



Software License Follies: Sales-Speak and Disclaimers

Legal Disclaimer

- Law is ever-changing. This briefing is a synopsis only and cannot substitute for personal legal advice. Everyone's facts and circumstances are different and you should not rely on the contents of this publication to make substantive legal decisions. Please contact me for a further consultation.

Some things never change. The licensing of software seems to be one of them. Most software developers and vendors who license software products have never heard of the US Uniform Commercial Code (UCC). Even if they have, they are usually not aware that courts will usually apply *sales* provisions to the protective language found in most software *licenses*. At least when it comes to the contract lingo used to limit liability, not much has changed and we face the same reasoning when software fails. Licensing agreements, typically contain three specific provisions protecting geeks in the event of software failures: **(a) a general merger clause, (b) warranty disclaimers and (c) limitations of liability.** Unfortunately, software failures are an unpleasant part of a developer's life. There is no piece of software in existence that doesn't have bugs. Some bugs are indeed bigger than others and cause more damage when they appear. In the event of a failure, the UCC could make a hash of a carefully drawn licensing agreement.

Merger and Intergratin'

Found in almost every contract document ever drafted is a "merger" or "integration" clause stating that the signed document is the final and complete expression of the parties' bargain and supersedes any and all oral or written agreements between the parties, which are, in turn, merged into the final agreement. If the merger clause is valid, a vendor should escape ultimate liability for overly enthusiastic claims made by sales representatives (called "sales puffery") that the product will meet the exact needs of

the customer. We've all heard the same breathless chatter from sales folk. These claims are often found in sales literature and advertising generally and they work: we all turn our heads at an attractive advertising claim. The final written contract is not necessarily the end of the matter, however. A court scrutinizing a contract will look at the totality of the bargain between the parties and ask several pertinent questions such as: what did the customer rely on when he decided to make the deal? What representations did the vendor make in its advertising, and more importantly, during the course of negotiations, if any? Did the vendor state that the software would meet the customer's needs? If so, then all of the prior understandings between the parties could be read into the final "bargain." Practically speaking, if a customer experiences a serious software failure, "everything comes in." The "everything" includes sales literature, representations made by the vendor's sales force, and software operating manuals. Prepare for a dose of "commercial realism." It probably won't be gentle.

A Bobbin' & A Weavin' & A Disclaimin'

As in the case of merger clauses, every software licensing agreement worth anything contains some disclaimer of warranties, be they "express" or "implied." Under the UCC, implied warranties of "merchantability" and "fitness for a particular purpose" are read into every contract unless the vendor expressly disclaims them. "Merchantability" means that the seller

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Software Disclaimers

warrants that the goods sold fall into the general range of salable quality. A product is “fit for a particular purpose” when the seller knows that the purchaser is relying on his expertise in selecting the particular item over another to accomplish the intended purpose. (Interesting, the new UCITA model statute also adds a warranty of “informational content” (stuff that the developer compiles for the end-user). The good news is that implied warranties are easily disclaimed with language like “as is” and “with all faults,” which draws the purchaser’s attention to the exclusion. *Express* warranties are quite another story, however. They stick to the vendor regardless of the weasel language in the agreement. Under the UCC, words, promises and other conduct relevant to the creation of a bargain and forming an express warranty about the product can be construed with words and conduct negating a warranty. If a disclaimer contradicts an express warranty implied from the totality of the bargain, then the disclaimer disappears. Ouch! This hurts especially in the case where user requirements are poorly defined or understood, as is so often the case in software projects.

Ya Don’t Get Nuthin’ — Or Do Ya?

Again, every decent licensing document seeks to limit the damages that an aggrieved customer can recover in the case of a software failure. Typically, such provisions state that the vendor will fix the defect while limiting monetary damages to the customers contract payments and excludes “consequential” damages (all the foreseeable losses that a user might incur in the event of failure). The UCC permits such an exclusive “remedy”

except where such a remedy “fails of its essential purpose.” If the vendor is unable or unwilling to fix a defect within a reasonable time, for instance, then the remedy “fails of its essential purpose.” At this point, some courts will impose consequential damages in spite of any written limitation while other courts uphold such exclusions unless they are so outrageous as to be “unconscionable.” Unlike warranty disclaimers and integration clauses, it is hard for vendors to protect themselves in the case of a serious, hard-to-fix failure. Think of it as stepping on a land mine — a good result is if you lose only half your leg rather than all of it. If you’re in the latter category, then all damages permitted may be exacted from your company.

Practical Advice

Don’t count on contract boilerplate language. As we have seen, it doesn’t always work.

Market Responsibly. There is a big difference between expressing an opinion of value (“This is a great product.”) and making an express warranty (“This product will meet your exact requirements.”).

Ascertain the potential user’s exact requirements ahead of time. In the case of specialty products, precise knowledge of customer requirements can keep vendors out of trouble. Spend substantial time with the potential client to determine exactly what the client’s needs and expectations are.

Fix bugs promptly. Like, no kidding . . .