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To: Carlyle Ring, Geoffrey Hazard

Re: Comments on Article 2B

Date: October 8, 1998

These notes are written in three sections:

1. My primary recommendation is that the Article 2B project be tabled for several years or that its scope be narrowed to exclude mass-market transactions (broadly defined).
2. In the alternative, this section lists some of the primary issues for small customers that arise in the 2B draft.
3. I've often been asked for a complete list of customers' issues with Article 2B. This section reflects my best current shot at gathering those issues. The list isn't exhaustive, but I think that it's close.

I don't believe that we can find a road to success with 2B in the next year or three. But if the drafting process goes on, I will continue to participate and to put forward suggestions that I think are constructive. In this case, my suggestion is that we collect the list of concessions and objections to 2B from the several sides, discard some of them, and seek a new balance in a new draft. This memo's collection of customer issues is designed to support that review.

Section 1: Recommendation to Table

I agree with other people who have written to you urging that Article 2B be tabled.

In the alternative, I recommend amendment of the scope provisions:

2B-104 "This article does not apply to the extent that a transaction:"

ADD 2B-104(8) as follows:

2B-104(8) is a consumer or mass-market transaction.

Comment

I do not believe that we are on a road that can lead to a successful Article over the next three years. I believe that the law is too unsettled to result in successful negotiation at this time. We have fundamental differences in perception of the current state of the law, and thus in our valuation of concessions from each side. Over the next few years, Congress will settle several intellectual property issues. State and federal courts will have more opportunities to distinguish between shrink-wrapped clauses that will be enforced under current law and clauses that won't, and between software-related statements and demonstrations that will create express warranties and those that will not. On many issues, we will develop the common understandings that we lack today.

Here's a powerful example of our differences in valuation of even simple things. One of the concessions made by mass-market software publishers to customers is the right to limited incidental damages if the customer rejects the license. I don't know any customer's advocate who thinks that this is a valuable concession. At the Article 2B meeting that I remember that this was proposed in, I praised it as a "gesture"—it didn't have much

value but it was at least an *effort, a first step*, in addressing a serious concern of ours. Other customer-side responses at that meeting were less friendly to the proposal. From my discussions with publishers' lawyers, I am convinced that they believe that they made a significant concession, that might backfire and harm an honest business.

How can we achieve win-win negotiation if we can't even agree on the value of simple proposals? When it is remarkably difficult to assess the actual value of a given proposal to the other side? When the publishers put what they see as a block of gold on the table and we see it as grains of sand?

When too many variables are in play (for example, when the law is seriously unsettled), common ground and common understanding are hard to find.

Complicating the conceptual issue is the problem of perceived good faith. When people represent strongly different interests, it is easy for them to come to believe that the other side is not listening, is not acting reasonably, is not being honest, and is negotiating in bad faith. As lawyers, we know this phenomenon and we know how much it interferes with clean communication and mutual problem solving.

In the first months of 1997, my phone started ringing daily with reports (especially from journalists) that people were making harsh statements about each other. (The calls that I received were primarily attacks on consumer advocates or reports of harsh, personal attacks on consumer advocates, though I know that others in the process felt personally attacked during this period as well.) I raised this issue in this letter to Connie Ring in March, 1997:

March 24, 1997

To: Carlyle Ring
For Distribution: ARTICLE 2B COMMITTEE AND MAILING LIST

Dear Connie:

You called me the other day to express concern over the recent press coverage of Article 2B. I'm writing to respond with a few suggestions:

1. In a process that involves strongly held views, it is too easy to misunderstand the motives of people who don't agree with you. Press coverage is frustrating for *all* of us.
2. I want to encourage you to think of recent press coverage as the result of an effort to break up a logjam. Customers have little to gain from non-uniform laws. But we need good faith negotiations between industry and customer advocates that result in realistic compromises and a law that is reasonably fair to all sides. If not, Article 2B cannot muster customer-side support.

We are at a difficult time in the meetings. There have been threats by trade association representatives, over several meetings, to withdraw "Industry" support of the Article unless a particular decision was or was not made. And since the *ProCD* and *Gateway 2000* decisions, trade association representatives have said that they have won the shrinkwrap battle, and that the "Industry" has limited need for 2B's ratification of mass-market licenses.

These representatives must understand that their position is not so solid. I am not sure how, under these circumstances, customer representatives can foster such an understanding without contacting the press.

3. I am convinced that we can develop a set of rules that work for customers and publishers alike.

On my part, I will be glad to travel anywhere in the country to try to develop a compromise position with industry representatives.

I've heard a great deal from certain people about customer advocates' alleged bad faith and unwillingness to negotiate. I have not heard from these people any acknowledgment of the intransigence on the other side. It is a major effort to even gain the occasional acknowledgment that some customers have been genuinely cheated by some software developers. At times I've provided data or hypos to support points made by trade association representatives. To the best of my recollection, no trade association representative has ever supported any customer-side point made by me.

It takes two motivated sides to work creatively toward a mutually acceptable position. I welcome suggestions on effective ways to motivate the trade associations' representatives.

No one on the customer's side is trying to sabotage Article 2B. We would rather see a balanced law pass than an unbalanced law fail.

I met with several publishers' lawyers. Nader appeared to reach an understanding about documentation with the Software Publishers Association. Bob Gomulkiewicz (Microsoft's lawyer) and I submitted a joint proposal. Other proposals grew out of discussions with publishers' lawyers and with politically/legally active members of the software development community. Unfortunately, as far as I can tell, none of the products of those discussions resulted in changes to Article 2B itself.

Also, unfortunately, the rhetoric of bad faith has escalated. I'll illustrate this with one example, which has appeared in drafts of Article 2B:

CONSUMER PROTECTION RULES

In the political process that surrounds any new law, many public statements have been made about the effect of Article 2B on consumer protection. Most are political efforts to mislead.

The truth is simple. Article 2B retains current UCC consumer protections, preserves existing non-UCC consumer laws, **and** creates new protections for the digital environment. When contrasted to existing law in the fields covered, Article 2B **expands** or retains consumer protection in virtually all states.

Nevertheless, Article 2B is a commercial statute and its primary focus is not on the creation of a uniform consumer protection code. It does not aggressively regulate contracts as many consumer advocates would prefer. It does create new protections in some cases such as Section 2B-118 and 2B-208. It does not take away protections created under existing UCC law.

It is sad that what is (at least on our side) a good faith disagreement is characterized as a “political effort to mislead” (which I read to mean, “a pack of lies.”) We might be wrong. We might be fools. But we have worked in this process in good faith from the start and continue to do so.

Consider this logic: The proposal (to table 2B or put mass-market transactions out of the scope) is not a request to increase regulation or to create new consumer rights. It is a request to leave the current laws in place. If Gail Hillebrand or Todd Paglia or I believed that the net effect of Article 2B would be to expand or preserve the rights of mass-market customers, I would never have made this appeal to you to table 2B.

It is a reflection on the difficulties inherent in the 2B process that a statement like this would appear in the 2B draft itself, and survive from draft to draft.

Negotiation is extremely difficult when the two sides have fundamentally different notions of how much a proposal will benefit the one or cost the other. Until we can reach agreement on the basic facts, we will continue to have extreme difficulties in recognizing and valuing concessions and compromises.

I urge you to close down this process and restart it (with an entirely new draft) in five years.

Section 2: Primary Issues for Mass-Market Customers

The following recommendations are in order of appearance in the Draft, not in a priority order within the group. This list replaces a list of “key issues” that Todd Paglia and I published. My revisions are based on feedback that I’ve gotten to that list.

(1) *Revise the definition of conspicuousness*

Redefine 2B-102(a)(9) so that

- A term is not conspicuous with respect to an electronic agent unless it is presented in a form that would enable this particular agent to take it into account or react without review of the record by an individual.
- A term is not conspicuous with respect to an individual unless it is available to that individual before the individual takes possession of a copy of the information or becomes bound to pay for the license,
- Independently of the safe harbor, a term is not conspicuous if a reasonable person in the position of the licensee would not notice it.

(2) *Clean up the question of coverage by consumer protection laws*

Add:

2B-105(e) For the purpose of determining the applicability of consumer protection laws, a mass-market software license shall be interpreted as equivalent to a sale of goods.

COMMENT

Current case law (e.g. consistent decisions under Article 2) holds that mass-market software transactions are treated as sales of goods. Article 2B appears to take mass-market software transactions out of the scope of several consumer protection laws, such as the federal Magnuson Moss Warranty Improvement Act and California’s Song-Beverly Act, by defining the transactions as sales of licenses (intangibles) rather than sales of goods. There have been several statements by members of the Drafting Committee that 2B does not change consumer protection laws.

The proposed revision makes clear that 2B does not take mass-market software transactions out of the scope of the consumer protection rules. Note that a transaction that would not have been a consumer transaction under current law does not become one under this provision. For example, some mass-market transactions will be consumer transactions under Mag-Moss and others will not.

(3) Delete 2B's override of established consumer protections involving conspicuousness and consent

Delete 2B-105(e)(3) and 2B-105(e)(4)

COMMENT

The terms being deleted say that 2B's definitions of conspicuous and consent trump existing and future consumer protection rules, statutes, and case law dealing with conspicuousness and assent. These are significant consumer protections and they should not be eliminated.

(4) Limit the nonnegotiable choice of forum

Let mass market customers sue in their home state when (a) the total amount in controversy is less than their state's small claims court limit, and (b) the licensor would be subject to suit in the customer's state in the absence of a forum selection clause to the contrary. The effect of 2B as written today will be to often (perhaps usually) provide the small customer with no realistic forum for dispute resolution. Please note that a similar proposal was made by the Institute of Electrical and Electronic Engineers. The Independent Computer Consultants Association has made a broader proposal, to include low-priced non-mass-market software.

(5) Adopt the Restatement of Contract's definition of material breach

Replace 2B-109's definition of "material breach" with the Restatement of Contract's multi-factor test.

COMMENT

The definition in Article 2B will make it much harder for a customer of packaged (mass-market or other off-the-shelf) software to prove a material breach. For a detailed discussion, see the Appendix of Cem Kaner & David Pels, *Bad Software: What To Do When Software Fails* (John Wiley & Sons, 1998). Alternatively, I'll gladly walk through hypotheticals with any Commissioner.

(6) Clarify the definition of unconscionability

Add the following:

- 2B-110(b) In a mass-market contract, a term to which the licensee has manifested assent is unconscionable if the term:
 - 2B-110(b)(i) is bizarre or oppressive;
 - 2B-110(b)(ii) varies unreasonably from applicable industry standards or commercial practices;
 - 2B-110(b)(iii) substantially conflicts with a negotiated term of the contract;
 - 2B-110(b)(iv) substantially conflicts with a material purpose of the contract;
 - 2B-110b(v) conflicts with an applicable consumer protection law;
 - 2B-110b(vi) imposes a restriction on use or transfer that would not be enforceable if the copy of the information had been sold rather than licensed.

COMMENT

The proposed revisions seek to enforce the reasonable expectations of the parties and to prevent the licensor from circumventing the balance of rights inherent in current intellectual property laws. Despite the stated intent

of the Drafting Committee, a licensing statute, Article 2B is incapable of neutrality on this issue. No less an authority than Ray Nimmer, the Reporter for Article 2B, wrote of Copyright Act related preemption:

“There have been no cases in which [Copyright Act] Section 301 preemption was used successfully to challenge and invalidate a term of a contract that was enforceable as a matter of general state contract law.”

(Breaking Barriers: The Relation Between Contract And Intellectual Property Law Conference on the Impact of Article 2B, Berkeley, April 23-25, 1998. <http://www.SoftwareIndustry.org/issues/guide/docs/rncontract-new.html>.),

If Professor Nimmer’s summary is correct, then any Copyright-relevant term allowed under 2B (which will be “general state contract law”) will not be preempted by federal law. And therefore, Section 2B-105(a), which purports to invalidate any term preempted by federal law, will have no effect.

Restrictions on fair use (such as a ban on reverse engineering) will be fully enforceable unless they are limited by 2B. Note that this variation of the McManis / Perlman line of motions provides customers with no rights beyond those that they would obtain as first purchasers of a copyrighted or patented product. It creates no new standards (such as 2B-105’s violation of “a fundamental public policy”) that some people fear would require years of litigation to elucidate.

(7) Errors in mass-market electronic contracts

Generalize 2B-118(b) so that it includes all mass-market customers within the defense and limit consumer liability for all genuine electronic errors, at \$50.

(8) Add contract formation rules

2B-208(a) states “However, a term does not become part of the contract:”

ADD:

2B-208(a)(2)(i) in the event of a product ordered or delivered electronically, if the party did not manifest assent to the entire contract, including that term, before becoming obligated to pay for the product;

2B-208(a)(2)(ii) in all other events, if the party requested a copy of the contract and did not receive the entire contract, including that term, before becoming obligated to pay for the product;

COMMENT

This implements some of the intent of the Braucher/Linzer motion that was adopted in the Spring of 1998. That motion stated that “Article 2B has not reached an acceptable balance in its provisions concerning assent to standard form records and should be returned to the Drafting Committee for fundamental revision of the several related sections governing assent.” In the supporting memo, the authors noted that the practice of post-purchase presentation of license terms will undermine the development of terms like warranties and remedies. That is because there is no reasonable opportunity for competition involving differences in terms that are not available to customers before the sale. The proposed revision states that a term is not enforceable if it was not readily available to the customer before the sale.

(9) Delete Section 310: Electronic Regulation of Performance

COMMENT

As written, Section 310 goes so far beyond the notion of allowing licensors to time-limit a license under special circumstances that it should be scrapped altogether.

If it is appropriate at all to time-limit a mass-market software product, the time limit should be made conspicuous, before the sale.

Additionally, Section 2B-310(c) is outrageous: It states that “Unless authorized by a term of the agreement, this section does not permit a restraint that affirmatively prevents or makes impracticable a licensee’s access to its own information in the licensee’s possession by means other than by use of the licensor’s information or informational rights.” This is a guide for licensors. The clear implication is that if such a restraint IS authorized by a term of an agreement, it is permissible.

Article 2B should ban licensors from affirmatively preventing licensees’ access to their own data. It shouldn’t tell licensors how to do it, or that they can do it.

(10) Express Warranties

Revise 402(a)(1) to read

“An affirmation of fact or promise made by the licensor to its licensee in any manner, including a medium for communication to the public such as advertising, which relates to the information creates an express warranty that the information to be furnished under the agreement shall conform to the affirmation or promise.”

Alternatively, add a sentence to 402(a)(1)

(1) An affirmation of fact or promise made by the licensor to its licensee in any manner, including in a medium for communication to the public such as advertising, which relates to the information and becomes part of the basis of the bargain creates an express warranty that the information to be furnished under the agreement shall conform to the affirmation or promise.

ADD “Unless the accuracy of documentation is specifically and conspicuously disclaimed by the licensor to the licensee at or before the time of contracting, user-level documentation of the information is part of the bargain.”

Revise 402(a)(3) and 402(b) back to the standards of Article 2.

Revise 402(a)(3)

“A sample, model, or demonstration of a final product which is made part of the basis of the bargain creates an express warranty that the performance of the information will reasonably conform to the performance illustrated by the sample, model, or demonstration, taking into account such differences as would appear to a reasonable person in the position of the licensee between the sample, model, or demonstration and the information as it will be used.”

As follows:

delete “reasonably” from “will reasonably conform”

and delete “taking into account such differences as would appear to a reasonable person in the position of the licensee between the sample, model, or demonstration and the information as it will be used.”

Revise 402(b)

“It is not necessary to the creation of an express warranty that the licensor use formal words such as “warrant” or “guarantee”, or state a specific intention to make a warranty.

However, an affirmation or prediction merely of the value of the information, a display or description of a portion of the information to illustrate the aesthetics, market appeal or the like, of informational content, or a statement purporting to be merely the licensor's opinion or commendation of the information does not create a warranty."

By deleting:

"a display or description of a portion of the information to illustrate the aesthetics, market appeal or the like, of informational content."

COMMENT 402(a)(1)

It is ludicrous that 2B should allow sellers to enforce statements that they put in the package, that the customer can't see before the sale. These were no part of the basis of the bargain. But given that the publisher can enforce some of the statements it puts in the package, why should the customer have to prove that other statements that the publishers put inside the same packages are part of the basis of the bargain.

Look at this a different way—part of the basis for the bitter dispute over 2B is that it allows publishers to sell complex products without any enforceable specifications. Under Article 2B as written today, most customers will have nothing to rely on to prove (or even determine) a breach of contract. At least let them rely on the seller's own words.

My experience, across companies, is that it takes 15 minutes per page to thoroughly test a user manual against a mass-market software product. This is not a big expense for the publisher. The costs (such as wasted time and lost data) to customers of false documentation are staggering.

COMMENT 402(a)(3)

Article 2B introduces qualifiers that will allow a seller to engage in sharp practices during product demonstrations.

Article 2 had none of this. It says in 2-313(c) "Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model."

The comments to 2B-402 say "Representations created by demonstrations and models must be gauged by what inferences would be communicated to a reasonable person in light of the nature of the demonstration, model, or sample. In the world of goods, showing a sample of a keg of raw beans by lifting out a cup-full communications one inference as to a whole, while a demonstration of a complex database program running ten files creates an entirely different inference if the intended use of the system is to process ten million files."

This is balderdash. If the vendor wants to give the ten-million-file customer a demonstration of the system as it will run for that customer, let the vendor create a ten-million-file sample database and give an honest demonstration. If such a demonstration is not possible, let the vendor specifically advise the customer of the non-representativeness of the demonstration, in a way that ensures that the too-fast performance is not part of the basis of the bargain.

COMMENT 402(b)

If screen shots on the software package do not accurately reflect the product, the licensor will say "Oh, but the screen shot was just there to illustrate the aesthetics." What kind of proof must the customer muster to counter such a claim? Doesn't this legislated tolerance of sloppiness create an environment that is bound to encourage sharp practices?

(11) Expand perfect tender to reflect the difficulty in discovering serious defects in a brief inspection

Revise 2B-609(b):

"In a mass-market license, a licensee may refuse a tender of delivery of a copy if the contract calls only for a single tender and the copy or tender fail in any respect to conform to the contract. The refusal cancels the contract."

Append after "conform to the contract"

For purposes of this section, acceptance of software does not take place until thirty days after delivery of the software to the customer, unless the customer has obtained the substantial benefit of the product before then.

COMMENT

Software is complex to develop (as acknowledged by Article 2B's drafters) and complex to use. Defects that are serious to the customer but which might not constitute a material breach should still justify return of the product if the customer discovers them very shortly after starting to use the product.

Before predicting the death of the industry as a result of this clause, remember that Microsoft and several other successful publishers already offer 30 to 90-day money back satisfaction guarantees.

(12) Remedy Limitations

Replace 703(d) with the following:

2B-703(d) Consequential damages and incidental damages may be disclaimed or limited by agreement unless the disclaimer or limitation is unconscionable. The following are unconscionable:

2B-703(d)(i) Limitation of incidental damages for per minute or per call fees for technical assistance for a defective information product, when the assistance is provided by or through a licensor of the product.

2B-703(d)(ii) Limitation of consequential damages for injury to the person in the case of a mass-market transaction for a computer program.

2B-703(d)(iii) Limitation of consequential damages (other than lost profits) or incidental damages that were caused by a software defect that was known to the licensor at the time of the transaction or that would have been discovered had the licensor subjected the product to a modest level of testing, unless at or before the time of contracting, the licensor supplies to the licensee a record that:

2B-703(d)(iii)(1) describes the defect in a way that is understandable to a typical member of the intended market for this product;

2B-703(d)(iii)(2) explains how to work around the defect in a way that is understandable to a typical member of the intended market for this product;

2B-703(d)(iii)(3) explains how to avoid the defect in a way that is understandable to a typical member of the intended market for this product;

2B-703(d)(iii)(4) and explains how to recover from the defect in a way that is understandable to a typical member of the intended market for this product.

COMMENT

First, the limitation on incidentals is restricted so that software publishers and retailers will not profit from defects in the mass-market products that they sell. This removes an incentive, and creates a disincentive, for publishers to ship shoddy code.

An alternative proposal states:

A mass-market publisher should not be able to exclude incidental expenses that are incurred in reporting the defect, in returning the defective product, or in seeking support from the publisher for the defect or its consequences.

Second, the current 2B limitation involves only injuries caused by embedded software. There is no reason to exclude injuries to individuals that were caused by non-embedded software. Additionally, liability for injuries to an individual for personal injury should not be disclaimable in nonnegotiable contracts.

Third, software publishers should be liable to customers for defects in mass-market products that they knew about but did not document when they sold (or licensed) their product and for defects that would be obvious to a publisher who subjected the program to a modest level of testing. (This latter is intended as a gross negligence standard.) When dealing with an industry that ships products with known defects as a matter of course, customers should at least be given a fair chance to mitigate their losses. Liability should include reimbursement for out-of-pocket incidental and consequential losses. Todd Paglia and I suggested that the damages could be capped.

If we create non-excludable accountability for hidden known defects, we should also reverse the default rule for other consequentials. The 2B Drafting Committee originally recommended that consequentials should not be available by default. This was partially motivated by recognition of genuine problems of small licensors. The people who are most affected by the default rule are small developers who lack the market power or (more often) the legal sophistication to include remedy exclusions in their contracts.

Please note that similar proposals (regarding known defects) have been made by the Institute of Electrical and Electronic Engineers, and the Independent Computer Consultants Association.

(13) *More on remedy limitation*

DELETE 2B-703(a)(1)

DELETE 2B-703(c)

COMMENT 2B-703(a)(1)

703(a)(1) allows the vendor to preclude “a party’s right to cancel for breach of contract.” This doesn’t even have to be conspicuous in the contract (let alone visible to the customer at the time of sale—a clickwrap, post-sale, will do). It will be hard to argue that a term that is expressly permitted by statute is unconscionable, even though this term would often be (by most people’s standards) unconscionable.

COMMENT 2B-703(c)

When the agreed remedies have failed or been found unconscionable, many states today allow the buyer of an Article 2 product to collect the full range of remedies for breach of contract, while others do not. By deleting 2B-703(b), we settle this nonuniformity to the benefit of licensors. Instead, the law should follow the Article 2 commentary and provide a minimum adequate remedy for the licensee, especially when the licensor is unable or unwilling to provide the agreed remedy (in effect, a further breach of contract).

(14) *Right to privacy in electronic transactions*

Add a right to privacy like the following

PRIVACY PROTECTION.

(a) Personal information concerning an individual or data concerning the licensee's actual use of a licensed program, or the context, or environment in which use occurs, may not be collected, transferred, made available to, or employed by the licensor other than in performing the contract unless before collecting the information

(1) the licensor notifies the licensee of its intent to collect the information, the manner in which it intends to use the information, and the licensee's right to object to the collection or use of the information; and

(2) the licensee expressly consented to the collection or use of the information.

(3) the licensee is provided a copy of the information; and

(4) if the information is transferred from the licensee's system or from a file or program controlled by the licensee, the licensee is provided with a reliable means of determining whether the provided copy of the information matches the communication that was actually sent.

(b) The limitations in subsection (a)(1) and (a)(2) do not apply to the following uses or types of information:

(1) transactional information obtained in the ordinary course when initiating the transaction;

(2) aggregate information obtained in the ordinary course regarding the use of a system or site or a part thereof owned or controlled by the party obtaining the information;

(3) information collected and used solely by a computer program in the licensee's system and not transferred to the licensor;

(c) A licensee who consents under subsection (a)(2) may object at any time to any further use or collection. Upon receipt of the objection, the licensor shall cease to collect or use the information except as allowed by subsection (b).

COMMENT

The privacy issue was discussed in 2B meetings and dropped. Studies of Internet users have repeatedly shown widespread concern with privacy. This is an issue that won't go away. We should deal with it now, while we are working on the infrastructure

(15) Add a requirement of reasonable care to prevent viruses on shipping product.

Add the following:

The publisher of a mass-market software product makes a nondisclaimable implied warranty that it has exercised great care to ensure that the product does not contain a virus. This warranty does not arise in the event that:

(a) The licensee agreed, before taking delivery and before becoming obligated to pay for the product, to a conspicuous term that specifically stated that the licensor would deliver files that had not been checked for viruses.

(b) The contamination of the file occurred during delivery, and was introduced by a third party.

(c) The licensor provided the file without charge.

COMMENT

Viruses sometimes come with mass-market commercial software. It is impossible to achieve 100% certainty that there is no virus on a product. However, reasonable measures can be taken, but are often not taken, to detect and eliminate viruses before shipping a product.

Viruses can cause extensive damage, such as lost data, wasted time, and the need for expensive technical consultants. In my experience, which spans about 300 software releases in the DOS, Macintosh, Amiga, Commodore 64, and Apple //gs markets, not one product that I was directly or indirectly associated with shipped with a virus. The processes for detecting and preventing release of viruses are tedious but not rocket science. Why should customers be at substantial risk in order to save publishers a few hours of work per product?

We discussed virus liability during the 2B meetings. Publishers' lawyers wanted to be able to disclaim the warranty as a matter of boilerplate. Customers' advocates considered this disclaimer unacceptable. Ultimately the drafting committee chose to drop the idea of a warranty against viruses. However, the problem hasn't gone away. And I am still amazed, as a software development consultant, by the number of companies I encounter who release software using processes that I would call "reckless."

Several members of the drafting committee pointed out that "the parties may agree" (which means that "the licensor may declare," in a mass-market license) on the standard of reasonable care. To avoid the development of boilerplate definitions that wipe out the "reasonable care" requirement, I use the phrase "great care." Other solutions might be more appropriate.

Section 3: The Laundry List

The following recommendations reflect most of what I believe are the remaining consumer-side objections to Article 2B. This list reflects the order of sections in Article 2B and not priority order.

We have talked and talked through most of these. Unless they are essential, I am not adding comments to the listed items. If you have any question about one of these, please contact me at kaner@kaner.com.

REPLACE 2B-102(a)(10) as follows:

2B-102(a)(10) "Consumer" means an individual who is a licensee of information or informational rights.

COMMENT—The distinction that I recommend drawing between the mass-market licensee and the consumer is that the mass-market licensee can be a corporation whereas the consumer cannot. Most software that is bought by individuals and used at home can be (and is designed to be) used for a business or professional purpose. "Consumer" should not exclude the high school teacher who surfs the net at home looking for material for tomorrow's class, or the graduate student who uses a word processor at home to write research papers, or the unemployed secretary who buys an introductory level desktop publishing program to make flyers for a home-based network marketing "business" that will probably never show a profit.

REVISE 2B-102(a)(14)

"Copy" should exactly match the definition in the Copyright Act.

REVISE 2B-102(a)(19)

"Electronic Agent" should be renamed "Electronic Device."

COMMENT—An electronic "agent" has no accountability to its principal. It is merely a machine employed by a person. Article 2B should eliminate the excess baggage that comes with the inappropriate use of the word "agent."

REVISE 2B-102(a)(24)

Delete "information" from the current wording: "Information" means data, text, images, sounds, mask works, or works of authorship."

COMMENT Works of authorship are not "information." Books are not "information." They are containers of information. This is another example of redefining a word in common use, with the risk that the new term will carry surplus meaning from the common definition.

REVISE 2B-102(a)(26)

"Informational content" means information that is intended to be communicated to or perceived by an individual in the ordinary use of the information, or the equivalent thereof. The term does not include instructions used solely to control the interaction of a computer program with other computer programs or with a machine.

Add the following sentence:

The term does not include the user interface of a computer program.

COMMENT—"Information content" as currently defined includes the user interface of a computer program. Article 2B makes special provisions for information content in later sections, limiting warranties and liability beyond the limitations for "information." As applied to the user interface, these limitations take a stand in an engineering debate that has not been seriously explored during 2B Drafting Committee meetings and that, with all due respect to the Committee, is outside of the skill and experience of most or all of the members of that Committee. It will create consequences that are probably unintended.

The user interface of a computer program can render the program unfit for normal use. The user interface can predictably induce serious user errors that cause losses to the user that far exceed the cost of the software. As an extreme example, the message "Press 1 to back up your data" is "information content" under the 2B-102(a)(26) definition. Suppose that pressing 1 has the effect of erasing your data instead of backing it up.

Case 1 -- if other specifications make it clear that pressing 1 should lead to data backup, then the defect is in the internal programming and liability for the defect may attach to the publisher.

Case 2 -- if other specifications make it clear that pressing 1 should lead to data erasure, then the defect is in the published information content and liability for the defect will not attach to the publisher.

This is not the type of distinction that should be the basis for a liability / no-liability result.

DELETE 2B-102(a)(27)

"Informational rights" include all rights in information created under laws governing patents, copyrights, mask works, trade secrets, trademarks, publicity rights, or any other law that permits a person, independently of contract, to control or preclude another person's use of the information on the basis of the rights holder's interest in the information.

"Informational rights" should be eliminated as a phrase and as a concept in Article 2B. The "Informational rights" associated with patents are substantially different from those associated with copyrights are substantially different from those associated with trade secrets, etc.

REVISE 2B-102(a)(28)

"License" should not include transactions that transfer title to a copy

REVISE 2B-102(a)(29)

"Licensee"—if the transaction is not a license, the customer should not be called a licensee.

REVISE 2B-102(a)(30)

"Licensor"—if the transaction is not a license, the vendor should not be called a licensor.

REPLACE 2B-102(a)(32)

New 102(a)(32)

"Mass-market transaction" means a transaction within this article that is with an end-user licensee and is directed to the general public as a whole under substantially the same terms for the same product.

COMMENT—Within the current 2B definition, the restriction to a "retail" market creates ambiguity. For example, is a purchase of a book from Barnes and Noble (the store) a mass-market transaction but the same purchase of the same book from <http://www.barnesandnoble.com> is not?

REVISE OR DELETE 2B-102(38)(B)(ii)

REVISE OR DELETE 2B-102(38)(B)(ii)(II)

(38) "Receive means: (B) with respect to a notice (ii) to be delivered to and available at a location designated by agreement for that purpose, or, in the absence of an agreed location: (II) in the case of an electronic notification, to come into existence in an information processing system in a form capable of being processed by or perceived from a system of that type, if the recipient uses, or otherwise has designated or holds out, that system as a place for receipt of such notices."

COMMENT re 2B-102(38)(B)(ii). We know how this will play out. In the shrink-wrapped document of adhesion that Article 2B labels a "contract" the seller will designate its own website as the location for notices. The determination will be stated in a term provided post-sale, inconspicuously. The seller also gets to determine the standards for reasonable notice, and the seller's decision will stick unless the court finds it manifestly unreasonable. MPAA noted the same problem in its brief and concluded that customers will have to check the vendor's web site constantly to determine whether there has been a revision in the terms of sale. Will a court find this "manifestly" unreasonable? Why should the statute provide a structure for the inevitable overreaching in the first place?

COMMENT re 2B-102(38)(B)(ii)(II). When the agreement doesn't specify a location for notices, will a notice be deliverable to the customer's email address? This has been the assumption in 2B discussions. Unfortunately, people who don't routinely check their e-mail (as many don't) will receive notices but not realize it until after the notice has taken effect. Also, if the notice is received at the customer's ISP but is then lost by the ISP, the customer will be held to have received the notice even though he never saw it.

Receive, with respect to an electronic notice, should refer to actual receipt by a human.

REVISE 2B-103(c)(2)

DELETE "applies to a transaction to which this article does not otherwise apply and"

COMMENT—As I understand this not-easy-for-me-to-understand section, if Article 2B applies to part of a transaction (such as a car with software), then the current 2B-103(c)(2) allows the manufacturer to move the entire transaction from Article 2 to 2B.

DELETE 2B-105 (a)

COMMENT—105(a) states that “A provision of this article which is preempted by federal law is unenforceable to the extent of such preemption.” This is entirely redundant with the constitution. It is misunderstood by some as a new consumer protection. Let’s clear the air and provide only what we provide.

DELETE 2B-105(b)

COMMENT—The Perlman amendment was rewritten to become this: “A contract term that violates a fundamental public policy is unenforceable to the extent that it is invalid under that policy.”

Isn’t this hornbook law already? Or something narrower than current law, which invalidates contract terms that violate public policy? Rather than providing the protections inherent in the Perlman amendment, 2B-105(b) appears to either restate or further restrict current protections.

DELETE 2B-106(c)(3)

COMMENT—2B-106(c)(3) states “Unless this article requires a term to be conspicuous or negotiated or that there be manifest assent or express agreement to the term, or makes a term that fails to meet any of these requirements unenforceable, such a requirement is not a condition to the enforceability of the term.”

What this means is that if a licensor dreams up some new outrageous term, that term need not be presented conspicuously to the customer. This provision pre-authorizes the inconspicuous presentation of any sharp term that is not specifically discussed in Article 2B.

DELETE 2B-107 (Choice of law)

COMMENT—Leave the choice of law to be determined in the same way as it is in all other contracts.

DELETE 2B-108 (Choice of forum)

COMMENT—Preferably, adopt the mass-market protection discussed above. Alternatively, delete this and leave choice of law to be determined in the same way as it is in all other contracts.

For electronic transactions, it would be reasonable to include one special requirement here. The law could provide an incentive for the buyer and seller to reveal their locations. If the seller does not reveal it, the forum and law become those of the customer’s home state. If the buyer does not reveal location, on request of the seller, the forum and law become those of the seller’s home state. If either side reveals falsely, the forum and law become those of the other’s home state. This disclosure allows the parties to refuse to deal with each other if they cannot stand the choice of law and forum that will otherwise result.

This proposal takes care of the repeated complaint raised by some people that it is impossible to know where anyone is on the net, and therefore (they say), the choice of law and forum should always be made to favor the vendor (who knows where it is or what its choice is). (As if the customer does not know where he is or what his choice is.)

2B-110 Restore the Perlman Amendment

COMMENT—Perlman’s amendment was “If a court as a matter of law finds the contract or any term of the contract to have been unconscionable or contrary to public policies relating to innovation, competition, and free expression at the time it was made, the court may refuse to enforce the contract or it may enforce the remainder of the contract without the impermissible term as to avoid any unconscionable or otherwise impermissible result.” Section 2B-105(b) is not the same as this.

2B-111 Revise manifest assent

DELETE 2B-111(a)(2) and 2B-111(c)

2B-111(a) A person or electronic agent manifests assent to a record or term in a record if the person, acting with knowledge of, or after having an opportunity to review the record or term, or the electronic agent, after having had an opportunity to review:

(1) authenticates the record or term;

DELETE (2) in the case of conduct or statements of a person, the person intends to engage in the conduct or make the statement and knows or has reason to know that the other party may infer from the conduct or statement that the person assents to the record or term;

DELETE 2B-111(c)

"(c) Conduct or operations manifesting assent may be proved in any manner, including a showing that a procedure existed by which a person or an electronic agent must have engaged in the conduct or operations in order to proceed with the use it made of the information or informational rights. Proof of assent depends on the circumstances. Compliance with subsection (a)(2) is established by conduct that affirms assent and subsequent conduct that electronically reaffirms assent.

COMMENT: This is the provision that validates a post-sale "click-wrap" contract—the customer buys the product (at the store or by mail order or by downloading), but when she tries to install the software, she is presented with a new contract. She has to click "I Agree" in order to install the software. This "I Agree" is treated as "assent"—as if the person has actually agreed to anything.

When the customer pays for the product, she must be buying the right to install the software. Otherwise, the initial sale is just a sham transaction. If she already has the right to install the software, then she should be entitled to install it and use it without those actions triggering any new legal responsibilities.

2B-111 Manifest assent

RESTORE 2B-111(b) "Mere retention of information, informational rights, or a record without objection is not a manifestation of assent."

2B-112 Fundamentally revise opportunity to review / refund

COMMENT—The idea of creating a post-sale "opportunity to review" of material terms, as the standard way of presenting the significant terms of the contract, is flawed. Under the Article 2 structure, the customer has to agree to post-sale material modifications. If the customer doesn't agree, the contract isn't modified. The same protection should be provided for Article 2B customers.

COMMENT—2B-112(a)(2) The notion of the "reasonably configured electronic agent" is elusive, at best. An electronic device has an opportunity to review a record or term only if it is made available in a manner that would enable that particular electronic device to react to the record or term.

DELETE 2B-112(c).

COMMENT 2B-112(c) If a right to a refund is part of the definition of "opportunity to review" then it should apply to all contracts.

REVISE 2B-115 (a)

Currently 2B-115(a) states "Subject to subsection (b) and Section 2B-116, between parties to an attribution procedure, a party that requires use of an attribution procedure that is not commercially reasonable as a condition for entering a transaction is liable for losses caused by reasonable reliance on the procedure in a transaction for which the procedure was required."

REVISE AS FOLLOWS "a party that requires OR RECOMMENDS"

COMMENTS: One of the points raised at the NCCUSL annual meeting is that the business that sets up the attribution procedures understands their risks. If the business presents a choice to the customer, with a commercially reasonable procedure and a commercially unreasonable one (especially if it charges more for use of the commercially reasonable procedure) then the customer will choose the easier or cheaper method. If the seller wants to avoid liability for using an insecure procedure, it should have to disclose the risk.

DELETE 2B-115(b)

Delete 2B-115(b) The liability of a party under subsection (a) is limited to losses in the nature of reliance or restitution. The party's liability does not extend to:

- (1) loss of expected benefit;
- (2) consequential damages;
- (3) losses that could have been prevented by the exercise of reasonable care by the aggrieved party;
- or (4) a loss the risk of which was assumed by the aggrieved party.

COMMENT--The seller is only liable if it recommended (or required) the unreasonable procedure and the customer suffered a loss as a result. Why decide, as a matter of law, to always stick the customer with the consequences of the seller's choice?

DELETE 2B-115(c)

Delete 2B-115(c) "For purposes of subsection (a), a person does not "require" a procedure if the person makes available to the other person a commercially reasonable alternative electronic or non-electronic procedure and the other person selects a commercially unreasonable procedure."

COMMENT—2B-115(c) could be made acceptable if the person not only makes available a commercially reasonable procedure but also explicitly identifies the unreasonable one as unreasonable, to be used at the customer's risk.

DELETE Section 2B-116, Section 2B-117, Section 2B-118, Section 2B-119, Section 2B-120

COMMENT—The UETA is on the same schedule as Article 2B. There is no reason to have separate laws for Article 2B versus everything else. The UETA has involved focused discussion on electronic commerce, in much more depth than 2B.

Barring deletion, Section 2B-118 should generalize to mass-market customers (at a minimum) and should cap consumer liability at \$50 in the event of a genuine error.

REVISE 2B-203

Given that “manifestation of assent” has been (should be) substantially revised, 2B-203 will require revision as well.

DELETE 2B-204

COMMENT—Leave this to the UETA or fundamentally revise it. As one specific objection, this section rewards sellers for adopting the most inflexible procedures possible. (See 2B-204(2)(B)).

DELETE 2B-207

COMMENT—This lays out the rule that “a party adopts the terms of a record, including a standard form, if the party agrees, by manifesting assent or otherwise, to the record.”

The notion of “manifesting assent,” as defined in Article 2B, bears no relationship to “agreement.”

DELETE 2B-208

COMMENT Same basic flaw as 2B-207.

REVISE 2B-208(b)(2)

208(b)(2) provides for “reimbursement of any reasonable expenses incurred related to the return and complying with any instructions of the licensor for return or destruction of the information or, in the absence of instructions, return postage or similar reasonable expenses in returning the information”.

ADD “reimbursement of any reasonable expenses, INCLUDING THE REASONABLE VALUE OF THE LICENSEE’S LABOR,”

COMMENT--Without endorsing 2B-208 or the claim that 2B-208(b) provides a consumer protection, this request seeks to conform this section to discussions of it at the NCCUSL annual meeting.

Note that the right of refund provided under this section should not be confused with the right of refund requested by consumer advocates throughout the drafting process. That request has been for a speedy refund in the event that the customer discovers defects in the product during early use of the product. The 208 “right of refund” extinguishes as soon as the customer clicks “I agree” during installation, before using it and before she has had any opportunity to discover defects.

DELETE 2B-209(b)

Delete -- “If there is no agreement on a material element of scope or if there is a material disagreement about a material element of scope, a contract is not formed by conduct.”

COMMENT—Either contracts can be formed by conduct despite a lack of agreement on a material term or they cannot. There is no principled basis for favoring a particular material term of significance to the licensor.

REVISE 2B-304 (b)

2B-304 (b) “If a contract provides that its terms may be modified as to future performances by compliance with a described procedure, a change proposed in good faith pursuant to that procedure becomes part of the contract if:

- (1) the procedure reasonably notifies the other party of the change; and

(2) in a mass-market transaction, the procedure permits the other party to terminate the contract as to future performance if the modification is of a material term and such party in good faith determines that

the modification is unacceptable."

REVISE AS FOLLOWS—delete "in a mass-market transaction" in 2B-304(b)(2)

DELETE OR REVISE 2B-304(c)

Delete 2B-304(c) "The parties by agreement may determine the standards for reasonable notice unless the agreed standards are manifestly unreasonable in light of the commercial circumstances."

REVISE 2B-308 DURATION OF CONTRACT.

COMMENT: In a mass-market software product, the term of a license that transfers ownership of a copy should be permanent, period. It should not be possible to override this with an "agreement" (undoubtedly post-sale, clickwrap) that limits the term. After all, how is this different from a book? Alternatively, at a minimum, the term should be conspicuous and presented before the sale.

REVISE 2B-403(b)(2) Merchantability

Current 2B-403(b)(2) "To be merchantable, a computer program and any physical medium on which it is delivered must: (2) be fit for the ordinary purposes for which it is distributed;"

REVISION change "for which it is distributed" back to Article 2's "for which such a program is used."

COMMENT--Under Article 2, most chairs would be unmerchantable if you couldn't stand on them to change a light bulb. Most people routinely use chairs that way, so chairs have to be reasonably fit for that type of use. But under Article 2B, a little sticker buried inside the packaging of the chair that says "This is for sitting, not for changing light bulbs" would let the chair be considered merchantable even if most users of the chair try to stand on the chair and injure themselves when it collapses. The distinction is that Article 2 considers merchantability from the viewpoint of the user, whereas Article 2B, as in so many other places, looks at the world through the eyes of the seller.

DELETE 2B-403(d)

Delete "A warranty created under this section applies to the functionality of a computer program but does not relate to informational content, including its aesthetics, market appeal, accuracy, or subjective quality, whether or not the content is included in or created by a computer program."

COMMENT This provision might have been acceptable if it only referred to data and traditional written descriptions. But "informational content" includes the user interface of a computer program. Many errors in a program that render it unfit for use will now be subject to a haggale—"Oh, but that's a defect at the user interface level. The law says that there are no warranties for defects in the user interface." How expensive a litigation will it take to draw the line between a user interface defect and an underlying functional defect in a given situation?

REVISE 2B-406(6)

2B-406(6) "In a mass-market transaction, language that disclaims or modifies an implied warranty must be conspicuous. "

REPLACE IT WITH 2B-406(6) Language that disclaims or modifies an implied warranty must be conspicuous and must be presented to the licensee at or before the customer undertakes an obligation to pay for the information.

COMMENT Article 2B should ban post-sale warranty disclaimers. The implied warranty of merchantability is not a mere consumer protection and a right to know whether there is a warranty or not should be, as it is under Article 2, provided to all customers, not just mass-market customers.

Post-sale warranty disclaimers are not allowed for sales of goods. Courts routinely refuse to enforce them in commercial contracts as well as consumer contracts. The circumstances under which post-sale disclaimers have been enforced by the courts are rare. Vendors in many industries would like to be able to disclaim all warranties in a record, after the customer has paid his money. Why should Article 2B vendors get this privilege (why should Article 2B customers be cut off from their normal privileges) when the rest of American vendors don't have it?

REVISE 2B-406(d)

2B-406(d) "There is no implied warranty under Sections 2B-403, 2B-404, or 2B-405 with respect to a defect that before entering the contract was known to, discovered by, or disclosed to the licensee, or that would have been discovered by the licensee if it had made use of a reasonable opportunity provided to it before entering into the contract to examine, inspect, or test the information or a sample thereof, unless the licensee was not aware of the defect after examination and the licensor knew that it existed at that time."

REVISE BY DELETING "or that would have been discovered by the licensee if it had made use of a reasonable opportunity provided to it before entering into the contract to examine, inspect, or test the information or a sample thereof, unless the licensee was not aware of the defect after examination and the licensor knew that it existed at that time."

COMMENT—What is a "reasonable opportunity?" How much testing time is enough? How much expertise will we attribute to the customer? This is a fact intensive determination that will often require expert testimony on both sides. It creates far too much opportunity for mischief. For example, if the licensor knows that a defect exists, but the customer does not take sufficient advantage of a "reasonable opportunity" to test, then the licensor has no duty to advise the customer of the defect and there is no implied warranty as to this known defect.

COMMENT—This is the only place in Article 2B that points out that software publishers know about defects that the customers might find difficult to discover. And the statement here is that the publisher is allowed to keep its knowledge a secret unless the customer makes an examination of the product that should have revealed the defect but fails to find it. The drafters of Article 2B have here demonstrated that they know how to distinguish between known and unknown defects. All of the later remedy limitations should be appraised with this in mind: the limits apply equally to not-yet-discovered defects (for which they might be fair) and for already-known defects (for which these remedy limitations are outrageously unfair). But more on that later.

REVISE 2B-406(e)

2B-406(e) "An implied warranty can also be disclaimed or modified by course of performance, course of dealing, or usage of trade."

REVISE BY DELETING "or usage of trade."

In software, vendors have been pretending to disclaim all warranties, express and implied, for years. The express warranty disclaimers are void on their face. The implied warranty disclaimers, when presented to software customers post-sale, have never been upheld. Do we say that there has been a usage of trade developed (even

though it was never enforceable) or do we say that there is not yet any evidence of “usage of trade” in the mass market?

DELETE 2B-502(1)(B)

Delete 2B-502(1)(B) “(1) A contractual interest can be transferred unless the transfer: (B) would materially change the duty of the other party, materially increase the burden or risk imposed on the other party, disclose or threaten to disclose the other party’s trade secrets, confidential information or information that is subject to an enforceable non-disclosure agreement, or materially impair the other party’s property or its likelihood or expectation of obtaining return performance.”

COMMENT Under Article 2B, any mass market software license can include non-disclosure clauses (these are just contractual use restrictions). And publishers can certainly argue that a transfer can materially impair their property or their expectation of obtaining return performance—after all, if someone can sell software USED then the publisher doesn’t make the sale NEW. We have a long history of publishers wanting to ban used book sales, used record sales, used-all-sorts-of-things sales. Restrictions on alienation (your ability to sell what you buy) have been strongly disfavored in American law for a long time. Within the intellectual property world, these are banned under the doctrines of exhaustion and first sale.

So what entitles software publishers to bar mass-market customers from reselling or giving away software products that they are finished with?

For mass-market software, licensors should not be able to ban the transferability of copies of their products, except to the extent that this is achieved under Copyright law.

DELETE 2B-502(2)

Delete 2B-502(2) “Except as otherwise provided in paragraph (3), a contractual term prohibiting transfer of a party’s interest is enforceable and a transfer made in violation of that contract term is a breach of contract and is ineffective except to the extent: ” (the listed factors are not relevant to the mass market).

COMMENT This specifically provides the mass-market software publisher with the right to say that you can’t give your sister a computer game when you are finished playing with it. For mass-market software, licensors should not be able to ban the transferability of copies of their products, except to the extent that this is achieved under Copyright law.

REVISE 601(d)

601(d) “A party may refuse a performance that is a material breach as to that performance or if refusal is permitted under Section 2B-609(b). The aggrieved party may cancel the contract only if the breach is a material breach of the entire contract or the agreement so provides.”

COMMENT At what point should a mass market customer be able to return a defective product? How defective does the product have to be before it is sufficiently defective to return? One proposed answer is that mass-market customers should be able to return a defective product, obtaining a full refund, within the first 30 days after purchasing the product. A second piece of the answer is that the definition of material breach should be conformed to the Restatement of Contracts.

Article 2B provides an all-or-none answer for mass-market customers and a none-or-none answer for everyone else. During a brief initial inspection period, the mass market customer (but not the other customer) can reject the product for any defect. After that, the customer must prove that the product is virtually worthless—a much more licensor-friendly approach than the traditional definition of “material breach.”

The typical customer is unlikely to find many of a program's defects in the first few hours or days of use. When that customer runs into a significant (but not crippling) defect a week after starting to use the program, the 2B-supplied remedies are as follows:

- no refund when the customer tries to return the product, because the breach is not material
- reimbursement of incidental expenses and consequential losses, unless (*as will always be the case*) the publisher has excluded reimbursement for incidentals and consequential
- Perhaps the customer will be able to get a partial refund.

In the face of genuine defects, this level of remedy (no remedy) seems inappropriate.

DELETE 604

Delete 604 "If a performance by a licensor, because of its nature, provides a licensee with substantially all the benefit of the performance or other significant benefit immediately on performance or delivery and the benefit cannot be returned after it is received, the following rules apply:

(1) Sections 2B-606 through 2B-614 do not apply.

(2) The rights of the parties are determined under Section 2B-601 and the ordinary standards of the business, trade, or industry.

(3) Before tender of the performance, a party may inspect the media and labels or packaging but may not view the information or otherwise receive the performance before completing any performance of its own that is due at that time unless the agreement so provides."

COMMENT Imagine ordering an expensive research analysis or a video and discovering when you receive it that the product does not conform to the contract. Under Article 2B, you have to prove that the product that you received is virtually worthless or you can't reject it. There might be a genuine problem here, because some customers could abuse a system in which they could see the product (read the information, watch the show) and then complain.

But if the product is genuinely defective or otherwise fails to conform to the contract, why should the licensor get to win? The licensor is the one who released the product in its defective or nonconforming state. As between the customer and the licensor, surely the risk should be on the licensor in this case.

DELETE 605(a)

Delete 605(a) "A claim or right arising out of a breach of contract may be discharged in whole or in part without consideration by a waiver contained in a record to which the party agrees after breach, by manifesting assent or otherwise."

COMMENT--The abuse that this will lead to is obvious and predictable. Customer buys a defective product, calls Publisher for support (very possibly paying \$3 per support-minute for the privilege). Publisher releases an alleged bug fix version to Customer, who installs it. The bug fix comes with a clickwrap that (surprise!) includes a waiver clause in which Customer releases Publisher from all claims. The customer clicks I AGREE to install the software, thereby manifesting assent to the record that contains the waiver.

DELETE 605(c)

Delete 605(c) "Except for a failure to meet a requirement that performance be to the satisfaction of a party, a party that refuses a performance and fails to state in connection

with its refusal a particular defect that is ascertainable by reasonable inspection waives the right to rely on that defect to justify refusal if:

(1) the other party could have cured the defect if it had been stated seasonably;
or

(2) between merchants, the other party after refusal made a request in a record for a full and final statement in a record of all defects on which the refusing party proposes to rely."

COMMENT--A mass market customer who receives a defective product will not necessarily be able to describe that defect or to describe all of the significant defects that she has seen. And in many cases, the mass market software publisher will know of the defect (and many others) independently of the report of this particular customer. If the product is defective, the mass market customer should not have to describe every defect in order to get a refund.

Additionally, many software customers will be "merchants" under 2B. 605(c)(2) says that these customers will have to supply the seller with a full list of defects when the seller demands it. But the product will have more defects (including many that the seller knows about but has not revealed to the customer) than the customer has discovered. For defects the customer discovers after filing the first list, Article 2B gives the seller a free ride. This is outrageous. The customer is not the quality control department of the software publisher and should not be charged with such quality control duties.

This section might read more reasonably if we think of custom software rather than mass market or other packaged software. But the packaged software customer shouldn't be taken advantage of in order to serve the needs of the custom software developer. Separate the cases.

DELETE 607(e)(2)

Delete 607(e)(2) "If the tendering party is required to send a copy to the other party and the contract does not require the tendering party to deliver the copy at a particular destination, the following rules apply: (2) In an electronic delivery of a copy, the tendering party shall initiate a transmission that is reasonable having regard to the nature of the information and other circumstances, with expenses of transportation to be borne by the other party."

COMMENT The problem here, discussed repeatedly in 2B meetings, is that the delivery might be ineffective. For example, the file might be corrupted during transmission. The seller's duty is to initiate a transmission, not to make sure that it gets through fully successfully to the end customer.

In the event of a bad transmission, or loss of the file by the customer's ISP, or some other event that prevents the customer from reading the full file, it is up to the customer to reorder the material. A more reasonable alternative would be to require the seller to resend it, charging only a reasonable handling charge for the retransmission.

REVISE 609(b)

609(b) "In a mass-market license, a licensee may refuse a tender of delivery of a copy if the contract calls only for a single tender and the copy or tender fail in any respect to conform to the contract. The refusal cancels the contract."

REVISION: Delete "In a mass-market license"

COMMENT: Current law (Article 2) provides this perfect tender right to all customers not just mass-market customers.

DELETE 2B-613(a)(4)

Delete "613(a) Acceptance of a copy occurs when the party to which the copy is tendered:
(4) substantially obtains the benefit or access from the copy and cannot return that benefit or access; or"

COMMENT See the comments above on 2B-604. If the product is nonconforming or defective, the customer shouldn't be forced to accept it without inspection as a matter of law.

DELETE 616(a)(2)(B)

Delete 616 "(a) If a person agrees to correct performance problems or provide similar services with respect to information other than as an effort to cure its own breach of contract, the following rules apply: (1) Except as otherwise provided in paragraph (2), the person: (A) shall perform at a time and place and with a quality consistent with the express terms of the agreement and, to the extent not dealt with by the express terms, in a manner that is reasonable in light of ordinary standards of the business, trade, or industry; and (B) does not commit that its services will correct all performance problems unless the agreement expressly so provides."

COMMENT Most people, when they buy a service contract (for corrections and repairs) expect that the contractor will repair everything that is legitimately broken/defective that they complain about. That's why you buy the contract.

REVISE 2B-707(a)

2B-707(a) "Except as otherwise provided in the agreement, an aggrieved party may not recover compensation for that part of a loss that could have been avoided by taking measures reasonable under the circumstances to avoid or reduce loss, including the maintenance before breach of contract of reasonable systems for backup or retrieval of information. "

REVISION: Delete "including the maintenance before breach of contract of reasonable systems for backup or retrieval of information. "

COMMENT 2B-707 requires the customer to maintain backup systems just in case of breach of contract by the software publisher. The customer cannot recover compensation for losses that could have been avoided if the customer regularly backed up her data.

There are many ways that any prudent person can protect herself against the possibility of breach of contract by any other party. The point of a contract, though, is that it lays out the duty of the publisher to not breach. The customer should not have to spend time, effort and money on defensive steps, before a breach, to minimize the damages that will be incurred if the publisher should happen to breach.

It is frequently reported that individuals and small businesses rarely back up their hard disks. At a Law Practice Management session at the August 1997 ABA meeting in San Francisco, only half the attendees reported that they backed up their hard disks. This might not be wise on their part but it is the current situation. Why should the law grant contract-breaching publishers a special deal by requiring a higher standard of self-protective care from customers than customers currently afford themselves today?

REVISE 2B-708

In the mass-market license, the licensor defines the remedies available to both sides. It will exclude its liability for incidental and consequential damages, but not the customer's liability for such damages. The rule should be

that if the licensor excludes consequential and incidentals, these damages should be limited for the licensee as well.

DELETE 2B-715(b)

Delete 2B-715(b) “A licensor may exercise its rights under subsection (a) without judicial process only if this can be done: (1) without a breach of the peace; and (2) without a foreseeable risk of personal injury or significant damage to information or property other than the licensed information.”