

**BRIEFING PAPER
PROPOSED UCC ARTICLE 2B**

SUBMITTED BY

**AMERICAN BAR ASSOCIATION
SECTION OF BUSINESS LAW
SUBCOMMITTEE ON SOFTWARE CONTRACTING
OF THE UNIFORM COMMERCIAL CODE COMMITTEE**

JULY 24, 1997

I. INTRODUCTION

The American Bar Association Section of Business Law Subcommittee on Software Contracting of the Uniform Commercial Code Committee (the "Subcommittee") has actively participated in the development of proposed UCC Article 2B since its inception. Several members of the Subcommittee were members of the original ABA Study Committee which recommended that software and related matters be treated separately under the UCC. The Subcommittee has done a substantial amount of work over the years since, researching many of the issues which have arisen in the drafting process, preparing position papers and recommendations on various matters and conducting an outreach program to educate members of the Bar and industry about proposed 2B. Members of the Subcommittee have attended almost every meeting of the Drafting Committee as observers. The Subcommittee is composed of members in private practice, academia and the corporate world, and its members represent both vendors and users of information.

This Briefing Paper covers aspects of the following topics which have been heavily discussed at the Drafting Committee meetings:

- A. Scope
- B. Treatment of Consumers
- C. Federal Preemption Issues
- D. Mass Market Licenses
- E. Electronic Contracting
- F. Viruses
- G. Express Warranties/Published Information Content
- H. Express Warranties/Basis of the Bargain
- I. Development Contracts
- J. Electronic Self-Help

The Paper contains the Subcommittee's analysis of each issue, based upon the June 18, 1997 Draft (the "Draft"), and offers recommendations as to how to proceed which are supported by a majority of the Subcommittee. The Subcommittee gratefully acknowledges the work of the following members in reducing to writing the discussions of the Subcommittee:

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An executive summary follows immediately for your quick reference.

II. EXECUTIVE SUMMARY

A. SCOPE (§ 2B-103)

ISSUE: What should be the scope of Article 2B?

RECOMMENDATION: The Subcommittee concurs with and recommends the adoption of the scope provision as currently drafted.

B. TREATMENT OF CONSUMERS

ISSUE: Should Article 2B adopt new consumer protections or retain a posture of leaving current consumer law largely intact, while providing some additional protections?

RECOMMENDATION: The Subcommittee believes that Article 2B should leave consumer law essentially intact, while adding some enhanced protections where the subject matter or specific industry practices indicate that additional protection is needed, and where adding such enhanced protection will not violate the fundamental themes of the Draft as a commercial code: (1) to support contractual choice; and (2) to provide a useful and usable commercial framework for the rapidly expanding information industry.

C. FEDERAL PREEMPTION ISSUES

ISSUE: Should Section 2B-308 invalidate provisions in a mass market license that attempt to impose restrictions on the use of informational products that may contain components that are not entitled to federal copyright or patent protection.

RECOMMENDATION: Article 2B neither should expand nor limit the scope of intellectual property protection that is otherwise available under federal law.

D. MASS MARKET LICENSES

ISSUES: How should mass market licenses be treated under proposed Article 2B. Should mass market licenses, including shrink wrap licenses be treated differently than other licenses under Article 2B? If so, what should that different treatment be?

RECOMMENDATION: Giving the typical mass market licensee, *i.e.*, one who receives the license after paying, the right to return the product for a full refund

and limited incidental damages is superior to some standard that seeks to determine whether the terms of the license were surprising, whether a reasonable licensee under the circumstances would have accepted the terms or whether the licensee actually agreed to the terms. The refund model follows 2B-307 and achieves certainty and fairness. Further, the Subcommittee does not believe that a Restatement Section 211 approach to shrink wrap licenses is productive. The Subcommittee's suggestion to give the costs of return associated with obtaining a refund places the parties on a level playing field and protects licensees who see terms for the first time post-payment. Other provisions already exist in Article 2B regarding the requirements of conspicuousness, etc., and those terms would apply equally to these types of licenses as they do to others. The Subcommittee believes that this approach would eliminate any uncertainty in the terms of the license while allowing the equivalent of prior review.

E. ELECTRONIC CONTRACTING

ISSUE: Should the electronic contracting provisions of the Draft be adopted?

RECOMMENDATION: The Subcommittee supports the adoption of the electronic contracting rules of the Draft.

F. VIRUSES

ISSUE: How should liability for viruses be treated in 2B?

RECOMMENDATION: There are at least three distinct areas in which viruses may arise which require different treatment under the law. The first area would cover mass market licenses involving delivery of a copy of information on a physical medium by a merchant dealing in information of the kind. The second area would cover electronic distribution of information over the Internet. The third area would cover all other information licenses. The Subcommittee recommends treating each area as follows: For mass market physical items, the Subcommittee supports the requirement of a non-waivable duty to use reasonable care to exclude viruses. The Subcommittee believes that the area of Internet Distribution requires more study before an affirmative recommendation can be made, but feels that to extend the non-waivable duty to use reasonable care in the area would allocate the full risk of a general societal problem to one party who does not create the virus and cannot control virus entry during distribution. The Subcommittee **does not** support the amendment of 2B-313 to extend liability to electronic settings. For all other information licenses, the Subcommittee recommends that there be an implied absolute warranty, which may be disclaimed by contractual agreement, that "the performance or message, when completed by [the party], does not contain an

undisclosed virus that may be reasonably expected to damage or interfere with the use of data, software, systems, or operations of the other party."

G. EXPRESS WARRANTIES/PUBLISHED INFORMATION CONTENT

ISSUE: Should the exception from Article 2B-402(c) for published informational content be retained?

RECOMMENDATION: The critical point is that Article 2B does not exempt persons who make affirmations of fact about published informational content from liability for express warranties when such liability exists under non-UCC law. Article 2B-402(c) simply leaves the rules for determining whether an express warranty has been created to that *other* law which, more so than a commercial code, can better handle the multiple issues surrounding published informational content. In short, we believe that Article 2B-402(c) strikes the right balance and should be adopted.

H. EXPRESS WARRANTIES/BASIS OF THE BARGAIN

ISSUE: What position should the Draft take with respect to the retention of the requirement that an affirmation of fact, promise or description made by the licensor to the licensee must become part of the "basis of the bargain" in order to be deemed an express warranty?

RECOMMENDATION: The Subcommittee has not resolved this issue, but instead has attempted to explain it and to recommend against (1) superficial solutions, such as mere language changes, or (2) dramatic changes in law without consensus, such as elimination of the basis of the bargain requirement. NCCUSL would appear to be faced with one of two choices: (a) define and reach a consensus regarding the meaning of the basis of the bargain test that will meet the needs of sellers (and licensors) and buyers (and licensees), or (b) retain existing law, including existing wording, and allow parties to present the respective merits of their arguments on a case-by-case basis.

Article 2B-402 adopts that latter approach. Proposed Article 2-403 adopts neither and creates additional confusion. If NCCUSL indicates a willingness to take on the formidable task presented by the first alternative, this ABA subcommittee will be willing to assist with formulation of a possible approach.

I. DEVELOPMENT CONTRACTS

ISSUE: Does the language of Section 2B-617(b)(3)(D) meet basic requirements for inclusion in proposed Article 2B?

RECOMMENDATION: Article 2B-617 deals with default rules when an authenticated record provides that ownership of intellectual property rights in a program passes to the client, but fails to provide specifics. The Subcommittee generally supports the revisions from the previous draft, with the exception of Subparagraph (D). Subparagraph (D) proposes a significant change from current law and practice and expands rights using undefined terms. We believe inclusion of (D) will reduce clarity in the law and increase litigation. Finally, it is not satisfactory to any of the groups it was designed to assist. We recommend deletion of subparagraph (D) in its entirety.

J. ELECTRONIC SELF-HELP

ISSUE: How should electronic self-help be treated under 2B?

RECOMMENDATION: Electronic self help should be permitted as long as there are sufficient protections to keep from putting too much power in the hands of licensors. By going well beyond the bare-bones Article 9 protections, electronic self help is recommended because it will preserve freedom of contract and provide a tough default rule that will apply in most cases, with the effect that licensors will refrain from exercise in all but the most egregious instances of licensee breach (and then with extreme caution). When negotiations regarding the issue do arise, this section will provide the proper backdrop against which negotiations can occur. Numerous protections already exist in the Draft, and the Subcommittee recommends additional protections in its discussion below. The practical effect of this provision will be to serve as a modest limit on licensees' ability to withhold payments. Where there is a legitimate dispute, licensors will not want to risk the consequences of wrongful exercise. Moreover, if a legitimate dispute exists and the software is vital to the licensee's enterprise, the proposed notice provision gives the licensee an opportunity to seek judicial relief. It is a notable curiosity that licensees want the right to claim that software is so fundamentally flawed that withholding payment is appropriate, but apparently not so fundamentally flawed that the licensee has taken its mission critical functions off of the software.

III. DISCUSSION

A. SCOPE OF ARTICLE 2B: UCC §2B-103

ISSUE: What should be the scope of UCC 2B?

ANALYSIS: The Draft covers commercial transactions in information: licenses of information, software contracts, access contracts, licenses to provide data and all related license agreements for the support, maintenance and modification of information.¹ Choosing the scope of Article 2B is a difficult policy choice. Four basic approaches to the scope of Article 2B are to: 1. Do Nothing (And Let Article 2 Govern Information Contracts); 2. Narrow the Scope of Article 2B; 3. Expand the Scope of Article 2B to Cover all Intellectual Property Rights or 4. Adopt the Approach in the Present Draft.

1. DO NOTHING

Why Article 2B? Article 2B will help to create a more predictable legal environment for the copyright industries. The software industry has arisen in only two decades to become America's third-largest manufacturing industry.² Article 2 of the Uniform Commercial Code (U.C.C.) was drafted fifty years ago by Karl Llewellyn, decades before the rise of the software industry, on-line contracting, and the Internet.³ The courts must employ the legal fiction that the licensing of information masquerades as the sale of tangible goods.⁴ Specialized legal rules are required to codify a licensing law for commercial transactions in information.

¹ U.C.C. §2B-103 (Proposed Draft, June 18, 1997).

² Steve Lohr, "Study Ranks Software as No. 3 Industry," *The New York Times*, June 3, 1997 at D2 (citing study by Nathan Associates funded by the Business Software Alliance).

³ Thomas Kuhn, *The Structure of Scientific Revolutions* 89 (2d ed. 1970).

⁴ See, e.g., LTD v. Unisys Corp., 925 F.2d 670 (3rd Cir. 1991).

2. NARROW THE SCOPE OF ARTICLE 2B TO A PARTICULAR TECHNOLOGY

The scope of Article 2B has become progressively broader as the project has unfolded.⁵ "Information" was chosen as the building block for Article 2B as opposed to a narrow existing technology such as software or digital information. A goal of the new Article is to permit the further expansion of global electronic commerce and a wide variety of information technologies. For example, neural networks consisting of sensing and processing nodes are being devised that mimic the transfers of sensory stimuli in the human brain.⁶ Scientists are developing complex neural networks to compress TV images and high-fidelity music.⁷ Information is broad enough to accommodate emergent information technologies such as computer-based imaging, signal processing, artificial intelligence, neural networks and information technologies yet to be conceived. Limiting Article 2B to an existing information technology would not only be arbitrary, but shortly be out of date.

3. BROADEN THE SCOPE TO INCLUDE ALL INTELLECTUAL PROPERTY

Article 2B "carves out" out all intellectual property rights unrelated to computer software or database agreements.⁸ The present draft does not govern patent and trademark licenses which have little connection to electronic commerce. Patent licenses are contractual arrangements between a patentee and one who has a "right to make, use or sell under a patent."⁹ Patent licensing of biotech, mechanical, or chemical processes involve different usages of trade and basic assumptions than the copyright industries. Trademark licensing has many different attributes than commercial transactions in information. A uniform licensing law covering all intellectual property would be difficult to conceptualize much like the ill-fated Uniform Payments Code.¹⁰ A broadened licensing law would require the Article 2B project to jettison its

⁵ The history of the project to devise Article 2B began in 1991 when the Permanent Editorial Board (PEB) of the UCC decided to revise article 2. The ABA Study Committee recommended that NCCUSL and the ALI develop a uniform law for software contracting. The "hub and spoke" model defined the scope as the licensing of intangibles. In July of 1995, the decision was made to draft a separate article covering transactions of digital information. In December of 1995, the Software Contracting Subcommittee recommended the expansion of Article 2B's scope from "digital information" to "information."

⁶ Cheryl Ajluni, "Neural Nets Are Bridging the Knowledge Gap," 43 Electronic Design 65 (August 7, 1995).

⁷ Editors, "November 1, 1995 Sidewire," M2 Communications, Telecomworldwire, (November 1, 1995).

⁸ U.C.C. §52B-103 (d) (1)-(3) (excluding contracts for (i) employment, entertainment or professional services, (ii) intellectual property licenses not related to a software contract, a motion picture license, an access contract or a database contract; and (iii) all embedded software).

⁹ William H. Francis and Robert C. Collins, Cases and Materials on Patent Law Including Trade Secrets--Copyrights--Trademarks 717 (1995) (defining the concept of the patent license).

¹⁰ NCCUSL and ALI abandoned an attempt to consolidate Articles 3, 4, and 8 of the U.C.C. which had evolved as separate bodies of law.

work and begin from ground zero. Finally, there is little industry support or need for a uniform licensing law for all intellectual property rights.

4. ADOPT THE PRESENT SCOPE

Proposed Article 2B will bring simplicity and uniformity to the licensing of information while permitting the expansion of commercial practices.¹¹ Proposed Article 2B must avoid the problem of built-in obsolescence anticipating the rise of new information technologies. Article 2B covers the copyright industries which includes digital information, on-line transactions, Internet licenses and software contracts.¹² Information is the building block for Article 2B and is defined as:

data, text, images, sounds, computer programs, databases, literary works, audiovisual works, motion pictures, mask works, or the like, and any intellectual property or other rights in information.¹³

Article 2B provides the Uniform Commercial Code for Electronic Commerce recommended by the White House Report on the Global Information Infrastructure ("GII").¹⁴

RECOMMENDATION: Adopt the present scope.

B. TREATMENT OF CONSUMERS

ISSUE: Should Article 2B adopt new consumer protections or retain a posture of leaving current consumer law largely intact, while providing some additional protections?¹⁵

¹¹ U.C.C. §1-102.

¹² Article 2B takes a realistic view of hybrid transactions which may involve several bodies of law. Article 2 and 2A apply a formalistic "predominant test" that is difficult to apply. There is no quantitative test for whether a transaction is a license, sale or lease. If the transaction is predominately a license, Articles 2 and 2A apply to the entire transaction. In contrast, Article 2B applies a more modern gravamen approach. The installation of a turnkey system may involve Articles 2, 2A and 2B and the body of law applied depends upon the "gravamen of the action." U.C.C. 2B-103, Reporter's Note #4.

¹³ U.C.C. §2B-102 (22) (Proposed Draft, June 18, 1997).

¹⁴ Vice President Gore, White House Report, "A Framework for Global Electronic Commerce," July 1, 1997, reprinted in 2 BNA Electronic Information Policy & Law Report, July 4, 1997.

¹⁵ This is the question in the Issues Paper proposed by the Reporter to accompany the Draft.

ANALYSIS:

1. BACKGROUND

As much as any other group, consumers have been represented in the Article 2B Drafting Process. A representative of the Consumer Project on Technology has attended most of the Drafting Committee meetings, and has been one of the most frequent speakers of the observers. The Consumers Union has been represented at several meetings, and has presented at least six written criticisms of 2B since June 1996, more than any other single group that we have seen. These written criticisms have contained requests for over 75 changes to Article 2B, some major, some minor.

We are all consumers of information, the subject matter of 2B. Perhaps this adds to the emotion of the subject. When we struggle personally to buy products over the Internet or find ourselves on the licensee end of a shrinkwrap contract, we want to be sure that the rules that apply to us as individuals are ones that we would judge reasonable and fair. Often, however, these rules clash with the purposes of a traditional commercial code, and, as commercial lawyers, we recognize that a commercial code is not a consumer protection law.

The Subcommittee has reviewed all of the papers submitted by consumer representatives. It is not particularly meaningful to examine each requested change in a vacuum. Often, a change to one section which appears to be fairly innocuous when viewed individually has significant ramifications throughout the rest of the Draft, and the cumulative effect of dozens of "minor" changes can result in a law that is cumbersome, confusing and difficult to apply. Thus, rather than commenting individually on each requested change, we have tried to develop a consistent method that can be used to analyze all requested changes.

The Subcommittee believes, with respect to consumer issues, that Article 2B should not vary significantly from Article 2 except where the nature of the subject matter being considered clearly indicates that different treatment is needed. In many cases, the areas in which consumer representatives have requested enhanced protections for consumers under Article 2B are not substantively different than Article 2. This Subcommittee does not recommend that the requested changes be made in these areas.

However, where the different subject matter of 2B or certain specific practices of the information industry (such as utilizing "shrinkwrap" licenses) result in fundamentally different treatment to consumers than they would receive under Article 2, different treatment for consumers may be appropriate.

2. METHOD FOR ANALYZING CONSUMER-RELATED CHANGES

The Subcommittee would analyze requests for consumer-related changes by asking the following questions:

- (1) Does the different subject matter of 2B, or a specific practice of the information industry, in the particular case result in fundamentally different treatment to consumers than they would receive under Article 2?
- (2) If "yes", then is there a need for additional protection to consumers in the particular case?
- (3) If the answer is "yes", would providing the requested additional protection unreasonably contradict either of the fundamental underlying principles of the Draft as a commercial code: (a) to support contractual choice; and (b) to provide a useful and usable commercial framework for the information industry?

If the answer to the final question is "no", we would make the change. If it is "yes", we would not make the change.

3. RESPONSE OF THE DRAFT TO OVERALL CONSUMER CONCERNS

In its initial review of Article 2B, in June, 1996, the Consumers Union stated:

The most important areas where we seek improvement in Article 2B are: 1) the addition of a simple statutory mechanism for a full refund for nonconforming software; 2) a higher dividing line between mass market and other licenses; 3) improved treatment of unexpected terms which are standard in the industry; 4) elimination of the partial preemption of state consumer statutes; and 5) treatment of the merchantability, virus, and non-infringement issues.

The Draft has responded to these requests as follows:

(a) The Addition of a Simple Statutory Mechanism for a Full Refund for Nonconforming Software

In this case, the Draft has done more than requested. First, the Draft now provides a right of full refund for any mass market/shrinkwrap licensee who did not have

an opportunity to review the license before paying.¹⁶ The licensee can seek the refund from one of two sources, the retailer or the manufacturer. This refund right does **not** even require that the software be **nonconforming**. The only prerequisite is that the licensee decline the terms of the license (for any reason or no reason) and return the product. This refund right does not exist in current law, and although it is fairly dramatic to provide a refund right that is not predicated on some defect in the product itself, the Subcommittee finds it to be an appropriate response to the shrinkwrap controversy because it puts the shrinkwrap licensee in exactly the same position as it would have been in had it had the opportunity to review the license before paying. This change meets the test set forth above.

In addition, the perfect tender rule has been restored for mass market transactions (which encompass all retail consumer transactions).

(b) A Higher Dividing Line between Mass Market and Other Licenses

While it is not clear exactly what was meant by this request, we assume that the request was to provide a meaningful mass market definition and meaningful differences in the treatment between mass market licenses and other licenses. That has been done. Mass market transactions are treated differently from other licenses in eleven important ways, from perfect tender to heightened disclaimer requirements. We note that this has been done at no small price in terms of complicating the statute, and limiting in many of these cases, contractual choice, but we support the enhanced protections for consumers in these cases because we do not find those limitations to be unreasonable.

(c) Improved Treatment of Unexpected Terms which are Standard in the Industry

The Draft provides improved treatment of unexpected terms which are standard in the industry. Previous drafts had provided that terms which were customary in the industry did not require manifestation of assent, even if surprising. The current Draft knocks out terms which the party proposing the form should know would cause an ordinary reasonable person acquiring this type of information in the general mass market to refuse the license if that party knew that the license contained the particular term, unless the terms were specifically called to the attention of the licensee and consented to. This is a significant expansion of protection for consumers.

(d) Elimination of the Partial Preemption of State Consumer Statutes

¹⁶ This is a typical characteristic of a shrinkwrap license; the terms of the license are not seen by the licensee until after the product is paid for and the package is taken home and opened.

The preemption which was objected to by consumer representatives is contained in Section 2B-104, which provides that in the case of a conflict between consumer protection laws of any State and Article 2B, the consumer protection law will control except as follows: (1) a requirement that a contractual obligation, waiver, notice, or disclaimer be in writing is satisfied by a record;¹⁷ (2) A requirement that a record or a contractual term be signed is satisfied by an authentication¹⁸ (3) A requirement that a contractual term be conspicuous or the like is satisfied by a term that is conspicuous in accordance with 2B.¹⁹ (4) A requirement of consent or agreement to a contractual term is satisfied by an action that manifests assent to a term in accordance with this article.

"Manifest Assent" is a new concept under Article 2B which describes what a party must do in order to indicate consent or agreement with a record or term. It is necessary, again, because of the often electronic subject matter of 2B. Here's what is required to manifest assent under Article 2B: A party must, **after** having had an opportunity to review the record (which, we should note is a meaningful opportunity to review), or with knowledge of the terms of the record, either authenticate the record or engage in other affirmative conduct or operations that the record conspicuously provide or the circumstances clearly indicate constitute acceptance of the record. The use of the words "conspicuously" and "clearly" are key in this section. If a party cannot tell by the terms of the record or the circumstances of the transaction whether a particular conduct will constitute acceptance of the record, it is highly unlikely (we cannot think of a reasonable scenario) that the conduct will constitute manifest assent. Further, although it has been suggested many times by the consumer representatives that the mere failure to return shrinkwrap software constitutes manifest assent, we note that Section 2B-112(b) expressly states that "Merely retaining information or a record without objection is not a manifestation of assent."

In our opinion, to accede to the request of the consumer representatives to delete these provisions from 2B would severely cripple the application of 2B in electronic transactions, while gaining no substantive advantage for consumers.

(e) Treatment of the Merchantability, Virus, and Non-Infringement Issues.

¹⁷ 2B-102(35) defines "record" as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. It is the Article 2B equivalent of a "writing", making allowances for the often electronic subject matter of 2B.

¹⁸ 2B-102((3) defines "authenticate" as "to sign, or to execute or adopt a symbol, or encrypt a record in whole or in part with present intent to identify the authenticating party, or to adopt or accept a record or term, or to establish the authenticity of a record or term that contains the authentication or to which a record containing the authentication refers" It is the Article 2B equivalent of signature, again, making allowances for the often electronic subject matter of 2B.

¹⁹ The rules for conspicuousness in 2B are similar to those in Article 2: they do not alter content, but are merely expanded to provide for electronic contracting.

With respect to merchantability, § 2B 403(b) restores the requirement that a computer program and any physical medium containing the program must, at a minimum, pass without objection in the trade under the contract description. With respect to viruses, the Draft has been revised, as described elsewhere in this paper.²⁰ Finally, with respect to non-infringement, the Draft continues to provide a warranty that the licensor at the time of the transfer has no reason to know that the transfer, or the information when used in any authorized use infringes an existing intellectual property right of a third party except as disclosed to or known by the licensee. The Subcommittee has not yet taken a position on this issue.

The Subcommittee has examined each of the papers prepared by the Consumers' Union, as well as the comments of the Consumer Project on Technology on the March 1997 draft. Most of the requested changes have been addressed in the Draft. Where a requested change has not been addressed, there generally are sound policy reasons for not doing so in accordance with the method of analysis described in the opening of this paper.

RECOMMENDATION: The current draft of Article 2B affords more protections for consumers than any existing commercial statute. The Subcommittee has examined each of the protections which have been added, and finds them to be appropriate in light of the subject matter of 2B, and, in particular, in connection with the "shrinkwrap" form of transaction. With respect to the changes requested by consumer representatives which have not been included in the Draft, the Subcommittee believes that there are sound policy reasons, based upon the above analysis, for not including them.

In answer to the policy question posed at the beginning of this paper, the Subcommittee believes that Article 2B should retain a posture of leaving consumer law essentially intact, while adding some enhanced protection where the subject matter or specific industry practices indicate that additional protection is needed, and where doing so would not violate the fundamental themes of the Draft as a commercial code -- (1) to support contractual choice and (2) to provide a useful and usable commercial framework for the rapidly expanding information industry.

C. FEDERAL PREEMPTION ISSUES

ISSUE: This section responds to Professor Charles McManis' motion to amend Article 2B-308. At issue is whether Section 2B-308 should invalidate provisions in a mass market license that attempt to impose restriction on the use of information products that may contain components that are not entitled to federal copyright or patent protection.

ANALYSIS: Professor McManis' motion contains two alternatives: the first alternative prohibits any term that is "inconsistent" with Sections 102, 107-112 and 117 of the

²⁰ Please see the paper of the Subcommittee on Viruses included herewith.

Copyright Act. The second alternative would prohibit contract provisions that would forbid certain types of reverse engineering of software as to components that may not be entitled to copyright or patent protection.

The Subcommittee recommends that the Article 2B not follow the approach suggested by Professor McManis. As discussed below, the body of law that balances the private interest of protecting rights in information versus the public's interest in having access to information remains under development. This balancing of rights is an issue that should be resolved by Congress and the courts, not by a uniform state law on licensing. The approach suggested in Professor McManis' amendments to Section 2B-308 (a) is unnecessarily redundant (the preemption section of 17 U.S.C. Section 301 of the Copyright Act already governs what is proposed in Prof. McManis' first alternative); (b) unduly limit the scope of intellectual property protection that may be available based on developing case law, and (c) inappropriately attempts to legislate the scope of intellectual property protection.

On the other hand, the Subcommittee recognizes Professor McManis' concerns that Article 2B should not be construed as granting licensors unlimited rights to restrict the use of information *beyond* those rights as interpreted by developing case law or in the absence of Congressional action. Accordingly, the Subcommittee proposes below an alternative to the McManis motion that would address this concern.

1. THE DILEMMA

Developers believe that federal patent and copyright laws inadequately protect their interest and investment in an informational product. Developers may invest millions of dollars in software design and development; however, once distributed, such software is easily copied and distributed to others. See O'Rourke, "Drawing the Boundary Between Copyright and Contract: Copyright Preemption of Software License Terms," 45 *Duke L. J.* 479, 485 (1995). Therefore, developers also turn to contract, trade secret, misappropriation, and unfair competition principles to protect their perceived rights in information. However, the developers' enforcement of such state rights may conflict with a federal policy of prohibiting the creation of a patent-like monopoly on information that otherwise belongs in the public domain.

The courts have been struggling with striking a proper balance between protecting a private interest in information with protecting the public's interest in having access to intellectual property and information. See, Nimmer, "Federal Preemption in Intellectual Property," *PLI Second Annual Institute for Intellectual Property Law*, 453 *PLI/Pat* 95 (1996). As discussed below, the balancing of private versus public rights in information remains under development. However, the approach suggested by Professor McManis would dictate the scope of intellectual property protection and foreclose any future application of developing case law in the area. The Subcommittee submits that this approach is improper. Until a body of law is sufficiently developed (by Congress and the courts) to balance these rights, Article 2B should not be used to legislate the scope of intellectual property protection.

2. PROTECTING THE PUBLIC INTEREST IN INFORMATION

The discussion below is intended to illustrate how courts are taking divergent views on the extent to which federal intellectual property law may (or may not) preempt or prohibit the use of state law and, especially, contract law, to restrict the use of information and technology.

No ALL information technology is eligible for protection under federal patent or copyright law. See e.g., *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991) (compilation of telephone numbers for directory was not protectable under the Copyright Act). Embedded in both patent and copyright law is the proposition that information and technologies that are not protected by exclusive rights under these statutes are, at least under some circumstances, available freely for public use. *Id.*

3. PREEMPTION

The Supremacy Clause of the Constitution preempts any state law which would "substantially interfere" and stand as an obstacle to the goals and objectives of federal copyright and patent laws. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 152 (1989) see also, *Sears Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964). The principle that a state may not substantially interfere with the balance of protection struck by federal intellectual property law is partly reflected in the language of Section 301 of the Copyright Act, which explicitly pre-empts a state law claim if it is "equivalent to any of the exclusive rights within the general scope of copyright." See also *Kregos v. Associated Press*, 3 F.3d 656, 666 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1056 (1994).

In light of Section 301 and in decisions such as *Bonito Boats*, courts have found that certain state claims asserted by a party to protect intellectual property interests were preempted by federal patent and copyright law. For example:

- A state claim based on misappropriation or unjust enrichment from the unauthorized copying, use or misappropriation of copyrightable material would be preempted by copyright law. See, e.g., *American Movie Classics Co. v. Turner Entertainment Co.*, 922 F. Supp. 926, 934 (S.D.N.Y. 1996); See also, *National Basketball Ass'n., et al. V. Motorola, Inc., et al.*, 105 F.3d 841 (1997) (state misappropriation claim preempted).
- A shrink-wrap license provision that banned copying and reverse engineering of software was preempted by the Copyright Act. *Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255 (5th Cir. 1988).
- The reverse engineering of software to understand the unprotected elements of a software program may constitute fair use of the software. See, e.g.,

Sega v. Accolade, 977 F.2d 1510 (9th Cir. 1993); *Atari Games Corp. v. Nintendo of America, Inc.*, 975 Fed. 2d 832 (Fed. Cir. 1992). These decisions, however, limit the fair use exception to the reverse engineering of unprotected elements of a program.

4. MISUSE

In addition to the preemption analysis, the courts also have applied theories of patent misuse and copyright misuse to penalize licensors for attempting to monopolize, by contract, information and technology. For example:

- In *Lasercomb America v. Reynolds*, 911 F.2d 970 (4th Cir. 1990), the court found that a software license agreement that prohibited the licensee from developing its own competing software improperly extended copyright protection from the particular expression to the idea of such software and constituted copyright misuse. That misuse was held a bar to an action for infringement, even against a blatant copier who did not itself sign such a restrictive license agreement. *See also, Qad v. ALN*, 770 F. Supp. 1261 (N.D.Ill. 1991) (holding that an effort to sue for infringement of the non-copyrightable portion of a program was copyright misuse, making the entire copyright unenforceable).
- In *DSC Communications Corp. v. DGI Technologies, Inc.*, 81 F.3d 597, 601 (5th Cir. 1996), the court noted that the use of license restrictions on copyrighted software "to obtain a patent-like monopoly over unpatented microprocessor card" might will constitute copyright misuse.

Thus, there is some basis to Professor McManis' motion prohibiting contract provisions in mass market licenses that would restrict the use of information. However, as discussed below, the courts have never applied a broad preemption or misuse standard to all intellectual property rights. *See, Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974) (patent laws do not pre-empt state trade secret misappropriation claims); *Aronson v. Quick Point Pencil*, 440 U.S. 257 (1979) (federal patent law does not pre-empt the enforcement of private contract claims). Several courts have recognized that parties may privately alter their intellectual property rights by agreement and that these agreements are enforceable. As discussed below, since there is a growing body of law treating the ability to alter intellectual property rights by contract, any attempt to limit those rights should not be legislated by Article 2B.

5. PROTECTING THE PRIVATE INTEREST

The argument that federal law does not preempt the restriction of information by contract is based on the premise that interests protected by contract are different than the rights protected by federal patent and copyright law. *ProCD v. Zeidenberg*, 86 F.3d

1447 (7th Cir. 1996). Contract claims require proof of a promise and a breach of that promise; the enforcement a promise is different than proving copying or other actions that violate exclusive rights under patent or copyright law. See, Nimmer, 453 PLI/Pat at 109.

6. PREEMPTION OF CONTRACT CLAIMS

In the patent area, the Supreme Court found in *Aronson v. Quick Point Pencil*, 440 U.S. 257 (1979), that federal patent law does not preempt state contract law requiring the payment of royalties for technology that no longer was protected under federal patent law. In *Universal Gym Equipment, Inc. v. Erwa Exercise Equipment, Ltd.*, 827 F.2d 1542 (Fed. Cir. 1987), the Federal Circuit found that federal patent law did not preempt an agreement restricting the use of designs and technology in certain gym equipment that were not patented. The fact that the agreement prevented the defendant from using information that it previously had gleaned by reverse engineering was irrelevant: "Parties to a contract may limit their right to take action they previously had been free to take." *Id.* at 1550.

Similarly, the Copyright Act does not preempt state law claims if such claims are "qualitatively different" and incorporate an "extra element" beyond that needed to establish copyright infringement. See, e.g., *Harper & Row Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 199 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985). (A breach of contract action is qualitatively different from a claim in copyright infringement when the right or obligation being enforced would not exist but for the parties' agreement) consequently, a contractual restriction on the use of information may constitute a right that is qualitatively different than one for copyright infringement and, therefore, not preempted. See, *National Car Rental System, Inc. v. Computer Associates International, Inc.*, 991 F.2d 426 (8th Cir. 1993)

More recently, in *ProCD vs. Zeidenberg*, *supra*, the Court held in a sweeping opinion that a shrink-wrap license provision restricting the commercial use of a national telephone directory contained on a CD-ROM disc was not pre-empted by the Copyright Act. The Seventh Circuit pointed out that Section 301 was intended to pre-empt states from creating substitutes to the exclusive rights created under the Copyright Act; Sec. 301 was not intended to prevent private parties from altering their rights or responsibilities under contract. "A Copyright is a right against the world," the Court observed. "Contracts, by contrast, generally affect only their parties; strangers may do as they please, so contracts do not create 'exclusive rights.'"

Thus, there is a growing body of case law indicating that the contractual restriction on the use of information -- even in a mass market license -- may not necessarily be preempted by federal intellectual property law. Only time will tell whether *ProCD* will represent a majority or minority view. Until such time, it would be inappropriate to amend Article 2B to reject (or embrace) the views taken in *ProCD*.

7. FRAUD AND UNFAIR COMPETITION CLAIMS

In addition to the decisions authorizing the use of contracts to modify a party's right in intellectual property, there are also decisions that find certain state law claims based on fraud or unfair competition are not preempted by federal copyright law. For example:

- *Fraud about Attribution is not Preempted:* In *Stillman v. Leo Burnett Co.*, 720 F. Supp. 1353 (N.D. Ill 1989), the court found that a fraud claim alleging that the defendant wrongfully held out that the idea for a silent television commercial was the defendant's rather than that of the plaintiff was not preempted by copyright law.
- *Palming Off not Preempted:* IN *CSM Investors, Inc. v. Everest Dev. Ltd.*, 840 F. Supp. 1304 (D. Minn. 1994), the court found that a claim of unfair competition was not preempted by copyright law because it contained an extra element of "palming off" another's work as his own.
- *Palming Off not Preempted:* Similarly, a New York federal district court denied a motion to dismiss an unfair competition claim raised by the plaintiff, the owner of the rights to "Lone Wolf McQuade" against the producers of CBS' program, "Walker, Texas Ranger". *Lone Wolf McQuade Associates v. CBS, Inc., et al.*, 42 U.S.P.Q.2d (BNA) 1522 (S.D.N.Y. 1997). Lone Wolf alleged that CBS was passing off the "Walker" show as being sponsored or affiliated with "Lone Wolf McQuade." The court found that the state unfair competition claim based the tort of passing off or confusion as to source was not preempted by the Copyright act.

The discussion above emphasizes that there is a growing body of law that supports the proposition that claims based on breach of contract and unfair competition may not be preempted by federal patent or copyright law. Accordingly, reasonable contract provisions placing restrictions on the use of information may be entirely appropriate. Article 2B should not be amended, as suggested in the approach offered by Professor McManis, to preclude further growth and development of this law in determining the scope of intellectual property protection.

8. CURRENT POLICY DEBATES

Federal decisions continue to develop and define the rights the public may have on reverse engineering informational products. On the one hand, federal decisions make clear that state statutes may not restrict the right of the public to reverse engineer products that are not protected by patent and copyright laws, *see, e.g. Bonito Boats, supra*, and that the Copyright Act does not prohibit the reverse engineering of nonprotectable elements of a computer program. *See, Sega, supra*. Yet, on the other hand, certain federal courts find that mass market licenses prohibiting reverse engineering of software are not precluded by federal law. *See, ProCD*.

Likewise, legal commentators continue to debate on the extent in which contracts may restrict the public's right to reverse engineer informational products. Software publishers typically restrict reverse engineering, decompilation and disassembly of their software because these activities risk exposing, and hence losing to the public domain, the "publisher's crown jewel - secrets contained in the software's source code." Gomulkiewicz & Williamson, "A Brief Defense of Mass Market Software Agreements," 22 *Rutgers Computer & Tech. L.J.* 335 (1996) See also, O'Rourke, 45 *Duke L.J.* at 498.

Most purchasers of off-the-shelf software care little, if at all, about the right to reverse engineer, and that "most certainly are not interested in paying more money to acquire this right." *Id.* The entities that are most interested in acquiring this right are competitors of the software developer. *Id.* A competitor "should not be permitted to acquire the right to examine a company's trade secrets for the low price that typical end users pay for the software." *Id.*

In light of this debate, one commentator has suggested an alternative approach to balancing the private versus the public interest in the reverse engineering of software by proposing that contractual restrictions to reverse engineering should not be preempted unless, by creating and enforcing the "private copyright", the licensor gains near monopoly power in the market for the particular information. O'Rourke, 45 *Duke L.J.* at 556. Thus, the debate whether mass market licenses may restrict reverse engineering continues to develop and belongs with the courts. It should not be legislated, as suggested by Professor McManis, in Article 2B.

RECOMMENDATION: The comments above point out that the process of balancing a private party's interest in protecting information with the public's interest to having access to information is under development and that it has not been sufficiently defined by the courts interpreting federal intellectual property law. This balancing of rights should be resolved by Congress (with respect to any amendments to the copyright and patent laws) and by court decisions (that must consider the scope of federal law preemption and the scope of federal doctrines pertaining to patent and copyright misuse). These federal issues cannot (and should not) be resolved in a uniform state law governing licensing.

Professor McManis' proposed amendments, in effect, would freeze this developing case law and subsequently reduce the flexibility of Article 2B. The amendments improperly attempt to legislate the scope of intellectual property protection by codifying what acts are or are not preempted by patent and copyright law and by attempting to overrule impact of decisions such as *ProCD*. This is a matter more appropriate for resolution by Congress and by federal courts.

Professor McManis' first alternative to prohibit contract provisions that are "inconsistent" with the Copyright Act is not necessary and may stand as an obstacle to the goals and objectives of federal copyright and patent laws. Section 301 of the Copyright Act, in essence, addresses the prohibitions contained in the first alternative to Professor McManis' motion; therefore, a similar prohibition in Article 2B is not needed.

Professor McManis' second alternative, although falling in line with decisions such as *Sega, supra*, 977 F.2d 1510 and *Atari Games, supra*, 975 F.2d 832, is inconsistent with *ProCD*. Again, the amendment attempts to legislate the scope of federal preemption, which is a matter that should not (and probably cannot) be resolved in a uniform state law for licensing. Article 2B neither should expand nor limit the scope of intellectual property protection that is otherwise available under federal or state law.

D. MASS MARKET LICENSES

ISSUES: How should mass market licenses be treated under proposed Article 2B. Should mass market licenses, including shrink wrap licenses be treated differently than other licenses under Article 2B? If so, what should that different treatment be?

ANALYSIS:

1. THE CURRENT STATE OF THE LAW

The courts are beginning to recognize the validity of shrink wrap licenses, as a means of establishing contract terms in information transactions. This recognition, however, is not unanimous.

Thus, there is uncertainty as to whether courts will treat shrink wrap licenses consistently. Proposed Article 2B addresses mass market and shrink wrap license issues in sections 2B-307 and 308.

2. THE POLICY ISSUES

Licensors of information desire an enforceable and efficient means to establish terms of their licenses in a mass market context. They are concerned about having a practical way to establish the terms of the license they are willing to give. They do not want the uncertainty of having the license terms depend on the identity of the licensee or on whether the particular licensee actually read the license. Ultimately, they want to retain the right not to license their products unless the terms of the license are acceptable to them.

On the other hand, licensees of information fear the imposition of onerous terms in standard form agreements which they have no practical opportunity to negotiate. This concern is sharpened in transactions in which the licensee has no opportunity to review the license terms before paying his money.

The consensus of the Subcommittee was that a separate section should be retained to expressly address shrink wrap licenses and should follow the model of section 2B-307.

First, section 2B-308 should provide that shrink wrap licenses are, like other standard forms, enforceable as set forth in the statute. Second, it should provide that the licensee is bound by the terms of the license (1) if the licensee has an opportunity to review the license before paying her money, or (2) if the licensee does not have that opportunity, she has the right to read the license when she opens the box, reject the license and obtain a full refund, plus limited damages like the cost of mailing the box back to the vendor, and, if the software must be installed to read the license and the software alters the system, any damages for restoration of the system to its status before the installation to read the license.

This model places the licensee who receives the license before paying and the licensee who receives the license after paying in essentially the same position. Although the licensee who receives the license after paying does have to take an additional step to return to the status quo, she does receive a refund and the cost of return. If time is of the essence in the licensee's use of the product, she could open the box at the counter after paying, read the license and determine whether she accepts its terms right then and there.

Section 2B-307 validates the use of standard form licenses. Read in conjunction with sections 2B-112, Manifesting Assent, and 2B-113, Opportunity to Review, section 2B-307 provides that if the licensee manifests assent to the standard form license before or in connection with the initial use of the information, the form license becomes part of the contract between the parties.

Section 2B-307 applies to all standard form licenses without regard to whether the licensee is a consumer. The term "standard form" is defined in section 2B-102(35). The definition is broad enough to include shrink wrap and click wrap licenses, although it does not expressly do so. Arguably, the parameters set forth in Section 2B-307 are themselves sufficient to address the enforceability of mass market and shrink wrap licenses. However, as stated before, a separate section seems advisable dealing with shrink wrap licenses following the model of Section 2B-307.

The model also allows the licensor to remain the master of its offer. The Subcommittee did not believe that the terms of the license should differ based on whether the license was printed on the outside of the box or was contained on the inside of the box.

RECOMMENDATION: The Subcommittee ultimately came to the conclusion that giving the typical mass market licensee, *i.e.*, one who receives the license after paying, the right to return the product for a full refund and limited incidental damages was superior to some standard that sought to determine whether the terms of the license were surprising, whether a reasonable licensee under the circumstances would have accepted the terms or whether the licensee actually agreed to the terms. The refund model follows 2B-307 and achieves certainty and fairness.

Further, the Committee does not believe that a Restatement Section 211 approach to shrink wrap licenses is productive. The Committee's new suggestion to give the costs of return associated with obtaining a refund places the parties on a level playing field and protects licensees who see terms for the first time post-payment. Other provisions already exist in Article 2B regarding the requirements of conspicuousness, etc., and those terms would apply equally to these types of licenses as they do to others. The Subcommittee believes that this approach would eliminate any uncertainty in the terms of the license while allowing the equivalent of prior review.

E. ELECTRONIC CONTRACTING

ISSUE: Should the electronic contracting provisions of the Draft be adopted?

ANALYSIS: The electronic contracting provisions of the Draft generally fall into two categories: (1) provisions relating to electronic contract formation,²¹ and (2) provisions relating to attribution and authentication of electronic messages.²² Both categories address electronic contracts made with direct human involvement and through the use of electronic agents -- i.e., a computer program designed to act on behalf of a party without the need for human intervention.²³ As a general rule, a party adopting the use of such an agent is bound by its performance.

1. FORMATION OF ELECTRONIC CONTRACTS

Article 2B extends traditional legal principles regarding contract formation to the electronic contracting environment. It implicitly recognizes electronic contracts by reaffirming the general rule that a contract may be made in any manner sufficient to show agreement,²⁴ and restates the general rule that an offer to make a contract invites acceptance in any manner and by any medium reasonable under the circumstances.²⁵

In addition to forming a contract by electronic communications between two individuals, Article 2B recognizes that a contract may also be formed between an individual and an electronic agent, or between two electronic agents, even if no individual representing either party was aware of the action of the agent or reviewed its results.²⁶ So long as two agents engage

²¹ Sections 202, 203, 204 and 205.

²² Sections 110 and 111.

²³ Section 102(a)(13).

²⁴ Section 202(a).

²⁵ Section 203(a).

²⁶ See Sections 202(a) and 203(e) and (f).

in operations that signify agreement, or an individual knowingly interacts with an electronic agent and performs actions the person should know clearly constitute acceptance, an agreement is formed.

Article 2B also addresses the timing of the creation of a contract and the effectiveness of a message. In recognition of the near instantaneous nature of electronic communications, it reverses the mailbox rule and provides that if an electronic message indicates an intent to be bound, a contract exists when the response signifying acceptance is received.²⁷ It also provides that an electronic message is effective when received, even if no individual is aware of its receipt, just as the rule with paper-based mail, which does not require that the letter be opened.²⁸

In light of the absence of a trusted entity (such as the Postal Service) to deliver a message, Article 2B also addresses concerns regarding whether a message was received. It adopts the basic principle that the sender has the right to control the legal effectiveness and required response to its messages.²⁹ Thus, messages made conditional upon receipt of an acknowledgment do not bind the originator until the acknowledgment is received, and lapse if an acknowledgment is not received in a reasonable time.

2. ATTRIBUTION AND AUTHENTICATION

Two of the greatest concerns for parties to electronic communications, especially over public networks like the Internet, are identifying the source of a message and assuring that it has not been altered since it was sent. Article 2B addresses these concerns by incorporating the concept of an "attribution procedure." Modeled after the concept of a security procedure used in Article 4A § 201, an attribution procedure is a commercially reasonable procedure that is established by an agreement of both parties for the purpose of authenticating the source of electronic messages and/or to detecting errors in the transmission of such messages.³⁰

When an attribution procedure is used, an enhanced level of legal reliability is attributed to the message. Thus, if two parties have agreed on a commercially reasonable attribution procedure, a message is attributable to the party identified as the sender if application of the attribution procedure by the receiving party, in good faith, results in a conclusion that it was sent by the other party.³¹ Likewise, to the extent that the attribution procedure is designed for the

²⁷ Section 204(a).

²⁸ Section 204(b).

²⁹ Section 205.

³⁰ Section 110(a).

³¹ Section 111(a)(2).

detection of errors in the message, the sender is not bound to errors relating to material elements if the error would have been detected had the recipient applied the agreed-upon attribution procedure.³²

An electronic message is also authenticated (i.e., signed) as a matter of law if the parties complied with an attribution procedure for authentication.³³ Likewise, the operations of an electronic agent constitute the Authentication of a party if the party designed, programmed, or selected the electronic agent for the purpose of achieving the result.³⁴

RECOMMENDATION: The Subcommittee supports the adoption of the electronic contracting rules of the Draft.

F. VIRUSES

ISSUE: How should liability for viruses be treated in 2B?

ANALYSIS: Section 2B-313 currently contemplates a reasonable person standard to ensure a virus-free product. "Unless the circumstances clearly indicate that a duty of care could not be expected, a party shall exercise reasonable care to ensure that its performance or message when completed by it does not contain an undisclosed virus that may be reasonably expected to damage or interfere with the use of data, software, systems or operations of the other party." §2B-313(b). The duty is satisfied if the party either (i) exercises reasonable care, or, (ii) except with respect to a mass-market license involving delivery of a copy of information on a physical medium by a merchant dealing in information of the kind, states in the contract that no action was taken by the party to ensure exclusion of a virus or that a risk exists that viruses have not been excluded. §2B-313(b).

After extensive discussion, the Subcommittee has concluded that there are three distinct areas in which viruses may arise which require different treatment under the law. The first area would cover mass market licenses involving delivery of a copy of information on a physical medium by a merchant dealing in information of the kind. The second area would cover electronic distribution of information over the Internet. The third area would cover all other information licenses. The Subcommittee recommends treating each area as follows:

1. MASS MARKET PHYSICAL ITEMS

³² Section 111(c).

³³ Section 114(c)

³⁴ Section 114(b).

For mass-market licenses involving delivery of a copy of information on a physical medium by a merchant dealing in information of the kind, technology currently exists to allow manufacturers to be reasonably certain that their products do not contain viruses. The Subcommittee thus is comfortable with requiring of such manufacturers a non-disclaimable duty to exercise reasonable care to exclude viruses. The Subcommittee recommends that there be a "duty to exercise reasonable care which may not be waived" to ensure that the "performance or message, when completed by [the party], does not contain an undisclosed virus that may be reasonably expected to damage or interfere with the use of data, software, systems, or operations of the other party."

2. INTERNET DISTRIBUTION

Internet distribution does not lend itself to such straightforward solutions as the mass market physical items, for several reasons.

- for Article 2B to have an effective shelf-life, it needs to be technology neutral and not require or assume a particular technology. Currently, encryption would be required to meet a duty of reasonable care, yet encryption requires particular technology and still would not solve the problem. A high level of encryption would be required but export or import restrictions may prevent use of such levels; encrypted delivery systems require sophistication and monetary investments that do not inform all transactions or parties; and encryption requires coordination between the sending and receiving party (e.g., exchange of keys and use of compatible software) that would inhibit the development of electronic commerce and technologies and would create additional problems.
- it is erroneous to view Internet transmission as a direct line from A to B. Reflecting its national security origins, transmissions are split into numerous packets sent along several routes and reassembled. The Internet was deliberately designed to route transmissions along paths that change randomly or in response to hardware or cabling failures; none of the intermediaries are agents of or controlled by the sender (licensor or licensee).
- a reasonable care standard will generate litigation. The closest analogy is environmental superfund litigation where all possible contributors to the problem are either named or joined no matter how small their contribution. With viruses there may be no contribution at all, but the named party will nevertheless have to bear the costs of litigation.

Drawing a distinction between mass-market licenses involving a physical diskette and those involving Internet distribution is a way to address arguments of those who contend that Article 2B should not impose any nondisclaimable duty regarding viruses at all. To extend that duty would allocate the full risk of a general societal problem to one party who does not create the virus and cannot control virus entry during distribution. The Subcommittee **does not** support the amendment of 2B-313 to extend liability to electronic settings.

3. ALL OTHER INFORMATION

For all other information, the Subcommittee recommends that there be an implied absolute warranty, which may be disclaimed by contractual agreement, that "the performance or message, when completed by [the party], does not contain an undisclosed virus that may be reasonably expected to damage or interfere with the use of data, software, systems, or operations of the other party."

G. EXPRESS WARRANTIES: PUBLISHED INFORMATION CONTENT

ISSUE: Should the exception from Article 2B-402(c) for published informational content be retained?

ANALYSIS: Under Articles 2 and 2B, qualifying affirmations or descriptions about goods or information can become express warranties. Article 2B-402(c), however, contains an exception for statements made about "published informational content." Whether such statements create express warranties is assigned by subsection (c) to the common law or other applicable law. Why?

The definition of "published informational content" is critical to the answer. Under Article 2B-102 (29), "published informational content" refers to generic information that is not created in a special relationship of reliance. An example would be a newspaper article as opposed to advice sent to clients. Within that smaller universe, published informational content is afforded special treatment for several reasons. Among those reasons are the First Amendment, the fact that the common law does not impose the same rule as the UCC, and the public policy favoring protection of the free flow of information.

Assume Planned Parenthood licenses for a fee a CD that it describes (in advertising or on the package) as "facts about abortion," "a balanced discussion of abortion," or "a complete source of information about abortion," to a national youth group for use in its health-science program. The CD contains this statement: "While abortion should always be avoided if possible, sometimes it is the best alternative, such as when you will not be able to care for your baby adequately." The CD also contains a picture of a young woman who, after having aborted her baby, appears to be well-adjusted and happy. Suit is brought against Planned Parenthood on behalf of a member of the youth group, or a class action is brought on behalf of all troops nationally, for breach of express warranty. Plaintiffs claim that the statements made about the CD and the picture³⁵ created express warranties that were breached because the CD is neither "factual," "balanced," or "complete."

³⁵ Under proposed Article 2-401(5), a "depiction" is included in the "representations" that can become an express warranty.

Under the common law, there would be no express warranty for that information or the picture. Consistent with this legal backdrop, Article 2B does not impose a "goods" rule of express warranty on published informational content. Nevertheless, a memo³⁶ has been submitted to the Article 2B Drafting Committee contending that Comment d to Section 19 of the Restatement of Torts: Products Liability (5/21/97 draft) distinguishes between information as an idea and information as a "product." With respect to express warranties, as we understand the argument (or its extension), if some information is a product, and if a product is a good, then express warranty rules for goods should apply to information products.

However, Comment d and Comment f to Restatement Section 19 would appear to make the opposite point: information is *not* a product, and even the few cases finding some information to be like a product are described as "better" analyzed under other theories. Further, the argument ignores the overlay of First Amendment law that applies to information but not to goods. In another context, this point is made in a case involving an advertisement about a book:

. . . the challenged advertisement is not about laundry detergent; it cannot be divorced from the book *Case Closed*; and the book is protected speech. . . . The court finds no justification for categorizing the Random House advertisement as commercial speech [which would be entitled to constitutional protection, but lesser protection than political speech], nor for diminishing the constitutional safeguards to which it is properly entitled.³⁷

Neither Planned Parenthood nor any other organization or business that licenses published informational content can withstand the cost of such suits. Some may have merit; some will simply be intended to stop the speech of organizations or businesses with whom the plaintiff does not agree. Also, for published informational content, the First Amendment might well invalidate a statute paralleling Article 2-313. Because the First Amendment protects speech in many different contexts, it would be very difficult to craft a rule that would avoid constitutional problems. While state law should not promote misstatements by providers of published informational content, it also should not impose rules contrary to the general common law, particularly when such rules might undermine competing state and federal policies that promote the free flow of information.

RECOMMENDATION: The critical point is that Article 2B does not exempt persons who make affirmations of fact about published informational content from liability for express warranties when such liability exists under non-UCC law. Article 2B-402(c) simply leaves the rules for determining whether an express warranty has been created to that *other* law

³⁶ See memo to Raymond T. Nimmer from David A. Rice submitted May 30, 1997, to Article 2B Drafting Committee, at 2.

³⁷ *Lane v. Random House, Inc.*, 1995 U.S. Dist. LEXIS 1332; 23 Media L. Rep. 1385 (1995). This case involved a claim of libel arising from an advertisement for a book. Among the issues considered by the court were whether the allegedly libelous advertisement was protected speech and what level of protection for that speech was appropriate.

which, more so than a commercial code, can better handle the multiple issues surrounding published informational content. In short, we believe that Article 2B-402(c) strikes the right balance and should be adopted.

H. EXPRESS WARRANTIES: BASIS OF BARGAIN

ISSUE: What position should the Draft take with respect to the retention of the requirement that an affirmation of fact, promise or description made by the licensor to the licensee must become part of the "basis of the bargain" in order to be deemed an express warranty?

ANALYSIS: Article 2B-402 parallels existing Article 2-313, which creates an express warranty out of any affirmation of fact, promise or description made by the seller to the buyer which relates to the goods and becomes or is made part of the "basis of the bargain." The warranty is that the goods/information will conform to the affirmation or description.

No one knows what "basis of the bargain" means because it is not defined in Article 2. Equally valid arguments can be made that (1) it was not intended to change the outcome of cases under the Uniform Sales Act, which required reliance on the affirmation, or (2) it was intended to eliminate the actual reliance requirement.³⁸ Courts adopt all positions: some require actual reliance; some do not but still require the statement *somehow* to figure in the buyer's purchase decision; and all purport to honor the basis of the bargain requirement but few clearly explain what factors satisfy it.

This is the kind of issue NCCUSL ideally ought to address: case law is disparate and confused and both buyers and sellers (and licensors and licensees) would benefit from clarification of the law. Yet the issue is not addressed. Proposed Article 2-403 substitutes "basis of the bargain" for the phrase "becomes part of the agreement," but no definition of the new phrase is supplied. Revised Article 2 will simply engender litigation over the new words without resolving the relevant issue. Participants in the revision process do not even agree whether Article 2-403 alters the basis of the bargain requirement: some argue the requirement is retained but reworded, while others argue the requirement has been eliminated.³⁹ Perhaps predicting that

³⁸ See e.g., *Hauter v. Zogarts*, 120 Cal. Rptr. 681, 687-88 (1975) (court discusses the two views, that reliance was or was not intended to be eliminated by Article 2-313, and notes that UCC comments and commentators support each view). See also, e.g., *Phillips v. Ripley & Fletcher Co.* 541 A.2d 946, 950 (1988) (UCC comments suggest basis of bargain is meant to continue uniform sales act requirement that purchaser must show reliance on the affirmation) and (*State By Div. Of Cons. Prot. V. GAF Corp.*, 760 P.2d 310, 315 (1988) (actual reliance not required and statement "need only form a 'part of the basis of the bargain'")

³⁹ Reporter's Note 1 to proposed Article 2-403 states that the phrase "becomes part of the agreement" is "substituted" for 'becomes part of the basis of the bargain, and that the change "clarifies that an express warranty is treated like any other term of the agreement and that the buyer need not initially prove reliance to include it in the agreement." This can be read several ways, i.e., that the reliance requirement has been eliminated, but the basis of the bargain requirement has not (although the wording has changed), or that the basis of the bargain requirement has been eliminated. A memo dated May 30, 1997 by Todd Paglia to the Article 2B Drafting Committee ("Consumer Memo"), appears to reach the latter conclusion: the memo requests elimination of the basis of the bargain requirement from Article 2B and describes that request as consistent with proposed changes to Article 2. But see Footnote 7.

clarification is not possible as a political matter, Article 2B does not create new problems but, by paralleling existing law, leaves in place the existing confusion.

In a perfect world, both Article 2 and 2B would define what is meant by "basis of the bargain." It means *something*. Possible explanations are posited in White and Summers.⁴⁰ Various courts have described the requirement as being met if it would be reasonable to conclude that a reasonable person would have "ventured into the transaction on the basis of a particular statement,"⁴¹ when a buyer is "influenced by the statement in making his or her purchase,"⁴² or when the seller's statements "induced" the buyer to buy,⁴³ even though actual reliance was not required under any of the foregoing explanations.

Instead of requesting definition, consumer representatives may have requested elimination of the basis of the bargain requirement.⁴⁴ That cannot be done without a dramatic change in law in jurisdictions where the basis of the bargain requirement has significance. In jurisdictions where it means less, elimination might mean little as a practical matter, but would still require an explanation of how the law will differ before and after elimination (elimination of a statutory test has to mean *something* in every jurisdiction). Elimination also would not solve the problem, at least for consumers: the federal Magnuson-Moss Warranty Act also contains the basis of the bargain requirement. Thus, even if state law is revised to avoid the issue, it will remain under preemptive federal law.

Manuals illustrate the kind of problem that can be created when the meaning of the basis of the bargain requirement is unclear. Affirmations in a manual clearly relate to the goods (or information), but are they part of the basis of the bargain? Most sellers do not intend an express warranty: manuals are intended to provide assistance for use or assembly and are not reviewed by legal counsel: to view every affirmation or description as an express warranty would simply encourage sellers to eliminate manuals, decrease their scope, or increase prices to

⁴⁰ James J. White & Robert S. Summers, *Uniform Commercial Code: Practitioner Treatise Series*, § 9-5 (4th ed. 1995) ("White and Summers").

⁴¹ *State by Div. Of Cons. Prot*, *supra* at 315.

⁴² *CIBA-GEIGY Corp. v. Alter*, 834 S.W.2d 136, 147 (1992).

⁴³ *Lutz Farms v. Asgrow Seed Co.*, 948 F.2d 638, 645 (10th Cir. 1991).

⁴⁴ It is not clear that such a request has actually been made. The Consumer Memo speaks in terms of eliminating the reliance requirement and of eliminating the basis of the bargain requirement. It may be that only the former is actually intended, i.e., the memo might simply seek adoption of the case law finding that "actual" reliance is not required but does not seek elimination of the basis of the bargain requirement itself.

accommodate legal review. It also would be inconsistent with warranty theory.⁴⁵ On the other hand, buyers have a reasonable expectation that manuals will be substantially accurate. Whether an affirmation or description in a manual is an express warranty (as opposed to something else) may ultimately depend on whether the affirmation is part of the basis of the bargain.⁴⁶

In jurisdictions requiring actual reliance, or not requiring reliance but requiring inducement or the like, manuals typically will not be part of the basis of the bargain because usually they are not seen before sale (they are included in the box or arrive by mail order). One could argue that the buyer expects a manual and therefore it is part of the basis of the bargain, but that analysis would also make a software license part of the agreement: in modern commerce, persons who obtain software also expect a license. While that might be a simple solution to the "shrinkwrap" issue (all manuals and all licenses are automatically part of the agreement whenever delivered and even if not seen until after payment), one would expect buyers to resist that conclusion and require the further protections contained in Article 2B.

Perhaps a solution can be found in Comment 1 to Article 2-313, which explains that express warranties rest on "dickered" terms. Also, Comment 3 looks to affirmations *during* the bargain. In short, the comments seem to circle a requirement of actual dickering or inducement but not actual reliance, and seem intended to isolate what actually is said or is influential during the ordering or deal-making period. What is that period? Comment 7 states that post-sale statements can count, but one must also correlate the "during the bargain" requirement of Comment 3. White and Summers seek to resolve this by counting post-sale statements made while the deal is still "warm," i.e., before the buyer crosses the seller's "threshold" to leave. *Id.* at 498.

RECOMMENDATION: The purpose of this paper is not to resolve these problems but to note them and recommend against (1) superficial solutions, such as mere language changes, or (2) dramatic changes in law without consensus, such as elimination of the basis of the bargain requirement. NCCUSL would appear to be faced with one of two choices: (a) define and reach a consensus regarding the meaning of the basis of the bargain test that will meet the needs of sellers (and licensors) and buyers (and licensees), or (b) retain existing law, including existing wording, and allow parties to present the respective merits of their arguments on a case-by-case basis.

⁴⁵ UCC express warranty rules have evolved from a principle in the 19th century that no express warranty was created unless a seller used particular words such as "warrant" or "guarantee." The law has since struggled to define when a warranty should be found even absent such words. However, it is presumably a complete abandonment of warranty theory to adopt a premise that every statement made is a warranty. Other legal theories exist to address such statements, e.g., misrepresentation, plain contract, false advertising laws and the like. For a brief discussion of the evolution express warranty theory, see *Southwestern Bell Telephone v. FDP Corp.*, 811 S.W.2d 572, 574-75 (1991).

⁴⁶ Comment 5 to Article 2-313 explains that "technical specifications, blueprints and the like" can be a description that rises to the level of an express warranty, *if* made part of the basis of the bargain.

Article 2B-402 adopts that latter approach. Proposed Article 2-403 adopts neither and creates additional confusion. If NCCUSL indicates a willingness to take on the formidable task presented by the first alternative, this ABA subcommittee will be willing to assist with formulation of a possible approach.

I. DEVELOPMENT CONTRACTS

ISSUE: Does the language of Section 2B-617(b)(3)(D) meet basic requirements for inclusion in proposed Article 2B?

ANALYSIS: Article 2B-617 deals with default rules when an authenticated record provides that ownership of intellectual property rights in a program passes to the client, but fails to provide specifics. The Subcommittee generally supports the revisions from the previous draft. The revised draft raises one issue on which the Subcommittee wishes to comment.

Proposed subparagraph (D) provides that the transfer includes transfer of ownership of "generally applicable components or code, including development tools or the like, developed in performance of the contract...but the developer has an irrevocable, nonexclusive license to use in other contracts generally applicable components or code that do not include confidential or otherwise proprietary information of the client". The provision reflects the belief that an unsophisticated purchaser who obtains ownership of the intellectual property rights in a program would expect those property rights to include the right to take the program apart and use pieces of it elsewhere.

There are several problems with the proposed provision from both the licensor/developer and the licensee points of view. It may in fact be the only provision in Article 2B which is objected to equally by developers and licensees. Developers object to it because they believe that it is contrary to current law and current custom in the industry. Under current law and practice, the majority of developers believe that transfer of all right, title and interest in a completed program transfers all right title and interest in the completed program, period. It does not transfer rights in "components". The expanded reading of what has been considered in the industry to be clear and plain language would give to sophisticated clients rights they now must notify developers they want, rights which they often cannot obtain by negotiation, and rights which, if they are granted, must be considered in calculating a fair price. Thus, subparagraph (D) would, in the opinion of most developers, give sophisticated clients a windfall and be a trap for the unsophisticated and unwary.

On the other hand, many large and sophisticated licensees see subparagraph (D) as diluting what they believe to be their current rights. Many such licensees have expressed at Drafting Committee meetings that they fully believe that they own all components and development tools and they strenuously object to being required, as a default rule, to grant a free,

irrevocable license to the developer to continue to use those components and tools in other works when the licensees have paid significant dollars for the development of the program.

A second problem arises from the fact that the word "component" is not defined in Article 2B, and has no generally agreed-upon meaning in the industry. The reference to "development tools", by way of an example of a "component", is of little assistance. It too is a flexible term, and may encompass code (such as a testing routine) which never becomes a part of the program to which ownership of intellectual property rights is conveyed. Current practice eliminates the problem by requiring the parties themselves to define what it is they expect beyond current law. If a grant of rights is to be expanded contrary to current law and practice, public policy considerations demand both an explanation of the reasons for such expansion and a clear definition of the scope of expansion.

The combination of changing current law and practice, and expanding grants of rights using undefined terms, is likely to reduce clarity and spawn additional litigation. One objective of Article 2B is to improve clarity and reduce litigation. The inclusion of subparagraph (D) is likely to have the opposite effect and does not appear to be welcomed by either of the groups it was intended to assist.

RECOMMENDATION: Overarching principles guiding the drafting of Article 2B include adherence to basic principles of contract law, codifying existing law and custom, elucidating the reasons for any changes in the law required by public policy, and improving clarity, thereby reducing litigation. The provisions of subparagraph (D) meet none of these criteria, and do not satisfy either of the principal groups that they were intended to assist. Accordingly, we recommend deletion of subparagraph (D) in its entirety.

J. ELECTRONIC SELF-HELP

ISSUE: How should electronic self-help be treated under 2B?

ANALYSIS: The self help provision permits a licensor to exercise electronic remedies without judicial process, upon a material breach, so long as certain additional conditions are met. While material breaches of all kinds can occur, the most common default that may be expected to motivate exercise of self help is a payment default. For analysis, it is useful to recognize that the licensees at risk are neither consumers (who typically pre-pay) nor very big corporate licensees (which have enough negotiating strength to eliminate self help from any contract), but rather, small to medium sized businesses that get extended payment terms. The

licensors most in need of self help are vendors of low to mid-priced software: high priced software justifies the expense of a judicial remedy.⁴⁷

The real issues are (a) who, as between the parties, ought to have leverage in the case of a payment default; and (b) whether wrongful exercise has consequences that are so dire that the mere possibility of wrongful exercise outweighs the utility of proper exercise. The decision represents a policy statement as to whether the parties should be restricted to judicial remedies only. The current UCC answer to lessors and secured parties is that self help is allowed. As currently drafted, the Article 2B remedy is substantially more circumscribed than self help under Article 9. We propose that as a matter of consistency and fairness, self help ought to be available to licensors, as well, with some serious safeguards.

There are three basic ways to treat self help in Article 2B: (a) remain silent on self-help; (b) prohibit self-help; or (c) permit self help.

SILENCE: This alternative serves no one⁴⁸. In the absence of a specific statute, courts would be left with analogies to other self help provisions (e.g., UCC Articles 2A and 9, which expressly permit self help) and their imaginations. Neither users nor vendors could proceed with any certainty. If information is sold, instead of licensed, the seller will have a purchase money security interest and presumably, could employ self help. Moreover, in combined hardware/software deals, unless an Article 2B self help provision not only exists but can be reconciled with Articles 2A and 9, we will have created uncertainty in leasing and secured transactions.

PROHIBITION: This alternative clearly serves licensees at the expense of licensors. Prohibition puts self help outside the bounds of freedom of contract, which is endorsed elsewhere in the UCC. Prohibition leads to a confusing statement of public policy: a secured party could repossess life support equipment under Article 9, so long as no breach of the peace occurs, but it would be against public policy to electronically repossess a screen saver. The strongest argument in favor of prohibition is that as long as 2B-314⁴⁹ is available to permit licensors to

⁴⁷ Because payment defaults are expected to be the most common reason for use of self help and because confidentiality breaches as well as copyright infringement and scope of use defaults often require injunctive relief for a complete remedy anyway, a suggestion has been made to *limit* the availability of self help to payment defaults. The licensor representatives on the subcommittee should consider this suggestion and the issue of whether other kinds of defaults are worthy of self help, as well. A benefit of this approach is that it would pretty much preclude the use of self help in consumer transactions, which are typically pre-paid.

⁴⁸ Subcommittee members include those who represent software vendors, customers or both. While members have all seen contracts permitting self help, each is aware of relatively few instances in which this remedy is actually exercised. The number of vendors that *believe* they can exercise self help even in the absence of contract language, is unknown, of course. The Subcommittee believes that rules with respect to this remedy are needed so that everyone's expectations can begin to converge.

⁴⁹ UCC 2B-314 permits the exercise of electronic means to restrict use within the scope of the agreement (for example, to stop concurrent use by the 21st user on a 20-person license). UCC 2B-314 does not apply to self-help employed by the licensor after a breach. Even those advocating prohibition of self help have not sought to prohibit the electronic restrictions

prevent breaches in the first instance, licensors have less need for 2B-711⁵⁰. The remaining arguments in favor of prohibition, including the potential for personal injury or property damage, are red herrings; adequate protections can be (and for the most part, already have been) built into the 2B self help remedy.⁵¹ The argument *against* prohibition is that judicial process is simply not an efficient remedy for most software contract breaches; software often bears a retail price that is insufficient to support litigation against a single user⁵². Smaller licensors, who can least afford litigation, may be expected to be hurt the most by this alternative. If self help is prohibited, 2B-314 becomes even more critically important to licensors.⁵³

PERMIT SELF HELP: Without sufficient protections, this alternative would put too much power in the hands of licensors. But by going well beyond the bare-bones Article 9 protections, electronic self help is recommended because it will preserve freedom of contract and provide a tough default rule that will apply in most cases, with the effect that licensors will refrain from exercise in all but the most egregious instances of licensee breach (and then with extreme caution⁵⁴). When negotiations regarding the issue do arise, this section will provide the proper backdrop against which negotiations can occur. The protections that already exist in the draft are these:

- Licensor cannot proceed except with respect to a material breach.⁵⁵

permitted by 2B-314.

⁵⁰ Unfortunately, 2B-314 does not eliminate the need for 2B-711 in the case of material breaches, especially with respect to payment defaults.

⁵¹ The protections are discussed *infra*. Another argument raised in favor of prohibition is that unlike equipment, the cost of goods for software is comparatively low and a single copy does not have "resale" value, as in the case of secured equipment transactions. This ignores the basic economics of both software and equipment transactions. In software, the development cost is effectively spread across the entire installed base and in niche markets especially, it is disingenuous to assert that no value has been lost to the licensor by permitting a breaching licensee to continue to use the software after a material breach. Moreover, equipment repossessions are often undertaken for payment leverage (just as would be the case under 2B-711), not for the resale value of the equipment. In many equipment repossessions, the cost of repossession approaches the resale/salvage value and repossession is undertaken reluctantly, even under the less stringent conditions of Article 9. UCC 9-503 only requires that the secured party proceed without breach of the peace. No prior agreement by the debtor is required under Article 9 self help.

⁵² For similar reasons, most intellectual property actions are brought against those *selling* infringing articles, as opposed to those *using* an infringing article. The single infringing use often does not support the cost of litigation.

⁵³ It may be argued by some that 2B-314 should be adjusted (e.g., to prohibit electronic enforcement of contract restrictions that tie software use to specific processing units by serial number, a proposal that is rooted in a broader inquiry as to software portability). Such proposed adjustments are beyond the scope of this paper.

⁵⁴ It has been argued that if any self help is allowed, licensors will exercise the right, but will not "read the fine print" concerning the conditions of exercise. Given the proposed consequences of wrongful exercise, this "problem" should be self limiting.

⁵⁵ Unlike the analogous remedy in Article 2A, the parties may not, under the current draft of 2B-711, agree as to what "material" will mean. The breach must be material as to the entire contract without regard to contract designations. It is the majority position of the Subcommittee that this restriction be lifted, which would have the effect of eliminating the sole instance in Article 2B that overrides the 2B-108 (Breach of Contract) definition of the term, "material breach."

- Licensor cannot proceed if there is a foreseeable breach of peace, risk of injury to person or significant damage to or destruction of information or property.
- These limitations cannot be waived by licensee before a breach.
- Separate manifest assent to a self help contract term is required.
- Wrongful exercise of self help is itself a breach by licensor.
- Licensee can recover damages for wrongful exercise, including damages resulting from foreseeable breach of the peace.

We propose that the following safeguards be added:

- 2B-711(a) should be clarified so that "foreseeable" applies to all of (i) breach of the peace; (ii) injury to person; and (iii) significant damage to or destruction of information or property.⁵⁶
- Before exercising self help, licensor should be required to notify licensee (i) that a material breach has occurred and (ii) the nature of the breach.⁵⁷
- Licensee damages for wrongful exercise should expressly include damages arising from personal injury and personal property or information damage or destruction.⁵⁸
- Licensee damages should expressly include consequential damages that may not be disclaimed.

RECOMMENDATION: Permit electronic self-help as described above. The practical effect of this provision will be to serve as a modest limit on licensees' ability to withhold payments. Where there is a legitimate dispute, licensors will not want to risk the consequences of wrongful exercise. Moreover, if a legitimate dispute exists and the software is vital to the licensee's enterprise, the proposed notice provision gives the licensee an opportunity to seek judicial relief.⁵⁹ It is a notable curiosity that licensees want the right to claim that software is so fundamentally flawed that withholding payment is appropriate, but apparently not so fundamentally flawed that the licensee has taken its mission critical functions off of the software.

⁵⁶ Some who argue in favor of prohibition have indicated that the licensee does not always know the use to which a licensee might put software. We would submit that the licensee must assume the risks if it decides, for example, to use spreadsheet software as a critical component of a life support system.

⁵⁷ This is to head off exercise in the case of *accidental breach*; by operation of 2B-711(b), this notice requirement could not be waived prior to breach. Licensor should *not* be required to notify licensee that licensor intends to exercise self help. This would completely defeat the self help remedy.

⁵⁸ The 1/20/97 draft implies, but does not express this result.

⁵⁹ Cf. Computer Associates Int'l. Inc. v. State Street Bank and Trust Co., 789 F.Supp. 470 (D. Mass. 1992), where the Court enjoined the software vendor from withholding maintenance support, because the bank was likely to prevail in the dispute and during the pendency of the suit, it was in the public interest to maintain stability in the bank's supervision of assets through continued use of the software.