

Please see the appendix to the materials for the grading guides for the 2008 and 2012 exams.

The George Washington University Law School
Munich Intellectual Property Summer Program

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Grading Guide for Final Examination In
THE LAW OF SOFTWARE CONTRACTS

(Course No. 6850; 1 credit)

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Each problem contained three questions, and each question was worth a total of seven possible points. Points were awarded based on how accurately and thoroughly answers addressed the question, applying the principles of law discussed in class to the facts at issue. This grading guide identifies and discusses some of the most important subjects raised by the questions. Given possible ambiguities in the law and in interpreting the facts of the problems, I sought to be as flexible and generous as possible in grading.

PROBLEM I.

- A. Even if the proposed exemption is not established, might car buyers still have grounds to challenge license terms restricting who may use, modify, remove, or reverse engineer the software in their cars?**

Analysis of the question: This question asks how consumers might challenge prohibitions in *license* terms. The issue is not whether, in the absence of a license agreement, car buyers might successfully argue that using, modifying, removing, or reverse engineering the software in their cars would not violate the copyright. The question, accordingly, does not specifically ask about the First Sale doctrine, the Fair Use doctrine, the Digital Millennium Copyright Act, or other laws or doctrines that might limit copyright protection in the *absence* of a license agreement.

Copyright Misuse. Car buyers might have grounds to challenge license terms on grounds that the terms constitute "copyright misuse." Copyright misuse is an impermissible attempt by a copyright holder to use a license agreement to extend the scope of copyright protection in an anti-competitive way. See, e.g., *Lasercomb America, Inc. v. Reynolds*; *Atari Games Corp. v. Nintendo of America, Inc.*; *Alcatel USA, Inc. v. DGI Technologies*; *Apple Inc. v. Psystar Corp.*; Principles of the Law of Software Contracts § 1.09(c) cmt. Misuse may consist of using a copyright to "secure an exclusive right or limited monopoly not granted" by the copyright law. See *Lasercomb* (citing *Morton Salt Co. v. G.S. Suppiger*); *Alcatel* (same). Car buyers might

argue that the vehicle makers are impermissibly attempting to use their copyrights in the software to gain a monopoly in vehicle repair services. The vehicle makers may respond that this restriction is necessary for safety because tampering with the software may lead to malfunctions and accidents. They further will argue that the restrictions do not "restrict creativity or . . . competition" because other manufacturers "are free to develop competing hardware and software." *Apple Inc. v. Psystar Corp.* If consumers do not want to buy a vehicle with such a license, they can select a different vehicle. In addition, the vehicle manufacturers will point out that the court in *MAI Systems v. Peak Computer* upheld similar repair restrictions (although they were not specifically challenged under the copyright misuse doctrine).

Unconscionability. Car buyers might have grounds to challenge license terms on grounds that the terms are unconscionable. Terms in contracts for the sale of goods may be unconscionable if they are so substantively unfair or if they constitute such an unfair surprise that their enforcement would shock the conscience of the court. See UCC § 2-302(1); *ProCD Inc. v. Zeidenberg* (asserting that certain terms at issue were not unconscionable); *RRX Industries, Inc. v. Lab-Con, Inc.* (Norris, J., separate opinion) (same); *Piper Jaffray & Co. v. Sungard Systems Intern., Inc.* (same). The sale of a car presumably would fall within the scope of article 2, even if the car is sold with a software license, because the car is a movable object and goods would predominant in the transaction. See *Nelson Business Equipment v. Monteleone*. Most car buyers would be surprised by contract terms preventing anyone other than copyright licensees from repairing their vehicles. Similarly, if the license terms are taken seriously, the restriction on "use" of the software would effectively prevent the car owners from selling their vehicles because the second-hand buyers would not be able to "use" the software. The vehicle makers, however, will argue that the license terms do not shock the conscience because they are necessary for vehicle safety.

Preemption / Copyright Policy. Car buyers also might have grounds to challenge license agreement terms on grounds that the terms are preempted by mandatory copyright terms or by copyright policy. Principles of the Law of Software Contracts § 1.09(c) cmt. The car buyers may have difficulty, however, identifying the specific copyright rules or policies at issue. Copyright law does not generally prohibit license terms restricting the use of copies of copyrighted software. As noted above, the vehicle manufacturers will point out that the court in *MAI Systems v. Peak Computer* upheld similar restrictions on repair.

B. How might vehicle manufacturers and sellers attempt to use software license agreements to limit their liability for defects in the software? How might buyers challenge the legality of these attempts?

Limits on Permissible Uses. Vehicle manufacturers and sellers might attempt to use software license agreements to limit their liability by including clauses that restrict potentially dangerous uses of the software or the vehicles (e.g., racing, driving off-road, exceeding speed limits, etc.). By way of comparison, as discussed in class and in one of the PowerPoint slides, Adobe prohibits using some of its software in medical devices for fear of the consequences if the software has defects.

Disclaiming or Limiting Warranties. Vehicle manufacturers and sellers also might attempt to use software license agreements to limit their liability by including clauses that disclaim or limit implied warranties, such as an implied warranty of merchantability (i.e., that the goods are fit for ordinary purposes). *See, e.g., Neilson Business Equipment Center, Inc. v. Monteleone.*

Limiting or Modifying Remedies. Vehicle manufacturers and sellers might attempt to use software license agreements to limit their liability by including clauses that disclaim or limit the remedies for breach of warranty. As discussed in the materials, UCC § 2-714(b) makes the ordinary measure of damages for breach of warranty the difference in value between the goods as delivered and the goods as warranted. This measure of damages sometimes appears to be excessive. *Chatlos Systems v. National Cash Register.* License agreements may limit remedies or provide liquidated damages. *See, e.g., Piper Jaffray & Co. v. SunGard Systems.*

Grounds for Challenging Remedy Limitations. Buyers typically might challenge the legality of remedy limitations by arguing (1) that they do not meet formal requirements, such as being conspicuous, *see ProCD Inc. v. Zeidenberg*; (2) that remedies provided are insufficient because they fail to achieve their essential purpose, *see RRX Industries, Inc. v. Lab-Con, Inc.*; or (3) the remedy limitations are unconscionable, *see* sources cited above. More information is needed to know whether any such grounds exist in the sale of any particular vehicles.

C. In what ways might buyers fare better if all of the software in their vehicles were subject to the GNU General Public License instead of proprietary licenses drafted by vehicle manufacturers? In what ways might buyers fare worse?

Benefits of GNU General Public Licenses. Buyers might fare better if all of the software in their vehicles were subject to the GNU General Public License (GPL) because the GPL would not restrict how the car buyers could use, modify, remove, or reverse engineer the software. *See* GPL §§ 1 & 2. Buyers thus potentially would have more options in seeking repairs for their vehicles. Buyers also might fare better because the GPL would make the source code to the software available, making it easier for repairers to determine how it works and how to make corrections and improvements.

Drawbacks of GNU General Public Licenses. Buyers might fare worse if all of the software in their vehicles were subject to the GPL because the GPL comes with no warranty. *See* § 11. If the GPL's disclaimer of warranty is enforceable (see discussion of this issue above), buyers might have little or no remedy if the software causes an accident or other problem. In addition, buyers might have difficulty selling their cars because, as discussed in the article, potential second-hand buyers might worry that they have altered the software and made the "car dangerous to drive without realizing it." Various answers identified other possible drawbacks.

PROBLEM II.

(30 minutes)

- A. In what ways might Lenovo's conduct here be seen as more culpable or less culpable than the defendant's conduct in *People ex rel. Spitzer v. Direct Revenue* [p. 110]?**

More culpable. Lenovo's conduct might be seen as more culpable for three reasons. First, unlike Direct Revenue, Lenovo apparently did not seek the buyers' consent to installation of the software. Second, the software at issue in Direct Revenue merely showed annoying pop-up advertisements, while the software here apparently makes the computers subject to security risks. Third, while Direct Revenue made it easy for customers to remove the software, it is not clear from the article that it was easy for customers to remove Superfish.

Less culpable. Lenovo's conduct also might be seen as less culpable for two reasons. First, Lenovo sold the computers with the software pre-installed. If Lenovo still owned the computers when it installed the software, the buyers would have less grounds for objection. (But it is not clear that Lenovo still owned the computers; it may have installed the software after the buyers had already purchased the computers but before the computers were delivered.). Second, Lenovo voluntarily took actions (1) to remove the software; (2) provide the consumers protection against security threats; and (3) to cease distribution of the offending Superfish software in the future.

- B. Suppose some buyers of Lenovo computers previously agreed to receive software updates from Lenovo and to have these updates automatically installed. May Lenovo distribute a new software update that installs MacAfee LiveSafe and removes Superfish without obtaining more specific consent from these buyers?**

Updating Software vs. Removing & Installing Software. Lenovo could not install or remove software from the customers' computers absent permission of the customers. *See People ex rel. Spitzer v. Direct Revenue; American Computer Trust Leasing v. Jack Farrell Implement Co.; Clayton X-ray Co. v. Professional Sys. Corp.* Lenovo might argue that an agreement to "receive software updates" allows it to remove software (like Starfish) and install software (like MacAfee LiveSafe). But consumers might argue that the term "software updates" typically refer to correcting errors in, or changing the versions, of software already installed, and does not refer to installing or removing new software packages. They will thus assert that they did not consent to installing LiveSafe or removing Starfish when they agreed to receive updates.

- C. Suppose the security researchers discussed in this article copied and decompiled the Starfish object code to determine the risks that the software posed. What arguments might be made about whether these researchers violated Starfish's copyright or a license agreement prohibiting copying for any purpose?**

Copying in violation of Copyright. The holders of Starfish's copyright might argue that software

is protected by copyright, and copyright law therefore prohibits copying of the software. The security researchers might respond that the Fair Use Doctrine allows them to copy the software to determine the risks posed. *See* Copyright Law § 107; *Wall Data Inc. v. Los Angeles Sheriff's Dept.* They would emphasize that the "purpose and character of the use" was not of a commercial nature to make a competing product but instead to determine security risks.

Decompiling in violation of Copyright. The holder of Starfish's copyright might argue that the process of decompiling usually involves copying (i.e., copying the object code into a decompiler). *See, e.g., Atari Games v. Nintendo of America, Inc.* The security researchers might respond that the Digital Millennium Copyright Act allows "reverse engineering" by saying that "a person who has lawfully obtained the right to use a copy of a computer program may circumvent a technological measure that effectively controls access to a particular portion of that program for the sole purpose of identifying and analyzing those elements of the program that are necessary to achieve interoperability of an independently created computer program with other programs." They would further argue that their research was done to achieve the "interoperability" of software, explaining that software that poses a security risk to a computer potentially could threaten the operation of other software. This argument presumes that the security researchers lawfully obtained a copy of the Starfish software.

Copying and Decompiling in violation of a License Agreement. Even if the copying and decompiling does not violate a copyright, it still could violate the term of a license. It is not clear that the security researchers have agreed to a license or, if so, what the license agreement might say. A court also might conclude that a license agreement that prevents the understanding of security threats violates public policy.