eContracts II: UCITA, etc. on Formation

[Class Exercise 1]

READINGS

In the prior section, we took a look at how the current law is adapting to meet the challenge of eContracts.

In this section, we'll discuss how legislative action is reshaping the legal infrastructure for electronic commerce. Our inquiry will focus on two particular projects initiated by the National Commissioners on Uniform State Laws.

> The first is the **Uniform Computer Information Transactions Act ("UCITA")**, which was formerly known as (proposed) Article 2B of the UCC.
>
> The second is the **Uniform Electronic Transactions Act ("UETA")**.

Each of these documents has different goals, and different scope. Of the two, UCITA has garnered the most attention, and is probably the most significant, for reasons that we shall see below.

The Prefatory Note to UCITA is as follows:

Uniform Computer transactions act (UCITA)

"A commercial contract code for the computer information transactions"

> Once land ownership and agrarian production were primary sources of wealth and income in our economy, and contracts for the exchange of horses and grain dominated the commercial landscape. Following the industrial revolution, manufactured goods assumed center stage. In the 1930s Llewellyn recognized that this change required revisions to the law of sales, so that its rules were relevant to the new economy. The result was UCC Article 2. Despite initially strong resistance, Article 2 won universal acceptance, for it reflected the reality of economic change and its implications for contract law.
>
> Our economy has experienced another fundamental change, with information products and services now driving increased productivity and growth. Accompanying this change is a widely diverse and rich array of methods for distributing and tailoring digital information to the modern marketplace. Contracts underlie both the creation and distribution of such information. However, legal rules that are not relevant to commercial practice or that are uncertain in application inhibit contracting or raise transaction costs. UCITA was drafted in

response to this fundamental economic change and need for clarity in the law.

Article 2 served as both a model and a point of departure for UCITA. Like Article 2, UCITA covers a variety of transactions, many of which take place solely between merchants. Article 2 governs sales of jet planes as well as toasters, not to mention the large-scale acquisition of jet and toaster parts. UCITA governs access by Fortune 500 businesses to sophisticated databases as well as distribution of software to the general public; it also covers custom software development and the acquisition of various rights in multimedia products.

Both UCITA and Article 2 are based upon the principle of freedom of contract: with limited exceptions, the terms and effect of a contract can be varied by agreement. Most provisions of both statutes are default rules, applicable only if the parties do not specify some other rule. Although one could try to fashion a contract code that regulates comprehensively rather than permitting such flexibility, it is hard to imagine such an approach being compatible with a vibrant market economy. Even if one succeeded in making the regulations stick, the effect would be to hinder rather than facilitate commerce. On the other hand, as noted, without certain default rules, contracting and thus legal rights remain unclear.

To be sure, not every contract should be enforced. UCITA follows Article 2 in providing a standard of unconscionability for courts to employ in policing contract terms. UCITA goes beyond Article 2 in authorizing courts to strike down over-reaching language that conflicts with fundamental public policy. UCITA provides that common law doctrines such as fraud and duress remain effective. UCITA does not alter competition or antitrust law. It does not change trade secret law, intellectual property law, or substantive consumer law. It deals only with contracts.

As Llewellyn recognized in drafting Article 2, contract law must be tailored to the type of transactions that it covers. Just as a body of law based on images of the sale of horses was not relevant a half century ago to sales of manufactured goods, so today a body of law based on images of the sale of manufactured goods ill fits licenses and other transactions in computer information. Rules based on an antiquated view of the transactional world do not give coherent guidance to courts or to transacting parties.

UCITA is the first uniform contract law designed to deal specifically with the new information economy. Transactions in computer information involve different expectations, different industry practices, and different policies from transactions in goods. For example, in a sale of goods, the buyer owns what it buys and has exclusive rights in that subject matter (e.g., the toaster that has been purchased). In contrast, someone that acquires a copy of computer information may or may not own that copy, but in any case rarely obtains all rights associated with the information. *See DSC Communications Corp. v. Pulse Communications*, Inc., 170 F.3d 1354 (Fed. Cir. 1999). What rights are acquired or withheld depends on what the contract says. This point only is implicit in Article 2 for goods such as books; UCITA makes it explicit for the information economy where, unlike in the case of a book, the contract (license) is the product.

Licensing is one way in which computer information is tailored to the information marketplace. Courts have enforced contract terms that, among other things:

- preclude commercial use
- permit commercial use
- preclude making copies
- permit making multiple copies
- grant access
- limit access
- allow use throughout a site
- limit use to a specific computer
- preclude distribution of copies for a fee
- allow distribution of copies
- preclude modification
- allow modification
- allow distribution only in specific way
- limit use to internal operations

Such contract terms have helped to create the wondrous array of products and services that characterizes our modern economy. Whether specific terms are appropriate for a given transaction or set of parties is fundamentally a marketplace issue.

> As noted, in computer information transactions, license terms often define the product. A software product may be provided in the same form in two transactions, but in one case the user is authorized to make 100,000 copies and in the other merely to use a single copy at home. The value of the transaction inheres not in the tangible medium (if, indeed, any is used), but rather in the license grant terms. UCITA does not require that computer information products and services be licensed; it covers sales as well. But UCITA provides a coherent contract law framework for analyzing a license, which has been the dominant contractual framework for commerce in computer information.

Up to this point, a complex mix of common law and Article 2 has governed computer information transactions. The common law is frequently difficult to ascertain, and it varies widely among states. In addition, differences in the legal norms that have developed in different areas of information practice are producing unpredictable results as those areas converge. Article 2, while uniform, does not properly apply to many issues involved in transactions in computer information, and when it applies, it often does not provide appropriate guidance because of differences in subject matter and transactional frameworks.

The need for a coherent, uniform body of law has never been greater. Revolutions in telecommunications and computer technology have made geography increasingly irrelevant to modern commerce. The Internet enables small firms as well as large ones to provide products and services throughout the country and around the world. Even as online systems have altered how many information transactions are performed, however, fundamental issues associated with contracting online remain unanswered. A modern contract law must give guidance on those issues. Failure to do so does not foster but rather impedes commerce in computer information.

The liberating promise of technology cannot be fully realized unless there is predictability in the legal rules that govern such transactions. This is the need that UCITA addresses. It clarifies and sets forth uniform legal principles applicable to computer information transactions. UCITA is a statute for our time.

The prefatory notes for UETA state as follows:

DRAFT PREFATORY NOTES

With the advent of electronic means of communication and information transfer, business models and methods for doing business have evolved to take advantage of the speed, efficiencies, and cost benefits of electronic technologies. These developments have occurred in the face of existing legal barriers to the legal efficacy of records and documents which exist solely in electronic media. Whether the legal requirement that information or an agreement or contract must be contained or set forth in a pen and paper writing derives from a statute of frauds affecting the enforceability of an agreement, or from a record retention statute that calls for keeping the paper record of a transaction, such legal requirements raise real barriers to the effective use of electronic media.

One striking example of electronic barriers involves so called check retention statutes in every state. A study conducted by the Federal Reserve Bank of Boston identified more than 2500 different state laws which require the retention of canceled checks by the issuers of those checks. These requirements not only impose burdens on the issuers, but also effectively restrain the ability of banks handling the checks to automate the process. Although check truncation is validated under the Uniform Commercial Code, if the bank's customer must store the canceled paper check, the bank will not be able to deal with the item through electronic transmission of the information. By establishing the equivalence of an electronic record of the information, the UETA removes these barriers without affecting the underlying legal rules and requirements.

A. Scope of the Act and Procedural Approach. The scope of this Act provides coverage which sets forth a clear framework for covered transactions, and also avoids unwarranted surprises for unsophisticated parties dealing in this relatively new media. The clarity and certainty of the scope of the Act have been obtained while still providing a solid legal framework that allows for the continued development of innovative technology to facilitate electronic transactions.

With regard to the general scope of the Act, the Act's coverage is inherently limited by the definition of "transaction." The Act does not apply to all writings and signatures, but only to electronic records and signatures relating to a transaction, defined as those interactions between people relating to business, commercial and governmental affairs. In general, there are few writing or signature requirements imposed by law on many of the "standard" transactions that had been considered for exclusion. A good example relates to trusts, where the general rule on creation of a trust imposes no formal writing requirement. Further, the writing requirements in other contexts derived from governmental filing issues. For example, real estate transactions were considered potentially troublesome because of the need to file a deed or other instrument for protection against third parties. Since the efficacy of a real estate purchase contract, or even a deed, between the parties is not affected by any sort of filing, the question was raised why these transactions should not be validated by this Act if done via an electronic medium. No sound reason was found. Filing requirements fall within Sections 17-19 on governmental records. An exclusion of all real estate transactions would be particularly unwarranted in the event that a state chose to convert to an electronic recording system, as many have for Article 9 financing statement filings under the Uniform Commercial Code.

The exclusion of specific Articles of the Uniform Commercial Code reflects the recognition that, particularly in the case of Articles 5, 8 and revised Article 9, electronic transactions were addressed in the specific contexts of those revision processes. In the context of Articles 2 and 2A the UETA provides the vehicle for assuring that such transactions may be accomplished and effected via an electronic medium. At such time as Articles 2 and 2A are revised the extent of coverage in those Articles/Acts may make application of this Act as a gap-filling law desirable. Similar considerations apply to the recently promulgated Uniform Computer Information Transactions Act ("UCITA").

The need for certainty as to the scope and applicability of this Act is critical, and makes any sort of a broad, general exception based on notions of inconsistency with existing writing and signature requirements unwise at best. The uncertainty inherent in leaving the applicability of the Act to judicial construction of this Act with other laws is unacceptable if electronic transactions are to be facilitated.

Finally, recognition that the paradigm for the Act involves two willing parties conducting a transaction electronically, makes it was necessary to expressly provide that some form of acquiescence or intent on the part of a person to conduct transactions electronically is necessary before the Act can be invoked. Accordingly, Section 5 specifically provides that the Act only applies between parties that have agreed to conduct transactions electronically. In this context, the construction of the term agreement must be broad in order to assure that the Act applies whenever the circumstances show the parties intention to transact electronically, regardless of whether the intent rises to the level of a formal agreement.

B. Procedural Approach. Another fundamental premise of the Act is that it be minimalist and procedural. The general efficacy of existing law, in an electronic context, so long as biases and barriers to the medium are removed, confirms this approach. The Act defers to existing substantive law. Specific areas of deference to other law in this Act include: 1) the meaning and effect of "sign" under existing law, 2) the method and manner of displaying, transmitting and formatting information in section 8, 3) rules of attribution in section 9, and 4) the law of mistake in section 10.

The Act's treatment of records and signatures demonstrates best the minimalist approach that has been adopted. Whether a record is attributed to a person is left to law outside this Act. Whether an electronic signature has any effect is left to the surrounding circumstances and other law. These provisions are salutary directives to assure that records and signatures will be treated in the same manner, under currently existing law, as written records and manual signatures.

The deference of the Act to other substantive law does not negate the necessity of setting forth rules and standards for using electronic media. The Act expressly validates electronic records, signatures and contracts. It provides for the use of electronic records and information for retention purposes, providing certainty in an area with great potential in cost savings and efficiency. The Act makes clear that the actions of machines ("electronic agents") programmed and used by people will bind the user of the machine, regardless of whether human review of a particular transaction has occurred. It specifies the standards for sending and receipt of electronic records, and it allows for innovation in financial services through the implementation of transferable records. In these ways the Act permits electronic transactions to be accomplished with certainty under existing substantive rules of law.

UCITA and UETA on Contract Formation

Each of these model laws takes a different approach to issues of eContract formation:

UCITA §§ 101-104, 201-211 (relevant to contract formation) (pdf, 28 kb)

UETA (relevant to contract formation) (pdf, 8 kb)

Additional UCITA Information:

(43) "Mass-market license" means a standard form used in a mass-market transaction.

(44) "Mass-market transaction" means a transaction that is:

(A) a consumer contract; or

(B) any other transaction with an end-user licensee if:

(i) the transaction is for information or informational rights directed to the general public as a whole, including consumers, under substantially the same terms for the same information;

(ii) the licensee acquires the information or informational rights in a retail transaction under terms and in a quantity consistent with an ordinary transaction in a retail market; and

(iii) the transaction is not:

(I) a contract for redistribution or for public performance or public display of a copyrighted work;

(II) a transaction in which the information is customized or otherwise specially prepared by the licensor for the licensee, other than minor customization using a capability of the information intended for that purpose;

(III) a site license; or

(IV) an access contract.

SECTION 305. TERMS TO BE SPECIFIED. An agreement that is otherwise sufficiently definite to be a contract is not invalid because it leaves particulars of performance to be specified by one of the parties. If particulars of performance are to be specified by a party, the following rules apply:

(1) Specification must be made in good faith and within limits set by commercial reasonableness.

(2) If a specification materially affects the other party's performance but is not seasonably made, the other party:

(A) is excused for any resulting delay in its performance; and

(B) may perform, suspend performance, or treat the failure to specify as a breach of contract.

Class Exercise

This class session is a little different from our usual. For this class, we'll break into groups to work on a series of exercises. For ease of administration, we'll use just six groups:

Group A: contains members of Groups 1, 7

Group B: contains member of Groups 2, 8

Group C: contains members of Groups 3, 9

Group D: contains members of Groups 4, 10

Group E: contains members of Groups 5, 11

Group F: contains members of Groups 6, 12

Each group will separately consider the following two parts of the exercise, reporting their consensus at the end of class:

Part I: UCITA Hypotheticals

The basic transaction:

Albert (A) operates a web site, offering "downloadable electronic widgets" "DEWs" for sale.

Betty (B) is in the market for some DEWs.

A and B want to agree to exchange DEWs for money, using the Internet.

For each of the following cases, consider whether there has been a contract formed under UCITA, and whether all the terms of the contract are included:

[1] B uses an electronic agent to contact A, establishing the price of $10,000 for 500 DEWs. B downloads the DEWs from A's web site.

[2] A places the following statement on his web site, on the page in which B fills in her credit card number: "This transaction will be governed by the terms and conditions which will be downloaded with the DEWs." B downloads the DEWs.

[3] A posts the terms and conditions of the agreement on his web site. These terms include the following statement: "we reserve the right to amend, modify, or vary this agreement at any time during its duration with or without notice to you." B downloads the DEWs.

[4] A's web site offers the DEWs at $5.00 each. B sends a message to A, stating: "I accept your offer, and will pay $4.00 for each DEWs," and then downloads the DEWs

[5] A's web site lists DEWs at $5.00 each. There is no apparent opportunity to negotiate. Upon downloading, each DEW is associated with a set of "terms and conditions," one term of which is that "the license to use the DEW expires in 30 days."

Part II: The UCITA Debate

So far, only Virginia and Maryland have passed UCITA; attempts to do so in other jurisdictions have met with great resistance. In this part of the Class Exercise, each group will assume the role of a state legislature, and consider the policy aspects of enacting UCITA and/or UETA. The bottom-line question is whether the

In considering the policy aspects, consider the following questions and resources:

1. How does the scope of UCITA and UETA differ? What, precisely, is the scope of UCITA? Does the phrase "computer information transactions" helpfully define which contracts fall within UCITA and which fall without?

2. Does UCITA reach the same result as *ProCD* and *Hill*? Why or why not?

3. UCITA Online (pro-UCITA information clearinghouse) (includes a "State Legislators' Guide") (*browse*)

4. AFFECT: Americans For Fair Electronic Commerce Transactions (anti-UCITA information clearinghouse) (*browse*)

5. Pamela Samuelson, *Forward: The Impact Of Article 2b Of The Uniform Commercial Code On The Future Of Information And Commerce*, 13 Berkeley Tech. L.J. 809 (1998) (pdf, edited) (reviewing various objections to UCC Article 2B/UCITA)

6. Federal Trade Commission, Letter Opposing UCITA on Public Policy Grounds

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[note: this is an edited version,highlighting contract <u>formation</u>]

UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT

February 9, 2000

PART 1
GENERAL PROVISIONS

[SUBPART A. SHORT TITLE AND DEFINITIONS]

SECTION 101. SHORT TITLE.

SECTION 102. DEFINITIONS.

[SUBPART B. GENERAL SCOPE AND TERMS]

SECTION 103. SCOPE; EXCLUSIONS.

SECTION 104. MIXED TRANSACTIONS: AGREEMENT TO OPT-IN OR OPT-OUT.

[. . . sections omitted . . .]

PART 2

FORMATION AND TERMS

[SUBPART A. FORMATION OF CONTRACT]

SECTION 201. FORMAL REQUIREMENTS.

SECTION 202. FORMATION IN GENERAL.

SECTION 203. OFFER AND ACCEPTANCE IN GENERAL.

SECTION 204. ACCEPTANCE WITH VARYING TERMS.

SECTION 205. CONDITIONAL OFFER OR ACCEPTANCE.

SECTION 206. OFFER AND ACCEPTANCE: ELECTRONIC AGENTS.

SECTION 207. FORMATION: RELEASES OF INFORMATIONAL RIGHTS.

[SUBPART B. TERMS OF RECORDS]

SECTION 208. ADOPTING TERMS OF RECORDS.

SECTION 209. MASS-MARKET LICENSE.

SECTION 210. TERMS OF CONTRACT FORMED BY CONDUCT.

SECTION 211. PRETRANSACTION DISCLOSURES IN INTERNET-TYPE TRANSACTIONS.

[. . . sections omitted . . .

UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT

PART 1

GENERAL PROVISIONS

[SUBPART A. SHORT TITLE AND DEFINITIONS]

. . .

SECTION 102. DEFINITIONS.

(a) In this [Act]:

(7) "Automated transaction" means a transaction in which a contract is formed in whole or part by electronic actions of one or both parties which are not previously reviewed by an individual in the ordinary course.

(10) “Computer information” means information in electronic form which is obtained from or through the use of a computer or which is in a form capable of being processed by a computer. The term includes a copy of the information and any documentation or packaging associated with the copy.

(11) “Computer information transaction” means an agreement or the performance of it to create, modify, transfer, or license computer information or informational rights in computer information. The term includes a support contract under Section 612. The term does not include a transaction merely because the parties’ agreement provides that their communications about the transaction will be in the form of computer information.

* * *

[SUBPART B. GENERAL SCOPE AND TERMS]

SECTION 103. SCOPE; EXCLUSIONS.

(a) This [Act] applies to computer information transactions.

(b) Except for subject matter excluded in subsection (d) and as otherwise provided in Section 104, if a computer information transaction includes subject matter other than computer information or subject matter excluded under subsection (d), the following rules apply:

(1) If a transaction includes computer information and goods, this [Act] applies to the part of the transaction involving computer information, informational rights in it, and creation or modification of it. However, if a copy of a computer program is contained in and sold or leased as part of goods, this [Act] applies to the copy and the computer program only if:

(A) the goods are a computer or computer peripheral; or

(B) giving the buyer or lessee of the goods access to or use of the program is ordinarily a material purpose of transactions in goods of the type sold or leased.

(2) In all other cases, this [Act] applies to the entire transaction if the computer information and informational rights, or access to them, is the primary subject matter, but otherwise applies only to the part of the transaction involving computer information, informational rights in it, and creation or modification of it.

(c) To the extent of a conflict between this [Act] and [Article 9 of the Uniform Commercial Code], [Article 9] governs.

(d) This [Act] does not apply to:

(1) a financial services transaction;

(2) an agreement to create, perform or perform in, include information in, acquire, use, distribute, modify, reproduce, have access to, adapt, make available, transmit, license, or display:

(A) audio or visual programming that is provided by broadcast, satellite, or cable as defined or used in the Federal Communications Act and related regulations as they existed on July 1, 1999, or by similar methods of delivering that programming; or

(B) a motion picture, sound recording, musical work, or phonorecord as defined or used in Title 17 of the United States Code as of July 1, 1999, or an enhanced sound recording.

(3) a compulsory license; or

(4) a contract of employment of an individual, other than an individual hired as an independent contractor to create or modify computer information, unless the independent contractor is a freelancer in the news reporting industry as that term is commonly understood in that industry;

(5) a contract that does not require that information be furnished as computer information or a contract in which, under the agreement, the form of the information as computer information is otherwise insignificant with respect to the primary subject matter of the part of the transaction pertaining to the information; or

(6) subject matter within the scope of [Article 3, 4, 4A, 5, [6,] 7, or 8 of the Uniform Commercial Code].

(e) As used in subsection (d)(2)(B), "enhanced sound recording" means a separately identifiable product or service the dominant character of which consists of recorded sounds but which includes (i) statements or instructions whose purpose is to allow or control the perception, reproduction, or communication of those sounds or (ii) other information so long as recorded sounds constitute the dominant character of the product or service despite the inclusion of the other information.

SECTION 104. MIXED TRANSACTIONS: AGREEMENT TO OPT-IN OR OPT-OUT. The parties may agree that this [Act], including contract-formation rules, governs the transaction, in whole or part, or that other law governs the transaction and this [Act] does not apply, if a material part of the subject matter to which the agreement applies is computer information or informational rights in it that are within the scope of this [Act], or is subject matter within this [Act] under Section 103(b), or is subject matter excluded by Section 103(d)(1) or (2). However, any agreement to do so is subject to the following rules:

(1) An agreement that this [Act] governs a transaction does not alter the applicability of any rule or procedure that may not be varied by agreement of the parties or that may be varied

only in a manner specified by the rule or procedure, including a consumer protection statute [or administrative rule]. In addition, in a mass-market transaction, the agreement does not alter the applicability of a law applicable to a copy of information in printed form.

(2) An agreement that this [Act] does not govern a transaction:

(A) does not alter the applicability of Section 214 or 816; and

(B) in a mass-market transaction, does not alter the applicability under [this Act] of the doctrine of unconscionability or fundamental public policy or the obligation of good faith.

(3) In a mass-market transaction, any term under this section which changes the extent to which this [Act] governs the transaction must be conspicuous.

(4) A copy of a computer program contained in and sold or leased as part of goods and which is excluded from this [Act] by Section 103(b)(1) cannot provide the basis for an agreement under this section that this [Act] governs the transaction.

* * *

SECTION 107. LEGAL RECOGNITION OF ELECTRONIC RECORD AND AUTHENTICATION; USE OF ELECTRONIC AGENTS.

(a) A record or authentication may not be denied legal effect or enforceability solely because it is in electronic form.

(b) This [Act] does not require that a record or authentication be generated, stored, sent, received, or otherwise processed by electronic means or in electronic form.

(c) In any transaction, a person may establish requirements regarding the type of authentication or record acceptable to it.

(d) A person that uses an electronic agent that it has selected for making an authentication, performance, or agreement, including manifestation of assent, is bound by the operations of the electronic agent, even if no individual was aware of or reviewed the agent's operations or the results of the operations.

* * *

SECTION 112. MANIFESTING ASSENT; OPPORTUNITY TO REVIEW.

(a) A person manifests assent to a record or term if the person, acting with knowledge of, or after having an opportunity to review the record or term or a copy of it:

(1) authenticates the record or term with intent to adopt or accept it; or

(2) intentionally engages in conduct or makes statements with reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term.

(b) An electronic agent manifests assent to a record or term if, after having an opportunity to review it, the electronic agent:

(1) authenticates the record or term; or

(2) engages in operations that in the circumstances indicate acceptance of the record or term.

(c) If this [Act] or other law requires assent to a specific term, a manifestation of assent must relate specifically to the term.

(d) Conduct or operations manifesting assent may be proved in any manner, including a showing that a person or an electronic agent obtained or used the information or informational rights

and that a procedure existed by which a person or an electronic agent must have engaged in the conduct or operations in order to do so. Proof of compliance with subsection (a)(2) is sufficient if there is conduct that assents and subsequent conduct that reaffirms assent by electronic means.

(e) With respect to an opportunity to review, the following rules apply:

(1) A person has an opportunity to review a record or term only if it is made available in a manner that ought to call it to the attention of a reasonable person and permit review.

(2) An electronic agent has an opportunity to review a record or term only if it is made available in manner that would enable a reasonably configured electronic agent to react to the record or term.

(3) If a record or term is available for review only after a person becomes obligated to pay or begins its performance, the person has an opportunity to review only if it has a right to a return if it rejects the record. However, a right to a return is not required if:

(A) the record proposes a modification of contract or provides particulars of performance under Section 305; or

(B) the primary performance is other than delivery or acceptance of a copy, the agreement is not a mass-market transaction, and the parties at the time of contracting had reason to know that a record or term would be presented after performance, use, or access to the information began.

(4) The right to a return under paragraph (3) may arise by law or by agreement.

(f) The effect of provisions of this section may be modified by an agreement setting out standards applicable to future transactions between the parties.

* * *

PART 2

FORMATION AND TERMS

[SUBPART A. FORMATION OF CONTRACT]

SECTION 201. FORMAL REQUIREMENTS.

(a) Except as otherwise provided in this section, a contract requiring payment of a contract fee of $5,000 or more is not enforceable by way of action or defense unless:

(1) the party against which enforcement is sought authenticated a record sufficient to indicate that a contract has been formed and which reasonably identifies the copy or subject matter to which the contract refers; or

(2) the agreement is a license for an agreed duration of one year or less or which may be terminated at will by the party against which the contract is asserted.

(b) A record is sufficient under subsection (a) even if it omits or incorrectly states a term, but the contract is not enforceable under that subsection beyond the number of copies or subject matter shown in the record.

(c) A contract that does not satisfy the requirements of subsection (a) is nevertheless enforceable under that subsection if:

(1) a performance was tendered or the information was made available by one party and the tender was accepted or the information accessed by the other; or

(2) the party against which enforcement is sought admits in court, by pleading or by testimony or otherwise under oath, facts sufficient to indicate a contract has been made, but the

agreement is not enforceable under this paragraph beyond the number of copies or the subject matter admitted.

(d) Between merchants, if, within a reasonable time, a record in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, the record satisfies subsection (a) against the party receiving it unless notice of objection to its contents is given in a record within 10 days after the confirming record is received.

(e) An agreement that the requirements of this section need not be satisfied as to future transactions is effective if evidenced in a record authenticated by the person against which enforcement is sought.

(f) A transaction within the scope of this [Act] is not subject to a statute of frauds contained in another law of this State.

SECTION 202. FORMATION IN GENERAL.

(a) A contract may be formed in any manner sufficient to show agreement, including offer and acceptance or conduct of both parties or operations of electronic agents which recognize the existence of a contract.

(b) If the parties so intend, an agreement sufficient to constitute a contract may be found even if the time of its making is undetermined, one or more terms are left open or to be agreed on, the records of the parties do not otherwise establish a contract, or one party reserves the right to modify terms.

(c) Even if one or more terms are left open or to be agreed upon, a contract does not fail for indefiniteness if the parties intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

(d) In the absence of conduct or performance by both parties to the contrary, a contract is not formed if there is a material disagreement about a material term, including a term concerning scope.

(e) If a term is to be adopted by later agreement and the parties intend not to be bound unless the term is so adopted, a contract is not formed if the parties do not agree to the term. In that case, each party shall deliver to the other party, or with the consent of the other party destroy, all copies of information, access materials, and other materials received or made, and each party is entitled to a return with respect to any contract fee paid for which performance has not been received, has not been accepted, or has been redelivered without any benefit being retained. The parties remain bound by any restriction in a contractual use term with respect to information or copies received or made from copies received pursuant to the agreement, but the contractual use term does not apply to information or copies properly received or obtained from another source.

SECTION 203. OFFER AND ACCEPTANCE IN GENERAL. Unless otherwise unambiguously indicated by the language or the circumstances:

(1) An offer to make a contract invites acceptance in any manner and by any medium reasonable under the circumstances.

(2) An order or other offer to acquire a copy for prompt or current delivery invites acceptance by either a prompt promise to ship or a prompt or current shipment of a conforming

or nonconforming copy. However, a shipment of a nonconforming copy is not an acceptance if the licensor seasonably notifies the licensee that the shipment is offered only as an accommodation to the licensee.

(3) If the beginning of a requested performance is a reasonable mode of acceptance, an offeror that is not notified of acceptance or performance within a reasonable time may treat the offer as having lapsed before acceptance.

(4) If an offer in an electronic message evokes an electronic message accepting the offer, a contract is formed:

(A) when an electronic acceptance is received; or

(B) if the response consists of beginning performance, full performance, or giving access to information, when the performance is received or the access is enabled and necessary access materials are received.

SECTION 204. ACCEPTANCE WITH VARYING TERMS.

(a) In this section, an acceptance materially alters an offer if it contains a term that materially conflicts with or varies a term of the offer or that adds a material term not contained in the offer.

(b) Except as otherwise provided in Section 205, a definite and seasonable expression of acceptance operates as an acceptance, even if the acceptance contains terms that vary from the terms of the offer, unless the acceptance materially alters the offer.

(c) If an acceptance materially alters the offer, the following rules apply:

(1) A contract is not formed unless:

(A) a party agrees, such as by manifesting assent, to the other party's offer or acceptance; or

(B) all the other circumstances, including the conduct of the parties, establish a contract.

(2) If a contract is formed by the conduct of both parties, the terms of the contract are determined under Section 210.

(d) If an acceptance varies from but does not materially alter the offer, a contract is formed based on the terms of the offer. In addition, the following rules apply:

(1) Terms in the acceptance which conflict with terms in the offer are not part of the contract.

(2) An additional nonmaterial term in the acceptance is a proposal for an additional term. Between merchants, the proposed additional term becomes part of the contract unless the offeror gives notice of objection before, or within a reasonable time after, it receives the proposed terms.

SECTION 205. CONDITIONAL OFFER OR ACCEPTANCE.

(a) In this section, an offer or acceptance is conditional if it is conditioned on agreement by the other party to all the terms of the offer or acceptance.

(b) Except as otherwise provided in subsection (c), a conditional offer or acceptance precludes formation of a contract unless the other party agrees to its terms, such as by manifesting assent.

(c) If an offer and acceptance are in standard forms and at least one form is conditional, the following rules apply:

(1) Conditional language in a standard term precludes formation of a contract only if the actions of the party proposing the form are consistent with the conditional language, such as by refusing to perform, refusing to permit performance, or refusing to accept the benefits of the agreement, until its proposed terms are accepted.

(2) A party that agrees, such as by manifesting assent, to a conditional offer that is effective under paragraph (1) adopts the terms of the offer under Section 208 or 209, except a term that conflicts with an expressly agreed term regarding price or quantity.

SECTION 206. OFFER AND ACCEPTANCE: ELECTRONIC AGENTS.

(a) A contract may be formed by the interaction of electronic agents. If the interaction results in the electronic agents' engaging in operations that under the circumstances indicate acceptance of an offer, a contract is formed, but a court may grant appropriate relief if the operations resulted from fraud, electronic mistake, or the like.

(b) A contract may be formed by the interaction of an electronic agent and an individual acting on the individual's own behalf or for another person. A contract is formed if the individual takes an action or makes a statement that the individual can refuse to take or say and that the individual has reason to know will:

(1) cause the electronic agent to perform, provide benefits, or allow the use or access that is the subject of the contract, or send instructions to do so; or

(2) indicate acceptance, regardless of other expressions or actions by the individual to which the individual has reason to know the electronic agent cannot react.

(c) The terms of a contract formed under subsection (b) are determined under Section 208 or 209 but do not include a term provided by the individual if the individual had reason to know that the electronic agent could not react to the term.

SECTION 207. FORMATION: RELEASES OF INFORMATIONAL RIGHTS.

(a) A release is effective without consideration if it is:

(1) in a record to which the releasing party agrees, such as by manifesting assent, and which identifies the informational rights released; or

(2) enforceable under estoppel, implied license, or other law.

(b) A release continues for the duration of the informational rights released if the release does not specify its duration and does not require affirmative performance after the grant of the release by:

(1) the party granting the release; or

(2) the party receiving the release, except for relatively insignificant acts.

(c) In cases not governed by subsection (b), the duration of a release is governed by Section 308.

[SUBPART B. TERMS OF RECORDS]

SECTION 208. ADOPTING TERMS OF RECORDS. Except as otherwise provided in Section 209, the following rules apply:

(1) A party adopts the terms of a record, including a standard form, as the terms of the contract if the party agrees to the record, such as by manifesting assent.

(2) The terms of a record may be adopted pursuant to paragraph (1) after beginning performance or use if the parties had reason to know that their agreement would be represented in whole or part by a later record to be agreed on and there would not be an opportunity to review the record or a copy of it before performance or use begins. If the parties fail to agree to the later terms and did not intend to form a contract unless they so agreed, Section 202(e) applies.

(3) If a party adopts the terms of a record, the terms become part of the contract without regard to the party's knowledge or understanding of individual terms in the record, except for a term that is unenforceable because it fails to satisfy another requirement of this [Act].

SECTION 209. MASS-MARKET LICENSE.

(a) A party adopts the terms of a mass-market license for purposes of Section 208 only if the party agrees to the license, such as by manifesting assent, before or during the party's initial performance or use of or access to the information. A term is not part of the license if:

(1) the term is unconscionable or is unenforceable under Section 105(a) or (b); or

(2) subject to Section 301, the term conflicts with a term to which the parties to the license have expressly agreed.

(b) If a mass-market license or a copy of the license is not available in a manner permitting an opportunity to review by the licensee before the licensee becomes obligated to pay and the licensee does not agree, such as by manifesting assent, to the license after having an opportunity to review, the licensee is entitled to a return under Section 112 and, in addition, to:

(1) reimbursement of any reasonable expenses incurred in complying with the licensor's instructions for returning or destroying the computer information or, in the absence of instructions, expenses incurred for return postage or similar reasonable expense in returning the computer information; and

(2) compensation for any reasonable and foreseeable costs of restoring the licensee's information processing system to reverse changes in the system caused by the installation, if:

(A) the installation occurs because information must be installed to enable review of the license; and

(B) the installation alters the system or information in it but does not restore the system or information after removal of the installed information because the licensee rejected the license.

(c) In a mass-market transaction, if the licensor does not have an opportunity to review a record containing proposed terms from the licensee before the licensor delivers or becomes obligated to deliver the information, and if the licensor does not agree, such as by manifesting assent, to those terms after having that opportunity, the licensor is entitled to a return.

SECTION 210. TERMS OF CONTRACT FORMED BY CONDUCT.

(a) Except as otherwise provided in subsection (b) and subject to Section 301, if a contract is formed by conduct of the parties, the terms of the contract are determined by consideration of the terms and conditions to which the parties expressly agreed, course of performance, course of dealing, usage of trade, the nature of the parties' conduct, the records exchanged, the information or

informational rights involved, and all other relevant circumstances. If a court cannot determine the terms of the contract from the foregoing factors, the supplementary principles of this [Act] apply.

(b) This section does not apply if the parties authenticate a record of the contract or a party agrees, such as by manifesting assent, to the record containing the terms of the other party.

SECTION 211. PRETRANSACTION DISCLOSURES IN INTERNET-TYPE TRANSACTIONS. This section applies to a licensor that makes its computer information available to a licensee by electronic means from its Internet or similar electronic site. In such a case, the licensor affords an opportunity to review the terms of a standard form license which opportunity satisfies Section 112(e) with respect to a licensee that acquires the information from that site, if the licensor:

(1) makes the standard terms of the license readily available for review by the licensee before the information is delivered or the licensee becomes obligated to pay, whichever occurs first, by:

(A) displaying prominently and in close proximity to a description of the computer information, or to instructions or steps for acquiring it, the standard terms or a reference to an electronic location from which they can be readily obtained; or

(B) disclosing the availability of the standard terms in a prominent place on the site from which the computer information is offered and promptly furnishing a copy of the standard terms on request before the transfer of the computer information; and

(2) does not take affirmative acts to prevent printing or storage of the standard terms for archival or review purposes by the licensee.

[note: this is an edited version, designed to highlight contract formation]

UNIFORM ELECTRONIC TRANSACTIONS ACT

* * *

SECTION 3. SCOPE.

(a) Except as otherwise provided in subsection (b), this [Act] applies to electronic records and electronic signatures relating to a transaction.

(b) This [Act] does not apply to a transaction to the extent it is governed by:

(1) a law governing the creation and execution of wills, codicils, or testamentary trusts;

(2) [The Uniform Commercial Code other than Sections 1-107 and 1-206, Article 2, and Article 2A];

(3) [the Uniform Computer Information Transactions Act]; and

(4) [other laws, if any, identified by State].

(c) This [Act] applies to an electronic record or electronic signature otherwise excluded from the application of this [Act] under subsection (b) to the extent it is governed by a law other than those specified in subsection (b).

(d) A transaction subject to this [Act] is also subject to other applicable substantive law.

* * *

SECTION 8. PROVISION OF INFORMATION IN WRITING; PRESENTATION OF RECORDS.

(a) If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt. An electronic record is not capable of retention

by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record.

(b) If a law other than this [Act] requires a record (i) to be posted or displayed in a certain manner, (ii) to be sent, communicated, or transmitted by a specified method, or (iii) to contain information that is formatted in a certain manner, the following rules apply:

(1) The record must be posted or displayed in the manner specified in the other law.

(2) Except as otherwise provided in subsection (d)(2), the record must be sent, communicated, or transmitted by the method specified in the other law.

(3) The record must contain the information formatted in the manner specified in the other law.

(c) If a sender inhibits the ability of a recipient to store or print an electronic record, the electronic record is not enforceable against the recipient.

(d) The requirements of this section may not be varied by agreement, but:

(1) to the extent a law other than this [Act] requires information to be provided, sent, or delivered in writing but permits that requirement to be varied by agreement, the requirement under subsection (a) that the information be in the form of an electronic record capable of retention may also be varied by agreement; and

(2) a requirement under a law other than this [Act] to send, communicate, or transmit a record by [first-class mail, postage prepaid] [regular United States mail], may be varied by agreement to the extent permitted by the other law.

* * *

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AFFECT, Americans for Fair Electronic Commerce Transactions, is a broad-based national coalition of industry leaders, libraries and consumer organizations dedicated to educating the public and policy makers about the dangers of UCITA, the Uniform Computer Information Transactions Act. AFFECT supports improvements in high-quality computer and information technology and the growth of fair and competitive markets in the United States and believes that UCITA is a dangerous, anti-competitive, anti-business, anti-consumer measure that will have a negative impact on the American economy and the development of electronic commerce and new technologies.

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FOREWARD: INTELLECTUAL PROPERTY AND CONTRACT LAW FOR THE INFORMATION AGE: THE IMPACT OF ARTICLE 2B OF THE UNIFORM COMMERCIAL CODE ON THE FUTURE OF INFORMATION AND COMMERCE.

PAMELA SAMUELSON *

Berkeley Technology Law Journal
Fall, 1998
13 Berkeley Tech. L.J. 809
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Intellectual property and contract laws have a long history of working in concert to regulate commercial transactions in information-rich works. n1 Yet, as both bodies of law have expanded their horizons to respond to the considerable challenges posed by digital technologies, the relationship between these two laws has shifted. n2 Some view the vulnerability of digital information to unauthorized and commercially harmful replication and distribution as a reason to propose a far broader role for contract than for intellectual property in the information age. n3 This view underlies a recently proposed model law that aspires to provide a standard set of default rules to regulate transactions in information, known as Article 2B of the Uniform Commercial Code (U.C.C.). n4 The drafters of this model law hope to accomplish for the information economy what Articles 2 and 2A of the U.C.C. - which regulate respectively sales and leases of goods - have suc8241*810 cessfully done to promote commerce in the manufacturing economy. n5 Proponents not only hope that Article 2B will be adopted by state legislatures in the near future, n6 but also that it will serve as a model for regulating commerce in information on a global scale. n7

To explore the implications of Article 2B and its intersection with intellectual property law, the Berkeley Center for Law and Technology convened a symposium on "Intellectual Property and Contract Law in the Information Age." n8 The program included intellectual property and commercial law scholars, as well as economists, technologists, government policy officials, representatives of various information industries, and lawyers specializing in information licensing. n9 To enable the insights from this symposium to be shared with a wider audience, the Berkeley Technology Law Journal and the California Law Review agreed to publish symposium issues featuring papers presented at the live symposium. n10 The main focus of the California Law Review symposium volume is on the extent to which federal intellectual property law and policy should "preempt" or 8241*812 otherwise limit enforcement of Article 2B contracts. n11 The papers in this symposium issue of the Berkeley Technology Law Journal take a broader look at Article 2B. They probe its underlying rationale, its implications for specific industry sectors, its intersection with other federal and state laws (for example, those regulating competition and digital signatures), and its consistency with existing and emerging societal norms and commercial practices.

I. THE SYMPOSIUM ARTICLES

The BTLJ symposium issue begins, as the live symposium did, with a presentation by Professor Raymond T. Nimmer, who is the Reporter for the Article 2B project. n12 His article, Breaking Barriers: The Relation Between Contract and Intellectual Property Law, perceives a growing importance for contract law in the new information environment because "in the new world of digital information," intellectual property constructs do not match up very well with new forms of commercial exploitation of digital information, such as those involving "transmission, extraction, and access." n13 Licensing, he explains, enables the emergence of these new information markets. Nimmer characterizes as "reactionary" the view that publishers must sell copies of information even they prefer to license copies. n14 Freedom of contract principles suggest that the decision to license information should be respected.

Also contributing to the growth of information licensing is uncertainty about potential liability for dissemination of defective information. Professor Nimmer explains that "Article 2B adopts a strong policy encouraging public distribution [of information] by limiting, and in some contexts, eliminating the liability risk in a manner consistent with caselaw on print media unless a different risk is expressly assumed by the information provider in its contract." n15 Nimmer perceives no "impending big bang" between intellectual property and contract laws, although he predicts that intellectual property law will recede in importance. n16 Contract and intellectual property laws "have always co-existed, not only peacefully, but in an aggressive interaction between ordinarily consistent and mutually supportive fields." n17 Occasional abuses can and will be dealt with on a case-by-case basis. n18

A similarly positive attitude about Article 2B's licensing rules - particularly its provisions validating mass market licenses of information - can be found in Robert Gomulkiewicz's contribution to the BTLJ symposium issue. n19 Gomulkiewicz not only views such licenses as an accurate reflection of commercial practice, but he also goes on to suggest that the software industry has been thriving in recent years "because of what mass-market licenses enable: a diversity of innovative products provided to end users at attractive prices." n20 Explaining why he titled his comment "The License Is the Product," Gomulkiewicz states that the program code may "provide[ ] functionality to the user, but the license delivers the use rights." n21 Gomulkiewicz asserts that there is considerable diversity in mass market software licenses, and that users are far from shy about using the Internet to complain if a software developer puts unreasonable terms in its licenses. n22 He opposes proposals to regulate mass market licenses simply because a few of them contain objectionable terms. n23 Indeed, he thinks that end users should cheer Article 2B because of its consumer protection provisions. n24 His principal complaint about Article 2B is that the drafters have been "too wedded to ill-fitting rules found in Article 2" relating to merchantability and noninfringement warranty responsibilities which Gomulkiewicz insists run counter to commercial practices and expectations in the software industry. n25

In stark contrast to Professor Nimmer and Robert Gomulkiewicz, Professor Jessica Litman characterizes as "dubious" the notion that current law enables publishers to make a transaction into a license by so designating it. n26 In her view, Article 2B would make new law, even though its drafters deny this. n27 Litman asserts that The Tales That Article 2B Tells about its relationship to copyright law are at best confusing and at worst disingenuous. n28 Confusion arises because,

although Article 2B sometimes incorporates language from the copyright statute into its definitions, Article 2B uses those terms in a manner different from and sometimes inconsistent with how they are used in copyright. n29 She finds further confusion, as well as disingenuousness, in Article 2B's assertions about the property law foundations on which Article 2B licenses are supposedly based. n30 The authority to license information is said to arise from "informational property rights" that the provider has in the information. n31 Article 2B defines this term to include intellectual property rights, such as copyrights and patents, but it also posits the existence of other sources of property rights in information besides those deriving from intellectual property law without clearly identifying their source. n32 This is important, for example, in determining the authority of an information provider to license a CD-ROM directory of telephone white pages listings which the U.S. Supreme Court has said cannot be protected by copyright law. n33 Litman finds Article 2B's veiled explanation of non-intellectual property sources of rights to be circular. She concludes that "whether from confusion or design, the tales that Article 2B tells us about its relationship with copyright law are 8241*815 an unreliable guide to what that relationship is likely, or is intended, to be." n34

Professor Jane C. Ginsburg shares some of Professor Litman's discomfort with the "anomalous nomenclature" of Article 2B as it intersects with copyright parlance. n35 She is, however, more sympathetic with Article 2B insofar as it favors the interests of licensors. Consistent with her pro-author positions on copyright matters, Ginsburg is mainly concerned with the implications of Article 2B for an often vulnerable class of licensors, namely, individual author-creators, hence her title: Authors as "Licensors" of "Informational Rights" Under U.C.C. Article 2B. n36 Professor Ginsburg reports that there is both good and bad news in Article 2B of the UCC for authors, "depending on the level of detail that informs their agreements." n37 The principal good news is that the licensor's terms generally prevail if the conduct of the parties indicates that a contract has been formed. n38 In addition, Ginsburg sees some benefits for authors in Article 2B's implied license provision, although less so than under an earlier version of the same provision. n39 The principal bad news is that "Article 2B's provisions governing the formation of enforceable agreements can be detrimental to authors who may end up assenting all too easily to detailed exploiter-written [agreements]." n40 She demonstrates the good and bad news by working through hypotheticals to show how Article 2B's default rules would affect various permutations. n41 Ginsburg also worries that Article 2B will make it too easy for authors to release important rights without realizing they have done so. n42 She offers a number of suggestions for refinement of Article 2B to confer greater protection to authors, and suggests that authors should become more involved in the Article 2B drafting process in order to promote pro-author provisions. n43

Authors and their publishers have, however, sometimes sought to become less involved with Article 2B by urging the drafters to exclude "up8241*816 stream licenses," such as those routinely entered into by writers and publishers, from the scope of Article 2B, as Laura Hutcheson reveals in The Exclusion of Embedded Software and Merely Incidental Information From the Scope of Article 2B. n44 Although author-publisher upstream licenses remained within the scope of Article 2B until the November 1998 drafting committee meeting, other groups have successfully sought or been given exclusions from Article 2B. n45 Indeed, defining a proper scope for Article 2B has been among the most persistently vexing problems with which the drafters have had to contend. n46 At first, the Article 2B project was focused on software licenses and development contracts. n47 Some years ago, it expanded to encompass transactions in digital information, and then to all transactions in information (except certain ones specifically excluded). n48 While the scope of

Article 2B has recently contracted to "computer information transactions," n49 there are still several categories of specific exclusions from the scope of Article 2B, including one for "embedded systems" (e.g., software that controls operations of a toaster or microwave oven). n50 Ms. Hutcheson probes some ambiguities in this exclusion n51 and in 2B's proposed rules for determining what law will apply when a transaction has a hybrid character (e.g., a computer game that comes with a joystick). n52 She offers proposals to clarify Article 2B's rules on exclusions and on hybrid transactions. n53 She concludes that the anticipated benefits of Article 2B "will only occur if [it] is drafted with default rules that reflect actual practices and expectations in the commercial world, and if the scope of Article 2B is clear." n54

Concern about a lack of clarity in Article 2B rules also emerges in Michele C. Kane's article When Is a Computer Program Not a Computer Program? n55 Kane asserts that Article 2B "adds needless complexity to computer industry transactions" because it employs the term "computer program" in a manner quite different from the term's use in common parlance or in copyright law. n56 Article 2B creates a new distinction between a "computer program" and "informational content" arising from or in the program. n57 Under Article 2B, the functionality of a program falls within the definition of a "computer program." n58 However, its user interface or displays, for example, generally do not. In addition, Article 2B distinguishes "informational content" and "published informational content," n59 although neither term is a well-established concept in commercial practice. Article 2B nevertheless confers great importance on all three concepts, for each comes with a different level of warranty responsibility. n60 Ms. Kane uses several examples to illustrate that Article 2B's distinctions are unclear, unnecessary, and harmful to consumers of software products who will often be unable to discern the source of a flaw and may, therefore, be without a workable remedy when software does not perform to reasonable commercial standards. n61

Consumer protection issues are also of concern to Michael Froomkin in Article 2B As Legal Software For Electronic Contracting - Operating System or Trojan Horse?, which focuses on Article 2B's rules about digital signatures and authentication procedures. n62 Froomkin finds "ample reason to doubt that Article 2B is compatible with the emerging model of digital signature-based e-commerce," n63 but he is also critical of consumer protection dimensions of Article 2B's digital signature rules. n64 Indeed, after a detailed examination of several provisions, Froomkin concludes that "Article 2B undermines the consumer law requirements it seeks to modernize and risks leaving consumers particularly vulnerable to more modern 8241*818 threats caused by hacked software and rogue electronic agents." n65 It would, for example, enforce contracts made by the exchange of messages between "reasonably configured" electronic agents. n66 Yet, as Froomkin points out, there are as yet no standards by which to judge whether an electronic agent has been reasonably configured. n67 It is, moreover, curious that "Article 2B is more solicitous about the limited capabilities of agents than of people <elip>." n68 Froomkin also questions the wisdom of having one set of electronic contracting rules for transactions in information (as Article 2B would provide) and another set of rules for other transactions (as the separate model law project to draft an Electronic Transactions Act would provide), especially given that many transactions may have a hybrid character. n69 Although finding Article 2B to be "a praiseworthy attempt to identify problems and solve them early," n70 Froomkin likens Article 2B to a "beta version of a large and complex operating system," and warns that substantial unwanted and unintended consequences would result from Article 2B's "over-ambitious reach." n71

Also questioning how well Article 2B meshes with emerging models of information-based commerce is Professor Peter Lyman in The Article 2B Debate and the Sociology of the Information Age. n72 Drawing upon the work of social science scholars, such as Manuel Castells, who have studied global information flows and the impact of digital networks on commerce and society, n73 Lyman asks: "Is the economic value of information that of a commodity, <elip> or is it better understood as a raw material?" n74 In the industrial age, information may have been treated as a commodity, but in the network age, Lyman suggests that allowing a freer flow of informa8241*819 tion and value-added uses may be more conducive to economic growth than the older industrial model. n75 "While Article 2B imagines a scarcity-based marketplace tightly controlled by information owners, [some] network entrepreneurs imagine the consumer living in an information rich environment in which vendors must compete to provide community services in order to sell products." n76 This model law also seems to assume that the network economy is mainly about using the Internet as a channel of distribution for software and digital publications. n77 However, many others believe that the digital economy is still being invented and has dimensions that Article 2B may not capture. n78 Lyman also explores some social dimensions of digital networks, in particular, the "social discipline" that technology "imposes on its users." n79 He views digital networks as carefully constructed governance systems that closely regulate the activities of users "as they conform to the community of social relations that the technology makes available." n80

A clear manifestation of the governance capabilities of digital information systems can be found in the "self-enforcing digital contracts" on which Professor Julie Cohen focuses in her article Copyright and the Jurisprudence of Self-Help. n81 The "self help" concept originated in common law rules, and more recently in Article 9 of the UCC, to enable secured creditors to repossess collateral upon a debtor's default if this can be accomplished without breaching the peace (e.g., by seizing a debtor's car when parked on a public street). n82 Drawing upon and extending this concept, the drafters of Article 2B contemplate that licensors will engage in "self-help" by, for example, disabling use of licensed software if a licensee has not paid the next quarter's royalty fee or has otherwise materially breached a license for that information. n83 There should, of course, be some safeguards to protect against abuse of such technical self-help, for example, requiring that licensees be informed of the self-enforcing nature of the digital information they are acquiring. n84 Most of the debate about the self- 8241*820 help provision of Article 2B has concerned the extent of these safeguards. n85 While not denying the importance of these process concerns, Professor Cohen directly challenges self-help features of digital information products insofar as they attempt to thwart public policy limitations on rightsholders embodied in copyright law and other federal policies. n86 She asserts that "Article 2B is not merely a neutral background for private bilateral agreements, but a public act of social ordering that is flatly inconsistent with copyright and First Amendment principles." n87 She goes further to assert the affirmative right of licensees to engage in a little self-help of their own, for example, bypassing a technical protection system to engage in fair use "when necessary to preserve the balance that the Copyright Act is intended to establish." n88

Technologist James Davis's comment questions whether the "right to hack" for which Cohen argues would really be meaningful to the average person, even if it were adopted, given "the relative advantage of those creating and using software security over those that would hack them." n89 Hacking is both technically demanding and expensive, and may not be worthwhile merely to enable an occasional act of fair use. n90 In a playful but serious reflection on self-enforcing digital contracts, Davis mentions a number of other things that "intelligent products" might do besides

disabling themselves for nonpayment of fees. n91 They might, for example, monitor types of uses, forbidding some or adjusting the price based on usage patterns. n92 Imagine, he suggests, what an intelligent sofa might demand if it knows you have a hot date on Friday night. n93 Davis also worries that adopting a rule that would not enforce terms to which an electronic agent could not react, as Article 2B currently proposes, might create the wrong kinds of incentives to those who are developing electronic agents. n94 In particular, he worries that "a vendor may cut corners by building a sys8241*821 tem that would not be able to react appropriately." n95 Davis draws upon user interface design principles to ensure that electronic agents will offer appropriate information to users. n96

While recognizing that a number of technical and other difficulties need to be overcome before technical enforcement of information licenses can be widely adopted, Professor David Friedman is far more sanguine about self-enforcing digital contracts than is Professor Cohen in his comment In Defense of Private Orderings. n97 Technology, he says, "has the potential to provide, for at least some forms of intellectual property, self-protection greatly superior in effectiveness and flexibility to the protection now provided by copyright law - and considerably less costly to enforce." n98 If the goal of intellectual property law is to promote access to a wide variety of works, Friedman argues that private ordering by means of licensing and technical protection will best accomplish this goal. n99 Copyright law may have once been necessary to ensure the existence of adequate incentives for creating and disseminating works of authorship, but with the aid of technology and licenses, it may no longer be needed. n100 Insofar as information providers look to technology and licenses to protect their works and do not rely on copyright, Friedman sees no reason why they should be subject to fair use rules which, after all, were crafted to limit rights under copyright law. n101 Friedman does not argue that the market will produce perfect results, for obviously some abuses will occur, but only that "it is less imperfect than the alternatives." n102 In general, he asserts, "a rational seller will design an efficient contract - a contract that maximizes the net gain to buyer and seller combined." n103 Friedman suggests that technical protection systems may even help resolve distributional concerns raised by Cohen and others by permitting price discrimination among different classes of users. n104

Confidence in the market's general ability to achieve a satisfactory equilibrium is also evident in Professor David McGowan's article Free Contracting, Fair Competition, and Article 2B. n105 He observes that "Article 2B's preference for freedom of contract, with its underlying assumption that parties whose interests are at stake in a negotiation are better judges of markets and the effects of contracts than are courts, should be given substantial weight." n106 Although Article 2B does not explain its rationale for endorsing freedom of contract principles, McGowan suggests that Article 2B should be understood as seeking "to benefit society by allowing resources to flow to their most-valued use through exchanges falling within the domain of commercial contract law." n107 If so, it has in common with competition law that it seeks to increase social welfare by enhancing allocative efficiency. n108 Yet he also observes that the draft distances itself from competition policy, and seems to base its superstructure on property rights. n109

On the much-contested issue concerning the stance Article 2B should take toward federal law and policy, McGowan regards as "sensible" the neutral stance Article 2B announces. n110 While noting that "each iteration of Article 2B has to one degree or another reflected the drafters' apparent determination that the free contracting principle [is to] control up to the point where it is decisively truncated by a federal rule," n111 McGowan also observes an "apparent trend <elip> toward an iteration of section 2B-105 that states more explicitly its deference to federal policy and that

identifies federal policies that presently pose a risk of conflict." n112 To explore the intersection of federal intellectual property and competition policy, on the one hand, and contract rule choices embodied in Article 2B, on the other hand, McGowan considers the issue of reverse engineering of computer programs. At present, Article 2B seems to regard anti-decompilation clauses in negotiated software contracts as enforceable, although it suggests that similar clauses in mass market licenses might be viewed differ8241*823 ently, in part because of federal policy concerns. n113 McGowan questions this distinction between mass market licenses and negotiated contracts as regards enforceability of anti-decompilation terms, given the external effects of such clauses on competitive development of programs regardless of whether the term has been negotiated. n114 McGowan's main concern is to persuade courts not to look to the "sledgehammer" of antitrust law when analyzing the enforceability of questionable contract terms when an examination of contract or intellectual property principles, including the doctrine of misuse, might adequately do the job. n115

Reverse engineering and competition policy concerns are also evident in Professor David A. Rice's article License with Contract and Precedent: Publisher-Licensor Protection Consequences and the Rationale Offered for the Nontransferability of Licenses Under UCC Article 2B. n116 Rice believes that the effect of Article 2B's transfer-of-rights rules is to override long-standing rules of trade secrecy law in a manner that would have negative impacts on reverse engineering. n117 Transfers of licensing rights might occur in a number of situations. n118 Article 2B anticipates that a licensor's permission will be needed to validate any transfer of license rights if the license contains a "no transfer" provision, as so many of them do. n119 In the absence of that permission, a transfer is not only a breach of the license; it is also ineffective, opening the transferee to a lawsuit for trade secret misappropriation and copyright infringement. n120 This not only represents a change from traditional principles of trade secrecy law, but it 8241*824 also runs counter to the normal expectations of ordinary people. n121 If two start-up companies merged, for example, they would expect that their new combined firm could continue to use licensed software on a particular computer. If reverse-engineering of that software would have been lawful if done by the original licensee, the merged firm would likely think that it should be able to reverse-engineer it also. However, Rice argues that the effect of Article 2B's transfer rules would make illegal both continued use of the software and any subsequent reverse engineering. n122 Rice objects to empowering "any software developer or information publisher <elip> to act as a toll collector on wholly unrelated business transactions." n123 Rice also questions whether Article 2B's transfer rules should be permitted to override "the venerable first sale doctrine" of copyright law. n124 Here, as elsewhere, Rice suggests not. n125

Although no equivalent to Article 2B exists in Japan, the issues with which it deals, especially as they concern the enforceability of mass market licenses, are of considerable interest in Japan, as Professor Tsuneo Matsumoto explains in his comment Article 2B and Mass Market License Contracts: A Japanese Perspective. n126 He indicates that Japanese intellectual property professionals have been learning about the Article 2B project and about U.S. thinking about the relationship between intellectual property and contract law in part by inviting U.S. speakers to Japanese conferences. n127 Professor Matsumoto explains why he believes that Japanese law would not enforce some mass market licenses, but might enforce others. n128 Because Japan does not have a federal-state system, there is no direct equivalent in Japanese law to the preemption issues that are much 8241*825 discussed in the U.S. n129 However, there are some mandatory rules in Japan that cannot be overridden by contract, although there is no caselaw in Japan on

whether copyright rules have a mandatory character. n130 Professor Matsumoto also discusses the potential implications for mass market licensing of software and other information products of a proposed Japanese consumer protection law that would decline to enforce terms that are unreasonably unfavorable to consumers. n131

II. CONCLUSION

Undertaking to draft a model law to regulate transactions in information for the information age is an almost unimaginably daunting task. Given the wide range of affected industries, the complex policy decisions such a law must necessarily embody, and the immaturity of certain technologies and markets the law aims to encompass, it is perhaps unsurprising that Article 2B would generate the considerable debate reflected in this symposium. To guide it through the Sturm und Drang, the drafters of Article 2B have sought to follow Grant Gilmore's advice that model commercial laws should be "accurate, not original." n132 Articles in this symposium reveal that Article 2B has been best received in certain sectors, such as the software industry, where it is perceived to abide by that maxim. Where Article 2B has veered in the direction of originality, as for example, in proposing to regulate author-publisher contracts, it has been less welcome, or at least its welcome has been contingent on its responding better to the concerns of that sector. Accuracy is all the more difficult to achieve given that Article 2B does not write on a blank slate. There are so many other laws and policies, some state and some federal, around which licensing practices have arisen, and Article 2B must successfully intermesh with all of them. Much of the resistance with which Article 2B has met in this symposium derives from a perceived mismatch between Article 2B concepts and some concepts from those other laws. Where Article 2B has been most original - for example, in proposing to regulate contracts made by electronic agents - it has also been criticized, but its rationale for these rules has been that they are necessary to enable the emergence of new markets. By attempting to make Article 2B technology-neutral, n133 its 8241*826 drafters have sought to provide flexible, adaptable rules for commerce in information. Nevertheless, there is reason to believe that electronic commerce will enable forms of transactions that simply cannot be imagined at this time. To borrow a phrase from a recent Dilbert cartoon, Article 2B seems to be "paradigm-shifting without a clutch." n134

No written or live symposium can hope to resolve all of the complex questions raised by such an ambitious proposal as Article 2B. This symposium has sought to illuminate the areas most in need of clarification and refinement so that the principal goal of the Article 2B project - to promote robust commerce in information - can be achieved. On behalf of the Berkeley Center for Law and Technology, I offer thanks to the contributors to this and the companion California Law Review issue for sharing their insights in support of this larger goal. At times it may seem a Sisyphean burden to carry on with the Article 2B project. However, the prosperity of the information economy is at stake, and we must all lend a shoulder if the rock is going to have a chance to make it up the hill.

FOOTNOTES:

n1. See, e.g., David Nimmer et al., The Metamorphosis of Contract into Expand, *87 Calif. L. Rev. 17* (forthcoming 1999).

n2. See, e.g., Maureen O'Rourke, Drawing the Boundary Between Copyright and Contract: Copyright Preemption of Software License Terms, *45 Duke L.J. 479, 480-81 (1995).*

n3. See, e.g., Raymond T. Nimmer, Breaking Barriers: The Relation Between Contract and Intellectual Property Law, *13 Berkeley Tech. L.J. 827 (1998).*

n4. As of this writing, the most recent draft of Article 2B is dated August 1, 1998. All versions of Article 2B are available on the Internet. See National Conference of Commissioners on Uniform State Laws, Drafts of Uniform and Model Acts Official Site (last modified Nov. 20, 1998) <http://www.law.upenn.edu/library/ulc/ulc.htm>.

n5. The Preface to Article 2B begins with the following epigraph:

The UCC has given parties in traditional sales of goods a well-understood legal framework to establish contract formation, terms, and enforcement rights. It is timely now to adapt this framework to the digital era and to the new information products and services that will increasingly drive Global Electronic Commerce<elip>. Article 2B can be a strong first step toward a common legal framework for digital information and software licenses.

U.C.C. Article 2B, Preface at 1 (Aug. 1, 1998 Draft) (quoting letter from CSPP, a coalition of eleven major manufacturing companies (Nov. 19, 1997)) (alteration in original). See generally U.C.C. Article 2 (1995) (providing a standard set of commercial law rules). Article 2 of the U.C.C. has promoted the growth of larger and more national markets for the manufacturing economy. See Fred H. Miller, The Uniform Commercial Code: Will the Experiment Continue?, *43 Mercer L. Rev. 799, 808 (1992)* (noting the U.C.C.'s "substantive excellence" and discussing its success in promoting national uniformity). In doing so, Article 2 has been supplemented by Article 2A, which sets forth rules for leases of goods. See generally U.C.C. Article 2A (1995) (providing standardized rules for leases of goods).

n6. As of this writing, neither the National Conference of Commissioners on Uniform State Laws (NCCUSL) nor the American Law Institute (ALI) has formally approved a draft of Article 2B. As of March 26, 1998, the ALI Ad Hoc Committee on U.C.C. Article 2B considered that the text of the Article needed "significant revision." See Letter from Geoffrey C. Hazard to Gene N. Lebrun, President, NCCUSL, and Charles Alan Wright, President, ALI (Mar. 26, 1998) (memorializing discussion of March 18, 1998 among the ALI Ad Hoc Committee on Article 2B) available at <http://www.2Bguide.com/docs/ghmar98.html> (visited Nov. 23, 1998). The ALI has tentative plans to submit a final draft to a vote by its membership on May 19, 1999, and NCCUSL will consider a final draft at its Annual Meeting in the summer of 1999. According to a joint press release, the two organizations "are committed to working together toward its completion so that U.C.C. Article 2B will be available for introductions and adoptions in state legislatures in 2000." NCCUSL and ALI Announce Schedule for Completion of Uniform Commerical Code Article 2B: Licensing (June 26, 1998), available at <http://www.law.upenn.edu/library/ulc/ucc2b/2breleas.htm>. However, on September 10, 1998, Jack Valenti on behalf of the Motion Picture Association of America, along with presidents and CEOs of five other copyright industry organizations, wrote a letter urging the ALI to table the

Article 2B project, characterizing the draft as "fatally flawed in its fundamental premise that all transactions in "information' may be governed by a single set of contractual rules." Letter from Jack Valenti, President and CEO, Motion Picture Association of America, et al. to Carlyle C. Ring, Jr., Chairman, NCCUSL Article 2B Drafting Committee, and Geoffrey Hazard, Jr., Director, The American Law Institute 1 (Sept. 10, 1998) (on file with author). At the November 1998 drafting committee meeting, the scope of Article 2B was curtailed to include only "computer information transactions." See Carlyle C. Ring, Jr., Summary of Actions at Article 2B Meeting, Nov. 12-15, 1998 (visited Nov. 21, 1998) <http://www.2bguide.com/docs/cr1198sum.html>. It remains to be seen if this will satisfy the copyright industry groups that sought to table the Article 2B project.

n7. See William J. Clinton & Albert Gore, Jr., A Framework for Global Electronic Commerce 3 (1997), available at <http://www.iitf.nist.gov/eleccomm/ecomm.htm> (visited Sept. 19, 1998) (discussing the need for a set of globally recognized commercial law rules). The President's announcement of the release of this report appears in Memorandum on Electronic Commerce, 33 Wkly. Comp. Pres. Doc. 1006 (July 7, 1997).

n8. The official name of the Conference is "Intellectual Property and Contract Law for the Information Age: The Impact of Article 2B of the Uniform Commercial Code on the Future of Information and Commerce." The following organizations were co-sponsors of the Conference: The American Law Institute; the Information Technology Association of America; Continuing Legal Education of the Bar of California; the Business and Law Section of the California State Bar Association; the School of Information Management and Systems at the University of California, Berkeley; the Institute of Management, Innovation, and Organization of the Haas School of Business at the University of California, Berkeley; and the Fisher Center for Management and Information Technology of the Haas School of Business at the University of California, Berkeley.

n9. The Conference has an Internet site. See Berkeley Center for Law & Technology, Intellectual Property and Contract Law for the Information Age: The Impact of Article 2B of the Uniform Commercial Code on the Future of Information and Commerce (visited Sept. 19, 1998) <http://www.sims.berkeley.edu/bclt/events/ucc2b/>. For a complete listing of speakers and their affiliations, see Conference Participants (visited Sept. 19, 1998) <http://www.sims.berkeley.edu/bclt/events/ucc2b/bio.html>.

n10. Last spring, editors from both the California Law Review and the Berkeley Technology Law Journal met to discuss how to allocate the papers between the two journals. The principal criteria for allocation were thematic congruence and the degree of completion of the papers (the California Law Review has a more time-intensive publication process and had to complete several stages of its process by May). I am deeply grateful to the editorial boards of both journals and to the authors of the articles and comments for their dedication to making the written Symposium as great a success as the live Symposium.

n11. See Symposium, Intellectual Property and Contract Law for the Information Age: The Impact of Article 2B of the Uniform Commercial Code on the Future of Information and Commerce, *87 Calif. L. Rev. 1* (forthcoming 1999). For a synopsis of the articles and comments in that issue, including those that discuss preemption issues, see Pamela Samuelson, Intellectual Property and Contract Law for the Information Age: Foreword to a Symposium, *87 Calif. L. Rev. 1* (forthcoming 1999).

n12. Nimmer, supra note 3.

n13. Id. at 829.

n14. Id. at 843.

n15. Id. at 839.

n16. Id. at 828.

n17. Id. at 829.

n18. Id. at 851.

n19. See generally Robert Gomulkiewicz, The License Is the Product: Comments on the Promise of Article 2B For Software and Information Licensing, *13 Berkeley Tech. L.J. 891 (1998).*

n20. *Id. at 896.*

n21. *Id. at 896.*

n22. *Id. at 898.*

n23. *Id. at 891.*

n24. *Id. at 891.*

n25. *Id. at 896.* But see Peter A. Alces, W(h)ither Warranty: The B(l)oom of Products Liability Theory in Cases of Deficient Software Design, *87 Calif. L. Rev. 271* (forthcoming 1999) (critical of Article 2B's warranty provisions for too low standard).

n26. Jessica Litman, The Tales That Article 2B Tells, *13 Berkeley Tech. L.J. 931, 938 (1998).*

n27. Id. at 891.

n28. Id. at 891.

n29. Id. at 891. Litman also objects to Article 2B because it "portrays copyright owners' rights as required and the limitations and exclusions <elip> as precatory." Id. at 935. On disputed issues in copyright, such as whether temporary reproductions of works in the random access memory of a computer are controllable, Article 2B resolves the ambiguity in favor of the rightsholders. Id. at 942.

n30. Id. at 937-48.

n31. See U.C.C. Article 2B, Preface. See also U.C.C. 2B-102(a)(27) (Aug. 1, 1998 Draft). Until the August 1998 version of Article 2B, the draft used the term "informational property rights." See, e.g., U.C.C. 2B-102(a)(26) (Apr. 15, 1998 Draft). However, the August 1998 draft speaks of "informational rights," although defining the term in the same way as previous drafts.

n32. See U.C.C. 2B-102(a)(27) (Aug. 1, 1998 Draft).

n33. *Feist Publications, Inc.. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991)* (holding that white page listings of telephone directories lack sufficient originality in the selection and arrangement of data elements to qualify for federal copyright protection).

n34. Litman, supra note 26, at 943.

n35. Jane C. Ginsburg, Authors as "Licensors" of "Informational Rights" under U.C.C. Article 2B, *13 Berkeley Tech. L.J. 945,* [3-4] (1998).

n36. *Id. at 945.* See also Jane C. Ginsburg, Putting Cars on the "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace, *95 Colum. L. Rev. 1466 (1995)* (offering a pro-author perspective on digital copyright law).

n37. Ginsburg, supra note 35, at 943.

n38. Id. at 945-68

n39. Id. at 962-66.

n40. Id. at 947.

n41. Id. at 946-47.

n42. Id. at 969.

n43. Id. at 973-74.

n44. Laura Hutcheson, The Exclusion of Embedded Software and Merely Incidental Information From the Scope of Article 2B, *13 Berkeley Tech. L.J. 977 (1998)*

n45. See U.C.C Article 2B, Preface (Aug. 1, 1998 Draft) (explaining Article 2B's exclusion of most patent and associated knowhow licenses, trademark and trade dress licenses, and financial information transactions because of different assumptions and practices in these industries).

n46. See, e.g., Hazard, supra note 6.

n47. See Hutcheson, supra note 44, at 979.

n48. See id.

n49. See Ring, supra note 6.

n50. See U.C.C. 2B-104 (Aug. 1, 1998 Draft).

n51. See Hutcheson, supra note 44, at 983-1003.

n52. See id. at 1003-12.

n53. See id. at 999-1000, 1011.

n54. See id. at 1011.

n55. Michele C. Kane, When Is a Computer Program Not A Computer Program?, *13 Berkeley Tech. L.J. 1013 (1998).*

n56. *Id. at 1013.*

n57. Compare U.C.C. 2B-102(a)(6) (Aug. 1, 1998 Draft) ("computer program") with id. 2B-102(a)(26) ("informational content"). See also U.C.C. Article 2B, Preface (Aug. 1, 1998 Draft).

n58. U.C.C. 2B-102(a)(6) (Aug. 1, 1998 Draft).

n59. Compare id. 2B-102(a)(26) ("informational content") with id. 2B-102(a)(35) ("published informational content").

n60. Kane, supra note 55, at 1017.

n61. Id. at 1017.

n62. See Michael Froomkin, Article 2B as Legal Software for Electronic Contracting - Operating System or Trojan Horse?, *13 Berkeley Tech. L.J. 1023 (1998).*

n63. *Id. at 1027.*

n64. See *id. at 1048-58, 1062.*

n65. *Id. at 1048.*

n66. See U.C.C. 2B-112(a)(2), -204 (Aug. 1, 1998 Draft). Article 2B defines "electronic agent" as "a computer program or other automated means used by a person to independently initiate or respond to electronic messages or performances on behalf of that person without review by an individual." Id.

2B-102(a)(19). Such contracts would be enforceable "if the interaction results in the electronic agents' engaging in operations that confirm or indicate the existence of a contract." Id. 2B-204(1). This rule would apply "even if no individual was aware of or reviewed the agent's actions or their results." Id. 2B-204(4).

n67. See Froomkin, supra note 62, at 1047.

n68. Id. at 1055.

n69. See id. at 1026.

n70. Id. at 1061.

n71. Id. at 1061-62.

n72. Peter Lyman, The Article 2B Debate and the Sociology of the Information Age, *13 Berkeley Tech. L.J. 1063 (1998).*

n73. See, e.g., Manuel Castells, The Rise of the Network Society (1996).

n74. Lyman, supra note 72, at 1069.

n75. See id. at 1076-77.

n76. Id. at 1080.

n77. See id. at 1079-80.

n78. See id.

n79. Id. at 1072.

n80. Id. at 1071 (citation omitted).

n81. Julie E. Cohen, Copyright and the Jurisprudence of Self-Help, *13 Berkeley Tech. L.J. 1089 (1998).*

n82. See U.C.C. 9-503 (1972).

n83. See U.C.C. 2B-716 (Apr. 15, 1998 Draft). This section was added back to Article 2B at the November 1998 drafting committee meeting. See Ring, supra note 6.

n84. See Ring, supra note 6.

n85. See, e.g., Letter from Susan H. Nycum to the Uniform Commercial Code Article 2B Reporter and Drafting Committee (Jan. 27, 1997), available at

<http://www.2bguide.com/docs/nycshelp.html>; Letter from Elaine McDonald & Randy Roth, The Principal Financial Group, to UCC-2B Drafting Committee (Nov. 25, 1997), available at <http://www.2bguide.com/docs/em.html>.

n86. See Cohen, supra note 81, at 1129-33.

n87. Id. at 1097.

n88. Id. at 1092, 1118-28.

n89. James R. Davis, On Self-Enforcing Contracts, The Right to Hack, and Willfully Ignorant Agents, *13 Berkeley Tech. L.J. 1145, 1147 (1998).*

n90. See *id. at 1147.*

n91. See *id. at 1146.*

n92. See id.

n93. See *id. at 1147.*

n94. See *id. at 1148.*

n95. *Id. at 1149.*

n96. See *id. at 1148.*

n97. David Friedman, In Defense of Private Orderings, *13 Berkeley Tech. L.J. 1151 (1998).* Friedman distinguishes among three types of technical protections: those that disable performance, those that monitor use, and those that enforce contracts directly. *Id. at 1152-54.* The privacy issues that Professor Cohen raises, he points out, really only arise in the context of monitoring technology. *Id. at 1164-67.*

n98. *Id. at 1154.*

n99. See *id. at 1153.*

n100. See *id. at 1169.*

n101. See *id. at 1159.*

n102. *Id. at 1171.*

n103. *Id. at 1157.*

n104. See *id. at 1171.*

n105. David F. McGowan, Free Contracting, Fair Competition, and Article 2B: Some Reflections on Federal Competition Policy, Information Transactions, and "Aggressive Neutrality," *13 Berkeley Tech. L.J. 1173 (1998).*

n106. *Id. at 1185.*

n107. *Id. at 1188.*

n108. See id.

n109. See id.

n110. *Id. at 1184.*

n111. *Id. at 1194.* See also Mark A. Lemley, Intellectual Property and Shrinkwrap Licenses, *68 S. Cal. L. Rev. 1239 (1995)* (discussing earlier versions of Article 2B as it pertained to anti-decompilation clauses).

n112. McGowan, supra note 105, at 1193-94.

n113. See id. at 1196-99.

n114. See id. at 1208.

n115. Id. at 1237. See, e.g., Mark A. Lemley, Beyond Preemption: The Law and Policy of Intellectual Property Licensing, *87 Calif. L. Rev. 111* (forthcoming 1999) (discussing misuse).

n116. David A. Rice, License with Contract and Precedent: Publisher-Licensor Protection Consequences and the Rationale Offered for the Nontransferability of Licenses Under Article 2B, *13 Berkeley Tech. L.J. 1239 (1998).*

n117. See *id. at 1246-51.* See also Rochelle Cooper Dreyfuss, Do You Want to Know a Trade Secret? How Article 2B Will Make Licensing Trade Secrets Easier (But Innovation More Difficult), *87 Calif. L. Rev. 191* (forthcoming 1999) (discussing implications of Article 2B for trade secrecy licensing).

n118. A firm might, for example, sell its used computers, including computer programs loaded on them, to another firm when going out of business. Or in the course of a merger between two firms, both might transfer their previously separate assets, including licensed software, to the new merged entity.

n119. See Rice, supra note 116, at 1246-47.

n120. See id. at 1246-51.

n121. See id. The ordinary good faith buyer of used computers would, for example, likely regard them as readily transferable as used chairs and desks.

n122. See id. at 1250-55.

n123. Id. at 1254.

n124. Id. at 1267. See *17 U.S.C. 109*(c) (first sale rule). See also Litman, supra note 26, at 939 (noting that some copyright caselaw has refused to enforce mass market licenses of copyrighted works). Rice's frustration with the anti-transfer bias of Article 2B surely derives in part from his many years of service on the Article 2B drafting committee and from his lack of success in persuading his fellow committee members that the transfer issues he raises should be resolved differently.

n125. Rice, supra note 116, at 1267. See also David A. Rice, Licensing the Use of Computer Program Copies and the Copyright Act First Sale Doctrine, *30 Jurimetrics J. 157 (1990).*

n126. Tsuneo Matsumoto, Article 2B and Mass Market Contracts - A Japanese Perspective, *13 Berkeley Tech. L.J. 1283 (1998).*

n127. See *id. at 1284.*

n128. See *id. at 1284-85.*

n129. See *id. at 1285.*

n130. See id.

n131. See *id. at 1286.*

n132. Grant Gilmore, On the Difficulties of Codifying Commercial Law, *57 Yale L.J. 1341 (1951).* See also U.C.C. Article 2B, Preface at Part 2: Basic Themes (Aug. 1, 1998 Draft) (adopting the "accurate, not original" goal for Article 2B).

n133. See U.C.C. Article 2B Preface at 10 (Aug. 1, 1998 Draft).

n134. Scott Adams, Dilbert (Sept. 29, 1998).

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Consumer Protection
Bureau of Competition
Policy Planning

July 9, 1999

Mr. John L. McClaugherty
Chair, Executive Committee
National Conference of Commissioners on Uniform State Laws
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611

Dear Mr. McClaugherty:

As the National Conference of Commissioners on Uniform State Laws (NCCUSL) prepares to consider adoption of the Uniform Computer Information Transactions Act (UCITA), the staff of the Bureaus of Consumer Protection and Competition and of the Policy Planning office of the Federal Trade Commission (FTC) wishes to express the same consumer welfare concerns that it raised in its October 30, 1998 letter to Carlyle C. Ring and Professor Geoffrey Hazard, Jr. about UCITA's predecessor, Uniform Commercial Code Article 2B (August 1, 1998 draft).(1) Those concerns, with one exception, have not been addressed in any significant respect in UCITA.(2) We briefly summarize the October 30, 1998 letter and have attached a copy for your convenience.

UCITA endorses a license model for "computer information transactions."(3) For example, under UCITA a license to use software (rather than the sale of the software itself) would allow the licensor to limit or control how the licensee uses the software, even where the software has been mass-marketed to consumers. Examples of these limits or controls include restrictions on a consumer's right to sue for a product defect, to use the product, or even to publicly discuss or criticize the product.(4)

Unlike the law governing sales of goods, UCITA departs from an important principle of consumer protection that material terms must be disclosed prior to the consummation of the transaction. UCITA does not require that licensees be informed of licensing restrictions in a clear and conspicuous manner prior to the consummation of the transaction.(5) For example, UCITA allows licensors of software to disclose these restrictions after the transaction has been completed, such as when the licensee opens the software box and discovers the terms of the license. Thus, in effect there may be no "meeting of the minds" prior to the consummation of the transaction. Moreover, UCITA adopts a definition of the term "conspicuous" that has the effect of allowing material license terms not to be disclosed clearly and conspicuously at any point before or after the transaction is completed.(6)

In addition, in its effort to establish a legal framework to facilitate electronic commerce, UCITA allocates significant risks to consumers in the event of unauthorized transactions. This, in turn, might deter, rather than advance, development of electronic commerce.

Further, UCITA expands the scope and power of contracts, particularly contracts designed by software vendors and intellectual property owners. The effect of such a change is potentially to provide state contract law with primacy over federal intellectual property laws in those cases where the licensor seeks to acquire or restrict rights beyond what federal or state law permits. For example, if a state were to adopt UCITA, state law could permit licensors to include anticompetitive grantback terms in a license that reduce the licensee's incentive to engage in research and development, unless the licensee took on the uncertain task of challenging the term subject to UCITA Section 105.(7) By doing so, this could upset the delicate balance between intellectual property and competition policy, which has been carefully calibrated to recognize certain limits on intellectual property so as not to stifle competition or innovation. By allowing licensors of computer information to expand their rights, there is a possibility that these state-enforced contracts could restrain trade in violation of the antitrust laws, constitute misuse of intellectual property, and/or violate state trade secret statutes. As a result, UCITA may not have a neutral effect on competition policy.

In sum, we question whether it is appropriate to depart from these consumer protection and competition policy principles in a state commercial law statute, especially since many of these same principles are now being included as core elements in international e-commerce discussions. UCITA proposes these changes based on the implicit assumption that there is something unique about the technology involved (software and information access) that necessitates this departure from the traditional law of sales. If this is the case, we believe it would be more appropriate to seek a change to the underlying laws that are deemed to be inappropriate to software and other UCITA products. If a license model is deemed most appropriate nonetheless, the FTC staff in its October 30, 1998 letter recommended a number of changes to an earlier draft of UCITA which would help alleviate the staff's concerns.

It is our hope that the NCCUSL membership will consider the issues raised in the attached letter during deliberations over whether to adopt UCITA.

Respectfully submitted,

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Attachment

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1. This letter represents the views of the Bureaus of Consumer Protection and Competition and of the Policy Planning office and does not necessarily represent the views of the FTC or any individual Commissioner. The FTC, however, has authorized the staff to submit this letter.

2. The one exception is UCITA Section 816, which had no counterpart in Article 2B, that does address the staff's notice concerns about the use of electronic self-help by a licensor.

Although UCITA Section 105(b) now includes a public policy preemption provision, the language of the provision creates additional barriers to enforcing this public policy preemption that were not proposed in the August 1, 1998 draft of Article 2B. Indeed, the new language of 105(b) only enhances the staff concerns enumerated in the October 30, 1998 letter.

3. The Prefatory Note to UCITA defines "computer information transactions" to include transactions involving computer software, multimedia interactive products, computer data and databases, and Internet and online information.

4. Although the actual provisions of UCITA itself do not expressly preempt or supplant any existing federal or state consumer protection laws and policies, the effect of these provisions is to allow licensors to enforce contract use restrictions in a mass market license that supplant many traditional terms of a contract that ordinarily are set by state and federal law.

5. Under Section 5 of the FTC Act, a misleading omission occurs "when qualifying information necessary to prevent a practice, claim, representation, or reasonable expectation or belief from being misleading is not disclosed." Federal Trade Commission Policy Statement on Deception, appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (note 4). This qualifying information must be made *prior to purchase.* The test of whether a misleading omission violates Section 5 of the FTC Act is whether "the omitted information would be a material factor in the consumer's decision to purchase the product." *Id.,* note 44. Under FTC law, a deceptive act or practice prior to purchase cannot be cured by a post-purchase money-back guarantee. *See e.g.*, *In the Matter of Thompson Medical Company, Inc.*, 104 F.T.C. 648 (1984) (money back guarantee is not a defense to the charge of deceptive advertising); *Montgomery Ward & Co. v. FTC*, 379 F.2d 666, 671 (1967) (defendant cannot rely on a money-back guarantee policy to defend deceptive advertising practice because such a defense "would make the false advertising prohibitions of the [FTC] Act a nullity."). For a specific example of this same principle, *see* FTC Telemarketing Sales Rule, 16 C.F.R. § 310.3(a)(1) (1998).

6. UCITA's approach to "conspicuous" disclosure fails to take into consideration the context in which the disclosure is given. For example, UCITA includes several broad safe harbors in its definition of "conspicuous," so that, for example, a disclosure which is "in capitals in a size equal to or greater than, or in contrasting type, font, or color to, the surrounding text" (UCITA § 102(a)(15)(A)) would be considered conspicuous regardless of the context of the disclosure. Thus, under UCITA a disclosure would be considered "conspicuous" even if such a disclosure were buried amid boilerplate license text, or were printed on one of many different leaflets enclosed within a software box. This is the opposite approach the FTC has used to fulfil its law enforcement responsibilities. The term "clear and conspicuous" in FTC law refers to a general standard of *effective communication.* This standard is central to much of the case law that has developed under Section 5 of the FTC Act, 15 U.S.C. § 45, which empowers the FTC to take enforcement action against deceptive commercial practices. In order to determine whether this standard has been met, "the Commission considers the disclosure in the context of all the elements of the advertisement." FTC Request for Comment, *Interpretation of Rules and Guides for Electronic Media*, 63 Fed. Reg. 24996, 25002 (1998) (footnote omitted).

7. *See* fn 2, *supra.*