D R A F T

FOR DISCUSSION ONLY

UNIFORM COMMERCIAL CODE
ARTICLE 2B – LICENSES

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-FIFTH YEAR
SAN ANTONIO, TEXAS

JULY 12 - JULY 19, 1996

UNIFORM COMMERCIAL CODE
ARTICLE 2B – LICENSES

WITH COMMENTS

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UNIFORM COMMERCIAL CODE ARTICLE 2B – LICENSES

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UNIFORM COMMERCIAL CODE
ARTICLE 2B – LICENSES

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UNIFORM COMMERCIAL CODE
ARTICLE 2B – LICENSES

PART 1
GENERAL PROVISIONS

SECTION 2B-101. SHORT TITLE. This [article] may be cited as Uniform Commercial Code – Licenses.

Uniform Law Source: UCC Section 2-102.

Reporter's Notes

The scope of Article 2B is outlined in Section 2B-103. While the scope covers more than licenses, the transaction used to develop this article involves licensing of information. The title follows the approach in Article 2 which is designated "sales" because that was the primary transaction format used to develop provisions for that article, but covers "transactions" in goods.

SECTION 2B-102. DEFINITIONS.

(a) In this [article]:

(1) "Access contract" means a contract that confers or results from access to a resource containing information, resource for processing information, data system, or other similar facility of a licensor or third party. The term includes a continuous access contract and a data processing contract.

(2) "Cancellation" means an act by a party that ends a contract because of a breach by the other party.

(3) "Computer program" means a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.

(4) "Consequential damages" means losses to a party resulting from its general or particular requirements and needs which at the time of contracting the other party had reason to know would probably result from the breach and which

the aggrieved party could not prevent by reasonable measures after breach. The term does not include direct or incidental damages.

(5) "Conspicuous," with reference to a contract term, means so displayed or presented that a reasonable person against whom it operates would likely have noticed it or, in the case of an electronic message intended to evoke a response without the need for review by an individual, in a form that would enable the recipient or the recipient's computer to take it into account or react to it without review of the message by an individual. Whether a term is conspicuous is a question of law. A term or clause is conspicuous if it is:

(i) a record or display and is in capitals;

(ii) language in the body of a record or display and is in larger or other contrasting type or color than other language;

(iii) referenced in the body of a record or in a display by conspicuous language and can be readily accessed from the record or display;

(iv) is so positioned in a record that the party cannot proceed without taking some additional action with respect to the clause, term, or the reference to the clause or term; or

(v) readily distinguished in another manner.

(6) "Consumer" means an individual who is a licensee of information intended by the individual to be used primarily for personal, family, or household use. An individual who is a licensee of information primarily for business, commercial, investment selection, management, or agricultural purposes is not a consumer as to such a transaction.

(7) "Continuous-access contract" means an access contract that confers a right or privilege to have access to or use of information, a resource for processing information, a data system, or another similar facility of the licensor or a

third party over a period of time and that gives the transferee a right of access at times substantially of its own choosing, subject to limitations on general availability.

(8) "Copy" means information that is recorded on a temporary or permanent basis in a medium from which the information can be perceived, reproduced, used, or communicated either directly or with the aid of a machine or other device.

(9) "Data" means facts or descriptions of facts.

(10) "Delivery" means the transfer of physical possession or control of goods, including a copy of information, or the creation of a copy of information or record by communication of the information to facilities controlled by the licensee or its intermediary.

(11) "Direct [general] damages" means losses to a party consisting of the difference between the value of the expected performance [as measured by the contract price] and the value of the performance received in fact or available in substitution. The term does not include losses resulting from the aggrieved party's inability to use the results of the expected performance in commercial or other contexts, lost profits, other consequential damages, and incidental damages.

(12) "Electronic agent" means a computer program designed, selected, or programmed by a party to initiate or respond to electronic messages or performances without review by an individual.

(13) "Electronic message" means a record generated or communicated by electronic, optical, or other analogous means for transmission from one information system to another. The term includes electronic data interchange and electronic mail.

(14) "Electronic transaction" means a transaction in which one party, or its intermediary, contemplates that an agreement may be formed through the use of electronic messages or responses, whether or not either party anticipates that the information or records exchanged will be reviewed by an individual.

(15) "Good faith" means

ALTERNATIVE A

honesty in fact in the conduct or transaction concerned.

ALTERNATIVE B

honesty in fact and the observance of reasonable commercial standards of fair dealing in the conduct of the transaction concerned.

(16) "Goods" means all things, including specially manufactured goods, that are movable at the time of identification to the contract. The term does not include money in which the price is to be paid, obligations arising from foreign exchange transactions, investment securities, documents, instruments, accounts, chattel paper, or general intangibles as defined in [Article] 9.

(17) "Incidental damages" includes any commercially reasonable charges, expenses, and commissions incurred in:

(i) inspection, receipt, transportation, care, or custody of property after the other party's breach;

(ii) stopping shipment;

(iii) effecting cover, return, or resale of property;

(iv) reasonable efforts otherwise to mitigate the consequences of breach; or

(v) actions otherwise incidental to the breach.

(18) "Information" means data, text, images, sounds, computer programs, software, databases, mask works, and the like, and any associated intellectual property rights.

(19) "Informational content" means data, text, images, sounds, or databases intended to communicate information to an individual in the ordinary course of use of the information.

(20) "Intellectual property rights" includes all rights in information created under patent, copyright, trade secret, trademark, and any similar state or federal law.

(21) "Intermediary" means a person that, on behalf of another, receives, transmits, stores, or provides other services with respect to a record or information. However, the term does not include a common carrier employed or used in that capacity.

(22) "License" means a contract for transfer of rights in information which expressly makes the rights conditional or limited, whether or not it provides for delivery or sale of a copy of the information. The term includes an access contract, a data processing contract, but does not include a software contract which transfers ownership of the intellectual property rights in the software. The term does not include the reservation or creation of a security interest in information.

(23) "Licensee" means a transferee of rights or any other person designated in or authorized to exercise rights under the contract.

(24) "License fee" means the price, fee, or royalty payable under an agreement.

(25) "Licensor" means a transferor of rights. In an access contract, as between the service provider and the customer, the service provider is the licensor, and as between the service provider and any provider of content for the service, the content provider is the licensor. If the consideration for a contract consists in whole or in part of an exchange of transfers of information, each party making a transfer is a licensor with respect to the information and rights that it transfers.

(26) "Mass-market license":

(i) means a standard form license whose intended or actual use by the licensor frequently includes transactions making information available to consumers and other members of the general public, and which is used in a transaction in which:

(A) the licensor does not modify the information in a way that alters its functionality specifically for the particular transaction;

(B) the standard terms of the form are not altered for the particular transaction; and

(C) the total license fee does not exceed $1,000 for all information or services of the same type acquired in a single transaction from a single licensor or, in an continuous access or other ongoing contract, acquired during the first year of the contract; and

(ii) subject to the terms of paragraph (i) includes a contract for support or other services associated with the mass market license.

(27) "Merchant" means a person who deals in information of the kind, a person involved in the transaction who by occupation purports to have knowledge or skill particular thereto, or a person to whom knowledge or skill may be attributed by the person's employment of an agent or broker or other intermediary who purports to have the knowledge or skill.

(28) "Nonexclusive license" means a license in which the licensor or other person authorized to make a transfer or license is not precluded from licensing the same information or rights therein to other licensees. The term includes a consignment of information products.

(29) "Receive" means to take delivery of a record or information. An electronic record or information is received when it enters a information processing

system in a form capable of being processed by that system if the recipient has designated or used that information system for the purpose of receiving such records or information.

(30) "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.

(31) "Sale" means the passing of title to goods or information from a seller to a buyer for a price.

(32) "Sign" or "signature" means a symbol, including a digital signal, encrypted identifier, or analogous symbol, or an act that encrypts a record in whole or in part, adopted by a party with present intent to authenticate a record or term. A record or message is signed as a matter of law if the symbol, or action adopted the party complies with an authentication procedure previously agreed to by the parties. Otherwise, a signature may be proved in any manner, including by showing that a procedure existed by which a party must of necessity have taken an action or executed a symbol in order to proceed further in the use or processing of the information.

(33) "Software" means a computer program in source code, object code, or any other form and any associated data, program description, media, and supporting documentation.

(34) "Software contract" means a contract to transfer rights in software, whether the software exists at the time of agreement or is to be developed and whether the contract provides for transfer or sale of copies of the software or for services to develop, support, or use it.

(35) "Standard form" means a record prepared by one party in advance for general and repeated use which substantially consists of standard terms and is

used in the transaction without negotiation of, or changes in, the substantial majority of the standard terms. Negotiation or customization of price, volume, delivery time, or method does not preclude a record from being a standard form.

(36) "Standard term" means a term prepared in advance for general and repeated use by one party.

(37) "Substantial performance" means performance of an obligation in a manner that does not constitute a material breach of contract.

(38) "Termination" means an act by a party to a contract which ends the contract for a reason other than for breach by the other party.

(39) "Transfer of rights" means a grant of a contractual or other right or privilege as between the parties for the transferee to have access to, modify, disclose, distribute, sell, lease, copy, use, have used, display, perform, or otherwise take action with respect to information, coupled with any actions necessary to enable the licensee to exercise those rights.

(b) In addition, [Article] 1 contains general definitions and principles of construction applicable throughout this [article].

Reporter's Notes

1. "Direct damages," "Incidental damages," and "Consequential damages" are defined terms. The draft adds a definition of "direct damages" in part to reflect the vote of the committee to reverse the presumption about when consequential damages are available and in part to provide guidance on the distinction among the three types of damages for purposes of interpreting disclaimer and other language in contracts. Direct damages are essentially defined as losses associated with a reduction of value or loss of value as to the contracted for performance itself, as contrasted to losses caused by intended uses of the performance or use of the results of the performance. Direct damages are measured in the various damages formulae contained in this article.

2. **"Licensor" is used as a generic term that refers to the transferor in any type of transaction governed here. Similarly, "licensee" is a generic term, referring to the transferee of information.** These terms are not limited to the parties in a license agreement. When distinctions are made in sections between the treatment of a license and the treatment of other types of transaction, the distinctions are established by reference to the transaction type itself, rather than indirectly by referring to the label of the parties involved.

3. The definition of mass market licenses sets out an important structural feature of this article. It substitutes for reference in other articles to consumers and, as defined here, includes both business and consumer transactions of a particular type (e.g., conducted in a mass market context). The definition of mass market license is limited to transactions in which information or information services are provided pursuant to an agreement used for general licensing to the public, including to consumers. It also explicitly covers support agreements associated with the mass market transaction. Online transactions may often be mass market contracts. This draft adds a dollar limit to the definition to avoid inappropriately protecting major licensees or interfering with contract freedom in cases where mass market protections are inappropriate. Compare Section 2A-103(1)(a) and Reg. Z. These suggest the use of a dollar limit. The $1,000 limit reflects a realistic reduction from Section 2A-103(e) because of the nature of the products and the inclusion of businesses in the mass market concept. Reg. Z does not include businesses in its scope of protection, nor does Article 2A. In a mass market context, a Fortune 500 business has the same protections as a consumer.

4. "Signed" refers to the intent to confirm the genuineness of the record and to indicate that it proceeds from its professed source. Under this definition, "signature" performs an identification function, indicating the source of the record and tending to confirm that it is genuine. The definition does not hinge on the extent to which the signature actually ensures authentication, but on the intent of the party using it. Normal signatures can be forged and digital encryption signatures can be broken or misused. The consequences of that refer to ideas of attribution, rather to whether an unsafe or insecure signature may not be a signature. However, the definition creates a signature as a matter of law (that is without requiring analysis of intent), if the actions conform to an established "authentication procedure". That is a defined term (see Section 2B-111). It would cover consensual resort to the terms of a so-called "digital signature" act or any other reasonable authentication procedure. Signing a standard form record or a term also constitutes a manifestation of assent to the record or term pursuant to Section 2B-307.

5. The separate concept of "electronic agent" has been defined here. An electronic agent is a program designed to act on behalf of the party without the need for recurrent human review. As a general rule, a party adopting use of such agents is bound by (attributable for) their performance and messages.

SECTION 2B-103. SCOPE.

(a) This [article] applies to licenses of information and software contracts, and to any related agreement to support, maintain, develop, or modify information. A transaction is within this [article] if the information exists at the time of the contract, is expected to come into being after the contract is formed, or is to be developed, discovered, compiled, or transformed as part of performance of the

agreement, whether or not development, discovery, compilation, or transformation in fact occurs.

(b) Except as otherwise provided in subsection (c), if another [article] of this [Act] applies to a transaction, this [article] does not apply to the part of the transaction governed by that other [article].

(c) If a transaction involves information and goods, this [article] applies to the transaction and to the copies of the information, its packaging, or documentation pertaining to the information, but [Article] 2 or 2A governs standards of performance of the goods other than the copies, packaging, or documentation pertaining to the information.

(d) This [article] does not apply to:

(1) a contract for the employment of an individual;

(2) a contract for performance of entertainment services;

(3) a contract for professional services involving performance by a member of a regulated profession with respect to services commonly associated with regulated aspects of that profession;

(4) to the extent not related to computer software or databases, a license of a trademark, trade name, or trade dress, or similar intellectual property right or of a patent and know how related to the patent;

(5) a transaction intended to operate only as a secured transaction except for the relationship between the transaction and an information contract governed by this [article]; or

(6) a sale or lease of a copy of a computer program that was not developed specifically for a particular transaction if the program is embedded in goods other than a copy of the program or an information processing machine and is not copied in the ordinary course of using the goods.

Reporter's Notes

1. This draft reflects extensive discussion and several votes of the Drafting Committee at the April, 1996 meeting. The fundamental scope issues focused on the extent to which the article should apply to all forms of information or only to a limited subset of information products and, as a separate issue, whether the article should be bounded by a scope defined in terms of the type of transaction – e.g., licenses. The committee rejected several proposals to limit scope to digital information (defined in several different ways). Based on comments from industry representatives and an analysis of modern convergence of various information technologies, it was concluded that references to digital or like terms did not provide a stable or functional scope definition. The committee, instead, determined to focus on scope as defined by licensing of information and transactions involving software contracts, whether conceived of as a license or a sale. Within this scope are the various forms of online services contracts relating to information, all software transactions (except for the exclusion stated in this section) and other forms of information licensing. Common to all of these transactions is that the focus of the transaction concerns information (rather than goods) and that there are conditions on use or access either express or implied in the transaction.

2. In this context, any line drawing to create a workable scope and focus entails some element of close differentiation. For transactions involving information other than computer software, this scope definition creates a distinction between transactions involving a license and transactions involving the sale of a copy. This leaves undisturbed major segments of the information industry that may not need treatment in a uniform law, such as contracts involving a sale of a copy of a book or a newspaper. The distinction between a license and a sale in the information industry may be as explicit as the distinction between a sale and a lease in reference to goods. Except for the characteristics of the paper or other material used in the copies, law dealing with sales of such information products arises under a body of common law tort and contract. The scope definition as to these products utilizes a transaction based characterization consistent with practices in those industries. For computer software transactions, however, the more important factor involves the nature of the product. With the exception of some limited types of software products, all transactions whether licenses or sales are subject to either express or implied limitations on the use, distribution, modification and copying of the software. These limitations are commercially important because the type of technology makes copying, modification and other uses easier to achieve in forms that can yield commercially harmful results. Bringing all transactions involving this subject matter into Article 2B thus reflects the functional and commercial similarity of the transactions and the need for a responsive and focused body of law applicable to these types of products. In addition, as a relatively new form of information transaction involving products with distinctive and unique characteristics, no body of common law exists to deal with many of the important questions that arise with reference to publisher and end user rights and which occur regardless of whether a transaction constitutes a license or a sale of a copy (e.g., what limitations are appropriate on the use of software capabilities to detect and report information about the licensee's computer environment in light of the obvious privacy concerns involved)? By covering all transactions in software, Article 2B provides a considered and balanced analysis of these common issues applicable regardless of the transaction type adopted.

3. In April, 1996, the Drafting Committee voted to exclude patent and trademark licenses not related to other subject matter covered by this article. The exclusion appears in (d)(4). The parties to such licenses, however, can opt into coverage by Article 2B under the terms of Section 2B-104.

SECTION 2B-104. TRANSACTIONS SUBJECT TO OTHER LAW.

(a) Except as otherwise provided in subsection (b), in the case of a conflict between this [article] and any of the following laws of this State, the conflicting law governs:

(1) a statute establishing a right of access to or use of information by compulsory licensing, public access or similar law; or

(2) a consumer protection law.

(b) If a law referred to in subsection (a) applies to a transaction governed by this [article], the following rules apply:

(1) A requirement that a contractual obligation, waiver, notice, or disclaimer be in writing is satisfied by a record as defined in this [article].

(2) A requirement that a particular agreement or term be signed is satisfied by a signature as defined in this [article].

(3) A requirement that a contract term be conspicuous or the like is satisfied by a term that is conspicuous as defined in this [article].

(4) A requirement of negotiation, consent, or agreement to a particular contract term is satisfied by actions that manifest assent to a term or a contract in accordance with this [article].

Sources: Section 9-104(1)(a); Section 2A-104(1).

SECTION 2B-105. APPLICATION TO OTHER TRANSACTIONS.

(a) Except as provided in subsection (b), the parties to a transaction not otherwise governed by this [article] may by agreement elect to have all or part of

this [article] apply to their transaction if the agreement is in a record other than a mass market license. The agreement is effective to the extent that it:

(1) covers issues that could be resolved or controlled by the parties by contract, or

(2) does not cover a law applicable to the contract under other articles of this Act.

(b) The parties to a license excluded from this [article] solely because of the operation of Section 2B-103(d) may elect to have all or part of this [article] apply to their transaction.

SECTION 2B-106. LAW IN MULTI-STATE TRANSACTIONS.

(a) A choice of law clause is enforceable. However, in a mass-market license involving an individual as a licensee, a choice of law clause is not enforceable if it chooses the law of a jurisdiction other than the jurisdiction in which:

(1) the individual resides when the contract becomes enforceable; or

(2) subsection (b) places the choice of law in the absence of a choice of law clause.

(b) Except as provided in subsections (c) and (d), if there is no enforceable choice of law clause, the rights and duties of the parties are determined by the law of the state where the licensor is located at the time that the transfer of rights occurred or was to have occurred.

(c) Except in a continuous access contract, if a contract requires delivery of a copy of the information to the licensee other than through electronic communication, the contract is governed by the law of the state in which the copy is

located when the licensee receives physical possession of the copy or, in the event of nondelivery, the state in which receipt was to have occurred.

(d) If the jurisdiction selected under subsection (b) is outside the United States, subsection (b) applies only if the laws of that jurisdiction provide substantially similar protections and rights to the party not located in that jurisdiction as are provided under this [article]. Otherwise, the rights and duties of the parties are governed by:

(1) the law of the state in this country in which the licensor does business which has the most substantial connection with the transaction; or

(2) if no such state exists, the law of the state in which the licensee is located.

(d) A party is deemed located at its place of business if it has one place of business, at its chief executive office if it has more than one place of business, or at its place of incorporation or other charter authorization if it does not have a physical place of business. Otherwise, a party is deemed located at its primary residence.

Uniform Law Source: Section 2A-105; Section 9-103; Restatement (Second) of Conflicts § 188.

Reporter's Notes

1. Subsection (a) validates choice of law agreements with a narrow exception for mass market licenses designed to reduce the risk of over-reaching. This conforms to the basic commercial law concept that contractual relationships should govern.

2. Subsection (b) applies in the absence of agreement by the parties as to the applicable law for the contract. The purpose of stating choice of law rules is to enhance certainty against which the parties can bargain for different terms if they so choose. In the online environment, this certainty is not developed by reference to concepts such as place of contracting, place of performance, or most substantial contacts. The draft opts for a focus on the licensor's location as encouraging certainty and expediting commercial transactions. The argument favoring choice of the licensor's location relates to the fact that this will better enable consistency of planning for that party where the other party to the transaction may be located in any of fifty states, and which state applies may not be ascertainable by the licensor. Alternatives would focus either on the licensee's location or on the location of the information resource. The latter was rejected because it will be essentially arbitrary

and a location often unknown to the licensee. The licensee's location was rejected because that rule would require the licensor to contend with the law of all fifty states and do so in transactions in which the licensee's location may in fact be unknown to the licensor at the time of the transaction and may change as the licensee changes location. By beginning with the licensor's location as the basic rule, this option lends certainty to the operations of the service provider. This rule was widely favored by industry representatives from both the licensee and the licensor community.

3. Subsection (c) deals with situations in which the licensor will routinely know where delivery will occur because it delivers a physical copy and is not engaged in an electronic communication. This allows electronic transactions to be governed by a choice of law rule that enables commercial decision-making based on an identifiable body of law and does not impose costs on the transaction by requiring that the electronic vendor determine what physical location corresponds to an electronic location.

4. Subsection (d) provides a protective rule in cases of foreign choices of law where the effect of using the licensor's location would be to place the choice of law in a harsh, under-developed, or otherwise inappropriate location. This is intended to protect against conscious selections of location designed to disadvantage the other party and forum shopping by U.S. companies who have virtually free choice as to where to locate. It is especially important in context of the global internet context.

SECTION 2B-107. CONTRACTUAL CHOICE OF FORUM.

(a) Except as otherwise provided in subsection (b), a clause in a contract that chooses an exclusive judicial forum is valid if:

(1) the clause was specifically negotiated; or

(2) the forum selected does not unfairly disadvantage the party in a mass market license against whom the forum selection is being asserted.

(b) If a judicial forum chosen by the parties to a mass-market license involving an individual as a licensee is a forum that would not otherwise have jurisdiction over the licensee, the choice of forum is not enforceable.

(c) A forum selected in a contract clause is not exclusive unless the contract expressly so provides.

Uniform Law Source: Section 2A-106. Substantially revised.

SECTION 2B-108. TRANSFER OF RIGHTS.

(a) A transfer of rights occurs when, pursuant to a contract, a licensor completes the acts required to make information available to a licensee in a form that enables the licensee to exercise the rights transferred and the licensee is or should be aware of this occurrence. If no act is required to make information available to the licensee, the transfer of rights occurs when the contract becomes enforceable between the parties.

(b) If a contract does not specify how the information is to be made available to the licensee, the information may be made available in any manner consistent with the technological capabilities of the licensee of which the licensor has knowledge and the ordinary methods in the trade of making transfers of the particular kind.

(c) If a contract specifies how the information or the capability to exercise rights in the information is to be made available to the licensee, the transfer must occur in that form or in a substantially equivalent manner unless the licensee agrees to a different means of transfer.

SECTION 2B-109. BREACH.

(a) Whether a party is in breach is determined by the terms of the contract and, in the absence of such terms, by this [article]. Breach occurs if a party fails timely to perform a performance obligation or exceeds a contractual limitation.

(b) A breach is material if the contract so provides or, in the absence of express contractual terms, if the circumstances, intent of the parties, language of the contract, and character of the breach indicate that the breach caused or may cause substantial harm to the interests of the aggrieved party, or if it meets the conditions of subsection (c) or (d).

(c) A breach is material if it involves:

(1) knowing or grossly negligent disclosure or use of confidential information of the aggrieved party not justified by the license;

(2) knowing infringement of the aggrieved party's intellectual property rights not authorized by the terms of the license and occurring over more than a brief period; or

(3) an uncured, substantial failure to pay a license fee when due which is not justified by an existing, colorable dispute about whether payment is due.

(d) A material breach occurs if the aggregate effect of the nonmaterial breaches by the same party satisfy the standards for materiality.

(e) If there is a breach, whether or not it is material, the aggrieved party is entitled to the remedies provided for in this [article] and the contract.

Uniform Law Source: Restatement (Second) Contracts § 241. Revised.

Reporter's Notes

1. The section defines both breach and the concept of a material breach. A breach of contract entitles the injured party to remedies as provided in this article or in the contract. What remedies are available, however, depends on whether the breach is material or nonmaterial. Faced with a nonmaterial breach, the injured party can recover for damages that arise in the ordinary course as a consequence of the breach, but cannot cancel the contract or reject the tender of rights unless the contract expressly permits that remedy. Faced with a material breach, a wider panoply of remedies is available to the injured party, including the right to cancel the contract. In both cases, the party in breach has the ability to cure.

2. The idea of material breach derives from common law. Material breach parallels the idea of substantial performance. This is achieved through definitions in Section 2B-102 which defines substantial performance as "performance of a contractual obligation in a manner that does not constitute a material breach of that contract." The material breach concept is based on the common law belief that it is better to preserve a contract relationship in the face of minor performance problems and that allowing one party to cancel the contract for small defects may result in unwarranted forfeiture and unfair opportunism. Materiality relates to the injured party's perspective and to the value that it expected from performance. It incorporates questions about the motivation of the breaching party. A series of minor breaches or slower than optimal performance may constitute a material breach where the motivation for this conduct involves a bad faith effort to reduce the value of the deal to the other party or to force that party into a position from

which it will be forced to relinquish either the entire deal or, through renegotiation, aspects of the deal that are otherwise important to it.

3. **Subsection (b) makes clear that a contract that provides that a particular breach of contract is material will control in determining materiality.** That is true except with respect to the remedy of self-help which can only occur in the event of a breach that is material without regard to a particular contract clause defining it as such. This reflects the basic idea of contract freedom adopted in this article and deals with the many cases in which the parties understand and adopt in their agreement that an aspect of the performance of the one party is critical to the contract. The Restatement does not necessarily adopt this view, especially in reference to contract terms involving time of performance.

4. The Convention on the International Sale of Goods (CISG) refers to "fundamental breach," which it defines as follows: "A breach ... is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person ... would not have foreseen such a result." CISG Article 25.

SECTION 2B-110. UNCONSCIONABLE CONTRACT OR TERM.

(a) If a court finds as a matter of law that a contract or any term of a contract was unconscionable at the time it was made, the court may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable term, or so limit the application of any unconscionable term as to avoid any unconscionable result.

(b) Before making a finding of unconscionability under subsection (a), the court, on its own motion or that of a party, shall afford the parties a reasonable opportunity to present evidence as to the setting, purpose, and effect of the contract or term thereof or of the conduct.

Uniform Law Source: Section 2-302; Section 2A-108. Revised.

SECTION 2B-111. AUTHENTICATION PROCEDURE.

(a) A procedure established by agreement of the parties for the purpose of verifying that electronic records, messages, or performances are those of the respective parties or detecting errors in the transmission or the content of an

electronic message, record, or performance constitutes an authentication procedure if the procedure so established is commercially reasonable. An authentication procedure may require the use of algorithms or other codes, identifying words or numbers, encryption, callback procedures, or similar security devices.

(b) The commercial reasonableness of an authentication procedure is a question of law to be determined by the court in light of the commercial circumstances at the time of the agreement, the purposes of the authentication procedure, the relative position of the parties and the procedures in general use for similar types of transactions or messages.

(c) If a loss occurs because a party complies with a procedure for authentication that was not commercially reasonable, the party who proposed or required use of the procedure bears the loss.

Uniform Law Source: Article 4A-201, 202.

Reporter's Notes

An authentication procedure has significance in this draft in respect to questions of attribution (see next section) and the existence of a signature.

SECTION 2B-112. ATTRIBUTION OF ELECTRONIC RECORD, MESSAGE, OR PERFORMANCE; ELECTRONIC AGENTS.

(a) If an electronic record, message, or performance is received by a party, as between the receiving party and the party indicated as the sender, the record, message, or performance is attributable to the party indicated as the sender only if:

(1) it was sent by that party, the party's electronic agent, a person with authority to act on behalf of that party in the transaction, or a person for whose conduct the party is otherwise responsible under the law of agency;

(2) the receiving party, in good faith and in compliance with the authentication procedure agreed to by the parties, concluded that the record, message, or performance was sent by, or attributable to, the other party; or

(3) the record, message, or performance:

(i) resulted from acts of a person who obtained from a source controlled by the alleged sender access numbers, codes, programs, or the like facilitating the appearance that it came from the alleged sender;

(ii) this access occurred under circumstances constituting a failure to exercise reasonable care by the alleged sender; and

(iii) the receiving party reasonably relied to its detriment on the appearances thus created.

(b) In subsection (a)(3), the following rules apply:

(1) The receiving party has the burden of proving reasonable reliance and the purported sending party has the burden of proving reasonable care and access source.

(2) Reliance on a record, message or performance that does not comply with an agreed authentication procedure is not reasonable unless authorized by an individual representing the purported sender.

(c) A party who hires an intermediary to transmit, make available for access, or log electronic messages or data electronically, or to perform like services, is liable for harm caused to the other party arising directly from the intermediary's errors or omissions in the performance of such services to the extent that the errors or omissions caused reasonable reliance on the part of another party and caused harm for which the party who hired the intermediary would have been liable if it had made the same error or omission.

(d) A symbol, digital signal, or action adopted or performed by an electronic agent constitutes a signature of a party if the party designed, programmed, or selected the electronic agent with an intent that the agent produce such results.

Source: Article 4A-202; UNCITRAL Draft Model Law on EDI.

Reporter's Notes

1. Overall, the section states underlying risk allocation rules pertinent to the potentially anonymous nature of electronic commerce regarding information assets. Additionally, it sets out the premise that a party is obligated by the actions of its "electronic agent." The idea of an electronic agent does not exist under current law, but has importance in the context of electronic contracting for information assets because of the increasing use of preprogrammed software to acquire and conclude agreements for information assets. The principle here is that the individual or company who created and set out the program undertakes responsibility for its conduct. That result could be reached by common law courts under agency theory, but the goal of the section is to eliminate uncertainty on this point.

2. Under other law, in cases where the primary electronic process involves transactions between large businesses and consumers, allocation of the risk of error, fraud or false attribution developed in a way that responds to the better ability of the system operator to spread and prevent loss than the individual consumer can achieve. This occurred in reference to electronic funds transfer systems under federal law. Our context requires a more general structure that goes beyond consumer issues because the problems addressed will not routinely be consumer protection questions. An individual, for example, may be an injured party or the wrongdoer. The transactions will often involve two businesses. Often, the transaction will be between two individuals. Also, in many cases, the transactions will occur in a public network, not owned, operated or controlled by a single operator. Also, unlike in cases involving electronic funds transfers (which are dealt with under federal law), the messages referred to here involve the creation or performance of contracts and the risk of financial loss without reciprocal value will typically be less. Here, one may be inclined to look to communications law and the allocation of risk there. In reference to telephone systems, pending resolution of current regulatory investigations, the proprietor of a system (telephone) is responsible for all calls using that number, even if produced by a hacker engaged in entirely illegal and unauthorized access. The loss allocation there, of course, is between the owner of the system and the system operator. This article adopts an intermediate position, keyed to the existence of attribution systems and reasonable care.

SECTION 2B-113. MANIFESTING ASSENT.

(a) A party manifests assent to a record or, if assent to a particular term in addition to assent to a record is required, to the term if, after having an opportunity to review the record or term under Section 2B-114, the party or its electronic agent:

(1) signs the record or term, or engages in other affirmative conduct if the record conspicuously provides or the circumstances clearly indicate that the conduct will constitute acceptance of the record or of the term; and

(2) had an opportunity to decline to sign or engage in the conduct after having an opportunity to review the record or the term.

(b) The mere retention of the information or the record without objection is not a manifestation of assent.

(c) A party's conduct does not manifest assent to a record unless the record was called to the party's attention before the party acts.

(d) If assent to particular terms in addition to assent to a record is required, a party's conduct does not manifest assent to the particular terms unless the terms were called to the party's attention before the party acts and the party's conduct relates specifically to the terms.

Reporter's Notes

1. The concept of manifesting assent is a central feature of this article and is used throughout this draft as a means of identifying when a party assents to terms of the record and to particular terms of the record. It is designed to provide procedural protections to ensure fairness in the use of standard and electronic forms. It is used in the Restatement (Second), but not defined there. The basic thrust of the term is that objective manifestations of assent bind a party to a term or to a record.

2. Two fundamental steps are required. First, there must be an affirmative act. A signature, of course, manifests assent to the record, while initials attached to a particular clause manifest assent to that clause. So to, in the electronic world would an affirmative act striking a return key in response to an on-screen description that this act constitutes acceptance of a particular term or an entire contract. The second is that the manifestation of assent can only come after the party had an opportunity to review what it is assenting to. In general, it is not required that the party actually read the contract or the term, merely that the party has had a clear and available opportunity to do so. "Opportunity to review" is a defined term in this article.

SECTION 2B-114. OPPORTUNITY TO REVIEW.

(a) A party or electronic agent has an opportunity to review a record or term if the record or term is made available in a manner designed to call it to the attention of the party or to enable the electronic agent to react to the term or record:

(1) before the acquisition of a copy of information;

(2) before the transfer of rights; or

(3) in the normal course of initial use or preparation to use the information or to receive the transfer of rights.

(b) In addition, except for a proposal to modify a contract, if the terms of a record are made available for review only after initial use of the information, a party has an opportunity to review only if it has a right to a refund of the license fees paid less the value received by the licensee by discontinuing use and returning any copies following its opportunity to review the terms of the record.

SECTION 2B-115. EFFECT OF AGREEMENT.

(a) Except as otherwise provided in subsection (b), the effect of any provision of this [article] may be varied by agreement of the parties. Unless this [article] requires that a contract term be conspicuous or that there be manifested assent to the term, those requirements are not conditions to the enforceability of the term.

(b) An agreement subject to this [article] may not limit or vary:

(1) the obligation of good faith under Sections 1-203 and 2B-102;

(2) the use of parole or extrinsic evidence under Section 2B-301;

(3) the right to relief from an unconscionable contract or clause under Section 2B-110;

(4) the effect of Section 2B-406 on limitation of express warranties; or

[other provisions to be specified]

PART 2
FORMATION

SECTION 2B-201. [NO] FORMAL REQUIREMENTS. ***If option 1 is selected, add "NO" to heading***

ALTERNATIVE A

(a) Except as otherwise provided in subsection (b) or Section 2B-303, a contract or modification thereof is:

(1) enforceable, whether or not there is a record signed by a party against whom enforcement is sought, even if the contract or modification is not capable of performance within one year after its making; and

(2) effective and enforceable according to its terms between the parties, against purchasers, and against creditors of the parties, without filing in any public record.

(b) A grant or limitation dealing with the subject matter of Section 2B-311, 2B-312, 2B-313 or 2B-319 may not vary the terms of those sections except by a record signed by a party against whom enforcement of the contract term is sought.

ALTERNATIVE B

(a) Except as otherwise provided in this section, a contract is not enforceable by way of action or defense unless there was a record signed by the party against whom enforcement is sought sufficient to indicate that a contract has been made between the parties and describing the subject matter.

(b) Any description of the subject matter satisfies subsection (a), whether or not it is specific, if it reasonably identifies what is described.

(c) A grant or limitation dealing with the subject matter of Section 2B-311, 2B-312, 2B-313, or 2B-319 may not vary the terms of those sections except by a record signed by a party against whom enforcement of the contract term is sought.

(d) A record is not insufficient merely because it omits or incorrectly states a term. However, a contract is not enforceable under subsection (a) beyond the subject matter shown in the record.

(e) A contract that does not satisfy the requirements of subsection (a), but which is valid in other respects, is enforceable if:

(1) the total value of the payments to be made and any other obligations incurred under the contract, excluding payments for options to renew or buy, is less than $1,000; or

(2) the licensor or a person authorized by the holder of intellectual property rights to do so transferred a copy of the information to the licensee.

(f) Except as otherwise expressly provided in this [article], a contract is effective and enforceable according to its terms between the parties, against purchasers, and against creditors of the parties without filing in any public record.

Uniform Law Source: Option 2, Section 2A-201. Revised.

Reporter's Notes

1. The statute of frauds has been controversial. The need for statute of frauds protection is greater in information contracts than in the sale of goods. This is true because of the intangible character of the subject matter, the threat of infringement, and the split interests involved in a license with ownership of intellectual property rights vesting in one party while rights to use or possess a copy of the intangible may vest in another party. These considerations buttress other arguments against repeal which include primarily the idea that the fraudulent practices and unfounded claims that this rule prevents justify the cost **and** that the statute codifies and encourages what might be regarded as desirable business practice.

2. There has been no industry support for entire repeal of the statute of frauds in reference to information transactions covered by this article. Discussion Option 1 comes closest to repeal. It makes a general repeal, but adds language that deals with the most significant issues that engender a need for a record. The policy, suggested by some industry representatives, holds that, unless an signed record exists, the default rules of this article dealing with certain basic licensing features apply. These provisions, in effect, cannot be altered by oral agreement. This cuts in both directions with respect to licensor and licensee. For example, since field of use constitutes one of the affected sections, a licensor cannot argue that there is an oral limit on the type of use allowed to the licensee, but since the single copy presumption is also covered, a licensee cannot argue that it received a right to make

multiple copies of the software based on an oral license. Option 2 retains the statute of frauds. Substantively, this option draws more from Article 2A than from Article 2.

3. Copyright law requires a written agreement for an enforceable transfer of a copyright. 17 U.S.C. § 204. A similar rule applies for patents. 35 U.S.C. § 261. A transfer of property rights occurs when there is an "assignment" or an "exclusive license." The federal rules do not apply to transfers of rights in data. For discussion of the difference between data and copyright in data compilations, see *Feist Publications, Inc. v. Rural Telephone Service Co.*, 111 S. Ct. 1282 (1991). Federal rules do not apply to nonexclusive licenses since a nonexclusive license is not a "transfer" of copyright ownership. However, in copyright law, a nonexclusive license that is not in writing may lose priority to a "subsequent" transfer of the copyright.

4. The common law rule is actually contained in statutes adopted in at least 47 states. *Restatement (Second) of Contracts* ch. 5, Statutory Note, at 282 (1979). State law rules differ. In some, a nonexclusive license can be enforced without a writing. *Gate-Way, Inc. v. Hillgren*, 82 F. Supp. 546, aff'd, 181 F.2d 1016 (9th Cir. 1950); *Sun Oil Co. v. Red River Refining Co.*, 29 F.2d 827 (7th Cir. 1928); *Wang Laboratories, Inc. v. Applied Computer Sciences, Inc.*, 741 F. Supp. 992 (D. Mass. 1990) (not applicable to patent license). The issue most often disputed in licenses deals with the requirement of a writing for contracts not capable of being performed in less than one year. See *Commonwealth Film Processing v. Courtaulds*, 717 F. Supp. 1157, 1158 (W.D. Va. 1989), app. dism., 892 F.2d 1049 (Fed. Cir. 1989) (patent license extended beyond one year); *Zysett v. Popeil Bros., Inc.*, 134 U.S.P.Q. 222 (N.D. Ill. 1963) (alleged to extend for five years); *Sun Studs, Inc. v. Applied Association, Inc.*, 772 F.2d 1557 (Fed. Cir. 1985); *Kurtz v. Ford Motor Co.*, 62 F.Supp. 255 (E.D. Mich. 1945); *Kastner v. Gover*, 19 A.D.2d 480, 244 N.Y.S.2d 275 (1963), aff'd 14 N.Y.2d 821, 200 N.E.2d 455 (1964).

SECTION 2B-202. FORMATION IN GENERAL.

(a) A contract may be made in any manner sufficient to show agreement, including by conduct of both parties or actions of electronic agents which reflect the existence of a contract.

(b) If the parties so intend, an agreement sufficient to constitute a contract may be found even if the time when the agreement was made cannot be determined, one or more terms are left open or to be agreed upon, or the standard form records of the parties contain varying terms.

(c) Although one or more terms are left open, a contract does not fail for indefiniteness if the parties intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

Uniform Law Source: Section 2-204, modifies (b).

SECTION 2B-203. FIRM OFFERS. An offer by a merchant to enter into a contract made in an signed record that by its terms gives assurance that the offer will be held open is not revocable for lack of consideration during the time stated. If no time is stated, the offer is irrevocable for a reasonable time not to exceed three months. A term of assurance in a record supplied by the offeree is ineffective unless the offeree manifests assent to the term.

Uniform Law Source: Section 2A-205; Section 2-205.

SECTION 2B-204. OFFER AND ACCEPTANCE.

(a) Unless otherwise unambiguously indicated by the language of an agreement or the circumstances, the following rules apply:

(1) An offer to make a contract invites acceptance in any manner and by any medium reasonable under the circumstances, including a definite expression of acceptance that contains standard terms varying the terms of the offer.

(2) An order or other offer to buy, license, or acquire information for prompt or current transfer invites acceptance either by a prompt promise to transfer or by prompt or current transfer. However, a transfer involving nonconforming information is not an acceptance if the transferor seasonably notifies the transferee that the transfer is offered only as an accommodation.

(3) A response by an electronic agent which signifies acceptance or commences performance constitutes acceptance of an offer even if the response is not reviewed or expressly authorized by any individual.

(b) If the beginning of a requested performance is a reasonable mode of acceptance, an offeror that is not notified of acceptance and has not received the relevant performance within a reasonable time may treat the offer as having lapsed without acceptance.

Uniform Law Source: Section 2A-206; Section 2-206.

SECTION 2B-205. ELECTRONIC TRANSACTIONS: FORMATION.

(a) In an electronic transaction, if an electronic message initiated by a party or its electronic agent evokes an electronic message or other electronic response by the other or its electronic agent, a contract is created when:

(1) the response is received by the initiating party or its electronic agent, if the response consists of furnishing information or access to it and the message initiated by that party did not preclude such a response; or

(2) the initiating party or its electronic agent receives notice or an electronic message signifying acceptance.

(b) A contract is created under subsection (a) although no individual representing either party was aware of or reviewed the initial message, response, reply, information, or action signifying acceptance. An electronic message is effective when received even if no individual is aware of its receipt.

Reporter's Notes

1. An electronic transaction is as "a transaction in which the party that initiates the transaction and the other party, or their intermediaries, contemplate that the creation of an agreement will occur through the use or electronic messages or an electronic response to a message." Section 2B-102.

2. The principal application of this section lies in the growing realm of electronic commerce. A principal contribution is in subsection (b) which indicates that a contract exists even if no human being reviews or reacts to the electronic message of the other or the information product delivered. This represents a modern adaptation away from traditional norms of consent and agreement. In electronic transactions, preprogrammed information processing systems can send and react to messages without human intervention and, when the parties choose to do so, there is no reason not to allow contract formation. A contract principle that requires human assent would inject what might often be an inefficient and error prone element in a modern format.

PART 3
CONSTRUCTION

[A. GENERAL]

SECTION 2B-301. PAROL OR EXTRINSIC EVIDENCE.

(a) Terms with respect to which confirmatory records of the parties agree or which are otherwise set forth in a record intended by the parties as a final expression of their agreement with respect to the terms included therein may not be contradicted by evidence of any previous agreement or of a contemporaneous oral agreement. However, the terms may be explained or supplemented by evidence of:

(1) course of performance, course of dealing, or usage of trade; and

(2) consistent additional terms unless the court finds that the record was intended by both parties as a complete and exclusive statement of the terms of the agreement.

[ALTERNATIVE A]

(b) A record that contains a clause indicating that the record completely embodies the agreement of the parties may not be contradicted or supplemented by evidence of any previous or contemporaneous agreement or additional terms if the party seeking to contradict or supplement the record manifested assent to the clause.

[ALTERNATIVE B]

(b) A contract term in a record other than a standard form indicating that the record completely embodies the agreement of the parties is presumed to state the intent of the parties on the issue.

Uniform Law Source: Section 2A-202; Section 2-202. Cf UNIDROIT Principles of International Commercial Contract Law ("A contract in writing which contains a clause indicating that the writing completely embodies the terms o which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing." Article 2.17.)

SECTION 2B-302. COURSE OF PERFORMANCE OR PRACTICAL CONSTRUCTION.

(a) If a contract involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other party, a course of performance accepted or acquiesced in without objection is relevant to determine the meaning of the agreement.

(b) Express terms of an agreement, course of performance, course of dealing, and usage of trade must be construed whenever reasonable as consistent with each other. However, if that construction is unreasonable, the following rules apply:

(1) express terms control over course of performance, course of dealing, and usage of trade;

(2) course of performance controls over course of dealing and usage of trade; and

(3) course of dealing controls over usage of trade.

(c) Subject to Section 2B-303, course of performance is relevant to show a waiver or modification of a term inconsistent with the course of performance.

SECTION 2B-303. MODIFICATION, RESCISSION, AND WAIVER.

(a) An agreement modifying a contract is binding without consideration.

(b) A contract that contains a term that excludes modification or rescission except by a record that is signed or to which the party to be bound manifested assent may not otherwise be modified or rescinded.

(c) An attempt at modification or rescission that does not satisfy the requirements of subsection (b) may operate as a waiver.

(d) A party who has made a waiver affecting an executory portion of a contract may retract the waiver by reasonable notification received by the other party that strict performance will be required in the future of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

Uniform Law Source: Section 2A-208; Section 2-209.

SECTION 2B-304. CONTINUING CONTRACT TERMS. Terms that become part of a contract involving repeated performances apply to all later performances of the parties, their agents, or their designees unless modified pursuant to this [article], even if the terms are not subsequently displayed or otherwise brought to the attention of the parties or their intermediaries in the context of the later performance.

SECTION 2B-305. OPEN TERMS.

(a) An agreement otherwise sufficiently definite to be a contract is not unenforceable merely because it leaves particulars of performance open, to be specified by one of the parties, or to be fixed by agreement.

(b) If the performance required of a party is not fixed or determinable from the terms of the agreement or this [article], the term requires performance, timing, or a fee that is reasonable in light of the commercial circumstances.

(c) If a term of an agreement is to be specified by a party, the following rules apply:

(1) Specification must be made in good faith [and within limits of commercial reasonableness] [delete if alternative B to definition of "good faith" is adopted].

(2) An agreement providing that the performance of one party be to the satisfaction of the other requires performance sufficient to satisfy a reasonable person in the position of the other party.

(3) If a specification to be made by one party materially affects the other party's performance but is not seasonably made, the other party:

(i) is excused for any resulting delay in the party's performance; and

(ii) may proceed to perform or may treat the failure to specify as a breach of contract.

(d) If a term is to be fixed by agreement and the parties intend not to be bound unless the term is fixed or agreed, no contract is formed if the term is not fixed or agreed. In that case, the licensee shall return any copies of information, goods, and other materials already received or, if unable to do so, pay their reasonable value at the time of transfer. The licensor is obligated to return any portion of the license fee paid on account for which value has not been received by the licensee. The parties remain bound with respect to any confidentiality or similar obligations to the same extent as if the obligations were part of a contract that terminated or was canceled.

Uniform Law Source: Section 2-305; Section 2-311. Revised.

SECTION 2B-306. OUTPUT, REQUIREMENTS, AND EXCLUSIVE DEALINGS.

(a) A term that measures quantity or volume of use by the output of the licensor or the requirements of the licensee must be construed as meaning the output or requirements as may occur in good faith. Even if output or requirements occur in good faith, a quantity or volume of use unreasonably disproportionate to any stated estimate or, in the absence of a stated estimate, to any normal or

otherwise comparable previous output or requirements, may not be offered or demanded.

(b) An agreement for exclusive dealing in the supply or distribution of copies of information, or in products produced by the exercise of rights in information, imposes an obligation by a licensor that is the exclusive supplier to the licensee to use best efforts to supply the copies or products. The agreement also imposes an obligation on a licensee that is the exclusive distributor of products created by use of the licensor's information to use best efforts to promote the information or product commercially if the license fee to the licensor is substantially measured by units sold or transferred by the licensee.

(c) In this section, "best efforts" means a standard of performance that involves more than indifference to the other party's interests and requires more than a duty to attempt or act with diligence to fulfill an obligation, but does not require a party to disregard its own interests.

(d) Meeting a standard of best efforts may require a party to incur minor losses for the other party's sake and to exceed prevailing business practices but does not require the party to imperil its own existence or to make a total effort to fulfill the obligation irrespective of all other considerations.

Uniform Statutory Source: Section 2-306.

Reporter's Notes

1. Licenses do not involve issues about "quantity" in the same way that sales (or leases) entail that issue. A prime characteristic of information as a subject matter of a transaction lies in the fact that the intangibles are subject to reproduction and use in relatively unlimited numbers; the goods on which they may be copied are often the least significant aspect of a commercial deal. Rather than supply needs or sell output, the typical approach would be to license the commercial user to use the information subject to an obligation to pay royalties based on the volume or other measurable quantity figure.

2. Subsection (b) reflects current case law in the treatment of royalty and best efforts obligations involving intellectual property and related products. An exclusive dealing arrangement in products does not imply that there is an exclusive

license. The obligation of best efforts is appropriate where the transferor's return hinges on the performance and marketing of the transferee. *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917). In the absence of an exclusive license, the concept of good faith does not require that the licensee use "best efforts" to promote or otherwise exploit the licensed product to optimize the commercial benefit of the licensor. In transactions in which the license is nonexclusive the licensor can rely on other parties to obtain a return on investment.

[B. FORMS]

SECTION 2B-307. STANDARD FORM RECORDS.

(a) Except as otherwise provided in subsection (c) and Sections 2B-308, 2B-309, and 2B-310, if all or part of an agreement is to be represented by a standard form, a party adopts the terms of the form if, before or within a reasonable time after beginning to use the information pursuant to an agreement or commencing performance, the party who did not prepare the form signs or otherwise by its behavior manifests assent to it.

(b) A term adopted under subsection (a) becomes part of the contract without regard to the knowledge or understanding of the term by the party assenting to the standard form and whether or not the party read the form.

(c) A term of a standard form which is unenforceable under other provisions of this [article], such as a provision that expressly requires conspicuous language or assent to the term, does not become part of the contract unless those other provisions are satisfied.

Reporter's Notes

1. This section deals with a case involving a single standard form. It states the premise that a party is bound by the terms of the form if it signs or if it otherwise manifests assent to the form. A similar premise is obvious in dealing with nonstandard records. This section is the first of several sections that deal with contracting through standard forms. Because mass market transactions are covered elsewhere, this does not deal with consumer contracts. **If a case is controlled by one of the other sections on standard forms, analysis of what terms come into the contract is governed by those sections.**

2. This section does not deal with whether an agreement exists, but with what terms become part of the contract between the parties. This section adopts

procedural safeguards allowing the party bound by the standard form an opportunity to discover problem terms and to reject the contract if the terms are not acceptable. The two safeguards are in the concept of "opportunity to review" (see Section 2B-114) and "manifests assent" (see Section 2B-113). Both terms are defined in this article. Under these definitions, a party cannot manifest assent to a form or a provision of a form unless it has had an opportunity to review that form before being asked to react. Furthermore, an opportunity to review does not occur unless the party has a right to return the subject matter, refuse the contract, and obtain a refund of fees already paid (if any).

3. A party manifests assent to a form if, after having an opportunity to review the record, or the contract term, the party engages in conduct that the record provides will constitute acceptance of the record or the particular term. The conduct cannot involve simply retaining the information or the form without objection. This intends a process that calls attention to the fact that a given action (signature or other) constitutes a significant event assenting to the contract form. In electronic media, this may be hitting a return key or entering an identification code. Mere silence does not suffice.

4. **"Opportunity to review"** is the second safeguard and is a precondition to being able to "manifest assent." This is a defined term, covered in Section 2B-114. If the opportunity to review occurs only in the course of initial use or preparation to use the information or receive the transfer, a party has an opportunity to review only if the party assenting to the form is authorized to obtain a refund of license fees paid that exceed the value received by the licensee by returning the copy or in the case of information requiring use in order to perceive the license terms, by discontinuing use and returning any copy following its opportunity to review the terms of the record. An issue raised in reference to "opportunity to review" based on committee comments concerns whether opportunity to review after initial use must be accompanied by a right to reimbursement of necessary expenses of reconfiguring the licensee's system back to its position prior to the initial use.

SECTION 2B-308. MASS-MARKET LICENSES.

(a) Except as otherwise provided in subsection (b) and Section 2B-309, a party adopts the terms of a mass-market license if, before or within a reasonable time after beginning to use the information pursuant to an agreement or commencing performance, the party signs or otherwise by its behavior manifests assent to the license.

(b) Terms adopted under subsection (a) include all of the terms of the license without regard to the knowledge or understanding of individual terms by the party assenting to the form. However, except as otherwise provided in subsection

(c), a term does not become part of the contract if the term creates an obligation or imposes a limitation:

(1) that is not consistent with customary industry practices at the time of the contract and which a reasonable licensor should know would cause an ordinary and reasonable licensee to refuse the license if the term were brought to the attention of the licensee; or

(2) that conflicts with the terms of a previous agreement of the parties which were negotiated and agreed to relating to the transaction and the party assenting to the form does not manifest assent to that particular term.

(c) A term excluded under subsection (b) becomes part of the contract if:

(1) the term creates rights for or restrictions on the licensee which give the licensee no fewer rights than would be given to a purchaser at a first sale under federal intellectual property law; or

(2) the licensee manifests assent to the term.

(d) A term of a standard form which is unenforceable under other provisions of this [article], such as a provision that expressly requires conspicuous language or assent to the term, does not become part of the contract unless those other provisions are satisfied.

(e) A licensor has the burden of proving customary industry practices under subsection (b)(1).

Reporter's Notes

1. This section deals with mass market transactions and attempts to balance the interests of individuals and business licensees with parties distributing information in this mass marketplace. The section covers significantly more than consumer transactions and in some respects contradicts the overall approach of this article regarding freedom of contract. Special treatment of mass market licenses is essential in this article because of the significance of the contracting approach in modern commercial practice and a need to clearly resolve issues about enforceability. This section supplants the general section on standard form contracts, but as provided in subsection (d) does not supplant specific requirements in other sections about conspicuous or specific assent to particular terms. In a

recent survey of computer law professionals, a majority of respondents (65%) believed that "shrink wrap" licenses, a form of mass market contract, should be enforceable. Michael Rustad, Elaine Martel, Scott McAuliffe, *An Empirical Analysis of Software Licensing Law and Practice*, 10 Computer L. Ass'n Bull ___ (1995).

> **Illustration 1:** Assume that party A accesses the front "page" of party B's online database of periodicals dealing with television shows and is confronted with a legend stating that "These materials are provided subject to an agreement relating to their use and reproduction that can be reviewed by clicking on the "license" icon. By striking the [return] key you assent to all of the terms of that license agreement, including the price to be charged for access rights." This is a mass market license. A has an opportunity to review the license (assuming that if A reviewed the license it could leave the contract without charge) and is provided with an instruction that a particular action constitutes acceptance of the license. By doing so, A adopts the license even if it did not review its terms.
>
> **Illustration 2:** ABC Industries agrees with Software Co. to acquire a $800 word processing program. The oral agreement contemplates that the program contains a spell checker. It does not contain reference to warranties. When the package is opened and placed into a computer, the first screens state: "This software is subject to a license agreement. To review the agreement, click [here]. If you agree to be bound by the license agreement, click below on the icon stating your agreement. If you do not agree, click on the icon stating your nonagreement and return this product and all copies you have. We will give you a full refund. Assume that by clicking to review the agreement, the entire license is available on screen. Also assume that the licensee cannot proceed to load the software without indicating its agreement. Does this license generally define the agreement if the licensee clicks acceptance? Yes. The licensee had an opportunity to review before taking steps defined as assent. The opportunity to review includes, as it must, a chance to read the license, an opportunity to decline it, and a right to a refund if the licensee declines. By clicking acceptance, it assents to the form. The fact that there was a prior agreement is not material since the license did not contradict negotiated terms.
>
> **Illustration 3:** In the foregoing illustration, assume that the license contains a term that provides that the software does not have a spell checker and that licensee shall not make backup copies of the program. Assume that the latter clause is not common in the industry and that first clause contradicts the express agreement of the parties. Does either license term govern the relationship of the parties? Answer is no. The terms are excluded by this section unless there is express consent to **the terms**.

Basically, if a party desires to use surprising and potentially objectionable terms in its mass market forms and does not wish to risk their unenforceability, that licensor must structure the transaction to obtain express assent by the licensee to the particular **term**. Under the definitions used here, that requires that the term be called to the licensee's attention and assent obtained by signing or an action specifically related to that term and with the assurance that, if he declines, the licensee can return the information product for a refund. The structure adopted here

not only attempts to balance the interests of licensor and licensee, it also attempts to create a structure in which transactions can occur. This is not a litigation standard, but an approach that says to the licensor: if you wish to impose a surprising potentially objectionable term, the only safe procedure you can adopt entails one in which that term is brought to the licensee's attention and specifically assented to by the licensee.

SECTION 2B-309. CONFLICTING STANDARD TERMS.

(a) If the parties exchange standard forms that purport to contain the terms of an agreement and the forms contain varying standard terms, the varying standard terms do not become part of the contract unless the party claiming inclusion establishes that:

(1) the other party manifested assent to the [particular term] [standard form]; or

(2) the records of both parties agree in substance with respect to the particular term.

(b) In cases governed by subsection (a), the terms of the contract are:

(1) terms negotiated and agreed to by the parties as being applicable to the transaction;

(2) terms on which the standard forms agree;

(3) standard terms included under subsection (a); and

(4) supplementary terms incorporated under any other provision of this [article].

Uniform Law Source: Section 2-207. Substantially revised.

Reporter's Notes

1. This section deals with cases where two standard forms are traded between the parties involving differing terms. In cases of two conflicting forms, this section controls over the prior two sections on standard forms and mass market licenses which deal with cases involving only one standard form.

2. This section adopts a knock-out rule for cases involving conflicting standard forms. Varying or conflicting terms in the two forms are excluded unless a party manifests assent to a particular term. A party does not manifest assent by

mere silence or retention of a form. Assent requires an affirmative act that reflects agreement to terms that the party had an opportunity to review and reject.

Illustration 1: Licensor and licensee exchange standard forms relating to an acquisition of software package. The terms conflict with respect to treatment of warranty. Under Section 2B-309, the conflicting terms drop out. The licensee does not obtain its term (full warranties) unless the other party assents to that particular term. Suppose that the Licensee form states that, by shipping this package, you consent to all of my terms and specifically to term 12 on warranties. Does shipping the package assent to the term? No. The conduct does not relate specifically to that term. The licensee would have to require initials on the term, telephone assent to the term, or other act clearly connected to the fact that the licensor knew of and assented to the term itself.

Illustration 2: Same facts, except that licensor desires to obtain its warranty terms. Its license provides that "by opening this package you assent to all the terms of my license." Does this conduct assent to the warranty disclaimer? No. Again, the conduct must relate to the particular term. For example, the licensor's license might contain a screen that appears at the outset of the first use of the program and provides that the licensee click on an icon indicating assent to the license and a second icon indicating assent to the warranty term.

SECTION 2B-310. ELECTRONIC TRANSACTIONS: TERMS.

(a) In an electronic transaction, if the parties exchange electronic messages containing varying terms, Section 2B-309 determines what terms are included in the contract. If contract terms are contained in one or more electronic messages or other records of one party and the other party does not send an electronic message or other record containing contract terms, Section 2B-307 or 2B-308 applies.

(b) Except as otherwise provided by the agreed terms of the contract, if the subject matter of an electronic transaction is informational content, neither party is entitled to consequential damages in the event of a breach by the other.

Reporter's Notes

This section is subject to substantial revision based on further discussion of the Drafting Committee to coordinate and conform this treatment of electronic transactions with other provisions of the article dealing with standard forms and agreement. As drafted, the section treats electronic messages as equivalent to standard form terms. The section needs further work to determine the treatment of mixed electronic and nonelectronic messages and to deal with so-called free text (text in an electronic message that is not formatted to enable the other computer to

take it into account). Subsection (b) states a presumption that would apply regardless of the eventual decision regarding consequential damages in this article. It is limited to information content and reflects both the low cost and high risk nature of electronic trade in content, as well as the general policy favoring free flow of information.

[C. INTERPRETATION]

SECTION 2B-311. INTERPRETATION OF GRANT.

(a) A license conveys nonexclusive rights to the licensee.

(b) Terms dealing with the scope and subject matter of an agreement must be construed under ordinary principles of contract interpretation in light of the commercial context. If the context and the terms are ambiguous, the following rules apply:

(1) A grant of "all possible rights," "all possible uses," or similar terms, without qualification, covers all uses considered by the parties as well as all uses in reference to technologies then existing or that are developed in the future unless the language is limited by the agreement.

(2) Subject to Sections 2B-318 and 2B-319, a contract grants all rights described and all rights within the licensor's control which are necessary to use the rights expressly transferred in the manner anticipated by the parties at the time of the agreement.

Reporter's Notes

Subsection (b)(1) provides guidance for dealing with a recurring problem: whether a license grants rights only in existing media or methods of use of an intangible or whether it extends to future uses. This adopts the majority approach. Ultimately, interpretation of a grant in reference to whether it covers future technologies is a fact sensitive interpretation issue. But the intent of the parties may not be ascertainable. In such cases, use of language that implies a broad scope for the grant without qualification should be sufficient to cover any and all future uses. This is subject to the other default rules in this chapter, including for example, the premise that the licensee does not receive any rights in enhancements made by the licensor unless the contract expressly so provides. See Section 2-2205.

SECTION 2B-312. IMPROVEMENTS AND ENHANCEMENTS.

(a) A contract, other than a continuous access contract, transfers rights in information as it exists at the time of the transfer. A continuous access contract grants rights of access over the duration of the license to the information as modified from time to time.

(b) In determining a licensee's right to make modifications of information that is subject to an information contract, the following rules apply:

(1) In a license of digital or similar information, a licensee may make those modifications or improvements contemplated or intended to be enabled by aspects of the information available for use in the ordinary course and such modifications as are necessary to the licensee's use in a manner authorized by the contract unless the contract expressly restricts modifications.

(2) If a transaction involves an unrestricted transfer of information, the licensee may make any modifications consistent with the intellectual property rights of the licensor.

(3) In a license of information not covered by paragraph (1) or (2), the licensee may make only modifications that are authorized by the license.

(c) A licensee is not entitled to rights in improvements or modifications made by the licensor, and a licensor is not entitled to rights in improvements or modifications made by the licensee.

Reporter's Notes

1. Subsection (c) states the basic principle that no right to subsequent modifications made by the other party is presumed. Arrangements for improvements constitute a separate valuable part of the relationship handled by express contract terms. This presumption states common commercial practice.

Illustration 1: Word Company licenses B to use Word's robotics software. The license is a four-year contract. Three months after the license is granted, Word develops an improved version of the software. Party B has no right to receive rights in this improved version unless the agreement expressly so provides.

Illustration 2: In the Word license, two years after the license is established, Party B's software engineers discover several modifications that greatly enhance its performance. Word is not entitled to rights in these modifications unless the license expressly so provides. However, the modifications may create a derivative work under copyright law and a question also exists about whether the license granted the right to make such a derivative work.

2. Subsection (b)(1) applies to digital information and gives a licensee a right to make modifications necessary to its authorized use. This is consistent with the rights of an owner of a copy of a program under federal law, but applies here independent of title to the copy. As applied to mass market licenses, this creates a presumption treating the licensee similarly to the treatment it would receive if the transaction involved a sale of a copy of the computer program. Modifications, of course, may alter warranty protection. Subsection (b)(2) is altered in this draft to cover cases where the contract does not restrict the licensee's use of the information and makes the presumption that this yields a right to make all modifications (and other uses) consistent with the retained intellectual property rights of the other party.

SECTION 2B-313. LOCATION AND USE RESTRICTIONS.

(a) If an agreement does not specify the location in which a licensee may use the information, the amount of use permitted, or the purposes for which it may be used, the licensee may use the information for any purpose and in any location that is consistent with the intellectual property rights of the licensor.

(b) If a license limits the purposes, amount of use, location in which use may occur, or other characteristics of use, the licensee may use or otherwise employ the information in any manner consistent with the terms of the agreement and this [article]. However, a licensee's exercise of rights which exceeds the limits in the license constitutes a breach of contract.

(c) A contract for the transfer of a copy of digital or similar information transfers only the right for a single user at a single time to use, copy, or otherwise utilize the information on a single information processing machine. Making or retaining additional copies in more than one machine or permitting simultaneous use by multiple users without authorization from the licensor is a breach of

contract. However, a licensee may make a reasonable number of additional copies as backup copies.

(d) In a license not governed by subsection (c), the licensee may make only such additional copies as are expressly authorized by the agreement. In all other cases, the licensee may make such additional copies as it desires, consistent with the intellectual property rights of the licensor.

SECTION 2B-314. LIMITATIONS ON PARTIES.

(a) If an agreement does not specify or limit the parties or individuals to whom use of information is restricted other than by identifying the licensee, the information may be used by any party authorized by the licensee to do so. However, a party using the information pursuant to authorization is bound by the terms of the agreement.

(b) If a license expressly specifies and limits the party or individual permitted to use the information, use by a party or individual other than the designated party or individual is a breach of contract.

Reporter's Notes

This section is designed to deal with both the use of licenses in family contexts and the use within a business. The principle adopted is that if the licensor desires close limits on who can use the information, it must expressly state those limits. This states the common expectation that a transaction gives uses that are not precluded. Current law enforces express limitations in a license. See *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993).

SECTION 2B-315. PLACE OF DELIVERY. If an agreement requires delivery of a copy of all or part of the information to enable the exercise of rights by the licensee, the following rules apply:

(1) If an agreement requires a transfer of an existing tangible copy to the licensee, the place for delivery of the copy is the licensor's chief place of business

or, if there is none, the licensor's residence. If the agreement involves identified copies that to the knowledge of the parties at the time of contracting are in some other place, that place is the place for their delivery.

(2) If an agreement requires the creation of a copy, by electronic transmission or otherwise, in an information processing system of the licensee, the place for delivery is the system designated by the licensee. If a system for delivery is not designated, the licensor fulfills its delivery obligation by making the information available to the licensee on an information processing system of the licensor and sending to the licensee notice of its availability.

Uniform Law Source: Section 2-308(1). Revised.

SECTION 2B-316. DURATION OF CONTRACT. An agreement that does not specify its duration is indefinite in duration. If an agreement is indefinite in duration, the following rules apply:

(1) If the agreement involves a sale of a copy of information, an unrestricted transfer of information, or a delivery of a copy pursuant to a mass-market license, the contract rights of the licensee are perpetual, subject to cancellation for breach by either party. However, the duration of any support or service obligation is determined under paragraph (2).

(2) Except as otherwise provided in subsection (1), the duration of the agreement is a reasonable time. However, the agreement may be terminated at will by either party during this period on giving reasonable notice to the other party.

Uniform Law Source: Section 2-309(1)(2).

Reporter's Notes

Subsection (a)(2) states the rule that currently applies in Article 2 and in common law regarding termination of indefinite contracts. See *Zimco Restaurants, Inc. v. Bartenders & Culinary Workers' Union, Local 340*, 165 Cal. App. 2d 235, 331 P.2d 789 (1958); *Ticketron Ltd. Partnership v. Flip Side, Inc.*, No. 92 C 0911,

1993 WESTLAW 214164 (ND Ill. June 17, 1993); *Soderholm v. Chicago Nat'l League Ball Club*, 587 N.E.2d 517 (Ill. Ct. App. 1992). This applies to both nonexclusive and exclusive licenses. The section assumes a contract of indefinite duration and does not apply to term licenses.

[D. CONFIDENTIALITY]

SECTION 2B-317. CONFIDENTIALITY IN GENERAL.

(a) Subject to subsection (c), a party is not obligated to retain in confidence information given to it by another party.

(b) A license term that creates conditions of confidentiality or nondisclosure is enforceable unless it imposes or continues those conditions on information that is or becomes generally known to the public other than through an act of the party on which duties of confidentiality and nondisclosure are imposed. If the combination of items of information, some of which may be generally known to the public, is not generally known, the combination is not generally known to the public for purposes of this section.

(c) If circumstances or an agreement create conditions of confidentiality or nondisclosure, the party on which the conditions are imposed may not disclose intentionally or knowingly the confidential information, except pursuant to an order of a court of appropriate jurisdiction or a valid governmental subpoena, and shall exercise reasonable care to maintain confidentiality, including giving notice to the other party of its receipt of a court order that may cause disclosure of the information.

(d) Confidentiality terms do not apply to residual information not in a record which was obtained and retained in good faith, such as concepts and general business knowledge.

(e) The remedy for breach of a duty of confidentiality may include compensation based on the benefit received by the breaching party as a result of its breach.

Uniform Law Source: Restatement (Third) Unfair Competition.

Reporter's Notes

1. Although this section recognizes no implied duty in a license, the circumstances of disclosure, the terms of the agreement and the general relationship of the parties may create one. This is consistent with the *Restatement (Third) of Unfair Competition*.

2. Subsection (b) follows both common practice and public policy considerations favoring free flow of information. This section, however, applies only to duties of nondisclosure or confidentiality, it does not disturb the general rule that royalties or other fees under a trade secret license continue to be enforceable even after the information enters the public domain. See *Restatement (Third) of Unfair Competition*. Subsection (c) excludes enforcement of nondisclosure agreements against truly public information. Such limitations are common in modern licenses, serving as a cap on the obligations that a licensor can place on a licensee. The invalidation, however, applies only to the nondisclosure/ use terms and does not invalidate appropriate royalty provisions. The information must be truly public, and the language in this subsection accounts for the possibility of so-called combination secrets where the essence of the secret lies not in the individual items of information, but in how they are brought together.

SECTION 2B-318. NO RIGHT TO UNDERLYING INFORMATION OR CODE. A contract does not convey a right to the licensee to receive the code or other information used by the licensor in creating, developing, or implementing the information or the system by which access to the information is made available to the licensee. In this section, "code" means source or object code, schematics, or other design material.

SECTION 2B-319. DATA RIGHTS IN ORIGINATING PARTY.

(a) If an agreement requires one party to deliver commercial, technical, or scientific data to the other for its use in performing its obligations under the agreement or obligates one party to handle or process commercial data, including

customer accounts and lists, and the receiving party has reason to know that the data has not been released to the public by the other party, the following rules apply:

(1) The data and any summaries or tabulations based on the data remain the property of the party delivering the data or, in the case of commercial data, the party to whose commercial activities the data relate, and may be used by the other party only in a manner authorized by the agreement.

(2) The party receiving, processing, or handling data has an obligation to use reasonable care to hold the data in confidence and make it available to be returned to the delivering party or destroyed according to the agreement or instructions of the delivering party.

(b) If technical or scientific data are developed during the performance of the agreement, the following rules apply:

(1) If data are developed jointly by the parties, rights in the data are held jointly by both parties subject to the obligation of each to handle the data in a manner consistent with protection of the reasonable expectations of the other respecting confidentiality.

(2) In cases not covered by paragraph (1), the data are the property of the party that developed or created the data.

(c) Breach of an obligation under this section is a breach of contract.

Reporter's Notes

This section deals only with **data**, a defined term referring to factual information. Subsection (a) states the principle that, unless agreed to the contrary, the delivering party or the person about whose business the commercial data relates maintains ownership of the data. This deals with an important issue in modern commerce relating to cases in which one party transfers factual data to another in the course of the transaction. The default rule applies to cases involving data that has not been released to the public and that the recipient knows is unlikely to be released. The default presumption is that the data is received in a confidential manner and remains the property of the party who delivers it to the transferee. In effect, the circumstances themselves establish a presumption of retained ownership.

Illustration 1: Staten Hospital contracts to have Computer Company provide a computer program and data processing for Staten's records relating to treatment and billing services. Staten data are transferred electronically to Computer and processed in Computer's system. This section provides that Staten remains the owner of its data. Data held by Computer are owned by Staten because the records are not released to the public. There is an obligation to return the data at the end of the contract.

See *Hospital Computer Sys., Inc. v. Staten Island Hosp.*, 788 F. Supp. 1351 (D.N.J. 1992) (respecting a contract dispute over a data processing contract in which Staten had a right to return of its information at the end of the contract; case assumed to be controlled by Article 2).

[E. ELECTRONICS]

SECTION 2B-320. ELECTRONIC VIRUSES.

(a) Subject to subsection (b) and except as otherwise provided in Section 2B-322, 2B-323, or 2B-712, if performance of an agreement involves a transfer of information, delivery of a copy of digital information, communication of an electronic message, or electronic access by either party to an information processing facility, each party undertakes that its performance will not introduce extraneous code or viruses that may be reasonably expected to damage or interfere with the use of data, software, systems, or operations of the other party which are not disclosed to the other party. In a mass-market license, the disclosure must be conspicuous.

(b) An obligation under subsection (a) does not arise if circumstances or terms of the contract give the other party reason to know that action was not taken to ensure exclusion of potentially damaging information. Language in a record is sufficient to negate this obligation if it states "Warning: May contain or transfer viruses or other potentially damaging code," or words of similar import.

(c) If an obligation arises under subsection (a), a party is not liable for undisclosed programs, extraneous code, viruses, or data that may be reasonably expected to damage or interfere with the use of data, software, systems, or

operations of the other party which did not arise from a failure of the party to exercise reasonable care to protect against introduction of the code or viruses.

SECTION 2B-321. INTERMEDIARIES IN ELECTRONIC MESSAGES.

A party that sends an electronic message or performance through or with the assistance of an intermediary providing transmission or similar services is bound by the message or performance as received despite errors in the transmission unless the party receiving the message would have discovered the error by the exercise of reasonable care or the receiving party failed to employ an authentication system agreed to by the parties before the transmission.

Reporter's Notes

1. As between buyer and seller, in cases involving errors by telegraph companies, the majority approach is that the sender of the message is liable for errors created by the intermediary it chose to communicate the message unless the other party should have known that the message was mistaken. See discussion in Calamari & Perillo, *The Law of Contracts* § 2-24. See also 1 *Williston on Contracts* § 94. A minority position exists, holding that no contract exists in such a situation because the sender is not responsible for the actions of an independent contractor. *Restatement (Second) of Contracts* § 64, Comment b.

2. In Article 4A, in contrast, the UCC defines the intermediary for this purpose as an agent. The fundamental rationale for this approach to the problem comes from the fact that neither the sender nor recipient may have been at fault in creating the problem, but that some loss occurred and must be allocated to one or the other. In such a case, the proper choice is to place the loss on the sender unless the recipient was in fact at fault in not recognizing that an error existed.

SECTION 2B-322. ELECTRONIC REGULATION OF PERFORMANCE.

(a) Subject to subsection (b) and Sections 2B-320 and 2B-712, a party entitled to enforce a limitation in a license on use may include in the information, or a copy thereof, code or an electronic or other device that restricts use consistent with the express terms of the agreement.

(b) An express term in a license is required for the use of code or a device to enforce a limitation on time of use or on the total number of uses of the information if the code or device will preclude further use without advance notice to the licensee.

(c) A party that includes code or a device to restrict use under this section is not liable for any loss caused by operation of the code or device that merely restricts use consistent with the agreement. However, if operation of the code or device precludes use permitted by the agreement, the party including the device is liable for breach of contract.

Reporter's Notes

1. To implant these, contract authorization is required because it is important that the licensee be aware of the fact that strict, electronically enforced compliance will end its effective use of the software without any opportunity for flexibility. This section does not authorize devices or codes that implement actions in the event of default. What is at issue here is simply electronics that terminate a license at its natural end or otherwise restrict license use within contracted for parameters.

2. Subsection (a) authorizes the use of electronic limiting devices in a contract to enforce term and performance limitations. In software, for example, these might entail a calendar or a counter, either of which can be used to monitor time or use. It would also cover devices that monitor for the existence of multiple users. The section focuses on active limiting devices, rather than on methods used to detect if a given copy comes from a specific original. In a recent case, a software vendor had included in its software code that caused the software to send an e-mail message to the vendor in the event that improper copying was occurring. That device would be a passive device under this section and does not require notice. Requiring notice in such cases would in effect defeat the impact of the antipiracy measure if the licensee chose to alter the code.

SECTION 2B-323. DATA PROTECTION.

(a) Data concerning a licensee or its business, the licensee's actual use of the information, or the context, or environment in which use occurs, may not be collected, transferred, made available to, or employed by the licensor other than in performing the contract or protecting its interests in the transaction, unless before collecting the data:

(1) the licensor notifies the licensee of its intent to collect the data, the manner in which it intends to use the data, and the licensee's right to object to the collection or use of the data; and

(2) the licensee did not object to the collection or use of the data.

(b) The limitations in subsection (a) do not apply to transactional data obtained in the ordinary course when initiating the transaction, aggregate data obtained in the ordinary course regarding the use of a system or site or a part thereof owned or controlled by the party obtaining the data, data collected and used solely by a computer program in the licensee's system and not transferred to the licensor, or uses of data in aggregate form not identifying the individual licensee.

(c) A licensee who does not object under subsection (a)(2) may object at any time to any further use or collection. Upon receipt of the objection, the licensor shall cease to collect or use the data under subsection (a).

Reporter's Notes

1. This section has not been reviewed by the Drafting Committee. It protects a privacy interest of the licensee. The obligations of prior notice and tacit consent are derived from and consistent with the European Data Directive and with recent policy proposals relating to privacy and data protection on the internet. They are also followed as routine practice by many online information providers.

2. The section conditions the right to collect and use personally identifiable information on prior notice to the licensee and a failure of that party to object. That obligation does not apply in cases listed, including the collection and use of pure aggregate data or the "collection" of information by a program resident in the licensee's system for purpose of the program's operations.

PART 4
WARRANTIES

SECTION 2B-401. WARRANTY OF AUTHORITY AND NONINFRINGEMENT.

(a) Except with respect to an intellectual property infringement claim, a licensor warrants that the licensor has authority to make the transfer, the licensor will not interfere with the licensee's exercise of rights under the contract, and no party, as a result of an act or omission of the licensor, holds any claim or interest that will interfere with the licensee's enjoyment of its rights under the contract.

(b) With respect to an intellectual property infringement claim, a licensor that is a merchant in information of the kind warrants, at the time of the transfer, that the licensor has no reason to know that the transfer, any goods transferred by the licensor, or that the information when used in any authorized use intended by the licensee and known to the licensor infringes or will infringe an existing intellectual property right of a third party, except as disclosed to or known by the licensee.

(c) The warranty under subsection (b) does not apply to a pure license of a patent. In this section, a “pure license” is a license of intellectual property accomplished by making of a contract without further obligation by the transferor and without any agreement by the licensor to provide to the licensee any property or services to enable the licensee to exercise the rights transferred.

(d) A licensee who furnishes specifications to a licensor warrants that the licensee has no reason to know that compliance with the specifications as to matters covered by the specifications infringes or will infringe an existing intellectual property right of any third party. However, if the contract allows the licensor to choose the method or approach to meet the specifications, the licensee is not liable

for losses caused to the licensor arising out of the licensor's choice of method or approach to meet the specifications if more than one commercially reasonable alternative existed and at least one of the alternatives would not infringe and the licensee disclosed that it had reason to know that the method or approach would infringe.

(e) A licensor of an intellectual property right does not warrant that the right is valid or exclusive.

(f) A warranty under this section may be excluded from the contract or modified only by express language or by circumstances giving the licensee reason to know that the licensor does not claim that competing claims do not exist or that the licensor purports to transfer only such rights as it may have. In an electronic transaction, language is sufficient if it is conspicuous. Otherwise, language in a record is sufficient if it states "There is no warranty of title, authority, or noninfringement in this transaction," or words of similar import.

Uniform Law Source: Section 2A-211; Section 2-312. Revised.

Reporter's Notes

1. Subsection (a) deals with issues other than intellectual property infringement. It has two aspects. First, the licensor represents it has authority to make the transfer. Second, the licensor will not interfere with the licensee's exercise of rights under the contract. This is the essence of the contract. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 181 (1938). See *Spindelfabrik Suessen-Schurr v. Schubert & Salzer*, 829 F.2d 1075, 1081 (Fed.Cir.1987), cert. den. 484 U.S. 1063 (1988). The transfer contains an obligation that the transferor has a right to give that assurance and will not act contrary to it during the license.

2. Subsection (b) employs a "reason to know" warranty for infringement claims. This standard does not impose a duty of inquiry, but relates only to facts actually known to the party. The choice between a "reason to know" and an absolute liability warranty requires a balancing of the interests of the licensor and licensee in a situation where infringement claims may arise without direct fault of either party. Both in copyright and patent infringement claims, the complexity of the technology, the diverse sources from which it arises and character of modern infringement claims that do not admit of good faith purchase and do not require knowledge of infringement all create significant risk in the modern commercial environment. The choice here is to place knowing misconduct risk on the licensor,

but in cases where neither party had knowledge that an infringement would ensue, to allow loss to stay with the licensee if it is the party sued unless the contract reverses that allocation. No knowledge warranties are common in modern licensing. See Section 2B-315. Note that this is a contract provision, and that it does not alter current intellectual property law which recognizes neither a concept of bona fide purchaser defense to infringement, nor a lack of knowledge defense. Thus, in dealing with the case of a merchant who does not know about the infringement, either the licensee or the licensor may have infringement liability and this warranty will not redistribute the loss. A majority of computer law professionals responding to a survey believed that a mass market license should not be able to disclaim warranties that the licensor has a right to make the license and has no knowledge of an infringement. While the inability to disclaim is inconsistent with the contract freedom base of this article, this section creates warranties consistent with that viewpoint.

SECTION 2B-402. EXPRESS WARRANTY.

(a) An express warranty by the licensor is created as follows:

(1) Any affirmation of fact, promise, or description of information made by the licensor to the licensee which relates to the information and becomes part of the basis of the bargain between them creates an express warranty that the information, intellectual property rights, and any services required under the contract will conform to the affirmation, promise, or description.

(2) A sample, model, or demonstration that is made part of the basis of the bargain between the licensor and licensee creates an express warranty that the performance of the information will reasonably conform to the performance that the model, sample, or demonstration illustrates, taking into account such differences between the sample, model, or demonstration and the information as it would be used as would be apparent to a reasonable person in the position of the licensee.

(b) In the case of informational content distributed to the public, an express warranty does not arise with respect to the accuracy or quality of the content unless the licensor or its agent dealt directly with the licensee and made the express warranty to the licensee.

(c) It is not necessary to the creation of an express warranty that the licensor use formal words, such as "warrant" or "guarantee," or that the licensor have a specific intention to make a warranty. However, a mere affirmation of the value of the information or a mere statement purporting to be the licensor's opinion or commendation of the information does not create a warranty.

Uniform Law Source: Section 2A-210; Section 2-313.

Reporter's Notes

This draft retains the "basis of the bargain" language used in current Article 2 and in Article 2A. This draft precludes any warranty regarding the **accuracy of the content** of a publicly available information product unless there is specific agreement between the parties. Unlike in reference to transactions in goods, expansive liability for information transactions is limited by considerations of free speech and social policy favoring free flow of information. The basis of the bargain concept and the exclusion of liability for indirect statements to a third party better reflect this preexisting case law and policy than does more expansive liability concepts that may be appropriate in sales of goods.

SECTION 2B-403. IMPLIED WARRANTY: QUALITY OF COMPUTER PROGRAM.

(a) Except as otherwise provided in subsection (b), if a computer program is delivered to a licensee and the licensor is a merchant with respect to programs of that kind, the licensor warrants that the program will perform in substantial conformance with any documentation or specifications directed to the quality of performance of the program and provided by the licensor or agreed to by the parties at or before the delivery of the program and that any media on which the program is transferred will be of merchantable quality. However, an affirmation merely of the value of the program or a statement of opinion or commendation does not create a warranty.

(b) In a mass-market license of a computer program, a licensor who is a merchant with respect to computer programs warrants that the computer program

and media are merchantable. To be merchantable, the computer program and any tangible media containing the program must:

(1) be fit for the ordinary purposes for which it is distributed;

(2) substantially conform to promises or affirmations of fact made on the container, documentation, or label if any;

(3) in the case of multiple copies, consist of copies that are, within the variations permitted by the agreement, of even kind, quality, and quantity, within each unit and among all units involved; and

(4) be adequately physically contained, packaged, and labeled as the agreement or circumstances may require.

(c) The warranties under subsections (a) and (b) do not extend to informational content that is supplied with or that constitutes part of the information and do not apply to the presence of electronic viruses.

Uniform Law Source: Section 2-314. Revised.

Reporter's Notes

1. This draft uses a substantial conformance to documentation standard for non-mass market software, rather than the general merchantability standard. That preference is based on the conclusion that this warranty is most commonly used in commercial licenses. The reliance on conformance to documentation reflects the wide range of variations involved and the general unworkability of the merchantability concept in that venue. As to mass market products, however, an implied merchantability warranty applies.

2. Most negotiated agreements disclaim merchantability; there are few reported commercial cases involving merchantability. Most licenses substitute a warranty of conformance to documentation. The section treats this as the presumed warranty, conforming to a commercial norm. This warranty measures performance by reference to what is said about the particular product. The argument in favor of retaining a merchantability warranty for transactions is that it would maintain a congruence between this article and Articles 2 and 2A. This may be ephemeral and could be reversed: those articles should adapt to commercial practice. Merchantability measures performance obligations by reference to other like products, while the documentation warranty measures performance by what the licensor says about its product.

SECTION 2B-404. IMPLIED WARRANTY: INFORMATION AND SERVICES.

(a) Subject to subsections (b) and (c), if a licensor provides services, access, data, data processing, or the like, the licensor warrants that there is no inaccuracy, flaw, or other error in the informational content caused by a failure of the licensor to exercise reasonable care and workmanlike effort in its performance in collecting, compiling, transcribing, or transmitting the information.

(b) A warranty under subsection (a) is not breached merely because the licensor's performance does not yield a result consistent with the objectives of the licensee or because the informational content is not accurate or is incomplete.

(c) A warranty does not arise under subsection (a) for errors in informational content if:

(1) the licensor made the informational content generally available to the public and the licensee acquired the content in that manner;

(2) the informational content is publicly available in United States Patent and Trademarks Office;

(3) the informational content is merely incidental to a transfer of rights and does not constitute a material portion of the value in the transaction; or

(4) the informational content was prepared or created by a third party and the licensor, acting as a conduit, makes available the informational content in a form that identifies it as being the work product of the third party, except to the extent that the lack of care or workmanlike effort caused a loss occurred in the licensor's performance in providing the informational content.

(d) The liability of a third party under this section is not excluded by the use of a conduit described in subsection (c)(4) or by the fact that the conduit is not liable for errors under that subsection.

Uniform Law Source: Restatement (Second) of Torts § 552. Revised.

Reporter's Notes

1. This section states the implied warranty with respect to "information" and services. This warranty derives from case law on services and information contracts. *Restatement (Second) of Torts* § 552 regarding negligent misrepresentation provides framework against which most modern information contracts are tested in terms of what performance is acceptable. The contract obligation consists of a commitment that the information provided will not be wrong due to a failure by the services provider to exercise reasonable care in the compilation, collection or transmission of the data. *Rosenstein v. Standard and Poor's Corp.*, 1993 WL 176532 (Ill. App. May 26, 1993) (license of index; liability for inaccurate number tested under *Restatement* concepts and in light of contractual disclaimer).

2. Under subsections (a) and (b) the obligation does not center on delivering a correct result, but on care and effort in performing. A contracting party that provides inaccurate information does not breach unless the inaccuracy is attributable to fault on its part. See *Milau Associates v. North Avenue Development Corp.*, 42 N.Y.2d 482, 398 N.Y.S.2d 882, 368 N.E.2d 1247 (N.Y. 1977); *Micro-Managers, Inc. v. Gregory*, 147 Wis.2d 500, 434 N.W.2d 97 (Wisc. App. 1988).

3. Subsection (c) lists situations in which the warranty does not arise under current law. Subsection (c)(4) incorporates, as a contract law, principle case law that holds the publisher harmless from claims based on inaccuracies in third party materials that are merely distributed by it. In part, this case law stems from concerns about free speech and leaving commerce in information free from the encumbrance of liability where third parties develop the information. In cases of egregious conduct, ordinary principles of negligence may apply to create liability. As a contractual matter, however, merely providing a conduit for third party data should not create an obligation to ensure the care exercised in reference to that data by the third party. See *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033 (9th Cir. 1991); *Walter v. Bauer*, 109 Misc 2d 189, 439 N.Y.S.2d 821 (S. Ct. 1981). Compare *Brockelsby v. United States*, 767 F.2d 1288 (9th Cir. 1985) (liability for technical air charts where publisher designed product). Subsection (c)(4) clarifies that the licensor is not absolved from its own negligence.

4. The issue of liability is important for information systems analogous to newspapers and are treated as such here for purposes of contract law. See *Daniel v. Dow Jones & Co., Inc.*, 520 N.Y.S.2d 334 (NY City Ct. 1987) (electronic news service not liable to customer; distribution was more like a newspaper than consulting relationship). The District Court in *Cubby, Inc. v. CompuServ, Inc.*, ___ F.Supp.___, 3 CCH Computer Cases ¶ 46,547 (S.D.N.Y. 1991) commented:

> Technology is rapidly transforming the information industry. A computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard [enabling] liability [for] an electronic news distributor... than that which is applied to a public library, book store, or newsstand would impose and undue burden on the free flow of information.

SECTION 2B-405. IMPLIED WARRANTY OF EFFORT TO ACHIEVE A PURPOSE.

(a) If a licensor at the time of contracting has reason to know any particular purpose for which the information is required in the transaction and that the licensee is relying on the expertise of an individual representing or acting as the licensor to develop, design, select, compile, or substantially modify the information to meet the licensee's objectives or purposes, the licensor warrants that it will make a reasonable and workmanlike effort to achieve those objectives or purposes.

(b) In contracts governed by subsection (a), a licensor warrants that it will produce a product of quality and performance suitable for the licensee's particular purposes if, from all of the circumstances and actions of the parties, it appears that the licensor agreed not to be paid in full for its work unless the information was fit for the purposes to which the licensee intended to use them.

Uniform Law Source: Section 2-315; Section 2A-213. Substantially revised.

Reporter's Notes

This section deals with development and design contracts. Design contracts involving software are a setting in which litigation is common over whether the contract involves goods or services under current law. This section sets out the premise that in the area of information contracts, the presumed or implied obligation is to make an effort to achieve the results sought by the client, but that there is no guaranty that the results will in fact meet these expectations. This choice reflects services contract law. Paragraph (b) shifts the presumption based on the character of the parties' relationship.

SECTION 2B-406. EXCLUSION OR MODIFICATION OF WARRANTY.

(a) Words or conduct relevant to the creation of an express warranty and words or conduct tending to exclude or modify the warranty must be construed wherever reasonable as consistent with each other. Subject to Section 2B-301,

words excluding or modifying a warranty are inoperative to the extent that such a construction is unreasonable.

(b) Subject to subsection (e), to exclude from the contract or modify an implied warranty arising under Section 2B-403 or 2B-404, the language must be in a record and mention "warranty of satisfactory quality," "warranty of merchantability," "warranty of accuracy," or words of similar effect. Language that mentions "merchantability," satisfactory quality," or "accuracy" is sufficient as to both warranties.

(c) Subject to subsection (e), to exclude from the contract or modify an implied warranty of effort arising under Section 2B-405, the exclusion or modification must be in a record. Language excluding all implied warranties of effort is sufficient if it states "There is no warranty that the subject of this transaction will fulfill any particular purpose or need of the transferee," or words of similar import.

(d) Subject to subsection (e), all implied warranties are excluded from the contract or modified only by specific language or by circumstances giving the licensee reason to know that the licensor does not provide the implied warranties arising under Sections 2B-403, 2B-404, and 2B-405. Language in a record is sufficient to exclude all implied warranties if it states that the information is provided "as is" or "with all faults" or other language that in common understanding or under the circumstance calls the licensee's attention to the exclusion of warranties. An implied warranty may be excluded or modified by course of performance, course of dealing, or usage of trade.

(e) In a mass-market license, language in a record which excludes from the contract or modifies an implied warranty must comply with this section and be conspicuous. To exclude all warranties in a mass-market license other than the

warranty in Section 2B-401, conspicuous language is sufficient if it states "The information is being provided 'as is' or 'with all faults' and the entire risk as to satisfactory quality, performance, accuracy, and effort is with the user," or words of similar import.

(f) If a licensee, before entering into the contract, examined and tested the information or an adequate sample or model thereof as fully as desired, or has refused to examine the information, there is no implied warranty with regard to defects or errors that an examination in the circumstances would have revealed.

(g) If a contract requires ongoing performance or a series of performances by the licensor, language of exclusion that complies with this section is effective with respect to all performance that occurs after the licensee manifests assent to the language of exclusion.

(h) A term excluding implied warranties as permitted by this section is not unconscionable and is not unenforceable for lack of actual negotiation or similar reasons unless the additional requirements are expressly imposed by statute.

Uniform Law Source: Section 2A-214. Revised.

Reporter's Notes

This section reflects the vote of the Drafting Committee that conspicuous language not be required in commercial as compared to mass market transactions. The section also adopts proposals that clarify and modernize the language of disclaimers. The modernization follows the lead of a number of state consumer protection laws in requiring disclaimers to be more explicit and informative in modern language. For example, subsection (e) amplifies the language used in reference to the traditional "as is" disclaimer. Treatment is also provided in this article forestalling judicial decisions that in sales law in some states superimpose a requirement of actual negotiation or similar standard on top of the requirements of this section.

SECTION 2B-407. MODIFICATION OF COMPUTER PROGRAM.

Modification of a computer program by the licensee voids any warranties, express or implied, regarding the performance of the modified copy of the program unless

the licensor previously agreed that the modification would not void the warranty or the modification involved use in the intended ordinary course of operation of capacities existing in the program. A modification occurs if a licensee knowingly alters, or adds code to, the computer program.

Reporter's Notes

This language follows common practice. It voids the warranties whether the modification is authorized or not unless the contract, or an agreement, indicates that modification does not alter performance warranties. The section refers to modifications intending to cover cases where the licensee makes changes in the program that are not part of the program structure or options itself. Thus, if a user employs the built-in capacity of a word processing program to tailor a menu of options suited to the end user's use of the program, this section does not apply. If, on the other hand, the end user modifies code in a way not made available in the program options, that modification voids all performance warranties.

SECTION 2B-408. CUMULATION AND CONFLICT OF WARRANTIES. Warranties, whether express or implied, must be construed as consistent with each other and as cumulative. However, if that construction would be unreasonable, the intent of the parties determines which warranty prevails. In ascertaining that intent, the following rules apply:

(1) Exact or technical specifications in a contract prevail over an inconsistent sample, model, demonstration, or general language of description.

(2) A sample, model, or demonstration prevails over inconsistent general language of description.

(3) An express warranty prevails over an inconsistent implied warranty.

SECTION 2B-409. THIRD-PARTY BENEFICIARIES OF WARRANTY.

(a) A warranty made to or for the benefit of a licensee extends to persons for whose benefit the licensor intends to supply the information, directly or indirectly, and who use the information in a transaction or application in which the licensor intends the information to be used.

(b) For purposes of this section, a licensor is deemed to have intended to supply the information to any individual who is in the family or household of the licensee if it was reasonable to expect that the individual would rightfully use the copy of the information delivered to the licensee.

(c) An exclusion, limitation, or modification of a warranty, or of rights and remedies, which is effective against the licensee is also effective against any beneficiary under this section. An expressed intent in the contract that there are no third-party beneficiaries of the agreement excludes any obligation or liability with respect to third parties other than the parties described in subsection (b).

Reporter's Notes

1. This draft adopts a third party beneficiary concept. It does not deal with the scope of tort liability under other law. For a discussion of beneficiary issues see *Artwear, Inc. v. Hughes*, 615 N.Y.S.2d 689 (1994). Subsection (b) modifies beneficiary concepts to include the family of a licensee regardless of intent in reference to the licensor. Subsection (c) defines the right of a party to exclude "intended" beneficiaries. An issue raised during the Drafting Committee meetings concerns the treatment of "pass through" warranty or contract obligation created by an express contract or form from the producer and intended to apply to remote parties. That issue has not yet been fully dealt with in this draft.

2. Unlike in goods, the willingness of courts and legislatures to avoid privity restrictions and impose third party liability through tort or contract theory has been extremely limited in information products. The Draft Restatement on products liability recognizes this, noting that information is not a product for purposes of that law. While there may be a shift to include embedded software in traditional products this article does not deal with embedded products.

PART 5
TRANSFER OF LICENSES

SECTION 2B-501. TITLE.

(a) Transfer of title to or possession of a copy of information does not transfer ownership of the intellectual property rights in the information.

(b) In a license, a licensee's right to possession or control of a copy of information is governed by the agreement and does not depend on title to the copy.

(c) Title to a copy of information delivered to a licensee is determined by the contract. In the absence of contractual provisions, title to a copy of information passes when the copy is delivered to the licensee.

(d) If a license involves intellectual property rights of the licensor, reservation in the licensor of title to a copy of information reserves title in the original copy and in any copies made by the licensee.

(e) A nonexclusive license does not create a security interest in or effect a sale of the information even if by its own terms or by operation of law it is valid in perpetuity or for so long as an obligation of the licensor exists.

(f) If a licensee receives ownership of a copy of information from the owner of intellectual property rights or an authorized person, the licensee receives all of the rights of an owner of a copy under federal copyright law.

(g) If an agreement transfers title to intellectual property rights and does not specify when title is to pass, title passes to the licensee when the information has been so far identified to the contract as to be distinguishable in fact from similar property even if it has not been fully completed and any required delivery has not yet occurred.

Reporter's Notes

1. Subsection (a) distinguishes title to the tangible property from title to the information intellectual property rights. This follows the Copyright Act. Title to goods does not convey title to the information contained on the goods.

2. Subsection (b) states that the right to the copy of information depends on the terms of the contract and not on the label one applies to handling underlying media. The media here is not the message, but the conduit. See *United States v. Wise*, 550 F.2d 1180 (9th Cir. 1977) (copyright licenses transferred only limited rights for exhibition or distribution of films for limited purpose and limited time did not constitute first sales); *Data Products Inc. v. Reppart*, 18 U.S.P.Q.2d 1058 (D. Kan. 1990) (license not a first sale). This is a default rule that applies regardless of the terms of the license contract. It does not apply, however, to cases not involving a license – that is to sales of copies of software.

3. Subsection (g) deals with cases where there is an intent to transfer title to intellectual property rights (as compared to title to a particular copy). In some cases, federal law requires a writing to make this ownership transfer; state law is subject to that limitation. The subsection solves the problem in *In re Amica*, 135 Bankr. 534 (Bankr. N.D. Ill. 1992) (court applied Article 2 theories of title transfer to goods to hold that title to an intangible (a computer program) being developed for a client could not pass until the program was fully completed and delivered.) The transfer of title hinges on sufficient completion separate the transferred property from other property of the transferor. See *In re Bedford Computer*, 62 Bankr. 555 (Bankr. D.N.H. 1986) (disallowed a transfer of title in software where the "new" program and code could not be separately identified from the old or pre-existing program or code.)

SECTION 2B-502. ASSIGNMENT OR TRANSFER OF PARTY'S INTEREST.

(a) Subject to subsections (b) and (c), a party's rights under an information contract may be assigned unless the assignment would materially change the duty of the other party, materially increase the burden or risk imposed on the other party, disclose or threaten to disclose trade secrets or confidential information of the other party without authorization, or materially impair the other party's likelihood of obtaining return performance.

(b) A licensee's rights under a nonexclusive license may not be assigned or otherwise transferred voluntarily or involuntarily, including by sale, attachment, levy, or other judicial process unless:

(1) the party who holds or controls intellectual property rights in the information consents to the transfer;

(2) the transfer is part of a transfer of all or substantially all of the assets of the licensee to one transferee and the transferee assumes all of the duties, obligations, and limitations of the license;

(3) the license was a mass-market license and the licensee transfers the original copy and all other copies made by it; or

(4) the licensee owns a copy of the information, the license did not expressly preclude transfer and the transfer complies with applicable terms of federal copyright law.

(c) A licensor's rights under a contract may not be assigned if the assignment transfers rights in information provided on a nonexclusive basis to the licensor by the licensee and the conditions of subsection (b) would not be met if the licensor were treated as the licensee under that subsection.

(d) A transfer by either party of the right to receive payment from the other is not prohibited by this section unless there is a delegation of a material performance of the party making the transfer.

Uniform Law Source: Section 2A-303. Substantially revised.

Reporter's Notes

1. The provisions of this section apply in the absence of contractual restrictions. The effect of contract restrictions on alienation are treated elsewhere as is the enforceability of a security interest. "Assignment" is used in the sense understood in intellectual property law, rather than the conditional assignment concept common in Article 9 financing. The section follows current law which holds that a licensee cannot assign its rights in a nonexclusive license. For patents and copyrights, this represents federal policy. See *Unarco Indus., Inc. v. Kelley Co.*, Inc., 465 F.2d 1303 (7th Cir. 1972). The non-transferability premise flows from the fact that a nonexclusive license is a limited privilege, representing less than a property interest. See *Harris v. Emus Records Corp.*, 734 F.2d 1329 (9th Cir. 1984) (copyright); *In re Alltech Plastics, Inc.*, 71 B.R. 686 (Bankr. W.D. Tenn. 1987).

2. Most of the exceptions in subsection (b) illustrate cases in which a transfer is permitted under current law. Subsection (b)(2) creates a presumption

(subject to contract terms that preclude it) that a transfer of substantially all of the assets of the licensee is a setting in which the licensee rights can be transferred without consent of the licensor. This has become a major issue in modern merger practice and the proposed language provides a commercially sustainable solution that enhances the ability of parties to engage in commercial contracts that affect license rights.

SECTION 2B-503. SECURITY INTEREST.

(a) The creation or enforcement of a security interest in a licensee's interest under a nonexclusive license is ineffective unless a transfer of the licensee's interest would be effective under Section 2B-502.

(b) The creation or enforcement of a security interest in a licensor's interest under a contract or in its ownership interest in the information governed by the contract is effective except to the extent that:

(1) it creates a delegation of a material performance of the licensor; or

(2) the transfer extends to information in which the licensee has intellectual property rights.

(c) To the extent a security interest is precluded by subsection (a) or (b), the creation or enforcement of the security interest is effective if the party holding intellectual property rights in the information and not involved in creating the interest consents to its creation.

Uniform Law Source: Section 2A-303. Revised.

Reporter's Notes

A security interest in a licensee's rights is not effective unless a transfer of those rights would be effective. This limits security interests in rights other than the right to receive money under a contract. It also allows transfer if the licensor consents in the agreement or otherwise. This approach to security interests reflects federal law on the nontransferability of licensee interests in nonexclusive licenses.

SECTION 2B-504. DELEGATION OF PERFORMANCE; SUBLICENSE. Subject to Section 502(a), a party may delegate or sublicense its performance under a contract unless the other party to the contract has a substantial

interest in having the original promisor perform or directly control the performance required by the contract or the contract prohibits delegation or sublicensing.

Uniform Law Source: Section 2-210; Section 2A-303.

SECTION 2B-505. EFFECT OF ASSIGNMENT OR DELEGATION.

Unless the transfer is merely for security, acceptance of an assignment of rights created under a contract constitutes a promise by the transferee to perform the duties of the party whose interest is conveyed. The promise is enforceable by the party making the conveyance or by the other party to the information contract. Unless the other party to the contract agrees, the assignment, delegation, or sublicense of the interest of a party to a contract does not relieve that party of a duty to pay or perform or of liability for breach.

Reporter's Notes

This section implements a policy in current Article 2. The recipient of a transfer is bound to the terms of the original contract and that obligation can be enforced either by the transferor or the other party to the original contract.

SECTION 2B-506. CONTRACTUAL RESTRICTIONS ON TRANSFER.

(a) Except as provided in subsection (b), a contractual restriction or prohibition on transfer of an interest of either party in a contract or of a licensor's ownership or intellectual property rights in the information that is the subject of a license is enforceable.

(b) The following contractual restrictions are not enforceable:

(1) A term that prohibits a party's assignment of or creation of a security interest in an account or in a general intangible for money due, or requires the other party's consent to such an assignment or security interest.

(2) A term that prohibits creation or enforcement of a security interest unless the creation or enforcement of the security interest would:

(i) result in a delegation of material performance of either party in violation of the contract;

(ii) be prohibited by Section 2B-503 if the term were not present; or

(iii) transfer an interest in information in which the other party to the contract holds intellectual property rights.

(c) A transfer made in breach of a provision that prohibits voluntary or involuntary transfer of an interest of a party under a contract is ineffective.

SECTION 2B-507. PRIORITY OF TRANSFERS BY LICENSOR.

(a) A licensor's transfer of its ownership of intellectual property rights associated with the information, other than by the creation or enforcement of a security interest, whether voluntary or involuntary, is subject to a previously granted nonexclusive license if the nonexclusive license:

(1) is represented by a record signed by the licensor and executed before the transfer of ownership;

(2) involved delivery of a copy to the licensee before the transfer of ownership; or

(3) was a mass-market license in the ordinary course of the business to a licensee that had no knowledge of the transfer of ownership.

(b) A security interest created by a licensor or a transfer of ownership made through the enforcement of a security interest in information or in copies of the information has priority over any nonexclusive license unless the nonexclusive license:

(1) involved a transfer of rights completed and enforceable before the security interest was perfected;

(2) was authorized by the secured party; or

(3) involved a transfer of rights in the ordinary course of the licensor's business.

(c) For purposes of this section, a transfer, including creation of a security interest, for which federal law requires filing or a similar act to attain priority against other transfers of ownership does not occur until filing or the similar act occurs.

Uniform Law Source: Section 2A-304. Revised.

Reporter's Notes

This is an area heavily influenced by federal copyright law as to copyright interests and the provisions here attempt to trace that influence while providing maximum state law recognition for traditional UCC priorities. This section does not take a position on whether a security interest should be filed in federal or state records systems; it simply refers to perfection of the interest. It adopts priority rules for a security interest in conflict with a nonexclusive license that parallel priority positions in current Article 9. The goal is to facilitate use of secured lending related to intangibles by creating provisions that enable the licensor whose intangibles are encumbered to continue to do business in ordinary ways. As this is written, a number of competing proposals are being considered in Congress to alter current federal law on security interests and registration rules.

SECTION 2B-508. PRIORITY OF TRANSFERS BY LICENSEE.

(a) In cases subject to Section 2B-502, 2B-503, 2B-504, or 2B-506, a creditor or transferee of a licensee acquires no interest in information, copies of the information, or any other rights held by a licensee under an information contract, by judicial process, contract, or otherwise, unless the conditions of those sections for an effective transfer are satisfied.

(b) A creditor or other transferee of a licensee that obtains an interest in information, copies, or rights held by the licensee under a contract takes that interest subject to the contract and to the rights of the licensor.

(c) A licensee that acquires a copy of information obtains all of its transferor's rights in the copy. The licensee is subject to the intellectual property rights of a remote licensor, the terms of any contract with that licensor to which it

assents, and the license restrictions contained in any contract between the remote licensor and the transferor.

Uniform Law Source: Section 2A-305.

Reporter's Notes

1. As a general principle, a license does not create vested rights and is not generally susceptible to freely be transferred on in the stream of commerce. The dominant rule is that a nonexclusive license is ordinarily not transferable. The idea of entrustment, which plays a major role in dealing with goods, has a lesser role in intangibles since the value involved resides in the intangibles and the concept of possession being entrusted in a manner that creates the appearance of being able to reconvey the valuable property is not ordinarily a relevant concern. Intellectual property law does not recognize a concept of buyer in the ordinary course. It does, however, allow for a concept of "first sale" which gives the owner of a copy various rights to use that copy.

2. *Microsoft Corp. v. Harmony Computers & Electronics, Inc.*, 846 F. Supp. 208 (ED NY 1994). The court granted a preliminary injunction against a retailer that it obtained from third parties. It argued first that the distribution was not a violation of copyright because it in good faith believed that it obtained the copies of the software through a first sale from an authorized party. The court rejected this argument, concluding that there is no concept of good faith purchaser under copyright law and that the buyer cannot obtain any greater rights than the seller had. In the case where the seller is neither an owner of a copy or a person acting with authorization to sell copies to third parties, no first sale occurs and the "buyer" is subject to the license restrictions created under any license to the third party seller. In one instance, the defendant had purchased from a licensee who was authorized to transfer the Microsoft product in sales of its machines. In fact, however, it purported to sell the product as a stand alone. This clearly exceeded the license to it and the mere fact that the alleged buyer acted in good faith did not insulate it from copyright liability. "Entering a license agreement is not a "sale" for purposes of the first sale doctrine. Moreover, the only chain of distribution that Microsoft authorizes is one in which all possessors of Microsoft Products have only a license to use, rather than actual ownership of the Products."

PART 6
PERFORMANCE

[A. GENERAL]

SECTION 2B-601. LICENSOR'S PERFORMANCE OF CONTRACT.

(a) A licensor's duty to perform, other than with respect to confidentiality and nondisclosure, is conditional on substantial performance by the licensee of its obligations under the license that precede in time the particular performance of the licensor, including compliance by the licensee with any restrictions on the scope, manner, method, or location or other limitations on the exercise of rights in the information.

(b) A licensor shall perform in a manner that conforms to the terms of the contract or, in the absence of terms, in a manner consistent with standards of the trade or industry.

(c) If a licensee breaches its obligations, including by failure to comply with any restrictions on use of the information, the licensor may suspend its performance, other than with respect to confidentiality and nondisclosure obligations, and demand assurance of future performance pursuant to Section 2B-622 or exercise its rights on breach of contract. The licensor may cancel the contract if the licensee's breach constitutes a material breach and has not been cured, or if the contract so provides.

(d) Nonmaterial breach by a licensee of its obligations, duties, or restrictions under a contract does not in itself justify the licensor to refuse to perform or to cancel the contract but entitles the licensor to resort to appropriate remedies under this [article] or the contract.

Uniform Law Source: Restatement (Second) of Contracts § 237. Substantially revised.

Reporter's Notes

1. This and the next following sections set out basic default rules regarding performance of a contract. The model treats the performance of the parties as being mutually conditional on the substantial performance of the other party. This section and Section 2B-602 set out generally applicable rules. Other sections dealing with specific types of contract **supplement these with more specific provisions that enhance and amplify the general rules**, but displace them only if there is a conflict. In this draft, these two sections replace former Sections 2B-601 and 2B-602 which stated general standards for specific performances. The change does not make a substantive alteration, but simplifies the performance criteria. As in all other situations, the terms of this and the subsequent section can be modified by the contract.

2. This model stems from the *Restatement* which states this proposition in the following terms: "[It] is a condition of each party's remaining duties to render performances ... under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time." *Restatement (Second) of Contracts* § 237. The standards for materiality or substantial performance are mentioned in the *Restatement* and incorporated in this draft. A breach is material if the contract provides that this is true.

3. This section and Section 2B-602 adopt a theme of substantial performance (or material breach). This replaces the Article 2 idea of perfect tender with a more flexible standard that is routinely applicable under common law and the CISG. Definitions in Section 2B-102 make "substantial performance" and "material breach" mirror image concepts. Material breach is defined in Section 2B-109 and is discussed in the Reporter's Notes to that section. The definition largely adopts the definition in the *Restatement (Second) of Contracts* § 241, adding some specificity related to the commercial context. This article rejects the less fully explored language used in Article 2A (and some limited parts of Article 2) which refers to breaches that "substantially impair" the value of a contract to the injured party. A material breach is a breach that significantly damages the injured party's receipt of the value it expected from the contract, but reliance on language that is common in general law and legal tradition enables this article to fall back on themes that courts are familiar with, rather than on language in other UCC articles that has not been well explored in case law.

4. The concept is simple: **A minor defect in the transfer does not warrant rejection of performance or cancellation of a contract. Minor problems constitutes a breach of contract, but the remedy is compensation for the value lost.** The objective is to avoid forfeiture based on small errors and to recognize that, especially if performance involves multiple, ongoing activity, fully complete and perfect performance cannot be the expected norm. This is especially true in information contracts. Software often contains "bugs" or imperfections. Information services often entail small errors and incompleteness. The policy choice here adopts general law and allows a party whose performance has minor errors to expect performance by the other party; subject, in appropriate cases, to offsets and compensation for the problems.

5. The substantial performance rule does **not** hold that substantial (but imperfect) performance of a contract is not a breach. Substantial (but imperfect)

performance is a breach of contract. The significance of substantial performance lies in the remedy for the injured party. Substantial performance is sufficient to trigger the injured party's obligations to perform. Unless a breach is material, it cannot be used as an excuse to void or avoid the contract obligations. A licensee who receives substantial (but imperfect) performance from the licensor, cannot reject the initial tender or cancel the contract on that account, but it can obtain financial satisfaction for the less than complete performance.

6. Article 2 applies a "perfect tender" rule to only one setting: the initial tender (transfer) of goods in a contract that does not involve installment sales. Article 2 does not allow the buyer to assert a failure of perfect tender in an installment contract (that is, a contract characterized by an ongoing relationship). Even in a single delivery context, the theory of perfect tender is hemmed in by a myriad of countervailing considerations. As a matter of practice, a commercial buyer cannot safely reject a tendered delivery for a minor defect without considering the rights of the vendor to cure the defect under the statute or under commercial trade use. White and Summers state: "**[we found no case that] actually grants rejection on what could fairly be called an insubstantial non-conformity . . .**" Indeed, in one case involving software, a court applied a substantial performance test to a UCC sales transaction. See *D.P. Technology Corp. v. Sherwood Tool, Inc.*, 751 F Supp. 1038 (D. Conn. 1990) (defect was slight delay in completion coupled with no proven economic loss).

SECTION 2B-602. LICENSEE'S PERFORMANCE OF CONTRACT.

(a) If the licensee's exercise of rights in the information is restricted or the contract requires other ongoing performance by the licensee, the licensee's right to exercise the rights transferred is contingent on its substantial performance of its obligations.

(b) A licensee's duty to perform obligations, other than those related to the scope, confidentiality, manner, method, or location of use or the disclosure of information, is contingent on the licensor's substantial performance of its obligations that precede in time the particular performance of the licensee.

(c) If a licensor breaches a contract, the licensee may cancel the contract if the breach is a material breach and has not been cured or if the contract so provides.

(d) Except as otherwise provided in the contract, nonmaterial breach by a licensor does not in itself justify the licensee to refuse to perform under the contract

or to cancel the contract but entitles the licensee to resort to appropriate remedies under this [article] or the contract.

SECTION 2B-603. TRANSFER AT SINGLE TIME. If it is commercially reasonable to render all of one party's performance at one time, the performance is due at one time, and payment or other reciprocal performance is due only on tender of the entire performance.

Uniform Law Source: Section 2-307.

Reporter's Notes

The section adopts an approach found in both Section 2-307 and common law as described in the *Restatement (Second)* with reference to the relationship between performance and payment in cases where performance can be rendered at a single time. It adds the qualification that the ability to so perform must be gauged against standards of commercial reasonableness. The section does not affect the treatment of contracts calling for delivery of systems in modular form or for contracts that extend performance out over time, such as in data processing arrangements. In each of these cases, the performance of the one party cannot be completed at one time.

SECTION 2B-604. WHEN PAYMENT DUE.

(a) If either party to a contract has the right to make or demand performance in part or over a period of time, payment, if it can be apportioned, may be demanded for each part performance accepted by the party obliged to pay.

(b) If payment cannot be apportioned or the agreement or circumstances indicate that payment may not be demanded for part performance, payment is due only on completion of the entire performance.

Uniform Law Source: Restatement (Second) Contracts; Section 2-310. Revised.

[B. TENDER OF PERFORMANCE; ACCEPTANCE]

SECTION 2B-605. ACCEPTANCE; EFFECT. A party shall pay or render other performance required by the contract according to the contract terms for any performance it accepts.

Uniform Law Source: Section 2-507.

Reporter's Notes

This section should be read in context of the treatment of the right to revoke, the licensor's obligation to cure nonmaterial breaches, and the licensee's right to recoup from future payments even in the case of a nonmaterial breach where the amounts to be recouped are liquidated amounts.

SECTION 2B-606. TENDER OF PERFORMANCE.

(a) A tender of performance occurs when a party to a contract completes the performance or, with manifested present ability to do so, offers to complete the performance.

(b) A tender of performance that substantially conforms to the contract entitles the party making the tender to acceptance of that performance.

(c) If payment is due and demanded at or before the time of performance, payment by the party receiving the performance is a condition to the other party's obligation to complete its performance.

Uniform Law Source: Section 2-507. Substantially revised.

SECTION 2B-607. TENDER OF RIGHTS; HOW MADE. If tendered performance of a contract consists of a transfer of rights, the following rules apply:

(1) A licensor shall tender first but need not complete the performance until the licensee tenders any initial payment or other performance required under the contract.

(2) If the contract requires physical delivery of a copy of information, tender requires that the licensor put and hold the copy at the licensee's disposal at

the location to which delivery is required by the contract and give the licensee notice reasonably necessary to enable the licensee to take possession or control of the copy. The manner of, time for, and place for tender are determined by the contract. However, tender must be at a reasonable hour, and the copy must be kept available for a period reasonably necessary to enable the licensee to take possession or control.

(3) If the contract requires electronic communication of a copy of the information or the transfer is in an access contract, tender requires that the licensor make the communication or the electronic resource containing the information available to the licensee and, unless the licensee knows of its availability, notify the licensee that the communication or resource is available.

(4) In cases governed by paragraph (3):

(i) the resource or communication must be made available in a form and for a period reasonably sufficient to allow the licensee to obtain access to the electronic facility; and

(ii) the licensor shall provide the licensee with information on how to obtain the initial access or transmission, including any access code, on completion by the licensee of any acts required by the contract.

Uniform Law Source: Section 2-503(1).

SECTION 2B-608. TENDER OF PAYMENT.

(a) Tender of payment is sufficient if made by any means or in any manner current in the ordinary course of business unless the other party demands payment in legal tender and gives any extension of time reasonably necessary to procure it.

(b) If an agreement requires payment in whole or in part before inspection pursuant to Section 2B-609, nonconformity in the tender does not excuse the licensee from so making payment unless:

(1) the nonconformity appears without inspection and would justify refusal under Section 2B-610; or

(2) the information is being developed pursuant to the agreement, the licensor materially fails to comply with its performance obligations, including timing for completion of the information or any material part thereof, and the licensee has substantially performed its prior obligations.

(c) Payment pursuant to subsection (a) does not constitute an acceptance or impair the licensee's right to inspect or any of the licensee's other remedies.

Uniform Law Source: Section 2-511(1)(3). Substantially revised.

Reporter's Notes

Payment may occur before inspection in a large number of circumstances in the ongoing relationships that arise in licensing. The provisions of subsection (b) circumvent the obligation to pay first in narrow circumstances. Subsection (b)(2) is tailored to information relationships. It deals with development contracts. The default rule allows the licensee to avoid making prepayments in the face of material breach by the licensor. This is consistent with subsection (a)(1) which voids the prepayment obligation when the defect is patent. Terminating pre-payment obligations for breach is consistent with *Restatement (Second) of Contracts* § 237 which states: "[It] is a condition of each party's remaining duties to render performances ... under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time." This allows the licensee to forego prepayments in a development contract if the licensor is in material breach and the licensee has previously performed it obligations. The situation here, in effect, authorizes withholding payments to an underperforming developer as a means of reducing loss or encouraging better performance.

SECTION 2B-609. LICENSEE'S RIGHT TO INSPECT. If performance requires delivery of a copy of information, the following rules apply:

(1) Subject to paragraphs (3) and (4), a licensee has a right before payment or acceptance to inspect the information and any goods involved at a reasonable

place and time and in a reasonable manner in order to determine conformance to the contract.

(2) Expenses of inspection must be borne by the party receiving the copy, but reasonable expenses may be recovered from the other party if the performance does not substantially conform to the contract and is refused.

(3) If the procedures for the delivery of the copy or for payment agreed on by the parties are inconsistent with an opportunity to inspect before making payment, the licensee does not have a right to inspect before payment.

(4) A licensee's right to inspect is subject to the licensor's interest in confidentiality. If inspection would disclose a trade secret or confidential information of the licensor jeopardize confidentiality or would provide the licensee with the value of the information before payment, the licensee does not have a right to inspect before payment.

(5) A place, method of inspection, or performance standard for inspection fixed by the parties is presumed to be exclusive. If compliance becomes impossible, inspection is as provided in this section unless the place, method, or standard fixed was clearly intended as an indispensable condition the failure of which avoids the contract.

Uniform Law Source: Section 2-513; CISG Article 58(3). Substantially revised.

SECTION 2B-610. REFUSAL OF DEFECTIVE TENDER.

(a) Subject to Section 2B-620, if a tender of performance fails substantially to conform to the contract or the tendering party's previous performance constitutes a material breach, the party to whom performance is tendered may:

(1) refuse the entire performance;

(2) accept the entire performance; or

(3) accept any commercial unit and refuse the rest.

(b) Refusal under subsection (a)(1) or (2) must be within a reasonable time after the tender. A refusal is ineffective unless the party refusing performance seasonably notifies the other party of the refusal.

(c) If a contract specifies a time during which a licensee may examine the performance or exercise rights in the information before accepting or refusing performance, failure to refuse the performance within that time constitutes acceptance unless the time period was manifestly unreasonable under the circumstances known to the parties at the time of the contract.

Uniform Law Source: Combines Section 2-601; Section 2-602; Section 2A-509. Substantially revised.

Reporter's Notes

This section deals with refusal of any type of performance. The word "refuse" is used in lieu of the Article 2 term "reject" because the intent here is to cover more broadly the circumstances under which a party can decline to accept a performance of any type, rather than merely to concentrate on cases of a refused (rejected) tender of delivery as the phrase is used in Article 2. Thus, for example, a party might refuse proffered services under a maintenance contract because of prior breach or of their failure to substantially conform to the contract. The right to refuse tendered performance hinges either on the substantial nonconformity of the particular performance or on the existence of an uncured, prior material breach by the tendering party.

SECTION 2B-611. DUTIES FOLLOWING RIGHTFUL REFUSAL.

(a) After refusal of a transfer of rights or of a delivery of a copy of information, any use or exercise of rights by a licensee with respect to the information, or any action the natural consequence of which would be to reduce substantially the value of the information to the licensor, is wrongful as against the licensor and constitutes a breach of contract.

(b) If a licensee before refusal of a transfer of rights has taken physical possession of copies or documentation relating to the information or has made additional copies, the licensee shall return all copies and documentation to the

licensor or hold them with reasonable care at the licensor's disposition for a reasonable time sufficient for the licensor to remove them. In this case, the following additional rules apply:

(1) If the licensee elects to hold the documentation or copies for the licensor's disposition, the licensee shall follow any reasonable instructions received by the licensee from the licensor with respect to the documents or copies. Instructions are not reasonable if the licensor does not arrange for payment of or reimbursement for the reasonable expenses of complying with the instructions.

(2) If the licensor does not give instructions within a reasonable time after notification of the refusal, the licensee may store the documentation and copies for the licensor's account or ship them to the licensor with a right to reimbursement for reasonable costs of storage, shipment, and handling.

(c) A licensee has no further obligations with regard to the information or related copies and documentation rightfully refused but remains bound by any restrictions on confidentiality, disclosure, or use which would have been enforceable had the tender not been refused.

(d) In complying with this section, a licensee is held only to a standard of care that is reasonable in the circumstances and good faith. Good-faith conduct under this section does not constitute acceptance or conversion and shall not be the basis for an action for damages.

Uniform Law Source: Section 2-602(2); Section 2-603; Section 2-604. Substantially revised.

Reporter's Notes

This section does not give the licensee a right to sell goods, documentation or copies related to the intangibles under any circumstance. The materials may be confidential and may be subject to the overriding influence of the proprietary rights held and retained by the licensor in the intangibles. As Comment 2 to current Section 2-603 states: "The buyer's duty to resell under [that] section arises from commercial necessity ... ." That necessity is not present in respect of information.

The licensor's interests are focused on protection of confidentiality or control, not on optimal disposition of the goods that may contain a copy of the information.

SECTION 2B-612. WHAT CONSTITUTES ACCEPTANCE.

(a) Subject to subsection (b), acceptance of a performance occurs when the party receiving the performance:

(1) substantially obtains the value or access expected from the performance and, without objection by it, retains the value or access beyond a reasonable time to refuse the performance;

(2) signifies, or acts with respect to the information in a manner that signifies to the licensor, that the information and manner of transfer conform to the contract or that the licensee will take or retain them despite their nonconformity;

(3) fails effectively to refuse performance under the terms of the contract or Section 2B-610; or

(4) acts in a manner that makes compliance with the licensee's duties on refusal impossible because of commingling or received a substantial benefit to it or knowledge of valuable information from the information, performance or access which benefit or value cannot be returned.

(b) Except in cases governed by subsection (a)(4) and subject to Section 2B-609(4), acceptance of performance that involves delivery of a copy of information occurs only after the party has a reasonable opportunity to inspect the information and any related goods or document.

(c) If a contract requires performance in stages with respect to portions of the information, or with respect to its performance capacity, this section applies separately to each stage or capacity. Acceptance of any stage or capacity is conditional until completion of the transfer of rights in the completed information or the full capacity required under the contract.

Uniform Law Source: Section 2A-515. Revised.

Reporter's Notes

Subsection (a)(4) focuses on two circumstances that may be significant in information and that differ from cases in goods. In both cases, it would be inequitable or impossible to refuse the performance. The obligation of a rejecting licensee is to return or to keep the information available for return to the licensor. Commingling does not refer only to placing the information into a common mass from which it is indistinguishable; it also includes cases in which software is integrated into a complex system in a way that renders removal and return impossible or where information is integrated into a database or knowledge base that it cannot be separated from. Commingling precludes the licensee's performance of its obligation to return rejected property.

The second situation is illustrated as follows:

> **Illustration 1:** A contracts with B to obtain the formula to Coca Cola and information from B about how to mix the formula. B delivers the formula, but the mixing information is entirely inadequate. What are A's options? First, if the mixing information is not significant to the entire deal, A cannot reject because it received substantial performance. Subsection (a)(1) holds that by retaining the information for a reasonable period, acceptance occurs. A can sue for damages. Second, if the mixing information is significant, a right to reject arises because of a material breach. Even if A holds the information for an extended period, this does not constitute acceptance under subsection (a)(1). However, subsection (a)(4) bars rejection and holds that acceptance has occurred because party A received substantial value by obtaining knowledge of the formula and cannot return that knowledge. Even though it can return copies of the formula, knowledge of the formula would remain. A can sue for damages, but cannot avoid acceptance after the formula is made known to it.

This section must be read in relationship to the reduced importance of acceptance. Refusal and revocation both require material breach in order to avoid the obligation to pay according to the contract. This is unlike Article 2 which follows a perfect tender rule for rejection, but conditions revocation on substantial impairment. Acceptance does not waive a right to recover for deficiencies in the performance.

SECTION 2B-613. REVOCATION OF ACCEPTANCE.

(a) Subject to subsection (b), a licensee may revoke acceptance of a commercial unit that is part of a performance by the licensor if the commercial unit is a material breach of the contract and the party accepted the performance:

(1) on the reasonable assumption that the breach would be cured and it has not been seasonably cured;

(2) during a period of continuing efforts at adjustment and cure and the breach was not seasonably cured; or

(3) without discovery of the breach if the acceptance was reasonably induced by the other party's assurances or by the difficulty of discovery before acceptance.

(b) Revocation of acceptance is not effective until the revoking party sends notice to the other party of it and is barred if:

(1) it does not occur within a reasonable time after the licensee discovers or should have discovered the ground for it;

(2) it does not occur before any substantial change in condition or identifiability of the information not caused by the breach; or

(3) the party attempting to revoke acceptance received a substantial benefit to it or knowledge of valuable information from the information, performance or access which benefit or value cannot be returned.

(c) A party who revokes acceptance:

(1) has the same duties and is under the same restrictions with regard to the information and any documentation or copies as if the party had refused the performance; and

(2) is not obligated to pay the contract price for the performance as to which revocation occurred.

Uniform Law Source: Section 2A-516; Section 2-608. Revised.

Reporter's Notes

Revocation is a remedy for the licensee, but its role in the remedies scheme must be carefully understood. In effect, revocation reverses the effect of acceptance and places the licensee in a position like that of a party who rejected the transfer initially. The effects of acceptance that are most important here include: (i) the licensee must pay the licensee fee for the transfer and is obligated as to other contract duties respecting that transfer and (ii) the licensee essentially keeps the copies or other materials associated with the transfer but subject to contract terms. Revocation does not, however, serve as a precondition to suing for damages. In the

context of information transactions, revocation is not appropriate where the value of the information cannot be returned and is significant. That principle is stated in subsection (b)(3).

[C. SPECIAL TYPES OF CONTRACTS]

SECTION 2B-614. ACCESS CONTRACTS.

(a) In a continuous access contract, access must be available at times and in a manner consistent with:

(1) express terms of the contract; or

(2) to the extent not dealt with by the terms of the contract, in a manner consistent with ordinary standards of the trade and industry for the particular type of contract.

(b) Intermittent or occasional failures to have access available do not constitute a breach if they are consistent with:

(1) standards of the trade;

(2) the express terms of the contract; or

(3) reasonable needs for maintenance, scheduled downtime, reasonable periods of equipment or system failure, or events beyond the licensor's reasonable control.

(c) Information obtained by a licensee through access to the licensor's facility and not related to information provided by the licensee to the licensor is received free of any contractual restriction on use or disclosure but is subject to the intellectual property rights of the licensor or a third party and other applicable law.

Reporter's Notes

This section applies to a "access" transactions. Continuous access contracts constitute a particular and important application of an ongoing relationship that involves tailored application of the general principles and default rules spelled out in an earlier section. "Continuous access" contracts are defined in Section 2B-102. The transaction is not only that the transferee receives the functionality or the information made available by the transfer of rights, but that the subject matter be accessible to the transferee on a consistent or predictable basis. The transferee

contracts for continuing availability of processing capacity or information and compliance with that contract expectation hinges not on any specific (installment), but on continuing rights and ability to access the system. The continuous access contract is unlike installment contracts under Article 2 which have more regimented tender-acceptance sequences. Often, the licensor here merely keeps the processing system on-line and available for the transferee to access when it chooses.

SECTION 2B-615. CORRECTION AND UPDATE CONTRACTS.

(a) If a licensor agrees to correct errors in information or provide similar services, the following rules apply:

(1) If the agreement covers a limited time and is in lieu of a warranty created in this [article], the licensor undertakes that its performance will complete a transfer that conforms to the agreement.

(2) In cases not governed by paragraph (1), the licensor shall perform at a time and place and with a quality consistent with the terms of the agreement and, to the extent not dealt with by the terms of the agreement, in a manner consistent with ordinary standards of the trade for the particular type of agreement, but a party providing the services does not thereby guaranty that its services will correct all defects or errors unless expressly so provided by the agreement.

(b) If a licensor agrees to provide updates or new versions of information, the following rules apply:

(1) The licensor shall make the new versions or upgrades available at a time and place and with a quality consistent with the terms of the agreement and, to the extent not dealt with by the terms of the agreement, in a manner consistent with ordinary standards of the trade for the particular type of agreement.

(2) The licensor does not agree to make available new versions or upgrades that it has not yet made available to the public or relevant customer base and has no obligation to make new versions or upgrades available to the public.

(3) New versions or upgrades provided pursuant to an agreement must conform to the same standards of quality applicable to the information involved in the initial transfer unless the licensor indicates that the compliance is not intended and the licensee accepts a lesser performance.

(c) Breach of the correction or update contract does not entitle the licensee to cancel the underlying contract concerning the information unless the breach causes a material breach of that contract.

Reporter's Notes

1. The section distinguishes between obligations to correct errors and obligations to provide updates. Error correction is discussed in subsection (a), while update contracts are in subsection (b). The default rules are similar, but contain a number of important difference. A licensor has no obligation to provide the licensee with updates or enhancements. It may have an obligation to make an effort to correct errors in cases where a licensee accepted a transfer of rights because the nonconformity was not material and did not justify refusal. See Section 2B-621. In modern practice, contracts to provide updates, generally described as maintenance contracts, are a valuable source of revenue for software providers. The reference to error corrections covers contracts where, for example, a software vendor agrees to be available to come on site and correct or attempt to correct bugs in the software for a separate fee. This type of agreement is a services contract. The other type of agreement occurs when, for example, a vendor contracts to make available to the licensee new versions of the software developed for general distribution. Often, the new versions cure problems that earlier versions encountered and the two categories of contract overlap. Yet, we are dealing more with new products when we are referring to generally available upgrades or new versions.

2. Subsection (a)(1) reflects a core distinction. In some cases, the replacement or correction agreement substitutes for a warranty and should be treated as creating a commitment to achieve the result that the parties originally contemplated in the intangibles contract to begin with.

SECTION 2B-616. SUPPORT CONTRACTS.

(a) A licensor is not required to provide support or instruction for the licensee's use of information or licensed access after the transfer of rights.

(b) If a person agrees to provide support to the licensee, that person shall make the support available at a time and place and with a quality consistent with the terms of the agreement and, to the extent not dealt with by the terms of the

agreement, in a manner consistent with ordinary standards of the trade for the particular type of agreement.

(c) A licensor's breach of a support agreement does not entitle the licensee to cancel the underlying contract concerning the information unless the breach causes a material breach of the underlying contract.

Reporter's Notes

Subsection (b) provides a default rule regarding the time, place and quality of the services that is subject to contrary agreement. The standard reflects a theme of "ordinariness" that provides default performance rule throughout the chapter. It measures a party's performance commitment by reference to standards of the relevant trade or industry.

> **Example:** Software Vendor agrees to provide a help line available for telephone calls from its mass market customers. If this agreement constitutes a contractual obligation, the availability and performance of that help line is measured by reference to similar services or by express terms of a contract.

Subsection (c) deals with the relationship between the support contract and the information contract itself. The support agreement potentially serves as an entirely separate agreement which can be enforced and for which remedies are available independent of the information agreement. On the other hand, in some cases, a failure to support produces a material breach of the information agreement, entitling cancellation of that contract. Just when this may or may not happen, of course, depends on the facts and cannot be predicted in general terms.

SECTION 2B-617. DISTRIBUTORS AND RETAILING.

(a) A licensee who receives information from a licensor for resale or relicense to end users is a retailer for purposes of this section. A licensor who is not a retailer, but contracts with an end user with respect to the information is a producer for purposes of this section.

(b) A retailer is a licensor in its sale or license to an end user for all purposes under this [article].

(c) As to its contract with the end user, a retailer is not bound by but does not receive the benefits of the contract between the producer and the end user.

(d) An authorized retailer who in good faith performs warranty or remedy obligations of a producer under the producer's contract with the end user is entitled to reimbursement of the reasonable costs of such performance from the producer.

(e) If a contract contemplates redistribution of copies of information in the ordinary course under the contract, the distributor shall distribute such copies and the documentation as received from the producer and intended to be distributed.

Reporter's Notes

This section deals with the three party relationship common in modern information transactions, especially in reference to digital products. The section was reviewed only once by the Drafting Committee and the language here makes significant changes based on that discussion. The basic principle is that a retailer is not bound by or benefit from the contract created by the producer through shrink wrap or other means with the end user. That result can be changed by contract, of course. However, it gives the end user two different points of recourse – retailer and producer. To the extent that the retailer performs the producer's warranty obligations, the presumption is that it has a right of reimbursement. This section will be subject to extensive Drafting Committee review during the next year and should be considered tentative in content.

SECTION 2B-618. DEVELOPMENT CONTRACTS; RIGHTS ACQUISITION. If an agreement requires the development or creation of a computer program by the licensor, on request of the licensee, the licensor shall notify the licensee that it used independent contractors in its performance and shall provide the licensee a statement that either confirms that, to its knowledge, all applicable intellectual property rights have been obtained from any independent contractor so used, or that it makes no representation about the status of those rights beyond any stated in the contract. The request must be made no less than 60 days before the transfer of rights and responded to within 30 days after the request. If the term of performance under the contract is less than sixty days, the request must be made at or before the time of contracting and responded to before the transfer of rights.

Reporter's Notes

This section provides important protection for a licensee in development contracts. The basis for the section stems from a problem created under federal intellectual property law, especially as to copyright ownership. Copyright law allows independent contractors to retain copyright control of their work unless they expressly transfer it. The licensee, even if unaware of the contractor's rights, is subject to them since intellectual property law does not contemplate good faith buyer protection. The section places an obligation on the developer of software in a development context to respond to a request of the licensee. This does not supplant warranties against infringement or warranties of title, but sets out a method or structure to potentially avoid those problems. Section 2B-401 deals with the warranty of authority and noninfringement.

SECTION 2B-619. SYSTEM INTEGRATION CONTRACTS.

(a) If an agreement requires a party to provide a single or integrated system consisting of components and the agreement indicates that the licensee is relying on the licensor's expertise to select the components, the components selected if delivered in proper condition must function together as a system substantially as described in the agreement.

(b) In cases governed by subsection (a), acceptance by a licensee of performance with respect to delivery or installation of part of a system is conditional on completion of the system consistent with subsection (a).

Reporter's Notes

This section needs further development. The intent is to distinguish cases in which the obligation is that each element of a system functions well separately and situations where the items are perfect, but do not work together as a system. Components in this sense refer to any discrete element of the system and, especially, the software and hardware elements. This obligation differs from the implied warranty since there is no reliance here on the expertise of the licensor to achieve a particular result other than a functioning system.

[D. PERFORMANCE PROBLEMS; CURE]

SECTION 2B-620. CURE OF BREACH.

(a) A party in breach of a contract, at its own expense, may cure the breach if:

(1) the party in breach without undue delay notifies the other party of its intent to cure; and

(2) the party in breach effects cure promptly, before cancellation by the other party, and within any contractual time period for cure of a breach.

(b) Other than in a mass-market license, if a licensor receives timely notice of a specified nonconformity and demand from a licensee that accepted a performance because a nonconformity was not material and did not allow refusal of the performance or revocation of acceptance, the licensor must promptly and in good faith shall make an effort to cure. Failure to make this effort is a breach of the contract unless the cost of the effort would be disproportionate to the effect of the nonconformity on the licensee.

(c) A breach that has been cured may not be used as a basis for cancellation of a contract.

(d) A cure occurs only if the party in breach:

(1) fully performs the obligation that was breached;

(2) fully compensates, or provides adequate assurance that it will promptly compensate, the aggrieved party; and

(3) provides adequate assurance of future performance.

(e) Failure timely to perform all assurances provided in reference to a cure is a breach that cannot subsequently be cured.

(f) Actions that do not put the aggrieved party in as good of a position as if full performance occurred, or that are part of a repeated pattern of breach and cure, do not constitute a cure.

Uniform Law Source: Section 2-508; Section 2A-513; 11 USC 365.

Reporter's Notes

This section brings together cure principles. The idea that a breaching party may, if it acts promptly and effectively, alleviate the adverse effects of its breach

and preserve the contractual relationship is embedded in modern law. *Restatement (Second) of Contracts* § 237 provides that a condition to one party's performance duty in a contract is that there be no **uncured** material breach by the other party. This section spells out some standards for determining the timing and character of the actions that constitute a cure. This section does not create a "right" to cure. The provisions of subsection (a) will commonly cut off the cure only in cases where it is not prompt and is not related to a material breach. The basic policy is that, when there exists a material breach, the aggrieved party's interests prevail over the vendor's interests. This is different than in Article 2 where the principle deals with minor problems stemming from the perfect tender rule.

SECTION 2B-621. RIGHT TO ADEQUATE ASSURANCE OF PERFORMANCE.

(a) A contract imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. If reasonable grounds for insecurity arise with respect to the performance of either party, the other party may demand in a record adequate assurance of due performance and, until that assurance is received, if commercially reasonable, may suspend any performance for which the agreed return has not already been received.

(b) The reasonableness of grounds for insecurity and the adequacy of the assurance offered is determined according to commercial standards.

(c) Acceptance of improper delivery or payment does not prejudice an aggrieved party's right to demand adequate assurance of future performance.

(d) After receipt of a justified demand, failure to provide within a reasonable time, not exceeding 30 days, assurance of due performance which is adequate under the circumstances of the particular case is a repudiation of the contract.

Uniform Law Source: Section 2-608.

SECTION 2B-622. ANTICIPATORY REPUDIATION. If either party to a contract states to the other that it will not or cannot make a performance still due

under the contract or, by voluntary, affirmative conduct, makes a future performance by it impossible or apparently impossible and the loss of the performance will substantially impair the value of the contract to the other, the aggrieved party may suspend its own performance or proceed under Section 2B-711 or 2B-718 and:

(1) await performance by the repudiating party for a commercially reasonable time; or

(2) resort to any remedy for breach, even if the repudiating party has been notified that the aggrieved party would await the repudiating party's performance and the aggrieved party has urged retraction.

Uniform Law Source: Section 2-609.

SECTION 2B-623. RETRACTION OF ANTICIPATORY REPUDIATION.

(a) A repudiating party may retract a repudiation until its next performance is due unless the aggrieved party, after the repudiation, has canceled the contract, materially changed its position, or otherwise indicated that the repudiation is considered to be final.

(b) A retraction under subsection (a) may be by any method that clearly indicates to the aggrieved party that the repudiating party intends to perform the contract. However, a retraction must include any assurance justifiably demanded under Section 2B-622.

(c) Retraction under subsection (a) reinstates a repudiating party's rights under the contract with due excuse and allowance to the aggrieved party for any delay caused by the repudiation.

Uniform Law Source: Section 2-6-110.

[E. LOSS AND IMPOSSIBILITY]

SECTION 2B-624. RISK OF LOSS.

(a) Except as otherwise provided in this section, the risk of loss as to a copy of information passes to the licensee on receipt of the copy. If the contract does not contemplate that the licensee take possession of a copy, risk of loss passes to the licensee when it obtains control of the copy.

(b) If a contract requires or authorizes a licensor to ship a copy by carrier, the following rules apply:

(1) If the contract does not require delivery at a particular destination, the risk of loss passes to the licensee when the copy is tendered and delivered to the carrier, even if the shipment is under reservation.

(2) If the contract requires delivery at a particular destination and the copy arrives there in the possession of the carrier, the risk of loss passes to the licensee when the copy is tendered so as to enable the licensee to take delivery.

(3) If a tender of delivery of a copy or a shipping document fails to conform to this [article] or to the contract, the risk of loss remains on the licensor until cure or acceptance.

(c) If a copy is to be delivered electronically or the licensee is provided with access to an information processing facility containing the information, risk of loss passes to the licensee upon its receipt of access or a copy of the information.

(d) If a copy is held by a bailee to be delivered without being moved, the risk of loss passes to the licensee:

(1) upon the licensee's receipt of a negotiable document of title covering the copy;

(2) upon acknowledgment by the bailee to the licensee of the licensee's right to possession of the copy; or

(3) after the licensee's receipt of a nonnegotiable document of title or record directing delivery.

Uniform Law Source: Section 2-509.

Reporter's Notes

1. Risk of loss concepts developed for goods are difficult to apply to information because the reduced significance of physical manifestations of the property means that allocating risk cannot depend on the treatment of physical items.

2. While, in many cases, there is no risk of loss element present in a information contract, there are situations where the risk of loss is potentially as significant as it is in the case of transactions in goods. For example, a licensee's data may be transferred to the licensor for processing and destruction of the processing facility may destroy the data. Alternatively, a purchaser of software transferred in the form of a tangible copy may (or may not) suffer a loss when or if the original copy is destroyed (depending of course on whether additional copies were made before that time).

3. This section uses a concept of transfer of possession **or control** as a standard for when risk of loss is transferred to the other party. Unlike in the buyer-seller environment, however, the transfers of control or the like may go in either direction. Basically, the proposition is that the risk passes to the party who has access to, taken possession of copies, or received control of the information.

SECTION 2B-625. CASUALTY TO IDENTIFIED PROPERTY. If a contract requires information identified when the contract is made or to be developed during the contract and the information is destroyed and there is no backup, and these events occur without the fault of either party before the risk of loss passes from the party originally in control of the information, the following rules apply:

(1) The party in control of the information shall promptly notify the other party of the nature and extent of the loss.

(2) If the loss is total, the contract is avoided.

(3) If the loss is partial or the copy or the information no longer conforms to the contract, the other party may nevertheless demand inspection and may either treat the contract as avoided or accept the information with due allowance from the

contract price for the nonconformity but without further right against the other party.

Uniform Law Source: Section 2-613. Revised.

SECTION 2B-626. INVALIDITY OF INTELLECTUAL PROPERTY. If a contract requires the existence or development of intellectual property rights and the intellectual property rights are declared invalid by a court of appropriate jurisdiction, the following rules apply:

(1) The party in control of the intellectual property rights shall promptly notify the other party of the nature and extent of the loss.

(2) The other party may continue performance with due allowance from the license fee for the lost intellectual property rights or may treat the contract as avoided if the rights that were declared invalid were material to the entire contract..

SECTION 2B-627. EXCUSE BY FAILURE OF PRESUPPOSED CONDITIONS.

(a) Delay in performance or nonperformance by either party is not a breach of contract if performance as agreed has been made impracticable by:

(1) the occurrence of a contingency whose nonoccurrence was a basic assumption on which the contract was made; or

(2) compliance in good faith with any applicable foreign or domestic governmental regulation, statute, or order, whether or not it later proves to be invalid.

(b) A party claiming excuse under subsection (a) must seasonably notify the other party that there will be nonperformance or delay. If the claimed excuse

affects only a part of the capacity to perform of the party claiming excuse, the following rules apply:

(1) The party claiming excuse shall allocate performance among its customers and may do so in any manner that is fair and reasonable and shall notify the licensee of the estimated quota made available.

(2) The party at its option may include regular customers not then under contract as well as its own requirements for further manufacture.

(c) If a party receives notice of nonperformance, a delay or an allocation justified under subsection (a) and the nonperformance, delay, or allocation would be a material breach if not justified by this section, the party receiving the notice may:

(1) terminate and thereby discharge any unexecuted portion of the contract; or

(2) modify the contract by agreeing to take the available allocation in substitution.

(d) In exercising its rights under subsection (c), a party shall notify the other party. If the party that is entitled to exercise a right under subsection (c) fails to terminate or modify the contract within a reasonable time not exceeding 30 days after receiving notice under subsection (a), the contract lapses with respect to any performance affected.

Uniform Law Source: Sections 2A-405, 406; Sections 2-615, 616.

[F. TERMINATION]

SECTION 2B-628. SURVIVAL OF OBLIGATION AFTER TERMINATION.

(a) Subject to subsection (b), upon termination of a contract, all obligations that are still executory on both sides are discharged.

(b) The following survive termination of a contract:

(1) a right based on previous breach or performance;

(2) a limitation on the scope, manner, method, or location of the exercise of rights in the information;

(3) an obligation of confidentiality, nondisclosure, or noncompetition;

(4) an obligation to return or dispose of data, confidential information, material, copies, or the like to the other party, which obligation must be promptly performed;

(5) a choice of law or forum, including an obligation to arbitrate or otherwise resolve contract disputes through means of alternative dispute resolution procedures;

(6) a contractual provision limiting the time for bringing an action or for providing notice;

(7) a remedy for breach of the whole contract or any unperformed balance or an indemnity provision; and

(8) a right, remedy, or obligation stated in the agreement as surviving.

Uniform Law Source: Section 2A-505(2); Section 2-106(3). Revised.

SECTION 2B-629. TERMINATION; NOTICE.

(a) Subject to subsection (b), a party may not terminate a contract, except on the happening of an agreed event, such as the expiration of the stated term of the contract, unless the party terminating the contract notifies the other party of the termination,

(b) Access to a facility under an access contract not involving information provided to the licensor by the licensee may be terminated without notice.

(c) An agreement dispensing with notice otherwise required under this section is invalid if its operation would be unconscionable. However, a contract term specifying standards on the nature and timing of notice is enforceable if the standards are not manifestly unreasonable.

SECTION 2B-630. TERMINATION; ENFORCEMENT AND ELECTRONICS.

(a) On termination of a license, a party in possession or control of information, materials, or copies that are property of the other party or that are subject to a possessory interest of the other party, must return all materials and copies or hold them for disposal on instructions of the other party. If the information was subject to restrictions on use or disclosure, continued exercise of rights in the information by the party in possession or control following termination is a breach of contract and wrongful as against the other party unless that use is pursuant to a contractual provision that survives cancellation or that was designated in the contract as irrevocable. The obligation to return does not apply to materials or copies received free of any contractual restriction on use, continued possession, or disclosure other than copies made from materials or copies received on a restricted basis.

(b) On termination, each party is entitled by judicial process to enforce its rights under subsection (a). To the extent necessary to enforce those rights a court may order the party or a judicial officer:

(1) to take possession of tangible objects containing the subject matter of the contract, information delivered to the other party, and information related thereto;

(2) without removal, to render unusable the information or the capability to exercise rights therein;

(3) to destroy any record, data, or files containing the information under the control or in the possession of the other party;

(4) to obtain injunctive relief against any continued use or purported exercise of rights in the information; and

(5) if the agreement so provides, to require the licensee to assemble all materials containing the information and make them available to the licensor at a place designated by the licensor or to destroy electronic and other records or files containing the information.

(c) Subject to Section 2B-322, a party may include electronic means to enforce the rights stated in subsection (a) and apply that electronic means at the end of the license term without judicial process. If termination is for reasons other than expiration of the license term, the party terminating the contract by electronic means must notify the other party before using the electronic means.

(d) Termination by electronic means is not wrongful if consistent with the agreement. Electronic termination inconsistent with the agreement is a breach of contract, unless the termination occurs under circumstances allowing cancellation by the terminating party.

PART 7
REMEDIES

[A. IN GENERAL]

SECTION 2B-701. REMEDIES IN GENERAL.

(a) A court shall administer the remedies provided in this [article] with the purpose of placing the aggrieved party in as good a position as if the other party had fully performed. However, consequential damages resulting from breach are not available for either party unless the agreement expressly so provides.

(b) Except as otherwise provided in a contractual term liquidating damages for breach, an aggrieved party may not recover for that part of a loss that could have been avoided by taking measures reasonable under the circumstances to avoid or reduce loss resulting from breach, including the maintenance before breach of reasonable systems for backup or retrieval of lost information. The party in breach has the burden of establishing a failure to take reasonable measures under the circumstances.

(c) Except as provided in the agreement, rights and remedies provided in this [article] are cumulative, but a party may not recover more than once for the same injury. A court may deny or limit a remedy if, under the circumstances, it would put the aggrieved party in a substantially better position than if the other party had fully performed.

(d) If a party breaches a contract and the breach is material as to the entire contract, the other party may exercise all remedies available under this [article] or the agreement subject to the conditions and limitations applicable to the remedy. If the breach is material only as to a particular performance, the remedies may be exercised only as to that performance. However, if a remedy cannot reasonably be applied to a particular performance, the remedy is not available.

(e) If a party is in breach of contract, the party seeking enforcement has the rights and remedies provided in this [article] and the contract and may enforce the rights and remedies available to it under other law.

Uniform Law Source: Section 2A-523. Revised.

Reporter's Notes

The exclusion for consequential damages reflects the vote of the committee. The sense of the vote was that consequential loss should be available as a measure of damages only if the parties agreed to that position. This proposition was based on a review of ordinary commercial contracting practice and on the idea that the drafters of a commercial statute should reflect what parties would agree to in most cases if the contract were fully and completely negotiated. This position obviously does not affect treatment of personal injury issues under tort law and provides a relevant starting point in reference to allocation of loss and risk in commercial contracts. The committee recognized that, in some cases (such as breach of confidentiality) a carve out for the "no consequentials" rule would be appropriate to deter wrongful conduct or to reflect what typically would be negotiated in a fully negotiated contract, but the committee has not yet fully explored the carve outs that would be appropriate. Comments by both licensee and licensor interests recognized that the exclusion of consequentials was standard practice in negotiated contracts.

SECTION 2B-702. DAMAGES FOR NONMATERIAL BREACH. If a party breaches a contract and the breach is not material, the other party may:

(1) recover any unpaid license fees and royalties for performance accepted;

(2) recover direct damages resulting from the breach as determined in any reasonable manner, together with incidental damages less expenses saved as a result of the breach; and

(3) exercise any rights or remedies provided in the agreement.

Uniform Law Source: Section 2A-523(2).

SECTION 2B-703. DAMAGE TO INFORMATION. In a license, in addition to any other direct damages permitted by this [article] or the agreement, on breach of contract by one party, an aggrieved party who has a property right or interest in the information may recover an amount that will compensate it for any

loss of or damage to the party's interest in the information which was reasonably foreseeable and caused by the breach, as measured in any reasonable manner.

Uniform Law Source: Section 2A-532.

SECTION 2B-704. CANCELLATION; EFFECT.

(a) If a party breaches a contract and the breach is a material breach of the entire contract and has not been cured or the agreement so provides, the aggrieved party may cancel the contract.

(b) Cancellation is not effective until the canceling party sends notice of cancellation to the other party.

(c) Upon cancellation of a contract, a party in possession or control of information, materials, or copies shall comply with the provisions of Section 2B-630(a).

(d) Subject to subsection (e), all obligations that are executory at the time of cancellation on both sides are discharged.

(e) The rights, duties, and remedies described in Section 2B-628(b) survive cancellation of a contract,

Uniform Law Source: Section 2A-505; Section 2-106(3)(4); Section 2-720; Section 2-721. Revised.

Reporter's Notes

This section outlines the remedy of cancellation for either party. Cancellation means putting an end to the contract for breach. This section makes clear that the right to cancel exists only if the breaching party's conduct constitutes a material breach of the entire contract or if the contract creates the right to cancel. Various other sections contain language about when and under what conditions a cancellation is appropriate. In an ongoing relationship, the remedy of cancellation is important to the injured party. Cancellation stems from a material performance problem. Of course, the mere fact that a material breach occurred does not **require** the injured party to cancel. It may continue to perform and collect damages under other remedial provisions.

SECTION 2B-705. SPECIFIC PERFORMANCE.

(a) Upon request of a party other than with respect to a contract for personal services, a court may grant specific performance to an aggrieved party:

(1) if specific performance is possible and the parties have expressly agreed to that remedy in their contract; or

(2) if the subject matter of the performance that was not rendered by the breaching party is unique and can be transferred to the aggrieved party.

(b) A decree for specific performance may include any term and condition as to price, damages, or other relief that the court considers just but must provide adequate safeguards consistent with the terms of the agreement for the confidential information and intellectual property of the party ordered to perform.

(c) An aggrieved party has a right to recover information that was agreed to be transferred to and owned by that party if, after reasonable efforts, that party is unable to effect cover for that property or the circumstances indicate that an effort to obtain cover would be unavailing and the information exists in a form capable of being transferred.

Uniform Law Source: Section 2A-521; Section 2-716. Revised.

Reporter's Notes

In common law, despite the often unique character of the intangibles, the off-setting respect for a licensor's property and confidentiality interests often preclude specific performance in the form of allowing the licensee continued use of the property. One is likely to find courts ruling that a monetary damage award suits the circumstances, unless the licensee's need for continued access is compelling. See *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985); *Johnson & Johnson Orthopaedics, Inc. v. Minnesota Mining & Manufacturing Co.*, 715 F. Supp. 110 (D. Del. 1989). Subsection (b) casts the balance in favor of a party not being required to specifically perform in cases where that performance would jeopardize interests in confidential information or require personal services of the party. Subsection (b) specifies that confidentiality and intellectual property interests must be adequately dealt with in any specific performance award. Article 2A merely allows the court to order conditions that it deems just. This standard is inappropriate for cases involving information assets.

SECTION 2B-706. CONTRACTUAL MODIFICATION OF REMEDY.

(a) An agreement may provide for remedies in addition to or in substitution for remedies provided in this [article], or may limit or alter the measure of damages, including incidental damages recoverable under this [article] such as by limiting the licensee's remedies to return of all copies of the information and refund of the portion of the license fee that exceeds the value already obtained by the licensee from its use or receipt of the information or repair and replacement of copies of the information by the licensor.

(b) A term of an agreement allowing recovery of consequential damages for either or both parties is not enforceable unless the party to be charged with the consequential damages manifested assent to the term.

(c) Resort to a modified or limited remedy is optional, but a remedy or remedies expressly described as exclusive precludes other remedies.

(d) Subject to subsection (e), if the performance of a party breaching a contract in providing an agreed remedy fails to give the other party the agreed remedy, the aggrieved party is entitled to:

(1) specific enforcement of the agreed remedy, or if specific performance is not feasible, to the extent that the agreed remedy has failed, to remedies under this [article]; and

(2) to attorneys fees and other costs associated with enforcing the terms of the agreed remedy.

(e) Failure or unconscionability of an agreed remedy does not affect the enforceability of separate terms relating to consequential or incidental damages unless the damages terms are expressly made subject to the performance of the other remedy.

Uniform Law Source: Section 2-719 (revised).

Reporter's Notes

This section was substantially rewritten to reflect decision of the Drafting Committee at the March meeting and has not subsequently been reviewed. Since consequential damages are no longer presumed unless disclaimed, the section provides a standard for inclusion of such damages. To protect both parties' interests, the standard reflects the highest standard in this article, manifest assent. It is not possible under this provision to obtain consequentials in a record by mere contract terms or even conspicuous terms, they must be assented to by the affected party. Revisions are also made in reference to the treatment of non-performance of an agreed remedy. In the absence of consequentials as a norm, there must still be a standard which gives the potentially breaching party a reason to perform what it agreed to perform. In this draft, that aspect of the relationship is covered by allowing recovery of attorney's fees for the aggrieved party if the other party failed to perform the agreed remedy.

SECTION 2B-707. LIQUIDATION OF DAMAGES; DEPOSITS.

(a) Damages for breach by either party may be liquidated but only in an amount that is reasonable in the light of the then anticipated loss caused by the breach. If a liquidated damages term is unenforceable, the aggrieved party has the remedies provided in this [article] or the agreement.

(b) If a party justifiably withholds or stops performance, the other party is entitled to restitution of the amount by which the sum of payments it made exceeds the amount to which the party withholding performance is entitled under terms liquidating damages in accordance with subsection (a).

(c) A party's right to restitution under subsection (b) is subject to offset to the extent that the other party establishes a right to recover damages under this [article] other than subsection (a) and the amount or value of any benefits received by the party claiming restitution directly or indirectly by reason of the contract.

Uniform Law Source: Section 2-718. Revised.

Reporter's Notes

This differs from Article 2 in subsection (a) in that it concentrates solely on the reasonableness of the amount. This draft continues the presumption that contractual choices should be enforced unless there is a clear, contrary policy reason to prevent enforcement or there is over-reaching. If the choice made by the parties was based on their assessment of choices at the time of the contract, that choice should be enforced. Certainly, a court should not revisit the deal after the fact and disallow a choice made because it later appeared to disadvantage one party.

SECTION 2B-708. STATUTE OF LIMITATIONS.

(a) An action for breach of contract must be commenced within four years after the right of action arose or one year after the breach was or should have been discovered, not to exceed five years after the right of action accrued, whichever is longer. By agreement, the parties may reduce the period of limitations to not less than one year after the right of action accrues.

(b) Except as otherwise provided in subsections (c) and (d), a right of action for breach, including a breach of warranty, accrues when the act or omission on which the breach is based occurs or should have occurred, regardless of the aggrieved party's lack of knowledge of the breach. Breach of warranty occurs when the transfer of rights occurs. If a warranty extends to future conduct, the breach of warranty occurs when the breaching conduct occurs, but no later than the date the warranty expires.

(c) A right of action for breach of the warranty of noninfringement or for a breach involving disclosure of confidential information accrues when the act or omission on which the breach is based is or should have been discovered by the aggrieved party.

(d) This section does not apply to a right of action that accrued before this [article] takes effect.

Uniform Law Source: Section 2A-506; Section 2-725. Revised.

Reporter's Notes

This section combines a discovery rule with a rule that the cause of action accrues when the breach occurs. Discovery concepts are allowed to extend the overall limitations period for one additional year if applicable. The rule that focuses on when the cause of action accrues is the primary rule in this draft. In addition, the reference here is to **conduct constituting a breach**. In the case of ordinary warranties, the warranty is met or breached on delivery, even if the "performance" problem caused by a defect may not surface until much later. Performance, in the sense of the operations of a program is not the measure of when the breach occurs.

[B. LICENSOR'S REMEDIES]

SECTION 2B-709. LICENSOR'S DAMAGES FOR BREACH.

(a) Subject to subsection (b), for a material breach of contract by a licensee, the licensor may recover as damages for the particular breach of performance or, if appropriate, as to the entire contract:

(1) the sum of the following:

(i) accrued and unpaid license fees and royalties and the present value of the total license fees and royalties for the then remaining contract term, less the present value of costs and expenses saved as a result of the licensee's breach and the present value of any incidental damages as of the date of entry of the judgment; and

(ii) the present value of the profit, including reasonable overhead, which the licensor would have received from full performance by the licensee, plus the present value of any incidental damages, all determined as of the date of the entry of the judgment;

(2) accrued and unpaid license fees or royalties as of the date of entry of the judgment for performances accepted by the licensee but not paid; or

(3) damages calculated according to Section 2B-702.

(b) The date for determining present value and the sum of accrued license fees and royalties under subsection (a)(1) is:

(1) if the licensee never received a transfer of rights, the date of the breach;

(2) if the licensor cancels and discontinues the right to possession or use, the date the licensee no longer had possession or the ability to use the information; or

(3) if the licensee's rights were not canceled or discontinued by the licensor as a result of the breach, the date of the entry of judgment.

(c) To the extent necessary to obtain a full recovery, a licensor may use any combination of the measure of damages provided in subsection (a).

(d) Damages under subsection (a) must be reduced by due allowance for the proceeds of any substitute transaction involving the information which was obtained because the transaction was made possible by the licensee's breach.

Uniform Law Source: Section 2A-528; Section 2-708. Revised.

Reporter's Notes

This section gives the licensor a right to elect damages recovery under any of three measures.

SECTION 2B-710. LICENSOR'S RIGHT TO COMPLETE. On material breach of a contract by a licensee, the licensor, in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization, may either complete and wholly identify the information to the contract or cease work on the information. In either case, the licensor may recover damages or pursue other remedies.

Uniform Law Source: Section 2A-524(2); Section 2-704(2). Revised.

SECTION 2B-711. LICENSOR'S RIGHT TO [REPLEVIN] [REPOSSESSION].

(a) Upon a breach of a license by the licensee which is material as to the entire contract, the licensor may invoke judicial process to prevent the licensee's continued exercise of rights in the information and [replevy] [repossess] any copies of the information and any materials transferred by it to the licensee pursuant to the contract. Subject to subsection (b), to the extent necessary to enforce this right, a

court may enjoin the licensee from continued exercise of rights in the information by the licensee and may order that the licensor or [governmental] [judicial] officer:

(1) take possession of any copies of the information or other material related thereto;

(2) without removal, render unusable any copies of the information;

(3) destroy or prevent access to any copy of the information or other information related thereto under the control or in the possession of the licensee or to which the licensee has access; and

(4) if the agreement so provides, require the licensee to assemble all copies of the information and other information relating thereto and make them available to the licensor at a place designated by the licensor which is reasonably convenient to both parties.

(b) The remedies under subsection (a) are not available if the information before breach of a license and in the ordinary course of performance under the license was so altered or commingled as to no longer be reasonably separable or identifiable from other property or information of the licensee to the extent the remedy cannot be administered without undue harm to the licensee's or another person's information or property.

Uniform Law Source: Section 2A-525; Section 9-503. Revised.

Reporter's Notes

1. This section defines the right of a licensor to use judicial process to prevent further use of information after material breach by the licensee. The right accrues on breach, which in context would involve expiration of any contractual right to cure the faulty performance. The right stated here exists only to the extent that the remedy can be administered without undue damage to the information or property of the licensee due to commingling in the ordinary course of performance under the license. The remedy entails a combination of an injunction and destruction or return of tangible copies of the information. Self help issues are in the next section. A right to discontinue a continuous access license is covered in a different section.

2. The section is specifically limited in application to licenses.

3. A right to prevent use is appropriate in a license because the contract restricts use of the information. The right to enforce this does not depend on there being a property interest in the subject matter, but that interest would augment the contractual right. In effect, the right to enforce a discontinuation of use also stems from contractual principles of specific performance. The restrictive license provisions carry with them the implication that a material breach ends the right to use as created by contract. Also, if there are intellectual property rights associated with the material, the remedies most often available in those property law areas give the licensor a right to retake and prevent continued use in the event of infringement. This draft limits the repossession right in two ways. First, the section only applies to licenses. Second, the rights cannot be implemented to the extent they would yield undue harm to property of the licensee.

4. The repossession remedy arises only if there is a material breach affecting the entire contract.

SECTION 2B-712. LICENSOR'S SELF-HELP.

(a) A licensor may proceed under Section 2B-711 without judicial process only if there is a breach that is material as to the entire contract without regard to contractual terms defining material breach and only if acting without judicial process can be done without a foreseeable breach of the peace, risk of injury to persons, or substantial damage to or destruction of information or property of the licensee.

(b) The limitations on a licensor's right to act without judicial process may not be waived by the licensee before breach.

(c) A licensor may not include in the subject matter of a license the means to enforce its rights under subsection (a) unless the licensee manifests assent to a term of the license expressly providing that it may do so. Even if a term authorizes the licensor to include a means to enforce its rights, the following rules apply:

(1) The licensor's use of electronic remedies to prevent further use of the information is subject to the limitations in subsection (a) and Section 2B-711(b). Exercise of the means to prevent further use in circumstances in which the licensee has not committed a material breach of contract constitutes a breach by the licensor.

(2) If the licensor's use of the means to prevent further use of the information damages property or information of the licensee, the licensee is entitled to recover as damages for the destruction or damage of the property any resulting loss in the ordinary course as measured in any manner that is reasonable, in light of the difficulty or ease of restoring or recreating any information that was damaged.

Uniform Law Source: Section 9-503. Revised.

Reporter's Notes

1. In modern practice, self help remedies are being used. This section attempts to draw a balance between the rights of a licensor to specifically enforce it contract and any property rights that it holds as against the rights of the licensee to not be exposed to unwarranted pressure and risk of loss. The remedy applies only in the case of a license. Given the definition of licensor, however, it applies to either party to the extent that the party transferred information to the other under conditions restricting use. Proportionality is introduced by providing in subsection (a) that self-help (electronic or otherwise) can occur only if there is a breach that would be material as to the entire contract independent of what definition of materiality exists in the contract. Thus, under the definition of material breach applicable in the absence of contract terms, there must be a breach by the licensee that substantially threatens or reduces the value of the contract to the licensor. If a licensor acts to use self help and the licensee's breach is not material, the licensor breaches the contract and is exposed to all contract remedies.

2. This proportionality concept is substantially different from the provisions of Article 9 where self help hinges solely on default and the absence of a breach of the peace. A policy consideration exists about whether this greater precondition is justified and whether it will simply result in self help occurring through the creation of an Article 9 interest as an adjunct of a license.

3. Considered together with the prior section, self help remedies are limited in the following manner: (a) **nonelectronic self-help** can occur only if the information is not commingled so as to make damage to the licensee's information or property inevitable, only if there is no breach of the peace or foreseeable risk of injury to persons, and only if there is no substantial damage to the licensee's information or property (irrespective of commingling); (b) **electronic self-help** can occur only if the foregoing conditions are met **and then only** if authorized by a conspicuous contract term, **furthermore, even if the preconditions are appropriate** the licensor is liable for damages caused to the information or property of the licensee.

SECTION 2B-713. LICENSOR'S RIGHT TO DISCONTINUE. In the event of a material breach of contract, a licensor may:

(1) refuse to complete the transfer of rights or copies;

(2) discontinue access by the licensee in an on-line or a continuous access contract; or

(3) instruct any third party engaged in assisting the transfer of rights or performance of the contract to discontinue its performance.

[C. LICENSEE'S REMEDIES]

SECTION 2B-714. LICENSEE'S DAMAGES.

(a) Subject to subsection (b), on material breach of contract by a licensor, the licensee may recover as damages for the particular breach of performance or, if appropriate, as to the entire contract:

(1) the present value, as of the date of breach, of the market value of any performance not provided, minus the present value as of that date of the license fees for the performance, both of which must be calculated in the case of damages for the entire contract, for the remaining contract term plus any extensions available as of right. In addition, the licensee may recover the present value of incidental damages resulting from the breach as of the date of the entry of judgment;

(2) the damages provided for breach of contract under Section 2B-702; or

(3) if a licensee has accepted performance from the licensor and has given timely notice of any defect in the performance, the present value, at the time and place of performance, of the difference between the value of the performance accepted, and the value if there had been no defect, not to exceed the contract price, together with present value of the incidental damages as of the date of the entry of judgment.

(b) The amount of damages calculated under subsection (a) must be:

(1) reduced by any expenses and costs saved by the licensee as a result of the licensor's breach; and

(2) if further performance is not anticipated under the contract, reduced by any unpaid license fees that relate to performance by the licensor the value of which has been received by the licensee, but increased by the amount of any license fees already paid that relate to performance by the licensor the value of which has not been received by the licensee.

(c) Market value is determined as of the place for performance. In determining market value, due weight must be given to any substitute transaction entered into by the licensee based on the extent to which the substitute transaction involved contractual terms, performance, and information that were similar in terms, quality, and character to the information or performance with respect to which a breach of contract occurred.

(d) To the extent necessary to obtain a full recovery, a licensee may use any combination of the measure of damages provided in subsection (a).

Uniform Law Source: Section 2A-518; Section 2A-519(1)(2). Revised.

SECTION 2B-715. LICENSEE'S RIGHT OF RECOUPMENT.

(a) If a licensor is in breach of contract, the licensee, after notifying the licensor of its intention to do so, may deduct all or any part of the damages resulting from breach from any part of the license fee still due under the same contract.

(b) In the case of a nonmaterial breach that has not been cured, a licensee may exercise its rights under subsection (a) only if the contract does not require further affirmative performance by the licensor and the amount of damages to be deducted can be readily liquidated under the terms of the contract.

Uniform Law Source: Section 2-717. Revised.

SECTION 2B-716. LICENSEE'S RIGHT TO CONTINUE USE. On breach of contract by a licensor, the licensee may continue to exercise rights under the contract. If the licensee elects to continue to exercise rights, the following rules apply:

(1) The licensee is bound by all of the terms and conditions of the contract, including restrictions as to use, disclosure, and noncompetition and any obligations to pay license fees or royalties.

(2) The licensee may pursue remedies with respect to accepted transfers or performance, including the right of recoupment.

(3) The licensor's rights and remedies in the event of breach remain in effect as if the licensor had not been in breach.

SECTION 2B-717. LICENSOR'S LIABILITY OVER.

(a) If a licensee is sued by a third party and the licensor is answerable over for breach of warranty or another obligation other than for infringement, the licensee may notify the licensor of the litigation. If the licensee notifies the licensor that the licensor may come in and defend and that if the licensor notified does not do so the licensor will be bound in any action against the licensor by the licensee by any determination of law or fact common to the two litigations, the licensor is so bound unless the licensor after seasonable receipt of the notice comes in and defends.

(b) If a licensee receives notice of litigation against it for infringement or the like in reference to the information or the licensee's exercise of rights therein, the following rules apply:

(1) The licensee shall notify the licensor in a seasonable manner or be barred from any remedy or recovery from or against the licensor for liability established by the litigation.

(2) The licensor may demand in writing that the licensee turn over control of the litigation, including settlement, if the licensor is answerable over to the licensee for the claim or the contract is a nonexclusive license. If the demand states that the licensor agrees to bear all of the expenses and satisfy any adverse judgment or settlement and the licensor provides reasonable assurance of its capability to do so, the licensee is barred from any remedy over against the licensor except for costs already incurred, and the licensor may seek control of the action by appropriate legal remedies unless the licensee after seasonable receipt of the demand turns over control. A licensor who takes over control under this subsection shall act in good faith and with reasonable care to protect the licensee's interests in the litigation and in any settlement.

Uniform Law Source: Section 2A-516; Section 2-607. Revised.