

POSITIVE ATTRIBUTES OF ARTICLE 2B

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Common rules are necessary for the Internet and e-commerce. The White House on July 1, 1997, emphasized the importance of a Uniform Commercial Code for both international and domestic electronic commerce and stated it supports “the adoption of uniform legislation by all states,” employing the following principles: parties should be free to contract between themselves; rules should support use of electronic technologies; and the market should lead the development of this the most rapidly expanding component of our economy. (<http://www.iist.gov.eleccomm/ecommm.htm>)

The proposed Article 2B incorporates these principles and establishes rules where none exist now or improves present law as follows:

1. Provides greater certainty and clarity, over the present diverse and uncertain applicable law to computer software and information transactions.

- Creates a uniform national framework for contracts in industries whose transactions routinely span state and international borders;
- establishes rules that reflect existing commercial practice;
- establishes warranty and remedy structures that are more appropriate to computer-information transactions than existing law;
- creates an appropriate framework for contracting allowing exchange of published informational content and data without a potentially chilling liability risk;
- modernizes and makes uniform the applicable statute of frauds applicable to computer information transactions, recognizing the sufficiency of electronic records and signatures;
- provides default gap-filler provisions (Parts 3,4,5 and 6) if the parties have not stated a term or the term is not otherwise provided by course of dealing, usage of trade or course of performance (1-102(3)); and
- enables electronic commerce with flexible, technology neutral rules.

2. Limits scope to “computer information transactions” (2B-103 & 104), thus excluding core businesses of traditional media industries that have established common law rules or are regulated; namely entertainment (movies, sound recording and broadcasting), print media (newspapers, magazines and books), and authors of text.

3. Enables parties to opt in or opt out (except for certain mandatory rules), so parties can elect to be under a common set of rules for mixed transactions (2B-103).

4. Updates contract formation rules to reflect modern contracting practice and provides contract formation rules for electronic transactions which the common law and present statutory rules do not uniformly address (2B-Part 2).

- Provides a framework for contracting on the Internet; and
- Provides a framework for obtaining assent to terms to make an agreement requires (1) an opportunity to review the terms (2B-112) and (2), that the person sign (“authenticate”), or by the person’s intentional conduct and have reason to know that the other party may infer assent from the conduct (2B-111 and Restatement, Section 19).

5. Provides licensee protections equal to or greater than current common law (or current Article 2, 2A and 9).

- Consumer protection laws trump Article 2B except as Article 2B allows consumers to engage in electronic transactions (2B-105(d));
- “unconscionable” terms are not enforceable (2B-110), and limits are placed on varying contract terms by contract (2B-106);
- terms that are clearly outweighed by fundamental public policy are not enforceable (2B-105(b));
- protections are extended to “mass-market” transactions including a cost free return right if for any reason the terms are rejected; the return right provides for refund of the price, costs of return and for restoration costs incurred if booting up to review the terms damages the user’s system or information (2B-208);
- terms cannot be performed or enforced in “bad faith” (2B-102 and 1-203);
- gives consumers a right to avoid effect of a mistake on-line (2B-118);
- supplemental general principles of law and equity (e.g. estoppel, duress, misrepresentation, fraud, coercion, etc.), apply (2B-105; 1-103);
- provides protections against abuse from electronic self-help (2B-716);

- ability to choose applicable law is limited in a consumer transaction (2B-107); and
 - unreasonable and unjust choice of forum is denied (2B-108).
6. Preserves freedom of contract in computer information transactions generally.
 7. Adopts and makes nationally uniform the modern view on choice of forum, allowing the parties by agreement to make the choices unless the choice is unreasonable and unjust, thereby facilitating the doing of business by small companies on the Internet (2B-107).
 8. Parties are expressly authorized to choose the governing law except for mandatory consumer protection provisions (2B-107).
 9. Warranties are equivalent to those under Article 2 but appropriately expressed for application to intangibles (2B-Part 4). New or enhanced warranties are added that do not exist in Article 2 or the common law. Article 2B-405(c), creates a system integration implied warranty; 2B-402(a)(1) makes uniform the principle that advertising can create an express warranty; and 2B-404 creates uniform warranties for information out of common law “non-warranty” rules.
 10. Establishes a remedy structure that is fashioned to provide clear and appropriate rules when a contract is breached.