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The Impact of Proposed Article 2B of the Uniform Commercial Code on Consumer Contracts for Information and Computer Software

by Diane W. Savage

I. Overview

Article 2 of the Uniform Commercial Code (“UCC”) has governed the law of sales of “goods” for more than 40 years.¹ All jurisdictions have adopted some form of the UCC.² Although the software industry did not exist at the time the UCC was completed, the overwhelming majority of court decisions have found that software and related licensing constitute “goods” under Article 2.³ A major overhaul of the UCC is currently underway. This overhaul includes creating a separate article, Article 2B, dealing with software contracts and the licensing of information, as well as the creation of a revised Article 2 which will continue to deal with sales of “goods,” but which will no longer apply to software. This article outlines the impact of proposed Article 2B on consumer contracts,⁴ first as it relates to electronic transactions generally, and then as it applies specifically to contracts for computer software and licenses of information.⁵

First, this article describes a history of the decisions that led to the creation of proposed Article 2B. Second, this article outlines how proposed Article 2B will increase certainty in the area of electronic contracting. Proposed Article 2B creates a

set of rules which recognize and enforce electronic contracts and validate shrinkwrap and bootscreen licenses.

Shrinkwrap licenses refer to “software purchased in a computer store or through the mail, or shipped as a backup for pre-installed software, [and] is usually distributed in sealed ‘shrinkwrap’ packaging, with a notice stating that breaking open the package constitutes acceptance of the terms of an accompanying license”⁶ — the “shrinkwrap license.” These licenses are used in the distribution of mass-market software products including virtually all consumer transactions for software. Furthermore, a “bootscreen license” is the electronic equivalent of a shrinkwrap license. Similar to the shrinkwrap license, “before downloading and installing software distributed over the Internet, the user typically is required to review a license agreement and click on a box stating that the user accepts the terms of the li-

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cense.”⁷ Proposed Article 2B validates these licenses through a “mass-market” contract concept (a concept generally defined to include retail distribution of software products).

Although the rules for electronic contracting will apply equally to all electronic transactions, whether they are transactions with consumers or not (“consumer contracts”), these rules will become increasingly important to consumers as the trend toward electronic contracting continues to grow. Similarly, the rules for mass-market contracts will apply to all mass-market transactions, including, but not limited to consumer transactions. Although the adoption of the mass-market contract will make shrinkwrap and electronic bootscreen licenses enforceable, proposed Article 2B will also permit software and information providers to define the contract terms and impose additional restrictions on consumers.

Finally, this article will discuss how proposed Articles 2 and 2B treat similar issues differently, and this difference in treatment will confuse the average consumer. It is likely that the consumer will not understand that different rules will apply depending on whether he or she has purchased goods (which are covered by Article 2), or licensed information and/or entered into software contracts (which are covered by proposed Article 2B).⁸ This article will highlight a number of these differences by using hypotheticals dealing with transactions covered under proposed Articles 2 and 2B.

II. Background: *Changes in Information Technology Spur Changes in Contract Law*

The information industry’s commercial significance has been tremendous. The software industry is the fastest growing major industry in

the United States today.⁹ Software and related information technology accounts for 4% of the gross national product.¹⁰ The U.S. software market as of 1996 was a 48 billion dollar business, and is expected to increase to a 98.8 billion dollar business by the year 2001.¹¹ Approximately 27% of U.S. households had a Personal Computer (“PC”) in 1994 and this number is expected to increase to 38% — or 32 million households — by the end of 1997.¹²

In addition, it is clear that the Internet will become an increasingly important conduit for many types of commercial transactions. In June of 1995, there were fewer than 1.5 million World Wide Web users; by June 1996, this figure had skyrocketed to 20 million users.¹³ Furthermore, it is projected that over 125 million Web surfers by the year 2000 will spend more than 9 to 10 hours per week using the Web.¹⁴ In addition, the volume of Web content is growing rapidly, creating a \$46 billion market opportunity by 2000.¹⁵ “No communications medium or consumer electronics technology has ever grown as quickly; not the fax machine, not even the PC. At this rate, within two years the citizens of cyberspace will outnumber all but the largest nations.”¹⁶ It is for this reason that the Working Group on Intellectual Property Rights for the National Information Infrastructure (“NII”) highlighted the need for a uniform set of laws related to electronic contracting in its White Paper: “[T]he challenge for commercial law . . . is to adapt to the reality of the NII by providing clear guidance as to the rights and responsibilities of those using the NII. Without certainty in electronic contracting, the NII will not fulfill its commercial potential.”¹⁷

In 1991, in response to fundamental changes in business practices, as well as the development of new and faster methods of communication,

the National Conference of Commissioners for Uniform State Laws ("NCCUSL") formed a drafting committee to revise Article 2 of the UCC. The two organizations that originally developed and currently revise the UCC are the NCCUSL and the American Law Institute ("ALI").

The NCCUSL is a national organization comprised of commissioners appointed from every state; its purpose is to draft uniform legislation that can be adopted by all states. The ALI is a national organization which was formed in 1923 to "promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work."¹⁸ The ALI comprises an

elected membership, which is limited to 0.5 of 1% of the bar. The Permanent Editorial Board ("PEB") of the UCC, a group formed by the NCCUSL and the ALI, also monitors UCC developments.¹⁹ One of the biggest issues facing the Article 2 NCCUSL drafting committee was the potential application of Article 2 to software, licensing agreements, and rights in intangibles.

The initial draft of Article 2B proposed a scope covering transactions involving licenses of intangibles, database access contracts, online ser-

vice contracts (such as Prodigy, AOL, Lexis/Nexis) and software contracts, as well as incidental agreements, such as support and maintenance.²⁰ Concern was expressed about the term "intangibles," which implied some overlap with the term "general intangible" in Article 9 of the

UCC and which is not a term with an accepted meaning within the affected industries.²¹ The drafting committee also rejected proposals to limit the scope of Article 2B to "digital information" and subsequent drafts have instead included all licenses of information and software contracts, whether the software contract was a license or a sale.

Also during 1991, an American Bar Association Study Committee recommended that consideration be given to the development of a uniform law of software contracts, either inside

or outside the UCC, and began a separate project to consider the actions which should be taken for the treatment of software and similar digital information contracts. A subsequent NCCUSL study committee agreed and proposed creation of a separate article of the UCC for such contracts. Shortly thereafter, however, groups representing the software industry objected to any uniform law development. A second study committee from the NCCUSL was appointed and later a special committee on software contracts

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was created to work in parallel with a drafting committee which was considering changes to Article 2. This special committee was eventually folded into the Article 2 drafting committee.²²

In 1993, the Article 2 drafting committee recommended to the sponsors of the UCC a "hub and spoke" approach in which provisions of Article 2 with common application to sales of goods, leases, software and licensing would be grouped in one part (the "hub").²³ Other parts (the "spokes") would deal with issues unique to sales of goods, leases, software and information contracts.²⁴ Subsequently, information industry groups reversed their earlier position, concluding that uniform treatment of contracts affecting their industry would be desirable. The industry, however, favored a separate UCC article on licensing because they believed that the unique character of such transactions justified separate treatment.²⁵

In 1995, the NCCUSL decided that Article 2 would deal with sales of goods, and there would be a separate article, proposed Article 2B, to deal with licenses. According to Professor Ray Nimmer, the NCCUSL Reporter for proposed Article 2B, this decision and the events that preceded it reflect:

an awakening to the fact that the modern economy and commerce within it no longer depends solely and entirely on goods and sales of goods. It encompasses a significant focus on intangible property transactions. Additionally, the decision involves a recognition of the fact that information and other license contracts entail far different commercial and practical considerations than can be addressed under a sale of goods

model.²⁶

The current objective of the drafting committees is to finalize Articles 2 and 2B so that they can be scheduled for a final reading and vote by the ALI membership in May of 1998 and at the NCCUSL annual conference in July of 1998.²⁷ There are still two more drafting committee meetings scheduled for September and November of 1997. The drafting process is ongoing and there will be additional changes. All drafts represent a work in progress, and one does not necessarily supersede another until a vote on the final draft has been taken by the NCCUSL and the ALI. This article draws upon revisions through the most recent January 1997 Draft of Article 2 and the March 1997 Draft of Article 2B of the Uniform Commercial Code.

III. Electronic Contracts: *Recognizing Contracts Created Electronically*

Millions of consumers have subscribed to online services like Prodigy, America Online, Netcom, and CompuServe where they can purchase goods and services, make loan applications, and establish electronic brokerage relationships to name just a few of the services provided by these organizations. It is estimated that \$7 billion dollars worth of these electronic transactions will take place over the Internet just four years from now.²⁸

Issues are further complicated when one or both parties turn the commercial decision-making process over to "electronic agents," or preprogrammed computer programs which are established to make contracts, find information, and otherwise interact with computers of other parties without human intervention.²⁹ Proposed Article 2B establishes a framework to validate

these electronic transactions when they involve the transfer of information.

An “electronic transaction” is a transaction “formed by electronic messages in which the messages of one or both parties will not be reviewed by an individual as a routine step in forming the contract.”³⁰ Whether these electronic transactions are enforceable has been suspect under the Statute of Frauds in existing Article 2 and under the common law.³¹ However, proposed Article 2B legitimizes these electronic transactions by replacing the idea of a “writing” with a “record,” so that electronic records are equivalent to paper records.

Proposed Article 2B will apply to software contracts, information licenses and access contracts.³² It will also provide a model for the other transactional articles of the UCC and, eventually, a “framework for national electronic commerce.”³³

A. Manifestation of Assent, Authentication, and Attribution: When a Contract Becomes Valid and Enforceable

Article 2B replaces the concept of acceptance with “manifestation of assent,” and it replaces the concept of a signature with “authentication.” Although it is not a required element of an electronic contract, Article 2B also introduces the concept of attribution which is used to verify the identity of the authenticating party.

Proposed Article 2B replaces acceptance with the concept of “manifestation of assent.” In an electronic contract setting, a party or electronic agent manifests assent to the contract if he: “(1) authenticates the . . . record or term, or engages in other affirmative conduct that [constitutes acceptance]; and (2) had an opportunity to decline

to authenticate [the contract’s terms].”³⁴ An offeror may prove that the offeree manifested assent by showing that the offeror had an electronic procedure which required that the offeree engage in specific conduct in order to continue processing information. For example, an offeree might see the following screen prior to purchasing a software program via an online transaction:

I am authorized to, and do, agree to the terms and conditions of the license. By clicking the “I agree” button, I agree to the terms of the license.

I agree	Cancel
---------	--------

If the license is available to the user (and the Reporter’s Notes make it clear that a hyper-link reference is sufficient), clicking “I agree” will constitute “manifest assent.”³⁵

Proposed Article 2B also replaces the idea of a signature with “authentication.”³⁶ Authentication means that a party electronically signs, executes, or adopts a signal, including “a digital identifier, or encrypt[s] a record, in whole or in part, with [the] present intent to [show that he accepts the] record or term that contains the authentication.”³⁷

An offeror may prove that an offeree authenticated a contract in any manner, including by showing that an offeree had to execute or adopt a symbol in order to further use or process information. For example, prior to purchasing a software program in an online transaction, the offeree might see this screen:

I hereby warrant that I am the licensee named in the licensee identification, or that I am an agent authorized to bind the lic-

ensee. [Click here to review the terms of the contract.](#) I intend to legally bind the licensee by typing my name on the signature line below as a symbol of the licensee's signature.

Type your name (or any symbol)	Cancel
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Here, the offeree's action of typing his name (or anything else) constitutes both manifestation of assent and authentication.

Section 2B-114 provides that a record or message is authenticated as a matter of law if the symbol executed or adopted by the party complies with an attribution procedure for authentication.

An 'attribution procedure' is a procedure established by agreement or mutually adopted by the parties for the purpose of verifying that electronic records, messages, or performances are those of the respective parties or for detecting errors in the transmission or informational content of an electronic message, record, or performance, if the procedure is commercially reasonable.³⁸

An attribution procedure not only verifies a party's electronic "signature," it also attributes performance to a particular party.³⁹ If a party establishes and follows an attribution procedure, then the message or performance has an enhanced level of legal reliability.⁴⁰ For example, a screen might state:

For your protection, we ask that you fill

out the following to ensure that the symbol adopted above belongs to you.

Name
Social Security Number
Address
Phone
Date of Birth
Current Address
Former Address

Disclosure: *You are about to send several lines of text over the Internet. It may be possible for other people to see what you are sending. Are you sure that you want to send this information?*

Yes	No	Tell me more about security on the Internet
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B. Choice of Law & Choice of Forum: Choosing the Governing Law and Where To Bring a Contract Claim

Choice of Law

A choice of law provision provides the licensor with certainty concerning the law which will govern a transaction. Certainty is particularly important for modern information transactions which occur in cyberspace, rather than in any fixed geographic location. Neither the present, nor the proposed Article 2 which deal with goods have a rule governing choice of law, although Article 1-105 of the UCC allows a choice of law

provision to govern in any case where the chosen state has a “reasonable relationship” to the transaction.

In the March 1997 Draft of Proposed Article 2B, which deals with software contracts and information licenses, Section 106(a) provides that a choice of law provision is enforceable.⁴¹ This approach conforms with the general commercial law concept that the contract terms govern the contractual relationship.⁴²

Alternatively, when a software contract or information license does *not* have an enforceable choice of law provision, proposed Article 2B, Section 106(b) governs how to choose which jurisdiction’s law should apply. The general rule is that the law of the state with the most significant relationship to the contract applies. However, there are two exceptions to this general rule.

First, “[i]n an access contract or a contract providing for delivery of a copy by electronic communication,” the law of the licensor’s jurisdiction will govern.⁴³ Second, if the contract is with a consumer and if the contract requires delivery of the software or information in physical form, then the law of the jurisdiction in which the consumer receives physical delivery will govern.⁴⁴

Choice of Forum

The March 1997 Draft of Article 2B, Section 107 provides that “[t]he parties may choose an exclusive judicial forum [except that a choice of a judicial forum] is not enforceable [in a consumer contract] if the chosen jurisdiction would not otherwise have jurisdiction . . . and the choice unfairly disadvantages the consumer.”⁴⁵ Article 2, dealing with goods, does not include a comparable provision dealing with choice of forum.

Under existing law, “the Supreme Court has enforced a choice of forum [provision] in a [cruise line’s] form contract . . . even though the choice effectively denied the consumer the ability to defend the contract and the choice was contained in a non-negotiated form.”⁴⁶ In *Carnival Cruise Lines, Inc. v. Shute*, the Supreme Court found the choice of law provision in a form contract was permissible because, “. . . [i]t would be entirely unreasonable for us to assume that respondents . . . would negotiate with petitioner in terms of a forum-selection clause in an ordinary commercial cruise ticket.”⁴⁷ Furthermore,

a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit. Because a cruise ship typically carries passengers from many locales, it is not unlikely that a mishap on a cruise ship could subject the cruise line to litigation in several different fora . . . Additionally, a clause establishing [the forum] has the salutary effect of dispelling confusion about where suits arising from the contract must be brought and defended. Finally, it stands to reason that passengers who purchase tickets containing a forum clause . . . benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.⁴⁸

Several recent cases involving jurisdictional questions have highlighted the importance of enforceable choice of forum provisions in electronic transactions.⁴⁹ In *CompuServe v. Patterson*, for instance, the Sixth Circuit found that an Ohio

court had personal jurisdiction over an Internet user from Texas because the Texas user had subscribed to an Ohio network service, entered into an agreement with an Ohio service to sell his software over the Internet, advertised his software through the Ohio service, and repeatedly sent his software to the service in Ohio.⁵⁰

The *CompuServe* decision contrasts with *Bensusan Restaurant Corp. v. King*, a trademark infringement action, in which the federal district court for the Southern District of New York found that it did not have jurisdiction over a Missouri business which had set up a Website in Missouri to advertise primarily to Missouri customers, despite the fact that the defendant admitted that there was a possibility of confusion with plaintiff, a New York restaurant.⁵¹ Article 2B, Section 107 of the March 1997 Draft will permit software vendors and information licensors to avoid inconsistent results by including choice of forum provisions in their contracts, which will be enforced unless the choice of forum unfairly disadvantages consumers.

IV. Mass-Market Licenses: *Making "Shrinkwrap Licenses" Enforceable*

"Shrinkwrap licenses" are the primary vehicle used in the distribution of mass-market software products, including virtually all consumer transactions for software. However, there are only four reported decisions dealing with the enforceability of shrinkwrap licenses and these courts are split regarding their enforceability.⁵²

Three courts found these licenses unenforceable.⁵³ However, in *ProCD Inc. v. Zeidenberg*, the Seventh Circuit held that a shrinkwrap license is enforceable unless the terms are objectionable on other grounds.⁵⁴ The court noted that though

proposed Article 2B would explicitly validate shrinkwrap agreements, this proposed law did not imply in any way that shrinkwrap agreements are invalid under the current UCC.⁵⁵ The court reasoned that this new Article might simply be intended to remove ambiguities in the law, rather than to change it.⁵⁶

Proposed Article 2B invents and uses the idea of a "mass-market" contract. The January 1997 Draft provides that a mass-market license is:

a standard form prepared and used in a retail market for information which is directed to the public as a whole under substantially the same terms for the same information, if the licensee is an end user and acquired the information in a transaction under terms and in a quantity consistent with an ordinary transaction in the general retail distribution.⁵⁷

A. Mass-market licenses includes consumer contracts.⁵⁸

Proposed Article 2B, Section 308 sets forth a series of rules which will render shrinkwrap and electronic bootscreen licenses enforceable, even though they are not signed by both parties and even if the license terms are not available prior to the purchase. Proposed Article 2B, Section 308(a) establishes the general rule that "a party adopts the terms of a mass-market license if the party agrees or manifests assent to the mass-market license before or in connection with the initial use of . . . information."⁵⁹ However:

a term . . . does not become part of the contract if the term creates an obliga-

tion or imposes a limitation which: (1) the party proposing [the licensing] form should know would cause an ordinary and reasonable person . . . to refuse the license if that party knew that the license contained the particular term; or (2) conflicts with the previously negotiated terms of agreement, . . . [unless] the party that did not prepare the form manifests assent to the terms, or if [the circumstances demonstrate,] the term was clearly disclosed to the party before it agreed or manifested assent to the mass-market licensee.⁶⁰

Professor Nimmer notes that this approach is at odds with both Article 2 and the *Unidroit Principles of International Commercial Contracts*.⁶¹ Both focus on whether the licensee could reasonably have expected a term to be present, rather than on whether the licensor should have known that the licensee would not have agreed to the term. In addition, Article 2 provides that in a consumer transaction, terms will not become a part of the contract unless the consumer expressly agrees to them.⁶² However, despite these concerns, the March 1997 Draft of proposed Article 2B makes no change in this area.

B. Shrinkwrap and bootscreen licenses

Statutory validation of shrinkwrap and bootscreen licenses will provide greater certainty for consumers and vendors. However, it will also permit vendors to become more aggressive in their use of such agreements to impose and enforce restrictions on consumers. Because the

enforceability of shrinkwrap and bootscreen licenses is uncertain under current laws, vendors have used such licenses to set forth use rights consistent with Section 117 of the Copyright Act and to limit and define warranties. However, vendors generally have not imposed additional obligations upon users, and have been reluctant to initiate litigation to enforce the license terms, as evidenced by the lack of case law in this area.⁶³ Now, however, as one author has noted:

In view of the Seventh Circuit's *ProCD* decision and the activity to amend the UCC, shrink wrap licenses have a great deal of vitality. The sanctioning of shrink wrap licenses comes at a time when manufacturers and producers of computer software already seem to have unfair bargaining power over software users. By making the terms of shrink wrap licenses readily enforceable, users of computer software may find that the license terms will become even more favorable to the software manufacturers.⁶⁴

V. The Article 2 and 2B Distinction: What Does This Mean for Consumers?

In explaining the rationale for separate Articles dealing with goods on the one hand, and software contracts and information licenses on the other hand, Professor Nimmer states that:

One difference between Proposed Article 2B (licenses) and existing UCC articles dealing with goods resides in this difference of subject matter. We

deal with . . . questions about handling ideas, information, [and] instructions . . . along with the property rights created by state and federal law regarding these intangibles, as commercial property, rather than with the question of whether the car runs, the television turns on, or the drill press presses.⁶⁵

However, many transactions involve mixed subject matter, including both goods and information or software. Articles 2 and 2B handle this overlap by creating a general rule and an exception. The general rule is that Article 2 will cover those aspects of the mixed transaction which involve goods, and proposed Article 2B will cover software or information licensed in the same transaction. The exception to that rule is set forth in proposed Article 2B, Section 103, which provides that Article 2 will apply to software which is embedded in any goods other than a copy of the software or a computer if the software was not the subject of a separate license with the buyer or lessee. Which Article applies to a particular dispute depends on whether the focus is goods (including embedded software) or information (including any non-embedded software).⁶⁶

The hub and spoke approach to the revised UCC would have aggregated in the hub all provisions which the Commissioners decided should apply to goods, software contracts and information licenses. Once the hub and spoke approach was abandoned, however, the drafting committees for Articles 2 and 2B took radically different approaches to a number of issues. Because the drafting of the proposed Articles is an iterative process and has involved input from a number of organizations, including the Consumers Union,⁶⁷ many of the initial differences in the two

drafts of Article 2 and 2B have been resolved in favor of a unified approach. However, the drafts of the two Articles still contain significant differences in the areas of contract formation, warranties, and remedies. Although some of these differences may be explained by the distinctions between goods and intangibles, they create confusion for the average consumer, who will not understand how different rules will apply to transactions, depending on whether they have purchased goods covered by Article 2 or entered into a software contract covered by proposed Article 2B. These different outcomes are inappropriate and harmful to consumers.

VI. Objections: *Criticisms of Proposed Article 2B*

The Consumers Union has objected to proposed Article 2B, Section 104(b). This section states that when a consumer law (statutory or case):

existing on the effective date of [proposed Article 2B] applies to a transaction, the following rules will apply: (1) [a] requirement that a contractual obligation, waiver, notice, or disclaimer be in writing is satisfied by a record[;] (2) [a] requirement that a record or a contractual term be signed is satisfied by an authentication; (3) [a] requirement that a contractual term be conspicuous . . . is satisfied by a term that is conspicuous in accordance with this article[; and] (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.⁶⁸

The Consumers Union's concern is that Article 2B, Section 104(b) could override state consumer protection statutes which might have additional requirements concerning waiver, notice, disclaimers, signatures, or conspicuousness requirements. For example, a state statute which required a consumer to physically sign an agreement in order to be bound by it would be automatically revised by Section 104(b) so that only "authentication" would be required.

In response, the Reporter's Note 2 to proposed Article 2B, Section 104 states that Section 104 does not alter content terms; it only expands the idea of a writing and a signature to include appropriate electronic equivalents, with the goal "to facilitate electronic commerce and to implement concepts concerning electronic trade."⁶⁹ Additionally, the Coordination Committee has recommended that Article 2 be modified to conform to proposed Article 2B in this respect.⁷⁰

VII. Illustrations: Article 2B in Action

Just as Professor Nimmer used hypotheticals in his Preface to the December 1996 Draft of proposed Article 2B, this article uses hypotheticals to illustrate how different treatment of the same issues in Articles 2 and 2B will impact a consumer transaction involving both goods and soft-

ware or other information.

Illustration A

As a result of a mail solicitation, which made a number of express warranties concerning the computer systems offered by a retailer, a senior

[A] state statute which required a consumer to physically sign an agreement in order to be bound by it would be automatically revised by Section 104(b) so that only "authentication" would be required.

citizen visits a retailer's store to purchase a computer system which controls all kinds of household systems, including TVs, stereos, heating, and security (a "home controls system"). During his visit, excessive pressure is placed on the senior citizen to purchase the home controls system. The system provides

functionality far in excess of that which the senior citizen needs, and is far more expensive than the system which could satisfy his needs.

The agreement which the senior citizen signs with the retailer of the home controls system includes a standard integration clause which provides that the contract supersedes all prior and contemporaneous oral or written agreements between the parties regarding the subject matter and provides that the contract can only be modified by a writing signed by both parties. It also contains provisions which state that the home controls system hardware and software are deemed to have been accepted upon purchase, which waives all subsequent rights of rejection or revocation and which disclaim any warranties. When the senior citizen asks whether he has

the right to return the home controls system if he is unhappy with it, the salesperson assures him that he can return the system at any time within the first 90 days after purchase.

1. No Oral Modification. Under Article 2 revisions, the “no oral modification” provision is generally enforceable, but is not enforceable against consumers, and therefore, the salesman’s assurances that the senior citizen can return the computer at any time within 90 days after purchase would be admissible and enforceable.⁷¹

Proposed Article 2B, on the other hand, provides that “in a consumer license, a term requiring an authenticated record for modification is not enforceable unless the consumer manifests assent to the term.”⁷² The March 1997 Draft changed the language to “. . . in a consumer contract represented in a standard form supplied by a merchant, a term requiring an authenticated record for modification of the contract is not enforceable unless the consumer manifests assent to the term.”⁷³ The oral modification would not be admissible because the consumer had signed or manifested assent to the record when he signed the contract.⁷⁴ As a result, the senior citizen would be able to return the home controls system hardware, but he would not be able to return the associated software (even though the software would be of no value to him without the hardware).

The Consumers Union recommends that proposed Article 2B, Section 303(b) be changed so it does not extend the grasp of “no oral modification” clauses in consumer licenses and that it adopts the approach of new Article 2, Section 2-210(b), which provides that clauses prohibiting oral modification are ineffective against consumers (or mass-market licenses).⁷⁵ “To track cur-

rent Article 2, a ‘no oral modification’ clause in a consumer license should become enforceable against a consumer only if the consumer . . . manifested assent to the clause, [and] provided [a] signature or electronic authentication with respect to that clause.”⁷⁶

2. Unconscionability. Draft Article 2 prohibits unconscionable inducement of contract. Therefore, the consumer may return the home controls system hardware and obtain a refund if he establishes unconscionable inducement of contract.⁷⁷ The Reporter’s Notes to draft Article 2 provide that placing excessive pressure on a senior citizen is an example of unconscionable inducement. Since proposed Article 2B contains no similar concept, he may not return the associated software for a refund unless he was able to prove fraud in the inducement, which is a much higher standard of proof than unconscionability. Professor Nimmer notes that “[t]he inducement concept does not exist in current law in any context other than in Article 2A [where it is] limited to consumer leases.”⁷⁸ Also, unconscionable inducement was criticized at the meeting of the ALI Article 2 Consultative Group in November 1996, and the issue will be revisited.⁷⁹

The Consumers Union has criticized the use of “unconscionable inducement”:

It is very difficult for a consumer or other small party to prove intent, and consumers need just as much protection from unintended unconscionable inducement as they do from intentional conduct. When a transaction is conducted electronically rather than in person, intent may well be an impossible burden. The remedies for uncon-

scionable inducement would not include damages. . . . Instead, the key remedy would be non-enforceability of the offending clause or of the contract as a whole.⁸⁰

3. **Integration.** Draft Article 2 creates a presumption that a merger clause states the parties' intent. However, this presumption is not applicable to a consumer contract.⁸¹ In addition, draft Article 2, Section 202(b)(2) provides that an integration clause is presumed to state the parties' intention except in a consumer contract.⁸² As a result, the consumer may introduce the express warranties concerning the computer in the mail solicitation as evidence. Alternatively, proposed Article 2B, Section 301 states that terms intended as a final expression of the parties' agreement may not be:

contradicted by evidence of any previous agreement or of a contemporaneous oral agreement. However, the terms may be explained or supplemented by evidence of: (1) course of performance, course of dealing, or usage of trade; and (2) consistent additional terms unless the court finds that the record was intended by both parties as a complete and exclusive expression of the [parties'] agreement.⁸³

Draft Article 2B does not include a provision on integration clauses. Since the express warranties in the mail solicitation are contradicted by the warranty disclaimer in the contract, the consumer may not introduce evidence of the express warranties, but the Article 2 Drafting Committee voted to the contrary. The oral assurance re-

garding a 90-day return would be admitted into evidence with respect to the hardware portion of the contract, but would not be allowed with respect to the software portion of the contract. The Coordination Committee has recommended that Article 2 delete the provision in its draft dealing with procedures and criteria for challenging the effectiveness of a merger clause made in the mail solicitation.⁸⁴

Illustration B

A consumer purchases a computer for use in his home. There is no written agreement covering the purchase transaction. The package containing the computer includes a card which disclaims all express or implied warranties of merchantability and fitness for a particular purpose in large, bold-faced type. The consumer also purchases a popular software package to use with the computer. He purchases the software from a different vendor than the computer vendor by way of a download from the Internet. The software includes an electronic record which also disclaims all express and implied warranties of merchantability and fitness for a particular purpose in large, bold-faced type and which contains the following language: "Warning: May contain viruses or potentially damaging code."

After repeated failed attempts to use the computer and associated software, the consumer determines that the software has a computer virus which has rendered it inoperable and that the computer hardware is also defective. The consumer also receives notice from a third party claiming that the software, when operated in conjunction with the computer, infringes a patent owned by the third party. Neither the computer vendor nor the software vendor had any prior

notice of the third party claim of infringement.

1. Warranty of Non-Infringement (Two Alternatives). Draft Article 2, Section 402 provides an absolute warranty of non-infringement for goods, but only covers the goods as delivered. Consequently, Article 2 would not cover the consumer's use of the computer with the database software. Proposed Article 2B, Section 401(a) contains two alternatives regarding the warranty of non-infringement. The first alternative provides that a licensor, which is a "merchant regularly dealing in information of the kind, at the time of the transfer," warrants that it, "has no reason to know that the transfer [itself], any copies transferred by the licensor, or the information when used in any authorized use, infringes an existing intellectual property right of a third party."⁸⁵ Thus, the software vendor would not be liable for infringement.

The second alternative under Article 2B, Section 401(a)(4) provides that:

a licensor that is a merchant especially dealing in information of the kind, indemnifies and holds the licensee harmless against any final judgment rendered in favor of a third party for infringement against the licensee . . . to the extent that the infringement pertains to an intellectual property right in existence at the time of the [transfer][activation] of rights.⁸⁶

Performance of the indemnity in Alternative B excludes any other liability to the licensee for infringement. Under this alternative, which was included for the first time in the January 1997 Draft, the software vendor would be obligated

to indemnify the purchaser, but only if a final judgment of infringement was entered against the purchaser.⁸⁷

The Reporter's Notes to proposed Article 2B, Section 401 expands the meaning of this section beyond the current Article 2 to cover infringing uses, yet uses a "reason to know" standard. The Reporter's Notes to an earlier draft of this section indicate that the choice between a "reason to know" standard and an absolute warranty requires a balancing of interests between the licensor and licensee. Further,

[a] majority of computer law professionals responding to a survey believed that a mass-market license should not be able to disclaim warranties that the licensor has a right to make the license and has no knowledge of an infringement. While the inability to disclaim is inconsistent with the contract freedom base of this article, this section creates warranties consistent with that viewpoint.⁸⁸

The Reporter's Notes to the March 1997 Draft indicate that some Commissioners were concerned about how the "no knowledge warranty" affects mass-market transactions.⁸⁹ One possible approach would be to apply the no knowledge warranty only to non-mass-market or non-consumer transactions.⁹⁰ Alternative B represents the Committee's attempt to address this concern.

In the case of the first alternative, Article 2B, Section 401(a)(4), although the outcome is the same for both the computer vendor and the software vendor, the rationale is different. Indeed, the hypothetical may be misleading on this front since it is likely that virtually every hardware

and software vendor will disclaim the warranty of non-infringement. Proposed Article 2, Section 402(b) provides that language is sufficient to exclude warranties if it states, "There is no warranty of title or against infringement in this sale" or similar language.⁹¹ Similarly, proposed Article 2B, Section 401(d) states that:

a warranty may be disclaimed or modified only by express language or by circumstances giving the licensee reason to know that the licensor does not warrant that competing claims do not exist or that the licensor purports to transfer only the rights that it has. In an electronic transaction that does not involve review of the record by any individual, language is sufficient to exclude a warranty if it is conspicuous. Otherwise, language in a record's adequate if it states, 'There is no warranty of title or authority,' or 'There is no warranty that the [information or computer program] does not infringe the rights of others,'⁹² or similar language.

It is not clear, however, whether the indemnity in Alternative B can be disclaimed by the software vendor since it is stated as an indemnity rather than as a warranty.

2. Disclaimer of Implied Warranties. Proposed Article 2 disallows disclaimers of consumer merchantability warranties unless the consumer "expressly agrees" to the disclaimer.⁹³ Consequently, the disclaimer of warranty for the computer is ineffective because the consumer did not expressly agree to it. The disclaimer, however,

would have been enforceable had it been contained in a contract signed by the consumer. Proposed Article 2B, Section 406(c) generally validates such disclaimers for software contracts and information licenses as long as they are contained in a record and are conspicuous. As a result, the disclaimer of warranty for the software is valid.⁹⁴

3. Electronic Viruses. The March 1997 Draft of Article 2B contains two alternative proposals regarding electronic viruses. Article 2B, Section 313 does not treat the issue of electronic viruses as a warranty, but rather imposes an obligation on both the licensee and the licensor to exercise reasonable care to exclude electronic viruses.⁹⁵ Section 313(a) sets forth the general rule that "[u]nless 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 reasonably be expected to damage or interfere [with the other party's use of] data, software, systems or operations."⁹⁶

Proposed Article 2B, Section 313(c) provides that "[t]he duty described in subsection (a) is satisfied if: (1) the party exercised reasonable care; or (2) . . . language in a contract [states] that no action was taken to ensure exclusion of a virus or that a risk exists that viruses have not been excluded."⁹⁷ However, option (2) does not apply to "mass-market licenses involving delivery of a copy of information on a physical medium by a merchant dealing in information of the kind."⁹⁸ Although the hypothetical involves a consumer transaction, the software was delivered electronically. Therefore, the notice that the software may contain viruses or a potentially damaging code is enforceable. The software ven-

dor will not be liable for any damage caused by the virus, even if the vendor failed to exercise reasonable care to exclude the virus and the software was in fact the source of the virus. The result would be different, however, had the consumer received physical, rather than electronic, delivery of the software.

Article 2B, Section 313, alternative B was added for the first time in the March 1997 Draft and it provides that, "a party that transfers information to another party in electronic form makes an implied warranty that the information does not contain a virus, [and the warranty] can only be disclaimed by conspicuous language which makes clear that the licensor is not providing any warranty as to the absence of viruses."⁹⁹ Under this alternative, the notice that the software may contain viruses would be sufficient to disclaim the implied warranty, and the result would not be affected by whether the consumer received physical or electronic delivery of the software.

Earlier versions of this section allowed a licensor to disclaim all liability for viruses, provided that the disclaimer in mass-market licenses was conspicuous. The Consumers Union was not satisfied with such versions because licensors would be able to disclaim their obligation to use reasonable care, but would not disclaim the licensee's liability to the licensor. The Consumers Union noted in a memorandum to the ALI members:

Section 2B-319(b)(2), in combination with Section 2B-319(e), makes it easy to disclaim even the obligation to use reasonable care to avoid viruses by a conspicuous disclaimer. A consumer who pays money for software is highly unlikely to expect that the provider will

not have taken even reasonable care to avoid viruses, yet this unexpected term is not subject to the manifest assent requirement which the draft applies to other unexpected terms.¹⁰⁰

Alternative A to Article 2B, Section 313 addresses this concern only in cases involving delivery of a diskette from the factory where the licensor is clearly the only party in a position to inject a virus. In all other situations, "the liability, risk and duty . . . goes in both directions and licensees are equally likely to be the source of a virus as are licensors."¹⁰¹ Nevertheless, alternative A and the Reporter's Notes fails to address the Consumers Union's concern that the consumer is not in a position to effectively disclaim his liability for viruses, whereas the licensor may easily do so pursuant to proposed Article 2B, Section 318. Alternative B, on the other hand, imposes the responsibility for viruses squarely on the licensor and therefore addresses the Consumers Union's concern.

Illustration C

A consumer purchases a telephone switch and an associated software program (together, the "telephone system") from a merchant for use in managing his home telephone system, which includes two outside lines and a third line which the consumer intends to use for his fax machine. The contract between the consumer and the merchant calls for payment of 90% upon delivery of the system and the remaining 10% upon consumer's acceptance of the system, which must occur within 30 days of delivery. The contract also contains a 90 day warranty that the telephone system will perform in accordance with

the merchant's end-user documentation and limits the consumer's remedy for breach of warranty to repair or replacement of the defective telephone system. The contract contains a disclaimer of any liability by the merchant for consequential or incidental damages arising out of or related to the sale or use of the telephone system. The contract further provides that any cause of action must be brought within one year of the date of purchase.

There are several problems with the telephone system. Despite repeated efforts by the consumer and the merchant (who continues to attempt to fix the problems even after expiration of the 90 day warranty), the telephone system never works as warranted by the merchant and the consumer never pays the remaining 10% of the purchase price which was due upon acceptance. Thirteen months after his initial purchase, the consumer decides to purchase a competitor's system and contacts the original merchant to see if he can return the defective telephone system to the merchant for a refund. The merchant refuses to provide a refund, and instead demands payment of the remaining 10% of the purchase price. When the consumer refuses to pay, the merchant deactivates the software, rendering the telephone system inoperative. The consumer files a lawsuit seeking a refund of the amounts paid by it for the telephone system, as well as consequential damages caused by the failure of the telephone system to work.

1. Consequential Damages. Revised Article 2 provides that consequential damages are available unless disclaimed under an excluder clause which is not unconscionable, and expressly states that the clause is invalid if a remedy fails of its essential purpose.¹⁰² Therefore, the consumer

may recover consequential damages for the telephone switch if he establishes that the limited repair or replace remedy failed of its essential purpose in this classic "lemon" hypothetical. Alternatively, Proposed Article 2B provides, "[c]onsequential damages and incidental damages may be excluded or limited by agreement, unless the exclusion or limitation is unconscionable."¹⁰³ Additionally, the March 1997 Draft is revised to state "[i]n a case involving published informational content, neither party is entitled to consequential damages unless the agreement expressly so provides."¹⁰⁴

However, Article 2B does not provide that failure or unconscionability of an agreed remedy affects the enforceability of separate terms relating to such damages. The Reporter's Notes provide that the "two contract terms are separate unless made dependent by the agreement."¹⁰⁵ As a result, the consumer may not recover consequential damages for the associated software even if he establishes that the limited repair or replace remedy failed of its essential purpose since the disclaimer was not made subject to the performance of that remedy.

The Consumers Union questions why a party imposing an exclusive remedy has authority to enforce excluder clauses if the limited remedy fails of its essential purpose or was so limited as to be unconscionable. "If Article 2B does not choose to codify the case law on the failure of the essential purpose which permits resurrection of all code remedies in some circumstances, then it should at least avoid codifying the opposite rule."¹⁰⁶

2. Contract Limitations Period. Proposed Article 2B, Section 705 follows Articles 2 and 2A by establishing a four-year limit for a contract

action. However, Draft Article 2 precludes shortening the term for consumer contracts, while proposed Article 2B contains no similar limitation.¹⁰⁷ Consequently, the consumer may sue for breach of contract regarding the telephone switch under Article 2, but may not sue for breach of contract with respect to the associated software, covered by proposed Article 2B.

3. Licensor's Self-Help. The law is currently unclear as to the availability of self-help remedies for software vendors in the event of a licensee's breach.¹⁰⁸ If adopted, proposed Article 2B, Section 716 will validate a licensor's right to self-help. However, the merchant in Illustration C may not exercise his self-help remedy unless the following conditions are met:

(1) "there is a breach that is material as to the entire contract;"¹⁰⁹ and (2) if self-help can be done "without a breach of the peace, or a foreseeable risk of injury to person or significant damage to or destruction of information or property of the licensee."¹¹⁰

A licensee may not waive these two conditions.¹¹¹ In addition, Article 2B, Section 716(b) provides that a licensor may not include a self-help clause in a license unless one of two alternatives occur: the licensee either manifests assent to the term or the term is conspicuous. Only one of these two alternatives will be included in the final version of Article 2B.¹¹²

If a contractual term authorizes a self-help provision, the following two rules apply. First, the licensor must follow the two non-waivable conditions mentioned above, also proposed in Article 2B, Section 715. Section 715 precludes the self-help remedy if in the ordinary course of per-

formance under the license, the software or information "was altered or commingled so as to be no longer reasonably identifiable from other property or information of the licensee and the remedy cannot be administered without undue harm to the information or property of the licensee or another person."¹¹³ Second, "the licensee may recover damages from the licensor, including damages incurred by the licensee resulting from any foreseeable breach of the peace and injury to persons," if the licensor's self-help remedy is improper under Section 716 and results in loss to the licensee.¹¹⁴

The Consumers Union argues that the self-help remedy in proposed Article 2B, Section 716 should be limited to non-mass-market transactions.¹¹⁵ Additionally,

[t]he attempted safeguards placed in the self-help remedy sections . . . will work only if people who are wrongfully subjected to self-help repossession are able to raise the issue in court. It is highly unlikely that mass-market licensees will do so [since] the amount of injury they will suffer from repossession is unlikely to warrant litigation, unless it includes personal injury.¹¹⁶

VII. Conclusion

Proposed Article 2B of the Uniform Commercial Code, if adopted, will provide a much needed differentiation of information transactions from transactions involving the sale or lease of goods. It will enhance consumer certainty about the general rules that apply to electronic transactions. However, the Article's validation of shrinkwrap and bootscreen licenses may cause software ven-

dors to include more restrictive provisions in their software contracts and information licenses because of the certainty that such licenses will generally be enforceable. Although many of the differences between Articles 2 and 2B are justified because of the differences in subject matter, the

remaining distinctions regarding contract formation, warranties, and remedies will confuse the consumer and lead to unusual results unless the Coordinating Committee reconciles these differences before the NCCUSL and the ALI approve the drafts. •

E N D N O T E S

¹ Henry D. Gabriel & Katherine A. Barski, *Updating the UCC*, BUS. L. TODAY, Sept.-Oct. 1996, at 16, 18.

² *Id.* at 18.

³ Raymond T. Nimmer, Reporter, Article 2B Preface: Meeting the Information Age, UCC DRAFT: TRANSACTIONS IN SOFTWARE & DIGITAL INFORMATION, Nov., 1995 (Preface Draft v-vi).

⁴ "Consumer" is defined as an:

individual who is a licensee of information primarily for personal, family, or household use. The term does not include a person that is a licensee of information primarily for profit making, professional, or commercial purposes, including agricultural, business management, and investment management, other than management of an ordinary person's personal or family assets. Whether or not an individual is a consumer is determined by the intent of the licensee at the time of contracting.

U.C.C. § 2B-102(7) (March 1997 Draft).

⁵ "Information" 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." U.C.C. § 2B-102(18) (March 1997 Draft).

"License" is defined as:

a contract that grants permission to access or use

information if the contract expressly conditions, withholds, or limits the scope of the rights granted, grants only non-exclusive rights, or affirmatively grants less than all rights in the information, whether or not the contract transfers title to a copy of the information. The term includes an access contract and a consignment of copies of information. The term does not include an assignment or other contract that transfers ownership of intellectual property rights, or that reserves or creates a financier's interest, or a transfer by will or operation of law.

U.C.C. § 2B-102(21) (March 1997 Draft).

"Software contract" is defined as a "contract that licenses software or that conveys ownership of software, including a contract to develop software as a work for hire, whether or not the contract transfers ownership of a copy of the software." U.C.C. § 2B-102(34) (March 1997 Draft).

⁶ Carey R. Ramos & Joseph P. Verdon, *Shrinkwrap & Click-On Licenses After ProCD v. Zeidenberg*, THE COMPUTER LAWYER, September 1996, at 1-2.

⁷ *Id.*

⁸ For an excellent discussion of the reasons for creating a separate legislative framework to deal with software contracts and information licenses, see Raymond T. Nimmer, Reporter, Preface to U.C.C. § 2B (Dec. 1996 Draft).

⁹ Ann Winbald, Speech at Technology Strategies '94 in Scottsdale, Ariz. (May 16, 1994).

- ¹⁰ Nimmer, *supra* note 8, at 6.
- ¹¹ *Industries in Transition*, IAC NEWSLETTER, Dec. 1, 1996, at 9.
- ¹² Winbald *supra* note 9.
- ¹³ *The Explosion of Internet Content & Commerce*, 27 MONTGOMERY SEC. REP., Aug. 5, 1996, at 5.
- ¹⁴ *Id.*
- ¹⁵ *Id.* at 21.
- ¹⁶ Christopher Anderson, *The Accidental Superhighway*, THE ECONOMIST, July 1, 1995, at Survey 3.
- ¹⁷ See Intellectual Property and the National Information Infrastructure, THE REP. OF THE WORKING GROUP ON INTELL. PROP. RTS., Sept. 1995, at 58. Additionally, as Raymond Nimmer notes in his preface to the December 1996 Draft of Article 2B:

The 1990's witnessed a rapid shift in the source of value and value production in the economy. The service sector now dominates. The information industry exceeds most manufacturing sectors in size. The software industry did not exist in the 1950's; it is now a major factor in the economy. Its products present challenges to traditional law in international trade, taxation, intellectual property, and contract law. Digitization of communications, creation of an information 'superhighway,' and development of multimedia products, mean that those challenges will expand. It is inevitable that a contract law codification that purports to be a 'commercial code' must adjust to the new commerce.

Nimmer *supra* note 8, at 5.

- ¹⁸ <http://www.ali.org/ali/thisali.htm>. (Last visited on May 1, 1997.)
- ¹⁹ Gabriel & Barski, *supra* note 1, at 18.
- ²⁰ Terrence Maher & Margaret Milroy, *Licensing on a New Age*, BUS. L. TODAY, Sept.-Oct. 1996, at 22.
- ²¹ Gabriel & Barski, *supra* note 1, at 18. Additionally, the preface to the December 1996 Draft of Article 2B notes that, "The consistent theme has been that the rules applicable to . . . electronic information will be the same as the rules applicable to their printed counterparts." Nimmer, *supra* note 8, at 19.
- ²² Nimmer, *supra* note 8, at 7.
- ²³ *Id.*
- ²⁴ Gabriel & Barski, *supra* note 1, at 18.
- ²⁵ Nimmer, *supra* note 8, at 7.
- ²⁶ *Id.*
- ²⁷ Raymond T. Nimmer, Speech at Software Industry Coalition Meeting in Santa Clara, Cal. (Nov. 7, 1996).
- ²⁸ *Id.*
- ²⁹ Proposed Article 2B, Section 102(a)(6) of the March 1997 Draft contains a definition of "conspicuous" which recognizes that the size of the letters or their placement will not be

meaningful where a party acts by way of an electronic agent. The proposed definition of "conspicuous" includes the following language:

'Conspicuous' means so displayed or presented that a reasonable individual against whom or whose principal it operates should have noticed it or, in the case of an electronic message intended to evoke a response without the need for review by an individual, in a form that would enable a reasonably configured electronic agent to take it into account or react to it without review of the message by an individual.

U.C.C. § 2B-102(a)(6) (March 1997 Draft).

Proposed Article 2B, Sections 102(a)(6) (A) and (B) of the March 1997 Draft provide that, except in the case of an electronic agent, a term is per se conspicuous if it is a "heading in all capitals" or language in a record in "larger or other contrasting type or color than other language." The Article 2 Drafting Committee eliminated these safe harbors from its definition of conspicuousness at its September 1996 meeting. In its November 7, 1996 letter to the ALI members, the Consumers Union stated its position that these safe harbors should also be eliminated from Article 2B; however, they remain in the current draft of Article 2B.

- ³⁰ U.C.C. § 2B-102(14) (March 1997 Draft).
- ³¹ Maher & Milroy, *supra* note 20.
- ³² An "access contract" is defined as a "contract for electronic access to a resource containing information, resource for processing information, data system, or other similar facility of a licensor, licensee, or third party." U.C.C. § 2B-102(1) (March 1997 Draft).
- ³³ Nimmer, *supra* note 8, at 21.
- ³⁴ U.C.C. § 2B-112(a)(1)-(2) (March 1997 Draft).
- ³⁵ *Id.*
- ³⁶ U.C.C. § 2B-102(2) (March 1997 Draft).
- ³⁷ *Id.*
- ³⁸ U.C.C. § 2B-110(a) (March 1997 Draft).
- ³⁹ U.C.C. § 2B-110 Reporter's Note 1 (Dec. 1996 Draft).
- ⁴⁰ U.C.C. § 2B-110(b) (March 1997 Draft).
- ⁴¹ U.C.C. § 2B-106(a) (March 1997 Draft).
- ⁴² U.C.C. § 2B-106 Reporter's Note 2 (March 1997 Draft).
- ⁴³ U.C.C. § 2B-106(b)(1) (March 1997 Draft).
- ⁴⁴ U.C.C. § 2B-106(b)(2) (March 1997 Draft).
- ⁴⁵ U.C.C. § 2B-107 (March 1997 Draft).
- ⁴⁶ *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991); U.C.C. § 2B-107 Reporter's Note 2 (March 1997 Draft).
- ⁴⁷ *Cruise Lines*, 499 U.S. at 593-94.
- ⁴⁸ *Id.* (citations omitted).
- ⁴⁹ U.C.C. § 2B-107 Reporter's Note 2 (March 1997 Draft); See,

- e.g., CompuServe v. Patterson*, 89 F.3d 1257 (6th Cir. 1996).
- ⁵⁰ *CompuServe v. Patterson*, 89 F.3d 1257 (6th Cir. 1996).
- ⁵¹ *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996).
- ⁵² *Vault Corp. v. Quaid Software Ltd.*, 655 F. Supp. 750 (E.D. La. 1987), *aff'd*, 847 F. 2d 255 (5th Cir. 1988); *Step-Saver v. Wyse Technology*, 939 F.2d 91 (3d Cir. 1991); *Arizona Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759 (D. Ariz. 1993); *ProCD Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).
- ⁵³ *Vault Corp. v. Quaid Software Ltd.*, 655 F. Supp. 750 (E.D. La. 1987), *aff'd*, 847 F. 2d 255 (5th Cir. 1988); *Step-Saver v. Wyse Technology*, 939 F.2d 91 (3d Cir. 1991); *Arizona Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759 (D. Ariz. 1993).
- ⁵⁴ *ProCD*, 86 F.3d 1447. This decision was recently upheld and expanded by the Seventh Circuit in *Hill v. Gateway 2000 Inc.*, a case involving the sale of goods. The court held that terms included in the box containing a computer which stated that they governed the sale unless the computer was returned within 30 days were enforceable against a buyer who did not return the computer. *Hill v. Gateway 2000 Inc.*, 105 F.3d 1147 (7th Cir. 1997).
- ⁵⁵ *ProCD*, 86 F.3d at 1452.
- ⁵⁶ *Id.*
- ⁵⁷ "Mass-market license" expressly excludes: (1) any significant transaction between non-consumers, including (a) any transaction in which either the total consideration for the particular item of information or the reasonably expected fees for the first year of an access or similar contract exceeds some amount to be specified (the draft suggest \$500 or \$1,000); (b) any license that contemplates current use of software by more than one person acting separately; (c) any transaction in which the information is customized or otherwise specifically prepared for the licensee; or (2) a license of the right to publicly perform or publicly display a copyrighted work. The draft brackets a third proposed exception for online or access contracts between parties neither of which is a consumer with respect to the particular transaction. U.C.C. § 2B-102(25) (Jan. 1997 Draft).

In the March 1997 Draft, this has been modified to read as follows: A "[m]ass market license" means a standard form that is prepared for and used in a mass market transaction." U.C.C. § 2B-102(24) (March 1997 Draft). And, a

'[m]ass-market transaction' means a transaction in a retail market for information directed to the general public as a whole under substantially the same terms for the same information, and involving a licensee that is an end user and acquired the information in a transaction under terms and in a quantity consistent with an ordinary transaction in the general retail distribution. The term does not include: (A) a transaction between parties neither of which is a consumer . . . in which either the total consideration for the particular item of information or the reasonably expected fees for the first year of an access contract exceed [\$500]; (B) a transaction in which the information is customized or otherwise

specially prepared for the licensee; (C) a license of the right to publicly perform or publicly display a copyrighted work; or (D) a site license or an access contract between parties neither [of] which is a consumer with respect to the particular transaction.

U.C.C. § 2B-102(25) (March 1997 Draft).

- ⁵⁸ U.C.C. § 2B-102(25) Reporter's Note (Jan. 1997 Draft).

- ⁵⁹ U.C.C. § 2B-308(a) (March 1997 Draft).

- ⁶⁰ U.C.C. § 2B-308(b)-(c) (Jan. 1997 Draft). The March 1997 Draft of proposed Article 2B, Section 308 has been modified to provide that any obligation or limitation that falls within the exception quoted above and is disclosed on the exterior of the product or otherwise prior to payment of the applicable fee or that is part of the product description will become part of the contract and "manifestation of assent" to such term is not required. However, such terms do not become part of the contract without manifestation of assent if there was no opportunity to review them prior to payment. U.C.C. § 2B-308 (March 1997 Draft).

- ⁶¹ *The Unidroit Principles of International Commercial Contracts*:

constitute a system of rules of contract law specifically adapted to the special requirements of modern commercial practice. They are addressed to business persons, to arbitrators and to legal circles as a whole [focusing on the fields of contract law and international trade law.] They consist of a Preamble and 119 articles divided into seven chapters (General Provisions; Formation; Validity; Interpretation; Content; Performance and Non-Performance).

http://ra.irv.uit.no/trade_law/nav/unidroit.html. (Last visited on April 30, 1997.)

Article 2, Section 206(b) provides: "Where a consumer has manifested assent to a standard form, a term contained in the form which the consumer could not have reasonably expected is not part of the contract unless the consumer expressly agrees to it." U.C.C. § 2-206(b) (Nov. 1996 Draft); U.C.C. § 2B-308 Reporter's Note 5 (Jan. 1997 Draft).

- ⁶² A motion to delete the Article 2 consumer provision was defeated based in part on Article 2 Drafting Committee assurances that Article 2 would use an "objective" test. U.C.C. § 2B-308 votes note 1 (March 1997 Draft).

- ⁶³ *See, e.g., Vault Corporation v. Quaid Software Ltd.*, 655 F. Supp. 750 (E.D. La. 1987), *aff'd*, 847 F. 2d 255 (5th Cir. 1988) (holding that the provisions of a shrinkwrap license agreement which conflicted with the rights of computer program owners under Section 117 of the Copyright Act were unenforceable, notwithstanding a Louisiana law which purported to validate shrinkwrap licenses). As a consequence, some vendors include only a notice explaining permitted use of a copyrighted software program and a warranty instead of a license.

For example, Davidson & Associates includes the following copyright notice in its Kid Works 2 software program:

The software and the manual are copyrighted. All

rights are reserved. They may not, in whole or part, be copied, photocopied, reproduced, translated or reduced to any electronic medium or machine-readable form without prior consent, in writing, from Davidson & Associates, Inc. The user of this product shall be entitled to use the product for his or her own use, but shall not be entitled to sell or transfer reproductions of the software or manual to other parties in any way, nor to rent or lease the product to others without written permission of Davidson & Associates, Inc.

Other vendors include a shrinkwrap license which does little more than restate the permitted use of a copy of a copyrighted software program. For example, the Pixar Animation Studio license for Toy Story provides that:

This non-exclusive and personal License gives you the right to use and display this copy of the Software. You must treat the Software like any other copyrighted material except that you may either (a) make one copy of the Software solely for backup or archival purposes, or (b) install and use the Software on the hard disk drive of a single computer provided you keep the original solely for backup or archival purposes. You may not copy the written material accompanying the Software.

⁶⁴ Thomas A. O'Rourke, Recent Developments in Shrink Wrap Licenses, 14 IPL NEWSLETTER, no. 4, Summer 1996 at 37.

⁶⁵ Nimmer, *supra* note 8, at 11.

⁶⁶ "Embedded software" refers to "items such as program code or commands that are built into their carriers rather than associated with or called by them when needed." THE COMPUTER DICTIONARY. Published by Microsoft Press, 1991, p.9.

⁶⁷ The Consumers Union is:

a nonprofit membership organization . . . [which] provides consumers with information, education, and counsel about goods, services, health, and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of Consumer Reports.

Letter from Consumers Union to the ALI members, at 6. (Nov. 7, 1996).

⁶⁸ U.C.C. § 2B-104(b)(1)-(4) (March 1997 Draft).

⁶⁹ U.C.C. § 2B-104 Reporter's Note 2 (March 1997 Draft).

⁷⁰ U.C.C. § 2B-104 coordination meeting note (March 1997 Draft).

⁷¹ U.C.C. § 2-210 (January 1997 Draft).

⁷² U.C.C. § 2B-303(b) (Jan. 1997 Draft).

⁷³ U.C.C. § 2B-303(b) (March 1997 Draft).

⁷⁴ U.C.C. § 2B-303(b) (Jan. 1997 Draft); U.C.C. § 2B-303(b) (March 1997 Draft).

⁷⁵ Consumers Union, *supra* note 67, at 5; U.C.C. § 2-210(b) (Jan. 1997 Draft).

⁷⁶ *Id.*

⁷⁷ U.C.C. § 2-105 (Jan. 1997 Draft).

⁷⁸ U.C.C. § 2B-109 Reporter's Note (March 1997 Draft).

⁷⁹ U.C.C. § 2-105 Reporter's Note 1 (Jan. 1997 Draft).

⁸⁰ Consumers Union, *supra* note 67, at 5.

⁸¹ U.C.C. § 2-202(b) (Jan. 1997 Draft).

⁸² U.C.C. § 2-202(b)(2) (Jan. 1997 Draft).

⁸³ U.C.C. § 2B-301 (March 1997 Draft).

⁸⁴ U.C.C. § 2B-301 coordination meeting results (March 1997 Draft).

⁸⁵ U.C.C. § 2B-401(a)(4) (March 1997 Draft).

⁸⁶ U.C.C. § 2B-401(a)(4) alternative B (March 1997 Draft).

⁸⁷ *Id.*

⁸⁸ U.C.C. § 2B-401 Reporter's Note 4 (Sep. 1996 Draft).

⁸⁹ U.C.C. § 2B-401 Reporter's Note 6 (March 1997 Draft).

⁹⁰ *Id.*

⁹¹ U.C.C. § 2-402(b) (Jan. 1997 Draft).

⁹² U.C.C. § 2B-401(d) (March 1997 Draft).

⁹³ U.C.C. § 2-407(c) (Jan. 1997 Draft).

⁹⁴ Proposed Article 2B, Section 406(c) provides that "in a mass-market license, language that disclaims or modifies an implied warranty must comply with [the following requirements and must also] be conspicuous:"

1. Except as provided in 5 and 6 below, "language of disclaimer or modification must be in a record;" U.C.C. § 2B-406(b)(1) (March 1997 Draft).

2. To disclaim or modify an implied warranty of merchantability for computer software or for informational content or services, "language that mentions 'warranty of quality,' 'warranty of merchantability,' 'warranty of accuracy,' or [similar words] is sufficient. Language sufficient to disclaim one of the warranties is sufficient to disclaim the others [and] language sufficient to disclaim the warranty of merchantability in a transaction governed by Article 2" is also sufficient. U.C.C. § 2B-406(b)(2) (March 1997 Draft).

3. "To disclaim or modify an implied warranty [of effort to achieve a purpose, the following is sufficient:] 'There is no warranty that the subject of this transaction will fulfill any of your particular purposes or needs,' " or similar language. Language sufficient to disclaim a warranty of fitness under Article 2 is also sufficient. U.C.C. § 2B-406(b)(3) (March 1997 Draft).

4. "All implied warranties may be disclaimed or modified only by specific language complying with paragraphs (1) through (3) above or other language that in common understanding calls the licensee's attention to the exclusion of all warranties. Language stating that the information is provided 'as is' or 'with all faults' or [similar language] excludes warranties of merchantability for computer software or for informational content." The January Draft of proposed Ar-

title 2B Section 406 has bracketed a proposal that such language also be sufficient to disclaim the implied warranty of effort to achieve a purpose. U.C.C. § 2B-406(b)(4) (March 1997 Draft).

5. "An implied warranty may be disclaimed or modified by course of performance or course of dealing." U.C.C. § 2B-406(b)(5) (March 1997 Draft).

6. "There is no implied warranty with respect to a defect that was known or discovered by, or disclosed to the licensee before entering into the contract, or which would have been revealed to the licensee if it had not refused to make reasonable use of an opportunity to examine, inspect, or test . . . unless the licensee was not aware of the defect after the examination and the licensor knew it existed at that time." U.C.C. § 2B-406(b)(6) (March 1997 Draft).

To disclaim all implied warranties in a mass-market license, other than the warranty in proposed Article 2B, Section 401, "language in a record is sufficient if it states: 'Except for express warranties stated in this contract, if any, this [information] [computer program] is being provided with all faults, and the entire risk as to satisfactory quality, performance, accuracy, and effort is with the user,' or words of similar import." U.C.C. § 2B-406(c) (March 1997 Draft). Proposed Article 2B, Section 406(e) further provides that a contract term that complies with the foregoing is not unconscionable. U.C.C. § 2B-406(e) (Nov. 1996 Draft).

⁹⁵ An "electronic virus" is "any set of computer instructions that are designed . . . to damage or destroy information within a computer." U.C.C. § 2B-313(a) alternative A (March 1997 Draft).

⁹⁶ U.C.C. § 2B-313(b) alternative A (March 1997 Draft).

⁹⁷ U.C.C. § 2B-313(c) alternative A (March 1997 Draft).

⁹⁸ U.C.C. § 2B-313(c)(2) alternative A (March 1997 Draft).

⁹⁹ U.C.C. § 2B-313 alternative B (a) (March 1997 Draft).

¹⁰⁰ Consumers Union *supra* note 67.

¹⁰¹ U.C.C. § 2B-318 Reporter's Note 5 (Dec. 12, 1996 Draft).

¹⁰² U.C.C. § 2-810 (Jan. 1997 Draft).

¹⁰³ U.C.C. § 2B-703(d) (March 1997 Draft).

¹⁰⁴ U.C.C. § 2B-707(d) (March 1997 Draft).

¹⁰⁵ U.C.C. § 2B-703(d) Reporter's Note 5 (March 1997 Draft).

¹⁰⁶ Consumers Union *supra* note 67, at 9.

¹⁰⁷ U.C.C. § 2-814(a) (Jan. 1997 Draft); U.C.C. § 2B-705 (March 1997 Draft).

¹⁰⁸ See *American Computer Trust Leasing v. Jack Farrell Implementation Co.*, 967 F.2d 1207 (8th Cir. 1992). In a similar scenario, a plaintiff's medical diagnostics company purchased a computer system (the "Scribe system") from defendant Medical Diagnostic Imaging, Inc. The court found that the plaintiff had a cause of action against defendant under the Computer Fraud and Abuse Act resulting from defendant's use of a time bomb to deny use of the Scribe system. *North Texas Preventive Imaging, L.L.C. v. Harvey Eisenberg M.D.*, 1996 Lexis 19990. See also, Fred Davis, *Could the Repo Man Grab Your Invaluable Software?*, P.C. WEEK, Nov. 12, 1990, at 266 discussing *Revlon, Inc. v. Logistico*.

¹⁰⁹ U.C.C. § 2B-716(a) (March 1997 Draft).

¹¹⁰ *Id.*

¹¹¹ U.C.C. § 2B-716(c) (March 1997 Draft).

¹¹² U.C.C. § 2B-716(b) (March 1997 Draft).

¹¹³ U.C.C. § 2B-715(c) (March 1997 Draft).

¹¹⁴ U.C.C. § 2B-716(b)(2) (March 1997 Draft).

¹¹⁵ Consumers Union, *supra* note 67, at 10.

¹¹⁶ *Id.*