Issues & Opinions

Legal Issues in Computer Software: The Written Contract

There could be no more appropriate manner of cautioning a potential purchaser of software products than the phrase 'caveat emptor' — buyer beware. The reason for this cautious approach is rooted in the fact that our courts have not taken the time to analyze the special relationships which are present in computer-related transactions. Anyone responsible for contracting with a vendor for the purchase of software should first scrutinize the language within the contract itself. Does the wording suggest that software is a product or a service? Does the contract language address itself to when the buyer actually accepts the software? And finally, does the contract language establish or disclaim warranties?

Product or service?

If the language of a contract for software implies that the vendor is supplying a service, a competent court may view an agreement for software as an on-going service contract based on finding that the vendor remained in contact with the purchaser. The software product may not generate the correct result or format, but if the vendor keeps trying to rectify the problem the court can reconize a good faith standard and award the vendor his contract price. However, if the language reads that the software is a product, the purchaser has an umbrella of protection over the agreement.

Article 2 of the Uniform Commercial Code (UCC) applies to "transactions in goods" and defines goods as "all things (including specifically manufactured goods) which are moveable at the time of identification to the contract." This group of commercial rules, when brought to the attention of the court, can provide a legal standard of reasonableness. It is critical to provide the courts with the correct set of rules when the subject matter is difficult to conceptualize.

Much of the law's frustration with computer systems results from its misperception of computer software. If software is perceived as no more than a set of ideas, a contract to sell software is a service contract and therefore is not covered by Article 2 of the UCC. But a computer cannot read ideas; for abstract instructions to become a computer program a technician must give those instructions a physical form. That technical metamorphosis from abstract instructions to concrete programs suggests a legal metamorphosis from services to goods. Therefore, if the software is not referenced as a "product" or "goods" in a contract it is generally wise for a buyer to insist that such language be used.

When you accept it, it's yours

Software contracts should define when the purchaser has accepted the software from the vendor. There is nothing more frustrating than to discover the software, which was supposed to work to perfection, needs some program modifications and it is going to cost more. If the contract has qualified the software as a "product" or "goods," the UCC provides that the purchaser have "a reasonable opportunity to inspect" the product. In the computer industry it is recognized that most software does not operate when first installed. Consequently, it is not until the software runs to its specifications that the buyer will have an opportunity to inspect the results of its data manipulation and be in a position to determine whether or not the product is conforming or nonconforming. Therefore, what constitutes acceptance of purchased software revolves around successful installation.

In a transaction where the seller has to make numerous modifications, and this is conveyed to the buyer, the parties should allow for conditional acceptance. Conditional acceptance based upon the successful maintenance or modification of the software allows both parties to continue their performance while staying within the spirit of their agreement. The flexibility of the agreement, as to its intended purposes, must not be subjected to inflexible interpretations of the UCC. The nature of the product requires continuing performance of the seller, once the software is tendered, and continuing good faith on the part of the buyer to allow the agreement to be effective.

The buyer is not restricted to the wording of a vendor's contract. Specifying and defining any item within a contract should not change the overall in-

tent of an agreement if both parties are in accord with the specification or definition. The courts have always encouraged parties to clarify the ambiguities of certain terminology which has a particular and definite meaning to an aspect of an agreement. Entering a notation upon the contract as to when the software becomes the exclusive property of the buyer will avoid any misinterpretations by outside parties. In doing so, the buyer is protecting himself while developing a favorable case in the event of a dispute.

Fix it at no cost

Even the best programmers have written systems which need modifications because some fact was not considered or conditioned. The issue which must be addressed before entering into an agreement with a software vendor is who will bear the burden for certain types of modifications. Are the modifications enhancements, whether cosmetic or functional, or are they corrections of errors in the original specifications? The UCC states that a purchaser has some warranties for which the vendor cannot disclaim or charge additional cost. One warranty that software will have is an implied warranty of fitness for a particular purpose. The primary qualification for this warranty is that the seller have some knowledge of what the buyer is buying the product for, and that the buyer looks to the seller to supply the correct product for his needs.

The vendor is presumed to be in a position of expertise — aware of what his product can and cannot do. When the consumer solicits the seller to explain the software he is interested in purchasing, the consumer is looking for a product which he can apply to his particular business. The software must simulate the buyer's method of operation (whether manually implemented at the time of his solicitation or computerized in some degree) or provide a new method of operation. Because the buyer seeks simulation or a new method, the buyer will naturally present the seller with actual knowledge for his reasons to purchase the software. The UCC states that "the buyer need not bring home to the seller actual knowledge of the particular purpose." Due to the nature of the intended purchase of software, knowledge of the particular purpose for which the consumer will use the product will be inescapable for the seller.

By assuring that the wording of the contract refers to software as a product, the courts can apply the warranties that it requires the seller to give the buyer in most commercial sales. In essence, a buyer of software can expect and demand from the seller the reasonable expectations of his purchase without additional cost.

There is a need to stabilize the manner in which the computer software commercial transaction is formulated, executed, and adjudicated. Contractual responsibilities in computer transactions reside equally with the purchaser and vendor. It would be a serious mistake for either or both parties to rely upon the legal community to resolve conflicts over software, with any consistency, without assistance. The courts are developing a perspective on the types of relationships which exist in today's technology, but it has been a slow process. Since numerous commercial transactions have been litigated under the UCC, judges are comfortable with its language and interpreted meanings. It is better to show up for your day in court knowing the judge is familiar with the law your case comes under than to find out the decision to be made is one of first impression.

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