

## MOVING TOWARD A USABLE WARRANTY OF MERCHANTABILITY

The implied warranty of merchantability is routinely disclaimed in contracts for computer software. One problem is that the trade press subjects all programs to criticism, even programs of very high quality. Therefore, no vendor can predict what software program a court will determine would “pass without objection in the trade . . . .” Another problem is that some aspects of the implied warranty do not sensibly apply to end customers, and vendors are concerned about the possibility of unintended and unexpected results.

The following warranty more accurately reflects commercial reality, and reflects a standard that software companies might not feel automatically obliged to disclaim. It is based on the concept that end users of computer programs and retailers of computer programs have different interests when acquiring the program, yet the current merchantability warranty lumps them together.

### 403 (a) Implied Warranty of Quality: End Users

A merchant licensor of a computer program warrants to the end user [as defined in 2B 616(a)(3)] that the computer program is reasonably fit for the ordinary purpose for which it is distributed.

### 403 (b) Implied Warranty of Quality: Retailers

A merchant licensor of a computer program warrants to a retailer [as defined in 2B 616(a)(1)] that:

- (1) the program is adequately packaged and labeled as the agreement or the circumstances may require; and
- (2) in the case of multiple copies, that the copies are, within the variations permitted by the agreement, of even kind, quality, and quantity, within each unit and among all units

involved.

This simplification of 2B-403 deletes all reference to “promises or affirmations of fact made on the container, documentation, or label” from Section 2B-403. This concept should be addressed in Section 2B-402, as express warranties.

We hope you will give this proposal serious consideration as a starting point toward a more practical warranty of merchantability for Article 2B.

Cem Kaner

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