to think
18 about this problem is in terms of whether there are
19 certain kinds of products conceived as a combination of
20 bits and the terms and conditions under which they may
21 be used that ought not -- that are defective, that
22 ought not to be allowed to be offered for sale.

23 Just a couple of examples in the online space,
24 I have to draw on my own personal experience in
25 starting an online system for lawyers, and one of the

1 problems we had there was we were creating a shared
2 space, obviously it had to have the same rules for
3 everybody, and because the end users were lawyers, we
4 wanted to make sure that no one asserted a copyright to
5 the postings they made to the service that would
6 interfere with a key term of the online space, which is
7 that anybody could copy and use the material in the
8 group discussion for other purposes.

9 So, we insisted as a non-negotiable adhesion
10 clause, clickwrap, if you will, that every poster agree
11 that their words became part of the collective work and
12 were available to be used by other members of the
13 group, but you really couldn't negotiate that. And on
14 the other hand, the satisfactory consumer experience
15 came from the fact that if somebody focused on that
16 provision and didn't like it, they were free to leave
17 and go somewhere else. That's the reality of the
18 marketplace.

19 I think it's a real reality in terms of the
20 existence of marginal consumers for any given online
21 system or any given online software space who will get
22 excited and object to the terms and notice terms.
23 There's an example recently of an acquisition by a
24 large portal of a shared online community in which in
25 the context of the acquisition there was some I think

1 unintentional alteration of the language associated
2 with intellectual property rights in the postings,
3 which gave rise to what was really a political backlash
4 on the part of that community. So, there are effective
5 constraints here.

6 Now, if you think of bits as really different
7 from atoms and if you think of contract as part of the
8 product, as I said, I think the key question then
9 becomes unconscionability and what is a defective
10 product, and once you think about the question that
11 way, it becomes clear that we want to show great
12 restraint in regulating what the minimum terms and
13 conditions can be, because it would be essentially
14 equivalent to try to set the minimum terms and
15 conditions that must apply to every conversation, that
16 bits are like conversations. They exist in a very
17 diverse environment, they are uncontrollable, and
18 they're affected by the actions of third parties over
19 whom the originator has no control.

20 If you take it issue by issue and ask yourself,
21 is there really some minimum rule we want to insist
22 that everybody have, some nondisclaimable implied
23 warranty or whatever, I think it becomes clear it's a
24 very difficult thing to do. The amount of risk to be
25 taken by each party, do we really want to prevent users

1 from being prepared to take some risk with regard to
2 the impact on their business if they run a piece of
3 software? I don't think so. Certainly the software
4 industry could not very economically provide software
5 if they were subjected to a requirement to assure that
6 that program would operate in all contexts at all times
7 in a way that prevented harm of very great variety and
8 types that might come to the users of a piece of
9 software in a complex process.

10 The nature of the rights given up, it's very
11 clear that there are lots of times when consumers want
12 to give up claims to property, intellectual property
13 rights, and even claims to privacy rights if it is as a
14 condition for participating in certain kinds of online
15 systems. The right of a supplier to withdraw the
16 service or shut it down, again, I think we really would
17 lose a lot of value in the marketplace if we didn't
18 have suppliers who were allowed to make an offer of
19 service without stepping up to a very costly obligation
20 to assure continued availability of that service under
21 all circumstances.

22 Even the right, which is typical in our line of
23 contracts, to require the user to be bound by future
24 changes in terms and conditions it seems to me is an
25 area where although superficially you might think the

1 contract is a contract, you ought to be able to insist
2 on having it remain the same, but in online environment
3 and in software environment is very dynamic, there is a
4 need to change the rules under which people operate
5 from time to time, and as long as the user has the
6 ability to click away to a competitor, it seems to me
7 that the contract remains meaningful and, in fact, more
8 valuable to the consumer if that kind of a flexibility
9 is allowed.

10 Now, there may be some terms and agreements
11 that are truly unconscionable and that essentially
12 produce a product that is defective, but where that
13 leads is the more interesting question of how we decide
14 when that's the case and who decides when that's the
15 case, and I think it is troubling to contemplate the
16 existence of 50 different state laws on that subject.

17 Arguably the group that clicked the clickwrap
18 agreement and didn't read it is the relevant group to
19 ask whether or not they're surprised and shocked to
20 find a particular term or condition in the agreement,
21 and since we have the net to locate and ask that kind
22 of group what they think, I might make one random
23 suggestion, and that is as we do in the trademark area,
24 insist that a claimant do a survey and find actual
25 evidence of consumer confusion, and maybe we should

1 explore the possibility of asking the people who
2 actually click the agreement and who actually didn't
3 read it, as we all know, whether particular terms, if
4 they are thought to be important, which they are often
5 not, find them shocking and unconscionable.

6 So, the meaningful agreement that is, in fact,
7 being entered into by the marketplace by everyone who
8 goes online these days is roughly the following, that
9 I'm betting that you'll make me a happy customer, and
10 I'm satisfied that you can't use my failure to read the
11 agreement, which we both know I didn't read, as an
12 excuse to do something that most people who click here
13 would find shocking and overreaching and therefore
14 render your product defective. And by the way, I'll
15 insert you if you don't keep me happy. That's the
16 meaningful agreement that the shrinkwrap and clickwrap
17 marketplace is producing.

18 One thing that -- but it is clear to me one
19 thing we don't need in the context of software is a
20 governmental body deciding in advance in specific terms
21 what it is the terms and conditions of software
22 licenses or online rules ought to be for many
23 additional reasons. Obviously if you think of this in
24 terms of traditional boxed software, aside from the
25 optical illusion of thinking that that turns software

1 into a thing, tangible thing, which it doesn't do, you
2 miss the migration in the market from software to
3 online places where groups are interacting, and the
4 model that we're moving to is one in which a community
5 of people share application service providers' services
6 or whatever, and in that context it's essential to
7 allow the migration of the marketplace to create new
8 kinds of areas.

9 And I guess I had some other thoughts about the
10 earlier things, but I think I'll stop there and say the
11 most important thing to remember in this context is the
12 difference between atoms and bits.

13 MS. MAJOR: Thank you very much for those
14 thoughtful comments.

15 Let me just clarify my remarks, my quote that
16 you referred to earlier, and I think we got a question
17 also that relates to that. I think we can all
18 appreciate the inherent differences between a toaster
19 oven and a piece of computer software or computer
20 information, interoperability features and so forth.
21 Does it make sense in those transactions, though, that
22 a consumer goes into these transactions with less
23 information than if they were buying a toaster? And
24 let me follow that up with a question from the
25 audience.

1 Why is the unpredictability of the application
2 of software conceptually different than the
3 unpredictability of the application of an automobile?

4 MR. JOHNSON: Well, I think the most important
5 reason is that an automobile viewed as an operating
6 physical product is self-contained to a degree that
7 software is not. Obviously the person who's selling
8 the automobile doesn't say you won't have an automobile
9 collision. The real analogy would be if somebody was
10 insisting that your car be warrantied and never would
11 have a crash, because what's happening when you run
12 software in the modern context of the internet, at
13 least, is that the particular string of bits that's
14 been supplied to you by the supplier is interacting
15 with lots of other strings that are coming from third
16 parties, and so it's impossible as a matter of theory
17 even to specify the circumstance in which it's supposed
18 to work.

19 MS. MAJOR: Here's another question, and then
20 we'll move on to our next panelist, because I'm sure we
21 all have things to add to this.

22 Your contention that software is different
23 because software interacts with other software raises
24 two issues. Does all software have this interactive
25 function? Obviously I am doubtful. Two, if multiple

1 software packages or software and hardware are sold by
2 one supplier with an express or implied promise that
3 they are compatible, what is the obligation?

4 MR. JOHNSON: The first I would answer by
5 saying I can imagine cases where the carburetor
6 software just sits in the carburetor and never has any
7 occasion to communicate with anything else, and that
8 probably is a place to draw the line. This is
9 something that might conceivably be the subject of the
10 warranty.

11 I'm sorry, the second question?

12 MS. MAJOR: Oh, I'm sorry.

13 If multiple software packages or software and
14 hardware are sold by one supplier --

15 MR. JOHNSON: Oh, there I think we go back to
16 the question of deception. I mean, if it's true that
17 somebody makes a promise that this will work with a
18 specified setup and it doesn't, then I think that is
19 arguably deceptive, and there is a recent case from
20 this building that would suggest thinking along those
21 lines. I don't think that's a difficult problem.
22 Obviously most originators of software are very careful
23 about what promises they make.

24 MS. MAJOR: And I'll follow it up with one
25 final question, I know I just broke my promise, I'm

1 sorry, wholesale modification.

2 Are you trying to say that a toaster or
3 microwave with a variety of preprogrammed capabilities
4 is any less functional than a software program that
5 does printer -- or that does a printer or digital
6 camera interfacing with limited options?

7 MR. JOHNSON: Well, I'm not sure I understand
8 the question, but remember, the overall question here
9 is what should we insist on by way of detailed
10 knowledge by the consumer before they treat it as being
11 bound by an agreement that's associated with a
12 software, and is it all right for the consumer
13 experience that the originator of the software dictate
14 the terms and not negotiate about them and limit the
15 intellectual property rights and maybe even insist on
16 some limitations of use?

17 And I think the answer to that is sure, you can
18 imagine a little piece of software, very deep into a
19 chip and a piece of hardware, that ought to be treated
20 as part of the physical product, but to the extent
21 we're talking about clickwrap agreements that are
22 involved in going into online spaces, downloading
23 invisibly software code that interacts with other
24 things on the internet, in that realm, it seems to me
25 as a practical matter there is not only no alternative

1 to adhesion clickwrap contracts, but there's lots of
2 protection for the consumer, and as a practical
3 reality, it involves the ability to go to another
4 online space, and it involves the default or existing
5 legal constraints on deception and unconscionability.

6 MS. MAJOR: Thank you, Mr. Johnson.

7 Mr. Dengler?

8 MR. DENGLER: Thank you very much. I
9 appreciate the opportunity to participate in this
10 symposium.

11 First let me point out that America Online
12 Companies offer a variety of products and services that
13 can't simply be lumped into one category, such as the
14 same category as having, perhaps, software that's
15 contained on a CD that's wrapped in the box that's made
16 available for distribution in a retail setting.
17 Therefore, my discussion is going to focus -- I mean,
18 the distribution of software on our end is really
19 incidental to the primary service of the America Online
20 Companies, which is distributing online services. So,
21 you know, one-size-fits-all doesn't apply in a
22 software/information technology setting.

23 My discussion is going to be more pragmatic.
24 We are going to focus on our more common types of
25 transactions on the AOL Companies, and we urge the

1 Commission not to make broad or hasty generalizations
2 about contract formation or warranties related to
3 computer information given the variety of information
4 products that are out there and how they're being
5 distributed.

6 First, one of the unusual aspects of computer
7 information transaction is the way they're distributed.
8 There are so many different models that computer
9 information is distributed that a simple rule that may
10 apply perhaps in a shrinkwrap box setting will totally
11 not work for a situation in an online setting like
12 ours.

13 For example, on AOL, needless to say, we do
14 start with software, like I said, it's just merely
15 incidental to the actual product, which is online
16 access and online services and a variety of content,
17 and we have different ways of distributing that
18 software. You can get it by mail, sometimes you get
19 those little packages in the mail with the CD contained
20 in it, or you can go to AOL.com's internet site or
21 CompuServe.com and download the software there, and
22 often, you know, the software is bundled on PCs. So,
23 you buy the PC and the software is already on there,
24 and obviously if you click on that and you want to set
25 up an account, you can. So, already we have three

1 different methods of distributing the software related
2 to the same product. So, to set simple rules on
3 pretransaction disclosures in those kind of settings,
4 it doesn't apply in all three circumstances.

5 I submit this afternoon that we do offer our
6 consumer, even in those three distribution models that
7 I just mentioned, we still offer consumers the ability
8 to make meaningful decisions when they consider
9 subscribing to our service or whether they remain as
10 members. As I will explain below, our members do have
11 the opportunity to review the contract terms before
12 they join the services, and they do it in the setting
13 in which they're able to see the terms quickly and
14 efficiently and able to register and get access to the
15 product in a realtime environment, which is what they
16 expect from us.

17 I mean, our customers want to get online, and
18 they don't want to wait forever to set up a
19 relationship with AOL, and I submit that we're able to
20 give them the opportunity to review terms and to be
21 able to do it in a quick and timely fashion.

22 In our registration process, obviously the
23 software begins to extract, and one of the first things
24 we do is we begin with a screen that displays the what
25 I think are key terms of the relationship that the

1 member will ultimately have with us. In some
2 circumstances, we offer -- in some of our promotions,
3 we offer the member or potential member the ability to
4 try the service for a month without having to pay a
5 subscription fee. Obviously we disclose that. We
6 disclose the fact that if you keep going, that you need
7 -- or if you want to just keep it as a free service and
8 you're not interested in continuing on a subscription
9 basis, that you, you know, you have the obligation to
10 discontinue your membership before the month is out.
11 Otherwise, we disclose that you'll start getting billed
12 on a monthly basis, and it will continue going on on a
13 monthly basis as set forth in that initial screen.

14 Next we go to the actual member agreement,
15 which sets forth some of the primary terms of the
16 member's relationship with AOL, and we do give them the
17 opportunity to review our terms of service, and they
18 need to click through that before they really start to
19 set up a relationship with AOL. And if the consumer
20 says, no, I don't agree, they're out, and they're not
21 bound by anything, there is no relationship
22 established, and they're not billed.

23 The biggest advantage of this approach is that
24 it gives the consumers quick, efficient and economic
25 access to online services. The registration and review

1 process is available in realtime, in which the --
2 whether the potential member is in Baltimore or in San
3 Diego. So, it's a great tool in having a mass market
4 product that's able to economically provide an online
5 service to most Americans and really an efficient means
6 of distributing that kind of a national-based product.

7 MS. MAJOR: Could I quickly interrupt with a
8 question --

9 MR. DENGLER: Sure.

10 MS. MAJOR: -- and I don't know this, are the
11 terms of the click-through agreements, are they
12 printable or savable by the consumers?

13 MR. DENGLER: You know, that's a good question.
14 I believe with the new version of the software, which
15 we announced a release of yesterday, I believe there
16 will be an implementation of a print button --

17 MS. MAJOR: Okay.

18 MR. DENGLER: -- on those terms. Obviously
19 there's perhaps a more tedious approach in doing a
20 print screen approach, as well, but they are available
21 for review, and actually if you ever go back, you can
22 re-review the terms before you continue to move forward
23 with the registration process.

24 MS. MAJOR: Okay.

25 MR. DENGLER: Indeed, our terms of service is a

1 standard form agreement, but we submit it's to the
2 advantage of the consumer. We offer a private network
3 that is now shared by more than 25 million users. With
4 so many people participating in this vast community,
5 it's important that we lay some ground rules for
6 appropriate behavior and conduct on the service.
7 Otherwise, a few miscreants could disrupt the benefits
8 and use our service -- could disrupt the benefits and
9 use of our service upon millions of others and even
10 jeopardize our members' safety.

11 Our ground rules are spelled out in our terms
12 of service. We prohibit the obvious; namely, don't
13 engage in illegal conduct, like pandering, child
14 pornography or hacking, but we also use the terms of
15 service to prohibit conduct that is disruptive to the
16 service itself and to our members, such as using the
17 service for spamming, for just distributing content to
18 victimize, harass, degrade or intimidate an individual
19 or group or for propagating hate speech. We prohibit
20 disruption of the flow of conversation in chat rooms
21 with vulgar language, abusiveness and hitting the
22 return key a thousand times so other people can't
23 participate in that chat room.

24 It's amazing to see how quickly mischief can
25 occur on our service, and that's why it's important we

1 need uniform, uncontested rules under our terms of
2 service to take swift action. These are matters,
3 therefore, in which consumers can benefit from a
4 standard form agreement, and these are terms that must
5 be consistent among all 25 million members, or
6 otherwise, needless to say, we would have mayhem.

7 I would equate such a process as having someone
8 over for Thanksgiving dinner, they are in a private
9 home, sure, there may be lively discussion, but you
10 would have a right to expect a guest to behave and a
11 right to ask that guest to leave if they become
12 disruptive.

13 Similarly, we also provide members with key
14 assurances of safeguards, including commitments about
15 their privacy and what steps we'll take to protect it.
16 Again, this is in our standard form terms of service.

17 Additionally, over and above what you will find
18 in other services, our terms of service take great
19 steps in protecting the privacy of teenagers who may be
20 too old to be protected by the Child Online Privacy
21 Protection Act but too young to have unrestrained
22 exposure to the internet.

23 Again, these policies, which I believe are of
24 tremendous benefit to consumers, offer consistency to
25 all 25 million members and would be meaningless if they

1 only applied to some of our users because of a
2 misguided belief that standard terms should not be
3 permitted.

4 Even in the setting where we have to rely on
5 standard terms to establish a relationship with our
6 members, our members still do have a variety of options
7 on the service. For example, we offer not one but
8 three different layers of parental controls that
9 parents can use to create a safer online environment
10 for their children. That's a choice that each of the
11 25 million members can do on the service.

12 Members can also make choices on marketing
13 preferences, opting out of receiving marketing by mail,
14 telephone and e-mail and so on based on their own
15 unique preferences. Again, these choices are offered
16 in realtime and can be customized for each and every
17 member. Therefore, while certain terms must be
18 standard for the operation of a shared service, there
19 are choices that are available to consumers even in a
20 mass market environment, and these are choices I
21 believe that are unique to my industry.

22 Let me emphasize a point, members do have the
23 ability to vote on their feet. There are more than
24 5000 internet service providers on the U.S., and a
25 dissatisfied member can quickly move on to another

1 alternative if they're not satisfied with the ISP they
2 currently have. So, we believe that consumers do have
3 choices.

4 As long as consumers are fully informed of the
5 terms they are agreeing to and the choices they have
6 with respect to those agreements, we believe the
7 current online environment allows for the creation of
8 meaningful contracts between consumers and companies,
9 while recognizing the incredible diversity of
10 technologies and business models that high-tech offers.

11 Thanks.

12 MS. MAJOR: Thank you very much.

13 Professor Kobayashi?

14 MR. KOBAYASHI: Thank you.

15 My colleague Larry Ribstein and I started off
16 probably about six years ago looking at the uniform
17 laws progress, including a general economic analysis of
18 the National Conference of Commissioners on Uniform
19 State Laws. This is when I first came to George Mason,
20 and I thought that I would do this project and it would
21 end, and here I am in the new millennium still doing
22 it.

23 But as a part of this, we also looked at
24 specific NCCUSL proposals as well as looking at the
25 overall forms of NCCUSL, and last summer we undertook

1 what looked like a very interesting proposal which
2 started off as UCC 2-B, but what was more interesting
3 to us was the fact that it never became a part of the
4 Uniform Commercial Code and it became a uniform law.

5 What that meant to us based on our previous
6 research was that it's likely to get fewer adoptions
7 than if it were a part of the UCC in which the likely
8 outcome was the agreement would be adopted by all 50
9 states, and that really is the major part of our
10 comments, and that is that we think that that's -- that
11 that was a positive outcome in that our work has tried
12 to look at the benefits of diverse state laws, of
13 having diverse state laws, rather than proceeding on a
14 uniform model. So, a lot of our comments in our
15 earlier papers were to criticize NCCUSL, and although
16 we don't look at this specifically, of course, this
17 would apply to federal law.

18 But one of the things that you miss when you
19 have a uniform body promulgating laws or the Federal
20 Government promulgating laws is that you lose the
21 benefits of experimentation and variety that you would
22 get if states were on their own and came up with their
23 own solutions to these very difficult problems. I
24 mean, there's very little agreement on these issues,
25 and you can see that by the way the UCC 2-B project

1 sort of fell apart, and when you have that, it's
2 inconceivable that a uniform law body or the FTC, to
3 the extent they look at this through the warranties
4 issue, is going to come up with something that's not
5 basically cutting the baby in half. So, our argument
6 is really to go slow with the uniform law-making,
7 whether it is NCCUSL or whether it is the FTC.

8 My colleague Larry Ribstein is going to be on
9 the panel tomorrow, and he is going to talk in more
10 detail about these particular issues. I just want to
11 say a couple of things that -- Mr. Johnson stressed the
12 problem of 50 different state laws, and a lot of our
13 comment is about contractual choice of law, which, of
14 course, solves the problem in some sense, it -- you
15 know, the effect of enforcing that contractual choice
16 is to literally enforce the terms of the contract, and
17 if you do choice of law on that level, you're not --
18 it's not anarchy or cyber-anarchy as they call it, but
19 you are within the bounds of some state's law. If you
20 want UCITA, you go to Maryland or Virginia, and I being
21 a Virginia consumer hope that Virginia isn't selling my
22 rights out.

23 But the second issue is it also is a good
24 solution to the one-size-fits-all problem in that, you
25 know, UCITA and all of UCC mostly are background,

1 default rules, and it's mostly left to the contracting
2 parties, except for those things which aren't foreseen.
3 So, in one sense we would like, you know, to simply
4 recommend something, is that for the Commission to
5 recognize, and I think as many people do, that this is
6 a very dynamic, diverse and new area and to go slow.

7 As opposed to the specific issue in this panel,
8 can consumers make meaningful agreements in shrinkwrap
9 or clickwrap transactions, you know, I am largely in
10 agreement with the first two speakers. I think they
11 can, and my sort of take on it is from economic
12 analysis. I think that to the extent you look at and
13 analyze the arguments that have been put forward for
14 limiting freedom of contract in these areas, they are
15 less convincing, maybe generally -- I mean, there's
16 lots of questions about what's different about
17 shrinkwrap and clickwrap and computer transactions, and
18 I guess my answer is I don't know, but to the extent
19 there are, I think the area of computer transactions is
20 one where you have lots of informed consumers, and as
21 was said before, lots of choice and lots of consumers
22 who can exercise that choice very easily.

23 And these three attributes I think make it
24 likely that even if you have standard forms which
25 consumers are accepting without even reading, those

1 forms are not going to contain by and large
2 unconscionable terms or terms that people pay for that
3 they don't want. Let me give an example of two basic
4 arguments quickly that you see in the literature and
5 discuss why as a matter of economics we don't think
6 that they're serious concerns in terms of this setting.

7 One is, of course, there is no explicit
8 bargaining, and consumers are taking things without
9 explicitly negotiating individually the terms. The one
10 thing, as long as the parties know the terms and if a
11 business, AOL or whoever, tried to put in a term which
12 really reduced the value of the service to the
13 consumer, as long as they know about it and as long as
14 they had a competitive solution, that, of course, is
15 going to be priced in the contract. As long as it's
16 reflected in the price, then you wouldn't expect to see
17 a contract which cost the consumer more than it
18 benefits the service, because AOL is not going to take
19 the hit in terms of the lower demand for its product by
20 inserting this term.

21 That, of course, is under a situation of
22 competition and informed consumers, and the other
23 question is, what happens when consumers -- there are
24 some consumers who are not informed or a lot of
25 consumers, like me, who basically freeride and just

1 don't bother to click on the "I agree" without reading
2 the terms? Why am I comfortable doing that? It's
3 because the terms are not generated by the
4 infra-marginal consumer, the uninformed consumer. It
5 is that these services or businesses have to compete
6 for the marginal consumer. The marginal consumer is
7 informed, and this is the result from the seminal
8 article of Schwartz and Willoughby.

9 As long as you have enough informed consumers,
10 the informed consumers protect the uninformed
11 consumers. That is, when AOL competes for those people
12 on the margin who were looking for terms and competing
13 on those terms and competing in price, to the extent
14 they can't discriminate between those who read the
15 terms and people like me who don't, I get the benefit
16 -- by freeriding get the benefit of the competition
17 without actually having to be informed.

18 What would be the result of a rule which
19 actually -- a mandatory rule, whether it's federal or
20 of the states, which made people do this? I mean, it
21 really aims right at the big benefits of the use of
22 internet in the consumer market, that is, the whole
23 explosion has to be based on that you're reducing
24 transactions costs to the market, and it really doesn't
25 make any sense to try and put those back through some

1 type of consumer protection law.

2 To close, I want to say a few things about the
3 approach contained in UCITA. I mean, I think that it
4 -- we submitted our paper along with our short comment.
5 I think we are favorable in terms of -- in allowing for
6 the general enforcement with the assent of the buyer,
7 and as long as the terms contained in the clickwrap or
8 shrinkwrap contracts don't contain unconscionable or
9 against public policy terms, I think we think it has
10 recognized and struck an appropriate balance between
11 the lines of market forces and contract rules.

12 The one thing we want to reiterate, and Larry
13 is, of course, probably going to say the same thing
14 tomorrow, is our analysis does not view UCITA as sort
15 of the final rule that we expect to see in all 50
16 states. I think we view UCITA as nothing but a
17 first-generation model to be adopted by a few states,
18 and we expect and hope superior versions of state laws
19 for computer transactions will replace UCITA in the
20 future.

21 What we would not like to see, of course, is
22 this evolution towards better terms and better versions
23 of contract rules for computer information transactions
24 to be stopped by some body at some point with a
25 mandatory uniform rule.

1 MS. MAJOR: Thank you.

2 Professor Hillman?

3 MR. HILLMAN: Thanks very much to the FTC for
4 listening to us.

5 One of the things I think Bruce just said or
6 said in the middle of his talk is there needs to be or
7 he thinks that maybe there ought to be a comparison of
8 paper contracting, standard form contracting on paper,
9 and electronically, and that's actually the project
10 that Jeff Rachlinski, my colleague, and I are involved
11 in with a special emphasis on the psychology involved
12 in contracting on paper and electronically. And I was
13 glad that April introduced Jeff as having a Ph.D. in
14 psychology, which hopefully will make what he has to
15 say more credible. In fact, I was also happy to see
16 that the speaker biographies refers to him as Dr.
17 Rachlinski.

18 So, we want to answer the question asked of the
19 panel at the outset and then try to explain why can
20 consumers make meaningful agreements, and I think we
21 take "meaningful agreements" to mean agreements that
22 the law ought to enforce, and our answer is that, yes,
23 consumers can make agreements that the law should
24 enforce; however, the electronic contracting -- and our
25 focus is over the internet -- creates a whole new set

1 of issues and similarly creates possibilities for their
2 resolution. The electronic solutions are there to some
3 of the problems.

4 We think there's a great value in really trying
5 to compare paper standard form of contracting and
6 electronic. So, let me very briefly set up the doctor
7 here by saying -- by having you think about the two
8 paradigms. In the paper form contracting, and it's
9 often in the literature, the car renter who has just
10 spent eight hours -- actually, Jeff just woke up at
11 4:00 this morning from -- in Ithaca, New York and
12 arrived here a little after 12:00 because of fog
13 problems, and so think of him getting to the airport
14 and -- the airport of his destination and wanting to
15 rent a car and waiting on the line at one of the car
16 rental services, tired, wanting to get out to his
17 destination, presented with a form that has tons of
18 boilerplate perfected over the years by the car rental
19 service, and the -- Jeff thinks that -- probably that
20 all -- that the form -- the legalese and the risks that
21 he's allocating will never come to pass. He's pretty
22 confident through experience and thinking about the
23 times that he brought back the car without any problems
24 that nothing is going to go wrong.

25 He also thinks that the rental car service is a

1 reputable one and will generally not put in outlandish
2 provisions, and even if they did, the law wouldn't
3 enforce them. So -- and he's got an agent who is
4 standing over him and looks a little bit rushed, there
5 may be a line, the agent wants him to get out of there
6 as quickly as possible as well. So, Jeff or any car
7 renter decides that the cost of reading this legalese
8 is clearly outweighed -- clearly outweighs the benefits
9 of doing so, and in such a situation, I think there's a
10 caricature of a form provider, like the car rental
11 service, there's a caricature that they're ready to
12 seize upon the consumer and will put in tons of
13 unconscionable provisions. I don't think that's the
14 case.

15 On the other hand, there certainly is the
16 possibility in this situation where the consumer is not
17 reading the form for some unscrupulous form providers
18 to put in unreasonable terms.

19 In the paper world, the law steps in and deals
20 with this problem, basically following a vision of
21 Llewellyn way back when he drafted Article 2, and that
22 is that the law should create a presumption of assent
23 to any negotiated terms, which there are few, but also
24 to reasonable boilerplate in the contract, and
25 "reasonable" entails looking both at the substance and

1 the present -- the form of presentation, the latter
2 making sure that it's not completely hidden, fine print
3 and all of those kinds of problems.

4 This vision is applied in lots of forums,
5 unconscionability, reasonable expectations, specific
6 federal and state law, supplements with disclosure
7 requirements and outlawing certain irrebuttably
8 presumed to be unfair terms and cooling-off periods, as
9 well. So, there's a package of protections in the
10 paper world.

11 Now, let's think of the new internet world, and
12 I have lots of data here about how many households have
13 computers and how many are tuning in to the internet
14 world. I think I won't go into it all. I'll just say
15 obviously it's the coming thing, it's going to grow
16 bigger and bigger, and standard form contracting over
17 the internet is something that people should be serious
18 about and lawmakers should wonder about whether there
19 are needs for changes.

20 So, now we have got, instead of the harried
21 person at the -- waiting at the rental car -- at the
22 airport, we have a consumer at home, usually in the
23 evening, relaxing, surfing partially for the fun of it
24 and without time pressure. Maybe the home page when
25 they turn on the computer is Netscape or another

1 service, and the computer user clicks at the end of an
2 advertisement about a movie that is on that screen, and
3 surprise, that leads to a bookseller home page. The
4 bookseller's name -- I won't mention the bookseller's
5 name.

6 The person looks at that home page, starts
7 shopping around, admires the speed in which he or she
8 can do the shopping. The design is well planned out on
9 the page, it's convenient. In short, the bookseller
10 has invested wisely in creating a nice web design that
11 sort of makes people want to purchase. So, our
12 purchaser does make some purchases, supplies the credit
13 card information, an address and checks out.

14 Now, what we've characterized as an outlier
15 problem that we're really not interested in, but this
16 actually exists, at the bottom of the home page of this
17 bookseller, not even on the screen when you first get
18 there, there could be a -- and there is -- a statement,
19 "Conditions of Use," and if you -- nobody sees this,
20 but if they did and clicked on that at the bottom of
21 the screen, they'd get to the form contract, and it
22 says if you visit or shop, you have accepted our terms,
23 and some of the terms, not surprisingly, are warranty
24 disclaimers and things like confidential arbitrations
25 in some far-off area.

1 That we call an outlier, because we don't think
2 that's the main problem. We think current law handles
3 that problem. I don't think current law would enforce
4 those provisions simply because somebody went to that
5 page and inadvertently they got to that page, as well,
6 and even under UCITA I think these terms would not be
7 enforceable under the manifest dissent with opportunity
8 to review standard.

9 So, we're interested in the harder case, I
10 think, where once the purchaser in the book context
11 clicks to purchase, a screen may appear with the first
12 portion of the contract, and it says "agree" at the
13 bottom of the page, and that gets you to the next page,
14 and finally at the end you have to click to "agree"
15 again. Even in this situation we believe there's some
16 question about meaningful assent. After all, the
17 consumer still thinks that the terms are not going to
18 affect him or her, this over-optimism that I was
19 describing in the car rental situation.

20 The consumer, notwithstanding that he or she is
21 home in the evening and has more time, the consumer is
22 still by virtue of using the computer and admiring how
23 fast things can be done and how easy, is enamored of
24 the speed and convenience and may be sort of
25 click-happy. So, impatience rules the day even in that

1 situation.

2 The consumer still doubts that he or she can
3 understand the complex legalese of the form contract
4 and so more often than not probably clicks through the
5 agreement without reading it, even though, again,
6 they're at home at night and have more time. So, we
7 doubt whether there really are consumers who can
8 freeride on other consumers who are really reading and
9 studying these forms. They simply might not exist.

10 In addition, I think consumers aren't
11 comparison shopping for terms for the very same
12 reasons. They want to quickly make that purchase, and
13 they're having fun on the computer doing so.

14 Now, those are the two paradigms, and obviously
15 there are variations in both, but those are the ones
16 that we want to compare, and Jeff is now going to
17 present our framework for analyzing these and for
18 determining whether there ought to be new rules to
19 protect consumers in internet contracting, whether
20 there should be less regulation or whether Llewellyn
21 had the presumption quite right even for the electronic
22 age.

23 MR. RACHLINSKI: Thanks.

24 It's apparent from my colleague Bob's
25 description that the law in the paper world recognizes

1 that consumers predictably, reliably and darn near
2 completely fail to read standard form terms. There are
3 three really good categories of reasons, if you think
4 about the paradigm that Bob described, three good
5 categories of reasons why consumers wouldn't do that.

6 First, it's perfectly rational not to, as
7 opposed to in the time you have available -- time is
8 valuable -- in the time you have available, it's not
9 likely to yield any benefits over relying on the
10 reputation of the company in the paper world certainly,
11 particularly since standard form contracts will be
12 commonly given to you at a time when you're, in fact,
13 quite busy, hurried, tired or have some other
14 impediment, making time even more valuable.

15 Second, beyond that, in fact, there are social
16 reasons, right? Attempting to read in front of a form
17 provider's agent, attempting to read the standard form
18 terms signals to that agent that you believe that he's
19 either a crook or he works for a crook or someone who
20 might be a crook, or worse, it signals that you're an
21 attorney. Trying to read that will signal that you're
22 some sort of weirdo outlier. I know, as an attorney
23 I've done it, and indeed, people will roll their eyes
24 at you and such.

25 It also, of course -- social reasons, the form

1 provider's agent may have developed a rapport with you,
2 not perhaps in the rental car context but in similar
3 contexts, wherein he or she will hand you the
4 boilerplate and say, here's what the lawyers make us
5 give you, or some other nonfraudulent but coercive way,
6 right, whereby the person looks friendly and knows you
7 and gets you to sign it without getting you to read it.

8 But there's a third category of reasons, also,
9 that we're referring to more or less as intrapersonal
10 cognitive reasons for not reading this, beyond sort of
11 rational calculation, beyond the social pressure, which
12 is that people really make decisions, especially when
13 they're under some time pressure, with rules of thumb
14 for deciding things, like that usually this works, so
15 it should be fine, and people are quite over-optimistic
16 about the endeavors they undertake.

17 I'll just give you a couple examples about the
18 over-optimism that most people have. Eighty percent of
19 automobile drivers say they're less likely to get into
20 an accident than the average driver. Eighty-seven
21 percent of federal magistrate judges say they are less
22 likely to be overturned on appeal than the average
23 federal magistrate judges. Ninety-six percent of
24 academics feel they are better teachers than average
25 teachers, apparently Lake Woebegone University. And

1 the best is, of course, that 99 percent of engaged
2 couples about to be married believe they are less
3 likely than the average couple to get divorced.

4 Now, there is widespread optimism about the
5 activities one undertakes leading one to underestimate
6 radically, in fact, the likelihood that something bad
7 is going to happen. So, when you think about the
8 likelihood of having to engage in an arbitration in
9 Seattle, Washington because you clicked on a website,
10 it probably does not come to mind that this is going to
11 be important in any way.

12 Now, compare this to these reasons on the
13 internet. Things change online, right? The rational
14 reasons are quite diminished, as many people have said.
15 You have more search time available, you're not
16 hurried, search costs are lower, you don't have to go
17 to a different rental car counter to look for the other
18 terms, and reputation is easier to spread. So, fine,
19 that makes things a little less enforceable or a little
20 more enforceable, rather, so more consumers are more
21 apt to read it or we would blame them for not doing so.

22 Secondly, the social reasons are gone, right?
23 You are not signaling anything to anybody by flipping
24 through those terms. There is no one there. It's just
25 a computer, it doesn't care, so you are not signaling

1 anything. So, the social reasons are quite diminished,
2 no one is pressuring you, but the cognitive reasons
3 remain, the intrapersonal cognitive concerns. You're
4 still over-optimistic about it.

5 And also, by the way, in the real world there
6 is a rule of thumb about signing your name, that that's
7 quite important. That's usually a signal that the
8 legal system has sent you that you, in fact, need to
9 slow down and think. Clicking, I agree it's not clear
10 that that has the same implication for a consumer, that
11 it invokes the same rule of thumb about slowing down.
12 I would say -- I would like to say that I know whether
13 it has the same rule of thumb, but I don't know. I
14 don't think anyone else does either, but it may, in
15 fact, be the case that that that's just as heuristic, I
16 agree it's okay, whereas signing your name means you
17 need to slow down.

18 More importantly here also, that the form
19 provider online has tremendous capacity to integrate
20 their disclaimers and warranties into their marketing
21 structure, as the bookseller has, and, in fact, a
22 fancy, elaborate, clever-looking web page with very
23 blandly phrased "terms of service" on the bottom may
24 not -- may, in fact, lead the consumer not to be
25 interested in clicking on terms of service, and indeed,

1 even better than that, if you're a form provider on the
2 internet, you can collect as much data as you want on
3 which consumers and what type of consumers and what
4 perhaps background material will lead consumers to
5 either read or not read the terms of service.

6 So, if you're a form provider, in fact, collect
7 some data. I have wonderful psychologists, graduate
8 students, friends, who will work cheaply to analyze it
9 for you, if you like, to decide what would induce a
10 consumer to completely avoid reading terms of service
11 provisions, and you can figure out which consumers will
12 do it and what circumstances they won't do it, and for
13 various -- for reasons that the consumer may not even
14 be aware of and for reasons that you may not even be
15 aware of. All you have to know is that the background
16 is purple, they won't read the terms of service, as
17 opposed to green or blue or some such thing. You can
18 collect as much data as you want on the internet, makes
19 it very cheap.

20 Thus, although electronic commerce really
21 diminishes two of our key reasons for -- the lost key
22 reason for failing to enforce standard form terms, the
23 rational reasons and the social forces, it doesn't have
24 -- which, by the way, thereby reduces our concern about
25 these terms online in the electronic format --

1 electronic format, in fact, does very little to
2 diminish the cognitive factors and, in fact,
3 exacerbates them or creates the opportunity to
4 exacerbate those sort of background characteristics,
5 stuff going on in your head that you don't even know
6 about to keep you away from reading -- consumers away
7 from reading standard form terms.

8 If you think about it, of course, it doesn't
9 matter how cheaply it is if you look at a different
10 site if you believe the probability that these terms
11 will come to pass is absolutely zero, right? That's
12 the essence of over-optimism in psychology. You don't
13 bother to search anywhere else, no matter, regardless
14 of the cost, so it undermines both of the two factors.

15 But we do add that electronic contracting
16 presents an interesting means of ameliorating some of
17 these concerns, as well. Courts and regulators could
18 identify a standard method of presenting the important
19 standard form terms that they could more or less assure
20 themselves of that enough consumers would read it to
21 create this sort of reputational market that Professor
22 Kobayashi -- Dr. Kobayashi I would say, too -- is
23 concerned with.

24 In fact, one might suppose that the description
25 of AOL's terms -- in fact, I remember setting up for

1 AOL, the whole screen pops out at you, it does indicate
2 to you that you are going to pay after the first three
3 months if you fail to do anything about it. Courts and
4 regulators could, in fact, identify that as a key way
5 of breaking through and signaling consumers that this
6 is something you have to think about and of not -- and
7 if it were done in a fairly sort of standardized,
8 stylized way, that it would get around those concerns
9 that this is being built into the marketing in some
10 way, whereas otherwise circumventing it, and, of
11 course, this standard thing popping up doesn't have any
12 social forces associated with it. So, it would be much
13 easier to take advantage of those sorts of things to
14 ameliorate many of the concerns that we have in the
15 paper world with standard form contracts.

16 In summary, I suppose what we're trying to
17 accomplish with this paper we're writing and the
18 comments we submitted is to create a framework for
19 assessing the differences between the paper world,
20 which is well known to the courts and well understood
21 and has a well-developed body of law, and the
22 electronic world, and indeed there are some
23 differences, of course, as I said, the rational -- the
24 information costs in a sense are much lower, but, in
25 fact, much of what the law has done already with

1 enforceability of standard forms applies very well to
2 the internet.

3 MS. MAJOR: Thank you very much. Every single
4 one of these presentations was very informative and
5 helpful. Let me just note, I think Mr. Dengler might
6 have to leave early to catch a flight --

7 MR. DENGLER: No, I'm fine. I'm fine, thank
8 you.

9 MS. MAJOR: Oh, okay. I was going to say, if
10 he gets up in the middle of a question, that doesn't
11 mean he's offended or something.

12 MR. DENGLER: I'm running.

13 MS. MAJOR: I'd like to just have each of you
14 talk a little bit more about the concept of competition
15 in these non-negotiable contracts, and you have the
16 example of a consumer walking up to an ATM machine and,
17 you know, they're presented with the terms, and they're
18 told that they're going to be charged, you know, a \$2
19 transaction fee, the fact that the consumer then
20 continues with that transaction, is that meaningful
21 assent?

22 Is that, you know, the fact that they don't
23 walk away because you have no other MAC machine or ATM
24 machine in the vicinity offers a transaction with \$1
25 transaction fee, do we really have meaningful assent?

1 And in that example, this is happening pretransaction,
2 this isn't happening post-transaction.

3 And, you know, an example perhaps in the
4 computer information industry might be clauses such as
5 mandatory binding arbitration clauses. What type of
6 incentive exists for manufacturers, you know, to not
7 collude with one another and to extract mandatory
8 binding arbitration clauses from these agreements,
9 particularly when consumers really don't understand the
10 effects of mandatory binding arbitration, the lack of
11 an ability for some type of collective action and so
12 forth?

13 MR. JOHNSON: Well, I think it's -- the key is
14 that online markets require you to build and preserve a
15 reputation in a way that geographically local markets
16 do not, and strongly do. I mean, you really are facing
17 a whole global set of competitors for the most part in
18 a way that was not previously the case.

19 I think competition policy is very important,
20 but I think it would be a real mistake to use any
21 particular failure of competition policy to migrate
22 over to redo policy with regard to efficient
23 contracting and lowering transaction costs.

24 I'm sure others can give real world examples of
25 -- but the one I gave earlier is the one that comes to

1 mind. I mean, if somebody actually tried online, in a
2 significant online marketplace of some kind, to change
3 a term that was significantly disadvantageous and, you
4 know, enforce it by requiring somebody to go to a
5 physically remote location to resolve a dispute as
6 opposed to an online dispute resolution service and so
7 forth, that would get known and written up in the press
8 and people would avoid that brand, you know, and unless
9 it happens to be a brand associated with a product that
10 you have no opportunity to avoid, and that goes back
11 into certain well-known competition areas.

12 MS. MAJOR: But would you say that consumers --

13 MR. RACHLINSKI: Why is it on there, then? We
14 found that on a reputable marketer's site. We didn't
15 make that up. That's on someone's site. Why is it
16 there if no one would do it?

17 MR. JOHNSON: Because the lawyers who were
18 drafting that got carried away and the marketing people
19 win in these cases, I would argue. In fact --

20 MR. RACHLINSKI: Well, it undermines the point
21 then, right? Someone's done it. What if they get
22 carried away when this becomes an actual litigated
23 issue?

24 MR. JOHNSON: Well, because the business side
25 controls the decision how to keep their customers

1 happy, and the reality in the online world is you get
2 your money back if you're unhappy. I mean, in fact,
3 satisfaction guaranteed policies are all over the net,
4 and we can talk as lawyers forever about what the
5 language ought to say, but it doesn't have an impact in
6 the marketplace, because you're building a relationship
7 over the long term with an online customer, and if you
8 don't build that relationship, you will be irrelevant
9 in the marketplace.

10 MS. MAJOR: Even if the consumers don't read
11 the --

12 MR. JOHNSON: Right, yeah, right.

13 MS. MAJOR: Professor Kobayashi, was there
14 something that you had to add?

15 MR. KOBAYASHI: Let me see, there are really
16 two issues. One is, of course, I guess there can be
17 market power, and, of course, if there is market power,
18 the ATM in the remote location, then, you know, that is
19 probably not, again, a contract law issue, but the
20 other half of this agency, which would be an antitrust
21 issue.

22 MS. MAJOR: Is there a point, though, where
23 market intervention -- we see market intervention all
24 the time -- is necessary to ensure the balance of, you
25 know, the social benefits we recognize with efficiency

1 and the fact that the cost of transactions might be
2 lessened with the standard contracts, but then the
3 social benefits that are given up, you know, such as
4 intellectual property benefits or something like that,
5 is there a time when intervention is appropriate at
6 that point?

7 MR. KOBAYASHI: Well, I guess my position is
8 yeah, I mean, you have state contract law which, of
9 course, is -- you know, more -- there are some
10 mandatory rules but mostly default rules, but I mean to
11 the extent courts are eviscerating contractual terms
12 because of unconscionability, I mean, that's all within
13 UCITA. Whether you want to go farther, it's not clear.

14 I think my basic point is that when you look at
15 what we're going to do in this new area, you basically
16 want to sort of stand back before you sort of uniform
17 -- make everything unified, and I think that to some
18 extent, you know, we're not saying that you don't need
19 some regulation on freedom of contract. It's just that
20 our basic point is we think there's a way to do it
21 which isn't a uniform way.

22 I want to say something about the arbitration
23 clause. I mean, the big part of our paper is, of
24 course, the choice of law clause, which is -- I do want
25 to let Larry talk about this in the other forum, but I

1 mean arbitration, of course, is a choice of forum, and
2 to some extent people choose it not just to sort of
3 hammer the consumer and arbitrate somewhere just south
4 of the North Pole, but arbitration clauses are there
5 because a lot of times you don't want to actually have
6 -- it's cheaper than actually going through some civil
7 litigation or it's cheaper than actually trying to
8 petition the FTC to get some consumer protection action
9 going. So, I mean, arbitration, you know, to the
10 extent it is a benefit to both sides is not necessarily
11 a bad thing.

12 MS. MAJOR: Do you think it's a balanced
13 benefit to both sides? Do you think --

14 MR. KOBAYASHI: Well, I mean, once again, I
15 think the economic issue is whether or not both sides
16 or the terms reflect a -- that term and price within
17 the contract. If it's not, then yeah, I mean -- but
18 the paradigm is not that firms impose these contracts.
19 The firm in contracting is that if arbitration raises
20 the cost to the consumer and the consumer knows about
21 it, then that should be reflected in the price of the
22 contract.

23 One troubling thing I think that Professor
24 Hillman and Rachlinski's comments I think touched on is
25 that what do you do when there's discrimination? I

1 mean, these companies get information on you and that
2 it's no longer a standard form. I feel comfortable
3 with standard forms, but what happens when they know --
4 I mean, somebody told me that Amazon, when you buy a
5 lot, they keep track, and then you get a different
6 price, and they didn't tell me whether it's higher or
7 lower, but I am now, you know, going on Amazon with my
8 Net Zero account and my GMU account, and maybe I'll use
9 those three AOL things now, but -- just to disguise
10 myself. I mean, my kids are buying a lot of books now.

11 But I mean standard forms are nice because they
12 apply to everybody. There is some worrying when
13 there's price discrimination or discrimination on
14 terms, and I think that's common.

15 MS. MAJOR: I think there are recognized
16 efficiencies. I have to let Mr. Dengler speak. He has
17 been raising his hand patiently.

18 MR. DENGLER: I didn't want you to think I was
19 dodging any questions since I don't have to run now,
20 but quite frankly, it still turns to market forces.
21 You talk about the ATM machine. I was stuck at Dulles
22 Airport and realized a moth came out of my pocket
23 rather than some bills I thought I had to pay for a
24 cab. I went ahead and clicked through that \$2 fee that
25 I had to pay because I needed the money. I mean, I

1 made the decision that the importance of getting cab
2 fare was more important than weighing whether or not I
3 wanted to pay the \$2.

4 In terms of the arbitration situation, for
5 example, in a standard form, I mean, there is a market
6 force that affects the vendor. I mean, the vendor may
7 find that it is more economically efficient not only
8 for the vendor but for the benefit of the vendee to use
9 arbitration as a mean to allocate or as a mean to
10 allocate costs and to control costs on some sort of
11 dispute resolution process. So, the point is there's a
12 benefit there, basically the vendor making the decision
13 I am going to rely on arbitration in order to reduce
14 the risk of cost on disputes.

15 But on the flip side, there's still safety
16 valves I think in place if that provision goes too far,
17 and I think we're all familiar with the Gateway
18 decision, unfortunately I already forgot the name of
19 the plaintiff, Bozeman or -- no, it wasn't Hill and it
20 wasn't Prosey -- Brower, that's it, thank you very
21 much, where there was an arbitration provision, but it
22 required the consumer to pay \$4,000 to file an
23 arbitration fee, and they automatically forfeited the
24 \$2,000 no matter what, plus it was the English rule on
25 who would bear the cost depending on the outcome of the

1 arbitration.

2 And it's funny, because the Court pointed out
3 that there was really nothing inherently wrong with
4 having an arbitration provision, it's just the filing
5 fee was outrageous, and from an unconscionability -- I
6 don't think it was an unconscionability standpoint, I
7 think it was an unfairness test that that provision
8 just, although the concept was right, the approach was
9 wrong. So, I think the safety valves are still there.

10 MS. MAJOR: Okay, let me take a couple of
11 questions from the audience.

12 One question is you mentioned that there --
13 this is to David Johnson -- you mentioned that there
14 may be some terms that are truly unconscionable. Under
15 what circumstances might a choice of law term be truly
16 unconscionable?

17 MR. JOHNSON: Well, I think the guidepost for
18 that is the Carnival Cruise case that says that if the
19 choice of law and the forum are effectively to defeat
20 the ability to get any redress, that that's not so -- I
21 mean, you could call that unconscionability. It's
22 really a condition under which choice of law and forum
23 should be enforced. So, it's probably somewhat
24 context-specific.

25 Because we're dealing with the online

1 marketplace here, I think we should look harder at
2 online dispute resolution systems just because you know
3 it's easy to get there as compared to traveling across
4 the country, and I very much liked the earlier remarks
5 about choosing a substantive standard from a set of
6 responsible state laws, which does help to mitigate the
7 application of multiple differing rules.

8 MS. MAJOR: I have another question to Brian
9 Dengler and I think to David Johnson.

10 If David Johnson is right that no internet
11 merchant would impose a remote forum for reputation
12 reasons, why does AOL still have 25 million customers?
13 AOL tried to enforce such a clause in California -- and
14 I can't read the rest of it.

15 MR. DENGLER: It's cost allocation. I mean,
16 let's be real frank. I mean, 25 million members, I
17 mean, quite frankly, if it's too -- for us to -- it's
18 the Carnival Cruise type approach, and the Carnival
19 Cruise type thinking that was involved with that, the
20 point being that it gets too expensive to litigate
21 every single issue in all corners of this country.

22 So, from a risk allocation standpoint,
23 obviously the term does indeed -- our terms of service
24 say that, you know, the forum is in a court in
25 Virginia, but I think that goes back to the safety

1 valves that I believe are still in place in this
2 country. You have that decision, Mendoza, in
3 California where the Court felt that the consumer would
4 not receive adequate protection under Virginia laws and
5 kept the case in California, but then you have other
6 decisions such as in Caspy -- I hope I pronounced that
7 name correctly -- in New Jersey where the opposite
8 result came out, where the Court there enforced the
9 venue provision on the Microsoft Network agreement.

10 MR. JOHNSON: I would like to just -- what I
11 said was that if you combined a remote forum with an
12 unconscionable term, I think the real -- the answer to
13 the question of why AOL has lots of customers is that
14 they -- A, the way they treat their customers is viewed
15 as satisfactory to those customers, and secondly,
16 anybody who is dissatisfied can just quit and go
17 someplace else. So, there is really no worry about the
18 theoretical possibility that they would -- you know,
19 that you would have to come to Virginia to sue them.
20 You just quit and join another service if you don't
21 like what they're doing.

22 MS. MAJOR: Well, this question somewhat
23 follows up on that issue. The Gateway case that was
24 last litigated to try to uphold the ridiculous
25 provision versus consumers, what do you make of this?

1 And I assume this is getting to the point of what about
2 all of the consumers who didn't contest the mandatory
3 binding arbitration clauses and just either sat back,
4 saw how much the arbitration was going to cost and did
5 nothing. Was there meaningful assent in that type of
6 situation?

7 MR. JOHNSON: Are you asking the psychologist?

8 MS. MAJOR: I'm asking anybody.

9 MR. DENGLER: We are kind of presupposing that
10 there's a dispute before they even get on the service,
11 and obviously I think, you know, the consumer is more
12 interested in the product rather than all the little
13 concerns that may arise if something goes wrong in the
14 future, and I think that still -- it still circles back
15 to the market force type approach, is that, you know,
16 the real interest at the time is to get on the service,
17 it's based on reputation, it's based on the number of
18 people that that service may have, which is kind of in
19 my view an indicia of the success of the service, and
20 again, I circle back that there are safety valves when
21 terms go that far.

22 I know Gateway dispensed rapidly with that type
23 of arbitration provision and as a reaction to not only
24 a court decision but the market forces, and quite
25 frankly, I think has come up with a very amicable

1 arbitration proceeding now with the National
2 Arbitration Forum, NAF -- I hope I pronounced that
3 correctly -- and has gone 180 degrees the other way and
4 came out with what I think is a very -- a very consumer
5 friendly approach to resolving dispute resolution.

6 MR. RACHLINSKI: Let me say one thing about
7 that, that there are two things being said at the same
8 time. One is consumers don't care about these clauses,
9 which is exactly what we're saying, and two, somehow
10 reputation markets, even though consumers don't read
11 these, don't know about them, don't care about them,
12 somehow still work. Consumers have to do one or the
13 other for the reputation marks to actually function.
14 They have to care about it or it has to actually --
15 they have to actually know about it, and if they don't
16 know about it, then there's no possibility that the
17 reputation market will function perfectly.

18 Now, it will function well, it will solve a lot
19 of problems, but it can't possibly function perfectly
20 in the world where no consumer is reading the standard
21 form terms, and, in fact, consumers don't particularly
22 care about these or don't think these things are going
23 to happen to them, that that -- I mean, the two things
24 sort of undermine each other, and I will say that
25 there's probably a lot of heated agreement here, in

1 fact. In many ways, what we're saying is the courts
2 shouldn't enforce the clause if it's unconscionable, we
3 quite agree, but there is nothing special about the
4 electronic commerce aspect of this.

5 MS. MAJOR: I need to end this panel,
6 unfortunately we have gone over our time, we only have
7 an hour left for the last panel of the day, but we are
8 going to post the questions online, and everybody will
9 have a chance to respond.

10 Thank you very much.

11 (Applause.)

12 (A brief recess was taken.)

13 MS. SCHWARTZ: Okay, we are fast approaching
14 the end of the day, and we have one last panel, and
15 it's going to be excellent, so I wanted to get started
16 and give them their full opportunity to speak.

17 This panel is the first of two on the subject
18 of UCITA, and although the statute has come up in the
19 -- throughout the day actually at various points, we
20 come to this first panel on UCITA to focus more
21 specifically on its background, the process by which it
22 was drafted and the prospects I think for adoption, and
23 we have an excellent panel of speakers who have been
24 deeply involved in this area.

25 Our first speaker is going to be Mary Jo

1 Dively, who is with Klett, Rooney, Lieber & Schorling,
2 and she chairs her law firm's technology law group, and
3 she has been involved deeply in the drafting of both
4 the Uniform Electronic Transactions Act and UCITA,
5 serving as the ABA adviser for the UCITA statute. She
6 has a Power Point, which as you can see is getting put
7 in place right now.

8 Our second speaker is Amelia Boss. She is
9 professor of law at Temple University. She is
10 certainly serving as the ALI member for the drafting
11 committee to revise Articles 1 and 2 of the UCC, and
12 she served as the ALI member of the drafting committee
13 that was drafting the new Article 2-B, which was the
14 predecessor to UCITA.

15 And finally, the third person on the panel is
16 Steve Sakamoto-Wengel, who is the Assistant Attorney
17 General with the Consumer Protection Division of the
18 Maryland Attorney General's Office, and I think most of
19 you know, Maryland is the only state in which UCITA has
20 been adopted and is now in effect.

21 So, with that, we will start with Mary Jo if
22 she is almost ready to begin.

23 MS. DIVELY: Good afternoon.

24 Well, it's been long and I understand a very
25 stimulating day. It was for me. My flight was

1 cancelled coming in this morning, and then the last
2 flight that could get me in got me here about 3:30, and
3 then the cabdriver took me to the Federal
4 Communications Commission instead of the FTC, so it's
5 been an interesting afternoon.

6 My job, as I understand it, on this panel is to
7 explain a little bit of the background of UCITA, what
8 its intentions were, how it was drafted, and then to
9 just briefly introduce what the warranties are that
10 UCITA provides, and then I think Professor Boss and Mr.
11 Sakamoto-Wengel will deal with those in more detail.

12 I am very pleased to be joined on the panel
13 today by Professor Boss who has one of the keenest
14 minds I've ever encountered and is certainly someone
15 with whom I have enjoyed a lot of spirited debate about
16 UCITA, and also by Mr. Sakamoto-Wengel, who I was
17 privileged to work with on the enactment in Maryland.
18 He provided a lot of good upgrades, and we were pleased
19 to work with him.

20 I'll just start first by acknowledging how I
21 became involved with UCITA. First, I'm a private
22 practice lawyer. I have about 17 years experience in
23 representing licensors and licensees in basically about
24 an equal number; started out mostly with licensees, but
25 in recent years have come to represent more licensors

1 as the high-tech world has discovered Pittsburgh, where
2 I live.

3 Twelve years ago, I became involved with the
4 American Bar Association's Information Licensing
5 Committee and through that became involved in the
6 initial debates about whether what was, you know, then
7 Article 2 being applied to software really made sense,
8 did Article 2 fit software transactions?

9 I participated in those debates, and basically
10 that committee ultimately recommended to the National
11 Conference of Commissioners on Uniform State Laws that
12 they needed to consider whether some upgrades and
13 changes to Article 2 would be appropriate to make it
14 more appropriate for software transactions.

15 And once NCCUSL decided to take that up, a
16 drafting committee was formed. I was ultimately asked
17 to serve as an ABA adviser to that drafting committee
18 and so in that guise attended almost all of the
19 drafting committee meetings, and my role there was
20 really not to be a proponent or opponent of the effort
21 but just to sit back and be kind of a neutral observer
22 and adviser with the goal that we would get a law that
23 was clear and workable and would provide the kind of
24 guidance to practitioners who increasingly were
25 expected to understand this very complex world of

1 licensing but didn't have a lot of background or a lot
2 of help.

3 Indeed, that's the reason I first turned to the
4 ABA committee back in 1987, because no one in
5 Pittsburgh was doing this stuff, and I couldn't find
6 anyone to help me, but yet I was expected to be
7 learning this and understanding it.

8 The purpose of UCITA is really to set up a
9 uniform contracting regime for licensors of
10 information, in a sense to provide a roadmap for
11 practitioners who may not be experienced in licensing.
12 Now, has UCITA succeeded by these standards? I think
13 that it has. No one, not even its strongest
14 supporters, would argue that UCITA is not a complex and
15 challenging statute. I don't know how it could be
16 otherwise given the breadth of issues that it's
17 expected to cover.

18 Consider the challenge if you were sitting in
19 the shoes of the drafting committee eight years ago, I
20 guess six years ago, of drafting a commercial law that
21 had to educate the public and practitioners about an
22 area, software licensing, that is not widely
23 understood, that must fit within the intellectual
24 property laws that are promulgated by the Federal
25 Government, that must despite it's overarching status

1 as a commercial law take into account the millions of
2 consumers that would be affected by it and come up with
3 a balanced way to address them, and finally, to provide
4 the kind of flexibility that's necessary not to stop
5 this freight train of growth that has been basically
6 driving our economy for the last eight years.

7 I think that at the end of the day UCITA
8 probably didn't satisfy anybody fully who participated
9 in the drafting process. I think that probably stands
10 as kind of a tribute to the drafting committee. They
11 managed to get I think enough compromises to get a wide
12 enough support for the law. It is a serious act, and
13 it requires study. I don't think that's a negative,
14 nor is it unprecedented in American commercial law.

15 The law on which it is based and particularly
16 upon which many of its policy choices are based and
17 which is widely considered to be the most successful
18 commercial law in American history, Article 2, today,
19 even after being in effect for more than 40 years still
20 requires almost a year's worth of classes in law school
21 before you can understand it or in order to be taught
22 properly. I wonder how many of us in the room that are
23 lawyers can remember scratching our heads when we first
24 were presented with the definition of goods and trying
25 to figure out, well, what does that really mean?

1 Indeed, I think many of the people who are
2 appearing on panels today and tomorrow make their
3 livings in part by teaching Article 2 to people. So,
4 clearly just because something requires study and
5 teaching does not mean that it will not be a successful
6 commercial law.

7 So, how did UCITA begin and how was it enacted?
8 As I mentioned before, its genesis was really this ABA
9 committee recommendation followed by a study from
10 NCCUSL, and essentially the conclusion that was reached
11 were that sales of goods were different from licenses
12 of software in a number of different ways and that this
13 was making it impossible to achieve consistent,
14 predictable and fair results from the application of
15 Article 2 to software.

16 Indeed, at the time there were already several
17 inconsistent decisions resulting from the Court's
18 attempts to apply Article 2 to software. In my own
19 jurisdiction, we had to deal with the Adventa-Unisys
20 case. There were numerous contrary cases around the
21 country, and it was really a challenging time to be
22 drafting these kinds of contracts back in the late
23 1980s.

24 So, initially, NCCUSL began by putting this
25 under the rubric of Article 2, which was then, as many

1 of you probably know, also being revised, and that
2 revision continues today. Ultimately, it just became
3 too complex and for a number of reasons the software
4 contracting rules were pulled out and put into a
5 separate statute, and that became UCITA.

6 What's NCCUSL? I get this question a lot when
7 I talk about UCITA, because it seems to be something
8 that only lawyers know about. NCCUSL is a national
9 body of commissioners that are appointed by the
10 governors of each state. The big rich states appoint
11 eight or ten commissioners; the smaller states or more
12 thrifty states may appoint two or three commissioners.
13 Commissioners are academics, judges and practitioners,
14 kind of balanced evenly among those three groups, so
15 that you get a very nice balance of people who approach
16 these problems in varying ways.

17 The purpose is simply to prepare uniform
18 legislation to be adopted in all states where it's
19 appropriate for a state to adopt uniform legislation,
20 and they take up a number of different topics every
21 year. Probably their most famous projects are the
22 Uniform Commercial Code and more recently the Uniform
23 Electronic Transactions Act.

24 So, how does NCCUSL go about drafting the law
25 once they decide to do it? Well, first they appoint a

1 drafting committee. In UCITA's case, they appointed a
2 drafting committee that was mixed of, again,
3 practitioners and academics, and then they appoint a
4 reporter, usually a law professor in the case of UCITA,
5 Professor Ray Nimmer from the University of Houston Law
6 School, who actually then writes the law. There are
7 advisers from the ABA who are appointed to advise the
8 drafting committee, and then there is an open drafting
9 process over the number of years that it takes to draft
10 the statute.

11 The UCITA drafting committee met 18 times over
12 six years, each meeting lasted for about two and a half
13 days, sometimes longer. This resulted in over 500
14 hours of aggregate meeting time. The chair of the
15 committee, Connie Ring, who you will see on tomorrow's
16 UCITA panel, was quite generous in granting all
17 interested parties ample time to present their views,
18 and they did, both orally and in writing between the
19 meetings.

20 Although the points of view differed widely,
21 often it was my observation that the process itself was
22 very much marked by civility and cooperation. Drafting
23 meetings were also attended by a number of observers,
24 many of whom were accompanied by counsel. The
25 observers included really everyone you might think

1 would be interested in this kind of a statute. There
2 were representatives of industry trade groups, consumer
3 groups, the motion picture, publishing and recording
4 industries, banks and other financial services groups,
5 automobile and insurance companies and a large number
6 of Fortune 500 licensees.

7 Representatives of entities outside the
8 software industry actually equaled or outnumbered at
9 many meetings the number of representatives of the
10 software industry who were there, and the typical
11 manner of proceeding at these meetings was that the
12 chairman would merely simply go around the room, the
13 Act would be read line by line, section by section, and
14 with every section the chair would go around the room
15 and he would ask anyone interested if they wanted to
16 make a comment.

17 So, it was a long process, but I think that the
18 committee and the advisers and indeed everyone who
19 attended these meetings was quite well educated about
20 the varying issues that come up in these types of
21 transactions.

22 In addition, I think it made it impossible for
23 this process to be dominated by any single group,
24 because there was simply so much input by so many
25 people, and if you look at the postings on the various

1 websites, I think you'll see that UCITA has a very
2 active life on the internet. You just type it in, and
3 you will get -- you will get the gamut of comments from
4 we hate it to we love it.

5 There is a particular website that I think
6 tries to gather all of the comments, both pro and con,
7 that's www.ucitaonline. It goes back to the very
8 beginning of the drafting process, has every draft that
9 was considered, has all of the comments, et cetera, and
10 all -- a lot of legal articles and the like, and it's
11 just a very useful site for those of you who are more
12 interested in learning about UCITA.

13 I think that I ought to note that as much as
14 any other group, consumers were very much represented
15 in the UCITA drafting process. A representative of the
16 consumer project on technology attended most of the
17 meetings and was, in fact, one of the most frequent
18 speakers at the meetings. The Consumers Union sent
19 representatives to many of the meetings and presented
20 at least six written substantive submissions over the
21 course of the drafting, which was as many if not more
22 than any other group submitted.

23 These submissions contained requests for dozens
24 of changes. Some were major; some were minor. All
25 were in my observation carefully considered by the

1 drafting committee. Some were adopted; some were not.
2 It's not surprising that not all were adopted, but I
3 think that many of the ones which were represented
4 valuable upgrades to the statute, such as correction of
5 errors online and the like.

6 It's also important to remember that there were
7 many members of the drafting committee who presented
8 substantial and effective consumer amendments, and many
9 of those were adopted, as well. So, now that we've
10 spent just a bit of time talking about UCITA's roots,
11 I'll spend the rest of the time just introducing what
12 the warranties are and then turn it over to Professor
13 Boss and Mr. Sakamoto-Wengel.

14 UCITA warranties really have their roots in
15 Article 2. They are -- and -- anyway, they -- they
16 result from an Article 2 tradition, but with sort of an
17 added fill-up that they come from an industry that
18 typically has focused more on effort than results, and
19 so you have to think about that blended tradition of
20 services usually focus on efforts, goods usually focus
21 on results when you look at the UCITA warranties and
22 think about whether they're appropriate.

23 Implied warranties are, in fact, creatures of
24 UCC Article 2, would not otherwise exist in law, and in
25 states where Article 2 expressly does not apply to

1 software, it's not likely that there would be any
2 statutory implied warranties that would apply to
3 software and information transactions. This becomes
4 important because with the ongoing revisions to Article
5 2, it is -- at least in the current drafting and what
6 is expected to be the final draft, software is removed
7 from Article 2, expressly removed from Article 2, so
8 its warranties no longer would apply.

9 UCITA creates implied warranties for computer
10 information transactions and I think thereby provides a
11 good benefit for licensees who otherwise would have to
12 negotiate to get them. The UCITA warranties, however,
13 are tailored to the information contracting arena. I
14 don't have hours to spend parsing these. I invite you
15 to spend hours reading them.

16 What are the implied warranties? They are
17 really four new warranties. One, noninterference --
18 noninfringement and noninterference; two,
19 merchantability of a computer program; three,
20 informational content; and four, licensee's purpose and
21 system integration. We will just go through those
22 briefly.

23 As I said before, it's a -- again, we have to
24 remember, a blending of the two traditions. Goods
25 focus on results; services focus on effort. Since the

1 UCITA subject matter has elements of both, the warranty
2 structure reflects the combined influence.

3 The noninfringement warranty simply says that
4 when a licensor provides information in the normal
5 course of business, the licensor has the duty to see
6 that no third-party claim of infringement or
7 misappropriation will affect the delivered information.
8 I think this is something that most of us as licensees
9 would want to see, and if I did not have it under
10 UCITA, I would go and negotiate for it separately, and,
11 in fact, most of what I do as a lawyer when I'm
12 representing licensees is try to negotiate these kinds
13 of warranties.

14 As in Article 2, this warranty is not provided
15 in a transfer by a person other than a dealer in
16 information. The warranty covers the information when
17 it's delivered and as it's delivered. It doesn't
18 pertain to future events and uses such as subsequently
19 issued patents. And UCITA also expressly points out
20 that this warranty applies only in the U.S. and other
21 countries that are expressly mentioned in the
22 agreement, and I think that this is an important
23 guidepost for practitioners, because many times
24 practitioners don't stop to think about the worldwide
25 implications of infringement, and I think that this --

1 it would be I think overreaching for a statute to say
2 that these warranties -- that this infringement
3 warranty would apply worldwide.

4 It's almost impossible, and those of you who
5 negotiate these warranties daily know what I mean.
6 It's almost impossible to get these kinds of warranties
7 worldwide, but it is usually possible to get them in
8 the countries where you want them, and what UCITA does
9 is remind you to make sure that you have looked and
10 been careful and gotten them where you need them.

11 The noninterference warranty says that all
12 licensors warrant that no act or omission of a licensor
13 will result in a third party holding a claim (other
14 than infringement), because that's covered by a
15 separate -- by the separate warranty, that interferes
16 with the enjoyment by the licensee of its interest.

17 The next warranty is the merchantability
18 warranty, which many of you should be familiar with
19 under Article 2, and it basically is intended to say
20 that it covers what your ordinary expectations would be
21 about the ordinary meaning in the ordinary transaction.
22 And this is what it says from the statute, to the end
23 user, the merchant licenses or warrants that the
24 computer program is fit for the ordinary purposes for
25 which the programs are used.

1 If I advertise, if I say it's a word processing
2 program, it better do word processing, not that it does
3 the best word processing in the world, not that it has
4 all the bells and whistles of the latest release of
5 Word or WordPerfect, but that it is a basic word
6 processing program. To the distributor, that the
7 program is adequately packaged and labeled and that the
8 copies are within permitted ranges of even kind,
9 quantity and quality, and conforms to promises made on
10 the label, and that I think is language that we are all
11 familiar with from Article 2.

12 A new warranty is the implied warranty of
13 informational content, because this is sort of a new
14 creature under UCITA, which is the informational
15 content subset. This implied warranty says that a
16 merchant who in a special relationship or alliance with
17 a licensee collects, compiles, processes, provides or
18 transmits informational content warrants that there is
19 no inaccuracy caused by the merchant's failure to
20 perform reasonable care.

21 You couldn't include all informational content,
22 such as what we call in UCITA published informational
23 content, would be -- which would be what you read in
24 the newspaper, what you buy in a book, because that
25 simply would have exposed publishers of that type of

1 content to obligations and warranties that they have
2 historically never had to face under current law, and
3 that was felt to be way overreaching, but the feeling
4 was that limiting this to the informational content
5 situation where you have a special relationship with an
6 alliance, the licensee ought to get this warranty.

7 The third new warranty is the -- actually, the
8 fourth new warranty is the fitness for the licensee's
9 purpose and the system integration, really kind of two
10 different warranties in one section. This first says
11 that if a licensor at the time the contract is made has
12 reason to know of any particular purpose for which the
13 computer information is being acquired and that the
14 licensee is relying on the licensor, then there's an
15 implied warranty that the information is fit for that
16 purpose. This is something that I now routinely draft
17 into all my contracts when I'm representing licensees,
18 because I want to make sure that I track this and that
19 we get the benefit of this.

20 And if it appears that the license -- but if it
21 appears the licensor was to be paid whether the product
22 worked or not, then the warranty is that it won't not
23 work due to the licensor's lack of reasonable effort,
24 which is slightly diminished, but that again only comes
25 up when it appears that the licensee bargained for

1 that.

2 Now, fitness for the license's purpose is very
3 similar to the Article 2 warranty. I think that it
4 resolves some diverse case law which reaches differing
5 results depending on whether the goods standard,
6 results, is used or whether the services standards,
7 efforts, is used.

8 The final implied warranty is a system
9 integration, and basically I think this addresses kind
10 of a fear of licensees and consumer buyers that somehow
11 what they buy will not be compatible with what else
12 they have, and basically if you have a situation with
13 an integrator where the agreement requires the licensor
14 to provide or select a system consisting of computer
15 programs and goods, hardware, et cetera, and the
16 licensor has reason to know that the licensee is
17 relying on the licensor's skill, then the implied
18 warranty is the components that are provided or
19 selected will function as a system.

20 Again, that's something that I think most
21 commercial licensees would want to know. I tend to put
22 all of this language in my contracts now.

23 For express warranties, UCITA basically follows
24 current Article 2. Express warranties are different
25 than implied warranties in that they tend to rest on

1 the negotiated aspects of the deal, and they go more to
2 the heart of the deal, thus it's much more difficult to
3 disclaim.

4 UCITA generally adopts the basis of the bargain
5 test as is set forth in Article 2 with some minor
6 tweaking. Basically if something goes to the basis of
7 the bargain, it's an express warranty; if it doesn't,
8 it's not. There's a lot of case law out there to
9 interpret this, and our feeling was to leave that case
10 law untouched and allow it to continue to build.

11 UCITA, like Article 2, sets up a careful
12 structure of how these warranties may be disclaimed.
13 Disclaimers are treated differently for each one of the
14 five new warranties that I mentioned. There's express
15 language in the statute telling you what you need to do
16 to disclaim them. The expectation of that is that if
17 you're going to disclaim such a warranty, you need to
18 have language in your contract that puts the other
19 party on notice that they're not getting this warranty,
20 so that if they want it, they can bargain for it.

21 I would just close, before I turn it over to
22 Professor Boss and Mr. Sakamoto-Wengel, to just say
23 ultimately I think UCITA will sell itself to you, and
24 it has to me over seven years of working on it, and
25 would just suggest that you look at it from the points

1 of view of the varying constituencies, see if you think
2 the compromises are appropriate, and we'll be happy to
3 take questions.

4 MS. SCHWARTZ: I think we will go directly to
5 Professor Boss, because we did get a little bit of a
6 late start, and I do have some questions, but I think
7 I'll hold off on that.

8 MS. BOSS: As a commercial lawyer, I guess I
9 should start with warranties and disclaimers. First,
10 earlier, Teresa Schwartz said this would be a great
11 panel, to the extent that any warranties were made,
12 they were made by her, and therefore, I can't be held
13 liable for the breach.

14 Second, with regard to disclaimers, as Teresa
15 Schwartz mentioned earlier, I was the American Law
16 Institute representative on the drafting committee
17 during some critical times, but I am not here on the
18 ALI's behalf, nor am I speaking on behalf of the ALI.
19 I am simply here as someone -- as having been requested
20 to come.

21 Second, I became involved in this project, like
22 Mary Jo, very early on in the American Bar Association.
23 Indeed, it came out of a small ad hoc subcommittee that
24 I created and chaired 12-13 years ago, which ironically
25 was on the scope of Uniform Commercial Code. Now,

1 although this came out of the ABA and I now chair the
2 business law section of the ABA, my comments, again,
3 are my comments alone, and they do not represent those
4 of the ABA.

5 It's very interesting when you look back at
6 history how people have different recollections of what
7 has gone, and I must say that listening earlier to the
8 discussion about is there a difference between software
9 and goods brought back some of the discussions that we
10 had way, way before NCCUSL ever became involved.

11 I say that it brought those memories back. I
12 looked at some of the responses from comments that were
13 filed in the context of the FTC, and it was very clear
14 that they fell into two camps, people who felt that
15 software was inherently different than goods and people
16 who felt that no, software and goods were the same
17 thing.

18 Well, as to both camps, I think each group has
19 it only half right. The reality is that there are
20 similarities and there are differences, and I think
21 that Mary Jo has adequately described the fact that
22 there is a great deal of overlap.

23 Indeed, if you look at UCITA, large portions of
24 UCITA are based on the structure and on the provisions
25 of Article 2. In fact, historically, if you go back,

1 again, as I mentioned, the proposal came out of an ABA
2 committee that was looking and struggling with scope
3 issues. I would hazard the suggestion that the scope
4 issues are still not settled as we speak, but it was
5 the recognition that Article 2 had been applied to
6 software, sometimes rightly but many times wrongly,
7 that gave rise to this effort.

8 When the proposal was made to the National
9 Conference and it was studied, the ultimate decision
10 was to create a separate committee on software
11 contract, but here's the irony. That separate
12 committee, which was actually created in 1990 and I was
13 a member of that committee, never met. At the same
14 time, there was a second committee to revise Article 2,
15 which did start meeting, and a decision was made to
16 combine the two committees and to become -- to combine
17 the two committees because of a recognition that many
18 of the issues were overlapping.

19 In the context of that combined committee, the
20 scope issue raged. What was the best way to govern
21 software? And there were really three proposals that
22 were put forward during those discussions.

23 One was treat software under Article 2. I must
24 say there was no real adherence to that proposal. A
25 second was kick it out into a completely separate

1 article, separate statute, some -- separate something.
2 And then there was an intermediate ground, which was
3 actually one that Ray Nimmer came up with, the notion
4 of hub and spoke, again a recognition that there are
5 some very common principles that govern all kinds of
6 contracting and are common to both sales and licenses,
7 common to both goods and software, and that it was
8 possible to articulate those common principles and then
9 have separate provisions dealing with areas where they
10 were separate.

11 The drafting committee -- and this, by the way,
12 was from '91 until '95 -- I think fairly well had
13 decided that the hub and spoke principle was the
14 principle that would be pursued or at least it would be
15 its recommendation to pursue, but something happened on
16 the way to the forum, and that something was that an
17 executive decision was made by the conference to spin
18 off the software discussions into a separate article
19 and not to entertain the hub and spoke position.

20 Now, there are, again, different recollections
21 of why those decisions were made. One of the
22 articulations was that a hub and spoke principle, while
23 theoretically sound, would require a great investment
24 of time and energy in trying to figure out what goes
25 where. There is another view, and I'll say I am one of

1 the -- am I finished? -- all right, is that the end?

2 I was about to say, what was the different view
3 of what transpired? It was very clear in the context
4 of the Article 2 discussions that there were some huge
5 philosophical differences among people who were on the
6 drafting committees and who were attending the meetings
7 and that there were differing views, for example, on
8 precisely the issues that are here in front of the FTC,
9 the extent to which freedom of contract should be given
10 free reign in such areas as adhesion contracts and
11 shrinkwrap licensing or the extent to which policing
12 and supervisory conditions should be put into those
13 articles.

14 There was a great deal of disagreement, and
15 ironically I think that it was precisely that
16 disagreement that led to the splitting of the two
17 articles. It's unfortunate.

18 As things transpired, there were attempts
19 within the process to try and coordinate Articles 1 --
20 Articles 2 and Article 2-B, as it was then named, and
21 to treat those provisions in a comparable manner. It
22 was very hard. I sat -- because I was also on the
23 Article 1 committee, which was called the coordinating
24 committee, I sat in on those discussions, and it really
25 was quite clear that there were drastically different

1 views that were being held at this point by the very --
2 by the two different drafting committees.

3 A bit more history, at this stage, by the way,
4 we're dealing with Article 2-B, and at the time Article
5 2-B was being proposed as an amendment to the Uniform
6 Commercial Code. As many of you are aware, in April of
7 1999, there was a joint press statement that was
8 released by the National Conference of Commissioners
9 and by its partner, the American Law Institute. In
10 that press release, the American Law Institute and the
11 National Conference announced that the two
12 organizations had decided that Article 2-B would not be
13 included within the Uniform Commercial Code.

14 The press release simply observed that there
15 was insufficient demonstration that we had reached a
16 state of -- a state where they could be combined into
17 the Uniform Commercial Code without fear of in some way
18 harming its everlasting nature. I'm paraphrasing, and
19 I apologize, because the exact words just flew out of
20 my mind, but that was the articulated rationale.

21 If you dig a little bit deeper and you go back
22 and you read the documents, and again, these were
23 documents that are posted on Carol's website that was
24 mentioned earlier, they're freely in circulation, you
25 will see a slightly additional set of facts emerging,

1 and that is that the differences that I mentioned that
2 existed among the drafting committees to these two
3 different projects were to some extent also being
4 replicated in differences between the two sponsoring
5 organizations.

6 Uniform Commercial Code is a product of both
7 the National Conference of Commissioners and the
8 American Law Institute. In order for any revision of
9 the Uniform Commercial Code to go forward as a joint
10 project, both organizations must approve that product.

11 Now, in the event that there is not approval,
12 one body is allowed to go ahead and propose it on its
13 own. That point, however, was never reached with
14 regard to Article 2-B.

15 The split-off of Article 2-B and Article 2
16 occurred in 1975, and it wasn't until January of 1976
17 that there was actually the first drafting committee
18 meeting of what was then --

19 MS. DIVELY: '96. You're saying '76.

20 MS. BOSS: Wait a minute, '96. It's been a
21 long day.

22 It wasn't until 1996 that actually there was
23 the first meeting a separate Article 2-B drafting
24 committee, and I want to point this out to you because,
25 you know, despite all of these discussions about how

1 lengthy this process has been, in my view, the
2 discussions up until 1996 centered primarily about in
3 what format are we going to be treating these issues,
4 as a separate statute, in conjunction with 2, and there
5 was very little attention that was being paid to the
6 actual details of the statute.

7 I say that as a member of the drafting
8 committees. I don't know what all was going on on
9 other fronts, but as a member of the drafting
10 committees, I know that the discussions up until 1996
11 revolved around where we were going to treat it, not
12 what we were going to say.

13 Come 1996, of course, everything began to
14 change, and there was another evolution that happened.
15 The original proposal that went to the National
16 Conference and that was proposed in 1991 was a drafting
17 committee on software contracting. By 1996, that had
18 completely changed. The scope had broadened from
19 software contracting into licensing of information, and
20 you had a great extension of what Article 2-B was
21 attempting to do.

22 Now, that introduced a number of uncertainties
23 into the project, a number of real difficulties that
24 the drafting committee, the reporters, the chair,
25 Connie Ring, who's in the back there, had to grapple

1 with, but one of the -- one of the difficulties that
2 ended up emerging is that there were very, very
3 differing views that were being held about the drafts
4 that were produced, and as early as the December 198 --
5 98 council meeting of the American Law Institute, there
6 was some skepticism being expressed about the --
7 actually it was before that, '97 council meeting of the
8 American Law Institute, that there were some real
9 concerns being expressed on the following fronts.

10 One, on scope. There was a fear first that the
11 scope of the proposed Article 2-B was not well defined
12 and it was so broad and so all-encompassing that it was
13 very difficult for the council to adequately understand
14 what was encompassed within its reach. So, scope was a
15 very, very big issue.

16 Combined with that was a draft that had reached
17 a level of complexity that it became quite difficult
18 even for the people who knew the area to read and
19 understand it. Mary Jo issued a challenge, and I would
20 issue it to you, as well, which is read it and make up
21 your own minds. Some people have found it quite
22 difficult to work its way through. A lot of the meat
23 is in the comments, not in the statute. And it was
24 this difficulty in architecture and clarity which again
25 contributed to some of the concerns that were expressed

1 by the council.

2 In addition, over a course of two years, a
3 number of concerns were raised on the floor of the
4 American Law Institute by its members, including issues
5 that will be addressed tomorrow such as the
6 meaningfulness of consent in the draft of Article 2-B,
7 the post-transaction and pretransaction availability of
8 license terms and the ability through adhesion or mass
9 market contracts to impose what some have been -- have
10 termed a contractual intellectual property scheme on
11 information that is in the public domain. I think
12 there's a -- these were a lot of concerns.

13 Unfortunately, I think that Article 2-B in my
14 mind has some wonderful stuff in it, but here's what
15 happened: The lack of consensus on some of these
16 issues brought us to the spring of 1999, where the
17 decision was made to take Article 2-B's provisions out
18 of the Uniform Commercial Code and propose it as a
19 separate statute. At this stage, the role of the
20 American Law Institute ended, as the American Law
21 Institute's role in this was because it was a UCC
22 project, and the National Conference proceeded on its
23 own.

24 It was also at that stage that my involvement
25 in this project, this particular project, ended. Some

1 of us were asked to continue. I regretfully resigned.
2 I felt that I had said my piece at the time and that
3 the project should go its way as it did.

4 The reason I've been asked to come here is to
5 give that historical perspective of what's happened and
6 to tie it back in many regards to some of the issues
7 that are faced in the FTC right now. The FTC is
8 concerned about consumer protection. How does consumer
9 protection relate to UCITA? To me that's the issue
10 that you're going to be confronting.

11 You'll see that it's like Article 2 in a number
12 of ways, and Mary Jo is quite right. The primary one
13 in my mind in this regard is that UCITA was not drafted
14 as a consumer protection statute. It was drafted as a
15 statute that was aimed at a widespread environment,
16 including a commercial environment.

17 In fact, UCITA itself recognizes that. It
18 recognizes that it's not addressing consumer protection
19 when it specifically in its introductory provisions
20 says consumer protection law is left in place, and I
21 want to underscore that, because UCITA therefore does
22 recognize that there is an independent role for
23 consumer protection and that there are other
24 authorities, such as the FTC, who are responsible for
25 promulgating consumer protection provisions and that

1 UCITA was not intending to preempt them in any way.

2 There's another reason that this is all
3 important, and that is that the process and the
4 challenges really facing the FTC at this stage is in my
5 mind very much like the challenge and the process that
6 was facing the Article 2-B drafting committee, the
7 UCITA drafting committee, as it went forward, and that
8 is how much of existing goods-based rules are properly
9 applicable to software? You have difference in subject
10 matter. Similarly, how much of existing rules applying
11 to sales can be carried over to licensing?

12 Okay, we may be changing the beast and we may
13 be changing the method under which we're distributing
14 that beast, but that does not totally mean that it's
15 subject to different rules. I was thinking this
16 through the other day, and it's like are there
17 difference between men and women? You know, if I were
18 to ask my kids, they'd say, well, duh, mom, of course
19 there are differences between men and women, but there
20 are many instances when we should all be treated the
21 same. The question is trying to determine when and if
22 that's appropriate.

23 So, I hope this history of -- at least my
24 history, her story of UCITA, helps shed some light on
25 some of the issues. I don't think that they are easy

1 issues to resolve. I wish the FTC well. I think that
2 the scope issue, as I mentioned, is still a
3 controversial one. Even within the Article 2 process,
4 there has been an attempt to define scope. It has been
5 the one issue that has kept Article 2 from reaching
6 final approval within the National Conference. We do
7 not yet have a final draft in front of the drafting
8 committee in which there has been consensus reached.
9 Scope remains an issue. It's what started the problem.
10 It's still here, and I think that it's an issue that
11 the FTC has got to confront.

12 MS. SCHWARTZ: Can I just ask on that, is there
13 a chance that the scope of Article 2 will overlap with
14 UCITA?

15 MS. DIVELY: Well, I could answer that because
16 I actually just spent the weekend working on a scope
17 issue for Article 2.

18 I think that the scope issue in Article 2, and
19 correct me if I'm wrong, Amy, but it revolves around
20 what's going to be done with what's called embedded
21 software, smart goods you may think of. I think there
22 is no quarrel with the decision that the vast bulk of
23 pure software licenses are being taken out of Article
24 2. That's a decision that I think was reached eight
25 years ago.

1 What has really held things up is trying to
2 figure out, you know, when is a refrigerator a
3 refrigerator and when is it a computer that tells you
4 that it's time to order milk? And I think that that's
5 the issue that's really holding up Article 2 as the
6 committee wrestles with how they will deal with smart
7 goods or embedded software, if you're looking at it
8 from the UCITA perspective, but my understanding is
9 that that's in process of constructive resolution right
10 now and hopefully will be something that's presented
11 within the next two months.

12 MS. SCHWARTZ: I hope the drafters hear from
13 our speaker this morning about what's embedded and
14 what's not and what's a computer and what's software
15 and what's not.

16 Listen, we are really running out of time, so I
17 need to move to Steve to talk about what has happened
18 in Maryland, and then we'll have some time for
19 questions.

20 MR. SAKAMOTO-WENGEL: I'm a relative newcomer
21 to UCITA compared to the two veterans who are sitting
22 on the panel with me, having become involved as a
23 result first of a case involving 43 states that entered
24 into a settlement with America Online, and Mr. Dengler
25 is not here to defend his company, but at the time we

1 had concerns that the fact that when you got a free
2 trial offer in the mail, it wasn't adequately disclosed
3 that you had to, A, use your what was at that time 50
4 hours and is now 500 hours within a month, and not to
5 talk about anybody who would be online 500 hours in a
6 month, what it says for them, but unless you
7 affirmatively cancel that you would become a member and
8 be billed, and we didn't think that those were
9 adequately disclosed, and as a result of that
10 settlement, we believe that is now being more
11 adequately disclosed to consumers so they know what
12 they are doing when they sign up for their free trial
13 offer with America Online.

14 It came to our attention that UCITA was coming
15 to fruition at NCCUSL, and a group of 25 attorneys
16 general sent a letter expressing concerns about the
17 impact of NCCUSL -- of UCITA on consumers and with
18 particular concern of what impact it might have on
19 disclosures such as those that might be required in the
20 America Online settlement. And so a letter was sent on
21 behalf of 25 state attorneys general asking that UCITA
22 not be adopted.

23 There have been a number of consumer
24 organizations that have already expressed opposition at
25 the final version of UCITA that came out, and I might

1 point out, I don't think that consumer groups were the
2 ones who were originally saying that we needed a new
3 separate law to deal with software transactions. I
4 believe that most of the consumer groups and state
5 attorneys general felt that there were existing
6 consumer protection laws out there that did adequately
7 protect consumers who engage in software transactions.

8 And so we had -- it was a simple letter, but on
9 the whole NCCUSL passed UCITA anyway and recommended
10 it, and last session in the Maryland General Assembly
11 UCITA was introduced, and after many, many, many, many,
12 many hearings to try to first figure out what it said
13 and what it didn't say, Maryland is now the only state
14 in the United States where UCITA is, in fact, the law.

15 Now, the General Assembly of Maryland did, in
16 fact, heed some of the concerns we raised, and they did
17 include some consumer protection language that
18 addresses some of the concerns, and one of the major
19 concerns that we did have was that despite the
20 intention of the law that consumer protection law would
21 continue to apply, as was pointed out, this is a very
22 complex statute, and the language in the statute may
23 have the either intentional or inadvertent result of
24 making laws that currently apply not apply.

25 For example, Maryland's Consumer Protection Act

1 deals in terms of protecting consumers in transactions
2 involving goods and services; however, under the
3 definitional language of UCITA, it's now talking in
4 terms of licenses of computer information transactions
5 and licenses of computer information transactions,
6 which is not necessarily clearly either a good or a
7 service, and therefore, it's possible that even though
8 the law expresses an intent that the Maryland Consumer
9 Protection Act would continue to apply to these
10 transactions, that legally, it may not.

11 One of the things the Maryland General Assembly
12 did was clarify that yes, in fact, for purposes of
13 Maryland's Consumer Protection Act, consumer
14 information transactions are, in fact, covered.

15 One of the other concerns that we had, this was
16 in the area of warranties, is that Maryland is one of
17 the states where a consumer transaction under Article 2
18 of the UCC, you cannot disclaim an implied warranty,
19 and the version of UCITA that was introduced into the
20 Maryland General Assembly did not include a similar
21 provision for computer information transactions.
22 Fortunately, the General Assembly decided that computer
23 information transactions should be similarly treated
24 and provided that implied warranties cannot be
25 disclaimed in software licenses, as well.

1 The other -- and this is one area where we do
2 think that the rules should be the same for, you know,
3 software as they are for any other product that you
4 would buy, and that is that any material facts be
5 disclosed and disclosed in a manner that consumers are
6 going to be made aware of them. We don't think UCITA
7 does that either as proposed or as the Maryland General
8 Assembly ended up enacting it. As the previous panel
9 pointed out, consumers are not likely to read the
10 license agreements. Even if they have the interest in
11 doing so, it's very difficult to sit there and read
12 this on a computer screen and understand what it says.

13 And there's nothing -- and the definitions of
14 conspicuousness under UCITA don't make it so that the
15 material terms will really be called to a consumer's
16 attention. There are ways that it could be done. You
17 could have separate click-ons for material terms or
18 otherwise highlighting them; however, UCITA contains a
19 number of so-called safe harbors that if the software
20 licensor complies with those, it will be deemed
21 conspicuous, whether or not anybody, in fact, notices
22 the term, and we don't think that the safe harbors
23 included in UCITA would provide for adequate
24 disclosure.

25 So, we needless to say had a number of concerns

1 about UCITA. Some of them were addressed by the
2 Maryland General Assembly. It went into effect October
3 1st of this year, so we haven't had much experience
4 with how it is. I guess we are going to be the guinea
5 pig of how it does affect transactions. The final bill
6 that came out was 90 pages long. It's going to be
7 years in the courts, I'm sure, figuring out exactly
8 what it says and what it doesn't say and where it might
9 need to be adjusted, but that was pretty much our
10 perspective of it.

11 We wanted to try to make sure first that it
12 didn't erode existing consumer protections, and
13 secondly, that to the extent that it could, that it
14 would provide consumers who do purchase software or
15 enter into an access contract with a company like
16 America Online with adequate disclose what they are
17 getting themselves into.

18 MS. SCHWARTZ: Steve, if I could ask or see if
19 I can understand this, there is a provision, then, in
20 the Maryland UCITA that existing consumer protection
21 law applies to these transactions, which brings into
22 play, then, requirements of clear and conspicuous
23 disclosures and so forth under case law and FTC --
24 mini-FTC Act cases and so forth?

25 MR. SAKAMOTO-WENGEL: Right. We have an

1 express cross-reference to the Maryland Consumer
2 Protection Act, and the Maryland Consumer Protection
3 Act also expressly references computer information
4 transactions.

5 MS. SCHWARTZ: And so to mesh these two, what
6 you're saying, it's going to take a while, case law
7 development and so forth.

8 Now, what -- the reaction, Mary Jo, what's your
9 reaction to that? Is that --

10 MS. DIVELY: Well, my reaction is that's
11 actually exactly what was anticipated by UCITA's
12 drafters. If you take a look at the section of UCITA
13 which refers to the fact that it is expressly
14 deferential to existing state consumer protection laws,
15 you'll see a legislative drafting note which reminds
16 them -- because the committee thought it was this
17 important, reminds legislatures to take a look at their
18 consumer protection law, see whether any changes to it
19 are necessary to make sure that this material is
20 adequately covered. That's exactly what Maryland did,
21 it's exactly what Virginia's looking at doing right
22 now, and I would expect it will become a part of state
23 UCITA enactment. So, I think the process worked
24 exactly as it was intended.

25 MS. SCHWARTZ: Okay. I have a number of

1 questions here, many of which go to very specific
2 provisions within UCITA, and we may have more time
3 tomorrow to get into that. I have a couple of
4 questions here about the process.

5 One asks about the organizations that were
6 participating in the early stages and whether they
7 continued -- the consumer organizations sort of
8 continued through this process or did they drop out at
9 some point?

10 MS. DIVELY: Well, there were -- I'm trying to
11 remember the later drafting committee meetings. My
12 sense was that we were seeing -- I'm thinking of the
13 people who were there. My sense was that the people
14 from the Consumers Union were there up until the last
15 drafting committee meeting. The person who is
16 representing the Consumers Project on Technology
17 stopped attending meetings about a year before the
18 statute was finished but continued submitting comments.
19 And that's my recollection.

20 Do you have --

21 MS. BOSS: It's a difficult process to partake
22 in, and, in fact, the conference has been looking at
23 different ways of getting adequate consumer
24 participation. There have been some proposals made,
25 for example, about scheduling the meetings to encourage

1 consumer participation.

2 There were a handful who did continue to
3 participate but no more than a handful at any meeting,
4 which I think is really unfortunate given that you are
5 talking about meetings that sometimes were over a
6 hundred people.

7 MR. SAKAMOTO-WENGEL: I know that by the time
8 the final product came out, there were a number of
9 consumer organizations that were actively opposed to
10 UCITA, including the Consumer Federation of America, I
11 believe Consumers Union was opposed at the end. I know
12 that the Federal Trade Commission had expressed
13 concerns about provisions of UCITA. So, by the time
14 the final product came out, I believe the consumer
15 organizations had determined this was not in any manner
16 a pro-consumer statute and something that consumers
17 should be wary of, in fact.

18 MS. SCHWARTZ: I have two questions that are
19 somewhat interrelated here which has to do with the
20 development and growth of e-commerce and the need for
21 UCITA.

22 There was a speaker this morning, Carol Kunze,
23 who said that for the open source software to flourish,
24 there was a need to be able to disclaim warranties, and
25 one of the question is will Maryland's refusal to

1 permit this have a negative impact on free software.

2 MR. SAKAMOTO-WENGEL: Well, actually, the
3 Maryland statute, even though it prohibits the
4 disclaimer of warranties in consumer software
5 transactions, does have an exemption to that for free
6 software, that is --

7 MS. KUNZE: But that's free according to the
8 price, not within the definition of free software
9 equivalent to open source software.

10 MR. SAKAMOTO-WENGEL: Right, but under the
11 warranty provisions, I mean, basically what it's saying
12 is that it's supposed to work the way that it was
13 intended to work, and I think if somebody is --

14 MS. DIVELY: I have -- go ahead, I'm sorry, I
15 didn't mean to interrupt you.

16 MR. SAKAMOTO-WENGEL: So, if somebody is, in
17 fact, selling somebody else a piece of software, then
18 that's coming with the implied representation that it's
19 going to work the way it's supposed to work. If it is
20 a -- for example, a beta version or if it is something
21 that is clearly some type of experimental or meant to
22 be, you know, meant to be modified, then that's
23 supposed to work the way that either a beta program's
24 intending to work or that is something that was
25 intended to be modified as intended to work. They

1 would not be responsible for any modifications that
2 were made. So, that's --

3 MS. DIVELY: I recall that we had this
4 discussion in Maryland. This was quite a serious issue
5 in Maryland, because as you can imagine, it affects
6 many categories of software, and the issues that come
7 up are rather complex and I think cannot be dismissed
8 lightly, and certainly this is an issue that may come
9 up in other states and hopefully will be dealt with I
10 hope more effectively, because I'm concerned about
11 categories of software and what effect this may have in
12 Maryland.

13 I agree with your concerns, Carol, and I recall
14 speaking to you about them during the time of the
15 Maryland enactment. There are some carve-outs in the
16 Maryland statute which I think are useful, but software
17 is something that evolves, and the question is if you
18 have an after-market for old releases of software,
19 should those have the same warranties as the new
20 releases? Should they be expected to work in the same
21 way? How is the consumer to know the difference?

22 I think it introduces a number of issues that
23 began to be dealt with in Maryland but probably need to
24 be parsed more fully.

25 MS. SCHWARTZ: You know, given the depth of

1 consumer concern that's been expressed by organizations
2 that have a familiarity with the statute and so forth,
3 are you concerned that consumers are going to lose
4 confidence, that is, that this is going to somehow
5 really have a negative impact on e-commerce?

6 In some ways, you know, the idea of consumer
7 acceptance of the selling methodology and kind of a
8 sense of security about how they're going to be treated
9 and what the consequences are and so forth is really
10 fundamental to the success of the marketplace.

11 MS. DIVELY: You're absolutely right. I will
12 tell you my own sense, is that UCITA improves the law
13 for consumers in this area. Right now, there are none
14 of the protections that UCITA provides for consumers
15 anywhere else in the law. I think that many people
16 misread the law to believe that those protections do
17 exist out there, and they simply do not.

18 UCITA provides a number of protections which
19 are beneficial. I think that state consumer laws, as
20 they take up these issues, may, in fact, decide that
21 they would like to provide more for consumers, and
22 that's entirely appropriate.

23 I don't really see much diminishing consumers'
24 confidence in electronic commerce. It seems to me that
25 it's a run-away train, and what we're trying to do is

1 put some reasonable rules around it without stopping
2 that train.

3 MS. BOSS: I guess I have a slightly different
4 reaction. If anything, it's in the eye of the
5 beholder, but I would actually turn the question
6 around. There was a period of time when there were no
7 implied warranties at all on the sale of goods, and
8 that didn't impede the sale of goods. I think the real
9 question is not whether you're impeding the sale but
10 whether you're giving adequate protection to the people
11 after the sale is over. So, I would distinguish
12 between the two issues.

13 MS. SCHWARTZ: Steve?

14 MR. SAKAMOTO-WENGEL: Yeah, well, I guess it is
15 going to depend on what happens. If you do start
16 planning a lot of new provisions in license agreements
17 that are anticonsumer and that cause problems for
18 consumers, yes, it will have a negative impact. If,
19 however, you know, the software licensors are, you
20 know, more responsible, which, you know, we assume they
21 will be, then, you know, we won't have negative impact.

22 MS. SCHWARTZ: Okay, we're past the closing
23 time, and what I'm going to do is save the specific
24 questions that were turned in about provisions of UCITA
25 and pass them on to tomorrow's moderator for the first

1 program in the morning.

2 Are there any announcements about reconvening
3 tomorrow, anything that -- come back here, we're going
4 to have coffee and pastries again?

5 MS. MAJOR: Yes, we are.

6 MS. SCHWARTZ: We will all be on time to get a
7 pastry. 9:00 tomorrow, starting up with the second
8 panel on UCITA.

9 (Applause.)

10 (Whereupon, at 5:35 p.m., the conference was
11 adjourned.)

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1 C E R T I F I C A T I O N O F R E P O R T E R
2 DOCKET/FILE NUMBER: P994413
3 CASE TITLE: WARRANTY PROTECTION FOR HIGH-TECH PRODUCTS
4 AND SERVICES
5 DATE: OCTOBER 26, 2000

6
7 I HEREBY CERTIFY that the transcript contained
8 herein is a full and accurate transcript of the notes
9 taken by me at the hearing on the above cause before
10 the FEDERAL TRADE COMMISSION to the best of my
11 knowledge and belief.

12 DATED: 11/7/00

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16 SUSANNE BERGLING, RMR

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18 C E R T I F I C A T I O N O F P R O O F R E A D E R

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20 I HEREBY CERTIFY that I proofread the
21 transcript for accuracy in spelling, hyphenation,
22 punctuation and format.

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