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Cases of Note-Licensing and the Uniform Commercial Code

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Cases of Note

Licensing and the UCC - Copyright: RIP?

Column Editor: **Anne F. Jennings** (InfoFacto) <infofacto_aj@charleston.net>

I recently returned from the **American Association of Law Libraries** annual meeting in Baltimore where much of the discussion of copyright and "fair use" has been replaced by the issue of licensing and the revision of Article 2 (to be called UCC 2B) of the Uniform Commercial Code. Several knowledgeable speakers addressed this issue in the presentation "Shrinkwrap ... did I agree to that?" (see accompanying box) and more programs are planned for next year at which time UCC 2B should be in its final form.

The problem for libraries with UCC 2B is that the Uniform Commercial Code addresses commercial law and contracts rather than user's rights and privileges as found under the Copyright Act, 17 USC 101 et. seq. According to the preface of the revision, Article 2B "deals with transactions in information; it focuses on transactions relating to the 'copyright industries'." (See Uniform Commercial Code Article 2B — Licenses, DRAFT, National Conference of Commissioners on Uniform State Laws, July 25-August 1, 1997, p.1.)

Special from **Anne Klinefelter**
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You may wish to order an audiotape of the July 21st American Association of Law Libraries Annual Meeting program titled "Shrinkwrap — Did I Agree To That?" The panel program began with **Raymond Nimmer**, the Reporter for UCC Article 2B, **Licensing**, outlining some of the portions of this still-in-draft form model law. **Mark Lemley**, a law professor at the University of Texas, followed with questions about the benefits of UCC Article 2B for consumers, particularly library consumers. **Lolly Gasaway**, Director of the Law Library at the University of North Carolina, Chapel Hill, then spoke about the critical consequences of the licensing trend for libraries. Tapes of this and other AALL 1997 Annual Meeting programs can be ordered through Mobiltape Company, Inc., at (800) 369-5718 or (805) 295-0504. Fax orders can be sent to (805) 295-8474. Individual tapes cost \$8.00.

Several other important issues relative to Article 2B about which you should be aware are in a reprint of a letter sent by the AALL Washington Affairs Representative, **Bob Oakley**, and the Chairman of the AALL Copyright Committee, **Jim Heller**, to Professor **Raymond Nimmer**, Reporter for the UCC Article 2B Drafting Committee. (See p.56)

A copy of the most recent draft of Article 2B is available on the Internet at the following site: <<http://www.law.upenn.edu/bll/ulc/ucc1/ucc1.htm>>

Two recent cases address the issue of licenses. The more familiar is *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir.1996) which held that consumers are bound by the terms inside a box of software after having had an opportunity to read the terms and to reject them by returning the product. An excellent article written by **Victor Rubell** on the *ProCD* decision appeared in the September, 1996 issue of *ATG* (v.8#4, p.50-51, 54). The second case, *Hill v. GATEWAY 2000, INC.*, was decided on January 6, 1997 and was written by Judge Easterbrook of the Seventh Circuit Court of Appeals, who also wrote the *ProCD* opinion.

In *Hill*, plaintiffs ordered a computer over the telephone from defendant Gateway. The computer arrived in a box which contained a list of terms, one of which was an arbitration clause. (Arbitration is an increasingly popular method of negotiating a dispute prior to filing suit or going through an expensive trial process.) The two parties meet with their attorneys and a mediator and try to come to an agreement acceptable to all regarding a claim.) The terms in the box were said to govern any claims unless the customer returned the computer within 30 days. Plaintiffs, Rich and Enza Hill, kept the computer for more than 30 days prior to complaining about its components and performance. Gateway sought enforcement of the arbitration clause which had been included in terms sent to the buyer in the box in which the computer was shipped. Plaintiffs subsequently filed a civil class-action lawsuit against Gateway in which they argued, among other things, that the product's shortcomings made Gateway a racketeer (this involves an allegation of mail and wire fraud), leading to treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO) for the Hills and a class of all other purchasers. The

United States District Court for the Northern District of Illinois refused to enforce the arbitration agreement and Gateway appealed. Writing for the Court, Judge Easterbrook vacated and remanded the District Court opinion and held that "terms sent in box, which stated that they governed sale unless computer was returned within 30 days, were binding on buyer, who did not return computer."

The question as determined by the Court in this case was: "Are these terms effective (e.g. the arbitration clause) as the parties' contract, or is the contract term free because the order taker did not read any terms over the phone and elicit the customer's assent?"

It was Judge Easterbrook's opinion that the "terms inside Gateway's box stand or fall together. If they constitute the parties' contract because the Hills had an opportunity to return the computer after reading them, then all must be enforced." In *ProCD*, the Court held that, "A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance" (at 1452). Gateway and *ProCD* both shipped their products with similar "accept or return" offers. And *ProCD* relied on the Uniform Commercial Code to govern said claim. That case, as in the one at hand, was determined to be about an issue of contract rather than software.

In an attempt to distinguish their case from *ProCD*, the Hills asserted that "the box containing *ProCD*'s software displayed a notice that additional terms were within, while the box containing Gateway's computer did not." However, the Court found this difference to be functional rather than legal. As an example, Judge Easterbrook described a situation wherein "consumers browsing the aisles of a store can look at the box, and if they are unwilling to deal with the prospect of additional terms can leave the box alone avoiding the transaction costs of returning the package after reviewing its contents."

continued on page 57

Cases of Note from page 55

In contrast, the Gateway box was actually a shipping carton that functions to protect the product during transit. The information on its sides was for the use of handlers rather than would be purchasers.

Finally, and perhaps most importantly, the Hills were aware before they ordered the computer that included in the box would be some important terms and they did not attempt to determine these terms in advance. Further, advertisements for Gateway's products clearly "state that their products come with limited warranties and

lifetime support." According to the Court, once a consumer has been put on notice of the existence of warranties, the question then becomes "how limited is the warranty?" Judge Easterbrook outlines three options available for consumers to discover these things:

- First, they can ask the vendor to send a copy before deciding whether to buy. The Magnuson Moss Warranty Act requires firms to distribute their warranty terms on request, 15 U.S.C. §2302(b)(1)(A).

- Second, shoppers can consult public sources (computer magazines, the Web sites of vendors) that may contain this information.

- Third, they may inspect the documents after the product's delivery.

By keeping the computer beyond 30 days, the Hills accepted Gateway's offer, including the arbitration clause. The Court of Appeals vacated the decision of the district court and this case was remanded "with instructions to compel the Hills to submit their dispute to arbitration."

Feast of Formats from page 54

²⁰ On the deleterious effects of legal publishing mergers, see Mary Brandt Jensen, "Law Publisher Genealogy, a Rose by Any Other Name: Mergers, Acquisitions, Spin Offs and Sales of American Legal Publishers," 27 *Law Librarian*, 114 (1996). Mary Chapman has observed 12.5%—23.5% price increases for certain West pocket parts since the Thomson merger. See "WEST: Am Jur Legal Forms and More," *Law-Lib Listserv* (Apr. 14, 1997) <law-lib@ucdavis.edu>.

²¹ These products include Matthew Bender's Authority line of CD-ROMs, BNA's CD-ROM Libraries (some of which have replaced the print), CD-ROM collections in taxation and business from RIA and CCH, and West's Bankruptcy Library on CD-ROM.

²² See, for example, Gary T. Cornwell, "The Dissemination of Federal Government Information: Prospects for the Immediate Future," 23 *Journal of Government Information*, 299 (1996); Wallis W. Conhaim, "Accessing State and Local Government," *Link-Up*, May-June 1996, at 5; and Josh Blackman, "Legal Forms on the Net," *Law Office Computing*, Apr.-May 1997, at 62.

²³ See Cary Griffith, "Internet Primary Law You Can Trust," *Law Office Computing*, Apr.-May 1997, at 48, and BLACKMAN, *supra* note 21.

²⁴ See Thomas Scheffey, "West Loses on Copyright Claim," *Legal Times*, May 26, 1997, at 2.

²⁵ For a recent discussion of these and similar problems, see Margaret Jobe, "Framed, Shocked and Other Net Horror Stories," 23 *Colorado Libraries* 36 (1997).

²⁶ Sarah Andeen, "Re: Dialog on the Net," *Law-Lib Listserv* (June 20, 1997) <law-lib@ucdavis.edu>.

²⁷ GELFAND, *supra* note 9, at 17, 21; KLAMPERT, *supra* note 9, at 84; and "Beyond CD Technology" and "Re: Beyond CD Technology," *supra* note 9.

²⁸ "The Future of the Law Firm Library: the AALL Electronic Roundtable," 89 *Law Library Journal* 101, 107 (1997).

²⁹ *Id.* at 115.

³⁰ James O'Meara, "BNA Environmental Reporter: State (Again)," *Law-Lib Listserv* (June 25, 1997) <law-lib@ucdavis.edu>.

³¹ Diana Keith, "Difficult Choices," private e-mail communication (June 4, 1997).

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