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The Exportability of the Principles of Software: Lost in Translation?

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Abstract

The American Law Institute approval of The Principles of Software Contracts is a significant milestone in the history of software law. The project began in 2004 because of the flaws of the Uniform Computer Information Transactions Act concerning this issue, problems strengthened by the widely held perception that the law at the time was "undeveloped, confused, and conflicting." Software licensing is presently America's third largest industry and has suffered from the mechanical extension of the law of sales to software over the last forty years, much like courts imported "horse and buggy law" to resolve problems posed by the automobile. Thankfully, the Principles achieve the objective of bringing common sense to the common law of software contracts. However, the project is heavily centered on the United States with limited exportability to the European Union in its current form. This piece looks at the path of software contracting law over the past twenty years, the Principles of Software Contracts itself, and its exportability to the rest of the world, particularly the European Union.

The Exportability of the Principles of Software: Lost in Translation?*

by MICHAEL L. RUSTAD** AND MARIA VITTORIA ONUFRIO***

I. Introduction

Software licensing is America's third largest industry, accounting for an increasingly large share of all exports.[1] The 2008 Software 500 study estimated that total revenue for the top 500 companies in the software and services industry increased to $451.8 billion for 2007,[2] up from $394 billion worldwide in 2006.[3] Game Industry Analysts predict that the market for software games alone will reach $35.4 billion by 2010.[4] The revenue for the top 500 software companies was

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1. Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 574 (1999) (stating by 1996 computer software was ranked as the "third largest segment of the U.S. economy, behind only the automotive industry and electronic manufacturing" and "growing five times faster than the economy as a whole").

2. *Radialpoint Tapped for Software Magazine's Software 500*, WIRELESS NEWS, Nov. 9, 2008, *available at* PROQUEST, Document ID 1591847781.

3. John P. Desmond, *Applications Go Worldwide*, SOFTWARE MAGAZINE: THE IT SOFTWARE JOURNAL, Oct. 2007, http://www.softwaremag.com/L.cfm?Doc=1085-10/2007.

4. Got Schwartz.com, *Game Industry Projections*, *2005-2010* (Aug. 20, 2006).

$394 billion worldwide for 2006.[5] Six out of the top ten on *Business Week's* 2009 survey of the most innovative companies were classifiable as software companies. This survey ranked Apple, Google, Microsoft, Nintendo, IBM, Hewlett-Packard, and Nokia in the top ten for their game-changing innovations.[6] *Business Week* rated Apple as the number one game-changer largely because of the success of its iPhone App Store, iPod, Macs, and the company's popular lines of cell phones. Microsoft, the fourth-ranked company, was praised for its applications that melded the Windows-based operating system with the ethereal world of cloud computing.[7] The publication applauded IBM's Smart Planet and its innovative software applications for improving "the performance of everything from transportation systems to electrical grids."[8]

This Article examines the exportability of the American Law Institute's Principles of Software Contracts for cross-border consumer license agreements. The United States and the European Union ("EU") follow diametrically opposed approaches to consumer protection in software licensing. Our thesis is that Principles of Software Contracts are not exportable because they conflict with mandatory consumer rules promulgated in the European Union, the world's largest single marketplace.[9] While we focus on Europe, many of the exportability issues for software licensing apply equally well to other post-industrial nations around the world.

Part II briefly examines a history of software and the various projects to develop software-contracting principles. The path of software contracting law begins with ill-fated attempts to codify software contract law, namely UCC Article 2B and UCITA. Part III outlines the methodology of the Principles as well as key concepts and methods. Part IV assesses the exportability of the Principles' procedural rules including a discussion of jurisdiction, choice of law,

5. John P. Desmond, *Applications Go Worldwide*, SOFTWARE MAGAZINE: THE IT SOFTWARE JOURNAL, Oct. 2007, http://www.softwaremag.com/L.cfm?Doc=1085-10/2007.

6. *The 50 Most Innovative Companies*, BUSINESSWEEK, 2009, http://bwnt.businessweek.com/interactive_reports/innovative_50_2009/.

7. *The 50 Most Innovative Companies*, BUSINESSWEEK, 2009, http://images.businessweek.com/ss/09/04/0409_most_innovative_cos/48.htm.

8. *The 50 Most Innovative Companies*, BUSINESSWEEK, 2009, http://images.businessweek.com/ss/09/04/0409_most_innovative_cos/46.htm.

9. Eric Engle, *Environmental Protection as an Obstacle to Free Movement of Goods: Realist Jurisprudence in Articles 28 and 30 of the E.C. Treaty*, 27 J. LAW & COM. 113, 115 (2008) (describing the formation of the single European market as the "world's largest single market").

and choice of forum clause. Part V explains the problems of harmonizing the Principles of Software Contracts with European Community regulations and directives germane to consumer software contracts. The subtitle, "lost in translation" alludes to the problems that will ensue when licensors make use of Principles of Software Contract provisions that diverge from European Union consumer law. While the Principles of Software Contract is a momentous advance for domestic software contracts, it is not an exportable law reform project as approved by the American Law Institute. The consumer protection rules of the Principles of Software Contract or more accurately, the absence of mandatory rules, places U.S. software law at odds with European mandatory procedural as well substantive directives and regulations governing software contracts.[10] We conclude by calling for transnational principles of software contracts that give consumers adequate remedies for the failure of software in the U.S. and around the world.

II. The Path of Software Contract Law

A. Legal Lag and the Law of Software Contracts

Every major technological invention requires a reworking of legal doctrine and software is no exception. The development of the railroad created a "legal lag" before railway law evolved addressing issues such as risk of loss, vicarious tort liability, and heightened duty owed passengers by common carriers. In the field of tort law, the fellow servant rule, assumption of risk, and contributory negligence evolved to limit liability for railroads during the country's industrialization.[11] The invention of the automobile reshaped every branch of U.S. law. In 1936, a law student observed that in 1905, all of American automobile case law could be contained within a four-page law review article, but three decades later, a "comprehensive,

10. Directives must be implemented by each Member State. For example, the United Kingdom's 1998 Data Protection Act implemented the REC Data Protection Directive (95/46/EC). *See* Council Directive 95/46/EC of the European Parliament and of the Council of 24 Oct. 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31, *available at* http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?url=CELEX:31995L0046:EN:HTML (last visited Aug. 19, 2009).

11. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 209–10 (Harvard University Press 1977).

detailed treatment [of automobile law] would call for an encyclopedia."[12]

That law student was Richard M. Nixon, who would later become the thirty-seventh President of the United States. Nixon's conclusion was that courts were mechanically extending "horse and buggy law" to this new mode of transportation in most doctrinal areas.[13] However, some judges were creatively constructing new doctrine in certain subfields of automobile accident law by "[stretching] the legal formulas at their command in order to reach desired results."[14]

The legislatures needed to rework criminal law to address the problems of resourceful thieves who took advantage of the fact that police officers were unable to pursue stolen cars across state lines. Decades later, all states enacted certificates of title legislation to enable law enforcement officers to trace stolen automobiles across state lines. Products liability evolved in the 1960s to address the perils of automobiles that were unsafe at any speed.[15] Nixon's observation that courts were developing new rights and remedies to adjust to an emerging technology applies equally well to the software industry. Over the past four decades, the software industry has

12. Michael L. Rustad & Thomas H. Koenig, *Cybertorts and Legal Lag: An Empirical Analysis*, 13 S. CAL. INTERDISC. L.J. 77, 77 (2003) (citing Richard M. Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROBS. 476, 476 (1936)).

13. Richard M. Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROBS. 476, 485 (1936).

14. *Id.*

15. Products liability was a field that owes its origins to automobile law cases. The field of products liability took form in large part through a series of groundbreaking automobile liability cases. Judge Benjamin Cardozo, in MacPherson v. Buick Motor Co., 111 N.E. 1050 (1916), was the first judge to lay the foundation for the field of products liability when he creatively sidestepping the harsh doctrine of privity permitting a consumer to recover for injuries caused by a collapsed wheel on his Buick roadster. In his famous ruling, Judge Cardozo declared that "if [the manufacturer] is negligent, where danger is to be foreseen, a liability will follow." *Id.* at 1053. The citadel of privity finally collapsed in yet another automobile liability case forty-four years later. *See* Henningsen v. Bloomfield Motors, 161 A.2d 69, 99-100 (1960) (finding no contractual privity for breach of warranty in accident arising out of a malfunctioning automobile steering system). The first one hundred-million dollar award for punitive damages was in the Ford Pinto case of Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 348 (Cal. Ct. App. 1981) (remitting the $125 million punitive damages to $3.5 million). The jurisprudence of strict liability was in large part a judicial solution to the problem of reallocating the cost of accidents caused by defective automobiles. For example, the manufacturer's duty to recall or retrofit defective products was directly impacted by automobile law. Michael L. Rustad & Thomas H. Koenig, *Cybertorts and Legal Lag: An Empirical Analysis*, 13 S. CAL. INTERDISC. L.J. 77, 79 (2003).

evolved out of step with the ability of contract law to adapt to the economic realities of software.[16] The term "cultural lag" was coined in 1922 by sociologist William Ogburn.[17] Cultural lag describes the problem of harmonizing the various institutions of American society, which do not evolve at the same rate. The problem of cultural lag occurs when one element of society does evolve at the same rate as another.[18] Any revolutionary technology is certain to cause "grave maladjustments."[19] In the case of software law, there has been a forty-year "legal lag" between the rises of software as a separate industry and the development of specialized contracting principles.

In the mid-1990s, one of the authors surveyed Computer Law Association lawyers that represented a wide range of proprietary companies in the software industry as well as law schools. Many computer lawyers perceived a swirl of "legal uncertainty" around basic legal infrastructure in their software licenses. Attorney respondents observed that courts were sharply divided as to whether mass-market licenses were enforceable. Other software lawyers had concerns about the licensor's power to repossess software and about the interface between intellectual property rights and contracting principles. In the unstructured part of the survey, many computer lawyers expressed the need for greater certainty in the rule governing software contracts.[20] The lack of a comprehensive body of software contract law created a swirl of uncertainty as to the enforceability of shrink-wrap and click-wrap agreements.

B. Stretching UCC Article 2 to Software

Since the birth of the software industry four decades ago, courts have mechanically extended the law of sales to software much like courts imported "horse and buggy law" to resolve problems posed by

16. *Id.* at 79.

17. WILLIAM F. OGBURN, SOCIAL CHANGE: WITH RESPECT TO CULTURE AND ORIGINAL NATURE 200 (B. W. Huebsch 1923) (1922).

18. Professor Ogburn's argument was that "the various parts of modern culture are not changing at the same rate, some parts are changing much more rapidly than others; and that since there is a correlation and interdependence of parts, a rapid change in one part of our culture requires readjustments through other changes in the various correlated parts of culture." SOCIAL SCIENCE QUOTATIONS: WHO SAID WHAT, WHEN & WHERE 175 (David L. Sills & Robert K. Merton eds., 2000) [hereinafter SOCIAL SCIENCE QUOTATIONS] (reporting survey of American life commissioned by President Herbert Hoover and published during Franklin Roosevelt's presidency).

19. *Id*.

20. Michael L. Rustad, Elaine Martel, & Scott McAuliffe, *An Empirical Analysis of Software Licensing Law and Practice*, 10 COMPUTER L. ASS'N. BULL. 1 (1995).

the automobile. UCC Article 2, drafted for the national distribution of durable goods, will soon celebrate its sixtieth birthday. Karl Llewellyn and Soia Mentschikoff drafted UCC Article 2 decades before the maturity of the software industry. The UCC Article 2 template is a flexible template that accommodates transaction in goods that include leases, franchising, and licensing.[21] Since the birth of the software industry, UCC Article 2 concepts devised for durable goods have been stretched to the general intangible of software.[22]

Software differs from durable goods in significant respects. Licensing is a contract that confers a lower-order property interest, parsing a right to use software or digital information for a designated period of time or under specified conditions and covenants. The licensing of software, like leases, validates the legal concept of the right to use property without the passage of title. While the consumer's title to the tangible copy of the software (the purchased CD-ROM, for example) may be absolute, that does not confer property rights upon the intangible code that makes up the software.

Software's short shelf life makes it difficult to realize liquidation value in the event of default. Software can be copied at no marginal cost. In *R C Tec Software, Inc.*,[23] the court ruled that a lender's foreclosure of software collateral was restricted to the version in place at the time of the secured agreement. The ease of copying software has made licensing the only efficient method of realizing value. A software "licensor" is the "person obligated by agreement to transfer or create rights in, or to give access to or use of, computer information or informational rights in it under an agreement."[24] In contrast,

21. Jean Braucher notes some of thorny problems extending UCC Article 2, but contends that overall Article 2 works remarkably well for software contracts:

> A few of the rules in Article 2 are a bit awkward as applied to software. For example, the risk of loss rules shift the risk to the buyer in certain circumstances where, for software, it might make sense to leave the risk with the seller because making another copy of software involves minimal cost. Furthermore, the default warranty of title provision may assume that title questions are more straightforward than is the case with software copies, with greater risk of infringement claims, but provisions for variation by agreement provide leeway to fashion appropriate contract terms.

Jean Braucher, Contracting Out of Article 2 Using a "License" Label: A Strategy That Should Not Work for Software Products, 40 LOY. L.A. L. REV. 261, 278 (2006) (footnote omitted).

22. U.C.C. § 9-102(a)(42) (2009).

23. 127 B.R. 501, 507–08 (Bankr. D.N.H. 1991).

24. UNIF. COMPUTER INFORMATION TRANSACTIONS ACT ("UCITA"), §102(a)(42) (rev. ed. 2002).

"licensee" means, "a person entitled by agreement to acquire or exercise rights in, or to have access to or use of, computer information under an agreement."[25] American courts have adapted UCC Article 2 principles to software contracts as a template for licensing transaction. However, UCC Article 2 does not address software licensing's contract/intellectual property interface.[26] Courts acknowledge the lack of fit between sales law and the law of software licensing. "It is not obvious; however, that UCC Article 2 ('sales of goods') applies to the licensing of software," since such licenses may provide the right to use intangible "downloaded" programs.[27]

Licenses are a specialized contractual form that protects intellectual property rights and enables vendors to realize their investments in developing code.[28] "By characterizing the original transaction between the software producer and the software rental company as a license, rather than a sale, and by making the license personal and non-transferable, software producers sought to avoid the reach of the first sale doctrine."[29] Licensing is far more flexible than assignments or sales because the licensor may control the permitted locations, duration of use, number of users, and even the permitted uses of the software. A seller of an iPod is unlikely to specify that the consumer may only use the device for six months. In addition, there is no second-hand software market because of anti-

25. UCITA, §102(a)(41).

26.

> Software licensing raises many complex issues related to both the nature of software and the manner in which it is distributed. Software does not fit neatly into preexisting legal categories because it is both tangible and intangible, and both privately owned and publicly distributable. Although the intellectual property constituting the underlying software code is legally "owned" by the software producer, the medium upon which the software is contained can be readily transferred by others (i.e., non-owners of the software code).

Nancy M. Kim, *The Software Licensing Dilemma*, 2008 B.Y.U. L. REV. 1103, 1113 (2008).

27. Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 29 n.13 (2d Cir. 2002).

28.

> Software licensing occupies a unique position at the intersection of contracts, intellectual property, and commercial law doctrines. The difficulty in analyzing software licensing issues directly results from the *sui generis* nature of software that leads to the construct of what I refer to as the "software licensing dilemma"—if software is sold and not licensed, the licensor's ability to control unauthorized uses of its product is significantly curtailed; on the other hand, if software is licensed and not sold, the licensee's rights under the agreement are unduly restricted.

Kim, *supra* note 26 at 1103.

29. Step-Saver Data Sys. v. Wyse Tech., 939 F.2d 91, 96 n. 7 (3rd Cir. 1991).

assignability and anti-transfer provisions.[30] Location and use restrictions are necessary tools for software makers to realize their investment in developing intangible information assets.[31] Jean Braucher criticizes the software makers' use of licensing to restrict use:

> This car is licensed for personal use. You are the only one who may operate it. You may not use it for business purposes. You may not have more than three passengers in the car at any time. You may not comment on or criticize the car. You may not open the hood to see how the engine works or for any other reason. You may not try to repair the car; only authorized dealers may repair the car. You may not sell the car. If you no longer want the car, you must have it compacted or return it to the dealer.[32]

U.S. courts classify most software licenses as falling under UCC Article 2 governing the sale of goods even though these transactions involve the transfer of information or digital data.[33] Courts may employ UCC Article 2's statutory non-infringement warranty framework to software development contracts where the customer is sued for copyright infringement, patent infringement or infringement of other proprietary rights. In software development contracts, the most common risk is that a licensee will be sued by a third party for patent infringement because of software supplied by a developer. Courts have not hesitated to apply UCC Article 2 to address the problem of infringing software. Recently, a California federal district court applied UCC §2-313 to a case where a third party sued the purchaser of an interactive voice response system ("IVR") for patent infringement in *Phoenix Solutions, Inc., v. Sony Electronics, Inc.*[34] Article 2 goods are tangible, while software is composed of digital data. Software seldom has a tangible aspect at all, with distribution methods such as software as a service and the widespread use of product activation keys. Since a customer can download software

30. U.C.C. § 9-408 (2009).

31. A contract for the sale of goods is one in which a seller agrees to transfer goods that conform to the contract in exchange for valuable consideration. U.C.C. § 2-301 (2009).

32. Jean Braucher, *Contracting Out of Article 2 Using a 'License' Label: A Strategy That Should Not Work for Software Products*, 40 LOY. L.A. L. REV. 261, 265 (2006).

33. Robert B. Doe & Jen C. Salyers, *Software Licenses*, *in* 1 LAW & BUSINESS OF COMPUTER SOFTWARE 18-5 to 18-6 (Katheryn A. Andresen ed., West/Thomson 2008).

34. 637 F. Supp. 2d 683 (N.D. Cal. 2009).

from the Internet, there is frequently no tangible aspect to an online software contract. Judges must treat software "as if" intangible digital information is the equivalent of durable goods.

The courts' strained efforts to make due with UCC Article 2 for software contracts reminds us of the television commercial in which two mechanics try to fit an oversized automobile battery into a car too small to accommodate it. The car owner looks on with horror as the mechanics strike the battery with mallets repeatedly driving it into place. The mechanics tell the owner: "We'll make it fit!" The owner says, "I'm not comfortable with make it fit!" The impetus to develop specialized software contracting law stem from a widespread perception that software contracting law needs a separate legal infrastructure.[35]

C. CISG's Application to Software

The Convention for the International Sale of Goods ("CISG") does not address the question of whether the international sales law applies to either the sale or licensing of software. However, even though the drafters of CISG excluded specific intangibles like electricity or shares of stock does not mean that all intangibles are outside CISG's sphere of application. The CISG drafter's exclusion of this nonexclusive list of intangibles does not signal, "the conclusion that the subject matter of a CISG sale must always be a tangible thing."[36] The author of a leading software law treatise and his co-author content that CISG is broadly applicable to many cross-border software transactions:

> The CISG applies to most information technology transactions between parties whose places of business are situated in countries that have adopted the CISG. . . . A lawyer involved in any sale, or license of hardware, and/or software between

35. Michael L. Rustad, *The Uniform Commercial Code Article 2B Symposium: Commercial Law Infrastructure for the Age of Information*, 16 J. MARSHALL J. COMPUTER & INFO. L. 255 (1997); *Cf.* Jean Braucher, *Contracting Out of Article 2 Using a 'License' Label: A Strategy That Should Not Work for Software Products*, 40 LOY. L.A. L. REV. 261, 274 (2006) (acknowledging that Article 2 does not address intellectual property licensing but contending that Article 2 should be followed for software contract formation, warranties and remedies).

36. Joseph Lookofsky, *In Dubio Pro Conventione? Some Thoughts About Opt-Outs, Computer Software and Preëmption Under the 1980 Vienna Sales Convention (CISG)*, 13 Duke J. Comp. & Int'l L. 263, 274 (2003).

> parties in these nations is required to look to CISG for the rules governing their contractual rights and duties.[37]

Joseph Lookofsky notes that courts in Denmark distinguish between the development of software as services and the sale of software.[38] He cites the example of software contract as being comparable to the seller of Royal Copenhagen dishes hand-painted by Danish artisan:

> By the same token, if S in Germany manufactures and delivers intangible software to B in France, the fact that the value of that product is mainly attributable to the intellectual efforts of brainy (and pricy) IT nerds hired by S to produce it does not somehow render the S-B transaction "ineligible" as a CISG sale of goods.[39]

CISG is easily adaptable to software despite the differences between tangible goods and the fact that computer transactions involve services:

> Though we cannot see or touch it, a computer program is not really different from a tractor or a micro-wave oven, in that a program—designed and built to process words, bill customers or play games—is also a kind of "machine." In other words, a computer program is a *real* and very *functional thing*; it is neither "virtual reality" nor simply a bundle of (copyrighted) "information." Once we recognize the functional nature of a program, we begin to see that the CISG rules (on contract formation, obligations, remedies for breach etc.) are *well suited* to regulate international sales of these particular "things."[40]

Custom software, Internet downloads, and standard mass-market licenses are arguably within the ambit of CISG though not all

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37. Marc S. Friedman & Lindsey H. Taylor, *Applying the CISG to International Software Transactions*, 7 METRO. CORP. COUNS. NO. 10 (Oct. 1999).

38. Joseph Lookofsky, *CISG Case Commentary*, Denmark, 7 March 2002, Eastern High Court (Ostre Landsret), published in Danish in UGESKRIFT FOR RESTVAESEN 2002, *available at* http://www.cisg.dk/cisg_case_commentary.htm.

39. Joseph Lookofsky, *In Dubio Pro Conventione? Some Thoughts about Opt-Outs, Computer Software and Preëmption Under the 1980 Vienna Sales Convention (CISG)*, 13 DUKE J. COMP. & INT'L L. 263, 275 (2003); *see also*, Marcus G. Larson, *Applying Uniform Sales Law to International Software Transactions: The Use of the CISG, Its Shortcomings, and a Comparative Look at How the Proposed UCC Article 2B Would Remedy Them*, 5 TUL. J. INT'L & COMP. L. 445 (1997).

40. Lookofsky, *supra* note 39, at 276.

authorities agree.[41] Under CISG, "the *goods* referred to are conceived as movable assets; and the common-law tradition sets great store by noting that they have to be corporeal as well."[42] CISG does not govern the sale of intellectual property rights and other immovable property nor does it apply to consumer transactions.[43] The Convention "seems well-suited to the regulation of contracts for the sale of computer software."[44] Most commentators agree that software can be classified as goods for the purposes of CISG.[45] CISG excludes consumer transactions, unlike UCC Article 2 which governs both consumer and non-consumer sales of goods. To date, there is a poverty of case law on whether CISG can be stretched to cover software in business-to-business license agreements.

D. The Firestorm of UCC Article 2B

By the early 1990s, the American Bar Association began a project to update the Uniform Commercial Code to bring software contracts within its scope. The impetus to create specialized legal infrastructure for software licensing began in the early 1990s when the National Conference of Uniform State Laws ("NCCUSL)[46] and the American Law Institute ("ALI")[47] joined forces to develop a separate

41. *Id.* at 278.

42. Fritz Enderlein & Dietrich Maskow, INTERNATIONAL SALES LAW: UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS (Oceana Publications 1992) *available at* http://www.cisg.law.pace.edu/cisg/biblio/enderlein-art01.html.

43. CISG art. 1(1).

44. Joseph M. Lookofsy, Understanding the CISG in the USA 61 (The Hague Netherlands: Kluwer, International 1995).

45. Hiroo Sono, *The Applicability and Non-Applicability of the CISG to Software Transactions*, *in* SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: FESTSCHRIFT FOR ALBERT H. KRITZER ON THE OCCASION OF HIS EIGHTIETH BIRTHDAY, 512–26 (Camilla B. Andersen & Ulrich G. Schroeter eds.,Wildy, Simmonds & Hill Publishing 2008).

46. The National Conference of Commissioners on Uniform State Law ("NCCUSL") is now the Uniform Law Commission: The National Conference of Commissioners on Uniform State Law ("ULC"). *See* Uniform Law Commission, http://www.nccusl.org/Update/ (last visited Aug. 20, 2009).

47. The American Law Institute describes its mission as follows:

> The American Law Institute is the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law. The Institute (made up of 4000 lawyers, judges, and law professors of the highest qualifications) drafts, discusses, revises, and publishes Restatements of the Law, model statutes, and principles of law that are enormously influential in the courts and legislatures, as well as in legal

article of the Uniform Commercial Code ("UCC") called Article 2B.[48] The avowed purpose of UCC Article 2B was to update UCC Article 2 concepts for the commercial realities of software licenses.

Industry, consumer, and bar association groups hotly debated the innumerable drafts of Article 2B, which preceded UCITA. In March of 1995, NCCUSL approved a "hub and spoke" model[49] that treated Article 2B as a separate spoke sharing hub provisions with Articles 2 and 2A. The hub and spoke model sought to harmonize Articles 2, 2A and 2B by forging general principles common to each article. The sponsoring organizations, ALI and NCCUSL, envisioned a common hub and separate spokes for Articles 2, 2A and 2B that correspond to sales, leases and licenses respectively.

The death knell for the hub and spoke model sounded in late July 1995, when NCCUSL abandoned the entire hub and spoke architecture in favor of making Article 2B a separate UCC article.[50] NCCUSL eliminated the hub and spoke model but retained Professor Raymond Nimmer as the Article 2B reporter. In addition to Professor Nimmer, the key players for the Article 2B project were the American Bar Association, NCCUSL and the ALI. The UCC has long been a project co-sponsored by the ALI and NCCUSL and these organizations need to approve a completed draft before enactment in the state legislatures. The ALI withdrew from the Project when members of the Council determined that UCC Article 2B was too controversial to be approved by the membership. ALI's scuttling of the joint statutory project with NCCUSL to create a specialized UCC Article was, in effect, UCC Article 2B's death sentence.

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scholarship and education. ALI has long been influential internationally and, in recent years, more of its work has become international in scope.

The American Law Institute, ALI Overview, http://www.ali.org/index.cfm?fuseaction =about.overview (last visited Nov. 15, 2009).

48. Professor Rustad served on the ABA Business Law's Subcommittee on Software Licensing for a decade. He served as the task force leader for the scope of UCC Article 2B that favored the licensing of information as opposed to software. The rationale was that information was broad enough to evolve as information technologies differentiate.

49. *See generally* Amelia H. Boss, *Developments on the Fringe: Article 2 Revisions, Computer Contracting and Suretyship*, 46 BUS. LAW. 1803 (1991).

50. *See* Thom Weidlich, *Commission Plans New UCC Article*, NAT'L L. J., Aug. 28, 1995, at B1 (noting that NCCUSL appointed Houston law professor Raymond T. Nimmer as Technology Reporter for the new UCC Article 2B).

E. The Short Life and Death UCITA Firestorm

ALI's withdrawal from the Article 2B project left NCCUSL with only two options. NCCUSL could either abandon a decade-long drafting project or introduce the model law as a stand-alone statute into state legislatures. NCCUSL renamed UCC Article 2B as the Uniform Computer Information Transactions Act ("UCITA") only two months after ALI's unscheduled departure. NCCUSL approved the new reformulated Uniform Computer Information Transactions Act for introduction to state legislatures. NCCUSL approved UCITA in July of 1999 and updated in 2002.

The statutory purposes of UCITA are to: (1) facilitate computer or information transactions in cyberspace; (2) clarify the law governing computer information transactions; (3) enable expanding commercial practice in computer information transactions by commercial usage and agreement of the parties; and (4) make the law uniform among the various jurisdictions. The only significant difference between UCC Article 2B and UCITA was the decoupling from the Uniform Commercial Code. Scorched-earth opposition from diverse stakeholders met the final approved version of UCITA, like UCC Article 2B. Without entering into the details of the UCITA hornet's nest, it is important to note that the proposed statute was opposed by most intellectual property law professors, representatives of large vendors, major consumer protection groups, and many lawyers in the software industry. Most critics contended that UCITA gave too much power to the licensors of software criticisms that also encumbered UCC Article 2B. UCITA was widely perceived as a recycled statute that reflected the interest of Microsoft and other vendors subordinating the interests of licensees.[51] However, most of UCITA's provisions reflected UCC Article 2 concepts as well as best practices from the software industry. Technology vendors tended to support UCITA while their big corporate customers vehemently

51. During the period that Professor Rustad was a minor participant in UCC Article 2B and UCITA, he attended a large number of drafting committee meetings. While Microsoft did have its lawyers involved in the drafting of UCC Article 2B and UCITA, large licensees also participated in all phases of the project. Legal academics and consumer groups participated but to a lesser extent. Representatives of law schools, consumer organizations, and government lawyers did not have the human resources to attend every drafting meeting nor the travel funding. However, in contrast to previous law reform projects such as Revised UCC Articles 3 & 4, UCC Article 2B and UCITA were far more inclusive.

opposed it.[52] UCITA's list of opponents was a "who's who" of American companies that licensed software.[53]

Researchers and librarians opposed UCITA, "seeking . . . to ensure that non-negotiated (or 'mass-market') contracts imposed under state law not be allowed to upset the balance that Congress and the federal courts have achieved in the copyright law over the past 200 years."[54] Critics charged that UCITA would "expressly authorize a software publisher, in a dispute over license rights, to remotely shut down an organization's mission-critical software without court approval, in many cases shielding the software publisher from liability for the harm caused."[55]

Maryland and Virginia were the only states to adopt UCITA from 1999 to the present. Three states have adopted defensive "bomb-shelter" statutes to protect their citizens from some of UCITA's anti-consumer protection features.[56] The perception in the

52. Patrick Thibodeau, *UCITA Opponents Slow Software Licensing Law's Progress*, COMPUTERWORLD, May 17, 2001, at 1.

53. Professor Rustad's article on consumer provisions of UCITA compares the UCITA controversy to the final scenes in the famous movie, Butch Cassidy and the Sundance Kid.

> Article 2B and UCITA, its successor statute, are the most controversial codification projects in recent history. Butch Cassidy and the Sundance Kid was a 1969 film that featured Paul Newman and Robert Redford playing two famous outlaws of the American Wild West. A relentless posse pursued Butch and Sundance after they robbed the Union Pacific railroad. The outlaws used every technique to evade the posse but the lawmen just kept coming. Butch finally turned to Sundance and asked: 'Who are those guys?' The battles over the enactment of UCITA and former UCC Article 2B resemble the last days of Butch and Sundance when the posse just kept pursuing the outlaws.

Michael L. Rustad, *Making UCITA More Consumer-Friendly*, 18 J. MARSHALL J. COMPUTER & INFO. L. 547, 550 (1999). The various stakeholders that opposed the model statute when it was introduced into state legislatures finally killed off UCITA. NCCUSL (now the ULC) is no longer introducing UCITA for consideration by state legislatures.

54. American Library Association, UCITA: Problems with a non-negotiated Contract, http://www.ala.org/ala/issuesadvocacy/copyright/statelegislation/ucita/nonnegotiated.cfm (last visited Nov. 14, 2009).

55. Americans for Fair Electronic Commerce Transactions, What is UCITA, http://www.ucita.com/what_problems.html (last visited Apr. 24, 2006).

56. UCITA "bomb shelter" statutes void choice of law clauses where UCITA is the choice of law. UCITA encourages vendors to choose UCITA in states other than Maryland and Virginia. The "bomb shelter" statute shields users from the choice of UCITA by prohibiting UCITA as the choice of law. Iowa, North Carolina, and West Virginia have enacted this defensive legislation. Americans for Fair Electronic Commerce Transactions (Affect), *UCITA 'Bomb Shelter' Legislation*, http://docs.google.com/gview?a=v&q=cache:uY-3E0b9rjkJ:affect.ucita.com/pdf/UCITABombShelter.pdf+UCITA+bomb+shelter &hl=en&gl=us (last visited Nov. 15, 2009).

UCITA bomb-shelter states is that consumers need protection from UCITA's anti-consumer features.[57] The American Bar Association's UCITA Working Group issued a report calling for revisions in UCITA. More damning was the charge that UCITA was incomprehensible and not ready for prime time.[58] Thirty-three state attorneys general wrote a letter to the UCITA standby committee in 2001 describing UCITA as "fundamentally flawed."[59] State attorneys general contended that UCITA stripped consumers of well-established principles.[60] In 2002, the American Bar Association ("ABA") Working Group on UCITA pronounced UCITA to be "a very complex statute that is daunting for even knowledgeable lawyers to understand."[61] The 2002 Amendments to UCITA implemented some of these suggestions. In 2004, the NCCUSL President withdrew a report on UCITA for approval by the American Bar Association because of "strongly held" beliefs the ABA should not take a position

57. *Id.*

58. Raymond Nimmer, the Reporter for UCITA (and UCC Article 2B) was placed in an unenviable position of continually responding to stakeholders threatening to stymie the project. Article 2B, UCITA's predecessor, was continually drafted and revised to address a seemingly endless set of demands by stakeholders. Don Cohn, UCITA's ABA advisor noted how "[e]xtensive changes were made over the years to reflect the reasonable needs and requests of various interest groups and to accommodate the convergence of technologies that are within the scope of UCITA." UCITA ABA Advisor Report from Don Cohn to the ABA Staff and House of Delegates, (Jan. 16, 2003) *available at* http://www.nccusl.org/nccusl/ucita/Cohn_Letter.pdf (last visited Aug. 20, 2009). The incomprehensibility critique came largely from UCITA's ambitious scope as well as its tackling the complex borderland between contracting law and intellectual property. The undue complexity of UCITA is partially a testament to its aspirations. To update commercial law scholar and sociologist Max Weber, Ray Nimmer was "attempting the impossible, to achieve the possible."

59. American Library Association, UCITA 101 & 102 (May 22, 2006), http://www.ala.org/ala/aboutala/offices/wo/woissues/copyrightb/statelegislation/ucita/ucita101.cfm (last visited Nov. 15, 2009).

60. One of the reasons that the UCITA project did not succeed is that, although UCITA attempted to mask its real focus on mass-market transactions with a purported paradigm of a negotiated transaction, it in fact explicitly addressed non-negotiated deals in a way that was inconsistent with UCC Art 2, which disfavors delayed disclosure of material terms . . . . UCITA seems to protect delayed disclosure of even significant terms in non-negotiated deals, thus revealing its real concern with validating an approach dubious under both commercial and consumer law. Most state attorneys-general in the United States—who enforce state consumer protection laws—and the Federal Trade Commission reacted negatively and pressed for changes. Jean Braucher, *U.S. Influence with a Twist: Lesson About Unfair Contract Terms from U.S. Software Customers*, 2007 COMPET. & CONSUMER L.J. 5, 12 (2007).

61. American Library Association, UCITA, *Id.*

on the model statute.[62] However, by 2009 it was clear that no states would enact UCITA and that it was a failed law reform project.

III. An Overview of the Principles of Software Contracts

The American Law Institute launched the Principles of Software Contracts project in 2004 when it became clear that UCITA was already in its last days in the law reform hospice. The Reporters acknowledge that the Principles were a response to the "near demise" of the ("UCITA") and the "vague scope provision" of Revised UCC Article 2's addressing software transactions.[63] The Reporters acknowledge that the law of sales for the sale of goods does not meet the economic and technological realities of software, its "novel speed, copying, and storage capabilities."[64]

The Reporters drafted the Principles of Software Contract in the shadow of UCITA's failure and a widespread perception that software contracting law was "undeveloped, confused, and conflicting."[65] The Principles sought to resolve four fundamental issues:

> (1) the nature of software transactions; (2) the acceptability of current practices of contract formation and the implications of these practices for determining governing terms; (3) the relationship between federal intellectual property law and private contracts governed by state law; and (4) the appropriateness of contract terms concerning quality, remedies, and other rights.[66]

A. A Roadmap of the Principles of Software Contracts

The Principles of Software Contracts consists of four chapters roughly corresponding to the stages of software licensing agreements. The first chapter covers scopes and general terms which are the prefatory terms in every software license agreement. The Reporter's scope section closely corresponds to the "four primary categories [of

62. K. King Burnett, Statement by NCCUSL President Burnett to ABA House of Delegates Regarding UCITA (Feb. 10, 2003), http://www.nccusl.org/nccusl/ucita/UCITA_withdrawal.pdf (last visited Nov. 15, 2009).

63. American Law Institute, *Principles of the Law of Software Contracts – Proposed Final Draft* (March 16, 2009), Reporter's Memorandum at 1.

64. *Id.*

65. Jean Braucher, *U.S. Influence with a Twist: Lesson About Unfair Contract Terms from U.S. Software Customers*, 2007 COMPET. & CONSUMER L.J. 5, 12 (2007).

66. *Id.*

software contracts]: sales of goods, licenses of technology, lease agreements and service."[67] Chapter 2 covers formation and enforcement provisions for software contracts with specialized rules for standard-form transfers. Chapter 3 covers performance with a focus on indemnification and warranties and the parol evidence rule and the interpretation of software contracts. Many of the provisions of Chapter 3 closely track UCITA and UCC Article 2's rules but there are some significant differences. Section 3.05 provides that software makers that receive money for a license make a strict-liability like warranty that their software contains no "material hidden defects of which the transferor was aware at the time of the transfer."[68] The warranty for latent defects is non-disclaimable and is assertable as a cause of action by end-users in the absence of privity. Section 3.05 is a new warranty provision not found in UCITA drawing upon the law of products liability failure to warn cases.

Chapter 3's quality warranties otherwise are akin to UCC Article 2's structure and function. The Principles recognize express warranties but decline to adopt "basis of the bargain" test for enforceability followed in UCC Article 2 and UCITA.[69] The Principles make it clear that express warranties "run with the software." Thus, a distributor or dealer is liable for express warranties if it adopts the maker's warranty."[70] The issue of third-party beneficiaries of software warranties is addressed in §3.07.

The Principles of Software Contracts draw extensively upon the Restatement (Second) of Contracts as well as UCC §2-202 in carving out a middle position between rigid enforcement and outright prohibition of the Parol Evidence Rule.[71] Topic 3 of Chapter 3 focuses on what constitutes breach entitling the parties to remedies. The fourth chapter of the Principles is devoted to software remedies. The goal of the Principles chapter is to spell out what remedies a licensor or licensee may have in the event of breach or cancellation of the software license. Section 4.01 broadly validates the widespread software industry practice of modifying and limiting remedies following the methodology of UCC §2-719. Similarly, the Principles

67. RAYMOND T. NIMMER, THE LAW OF COMPUTER TECHNOLOGY: RIGHTS, LICENSES AND LIABILITIES § 6.01 at 6-3 (Warren Gorham & Lamont, 2nd ed. 1992).

68. *Id*. at § 3.05(b).

69. *Id*. at § 3.02.

70. *Id*. at § 3.02(d).

71. The Principles of Software Contracts' approach to parol evidence is at odds with the Convention for the International Sale of Goods. *See*, CISG, Art. 8.

endorse the concept of liquidated damages drawn from UCC §2-718 and UCITA §804.

The use of remote repossession by automatic disablement to impair use of software is largely prohibited by §4.03. The Principles prohibit the licensor from remotely disabling software licensed to consumers or to other standard-form licensees. The Principles place limits on the use of electronic means to render inoperative software in other software transactions. Section 4.04 permits either party to cancel the software contract if the other party is in material breach, not cured within a reasonable amount of time. The Principles establish expectation damages as the default remedy for the aggrieved party. Finally, a court may decree specific performance if the software "is unique or in other proper circumstances."[72] The diagram below presents a telescopic roadmap of the key provisions of the Principles.

PRINCIPLES OF SOFTWARE CONTRACTS ROADMAP

Chapters of Principles	Topics Covered	Key Sections
Chapter 1, Definitions, Scope & General Terms (Sections 1.01-1.14)	Definitions, Scope, General Terms, Public Policy and Unconscionability	Definitions in §1.01; Scope in General, §1.06; Scope of Embedded Software; §1.07; Scope: Mixed Transfers, §1.08, Enforcement of Terms under Federal intellectual property Law, §1.09; Public Policy, §1.10. Unconscionability, §1.11; Relation to Outside Law, §1.12 Choice of Law in Standard Form Transfers, Forum-Selection Clauses, §1.14.
Chapter 2, Formation and Enforcement (Sections 2.01-2.04)	Formation and Enforcement: Formation Generally, Standard-	Formation Generally, §2.01. Enforcement of the Standard Form,

72. *Id*. at § 4.06(a).

	Form Transfers, Contract Modification Contract	§2.02; Contract Modification, §2.03.
Chapter 3, Performance (Sections 3.01- 3.12)	Indemnification and Warranties; Parol-Evidence and Interpretation, & Breach	Implied Indemnification vs. Infringement, §3.01; Express Quality Warranties, §3.02; Implied Warranty of Merchantability, §3.03; Implied Warranty of Fitness for a Particular Purpose, §3.04; Other Implied Quality Warranties, §3.05; Disclaimer of Express & Implied Quality Warranties, §3.06; and Third-Party Beneficiaries of Warranty, §3.07.
Chapter 4 Remedies (Sections 4.01-4.06).	Agreements With Respect to Remedy, Remedies in the Absence of Agreement	Contractual Modification or Limitation of Remedy, §4.01; Liquidation and Limitation of Damages, §4.02; Use of Automated Disablements, §4.03; Cancellation, §4.04; Expectation Damages, §4.05; and Specific Performance, §4.06.

B. The Soft Principles of Contracting

The Principles of Software Contract are "soft law" in that they are not mandatory provisions enacted by state legislatures. Legislatures enacted UCC Article 2 and UCITA as "hard law." The Associate Reporter notes that the Principles can provide guidance for courts and legislatures when addressing software-contracting issues. "Courts can apply the Principles as definitive rules, as a 'gloss' on the

common law or UCC Article 2, or not at all, as they see fit."[73] The Principles are a distillation of common law principles drawn from UCC Article 2, UCITA, and industry standards. In contrast, "hard law" is binding law enacted by state or federal legislatures. Because "soft law is never introduced as legislation, it is less politically risky." With soft law projects, the only politics is within the American Law Institute and there was rather minimal dissent to this law reform project. In contrast to UCC Article 2B and UCITA, there has been more light than heat. The purpose of the Principles is to illuminate the law of software by gathering together best practices. The Principles of Software Contracts harmonize common law principles from courts in the fifty plus U.S. jurisdictions. The Reporters draw upon well-established principles of UCC Article 2, UCITA, the common law, and best practices of the U.S. software industry in forging the Principles of Software Contracts.

C. The Principles' Methodology

Commercial law evolved out of the law merchant or *lex mercatoria*. Just as UCC Article 2 was a new paradigm in its day, displacing nineteenth century "horse law and haystack law,"[74] The Principles of Software Contracts are accommodating software transfers. The Principles of Software Contracts are ideological and utopian. They are ideological in that they reflect the interests of the software industry but also utopian in the sense that they express "the law as it should be" in several provisions.[75] However, the Reporters treaded lightly in attempting to validate potentially controversial provisions by deferring to the courts. The Reporters characterized the following common software terms as troublesome: "(1) preclude the transferee generally from making fair uses of the work; (2) ban or limit reverse engineering; (3) restrict copying or dissemination of factual information; and (4) forbid transfer of the software."[76] The Principles do not take a position on any of these terms leaving that to the courts. The warranty as to undisclosed defects is an example of a

73. Maureen O'Rourke, Software Contracting, in AMERICAN LAW INSTITUTE-AMERICAN BAR ASSOCIATION CONTINUING LEGAL EDUCATION COURSEBOOK SM088 ALI-ABA 27 (June 7-8, 2008).

74. Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L.J. 1341, 1341 (1948).

75. *Id.* at § 1.12 cmt. a (citing ALI, No. 12, CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK (2005)).

76. *Id.* at § 1.09 cmt. c.

utopian assumption.[77] This warranty brings common sense to the common law in requiring vendors to disclose material defects so that consumers and other users may protect themselves from known perils.[78] The Principles' non-disclaimable duty to disclose hidden defects created the only significant firestorm during the ALI approval process. The General Counsel for the Linux Foundation and Microsoft jointly authored a letter to the ALI questioning the provision that software makers make a warranty against "material hidden defects."[79] Raymond Nimmer, UCITA's Reporter, castigated the principles for the §3.05 warranty charging that it was inconsistent with case law as well as industry practices. Nimmer charged that there was no support in the current software law for such a warranty and that the law of fraud places limits on liability not found in this warranty.[80] He notes that there is no reliance requirement under this non-disclaimable warranty, which is a limitation of fraud. The strict liability duty to disclose known material defects is what the software law "ought to be" versus a provision distilling the software law as it is.

The Principles reflect software industry practices in order to provide "soft" guidance to courts and practitioners whether the software transaction is structured as licenses, transfers, assignments,

77. The Reporters are extending a well-established theory of products liability requiring licensors to warn licensees of known dangers. This provision is well established in products liability: "The majority of states, either by case law or by statute, follow the principle that 'the seller is required to give warning against a danger, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge of the danger.'" Vassallo v. Baxter Healthcare Corp., 696 N.E.2d 909, 922 (Mass. 1998) (citing Restatement (Second) of Torts, § 402A, cmt. 1); *See also*, Restatement (Third) of Torts: Products Liability, Reporters' Note to comment m, at 104 (1998) (stating that "[a]n overwhelming majority of jurisdictions supports the proposition that a manufacturer has a duty to warn only of risks that were known or should have been known to a reasonable person").

78. Liability for software defects is just beginning to evolve, and the Principles will jumpstart remedies for consumers harmed by these defects. Michael L. Rustad & Thomas H. Koenig, *Extending Learned Hand's Negligence Formula to Information Security*, 3 ISJLP 237, 247 (1997) (addressing "the first wave of computer security lawsuits"). The Principles of Software Contracts formulation of a strict liability failure to warn of known defects will make it easier for consumer and other users to file suit against software makers for the consequences of failed software.

79. Cliff Saran, *Microsoft and Linux Join Forces Over Software Warranties*, COMPUTERWEEKLY.COM, May 19, 2009, http://www.computerweekly.com/Articles/2009/05/19/236102/microsoft-and-linux-join-forces-over-software-warranties.htm (last visited Nov. 8, 2009).

80. Raymond Nimmer, *Flawed ALI Software Contract 'Principles'* CYBERSPACE LAWYER, 14 No. 5 Cyberspace Law 3 (June 2009).

or sales. The Principles of Software Contracts resolve four telescopic issues:

> (1) the nature of software transactions; (2) the acceptability of current practices of contract formation and the implications of these practices for determining governing terms; (3) the relationship between federal intellectual property law and private contracts governed by state law; and (4) the appropriateness of contract terms concerning quality, remedies, and other rights.[81]

The Principles of Software do not address cross-border international licensing. The next section critically examines the key issues of the Principles of Software Contract applicable to cross-border international contracts.

IV. The Exportability of the Principles' Procedural Rules

A. The Legal Ethnocentrism of the Principles of Software Contracts

The Principles of Software Contracts is a significant advance for domestic software law because it clarifies the common law precedents for computer software. The Reporters take a legal realist approach in formulating "best practices" for software contracts. The Principles of Software Law are an advance over UCITA in their *real politik* approach to the scope of the model law encompassing sales, leases, and licensing of software. The Reporters demonstrate that they are aware of mandatory consumer rules in Europe. The Reporters recognize that the Principles' procedurally based doctrine of unconscionability differs from the regulatory rules-based approach taken by the European Commission.[82] They also accept that licensors will need to recalibrate U.S. rules on reverse engineering to comply with the European Union's Software Directive. The Directive grants customers a right to reverse engineer software for the purpose of interoperability.[83]

The Principles clarifies and harmonizes the law of software contracts for the U.S. marketplace.[84] However, the harmonization of

81. *Principles of the Law of Software Contracts* § 1.12 cmt. a (Proposed Final Draft 2009).

82. *Principles of the Law of Software Contracts*, 2009 A.L.I. §1.11, cmt a (comparing Principles to the EU Directive on Unfair Contract Terms and explaining the difference as the European Union's regulatory approach as opposed to the U.S. market approach).

83. *Id*. at Art. 1.1, cmt. 1.

84. *Id.*

software contracts does not extend to international consumer transactions. The only references to the term "international" in the Principles or comments refer to case names such as the International Business Machines ("IBM"). In a Reporters' comment, they refer to a famous hypothetical involving International Falls, Minnesota. Nevertheless, other than these stray references, the Principles are American centric designed for the domestic software marketplace. This part of the article demonstrates the parochialism of the Principles and its failure as an exportable reform project for the global marketplace.[85] Software law reform has a long history of legal ethnocentrism:[86]

> United States law reform organizations and the U.S. government often seek to export U.S. commercial law to other parts of the world. When it comes to the law of software and other digital products, the failure so far in the United States to produce a successful domestic statute leaves other countries a

85. The U.S. centric approach to contract law was also documented in a recent empirical study entitled the "International Contracting Practices Survey Project." Professor Peter Fitzgerald, who was the principal investigator, observed: "In an era of globalization it is perplexing that so many U.S. practitioners, jurists, and legal academics continue to view contract issues as governed exclusively by state common law and the Uniform Commercial Code." Peter L. Fitzgerald, *The International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the United Nations Convention on the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts to Practitioners, Jurists, and Legal Academics in the United States*, 27 J.L. & COM. 1, 1 (2008). Professor Fitzgerald found that 65% of his practitioner respondents do not address the UNIDROIT Principles at all in their commercial contracts. *Id.* at 16. Practitioners were more likely to be familiar with the CISG. However, practitioners either opt out of CISG or do not address it all in their commercial sales contracts. *Id*. at 14. His survey concluded that CISG and UNIDROIT Principles are "being ignored either out of outright ignorance or because these instruments are unfamiliar . . . ." *Id.* at 24. Robert A. Hillman of the Cornell Law School is the Reporter of the Principles of the Law of Software Contracts, while Maureen O'Rourke, the Dean of the Boston University Law School, the Associate Reporter, are distinguished legal academics who understand the globalized nature of software transaction unlike many of the respondents in Fitzgerald's study. The Reporters also demonstrate their sophisticated understanding of software consumer issues when they acknowledge the different approach taken in the Principles from Europe's "pro-regulatory stance to consumer protection and contract terms specifically." *Principles of the Law of Software Contracts*, 2009 A.L.I., §1.11, cmt c. The Reporters acknowledge that they have considered the European approach to consumer transactions rejecting it in favor of the U.S.-based unconscionability doctrine. *Id*. The Reporters note that the annex to the Unfair Contract Terms Directive may be useful to courts "in evaluating unconscionability claims." *Id.* Finally, the Reporters acknowledge that it may be expensive for software makers to localize their contracts for the European consumer market. *Id*.

86. *See*, Nora V. Demleitner, *Combating Legal Ethnocentrism*, 31 ARIZ. ST. L.J. 737, 745 (1999).

> window to develop their law for these transactions in relative independence from industry-driven U.S. influence.[87]

The American Law Institute's approval of the Principles of Software Contracts in May of 2009 is a propitious moment to examine the exportability of software contracting principles for European software contracts. In the flattened global economy, Europe will continue to be a major customer for U.S. software. The twenty-seven countries of the European Union comprises the "world's largest trading block with an affluent population of 370 million."[88] Just by way of example, six out of the ten leading software providers in Germany are American-based proprietary companies.[89] American software companies account for 70% of all software sales in the European continent.[90]

Europe's harmonized system of procedural and substantive law has its roots in the unifying principles of the 1957 Rome Treaty.[91] The European Union developed an array of transnational legal institutions to carry out the European Community's objective of transcending national borders. The Council of European Union is composed of twenty-seven national Ministers and forms along with the European Parliament the legislative arms of the European Union.[92] The European Commission is the executive body of the

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87. Jean Braucher, *U.S. Influence with a Twist: Lesson About Unfair Contract Terms from U.S. Software Customers*, 2007 COMPET. & CONSUMER L.J. 5, 12 (2007).

88. Roger A. Phillips, GUIDE TO SOFTWARE EXPORTS: A HANDBOOK FOR INTERNATIONAL SOFTWARE SALES 53 (Binghamton, N.Y: The International Business Press, 1998).

89. Jock O'Connell, *Soft Figures on Software Exports* (last visited November 8, 2009) http://jockoconnell.tripod.com/softwareexports.html.

90. *Id.*

91. Article 2 of the Treaty of Rome states the following principle:

> The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

Treaty of Rome, art. 2, March 25, 1957, 298 U.N.T.S. 11 *available at* http://www.hri.org/docs/Rome57/.

92. The Council of European Union is a key decision-making institution that is responsible for foreign affairs, farming, industry, transport, and other emergent issues. *See* Gateway to the European Union, http://europa.eu/index_en.htm (last visited Nov. 8,

European Union and responsible for proposing legislation, implementing decisions, and upholding European Union's Treaties. The European Commission is charged with developing a legal framework to advance free competition in the Single Market. The European Commission in the "eEurope 2002 Action Plan" noted, "[c]onsumer confidence needs to be enhanced if e-commerce is to achieve its full potential." Traditionally, European consumers look with suspicion at markets which do not guarantee the same level of protection provided by their national legislature. The EU's seamless internal market cannot flourish unless consumers are secure in their software contracts outside their home country. As a result, with the intention to create a safer market for less sophisticated consumers, the European Legislature enacted a certain number of regulations and directives.[93] By providing the same or similar degree of consumer protection, the EU encouraged consumers to buy goods and services in the other Member States, and enabled cross-border European commerce. Over the past two decades, the European Union has adopted comprehensive consumer protection governing software licensing as well as the sale of goods. The next section will examine how the mandatory consumer rules provided by the Brussels Regulation, Rome I Regulation, the E-Commerce Directive, the Distance Selling Directive, the Unfair Commercial Practices

2009). The Council, known even as the Council of Ministers, is the principal legislative and decision-making body in the EU. The Council includes ministers of the governments of each of the Member States and is divided into different functional areas called formations. European citizens directly elect the European Parliament every five years. The Parliament consists of 785 Members of the European Parliament ("MEP"), representing nearly 500 million European citizens. The European Council and the Parliament are principally responsible for the legislative functions of the single EU market. The MEP is divided into political groups rather than representing national blocs. Each political group reflects its parties' political ideology as opposed to national political ideologies. Some MEPs are not attached to any political group. *Id.*

93. A European regulation is a legal instrument binding in all of its part and, more important it is self-executing, which means that it is immediately enforceable as law in all Member States. By contrast an European directive is not self executing and it is binding on the Member States as to the result to be achieved but leaves to individual countries the choice of the form and method they adopt to realize the Community objectives within the framework of their internal legal order. Regulations are very invasive legal instruments and that their purpose is the unification of the European law. By contrast, directives are more flexible because they require Member States to meet just a certain minimum standard, but Member States can improve that minimum with more stringent provisions. The purpose of the Directive is the harmonization of European law because they are meant just to align the legislation of Member States.

Directive and the Unfair Contract Terms Directive class with the U.S. law of software licensing.[94]

B. U.S. vs. Europe: Choice of Forum Rules

1. Principles Approach to Forum Selection

The Principles of Software Contracts adopt a Restatement (Second) of Contracts-like approach to choice of forum where the parties are free to choose an exclusive forum. Section 114 entitled "Forum-Selection Clauses" states that courts will broadly enforce the parties' choice of forum clauses "unless the choice is unfair or unreasonable."[95] In addition, courts will not enforce the parties' choice of forum if the clause was a product of "misrepresentation, duress, the abuse of economic power, or other unconscionable means."[96] Choice of forum clauses "repugnant to public policy as expressed in the law of the forum in which suit is brought" are unenforceable.[97]

2. Brussels' Regulation Governing Jurisdiction

In the European Union, the Brussels Regulation governs jurisdiction and enforcement of judgments in civil and commercial disputes between litigants and provides for the enforcement of judgments throughout the European Union.[98] The Brussels Regulation provides the ground rules for determining jurisdiction as well as the enforcement of judgments that applies equally well to cross-border software license agreements. The Brussels Regulation is self-executing in each of the twenty-seven countries of the European Union. The Brussels Regulation sets forth the general rule that "persons domiciled in a Contracting State shall whatever their nationality, be sued in the courts of that State."[99]

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94. Directives are increasingly important in harmonizing law across the European Community. After that, the Council and the European Parliament approve a Directive Member States have a time limit in which to adopt national legislation implementing the directive.

95. *Principles of the Law of Software Contracts* § 1.14(a) (Proposed Final Draft 2009).

96. *Id*. at §1.14(b).

97. *Id.* at §1.14(d).

98. Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1, *available at* http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:EN:HTML (last visited Aug. 5, 2009). [hereinafter Brussels Regulation].

99. *Id*. at art. 2(1).

The Brussels Regulation gives consumer software licensee's mandatory protection against having to litigate in a distant forum. Articles 15-17 of the Brussels Regulation give consumers the right to file suit or defend actions in the courts of the consumer's country of domicile. Article 15 defines "consumer" as someone who is acting "outside his trade or profession" which is definition used by the European Legislature in all of its mandatory consumer rules.[100] Additionally, Article 17 of the Brussels Regulation provides that a consumer cannot waive her right to file or defend lawsuits in her local court.[101] European consumers, unlike their American counterparts, have an absolute right to sue a seller or supplier if it "pursues commercial or professional activities in the Member State of the consumer's domicile."[102] The Brussels Regulation's consumer rules clash with Section 114 of The Principles of Software Contracts that legitimates software maker's "choice of forum clauses.

In contrast to European courts, Americans courts broadly enforce choice of forum clauses even when they have the effect of compelling consumers to litigate in the seller's home court at a great distance from their home.[103] The inclusion of a choice of forum clause in a consumer license agreement is the functional equivalent of an anti-remedy. No rational consumer will litigate a claim that costs more to pursue than what is at stake. The Principles' validation of

100. *Id.* at art. 15.

101. Article 17 of the Brussels Regulations provides that a consumer cannot waive her right to sue a supplier in her local court. A supplier, which includes U.S. software companies, directing their activities to the consumer's home state is automatically subject to jurisdiction because he has directed activities to that state as defined in Article 15. Finally, a consumer may enforce a judgment in any Member State upon completion of the formalities set forth in Article 53. *Id*. at arts. 15, 17, 53.

102. *Id.* at art. 15(1)(c).

103. Section 114 of the Principles is consistent with case-law enforcing choice of forum clauses in consumer license agreements. Compulsory arbitration clauses in mass-market license agreements have been enforced by the vast majority of U.S. courts. *See*, *e.g.*, Westendorft v. Gateway 2000, Inc., 2000 Del. Ch. LEXIS 54 (Del. Ch. Ct., Mar. 16, 2000); Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569 (1998); Lieschke v. RealNetworks, Inc., 2000 U.S. Dist. LEXIS 1683 (N.D. 2000) (enforcing arbitration clauses in mass market licenses); American Online, Inc. v. Booker, 781 So.2d 423, 425 (Fla. Dist. Ct. App. 2001) (upholding forum selection clause in "freely negotiated agreement" and holding that the unavailability of a class action procedure in Virginia was not a sufficient basis for striking down a forum selection clause); Caspi v. Microsoft Network, L.L.C., 323 N.J. Super. 118, 732 A.2d 528, 530, 532–3 (N.J. Super. Ct. App. Div. 1999) (validating forum selection clause where subscribers to online software were required to review license terms in scrollable window and to click "I Agree" or "I Don't Agree").

parties' choice of forum clauses is antithetical to recent European case law developments.[104]

3. Case-Law Developments

American style choices of forum clauses in business-to-consumer licensing transactions are not enforceable in Europe because the Brussels Regulation has an anti-waiver provision.[105] U.S software companies cannot side-step the more restrictive mandatory consumer rules by the simple expedient of parties' choice of law or exclusive jurisdiction clauses.[106] The standard U.S. choice of forum clause that requires consumers to litigate claims in the licensor's home court are also suspect terms under the EC Unfair Contract Terms Directive which will be discussed in detail in the substantive law section of this article.[107] Choice of forum clauses conferring exclusive jurisdiction on a court in a city or country distant from the consumer's domicile

104. Another case illustrating this principle has been handed down by the European Court of Justice in Case C-381/98, Ingmar G.B. Ltd. v. Eaton Leonard, [2000] E.C.R. I-9305 (reasoning that the Council Directive imposes an obligation on commercial agents for the indemnification of commercial agents upon the termination of their contracts). In *Ingmar*, an agent was performing his activities in the UK on behalf of a California firm and law chosen by the parties to govern the agency contract was the law of California, which did not include such indemnification. The European Court of Justice stated that

> it is essential for the Community legal order that a principal established in a non-member country, whose commercial agent carries on his activity within the Community, cannot evade those provisions by the simple expedient of a choice-of-law clause. The purpose served by the provisions in question requires that they be applied where the situation is closely connected to the Community, in particular where the commercial agent carries on his activity in the territory of a Member State, irrespective of the law by which the parties intended the contract to be governed. Even though this is not a consumer law case, the principle established here is the same as that expressed by the previously mentioned Article 7 of the Directive 93/13/EC.

Id.

105. BRUSSELS REGULATION, *supra* note 101, at arts. 15–17.

106. David Naylor & Cyril Ritter, *B2C in Europe and Avoiding Contractual Liability: Why Businesses with European Operations Should Review Their Customer Contracts Now, Legal Updates & News,* http://www.mofo.com/news/updates/files/update1297.html (Last visited Nov. 8, 2009); Robert L. Oakley, *Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts*, 42 HOUS. L. REV. 1041, 1067 (2005) (asserting that "the Directive also specifically provides that consumers in member states should not lose the protection of the Directive by virtue of a choice-of-law provision in a non-member country. That would make, for example, the choice of Virginia law in an AOL contract inapplicable within the European Union.").

107. Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contract, 1993 O.J. (L 95) 29.

hinders the consumer's right to take legal action.[108] U.S. companies that require consumers to arbitrate disputes squarely conflict with the Unfair Terms Directive.[109] In *Océano Grupo Editorial* and *Salvat Editores,*[110] the European Court of Justice ("ECJ") refused to enforce an encyclopaedia seller's choice of forum clause in a consumer installment contract. The sellers' installment sales agreements conferred exclusive jurisdiction on the court in a Spanish city where neither of the consumers were domiciled, but where the sellers had their principal place of business. When the consumer defaulted on an instalment contract, the companies jointly filed legal actions in the Spanish city designated in the choice of forum clauses.

The ECJ ruled that this provision violated the Unfair Contract Terms Directive because consumers were compelled to litigate disputes so far from their domicile.[111] Additionally, the court observed that in cases involving small amounts of money, the consumer has, in effect, no remedy because the cost of litigation will frequently exceed the potential recovery.[112] The ECJ reasoned that "such a [choice of forum] term thus falls within the category or term which has the effect of excluding or hindering the consumer's right to take a legal action.[113]

Choices of forum clauses in consumer contracts are "unfair" under the meaning of the article 3 of the Unfair Contract Terms Directive because these provisions create a significant imbalance in favor of the software maker.[114] Foreign software companies, too, are subject to the Directive because in transnational litigation, the

108. Council Directive 93/13/EEC of April 1993 on Unfair Terms in Consumer Contracts, Annex, 1993 O.J. (L 95) 29, at letter (q) (excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract).

109. *Id.*

110. Joined cases C-240/98 to C-244/98, *Océano Grupo Editorial SA v. Roció Muciano Quinterno* and *Salvat Editores SA v. José M. Sánchez Alcón Prades, José Luis Copano Bacillo, Mohammed Berroane and Emilio Vinas Feliù*, 2000 E.C.R. I-4941.

111. *Id.* at I-4971 para. 22.

112. *Id.*

113. Letter (q) of the Annex considers terms unfair if they exclude or hinder the consumer's right to take legal action. Council Directive 93/13/EEC of April 1993 on Unfair Terms in Consumer Contracts, Annex, 1993 O.J. (L 95) 29, at letter (q).

114. Article 3 of the Unfair Contract Terms Directive states: "A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer." *Id.* at art. 3.

European consumer has an absolute right to file a proceeding in her home country because of the Unfair Contract Terms Directive and the Brussels Regulation.[115]

The Brussels Regulation's mandatory consumer rules are diametrically opposed to the market-based approach followed by the Principles of Software Contracts.[116] The Principles adopt the reasoning of the Supreme Court in the *Carnival Cruise Lines* case.[117] The Principles of Software Contracts urges courts to uphold forum selection clauses, unless they are unfair or unreasonable.[118] In contrast, all European Member States consider choice of forum clauses that deprive the consumer of their "home court" to be unfair and unenforceable.

C. Choice of Law: U.S. vs. Europe

1. Principles' of Software Choice of Law

Section 1.13 of the Principles of Software Contracts set forth the rules for parties' choice of law in standard-form transfer of generally available software. The Principles adopts the "reasonable relationship" test imported from former UCC §1-105. Section 1.13 sets the default for consumer agreements as the law of the jurisdiction where the consumer is located.[119] U.S. consumers have no right to have the choice of law clause corresponding to their home court.

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115. Article 15 provides that if a business "pursues commercial or professional activities in the Member State of the consumer's domicile, the consumer may sue in the court where he or she is domiciled." *Id*. at art. 15. Article 15.1(c) extends the consumer home forum rule to entities that "direct such activities" to the consumer's domicile. *Id.* at art. 15.1(c). Article 16.1 of the Brussels Regulation notes: "[a] consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled." Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1. Similarly, article 16.2 of the Brussels Regulation makes it clear that the U.S. company may only sue "in the courts of the Member State in which the consumer is domiciled." *Id*. at art. 16.2.

116. "The parties may by agreement choose an exclusive forum unless the choice is unfair or unreasonable." Principles of Software Contracts, §1.14.

117. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991) (holding a forum-selection clause in a standard-form agreement between a consumer and a cruise line enforceable).

118. Principles of Software Contracts, §1.14.

119. *Id.* at §1.13(b).

2. Rome I Regulation for Choice of Law

Choice of law in Europe is a branch of private international law that governs the principles courts use in determining which law to apply in a cross-border transaction. The Rome I Regulation on the law applicable to contractual obligations ("Rome I") governs the choice of law in European cross-border transactions.[120] In December 2005, the European legislature approved replacing the Rome I Convention of 1980 with a Community-Wide Regulation.[121] The Rome I Regulation establishes mandatory rules to determine which law applies to contracts with connections in more than one European Union Member State.

3. Courts' Choice of Law

Rome I gives the parties in business-to-business commercial transactions the power to make their own choice as to the governing law. If the parties do not choose the law, the court will apply the Rome I by default, which is the "close connection" test. Article 4 of the Rome I Regulation mandates the law determined partially by substantive field of law as follows shall govern the contract. For a software sale, for example, the contract "shall be governed by the law of the country in which the seller has his habitual residence."[122] In service contracts, for example, the law is "governed by the law of the country in which the party who is required to perform the service characterizing the contract has his habitual residence at the time of the conclusion of the contract."[123] The Rome Regulation permits the parties to business-to-business contracts to choose the law applicable to their contract, which is a rule similar to Section 1.14 of the Principles of Software Contract.

4. Mandatory Consumer Rule

In Europe, a party's choice of law clause is ineffective in divesting the consumer of the protection of mandatory rules. That rule is functionally equivalent to Brussels Regulation's mandatory rules.[124] The Rome I Regulation adopts the consumer's home court rule, which means the governing law of the place where a consumer

120. Council Regulation (EC) No. 593/2008 of 17 June 2008, 2008 O.J. (L 177) 6.

121. Commission Regulation 864/2007, on the law applicable to non-contractual obligations, 2007 O.J. (L 199) 40.

122. *Id.* at art. 4(1).

123. *Id.*

124. *Id*. at art. 3(5).

has her "habitual residence."[125] The special consumer rules apply only to natural persons who have their place of residence in European Union Member States. Article 6 of the Regulation applies to natural persons for a purpose which can be regarded as being outside his trade or profession (the consumer). If a consumer, defined as a person acting outside of his trade or profession, contracts with a business, the contract is governed by the law of the country where the consumer has her habitual residence.[126] If an American software company licenses software to an Italian consumer, the Italian consumer will have an absolute right to have the decision decided by Italian rather than U.S. law because of Article 6's mandatory choice of law provisions. This consumer rule binds U.S. companies if they "pursues . . . commercial or professional activities in the country where the consumer has his habitual residence."[127] Similarly, any software vendor directing activities to a Member State will be bound by the Rome Regulation's mandatory consumer rules.

Article 7 of the Unfair Contract Directives requires "Member States . . . [to take] the necessary measures to ensure that the consumer does not lose the protection granted by the Directive by virtue of the choice of the law of a non-Member country."[128] As a result, America Online, for example, cannot require European consumers to litigate disputes according to Virginia law.[129] The Principles adopt choice of law rules unenforceable in European consumer transactions. Section 1.13 of the Principles of Software Contracts gives software vendors the discretion to apply the choice of law that deprives consumers of their home court which is inconsistent with the mandatory consumer rules of Rome I and the Unfair Contract Terms Directive. The Principles of Software validate U.S. style choice of law provisions unenforceable in the twenty-seven countries of the European Union.

V. The Exportability of the Principles' Substantive Provisions

The prior section has demonstrated that the Principles' procedural rules for determining jurisdiction and choice of law or forum are prohibited throughout Europe. Similarly, the market-

125. *Id*. at art. 6.

126. *Id.*

127. *Id.*

128. *Id.* at art. 7.

129. *Oakley*, *supra* note 106, at 1067.

based substantive law provisions of the Principles of Software Contracts will also not pass muster in European consumer transactions. The U.S. market-based approach to licensing in the Principles largely defers to software industry practices in contrast to the pro-regulatory approach of European consumer law. A U.S. company that uses the Principles' defaults as a safe harbor will subject to enforcement actions throughout Europe.

A. Distance Selling Directive

The European legislature enacted the Distance Selling Directive to guarantee that all consumers in the twenty-seven Member States of the European Union have the same rights whether they purchase goods in person or through distance communications.[130] The European Legislature defines "Distance Selling" as "the conclusion of a contract regarding goods or services whereby the contract between the consumer and the supplier takes place by means of technology for communication at a distance."[131] The Directive applies to any distance contract made under the law of an EU Member State. The purpose of the Directive is to guarantee fundamental legal rights for consumers in contracts arising out of direct marketing, including mail order, telephone sales, television sales, newspapers, and magazines.[132]

The Distance Selling Directive is presumably applicable to all remote software website sales as well as digital information contracts.[133] While the Distance Selling Directive does not expressly

130. Council Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts, 1997 O.J. (L 144) (June 4, 1997).

131. *Id.* at art. 2.

132. Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the implementation of Directive 1997/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of consumers in respect of Distance Contracts, 21 September 2006 available at http://ec.europa.eu/consumers/cons_int/safe_shop/dist_sell/index_en.htm.

133. A website sale is classifiable as a distance contract in that it is concluded by "means of distance communication up to and including the moment at which the contract is concluded." *Id.* Article 3 does not exempt software contracts. Council Directive 97/7, *Id*. at art. 3. "European consumer law has influenced to a substantial degree the consumer laws of the Member States of the European Union. Furthermore, the Directorate General for Consumer Affairs has begun to show a pronounced interest in digital information consumers and the potential of consumer law to protect their interests, and an extensive review of the current state of EC law is on its way. A chief objective of the EC review is to strengthen the rights of consumers of digital information services." Natali Helberger & P.

address Internet-related transfers of software, scholars argue that the Directive applies equally well to cyberspace and any other digital transfers of information.[134] The legislative purpose of the Distance Selling Directive is to promote cross-border contracts by providing consumers with mandatory consumer protection no matter where they reside or whether they complete the contract by telephone, online, or in person at a bricks-and-mortar retail establishment.[135]

Article 4 of the Directive requires all distance sellers to provide consumers with minimum disclosures about key terms in a durable medium prior to the conclusion of the contract. This information includes the name and address of the supplier; a description of the goods or services sold or supplied; the price of those goods or services (including all taxes); delivery costs (if any), payment arrangements, delivery and performance; and the period for which the offer remains valid, as well as the minimum duration of the contract.[136] The seller must make these disclosures "in writing, or in another durable medium which is available and accessible to the consumer."[137] The supplier must make these disclosures to the consumer prior to the conclusion of the contract or at the latest at the time of delivery.

The EU requires all Member States to enact legislation to guarantee consumers a seven-day-minimum cooling off period or right of withdrawal. The concept of a cooling-off period is not recognized by the Principles of Software Contract.[138] Article 6 of the Distance Seller's Directive gives consumers an unconditional right to cancel the contract within seven working days starting from the day of the receipt of the goods or from the day of the conclusion of the

Bernt Hugenholtz, *No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law,* 22 BERKELEY TECH. L. J. 1061, 1079 (2007).

134. Nicola Lucchi, *Countering the Unfair Play of DRM Technologies*, 16 TEX. INTELL. PROP. L.J. 91, 118 (2007); Jane K. Winn and Brian H. Bix, *Diverging Perspectives on Electronic Contracting in the U.S. and EU*, 54 CLEV. ST. L. REV. 175, 188 (2006).

135. *Id.* at 187.

136. Council Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts, 1997 O.J. (L 144) (June 4, 1997), at art. 4.

137. The Distance Selling Directive sets forth minimum mandatory disclosures that cover (a) the price of the goods or services including all taxes, (b) delivery costs, where appropriate, (c) the arrangements for payment, delivery or performance, (d) the existence of a right of withdrawal, (e) the cost of using the means of distance communication, where it is calculated other than at the basic rate, (f) the period for which the offer or the price remains valid, and, where appropriate, (g) the minimum duration of the contract in the case of contracts for the supply of products or services to be performed permanently or recurrently. *Id.* at art. 5.

138. *Id.* at art. 6(1).

contract.[139] The cooling-off period will be extended by a further three months if the supplier fails to provide the necessary information in writing or in another durable medium.[140] The right of withdrawal begins tolling from the date on which the supplier provides the information.[141] The supplier is obliged to reimburse the sums paid by the consumer without charges other than the direct cost of returning the goods.[142] American software licensors, like their European counterparts, may not penalize European consumers for canceling a distance contract and may only assess the cost of returning the item.[143] This European-wide cooling-off period gives consumers an opportunity to inspect goods and reject them just as if they were in a brick and mortar shop. Consumers may also cancel the contract if the seller cannot deliver the goods or services within thirty days.[144]

The consumers' right of withdrawal does not apply to software contracts if the product is unsealed by the consumer.[145] This means that the Directive's right of withdrawal is inapplicable also to click-wrap agreements where the consumer downloads the software from the Internet.[146] By contrast, the right of withdrawal can be exercised if a consumer places a telephone order and the sealed software arrives in a durable medium at home.

While the Directive does not apply to software CD-ROMS or other goods bought at auctions, a German court applied the Directive to an eBay style auction. This court's ruling was inconsistent with the Distance Sellers Directive's general exemption of auctions under German law. The German court ruled the eBay auction was not classifiable as an auction for purposes of the Directive's exemption because consumer rights are expansive.[147]

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139. *Id*. at art. 6.

140. *Id.* at art. 6(1).

141. *Id.*

142. Council Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts, 1997 O.J. (L 144) (June 4, 1997).

143. *Id.*

144. *Id.* at art. 7.

145. *Id*. at art. 6(3).

146. Software downloadable from the Internet technically has no seal or shrink-wrap plastic. However, the principle will likely be extended to downloadable software. The software industry would no longer be profitable if the right of withdrawal applied to downloadable software.

147. *E.U.Right to Revoke Distance Purchase Extends to Commercial eBay Auctions*, PIKE & FISCHER INTERNET LAW & REGULATION (Nov. 11, 2004).

Under the Distance Seller's Directive, sellers must not only make pre-contract disclosures but confirmatory disclosures at the latest when the computer hardware or software is delivered to a European consumer where there is a distance contract. Article 5, entitled "Written confirmation of information" provides:

> The consumer must receive written confirmation or confirmation in another durable medium available and accessible to him of the information referred to in Article 4 (1) (a) to (f), in good time during the performance of the contract, and at the latest at the time of delivery where goods not for delivery to third parties are concerned, unless the information has already been given to the consumer prior to conclusion of the contract in writing or on another durable medium available and accessible to him.[148]

The supplier's confirmation disclosure must disclose the period in which the contract can be cancelled. Article 9 of the Directive prohibits unsolicited deliveries of goods and services.[149] The European Union's Distance Selling Directive applies to a vendor's website sales just as in the brick-and-mortar world. However, if a consumer unseals physical CD-ROMs or the clickwrap functional equivalent, the Distance Selling Directive is inapplicable. Software vendors may be subject to the Directive if the consumer receives a physical CD-Rom and changes her mind prior to loading it on to her computer's hard drive.[150]

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148. *Id.* at art. 5.

149. *Id*. at art. 9.

150. A growing body of European case law proves our point that click-wrap agreements are suspect under the Unfair Contract Terms Directive as well as national law. *See*, *e.g.*, *Giudice di pace di Partanna n. 15/2002*, case No. 206/2001 R.G.A.C. available at http://www.infogiur.com/giurisprudenza/g_d_p_partanna_15_2002.asp; *Union Fédérale des Consommateurs v. AOL France*, R.G. N 02/03156, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Nanterre, le ch., June 2, 2004, tgin020604 (Fr.), available at http://www.clauses-abusives.fr/juris/tgin020604.pdf, *aff.'d AOL France v.UFC Que Choisir*, R.G. N [degree] 04/05564, Cour d'appel [CA] [regional court of appeal] Versailles, le ch., Sept. 15, 2005, J.C.P. IV 150905, available at http://www.steptoe.com/attachment.html/1694/AOL+France+v.+UFC+Que+Choisir%2C+R.G.+N+0405564.pdf. The trend in the United States is for courts to enforce click-wrap or clickstream agreements. *See*, *e.g.*, Stomp, Inc. v. Neato, LLC, 61 F.Supp.2d 1074, 1080 n. 11 (C.D. Cal. 1999); Burcham v. Expedia, Inc., 2009 U.S. Dist. LEXIS 17104 (E.D. Mo. 2009); Burcham v. Expedia, Inc., 2009 U.S. Dist. LEXIS 17104 (E.D. Mo. 2009); A.V. v. iParadigms, LLC, 544 F. Supp. 2d 473, 480 (E.D. Va. 2008) (quoting several cases on point); Adsit Co., Inc. v. Gustin, 874 N.E.2d 1018, 1024 (Ind. Ct. App. 2007); *Hauenstein v. Softwrap Ltd.*, 2007 U.S. Dist. LEXIS 60618 (W.D. Wash. 2007); Feldman v. Google, Inc., 513 F. Supp. 2d 229 (E.D. Pa. 2007); Tres Jeanee, Inc. v. Brolin Retail Sys. Midwest, Inc., 2007 WL 3118482

B. Unfair Commercial Practices

The European Union adopted The Unfair Commercial Practices Directive ("UCP") on 11 May 2005.[151] The UCP Directive regulates commercial practices from B2C replacing the Misleading Advertising Directive.[152] The UCP Directive prohibits advertising distorting economic behavior.[153] This includes misleading actions (Article 6), misleading omissions (Article 7), and aggressive commercial practices (Article 8) on the advertiser's behalf. Article 6 of the UCP defines commercial practices as misleading if it contains false information or otherwise deceives the consumer. Article 6 covers misleading practices that shape economic behavior, in particular the existence and nature of the product, its main characteristics, and other qualities. Software vendors that advertise the capabilities of their product and then proceed to disclaim them will likely violate the misleading advertising directive.

Article 7 treats commercial practices as misleading if it omits material information that the average consumer needs in order to take an informed transactional decision. Finally, Article 8 provides that an unfair practice includes any aggressive commercial practice which significantly impairs the average consumer's freedom of choice and therefore causes to take him a transactional decision that he would not have taken otherwise. Many of pro-vendor practices

(W.D. Ky.); RealPage, Inc., v. EPS, Inc., 560 F. Supp. 2d 539 (E.D. Tex. 2007); ESL Worldwide.com v. Interland, Inc., 2006 WL 1716881 (S.D.N.Y. 2006); Person v. Google, Inc., 456 F. Supp. 2D 488 (S.D.N.Y. 2006); Recursion Software, Inc. v. Interactive Intelligence, Inc., 425 F. Supp. 2d 756 (N.D. Tex. 2006); Hotels.com, L.P. v. Canales, 195 S.W.3d 147 (Tex. Ct. App. 2006); Siebert v. Amateur Athletic Union of U.S., Inc., 422 F. Supp. 2d 1033 (D. Minn. 2006); Salco Distributors, LLC. v. iCode, Inc., 2006 WL 449156 (M.D. Fla. 2006); Davidson & Assocs. v. Jung, 422 F.3d 630 (8th Cir. 2005); Motise v. America Online, Inc., 346 F. Supp. 2d 563 (S.D.N.Y. 2004); Mortage Plus, Inc., v. DocMagic, Inc., 2004 U.S.Dist. LEXIS 20145 (D. Kan. 2004); Novak v. Overture Services, 309 F.Supp. 2d 446 (E.D. N.Y. 2004); DeJohn v. TV Corp., 245 F. Supp. 2d 913 (N.D. Ill. 2003); Koresko v. RealNetworks, Inc., 291 F.Supp. 2d 1157, 1162–63 (E.D. Cal. 2003); Moore v. Microsoft Corp., 741 N.Y.S.2d 91, 92 (N.Y. App. Div. 2002); Forrest v. Verizon Communications, Inc., 805 A.2d 1007, 1010 (D.C. 2002); Barnett v. Network Solutions, Inc., 38 S.W.3d 200 (Tex. Ct. App. 2001).

151. Council Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market, 2005 O.J. (L 149) 22.

152. Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, Official Journal L 250, 19/09/1984 P. 0017–0020.

153. Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, Id. at Art. 5.2(b).

validated by the Principles of Software Contracts are reviewable under this Directive. Additionally, the UCP Directive includes in the annex a list of practices that shall be in all circumstances regarded as misleading. This Directive is a touchstone for identifying consumer protection standards for software transactions, digital media transactions, and Internet-related licensing in the European electronic marketplace.[154]

C. E-Commerce Directive

European Member States are required to develop national legislation implementing the E-Commerce Directive. The E-Commerce Directive governs the activities of information society service providers ("ISSPs"). The European Union Electronic Commerce Directive took effect on January 6, 2002. The E-Commerce Directive creates a legal infrastructure for online service providers, commercial communications, electronic contracts, and establishes the liability of intermediary service providers for posted content. The Directive also covers topics such as the unsolicited commercial email and the prohibition of Internet-related surveillance unrelated to software contracts.

The E-Commerce Directive states an ISSP established within one European Member State needs only comply with the laws of that state, even if the activities of the ISSP affect individuals from other Member States.[155] If an ISSP complies with the law of the country in which it is established, it is free to engage in electronic commerce throughout the European Union. The "country of origin principle," is the cornerstone of the E-Commerce Directive. The applicable law is the country of origin where the seller performed services. The country of origin principle is inapplicable to consumer transactions because mandatory rules apply to business to consumer relationships. Member States must "ensure that service providers undertaking unsolicited commercial communications by electronic mail consult regularly and respect the opt-out registers in which natural persons not wishing to receive such commercial communications."[156] Many of the software-related provisions are consistent with the Principles of Software Contracts. Article 9 of the E-Commerce Directive validates

154. Nicola Lucchi, *Countering the Unfair Play of DRM Technologies*, 16 TEX. INTELL. PROP. L.J. 91, 118 (2007).

155. 00/31/EC, *Id.* at art. 3.1.

156. *Id*. at art. 7(2).

electronic or computer-to-computer contracts except for designated exceptions like real estate transfers or family law.[157]

The E-Commerce Directive requires seller to give consumers disclosures before electronic contracting on how to conclude online contracts, as well as the means of correcting errors. Similarly, users must be able to store and retrieve contracts or they are unenforceable.[158] The Principles complies with the E-Commerce Directive because of its mandatory provisions on the prior disclosure of terms. Rolling contracts structured as pay now, terms later conflict with the E-Commerce Directive.[159] The Principles of Software Law Reporters import a provision of the European Union's Electronic Commerce Directive that requires vendors to provide a copy of standard form[160] agreements that can be stored and reproduced.[161]

Judge Easterbrook in *Hill v. Gateway* first used the term "rolling contract."[162] This case arose when Rich and Enza Hill responded to a Gateway advertisement in PC *World Magazine* by ordering a personal computer. The Hills placed a telephone order with a Gateway representative and purchased it with a credit card. Gateway included a software license agreement in the box with their personal computer. One of the terms of the agreement was that the customer was bound if the consumer did not return the personal computer to Gateway within thirty days. The license agreement placed in the box containing the Gateway 2000 system required all disputes to be settled by arbitration.

The couple testified that they did not see the license agreement and filed suit against Gateway, who filed a motion to dismiss citing the arbitration clause in the license agreement. The couple

157. *Id*. at art. 9.

158. *Id.* at art. 10.

159. Amy Boss contends that rolling contracts likely violate the UNIDROIT Principles of International Commercial Contracts. UNIDROIT prohibit "the enforceability of terms in standard form contracts that are both unreasonable and "surprising." It is noteworthy that the UNIDROIT Principles are not consumer protection principles; by their own terms, the Principles apply only to commercial contracts." Amy Boss, TAKING UCITA ON THE ROAD, WHAT LESSONS HAVE WE LEARNED? UNIFORM COMPUTING INFORMATION TRANSACTIONS ACT: A BROAD PERSPECTIVE 2001, PLI Order No. G0-00WN (Oct. 17, 2001).

160. Standard form contracts are non-negotiated agreements with preordained terms. *See generally* W. David Slawson, Standard *Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971).

161. *Id*. at §2.02(4)(c). *See also*, §2.02, cmt b (noting that section 4(c) of §2.02 was "partially taken" from the Electronic Commerce Directive).

162. 105 F.3d 1147 (7th Cir. 1998).

challenged the enforceability of the agreement, contending that arbitration was not part of the contract they entered when ordering the computer. The Seventh Circuit noted that the "terms inside Gateway's box stand or fall together."[163] The Seventh Circuit held that Gateway's license agreement was enforceable because of the consumer's decision to retain the Gateway system beyond the thirty-days specified in the license agreement. The court reasoned that the parties did not complete contract formation until the consumer retained the personal computer beyond the thirty day period. The *Hill* court departed from traditional contract analysis in upholding acceptance by silence and the entire agreement was binding including the arbitration clause.

D. The Directive on Unfair Contract Terms

Software licenses are broadly classifiable as contracts and are therefore subject to the EU's Directive on Unfair Contract Terms.[164] The Unfair Contract Terms Directive requires the twenty-seven EU Member States to harmonize rules consumer specific contract laws governing unfair terms. The Directive reflects mandatory rules that supplement regulatory provisions in each European Member State.[165] Unfair terms in software licensing agreements are not binding for consumers. The Directive requires all courts to construe ambiguous provisions in software contracts in favor of consumers.[166]

1. Application to Software Contracts

American software companies licensing content or code to the European consumer market must ensure that unfair terms are not included in their license agreements. The Council Directive on Unfair Terms in Consumer Contracts ("Unfair Contract Terms Directive") applies only to non-negotiated consumer software licenses not to business-to-business license agreements. The European legislature defines a consumer as a natural person "who is acting for purposes which are outside his trade, business or profession."[167] The Unfair Contract Terms Directive applies only to contracts of

163. *Id*. at 1148.

164. Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contract, 1993 O.J. (L 95) 29.

165. *Id*. at art. 1.

166. *Id*. at art. 5.

167. *Id*. at art. 2(b).

adhesion offered on a "take it or leave it basis" as opposed to negotiated contracts.[168]

This means that any U.S software company that licenses its product using standard form contracts must comply with the Directive. An Annex to the Unfair Contract Terms Directive is a non-exclusive list of terms considered suspect under Article 3(3).[169] If a given term in a license agreement is not addressed in the Annex of suspect terms, the court may turn to a more general test of unfairness.

The language of the Directive mandates courts to apply a two part test to determine whether a given contractual provision is unfair under the general test. First, there must be a significant imbalance to the detriment of the consumer and that imbalance should be "contrary to good faith."[170] Nevertheless, the prevailing and more correct interpretation is that that any contractual term in a consumer contract causing a significant imbalance is by definition contrary to the principle of good faith.[171] This language in Article 3 addresses newly emergent terms not found in the annex.

2. Formation of Software Contracts: U.S. vs. Europe

The European Union's Unfair Contract Directive gives, in effect, all European consumers a fundamental right to read, review, and understand standard terms before concluding a contract. The Directive is viewed by the Commission as the chief tool to achieve a fair result and to prevent unfair surprise and oppression.[172] The Directive's purpose is free consumers from distortions of competition which impede cross-border contracts.[173] The Principles of Software Contracts rejects this thick regulatory approach, in favor of a market-base approach employing instead the doctrine of unconscionability. Courts may strike down egregious terms on unconscionability or public policy grounds. The sixty year experience of Article 2's unconscionability doctrine under UCC §2-302 is that the doctrine is frequently invoked and seldom successful.[174] The Principles of

168. *Id.* at art. 3.

169. *Id.* at Annex.

170. Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contract, 1993 O.J. (L 95) 29.

171. *Id.*

172. *See* Prefatory Clauses to Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contract, 1993 O.J. (L 95) 29.

173. *Id*.

174. Over the past four decades, U.S. courts have seldom struck down software license agreements or terms of service agreement on unconscionability grounds. *But see*, Specht

Software Contracts also forge contract formation rules that share common ground with the Directive. The differences between the U.S. and European approaches are illustrated in the next section with a focus on specific software contracts.

3. Rolling Contracts: U.S. vs. Europe

The rolling contract where the consumer pays now and receives the terms later evolved as a software industry practice.[175] In general, European consumers have a procedural right not to be bound by contracts unless they have a prior opportunity to review the terms prior to payments. European courts will not enforce rolling contracts because the consumer must have "a real opportunity of becoming acquainted (with its terms) before the conclusion of the contract."[176] The Principles, like the Directive on Unfair Contract Terms, will not enforce standard-form software contracts if licensees have no opportunity to review terms.[177] The Reporters for the Principles of Software Contracts contend that the time of formation should not determine the enforceability of a rolling contract.[178] Robert Hillman, the Reporter for the Principles of Software Contracts, describes their conceptual problem well:

> In a rolling contract, a consumer orders and pays for goods before seeing most of the terms, which are contained on or in the packaging of the goods. Upon receipt, the buyer enjoys the right to return the goods for a limited period of time. Rolling contracts therefore involve the following contentious issue: Are terms that arrive after payment and shipment, such as an arbitration clause, enforceable?[179]

v. Netscape Communs. Corp., 306 F.3d 17 (2d Cir. 2002) refusing to enforce arbitration provision in terms of service agreement); Trujillo v. Apple Computer, Inc., 578 F. Supp. 2d 579 (N.D. Ill. 2008) (striking down terms of service agreement on grounds of unconscionability).

175. Professor Jean Braucher has compared the rolling contract to the bait and switch practices prohibited by the Federal Trade Commission. Jean Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice*, 46 WAYNE L. REV. 1805, 1852–53 (2000) (stating that "[h]olding back terms can be seen either as involving a deceptive representation or a deceptive omission" and that the FTC policy presumes that this practice will mislead consumers).

176. *Id*.

177. Principles of Software Contracts, *Id*. at §2.02.

178. *Id*. at §2.02, cmt. b.

179. Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743, 744 (2002).

Section 2.02 of the Principles is a pro-consumer disclosure rule: "To ensure enforcement of their standard form, software transferors should disclose terms on their website prior to a transaction and should give reasonable notice of and access to the terms upon initiation of the transfer, whether initiation is by telephone, Internet, or selection in a store."[180] In a comment to §2.01, the Reporters note that the following contracting practices are standard-form contracts:

> To reiterate and elaborate, software transferors present standard forms as part of "shrink-wrap" transactions, in which the transferor delivers terms printed inside the software packaging or delivers terms electronically on a computer screen during the installation of the previously packaged software. The transferee, who orders the software by telephone, via the Internet, or in a retail store, can read the terms only after payment and opening the software package.[181]

While the Principles' disclosure rules in §2.02 may be consistent with European law when it comes to procedural rights, the U.S. approach diverges from Europe when it comes to policing substantive terms of software contracts. Here, the Principles are at odds with the Unfair Contract Terms Directive to the extent that it validates limitations of warranty and remedies that favour software vendors. The Principles are forward-looking in their harmonization with the E-Commerce Directive as far as procedural protection. However, as we shall learn in the next section, they do not go far enough in complying with other substantive provisions of the EU's mandatory consumer regime. Dell Computer's rolling contracts have been revised in Europe.

In July 2006, following concerns raised by the British Office of Fair Trading ("OFT"), Dell Corporation Limited changed its online terms and conditions to make them fairer to consumers. "Dell agreed to amend [the following] terms that . . . 'limit liability for negligence to the price of the product'; 'exclude liability for consequential loss arising out of breach of contract'; [and] 'exclude liability for oral representations not confirmed in writing.'"[182] The United Kingdom's

180. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS, Summary Overview to Standard-Form Transfers of Generally Available Software, Topic #2.

181. *Id.*

182. Jane K. Winn & Mark Webber, *The Impact of EU Unfair Contract Terms Law on U.S. Business-to-Consumer Internet Merchants,* 62 BUS. LAW. 209, 224–25 (2006); *see also*,

National Consumer Council ("NCC") surveyed twenty-five U.S. software license agreement and concluded that the typical end user license agreement ("EULA") "mislead consumers and remove legal rights."[183] The consumer group recommends an investigation by the Office of Fair Trading because of the failure of software companies to provide up-front information on key provisions and "pay now, terms later" licenses.[184]

The Annex to the Unfair Contract Terms Directive makes it clear that the consumer is "not bound by terms which he had no real opportunity of becoming acquainted before the conclusion of the contract."[185] The Reporters expressly rejected the pro-regulatory approach taken by the European Union

The Unfair Contract Terms Directive is a tool for striking down "rolling contracts" with imbalanced substantive terms even if the vendor satisfies the consumer's procedural rights of having an opportunity to review the terms before concluding the contract.[186] The Unfair Contract Terms Directive calls for rules-based policing of contractual terms giving the courts greater powers to strike down unfair clauses than the American doctrine of unconscionability.[187] In fact, in Europe "if a contract term is drafted in advance and the consumer has no influence over the substance of the term, then it is always considered not to be individually negotiated, and hence subject to review based on substantive fairness."[188] Article 3 of the Unfair Contract Terms Directive considers non-negotiated terms to be unfair if, "contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of consumers."[189]

Office of Fair Trading, Dell to Improve Terms and Conditions for Consumers, http://www.oft.gov.uk/news/press/2006/111-06 (last visited Nov. 15, 2009).

183. John Oates, *Consumer Group Slams 'Unfair' Software License,* THE REGISTER (United Kingdom) (Feb. 19th, 2009), http://www.theregister.co.uk/2008/02/19/eulas_unfair_investigation/print.html (last visited Nov. 15, 2009).

184. *Id*.

185. Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contract, Annex, 1993 O.J. (L 95) 29, at letter (i).

186. *Id.*

187. Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contract, 1993 O.J. (L 95) 29, at art. 5.

188. Jane K. Winn and Brian H. Bix, *Cyberpersons, Propertization, and Contract in the Information Culture: Diverging Perspectives on Electronic Contracting in the U.S. and EU*, 54 CL. ST. L. REV. 175, 186 (2006).

189. Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contract, 1993 O.J. (L 95) 29, at art. 3.

In companion ECJ decisions from Spain, the ECJ struck down inconvenient forum selection clauses in encyclopedia instalment sales contracts. The ECJ reasoned that "the aim of Article 6 of the Directive, which requires Member States to lay down that unfair terms are not binding on the consumer, would not be achieved if the consumer were himself obliged to raise the unfair nature of such terms."[190] In the Spanish cases, the ECJ expressed concern that oppressive choice of forum clauses pose a risk that the consumer will simply abandon their claim rather than defendant themselves in such proceedings. Effective consumer protection can only be attained only if the national court[191] "acknowledges that it has power to evaluate terms of this kind of its own motion."[192] That means that while generally the consumer can raise the unfair nature of a term included in a non-negotiated contract, it is not a necessary predicate. A European court on its own motion can police the unfairness of a term incorporated in a non-negotiated contract.

4. Browse-wrap Contracts: U.S. v. Europe

A browse-wrap agreement purports to bind the consumer by merely using the web site. The typical browse-wrap will have a usage policy that requires the user to agree to the terms in order to view the content. The Reporters note that browsewrap agreements are problematic because "they do not require transferees to see the terms, before 'agreeing' to them.'"[193] In general, U.S. courts are disinclined to enforce browse-wraps that specify that the user is bound by merely using the website. However, U.S. courts will enforce browse-wraps where the user has notice of the terms and conditions even if only available through clicking on a link.[194] In

190. *Océano Grupo Editorial SA v. Roció Muciano Quinterno and Salvat Editores SA v. José M. Sánchez Alcón Prades, José Luis Copano Bacillo, Mohammed Berroane and Emilio Vinas Feliù*, joined cases (C-240/98 to C-244/98) [2000] ECR I-4941, I-4973 para. 25

191. National courts are in Member States as opposed to the ECJ, which has jurisdiction for consumer cases throughout the European Community.

192. *Id.* at para. 26.

193. *Id*. at §2.02, cmt. b.

194. A number of courts have enforced terms of service even though they do not require the user to click a specific box. These courts have found terms of service agreements binding the user through use of the website. *Burcham v. Expedia, Inc.,* No. 4:07CV1963 CDP (E.D. Mo. 2009) (summarizing cases). Courts considering browsewrap agreements have held that "the validity of a browsewrap license turns on whether a website user has actual or constructive knowledge of a site's terms and conditions prior to using the site." Southwest Airlines Co. v. Boardfirst, LLC, Civ. Action No. 3: 06-CV-0891-B, slip op. at 5 (N.D. Tex. 2007). *See also*, Pollstar v. Gigmania Ltd., 170 F.Supp.2d 974,

Register.com, Inc. v. Verio, Inc.,[195] the domain database's terms of service were structured as a browse-wrap, which stated that the user was agreeing to the terms of service when asking about the agreement since "by submitting this query, you agree to abide by these terms."[196] Verio contended that it did not click agreement to Register.com's terms and was thus not bound. The Second Circuit upheld Register.com's browse-wrap, finding that the defendant's submission of the WHOI query manifested its consent to Register.com's terms of use.[197]

The mere posting of browse-wrap terms was sufficient to bind the customer in *Hubbert v. Dell Corp*.[198] The *Hubbert* court held that consumers purchasing Dell computers were bound by the terms and conditions of sales posted on Dell's website even though they were not asked to click agreement to terms made available only by a hyperlink. However, in *Defontes v. Dell Computers Corp*.,[199] a Rhode Island court refused to uphold Dell computers Terms and Conditions Agreement accompanying the shipment of personal computers. The Rhode Island Superior Court reasoned there was no contract formation because Dell's posting of the link to its Terms and Conditions was not conspicuous. Under the Directive, browse-through agreements could be enforceable so long as the user has fair notice of the terms. European courts are not inclined to enforce a browse-wrap merely because a consumer accessed a website because such a practice conflicts with the Unfair Contract Terms Directive as well as national legislation.[200]

5. Shrink-Wrap Agreements: U.S. vS. Europe

Software makers licensed software by including box-top agreements under the plastic or cellophane tightly wrapped around

982 (E.D. Cal. 2000) ("[T]he browser wrap license agreement may be arguably valid and enforceable."); Molnar v. 1-800-Flowers.com, No. CV 08-0542 CAS, slip op. at 7 (C.D. Cal. 2008) ("[C]ourts have held that a party's use of a website may be sufficient to give rise to an inference of assent to the terms of use contained therein.").

195. Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 395 (2d Cir. N.Y. 2004).

196. *Id*. at 420.

197. *Id.*

198. Hubbert v. Dell Corp., 359 Ill. App. 3d 976 (Ill. App. Ct. 5th Dist. 2005).

199. Defontes v. Dell Computers Corp., No. P.C. 03-2636 (R.I. Superior Ct., Jan. 29, 2004).

200. *See*, *e.g.*, *Netwise v. NTS Computers*, Rechtbank Rotterdam, 5 December 2002, *Computerrecht* 2003/02, p. 149 with annotation by A.R. Lodder, and in *Mediaforum* 2003/15 109-112 p. with annotation by M. Voulon.

the box. The licensors of CD-ROM shrink-wrap their products just as supermarkets shrink-wrap packages of meat or vegetables. Initially, shrink-wrap agreements were unsigned agreements printed on the outside of the box containing licensed where the user manifests assent by breaking open the transparent "shrink-wrap" plastic covering the box.[201] The typical shrink-wrap license gives users a nonexclusive, nontransferable license to use the software stripped of all meaningful warranties and remedies.[202] Shrink-wrap licenses typically have a large number of restrictions such as a prohibition against reverse engineering or installing the computer on more than one computer. Shrink-wraps also prohibit the renting, leasing or transferring of the software to others. Lawyers that invented shrink-wrap in the early 1980s were uncertain as to its enforceability. The packaged software maker hoped that courts would rule that customers were bound to the restrictive terms of box-top terms when they broke open the plastic. The invention of the shrink-wrap license was to create some functional equivalent to a paper and pen contract for standard form software products. A typical shrink-wrap agreement provides:

> PLEASE CAREFULLY READ THIS LICENSE AGREEMENT BEFORE [OPENING THE SHRINK-WRAP] OR USING THE SOFTWARE. THE RIGHTS IN THE SOFTWARE ARE OFFERED ONLY ON THE CONDITION THAT THE CUSTOMER AGREES TO ALL TERMS AND CONDITIONS OF THE LICENSE AGREEMENT. YOUR BREAKING OPEN THE SHRINK-WRAP INDICATES YOUR ACCEPTANCE OF THESE TERMS AND CONDITIONS. IF YOU DO NOT AGREE TO THE LICENSE AGREEMENT, YOU MAY RETURN THE UNOPENED PACKAGE.

The Reporters describe the path of shrink-wrap law from the early 1980s to the present in reporter's notes, concluding that the tide turned in favor of enforceability in U.S. courts after Judge

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201. *See generally* Pamela Samuelson, *Intellectual Property and Contract Law for the Information Age: The Impact of Article 2B of the Uniform Commercial Code for the Future of Information and Commerce*, 87 CAL. L. REV. 1, 4 (1999) (describing shrink-wraps as preprinted forms "under the plastic wrap or inside a box of prepackaged software").

202. Licensing was invented so that software makers could avoid the first sale doctrine of copyright law. 17 U.S.C. §109 (2005). Section 109 permits purchasers to sell, rent, or transfer lawfully made copies to other users. In its essence, Section 109 shields resellers from copyright infringement lawsuits by the copyright owner. Software makers license rather than sell software so there is no "first sale."

Easterbrook's 1996 decisions in *ProCD v. Zeidenberg* and *Hill v. Gateway*.[203] The Reporters criticize courts that struck down shrink-wrap contending that their myopic focus was on contract formation.[204] The Reporters take a middle road position when it comes to shrink-wrap requiring only that the terms be "readily accessible."[205] Once again, the U.S. and Europe take divergent paths when it comes to shrink-wrap licenses.

European courts would strike down many shrink-wrap agreements as violative of the Unfair Contract Terms Directive because printing the terms in a form inside the box would not afford consumers a real opportunity to evaluate the terms prior to contract formation. Under the Directive, shrink-wrap licenses are only enforceable to the extent that the consumer was made aware of the terms prior to opening the package or box. The Directive's general provision that contracts not be imbalanced would also be a basis for striking down many shrink-wraps that disclaim all warranties and limit remedies.

Many of the first shrink-wrap agreements included the terms in the box or in screen displays when the software was first loaded. Either of these software industry practices are illegal in Europe for consumer transactions. European courts would strike down all software license agreements where the form was only accessible inside the box. The reason for this outright prohibition is that consumers would not have a meaningful opportunity to review terms prior to contract formation.

The Principles of Software Contracts are also not likely exportable to other parts of the world because of their provisions on standard form transfers. Under the Japanese law, for example, shrink-wrap agreements are unenforceable absent evidence that that consumer is aware of the license terms and consents them prior to entering into a software license agreement.[206] Box-top licensing occurs when the licensor prints the licensing contract on the box below the shrink-wrap giving consumers an opportunity to read the license terms before they purchase the product. However, even in this scenario, if terms in standard form contracts are unreasonably

203. *Id*. at 2.02, cmt. b.

204. *Id.*

205. *Id*. at 2.02(c)(1) (stating that the purpose of this standard is to deter vendors from placing terms difficult to find).

206. Tsuneo Matsumoto, *Article 2B and Mass-market License Contracts: A Japanese Perspective*, 13 BERKELEY TECH. L.J. 1283, 1284 (1998).

unfavorable to the consumer, they can be struck down by the courts.[207] The exportability problems with one-sided U.S. style licenses presents risks outside of Europe as well. Japan, as well as other modern economies such as New Zealand and Canada, has mandatory consumer legislation that prohibits unfair contract terms. In these countries, an opportunity to review the terms, the procedural protection provided by §2.02 of the Principles, is not enough. These countries pro-regulatory approach will not enforce unfair terms even if the consumer had the opportunity to review them and manifest assent. There is growing evidence that the U.S. is lagging behind Europe as well as trading partners in other corners of the globe when protecting consumers in software transactions.

6. Disclaimer or Limitation of Liability: U.S. v. Europe

The Reporters of the Principles of Software Contract take the position that so long as there is adequate disclosure, most substantive terms are enforceable. The Reporters reject the mandatory consumer rules adopted by the European Union:

> So long as the formation process is reasonable, an important philosophy of these Principles is freedom of contract. The view that transferors understand their products and the risks of contracting better than lawmakers' contract underscores this philosophy. In addition, regulators may misidentify the class of terms that are the product of market failures. These Principles therefore reject, in large part, adopting substantive mandatory rules for software agreements. Exceptions, in limited circumstances, include certain terms that apply to contract breakdown, such as choice of law, forum selection, and the warranty of no material hidden defects, liquidated damages, and automated disablement.[208]

The European approach, in contrast, is to police substantive terms as well as procedural terms. Many American software practices validated by the Principles have already been struck down by European courts. America takes a diametrically different approach permitting vendors to exclude or limits the liability of providers and licensors. American style mass-market licenses are broadly validated by §2.02 of the Principles of Software Contracts. A Dilbert cartoon

207. *Id.* at 1285.

208. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS, *supra* note 180 (explaining the procedural approach supplemented by "policing tools such as public policy and unconscionability").

lampoons these adhesion contracts where the consumer waives all meaningful rights. In the first frame, Dilbert states, "I didn't read all of the shrink-wrap license agreement on my new software until after I opened it." In the next frame, he says that "agreed to spend the rest of his life as a towel boy in Bill Gates' new mansion." The third frame states: "Too late. He opened software yesterday. Now, he's Bill's laundry boy."[209]

These popular culture references reflect a popular perception that U.S. style license agreements for the consumer market are one-sided and unfair. Few mass-market licenses will offer meaningful warranties and remedies. A pundit states, "By unwrapping a software package or downloading a demo, you've agreed to a thickly worded contract that may result in enslaving your first-born child to Bill Gates for all you know."[210] The Annex of the Unfair Contract Terms Directive classifies as unfair terms software licenses that fail to provide a minimum adequate remedy to consumers. Clauses "excluding or limiting the legal rights of the consumer vis-à-vis the seller or the supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or the supplier of any of the contractual obligations."[211] The Principles approach though is to validate substantively unfair terms so long as they are disclosed. Article 3 of the Unfair Contract Terms Directive instructs all European courts to strike down these clauses as unfair and illegal.[212] Standard U.S. software licensing practices limiting liability are likely to create imbalance and thus be objectionable under the Directive.

7. Principles of Software Contract Approach

The application of the Principles of Software Contracts would result in a similar result since Section 1.11 import the concepts of procedural and substantive unconscionability from UCITA and UCC

209. Bill Gates' Towel Boy from Zepe's Dilbert Collection, http://www.mevis-research.de/~meyer/MISC/di/a.htm (last visited June 21, 2009).

210. Margie Wylie, *Shrink-Wrapping the Social Contract* (Apr. 23, 1997) (visited Mar. 10, 1998) <http://www.news.com/Perspectives/mw/mw4 23 97 a.html>.

211. Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contract, Annex, 1993 O.J. (L 95) 29, at letter (b).

212. Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contract, 1993 O.J. (L 95) 29, at art. 5; For a more complete list of the unenforceable AOL's contract terms *see* Bradley Joslove & Andrei Krylov, *Standard American Business to Consumer Terms and Conditions in the EU*, 18 MICH. INT'L LAW 1, 2–3 (2005), *available at* http://www.michbar.org/international/pdfs/Spring05.pdf (last visited Nov. 8, 2009)

Article 2. Section 1.11 of UCITA gives courts the power to strike down unconscionable software licenses or individual provisions. A court may refuse to enforce the entire software license or the remainder of the contract without the unconscionable term. The court has broad equitable powers to limit the application of any unconscionable term as to avoid any unconscionable result. The issue of unconscionability is a matter of law and one for the trial judge rather than the jury. The Principles consider unconscionability as when a license or a term is too one sided to result in "oppression and unfair surprise."[213]

Section 1.11 of the Principles of Software Contracts imported the doctrine of unconscionability from UCC §2-302.[214] The UCITA Reporter, too, adopted UCC §2-302 but goes beyond it in "authorizing courts to strike down over-reaching language that conflicts with fundamental public policy."[215] Unconscionability is frequently asserted but is seldom successfully deployed in software contracts litigation. However, in *Trujillo v. Apple Computer, Inc.*,[216] a federal district court struck down an arbitration clause in Apple iPhone's standard consumer license. The court ruled that the arbitration requirement of an agreement between the buyer of a mobile phone and the exclusive provider of wireless service for the iPhone was unenforceable because of procedural unconscionability. The federal district court found that Apple's failure to make the terms of its arbitration agreement available prior to purchase and its failure to deliver a paper copy of the iPhone terms of service to be procedurally unfair. According to the court Apple's failure to make the terms of service available at their retail stores, where the consumer purchased the phone, was an evidence of procedural unconscionability. In this case, the only version of the iPhone' terms of service were available online and its provisions were not up to date. Finally, the court found that Apple produced no evidence of how a reasonable consumer would have known that the service terms were available on the Internet.

"In order to strike down a license agreement or a clause in a license agreement, a court must find both an unfair bargaining process, which is procedural unconscionability, as well as unfair

213. This test was imported from U.C.C. § 2-302 (2009).

214. Principles of Software Contracts, §1.11, cmt (stating that Section 1.11 "reproduces § 2-302 of the U.C.C").

215. Uniform Computer Information Transaction Act, Prefatory Note.

216. 578 F. Supp 2d (N.D. Ill 2008).

terms, which is substantive unconscionability."[217] Courts would be unlikely to strike down a forum selection clause absent egregious inconvenience such as if a U.S. citizen was compelled to litigate a software contract in Budapest, Hungary. Subsection (b) of 111 is the functional equivalent of UCC §2-302's methodology in requiring a court to hear evidence of the commercial setting and other circumstances before invalidating a license agreement on the grounds of unconscionability.

Section 1.11 of the Principles suggests that courts evaluate a license agreement's overall purpose and circumstances when executed to determine whether it was unconscionable or not. In *Aral v. Earthlink, Inc.*,[218] The California Court of Appeals struck down EarthLink's arbitration agreement, which also included a class action waiver. The court found the agreement to be a product of unfair bargaining (procedural unconscionability) because consumers had no opportunity to opt out. The appellate court found EarthLink's class action waiver clause to be unfair bargain in fact (substantive unconscionability). The court ruled that consumers did not need to arbitrate DSL disputes and they could fill a class action. *EarthLink's* service agreement court illustrates courts tendencies to strike down consumer arbitration agreements, which are procedurally flawed.[219] The Principles can also strike down licensing terms or clauses because they violate public policy or mandatory state and federal consumer protection rule or standard.

In general, American courts are reluctant to find unconscionability in standard form contracts and will strike down a clause only if it is so one-sided as to be oppressive or surprising.[220]

By contrast, European courts closely police licenses where the terms are skewed in favour of the licensors. Article 3 of the Council Directive considers a term to be unfair if, "contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of

217. The Reporters observe: "Most courts entertaining an unconscionability or related claim, including those involving e-commerce, look for both procedural and substantive unconscionability. See § 1.11 of these Principles." Principles of Software Contracts, §2.02, cmt. h.

218. 36 Cal. Rptr. 3d 229 (Ct. App. 2005).

219. *Id*.

220. The doctrine of unconscionability exists to prevent oppression and unfair surprise. In software licensing disputes, it is for the court to determine whether a clause or license as a whole was unconscionable. To prove unconscionability, the customer must prove that a substantively unfair clause was the subject of unfair bargaining.

consumers." In determining the unfairness of a contractual term the judge takes in consideration several factors and criteria, including "the nature of the goods or service for which the contract was concluded and by referring, at the time conclusion of the contract to all circumstances attending the conclusion of the contract and to all other terms of the contract or of another contract on which it is dependent."[221]

E. European Consumer Case Law Developments

1. America Online's Terms of Service

A French court, the *Tribunal de Grande Instance*, struck down thirty-one of thirty-six clauses of American Online's ("AOL") standard subscriber agreement as violative of the Unfair Contract Terms Directive. Directives require Member States to enact national legislation providing a floor but not a ceiling of consumer protection. AOL's license agreements breached French national consumer legislation implementing the Council Directive 93/13/EC on Unfair Terms in Consumer Contracts which are classified as mandatory rules of local contract law.[222] AOL was fined $30,000 euros and ordered the service provider to remove the unfair clauses from their license agreements within one month. The French Court's injunction ratcheted up the fine each day that AOL delayed revising their licensing agreements. The French Court found AOL's clause that excluded liability to be unfair. Among AOL's clauses that the French Court found to be unfair there was a clause that excluded liability. In Germany, AOL agreed to cease and desist use of nineteen unfair terms in its standard agreements. AOL also agreed to pay 2,000 Deutsche Marks each time it uses an unfair term in future terms of service agreements.[223]

2. Limitations of Remedies

The Unfair Contract Directive also addresses software licenses that limit remedies to return of the purchase price or effectively give the consumer no meaningful remedy. The purpose of mandatory

221. Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contract, 1993 O.J. (L 95) 29, at art. 4.

222. R.G. N 02/03156, *Tribunal de grande insta*nce [T.G.I.] [ordinary court of original jurisdiction] Nanterre, le ch., June 2, 2004, tgin020604 (Fr.), available at http://www.clauses-abusives.fr/juris/tgin020604.pdf

223. James R. Maxeiner, *Standard-Terms Contracting in the Global Electronic Age: European Alternatives*, 28 Yale J. Int'l L. 109, 164 (2003).

rules is to ensure that consumers will never been deprived of the legal remedies provided by the law. Letter (q) of the Unfair Contract Terms Directive prohibits clauses "excluding or hindering the consumer's right to take legal action or exercise any other legal remedy."[224] Letter q is inconsistent with the Principles that disclaim warranties and limit remedies. Under the Principles, a consumer may waive their right to remedies, whereas the Directive's mandatory protection cannot be overruled by a contract. Clauses that limit remedies of the consumer to the termination of the contract,[225] or in alternative to the replacement of the software would be considered unfair under this provision.

The Principles market-based approach gives licensor's the right to limit software remedies so long as there is proper disclosure. A transferor may limit the transferee's legal remedies, unless the limited or exclusive remedy fails its essential purpose. A limited remedy fails of its essential purpose when the transferor is unable or unwilling to provide the transferee with conforming software within a reasonable time. Only under these circumstances the aggrieved party may recover a remedy as provided in these Principles or applicable outside law. The Principles' endorsement of broad warranty and remedy disclosures is not exportable to any of the twenty-seven EU Member States.

3. Contract Enforcement: U.S. vs. Europe

Article 6 of the Unfair Contract Terms Directive provides that unfair terms in any contract are unenforceable. The European legislature is not only concerned with striking down individual clauses *ex-post*, but seeks to prevent the European and American companies from using objectionable or unfair clauses in the marketplace. The European legislature's pro-regulatory approach seeks to eliminate unfair terms from standard-form contracts. The European legislation expressly authorizes consumer groups and trade associations to bring a legal action to prevent the continued use of unfair standard form terms. These institutional actions are functionally equivalent to the American class actions. The goal of this provision is not to protect

224. Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contract, Annex, 1993 O.J. (L 95) 29, at letter (b).

225. For example in the case *Union Fédérale des Consommateurs v. AOL France,* among the incriminated clauses, there was a clause providing that the subscriber's sole remedy in the event of breach by AOL is termination of the agreement. *See* Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Nantere, 1e ch. A, June 2, 2004, Gaz. Pal. 2005, 2, pan. jurispr. 1334–35, Brigitte Misse & Celine Avignon (Fr.), available at http://www.foruminternet.org/telechargement/ documents/tgi-nan20040602.

the individual user but to eliminate unfair and oppressive license agreements from the marketplace. Consumer groups and associations have already been successful in eliminating American style software licenses from the marketplace.

In *Union Fédérale des Consommateurs v. AOL France,* AOL's terms of service agreement was struck down. The AOL France case is not an isolated case but reflects a larger trend to challenge U.S. style software contracts. In Germany, consumers associations have challenged successfully the terms of Compuserve, AOL, and Microsoft: the first one was subject to a default judgment; the other two agreed to a binding cease-and-desist declaration.[226] All three American companies have entered into settlement agreements agreeing to change their marketing practices. The implications of these cases are that practices validated by the Principles of Software Contract expose U.S. companies to a heightened litigation risk in Europe. As a result, the U.S. companies should review their clauses before starting business in Europe, otherwise they run the double risk that their licenses are considered unenforceable and that they can be considered liable for damages to consumer and consumer protection bodies.

VI. Conclusions: Old America vs. New Europe

Robert Kagan's article in *The Economist* entitled "Old America v. New Europe" explodes the view that Europe is a "clapped-out old continent" while America is the young teenager.[227] Kagan notes how America's political system is old as compared to the upstart European Community.[228] The Principles of Software Contracts embracing of the U.S. free market approach to consumer e-commerce relies upon private ordering generally "taking the form of one-sided clickwrap license agreements that disclaim all warranties and meaningful remedies and requires parties to litigate in the functional equivalent of Siberia."[229] The Principles of Software Contracts do not acknowledge that those European courts may not be as eager to enforce one-sided choice-of-law or forum clauses and anti-remedies in consumer software contracts.

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226. James R. Maxeiner, *Standard-Terms Contracting in the Global Electronic Age: European Alternatives*, 28 YALE J. INT'L L. 109, 164 (2003).

227. Robert Kagan, *Old America v. New Europe*, THE ECONOMIST, Feb. 20, 2003.

228. *Id*.

229. Michael L. Rustad, *Circles of E-Consumer Trust: Old E-America v. New E-Europe,* 16 MICH. ST. J. INT'L L. 182, 185–86 (2007).

In the flattened global economy, software law must make the perceptual shift to develop a legal infrastructure so that the software industry will remain competitive in a global market where historical and geographical divisions are becoming less relevant.[230] The Principles of Software Contracts are the most recent chapter in the history of non-exportable law reform projects. American software companies are increasingly operating in an international environment and their software licenses must comply with local law. Apple, for example, translates its iTunes licenses into English, French, German, Japanese, Chinese (traditional and simplified), Italian Spanish, Portuguese (Brazilian as well as Portuguese European style), Polish, Danish, Finnish, Norwegian, and Russian.

U.S. software companies not only need to contend with foreign currencies and time zones but comply with radically different consumer laws. The Principles of Software have not addressed international software licensing which is a major sector of the global economy:

> The United States has been the world leader in the software industry throughout its history, and today accounts for half of global revenues overall, and an estimated three-quarters of the software products market. A notable feature of the industry is its low concentration: there are many thousands of software firms in the United States and throughout the world, but relatively few—mostly American—global players.[231]

The Principles of Software Contracts are not exportable for European software contracts though some of its provisions are advances when compared to UCITA's cross-border transaction rules.[232] The different consumer laws of Old America and New Europe erect a trade barrier for cross-border software contracts.

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230. Thomas L. Friedman, *The World is Flat: A Brief History of the Twenty-first Century* (New York: Farrar, Straus & Giroux, 2005).

231. Answers.com, *Software Industry* (last visited Aug. 20, 2009) http://www.answers.com/topic/software-industry.

232. The Principles of Software Contract, like UCITA, does not constitute law adaptable to Europe and other continents. "The critique of UCITA is essentially a critique of US software producer practices because UCITA sought to validate those practices. Law reformers in other countries may be concerned about checking these industry practices. They may wish to take note that US customers are extraordinarily dissatisfied with the practices of the US digital product industry." Jean Braucher, *U.S. Influence with a Twist: Lesson About Unfair Contract Terms from U.S. Software Customers*, 2007 COMPET. & CONSUMER L.J. 5, 12 (2007).