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We are writing to express our support for the Society for Information Management proposal on self-help that was submitted to you on November 25, 1998.

We are writing you from a special vantage point.

- Sharon Marsh Roberts is Chairman of the Independent Computer Consultants Association. When certain activists in the Article 2B process cry their crocodile tears for small licensors, they are speaking about my organization's members.
- Cem Kaner's client base is of independent software development consultants and independent writers. I advocate for small customers, on a purely pro bono basis, as a public service. But my paying clients are small licensors and I am intensely interested in the effect of Article 2B on them.

As advocates for small licensors, who are supposedly the ones most benefited by self-help, we support the SIM proposal.

We read that proposal to mean three things:

- (1) Self-help is banned.
- (2) A party wishing to terminate use of its software can proceed by injunction and can recover attorney's fees. The availability of attorney's fees goes a long way toward making it possible for a small licensor to be able to afford to obtain the injunction.
- (3) Section 310 should be revised so that it cannot be used as a alternate form of "self-help"

Regarding the third point, we are still concerned with the potential for abuse of 2B-310. The drafting committee revised 310(c) to say that it does not authorize or forbid a software licensor from locking up your "information" when it locks up the software by expiration or by whatever other trigger instigates an automatic shutdown. This is better than saying that the section authorizes it only if there is a term in the contract. But we think that 2B should say explicitly that the licensor can lock up your data ONLY pursuant to a court order.

There has been a great deal of discussion of self-help. In closing this letter, we would like to remind you of four risks that we see as substantial. Each of them stems from the fundamental software problem, that shutting down the software system can cause tremendous consequential losses that far outweigh the cost of the license:

- (1) As the Motion Picture Association has stated in its briefs to you, one of the key problems of self-help is the opportunity that it appears to offer for extortion, or for extortion-like negotiating tactics once a licensee has come to rely on the availability of a given software product.

- (2) Another of the key problems, highlighted in the Institute for Electrical and Electronic Engineers' memo to you, is the risk to third parties who rely on the functioning of a system that might be shut down by self help.
- (3) As we and several others have pointed out in the 2B meetings, there is a real risk of a shutdown induced erroneously, by a defect in the routines that implement self-help.
- (4) Finally, as highlighted in Committee meetings by Sharon Roberts, the existence of rules that allow self-help will encourage small developers to use this strategy. Self-help is a tempting approach. Small licensors are, or feel that they are, often mistreated by large licensees. But these developers are not lawyers and many of them rarely consult lawyers. They are likely to implement and use self-help in ways that don't meet the formal requirements of Article 2B, creating a mess for all concerned.

We want to remind you that the small licensor is often uninsured and unable to pay the significant damages that can be obtained from a successful suit arising from improper use of self-help. The remedies that are apparently available to the licensee will often be illusory.

Yours truly,

Sharon Marsh Roberts

Cem Kaner

Cc: Connie Ring, Chair, Article 2B Drafting Committee