ARTICLE 2B and CONSUMERS

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I don't know any consumer advocate who thinks that Article 2B is even close to acceptability. This isn't a matter of not getting all of our agenda. Tracing through my 2.5 years of work on Article 2B, I've achieved almost none of my agenda. Similarly for other consumer advocates. With all due respect to the benefits claimed by Article 2B, my sense is that the only significant benefit offered small customers by Article 2B is uniformity of the law. Unfortunately, when the nearly uniform result is "customers lose," the benefit of uniformity diminishes in value.

The right of return that is being touted this year as a grand compromise was no compromise with consumer advocates. I don't know any consumer advocate who thinks that it is a good idea to let sellers hide their contracts until after the sale, even if the buyer can get a refund if she doesn't like the terms. In many states, current law (Article 2) doesn't let sellers hide remedy exclusions until after the sale. And to the best of my knowledge, no court in any state has said that effective post-sale warranty disclaimers can be made in a mass-market setting. Even in commercial settings, post-sale warranty disclaimers have only rarely held up. **I agree with George Graf, the Advisor from the ABA's Science and Technology Section, who said:**

> **"The committee adopted a 'right of return' rule, which, in my view, does nothing to deal with the real problem--the fact that mass-market licenses are generally structured in a way so as to conceal their contents from all but the most persistent customers."**

My colleagues in software development are also deeply concerned with Article 2B. We expect it to encourage companies to ship software that is even less stable than the stuff on the market today. Competitive pressures today drive companies to rush their products to market. Legal accountability for defects creates a countervaling pressure. When you minimize the seller's accountability to its customers, you weaken that balance. The result will be worse product, shipped more quickly.

Here are my top ten recommendations for improvements to Article 2B. There are many other problems beyond these.

1. **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.) Liability should include reimbursement for out-of-pocket incidental and consequential losses. It might not include lost profits. Given this non-excludable accountability for hidden known defects, the default rule for other consequentials should be reversed. The default rule is a trap for 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 have been made by the Institute of Electrical and Electronic Engineers, and the Independent Computer Consultants Association.*** **Section 703, 707.**
2. **Drop the electronic contracting provisions from Article 2B.** The Uniform Electronic Transactions Act covers much of the same ground, the provisions have been more carefully considered, and the UETA will be probably be ready for submission to the states at the same time as (or before) Article 2B. **Sections 113, 114, 115, 116, 117, 118, 119, 120, all references to electronic agents, and various parts of other sections.**

3. **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..*** **Section 108.**

4. **Statements, descriptions or affirmations of fact in the hard copy or online documentation or on the packaging or in other statements made by the publisher to the public at large should be express warranties, whether or not the licensee was aware of their content at the time of contracting.** It is ludicrous that 2B should allow sellers to enforce statements that *they* put in the package, that were no part of the basis of the bargain, but it does not enforce the other statements that the publishers put inside the same packages unless the customer can prove that *they* were 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. Customers 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. **Section 402.**

5. **Adopt H. Perlman's amendment or some other set of rules that limits the extent to which a software publisher can go, *in the mass market contract,* beyond the Copyright Act and the patent doctrine of exhaustion.** Before you say, "Yes, yes, but federal law will preempt the worst of these," let me remind you of Ray Nimmer's recent analysis of federal preemption of contract clauses:

   > **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.**

   Article 2B might appear to be "neutral" but it makes presumptively valid (and perhaps absolutely valid) a wide, wide range of restrictions that would never be valid after a first sale.

6. **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. Section 703.**

7. **Amend Section 105 (c) to provide that, for purposes of interpretation of consumer protection laws, a mass-market software product will be treated as "goods."** Without this, the consumer protection laws that apply specifically to goods, such as California's *Song-Beverly Act* and the *Magnuson-Moss Act*, will no longer apply to software because the sale will be of an intangible license, not goods. **Section 105(c).**

8. **For the definition of "material breach", adopt the Restatement of Contract's multi-factor test.** 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. I'll gladly walk through hypotheticals with any Commissioner. **Section 109.**

9. **Invalidate compulsory arbitration clauses *in mass market contracts* when they require arbitration of a claim of fraud or defects that could threaten the health or safety of customers or the general public or that requires arbitration in a state other than the home state of the customer.**

10. **Fix the definitions of "informational content" and "published information content."** As stand, they include the user interface of software. Article 2B will create a huge mess by (for most Commissioners) unintentionally taking a stand in a longstanding debate within the software

development community about the extent to which defects in the user interface of the software should be treated as defects in the product. In effect, Article 2B says they should not.

My technical specialty in software is human factors (user interface design and usability evaluation), which grew out of my work for my first doctorate, in Human Experimental Psychology. As I read this aspect of Article 2B, it is poised to set the field back by ten years. The simplest solution would be to state, "'Informational content' does not include the user interface of a computer program." **Section 102(a)(26), 102(a)(36) and all the warranty exclusions and special provisions for published informational content.**