

Bad Software

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The Underlying Problems

David Pels and I wrote *Bad Software* because we were troubled by several problems:

- Software companies ship software with known defects as a matter of course, but they are taking less responsibility for it:
 - Less troubleshooting information in documentation
 - “Call avoidance” philosophy underlies support practices in many companies.
 - Support services are often treated as profit centers.
 - Greater rush to release products early--“Internet time.”
- People aren’t as effective in getting support for software than for most other consumer products.
- Some people don’t realize that they have the same rights to good software as to other products (and some lawyers are trying to take advantage of this).

Defects and Support: People are Upset

- Defects are inevitable in mass-market software.
 - Cost/benefit tradeoffs are routine for known defects and for product testing.
 - Immense pressure to ship products quickly: The 4th competitor to market probably gets less than a 3% share.
 - High cost of entry for new publishers' products.
 - Increasingly complex hardware/software configurations drive up support calls and costs.
 - Myth that no one uses documentation results in lower doc budgets and hugely increased support costs.

Defects and Support: People are Upset

- Companies routinely deny their defects during calls for support (even known defects):
 - we've never heard of that
 - it must be your video card
 - it must be you
 - it's a feature
- 200 million calls to tech support in 1996. 3-4 billion customer-minutes wasted on hold.
- Longest complaint hold times, across industries
- Computer transactions joined the BBB top 10 complaint list, knocking out used car dealers.

Defects and Support: People are Upset

- Support costs have skyrocketed. Staff ratios have gone from 1:12 to 1:7.
- Tarter, Is there a payoff for service quality? (*Microsoft improved its customer service but a survey said that this won't affect Microsoft products' salability. Conclusion--this massive improvement in quality didn't improve Microsoft's competitive position. Yeah, right.*)
- For more data (Prognostics, SSPA, Softbank, etc.), see <http://www.badsoftware.com/stats.htm>

Defects and Support: People are Upset

- Research data from Industry Canada, Bureau of Competition (analogous to our Federal Trade Commission):
 - Over 2000 claims were evaluated during this survey. Overall, some 163, or 8.1% of all claims evaluated were potentially false or misleading. While this may appear to be a small percentage based on the number of claims evaluated, these incorrect claims represent 65% of all the software titles tested.
 - <http://www.strategis.ic.gc.ca/FBP> and search for “software”
- Product compatibility problems are the most often complained about, but many companies test this very lightly. Recent court cases make it clear that companies are accountable for their compatibility claims.

People Can Complain More Effectively

- Few people call for help, and far fewer call back
- Easy to intimidate / convince people that it is their problem
- When you know you're right (losses caused by defect), what should you ask for?
 - You want to keep it
 - free upgrades
 - free support, free extended support
 - reimbursement for documented out-of-pocket losses
 - re-entry of your data
 - You want to get rid of it
 - refund
 - conversion of data to other format
 - repayment for documented out-of-pocket losses

People Can Complain More Effectively

- These remedies might not be legally required, but many companies will provide them in order to do the right thing for a reasonable customer with a genuine problem.
- In our opinion, chapters 3-5 (how to research the problem, how to figure out what you want, and how to negotiate with the publisher) are the most valuable chapters of the book.

Legal Issues: Shrink-Wrapped Licenses Misrepresent Customers' Rights

- Post-sale warranty disclaimers are invalid.
 - *Warranty of merchantability has been hard to disclaim since the days of snake oil.*
- Post-sale limitations on remedies are suspect. Several states reject them.
- Restrictions on use (no reverse engineering, can't write negative magazine reviews) are invalid under Fair Use doctrine.
- Restrictions on transfer (can't lend or give away) are invalid under First Sale doctrine.
 - *This is an old conversation*

Licensing Restrictions in the Mass Market

- Bobbs-Merrill v. Straus (1908)
- Boston Store of America v. American Graphophone (1918)
- Matthew Bender v. West Publishing opinions (1998). The ProCD case provides the only real hope to private companies that want to own the public domain.

UCC Article 2B: Proposed New Legislation

- Uniform Commercial Code (UCC) is the law in 50 states.
- Article 2 governs contracts for sale of goods in USA in 49 states.
 - Sale of packaged software is a sale of goods.
 - Sale of custom software is a sale of services, not covered by the UCC.
- UCC is supplemented by laws governing fraud, deceptive trade practices, unfair competition, public safety, and consumer protection.

UCC Article 2B: Proposed New Legislation

- UCC is maintained and updated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) a legal drafting organization funded by the 50 US states that writes all “Uniform” laws.
- The UCC is co-maintained by the American Law Institute, another non-profit body of senior lawyers.
- UCC and ALI appoint a joint Drafting Committee to prepare recommended revisions.

UCC Article 2B: Proposed New Legislation

- Will govern all contracts for the development, sale, licensing, maintenance and support of software and almost all contracts for the licensing of information.
- Current draft is over 200 pages (“official” formatting runs well over 250 pages)
- 12 years in the works so far.
- Scheduled for completion this spring, and introduction into state legislatures in winter, 1999.
- Current draft significantly criticized at ALI and NCCUSL annual meetings, which passed motions calling for significant revision. Despite that, good chance that legislators will receive a bill with only cosmetic changes.

UCC Article 2B: Proposed New Legislation

- Validates shrink-wrap / click-wrap contracting with hidden terms. Repeated refusal to require companies to let customers see the licenses, on request, before the sale.
- Takes software out of scope of several consumer protection laws. (While claiming that it doesn't.)
- Changes the rules for creating and disclaiming warranties.
- Makes it harder to get a refund.
- Lets vendors profit from known bugs.
- Approves use restrictions for mass-market products, including information content products (such as electronic books, online magazines, etc.).
- Current draft of 2B is at <http://www.law.upenn.edu/bll/ulc/ulc.htm>

Growing Opposition to Article 2B

Here are some of the organizations that have recently asked that 2B be tabled or cancelled or that have raised fundamental criticisms of Article 2B:

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© Magazine Publishers of America (www.2BGuide.com/docs/v9-98.1

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