ARTICLE

THE POLITICS OF LICENSING LAW

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I. INTRODUCTION

Article 2B[1] is the most important and intellectually impressive legislative proposal in current memory. It creates and adapts by melding a body of law for computer information: principles of commercial law; the law for sales of goods found in UCC Article 2,[2] the common law as it relates to software, contracts, published informational content, and services; UCC consumer law; intellectual property law; secured transaction and lease-financing laws;[3] and principles of electronic commerce.

1. Article 2B is a proposed new article of the Uniform Commercial Code ("UCC") that will govern computer information transactions. It is being drafted under the joint auspices of the National Conference of Commissioners on Uniform State Laws ("NCCUSL") and the American Law Institute ("ALI"). *See* U.C.C. Article 2B (Proposed Draft Feb. 1999) <http://www.law.upenn.edu/library/ulc/ucc2b/2b299.htm>. "The purpose of [NCCUSL] is to promote uniformity in state law on all subjects where uniformity is desirable and practicable." NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1997-98 REFERENCE BOOK 6. To accomplish this goal, the commissioners participate in drafting acts and endeavor to secure their consideration by state legislatures. *See id*. NCCUSL is composed of commissioners from each state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. *See id*. Commissioners are appointed by state governors, and tend to be law school professors, legislators, practicing lawyers, and state code revisers. *See id*. Commissioners are appointed to drafting committees, and a "reporter" is chosen to draft each proposed act. The Reporter for the Article 2B Drafting Committee is Professor Raymond T. Nimmer, Leonard Childs Professor of Law, University of Houston Law Center. All citations herein are to the February 1999 draft, except as otherwise noted.

The current draft is the product of submitted comments and meetings regarding numerous previous drafts. Commentators include, but are not limited to, the NCCUSL Drafting Committee for Article 2B; representatives of the software, publishing, banking, entertainment, and information industries; business and consumer end-users; federal regulators; various state bar associations; and several American Bar Association committees. *See Comments to Drafting Committee* (last modified Jan. 22, 1999) <http://www.2bguide.com/parcom.html> (featuring letters and memos sent to the Drafting Committee and comments sent to NCCUSL and ALI separately from February 1996 through the present); *see generally* Gene N. Lebrun, *Who's Writing the New Licensing Law?* (visited Jan. 21, 1999) <http://www.2bguide.com/docs/glenbrunww.html> (detailing the process by which comments are taken and considered in Drafting Committee meetings).

2. *See* U.C.C. §§ 2-101 to –725 (1995).

3. Until the adoption in July 1998 of revisions to UCC Article 9 regarding secured financing, NCCUSL's expressed intention had been to develop in Article 2B, instead of in Article 9, principles for the financing of licenses. Article 2B, therefore, was to prevail over any contrary provision in Article 9. However, given the adoption, in August 1998 of Revised Article 9 with its divergent provisions, the Article 2B Drafting Committee determined at its November 1998 meeting to remove the financing provisions from Article 2B and to defer to Article 9.

This decision is unfortunate because Revised Article 9 is legally inappropriate as to several issues affecting the information licensing industries. *See, e.g.*, Memorandum from Lorin Brennan to Article 2B Drafting Committee (Oct. 26, 1998) (available at <http://www.2bguide.com/docs/lb1098art9.html>) (arguing that certain provisions of Article 9 are not appropriate for certain licensing transactions).

Supporters and critics of the draft are knowledgeable about some, but not all of these areas. Professor Raymond T. Nimmer is unique in his knowledge of these disciplines,[4] and in his ability to withstand gracefully the strong criticism[5] made by those of us who can sermonize from the safety of our narrower disciplines or perspectives as licensors and licensees;[6] practicing lawyers, academics, or judges;[7] or transactional or litigation attorneys.[8]

This situation in part results from the fact that NCCUSL had announced that Revised Article 9 was to defer to Article 2B. During the drafting process, accordingly, most input on license financing issues was made to the Article 2B Drafting Committee instead of to the Article 9 Drafting Committee. Not until after the Revised Article 9 Drafting Committee meetings ended did it become apparent that the Revised Article 9 Drafting Committee had not cured the divergence between Article 2B and Revised Article 9. Procedures were further complicated when, as part of the ALI's adoption of Revised Article 9, it was announced that Revised Article 9 would be conformed to an accord reached with Article 2B. That conformance was not made, and further examination of Revised Article 9 and related materials have revealed additional problems that involve Revised Article 9 only, not Article 2B. *See* Letter from Jerry T. Myers, Observor for Commercial Law League of America, to Carlyle C. Ring, Jr., Chairman, Article 2B Drafting Committee (Jan. 20, 1999) (available at <http://www.2bguide.com/docs/0199clla.html>). Some of the problems have been resolved through the efforts of the Revised Article 9 Reporters, but some likely cannot be resolved absent amendment of Article 9. Given the lack of a current forum to cure these problems, it is unfortunate, but not surprising, that states may need to resort to solving these issues unilaterally and nonuniformly.

4. Publications authored or co-authored by Professor Nimmer provide a glimpse of the breadth of his academic knowledge. *See, e.g.*, LIONEL H. FRANKEL & RAYMOND T. NIMMER ET AL., COMMERCIAL TRANSACTIONS: SALES, PAYMENT SYSTEMS, SECURED FINANCING (1982); RAYMOND T. NIMMER, COMMERCIAL ASSET-BASED FINANCING (1988); RAYMOND T. NIMMER, INFORMATION LAW (1996); RAYMOND T. NIMMER, THE LAW OF COMPUTER TECHNOLOGY (3d ed. 1997); RAYMOND T. NIMMER, THE NATURE OF SYSTEM CHANGE: REFORM IMPACT IN THE CRIMINAL COURTS (1978); RAYMOND T. NIMMER & INGRID MICHELSEN HILLINGER, COMMERCIAL TRANSACTIONS: SECURED FINANCING (1992); Raymond T. Nimmer, *Services Contracts: The Forgotten Sector of Commercial Law*, 26 LOY. L.A. L. REV. 725 (1993).

5. One commentator has described such criticism as follows:

> Consumers and business licensees, as well as some software consultants, complain that the proposed law favors big licensers. Some members of the entertainment, banking, book publishing and music industries don't like the draft either. Even big software companies do not like parts of the draft. When this many diverse interests start whining in chorus about a proposed law, the draftsperson (in this case, Raymond T. Nimmer) is to be congratulated.

Wayne D. Bennett, *Legal and Blinding*, CIO WEB BUS. MAG. (Oct. 1998) <http://www.cio.com/archive/webbusiness/100198/graycontent.html>.

6. In reality, most licensors are also licensees, but not all licensees are also licensors. *See, e.g.*, Micalyn S. Harris, *Is Article 2B Really Anti-Competitive?*, 16 CYBERSPACE LAW., Nov. 1998, at 16, 16.

7. That there are differences between the views of practicing lawyers, judges, and academics is characteristic of American law:

> Within the legal profession most practicing lawyers (who are interested in winning cases or in advising their clients in such a way that they don't have cases) prefer a formalistic approach to law. That approach holds out

> the promise of stability, certainty, and predictability– qualities which practitioners value highly. Judges, on the other hand, are paid to decide cases. . . . [J]udges want to decide the cases which come before them sensibly, wisely, even justly. Sense, wisdom, and justice are community values, which change as the community changes. It is a reasonable assumption that swings toward or away from legal formalism are determined by changes in community values and that such swings will be more marked in the case of the judiciary than in the case of the practicing bar.
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> For the past hundred years academic lawyers have constituted a third distinct segment of the profession. Professors who regularly engage in practice have disappeared from the faculties of our major law schools. . . . Most law professors spend most of their time teaching; a few of them also write books and law review articles, whose production has for a long time been an almost exclusively academic monopoly. The academic layers who choose to write as well as teach lack the salutary discipline which is imposed on judges who must decide . . . their cases in the light of the evidence properly introduced . . . . The author of a leading article in a law review need not fear being reversed on appeal: there is no higher court. The academic legal literature which has been produced over the past hundred years shows, even more dramatically than the judicial opinions of the same period, the periodic swings toward and away from formalism. It is, however, also true that a considerable number of quirky eccentrics end up teaching law and writing law books. These are people who instinctively deny what everyone else affirms. Thus, at any given time, the literature contains a considerable amount of writing which cuts against the prevailing grain. Nevertheless, the academic literature, viewed historically, brings us as close as we are apt to come to what Justice Holmes once referred to as "the felt necessities of the time."

GRANT GILMORE, THE AGES OF AMERICAN LAW 17-18 (1977).

8. *See id*. There is also a split among practicing lawyers between the transactional attorney and the litigator. As Professor Karl Llewellyn described, transactional attorneys judge the value of rules of law "according to the degree of solidity and reliability which they offer as foundation and tools for building, or else according to the nature and degree of the danger which they offer of producing an upset or other undesired result." K.N. Llewellyn, *The Modern Approach to Counseling and Advocacy– Especially in Commercial Transactions*, 46 COLUM. L. REV. 167, 168 (1946). Litigators, however, who only see the transaction after trouble has occurred, prefer uncertainty because of the opportunities it provides:

> [T]hat vast range of law which is not so clear or not so settled, of rules whose application is uneven, of "trends" in decision, of rules which courts commonly recite only to find a way around them if their direct application appears unfortunate– that vast range is to the advocate not merely an area of risk, as it is to the counsellor; it is also to the advocate an area of opportunity: he may be able to win his case with the help of one or more of these available through far from wholly reliable rules.

Id. at 169 (footnote omitted).

In the Article 2B debates, this difference in view can most easily be seen by comparing the goals of industry and attorneys who represent some consumer interests. The former tend to seek certainty and the latter tend to seek uncertainty. For example, for both Revised Article 2 and Article 2B, attorneys for these consumers have argued for abolishing the "safe harbors" found in the existing § 1-201(10) definition of "conspicuous." *See* U.C.C. § 1-201(10) (1995) (defining "conspicuous" and listing actions deemed to meet this definition); *cf*. Memorandum from Gail Hillebrand, representing Consumers Union, to Uniform Law Commissioners (July 1997) (available at <http://www.2bguide.com/docs/cun.html>)

Like others before him, Professor Nimmer is saddled with the job of striving for a perfect product in an imperfect world.[9]

Strong resistance appears to accompany all important and groundbreaking legislation. Drafting on what became the UCC, the only and most significant source of uniform contract law in the United States, started in the 1930s,[10] and it was first proposed in 1949.[11] However, it was not widely adopted until the 1960s,[12] more than ten years later. Many criticized the UCC as too dramatic a change from contemporary law, but by the time it was widely adopted, it was viewed as obvious.[13]

(criticizing the existing rules and their retention in Article 2B). In contrast, industry representatives have argued for retaining the safe harbors. *See, e.g.*, Memorandum from Business Software Alliance to National Conference of Uniform Law Commissioners (July 17, 1997) (available at <http://www.2bguide.com/docs/bsacun.html>). The issue was specifically considered at the 1997 annual meeting of NCCUSL, in which the commissioners voted to retain safe harbors in both Articles 2 and 2B. *See* Carol A. Kunze, *Brief Report on the NCCUSL Annual Meeting July 25-August 1, 1997* (last modified Sept. 28, 1998) <http://www.2bguide.com/nmtgrpt.html> (reporting that there should be safe harbors in the Article 2B definition of "conspicuous" and these safe harbors should be consistent throughout Articles 2, 2A, and 2B).

9. No legislation is perfect. With respect to Article 2, Professor Grant Gilmore described Professor Llewellyn's struggle with this reality:

> I have come to feel that Karl saw more clearly than his critics and that the Code as he initially conceived it might better have served the purposes of the next fifty years. Yet Karl never lost sight of the fact that his job was to produce, not the best Code which could ideally be put together by a band of scholarly angels, but the best Code which stood a chance of passage in the imperfect world of man. He cheerfully gave ground when he had to . . . .

Grant Gilmore, *In Memoriam: Karl Llewellyn*, 71 YALE L.J. 813, 814-15 (1962). Article 2 was imperfect and no group was completely satisfied:

> In all probability, Llewellyn thought that he could persuade his employers [NCCUSL and the ALI] to adopt his own theories. In turn, the people who controlled [NCCUSL and the ALI] thought that they could make use of Llewellyn's drafting skills and encyclopedic knowledge of the law, while reserving the power to veto any excesses toward which their unpredictable Chief Reporter might seek to lead them. . . . The Code in its final form can best be described as a compromise solution which satisfied no one.

GILMORE, *supra* note 7, at 84-85. Professor Llewellyn himself said that "[a] wide body of opinion has worked the law into some sort of compromise after debate and after exhaustive work. However, when you compare it with anything that there is, it is an infinite improvement." Karl Llewellyn, *Why a Commercial Code?*, 22 TENN. L. REV. 779, 784 (1953).

10. *See* GILMORE, *supra* note 7, at 140 n.38.

11. *See* Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True, the Beautiful in Commercial Law*, 73 GEO. L.J. 1141, 1142 n.7 (1985).

12. *See id.* (stating that the Code was officially introduced in 1949; Pennsylvania was the first to adopt it in 1954 and Massachusetts followed in 1958, while the remaining states delayed adoption until the 1960s).

13. Professor Gilmore, reporter for Article 9 of the UCC, argued:

> [T]he legal establishment which controlled the bar associations (and had great influence with the bankers' associations) opposed the Code and was successful in preventing its enactment. In the 1960s the same people who

Nothing is obvious, however, in the age of the Internet, and there is a need for uniform legislation:

> The unique nature of the Internet highlights the likelihood that a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states. . . . Typically, states' jurisdictional limits are related to geography; geography, however, is a virtually meaningless construct on the Internet. The menace of inconsistent state regulation invites analysis under the Commerce Clause of the Constitution, because that clause represented the framers' reaction to overreaching by the individual states that might jeopardize the growth of the nation– and in particular, the national infrastructure of communications and trade– as a whole.
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> . . . [T]he Internet is one of those areas of commerce that must be marked off as a national preserve to protect users from inconsistent legislation that, taken to its most extreme, could paralyze development of the Internet altogether.[14]

Nevertheless, Article 2B may be headed down the same road as the original Article 2. While it is a visionary work, its critics urge that it should not be adopted until it has become obvious.[15] The difference between 1949 and today, however, is that the United States is no longer operating unilaterally, and there is a current, real need for this legislation. This is obviously the case for electronic commerce,[16] as well as the many other areas Article 2B covers.[17]

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had fought the Code ten years earlier had reversed their field and were counted among its most vigorous supporters. A plausible reason for this reversal is that during the 1950s the courts, in a surge of activism, had themselves been rewriting much of the law. The Code, which in the 1940s had seemed much too "liberal" to its conservative critics, had by the 1960s become an almost nostalgic throwback to an earlier period.

GILMORE, *supra* note 7, at 86.

14. American Libraries Ass'n v. Pataki, 969 F. Supp. 160, 168-69 (S.D.N.Y. 1997).

15. *See, e.g.*, Memorandum from American Law Institute Ad Hoc Committee on Article 2B to the American Law Institute (Dec. 1998) (on file with the *Houston Law Review*) ("Because the field of commercial endeavor being addressed by Article 2B is both new and rapidly changing, there is no settled practice to 'codify' or 'unify' as there has usually been in other fields addressed by the UCC. These considerations alone militate against haste in promulgating such an article.").

16. For example, there is no uniform answer in the United States for even the simplest questions regarding electronic commerce. As explained by the Information Infrastructure Task Force:

> The law dealing with electronic commerce is not clear– especially for totally paperless transactions. On-line contracting and licensing raise a number of concerns about the validity and enforceability of such

> transactions. The [National Information Infrastructure] will not be used to its fullest commercial potential if providers and consumers cannot be confident that their electronic agreements are valid and enforceable.
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> . . . .
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> The threshold question is whether an electronic message or offer or acceptance or the simple use of the "accept" or "return" key in response to a provider's offer or consumer's request is assent.
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> . . . .
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> . . . [Another] issue involves writing and signature requirements for certain contracts. In the [National Information Infrastructure], where transactions may be entirely paperless, it may be unclear whether electronic messages are written and what will be considered an adequate signature.

INFORMATION INFRASTRUCTURE TASK FORCE, THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 54-56 (1995) <http://www.iitf.nist.gov/documents/committee/infopol/ipnii.html> [hereinafter TASK FORCE REPORT].

Digital signature or other electronic signature acts are not sufficient to answer even these narrow questions. Digital signature acts such as those adopted in Washington and Utah only allow use of a particular encryption technology, and require a certification infrastructure that is not yet widely in place or commonly accepted. *See* UTAH CODE ANN. §§ 46-3-101 to –504 (1996 & Supp. 1997); WASH. REV. CODE ANN. §§ 19.34.10 to .902 (West 1996 & Supp. 1999). Other electronic signature statutes allow more technologies but have diverse coverage. For an overview of electronic signature statutes, see McBride Baker & Coles, *Summary of Electronic Commerce and Digital Signature Legislation* (last modified Jan. 11, 1999) <http://www.mbc.com/ds_sum.html>.

In the end, none of these statutes are particularly helpful because they are not uniform. That fact creates the question of whether an electronic or digital signature that complies with the law of State A will be recognized in State B. In a national economy, it is silly to leave this question unanswered. NCCUSL is working on a uniform act, the Uniform Electronic Transactions Act ("UETA"), which would answer some of these questions if it is uniformly adopted. By its nature, however, the UETA cannot answer the kinds of questions that are and must be treated in Article 2B because the UETA will be applied to a much broader spectrum.

17. Two examples are illustrative. First, the Federal Reserve Board recently amended or proposed amendments for the major consumer regulations that require delivery of written disclosures, Regulations E, B, Z, DD, and M. *See* Equal Credit Opportunity, 63 Fed. Reg. 14,552, 14,555 (1998); Electronic Fund Transfers, 63 Fed. Reg. 14,528, 14,532 (to be codified at 12 C.F.R. pt. 205); Consumer Leasing, 63 Fed. Reg. 14,538, 14,541; Truth in Savings, 63 Fed. Reg. 14,533, 14,537; Truth in Lending, 63 Fed. Reg. 14,548, 14,552. The amendments essentially allow use of electronic communications to meet the "written delivery" requirements of various government regulations if the consumer and the financial institution (which can include all businesses, not just depository institutions) *agree* to use electronic communications. *See, e.g.*, Electronic Fund Transfers, 63 Fed. Reg. at 14,528-29 (proposing to allow depository institutions to deliver required disclosures under the Electronic Fund Transfer Act via electronic communication with consumer consent). Many commentators asked the Board to clarify when an "agreement" would exist, and asked whether agreements may be established electronically. *See id.* at 14,529. The Board responded as follows:

> There may be various ways that a financial institution and a consumer could agree to the electronic delivery of disclosures and other information. *Whether such an agreement exists between the parties is determined by applicable state law*. The regulation does not preclude a financial institution and a consumer from entering into an agreement electronically, nor does it prescribe a formal mechanism for doing so.

Article 2B blends diverse legal disciplines but does so for a principled reason. The information economy forces such a blend;

Id. at 14,529 (emphasis added). Where in state law, then, can a financial institution turn in order to determine whether and how it may contract electronically? In most states, the answer is "nowhere," or the answer is that compliance with a digital signature statute (that may or may not be consumer friendly) is required. In no states are there uniform answers.

Second, the Office of the Comptroller of the Currency ("OCC"), the regulator of national banks, recently issued an interpretive letter concluding that a national bank is empowered to create a subsidiary to be a Utah certification authority and repository for certificates used to verify digital signatures. *See generally* Letter from Julie L. Williams, Chief Counsel, Comptroller of the Currency, to Stanley F. Farrar, Sullivan & Cromwell (Jun. 12, 1998) (on file with the *Houston Law Review*) [hereinafter OCC Letter]. Utah is one of the few states that licenses certification authorities to issue certificates regarding digital signatures that require and rely on public-private key encryption technology. The OCC Letter is particularly significant because it recognizes the "new risks that arise from a new use of technology," and goes to great lengths to explain the risk reduction program the subsidiary in which must engage. *See id.* at 5-8, 18.

However, the risk reduction program touches on an old legal debate: contractual choice of law provisions. As does § 2B-107, the Comptroller recognizes that settling the question of what law will apply to a contract is critical for handling these new risks. *See id.* at 7. The Comptroller included as one of the "legal devices to control and limit [the subsidiary's] risk of liability," the subsidiary's use of a choice of Utah law provision in all of its contracts. *Id.* While most of the initial contracts were to be between commercial parties, the Comptroller recognized that the subsidiary would eventually do business with consumers and, therefore, required inclusion of choice-of-law provisions in the consumer contracts as well. *See id.* at 7 n.17. The Comptroller acknowledges the chaos of existing law regarding the enforceability of choice-of-law clauses, but takes the position that state courts have long enforced choice-of-law provisions even as to issues as important as usury. *See* Letter from Julie L. Williams, Chief Counsel, Comptroller of the Currency, to Jeremy T. Rosenblum, Ballard, Spar, Andrews & Ingersoll 11 n.37 (Feb. 17, 1998) (on file with the *Houston Law Review*) (discussing the ability of an interstate national bank to charge the rate of interest allowed in the bank's home state under federal and state law). Noting that the subsidiary's ability contractually to control its liability is not complete (because of the uncertainty regarding enforcement of choice-of-law clauses), the Comptroller also required the subsidiary to take "appropriate steps to manage its liability," such as the use of non-contractual disclaimers in the company's "certificate practice statement." OCC Letter, *supra*, at 7.

The Comptroller's position is relevant to the Article 2B debate regarding choice-of-law provisions. It illustrates the need for such provisions, particularly in an age in which new products create new risks and where commerce is routinely conducted nationally and internationally. This need is echoed by others: "[I]n order to protect consumers online, the global community must address complex issues involving choice of law and jurisdiction— how to decide where a virtual transaction takes place and what consumer protection laws apply." U.S. GOV'T WORKING GROUP ON ELEC. COMMERCE, FIRST ANNUAL REPORT 27 (1998). Section 2B-107 addresses choice-of-law and also protects consumers: it provides that, in a consumer transaction, a choice-of-law provision may not vary a mandatory consumer law. *See* U.C.C. § 2B-107(a) (Proposed Draft Feb. 1999). This rule may interfere with Internet commerce and the principle of freedom of contract, but the drafters believe that states' individual policy determinations should be respected. *See id.* reporter's note 3. Although one can criticize this rule as being too protective given the difficulty or impossibility of locating mandatory consumer laws globally, the rule at least provides certainty for non-consumer contracts.

therefore, the law must either continue to fall behind and leave chaos, or lead. Moreover, if the United States, through the states, does not act, the European Union ("EU") will. As a unified market for the first time in history, the EU is happily legislating in each of the areas Article 2B covers,[18] while the Article 2B supporters and critics wrangle. If one is comfortable with the EU as a de facto state legislator, or with legal chaos, then there is no need to continue wrangling.

Some are not comfortable with that result. This Article concludes that the states should determine their own laws and policies, and that Article 2B is the vehicle for doing so. More particularly, this Article looks at the following political traps that have ensnared Article 2B: (1) fear of change; (2) too many trees, no forest; (3) history repeats itself or comes full circle; (4) academia– an explored journey or shortcut to results?; (5) as long as we're just talking about you, there ought to be a law; and (6) leading by designers, not design.

II. FEAR OF CHANGE

The first statement every industry made upon learning of its potential inclusion within the ambit of Article 2B was, in effect, "Leave us alone! Our law is fine and we don't want to learn a new law." As a participant in the software industry, I too, expressed those sentiments. Interestingly, the same comments were made

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18. For example, the European Commission has stated:

> The Commission's 1997 Communication on electronic commerce set a clear objective of creating a European coherent legal framework by the year 2000. This proposal meets that objective. It builds upon and completes a number of other initiatives [Note 2] that, together, will eliminate the remaining legal obstacles [to the provision of on-line services and electronic commerce], while ensuring that general interest objectives are met, particularly the achievement of a high level of consumer protection. This proposal will reinforce the position of the Community in the international discussions on the legal aspects of electronic commerce which are currently underway in a number of international fora (WTO, WIPO, UNCITRAL, OECD). The Community will thus secure a major role in international negotiations and significantly contribute to the establishment of a global policy for electronic commerce.
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> [Note 2 reads as follows:] Amongst the most recent are the directives on the "regulatory transparency mechanism", the protection of personal data, the protection of consumers in respect of contracts negotiated at a distance; and the proposals on the legal protection of conditional access services, electronic signatures, copyright and related rights and electronic money.

See Council Proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market, COM(98) at 3 & n.2 (Provisional final version 1998) (unofficial English translation) (on file with the *Houston Law Review*) [hereinafter Council Proposal].

about Article 2. One commentator has noted that "some opposed the Code because it would disturb the existing law they thought clear and settled."[19] Karl Llewellyn, the reporter for Article 2, in response to this criticism stated:

> The question that faces a lawyer first of all, as he thinks about the Code, is: Do I have to learn all over again everything that I have already learned and upon which I have relied now these many years? Is the law which I have practiced to be upset by a new body of material? Must I start afresh? As to this, let me say three things. I wish you would let me say them very slowly, very loudly, and with all the cogency at my command. The first is that you don't know the present law, and if you are practicing on the assumption that you do, all I can say to you is "God pity your clients!" The amount of abysmal, unbelievable, utterly un-understandable, base ignorance on the part of the bar giving commercial advice which I have found in the highest quarters of the land, is a thing which has turned my hair— not white,— but taken it out— during the process of discussion of the problems of this Commercial Code. Shall I say it over again, or did I make it moderately clear?[20]

Professor Llewellyn conceived of the law as what courts do.[21] "In saying the law was uncertain and unsettled, Llewellyn meant that under the pre-Code rules no one could safely predict what a court would do in any given instance. If you could not predict a court's behavior, you could not adjust your own."[22] For Professor Llewellyn, such a situation was "intolerable for businessmen who needed to plan and act rationally."[23]

We have a similar situation today— no one can reliably predict how courts will rule regarding contract law issues that concern electronic commerce and computer information.[24] It is

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19. Hillinger, *supra* note 11, at 1164.

20. Llewellyn, *supra* note 9, at 781.

21. *See* Hillinger, *supra* note 11, at 1165.

22. *Id.*

23. *Id.*

24. Refer to note 16 *supra* (illustrating that basic legal issues, such as the validity of electronic consents, are unclear and vary from state to state). *See also* United States v. Stafford, 136 F.3d 1109, 1111, 1114-15 (7th Cir.), *cert. denied*, 119 S. Ct. 123 (1998). *Stafford*, in illustrating a distinction between information (codes for obtaining money transfers) and goods, demonstrates the difficulty of predicting when and whether laws written for goods will apply in any given circumstance (here, a circumstance in which the court had to determine whether access codes constituted "goods"):

> The government concedes that the codes are not securities or money, but it

also clear that each Article 2B industry views "the law" as the common law under which it operates, and yet that law varies with each industry. As best conceived,[25] Article 2B industries at

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says that they are goods, wares, or merchandise.

> They're not; they're information. No doubt Allison wrote them down rather than committing them to memory, but he was not charged with having transported pieces of paper containing codes across state lines . . . . He was charged with transferring the codes themselves, which are simply sequences of digits. The sequences have no value in themselves; they are information the possession of which enables a person to cash a check. If this information comes within the statutory terminology of goods, wares, or merchandise, then so does a tip phoned by a crook in Chicago to one in San Francisco . . . . The government presses on us cases that hold, very sensibly as it seems to us, that wire transfers of money can violate the statute. . . . What is transferred is intangible, the claim represented by money rather than the rice paper itself, but it is money, and the statute expressly includes transfers of "money." The [] code has to be "goods, wares, [or] merchandise" to come within the statute. It is none of those things.

Id. at 1114-15.

25. For several years, some entertainment industry licensing contracts were included within the coverage of Article 2B. At its November 1998 meeting, the Article 2B Drafting Committee expanded an exemption to exclude entirely the primary businesses of the entertainment industries, *e.g.*, motion pictures, sound recordings, television broadcasting, and newspapers, books, and magazines in print form. In reality, the entertainment and computer industries are converging, hence the best intellectual product would be one that creates a uniform set of rules for the converging industries. When convergence affects the core of an industry's business, however, care must be taken to honor the premise that commercial law should not surprise, but should merely codify existing practices. As one noted commentator explained, commercial legislation is "legislation which is designed to clarify the law about business transactions rather than to change the habits of the business community" and the principal objective of the draftsmen of commercial legislation is "to be accurate and not to be original." Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L.J. 1341, 1341 (1948).

The entertainment industry feared that Article 2B would somehow surprise it, and expressed its belief that it was not possible to draft one set of rules that would work well for all of the information industries:

> [W]e deeply appreciate your sincere and considerable efforts together with those of the Reporter and the Drafting Committee to fashion an acceptable document. However, we are convinced that the current draft is fatally flawed in its fundamental premise that all transactions in "information" may be governed by a single set of contractual rules. Therefore, we have reluctantly concluded that the draft cannot be reworked to accommodate the breadth and variety of all of our respective and diverse business practices.

Letter from Jack Valenti, President & CEO, Motion Picture Association of America, et al. to Carlyle C. Ring, Jr., Chairman, NCCUSL Article 2B Drafting Committee & Geoffrey Hazard, Jr., Director, American Law Institute 1 (Sep. 10, 1998) (on file with the *Houston Law Review*). *But see* Letter from Barry K. Robinson, Recording Industry of America to Carlyle C. Ring, Jr., Chair, U.C.C. 2B Drafting Committee (Feb. 24, 1997). Mr. Valenti's letter goes on to state the intention of the Motion Picture Association of America ("MPAA") to:

> [E]xplor[e] an approach to craft limited legislation that would create certainty and clarity in the law affecting some important types of transactions in the information and media industries. If such an approach

least included, in whole or in part, the information, data, software, publishing, entertainment, and banking industries. None of these industries looks to Article 2 as its governing or primary law, although courts have, questionably, begun to include software in Article 2.[26] If each industry Article 2B affects

> appears promising, the discussion will be expanded to include many of the trade associations listed below, as well as other interested parties. We are hopeful that the product of our work will be to everyone's benefit.

Valenti et al., *supra*, at 2. However, as of the date of this writing, the MPAA has not suggested an alternate draft.

While one can validly disagree with the position of the entertainment industry, certainly their fears are understandable, particularly given the fact that the movie industry has unique methods of contracting. When explaining the culture gap between the movie industry and the computer industry in another context, one commentator noted that "even the easiest-going people in computers and films sometimes find it hard to get on. Their businesses, cultures and working practices are at odds. . . . The distance between the two worlds, . . . gets in the way of the business." *Electronic Anthills*, ECONOMIST, Nov. 21-27, 1998, at 12, 13. The fact of conversion is still a reality, however– "Despite their differences, computer and film people are being forced together. Since the first Disney-Pixar collaboration, 'Toy Story' (1995), computer animation has moved into the mainstream. 'Toy Story', which was intended as a little boutique movie, unexpectedly took off." *Id.* It is this convergence that the Article 2B Drafting Committee attempted to address. While its efforts were unsuccessful, they were commendable. Given the entertainment industry's decision to be excluded, the convergence of these industries will be handled under the uncertainty created by current law, *i.e.*, the common laws, Article 2, or a combination of both, depending upon the product in question.

26. *See, e.g.*, Advent Sys., Ltd. v. Unisys Corp., 925 F.2d 670, 675-76 (3d Cir. 1991). In *Advent*, the Third Circuit acknowledged that computer programs do not start as goods and, thus, are not, in their original form, within Article 2 coverage. *See id.* at 675 (stating that "[c]omputer programs are the product of an intellectual process," just as is music, before it is recorded and transferred to a compact disc, or a professor's lecture before it is transcribed into a book). However, the court reasoned that once they are put onto floppy disks, they are goods, because they become tangible and movable. *See id.* at 675-76. A problem with this analysis is that it will result in the development of two bodies of law, one for information delivered via disk or CD, and one for information that is downloaded via the Internet.

This problem has already been articulated by the White House task force regarding the national information infrastructure ("NII"):

> The licensing of copyrighted works via the NII is more problematic. Application of UCC Article 2 is questionable, because the works involved may not be "goods" under the UCC, and because the transaction itself is not a "sale," but rather a license to use or access the work. Common law principles of contract law, therefore, may apply to on-line licenses. Amendment of Article 2 of the UCC to cover such licensing transactions is being actively considered by the Permanent Editorial Board for the Uniform Commercial Code.

TASK FORCE REPORT, *supra* note 16, at 58. The referenced project is Article 2B.

Forcing an information peg into a square hole made for goods is particularly unfortunate given the fact that Article 2 was not written with information in mind; software did not even then exist. For the same reasons that Professor Llewellyn believed that commercial sales rules had to be "unhorsed," it is inappropriate to use rules that have evolved from the law of goods for computer information. Why then are some courts applying Article 2? In *Advent*, the Third Circuit suggested that answer. The court concluded that applying a uniform body of law to the wide range

were certain that its own version of "the law" would prevail, it could also conclude that there is no need for Article 2B. Such confidence is misplaced and does not account for the fact that in each area of the common law, new products, distribution methods, and legal issues are not addressed at all, or at least they are not addressed uniformly.

In short, we are wrong about how well we know "the law," just as others were wrong about original Article 2. Further, the only uniform contract law that we think we know is slated for change. Article 2 is being substantively revised in numerous ways that will require all to relearn and retool and, unless corrected, will make contracts more uncertain.[27] Also, Revised Article 2 still only contemplates sales of goods, not information or licensing. That is appropriate, given the fact that Article 2B is being drafted for computer information transactions. However, if Article 2B is delayed, or is not adopted simultaneously with Revised Article 2, then the damage already done by applying original Article 2 to information will be exacerbated.

"So what," some will say. "Article 2 doesn't apply to my common law industry anyway, so I don't care." However, that statement may well be incorrect. The software industry believed that it was governed by the common law and not Article 2, but some courts have begun to disagree.[28] If laws written for goods are going to be applied to information, those laws should be adapted to information.

III. TOO MANY TREES, NO FOREST

The high technology industry is fueling the U.S. economy,[29] yet no uniform body of contract law exists for computer

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of commercial questions likely to arise in software disputes would offer substantial benefits, particularly given the importance of software in commerce. *See Advent*, 925 F.2d at 676. In other words, the court needed a body of uniform contract law and had no place else to go.

27. *See, e.g.*, Letter from Edwin E. Huddleson, III, Driscoll & Draude, to Lawrence J. Bugge, Chair, Drafting Committee to Revise Uniform Commercial Code Article 2– Sales et al. (Jan. 29, 1999) (on file with the *Houston Law Review*); Letter from Charles R. Keeton, Brown, Todd & Hyburn, P.L.L.C., to U.C.C. Article 2 Drafting Committee (Feb. 2, 1999) (on file with the *Houston Law Review*); Letter From Andrew D. Koblenz, Alliance of Automobile Manufacturers, to Lawrence J. Bugge, Chairman, U.C.C. Article 2 Drafting Committee, NCCUSL (Feb. 4, 1999) (on file with the *Houston Law Review*); Memorandum from National Association of Manufacturers et al. to U.C.C. Article 2 Drafting Committee (Jan. 29, 1999) (on file with the *Houston Law Review*).

28. *See, e.g.*, *Advent*, 925 F.2d at 675-76.

29. *See* AMERICAN ELECTRONIC ASSOCIATION, CYBERNATION: THE IMPORTANCE OF THE HIGH-TECHNOLOGY INDUSTRY TO THE AMERICAN ECONOMY (1997). The U.S. high-tech industry represented a projected 6.2% of the 1996 gross domestic product

information. The only uniform contract statute in the United States is Article 2, which was written for sales of goods.[30] The need for a comprehensive statute contemplating information licensing instead of sales of goods (*i.e.*, the need for a "forest" instead of individual trees) has been explained in other contexts:

> Applying the present libel laws to cyberspace or computer networks entails rewriting statutes that were written to manage physical, printed objects, not computer networks or services. . . .
>
> . . . .
>
> A uniform system . . . is needed to cope with the impact of the information age. It is the responsibility of the legislature to manage this technology and to change or amend the statutes as needed.[31]

The need to rewrite law to reflect new economies is an old problem evidenced throughout the history of the law of sales. Professor Llewellyn once described the need to "unhorse" a sales law that was based on economies that existed before the mercantile or industrial ages. There was a need to divorce mercantile sales law from laws written for economies contemplating real estate, horses, and haystacks.[32] In describing the early efforts to unhorse sales law from analytical tools deriving from the "village smithy," Professor Llewellyn noted that judges thinking in terms of "land-law" developed a rigid attitude towards words with a tremendous power of carry-over into non-land transactions, and that approaching a commercial (sales) document with the eyes of a land conveyancer could lead to "pretty awful results."[33]

("GDP"), up from 5.4% in 1990. *See id*. at 3. The automotive manufacturing and services percentage of GDP is 4.3%, and the high-tech industry (which was conservatively defined only to include high-tech manufacturing, communications services, and software and computer-related services, and not the biotechnology industry and the wholesale and retail trade of high-tech goods) is only slightly behind the private health services industry's 6.5% share of GDP. *See id*. The high-tech industry also creates millions of new jobs; because these high-tech jobs require workers with more education and technical abilities, they pay 73% more than the average private sector wage in the United States. *See id*. Additionally, the high-tech industry is the single largest U.S. exporter. *See id*.

30. *See* U.C.C. § 2-102 (1995) (stating that Article 2 applies to transactions in goods).

31. It's In The Cards, Inc. v. Fuschetto, 535 N.W.2d 11, 14-15 (Wis. Ct. App. 1995).

32. *See generally* K.N. Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873, 874-75, 904 (1939).

33. *See id*. at 873.

Professor Llewellyn also believed that all sales law could not be lumped into a single class, and that sales of mercantile goods needed to be thought of and treated differently from sales of farms, sales made at farms (instead of in distant markets), and sales of horses:

> If the wares are there, the descriptive words may be but a means of *identifying* which bales or barrels are under discussion, but such influence as the horse has is toward making words have legal force: "sound and kind" in a bill of sale for a horse means "warranted so." The first move toward a law of pure commerce in wares is thus interestingly *away from* giving meaning to such words; for wool is not to be expected to have hidden vicious tendencies to kick. The type of "description" of wares which is to be relied on is a description of species, which, if it proves not to fit the barrel or the bale, unidentifies what has been apparently identified as the subject of the deal.[34]

The same subtleties can arise with respect to the differences between information and goods. The reason Professor Llewellyn believed mercantile sales should not be thrown into a "single intellectual bin with cases of other and different pattern[s]," is the same reason that licenses of information should not be thrown into the single intellectual bin for sales of goods.[35] Professor Llewellyn further believed that courts should be discouraged from applying statutory rules in a mechanical fashion, and instead encouraged to understand the purposes and reasons behind statutes to allow construction in light of those

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34. *Id*. at 886-87. This point, it appears, is that horses could not be characterized by species because of their inherent individual differences. It appears that they traditionally did not carry any implied warranties either, because they were viewed as "detachable agrarian chattel," "articles of natural growth" distinguishable from wares or simply as horses and not wares. *See* K.N. Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725, 737, 740-41 (1939).

Professor Llewellyn chiefly encountered sales law in the form of the Uniform Sales Act of 1906. *See* Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 471 (1987). Professor Llewellyn apparently believed that it was obsolete because it "consisted of rules derived from a few broad abstractions, removed from practical experience, and expected to answer all questions." *Id*. at 473. He also believed that it was not sufficiently unhorsed from the 1893 English Sales of Goods Act, which was based on English law that reflected eighteenth- and nineteenth-century commerce. *See id*. at 475.

35. *See* Llewellyn, *supra* note 32, at 874 (arguing that as between the law of real estate conveyancing and the law of mercantile sales, the latter should be channeled under circumstances that permit it to be perceived as governing mercantile cases only, which in turn permits it to remain unconfused in its impact because it is not thrown into a single intellectual bin).

purposes.[36] He thus wrote lengthy comments to each provision of Article 2.[37] That concept, which is taken for granted today, was then quite controversial and heavily criticized.[38] Article 2B proceeds on the same premise and creates a different and distinguished intellectual bin for cases of other or different patterns, to wit, information. It also contains Reporter's Notes to aid understanding of the purpose and reason behind the statute.

Sales law reflects the history of the United States.[39] As we deal with a new stage of that history, it is as appropriate now to "ungoods" sales law as it previously was to unhorse it.

IV. HISTORY REPEATS OR COMES FULL CIRCLE

The Article 2B debates are critical to those affected by the proposed legislation and often involve significant questions regarding the direction contract law will take. What is interesting, however, is that several of the same debates took place when Article 2 was drafted. We are dancing to tunes that have already been named, although we may not be aware of the titles.

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36. *See* Wiseman, *supra* note 34, at 499.

37. *See id*. at 499-500.

38. *See id*. at 500-01. In fact, Professor Llewellyn proposed a statutory provision that would have adopted the official comments as an explicit guide for the application and construction of Article 2. *See id*. at 500. That drew extensive criticism and created a near "mutiny." In the end, that provision did not survive, although judicial reference to the comments was made permissible. *See id*. at 501.

39. Such is a thesis of Professor Llewellyn:

> It is possible that there are fields of our law more fascinating than that of Sales, but I find the possibility difficult to credit. For packed into this small sector of the law is the course of our history over a century and a half, reflected with a range which the narrowness of the subject matter would seem offhand to make impossible.
>
> . . . .
>
> Mercantile capitalism yields to industrial capitalism . . . industrial yields again to financial capitalism: and the dye-woods, cloves . . . and simple textiles . . . are pushed out of dominance by chemicals . . .; you follow iron . . .; you meet sewing machines sold to householders on the installment plan, you meet locomotives sold on the "same" plan to an equipment trust . . .; you find "choses-in-action," which means here stocks and bonds, excluded from the Uniform Sales Act. You wake up then to the fact that the throne your subject matter once occupied is overshadowed . . . .
>
> . . . .
>
> Finally Sales, as the law of the very subject matter of business, sets forth the problems faced by law under the peculiar United States regime: galloping economic development together with a multiple jurisdictional scheme. I do not know where else to find these things displayed so vividly, and so knit into one.

Llewellyn, *supra* note 34, at 725-27.

A. The Mass-Market License Debate

In Article 2, Professor Llewellyn created the distinction between merchants and nonmerchants[40] that is taken for granted today:

> Llewellyn believed the policies and considerations involved in a mercantile situation differed from those in a nonmercantile situation, and that a unitary approach to sales rules would inevitably muddle policies and rationales. This result would jeopardize the predictability he so wanted to create for businessmen. Under a single rule, governing both businessmen and nonbusinessmen, a court trying to protect Aunt Tilly might manipulate, distort, or misconstrue the rule, making uncertain its later interpretation or application to Tilly, Inc. Rules fashioned specifically for a commercial setting, and insulated from nonmercantile considerations, would thus protect the rules' predictability for businessmen. One set of sales rules for businessmen and another for Aunt Tilly would eliminate the possibility of undermining the commercial rule to do justice to Aunt Tilly.[41]

Accordingly, Professor Llewellyn classified some Article 2 rules according to a party's *status* as a merchant or nonmerchant. In today's terms, this split would be between consumers and nonconsumers[42] and it is routine for legislation to accord special protection only to persons qualifying for consumer status.[43]

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40. *See* Hillinger, *supra* note 11, at 1141-42 (finding that, unlike prior sales law, Article 2 at times states two rules regarding each legal issue, a rule for merchants, and a rule for nonmerchants); *see also* U.C.C. § 2-104 (1995) (providing the definition of merchant). By way of example, the following Article 2 rules only apply to merchants: *id.* § 2-201(2) (the statute of frauds "confirmatory memorandum" rule); § 2-312(3) (warranty against infringement); § 2-314(1) (implied warranty of merchantability).

41. Hillinger, *supra* note 11, at 1147-48.

42. *See id.* at 1184.

43. Consumer protection laws typically do not look to the market, but instead look to the nature or purpose of the purchaser or the product. Generally, the customer must be a natural person, not a corporation. *See, e.g.*, 15 U.S.C. § 1693a(5) (1994) (providing that under the Truth in Lending Act, only a natural person can qualify as a consumer). Further, the purchaser of a toaster is subject to one set of laws if she purchases for consumer use (*e.g.*, to use the toaster at home), and another set if she purchases for business use (*e.g.*, to use the toaster at her office or in her home office). *See, e.g.*, Consumer Leasing (Regulation M), 12 C.F.R. § 213.2(e)(2) (1998) (providing that a "consumer lease" does not include a lease for business, agricultural, or commercial purposes); Truth in Lending (Regulation Z), 12 C.F.R. § 226.3 (exempting extensions of credit primarily for commercial, agricultural, or business purposes from federal truth in lending regulations); U.C.C. § 2A-103(1)(e) (Supp. 1998) (including within the definition of a "consumer lease" only one who enters into the lease predominantly for family, personal, or household purposes); *see*

Ironically, Professor Llewellyn apparently did not intend to draw such a firm line and believed that the merchant (business) rules *should* be applied to nonmerchants (consumers) in appropriate circumstances.[44] That has not been the trend, however, and in the Article 2B project the opposite argument is being made– *i.e.*, some business professionals are seeking status as *nonmerchants* in order to avoid merchant obligations.[45] At the same time, some

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also WASH. REV. CODE ANN. § 19.52.080 (West 1989) (noting that the Washington usury statute does not apply to a loan made primarily for business, commercial, investment, or agricultural purposes, but does apply to a loan made primarily for personal, family, or household purposes). An exception is the federal Magnuson-Moss Warranty Act, which does protect all purchasers of toasters, but the Act itself applies only to "consumer products." *See* Magnuson-Moss Warranty– Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (1994).

44. *See* Hillinger, *supra* note 11, at 1175.

45. *See, e.g.*, Letter from National Writers Union UAW Local 1981, to Carlyle C. Ring, Jr., Chair, Article 2B Drafting Committee & Raymond T. Nimmer, Reporter, Article 2B Drafting Committee (Oct. 9, 1998) (available at <http://www.2bguide.com/docs/nwu1098.html>). This letter states:

> The notion of "merchant" in [the Sales] Article 2 did not include individual service providers (who marketed their own labor). . . .
>
> . . . .
>
> The National Writers Union respectfully submits that the original creators of information, who spend the bulk of their time creating information, and not dealing in already-created information, are not and should not be classified as merchants. To do so presumes and imposes a level of commercial sophistication which is not naturally acquired in the act of information creation. Requiring creators to acquire such sophistication is antithetical to the creative process. Further, the term "merchant" or "between merchants" (a phrase frequently utilized throughout Article 2B), implies a parity of power which in reality, original creators of information do not usually possess, vis-à-vis [sic] commercial publishers and producers. We therefore propose that the definition should contain the following sentence, to be added at the end of its presently drafted form:
>
> > In a transaction involving the license or other transfer of rights in information under this Article, the original writers and/or artists who create that information are not merchants within the meaning of this subsection, nor are their agents, brokers or other intermediaries.

Id. (alterations in original) (emphasis omitted).

A premise of this view of merchant– *i.e.*, that the definition is not intended to include a person who markets her own labor– presents an interesting policy question. If that view is correct, then a software developer hired to write computer code similarly should not be a merchant, although Article 2B clearly treats developers as such. *See* U.C.C. § 2B-102(a)(35) (Proposed Draft Feb. 1999) (paralleling Article 2 and defining merchant broadly to include a person who "deals in information or informational rights of the kind" or a person that, by its occupation, "holds itself out as having knowledge or skill peculiar to the practices or information involved in the transaction"). One could argue that software developers are distinguishable from writers because they deliver something, *i.e.*, the code, but writers deliver something as well, the manuscript. Furthermore, some courts view software as "speech", thus, one could argue that software developers and writers engage in exactly the same profession. *See, e.g.*, Bernstein v. United States Dep't of State, 922 F. Supp. 1426, 1434-35 (N.D. Cal. 1996) (deciding in a preliminary ruling that source code is speech for purposes of the First Amendment, and stating that it

merchants seek to ensure that even the novice or first-time merchant is firmly subjected to merchant status.[46]

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could find no meaningful difference between computer language and languages such as French or German). *But see* Junger v. Daley, 8 F. Supp.2d 708, 716 (N.D. Ohio 1998) (rejecting *Bernstein* and holding that encryption software is not expressive of ideas). The majority of all software companies, not just sole proprietor developers, are small businesses that often have the same lack of sophistication claimed by writers and typically must contract with end-user corporations that are vastly larger and more sophisticated (*e.g.*, banks, insurance companies, or entertainment studios). *See, e.g.*, WASHINGTON SOFTWARE ALLIANCE, 1998-99 INDUSTRY OVERVIEW (1998) (describing that in Washington, despite being home to Microsoft, 64.5% of software companies have only 1 to 15 employees, with 22% of that percentage being companies comprised of 1 to 2 employees).

If the UCC rule is to be that professionals who market their own labor are not merchants, then that rule should cover software developers and other service providers also, not just writers. While the National Writers Union would likely agree with that conclusion, commercial licensees of software would not. Refer to note 46 *infra* (noting a push to have the definition of merchant cover a broad scope and that some implied warranties are only applicable in transactions with merchants). The reality is that Article 2 was not written with services in mind: it was written only to cover sales of goods. Accordingly, while the union suggests an interesting analysis, it is difficult to conclude that Article 2 makes an intentional analytical decision that the concept of merchant, *i.e.*, the concept that a professional is charged with more knowledge than a nonprofessional, can never be applied to one whom provides services.

The NCCUSL drafting committee for Revised Article 2 appears to agree: it has rejected the conclusion that farmers can never be merchants and has concluded that the merchant concept rests "on normal business practices which are or ought to be typical of and familiar to any person in business." *See* U.C.C. § 2-201 cmt. 2 (Proposed Draft Mar. 1999). This concept is recognized in the definition of "merchant" itself: it requires knowledge as to goods or information "of the kind" or "peculiar to the practices or goods [or information] involved." *Id.* § 2-102(19) (Proposed Draft Mar. 1999); *see also id.* § 2B-102(a)(35) (Proposed Draft Feb. 1999). Further, particular sections of the UCC, whether in Article 2 or Article 2B, allocate some burdens only to merchants who deal in goods or information "of the kind," not *all* merchants generally. *See, e.g.*, *id.* § 2B-401(a) (setting forth that the warranty regarding non-infringement is only made by merchants "regularly dealing in information of the kind"); *id.* § 2-312(3) (1995) (providing that only merchants "regularly dealing in goods of the kind" warrant non-infringement under Article 2). This distinction, that merchant status sometimes is tied to the type of goods or information in question or practices involving them, is often missed. For example, the Independent Computer Consultants Association ("ICCA") requested that "merchant" be revised because:

> It is a logical disconnect to state that just because one is a merchant of licensed goods, whether custom programs or video games or feature films, therefore one is a "merchant" of software. It doesn't work. Some of the best computer programmers do not have the expertise to evaluate development environments and languages.

Independent Computer Consultants Association, *Position Statement: UCC Article 2B-Licensing*, July 1998, at 7 (on file with the *Houston Law Review*). The ICCA's point is as true for a seller of coffee as for a licensor of software, but the UCC definition of merchant and the use of the term already acknowledges the point, when relevant.

46. This issue was first raised in a letter asking: "Is a first-time software developer, author or inventor a 'merchant'? Certain implied warranties and certain other provisions only are available in transactions with a merchant." Memorandum from Michele C.

Perhaps most ironic, is the fact that traditional merchants are seeking consumer protections. This is evidenced in the debate regarding "mass-market transactions."[47] A mass-market transaction includes all consumer transactions without a dollar limit[48] and, essentially, other transactions in the retail market that are directed to the general public under substantially the

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Kane, Walt Disney Co., to Uniform Commercial Code Article 2B Drafting Committee (December 2, 1997) (available at <http://www.2bguide.com/docs/mk-disn.html>). In response, the Committee eventually added the phrase "whether or not the person previously engaged in such transactions," to the definition of merchant. U.C.C. § 2B-102(a)(34) (Proposed Draft Dec. 1998). Given the policy of NCCUSL to conform like definitions in like articles, it has long been questionable whether the new phrase would remain in Article 2B if it were not also added by the committee revising Article 2. That has not occurred, and the current draft of Article 2B does not include the phrase. *See id*. § 2B-102(a)(35) (Proposed Draft Dec. 1999). The result of this deletion is to leave existing law regarding the definition of "merchant" unchanged.

47. Proposed 2B-102(a)(34) provides:

> "Mass-market transaction" means a transaction under this article that is:
>
> (A) a consumer transaction; or
>
> (B) any other transaction with an end-user licensee if:
>
> (i) the transaction is for information or informational rights directed to the general public as a whole including consumers under substantially the same terms for the same information;
>
> (ii) the licensee acquires the information or rights in a retail transaction under terms and in a quantity consistent with an ordinary transaction in a retail market; and
>
> (iii) the transaction is not:
>
> (I) a contract for redistribution or public performance or public display of a copyrighted work
>
> (II) a transaction in which the information is customized or otherwise specially prepared by the licensor for the licensee other than minor customization using a capability of the information intended for that purpose
>
> (III) a site license; or
>
> (IV) an access contract.

U.C.C. § 2B-102(a)(34) (Proposed Draft Feb. 1999). A "mass-market license" is a standard-form license "that is prepared for and used in a mass-market transaction." *Id*. § 2B-102(a)(33).

48. Consumer protection statutes frequently contain a dollar limit. For example, under consumer credit acts such as the Truth in Lending Act and NCCUSL's Uniform Consumer Credit Code, $25,000 is the general limit for money loaned to purchase personal property. *See* Truth in Lending (Regulation Z), 12 C.F.R. § 226.3(b) (1998); UNIF. CONSUMER CREDIT CODE § 1.301(15), 7A U.L.A. 1, 37 (1999). This amount is roughly the average price of a new car, and a new car is a product consumers typically finance. Due to the $25,000 statutory limit, the financing of high-priced products (*e.g.*, an airplane) is not covered under either act, even if purchased by a consumer. Similarly, Article 2A leasing provisions contain a dollar limit, as do Federal Regulation M leasing provisions. *See* Consumer Lending, 12 C.F.R. § 213.2(e)(1) (1998); U.C.C. § 2A-103(1)(e) (1995). Moreover, under the Truth in Lending Act, the Federal Reserve Board is empowered to eliminate consumer protections for any individual who has net assets in excess of $1,000,000 or an annual income of more than $200,000. *See* 15 U.S.C. § 1604(g)(1)(A)(i) (Supp. I 1996).

same terms for the same information.[49] For example, if word processing software license provided to a professional accountant is on the same form that is provided to Aunt Tilly, then that license is a mass-market license: it is a standard form, directed to the general public, including consumers. Neither the software nor the license is modified for the accountant or Aunt Tilly and the license fee is a small dollar amount typical of retail markets. However, if the accountant was working for a company that obtained a site license for the one thousand accountants at its U.S. headquarters, the site license would not be a mass-market license because the terms, contract pricing, and quantities contemplate the purely commercial, non-retail market.

The Drafting Committee for Revised Article 2 has rejected the mass-market concept. Why then, has the Article 2B Drafting Committee adopted it? The answer lies in the concept's *marketplace* distinction. Presumably, the Article 2B Committee's goal is not the provision of consumer protections to Fortune 500 companies. Rather, just as Professor Llewellyn innovated the party status concept (merchant/nonmerchant),[50] Professor Nimmer has innovated a market concept that the Committee believes is useful for "store-bought" software.[51] In part, Professor Nimmer and the Committee are correct.[52] However, the market

49. *See* U.C.C. § 2B-102(a)(33)-(34).

50. Refer to note 40 *supra*.

51. Refer to note 47 *supra* (defining "mass-market transaction" and "mass-market license").

52. The mass-market concept is used in two ways: (1) to treat the marketplace as a surrogate for consumer protection, thereby extending consumer protections to business (*i.e.*, merchant-to-merchant) transactions; and/or (2) as a marketplace identifier which allows definition of various expectations about the nature of transactions in that market. *See Information Age in Contracts* (Preface to ALI Draft Article 2B Nov. 1, 1997) (available at <http://www.law.upenn.edu/bll/ulc/ucc2/2bnov97.htm>). An illustration of both concepts is supplied by § 2B-304(b)(2), which creates a right of withdrawal from a continuing mass-market transaction upon the licensor's alteration of a material term pursuant to a previously agreed procedure. *See* U.C.C. § 2B-304(b)(2) (Proposed Draft Feb. 1999). An example would be a subscription to an online service offered to the general public on standard terms.

An example outside the coverage of Article 2B would be a bank deposit contract: such contracts continue for years on standard terms and conditions for most depositors. The bank needs to be able to change the continuing contract in order to meet rising costs or changing risks and laws etc., but the depositor needs to be able to determine if those changes render the contract unacceptable. Under the Article 2B concept, the "depositor" may withdraw if a change in a material term is unacceptable. The consumer protection inherent in this rule is obvious.

The "market" category of transaction to which this rule applies is the mass market, *i.e.*, the bank's standard deposit contract– not a customized contract or a contract only offered to commercial depositors. The latter category (non-mass-market commercial category) typifies a different market, a market that typically involves contracts allowing unilateral amendments of all terms, even pricing (*e.g.*, for a commercial depositor a bank might agree to wholesale pricing for basic services

concept recreates the same problems that were solved by the party-status rules in Article 2[53] and post-Article 2 consumer protection laws.[54]

In short, the mass-market license concept eliminates the merchant/non-merchant, party-status distinction as to a particular class of transactions. The opponents of the concept fear the same things that Professor Llewellyn feared: if the same rules apply to Aunt Tilly and a Fortune 500 company, courts may be tempted to manipulate, distort, or misconstrue the rules in order to provide

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but contract for the right unilaterally to amend for increases in costs or deposit reserve requirements). Deposit contracts are not covered by Article 2B. The purpose of the example is to illustrate that Article 2B codifies the concept that some contracts have features that are characteristic of a particular market and, thus, certain default rules are appropriate for contracts within that market. While this is correct in theory, in practice, use of the mass-market concept necessarily tends to emphasize the consumer protection aspects of the concept because of the variance in consumer protections in business-to-business transactions and the risk exposure attendant upon such transactions that must be controlled by contract (*e.g.*, the greater potential for consequential damages such as lost profits).

53. Refer to note 41 *supra* and accompanying text.

54. *See* Hillinger, *supra* note 11, at 1184 (arguing that the proliferation of consumer legislation in the 1980s indicated "the perceived need to create different rules for different classes of people"). Professor Hillinger also notes that the original UCC was criticized for not containing more consumer protection rules. *See id.* at 1184 & n.271. Given the proliferation of state and federal consumer protection laws after the UCC's passage, the same issue is not present today. *See id.* at 1184 (noting a "proliferation" in federal consumer protection statutes). Article 2B leaves all of those consumer protection statutes in place except for a few aspects of electronic commerce, such as writing requirements. *See* U.C.C. § 2B-105(d)-(e) (Proposed Draft Feb. 1999) (stating that with the referenced exceptions, consumer protection statutes conflicting with Article 2B prevail over Article 2B). Theoretically, it would be advisable to aggregate all of the state and federal consumer statutes and insert their common denominator into both Articles 2 and 2B, with resulting uniformity. This would make it unnecessary for one doing business in multiple states to ascertain and comply with the varying consumer laws of each state. As a political matter, however, that would not be possible: attorneys for consumers in both Articles 2 and 2B routinely request additional consumer protections in the UCC, but none have suggested that the new or uniform protections ought to replace existing consumer protections laws. Thus, § 2B-105(d) preserves those varying consumer laws. For a discussion of the treatment of consumers under the UCC or Article 2B, see Mary Jo Howard Dively & Donald A. Cohn, *Treatment of Consumers Under Proposed U.C.C. Article 2B Licenses*, 16 J. MARSHALL J. COMPUTER & INFO. L. 315 (1997) (concluding that Article 2B has treated consumers fairly); Gail Hillebrand, *The Uniform Commercial Code Drafting Process: Will Articles 2, 2B and 9 be Fair to Consumers?*, 75 WASH. U. L.Q. 69, 73 (1997) (summarizing Article 2B and the Revised Articles 2 and 9 drafts and arguing that the drafters "have a special responsibility to weigh the fairness of uniform law drafts on consumers"); Fred H. Miller, *Consumers and the Code: The Search for the Proper Formula*, 75 WASH. U. L.Q. 187 (1997) (describing the tensions, problems, and incentives created through inclusion in a commercial code of consumer protections). For a debate regarding requests made by an attorney for Consumers Union, see generally Gail Hillebrand & Holly K. Towle, *A Debate on Proposed Article 2B's Effect on Consumers* (pt. 1), UCC BULL., Sept. 1997, at 1; and Gail Hillebrand & Holly K. Towle, *A Debate on Proposed Article 2B's Effect on Consumers* (pt. 2), UCC BULL., Oct. 1997, at 1.

protections to Aunt Tilly that are not necessary for, or traditionally applied to, the Fortune 500 company (because of the absence of a merchant/non-merchant distinction).[55] Opponents also object to the concept of allowing large businesses protections as licensees that may harm the smaller licensor, even though one of the premises of the mass-market concept is that limited extension of protection to small businesses is desirable. In critiquing comments submitted by the Consumers Union (an advocate of extending protections to small businesses) one commentator explained these problems:

> Consumer representatives have not acknowledged the variety in size of the companies engaged in software development, nor the fact that there are many small and

55. *See, e.g.*, Memorandum from the Business Software Alliance et al. to National Conference of Commissioners on Uniform State Laws (July 15, 1998) (available at <http://www.2bguide.com/docs/amemo981.html>). This memorandum states:

> The debate regarding the definition of "mass market transaction" illustrates new demands made by commercial licensees.
>
> The Article 2 drafting committee rejected even the concept of a mass market transaction. State and federal laws typically do not accord consumer protections to businesses. Usually, a firm line is drawn between consumer and business transactions. Article 2B eliminates that line for a category of transactions, mass market transactions. Mass market transactions also include *all* consumer transactions *without a dollar limit*, even though consumer statutes generally impose a dollar limit.
>
> Most of the arguments regarding mass market licenses concern only the extent to which that category will be applied to *business-to-business* transactions in software. The reality is that none should be covered or, at most, that the concept should apply only to small businesses (if Article 2 and the common law are changed so that all industries may compete on a level playing field). But the software industry made a tremendous concession when it indicated that it would be willing to live with this incursion into business-to-business contracting. It made another significant concession when it indicated that it would live with dropping the dollar limit for mass market transactions (remember, all *consumer* transactions are covered without limit). It did this because it conceded the Drafting Committee's argument that there was no need for a dollar limit *because the remainder of the definition of "mass market transaction" is detailed enough to confine application of the concept to its intended purpose*: retail and consumer product-like transactions, not wholesale or true business-to-business transactions.
>
> Now licensees are asking to eliminate those details. And who is asking? Not consumers–they don't need to, because they're already fully covered. Fortune 500 and Fortune 100 companies are asking: SIM, The Society of Information Management, and the Motion Picture Association. SIM requests removal of the "quantity restriction and reference to retail." Why? Because the "definition has been crafted to exclude the distribution channels favored by most businesses." Granting SIM's request would mean that the mass market rules would apply to all business-to-business contracting, including wholesale transactions in which the licensee is provided with a "gold disk" from which it may make unlimited or thousands of copies in return for royalty payments.

Id. (footnotes omitted).

> medium-sized software companies which contract with licensees many times their size. They have taken the position that 2B should afford special protection to small and medium businesses– *but only in their capacity as licensees*. They appear to be indifferent to the impact on small and medium-sized software companies of the new risks and liabilities that they are so anxious to impose. They do not remark on the fact, pointed out numerous times, that their approach also grants "consumer protection" to large, Fortune 500 companies.
>
> This tunnel vision is troublesome. Worse, the inability to focus on the larger question– whether there is any collective public benefit, or the competitive impact of the many changes in the draft law that [Consumers Union] is demanding, suggests that the narrow tunnel vision is near-sighted as well.
>
> Individual, as well as class action law suits [sic] do impact costs in the industry that are then borne by the next consumer. An industry that is rife with lawsuits by companies demanding their consumer protection rights will add to the cost of producing software, making it a less hospitable industry for the small entrepreneur. The question is whether these lawsuits will have an overall incremental positive impact on the public good– will they result in better software products or just result in some individuals getting a recovery with the rest of the public footing the eventual bill.
>
> A simple example of the latter situation would be where a small software company is bankrupted by its attempt to defend itself against a claim, relating to a single transmission, that the care it took to avoid viruses was not sufficiently "reasonable." The defendant recovers, the company goes out of business and consequently, the software held by all of its other customers, which is no longer technically supported or upgraded, becomes worthless and must be replaced, at each customer's expense, with other software. Consumer representatives cannot see beyond that first lawsuit– they are indifferent to the broader impact on consumers as a whole.[56]

To avoid the problems Professor Llewellyn outlined, the mass-market concept should be abandoned.[57] If it is retained,

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56. Carol A. Kunze, *Hot Button Issue: Consumer Issues* (last modified Sept. 28, 1998) <http://www.2bguide.com/hbici.html>.

57. This was actually suggested by Professor Nimmer at the November 1998

courts should use it primarily to protect consumers. It should not be used unduly to advantage business licensees who, when providing their own products or services under Article 2, Article 2A, or the common law, will not be subject to mass-market restrictions or exposure. The contradictions that will result from a failure to so apply the mass-market concept were described in an article chiding large commercial licensees for their efforts to broaden mass-market protections:

> [I]f I represent a business buyer, I don't have the benefit of those nifty consumer protection laws. Why should shrink-wraps be different? The 2B draft provides that if I don't agree with the terms, I can return the software for a full refund (plus costs, if it is costly to accomplish the return). And by the way, when your company [the large commercial licensee] issues purchase orders to your vendors with the microscopic print on the back requiring your vendor to stand on its head and whistle the theme to Sesame Street, should those be invalid, too? And when your company sells goods, does it include similar warranty disclaimers? For those who think that software vendors have broken new ground by creating grossly unfair shrink-wrap agreements, I invite you to compare a Microsoft (or other big vendor) shrink-wrap to any contract for the sale of goods (say, for example, a DuPont contract).[58]

Drafting Committee meeting in response to arguments made by large commercial licensees. *See* Letter from John Stevenson, SIM, to Carlyle C. Ring, Jr., Chairman, NCCUSL Article 2B Drafting Committee (Oct. 8, 1998) (available at <http://www.2bguide.com/docs/simltr1098.html>). The Society for Information Managers ("SIM") and other large corporate licensees argued for removing limitations on the definition of "mass market transaction"; they wanted to apply the concept to wholesale and other commercial licenses allegedly to avoid problems with tracking purchasing channels. *See generally id*. Professor Nimmer noted that a solution to their complaints would be to abandon the mass-market concept and return to the existing consumer/business dichotomy. Otherwise, their suggestions would destroy the marketplace concept, which is an integral element of the mass-market concept. However, the suggestion to abandon the concept and, thus, remove consumer protections from their businesses was not supported by SIM or the other speakers.

SIM's failure to accept the invitation to return to the traditional consumer/business dichotomy is at odds with the consumer protections contemplated by the Clinton Administration. In discussing Internet consumer protection issues, a recent report noted: "In seeking to protect consumers online, we will keep in mind the distinctions between business-to-business and business-to-consumer transactions in discussions at both domestic and international levels." WORKING GROUP ON ELEC. COMMERCE, *supra* note 17, at 27.

58. Bennett, *supra* note 5.

B. The Contract Terms Debate

Another debate concerning Article 2B is which *terms* of a mass-market license (commercial and consumer licensees) will be enforceable. This same debate is occurring with respect to Revised Article 2,[59] but there, the debate only concerns the enforceable terms of a consumer contract (but *not* contracts with any commercial buyers). The Article 2B debate centers on section 2B-208, which applies to both consumer and commercial mass-market licensees. As with existing law, section 2B-208 makes unenforceable any unconscionable terms,[60] but also makes unenforceable terms that conflict with expressly agreed terms,[61] or are preempted by federal law, or that violate public policy.[62] The debate concerns whether Article 2B also should make *additional*, *conscionable* terms unenforceable, and if so, what those terms should be. Proponents of further regulation argue first, that courts should not enforce terms that even if

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59. The committee charged with revising Article 2 has floated various, sometimes more expansive, versions of the *Restatement (Second) of Contracts* § 211 "reasonable expectations" test. Refer to note 72 *infra* and accompanying text. That test itself, however, has been strongly criticized by many observers, essentially on the ground that it creates covert tools. *See, e.g.*, James J. White, *Form Contracts Under Revised Article 2*, 75 WASH. U. L.Q. 315, 345, 351 (1997) (examining the application by courts of the reasonable expectations test of the *Restatement (Second) of Contracts* § 211(3) and revealing the large "discretion" it grants to judges); Letter from Gregory P. Landis, Senior Vice President & General Counsel, AT&T Wireless Services, Inc., to the National Conference of Commissioners on Uniform State Laws (July 11, 1997) (on file with the *Houston Law Review*) (criticizing § 211 as creating significant confusion in the courts). On the other hand, consumer groups and various representatives of the ALI have strongly supported the same tests. In this author's view, this issue alone was responsible for causing NCCUSL's 1997 decision to alter the drafting schedule for Revised Article 2. The AT&T letter, which includes a "pop quiz" concerning both Article 2 and an early, more conservative but similar Article 2B proposal, concludes that neither proposal is workable in modern commerce. *See* Landis, *supra*.

60. *See* U.C.C. § 2B-208(a)(1) (Proposed Draft Feb. 1999).

61. *See id.* § 2B-208(a)(2). An example would be a situation in which a consumer orders a product by telephone and asks whether there is a 90 day return right. The operator answers affirmatively, but the packaging, once seen, only offers 30 days. Article 2B would enforce the 90 day term, not the 30 day term. *See id.*; *see also id.* reporter's note 2(c) (noting, however, that the parties agreement is subject to traditional parol evidence concepts).

62. *See id.* § 2B-208(a)(1); *id.* § 2B-105(b). Section 2B-105(b) provides:

> If a term of a contract violates a fundamental public policy, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the impermissible term, or it may so limit the application of any impermissible term as to avoid any result contrary to public policy, in each case, to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of that term.

Id.

conscionable, are nevertheless objectionable (based on various proposed tests), and second that a further safety valve is needed.

Opponents of this view argue that unconscionability and public policy are sufficient tests, particularly when combined with the other protections in Article 2B, and that modern courts understand how to utilize the unconscionability test appropriately.[63] Again, we are repeating history:

> Llewellyn did not like the judicial torture, manipulation and misconstruction of contractual language or intent to which courts resorted to achieve their desired result. He referred to these exercises in judicial gymnastics as "covert tools" of intentional and creative misconstruction, which were unacceptable to businessmen for three different reasons. First, businessmen, relying on what a court had said, would "recur to the attack" by attempting to draft contract language that better expressed their contractual intent:
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> > We have all of us seen this kind of series of cases . . . . The clause is perfectly clear and the

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63. *See, e.g.*, Letter from Business Software Alliance to Article 2B Drafting Committee et al. (Oct. 10, 1998) (available at <http://www.2bguide.com/docs/bsa1098.html>). The BSA letter argues:

> We continue to believe that the concerns raised by Professor Henderson [NCCUSL Commissioner] are addressed by the refund and expense reimbursement provisions of Section 2B-208(b). If a party does not like any term, even a beneficial term, it may reject the contract and obtain a cost-free refund. Article 1-103 additionally addresses this concern through supplemental legal principles such as copyright misuse, construing contracts against the drafter, fraud, duress and the like. Last, Article 2B-208 makes unenforceable terms that conflict with an express agreement, and also reminds courts to look to unconscionability.
>
> There is no *further* need to address this issue and a new case demonstrates the viability of the Article 2B approach. In *Brower v. Gateway 2000, Inc.*, 1998 WL 481066 (N.Y.A.D.1 Dept) (8/13/98) the court found as follows:
>
> . . . .
>
> *the court rejected the argument that the contract was unenforceable as a contract of adhesion and noted that rolling contract structures allow easy consumer purchases of sophisticated merchandise;
>
> . . . .
>
> *the court, *nevertheless*, found that one term might be unconscionable and partially remanded the case.
>
> Our point is that even after finding the contract to be enforceable, the court was still able to appropriately use the tool of unconscionability to prevent egregious terms. Article 2B-208 honors this approach and *adds*, on a uniform statutory basis, the ability of consumers to return information for a refund. It also *adds*, above and beyond current law and *Gateway*, an obligation of the vendor to pay the expenses of return and restoration. No additional protections are needed.

Id.

> court said, "Had it been desired to provide such an unbelievable thing, surely language could have been made clearer." Then counsel redrafts, and they not only say it twice as well, but they wind up saying, "And we mean it," and the court . . . says, "Had this been the kind of thing really intended to go into an agreement, surely language could have been found" . . .

Judicial reliance on covert tools led businessmen down the primrose path: the problem was not one of better drafting, but of objectionable commercial intent.

Second, judicial subterfuge failed to tell businessmen what was and was not permissible. Third, judicial use of covert tools would "seriously embarrass later efforts at true construction." In short, covert tools were unacceptable legal tools for business transactions:

> It means you never know where you are, and it does a very bad thing to the law indeed. The bad thing . . . is to lead to precedent after precedent in which language is held not to mean what it says and indeed what its plain purpose was and that upsets everything for everybody in all future litigation.

Article 2 gave a devastatingly simple solution to the covert tool problem and its attendant unsettling effect on the planning and transacting of business. Section 2-302, the unconscionability provision, gave courts an overt tool that would eliminate any need for covert activity. . . . The accumulation of opinions over time would provide businessmen with explicit guidelines as to what was and was not beyond the pale. The unconscionability provision, amorphous as it was, would give concrete direction to businessmen in the future drafting of their contracts.[64]

The Article 2B and Revised Article 2 debates over further regulation of contract terms are the same debates in which Professor Llewellyn engaged and which were solved by creation of the overt tool of unconscionability. Yet we repeat history, this time from a new, higher base. The proponents of further regulation are essentially alleging that unconscionability is not a sufficiently overt tool. Opponents maintain that any new, additionally overt tool is either unnecessary or will invite the same problems that Professor Llewellyn sought to cure.[65]

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64. Hillinger, *supra* note 11, at 1169-70 (emphasis added) (footnotes omitted).

65. Refer to note 63 *supra* and accompanying text.

The policy question is whether the unconscionability test remains viable or whether new tests are needed. The fact that times have changed is also relevant. For example, since the adoption of the UCC, federal and state governments have adopted numerous consumer protection statutes.[66] Article 2B is preempted by the former[67] and preserves the substance of the latter.[68]

Also important is the real possibility that consumers themselves will use standard-form contracts. The World Wide Web Consortium, a standard setting body, has proposed the Platform for Privacy Preferences, an automated system to give users more control over the information they disclose about themselves as they navigate the Web.[69] Under the proposal, site designers would post their privacy practices in a format that the users' Web browsers would understand; users, in turn, would set their own browser preferences to control how much information they are willing to release. Unless the two sets of "terms" match, the users' browsers will display an "alert" before connecting the user to the site.

It is a short step from that "preference" to an actual contract, and it is easy to envision that consumers will establish their own standard-form contracts to be accepted or rejected by Web site owners without negotiation. In fact, such contracts already exist,[70] and a patent has been issued on just such a "business model."[71] Article 2B acknowledges the possibility of this turn in

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66. Refer to note 54 *supra* and accompanying text.

67. *See* U.C.C. § 2B-105(d).

68. *See id*. § 2B-105(a).

69. *See* Ric J. Sinrod & Barak D. Jolish, *Privacy Lost in the Brave New Web?*, INTERNET L., Sept. 1998, at 1, 5.

70. *See* Lorin Brennan, *Through the Telescope: Article 2B and the Future of E-Commerce*, UCC BULL. (forthcoming Apr. 1999) (manuscript at 2-3, on file with the *Houston Law Review*). Mr. Brennan discusses Web sites and robotic agents that allow consumers to "shrink-wrap" themselves, or their groups, by sending to Internet vendors standard terms and conditions that the vendor must either accept or reject, or engage in negotiations through robots. *See id*. at 2-6. Some of the robots will allow terms to follow contracts initially made on just a few terms. *See id*. at 8.

71. *See* U.S. Patent No. 5,794,207 (issued Aug. 11, 1998). The patent has been described as follows:

> The patent relates to Priceline.com's "buyer driven" system for doing business on the Internet. In this system, the consumer makes a conditional offer to purchase a product, specifying required terms of the purchase and providing credit card information to bind the offer. The offer is then communicated to a number of potential sellers for consideration. When a seller accepts the consumer's offer, the consumer's payment is made and the transaction is completed.

Debra Freeman, *Selected Intellectual Property Law Developments*, Electronic Banking L. & Com. Rep. (Glasser Legal Works), Sept. 1998, at 13, 14.

the tables, *i.e.*, the possibility that vendors will be faced with accepting or rejecting consumers' terms.

That scenario should be tested against some of the proposals that have been floated to solve the "contract terms" debate. At one time, the drafting committee for Revised Article 2 considered alternative proposals to exclude from consumer contracts "any non negotiated term that a reasonable consumer in a transaction of this type would not expect;" or any term the consumer was not "expressly aware" if a "reasonable consumer" in such a transaction would not expect the term; or terms that the person preparing the form had reason to know would not be agreed to if the consumer were aware of them.[72] Exclusion under each proposed alternative was premised on a judicial hearing in which the court would weigh, among other factors: the efforts of the person preparing the form to inform the consumer of the terms; the expectations of consumers in similar transactions; and the degree to which the terms were publicized. As of this writing, the current proposal for Article 2 is misleading.[73]

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72. U.C.C. § 2-206(a) (NCCUSL Draft March 21, 1997) (alternatives A-C) (available at <http://www.law.upenn.edu/library/ulc/ucc2/397art2.htm>); *id*. § 2-206(b).

73. *See id*. § 2-206(a) (Proposed Draft Mar. 1999). Section 2-206(a) states: "In a consumer contract, a court may refuse to enforce a standard term in a record *the inclusion of which was materially inconsistent with reasonable commercial standards of fair dealing in contracts of that type*, or, subject to Section 2-202, conflicts with one or more terms in the record." *Id*. (emphasis added)

The statutory text focuses on fair dealing in the inclusion of terms within a contract. However, the draft comment, without support from the statutory text, states that the test also governs the *content* of the included term. Moreover, it cites, by way of explanation, the *Restatement (Second) of Contracts* § 211(3) and accompanying comments.

Section 211(3) of the *Restatement* has been the subject of intense debate in relation to both Revised Article 2 and Article 2B, and earlier versions of § 211 were rejected by NCCUSL at its 1997 annual meeting. The states have not commonly adopted § 211. To the contrary, it has only been adopted by a handful of state courts, primarily with respect to insurance contracts. *See* White, *supra* note 59, at 324-25. Further, a noted commercial law expert and UCC scholar has concluded, after study of the cases in which § 211 was applied, that it is not an appropriate test for the UCC. *See generally id*. (discussing the application of § 211 in the courts). Refer to notes 91-106 *infra* and accompanying text (finding that adoption of § 211 would significantly change commercial law). Despite this fact, the comment to Revised Article 2 adopts § 211 as an explanation of the Article 2 test.

This is confounding given the dissonance between the statutory text and the comment and the history of this debate. Given the strong reaction to the citation of § 211 by observers at the February 1999 meeting of the Article 2 Drafting Committee, it would not be surprising if the comment is revised to delete reference to § 211. However, without a change to the statutory text of Revised § 2-206, deletion would be ineffectual. The fact that the Co-Reporters for Revised Article 2 could at any time interpret the proposed new test as being explained by § 211 illustrates that a court might do the same thing. Ironically, removal of the § 211 citation could actually exacerbate the problems posed by Revised § 2-206: § 211, at least, is tied to the

Assume that the consumer, or consumer group or organization, prepares the standard form and that the vendor, be it a nonprofit organization, sole proprietor, or Fortune 500 company, is the recipient and must take it or leave it. Under some of the tests suggested for Revised Article 2, or for Article 2B, the vendor could escape the terms of the consumer's contract, even those which are not unconscionable and of most importance to the consumer, simply because the vendor did not "reasonably expect" them or because their inclusion or content was consistent with commercially reasonable standards of fair dealing.[74] The fact that these contract rules will run in both directions, that Internet vendors may actually be less sophisticated than some

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concepts of unconscionability, refer to note 100 *infra*; proposed § 2-206 is not.

74. For example, if a term in the consumer's standard form specified that the vendor could not retain the consumer's name for a mailing list, the vendor could claim that the term should be excluded under most of the suggested tests: the term was not negotiated; the vendor was not expressly aware of the term (assuming that the vendor simply consented to the form generally, without taking any action with respect to the term itself); the inclusion and content of the term materially vary from other terms included in such contracts; the vendor would not reasonably expect such a term because mailing lists are routine, often necessary, and not protected by constitutional protections for privacy; and the consumer may be viewed as having reason to know that the vendor would have rejected the term had it known of it (because of the custom and practice of retaining names for customer lists).

In fact, application of one or more of the suggested tests might *appropriately* protect the vendor in this situation. But that conclusion, which could be subject to debate, begs the question. The question is whether the vendor ought to read contracts before it consents to them and whether conscionable terms ought to bind the vendor, even if they are surprising. Each of the suggested tests advantages the vendor, in the above example, or the mass-market licensee, in traditional examples, who does *not* read the contract. Each can then claim unfair surprise or inclusion and attempt to rewrite the contract. That kind of roulette cuts against the very purpose of contracting, to wit achieving certainty and allocating risks per the bargain made. Even non-negotiated contracts involve such an allocation: the price is low *because* there is no negotiation, and the risks are certain as long as the terms are conscionable. A university library licensor provides an example of this concept:

> I'd like to comment on the question raised last month . . . regarding why a publisher might decide to make its licenses non-negotiable. We . . . have, in fact, decided that the two site licenses we have written so far should not be negotiable. The first is for the *Dictionary of Old English Corpus* and the second is for the *Middle English Compendium*. . . . We have priced subscriptions to these bodies of work as low as possible, seeking to cover just the basic costs of production and our overhead. We have not included enough of a margin in the price to allow for time spent in conversations and negotiations with individual libraries or consortia interested in revising terms of the license. In these cases, there is a clear link between offering as low a price as possible and limiting the amount of staff time spent in administering licenses.

Electronic Mail from Michelle Miller-Adams, Manager, Digital Publishing, University of Michigan Press, to *liblicense-l@lists.yale.edu*, *Re: Not negotiable* (May 14, 1998) (on file with the *Houston Law Review*). The foregoing principles do not change, even when a profit margin is added; the price will be lower for non-negotiated contracts or if risk allocation uncertainty is decreased.

consumers (and clearly less sophisticated than many business mass-market licensees),[75] and that robots will not necessarily be able to interact in a manner that mirror "human expectations," are all among the changes that one must factor into any modern debate regarding contract terms.

All of these factors are compounded, of course, by the reality of a global economy. Even if the person preparing a form in one country could discern what another party might "reasonably expect," or what terms are consistent with reasonable commercial standards, what might be expected or consistent in one country will not necessarily be so in each country accessible via the Internet. Parties in the United States, as among the most active licensors and licensees who may offer forms, will be the clear losers in this contract game of roulette. This will be particularly true for small vendors who lack funds to determine these issues globally, let alone among the fifty states. For them, the promise of the Internet may prove to be a false hope.[76]

Neither the ALI nor attorneys representing some consumers, the chief proponents of new, overt legal tools, appear to acknowledge these new factors. To the contrary, they support a

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75. One of the unique features of the Internet is that it affords the same "shelf space" to small vendors and sole proprietors as it affords to large, well funded corporations. Instead of establishing, qualifying for, and funding an extensive retail distribution system, the small vendor simply needs to establish a Web site:

> My second jarring event was a chat with my brother Richard. He runs a small inn in Cape May, N.J. In the past year, he started advertising on the Internet with his own Web site. He's never seen anything like it; almost a fifth of his customers found the inn online. No magazine or newspaper ad ever showed remotely similar results. And the Internet is inexpensive. He paid less than $1,000 to a small company in Indianapolis to create and maintain the site for a year. "On the Internet, you compete equally [with bigger inns and hotels]," he says. "You have a page, and they have a page."

Robert J. Samuelson, *Down with The Media Elite!?*, NEWSWEEK, July 13, 1998, at 47 (pondering the fact that "new communications and computer technologies" are challenging the mass media). Refer to note 76 *infra* (concerning opportunities the Internet provides to small vendors).

76. *See, e.g.*, Samuelson, *supra* note 75, at 47. As noted, one of the primary benefits of the Internet is the opportunity it affords to small vendors. As the Clinton Administration's Electronic Commerce Working Group explains:

> In this emerging digital marketplace, anyone with a good idea and a little software can set up shop, and become the corner store for the entire planet. This capability promises to unleash a revolution in entrepreneurship and innovation– a cascade of new products and services that today we can scarcely imagine.

Al Gore, *Introduction* to WORKING GROUP ON ELEC. COMMERCE, *supra* note 17, at i. In keeping with this insight, the Electronic Commerce Working Group has included in its five new issues for focus in 1999, "facilitating small business and entrepreneurial use of the Internet and electronic commerce." *Id.* at v. However, small vendors will not be able to absorb the risks created by legal structures designed to defeat contract certainty, whether nationally or globally.

model that will more likely work against consumers.[77] The purpose of this Article is not to solve the contract terms debate, but to note that the basic debate is not new, that the modern debate has more complexity, and that modern capabilities require more reliance upon predictable[78] tools, and not amorphous tools that may act as a boomerang against one party.

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77. The ALI Council, has approved for submission to the ALI membership, and attorneys for some consumers requested or support, a proposed revision of Article 2 which contains numerous new consumer "protections." An example of the fact that such "protections" may actually harm consumers can be found in proposed § 2-807, which states that a court may enter a decree for a specific performance if the parties have agreed to that remedy. *See* U.C.C. § 2-807 (Proposed Draft Mar. 1999). However, the section excepts consumer contracts. *See id*. At the February 1999 meeting for Revised Article 2, a committee member explained that the purpose of the provision was to ensure that a consumer would not be required to accept delivery of a car when the purchase of the car had been induced by "hotboxing" (*e.g.*, a situation in which a car dealer works on the consumer for five hours and will not let the consumer leave until the consumer agrees to make a contract).

Given the empowerment afforded by electronic contracting, consumers may be better protected by relying on concepts of procedural unconscionability and allowing enforcement of specific performance clauses in consumer contracts. For example, assume an Internet consumer buying service that provides a standard-form contract that the *consumer* can require a car dealer to accept without change. Refer to note 70 *supra*. The consumer's robot searches the Internet for a dealer willing to supply the car on the consumer's terms and the contract is made by the electronic robots. Assume that the contract contains a specific performance provision and the car dealer accepts the contract for a car that is in short supply. Before delivering the car, however, the dealer gets a better offer or does not receive all of the cars that the dealer ordered. Can the consumer enforce the contract term that would require the dealer specifically to perform the contract by delivering the car? No. The consumer will have to convince a court to use its equitable powers to require specific performance, but may not enforce the contract term because Revised Article 2 does not allow such terms in a consumer contract. Where the dealer has reasonably allocated a shortage of cars between customers, there should be no inequity in failing to deliver the car to the consumer.

Many other examples could be given: assume the consumer's contract contains a privacy provision that prohibits the dealer from adding the consumer's name to a mailing list. If the vendor breaches that contract, the consumer may sue for damages but may not require the dealer specifically to perform the contract by causing the removal of the consumer's name from the mailing list. It will not be worthwhile for the consumer to sue for the damages because there probably will not be any. The value of the list is not in one consumer's name, but in the list of aggregate names. *See, e.g.*, Dwyer v. American Express Co., 652 N.E.2d 1351, 1356 (Ill. 1995). The Illinois Supreme Court states:

> Undeniably, each [consumer's] name is valuable to [the vendor]. The more names included on the list, the more that list will be worth. However, the single, random [consumer's] name has little or no intrinsic value to [the vendor] (or a merchant). Rather, an individual name has value only when it is associated with one of [the vendor's] lists. . . . Furthermore, [the vendor's] practices do not deprive the [consumers] of any value their individual names may possess.

Id.

78. Refer to notes 128-29 *infra* (discussing the need for minimal guidelines to allow public policy to lead the law and to decrease chaos and legal costs).

At bottom, this debate is about the existence and extent of freedom of contract and the adequacy of the uniform overt tools, such as unconscionability and public policy, that are available to modern courts through their maintenance or creation in Article 2B.[79] The contract terms debate is not created by, nor is it unique to Article 2B, notwithstanding media characterizations of Article 2B as the villain in this larger drama.[80]

V. ACADEMIA– AN EXPLORED JOURNEY OR SHORTCUT TO RESULTS?

Article 2B has been the most open and publicized legislative project in the history of NCCUSL and the ALI.[81] Consequently, it is not surprising that many have made erroneous statements about it.[82] What is surprising is the misleading statements

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79. Some of these tools were listed in a recent letter from Carlyle C. Ring, Jr., Chair of the Article 2B Drafting Committee. Professor Ring stated:

> Within the UCC framework, important safeguards equal to or in excess of current law protections are provided. Among them are that "unconscionable" terms are unenforceable (2B-110); terms clearly contrary to fundamental public policy (such as freedom of expression, innovation and competition) overridden (2B-105(b)); duties and obligations cannot be performed or enforced in bad faith (1-203); a state's consumer protection laws trump Article 2B (2B-105); consumer protections are expanded to the "mass market" including an expanded return right if for any reason the terms are rejected that includes not only refund of the price, but the costs of return and any damage done to the data base and software by booting up the terms (2B-208); a consumer is protected from a key stroke error (2B-118); specific attention is brought to federal preemption (2B-105); supplemental general principles of law and equity (e.g. [sic] estoppel, duress, misrepresentation, fraud, coercion, etc.) apply (1-103); as well as numerous other special provisions.

Letter from Carlyle C. Ring, Jr., Chair, Article 2B Drafting Committee, to Adam G. Cohn et al., Bureau of Consumer Protection and Competition Policy Planning Federal Trade Commission (Nov 30 1998) (available at <http://www.2bguide.com/docs/1198rftc.html>).

80. Refer to Part V *infra* (discussing the media coverage of Article 2B).

81. Professor Michael L. Rustad discussed the Article 2B effort in the following manner:

> Justice Brandeis stated that, "[s]unlight is the best of disinfectants." Article 2B has been the most open codification project in Anglo-American history. Electronic democracy makes it possible for Internet users to participate in the codification process. The Reporter has met with hundreds of interested industry groups, bar associations and consumer groups. The evolving path of Article 2B reflects an attempt to balance competing concerns. It is not possible to draft an Article 2B that will satisfy everyone. The "engineered consensus" reflects attempts to respond to accommodate to consumer concerns.

Michael L. Rustad, *Commercial Law Infrastructure for the Age of Information*, 16 J. MARSHALL J. COMPUTER & INFO. L. 255, 313 (1997) (footnotes omitted).

82. *See, e.g.*, Cem Kaner, *In My Opinion: Restricting Competition in the Software Industry– The Impact of Pending Revisions to the U.C.C.*, CYBERSPACE LAW., May 1998, at 11. *But see* Harris, *supra* note 6. While her article is not limited

academics have made.[83] In the public mind, it is assumed that academic commentators speak on the basis of knowledge or thorough and accurate research, yet such is not always the case.

With respect to the foregoing "contract terms debate," Harvard University School of Law Professor Lawrence Lessig's statement is illustrative:

> Article 2B establishes rules that fundamentally alter the traditional balance in contract law. These changes favor— surprise, surprise— the companies whose lobbyists have been sitting at the 2B table.
>
> *One example illustrates the situation. It has long been a principle of commercial law that contract provisions— especially those in a standard contract— that are surprising to a reasonable person are not binding unless they are brought to the signer's attention.* You don't need to worry about paragraph 106 of your car rental agreement, which promises your annual salary to Hertz, because no reasonable person would expect such a provision.
>
> The principle makes perfect sense. The law spares consumers the burden of reading 100 pages of turgid

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to the "contract terms debate," Ms. Harris notes with respect to that debate that:

> Mr. Kaner's general objection may be summarized by his comment that, in essence, Article 2B is faulty because "giving publishers the right to create enforceable contracts does not mean that they should be allowed to toss in whatever terms they want, no matter how outrageous."
>
> Article 2B does not give anyone the right to create enforceable contracts containing "whatever terms they want." Article 2B was conceived and drafted as a contract statute. With regard to mass market licenses, 2B-208 provides for enforceability of mass market licenses under basic principles of contract law. License agreements under 2B-208 are enforceable only to the extent other contracts in our society are enforceable. Terms which are "unconscionable" or against public policy are not enforceable, under Article 2B, or under general principles of contract law.
>
> . . . .
>
> There is no evidence that the market is in need of regulation by way of having a uniform body of law dictating what may and may not be included in software licenses. Mr. Kaner's objections appear to be based more on what he would like included in the price of mass market software than on what the market as a whole needs to maintain competitiveness.

Id. at 18 (footnotes omitted); *see also* Dan Gillmor, *Software Industry Wields Fine-Print Attack*, SAN JOSE MERCURY NEWS, May 26, 1998, at 1C; Letter from Terrence P. Maher to Dan Gillmor, Mercury News (May 28, 1998) (available at <http://www.2bguide.com/docs/tmahersjm.html>) (taking Mr. Gillmor to task for many statements that are "incomplete or misleading").

83. *See generally* Holly K. Towle, *No Good Deed Goes Unpunished, Comment on "Whither Warranty: The Bloom of Products Liability Theory in Cases of Deficient Software Design"* (1998) (delivered Apr. 25, 1998, Berkeley 2B Conference) (available at <http://www.2bguide.com/docs/berkht.html>) (commenting on "example[s] of the manner in which Article 2B is frequently mischaracterized").

> prose, instead letting people rely on what's reasonable and focus only on what's different.
>
> *Article 2B reverses this presumption. If it passes*, the consumer is bound by the terms of the contract (subject to a rare finding of unconscionability) so long as the consumer had an opportunity to discover the surprising provision. This means before you "sign" a software contract by clicking on "I agree" in the installation routine, you'll have to page through unintelligible legalese to make sure there's not a rat hiding somewhere.[84]

Start with the premise that "[i]t has long been a principle of commercial law that contract provisions– especially those in a standard contract– that are surprising to a reasonable person are not binding unless they are brought to the signer's attention."[85] This is simply wrong. In what has been described as the "ancient rule" of contract law, "one who signs a contract is bound by it whether he reads it or not."[86]

Of course, there have always been exceptions to that rule. Article 2 expressly codified the concept of substantive unconscionability, thereby giving courts the "overt tool" to invalidate unconscionable terms.[87] Under that standard, any court would invalidate as substantively unconscionable, the term of the car rental contract that Professor Lessig posits, *i.e.*, a term hidden in the boilerplate of a car rental contract that promises the renter's annual salary. On the other hand, in a home loan contract, a term that grants a security interest in the borrower's annual income should be fully enforceable and is not unconscionable.

In addition, courts have developed rules regarding "procedural" unconscionability– *i.e.*, rules to ensure that if there is a "rat" in a contract, it will not be enforceable if it is truly hidden.[88] Not only does Article 2B not disturb those doctrines, it

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84. Lawrence Lessig, *Sign It and Weep*, THE INDUSTRY STANDARD (Nov. 20, 1998) <http://www.thestandard.net/articles/article_print/0,1454,2583,00.html> (emphasis added). For Professor Lessig's comments on cyberspace generally, refer to note 124 *infra*.

85. *Id.*

86. *See, e.g.*, White, *supra* note 59, at 319.

87. Refer to note 64 *supra* and accompanying text (explaining that Article 2's unconscionability provision was intended as a solution to courts' use of covert tools to strike down reprehensible contract provisions).

88. *See, e.g.*, Nelson v. McGoldrick, 896 P.2d 1258, 1262 (Wash. 1995) (en banc) (noting that two classifications of unconscionability have generally been recognized, substantive unconscionability, which relates to the content of contract terms, and procedural unconscionability, which relates "to impropriety during the during the

codifies and makes portions of them uniform in its concepts of manifest assent and opportunity to review.[89]

From where then does Professor Lessig conjure this "long" existing principle of commercial law prohibiting merely "surprising terms?" There are two possibly analogous sources. First, it could be from a United Nation's International Institute for the Unification of Private Law ("UNIDROIT") principle, which focuses on what the person receiving the form could not reasonably expect.[90] Second, Professor Lessig could have garnered his belief from the "reasonable expectations" test described in the *Restatement (Second) of Contracts* § 211, which focuses on whether the person providing the form had reason to know that the person receiving it would refuse the objectionable term.[91] Of the two, the UNIDROIT rule is closest to the rule that,

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process of forming a contract" and can factor in whether terms are "hidden in a maze of fine print" (quoting Schroeder v. Fageol Motors, Inc., 544 P.2d 20, 23 (Wash. 1975) (en banc))).

89. Section 2B-105(c) reminds users of § 1-103, which supplements Article 2B and the other UCC articles with nondisplaced principles of law and equity, including laws relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy or "other validating or invalidating cause." *See* U.C.C. § 1-103 (1995); *id*. § 2B-105(c) (Proposed Draft Feb. 1999) (stating that "[p]ursuant to Section 1-103, among the laws supplementing, and not displaced by this article, are trade secret laws and unfair competition laws"). The definition of "manifest assent" in § 2B-111 reflects and generally codifies the ALI's definition of "manifest assent" in the *Restatement (Second) of Contracts*. *See* RESTATEMENT (SECOND) OF CONTRACTS § 19 (1979). The definition of "opportunity to review" is in § 2B-112. As do common law courts, Article 2B codifies and requires that a party have an "opportunity to review" contract terms in certain scenarios. Unlike the common law, it also mandates a right of return in many cases. *See* U.C.C. § 2B-112(c); *id*. § 2B-208(b) (providing a right of return if there is no opportunity to review mass-market license terms before payment is made); *id*. § 2B-617(b)(2) (providing a right to a refund on return for contracts involving publishers, dealers, and end users if the end user's right to use information is subject to a license and the user did not have an opportunity to review the license before becoming obligated to pay).

90. Article 2.20 of the UNIDROIT Principles of International Commercial Contracts reads as follows:

> (1) No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party.
>
> (2) In determining whether a term is of such a character regard is to be had to its content, language and presentation.

UNDROIT, PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS art. 2.20 (1994). As explained in the introduction to the principles, "the Principles, which do not involve the endorsement of Governments, are not a binding instrument and that in consequence their acceptance will depend upon their persuasive authority." UNIDROIT, *Introduction* to PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, *supra*, at ix. Given the lack of acceptance in the United States of the *Restatement (Second) of Contracts* § 211, such may explain why UNIDROIT Article 2.20 has also been unpersuasive in the United States.

91. Section 211 reads as follows:

Professor Lessig alleges, has "long" governed contract law– *but in fact no country or U.S. state has ever adopted that UNIDROIT rule*.[92] Further, a search reveals that no U.S. court has even cited UNIDROIT Article 2.20 as a basis for invalidating a contract term.

As for the rule set forth in *Restatement* section 211, it is not intended to focus only on what the consumer expects, nor does it cover merely "surprising" terms.[93] It is in fact closely related to the unconscionability concept that Professor Lessig implies is ineffective.[94] More important, only a handful of courts have adopted that portion of the *Restatement*, chiefly in Arizona, and chiefly with respect to insurance contracts.[95]

Professor James White, a leading authority on commercial law,[96] reviewed the Arizona cases to determine the likely impact of a proposed revision to UCC Article 2; the revision would have added to Article 2 a test using a version of the "surprising terms"

> (1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.
>
> (2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard term of the writing.
>
> (3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

RESTATEMENT (SECOND) OF CONTRACTS § 211. The provision is explained in the comments to the section:

> Reason to believe [that a term would have been refused had the other party known of it] may be inferred from the fact that the term is *bizarre or oppressive*, from the fact that it *eviscerates* the non-standard terms explicitly agreed to, or from the fact the it eliminates the *dominant purpose* of the transaction. The inference is reinforced if the adhering party never had an opportunity to read the term, or if it is illegible or otherwise hidden from view. This rule is *closely related* to the policy against unconscionable terms and the rule of interpretation against the draftsman.

Id. § 211 cmt. f (emphasis added).

92. *See* John C. Yates, *Electronic Commerce and Electronic Data Interchange*, *in* 18TH ANNUAL INSTITUTE ON COMPUTER LAW 147, 272 (Peter Brown & Wayne E. Webb eds., 1998).

93. *Cf.* Restatement (Second) of Contracts § 211 cmt. f.

94. Refer to notes 84, 91 *supra* and accompanying text (noting that *Restatement (Second) of Contracts* § 211 comment f explains that the § 211 rule is "closely related to the policy against unconscionable terms"). *But see* White, *supra* note 59, at 349 (observing that not all courts correctly apply § 211).

95. *See* White, *supra* note 59, at 324-25 & n.17.

96. Professor White is the co-author of a widely used hornbook on the UCC. *See* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE (4th ed. 1995).

principle alleged by Professor Lessig.[97] Professor White concluded that such a test would result in a significant change in commercial law– a change that would be inappropriate.[98] Yet, Professor Lessig writes, and submits for publication, an article stating that Article 2B "reverses" a long standing principle of commercial law.[99] In fact, Professor Lessig's alleged principle does not even exist as a significant part of American jurisprudence. In rejecting the *Restatement* "reasonable expectations" doctrine, one court explained:

> [A] number of states have struggled with the doctrine's scope, leaving a trail of inconsistent decisions and creating an obviously uncertain future for the doctrine in those states.
>
> . . . .
>
> Today, after more than twenty years of attention to the doctrine in various forms by different courts, there is still great uncertainty as to the theoretical underpinnings of the doctrine, its scope, and the details of its application.
>
> . . . .
>
> [W]e note that the reasonable expectations doctrine has been urged because of the supposed inadequacy of the existing equitable doctrines available to courts confronted with overreaching insurers. It is not clear why estoppel, waiver, unconscionability, breach of implied duty of good faith and fair dealing, and the rule that ambiguous language is to be resolved against the drafter, for example, are insufficient to protect against overreaching insurers when applied on a case-by-case basis.[100]

This analysis is equally true today, and this same "contract terms" debate has been engaged. It is appropriate to argue that a "surprising terms" test should or should not be adopted, and it is appropriate to argue that the UNIDROIT or *Restatement* rule should or should not be adopted or codified. But it is wrong for Professor Lessig to mischaracterize the law as a means of concluding that "*Article 2B reverses this presumption. If it passes,* the consumer is bound by the terms of the contract (subject to a

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97. *See* White, *supra* note 59, at 325-54.

98. *See id.* at 355 (concluding that Revised § 2-206 offers sellers and lessors no safe harbors and "runs the risk of creating inefficiency").

99. Refer to note 84 *supra* and accompanying text.

100. Allen v. Prudential Property & Cas. Ins. Co., 839 P.2d 798, 802-03, 805-06 (Utah 1992) (footnotes and internal citations omitted).

rare finding of unconscionability)."[101] If Article 2B does *not* pass, with few exceptions, contractual terms will still bind consumers, subject to exceptions for unconscionability and the like.

Professor Lessig also fails to note that Article 2B has added several overt tools that do not exist– at all or in a uniform, codified form– under current law. For example, Article 2B invalidates terms in a mass-market license that contradict the express agreement of the parties[102] or violate public policy.[103] It further adds a statutory right to return the product if, once seen, the contractual terms are not acceptable to the licensee for *any* reason.[104] It further adds a right to reimbursement for the costs

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101. Lessig, *supra* note 84.

102. *See* U.C.C. § 2B-208(a)(2) (Proposed Draft Feb. 1999)

103. *See id.* § 2B-208(a)(1).

104. *See id.* § 2B-208(b) (mandating that if a party is not afforded an opportunity to review terms before it pays, then it may still refuse the terms and have a right of return). The ability to return an item, if contract terms are not acceptable once they are seen, gives buyers "bargaining" power:

> Although the parties clearly do not possess equal bargaining power, this factor alone does not invalidate the contract as one of adhesion. As the IAS court observed, with the ability to make the purchase elsewhere and the express option to return the goods, the consumer is not in a "take it or leave it" position at all; if any term of the agreement is unacceptable to the consumer, he or she can easily buy a competitor's product instead– either from a retailer or directly from the manufacturer– and reject [the] agreement by returning the merchandise. The consumer has the unqualified right to return the merchandise, because . . . terms are unsatisfactory . . . .

Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 572-73 (N.Y. App. Div. 1998) (internal citations omitted). Article 2B would codify and make uniform the return right that was offered, as a matter of contract, in the above case. *See* U.C.C. § 2B-208(b). This right does not exist, as a matter of law.

> Proposed 2B-208 of Article 2B would require licensors distributing through channels that do not permit review of license agreements prior to shipment to accept return of shipped software– not just because the license agreement is unsatisfactory, but for any reason. This is a right which in other industries is granted at the discretion of the distributor, as a marketing technique, and not required by statute. . . .
>
> The right of return is a right which customers do not now have, either for software or other items ordered from catalogs, although many catalogs accept returns for marketing reasons. Thus, proposed Article 2B would give customers a right which they do not now have. Mr. Kaner, however, does not find the proposed arrangement satisfactory because if the customer must go to the trouble of returning software, he may not seek an alternative because the customer is no longer "in a shopping frame of mind." Destroying or significantly reducing the channels of trade for thousands of software applications in order to permit preshipment review because that is when the customer is "in a shopping frame of mind" seems, as a matter of public policy, a poor choice. Society does not impose such requirements on other items. If one brings home a shirt which turns out to be the wrong color, one may or may not have a right to return it, and in the absence of a defect, will have to bear the time and expense of a permitted return. It is not at all clear why software should be burdened with obligations not imposed on

of return and a right to damages incurred in viewing the license,[105] neither of which exists under the current version of the UCC.[106]

Any debate designed to resolve legislative policy issues should be fully informed and fair. Academics are accorded the favorable presumption that they speak from a foundation of studied knowledge and full assessment. To make statements that belie this presumption is a disservice to the debate and Article 2B.

VI. AS LONG AS WE'RE JUST TALKING ABOUT YOU, THERE OUGHT TO BE A LAW

For many years, the Article 2B debates were characterized by full discussion of all issues, with resolutions based on existing analogous law or centrist positions. However, deadlines approached and issues needed to be resolved instead of tabled. Moreover, exemptions were created allowing observers to emphasize their own interests, and positions eventually moved away from the middle.

One disturbing trend has been to advocate a particular rule as long as it only applies to licensors of computer information. With respect to the advocate's products or services that are not computer information or that the advocate provides as vendor or lessor under Article 2, 2A, or the common law, corresponding change is rarely suggested.[107] In short, licensees who are not also licensors are increasingly failing to observe the golden rule of

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> other items. As a matter of public policy, we do not insist that suppliers accept returns, or that they pay the cost of customer returns.
>
> Nevertheless, Article 2B as presently drafted, imposes that burden on software licensors if license terms are not available prior to payment and delivery of the licensed software. If there were any public policy concerns regarding inability to review license terms prior to shipment and payment, such concerns should be laid to rest by 2B-208, which requires a licensor who does not make license terms available prior to shipment and collecting payment, to place the licensee in as good a position as if he had reviewed such terms prior to ordering the software and found the terms unacceptable.

Harris, *supra* note 6, at 20 (footnotes omitted).

105. *See* U.C.C. § 2B-208(b).

106. Some state consumer statutes provide rights of return and/or cost reimbursement. However, this author is not aware of any statutes that provide restoration damages. Those that allow returns tend to be "door-to-door" sale statutes that typically allow three days to rescind the contract. However, Article 2B's provision applies not only to consumers, but also to all other *non-consumer* mass-market licensees, *i.e.*, Fortune 500 companies.

107. Refer to note 58 *supra* and accompanying text (chiding commercial licensees of software for seeking rules for software contracts).

proposing for others what one would propose for oneself.

In contrast, computer information licensors are almost always licensees. This generally forces them to sit on both sides of the fence:

> In describing the participants in Drafting Committee meetings, you indicate that they included software industry licensors, but not licensees. In fact, virtually all software industry participants are both licensors and licensees.
>
> Anyone who uses Windows is a licensee. Software developers [licensors] are licensees of compilers, software development kits, commercially available code libraries (e.g., dynamic and static link libraries), and a host of "tools" and other licensed items.
>
> Those in the industry are accustomed to reading licenses, and generally treat licensed items as they wish to have their own licensed items treated. . . .
>
> Possibly, software industry participants gave the impression that they represented licensors because they understand that unreasonable licenses have effectively "killed" products. For example, several years ago, Borland introduced a new version of its flagship software development product. Developers who purchased the new product promptly discovered that Borland had changed its license to provide that a developer would be permitted to distribute up to 10,000 copies of any software developed using the new product, but that for more than 10,000 copies, a separate license would have to be negotiated. Developers realized that if they used the product (as intended) to develop applications which turned out to be very successful, they would be "over a barrel" when they tried to negotiate to sell the 10,000th copy. They "wrote" to Borland on-line, many returned the product for a refund, and others refused to purchase the product. Within six to 12 weeks, Borland posted a revised license, but a significant segment of the developer community found substitute products or other ways to meet its needs, and Borland lost valuable market share which it never regained.
>
> Thus, within the industry, it is generally accepted that for commercial reasons, one must draft licenses thoughtfully, recognizing that it is essential to grant rights which target users seek for their legitimate needs while protecting the rights and commercial interests of

software creators and marketers.[108]

A software developer sits on both sides of the fence because it licenses software in and out. In contrast, parties who sit on only one side of the fence (*e.g.*, an insurance company that provides its products under insurance statutes or a vendor of lumber who provides its product under Article 2) only licenses *in* business applications software and has nothing to lose by taking one-sided positions. Much of the criticism lodged against Article 2B comes from such parties. Industries that would sit on both sides of the fence, but instead obtained exclusions from Article 2B for all or some of their major information products, are also free to take a more one-sided position.

Section 2B-402, regarding express warranties, provides an example.[109] Article 2 creates express warranties beyond those (if any) found under the common law; Article 2B does this as well, even though the original and current Article 2B industries are (or should be) governed by the common law.[110] Article 2 excludes statements that are viewed as "puffing" and the like.[111] Article 2B does likewise, and incorporates the common law's exclusion of published informational content,[112] including a "display [or] description of a portion of the information to illustrate the aesthetics, market appeal, or the like, of informational content."[113]

Some commentators, as licensors of information, welcomed these and related exclusions. They then objected, however, when the exclusions were also applied to computer information that the same commentators acquired as licensees. For example, with respect to software acquired as a licensee, a representative of a motion picture company expressed concern about the lack of an express warranty for aesthetics and some demonstrations, stating a "demonstration of a portion of a finished video game, a sample of a product containing clip art, or a display of a

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108. Letter from Micalyn S Harris to Carlyle C. Ring Jr., Chair U.C.C. Article 2B Drafting Committee 1 (July 17, 1997) (on file with the *Houston Law Review*).

109. *See* U.C.C. § 2B-402.

110. Refer to note 26 *supra* and accompanying text (observing the decision by some courts to include software licensing within the scope of Article 2).

111. *See* U.C.C. § 2-313(2) (1995).

112. *See, e.g.*, Joel R. Wolfson, *Express Warranties and Published Information Content Under Article 2B: Does the Shoe Fit?*, 16 J. MARSHALL J. COMPUTER & INFO. L. 337, 383-84 (1997); *see also* U.C.C. § 2B-402 reporter's note 8 (noting that Article 2B preserves current legal protections for published informational content and stating that "[t]his subject matter entails significant First Amendment interests and general public policies that favor encouraging public dissemination of information").

113. U.C.C. § 2B-402(b) (describing instances in which an express warranty is not created).

commercial software product whose value is created by its appealing and easy-to-use graphical user interface," would not create an express warranty because of the exclusions for samples and for the aesthetics, market appeal, and the like for informational content.[114] The Motion Picture Association of America ("MPAA") echoed this concern, explaining that "[a] display of a portion of a video game or computer graphics program that demonstrates the product's aesthetics would typically be relied upon by a licensee . . . ."[115]

Yet with respect to movies, the MPAA took the opposite position:

> [I]t is not uncommon for a trailer for "coming attractions" to be out in movie theatres to build up public interest before the movie is itself completed. The final picture may not be representative of, or in rare situations may not even include, the scenes that were in the trailer. To avoid the argument that this is a breach of an express warranty, it must be clear that the yet-to-be finished motion picture falls within the definition of "published information content," which can presently be read to include only finished works.[116]

If a customer reasonably relied on a demonstration of a video game, graphics program, or movie (finished or not) that contained scenes from outer-space, and the final product has no scenes from outer-space, the policy question is whether the demonstration creates an express warranty. The movie industry representatives (who make a valid point as to certain aspects of this issue[117]) sought to answer the question one way for software

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114. Michele C. Kane, *When Is a Computer Program Not a Computer Program? The Perplexing World Created by UCC-2B* (visited Jan. 9, 1999) <http://www.2bguide.com/docs/berkane.html>.

115. Memorandum from Motion Picture Association of America to National Conference of Commissioners on Uniform State Laws 16-17 (July 17, 1998) (on file with the *Houston Law Review*).

116. *Id.* at 8.

117. Part of Ms. Kane's concern, and presumably that of the MPAA, stems from the difficulty of defining what is meant by "aesthetic." *See* U.C.C. § 2B-402(b) (providing that an express warranty is not created from "a display or description of a portion of the information to illustrate the aesthetics . . . of informational content"). Discussions of the issue at Drafting Committee meetings never centered on allowing the term to be used to dodge actual obligations. For example, does "aesthetic" mean that the movie producer or software publisher is free to cut outer-space scenes after it has shown a demonstration, merely because the producer or publisher deems them not to have artistic or market merit or because the color is unappealing? "Aesthetics" should mean that, as long as the demonstration did not fairly indicate otherwise (*e.g.*, if the demonstration was to a distributor that only shows science fiction pictures or to a company that specializes in extra-terrestrial products). When the demonstration illustrates the essential nature of the work, however (such as when

which it acquires as licensee, and another way for movies that it provides as licensor, even though the same policy considerations are relevant for both. Article 2B would have answered the question the same way for both industries.[118]

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outer-space scenes are shown to the distributor who only wants outer-space pictures), then such scenes likely are no longer aesthetic (although the colors should be). The Reporter's notes in the later drafts of Article 2B are consistent with, and clarify, this conclusion:

> Aesthetics, as used here, refers to questions of the artistic character, tastefulness, beauty or pleasing character of the informational content, not to statements pertaining to how a person uses the information or to what is the essential nature of the information itself. Thus, for example, a statement that a clip art program contains easily useable images of "horses" or images of "working people," if it becomes part of the basis of the bargain, creates an assurance that the subject matter of the clip art program is horses or working people and that the images are usable. However, it does not purport to state that they are tasteful or artistically pleasing.

Id. § 2B-402 reporter's note 4.

118. When this debate started, movies, other than those shown in theaters, were covered by Article 2B. As of this writing, all movies are excluded. *See id.* § 2B-104(2); *see also id.* § 2B-103(a) (providing that the scope of "computer information transactions" and definitions of "computer" and "software" are intended to exclude motion pictures). The definitions in § 2B-103(a) are being refined to state this exclusion as clearly as possible. As to software, the answer would depend on the circumstances. Similar to the existing § 2-313(c), Article 2B allows the outer-space scene demonstration example to create an express warranty if the demonstration became part of the basis of the bargain for acquiring the software. *See id.* § 2-312(c) (1995); *id.* § 2B-402(a)(3) (creating an express warranty for a demonstration of a final product that becomes the basis of the bargain). If so, then under § 2B-402(a)(3), the final product must reasonably conform to the demonstration. Whether conformity could be achieved without outer-space scenes is a question of fact that is explained under existing law in Comment 6 to § 2-313. *See id.* § 2-313 cmt. 6. Comment 6 directs the inquiry to factors such as, was the demonstration illustrative or a straight sample, and, if a sample, was it fairly representative and/or intended to "be" rather than "suggest" the character of the final subject matter? *See id.* Under Article 2B, a similar approach is taken. *See id.* § 2B-402 reporter's note 7 (stating that "[r]epresentations 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"). If the final product does not reasonably conform to the demonstration, then, under § 2B-402(b), the court will ask, for instance, whether the outer-space scenes were simply "puffing," or merely a portion of the information illustrating aesthetics or the like. *See id.* § 2B-402(b) (outlining instances wherein an express warranty is not created). Again, the outcome would depend on the facts. Refer to note 117 *supra* and accompanying text.

As to the exclusion for published information content, Article 2B continues the current legal standard. It does not allow avoidance of express contractual obligations– rather, it simply does not necessarily treat them as warranties. This is explained in the Reporter's notes as follows:

> This section leaves undisturbed existing law dealing with how obligations are established with reference to published informational content. The cases tend to deal with obligations of this type as questions of express contractual obligation, rather than in language relating to warranties. Thus, a promise to provide an electronic encyclopedia obligates the party to deliver that type of work and is not fulfilled by delivery of a computerized work of fiction. In other cases where the issues focus on the quality of the content or the like,

Another example concerns informational content. When informational content, including published informational content, is included in a computer program, representatives of the movie industry requested that the content be viewed as part of the computer program. An example would be tax software. If the Internal Revenue Service tax tables were published in a book, the common law and the First Amendment would accord protections to the informational content in that book. Yet, if the very same book is added to software, the movie industry representatives requested removal of those content protections. For movies, however, these same commentators sought to shield the movie's content. They did so by seeking an exclusion for movies from the definition of "computer program," even when the movie might, in fact, be a computer program.[119]

> courts if inclined to find contract liability will do so under general contract law theory. Many, however, will conclude that the level of risk in the published informational content situation and the potentially stifling effect that contract liability might have on the dissemination of speech should lean toward limiting or excluding liability. See *Daniel v. Dow Jones & Co., Inc.*, 520 N.Y.S.2d 334 (N.Y. City Ct. 1987). In some other cases, liability may arise under tort law theories, such as in *Hansberry v. Hearst*, 81 Cal. Rptr. 519 (Cal. App. 1968) [sic]. However, this section rejects the seemingly simple, but ultimately inappropriate step of merely adopting Article 2 concepts from sales of goods to this much different context. That would risk a large and largely unknown change of law and over-reaching of liability in a sensitive area. It would create uncertainty that would in itself chill public dissemination informational content while courts grapple with adapting entire new standards of liability to this area.

Id. § 2B-402 reporter's note 8. Fraud and other causes of action are also preserved in Article 2B. *See id.* § 2B-105(c) (referencing § 1-103, which provides that Article 2B does not displace laws regarding fraud).

119. Originally, the MPAA requested that the definition of "computer program" in Article 2B match the definition contained in the federal Copyright Act, 17 U.S.C. § 101 (1994). *See* Kane, *supra* note 114 (arguing that the distinction between the Copyright Act and Article 2B regarding the definition of "computer program" is unnecessary). One commentator argued that the federal definition is fundamental to the Copyright Act, benefits from at least sixteen years interpretation, and that any deviation would surprise practitioners by conflicting with federal law and common meaning. *See id.* Professor Nimmer adopted this suggestion, although the MPAA claimed that the Reporter's notes also needed to conform to the Copyright Act's definition. *See* Memorandum from the Motion Picture Association of America to National Conference of Commissioners on Uniform State Laws 2 (July 17, 1998) (on file with the *Houston Law Review*) [hereinafter MPAA Memorandum].

The MPAA then reversed course and concluded that a state-law definition would be preferable to one that matched the federal definition. It proposed the following definition of "computer program" for Article 2B (the language that goes beyond the federal definition is in italics):

> "Computer program" means a set of statements or instructions to be used in a computer in order to bring about a certain result *and shall include the user interface. The term does not include (a) a separately identifiable motion picture, sound recording or other work of authorship (other than a computer program) notwithstanding (i) the use or existence of such other work by or in*

Everyone is entitled to protect their own interests. However, Article 2B should strike a fair balance, contain rules that are appropriate for similarly situated parties, and avoid straying too far in any particular direction without sufficient justification.[120]

> *connection with or as a result of the operation of a computer program or (ii) the use in such other work of codes or other attributes that are intended to be detected by or acted upon by a computer or computer program. A license to include a work of authorship in a computer program does not make the licensed work of authorship a computer program.*

Id. This definition neatly eliminates, for state law purposes, most MPAA products from the definition of "computer program," even though some of those products might otherwise be included in the federal definition of "computer program."

The Copyright Act does not treat motion pictures as computer programs. *See* 17 U.S.C. § 101. Moreover, it narrowly defines "motion picture" as "audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any." *Id.* The Copyright Act does not treat traditional motion pictures on celluloid as computer programs; however, it is fair to ask whether it would treat a digital motion picture, such as *Toy Story*, or one that contains computer codes allowing viewers to change or select plot lines, as a "motion picture" or a "computer program."

For state-law purposes, the MPAA's proposed "computer program" definition, and other changes requested in its July 17, 1998, memorandum regarding the Article 2B treatment of "informational content" and "published informational content," would eliminate most of its products from the definition of computer program, even though some might, in fact, be computer programs under federal law. The memorandum's suggested changes regarding "informational content" and "published informational content" would eliminate for all software products First Amendment and traditional common-law protections for informational content and subject software computer programs (but not "motion picture computer programs") to the Article 2B implied warranties for computer programs. Finally, the MPAA would expand the definition of "computer program" to include all user interfaces. *See* MPAA Memorandum, *supra*, at 2. The latter point is the subject of current controversy and developing federal law. At its November 1998 meeting, the Drafting Committee excluded movies from the definition of "computer program" and added additional exclusions, thereby restoring common law protections for movies, directly or as applied through Article 2. Refer to notes 25 and 112 *supra* and accompanying text. The industries Article 2B still covers also seek retention of the same common-law protections for their products.

120. *See, e.g.*, Harris, *supra* note 6, at 21. In commenting on attempts by advocates for some consumers to influence Article 2B, Ms. Harris, an officer of and legal counsel to a small developer, observed:

> The legislative process invites affected groups to attempt to influence legislation to their benefit. It provides an opportunity for individuals and groups (e.g., Mr. Kaner and like-minded others) to influence a market in ways which the market system, as an economic system, does not permit. Where the market system appears not to be operating satisfactorily, government intervention may be appropriate. Where the market system is working, or other avenues for appropriate government intervention exist when it is not working, permitting proposed legislation to become a basis for negotiating more favorable terms for certain interests than they can now obtain in the market place is, at least in a market system, ill-advised. Such negotiation through legislation is particularly undesirable when these interests make demands without regard to their second-level effects, which frequently take the form of unintended (and therefore unconsidered) consequences of government intervention.

To criticize Article 2B for failing to adopt rules for Article 2B licensors, that licensees refuse to tolerate when they are licensors or sellers under other law, is highly questionable.

VII. LEADING BY DESIGNERS, NOT DESIGN

Who should write laws, computer programmers or legislators? Given the nature of politics, the easy answer is the former. The seriousness of the question can be illustrated, however, with a simple example.

The Federal Trade Commission's Telemarketing Sales Rule requires certain disclosures (such as the total cost to purchase and receive goods and services) to be made to customers "[b]efore a customer pays for goods or services offered . . . ."[121] No court has yet interpreted what "pays for" means in this regulation, but a common sense reading would require disclosure before the telemarketer accepts a check or submits a charge to the customer's credit or debit card. Not surprisingly, the logical answer might not be the legal one: the FTC "intends" the rule to require disclosure before the customer "*divulges* to a telemarketer or seller credit card or bank account information."[122]

This rule does not apply to on-line transactions.[123] However, faced with the task of helping a company design its Web site purchasing screens, this author once suggested use of the FTC

> For software developers, publishers and users ("consumers"), the question is not whether Article 2B is ideal, but whether, on balance, those who provide and utilize software, and society as a whole, would be better off with the proposed law in place than without it. That is the fundamental question which the Drafting Committee will ultimately have to decide and the appropriate question for determining whether proposed Article 2B deserves support.
>
> The software industry has found that the licensing model works well. It offers maximum flexibility in an industry in which change is constant and rapid. To the extent that a uniform law confirms the enforceability of contractual arrangements, it is likely to be welcomed. To the extent it reduces flexibility, makes enforcement of contracts less predictable, or potentially narrows efficient and effective distribution channels, it presents a potential for disruption of the market and diminution of opportunity, and is therefore less likely to be welcomed by the industry.

Id. at 21.

121. 16 C.F.R. § 310.3(a)(1) (1998) (footnote omitted).

122. 60 Fed. Reg. 43,842, 43,846 (1995) (emphasis added).

123. When initially proposed, the rule was thought to apply to on-line services because the definition of telemarketing contained the term "telephonic mediums." *See* 60 Fed. Reg. 28,509, 30,411. The rule was revised, however, to limit its application to telephone calls only. *See id*. ("[T]he Commission acknowledges that it does not have the necessary information available to it to support the coverage of on-line services under the Rule.").

rule by analogy. I suggested placing the screens showing price and taxes before the screens requesting credit card information.

Once the shouting stopped, I learned (or was fooled into believing) that it is not practical to calculate taxes without the credit card number. Many of the databases used to calculate applicable taxes depend upon knowing the customer's address, which in turn relates to credit card number databases. This is part of an anti-fraud structure. In short, a legal rule that requires taxes to be disclosed before credit card information appears impractical in modern commerce. In the present case, there was no loss of protection for the customer because the total costs could be shown before the "Submit My Order" button was pressed, even if the credit card screen did not appear in the order the FTC unofficially prefers.

But which *should* come first? Should rules of law grounded in public policy choices be promulgated to guide the development of electronic commerce, or should commerce develop first and the law follow (and then impose costly or perhaps impossible requirements on commerce)? That technology may influence the ability to craft laws is beginning to be recognized. In any area in which regulation is appropriate, the answer to the question, "which should come first, technology or law?," deserves serious consideration and can even be said to invoke questions of democratic control.[124]

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124. While Professor Lessig's conclusions regarding contract law are not sustainable, refer to note 84 *supra*, his comments on cyberspace are interesting. He notes:

> As important as the nature of these newly zoned spaces [areas of cyberspace] is, more important is who is designing them. They are the construction . . . of "engineers." Engineers write the code; the code defines the architectures, and the architectures define what is possible within a certain social space. No process of democracy defines this social space, save if the market is a process of democracy.

Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403, 1410 (1996). Given that legislation is the product of democracy, to the extent that cyberspace controls areas that should be the subject of legislation, the structure of those areas arguably ought to be designed by elected legislators and not by engineers. That is not to say that cyberspace *should* be the subject of legislation. However, assuming that some narrow class of issues is appropriate for legislation, the question is who should write that legislation: engineers or legislators? With respect to NCCUSL and the ALI, it is true that they are not legislators. However, NCCUSL, at least, is as close to the traditional concept of a legislature as is likely possible (that is, if one wants people knowledgeable about existing law to draft legislation). Governors, who are themselves elected officials, appoint commissioners; all of the drafting committee meetings are open; anyone can speak or write to the committees; the drafting committees tend to be made from cross sections of professors, practicing attorneys, judges, and legislators of varying political or social viewpoints, including, visibly, the consumer point of view; and the drafting process is long enough to effect a thorough airing of issues (*e.g.*, in the case of Article 2B, the process was started about 10 years

In fact, "[t]he code or software or architecture or protocols set . . . features selected by code writers; they constrain some behavior by making other behavior possible, or impossible. They too are regulations."[125]

The UCC has taken both approaches to answering the question of whether law should follow or lead. Section 1-102(2) states that one of the underlying purposes of the UCC is to permit the continued expansion of commercial practices through custom and usage, *i.e.*, to let commercial practices develop first.[126] But the original Article 2, while adhering to that principle, was also innovative.[127]

What is appropriate for today's information economy? The answer cannot simply be "nothing."[128] To the contrary, and as

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ago as part of the Article 2 revision). Furthermore, NCCUSL's work is ultimately reviewed and adopted by legislators.

This author concedes that the ALI procedures are not democratic– ALI members are nominated, and only members may attend the annual meeting of members unless an invitation is obtained. *See* AMERICAN LAW INSTITUTE, ANNUAL REPORTS: SEVENTY-FOURTH ANNUAL MEETING Rules of the Council 1.01 to .06, at 67-68 (1997) (listing classes of membership, including members and ex officio members such as certain judges who are members during their term of office). Typically, only ALI members, who largely do not attend or hear the debates at the NCCUSL drafting committee meetings, may comment on the draft at the ALI annual meeting. It should be noted, however, that at the 1997 and 1998 meetings regarding Article 2B, non-member speakers were allowed to comment. Also, only ALI members may make motions to amend the draft. *See, e.g. id*. Rules of the Council 9.03(A), at 73 (noting that members may presubmit motions). The ALI President sets the agenda for the annual meeting of the ALI membership, such as consideration of draft legislation by the membership, the ALI counsel determines what projects will be undertaken by the institute; membership on the council is composed of ALI members only. *See id*.; *id*. Bylaws 4.01 to .02, at 64-65. The ALI does have several representatives on the Article 2B Drafting Committee, so those members are exposed to the full debates and written input to the Drafting Committee.

125. Lawrence Lessig, *The Constitution of Code: Limitations on Choice-Based Critiques of Cyberspace Regulation*, 5 COMMLAW CONSPECTUS 181, 183 (1997) (footnote omitted). Professor Lessig's thesis is that behavior in cyberspace is regulated in three basic ways: direct regulation through laws such as defamation and obscenity laws; through social norms (*e.g.*, talking too much in a discussion list might cause placement on a "common bozo filter"); and software code creates a set of constraints that limit how one can act in cyberspace. *See id*.

126. *See* U.C.C. § 1-102(b) (1995).

127. *See* Hillinger, *supra* note 11, at 1141. Professor Hillinger cites as a myth the claim that Article 2 merely codified preexisting commercial practices. *See id*. at 1148. She suggests the dichotomy Article 2 created between "merchant" and "nonmerchant" rules was unique and "represented Llewellyn's attempt to create simpler, clearer, and better adjusted rules for commercial transactions. The rules incorporated actual business practice, however, only to the extent that such practice comported with Llewellyn's view of sound and reasonable commercial conduct." *Id*. at 1151 (footnote omitted).

128. Some would disagree, including Professor Lessig:

Humility should be our first principle when legislating about cyberspace:

> We should be honest about how much we don't yet know. Although 2B would facilitate tight control of information on the Net, we don't know whether tight control makes sense. The Supreme Court has hinted, wisely, that treating information as property would be unconstitutional. The best thing is to go slowly– to let parties write the contracts they want and let courts test them. A practice should develop before laws are passed.
>
> But 2B has this process backwards. We are just beginning to see how electronic commerce will work and, therefore, just learning how contracts governing electronic commerce should work. But Article 2B establishes rules that fundamentally alter the traditional balance in contract law. These changes favor– surprise, surprise– the companies whose lobbyists have been sitting at the 2B table.

Lessig, *supra* note 84. Professor Lessig misstates contract law. Refer to Part V *supra*. He also misses the point that contracts will be made about information with or without Article 2B. Contracts will be made under the common law or Article 2, and their terms will be governed by standards less protective of licensees than those set in Article 2B. Refer to notes 102-06 *supra* and accompanying text (discussing some of the Article 2B protections for licensees). He also misses the point that Article 2B cannot dictate *whether* a contract can be made about property or constitutional matters, but only *how* it is made, *if* it can be made. *See* U.C.C. § 2B-105(a)-(c) & reporter's notes 2-4 (Proposed Draft Feb. 1999) (discussing the effects of preemption and public policy on Article 2B).

Professor Lessig does validly raise the question of what should come first, the law or commerce? But for the chaotic state of current law regarding electronic commerce and the other issues addressed by Article 2B, this author would tend to agree that commerce should come first. But the presence and costs of this chaos are real. Refer to notes 16-24 *supra* & note 129 *infra* and accompanying text. Thus, the conclusion is forced that law should come first to the minimal degree contemplated by Article 2B. Refer to note 137 *infra* and accompanying text (comparing Article 2B to other proposed methods of regulating the Internet). Others agree:

> Finally, we think it worthwhile to comment on the suggestion made by a couple of critics that Article 2B be abandoned and that the development of law in this area be left to the courts on a case by case basis. Ten years ago, groups were convened by the ABA and NCCUSL to address that very issue and they decided overwhelmingly that uniform law was needed in this area to guide courts and practitioners. The explosion of the industry since then has only made the need more pressing. In particular, with regard to shrinkwrap licenses, which have been a source of controversy throughout this process, it is not responsible to tell one of the largest industries in our economy that they must wait for development of the law on a case by case basis over a period of years to know whether the standard form by which they do a majority of their contracting is in fact valid, or to have different results in different jurisdictions, where the distribution of the products is. Better to develop a set of reasonable rules in a uniform statute. We believe that Article 2B accomplishes this. In fact, with the further development of technology that is resulting in more and more software licenses being done on-line rather than through box licenses, the entire shrinkwrap issue is fast becoming a solution in search of a problem. Article 2B strikes the right balance by incentivizing companies to display their terms up front on-line, but not requiring them to do so.

Letter from Donald A. Cohn & Mary Jo Howard Dively to ALI Council Members (Dec. 9, 1998) (available at <http://www.2bguide.com/docs/1298abaa.html>).

explained in a EU proposal for its internal market, the costs of current legal uncertainty are real,[129] and the existence of a legal structure is *itself* a valuable asset:

> Electronic commerce provides the Community with a unique opportunity to create economic growth, a competitive European industry and new jobs. The legal framework of the internal market and the euro are key tools for exploiting this opportunity.
>
> . . . .
>
> . . . [T]he Union must act in order to establish within Europe a genuine single market for electronic commerce. This single market must ensure that European businesses and citizens are able to receive and supply information society services throughout the Community, *irrespective of frontiers. Indeed, the legal framework of the internal market forms a major asset for electronic commerce, and electronic commerce forms a major asset*

129. The EU reports:

> The current legal framework gives rise to significant costs for operators wishing to develop their activities across borders. The results of a survey undertaken within the *"Commercial Communications"* newsletter demonstrate the significance and specific nature of these costs.
>
> *The significance of legal costs:* 64% of respondents undertook a legal analysis of the regulatory situation and notably regarding the cross-border situation. Of the 36% who did not, 43% had not yet done so because they were still in pilot phases and 30% because they could not afford to undertake such an evaluation.
>
> Estimated legal costs to launch an Information Society service vary enormously. Several examples demonstrate how they often amount to considerable sums: one operator responded that he is using 3-4 days of external legal advice per month, another uses 50 hours per month of both internal and external legal advice (amounting to approximately 70,000 DM per year), another used fifty days of both in-house and external legal advice to launch a new service and an SME indicated that it had to employ a lawyer on a full-time basis. One of the key operators in the electronic commerce market noted that he has to rely on 8 in house lawyers dedicating 45 hours per week and 18 outside legal advisers who on average supply 175 hours of advice per week. For the UK market alone, this operator estimated that a review of the regulatory framework for his information society service cost him 60,000 ECU.
>
> *The specificity of the legal costs associated with electronic commerce.* [O]f those who have undertaken a legal analysis, no less than 40% believe that the legal uncertainty that characterised electronic commerce was greater than for other lines of business. The cross-border dimension of the activity also distinguishes it since 64% evaluated legal aspects other than those in their own country and 57% believed it was essential to evaluate how the activity would be treated in other Member States. Moreover, of those who did not make a legal assessment, only 26% denied that there was a risk and 30% would have done so if they had had the resources to.

Council Proposal, *supra* note 18, at 8.

for the internal market . . . .[130]

Yet, technology can create social norms that are frequently sufficient without the law,[131] and over-regulation can impede and adversely affect the development of both technology and markets.[132] Anything other than the most basic legal rules is unwise and freezes or forces development into artificial and perhaps harmful directions.[133] The diverse options that

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130. *Id*. at 6 (emphasis added).

131. In describing the current condition of cyberspace, Professor Lessig notes:

> [C]yberspace is such a place of relative freedom. The technologies of control are relatively crude. Not that there is no control. Cyberspace is not anarchy. But that control is exercised through the ordinary tools of human regulation– through social norms, and social stigma; through peer pressure, and reward. How this happens is an amazing question– how people who need never meet can establish and enforce a rich set of social norms is a question that will push theories of social norm development far. But no one who has lived any part of her life in this space as it is just now can doubt that this is a space filled with community, and with the freedom that the imperfections of community allows.

Lessig, *supra* note 124, at 1407. On the other hand, Professor Lessig believes that cyberspace is changing. He also believes that the law can force code, the software that creates and maintains cyberspace, to be structured such that law can be more effective. *See* Lessig, *supra* note 125, at 184. Professor Lessig opines that "[r]ather than making rules that apply to constrain individuals directly, government will make rules that require a change in code, so that code regulates differently. Code will become the government's tool. Law will regulate code, so that code constrains as government wants." *Id*. It is not this author's purpose to engage in that debate, or to suggest that governments should regulate code to expand or make law, especially if that law otherwise would not be necessary or appropriate. The point is more limited and is this: *when and to the extent law is appropriate*, it is valid to consider whether that law should be developed before or after contrary code and cyberspace norms are developed. As noted, the fundamental question is whether the law should lead or follow.

132. Refer to notes 133-34 *infra* and accompanying text (noting arguments that unnecessary commercial regulation will distort the development of the electronic marketplace).

133. *See* White House, *A Framework for Global Electronic Commerce* (July 1, 1997) (available at <http://www.doc.gov/ecommerce/framewrk.htm>). This White House position paper explains this point:

> *2. Governments should avoid undue restrictions on electronic commerce.*
>
> Parties should be able to enter into legitimate agreements to buy and sell products and services across the Internet with minimal government involvement or intervention. Unnecessary regulation of commercial activities will distort development of the electronic marketplace by decreasing the supply and raising the cost of products and services for consumers the world over. Business models must evolve rapidly to keep pace with the break-neck speed of change in the technology; government attempts to regulate are likely to be outmoded by the time they are finally enacted, especially to the extent such regulations are technology-specific.
>
> Accordingly, governments should refrain from imposing new and unnecessary regulations, bureaucratic procedures, or taxes and tariffs on commercial activities that take place via the Internet.
>
> . . . .

minimalist regulation creates will better serve society and allow competition by new players, including small ones.[134]

> *3. Where governmental involvement is needed, its aim should be to support and enforce a predictable, minimalist, consistent and simple legal environment for commerce.*
>
> In some areas, government agreements may prove necessary to facilitate electronic commerce and protect consumers. In these cases, governments should establish a predictable and simple legal environment based on a decentralized, contractual model of law rather than one based on top-down regulation. This may involve states as well as national governments. Where government intervention is necessary to facilitate electronic commerce, its goal should be to ensure competition, protect intellectual property and privacy, prevent fraud, foster transparency, support commercial transactions, and facilitate dispute resolution.

Id.

134. The Federal Reserve Board ("FRB") noted the need to go slow and let multiple technologies develop when reporting on the advisability of regulating "smart cards" and on other developing alternatives to existing payment systems under Regulation E, a consumer regulation that implements the federal Electronic Fund Transfer Act. BOARD OF GOVERNORS OF FED. RESERVE SYS., REPORT TO CONGRESS ON THE APPLICATION OF THE ELECTRONIC FUND TRANSFER ACT TO ELECTRONIC STORED-VALUE PRODUCTS 2-4 (1997) (discussing the potential negative side effects of regulating electronic stored-value products). The FRB stated:

> Government regulation may be warranted when the unfettered operations of the private sector fail to achieve an economically efficient outcome, i.e., in the presence of "market failure." Government responses to market failures, although having the potential to improve market outcomes, may have unforeseen, and sometimes adverse, consequences. Economic theory and empirical evidence suggest that government regulation has the potential to foster or hinder technological progress and the development of new products by influencing private sector incentives to invest in research and development activities and private sector choices among alternative technologies. In deciding whether and, if so, how to regulate electronic stored-value products, policymakers must carefully assess the potential effect of their decisions on the evolution of these new products and the extent to which they achieve market acceptance. Choices made today may significantly influence the payment options available to market participants in the future.

Id. at 2-3.

The Clinton Administration echoed this view:

> The market is very much in the early stages of experimentation with respect to the business models for electronic commerce. The United States believes it is not wise at this time to attempt to identify a single model that these transactions will use or to develop a legal environment using a single model. Indeed, such an approach would prevent the market from testing different possible approaches and prematurely impose a particular model on all electronic commerce, inevitably limiting its growth. Therefore, at the current state of development, the legal framework should support a variety of business models so that the market is able to experiment and select the models that best fit particular types of electronic commerce.

WORKING GROUP ON ELEC. COMMERCE, *supra* note 17, at 14.

Ms. Harris, discussing the need to design laws that will create a level playing field and not favor large companies, noted:

> The NCCUSL Drafting Committee, and most if not all of those who have actively participated in the process, have, as their goal, creating a

That is perhaps the best argument for Article 2B. Unlike some of the digital signature acts that try to set or predict technology, and unlike proposals that assume erroneous facts or freeze development,[135] Article 2B simply adapts rules of a contract law written for goods to an economy that is increasingly being driven by information. That economy will, therefore, depend on contracts to deliver changing and ever more complex products.[136] With Article 2B, we are not talking about technology-biased legislation or pie-in-the-sky grand new rules of law for the Internet.[137] Rather, we are talking "meat and potatoes," *i.e.*, essential elements of contract law and consumer protections—nothing more.[138] There is a critical need for that menu, not for nouveau cuisine.

> statute which is clear, even-handed, and will promote commerce in an industry which, over a period of less than two decades, has burgeoned from tiny to in excess of $100 billion. Of all those involved in the process, it is the small developers who are perhaps most eager to assure that whatever legislation is recommended by NCCUSL is fair and even-handed, because small developers are both licensors and licensees. They must rely on the rights granted in licenses for software they use as well as rely on the licenses they grant to protect their ability to commercialize their software applications. If burdens are to be imposed on developers, distributors and publishers, it is the small developers who are most likely to suffer from their weight.

Harris, *supra* note 6, at 16 (footnotes omitted).

135. *See, e.g.*, WASH. REV. CODE ANN. §§ 19.34.10 to .903 (West Supp. 1999) (The Washington digital signature act only contemplates a specific technology based on public/private key encryption); *id*. § 19.34.010(11) (providing the definition of "digital signature" and noting that it contemplates public-private key encryption technology); *see also* 63 Fed. Reg. 24,996 (1998) (requesting public comment regarding the application of FTC rules and guides to electronic media). For a discussion of the adverse impacts on the development of technologies posed by the FTC proposal, see the comments posted after a search under "electronic media" at <http://www.ftc.gov/search> (visited Mar. 13, 1999).

136. For an explanation of why contracts are necessary to information licensing, see Harris, *supra* note 6, and Robert W. Gomulkiewicz & Mary L. Williamson, *A Brief Defense of Mass Market Software License Agreements*, 22 RUTGERS COMPUTER & TECH. L.J. 335 (1996).

137. Some of the grander schemes for Internet law have included suggestions for patterning it after admiralty law (because like the high seas, no state may claim sovereignty), lex mercatoria (the medieval merchant law collection of customary rules traveling traders used in medieval Europe and Asia), outer-space law (because, like space, the Internet is transnational and not easily demarcated into jurisdictions), and Antarctica law (a transnational, yet non-national area in which nations have agreed on legal issues). *See* Michael A. Geist, *The Reality of Bytes: Regulating Economic Activity in the Age of the Internet*, 73 WASH. L. REV, 521, 546-47 (1998).

138. Some have criticized Article 2B for being too long. In part that is due to the Reporter's notes, which explain each section. The fact that those notes have been made available to aid understanding (and criticism) should be applauded, not criticized. Refer to note 38 *supra* and accompanying text (explaining Professor Llewellyn's view that explanation of statutory text is laudable and necessary, and

Section 2B-118 provides a simple example; it creates a new consumer defense to electronic contracts involving an "electronic error."[139] The definition of "electronic error" includes errors the

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the controversy that resulted from his attempt to have the Article 2 comments adopted).

As to the length of the statute, before commenting on Article 2B, commentators should read *all* of existing Article 2 and Revised Article 9, including comments. Both are long and complex, particularly to those unfamiliar with them or who rely on the common law. The reality is that commercial law *is* long; one may go years without consulting a provision on what constitutes, for example, repudiation of a contract. But when the need arises, it is better to have a uniform rule on the point instead of having to plow through all potentially applicable common law. Some of the most dense language in Article 2B comes straight out of Article 2: it deliberately was not changed to avoid creating an inference of change when none was intended. In fact, the Article 2 revision committee has taken the opposite approach and has received legitimate criticism for doing so:

> In an overwhelming number of instances, new language has been used [in revisions to Article 2] when there is no professed intent to alter the meaning of the Code. The difficulty with these changes arises because new language invites questions concerning its meaning and the reasons for its use. Moreover, even after it is understood, new terminology requires business to readapt its methods and processes for doing business. In light of rapidly changing technology and our increasingly complex and litigious society, the costs to business of interpreting, and then accommodating to, a radically altered sales law are immense.

Letter from Andrew D. Koblenz, Senior Attorney, American Automobile Manufacturers Association, to Article 2 Drafting Committee, National Conference of Commissioners on Uniform State Laws 4 (May 15, 1997) (on file with the *Houston Law Review*); National Association of Manufacturers et al. Memorandum, *supra* note 27, at 9-11. Complaints about long, complex statutes are not unique to Article 2B:

> It is an understatement to suggest that the Code is not artfully drawn . . . . Related legislative enactments such as retail installment sales acts . . . were not integrated into the Code but were left on the books. This resulted in both non-uniformity and a plethora of other problems. . . . Apart from the need to understand non-Code legal materials in order to apply the Code correctly, the fact remains that the Code itself is too complex to be readily understood. It contains seemingly endless definitional problems, and interpretation of several different sections, sometimes located in different articles, is usually required in order to arrive at the proper Code solution . . . .

David W. Carroll, *Harpooning Whales, of which Karl N. Llewellyn is the Hero of the Piece; Or Searching for More Expansion Joints in Karl's Crumbling Cathedral*, 12 B.C. INDUS. & COM. L. REV. 139, 150 (1970); *see also* Grant Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 GA. L. REV. 605, 628 (1981) ("One of the sad truths about the Code is that its several articles were never coordinated as they should have been. The lack of coordination between Article 2 on sales and Article 9 on secured transactions is glaringly evident.").

139. *See* U.C.C. § 2B-118 (Proposed Draft Feb. 1999). In its entirety, § 2B-118 states:

> (a) In this section, "electronic error" means an error created by an information processing system, by electronic transmission, or by a consumer using an information processing system, when a reasonable method to detect and correct or avoid the error was not provided.
>
> (b) In an automated transaction, a consumer is not bound by an electronic

consumer makes if a means for correcting or avoiding the error is not reasonably provided.[140] If this rule is timely adopted, Web sites will be designed to accommodate it and will, therefore, provide reasonable correction procedures. If, however, as with original Article 2,[141] adoption is delayed for ten years or so, Web sites will each follow their own course, some with better, worse, or no procedures, or maybe even EU rules.[142] Moreover, there is a danger that technology will divorce law from its traditional rooting in general principles that are sustainable for varying circumstances.[143]

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message that the consumer did not intend and which was caused by an electronic error, if the consumer:

(1) promptly on learning of the error or of the other party's reliance on the message, whichever occurs first:

(A) in good faith notifies the other party of the error; and

(B) causes delivery to the other party all copies of information or delivers or destroys all copies pursuant to reasonable instructions received from the other party; and

(2) has not used or received any benefit from the information or caused the information or benefit to be made available to a third party.

(c) If subsection (b) does not apply, the effect of an error is determined by other law.

Id.

140. *See id*. § 2B-118(a).

141. Refer to note 13 *supra* and accompanying text (relating the history of original Article 2 and the forces that delayed its adoption).

142. Refer to note 18 *supra* and accompanying test (quoting the EU Commission's proposal for creating a legal framework for electronic commerce by the year 2000 and concluding that the U.S. states should set their own laws and policies instead of allowing the European Union to legislate without them). A recent experience with a financial institution client illustrates the point. This author reviewed extensive Internet loan application screens. At the very end was a "Reset" button. Upon a query regarding whether customers unfamiliar with the designers' language would know what Reset meant, the answer was that "everyone" knows "reset" means "reset the screens to correct your errors." When asked whether pushing the button would reset all the screens, *i.e.*, the 30 minutes worth of data the customer just collected and entered, or only a few entries at a time, the answer was: "all screens." Using § 2B-118 by analogy, this author suggested labeling the button "Correct Any Errors" and having it work on only a few screens or entries at a time so that data would not be lost and could be reasonably corrected. Article 2B prompted the advice, and the client willingly redesigned what was otherwise touted as a common and continuing practice among designers.

143. For example, digital signature constructs are currently being criticized for failing to take sufficient notice of traditional legal theory. An electronic mail from an attorney on a digital signature list serve contained the following comment that illustrates the tension between technology and law:

I think the people who promote non-repudiation as a technical standard or as a result of the application of technology are engineers with no knowledge of legal principles, or the marketing departments of technology companies and their clients.

. . .[P]ointed out to me at the time that . . . a chapter of their book . . . [is devoted] to non-repudiation. My reading of that chapter does not change my views. The chapter starts off talking as if non-repudiation were a technical

Article 2B addresses additional and greater public policy issues. The ultimate question, however, is whether the law should follow or lead. Given Article 2B's reliance on the over forty years of law created in Article 2, and the need for guidance in the information age, Article 2B is not only necessary but vital.

Professor Llewellyn included the following in the draft preamble for a code for the Pueblo of Zia: "It is well for our younger men to know our law. It is well for our older men and our younger men to agree about our law. It is not good to wait until trouble comes up before our law becomes clear to all."[144] For the information economy, Article 2B creates or adapts good law and forestalls the trouble that is surely coming. It would be well for all of us to step back from politics and accord it some grace.

concept, but does not end up that way.

I don't know of any legal texts–say UETA or UNCITRAL or Illinois Act etc.– that speak of non-repudiation or use the term, even in explanatory notes. If there are some, I would be interested in hearing about them but would be skeptical that the people responsible knew what they were talking about.

Email from John Gregory, Ministry of the Attorney General, Ontario, to digsig@listserv.temple.edu (Oct. 15, 1998) (on file with the *Houston Law Review*).

144. Hillinger, *supra* note 11, at 1141.