

TAB 1
Nimmer/Ring Proposals
ELECTRONIC COMMERCE RULES
(see draft for black-lining)

Note:

The following sections include most of the electronic message or signature provisions of Article 2B. The provisions here do not include various other rules that are significant for electronic commerce, such as manifesting assent, choice of law, choice of forum, etc. They also do not include the provision dealing with attribution of a message to a person since the Reporter and Chair have proposed under a separate tab, a relatively substantial revision of that section.

The provisions on electronic commerce have been modified based on in-put from several sources and, especially, based on conversations with the Chair and Reporter of the UETA (electronic transactions act). Those conversations identified an approach to the coordination of Article 2B and UETA. Many of the changes made in this draft (which are indicated in the draft itself) are for the purpose of coordinating with UETA.

In addition to the separate proposal regarding attribution of an electronic record, message, etc., the major changes from the prior draft are;

1. A proposal to add new subsections to Section 2B-113 as indicated. These derive from the current draft of UETA and fill a gap that was present in the prior draft.

2. A proposal to delete Section 2B-115 dealing with the treatment of the use of a “required” but unreasonable attribution procedure. The basic principle adopted in ETA and in Article 2B is that, in the absence of reasons to shift the issue, a person relying on the fact that a message came from another person must prove the source. Article 2B changes this if the relying party followed an agreed and commercially reasonable attribution procedure. Additionally, as illustrated by numerous comments, the prior provision was extraordinarily difficult to apply in a consistent manner and was capable of creating substantial confusion.

3. A proposal to delete subsection (c) of Section 2B-120 dealing with the effect of messages made conditional on receipt of an acknowledgement.

2B-102 (Definitions) Various edits proposed.

(3) “Attribution procedure” means a procedure established by law, regulation, or agreement, or a procedure adopted by the parties, to verify that an electronic authentication, message, record, or performance is that of a specific person, or to detect changes or errors in the information. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, callback or other acknowledgment procedures, or any other procedures that are reasonable under the circumstances.

(4) “Authenticate” means to sign, or otherwise to execute or adopt a symbol or sound, or to use encryption or another process with respect to a record, with intent of the authenticating person to:

(A) identify that person;

(B) adopt or accept the terms or a particular term of a record that includes or is logically associated with, or linked to, the authentication, or to which a record containing the authentication refers; or

(C) confirm the content of the information in a record that includes or is logically associated with, or linked to, the authentication, or to which a record containing the authentication refers.

(5) “Automated transaction” means a contract formed or performed in whole or in part by electronic means or by electronic messages in which the electronic actions or messages of one

or both parties that establish the contract are not intended to be reviewed in the ordinary course by an individual.

(21) “Electronic” means of or relating to technology having electrical, digital, magnetic, wireless, optical, or electromagnetic, or similar capabilities. “Electronically” has a corresponding meaning.

(22) “Electronic agent” means a computer program, electronic, or other automated means used to initiate an action or to respond to electronic messages or performances without review by an individual.

(27) “Information processing system” means an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information.

(40) “Receive” means:

(A) with respect to a copy, to take delivery; and

(B) with respect to a notice:

(i) to come to a person’s attention; or

(ii) to be delivered to and available at a location designated by agreement for that purpose or, in the absence of an agreed location:

(I) to be delivered at the person’s residence, or the person’s place of business through which the contract was made, or at any other place held out by the person as a place for receipt of such communications; or

(II) in the case of an electronic notification, to come into existence in an information processing system in a form capable of being processed by or perceived from a system of that type, if the recipient uses, or otherwise has designated or holds out that system as a place for receipt of such notices.

(41) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(45) “Send” means, with any costs provided for and properly addressed or directed as reasonable under the circumstances or as otherwise agreed, to (i) deposit in the mail or with a commercially reasonable carrier; (ii) deliver for transmission to or creation in another location or system; or (iii) take the steps necessary to initiate transmission to or creation in another location or system. In addition, with respect to an electronic record, “send” means to initiate operations that in the ordinary course will cause the record to come into existence in an information processing system in a form capable of being processed by or perceived from a system of that type, if the recipient uses or otherwise has designated or held out that system as a place for the receipt of such communications. Receipt within the time in which it would have arrived if properly sent has the effect of a proper sending.

2B-105(g) (other law) (revised):

Delete the provision dealing with digital signature statutes and replace with a provision in Section 2B-802(c) as follows:

The following provisions of state law establishing a digital signature or similar form of attribution procedure govern in the case of a conflict with the provisions of this article with respect to the use of that procedure:

[Note: Not all pre-existing digital or electronic signature laws should prevail over Article 2B. The state should review prior legislation on these topics to determine whether and to what extent particular legislation should be treated as predominant in the case of a conflict.]

2B-113(b)(c) (general re electronic records) (new):

(b) This article does not require that a record or an authentication be generated, stored, sent, received, or otherwise processed by electronic means or in electronic form.

(c) In any transaction, a person may establish reasonable requirements regarding the type of authentication or record acceptable to it.

2B-115: (effect of requiring an unreasonable procedure) (delete)

2B-116: (attribution to a person) (see revised draft):

2B-117: (detection of errors etc.) (edited):

(a) In this section, "electronic record" means an electronic authentication, message, record, or performance.

(b) If the parties use a commercially reasonable attribution procedure to detect errors or changes in an electronic record, the following rules apply:

(1) The effect of the procedure is determined by the agreement or, in the absence of agreement, by this section or any law establishing the procedure.

(2) If the procedure indicates that an electronic record was unaltered since a point in time, it is presumed not to have been altered since that time.

(3) As to portions to which the procedure applies, if a procedure indicates that there is no error in content, an electronic record is presumed at the time it was sent to have the content intended by the person creating or sending it pursuant to the procedure.

(4) If the sender has conformed to the procedure, but the other party has not and the nonconforming party would have detected the change or error had that party also complied, the sender is not bound by the change or error.

Section 2B-118 (consumer defense) (edited):

(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 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 the error is determined by other law.

Section 2B-119 (proof of authentication/ electronic operations) (edited):

(a) A person that uses an electronic agent for authentication, manifestation of assent, or performance is bound by the operations of the electronic agent even if no individual was aware of or reviewed the agent's actions or their results.

(b) Subject to Section 2B-116, compliance with a commercially reasonable attribution procedure for authenticating a record authenticates the record as a matter of law. Authentication may be proven in any manner, including by showing that a party made use of information or access that could only have been available if it engaged in conduct or operations that authenticated the record or term.

(c) Unless the circumstances indicate otherwise, authentication is deemed to have been done with the intent to:

(1) establish a person's identity; and

- (2) establish that person's adoption or acceptance of the authenticated record, term, or contract; and
- (3) confirm the content of the record or term as of the time of the authentication.

Section 2B-120 (electronic messages: timing and place of receipt) (delete c)

(a) Except as otherwise provided in subsection (b) ~~and (c)~~, an electronic record is effective when received even if no individual is aware of its receipt.

(b) If an offer in an electronic message evokes an electronic message in response, a contract is formed:

- (1) when an acceptance is received; or
- (2) if the response consists of furnishing or giving access to information, when the information or notice of access is received or use is enabled, unless the originating message required acceptance in a different manner.

~~————— [Proposed deletion (c) If the originator of an electronic message requests or has agreed with the addressee that receipt be acknowledged electronically, the following rules apply:~~

~~————— (1) If the effectiveness of the message was expressly conditioned on receipt of an electronic acknowledgment, the message:~~

- ~~————— (A) does not bind the originator until acknowledgment is received; and~~
- ~~————— (B) expires if acknowledgment is not received within the time specified or, in the absence of a specified time, within a reasonable time after the message was sent.~~

~~————— (2) If the effectiveness of the message was not expressly conditioned on electronic acknowledgment and acknowledgment is not received within the time specified or, in the absence of a specified time, within a reasonable time after the message was sent, the originator, on notice to the other person, may:~~

- ~~————— (A) treat the message as no longer effective; or~~
- ~~————— (B) specify a further time for acknowledgment and, if acknowledgment is not received within that time, treat the message as no longer effective.]~~

(c) Receipt of an electronic acknowledgment creates a presumption that the message was received, but, in itself, does not establish that the content sent corresponds to the content received.

SECTION 2B-204. OFFER AND ACCEPTANCE; ELECTRONIC AGENTS.

(a) A contract may be formed by the interaction of electronic agents. If the interaction results in the electronic agents engaging in operations that confirm or indicate the existence of a contract a contract is formed unless the operations resulted from fraud or electronic mistake or the like.

(b) A contract may be formed by the interaction of an electronic agent and an individual. A contract is formed if the individual takes actions that it is free to refuse to take or makes a statement that the individual has reason to know will:

(A) cause the electronic agent to perform, provide benefits, permit the use or access that is the subject of the contract, or instruct a person or an electronic agent to do so; or

(B) indicate acceptance or an offer, regardless of other expressions or actions by the individual to which the electronic agent cannot react.

(c) The terms of a contract formed under subsection (b) are determined under Section 2B-207 or 2B-208, as applicable, but do not include terms provided by the individual if it had reason to know that the electronic agent could not react to the terms as provided.

TAB 4
Nimmer/ Ring
PROPOSAL: ATTRIBUTION

The following draft language presents a proposal to revise Article 2B on attribution of an electronic message, record, etc. to a person. The draft clarifies questions about allocation of risk and proposes a new standard with reference to the use of a commercially reasonable attribution procedure. It is modeled on existing Article 4A.

Subsection (b) clarifies that the party seeking to rely on attributing the source of an electronic record bears the burden of establishing that the record was the act of person or its authorized agent. Article 1 defines the “burden of establishing” as “the burden of persuading the trier of fact that the existence of a fact is more probable than its non-existence.” In effect, a vendor that desires to attribute an order to a particular party bears the risk of being able to do so.

Subsection (c) deals with the effect of attribution procedures. The basic rule is that, unless the procedure used is “commercially reasonable”, subsection (b) governs. Subsection (c), however, allows a party that relies on attribution procedure to establish attribution to the other party if, and only if, the relying party carries the *burden of establishing* that:

- The procedure used was *commercially reasonable*
- The procedure was relied on in good faith
- The procedure indicated that the party attributed with the record was the responsible person

The net effect of this is that the party seeking to establish attribution has the burden and risk of establishing actual attribution or the foregoing characteristics with respect to the procedure used. Under Section 2B-102, an “attribution procedure” is a procedure established by law or adopted or agreed to by the parties. That is, it is a procedure that the parties select by agreement.

Some have argued that the standard of commercial reasonableness is vague and inhibiting of commercial development. In fact, however, the reverse is true. The standard has two functions and is essential to the basic theme of Article 2B here, which is to develop rules that are “technology neutral” for the Internet context. The first function is that it establishes a standard for courts to develop case law and for parties to develop standards for the development of effective procedures. A rule that does not set out a standard of commercial reasonableness or similar concept in effect leaves courts with no standard to decide particular cases and, to the extent that it relies on jury or other fact findings in the absence of a substantive standard, does not provide a basis for the development of a relevant body of law to guide commerce. The second function is equally important. Regardless of the agreement of the parties, an attribution procedure has the designated effects only if it is commercially reasonable. This gives courts a basis to monitor transactions in order to prevent abuse.

Even if a relying party (e.g., vendor) establishes the three elements under subsection (c), it does not succeed if the other party can establish that the message was not caused by a person:

- entrusted at any time with the right or duty to act for the person with respect to such electronic records or attribution procedure;
- who obtained access to transmitting facilities of the person; or
- who obtained, from a source controlled by the person, information facilitating breach of the attribution procedure.

The net effect of these rules is that the burden of establishing attribution is primarily on the party seeking to rely on the attribution. It must establish either that the party actually was the sender or that a commercially reasonable procedure, actually applied, indicated that this was true. Even then, the other party succeeds if it establishes the criteria under (c)(3).

SECTION 2B-116. TO WHICH PERSON AN ELECTRONIC AUTHENTICATION, MESSAGE, RECORD, OR PERFORMANCE IS ATTRIBUTED; RELIANCE LOSSES.

(a) In this section, “electronic record” means an electronic authentication, message, record, or performance.

(b) An electronic record is attributed to a person if it was the act of that person or its electronic agent, or if the person is otherwise bound by it under the law of agency. The party relying on attribution of an electronic record to another person has the burden of establishing attribution.

(c) If an attribution procedure exists between the parties with respect to the electronic record, the following rules apply:

(1) The effect of compliance with an attribution procedure created by other law or regulation is determined by that law or regulation.

(2) In all other cases, if the parties agree to, or otherwise adopt an attribution procedure to verify the person from which an electronic record comes, the record is attributable to the person identified by the procedure, if the party relying on that attribution satisfies the burden of establishing that:

- (i) the attribution procedure is commercially reasonable;
- (ii) the party accepted or relied on the electronic record in good faith and in compliance with the attribution procedure and any additional agreement with or separate instructions of the other party; and
- (iii) the attribution procedure indicated that the electronic record was that of the person to which attribution is sought.

(3) If the electronic record is not binding on a person under subsection (b) but is binding under subsection (c), that person nevertheless avoids attribution under subsection (c) for the electronic record if the person satisfies the burden of establishing that the electronic record was not caused directly or indirectly by a person:

- (i) entrusted at any time with the right or duty to act for the person with respect to such electronic records or attribution procedure;
- (ii) who obtained access to transmitting facilities of the person; or
- (iii) who obtained, from a source controlled by the person, information facilitating breach of the attribution procedure.

(d) The provisions of subsection (c) may not be varied by agreement in a consumer transaction except in a manner that provides greater protection to the consumer. In all other cases, the effect of an attribution procedure may be determined by agreement if the attribution procedure is commercially reasonable.

(e) If an electronic record is not binding on a person under subsection (b) and is not effective under subsection (c), the person identified as the source of the electronic record is nevertheless liable for losses of the other party measured by the cost of that party’s performance in reliance if the loss occurs because:

- (1) the person identified as the source failed to exercise reasonable care;
- (2) the other party exercised reasonable care and reasonably relied on the belief that the person identified was the source of the electronic record because access materials, computer programs or the like created the appearance that it came from that person; and
- (3) the appearance on which the party relied resulted from acts of a third person that obtained the capability to create that appearance from a source under the control of the person identified as the source of the record.

TAB 7
Nimmer/ Ring Proposal
Pretransaction Disclosure of Terms

Note:

The new section deals with pre-transaction disclosures of contract terms in transactions conducted on Internet involving formation of a contract on-line with an electronic delivery of the information. The draft responds to concerns expressed by the ALI Council about pre-transaction disclosure of terms. The draft creates an incentive for disclosure of terms before initial agreement by indicating certain modes of disclosure that create an opportunity to review before the transaction. Failure to follow these procedures does not preclude enforceability of the license so long as proposal of terms conforms to standards requiring an opportunity to review before assent with a right to refund if terms are refused.

This section fits within the Article 2B structure on assent, which have been revised over the past several meetings of the Committee. Based on concepts developed in revised Article 2 (and the Restatement), Article 2B distinguishes between agreement to a contract and assent to (or adoption of) contract terms. On contract formation, Article 2B follows original Article 2. It adds rules confirming that contracts can be formed by the operations of electronic agents and otherwise relevant electronic commerce settings.

Article 2B also adopts concepts from the Restatement regarding assent. As revised after the NCCUSL Annual meeting, the assent rules include the following elements, relevant to both creation of a contract and adoption of terms.

- **Manifestation of assent:** To be bound to a contract or the terms of a record, a party must manifest assent. Section 2B-111 generally defines the idea of manifestation of assent in terms used in the Restatement. This establishes a uniformity of rule and terminology that has not developed under the Restatement and common law. The standard for manifesting assent requires an act that the party has *reason to know* will be understood as involving assent to a contract or its terms by the other party. Section 2B-111 also provides guidance for obtaining assent in electronic contexts.
- **Opportunity to review:** For a manifestation of assent to terms of a contract to occur, the party must have an opportunity to review the terms prior to giving its assent (Sections 2B-111; 2B-112). This rule contains significant protection for the assenting party and establishes a basic requirement of procedural fairness.
- **Where the assent to terms occurs after an initial agreement to a transaction,** assent is ineffective unless, after having an opportunity to review the terms, the party has a right to a refund or to avoid payment in the event that the terms are not acceptable. While some courts dealing with this context indicate that the presence of this right is potentially significant, Article 2B elevates this to a statutory requirement.

With respect to adopting a record containing terms of a contract, Article 2B follows the Restatement rule: a party adopts terms of a standard form (or other record) if it manifests assent to that record. Manifesting assent, in Article 2B requires a prior opportunity to review the terms and a reason to know that the acts will be viewed as assent. Section 2B-207 also follows the common law rule that assent covers the terms of the record generally, regardless of whether the party actually read each term.

Assent to a record does not mean that each term of the record is enforceable. Some terms may be invalid. Article 2B (as with revised Article 2) does not adopt Restatement Section 211 (allowing a court to invalidate a contract term if it believes that the term would have caused the party to refuse the contract if it had known of the term). That standard is law in only a handful of states three decades after promulgation of the Restatement. Article 2B, however, does 1) retain

existing law on invalidating terms, 2) retain all consumer protection rules that invalidate or regulate terms, and 3) add protections for the person assenting to a standard form, providing for invalidation in various cases, including:

- A term (or contract) is unenforceable if it is unconscionable. Article 2B follows current Article 2 in defining the idea of unconscionable terms, thus expanding the concept in those states where it has not been adopted outside the UCC.
- In a mass-market transaction, a term in a standard form is not enforceable if it conflicts with the express agreement of the parties. This is an entirely new safeguard designed to protect actual agreements in the mass market and applies whether or not the transaction is a consumer transaction.
- A term is not enforceable if it clearly violates fundamental public policy of the state. This makes clear an underlying concept established in the Restatement.
- A choice of forum term is unenforceable if it is unreasonable and unjust. This adopts the view of modern case law on the subject.
- A choice of law term is ineffective to alter a mandatory consumer protection rule.
- A limited of remedy is unenforceable if performance of the remedy causes it to fail of its essential purpose. This follows original Article 2.

In addition, standard doctrines of preemption, copyright or patent misuse, antitrust and similar unfair competition principles are not altered by Article 2B.

Article 2B deals with assent to terms provided for review after an initial agreement is reached about entering into a transaction, but imposes a number of restrictions. Most cases in the software and related industries enforce terms in this context where there was a reason to expect that additional terms will follow initial agreement. The cases include:

- *ProCD Inc. v. Zeidenberg*, (7th Cir. 1996).
- *TI Brower v. Gateway 2000, Inc.*, (N.Y.A.D. 1998)
- *Hill v. Gateway 2000, Inc.*, (7th Cir. 1997)
- *Mortinsen Co. v. Timberline Software, Inc.*, (Wash. App. 1999)

Compare *Step-Saver Data Sys., Inc. v. Wyse Technology*, 939 F2d 91, n.7 (3d Cir. 1991) (Not enforced where terms discussed and rejected between commercial parties, but subsequently proposed in a standard form court treated as proposed modification.). The commercial practice of providing terms after initial agreement to a transaction is common in various areas of commerce outside Article 2B (e.g., airline ticket restrictions, mail order contracts, telephone orders, catalogue sales, cruise tickets, insurance policies, and manufacturer warranties).

While Article 2B recognizes this commercial practice, but places several significant restrictions not clearly reflected in the reported cases.

- Terms proposed here are enforceable only if the party assents to them and at the time of the initial agreement, there was reason to know that terms would follow. Unexpected proposals are not enforced unless adopted as modifications of contract.
- In a mass-market transaction, the terms must be presented for review and agreement (or rejection) no later than the first use of the covered information.
- The terms are not enforceable unless the party being asked to assent has a right to a refund if it refuses the terms. This right is not present in current law. In the mass market, it requires a cost free refund right.

The following proposal fits within that structure.

SECTION 2B- ---. PRETRANSACTION DISCLOSURES IN INTERNET TRANSACTIONS.

A licensor that makes computer information available to a licensee electronically from an Internet or similar electronic site has given an opportunity to review the terms of the license and satisfies Section 2B-112, if the licensor makes the standard terms of the license readily available

for review by the licensee before the information is delivered or the licensee becomes obligated to pay by:

(1) displaying in close proximity to a description of the computer information or to instructions or steps for acquiring the computer information, the standard terms or a reference to an electronic location from which they can be readily obtained; or

(2) disclosing the availability of the standard terms in a prominent place on the site from which the computer information is offered and furnishing a copy of the standard terms on request prior to the sale or license of the computer information.

TAB 8
Nimmer/ Ring proposal
SCOPE OF THE ARTICLE

Note:

This proposal builds on and refines the scope concept approved by the Committee at its last meeting. Most importantly, the proposal clarifies definitions central to the scope of the article. It also clarifies the right of the parties to opt into or out of Article 2B coverage.

(8) “Computer information” means information in an electronic form that is obtained from or through the use of a computer, or that is in digital or equivalent form capable of being processed by a computer, but does not include information referred to in Section 2B-104(2).

(9) “Computer information transaction” means an agreement a purpose of which is to create or modify, transfer, license, or provide access to computer information or informational rights in computer information. The term includes support agreements to the extent covered in Section 2B-616.

(25) “Information” means data, text, images, sounds, mask works, software, or collections or compilations thereof.

Notes:

1. The comments to “computer information” will indicate that the reference to “equivalent form” refers to analog and any future computational technologies, eliminating the possibility that the reference to “digital” technology would otherwise lock the scope of the article into a particular, current technology. They will also explain that the term does not cover information merely because it could be scanned or otherwise entered into a computer, but is limited to electronic information form or capable directly of being processed in a computer.

2. The comments to “computer information transaction” will indicate that the concept obviously does not cover transactions involving books, magazines or other print material. This is true even though the information provided under a contract for the distribution of information in a print publication is performed by the delivery of the text on a computer diskette. The purpose of such transactions is to engage in print publication and distribution, not in a computer transaction.

SECTION 2B-103: SCOPE

(a) This article applies to computer information transactions.

(b) If a transaction involves computer information and goods, the following rules apply:

(1) This article applies to the computer information and to copies of it, its packaging and documentation. However, if a copy is contained in and sold or leased as part of goods, this article applies to that copy only if:

(A) the goods are a computer or computer peripheral; or

(B) giving the purchaser of the goods access to or use of the computer information is a material purpose of the transaction.

(2) Except as provided in paragraph (1), Article 2 or 2A applies to the goods in the transaction.

(c) If this article and another article of the U.C.C. other than Article 2 or 2A, apply to a transaction, the following rules apply:

(1) If there is a conflict between this article and Article 9, Article 9 governs.

(2) In all other cases, this article does not apply to the subject matter of the other article.

[(d) If a transaction involves computer information and other subject matter, but not within subsection (b) or (c) and is not excluded under Section 2B-104, this article governs if the computer information is the primary purpose of the transaction.]

(e) Except as provided in subsection (c)(1), the parties may agree that this article, including contract formation rules, governs a transaction (“opt in”) or that other law governs the transaction and this article does not apply (“opt out”). The agreement is subject to the following rules:

(1) An agreement to opt into this article in a mass-market transaction:

(i) does not alter the applicability or effect of a consumer law referred to in Section 2B-105(d); and

(ii) is unenforceable with respect to a purchase of a tangible copy of information in print form.

(2) An agreement to opt out of this article in a mass-market transaction:

(i) does not alter the applicability or effect of standards of good faith, unconscionability, or public policy invalidation under this article, or the defense in Section 2B-118; and

(ii) cannot alter the limitations in Section 2B-716.

Notes:

1. Subsections (b) and (c) adopt approaches to over-lapping coverage among articles of the U.C.C. The rules allow each article to apply to its own subject matter. The exception in subsection (b) retains the approach to allocating coverage between Article 2 (or 2A) and Article 2B which gives coverage of computer information embedded in goods to Article 2 (or 2A) except with respect to the circumstances described in subsection (b), and gives coverage of copies and documentation relating to computer information to Article 2B.

2. Subsection (d) adopts the principle discussed in notes to the prior draft, applying a predominant purpose to “mixed transactions” where the non-Article 2B subject matter is not within another article of the code. This would apply, for example, to a transaction involving computer information and services, or involving computer information and print information.

3. Subsection (e) simplifies and clarifies the prior draft with respect to the ability of parties to opt into or out of Article 2B. It follows a principle of contract choice, subject to relatively limited exceptions intended to protect specific interests. Among the limitations is the rule that the agreement cannot alter the rule relating to conflicts with Article 9 as stated in subsection (c)(1).

Subsection (e)(1) deals with opt in agreements and clarifies that this agreement cannot alter the effect of otherwise applicable consumer protection rules. Subsection (e)(1) provides in effect that the parties cannot opt into Article 2B in a mass market transaction involving a purchase of information in print form. Within the U.C.C., the term “purchase” includes all forms of voluntary transfers. The limitation applies only with respect to mass-market transactions and, thus, would not preclude parties to a commercial agreement that does not occur in a retail market from electing to be governed by Article 2B.

Subsection (e)(2) deals with agreements to opt out of Article 2B. Here, in agreeing to opt out of Article 2B, the parties in effect agree to place themselves under a body of law developed in common law or another U.C.C. article, each of which provides its own integrated set of rules applicable to particular transactions. That being true, the provisions of that other law supplant Article 2B rules with their own approach to fairness and other issues. There are two primary exceptions. The first concerns mass-market transactions where it seems appropriate to preclude alteration of fundamental protections in light of the nature of the agreement that is likely in a retail market. The second concerns the limitations on electronic self-help.

TAB 14
Nimmer/Ring Proposal
Electronic Self-help

Note:

The following draft provides a proposed compromise treatment of the issue concerning the licensor's ability to exercise self-help electronically. The proposal is a modification and elaboration of the notice-based concept adopted by the Committee at the last meeting. The proposal is that this new language be adopted or that the Committee adopt an affirmative statement of neutrality on the issue, such as to the following effect:

"This article neither authorizes nor restricts the right of a party to exercise the rights under Section 2B-715(-) electronically."

TAB 15
Nimmer/ Ring Proposal
Financing Other than Under Article 9

Note:

The following sections propose a new Part for Article 2B dealing with financing relationships that are outside the scope of Article 9. These include unsecured, but contract-based financing, as well as financing involving “lease” arrangements. This an emerging area of finance that can benefit significantly from uniform baseline concepts for reconciling the relationship between a lender, the financed licensee, and a licensor.

The specific provisions are based in part on a proposal by the Equipment Leasing Association and on earlier provisions on financing contained in prior drafts of Article 2B. There is no conflict with policies adopted in Article 9. As indicated in the scope provisions, in the case of any conflict, Article 9 controls. Furthermore, the definitions of financier and financial accommodation contract that are central to these proposals expressly exclude Article 9 interests.

PART _____
FINANCIAL ACCOMMODATION CONTRACTS

SECTION 2B-.01. DEFINITIONS. The following definitions apply to this Part:

(1) “Financial accommodation contract” means an agreement under which a financier provides a financial accommodation to a licensee which agreement does not create a security interest or other transfer that is subject to Article 9. A financial accommodation contract may take any form, including a license, lease, or software lease.

(2) “Financier” means a person that provides a financial accommodation to a licensee under a financial accommodation contract and either (i) becomes a licensee for the purpose of transferring or sublicensing the license to the party to which the financial accommodation is provided or (ii) obtains a contractual right under the financial accommodation contract to prevent the licensee’s use of the information or informational rights under a license in the event of breach of the financial accommodation contract. However, the term does not include a person that selects, creates, or supplies the information that is the subject of the license, owns the informational rights in the information, or provides support, modifications, or maintenance for the information.

(3) “Software lease” means a lease of a copy of software, whether or not such lease constitutes a lease under Article 2A of the Uniform Commercial Code.

SECTION 2B-.02. FINANCING WHERE FINANCIER DOES NOT BECOME LICENSEE. If a financier does not become a licensee, the following rules apply:

(1) The financier does not receive the benefits or burdens of the license.

(2) The licensee’s rights and obligations with respect to the information and informational rights are governed by:

(A) the license;

(B) any rights of the licensor under other applicable law or another agreement with the licensee; and

(C) to the extent not inconsistent with subparagraph (A) and (B), any agreement between the financier and the licensee, which may add additional conditions to the licensee’s right to use the licensed information or informational rights.

SECTION 2B-.03. FINANCE LICENSES.

(a) If a financier becomes a licensee and then transfers the license, or sublicenses the information or informational rights, to a licensee receiving the financial accommodation, the following rules apply:

(1) The transfer or sublicense to the accommodated licensee is not effective unless:

- (A) the transfer or sublicense is effective under Section 2B-502; or
- (B) the following conditions are met:

(i) before the licensor delivered the information or granted the license to the financier, the licensor received notice in a record from the financier giving the name and location of the accommodated licensee and clearly indicating that the license was being obtained in order to transfer or sublicense it to the accommodated licensee;

(ii) the financier became a licensee solely to make the financial accommodation; and

(iii) the accommodated licensee adopts the terms of the license, as supplemented by the financial accommodation contract to the extent that such modifications are not inconsistent with the license contract and any rights of the licensor under other applicable law.

(2) A financier that makes a transfer that is effective under paragraph (1)(B) may make only the single transfer contemplated by the notice unless the licensor consents to a subsequent transfer.

(b) If a financier makes an effective transfer of a license, or an effective sublicense of the information or informational rights subject to such license, to an accommodated licensee, the following rules apply:

(1) The accommodated licensee's rights and obligations are governed by:

(A) the license;

(B) any rights of the licensor under other applicable law and any other agreement with the licensee; and

(C) to the extent not inconsistent with subparagraphs (A) and (B), the financial accommodation contract, which may add additional conditions to the licensee's right to use the licensed information or informational rights.

(2) The financier makes no warranties to the accommodated licensee other than the warranty of quiet enjoyment under Section 2B-401(b)(1) and any express warranties in the financial accommodation contract.

SECTION 2B-.04. OBLIGATIONS IRREVOCABLE. Unless the accommodated licensee is a consumer, a provision in the financial accommodation contract that the accommodated licensee's obligations are irrevocable and independent is enforceable. The obligations become irrevocable and independent upon the licensee's acceptance of the license or the giving of value by the financier.

SECTION 2B-.05. REMEDIES OR ENFORCEMENT.

(a) Except as otherwise provided in subsection (b), on material breach of the financial accommodation contract by the accommodated licensee, the financier:

(1) may cancel the financial accommodation contract;

(2) subject to paragraphs (3) and (4), may exercise against the accommodated licensee its remedies under the financial accommodation contract;

(3) if the financier became a licensee and made a transfer or sublicense that was effective under Section 2B---, may exercise the remedies of a licensor under this article, including the rights of an aggrieved party under Section 2B-715 subject to the limitations of Section 2B-716.

(4) if the financier did not become a licensee, it may enforce a contractual right to prevent the licensee's further use of the information. The financier has no right to take possession or use the information or informational rights, or to transfer the license. If the accommodated licensee agreed to transfer possession to the financier in the event of breach, the financier may

enforce that contractual right only if the licensor consents or if a transfer would be effective under Section 2B-502.

(b) The following further limitations apply to the financier's exercise of remedies under subsection (a):

(1) A financier entitled to take possession or prevent use of the information, copies or related materials, may do so only if the licensor consents or if doing so would not result in a material adverse change in the duty of the licensor, materially increase the burden or risk imposed on the licensor, disclose or threaten to disclose trade secrets or confidential material of the licensor, or materially impair the licensor's likelihood or expectation of obtaining return performance; and

(2) The financier may not otherwise exercise control over, have access to, or sell, transfer or otherwise use the information or copies without the consent of the licensor unless the financier or transferee is subject to the terms of the license and:

(A) the licensee owns the title to the licensed copy, the license does not preclude transfer of the licensee's rights, and the transfer complies with federal copyright law for the owner of a copy to make the transfer, or

(B) the license is transferable by its express terms and the financier complies with any conditions to, or restrictions on, transfer.

(3) The financier's remedies are subject to the licensor's rights and the terms of the license. The remedies may not be exercised in a manner that interferes with the licensor's exercise of its remedies for breach or otherwise pursuant to the license.

SECTION 2B-.06. MISCELLANEOUS RULES.

(a) The creation of a financier's interest does not place any obligations on or alter the rights of the licensor.

(b) No financier's interest can be created or perfected to the extent that the interest purports to attach to any intellectual property rights of the licensor unless the licensor expressly consents to the creation and perfection of that interest in the license or another record.

* * *

SECTION 2B-614. REVOCATION OF ACCEPTANCE OF COPY.

(a) A party that has accepted a copy may revoke acceptance if the nonconformity is a material breach as to that copy and the party accepted the performance:

(1) except in the case of a financial accommodation contract, on the reasonable assumption that the nonconformity would be cured, and it has not been seasonably cured;

(2) except in the case of a financial accommodation contract, during a period of continuing efforts at adjustment and cure, and the breach has not been seasonably cured; or

(3) without discovery of the nonconformity, if the acceptance was reasonably induced either by the other party's assurances or, except in the case of a financial accommodation contract, by the difficulty of discovery before acceptance.

* * *

SECTION 2B-715. RIGHT TO POSSESSION AND TO PREVENT USE.

(a) On cancellation of a license because of breach by the licensee or the licensor has the right:

(1) to possession of all copies of the licensed information in the possession or control of the licensee and any other materials pertaining to that information that by contract were to be returned or delivered by the licensee to the licensor; and

(2) to prevent the continued exercise of contractual and informational rights in the licensed information under the license.

(b) A licensor may exercise its rights under subsection (a) without judicial process only if this can be done:

- (1) without a breach of the peace;
- (2) without a foreseeable risk of personal injury or significant damage to information or property other than the licensed information; and
- (3) when applicable, in compliance with Section 2B-716.

(c) In a judicial proceeding, a court may enjoin a licensee in breach of contract from continued use of the information and the informational rights and may order that the licensor or a judicial officer take the steps described in Section 2B-627. If the agreement so provides, the court may require the licensee to assemble all copies of the information and any other materials relating thereto and make them available to the licensor at a place designated by the licensor, which is reasonably convenient to both parties.

(d) Subject to Section 2B—05, on breach of a financial accommodation contract and to licensor's rights under the license, a financier may exercise the rights of a licensor under this section.

TAB 21
Nimmer/ Ring Proposal
RESTRUCTURE OF SECTIONS

Note:

The following outline indicates a proposed re-ordering of the sections of Article 2B. The concept here is to set out related sections in an understandable grouping. Article 2B was developed initially within the Article 2 revision process and its structure relied largely on the structure of original Article 2. While that Article 2 structure has become familiar to U.C.C. experts, it does not necessarily link relevant sections together in a coherent whole. It was not followed in Article 2A.

The revisions are self-explanatory and do not depend on substantive changes otherwise proposed.

PART 1: GENERAL PROVISIONS

SECTION 2B-101. SHORT TITLE.

SECTION 2B-102. DEFINITIONS.

SECTION 2B-103. SCOPE.

SECTION 2B-104. EXCLUSIONS FROM THIS ARTICLE.

SECTION 2B-105. RELATION TO FEDERAL LAW; TRANSACTIONS SUBJECT TO OTHER STATE LAW.

SECTION 2B-106. VARIATION BY AGREEMENT; RULES OF CONSTRUCTION; QUESTIONS DETERMINED BY COURT.

SECTION 2B-107. CONTRACTUAL CHOICE OF LAW.

SECTION 2B-108. CONTRACTUAL CHOICE OF FORUM.

PART 2: FORMATION AND TERMS

[A. Formation of Contract]

SECTION 2B-201. FORMAL REQUIREMENTS.

SECTION 2B-202. FORMATION IN GENERAL.

SECTION 2B-203. OFFER AND ACCEPTANCE.

SECTION 2B-204. ACCEPTANCE WITH VARYING TERMS.

SECTION 2B-205. ACCEPTANCE OF CONDITIONAL OFFERS.

SECTION 2B-206. OFFER AND ACCEPTANCE; ELECTRONIC AGENTS.

SECTION 2B-207. FIRM OFFERS.

SECTION 2B-208. FORMATION: RELEASE OF RIGHTS.

SECTION 2B-209. FORMATION: CONTRACT FOR SUBMISSION OF IDEAS.

[B. Terms of Contract]

SECTION 2B-210. ADOPTING TERMS OF RECORDS.

SECTION 2B-211. ADOPTING TERMS OF MASS-MARKET LICENSES.

SECTION 2B-212. TERMS WHEN CONTRACT FORMED BY CONDUCT.

SECTION 2B-213. UNCONSCIONABLE CONTRACT OR TERM.

SECTION 2B-214. MANIFESTING ASSENT.

SECTION 2B-215. OPPORTUNITY TO REVIEW; RETURN.

[C. Electronic Contracts]

SECTION 2B-216. LEGAL RECOGNITION OF ELECTRONIC RECORDS AND AUTHENTICATIONS.

SECTION 2B-217. COMMERCIAL REASONABLENESS OF ATTRIBUTION PROCEDURE.

SECTION 2B-218. EFFECT OF REQUIRING COMMERCIALLY UNREASONABLE ATTRIBUTION PROCEDURE.

SECTION 2B-219. DETERMINING TO WHICH PERSON AN ELECTRONIC AUTHENTICATION, MESSAGE, RECORD, OR PERFORMANCE IS ATTRIBUTED; RELIANCE LOSSES.

SECTION 2B-220. ATTRIBUTION PROCEDURE FOR DETECTION OF CHANGES AND ERRORS; EFFECT OF USE.

SECTION 2B-221. ELECTRONIC ERRORS: CONSUMER DEFENSES.
SECTION 2B-222. PROOF OF AUTHENTICATION; ELECTRONIC AGENT OPERATIONS.
SECTION 2B-223. ELECTRONIC MESSAGES: TIMING OF CONTRACT; EFFECTIVENESS OF MESSAGE; ACKNOWLEDGING MESSAGES.

PART 3: CONSTRUCTION

[A. General]

SECTION 2B-301. PAROL OR EXTRINSIC EVIDENCE.
SECTION 2B-302. COURSE OF PERFORMANCE OR PRACTICAL CONSTRUCTION.
SECTION 2B-303. MODIFICATION AND RESCISSION.
SECTION 2B-304. CONTINUING CONTRACTUAL TERMS.
SECTION 2B-305. TERMS TO BE SPECIFIED BY A PARTY
SECTION 2B-306. PERFORMANCE UNDER OPEN TERMS.

[B. Interpretation]

SECTION 2B-307. INTERPRETATION OF GRANT.
SECTION 2B-308. DURATION OF CONTRACT.
SECTION 2B-309. LIMITED RIGHTS TO INFORMATION GIVEN FOR STORAGE OR PROCESSING IN RECEIVING PARTY.
SECTION 2B-310. OUTPUT, REQUIREMENTS, AND EXCLUSIVE DEALING.
SECTION 2B-311. DELIVERY TERMS.
SECTION 2B-312. TERM FOR PERFORMANCE TO PARTY'S SATISFACTION.

PART 4: WARRANTIES

SECTION 2B-401. WARRANTY AND OBLIGATIONS CONCERNING QUIET ENJOYMENT AND NONINFRINGEMENT.
SECTION 2B-402. EXPRESS WARRANTY.
SECTION 2B-403. IMPLIED WARRANTY: MERCHANTABILITY OF COMPUTER PROGRAM.
SECTION 2B-404. IMPLIED WARRANTY: INFORMATIONAL CONTENT.
SECTION 2B-405. IMPLIED WARRANTY: LICENSEE'S PURPOSE; SYSTEM INTEGRATION.
SECTION 2B-406. DISCLAIMER OR MODIFICATION OF WARRANTY.
SECTION 2B-407. MODIFICATION OF COMPUTER PROGRAM.
SECTION 2B-408. CUMULATION AND CONFLICT OF WARRANTIES.
SECTION 2B-409. THIRD-PARTY BENEFICIARIES OF WARRANTY.

PART 5: TRANSFER OF INTEREST AND RIGHTS

SECTION 2B-501. OWNERSHIP OF INFORMATIONAL RIGHTS AND TITLE TO COPIES.
SECTION 2B-502. TRANSFER OF CONTRACTUAL INTERESTS.
SECTION 2B-503. EFFECT OF TRANSFER OF CONTRACTUAL RIGHTS.
SECTION 2B-504. DELEGATION OF PERFORMANCE; SUBCONTRACT.
SECTION 2B-505. PRIORITY OF TRANSFER BY LICENSOR.
SECTION 2B-506. TRANSFER BY LICENSEE.

PART 6: PERFORMANCE

[A. General]

SECTION 2B-601. PERFORMANCE OF CONTRACT IN GENERAL.
SECTION 2B-602. LICENSOR'S OBLIGATIONS TO ENABLE USE.
SECTION 2B-603. SUBMISSIONS OF INFORMATION TO THE SATISFACTION OF A PARTY.
SECTION 2B-604. IMMEDIATELY COMPLETED PERFORMANCES.
SECTION 2B-605. ELECTRONIC REGULATION OF PERFORMANCE.

[B. Performance in Delivery of Copies]

SECTION 2B-606. COPY: DELIVERY; TENDER OF DELIVERY.
SECTION 2B-607. COPY: PERFORMANCE RELATED TO DELIVERY.
SECTION 2B-608. COPY: RIGHT TO INSPECT; PAYMENT BEFORE INSPECTION.
SECTION 2B-609. COPY: ACCEPTANCE.
SECTION 2B-610. COPY: EFFECT OF ACCEPTANCE.

[C. Special Types of Contracts]

SECTION 2B-611. ACCESS CONTRACTS.
SECTION 2B-612. CORRECTION AND SUPPORT AGREEMENTS.

SECTION 2B-613. CONTRACTS INVOLVING PUBLISHERS, DEALERS AND END USERS.

[D. Loss and Impossibility]

SECTION 2B-614. RISK OF LOSS OF COPIES.

SECTION 2B-615. EXCUSE BY FAILURE OF PRESUPPOSED CONDITIONS.

[E. Termination]

SECTION 2B-616. TERMINATION; SURVIVAL OF OBLIGATIONS.

SECTION 2B-617. NOTICE OF TERMINATION.

SECTION 2B-618. TERMINATION ENFORCEMENT.

PART 7: BREACH OF CONTRACT

[A. General]

SECTION 2B-701. BREACH OF CONTRACT; MATERIAL BREACH.

SECTION 2B-702. WAIVER OF REMEDY FOR BREACH OF CONTRACT.

SECTION 2B-703. CURE OF BREACH OF CONTRACT.

[B. Defective Copies]

SECTION 2B-704. COPY: REFUSAL OF DEFECTIVE TENDER.

SECTION 2B-705. COPY: INSTALLMENT CONTRACTS; REFUSAL AND DEFAULT.

SECTION 2B-706. COPY: CONTRACTS WITH A PREVIOUS VESTED GRANT OF RIGHTS.

SECTION 2B-707. COPY: DUTIES UPON RIGHTFUL REFUSAL.

SECTION 2B-708. COPY: REVOCATION OF ACCEPTANCE.

[C. Repudiation and Assurances]

SECTION 2B-709. RIGHT TO ADEQUATE ASSURANCE OF PERFORMANCE.

SECTION 2B-710. ANTICIPATORY REPUDIATION.

SECTION 2B-711. RETRACTION OF ANTICIPATORY REPUDIATION.

PART 8: REMEDIES

[A. General]

SECTION 2B-801. REMEDIES IN GENERAL.

SECTION 2B-802. CANCELLATION.

SECTION 2B-803. CONTRACTUAL MODIFICATION OF REMEDY.

SECTION 2B-804. LIQUIDATION OF DAMAGES; DEPOSITS.

SECTION 2B-805. STATUTE OF LIMITATIONS.

SECTION 2B-806. REMEDIES FOR FRAUD.

[D. Damages]

SECTION 2B-807. MEASUREMENT OF DAMAGES IN GENERAL.

SECTION 2B-808. LICENSOR'S DAMAGES.

SECTION 2B-809. LICENSEE'S DAMAGES.

SECTION 2B-810. RECOUPMENT.

[E. Performance Remedies]

SECTION 2B-811. SPECIFIC PERFORMANCE.

SECTION 2B-812. LICENSOR'S RIGHT TO COMPLETE.

SECTION 2B-813. LICENSEE'S RIGHT TO CONTINUE USE.

SECTION 2B-814. RIGHT TO DISCONTINUE.

SECTION 2B-815. RIGHT TO POSSESSION AND TO PREVENT USE.

SECTION 2B-816. ELECTRONIC SELF HELP.

PART 9: MISCELLANEOUS PROVISIONS

SECTION 2B-901. EFFECTIVE DATE.

SECTION 2B-902. TRANSACTIONS COVERED; LAWS AFFECTED.

TAB 22
Nimmer/ Ring proposal
MINOR OR HARMONIZATION ISSUES

NOTE:

The following propose various changes in Article 2B as indicated.

1. Title:

Approve or modify the proposed new title of the act.

2. 2B-102 (“damages”): (direct, incidental, consequential)

Change language from “includes” to “means.” This would bring the definitions back to the original intent, which is to delineate terminology and standards that distinguish clearly between the various types of damages recoverable.

3. 2B-102 (“software”):

Modify to conform to exclusions from scope and earlier proposals by MPAA and others.

“Software” means a computer program, any informational content included in the program, and any supporting information provided by the licensor. The term does not include:

(A) a separately identifiable motion picture or sound recording; or

(B) a computer program included in a copy of a motion picture or sound recording if the purpose of the program is solely to make possible the display or performance of the picture or recording.

4. Section 2B-209: (K by conduct):

Modify subsection (b) to provide:

(b) A contract is not formed by conduct ~~if there is no agreement on, or if there is a~~ material disagreement about a material element of scope.

5. Section 2B-401: (infringement warranty):

Edit subsection (c)(2) as follows:

The obligations under subsections (a) and (b)(2) apply solely to informational rights arising under the laws of the United States, a State thereof, or other jurisdiction of the United States, unless the contract expressly provides that the warranty obligations extend to rights under the laws of other countries. Language is sufficient for this purpose if it states “The licensor warrants [exclusivity] [noninfringement] ~~in~~ in specified countries] [worldwide including non-treaty countries],” or words of similar import. ~~In that case, the warranty extends to the specified country or, in the case of a general reference to “worldwide” or the like, to all countries within the description, but only to the extent that the rights are recognized under a treaty or international convention to which the country and the United States are parties.~~

6. Section 2B-506: (Priority):

Delete the section. Issue is not significant in light of deletion of secured financing issues. Federal law has dominant position here.

7. 2B-702: (cancel):

The following modification of this section is proposed to make clear that there is a limited term right to use solely for purposes of mitigation by the aggrieved party where the license has canceled because of breach.

(3) Cancellation of a license ends any right of the licensee to use the information, informational rights, copies or other materials under the license. However, the aggrieved party may use them for a limited time after cancellation if the use:

- (i) is within contractual use restrictions;
- (ii) occurs after the party in breach is notified of cancellation;
- (iii) is solely to mitigate loss; and
- (iv) is not contrary to instructions received from the party in breach concerning disposition of them.

8. 2B-705:

Reinstate original Article 2-725(4) rule on tolling laws as indicated in Draft.

(f) This section does not alter the law on tolling of the statute of limitations nor does it apply to a right of action that accrued before the effective date of this article.

9. Section 2B-707: Damages.

Delete the reference to maintaining reasonable systems of back-up prior to breach as a form of mitigation. The issue is better considered as a question of proximate cause and foreseeability. The deletion of the clause would leave mitigation efforts focused on actions post breach.

10. 2B-712:

Add the following language to conform to existing Article 2.

Upon breach of contract by a licensee, a licensor remains bound by all contractual use restrictions on information of the licensee in its possession. The licensor may:

- (1) Identify to the contract any conforming copy not already identified if, at the time it learned of the breach, the copy was in its possession.

11. 2B-801-802: Transition rules

Confirm the transition rules outlined in the two sections.

Add the following provision to clarify the interaction between Article 2B and other electronic attribution laws:

2B-802(c):

The following provisions of state law establishing a digital signature or similar form of attribution procedure govern in the case of a conflict with the provisions of this article with respect to the use of that procedure:

[Note: Not all pre-existing digital or electronic signature laws should prevail over Article 2B. The state should review prior legislation on these topics to determine whether and to what extent particular legislation should be treated as predominant in the case of a conflict.]