

# Article 2B – Report from the November 13-15, 1998 Meeting

In Press (in two parts), UCC Bulletin.

Part 1, January, 1999 issue.

Part 2, February, 1999 issue.

## Summary

*On November 17, NCCUSL published a press release about the meeting, entitled “Committee Drafting New Article 2B Of Uniform Commercial Code Makes Major Changes To Protect Consumers And Small Businesses, And To Safeguard Public Interests In Free Speech And Fair Criticism In The Electronic Age.” It is available at [www.2BGuide.com/docs/prsr1198.html](http://www.2BGuide.com/docs/prsr1198.html).*

*The Chair of the Drafting Committee, Connie Ring, also published a, “Summary Of Actions At Article 2B Meeting November 13-15, 1998” at [www.2BGuide.com/docs/cr1198sum.html](http://www.2BGuide.com/docs/cr1198sum.html).*

*The impression that one might get from these two papers is that progress was made and that consumers gained additional protections.*

*I attended most of the meeting (I had to leave the meeting early on Sunday to fly to a client’s site) and these are my notes.*

*My impression of the meeting was that a few provisions were adopted that will give the appearance of consumer (or customer) protection but that will actually provide minimal (if any) additional protection. Other recommendations that would have provided genuine customer protection were rejected. There was relatively little time at this meeting for comment by the observers, and so the deep divisions between observer groups were perhaps not as obvious during the debates, but the meeting continued to be polarized, with little apparent effort made to seek common ground. Many organizations have recently called for tabling or cancellation of the Article 2B project. I don’t think that this meeting went very far to satisfy their concerns.*

## Contents

1. General
2. Issues For Customers And Developers
3. Issues For Writers
4. Conclusion

## 1. GENERAL

The Uniform Commercial Code is the dominant body of commercial law (e.g. law governing sales) in the United States. There is a proposal, under development for 11 years, to make a major revision to the UCC called Article 2B. Article 2B will govern all contracts for the sale, licensing, development, distribution, maintenance, documentation and support of computer software. It will also govern a wide range of other contracts involving information, especially information products that can be distributed digitally. I have been attending 2B meetings as an observer, advocating for consumers, small business customers, and authors (text or software) for the last three years. You can see more information about my work on 2B at [www.badsoftware.com](http://www.badsoftware.com). To discuss Article 2B further with me, please contact me at [kaner@kaner.com](mailto:kaner@kaner.com).

Over the three years that I’ve worked on this project, I’ve seen its (public and private) discussions change character dramatically. As David Pels and I noted in our recent book, *Bad Software: What to Do When Software Fails* (Wiley, 1998), 18 months ago we had a sense of constructive discussion, of significant informal efforts to work compromises. Today, there is less discussion of compromise and consensus and

there are fewer informal meetings to seek common ground among publicly opposing groups. There is an increasing rhetoric of bad faith. To illustrate the bad faith rhetoric, consider the following language, taken from the introductory material in the 2B draft itself (August 1, 1998 and some previous drafts):

**“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. And I’ll note that a recent advisory letter from the Federal Trade Commission ([www.ftc.gov/be/v980032.htm](http://www.ftc.gov/be/v980032.htm)) raises many of the same concerns that we’ve raised.

Recently, several organizations have submitted letters to NCCUSL or ALI asking that 2B be tabled or cancelled. Not all of these letters have been published. I’m aware of letters from:

- fifty intellectual property law professors ([www.2BGuide.com/docs/1198ml.html](http://www.2BGuide.com/docs/1198ml.html))
- American Association of Law Libraries ([www.arl.org/info/letters/libltr.html](http://www.arl.org/info/letters/libltr.html) and [www.arl.org/info/letters/Wright\\_ALI\\_letter.html](http://www.arl.org/info/letters/Wright_ALI_letter.html))
- American Library Association ([www.arl.org/info/letters/libltr.html](http://www.arl.org/info/letters/libltr.html) and [www.arl.org/info/letters/Wright\\_ALI\\_letter.html](http://www.arl.org/info/letters/Wright_ALI_letter.html))
- American Society of Media Photographers ([www.nwu.org/pic/uccasmp.htm](http://www.nwu.org/pic/uccasmp.htm))
- Association for Computing Machinery ([www.acm.org/usacm/copyright/usacm-ucc2b-1098.html](http://www.acm.org/usacm/copyright/usacm-ucc2b-1098.html))
- Association of Research Libraries ([www.arl.org/info/letters/libltr.html](http://www.arl.org/info/letters/libltr.html) and [www.arl.org/info/letters/Wright\\_ALI\\_letter.html](http://www.arl.org/info/letters/Wright_ALI_letter.html))
- Consumer Federation of America ([www.cptech.org/ucc/sign-on.html](http://www.cptech.org/ucc/sign-on.html))
- Consumer Project on Technology (Ralph Nader) ([www.cptech.org/ucc/sign-on.html](http://www.cptech.org/ucc/sign-on.html))
- Consumers Union ([www.2BGuide.com/docs/cu1098.html](http://www.2BGuide.com/docs/cu1098.html))
- Independent Computer Consultants Association (unpublished)
- Institute for Electrical & Electronics Engineers (IEEE) submitted specific criticisms of 2B ([www.ieee.org/usab/FORUM/POLICY/98feb23.html](http://www.ieee.org/usab/FORUM/POLICY/98feb23.html)) which have not been resolved in the ways requested. The IEEE suggested in its most recent letter ([www.ieee.org/usab/FORUM/POLICY/98oct09.html](http://www.ieee.org/usab/FORUM/POLICY/98oct09.html)) that if these issues were not satisfactorily resolved, it too would recommend tabling.
- Magazine Publishers of America ([www.2BGuide.com/docs/v9-98.pdf](http://www.2BGuide.com/docs/v9-98.pdf))

- Motion Picture Association of America ([www.2BGuide.com/docs/v9-98.pdf](http://www.2BGuide.com/docs/v9-98.pdf) and [www.2BGuide.com/docs/mpaa1198.html](http://www.2BGuide.com/docs/mpaa1198.html))
- National Association of Broadcasters ([www.2BGuide.com/docs/v9-98.pdf](http://www.2BGuide.com/docs/v9-98.pdf))
- National Cable Television Association ([www.2BGuide.com/docs/v9-98.pdf](http://www.2BGuide.com/docs/v9-98.pdf))
- National Consumer League ([www.cptech.org/ucc/sign-on.html](http://www.cptech.org/ucc/sign-on.html))
- National Music Publishers Association (unpublished)
- National Writers Union ([www.nwu.org/pic/ucc1009a.htm](http://www.nwu.org/pic/ucc1009a.htm))
- Newspaper Association of America ([www.2BGuide.com/docs/v9-98.pdf](http://www.2BGuide.com/docs/v9-98.pdf))
- Recording Industry Association of America ([www.2BGuide.com/docs/v9-98.pdf](http://www.2BGuide.com/docs/v9-98.pdf) and [www.2BGuide.com/docs/riaa1098.html](http://www.2BGuide.com/docs/riaa1098.html))
- Sacramento Area Quality Association (unpublished)
- Society for Information Management ([www.2BGuide.com/docs/simltr1098.html](http://www.2BGuide.com/docs/simltr1098.html))
- software-test-discuss (this is the Net's largest e-mail discussion forum on software quality control)
- Special Libraries Association ([www.arl.org/info/letters/libltr.html](http://www.arl.org/info/letters/libltr.html) and [www.arl.org/info/letters/Wright\\_ALI\\_letter.html](http://www.arl.org/info/letters/Wright_ALI_letter.html))
- United States Public Interest Research Group ([www.cptech.org/ucc/sign-on.html](http://www.cptech.org/ucc/sign-on.html)).

Most of these letters are brief. After consultation with some other consumer advocates, I submitted a detailed letter with a section-by-section call for consumer-side revisions ([www.badsoftware.com/kanerncc.htm](http://www.badsoftware.com/kanerncc.htm)). The National Writers Union letter ([www.nwu.org/pic/ucc1009a.htm](http://www.nwu.org/pic/ucc1009a.htm)) details writers' issues. The Society for Information Management's letter details the concerns of large software customers ([www.2BGuide.com/docs/simltr1098.html](http://www.2BGuide.com/docs/simltr1098.html)).

As far as I can tell, every customer advocacy organization that has commented on 2B has now requested that 2B be tabled or cancelled. (If we thought that 2B was neutral or more consumer-protective than current law, we wouldn't be asking for cancellation of the project.) And the significant organizations representing professional developers of software (ACM, IEEE, ICCA), along with some smaller groups, have also requested that 2B be tabled, cancelled, or dramatically modified. Similarly, it appears that many professional writers are in opposition to 2B.

Article 2B has built up so much inertia that my bet is that it will continue to go forward through ALI and NCCUSL, eventually running into determined, organized opposition in every state.

## 2. Issues For Customers And Developers

Here are the main results of the Emeryville meeting as to customers and software developers.

### A. **Scope (narrowed)**

The scope of 2B was narrowed somewhat, so that its focus is on "computer information." This excludes a few more products. For example, it excludes contracts for the retail sale of books. It might also exclude contracts for writing these books (though I don't think it does). It still includes all contracts involved in the development, maintenance, sale, documentation, licensing, and support of software, along with all types of electronic information. Thus a book on disk is covered by 2B whereas the same book in print is not.

The scope section includes a broad opt-in provision. A contract for any product or service that is not otherwise covered by Article 2 can be brought under 2B as long as the contract so provides.

### B. **Conflict with public policy. Reverse engineering. (watered down)**

Motion to allow courts to disallow provisions that violate "fundamental" public policies. This is a watered down version of the Perlman amendment, which was passed at the annual meeting of NCCUSL this summer.

As far as I can tell, this wording essentially restates current law—courts can discard contract provisions that conflict with public policy. This version's strength is that it specifically identifies public policies favoring innovation, free speech and competition. This provides courts with some guidance, and might encourage the striking of a few additional clauses.

Some attorneys believe that with the requirement that the provision "violate" (rather than conflict with) a "fundamental" public policy, the clause is narrower than current law by limiting the range of clauses that a judge can strike. A motion to drop "fundamental" was deleted. On the other hand, Commissioner Perlman supported the language as adopted.

For software developers at the meeting, the acid test was this -- with this amendment, can we have any confidence that a clause banning reverse engineering of a mass market software product will be strick down? My answer is no. That was also the impression of others who represent individual developers. Similarly, can we have any confidence of striking down a clause in a mass market software product that says that the purchaser cannot use this product to help develop a competing product? No. At the extreme, what about the clause that says that you may not write a review of this product without the publisher's permission--is this clause banned? I don't think we can have complete confidence in this. First point to note is that all of these restrictions would be lawful and enforceable in a signed, negotiated contract. In essence, 2B says that mass-market terms are to be treated as if they were signed and explicitly agreed to. So what distinction will a court rely on in tossing out these terms? More to the point, will a court rely on them consistently? Consider the recent case of *Gateway 2000 v Hill*, in which the court enforced an oppressive arbitration clause (requiring arbitration through the International Chamber of Commerce). A court in New York considered the same clause and ruled that the choice of the ICC was unconscionable (*Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 1998). This was fine for the New York customer, but cold comfort for Hill. The same problem will arise for software developers and customers who have to rely on a vague and restricted public policy unconscionability theory for salvation. The same facts might give rise to a finding of unconscionability in one court and not in another. The developer will have to decide whether he can afford the risk. Small developers and small customers who cannot afford the lawsuits will be well advised to be cautious, more cautious than they would be under current law. Along with the wording of the amendment, the comments that accompany the new provision certainly don't help. They are vague and far from cleanly supportative of any customer or developer right.

### **C. *Clean up conflict with laws governing competition (rejected)***

Motion defeated to amend 2B-105(c) by dropping "unfair" from "unfair competition". The issue was that 2B states that does not displace laws governing "competition." Commissioner Steve Chow (who comments initially led to the drafting of 2B-105(c)) argued that a narrow range of laws governed "unfair competition" and a broader range governed "competition." His argument was and continues to be that 2B cn be interpreted as including rules (or allowing contract terms) that involve competition. This is inappropriate without extensive and explicit consideration of laws governing competition.

### **D. *Clarify relationship with consumer protection laws (rejected)***

2B takes a transaction that is normally treated as an Article 2 sale of goods (sales/licenses of packaged software are almost always treated as sales of goods under Article 2) and redefines it as a licensing transaction. As Microsoft's lawyer, Bob Gomulkiewicz put it in the title of a recent paper, "The Product Is The License" (the software is just something that comes with the license). In this case, we are no longer dealing with a sale of goods, and it would appear any consumer protection laws that specifically apply to sales of goods no longer have software transactions within their scope. This includes the federal Magnuson-Moss Warranty Improvement Act along with some state consumer protection laws, like California's Song-Beverly Act.

2B specifically (2B-105(d)) claims to defer to consumer protection laws, and members of the drafting committee have cited this provision repeatedly to say that there is no change in consumer protection.

Todd Paglia (representing Ralph Nader) and I have repeatedly asked the committee to clarify its position. If they intend that consumer protection laws that apply today should continue to apply, then we want them to say so clearly, to avoid what is at best an ambiguity.

In that light, in my memo to the Drafting Committee ([www.badsoftware.com/kanerncc.htm](http://www.badsoftware.com/kanerncc.htm)), I asked it to add the following:

**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.**

The call for comments for this meeting stated that we should make specific recommendations and all recommendations would be considered. For example, in his memo to MPAA ([www.2BGuide.com/docs/crjv.html](http://www.2BGuide.com/docs/crjv.html)), Connie Ring stated:

**As we have previously communicated to all interested groups, the November meeting will consider all suggestions for amendments that are provided by October 10.**

My memo reached NCCUSL by the deadline and was circulated with the other received-on-time memos. This issue was also raised by a Commissioner at the annual NCCUSL meeting and (as I recall it) the drafting committee promised to clarify in the near future (near to last July). However, this proposed amendment, which I have raised several times previously, alone and jointly with Todd Paglia (Nader's lawyer) was (as in the past) not considered, not discussed, and not voted on.

As Pels and I said in more detail in *Bad Software*, the committee's consistent failure to revise or clarify its language suggests that they intend 2B to operate the way that we think it will operate, that is, to take software outside of the scope of many of the country's most important consumer protection laws.

### **E. Disclosure of contract terms (rejected)**

Last May, the American Law Institute passed the following resolution ([www.ali.org/ALI/Braucher.htm](http://www.ali.org/ALI/Braucher.htm)), authored by Jean Braucher and Peter Linzer.

**The current draft of proposed UCC 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.**

The comments in support of that motion indicate that the policy that the ALI is most actively trying to defend is the free market—if customers can know the terms of the contracts before the sale, there can be competition on terms like warranty length and scope and on the cost of technical support. In contrast, if customers have to wait to see these terms until after they buy the software, the likelihood of genuine, informed competition over such terms is dramatically reduced.

Braucher asked the drafting committee to require licensors to post a hypertext link to the license, if they are selling their product at their website. This lets the customer see the license, in this one narrow case, before the sale. We have heard time and again that this is no big deal. I have been told by several publishers' lawyers that they already do this -- post their terms for customers to see, and therefore there is no need for this regulation. That argument has been made previously in drafting committee meetings, as a basis for saying that it isn't necessary to legislate disclosure of contract terms, because it will happen automatically, because it is so cheap, easy, and natural to post these licenses on the web.

Dan Coolidge (who chairs the Computer and Technology Division of the ABA Law Practice Management Section) was intrigued by these claims, and checked publishers' websites. He reported at a session of the ABA Law Practice Management Section last spring that few publishers do post their licenses. In fact, he said, 95% of the sites that he checked didn't post their licenses.

Now that there was a proposal on the table to actually require publishers to post their licenses, the story from “This will happen automatically” to “This is very difficult.”

The drafting committee rejected the motion. Publishers, even publishers of consumer software, are not required to let customers see the terms of contracts that they will be held to before they pay for the products, not even when it is absolutely trivial to provide them with those terms.

I can't believe that this bill will actually go to the states in this form. This has to be a negotiating position. Some day the committee will back down and we will see a press release, hailing some great new consumer protection that allows customers to do what any competent lawyer would advise any customer who had concerns about a contract to do today, “Read the contract before paying for the product.”

By holding even disclosure of terms hostage, the drafting committee certainly influences the scope and emphasis of discussion of customer-protective provisions. But instead of encouraging consumer advocates to enthusiastically haggle for tidbits, the effect of this strategy is to drive consumer (and larger customers') advocates away.

#### **F. *Make conspicuous terms conspicuous (rejected)***

Another partial response to the ALI resolution was proposed by George Graff (the Advisor to the Drafting Committee from the ABA Section of Science and Technology) at the July drafting committee meeting, held just before the annual NCCUSL meeting.

Graff asked the Committee to require publishers to make "conspicuous" terms available to the customer before the sale. This was rejected. Under 2B, terms are conspicuous even if the customer can't see them before the sale, so long as they are printed in a different font, or in capital letters in a typeface larger than the surrounding text. Issues involving conspicuousness were considered again at the Emeryville meeting and the language was not significantly improved, despite a wide range of proposals.

#### **G. *Require publisher to advise customer pre-sale that "additional terms are to follow" (passed)***

Requirement (passed) that for a publisher to be allowed to include post-sale terms in the contract, it has to say so at the time of sale. So, when you buy the software product, the product must say on the box (or in the advertisement, or whatever) something like "additional terms to follow." This purely formal requirement is being presented as a significant consumer protection by the NCCUSL press release. I don't think that any consumer advocate would call it a protection.

Actually, this alleged protection is weaker than I just stated, because if the publisher does not say that there are "terms to follow" or "additional terms in the box", then the publisher can argue under 2B that the customer already had "reason to know" that there would be additional terms. We all know that there are additional terms in the box that define the details of the contract. Most people who have experience buying software expect to find terms in the box, so all (or almost all) of us have "reason to know" that some terms will be defined post sale. The issue is not that there are some new terms. The issue is, “*What terms?*” Under Article 2 (the current law of sales, which governs the sale of packaged software), *material* post-sale changes to the presumptive contract don't come into the contract unless the customer agrees to them. Under 2B, there is no issue of materiality. The customer is simply stuck with all of the terms, along with the strange notion that clicking a button to continue installation of software that has already been bought and paid for should constitute agreement to a contract.

The real protection would be to allow customers to see the material terms before the sale. Without providing customers with a genuine opportunity to learn the terms of the deal, these other protections are empty formalisms, propaganda that lets people claim consumer protection when there is none. Another of these formalisms is the new “protection” that encourages publishers to ask “Are you sure?” when they present you with terms for the first time, after the sale, when you are trying to install the product. You click a button that says something like “I Agree. Let Me Finish Installing What I Paid For” and you get a purely formal second click “Yes, Yes, I Know That Really Was A Contract. Now Let Me Finish Installing What I Paid For.”

The point of requiring pre-sale disclosure of terms is to enable competition on the terms. Some customers will change their buying decision, if they know about the consequences of their purchase at the time they pay their money. And magazine reviewers will have a reliable, easy to obtain source of data that they can use to make product comparisons. The Magnuson-Moss Act requires warranty-related information pre-sale for all consumer products. Why should we give software publishers a free ride and deny software customers the opportunity to learn easily about highly relevant competitive data?

#### **H. Allow non-mass-market customers a refund if they reject the post-sale license (that they couldn't see until after paying for the software) (rejected)**

A request (from the Society for Information Mgmt) was rejected that would entitle non-mass-market customers (which will include many of the purchases by small businesses) to a refund if they reject the terms of a license that are presented post-sale. For background, see 2b-112(c). Only mass-market customers have a refund right. Non-mass market customers can reject the license but they are not entitled to a refund.

This has seemed like a remarkable provision to me in 2B. 2B advocates constantly refer to the idea that it is OK to enforce terms in a contract that are presented post-sale because these are subject to a rule requiring "manifest assent" (click "I agree" during installation). The argument that this is genuine assent comes from the refund right -- if you don't agree to the terms, you can get your money back. 2B implements the refund right for mass-market customers, but a very wide range of small business transactions will not meet the requirements of "mass-market." For these customers, if they choose not to assent to the terms of a license that they could not see before the sale, they can apparently be required to throw the product away, without refund. This is one of the many ways in which 2B severely disadvantages small business customers. It is much worse for them than current law, and much worse for them than it is for consumers. Unfortunately, their interests have not been represented in 2B meetings.

#### **I. Allow transferability of mass-market software products (rejected)**

Motion (rejected) to allow transferability in the event of a sale of all of the assets of your business. Under 2B-502, the publisher can declare that any license (mass-market or not) is not transferrable. If you buy a computer game and get tired of it, you can't lend, sell, rent, or donate it to your kid sister. And if you have a business that you sell, watch out. If your business owns a computer, you cannot transfer the software that is on that computer without permission of the software publisher. One software developer pointed out that he has more than 150 licenses on his computer. To sell it (and the software with it) under 2B would require an inventory to discover the 150 licenses, then 150 letters to (if you can find them) the publishers, and negotiation/payment/whatever with all 150. Now multiply this by all of the computers at your client's company. Imagine the extent to which this can drive up the costs of a merger or acquisition. The M&A complexity was discussed, and publishers' lawyers (and some committee members) said that it would just be another incremental expense of a merger or acquisition, nothing to worry about. Motion defeated.

#### **J. Warranty created by publisher's statements (rejected)**

Motion (rejected) to hold software publishers accountable for statements of fact (things you can prove true or false) that they make to customers about their products in the manual that accompanies the product. The particular wording came from the Society for Information Management, but the concept has been suggested many times.

Under this proposal, the user manual in a mass-market sale automatically becomes usable by the customer as a specification (i.e. an express warranty) of what the product is supposed to do. This is already the law in several states. (see, for example, *Daughtrey v. Ashe*, 413 S.E.2d 336, Virginia, 1992, and Kaner, "Liability for Bad Documentation" [www.badsoftware.com/baddocs.htm](http://www.badsoftware.com/baddocs.htm).) There's fairness here—after all, these are statements of fact by the seller to the buyer about the product, that come with the product. We shouldn't have to argue about whether these are part of the "basis of the bargain" in a world that will enforce the seller's *other* post-sale statements (the license terms) that the seller will not provide customers until after the sale.

The motion made, by Commissioner Fry, was even weaker than this. It provided that a manual included with the product *may be* a source of express warranties even if the customer didn't see the manual until after the

sale. This leaves the decision for any given product/manual up to the court. One benefit of the provision is to make clear to publishers that the manual might be an express warranty, which will encourage publishers to put their documentation through a QA pass. (50% of software publishers don't submit their manuals to Testing groups, according to repeated years of the Customer Care Survey of Software Support Practices.) This is less strong than current law in several states, but the motion was rejected anyway.

### ***K. Motion to loosen standards for implied warranty, reducing the risks of publishers (passed)***

In his summary ([www.2BGuide.com/docs/cr1198sum.html](http://www.2BGuide.com/docs/cr1198sum.html)), Connie Ring said of this “Merchantability Warranty. A new merchantability warranty is included in the draft proposed by both a software company and a consumer advocate as a more realistic warranty that parties are less likely to modify.”

As I explained to the drafting committee before they voted, this had been part of a 3-part compromise that was originally co-introduced by Bob Gomulkiewicz (Microsoft’s senior lawyer at the meetings) and I nearly two years ago.

- The first two parts narrowed the circumstances under which a publisher could be sued for breach of warranty. This has an immediate effect because 8 states ban disclaimers of implied warranty and federal law invalidates disclaimers of warranties in consumer cases if the product comes with any type of express warranty.
- The third part of Bob's and my agreement provided that statements on the product packaging should be treated as express rather than implied warranties. The statements on the package *will be* treated as express warranties if the customer sees the package before the sale. But the mail order customer and the internet customer don't see the package. So suppose they get a product that has a pack of lies on the box. The product doesn't breach the contract by not meeting these statements because they would not be, in some states, warranties. The drafting committee chose not to adopt the third provision, in their rejection of the motion that descriptions of the product that come with the product are warranties--see J, above.

It wasn't surprising that the committee adopted the additional publisher protections by a vote of 8-0. I don't object, and explained to the drafting committee that I did not object, to the two specific protections afforded to the publishers. These reduced the probability of some frivolous lawsuits and no one has an interest in subjecting software publishers to a risk of frivolous lawsuits. But goshdarn it, I do wish that there was some way that consumers and publishers could reach compromise agreements (as we did in this case) with some confidence that both sides of the compromise will be honored. I don't see any basis for negotiation if we can't have at least that much assurance.

I've done a lot of work with consumer lobbyists (some who attend 2B meetings and some who don't), trying to broker compromises between them and publishers. This work has been greeted by them with some genuine cynicism. They have predicted that when I come in with a compromise, the committee will accept the terms that favor the publisher and toss out the terms that favor the customer. That's exactly what happened in this meeting. I don't object to the terms the drafting committee adopted, but the adoption of only the one side of the bargain makes my work (finding common ground) harder.

Over the three years that I've worked on 2B, several of my publisher-protective recommendations have passed. I can't remember a single one of my small-customer-side recommendations that has passed (except for occasional requests to kill a provision. I can sometimes obtain deletion, but not addition.) This consistent imbalance played a big factor in my change in position from publicly supporting a compromise to publicly recommending that we kill 2B.

By the way, let me speak explicitly to avoid misunderstanding. My belief is that Bob handled our negotiation and the presentation of the proposal to the drafting committee with complete integrity. This isn't an issue between me and Microsoft or me and the Business Software Alliance, who re-proposed this compromise, in the form voted on, at the meeting. The problem is with the drafting committee itself.



**L. *Limit forum selection clauses to allow small claimants to sometimes sue in their home states. (rejected)***

This motion was requested by the IEEE and by various customer's advocates. It was introduced by Commissioner Fry. It would normally recognize the publisher's (hidden inside the box, presented inconspicuously post-sale, nonnegotiable) forum selection clause. But there is one exception. If (a) you bought the software under a mass-market license and (b) the total amount in controversy is less than your state's small claims court jurisdictional limit and (c) you can obtain personal jurisdiction over the publisher under other law, then you can sue the publisher in your own state.

A previous version of this motion, from Commissioner Rice, restricted it further to consumer licenses. That version was defeated several months ago. In the discussion this time, as in the discussion previously, it was recognized that customers with small claims would not be able to afford to travel to a foreign jurisdiction to present their claim. The forum selection clause, if enforced, will in effect take away their right to sue for breach of contract. The main argument on the other side is that publishers who do business in 50 states don't want to have to defend their products in 50 states, and they might have to give in on suits because they are too expensive to defend. As before, where there is an issue of balance of risk between publisher and customer, the balance is tipped in favor of the publisher. This is, after all, Article 2B, which several of us have come to call the Software Publishers Protection Act.

One straw issue that was raised in the meeting was that the jurisdictional limit of some small claim courts is large (allegedly \$30,000). That is too big a suit, it was said. OK, they could have amended to cap it at your state's small claims limit or \$5000 (or whatever) whichever is smaller. But that's not what was done. The bulk of the discussion was about who should lose their right to a day in court, the consumer or the seller -- and the predictable result of that type of discussion in a 2B meeting ensued.

**M. *Limit self-help (publisher's ability to shut down its product without consulting a judge). Adopted one set of limits but left intact and unregulated a more powerful means for self-help.***

The main customer protection adopted involved self-help. SIM (Society for Information Mgmt) has stated repeatedly that they will actively oppose 2B if it does not restrict the publisher's ability to engage in self-help (shutoff of the software without your agreement and without supervision by a court.)

The committee adopted an amendment that restricted the publisher's ability to engage in one type of self-help, that being the sending of a message to your computer, at whatever time it chooses, to tell the software to shut down. However, the committee refused to place a constraint on a much more powerful self-help provision, section 2B-310. 310 allows time bombs in software. The publisher simply puts in a requirement that you enter a new code every month or the software will shut down. Self-help shutdown occurs, if there is a dispute between the publisher and the customer, by the publisher refusing to provide the customer with a code. At the end of the month, the software shuts down automatically. Worse, the publisher can also shut off the customer's access to her own data when it shuts down the program.

Here is the language. Note particularly 310(c) and 310(d).

**2B-310 (a) In this section, "restraint" means a program, code, device, or similar electronic or physical limitation that restricts use of information.**

**(b) A party entitled to enforce a limitation on use of information which does not depend on a breach of contract by the other party may include a restraint in the information or a copy of the information and use that restraint if:**

**(1) a term of the agreement authorizes use of the restraint;**

(2) the restraint prevents uses of the information which are inconsistent with the agreement or with informational rights which were not granted to the licensee;

(3) the restraint prevents use of the information after expiration of the stated duration of the contract or a stated number of uses; or

(4) the restraint prevents use when the contract terminates, other than on expiration of a stated duration or number of uses, and the licensor gives reasonable notice to the licensee before further use is prevented.

(c) 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.

(d) A party that includes or uses a restraint pursuant to subsection (b) or (c) is not liable for any loss caused by its authorized use of the restraint.

(e) This section does not preclude electronic replacement or disabling of an earlier copy of information by the licensor in connection with delivery of a new copy or version under an agreement to electronically replace or disable the earlier copy with an upgrade or other new information.

When I left the meeting, they were debating 2B-310(c). As I pointed out, under this provision, if the publisher places language in the fine print of a mass-market license (which you aren't allowed to see until after the sale), the publisher can place a restraint (such as by encrypting your files) that affirmatively prevents your access to your own information on your own computer. Under (d), the publisher is not liable to you for any losses caused by that restraint.

For example, suppose that Bugs, Inc. publishes BugWord 2000, a word processor. The program comes with a time bomb that will shut down the program (and take out all of your word processing files with it), on the first of the month unless you pay Bugs a license fee. You decide that the bugs are just too much -- the publisher won't fix the product, it just wants to keep collecting your money. But if you stop paying, you lose your data. How hard would you press a complaint against a company if you knew that it could exercise this power against you with impunity?

I'm not sure what happened with 310(c), but my understanding is that 310(d) was left intact. A publisher who wrongfully refuses to give you the access code that you need to continue to have to your accounting or word processing or medical diagnostic software can shut you down just as effectively and just as unfairly as on who wrongfully sends a message to your machine to shut the software down today.

### **3. Issues For Writers**

The big news for writers is the new scope provision. Retail sale of printed books is no longer covered by Article 2B. However, as I read the new scope provision, 2B will still cover contracts for the licensing of the manuscript to the book publisher. It does not cover contracts for creation of movies, but the exclusion does not extend to books. A request by the National Writers Union to extend the 2B exclusions to cover creation of text products in general was turned down.

Additionally, 2B can cover books at the choice of the contracting parties. Anyone can opt into 2B unless the subject matter of the contract is Article 2 merchandise. Relatively few terms of contracts are negotiable and

extremely few writers have the experience and the stomach to negotiate a choice of law clause. I've counselled a lot of writers in their book contracts, and none of them would have been comfortable with strenuously challenging a choice of law clause. Therefore, as a matter of practice, the publisher will get to choose to have the contract covered under 2B or not, depending on what it considers more advantageous.

Contracts to document software will still be covered under 2B automatically.

Contracts to write articles might be covered by 2B. The articles will be covered if they are written for an online publisher, might not be covered if they are written for a print publisher, and maybemaybenot be covered if they are written for simultaneous publication in both media.

The next issue was the National Writers Union request to drop 2B-307(f)(1) (defining a grant of all rights) was discussed and denied. Under 2B, a grant of all possible rights will include all rights in new media, even media that were unimagined at the time of contracting. In Europe, such grants don't extend this far. In the United States, they appear to. The Union wanted 2B to keep out of this area of law and let it develop further in the common law, as European and American intellectual property laws continue to evolve to take each other into account.

The Union also asked the drafting committee to revise 2B-306(b), so that it would require publishers to provide best efforts to market information products when they have the exclusive license to market them. This request was rejected, along with a motion to delete the provision.

The best efforts standard is the one required under Article 2 for exclusive licenses of goods and is also the one (often and perhaps usually) used for patent licenses. But software and book publishers objected to the best efforts standard in 2B years ago. The committee originally adopted a standard of commercially reasonable effort to promote the book, but revised this at the urging of the Independent Producers Association to a "good faith" standard -- a minimal subjective standard that (as debated in two meetings) will not even allow the licensees (authors and small software development groups whose works are published) to provide expert evidence as to "reasonable" promotional practices in the industry. As I've stated to the drafting committee before, the single largest complaint of book authors is that their book is not being appropriately publicized. Surveys of the National Writers Union membership turn up that issue among 87% of book authors. This is a real problem. The new language in 2B almost completely takes away the ability of the writer to argue that a book is under-promoted.

## 4. Conclusion

As we head into Y2K season, American businesses and governments have spent hundreds of billions of dollars dealing with a simple software defect. (The shocked statements that no one could have predicted such a problem or that, in 1990 it was still good practice to write code that pretended the year 2000 would never come, are ludicrous, even funny. Imagine arguing to a judge that even though someone had filed a complaint against your client, you never bothered to answer it because you knew it would be a while before the case would come to court. Next, try that argument on your malpractice carrier.)

There are widespread predictions that we'll encounter serious problems in practice, come the turn of the century. No one knows how serious, because of the multi-multi-billion dollar clean-up efforts happening today.

Article 2B is scheduled to hit state legislatures at the end of 1999 and the start of 2000, after the country will have squandered nearly a trillion dollars dealing with this defect.

Article 2B will essentially guarantee to publishers, especially mass-market publishers, that if there is ever another Y2K-type crisis, they won't have to worry about it because they will be fully shielded from liability. Customers will have discovered after buying the software products that they bought something with no warranty, with no accessible forum in case there is any assertable cause of action, with no remedies beyond a partial refund available if they find a forum and win, no requirement of disclosure of defects (which would at least let them mitigate their damages by avoiding certain risks), and little protection from a publisher who gets sick of their whining and decides to shut their use of its software down.

Imagine hearing about this, as a customer, during Y2K season. What do you think that customers are going to say to their state legislators?

As Lawrence Lessig wrote this week (November 20, 1998, "Sign It and Weep", [www.thestandard.com/articles/display/0,1449,2583,00.html?01](http://www.thestandard.com/articles/display/0,1449,2583,00.html?01)),

**"The current draft represents little more than the narrow commercial interests of the major software companies. It's an embarrassment to its sponsors, who ought to dump the draft and leave the topic alone."**