UNIFORM COMMERCIAL CODE
ARTICLE 2B
LICENSES

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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Draft

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With Notes

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PREFACE

This draft reflects substantial changes and new material from the Draft presented at the July meeting of the Conference.

Since the Committee's last meeting, Article 2B has been the subject of discussion among a large number of groups and has received both written and oral suggestions for editorial and other changes from many sources. The materials here reflect many of those comments as well as additional analyses stimulated by the discussions.

This Draft should be reviewed in light of and with reference to the Issues Memorandum prepared by the Reporter for the September meeting. In addition, for substantive commentary and case law citations, prior drafts of Article 2 should be consulted.

The Reporter would like to extend his appreciation to all those who have committed time to the further development of this product project.

LICENSES

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PART 1

GENERAL PROVISIONS

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

Uniform Law Source: UCC 2-102.

Reporter's Note:
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.

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SECTION 2B-102. DEFINITIONS.

(a) In this [article]:

(1) "Access contract" means a contract for access to a resource containing information, resource for processing information, data system, or other similar facilities of a licensor or third parties whether or not performance of the contract also entails access to information resources delivered to or controlled by the licensee. The term includes a continuous access contract.

(2) "Cancellation" means an act by either party which 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 compensation for 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 are not unreasonably disproportionate to the risk assumed by the breaching party under the contract and could not have been prevented by reasonable measures after breach by the aggrieved party. The term includes compensation for losses resulting from the breach in the form of lost profits or opportunity, damage to reputation, lost value in confidential information due to wrongful disclosure, damage

to information other than the subject matter of the contract, damage caused by viruses, and injury to person or property proximately resulting from breach of warranty. The term does not include direct or incidental damages.

(5) "Conspicuous" 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 a reasonably configured electronic agent 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. Except in the case of an electronic agent, a term or clause is conspicuous if it is:

(i) a heading in capitals in a record or display;

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

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

(iv) is so positioned in a record or display 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 that at the time of contracting is intended by the individual to be used primarily for personal, family, or household use. An individual is not a consumer as to a transaction if the person is a licensee of information primarily for business, professional, or commercial purposes, including agricultural, investment management, professional research, orbusiness management.

(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 a similar facility of the licensor or a third party over a period of time and that within the time of agreed availability gives the transferee a right of access at times substantially of its

own choosing.

(8) "Copy" means information that is fixed 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) “Court” includes a judicial, arbitration or similar dispute resolution forum.

(10) “Data processing contract” includes a in which one party processes information of the other. [to be **further** developed]

(11) "Delivery" means the transfer of physical possession or control of a copy of information or communication of a copy to facilities controlled by the licensee or its intermediary.

(12) “Direct [general] damages” means compensation for losses to a party consisting of the difference between the value of the expected performance and the value of the performance received. The term does not include losses resulting from the aggrieved party’s inability to use the results of the expected performance in a commercial or other context, consequential damages, or incidental damages.

(13) "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. The term does not include a common carrier employed or used in that capacity.

(14) “Electronic message” means a record stored, generated, or transmitted for purposes of communication to another party or an electronic agent by electronic, optical, or other similar means. The term includes electronic data interchange, electronic mail, [facsimile, telex and like communications].

(15) "Electronic transaction" means a transaction in which a contract isformed through the use of electronic messages or an electronic response to a message, with or without

review by an individual.

(16) "Good faith" means

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

(17) "Incidental damages" includes compensation for any commercially reasonable charges, expenses, and commissions incurred after breach by the other party 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.

Incidental damages do not include consequential or [direct] damages.

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

(19) “Informational content” means data, text, images, or sounds or similar information intended to communicated to a person in the ordinary use of the information.

(20) "Intellectual property rights" includes all rights in information created under patent, copyright, trade secret, trademark, publicity rights, moral rights, and any similar state or federal law or a similar law of any country that permits a party independent of contract to control or preclude another party’s use or disclosure of information.

(21) "License" means a contract for transfer of rights in information which expressly makes the rights conditional or limited, whether or not it transfers title to a copy of the information. The term includes an access contract, a data processing contract, and a software contract, but not 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.

(22) “Licensee” means a transferee of rights or any other person designated in or authorized to exercise rights as a licensee under an information contract whether or not that contract constitutes a license.

(23) "License fee" means the price, fee, or royalty payable under an information contract.

(24) "Licensor" means a transferor of rights in an information contract whether or not that contract constitutes a license. 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 informational content for the service, the informational content provider is the licensor. A provider of services in a contract within this [article] is a licensor. Except as to transactional data, 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.

(25) "Mass-market license" means a standard form

(i) used in a transaction in a market setting that for the particular type of information is characterized primarily by transactions involving consumers as licensees and whose terms and quantity are characteristic of consumer contracts in that market;

(ii) used in a transaction with a consumer licensee; or

(iii) a contract for support or other services associated with a transaction in paragraph (i) or (ii). (26) "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 who purports to have the knowledge or skill.

(27) "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.

(28) "Receive" means to take delivery of a record or information. An electronic record or information is received when it enters an information processing system in a form capable of being processed by that system if the recipient uses or has designated that information system for the purpose of receiving such records or information.

(29) "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.

(30) "Sale" means the passing of title to a copy of information for a license fee.

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

(32) "Software" means a computer program in source code, object code, or any other form and any data, program description, media, and supporting documentation which are provided by the licensor as part of the transaction.

(33) "Software contract" means any contract to transfer rights in software, including a contract to develop software as a work for hire, whether the software exists at the time of agreement or is to be developed and whether the contract provides for transfer of ownership of or conditional rights in copies of the software or for services to develop, support, or use it.

(34) "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 or method of payment, volume, or delivery time or method of delivery does not preclude a record from being a standard form.

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

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

(37) "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.

(38) "Transactional data" means information pertaining to the terms, parties, addresses, and other characteristics of a contract or transaction.

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

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

Reporter's Notes:

1. **Access Contract** includes the relationship that arises when there is a single access to the resource (e.g., web site) if, under ordinary contract law principles, that access creates a contract or contract-like obligation. The comments to this definition will spell out that we are talking about information contracts and that the relationships here include E-Mail system contracts (i.e contracts for access to E-Mail systems as a resource), EDI services by a provider, as well as web site contracts. The definition may need further refinement to cover the following situation: Lexis provides an integrated environment where the software first queries an on-site copy of a CD-ROM then checks a local network update and obtains the latest information in a seamless internet or dial-up updating.
2. **Cancellation**. Changed to coordinate with Article 2.
3. **Computer program.** Comments need to make clear that the program is distinct from

databases that the program may search or organize. Need to check the definition in the Copyright Act for this term to make sure we have not too seriously deviated from that definition

4. Consequential damages. This draft follows original Article 2. The July Draft did not refer to damage to persons or property. This reflected an effort at boundary drawing with the ALI Restatement and general tort law. It did not, however, expressly exclude liability for that type of damage, leaving the issue to the courts. **This draft replaces that language.** The issue does not relate to products liabililty considerations, but simply to what damages flow from breach of contract. There is no reason in principle to distinguish between economic and other types of loss resulting from contract breach in a direct contract relationship.

Draft Article 2 allows a court to reduce consequential damages if unreasonably disproportionate to the risk assumed by the breaching party. A motion to delete that phrase was defeated on the floor of the Conference by a large vote. Based on that vote, the clause is inserted here for Committee consideration.

Based on suggestions by several groups, the definition includes illustrative types of consequential damages, some of which are problematic without guidance in the statute. The issulstrations in this section raise the most significant of these. **The Committee should consider whether the following should be considered direct or consequential:: 1) damage to confidential information by disclosure, 2) damage to computer programs or informational content associated with the same system, 3) damages caused by viruses.**

5. Conspicuous. Deletes reference to contract term as not needed. The prior draft allowed caps to suffice in all cases. Based on a number of comments, the sub (i) definition was changed to revert to original Article 2. Several commentators ask: should there be a safe harbor for electronic agents? My view is that the general definition suffices.

This draft edits language about conspicuous with reference to electronic agents. "Conspicuous" in a message received by an electronic agent refers to the ability to act on the term; that is, the term must be in a form that can be processed and understood by the computer. It need not be otherwise separated out in the machine situation. If an electronic message (e.g., E-Mail) is used and a human reaction is intended, the other provisions of this definition apply. The electronic message suffices if it is designed to invoke such a response from a "reasonably configured" electronic agent, a concept that will be spelled out in the commentary to indicate that it intends an analogous construct that parallels the reasonable man standard used for the general concept of conspicuous.

6. Consumer: Original Article 2 does not contain a definition of "consumer", but relies on current Article 9's definition which, in turn, produces the focus on acquiring property *primarily* for personal or household uses. This section follows revised Article 2, except that revised Article 2 refers to the time of "delivery" as the point at which intent is measured. This is not consistent with case law. Also, the difficulty with that focus is that the idea of "consumer" refers to restrictions on contracting practice. While in many cases, intent will not change from the time of contract to the time of delivery, when such changes occur, we are retroactively changing the rules of the contracting game based on changes in the buyer-licensee's intent. The issue is more important in Article 2B than in Article 2 since many contracts in Article 2B are on-going relationships.

This Draft also clarifies some uses that are not *personal or household*. The reference to professional research results from an issue frequently faced in the information industry. Is a college student using an on-line system or a computer program for academic research or writing is a "consumer." The last sentence is taken from Regulation E.

Any definition that relies on the idea of "primary" use will be unclear at the perimeters. That is true now in Article 9 and will be true in Article 2. European directives and treaties use a different approach. They define "consumer" as someone entering into a contract outside her business or profession activity.

In this draft, "consumer" is used in the definition of mass market licenses. It plays a significant role. Depending on the committee's resolution of mass market issues, the idea of a

consumer as compared to a non-consumer transaction may have general importance.

7. Continuous access: Edited to indicate that definition might also apply to cases where contract calls for availability during afternoons only and does not allow for access whenever the licensee desires outside that time period.

8. Copy: Edit intended to avoid confusion with defined term "record" and to use language that has common meaning in the Copyright Act, corresponding this statutes to case law developing in that field about when a copy occurs. Case there hold that a copy does not require permanence, but cannot be purely transitory, such as an image on a screen. Courts hold that moving information into a computer memory constitutes making a copy of that information.

9). Court: This definition raises the question of whether the committee wishes to extend the power to make choices, such as on conscionability, available to officers of non-judicial forums.

9. Data: Deleted. To the extent this is an important variable, it is covered within the idea of information content.

10. Delivery: Edited for clarity with no change in substance. Notice, that a distinction occurs between a "record" (form of notice or agreement) and a "copy" (manifestation of the information itself).

11. Direct damages: "Direct damages", "Incidental damages" and "Consequential damages" are defined terms. The Draft adds a definition of Adirect damages@ in part to provide guidance on the distinction among the types of damages for purposes of interpreting disclaimer and other language in contracts. Direct damages are essentially 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.

A dispute exists between at least two commissioners on whether this concept should be labeled "direct" or "general" damages. Direct appears to be the more common term in commercial discussions. General may more accurately reflect the common language. The edits here are primarily for sake of clarification.

The goal of the definition is to provide guidance in contract drafting and to clarify terms central to the treatment of damages in this Article. The second sentence is added to reject cases that incorporate expected benefits (e.g., consequential damages) within direct damages. Thus, one case held that defects in a system under a contract that disclaimed consequential damages included all the lost benefits that the party expected from the deal (a total far in excess of the purchase price and incorporating what would ordinarily be consequential loss). The query is: if we have software purchased for $1,000 which, if perfect, would give profits of $10,000 and the thing is totally defective, should the "value" of the software be considered to be "$10,000 or $1,000 as "general" damages? The answer here is $1,000. Similarly, if a virus in a program causes $10,000 loss, but the program otherwise fully performs, should that $10,000 be direct or consequential loss? Again, the answer describes this as consequential loss.

12. Electronic Agent: The 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. The term plays an important role in shaping responsibilities and how parties comply with various conditions, such as an obligation to make terms conspicuous. Courts may ultiamtely conclude that an electronic agent is equivalent in all respects to a human agent, but this Draft does not go so far, making specific provisions relating to electronic agents when needed. The accountability of a party for actions of a computr program may hinge on different issues than accountability for a human agent.

12. Electronic Message: The edit attempts to deal with the breadth of alternatives that may ultimately come available. The objective is cover all types of electronic and mechanical transmission systems. Additionally, it is not possible to refer to transfer from one system to another. An E-Mail conducted entirely within the America On-line system is an electronic

message. The bracketed langauge raises the question of whether this draft should follow the UNCITRAL Model Law and cover fax, telex and similar electronics?

13. Electronic Transaction: Edited for clarity and to indicate that the controlling factor is not the intention of a party. Of course, intent issues arise in whether a message is an offer or an acceptance.

14. Good Faith: Edited to be consistent with vote on the floor of the Conference in discussion of draft Article 2. As voted on by the conference, the definition extends the duty of good faith in the form of fair dealing to consumers, rather than alternatives that would restrict the concept to honesty alone or that would limit the broader concept to merchants only. The idea of a non-merchant duty of fair dealing would, in the context of this article, probably encompass uses of information, such as computer programs, that may not violate express terms, but represent unfair dealing.

15. Goods: Deleted. Article 2 should edit to exclude any uncertainty about overlap with reference to electrical impulses.

16. Informational Content: This definition is intended to cover materials (facts, images) whose ordinary use communicates knowledge of to a human being or organization. Thus, for example, in a database of images contained on a CD-ROM along with a program to allow display of those images, the program is not information content, but the images are. Similarly, when one accesses Westlaw and uses their search program to obtain a copy of a case, the search program is not informational content, but the text is within the definition. The reference here is to the effect of the information in its normal use.

17. Intellectual Property Rights: The edits are intended to make the definition inclusive and capable of responding to new developments in national and international law, such as the development of non-copyright database protections. With respect to each area of law referenced here, of course, the relevant law itself defines what rights are and are not covered. Whether this affects contract limitations pertaining to the information has been debated, but subject to misuse and other regulatory concepts that go beyond this statute, the general approach in courts is that a property right need not exist in order to have an enforceable contractual limitation.

18. Intermediary: Deleted. Several observers and one commissioner recommended deletion of 2B-321 (intermediaries) and, if agreed to this mandates deletion of this definition. The former last sentence regarding common carriers is moved to the definition of electronic agent.

19. License: The linchpin of this definition lies in the conditional nature of the rights transferred. At least some conditions must be express, rather than implied. Some have suggested that fully "implied licenses" should be included. These arise, for example, where a court concludes that, to make the transaction a reasonable one in light of the parties' expectations, some rights or limitations not made express should be inferred (e.g., where intent was to transfer ownership, an implied license may be inferred if the ownership transfer was ineffective). Many such transactions are within this Article, including any transaction where some rights are implied in any otherwise conditional transaction. We do not include implied in law licenses such as occur under first sale rules in copyright relating to the sale of a copy of a book. As noted by the Federal Circuit Court of Appeals, a sale can be made conditional on intellectual property rights (e.g., patent in that case) and, similarly, while a sale of a copy transfers some copyright rights under federal, the licensor retains control of a great deal of the copyright law's exclusive rights even as to that copy. A license deals with control of rights of use and the like with reference to the information, while title to the goods deals simply with that - title to the goods.

20. Licensor and Licensee: These are generic terms. Changes in the text to clarify that these terms are used not only in reference to "licenses" but in reference to other contract covered by the Article (e.g., a development contract in which the licensee obtains ownership of the copyright in the software). In the definition of licensor, several specific illustrations are used to avoid confusion in cases where more than one party transfers information, that is, where the parties exchange information or performance.

21. Mass Market License: Please refer to the issues memo for a discussion of the issues raised under this definition. This is a key term whose definition has been difficult. What we are trying to capture is the difference between a mass marketplace and non-mass market transactions in which standard forms are employed (e.g., a transaction between Xerox and IBM for a group of Xerox copiers). The problem comes in defining a mass market as compared to any other market. Suggestions have included: "retail", "transacted in a market predominantly used by consumers," etc.

During the floor discussion at the annual meeting, significant sentiment was expressed about the $1,000 dollar cap. Some form of escalator should be adopted. Additionally, questions have been raised about how the draft deals with modular forms where a party picks and chooses among existing, optional clauses. The elusive nature of the definition, of course, is one reason to reconsider whether we shouldn't scrap the concept and refer simply to consumer licenses. At least most people think they know what this means.

The proposed definition combines a focus on the market context (mostly consumer), the type of product, and the general terms of the transaction. Basically, a business (of whatever size) receives mass market purchaser treatment if it acquires in a context and under terms characterized by a consumer-driven mass market.

> (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.

22. Receive: This definition covers receipt of both messages and performance in an information contract. Electronically, the occurrence of receipt hinges on sending the electronic record or information to a designated system in a form capable of being process by that system. The draft places the burden of determining what format is appropriate for that system on the person sending the message or performance. One Commissioner has suggested that this should be reversed to place the burden on the recipient to designate the form and, failing that, to allow receipt even if not capable of being processed by the system. Consider: I order a copy of Lotus Notes from IBM and direct them to transfer the copy electronically to my computer (Compaq, but I forget to mention that). They do so, but the software is in Apple format. Have I received performance?

23. Sale: The definition goods comes from Article 2 and presents few problems. With respect to information, however, a distinction is made between title to the copy and title to the information. Title to information essentially means that the transfer is free of any restrictions, express or implied, on the use, reproduction or modification of the information.

24. Signed: The coordination committee suggested that the draft move to authentication in lieu of signature as the operative concept in Article 2B, reflecting that electronics are not like traditional signatures. That would be the preferable approach and should be adopted by the Committee.

"Authenticated @ 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.

The goal is to parallel general signature rules, but clarify the adequacy of electronic or encryption concepts. The basic definition has been modified to accommodate the fact that symbols here may not be contained in the same record that contains the information being authenticated. The rle here allows a form of incorporation by reference.

The second and third sentences deal with issues of proof and lay out safe harbors to facilitate practice in this area. Sentence two deals with the effect of complying with an agreed procedure. By making compliance equivalent to a signature as a matter of law, the definition takes out the intent issue and adds certainty. The intent issue is a common one in automated systems. For example, a recent New York case held that a name imprinted by automatic functioning of a fax machine did not constitute a signature because the intent was not present to authenticate the specific document.

The third sentence deals with issues of proof in an environment where it may not be feasible to retain the symbol (electronic). On the issue of dealing with proof of signature, the comments will clarify that various standards might apply here since concepts of adequacy of proof and degree of appropriate security vary depending on the commercial context, including the dollar amounts and type of information involved. It has been suggested that the definition of signature provide for the ability of a disabled person to make a signature.

The idea of authentication relates to manifesting assent. Any act that is an authentication qualifies as a manifestation of assent. On the other hand, not all manifestations of assent constitute authentication. For example, tearing open a package may manifest assent to terms, but cannot be a signature.

25. Standard form: The coordinating committee recommended that Article 2 conform to Article 2B on this definition. The definition needs to be evaluated in light of modularity that can occur in contracts in electronic form. One approach is to provide that a record remains a standard form even if the licensor selects among an array of available standard terms to suit the particular transaction so long as there is no negotiation of selected terms.

26. Standard term: One observer suggests that this can be deleted since the term is only used as part of more general standard form-related definitions. Unlike in Article 2, no substantive provision hinges on a term being a standard term. The current draft leaves the definition in to provide a framework for the other definitions. The coordinating committee recommended that Article 2 conform to Article 2B on this definition.

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 software or licensed 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 , whether or not development, discovery, compilation, or transformation in fact

occurs.

(b) Except as otherwise provided in subsections (c) and (d), 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 both information and goods, this [article] applies to the information and to the copies of the information, its packaging, documentation pertaining to the information, or any related agreement to support, maintain, develop or modify software or licensed 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 employment of an individual who is not an independent contractor or for the performance of entertainment services by an individual or group;

(2) to the extent not related to computer software, an access contract, or a database contract, 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; or

(3) 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.

Committee Votes:

a. Committee voted 10-3 to reject a proposal to limit the scope of the article to "coded", "digital", "electronic" or similar concept.

b. On reconsideration, the Committee voted 10-0 to limit the scope to licenses of all information and software contracts.

c. Voted 9-3 to reject a proposal to include all patent and trademark licenses in the Article.

Selected Issues:

a. Should authors' contracts in the publishing industry be excluded?

b. Should the Committee reconsider the exclusion for patent licenses?

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 close issues. For transactions in information other than 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 paper or other material used in the copies, law dealing with 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. The revisions of (a) are or clarity and simplification based on comments from commissioners. While several observers indicate that subsection (b) is unnecessary and redundant, potential overlap issues should be addressed. The remaining provisions of the scope section deal with the interface of 2, 2A and 2B.

4. Edits also seek to simplify the exclusions. Based on a suggestion from the floor of the annual meeting, comments will make it clear that manuals delivered in connection with software are covered under Article 2B. The exclusion in subsection (c)(1) deals with employment contracts and services agreements related to entertainment (e.g., actor, musical group performance, producer, etc.). **Especially as to the entertainment industry, the scope of this exclusion needs to be explored with industry representatives.** In all of the excluded cases, however, the personal services contracts involve law with different assumptions on default provisions than here. Given the scope adopted by the Drafting Committee, these contracts would not fall within the scope in most cases; exclusion makes this clear. **Representatives of the movie and publishing industries have suggested that the Committee consider exclusion of**

talent and author contracts generally (e.g., the upstream portion of the industry).

5. The prior draft contained an exception for professional services. This exception is not needed given the scope definition and the fact that regulatory standards of regulated professions will supersede basic contract principles. **The Committee should consider whether guidance should be given in this draft about dealing with professional (law firm) websites or software?** One group has suggested that the over-ride be made explicit in section 2B-104.

6. Subsection (c)(2) contains the exception adopted at our last meeting. Comments at the Annual Meeting suggested that this might be reconsidered and a more comprehensive treatment of licenses adopted. At a meeting with representatives of the American Intellectual Property Law Ass'n, this idea was suggested for consideration as a groups affected by such proposal.

7. The former exception for Article 9 transactions was deleted as unnecessary. In a pure security interest transaction, Article 9 governs under subsection (b).

8. Several commissioners raised concerns about the scope and meaning of subsection (c)(4) and this has been an on-going problem. Clearly, the subsection excludes and shifts to Article 2 information programs such as airplane navigation or operation software in the airplane, software that operates automobile brake systems, and the like. Most likely, it will not be possible to draw a bright line. Comments will attempt to clarify this by citing examples from case law and other sources. **Also, we need to develop a definition of the term "information processing system."**

9. The comments will also discuss the role of application by analogy of this Article in context of the history of reasoning by analogy in other contexts. See, e.g., the discussion of applying Article 2A to leases of other personal property.

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); 2A-104(1)
Cross Reference: 2-104 (revision draft)
Coordination Meeting: Coordinating Committee recommended that Article 2 conform to 2B-104(b).
Selected Issues:

1. Are the coordination provisions relating to consumer law and electronic contracting appropriate or should they be narrowed (or expanded)?

Reporter's Notes:

1. This section lists applicable law that may affect information contracts, but that is not displaced by this article. Subsection (a) reflects the diversity of statutory and common law regulation of aspects of law relating to information assets. The intent is to focus this article on voluntary contractual arrangements and to not disturb any regulation that compels disclosure or other rights of access to the materials. This Article leaves undisturbed the law relating to privacy and personality rights. While these rights may be the subject of a license agreement which falls within this article, the underlying property right is not affected by the UCC. For example, a state may hold that individuals have rights to control use of data concerning them. A licensee of a computer database of addresses would have to deal with the fact that each individual may be the required licensor. This article would not affect those individual rights, but would deal with contract terms and remedies. While privacy and public access laws are especially relevant for the increasing commercial use of information, this article deals with contract law, not property rights and, thus, leaves to these other contexts the development of appropriate rules on information as property. There are, however, provisions in this article that create a contract principle based on a theme of protecting a licensee's privacy interests. As recommended by a bar association group, the comments to this section will contain illustrations suggesting the type of statutes referred to in subsection (a)(1).

2. The Article is also, of course, subject to preemptive federal law rules. Modern federal intellectual property law contains some limited contract rules. This draft, however, deletes specific reference to federal law which, of course, governs under concepts of preemption regardless of the terms of this statute. Article 2, however, does contain a reference to federal law and the three articles should coordinate on this. The Coordinating Committee recommended that Article 2 drop the federal law reference.

3. Given the functions of subsection (a), the Committee might include a reference to professional regulations in the case that a transaction involving a lawyer or medical professional comes within the scope of this Article.

4. Comments will make clear that the consumer law reference in (a) covers both case law and statutory law.

5. In reference to consumer protection or other laws regulating contracting practice, a balance needs to be drawn, preserving the important policies and diversity of these laws, but extending the effectiveness of important innovations in the UCC in reference to electronic contracting. How, for example, will statutes requiring a written agreement be affected by and interact with the approach in this article to replace writings with a general concept of a record? The approach adopted involves setting out a presumption that the other law controls, but then identifying aspects of other law in subsection (b) where it is appropriate to reverse that presumption as to those particular rules.

6. The goal of the exceptions in subsection (b) is to implement Article 2B concepts concerning electronic contracting and digital signatures. We have expanded the idea of a writing

and a signature to include, respectively, a record and authentication. Conspicuous is defined to deal with electronic contexts. In all of these respects, the electronic concepts were simply not at issue in the development of existing consumer law and adjustments are now appropriate in order to promote uniformity and certainty in commerce that, for this and related industries, is truly interstate and national in nature. There is no effort to alter content terms, such as whether a disclaimer can be made, what language must be used, and like issues. Digital signature laws in Washington, Utah and proposed in other states adopt a similar reconciliation approach, defining actions that comply with their requirements broadly to comply with writing, signature and similar requirements in **all state laws.**

7. The terms of subsection (b) are designed to achieve optimal impact of the electronic contracting rules developed here and in Article 2. Some have expressed concern about the preemptive effect created, but it provides for implementation of important principles that permeate this Article. **The Coordination Committee recommended that Article 2 conform to Article 2B in this respect. After review, the Article 1 revision committee may elect to move this into revised Article 1.**

SECTION 2B-105. APPLICATION TO OTHER TRANSACTIONS. The parties to a transaction not otherwise governed by this [article] or excluded from this [article] by operation of Section 2B-103 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] [consumer] license. The agreement is effective to the extent that it covers issues that could be resolved or controlled by the parties by contract.

Sources: None.
Coordination Meeting: Coordinating Committee recommended that Article 2 conform and the approach be considered for possible inclusion in Article 1.
Selected Issue: Is there any reason to preclude parties from opting out of law under another Article of the Code on an issue they can control by contract in a non-consumer transaction?
Reporter's Notes:

1. This Section makes explicit an approach that has been generally discussed with respect to party autonomy and the rules of Article 2. The basic concept is that a contractual election to apply the provisions of this article performs functions analogous to a choice of law clause in a contract. By agreement, the parties are able to determine, for example, that the warranty rules of this article are appropriate in a contract involving services unrelated to information assets. If there are no barriers in the state to the use of these rules, the choice of law made by contract governs. The exclusion for consumer contracts assumes that it is appropriate to restrict such agreements where consumers are not likely to understand or have access to understanding the differences in law.

2. The rule does not apply to consumer contract. Also, this draft deletes an exclusion to the contract autonomy rule for cases involving laws under other articles of the UCC. If the other articles allow modification by contract, an opt in alternative for this (or any other) article merely implements that contract choice option.

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

Alternative A

(a) A choice of law clause is enforceable.

Alternative B

(a) A choice of law clause is enforceable. However, in a consumer license, a choice of law clause that selects the law of a jurisdiction other than the jurisdiction whose law would apply in the absence of the clause is not enforceable to the extent that giving effect to the clause would deny the licensee the benefit of fundamental protections available to it under that otherwise applicable law.

(b) If there is no enforceable choice of law clause, the following rules apply:

(1). Except as otherwise provided in this subsection, 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.

(2) Except in an 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 non-delivery, the state in which receipt was to have occurred.

(3) If the jurisdiction selected under subsection (b)(1) is outside the United States, subsection (b)(1) 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:

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

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

(c) 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: Restatement (Second) of Conflicts ' 188;Section 1-105; Section 9-103.
Coordination Meeting: These issues are unique to Article 2B.
Selected Issues:

1. Is a general validation of choice of law agreements desirable for on-line and other information contracts since that choice of law clause remains subject to general consumer laws and to invalidation of unconscionable provisions?

Reporter's Notes:

1. During the Drafting Committee meeting in January, 1996, substantial sentiment was expressed to enhance the certainty of enforcement of choice of law rules and to apply more broadly the principle of freedom of contract. Subsection (a) generally validates choice of law agreements. In Alternative A, the clause is enforceable without further issues. Comments from the floor of the Conference, including comments from a consumer advocate, indicated that invalidating choice of law or controlling it in the mass market was not essential, as contrasted to choice of forum for consumer protection. With the limited exception of Article 2A and cases involving mandatory consumer rules with respect to which a particular state invalidates choice of law, no body of current law in the U.S. precludes choice of law enforcement. Neither the Restatement, the current provisions of Article 1 or Article 2, nor the provisions of revised Article 2 place special consumer protection restrictions on choice of law. Alternative A was recommended and strongly supported by members of a committee of the New York City Bar Association. It conforms to the basic commercial law concept that contractual relationships should govern. It provides a potentially important base for operation in the context of the national information infrastructure, while an alternative rule would significantly impinge on that base, essentially forcing an on-line system to comply with and learn the law of all fifty states.

2. Alternative B makes a limited incursion on freedom of choice of law, precluding the denial of fundamental protections. The draft focuses that incursion on consumer licensees. There is no body of law in this country that restricts choice of law in contracts between two merchants.

3. There was virtually no support and strong dissent from the terms of the prior draft which would limit choice of law in consumer transactions to either the licensor's location of the consumer's location. These were uniformly seen as arbitrary restrictions, not necessarily connected to the transaction or the nature of the transactional environment. The former language of the mass market choice of law rule in this section provided:

> 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.

4. Under current law, software contracts are governed largely by Article 2 which does not have a choice of law rule. Thus, the governing rule is in Article 1-105 which allows a choice of law clause to govern in any case where the chosen state has a "reasonable relationship" to the transaction. At least one court suggests that this rule applies to other licenses. This rule provides special protection for consumer cases.

5. Article 2A provides a more limited rule for *consumer* leases, restricting the choice of law to jurisdiction in which the lessee resides on or within thirty days after the contract becomes enforceable. ' 2A-106. That rule is inappropriate for the highly mobile, intangible

property involved in the subject matter of this article. It would create, for example, a situation in which an on-line provider would be subject to the law in all fifty states and unable to resolve this by contract. That would be true even if no discernible consumer protection interest justified the contractual choice limitation. That rule does not exist under Article 2 or under generally applicable rules in Article 1 or, indeed, under the Restatement. As a consumer protection matter, it assumes that the domicile is more protective than any other state law. As a matter of logic, that **cannot** be true in all cases. Thus, the residence rule actually harms the consumer as often at it helps her. The licensor interest, especially in on-line transactions, is in uniformity and being able to control the number of divergent laws with which it must comply.

Illustration 1: AOL provides on-line services throughout the United States and has its chief offices in Virginia. Under the proposed draft, in a contract with a [consumer] [mass market individual] who resides in Oklahoma, the contract may choose the law of Virginia (licensor location) or Oklahoma (licensee residence). If it purports to choose Alaska law, that choice of law is enforceable except to the extent that it denies the licensee significant protections that would be available to it under Virginia or Oklahoma law.

6. 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 licensors location as encouraging certainty and expediting commercial transactions. The argument favoring choice of the licensors 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 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 licensees 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 licensees 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.

7. 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 licensors 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) A clause in a contract that chooses an exclusive judicial, arbitration, or other dispute resolution forum is valid unless, in a [consumer license] [mass market license involving an individual], the forum selected is a judicial forum that would not otherwise have jurisdiction over the licensee and the selection unfairly disadvantages the licensee.

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

Uniform Law Source: Section 2A-106. Substantially revised.
Coordination Meeting: This issue is covered only in Article 2B.
Selected Issue:

1. Should restrictions on forum selection be limited to consumer contracts in light of a modern pattern in U.S. law enforcing forum selection in most contracts, including standard form agreements?

Reporter's Notes:

1. This section deals solely with choice of exclusive forum. The changes respond to virtually uniform comments that indicated that a limitation to specifically negotiated clauses in non-mass market contracts was inappropriate and provided no substantive guidance. Modern case law generally enforces choice of forum clauses, even if contained in unread and highly formalistic contract forms. In Bremen v. Zapata Offshore Co., 407 U.S. 1, 10 (1972), the Supreme Court noted that choice of forum clauses in commercial contracts are "prima facie valid." This case law in most states does not differentiate between standard form and negotiated contracts involving commercial parties.

2. A number of comments have been received questioning what meaning attaches to the term "unfairly disadvantage." The intent it to track modern law on when choice of forum clauses are invalidated. Comments will spell out the factors, which tend to require extreme inconvenience to the affected party. There will be further research to determine if courts frequently use a different phracse to capture this idea.

3. A question remains about scope of the section. This requires, once again, a judgment about whether the operative focus is on consumer protection or protection of consumers and businesses. The bracketed language assumes that the operative question here raises the issue and would focus on consumer protection. Even at that level, the section provides consumer protections that are not necessarily available under current law in all states. The Supreme Court has enforced a choice of forum in a form contract involving a cruise line even though the choice effectively denied the consumer the ability to defend the contract and the choice was contain in a non-negotiated form and not presented to the consumer until after the tickets had been purchased. See Carnival Cruise Lines, Inc. v. Shute, 111 S.Ct. 1522 (1991). There is no case law going that totally invalidates consumer choice of forum clauses. The Supreme Court's comments in that context have some relevance to Internet contracting:

> [It would] be entirely unreasonable to assume that a cruise passenger would or could negotiate the terms of a forum clause in a routine commercial cruise ticket form. Nevertheless, including a reasonable foum clause in such a form well may be permissible for several reasons. Because it is not unlikely that a mishap in a cruise could subject a cruise line to litigation in several different fora, the line has a special interest in limiting such fora. Moreover, a clause establishing [the forum] has the salutaory effect of dispelling confusion as to where suits may be

brought…. Furthermore, it is likely that passengers purchasing tickets containing a forum clause … benefit in the form of reduced fares relfecting the savings that the cruise line enjoys….

4.. Comments to this section will make it clear that the section does not deal with arbitration or other alternative dispute resolution clauses. The law regarding that field is characterized by substantial federal preemption and specific, existing state law rules that should not be disturbed here.

[deleted]Reporter's Notes: The provisions of this section have been moved to and expanded in new Section 2B-602.

SECTION 2B-108. BREACH.

(a) Whether a party is in breach is determined by the terms of the contract and 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. In the absence of express contractual terms, if the circumstances language of the contract, expectation of the parties, and character of the breach indicate that the breach caused or may cause substantial harm to the interests of the aggrieved party, that the injured party will be substantially deprived of the benefit it reasonably expected under the contract, or if it meets the conditions of subsection (c) or (d).

(c) A breach is material if it involves:

(1) a failure to perform in a manner consistent with express performance standards;

(2) knowing or negligent disclosure or use of confidential information of an aggrieved party not authorized by the license;

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

(4) an uncured [substantial] failure to pay a license fee when due which is not justified by a bona fide dispute about whether payment is due.

(d) A material breach occurs if the aggregate effect of the non-material 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.
Coordination Meeting: Article 2 and 2A to conform to Article 2B.
Selected Issues:

1. Should it be made clear that breach of an express contract condition constitutes a material breach?

2. Should Article 2B adopt the approach of Article 2A that **any** non-payment of a license fee constitutes a material breach allowing cancellation, rather than limiting that to **substantial** non-payment?

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 ' 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. In this draft, subsection (b) is amended to include language paralleling an important element of the common law concept of materiality - whether there is a significant deprivation of the expected contractual benefit. Also, **Subsection (b) makes clear that a contract that provides that a particular breach of contract is material will control in determining materiality.** This is true with respect to virtually all modern law and reflects the idea of contractual flexibility. That rule is true here 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. 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 Art. 25.

5. Subsection (c) is amended to include an important aspect of material breach - the failure to comply with express contract performance criteria. This mirrors ideas of express contractual conditions parallels common law notions of express conditions, breach of which

permits cancellation or otherwise excuses non-performance by the injured party. It solves a problem for licensees in cases where the contract requires software to meet particular performance standards. Failure to do so constitutes a material breach.

6. A major issue should be addressed about whether this Article should correspond to Article 2A and Article 9 (at least by implication), both of which provide that any failure to pay (substantial or not) that is neither waived nor cured is in effect a material breach justifying cancellation and repossession. No reason appears why licenses should not follow a similar rule.

SECTION 2B-109. 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; 2A-108. Revised.**Coordination Meeting:** Article 2B to *consider* Article 2 formulation that introduces the idea of "inducement" of contract. Article 2A applies that concept to consumer contracts only.
Votes: In debate on Article 2 at the 1996 Annual Meeting, a motion to delete the inducement language was defeated as was a motion to delete the requirement that unconscionable is a matter of law for the court. No motion was made to limit the Article 2 provision to consumers.
Reporter's Notes:

1. This draft generally follows original Article 2. Draft Article 2 contains language regarding unconscionable inducement of a contract. At the Coordinating Committee session, the consensus was that, unless the Drafting Committee reversed position, Article 2B would not be required to adopt the inducement language unless directed to do so by vote of the Conference.
2. The inducement concept does not exist in current law in any context other than in Article 2A. In Article 2A, the inducement concept is expressly limited to consumer leases and does not apply to mass market or other commercial contracts. The argument for extending the scope of any inducement language beyond consumer contracts is not clear. That extension weakens certinty of contracting in commercial contexts.
3. In this article, many of the situations where inducement may be an issue are dealt with by the new concepts of manifesting assent, opportunity to review and statutory creation of a right to exclude surprising terms.

SECTION 2B-110. AUTHENTICATION PROCEDURE.

(a) A procedure established by agreement or adopted by 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.

(b) The commercial reasonableness of an authentication procedure is a question of law to be determined by the court in light of the purposes of the procedure and the commercial circumstances at the time of the agreement, including the nature of the transaction, the volume of similar transactions engaged in by either or both of the parties, the availability of alternatives offered to but rejected by the party, and the procedures in general use for similar types of transactions or messages. An authentication procedure may require the use of algorithms or other codes, identifying words or numbers, encryption, callback procedures, key escrow, or similar security devices that are reasonable under the circumstances.

(c) Except as provided in Section 2B-112 and in Section 2B-102(--), 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 unless it disclosed the nature of the risk to the other party or offered commercially reasonable alternatives that the party rejected

Uniform Law Source: Article 4A-201; 202.
Coordination Meeting: Article 2 and 2A to conform to eventual Article 2B formulation.
Selected Issues:

1. Should an authentication procedure be effective only if commercially reasonable or should this requirement be restricted to mass market transactions?

2. How should the draft handle situations of use where no prior agreement exists?

Reporter=s Note:

1. An authentication procedure has significance in this draft in respect to questions of attribution (see next section) and the existence of a signature (authentication). In effect, if an authentication procedure is established and followed, then an enhanced level of legal reliability is attributed to the authenticated message or performance. In reference to signature requirements, following an authentication procedure results in a signature as a matter of law and without inquiry as to the intent of the parties. In other contexts, if there is a question of who sent the message or performance, compliance with an authentication procedure makes the alleged originator of the message attributable as a matter of law. **On the other hand, failure to use an authentication procedure does not indicate that there is no signature or that the purported sender is not responsible for the message or performance. It merely places attribution issues under the general attribution sections.**

2. Against this background of enhanced legal force, a question arises about whether,

in a non-mass market context, we should eliminate the requirement of commercial reasonableness. That requirement was adapted from current Article 4A and provides a potential buffer for over-reaching and for protecting parties who do not necessarily have co-equal knowledge of technology. Viewed as used here as an enhanced assurance of reliability, the requirement of commercial reasonableness serves to encourage the development of reasonable attribution procedures. This section regulates the procedures ala Article 4A. The requirement of commercial reasonableness is an important safety valve for consumer and other users of these systems. Consider the following:

Illustration 1: General Motors sets up an authentication procedure in is contract with franchisees that requires merely that a message contain the franchisee's E-mail address as an identifier. A bad guy uses that system and causes loss of $100,000 in the name of the franchisee. If the contract controls, the franchisee is liable for the loss unless the procedure is commercially unreasonable. It would most likely be unreasonable in this case.

3. The provisions relating to how to gauge reasonableness are adapted from suggestions of a member of the committee. In subsection (c), the edits are designed to clarify the effect of non-compliance with the reasonableness standard (the parties are placed under the other attribution and signature rules) and to allow for notice of the risk to avoid liability.

SECTION 2B-111. ATTRIBUTION OF ELECTRONIC RECORD, MESSAGE, OR PERFORMANCE; ELECTRONIC AGENTS.

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

(1) it was sent by that party or the party's agent, or its electronic agent;

(2) the receiving party, in good faith and in compliance with an authentication procedure , concluded that it was sent by the other party; or

(3) the record, message, or performance:

(i) resulted from acts of a person who obtained access to access numbers, codes, computer programs, or the like from a source under the control of the alleged sender creating 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 apparent of the message or performance.

(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 [signature] [authentication] made by an electronic agent constitutes a [signature] [authentication] of a party if the party designed, programmed, or selected the electronic agent a purpose of which was to produce such results.

Uniform Law Source: Article 4A-202; UNCITRAL Draft Model Law on EDI.
Coordination: Article 2 and 2A to conform to Article 2B.
Votes: Section on reasonable care liability selected from other alternatives based on Committee discussion without a formal vote.
Selected Issues:

1. Should liability for acts of selected intermediary be deleted?
2. Should liability under (a)(iii) create liability regardless of fault?

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 Aelectronic 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.

3. This Draft contains numerous edits suggested by various sources for purposes of clarifying the Draft. Additionally, one member of the Drafting Committee suggests that liability exist under a version of (a)(iii) without proof of negligence or any other element of fraud. This was discussed at a prior Drafting Committee meeting, but needs to be evaluated here in terms of drawing a balance between the interests of senders and the reliance interests of recipients of messages. In other contexts, it has been argued that use of a new system can be encouraged by liability limitations.

4. Based on the suggestion of a Commissioner, former Section (c) attributing a party with liability for errors of its intermediary is deleted as being within the aegis of agency law and not fundamental to the focus of this Article.

SECTION 2B-112. MANIFESTING ASSENT.

(a) A party or an electronic agent 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-113, it:

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

(2) had an opportunity to decline to [sign] [authenticate] or engage in the conduct after having an opportunity to review.

(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 unless the record was called to the party's attention before the party acts.

(d) If assent to a particular term in addition to assent to a record is required, a party's or an electronic agent's conduct does not manifest assent to the term unless there was an opportunity to review the term and the conduct manifesting assent relates specifically to the term.

Uniform Law Sources: Restatement (Second) of Contracts ' 211.
Coordination Meeting: Article 2 to conform to Article 2B.
Selected Issues:

1. Should the section be approved as drafted?

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 of clicking on a displayed button 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.

3. This draft contains edits for clarity. In (d), the reference to calling the term to a party's attention is deleted as redundant; that concept is required under the notion of opportunity to review. Edits are made at the suggestion of a member of the style committee suggesting that the phrase "record or term" need not be repeated throughout the section. The basic point is that assent to a record involves meeting the procedures generally with respect to the record, while assent to a particular term, if such is needed, occurs only if the actions relate to that particular term. These edits result in the edits in subsection (d) which basically attempt to state that the activities involved in manifesting assent to a term must all occur with respect to the particular terms. Comments will clarify any ambiguities on this point.

4. Based on comments of several commissioners, it will be clarified in the comments or elsewhere that, in lieu of being conspicuous, the sequence here is satisfied if the party has actual notice of the terms or other methods are used to call attention to the term.

5. In this and the next section, **we need to deal with the idea of changing terms in an on-going contractual relationship. For example, how do we handle the customary practice in which continuous access providers change their rules of operation by posting the changes and indicating that continued use over time constitutes assent to those changes?**

. **SECTION 2B-113. OPPORTUNITY TO REVIEW.**

(a) A party or an 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:

(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) Except for a proposal to modify a contract, if the record is 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 all copies if it declines to manifest assent. In the case of products transferred for a

single, bundled price, the refund must be of a reasonable allocation of the portion of the total price to the licensee attributable to the rejected license in light of the price paid for the bundled products to the party providing the refund.

Uniform Law Source: None
Coordination Meeting: Article 2 to conform to Article 2B.
Selected Issues:

1. Should deduction in refund for value received be retained?
2. Should the section be approved as drafted?

Reporter's Notes:

1. The concept of an opportunity to review corresponds to the idea of manifesting assent. Taken together, they enable assent in forms other than a writing, but place important procedural limitations on when and how this can occur. Unless a party had a prior opportunity to review the applicable term or clause, actions purporting to manifest assent are ineffective for purposes of this article.

2. Importantly, these concepts do not substitute for "agreement" as that term is defined in the UCC or in contract law generally. Assent and review are typically associated here with what terms become part of the contract. The fact that a party did not effectively assent to a form because there was no opportunity to review does not necessarily negate the existence of a contract, only what terms the contract contains.

3. The edits here address general clarity issues. The additional language of subsection (b) deals with the options available in cases of bundled products. The obligation to refund and return is as to the entire bundled package unless the licensee agrees to an allocation of the price based on the proportionality of cost measured by the vendor's cost for the product bundle. Thus, if the particular software being refused was attributable for 5% of the total cost of the bundled products for the vendor, the refund must be of 5% of the price of the bundle to the licensee. The bundled products here can include both goods and information products, but the principle remains the same.

. **SECTION 2B-114. EFFECT OF AGREEMENT.**

(a) The effect of any provision of this [article] may be varied by agreement of the parties except that the agreement may not vary:

(1) the obligation of good faith;

(2) the right to relief from an unconscionable contract or clause: or

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

(4) the limits on waiver or protections in Section 2B-712(d)..

(b) Unless this Article provides that a term be conspicuous or that there be manifest

assent to the term, those conditions are not necessary to the enforceability of the term.

Uniform Law Source: None.
Coordination Meeting: Recommends deletion of the Section in Article 2 and 2B.
Selected Issue:

1. Should the section be deleted?

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] [authenticated] 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 Sections 2B-311, 2B-312, 2B-313 or 2B-319 may not vary the terms of those sections except by a record [signed] [authenticated] 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] [authenticated] by the party against whom enforcement is sought that is sufficient to indicate that a contract has been made between the parties and describing the subject matter. Any description of the subject matter satisfies subsection (a), whether or not it is specific, if it reasonably identifies what is described.

(b) A contract that is enforceable under this Section is not made unenforceable by the

fact that it is not capable of being performed within one year of its making.

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

(d) A record is not insufficient merely because it 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:

(1) if the fixed 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 $ 20,000;

(2) to the extent that the licensor or a person authorized by the holder of intellectual property rights to do so transferred copies of the information to the licensee; or

(3) to the extent that performance has been rendered by one party and accepted by the other.

(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.

(g) By an agreement that is enforceable under this section, the parties may waive the provisions of this section as to future transactions.

Uniform Law Source: Option 2, Section 2A-201. Revised.
Coordination Committee: Differences in Article 2B subject matter support different treatment than in Article 2.
Votes: In debate on Article 2 at the Annual Meeting, repeal of the statute of frauds in that Article was sustained by a relatively narrow vote (65-52).
Selected Issues:

1. Should a statute of frauds be retained?
2. Should dual alternatives be presented to the states?
3. Are the substantive terms of Alternative 2 generally appropriate?
4. In Alternative A are the specific issues for which a record is required sufficient or are there other issues that need to be addressed?

Reporter's Notes:

1. This section has relatively few edits for clarity. In addition, subsection (g) is added to make clear that trading partner agreements are enforceable on the statute of frauds issue. The edits propose a high threshold dollar amount with respect to unenforceable contracts as a means of alleviating the controversy that has surrounded the statute of frauds issue. In addition, consistent with current Article 2, a partial performance exception has been added.

2. 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.

3. 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.

4. 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.

5. 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.

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 recognizes 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, one party reserves the right to modify terms, or the standard forms 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).
Coordination Meeting: Article 2 to conform in style to Article 2B.
Selected Issue:
1. Should the section be approved?
Reporter's Notes:
1. No changes. One commissioner has suggested that the burden of establishing an agreement should be made more difficult, perhaps by requiring "clear evidence" of an agreement. Article 2 to conform in style to Article 2B.
2. Article 2 proposes that language of condition, that conditions the intent to be bound in a standard form must be "clear and conspicuous." Should this be adopted in Article 2B and, if so, should it be contained in Section 2B-204?
3. Modifications are made to subsection (b) to reflect a relatively common contracting practice in cases of start up ventures based on long term relationships that may require adjustment as circumstances change. The critical issue there centers on whether there was an actual intent to contract or not. If so, the fact that some terms may be later modified by another party does not deny enforcement of the agreement. The modifications, under other provisions of this Article must be in good faith.

SECTION 2B-203. FIRM OFFERS. An offer by a merchant to enter into a contract made in an [signed] [authenticated] 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 offeror manifests assent to the term.

Uniform Law Source: Section 2A-205; Section 2-205.
Coordination Meeting: Article 2 to conform to Article 2B and use manifest assent in lieu of requiring conspicuous term.
Selected Issue:
1. Should the section be approved in principle?
Reporter's Notes:
1. No changes suggested. Coordination Committee recommends that Article 2 conform to Article 2B on this section and adopt concept of manifest assent instead of conspicuous.

SECTION 2B-204. OFFER AND ACCEPTANCE.

(a) Unless otherwise unambiguously indicated by the language or the circumstances, 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.

(b) 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.

(c) 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 authorized by any individual.

(d) 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.

(e) Language in a standard form that states that the party using the form does not intend to be bound to the agreement unless the other party agrees to terms that are in the form or are otherwise proposed is enforceable if the language is conspicuous.

Uniform Law Source: Section 2A-206; Section 2-206.
Coordination Meeting: Article 2 to conform to Article 2B except for subject matter differences. Article 2B to consider adding section of conditional proposals.
Selected Issues:

1. Is the treatment of conditional offers appropriate?
2. Should the section be approved?

Reporter's Notes:

This draft incorporates in modified form a provision contained in draft Article 2 relating to conditional acceptances. It makes those conditions enforceable only if conspicuous. Of course, a condition can be waived by behavior or altered by course of dealing, but this provision sets out the initial premise that a party can condition its agreement if it desires to do so. As in proposed Article 2, this conditional language section is separate from provisions about what terms are in the agreement. In a classic battle of forms context, that issue is dealt with under 2B-207.

SECTION 2B-205. ELECTRONIC TRANSACTIONS: FORMATION.

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

(1) the response is received if the response consists of furnishing information or access to information and the originating message did not preclude such a response; or

(2) the sender of the originating message receives 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.

Uniform Law Source: Section 2A-206; Section 2-206.
Coordination Meeting: Article 2 to conform to Article 2B.
Selected Issues:

1. Should the Section be approved in principle?

Reporter's Notes:

1. This section has been edited for clarity based on suggestions by a commissioner.

2. 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.

3. 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.

SECTION 2B-206. RELEASES. [new] A release or waiver of rights in whole or in part is effective without consideration if it is contained in a record authenticated [signed] by the party giving the release and identifying the rights released.

Reporter's Note: This section relates to practices important in the entertainment and multimedia industries involving acquisitions of rights clearances relating to properties used in new works. The release or waiver here does not relate to claims based on breach of contract, but refers to releases of intellectual property and similar rights.

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 that 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. UNIDROIT Principles of International Commercial Contract Law (AA contract in writing which contains a clause indicating that the writing completely embodies the terms on 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.@ Art. 2.17.)
Coordination Meeting: Article 2 to drop subsection (b) regarding contest of merger clause; Article 2B to conform to remaining Article 2 language; alternatives to be considered.
Selected Issue:

1. Is a presumption favoring integration clauses appropriate? Should it be limited to non-consumer contracts?

Reporter's Notes:

1. The Coordination Committee recommended that Article 2 delete a provision in its draft dealing with procedures and criteria for challenging the effectiveness of a merger clause. That decision was announced to the floor of the annual meeting before discussion of this section in Article 2. The Article 2B Drafting Committee had already declined to include that provision in our draft.

2. Alternatives A and B were not discussed at the annual meeting. The Committee needs to determine which option to adopt or, whether to reject both. The approach in each is to enhance the effectiveness of merger clauses. A number of commercial groups have expressed a preference for alternative A.

3. A consumer group has argued that no action should not enhance the effectiveness of parole evidence rules in consumer transactions.

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.

Uniform Law Source: Section 2A-207; Section 2-208; Section 1-205. Revised.
Coordination Meeting: Coordinating Committee recommended that Article 2 and 2A conform to Article 2B; consider removing section to Article 1.
Selected Issue:

1. Should the section be approved as drafted?

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 manifests assent may not otherwise be modified or rescinded. However, in a consumer license, a term requiring an [authenticated] [signed] record for modification is not enforceable unless the consumer manifests assent to that term.

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

Uniform Law Source: Section 2A-208; Section 2-209.
Coordination Meeting: Article 2 to delete first sentence of 2-210 relating to modification by waiver. Article 2B will not conform to remainder of Article 2 section.
Selected Issues:
1. Should a no-modification clause be invalid in a consumer contract as proposed by Article 2 draft? (Current enacted Article 2B requires that the consumer sign such a term, BUT Article 2B otherwise parallels existing law)?
Reporter's Notes:
Subsection (d) was moved into a general section on waiver of breaches. Subsection (b) contain a modication designed to bring this section into parallel with current law. Article 2 and Article 2A require no oral modifiction terms to be signed by the consumer. This change was strongly suggested by comments received since the last meeting.

SECTION 2B-304. CONTINUING CONTRACT TERMS. Terms 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 electronic agents in the context of the later performance. A term that provides that a contract may be modified by compliance with a procedure described in the contract is enforceable and modifications made pursuant to that procedure are effective if the procedure gives the other party a reasonable opportunity to have access to the changed terms before they become effective, the contract could be terminated by the party making the modification at or before the time the modifications become effective, and the procedure permits that party to withdraw from the contract without penalty if the terms are unacceptable.

Uniform Law Source: None
Coordinating Meeting: Either leave in Article 2B alone, or move to Article 1 for general application.
Selected Issue:
1. Should the section deal with modification of continuing terms in light of on-line practices of posting changes in terms of service?
2. Should the section be approved in principle?
Reporter's Notes:
1. The second sentence has been added as a first step in dealing with a common practice in online or other continuing service contracts where changes in service conditions occur by posting on the service from time to time. This language requires that the procedure be in the contract, followed and that the circumstances be such that a person affected by the modifications will not be prejudiced if it declines the terms and withdraws from the contract.

SECTION 2B-305. OPEN TERMS.

(a) An agreement otherwise sufficiently definite to be a contract is enforceable even if 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 agreement requires performance 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.

(2) An agreement that provides that the performance of one party be to the satisfaction or approval of the other

(i) requires performance that satisfies the other party in fact, if the agreement requires the party to provide informational content to the party whose satisfaction or approval must be met, and

(ii) in all other cases, requires performance sufficient to satisfy a reasonable person in the position of the party whose satisfaction must be met unless the agreement expressly provides that the performance is to be judged in the "sole discretion" of a party or words of similar import..

(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 its performance; and

(ii) may proceed to perform, suspend performance, or 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 to, no contract is formed if the term is not fixed or agreed. In that case, each party shall return any copies of information, 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.
Coordinating Meeting: Articles to avoid substantive differences where not merited by subject matter and commercial practice; different frameworks to be retained.
Selected Issue:
1. Is the treatment of contracts in publishing, entertainment and other similar venues appropriate?
2. Should the section be approved in principle?
Reporter's Notes:
1. Significant changes are made in subsection (c) dealing with contracts calling for performance that is to the satisfaction of one party. The two different approaches to this issue reflect entirely different traditions and case law background in the industries affected by Article 2B and differences in the qualitative standards that are appropriate to the commercial relationships. Subsection (c)(2)(i) states the rule that is applicable to informational content industries such as publishing and motion pictures. The factor that distinguishes these industries is that many of the information products that they obtain entail judgments about aesthetics and marketplace shifts, leaving it important that the judgment of the licensee be unfettered by overview in terms of reasonable man standards. The converse rule is more appropriate as a default rule in cases involving the development of computer programs and the like. The comments to this section will outline the type of language that can be used to shift the default rule in both cases (e.g., "Acceptable in the licensee's sole discretion.").
2. The Restatement ' 228 provides that it "prefers" a reasonable man approach if the context permits of the creation of objective standards for determining satisfaction. This, very imprecise standard is not adequate to information content industries. Indeed, the Restatement cites an entertainment industry example as one in which no reasonable standard of satisfaction is possible.

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, Abest 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.
Coordination Meeting: Article 2 should try to conform to Article 2B in substance.
Selected Issue:

1. Should the section be approved as drafted?

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 FORMS.

(a) Except as otherwise provided in subsection (c) and Sections 2B-308 and 2B-309, a party adopts the terms of a standard form if, before or within a reasonable time after beginning to use the information pursuant to an agreement or commencing performance, the party 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 that is unenforceable under other provisions of this [article], such as a provision that expressly requires use of conspicuous language or assent to the term, does not become part of the contract unless those other provisions are satisfied.

Uniform Law Sources: Restatement (Second) of Contracts 211.
Coordination Meeting: Concept should be applicable in all three articles; Article 2 to conform to Article 2B definitions of standard form and standard terms.
Committee Votes:
a. Rejected a motion to add retention of benefits as manifesting assent.
b. Rejected a motion to make specific reference to excluding terms that are unconscionable in addition to general exclusion under section 2B-111.
Selected Issues:
1. Should the approach be limited only to cases in which the form purports to contain all of the terms of the contract?
2. Should the section be approved in principle?
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 2B-114) and "manifests assent" (see 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 Aopportunity 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.

5. In this draft, deletions in subsection (a) are non-substantive. Signing or manifesting assent by behavior are incorporated into the definition of manifesting assent. Deleting the reference to the person who did not prepare the form simply makes it clear that both parties have assented to the form.

6. **There is a potentially significant difference between this section and the equivalent Article 2 provision relating to non-consumer contracts.** This section applies if all or part of an agreement is represented by a single standard form, while Article 2-206 applies only if the form purports to totally integrate the contract (e.g., cover all terms). Apparently, in other cases, the issue shifts over to the “battle of forms” construct which in Article 2 invalidates significant portions of the form even in non-consumer contracts. The battle of forms becomes, in essence, both a battle of forms and a regulation of incomplete forms. In Article 2B, the battle of forms context applies only if there are two, conflicting forms.

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 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 on the party who did not prepare the form:

(1) that [is not consistent with customary industry practices at the time of the contract and which] a reasonable [person in the position of the party proposing the form should know would cause an ordinary and reasonable person in the position of the party receiving the form] to refuse the license if the term were brought to the attention of that party; or

(2) that conflicts with the previously negotiated terms of agreement of the parties relating to the transaction.

(c) A term excluded under subsection (b) becomes part of the contract if the party who did not prepare the form manifests assent to the term.

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

(e) The terms of a mass market license are to be interpreted whenever reasonable as treating all similarly situated parties in a similar fashion without regard to their knowledge or understanding of the terms of the record.

(f) A party proposing the license has the burden of proving customary industry practices under subsection (b)(1).

Uniform Law Source: Restatement (Second) of Contracts ' 211.
Coordination Meeting: Difference in practice and focus justify substantive differences.
Votes:

a. Drafting Committee rejected motions to strike the reference to customary industry standards.

b. During Article 2 discussion, motion to delete special treatment there for consumer was defeated based in part on Committee assurances that Article 2 would use an objective test.

Selected Issues:

1. See issues memorandum.

2. Should the additional language of subsection (e) be included?

3. Should the Restatement focus on the reasonable expectations of the proposing party be retained or should the Committee adopt the provisions of the UNIDROIT draft?

Reporter's Notes:

1. As discussed in the Issues Memorandum, substantial discussion at the Annual Meeting centered on whether the bracketed language in subsection (b)(1) should be retained. The argument was that simply because of a term being customary in the industry, that does not justify conclusively including it in a contract. The Committee should consider its decision to retain that language. With that language taken out, the remaining standard parallels the exclusion terms in Restatement ' 211(3).

2. This section follows the Restatement for mass-market licenses, while Article 2 adopts the provisions of UNIDROIT for consumers. A motion to delete the Article 2 consumer provision was defeated based in part on the representation that the Article 2 consumer test was an "objective" standard. It is probable that the standard will be rewritten to reflect this intent. This Draft is edited to reflect that forms in this industry may be proposed by the licensee, especially in the common cases dealing with relatively small licensors.

3. Article 2 uses the idea of "expressly agrees" (a subjective standard) to deal with when otherwise excluded terms can be brought into the agreement in a "consumer" transaction, while Article 2B relies on the idea of manifestation of assent (an objective standard) in "mass market" licenses.

4. This draft deletes the reference to clauses that correspond to first sale rights as a safe harbor. This safe harbor has caused some confusion. More important, as pointed out by several sources, there are cases where terms consistent with first sale are not necessarily outside the idea of non-customary surprising terms. For example, this might be the case in a license of clip art which provides in the form that the licensee can only transfer copies of the clip art if it transfers all copies that it has made and the original.

5. This draft adds new section (e) containing a directive regarding interpretation of the standard forms. The subsection intends to incorporate the provisions of the Restatement and reflects a fair estimation of how courts should approach standard contracts in a mass market context.

6. 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: AThis 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 TERMS.

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

(1) the other party manifested assent to the term; or

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

(b) Subject to subsection (c), in cases governed by subsection (a), the terms of the contract are:

(1) terms negotiated and agreed to by the parties;

(2) terms on which the records agree;

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

(4) supplementary terms in any other provision of this [article] that are not inconsistent with the other included terms.

(c) The contract formed under this section includes the terms limiting the scope, character, amount and other aspects of the permitted use of the information to the extent that these terms do not conflict with the negotiated terms of the agreement.

(d) Subsequent contract terms contained in a record [signed] [authenticated] by the parties after the exchange of records supersede the terms included under subsections (b) and (c).

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

Coordination meeting: Approaches in all three articles differ. Due to differences in practice and subject matter, reconciliation is not likely.

Selected Issues:

1. Is the treatment of use issues in subsection (e) appropriate?

2. Is the treatment of subsequent authenticated records appropriate?

Reporter's Note:

1. This section has been broadened in scope to cover all cases in which records are exchanged that contain varying terms purporting to represent the agreement of the parties. Previously, the section focused solely on standard forms. However, in light of the structural changes made in Article 2 and here separating questions of what terms are included from whether a contract is formed, no purpose is present in that limitation. Under this section, the first question in cases of conflicting, exchanged records deals with whether there is a contract. That question is considered under the formation sections. The second question deals with how to determine what are the terms of the contract. That question does not hinge on whether the conflicting records qualify as standard terms, standard forms or not. Especially in an E-Mail age, objecting to a term in a record, but then performing as if a contract exists should be treated the same whether it deals with a standard or a non-standard record.

Illustration 1: In response to a standard order form from DuPont, Little Developer ships software subject to a form. The two forms disagree on warranty terms. Under this rule, both warranty terms drop out. The same result occurs if Little Developer sends an E-mail objecting to the warranty terms, but goes ahead and ships without obtaining assent from DuPont to any change.

2. This section deals with cases where two records are traded between the parties involving differing terms. In cases of two conflicting records, this section controls over the prior two sections on standard forms and mass market licenses which deal with cases involving only one standard form. It adopts a knock-out rule. Varying or conflicting terms are excluded unless a party manifests assent to a particular term. A party does not manifest assent by mere silence or retention of a record. Assent requires an affirmative act that reflects agreement to terms that the party had an opportunity to review and reject.

Illustration 2: 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 3: Same facts, except that licensor desires to obtain its warranty terms. Its license provides that Aby 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.

3. The equivalent Article 2 section, although characterized as a conflicting or varying terms section, applies to all cases involving a standard form except for cases in which the form purports to state the **entire** contract of the parties. Thus, a form contract that covers some, but not all terms, would be reviewed under the Article 2 section on "varying forms" but would be review in Article 2B under either the mass market or the standard for sections.

3. Additionally, Article 2 deals with standard terms, rather than forms. **As written, a standard term may exist within a custom record.** Thus, for example: The parties negotiate a sale of 1000 widgets for an agreed price, not directly discussing merchantability warranty. The draft written agreement contains a standard term disclaiming warranties. It is signed by Buyer. Draft 2-207 asks, apparently whether a contraxct was formed before the signature was affixed and, if so, whether the standard term (disclaimer) varies that contract (e.g., the default terms). If yes, the disclaimer goes out unless the buyer expressly agreed to it or the buyer had reason to know the terms would be there based on course of dealing or usage of the trade. **The conflicting terms section also governs cases where the standard form does not purport to fully integrate the entire contract.** For example, S and B agree to a sale of widgets for a price. S hands B and B signs a form agreement covering price, quantity, warranty disclaimers, and delivery commitments. The enforceability of these terms is not governed by 2-206. Whether the terms become part of the contract is not apparently dealt with in the Article 2 draft. 2-207 requires a court to ask whether these terms vary the contract. If yes, then the foregoing analysis applies.

4. The Committee should consider whether special treatment should be given to terms regulating use of software. Should a party be able to eliminate a single CPU restriction, for example, by including in its order forms terms that require a right to use the software on any CPU of the user's selection? Should it be able to nullify a restriction limiting the license to non-commercial use by providing that a contrary term in its order form and, thus, forcing the transaction back onto default rules which contain no such restriction? Unlike warranty and similar terms, the use terms define what product is being sold (e.g., multi-user or single user license). The licensee should not be able to alter the conditions of sale of the product in this manner. The pure knock out rule may not be appropriate in the multi-element world of software and information licensing. Subsection (c) proposes a method of dealing with this factor.

[deleted]

Reporter's Note: This section was deleted at the suggestion of a commissioner as unnecessary as to subsection (a) dealing with the terms of electronic transactions. This redundancy became especially apparent in light of the proposed changes in Section 2B-309. Former subsection (b) has been relocated to Section 2B-701.

[C. Interpretation]

SECTION 2B-310. 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 terms are ambiguous in the commercial context

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

(2) Subject to Sections 2B-317, 2B-318, and 2B-501(a), 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.

Uniform Law Source: None
Coordination: Section is unique to Article 2B.
Selected Issue:
1. Should the section be approved as drafted?
Reporter's Note:
The edits in this Draft are for purposes of clarity based on suggestions. No substantive changes. 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.

SECTION 2B-311. IMPROVEMENTS AND ENHANCEMENTS.

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

(b) In a license, a licensee may make those modifications (i) enabled by the ordinary use of the information or (ii) necessary to the licensee's use as authorized by the contract.

(c) In an unrestricted transfer of information, the licensee may make any modifications consistent with the intellectual property rights of the licensor.

(d) 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.

Uniform Law Source: None
Coordination Meeting: Unique to Article 2B.
Selected Issue:

1. Should the section be approved in principle?

Reporter's Notes:

1. Edited for clarity and to remove limitation to digital information. With that removal, former subsection (b)(3) became redundant and was deleted.
2. A question is raised about the risk of modifications being distributed or used under the name of the licensor. The Committee should consider whether, for example, the section should provide that: **"Any distribution or commercial use of the altered information permitted under the contract other than as an end user must indicate that the information has been modified by the licensee."**
3. Subsection (d) 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.

4. Subsection (b) 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 (c) 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-312. LOCATION AND USE RESTRICTIONS.

(a) If an agreement does not specify the location in which a licensee may use the information, the number of uses permitted, or the purposes for which it may be used, the licensee may use the information any number of times for any purpose and in any location that is not inconsistent with any intellectual property rights of the licensor not granted in the agreement such as the exclusive right to publicly perform or display the information.

(b) If a license limits the purposes, number of uses, 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 license and this [article], but exceeding the limits in the license constitutes a breach of contract.

Reporter's Notes:

This section contains material previously in section 2B-313. It deals with the number and type of use, basically allowing the licensee any purpose or number of uses as a default rule, requiring an agreement to vary that premise.

SECTION 2B-313. MULTIPLE USERS AND COPIES.

a) A license of digital or similar information transfers the right for a single user at a single time to access, use, or copy the information on a single information processing machine and making or retaining additional copies in more than one machine or permitting simultaneous use by multiple users without authorization is a breach of contract. However, a licensee may make a reasonable number of backup copies.

(b) If information is transferred on an unrestricted basis, the licensee may allow such simultaneous users and make such additional copies as it desires to the extent consistent with any

intellectual property rights of the licensor not expressly licensed under agreement.

(c) In all other cases, the licensee may allow only such simultaneous users and make only such additional copies as are expressly authorized by the agreement.

Uniform Law Source: None.
Coordinating Meeting: Unique to Article 2B.
Selected Issue:
1. Is the treatment of simultaneous users appropriate?

Reporter's Notes:
This Section was created from prior Section 2B-313, the other portions of which are now located in Section 2B-312. There are no substantive changes from the prior draft. The section sets as a default rule that a single user single CPU license is intended. Commercial cases involving site licenses and other multiple user agreements, of course, are permitted variations on this theme that have common involvement in commercial practice.

This section deals with simultaneous use. The next section deals with the question of when or whether a license restricts use to a designated user (e.g., Joe Jones and no other person). So long as there is only one user at a time, this default rule is not violated regardless of the identity of that user. The comments will indicate that the open-ended party designation does not over-ride use and other limitations.

SECTION 2B-314. LIMITATIONS ON PARTIES.

(a) If a license expressly limits the person permitted to use the information, use by a person other than the designated person is a breach of contract. (b) If a license does not specify or limit the person to whom use of information is restricted other than by identifying the licensee, subject to section 2B-504, use by any person authorized by the licensee does not breach the license. Any person using the information pursuant to authorization is bound by the terms of the license.

Uniform Law Source: None.
Coordinating Meeting: Unique to Article 2B.
Selected Issue:
1. Should the section be approved as drafted?
Reporter's Note:
1. 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).
2. The cross-reference in subsection (b) refers to restrictions on the right to delegate performance and sublicense under a license. Those rules restrict the ability to allow others to use the licensed information in cases covered by this subsection.

3. Based on comments at the annual meeting, the language in subsection (b) was amended to reflect that a license may not convey an affirmative right to use intellectual property, but that use by any person does not violate the contract. Thus, for example, a third party patent may be violated by use by someone other than the licensee as a matter of intellectual property law, but that use does not violate the agreement.

[deleted]

Reporter's Notes: This section has been moved to and expanded on in Section 2B-602.

SECTION 2B-315. 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.

(2) In all other cases, including a support or service obligation with an indefinite term that is associated with a contract in paragraph (1), the duration of the agreement is a reasonable time, but 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).
Coordination Meeting: Differences in transactions justify differences in approach.
Selected Issue:
1. Should the section be approved in principle?
Reporter's Note:
1. 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.
2. Editing here is intended for clarity based on suggestions by commissioners during the annual meeting.

[D. Confidentiality]

SECTION 2B-316. CONFIDENTIALITY IN GENERAL.

(a) A party is not obligated to retain in confidence information given to it by another party unless the terms of a license, this [article], or other law create conditions of confidentiality

or nondisclosure..

(b) A 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 an agreement creates conditions of confidentiality or nondisclosure, the party on which the conditions are imposed may not disclose 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 or subpoena that may cause disclosure of the information.

(d) 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. Remedies under the contract or under this [article] for breach of confidentiality are not exclusive and do not preclude remedies under other law, including the law of trade secrets unless the contract specifically so states.

Uniform Law Source: Restatement (Third) Unfair Competition
Coordinating Meeting: Unique to Article 2B.
Selected Issue:

1. Is deletion of former provision for damage recovery based on benefit received by other party appropriate?

2. Should the section be approved in principle?

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. Comments will clarify that the presumption in subsection (a) applies only in reference to contract principles and does not alter established trade secrecy law, although it is consistent with that law in most states.

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.

3. The confidentiality duty may go in either direction in commercial transactions. The edits to subsection (c) delete language that might have permitted reckless disclosure of confidential material. Basically, when the confidentiality restriction exists, the duty is to not disclose and to use reasonable care to maintain confidentiality in reference to third party intrusions and the like.

4. Former subsection (d) was deleted based on virtually universal comments that it raised an issue that should be left to the agreement and to courts' interpretation of what information is and is not covered under a confidentiality clause.

SECTION 2B-317. 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, Acode@ means source or object code, schematics, or other design material.

Uniform Law Source: None
Coordinating Meeting: Unique to Article 2B.
Selected Issue: Should the section be approved as drafted?

SECTION 2B-318. INFORMATION RIGHTS IN ORIGINATING PARTY.

(a) If an agreement requires one party to deliver commercial, technical, or scientific information 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 information has not been released to the public by the other party, the following rules apply:

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

(2) The party receiving, processing, or handling information must to use

reasonable care to hold the information in confidence and make it available to be destroyed or returned to the delivering party according to the agreement or instructions of the delivering party.

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

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

(2) If the information is developed by one of the parties, the information is the property of that party.

(c) The rules in this section do not apply to transactional data. **Uniform Law Source:** None.

Coordinating Meeting: Unique to Article 2B.

Selected Issue: Should the Section be approved in principle?

Reporter=s Note:

Various non-substantive edits have been made in response to the suggestion of various commissioners and other parties.

The section has been amended to remove the reference to "data", the definition of which was deleted in this Draft and to cover information generally. The scope of the section remains focused, however, on cases in which information is delivered and required for performance of obligations owed to the other party (e.g., data processing, out-sourcing).

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 data to another in the course of the transaction. The default rule applies to cases involving information that has not been released to the public and that the recipient knows is unlikely to be released. The default presumption is that the information 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).

The comments will point out that the remedies for any breach of this section is a breach of contract and that ordinary contract remedies apply. New subsection (c) is intended to indicate that the section applies to situations involving out-sourcing, data processing and similar contracts for handling information, and does not state a data protection right.

[E. Electronics]

SECTION 2B-319. ELECTRONIC VIRUSES.

(a) Except as provided in Section 2B-320, 2B-321, or 2B-712, each party undertakes that its performance or electronic messages will not introduce extraneous programs, 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 and are not disclosed to the other party.

(b) A party is not liable under subsection (a) if:

(1) The circumstances or terms of the contract give the other party reason to know that action was not taken to ensure exclusion of the programs, code, or viruses or that a clear risk exists that they have not been excluded.

(2) The party exercised reasonable care to exclude the programs, extraneous code or viruses.

(c) If the performance is a transfer of rights, the obligation under subsection (a) relates to the time when the transfer of rights is completed. In all other cases, the obligation relates to the time that the message or performance is received.

(d) Language in a record or display is sufficient under subsection (b)(1) if it states AWarning: May contain viruses or potentially damaging code,@ or words of similar import. In a [mass market] [consumer] license, the disclosure in subsection (a) or the language negating the obligation under subsection (b)(1) must be conspicuous.

(e) In determining whether reasonable care was exercised under subsection (b)(2), a court shall consider the nature of the party, the type and value of the transaction, and the general standards of practice prevailing among persons of similar type for similar transactions at the time

of the performance or the transmission of the message.

Uniform Law Source: None.
Coordination: Unique to Article 2B.
Selected Issues:

1. Is reasonable care an appropriate standard?
2. How should the obligation be disclaimable or otherwise avoidable?

[deleted].

SECTION 2B-320. ELECTRONIC REGULATION OF PERFORMANCE.

(a) Subject to subsection (b) and Sections 2B-319 and 2B-712, a party entitled to enforce a limitation on use in a license may include in the information, 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 authorizing the use of code or a device to enforce a limitation is required unless

(1) the code or device provides reasonable notice to the licensee prior to precluding further use at the expiration of the term of the license;

(2) the code or device merely precludes use of the information by more that the authorized number of simultaneous users or at an unauthorized location; or

(3) the information is obtained for a stated period of time less than five days and the code or device merely enforces that time limitation.

(c) Operation of a code or device that restricts use consistent with the agreement is not a breach of contract and the party that included the code or device is not liable for any loss created by its operation, but operation of a code or device that precludes use permitted by the contract constitute s a breach of contract. .

(d) Nothing in this section precludes electronic replacement or disabling of a prior version of information by the licensor with a new version of the information pursuant to an agreement.

Uniform Law Source: None
Coordination: Unique to Article 2B.
Selected Issue:

1. How should we handle restrictions that are inherent in the product

distributed (e.g., an element that terminates the code after a single use in a single use license)?

Reporter=s Notes:

1. 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 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.

3. The changes in subsection (c) are designed to clarify the limitations on the use of a device and to accommodate the use of so-called "Java Applets" which consist of elements of programs provided for very brief periods for use in a licensee's system.

SECTION 2B-321. DATA PROTECTION.

(a) Personal information concerning an individual or data concerning the licensee=s actual use of a licensed program, 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 information:

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

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

(b) The limitations in subsection (a) do not apply to the following uses or types of information:

(1) transactional information obtained in the ordinary course when initiating the transaction;

(2) aggregate information 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 information;

(3) informationcollected and used solely by a computer program in the licensee=s

system and not transferred to the licensor;

(4) information collected and used in performing or enforcing the terms of the contract; and

(5) uses of informationin 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 information except as allowed by subsection (b).

Uniform Law Source: None.
Coordination: Arguably unique to Article 2B.
Selected Issue: Should this section be deleted and a recommendation be made to NCCUSL that a project on data protection issues be undertaken?
Reporter=s Note:

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 Acollection@ of information by a program resident in the licensee=s system for purpose of the program=s operations.
3. The basic issue concerning this section and the general theme is suggests deals with whether treatment of this broad of a concern in a limited way under Article 2B and Article 2 is appropriate or whether a more comprehensive treatment is needed. The European Directive on this point contains a large number of provisions and deals with a myriad of policy considerations. These go beyond problems involved in licensing and on-line contracting. If the issue is to be dealt with here, the Committee needs to deals expressly with how and under what terms the various interests are to be balanced. The issues affect the development of mailing lists, customer service systems, software development and a whole range of other questions.

SECTION 2B-322. RETENTION OF RECORDS [NEW].

(a) If an agreement requires that certain information be retained or made available to the other party the information may be retained in any form that constitutes a record under this [article].

(b) If the information is retained in an electronic record, the electronic record must be in a format that (i) is capable of subsequent reference based on criteria that are ordinary in the industry, and (ii) represents the information retained with reasonable accuracy.

(c) Nothing in this section abrogates any law or court rule concerning fiduciary duties, the retention of originals, or the presentation of best evidence in a court proceeding. However, the records retained are not insufficient under the contract simply because they do not constitute an original or a best evidence of the information under applicable law or rules unless the contract specifically requires records that qualify under these standards.

Uniform Law Source: UNCITRAL Model EDI Law
Reporter's Note: This new section was developed based on suggestions of a member of the Drafting Committee and generally covers an area covered by the UNCITRAL model act that had not been addressed in Article 2B.

SECTION 2B-323. ACKNOWLEDGMENT OF ELECTRONIC MESSAGE [new].

[to be developed in light of model EDI law provisions and commercial practice]

SECTION 2B-324. FINANCE LICENSES: BENEFICIARY OF SUPPLY CONTRACTS [new].

(a) The benefit of a supplier's promises to the licensor under the supply contract and of all warranties, whether express or implied, including those of any third party provided in connection with or as part of the supply contract, extends to the licensee to the extent of the licensee's interest under a finance license related to the supply contract, but is subject to the terms of the warranty and all defenses or claims arising therefrom.

(b) The extension of the benefit of a supplier's promises and of warranties to the lessee under subsection (a):

(1) does not modify the rights and obligations of the parties to the supply contract, whether arising therefrom or otherwise; and

(ii) and does not impose any liability under the supply contract on the licensee except that the licensee is bound by all of the terms, conditions and obligations of the license other than obligations to pay licensee fees.

(c) Any modification or rescission of the supply contract by the supplier and the lessor is

effective between the supplier and the lessee unless, before the modification or rescission, the supplier has received notice that the lessee has entered into a finance lease related to the supply contract.

(1) If a modification or rescission is effective between the supplier and the lessee, the lessor is deemed to have assumed

(i) the obligations of the licensor to the licensee under the lease contract, and

(ii) the promises of the supplier to the lessor as they existed and were available to the lessee before modification or rescission.

(d) In addition to the extension of the benefit of the supplier's promises and of warranties to the lessee under subseciton (a), the lessee retains all rights that the lessee may have against the supplier which arise from an agreement between the lessee and the supplier or under other law.

Reporter's Notes:
The finance license sections are being developed and wait reactions from persons with experience in computer, software and related finance leasing practice. This section reflects the terms of existing Article 2A-209 and sets out the basic idea that the three party relationship that arises in a finance license (lease) passes through obligations of the supplier directly to the licensee. The licensor in this situation acts as a go-between with limited role and liability. Warranty sections will be modified in the next draft to indicate that the finance licensor does not make separate warranties to the licensee. Appropriate definitions of "finance license" and "supply contract" or "supplier" will be added in the next draft modeled after Article 2A definition.

SECTION 2B-325. FINANCE LICENSES: RIGHTS TO POSSESSION AND USE [new].

(a) During the term of a finance license, unless otherwise agreed by the finance licensor, as between the finance licensor and the licensee, the finance licensor is entitled to possession of any upgrades, new versions or other modifications of the licensed information and to the benefit of any discounts, refunds or other rigts relating to the return of the licensed information to the supplier.

(a) On termination or cancellation of a finance license, as between the finance licensor and the licensee, the finance licensor is entitled to possession and control of all copies of licensed

information and materials related thereto that are to be returned to the licensor or the supplier, including any upgrades or new versions provided to the licensee during the term of the license directly or indirectly by the supplier..

Reporter's Notes:
The finance license sections are being developed and wait reactions from persons with experience in computer, software and related finance leasing practice. This section deals with a common area of litigation in the industry, focusing on the relationship between the three parties in reference to update and the like made available during the license term.

SECTION 2B-326. FINANCE LICENSES: IRREVOCABLE PROMISES [new].

(a) In the case of a finance license that is not a consumer license, the licensee's promise under the license contract become irrevocable and independent on the licensee's acceptance of the transfer of rights.

(b) A promise that has become irrevocable and independent under subsection (a):

(1) is effective and enforceable between the aprties and by or against third parties including the assignee of the parties; and

(2) is not subject to cancellation, termination, modification, repudiation, excuse, or substitution without the consent of the party to whom the promise runs.

(c) This section does not affect the validity under any other law of a convenant in any license making the licensee's promises irrevocable and independent on the licensee's acceptance of the transfer of rights.

Reporter's Notes:
The finance license sections are being developed and wait reactions from persons with experience in computer, software and related finance leasing practice. This section deals with area covered under current Article 2A-407.

PART 4

WARRANTIES

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

(a) Except with respect to a claim of infringement or the like, 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 the licensor has not by act or omission created in any

party a claim or interest that will interfere with the licensee's enjoyment of its rights under the contract.

(b) With respect to a claim of infringement or the like, a licensor that is a merchant in information of the kind warrants that, at the time of the transfer, the licensor has no reason to know that the transfer, any copies transferred by the licensor, or 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 license of a patent accomplished by the 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 if more than one commercially reasonable alternative existed and at least one of the alternatives would not infringe and, if the licensee had reason to know that the method or approach would infringe, the licensee disclosed this to the licensor.

(e) If information [under an exclusive license] is for redistribution by the licensee, the licensor warrants that the intellectual property rights that are the subject of the license are valid and held solely by the licensor. In all other cases, licensor of an intellectual property right does not warrant that its rights are exclusive.

(f) A warranty under this section may be excluded from the contract or modified only by express language or by circumstances giving the party reason to know that the other party does not claim that competing claims do not exist or that the it purports to transfer only such rights as

it may have. In an electronic transaction that does not involve review of the record by any individual, 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 that the [information] [computer program] does not infringe the rights of others", or words of similar import.

Uniform Law Source: Section 2A-211; Section 2-312. Revised.
Coordination: Differences in subject matter justify differences here.
Committee Votes:

a. Voted to adopt a "reason to know" standard in lieu of "knowledge."
b. Rejected a motion to exclude "mass market" contracts from disclaimer rule.

Selected Issues:

1. Is the treatment of transactions for redistribution appropriate in (e) as reflecting practice in entertainment and similar industries?
2. Should language of disclaimer in a record be conspicuous?
3. Should non-infringement warranty be an absolute, rather than no knowledge warranty at least in mass market licenses?

Reporter's Notes:

1. There was substantial discussion of this section at the annual meeting and the revisions here reflect some of those comments as well as discussions with persons involved in the entertainment and publishing industries.
2. A letter from the Consumer's Union criticized the language of the May Draft in this section as making possible the disclaimer of infringement and title issues. In fact, the language in the May Draft on this point is identical to the language contained in the draft revisions of Article 2 and in current law. In this Draft, the safe harbor language of disclaimer has been adjusted to be more informative for the party affected by the disclaimer.
3. 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).
4. 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 Areason 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. 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.

5. Comments from the annual meeting suggest that some Commissioners are concerned about the no knowledge warranty in this Article, at least as it affects mass market transactions. Part of the difficulty here involves the fact that patents are not knowable or readily checked by the myriad of small producers in this market place and that, therefore, an absolute warranty would place liability exposure on them without an effective means of protection. One possible approach, if the Committee so desires, would be to shift the no knowledge warranty to non-mass market or non-consumer transactions. This would still adversely affect many small vendors, but do so (if consumer is the operative term) in setting where the other party has no effective means of protection.

6. New subsection (e) reflects standard practice in motion picture and publishing industries and states an appropriate warranty for those settings. As to end users, the question of whether intellectual property rights are exclusive in the licensor is seldom significant.

SECTION 2B-402. EXPRESS WARRANTY.

(a) A licensor creates an express warranty as follows:

(1) Any affirmation of fact, promise, or description of information made by the licensor to the licensee that relates to the information and becomes part of the basis of the bargain 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 of a final product that is made part of the basis of the bargain 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) 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 statement purporting to be the licensor's opinion or commendation of the information does not create a warranty.

(c) An express warranty concerning informational content distributed to the public does not arise unless the licensor or its agent dealt directly with the licensee and made the express

warranty to that licensee.

Uniform Law Source: Section 2A-210. Section 2-313.
Coordination: Article 2B may remain different from revised Article 2 based on different history, practice settings, and development.
Committee Vote:
a. Deleted former subsection (b) clarifying that warranties are presumptively limited to the time of transfer based on conclusion that this merely restates current law.
Selected Issues:
1. Should ideas of express warranty be incorporated into contract obligations?
2. Is there a need to address direct warranties by advertising?
Reporter's Note:
1. This section parallels original Article 2, but does not follow the new structure being proposed in draft Article 2. The Coordinating Committee concluded that non-conformance was reasonable in light of the different history and developed expectations in the two fields. It was also suggested that Article 2B might explore treating express obligations under terms that do not rely on warranty language, but are more consistent with the treatment of obligations in the Restatement, the Convention on the Sale of Goods, and UNIDROIT principles.
2. This draft retains the "basis of the bargain" language used in current Article 2 and in Article 2A. 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.
3. At the annual meeting, a question arose about whether this section enables a warranty based on advertising. The draft does not change existing law in this respect. Some have argued in the context of Article 2 revisions that current law creates advertising warranties and, if so, this draft does not alter that concept. The Draft, however, does not adopt the controversial approach of revised Article 2 which creates an express advertising warranty rule. In an area such as information contracts where the development of liabilty and warranty theory is less fully established than in goods and encounters first amendment and related restrictions, the draft adopts a cautious, rather than aggressive approach toward creating new forms of liability. Either the advertising liability exists under current law and is carried forward here, or it does not exist under current law and is not created here. Comments will indicate that this draft does not alter existing state law on this subject.
4. Modifications to subsection (a)(2) deal with use of so-called beta models, especially in the industry. These are employed in testing developmental, not yet completed products. A beta model may include elements that are not carried into the final product and may include defects that are not cured in the final product. In either event, the parties both expect that the product being demostrated or used is not representative of what will eventually be the product and the exclusion here is designed to protect against harm to either party as a result (e.g., licensee believes a defect will be cured, but it is not cured; licensor elects to delete an element in the test model when it produces the eventual product).
5. Subsection (c) from the prior draft reflects a policy position that parallels modern treatment of when liability arises in connection with publicly distributed materials. The basic assumption under current law is that liability for information content does not exist unless there is a special or direct relationship creating it. There are no cases using warranty theory for generally distributed information based on contract concepts and only a small number of largely discredited (or at least not followed) cases under other theory. The idea here involves the problem of the scope of liability that might arise and the negative impact that liability might have on dissemination of information in public forums.

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

(a) A licensor who is a merchant with respect to computer programs in licensing under a mass-market license warrants that the computer program and media are merchantable. To be merchantable, the computer program and any tangible media containing the program must:

(1) pass without objection in the trade under the contract description;

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

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

(4) 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

(5) be adequately packaged and labeled as the agreement or circumstances may require.

(b) In cases not governed by subsection (a), if a licensor is a merchant with respect to computer programs of the kind delivers a program to a licensee, the licensor warrants that any media on which the program is transferred will be of merchantable quality and that the computer 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. An affirmation of the value of the program or a statement of opinion or commendation does not create a warranty.

Uniform Law Source: Section 2-314. Revised.
Coordination: Article 2B to conform to definition of merchantability insofar as appropriate to the subject matter.
Committee Votes:
a. Rejected a motion to add language as a subpart (5) warranting that the program will not damage ordinary configured systems.
Selected Issue:
1. Is the treatment of non-mass-market licenses appropriate; in light of commercial practice and the wide diversity of non-mass market software is a merchantability warranty possible or appropriate outside the mass market?

2. Is the addition to the language of merchantability appropriate?
3. Should the approach be approved?

Reporter's Notes:

1. This section was restructured to improve the flow and connection of the subsections. The only substantive change involves (a)(1) which was omitted in the earlier draft, but carries forward merchantability as it exists under current Article 2. Former subsection (c) was deleted as not necessary in that information content is covered under the next section and not by this language which focuses on computer programs.

2. The general warranty provisions were debated at the annual meeting with some confusion existing about the relationship of implied warranty principles, information products, and computer programs. Notes to the draft should spell out the distinctions with greater clarity than in the draft taken to the annual meeting. One element that needs to be added was suggested by several comments on the floor of the conference: the warranties are not mutually exclusive in that both the computer program and the content warranties are likely to apply in to the same digital product (e.g., an encyclopedia). Notes will be developed containing illustrations indicating the manner in which the warranties work together.

3. 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 prevalence of the approach in commercial cases to disclaiming merchantability is such that there are virtually no software cases dealing with that warranty - it is almost never allowed in the contract. The reliance on conformance to documentation reflects the wide range of variations involved and the unworkability of the merchantability concept in that context. As to mass market products, however, an implied merchantability warranty applies. A number of comments at the annual meeting supported the idea that merchantability should be the standard in reference even to non-mass market software. The two standards both give assurances of quality, but focus on different reference points. Merchantability asks what are normal characteristics of all products of this type, while the documentation warranty focuses on the manuals and contours of the particular product. Beside conforming to ordinary commercial practice (e.g., disclaim merchantability and give substantial conformance warranty), the substantive question here deals with whether merchantability is a relevant standard and at all protective in cases where software products are often relatively unique. For example, assume a commercial computer program that provides data compression functions on an ABC computer with an XYZ operating system. Merchantability would ask whether that product passes without objection among all data compression products of all types (e.g., mass market, Windows-based, Apple systems, etc.) even though the particular environment, approach and capabilities of this product may be unique. How that standard protects the licensee is not clear and in fact it may set out standards well below what the documentation provides.

4. 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 Article 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 who is a merchant provides services, access, informational content, 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. This warranty is not breached merely because the performance does not yield a result consistent with the objectives of the licensee or because the informational content is not accurate or is incomplete.

(b) A warranty does not arise under subsection (a) for:

(1) the aesthetic value or market appeal of the content; or

(2) errors in informational content if:

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

(ii) 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

(iii) the informational content was prepared or created by a third party and the licensor, acting as a conduit providing no more than editorial services with respect to the information content, makes the informational content available 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 that caused the loss occurred in the licensor's performance in providing the informational content. (c) The liability of a third party under this section is not excluded by the use of a conduit described in subsection (b)(2)(iii) or by the fact that the conduit is not liable for errors under that subsection.

Uniform Law Source: Restatement (Second) of Torts ' 552..
Coordination: Unique to Article 2B subject matter.
Selected Issues:

1. Should subsection (b)(2)(ii) be deleted?
2. Should the approach be approved in principle?

Reporter's Notes:

1. This section creates an affirmative warranty in cases of consulting, data processing and similar contracts involving an information provider or processor dealing directly with a client. This warranty derives from case law on services and information contracts. Restatement (Second) of Torts 552 regarding negligent misrepresentation provides framework against which the information contracts are tested. 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). In most states, under the Restatement, the affirmative obligation is limited to cases involving a special or fiduciary relationship relating to the information.

2. Although it was not made clear in prior drafts, this section substantially expands the scope of liability for information contracts as contrasted to the Restatement (Second) of Torts. Liability under the Restatement for providing inaccurate information exists only if the information was intended or designed to guide the business decisions of the other party. This section is not limited to commercial information contracts. In many states, the Restatement is also limited to intended guidance in specific or known transactions, a standard that is not met in publicly distributed products.

3. This section has been reorganized for clarity and to make the various principles more compact. Former subsection (c)(2) was deleted. It dealt with information contained in the patent office and similar records. To the extent that these protections are relevant in light of the scope of Article 2B, they are adequately covered by the exclusion of liability for public informational content. Subsection (b)(1) was added to clarify that this is not a warranty of aesthetic quality, but accuracy, an element present in current U.S. law and of importance in the various publishing and entertainment indstries affected by this Article. This point, although it could be inferred from the affirmative terms of the warranty, has substantial importance to the motion picture and publishing industries and to their digital publishing counterparts.

4 Under subsection (a) 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).

5. Subsection (b) lists situations in which the warranty does not arise under current law. Subsection (b)(2)(i) states 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) (query of whether this is a publicly distributed product).

6. 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., 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. If a licensor at the time of contracting has reason to know of any particular purpose

for which the information is required and that the licensee is relying on the expertise of the licensor to develop, design, select, compile, or substantially modify the information to meet the licensee's purposes, the licensor makes an implied warranty that

(1) it will make a reasonable and workmanlike effort to achieve that purpose, but

(2) the licensor warrants that it will meet that purpose if, from all of the circumstances, it appears that the licensor agreed not to be paid in full unless the information fulfills the licensee's purposes.

Uniform Law Source: Section 2-315; 2A-213. Substantially revised.
Coordination: Committee concluded that there were differences justified by subject matter.
Selected Issue:

1. Is the choice of basic rule, derived from services contract law, appropriate or should the article presume correct completion of the licensee's intended result?

Reporter's Note:

1. This section wasredrafted for clarity without substantive change.
2. The 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 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 (2) shifts the presumption based on the character of the parties= relationship. Under current law as to software, the distinction between and effort commitment and a results commitment hinges on whether the contract is one for goods (result) or for information services (effort). The test here gives a better measure of how to determine which implied obligation fits the parties' expectations.
3. The issues in information contracts are different than in sales of goods and modern case law in states such as New York holds that commitments to achieve a specific result (as compare to making a effort) are never implied in contracts outside the scope of goods sales.

> **Illustration:** Attorney calls Westlaw customer service, asking for a search term that will identify all cases relating to implied warranties in the sale, lease, or the development of feed for pigs for use in litigation that he hopes to win. The attorney agrees to pay a fee for the service. West provides ideas on a search term. Using that term, the attorney obtains most, but not quite all the relevant cases. The implied warranty is that West use reasonable efforts unless it is clear from the circumstances that West agreed not to be paid at all unless **all** cases were in fact obtained or, perhaps, unless the attorney won the case.

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 (c), to exclude from the contract or to modify an implied warranty, the following rules apply:

(1) Except as provided in paragraphs (5) and (6), language of exclusion or modification must be in a record.

(2) To exclude or modify implied warranties under Section 2B-403 or 2B-404, the language must make reference to “warranty of quality”, "warranty of merchantability", "warranty of accuracy”, or words of similar effect. Language sufficient to exclude one of these warranties is also sufficient to exclude the other.

(3) To exclude or modify an implied warranty arising under Section 2B-405, language is sufficient if it states "There is no warranty that the subject of this transaction will fulfill any of your particular purposes or needs," or words of similar import.

(4) All implied warranties are excluded from the contract or modified only by specific language complying with the foregoing paragraphs, by expressions that state 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 all warranties.

(5) An implied warranty may be excluded or modified by course of performance, course of dealing, or usage of trade.

(6) If a licensee, before entering into the contract, examined and tested the final 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.

(c) In a [mass-market] [consumer] license, language that excludes from the contract or modifies an implied warranty must comply with subsection (b) and be conspicuous. To exclude all warranties in a [mass-market] [consumer] license other than the warranty in Section 2B-401, language is sufficient if it states: “The [information] [computer program] is being provided with

all faults and the entire risk as to satisfactory quality, performance, accuracy, and effort is with the user," or words of similar import.

(d) 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 contract is formed.

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

Uniform Law Source: Section 2A-214. Revised.
Coordination: Approaches are consistent (except for record requirement in commercial deals) and language should be conformed to the extent possible in light of subject matter differences.
Committee Votes:
a. Voted to remove the requirement of conspicuousness for non-mass market disclaimers.
b. Rejected a motion to delete conspicuousness for mass market contracts.
Selected Issues:
1. Should the protections focus on consumer transactions?
2. Should subsection (e) be retained?
3. Should a record be required for disclaimer in non-consumer transactions?
4. Should the section be approved in principle as amended in light of the above?
Reporter's Note:
1. This section has been reorganized for clarity with no substantive changes. The style has been set to match the style of revised Article 2. The proposed revisions for Article do not contain a safe harbor language rule for consumer disclaimers, apparently leaving any language as sufficient. As drafted, this section is more protective of licensees than the proposed Article 2 revisions are for buyers.
2. One Commissioner suggests that the disclaimer modification of title and infringement warranty be brought into this section. That will be considered in the next draft.
3. As voted on by the Committee in April, this exclusion section was more protective of licensors than the equivalent section of draft Article 2 (2-316). It requires a record even in commercial cases and states plain language terms for disclaimer.
4. As to samples and models, at the suggestion of one commissioner, the comments will deal with the case of data not included in the sample.
5. There was a suggestions from the floor at the annual meeting that subsection (e) be deleted. However, it states current law in the vast majority of all states.
6. 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 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, the section amplifies the language used in reference to the traditional "as is" disclaimer.

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.

Uniform Law Source: None
Coordination: Unique to Article 2B.
Selected Issue: Should the section be approved as drafted?
Reporter=s Note:

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.

Uniform Law Source: ' 2-317.
Coordination: Article 2B and 2 should conform, except with respect to consumer exception contained in Article 2 subsection (3)
Selected Issue: Should the section be approved in principle?

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 immediate 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).

Uniform Law Source: ' 2B-318.
Coordination: Article 2B to remain different because of different stage of development in non-privity liability in licensing.
Selected Issue: Should this section be approved in principle?
Reporter=s Notes:

1. This draft adopts a third party beneficiary concept. It does not address 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 Aintended@ beneficiaries. An issue raised during the Drafting Committee meetings concerns the treatment of Apass 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 different policy dealing with embedded software in traditional products, this article does not deal with embedded products which are left to Article 2.
3. The basic principle here is that, in the absence of prior law creating product or other tort liability for the subject mater covered by this Article, Article 2B allows the development of that theme to common law courts.

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, the following rules apply as to copies of the licensed information:

(1) A licensee's right to possession or control of a copy is governed by the contract and does not depend on title to the copy.

(2) Title to a copy is determined by the contract. In the absence of contractual provisions:

(i) If the copy remains in the possession of the licensor, title to the copy remains in the licensor.

(ii) Physical transfer of a tangible copy to the licensee transfers title to the copy on delivery to the licensee.

(iii) Transfer of a copy by electronic means to the licensee transfers title of the copy if the transfer constitutes a first sale under copyright law. (3) If a license involves intellectual property rights of the licensor, reservation of title to a copy reserves title in the original copy and in any copies made by the licensee.

(4) If a licensee receives ownership of a copy 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 law.

(c) A nonexclusive license does not create a security interest in or effect a sale 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.

(d) If an agreement transfers title to intellectual property rights and does not specify when title is to pass, title passes to the transferee 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.

Uniform Law Source: Section 2-401; section 2A-302. Revised.
Coordination: Subject matter differences justify differences in treatment.
Committee Vote:

a. Voted 11-0 to delete former last sentence of (g) limiting the ability to exercise rights until it pays according to the terms of the contract. That concept can be transferred to comments in a form that also accommodates in kind and other value.

Selected Issues:

1. Should transfer of title be presumed in an electronic delivery in the absence of contract terms?

Reporter's Notes:

1. Except as noted below, edits are for clarity. The introductory clause in (b) refers to 2B-502(b)(4) among other provisions.

2. Subsection (a) distinguishes title to the copy from title to the information intellectual property rights. This follows the Copyright Act and other law, and represents a basic theme in differentiating intangibles and tangible. Title to goods does not convey title to the information contained on the goods.

3. Under subsection (b) 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 rights for exhibition or distribution of films and did not constitute first sales); Data Products Inc. v. Reppart, 18 U.S.P.Q.2d 1058 (D. Kan. 1990) (license not a 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.

4. Subsection (b)(2) states the various presumptions relating to title to copies in a license. The basic theme is that the contract controls. Absent contract terms, the draft distinguishes between tangible and electronic transfers. The rule for tangible transfers of a copy parallels Article 2 in current law. The electronic transfer approach defers to federal law on a potentially controversial issue. The White Paper of copyright in the Internet suggests and leigslation is being considered to implement that the electronic delviery of a copy of a copyrighted work is not a first sale because it does not involve transfer of a copy from the licensor to the licensee. While state law can control questions of title to personal property, this draft suggests that the issue be left to federal policy.

5. 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). If federal law requires a writing to make this ownership transfer; state law is subject to that limit. 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 completion that separates 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) In the absence of contract provisions and except as otherwise provided in this section, a party's rights under a 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, or materially impair the other party's likelihood of obtaining return performance.

(b) A licensee's rights under a nonexclusive license may not be transferred voluntarily or involuntarily, including by creation or enforcement of a security interest, sale, or assignment, or by attachment, levy, or other judicial process unless:

(1) the license involved the delivery of a copy subject to a mass-market license and the licensee transfers the original copy and all other copies made by it; or

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

(c) A licensor's rights under a contract may transferred voluntarily or involuntarily, including by creation or enforcement of a security interest, sale, or assignment, or by attachment, levy, or other judicial process unless:

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

(2) the transfer extends to information in which the licensee designated as confidential or otherwise protected under intellectual property law.

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

(e) A security interest or other transfer precluded by this section is effective if the party to which the information is confidential or that holds intellectual property rights in the information and is not involved in creating the interest consents to its creation in the license or otherwise.

Uniform Law Source: Section 2A-303. Substantially revised.
Coordination: Substantive differences justify largely different treatment except when conformance is possible.
Committee Vote:
a. Voted 7-1 to add a provision to allow transfer when the licensee owns the copy of the information.

Selected Issue:

1. Should we permit creation of security interest in licensee interest despite federal policy regarding no transfer of that interest?

Reporter's Notes:

1. Edits for clarity based on Commissioner suggestions; provisions regarding security interest creation and enforcement moved here from 2B-503. Former subsection (b)(2) dealing with transfers as part of the transfer of substantially all assets of a licensee has been deleted in light of recent Ninth Circuit authority holding that federal policy precluding a licensee's transfer of non-exclusive license rights pre-empts state law and makes the license not transferable. This section goes beyond the parameters of federal law and, thus, creates both a preemption problem and a form of misinformation for users of the statute who are not knowledgeable of intellectual property law

2. 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. AAssignment@ 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. **The fact that this federal policy over-rides state law was restated and accepted by the Ninth Circuit in 1996.** See also 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).

3. The exceptions in subsection (b) illustrate cases in which a transfer is permitted under current law.

4. Persons involved in Article 9 suggest a model that allows creation of a security, but focuses on enforcement as the context in which to limit the transferability consistent with common law and federal law. This approach has support from only one case in a bankruptcy proceeding involving an federal regulatory "license" and there is authority to the contrary. The Committee should consider whether the risk of preemption is justified and, in any event, whether confidentiality and other aspects of information licenses indicate that security interests should be precluded without consent.

SECTION 2B-503. 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 except to the extent that creation or enforcement of the security interest would be ineffective under Section 502.

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

Uniform Law Source: Section 2A-303(2)(3)(4)(6)(8).
Committee Vote:
a. Voted 8-0 to delete provision that invalidates a prohibition on transfer in a mass market license.
Selected Issue: Should the section be approved in principle?

SECTION 2B-504. DELEGATION OF PERFORMANCE; SUBLICENSE. Subject to Section 502, 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 supervise or control the performance required by the contract or the contract prohibits delegation or sublicensing.

Uniform Law Source: Section 2-210; Section 2A-303.
Coordination: Language should conform in substance.
Selected Issue: Should the section be approved as drafted?

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

(a) Unless the assignment is merely for security, acceptance of an assignment of rights created under a contract constitutes a promise by the assignee to perform the accompanying duties of the party whose interest is assigned. The promise is enforceable by the party making the assignment or by any other party to the information contract.

(b) Assignment, delegation, or sublicense of a contract does not relieve the assignor or delegator of any duty under the contract to pay or to perform or of liability for breach unless the other party agrees to such a release.

Uniform Law Source: 2-210; 2A-303.
Selected Issue: Should the section be approved in principle?
Reporter's Note:
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. PRIORITY OF TRANSFERS BY LICENSOR.

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

(1) is represented by a record [signed] [authenticated] 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.

(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.
Coordination: Differences based on over-riding intellectual property concepts.
Reporter's Note:

1. 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.

2. Subsection (a) states a priority rule that is not consistent with many other provisions of the UCC, but which attempts to parallel, but to push toward UCC concepts, the priority rule present in current copyright law. Under the Copyright Act, a prior non-exclusive license is subordinate to a later transfer of copyright ownership unless the license is in a signed writing. The **policy issue here is whether we should delete this subsection since we lack the ability to totally reverse the federal rule.** The provisions here do extrapolate that rule to protect some licenses not expressly safeguarded under federal law: mass market and prior licenses involving delivery of a copy. Including the section in this statute may serve to provide information and notice to parties involved in contracting here who do not have expertise in copyright.

3. Under federal law, the provisions of (b) may also be subject to the foregoing priority rule, but the case is less clear.

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

(a) A creditor or other transferee of a licensee acquires no interest in information, copies, or rights held by a licensee unless the conditions for an effective transfer under this [article] and the license are satisfied.

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

(c) A licensee that acquires a copy is subject to the intellectual property rights of a remote licensor, the terms of its contract with that licensor, and the license restrictions on use of the intellectual property in any contract between the remote licensor and a transferor.

Uniform Law Source: Section 2A-305
Coordination: Differences based on over-riding intellectual property concepts.
Reporter's Notes:

1. As a general principle, a license does not create vested rights and is not generally susceptible to free transfer 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). A retailer that obtained copies of software from third parties argued 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 held 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. PERFORMANCE OF CONTRACT.

(a) A party's duty to perform, other than with respect to contractual use restrictions, is contingent on there being no uncured material breach by the other party of its obligations that precede in time the party's particular performance. [*However, in a mass market license, if the duty to perform involves a duty to accept a copy of information tendered by the other party, the performance need not be accepted unless the tender of performance conforms to the contract.*]

(b) If the contract places contractual use restrictions on a party or requires other on-going performance by that party, the party's right to exercise the rights under the contract is contingent on there being no uncured material breach of its obligations or duties under the contract.

(c) A party shall perform in a manner that conforms to the terms of the contract and, in the absence of terms, in a manner and a quality that is reasonable in light of the ordinary standards of the trades or industries involved.

(d) Subject to subsection (e), if a party breaches its obligations, including by failure to comply with any contractual use restrictions, the aggrieved party may:

(1) suspend its performance, other than compliance with contractual use restrictions, and demand assurance of future performance pursuant to Section 2B-622; or

(2) exercise its rights on breach of contract under this [article] or the terms of the contract, but the aggrieved party may cancel the contract only if the contract so provides or the

breach is a material breach and has not been cured.

(e) For purposes of this section, "contractual use restrictions" include nondisclosure and confidentiality obligations, as well as limitations on scope, manner, method, or location of use of information transferred, exchanged, or developed in the creation or performance of the contract, to the extent that such obligations or limitations are created by the contract.

Uniform Law Source: Restatement (Second) of Contracts ' 237. Substantially revised.
Coordination: Differences in subject matter and practice justify differences in Article 2B and 2.
Selected Issue:

1. Should the bracketed language be added to preserve perfect tender rule in tender of delivery and rejection in mass market?

Reporter's Notes:

1. Sections 601 and 602 have been substantially restructured and placed into a single section dealing with general duties to perform applicable to both parties. A number of edits have been made for purposes of clarity, but no substantive changes are suggested or intended with respect to these sections. The edits include shifting to the term "material breach" rather than using the term "substantial performance" since this more accurately conveys the intended standard. This phrasing corresponds to Section 237 of the Restatement. The second general edit involves creating the term "contractual use restrictions" to summarize the various information use limitations that are not suspended or excused by breach. The term applies to information flowing in either direction (to or from the licensor) to the extent that the *contract* creates the limitations. The term contract here covers both the express terms of the contract *and* the default rules of this Article to the extent they are incorporated into the contract.

2. Bracketed language in subsection (a) is intended to raise and suggest a response to concerns raised by consumer advocates arguing that "perfect tender" should apply to consumer transactions. The bracketed language would create exactly the rights currently in force under Article 2. This so-called perfect tender rule does not mean that the tendered information is in fact perfect, but that it meet the general contract description in light of ordinary expectations and trade use. **As in Article 2, it would apply only to tender of a copy and the resulting duty to accept or right to refuse the tender.**

3. This section sets 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 sets 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.

4. This section adopts 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-107 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.

5. 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.

6. 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.

7. 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. TRANSFER OF RIGHTS; LICENSOR OBLIGATIONS. [new]

(a) A transfer of rights occurs when, pursuant to a contract, a licensor completes the acts required to make information available to a licensee and gives the licensee any notice reasonably necessary to make it aware of this occurrence. If no act is required to make information available, the transfer of rights occurs when the agreement becomes enforceable between the parties.

(b) If a licensor's performance includes a transfer of rights, the licensor must take such actions as are reasonably necessary to make the information available to the licensee.

(c) If the information is made available by delivery of a copy of the information, the following rules apply:

(1) If the contract is silent as to delivery:

(i) In the case of physical transfer of copies, the licensor must make the copies available to the licensee at the licensor's place of business or, if it has none, its residence, but if the copies are identified at the time of the contract and located elsewhere, that place is where the copies must be made available.

(ii) In the case of transfer of copies by electronic means, the licensor must make the information available in an information processing system of or designated by it and provide the licensee with authorization codes, addresses or any other material necessary to obtain the information.

(2) If the copies are held by a third party and are to be delivered without being moved, the licensor must deliver any documents, authorizations, addresses, access codes or such other materials as are necessary for the licensee to obtain the copies.

(3) If the contract requires or authorizes the licensor to send copies of the information to the licensee or to a third party, but does not require the licensor to deliver them to a destination:

(i) In the case of physical transfer of copies, the licensor must put the copies in the possession of a carrier, make such a contract as is reasonable for their transportation to the licensee or the third party with the costs of the shipment to be borne by the licensee, and deliver any documents necessary to obtain the copies from the carrier.

(ii) In the case of transfer of copies by electronic means, the licensor must initiate an appropriate transmission of the information to the licensee or the third party.

(d) If the transfer of rights is to occur by making access to a facility available to the licensor, the licensor must complete such acts as are necessary to make access available, including providing the licensee with any documents, authorizations, addresses, access codes or such other materials as are necessary for the licensee to obtain access to appropriate facility.

(e) In the case of electronic transmission or delivery, information must be made available in a manner consistent with (i) the technological capabilities of the receiving party to receive the information that are known to the licensor, or (ii) the ordinary methods in the trade or industry of

making transfers of the particular kind.

Uniform Law Sources: 2-401, 509(a), 308
Reporter's Notes:

This section arises from an effort to bring together the various rules defining the obligations of the licensor relating to acts needed to complete a transfer of rights. The section contrasts to Section 2B-606 which deals with tender of performance, including tender of a transfer of rights. The actual transfer of rights is, when applicable, an obligation of the contract (like delviery and passing title in Article 2), tender is the present offer to complete the transfer.

By and large, this section corresponds to the treatment of title and delivery in Article 2. While title itself is not a key concept in article 2, the seller's obligations for delivery correlate to obligations relating to title transfer and risk of loss. In article 2B, title and delivery are relatively less significant. The keys are transfers of rights which involve making information available to the transferee. The default rules here correspond to standards in Article 2 relating to delivery and title transfer, but they account for transactions involving access and electronic transfers.

This section brings forward and supplants rules in former 2B-108 and former 2B-315.

SECTION 2B-603. PERFORMANCE 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.
Coordination: Article 2B to conform to Article 2 language.
Selected Issue: Should this section be approved in principles?
Reporter's Note:

Edited for clarity. The section adopts an approach found in both ' 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 tendered to 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 tender of

completion of the entire performance.

Uniform Law Source: Restatement (Second) Contracts; Section 2-310.
Coordination: Language to be coordinated.
Selected Issue: should section be approved as drafted?

[B. Tender of Performance; Acceptance]

SECTION 2B-605. ACCEPTANCE; EFFECT.

(a) A party shall pay or render other performance required by the contract according to the contract terms for any performance it accepts.

(b) The burden is on the party that accepted the performance to establish any breach with respect to the performance accepted.

Uniform Law Source: Section 2-507.
Selected Issue: Should this section be approved as drafted?
Reporter's Note:

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. The additional language in new (b) is taken from current Article 2-607(4).

SECTION 2B-606. TENDER OF PERFORMANCE.

(a) A tender of performance occurs when a party, with manifested present ability to do so, offers to complete the performance. If a performance by the other party is due before the tendered performance, the other party's performance is a condition to the duty to complete the tendered performance.

(b) Tender of performance that substantially conforms to the contract entitles the party to acceptance of that performance [, except that in a mass market license, a tender of a copy of information requires acceptance only if the tender conforms to the contract.]

(c) If the performance is a transfer of rights, a licensor shall tender first but has no duty to complete the performance until the licensee pays and tenders other performance required at that time under the contract. Tender must be at a reasonable hour and requires that the licensor

(1) notify the licensee that the information or copies of the information are

available or have been shipped;

(2) tender any documents, authorizations, addresses, access codes, acknowledgments, or other materials necessary for the licensee to obtain access to, control over, or possession of the information; and

(3) hold the information, copies, and materials at the licensee's disposal for a period reasonably necessary to enable the licensee to take possession or control or to achieve access.

(d) 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 money and gives any extension of time reasonably necessary to procure it.

Uniform Law Source: ' 2-510, 511(a)(b). Restatement (Second) of Contracts ' 238.
Reporter's Notes:

1. This section is substantially revised by bringing in various rules from the prior draft and important licensee protections from original Article 2 that were not specifically incorporated in this Article. The revised section brings together tender of performance rules from various sections in the current Article 2.
2. Subsection (a) states a general principle of what constitutes tender, drawn largely from the Restatement and intended to cover cases not directly addressed in this section.
3. The basic model is that tender of a performance means to offer to perform, and typiclly precedes actual performance. In reference to transfers of rights, Article 2B follows Article 2 by requiring tender, then payment, then completion. For tender, however, enough must be given to the attention of the licensee to allow a clear indication that performance is immediately forthcoming. This is the function of the references to shipment, tender of materials and the like.
4. Subsection (d) is drawn from former 2B-608 and is identical to Article 2 treatment of this issue.

SECTION 2B-607. PAYMENT BEFORE INSPECTION.

(a) If an agreement requires payment in whole or in part before inspection pursuant to Section 2B-608, 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-609; 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.

(b) 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).
Coordination Meeting: The provisions on acceptance and inspection involve different frameworks.
Selected Issue: Should the section be approved in principle?
Reporter=s Note:

Payment may occur before inspection in a large number of circumstances in the ongoing relationships that arise in licensing. The provisions of subsection (a) circumvent the obligation to pay first in narrow circumstances. Subsection (a)(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 provisions which void 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.

Subsection (a) in the former draft has been relocated to Section 2B-606.

SECTION 2B-608. LICENSEE'S RIGHT TO INSPECT. If performance requires delivery of a copy of information, the following rules apply:

(1) Subject to paragraphs (3), (4) and (5), a licensee has a right before payment or acceptance to inspect the information and any related documentation 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 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 confidentiality of the information. If inspection would disclose a trade secret or confidential information, jeopardize confidentiality, or provide the licensee substantially with the value of the information to payment before payment, the licensee does not have a right to inspect before payment.

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

Uniform Law Source: Section 2-513; CISG art. 58(3). Substantially revised.
Coordination Meeting: The provisions on acceptance and inspection involve different frameworks.
Selected Issue: Should the section be approved in principle?
Reporter's Note: Edited for clarity. Generally conforms to current law, but deals with the relationship between confidentiality and the right to inspect.

SECTION 2B-609. REFUSAL OF DEFECTIVE TENDER.

(a) Subject to Section 2B-619, if a tender of performance 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 commercially reasonable unit and refuse the rest.

(b) Refusal 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 circumstances known to the parties at the time of the contract.

Uniform Law Source: Combines ' 2-601, 2-602, 2A-509. Substantially revised.
Coordination Meeting: The provisions on acceptance and inspection involve different frameworks.
Selected Issue: Should there be a carve out for "perfect tender" rule applicable to consumer transactions with respect to a refusal of the transfer of rights?
Reporter's Note:

If the committee adopts a "perfect tender" rule regarding rejection of a transfer of rights, that decision would be incorporated here as well as in other sections of the draft.

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-610. DUTIES FOLLOWING RIGHTFUL REFUSAL.

(a) After refusal of either a transfer of rights or 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 or that conveys a further substantial benefit to the licensee, exceeds any authorization for use under the contract and is 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 time reasonably 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 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 being notified of refusal, the licensee may store the documentation and copies for the licensor's account or ship them to the licensor with a right of reimbursement for reasonable costs of storage, shipment, and handling.

(c) A licensee has no further obligations with regard to information or related copies and documentation rightfully refused but remains bound by any obligations of nondisclosure or

confidentiality and any limitations on use which would have been enforceable had the tender not been refused.

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

Uniform Law Source: Section 2-602(2), 2-603, 2-604. Substantially revised.
Coordination Meeting: The provisions on acceptance and inspection involve different frameworks.
Selected Issue: Should the section be approved in principle?
Reporter's Note:

Edited for clarity.

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 ' 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-611. WHAT CONSTITUTES ACCEPTANCE.

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

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

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

(3) fails effectively to refuse performance under the terms of the contract or Section 2B-609;

(4) acts in a manner that makes compliance with the licensee's duties on refusal impossible because of commingling;

(5) received a substantial benefit or valuable knowledge from the information,

performance or access which benefit or knowledge cannot be returned.

(b) Except in cases governed by subsection (a)(4) and (a)(5) and subject to Section 2B-608(4), acceptance of performance that involves delivery of a copy of information occurs only when the party has a reasonable opportunity to inspect the information and any document.

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

Uniform Law Source: Section 2A-515. Revised.
Coordination Meeting: The provisions on acceptance and inspection involve different frameworks.
Selected Issue: Should the section be approved in principle?
Reporter's Note:

Edited for clarity based on commissioners' suggestions.

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-612. REVOCATION OF ACCEPTANCE.

(a) Subject to subsection (b) and (c), 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 and 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 of it to the other party 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 theperformance or access which benefit or knowledge cannot be returned.

(c) A party who justifiably 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; 2-608. Revised for licensing terminology and to reflect that revocation is an issue for licensor and licensee.
Coordination Meeting: The provisions on acceptance and inspection involve different frameworks.
Selected Issue: Should the section be approved in principle?
Reporter's Note:

Edited for clarity. 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-613. 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; and

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

(b) In a continuous access contract, intermittent or occasional failures to have access available do not constitute a breach if they are consistent with:

(1) standards of the trade or industry for the particular type of contract;

(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 is free of any restriction by the licensor except for contractual restrictions and restrictions resulting from the intellectual property rights of the licensor or other applicable law. The licensee may make and retain a copy of the information on an information processing machine.

Uniform Law Source: None
Coordination Meeting: No equivalent in Article 2.
Selected Issue: Should the section be approved in principle?
Reporter's Note:

Edited for clarity and, in the case of non-contractual standards, for consistency with the general provisions of 2B-601. 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 ' 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-614. CORRECTION AND UPDATE CONTRACTS.

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

(1) If the contract to correct errors covers a limited time and is in lieu of a warranty in an agreement between the parties to provide information to the licensee, the party undertakes that its performance of the contract to correct errors will complete a transfer that conforms to that other agreement.

(2) In cases not governed by paragraph (1), the party 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 and with a quality that is reasonable consistent with ordinary standards of the trade or industry for the particular type of agreement.

(3) In cases governed by paragraph (2), the party providing the services does not guaranty that its services will correct all defects or errors unless expressly so provided by the agreement.

(b) An agreement to provide updates or new versions is an agreement to provide only such updates or new versions as are developed unless the circumstances or the terms of the contract expressly indicate that the licensor agreed to develop and provide new versions or updates in a timely manner. If a licensor agrees to provide updates or new versions of information that are developed, the following rules apply:

(1) The licensor is not required to provide new versions or upgrades that it has not made available to the public or relevant customer base and has no obligation to make new versions or upgrades available to the public or the customer base. (2) 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 and a quality that is reasonable consistent with ordinary standards of the trade or industry for the particular type of agreement.

(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 knowingly accepts the lesser quality of 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.

Uniform Law Source: None
Coordination: Similar but different context than in revised 2-504.
Selected Issue: Does this section correctly capture default term obligations?
Reporter's Notes:

1. Edited for clarity and to focus on the issues actually involved. The order of paragraphs (b)(1) and (2) were reversed from the prior draft. Edited for clarity and, in the case of non-contractual standards, for consistency with the general provisions of 2B-601.
2. Editing is designed to clarify confusion created in the prior draft. The new

language in (b) indicates what, it is believed, constitutes the actual nature of most update commitments, that is, the updates are to be provided if developed ad made available to the public. As the comments of one commissioner stated, the "licensor should not be required to make every new version or upgrade available to the public. The new version or upgrade may contain bugs that cannot be corrected without major expense or the developer may learn that a proposed upgrade infringes intellectual property rights of others." Subsection (b) sets out a rule of interpretation for when the assumption is reversed.

3. 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-620. 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.

4. 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-615. SUPPORT CONTRACTS.

(a) A licensor is not required to provide support or instruction for the licensee's use of information or licensed access after completion of 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 contract and, to the extent not dealt with by the contract, in a manner and with a quality that is reasonable consistent with ordinary standards of the trade or industry 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.

Uniform Law Source: Restatement (Second) of Torts § 299A.
Coordination Meeting: Similar but different context than revised 2-503.
Selected Issue: Does this correctly capture default rules?
Reporter's Note:

Edited for clarity and for consistency with the general standard of 2B-601. 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-616. 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

(1) is not bound by the terms of the contract between the producer and the end user; and

(2) does not receive the benefits of the contract between the producer and the end user.

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

(e) In the case of refunds made in good faith pursuant to Section 2B-113

(1). a retailer who makes a refund to a licensee that refuses a license is, on return

of the copy and documentation to the producer, entitled to reimbursement of the cost of the copy paid to the producer by the retailer, and

(2) a producer who makes a refund to the licensee is entitled to reimbursement from the retailer of the difference between the amount refunded and the price paid by the retailer to the producer for the refunded product.

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

Uniform Law Source: None
Coordination Meeting: No Article 2 equivalent.
Selected Issue: Does this correctly describe default position?
Reporter=s Note:

1. 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.

2. The provisions regarding refund issues are intended to coordinate this section with the obligations that might be incurred in reference to creating an opportunity to review the terms of a license, which opportunity requires that there be the availability of a refund if the terms of the contract are refused. The consumer is entitled to the retail value of the refused product and may obtain that either from the retailer or the producer. However, as between the producer and the retailer, the retailer can only receive reimbursement for what it paid to the producer. Thus, for example:

> **Illustration:** Consumer refuses a program because it dislikes the license. It obtains a refund of the price paid to retailer ($100). Retailer is entitled to reimbursement from Producer of the $75 price that Retailer paid Producer for the product (if it returns the product). On the other hand, if Consuemr obtains the $100 from Producer, Producer is reimbursed $75 from Retailer.

SECTION 2B-617. DEVELOPMENT CONTRACTS. If an agreement requires the development or creation of a computer program by the licensor, the following rules apply.

(1) Unless otherwise expressly provided in a record, performance does not transfer ownership of any intellectual property rights in the developed program to the licensee with respect to aspects of the program not developed or provided by it.

(2) The licensee receives a nonexclusive license to use the computer program in any manner consistent the use of the program understood by the parties at the time of contracting as the purpose for which the development was undertaken.

(3) On request of the licensee, the licensor shall notify the licensee if it used independent contractors or information provided by other third parties to which intellectual property rights may apply in its performance and shall provide the licensee with a statement that either confirms that, to its knowledge, all applicable intellectual property rights have been obtained or will be 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.

(4) If the contract provides that ownership of intellectual property rights in the completed program will pass to the licensee:

(i) The licensor retains the intellectual property rights in any components or code used that were developed prior to or independent of performance of the contract, but the licensee may use or modify such components or code in any manner in connection with its use of the program or modifications thereof. The licensee's rights vest on payment and performance of all of its obligations and cannot thereafter be canceled by the licensor unless the contract otherwise provides.

(ii) The licensor has a nonexclusive right to use in performance of other contracts any components or code developed by it during the performance of the contract to the extent that such use does not interfere with or diminish the benefits to the licensee of the contract and does not result in the disclosure or misuse of confidential information of the licensee.

(iii) The licensee receives the program free of any restrictions on use on the part of the licensor.

Uniform Law Source: None
Coordination Meeting: No Article 2 equivalent
Selected Issue: Does this section provide proper default rules for development contracts?
Reporter's Note:

1. Based on suggestions by various observers, this section has been substantially expanded to provide treatment of several common issues present in development contracts. The default rules suggested parallel existing intellectual property law.

2. In addition to the substantive terms of this section, the Committee should also consider whether the scope of the section should be limited to "computer programs" or should be expanded to cover other information products, such as databases and the like.

3. This section provides important new 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-618. SYSTEM INTEGRATION CONTRACTS.

(a) If an agreement requires a party to provide a single or integrated system consisting of components and the licensee relies on the licensor=s expertise to select the components, the components selected must function together as a system substantially as described in the agreement.

(b) Acceptance by a licensee of performance with respect to delivery or installation of part of such a system is conditional on completion of the system consistent with subsection (a).

Uniform Law Source: 2-315.
Coordination Meeting: Different subject matter.
Selected Issue: Should the section be approved in principle?
Reporter's Note:

1. Edited for clarity.

2. Note that this section does not require or deal with the creation of a system that fulfills the needs of the licensee. That is treated as a warranty elsewhere. Here, the key standard is that the selected parts must function as a system, even if the system is not adequate to particular needs of the licensee which may be known only to it.

3. 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-619. CURE OF BREACH.

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

breach:

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

(2) effects cure promptly, before cancellation or refusal by the other party, and within any time period for cure specified in the contract.

(b) If a licensor, other than in a mass-market license, 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 shall promptly and in good faith make an effort to cure or provide a refund. Failure to make this effort is a material breach of the contract unless the cost of the effort would be disproportionate to the adverse effect of the nonconformity on the licensee.

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

(1) fully performs the obligation that was breached;

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

(3) provides adequate assurance of future performance.

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

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

(f) A breach that has been cured consistent with this section may not be used in itself as a basis for cancellation of a contract, but mere notice of an intent to cure does not preclude cancellation.

Uniform Law Source: Sections 2-508; 2A-513; 11 USC 365
Coordination Meeting: Different context because of substantial performance standard.
Selected Issues:
1. Should cure be subordinate to the right to cancel?
2. Should failure to make effort to cure minor breach constitute material breach?
Reporter's Note:
1. Edited for clarity. A failure in good faith to make an effort to correct a nonmaterial default is defined as a material breach. This is necessary to provide incentive for performing the obligation. By definition, the breaching party is already in breach of the contract. This provision, of course, would be modified if the Committee moves away from the material breach standard.
2. 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-620. WAIVER OF OBJECTION [new, section will be renumbered].

(a) Any claim or right arising out of an alleged breach may be discharged in whole or in part without consideration by a waiver or renunciation contained in record that is [signed] [authenticated] by the aggrieved party. A [signed] [authenticated] waiver may not be revoked except for noncompliance with any agreed conditions for the renunciation or waiver.

(b) A party who accepts a tender of performance knowing or with reason to know that the performance constitutes a breach:

(1) waives its right to revoke acceptance or cancel the contract because of the breach unless the acceptance was on the reasonable assumption that the breach would be seasonably cured, but does not in itself impair any other remedy provided by this [article]; and

(2) if the party fails within a reasonable time to object to the breach, the party waives any remedy for that breach.

(c) The failure of a party that refuses a performance to state in connection with its refusal a particular defect that is ascertainable by reasonable inspection waives the right to rely on the unstated defect to justify refusal or to establish breach only

(1) if the other party could have cured the defect if stated seasonably; or

(2) between merchants when the other party has after refusal of a performance made a request in a record for a full and final statement in a record of all defects on which the refusing party proposes to rely.

(d) Payment against documents made without reservation of rights waives the right to recover the payment for defects apparent on the face of the documents.

(e) A waiver under this may not be revoked as to the performance to which the waiver applies. However, waiver of a breach in one performance does not waive the same or similar breach in future performances of like kind unless the party making the waiver expressly so states.

Other than a waiver pursuant to subsection (a), a party that 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 by that other party.

Reporter's Notes:

1. This section brings together rules from various portions of existing Article 2 dealing with waiver issues and recasts those rules to fit the broader number and variety of types of performance that are involved in Article 2B transactions. A prior version of this section is currently carried forward in revised Article 2-505 (July Draft).

2. Subsection (a) stems from 2A-107 and accommodates written waivers. Under subsection (e), this form of waiver cannot be rescinded as to future performances. In effect, it is a contractual modification. The Restatement is consistent with this view.

3. Subsection (b) brings together rules from current Article 2-607(2) and (3)(a) and generalizes the language. In Article 2, the rules apply only to a tender by the seller and acceptance of delivery by the buyer. Here, the effect also applies to acceptance of tendered performance by the licensee (e.g., a payment of royalties). The rule does not apply to cases where the party merely kknows that performance under the license is not consistent with the contract unless that defective performance is tendered and accepted. The language on waiver here is from original Article 2. Draft Article 2 does not impose a waive by the accepting buyer unless the seller is prejudiced by the failure to object under what is here subsection (b)(2). The following illustrates the rule here:

> **Illustration:** Licensee has an obligation to pay royalties to the Licensor based on 2% of the sale price of products licensed for its manufacture and distribution. The roylaty payments must be received on the first of each month. A 5% late fee is imposed for delays of more than five days and the license provides that delay of more than five days is a material breach. One month, licensee does not tender payment until the 25th day of the month and its tender does not include the late charge. Licensor may refuse the tender and cancel the contract. If it accepts the tender it knows of the breach and cannot thereafter cancel the contract for that breach. If it fails to object in a reasonable time to the late tender and the nonpayment of the late fee, it is also barred from recovering that amount.

3. Subsections (c) and (d) come from current article 2-605 and, except for changes that adopt the language of waiver, are substantively identical to that section.

4. Subsection (e) sets out a default rule common in most contracts involving ongoing relationships by indicating that waivers are presumed to be related to the performance accepted only. This does not alter traditional estoppel concepts, of course, since a waiver by performance may build justifiable reliance as to future conduct in an appropriate case. Such common law principles continue to apply to UCC transactions. The section goes on to take language from former 2B-303 and the article 2 predecessor of that section setting out when waiver as to executory obligations can be retracted. The language is from current Article 2, but revised article 2 is consistent

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

(a) A contract imposes on party an obligation not to impair another party's expectation of receiving due performance. If reasonable grounds for insecurity arise with respect to the performance of a party, the party whose expectation of performance is affected 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 that is adequate under the circumstances of the particular case is a repudiation of the contract.

Uniform Law Source: 2-608.
Coordination Meeting: Conform to Article 2 language.
Selected Issue: Should the section reinstate reference to "between merchants" in (b)?
Reporter's Note: Edited for clarity.

SECTION 2B-622. ANTICIPATORY REPUDIATION. If a party to a contract states to another 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: 2-609.
Coordination Meeting: Conform to Article 2 language.
Selected Issue: Should the section be approved in principle?
Reporter's Note: Edited for clarity and, at the suggestion of a commissioner, to clearly encompass transactions involving more than two parties.

SECTION 2B-623. RETRACTION OF ANTICIPATORY REPUDIATION.

(a) A repudiating party may retract a repudiation until its next performance is due unless an 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 an aggrieved party for any delay caused by the repudiation.

Uniform Law Source: Section 2-6-110.

Coordination Meeting: Conform to Article 2 language.
Selected Issue: Should the section be approved in principle?
Reporter's Note: Edited for clarity.

[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 send 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 held by a third party 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
Coordination Meeting: Different subject justifies differences, but sections are parallel.
Selected Issue: Should the section be approved in principle?
Reporter's Notes:

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).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.

2. This draft deletes former section (c) as redundant in part and not needed.

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.
Coordination Meeting: Substantive differences justified by subject matter.
Selected Issue: Should the section be approved in principle?

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.

Uniform Law Source: None.
Coordination Meeting: Substantive differences justified by subject matter.
Selected Issue: Should the section be approved in principle?

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 party claiming excuse shall allocate performance among its customers in any manner that is fair and reasonable, notify the licensee of the estimated quota made available, and 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 (b), the contract lapses with respect to any performance affected.

Uniform Law Source: Section 2A-405, 406; Section 2-615, 616.
Selected Issue: Should the section be approved in principle?

[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 use, 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 information, materials, documentation, copies, records, 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) any right, remedy, or obligation stated in the agreement as surviving.

Uniform Law Source: Section 2A-505(2); Section 2-106(3).
Coordination Meeting: Article 2 to conform to Article 2B..
Selected Issue: Should the section be approved in principle?
Reporter's Note: Edited for clarity and to reflect deletion of separate concept of "data".

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 sends reasonable notice to 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) In cases not governed by subsection (b), an agreement dispensing with notice otherwise required under this section is invalid if its operation would be unconscionable, but a contract term may specify standards for the nature and timing of notice. The contract standards are enforceable if not manifestly unreasonable.

Uniform Law Source: Section 2-309(c)
Coordination Meeting: Recommends that section conform to Art. 2 requirement.
Selected Issue: Should the section be approved in principle?
Reporter's Notes:

1. Edited to clarify that the notice must be reasonable. Focuses on sending notice. Draft Article 2 requires receipt of notice.
2. Based on several suggestions to this effect, the comments will make it clear that the terminating party must have a right to do so under the contract or other applicable law.

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 any foregoing was subject to restrictions on use or disclosure, continued exercise of rights in the restricted material by the party in possession or control following termination shall cease. Continued exercise of rights or other use is a breach of contract and wrongful as against the other party unless 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, but does apply to copies made from materials or copies received on a restricted basis.

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

(1) to take possession of tangible objects containing the licensed information or any other materials to be returned under subsection (a);

(2) to render unusable or eliminate the capability to exercise rights in the licensed information and any other materials to be returned under subsection (a) without removal;

(3) to destroy or prevent access to any record, data, or files containing the licensed information and any other materials to be returned under subsection (a)under the control or in the possession of the other party; and

(4) to require that the party in possession or control of the licensed information and any other materials to be returned under subsection (a) assemble and make them available to the other party at a place designated by that other party or destroy electronic and other records or files containing the materials.

(c) In an appropriate case, to enforce the rights the court may grant injunctive relief to enforce the rights under subsection (a).

(d) Subject to Section 2B-320, a party may include electronic means to enforce the rights stated in subsection (a) and use that 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. 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.

Uniform Law Source: None.
Coordinating Meeting: Subject matter differences.
Selected Issue: Does the section properly balance rights in the absence of breach?

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.] [However, if the contract is an electronic transaction for informational content or the breach is nonmaterial neither party is entitled to consequential

damages in the event of a breach by the other 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) 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. If a remedy cannot reasonably be applied to a particular performance, the remedy is not available.

(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 contract 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.

(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.
Coordination Meeting: Differences in approach are acceptable.
Selected Issue:

1.. Should the exclusion of consequential damages be retained?

2. Is it appropriate to limit court's ability to monitor to allowing denial of remedy on if it substantially over-compensates?

Reporter's Note:

1. 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 Ano 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.

2. Subsection (a) contains bracketed language indicating that the committee needs to determine whether the exclusion of consequential damages as a default rule should be retained. If consequential damages are re-instated as a default rule, the second bracketed language indicates that they should not be presumed to be present in electronic transactions involving content where the nature of the transaction involves low cost transactions and potentially high risk situations where maintaining the cost parameters of the system and encouraging a free flow of information content indicate the desirability of restricting the scope of potential liability or in nonmaterial breaches where the nature of the default suggests that expansive damages are not routinely appropriate unless previously agreed to by the parties.

3. Subsection (c) edited to conform to Article 2 language (2-703(b)).
4. Instead of the provisions in subsection (d), prior drafts included a summary and detailed list of remedies available to licensors and licensees. This was deleted based on stylistic questions, but the Committee should consider whether that approach should be reinstated.

SECTION 2B-702. DAMAGES FOR NONMATERIAL BREACH. If a party breaches a contract and the breach is not material or, in the case of a material breach, if the aggrieved party so elects, the aggrieved party may:

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

(2) recover [direct] [general] damages measured as the loss resulting in the ordinary course from the breach as determined in any reasonable manner, together with incidental [and consequential] damages less expenses and costs saved as a result of the breach; and

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

Uniform Law Source: Section 2A-523(2).
Coordination Meeting: Damages measure should generally follow revised 2-704.
Committee Vote:
a. Voted to provide that consequential damages are not available unless agreed to for either party except in cases that may be identified for special treatment during committee discussion.
Selected Issue: Should the section be approved in principle?
Reporter's Notes:
1. Edited for clarity and to correspond to Article 2 language relating to general damages measures..
2. New language to indicate that a party may elect this measure of damages in the event of a material breach. This election is subject to general limitations on double recovery and the like. The Committee should consider whether this election should be further constrained in the case of a material breach.

SECTION 2B-703. LOSS TO CONFIDENTIAL INFORMATION. In a license, on breach of contract by a party, an aggrieved party who has a property right or interest in confidential or trade secret information may recover an amount as measured in any reasonable manner that will compensate it for any loss of or damage to the party's interest in that information which was reasonably foreseeable and was caused by breach involving disclosure of the information.

Uniform Law Source: 2A-532.
Coordination Meeting: No article 2 equivalent.
Reporter's Notes:
1. Edited to clarify that it focuses on confidential or secret information.
2. The Committee should determine whether this type of damage constitutes direct or consequential damage.

SECTION 2B-704. CANCELLATION; EFFECT.

(a) A party may cancel the contract if the other party's breach constitutes a material

breach of the entire contract which has not been cured or if the contract authorizes cancellation.

(b) Cancellation is not effective until the canceling party gives 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) All obligations that are executory at the time of cancellation are discharged Except that therights, duties, and remedies described in Section 2B-628(b) survive cancellation.

(e) A contract clause providing that rights under a contract cannot be canceled is enforceable and precludes cancellation and the exercise of rights under sections 2B-711, 2B-712, and 2B-713, but a party whose right to cancel is subject to that limitation retains all other rights and remedies under this [article] or the contract.

(f) Unless a contrary intention clearly appears, an expression that a contract has been "cancelled," "rescinded," or "avoided" or similar terms may not be construed as a renunciation or discharge of any claim in damages for an antecedent breach.

Uniform Law Source: 2A-505; Sections 2-106(3)(4), 2-720, 2-721. Revised.
Coordination Meeting: Article 2B should generally conform to Article 2, but retains structural differences.
Selected Issue:

1. Should cancellation be effective on sending or receiving notice?

Reporter's Note:

1. 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. Under the section dealing with cure, the ability to cure a material breach is subject to the injured party's right to cancel. Thus, there is no obligation to wait for a possible cure. Cancellation may be immediate. However, if cure precedes cancellation, it precludes cancellation.
2. Edited for clarity and style.
3. Adds subsection (e) making enforceable contract terms that provide that a contract right cannot be canceled. These have special importance in transactions where the licensee contemplates distribution of the information product developed or licensed by the other party.
4. Should "sends notice" be amended to refer to "notifies" which is defined in article 1 (1-201(26)) as taking steps reasonably required to inform the other party of the fact, but does not require receipt of the notice? More generally, since cancellation requires a material breach, should an obligation to give notice be imposed?
5. New subsection (f) is brought forward from original Article 2 and draft Article 2 (2-708).

SECTION 2B-705. SPECIFIC PERFORMANCE.

(a) Except in a contract for personal services, a court may decree specific performance of any obligation other than the obligation to pay a license fee for information already received if:

(1) the parties have expressly agreed to that remedy and specific performance is

possible; or

(2) the agreed performance is unique and monetary compensation would be inadequate.

(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 it must provide adequate safeguards consistent with the terms of the agreement to protect the confidential information and intellectual property of the party ordered to perform.

(c) An aggrieved party has a right to recover information that was to be transferred to and thereafter owned by that party if, after reasonable efforts, that party is unable to effect cover 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: 2A-521. Section 2-716. Revised.
Coordination Meeting: Article 2B should generally conform to Article 2 approach, but retain special treatment of confidentiality and of replevin in a separate section.
Reporter's Notes:

1. Edited for clarity and to conform more closely to language of draft Article Comments will discuss how this works with respect to development contracts; it depends on the type of commitment made in the contract.

2. 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.

The clause relating to payment obligations is suggested by a consumer group. Excluding specific performance of the price element of a contract avoids creating a surrogate form of contempt proceeding. Of course, if there is a specific performance order requiring transfer of property under court order, a reciprocal obligation to pay any relevant fees is appropriate.

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 [and consequential] 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 to repair and replacement of copies of the information by the licensor.

[(b) A term of an agreement allowing recovery of consequential damages by 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 other 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).
Coordination Meeting: Any decision on conformity is premature at this point.
Reporter's Note:
This section was 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. That element of recovery would be deleted if the presumption on consequential damages is returned to traditional law in this respect.

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 actual loss or the then anticipated loss caused by the breach and the difficulties of proof of loss in the event of 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 reason of the contract by the party claiming restitution.

Uniform Law Source: 2-718. Revised.
Coordination Meeting: Conform to Article 2 given that standard is clarified that compliance with either element of the test validates the liquidated damages.
Votes: At the annual meeting, in reference to Article 2, the Drafting Committee accepted a motion from the floor to remove sentence two of that draft to clarify that no after the fact determination of excessive or too minial damages is intended.
Reporter's Note:
Minor edits for clarity. 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 accrues 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 of contract 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; 2-725. Revised.
Coordination Meeting: Differences in subject matter and nature of transaction may justify different limitations rule.
Reporter's Note:
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 Aperformance@ 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 or, if appropriate, as to the entire contract:

(1) either 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 [and consequential] damages determined as of the date of entry of the judgment; or

(ii) the present value of the profit and general overhead which the licensor would have received from full performance by the licensee, plus the present value of any incidental [and consequential] 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 for which the licensor has not been paid; or

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

(b) The date for determining present value of unaccrued license fees or royalties and date for determining 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 of 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 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, made possible by the licensee's breach.

Uniform Law Source: Section 2A-528; Section 2-708. Revised.
Coordination Meeting: Differences in subject matter cause different approaches.
Reporter's Note:
This section gives the licensor a right to elect damages recovery under any of three measures. The measures reflect the intangible nature of the subject matter. Unilke with reference to goods, the information product can be replicated many times over with very little cost or none in terms of tangible materials. Thus, the remedies do not typically relate to resale or re-license of the particular diskette or other copy. This draft contains minor edits from the May Draft. We need to review this to determine whether it permits a double recovery. One commissioner suggests that the parties be able to specify the applicable discount reate.

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 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); 2-704(2). Revised.
Coordinating Meeting: Language differences to be conformed, but subject matter and transactional differences will remain.

SECTION 2B-711. LICENSOR'S RIGHT TO OBTAIN POSSESSION.

(a) In a license, on a breach by the licensee that is material as to the entire contract, the licensor may invoke judicial process to prevent the licensee's continued exercise of rights in the licensed information and obtain possession of the licensed information, any copies thereof, and any other materials to be returned by the licensee pursuant to the contract. Subject to subsection (c), 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 take the steps described in Section 2B-630(b).

(b) If the agreement so provides, a court may 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.

(c) The remedies under this section are not available if the information, before breach of a license and in the ordinary course of performance under the license, was altered or commingled so 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.
Coordination Meeting: No equivalent Article 2 section. Tighter controls as compared to Article 2A may be justified.
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. The section has been streammlined without substantive change by deleting the specific actions permitted and cross-referencing the identical list in Section 2B-630.
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 peace, risk of injury to persons, or significant 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 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 harms property or information of the licensee, the licensee is entitled to recover as damages for that harm any loss resulting 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 harmed.

(d) Except as specifically so provided in this Section, the licensee's remedies and the limitations on the licensor under this Section may not be waived or altered by contract.

Uniform Law Source: Section 9-503. Revised.
Coordination Meeting: No equivalent Article 2 section. Tighter controls as compared to Article 2A may be justified.
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) **non-electronic 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.

4. New subsection (d) provides that the licensee protections are non-waivable based on comments and suggestions from the floor of the Annual Meeting.

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

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

(2) discontinue access by the licensee in an access contract; or

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

Uniform Law Source: Section 2A-525(1);. Sections 2A-526; 2-705. First appeared: 2-2519 (Feb. 1994). Also: Section 2-2519 (Licenses, September); 2-2614 (prototype).
Reporter's Notes:

1. This section deals with the right of the licensor to stop performance under several significant circumstances. This is not a right to retake transfers already made, but merely to stop performance. Article 2 and Article 2A are similar in reference to the seller's (lessor) right to stop delivery of goods in transit and to act in response to insolvency by the licensee. This derives in part from Section 2A-525(1). As redrafted, this section does not create special rules for insolvency. Cases of insolvency will be handled either in the definition by contract of material breach or in the rules dealing with insecurity about future performance.

2. Licenses are governed by bankruptcy law in reference to rights in the event of insolvency. See 11 U.S.C. § 365. Those rights over-ride the ability to stop performance in the event of insolvency if that right is not exercised before the licensee files a bankruptcy petition.

[C. Licensee's Remedies]

SECTION 2B-714. LICENSEE'S DAMAGES.

(a) Subject to subsection (b), on material breach 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 [and consequential] 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 of the performance had there been no defect, not to exceed the contract price, together with present value of the incidental [and consequential] 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 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, 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 agreed performance.

(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.
Coordination Meeting: Differences reflect subject matter.
Reporter's Notes:

1. Because of the diverse problems that might be involved in dealing with breach of a license, the narrow structure of Article 2 remedies for a licensee (buyer) is not appropriate. This Draft makes the choice of remedy broader and eliminates the hierarchy set out in current Article 2. The remedial options in this section should be read in conjunction with the general damages measure stated in section 2B-716(b) which by the terms of that section is available in any appropriate combination with this section.

2. There is no specific provision dealing with a remedy based on "cover." This remedy is removed as a major element of this Draft because, in dealing with intangibles that are, by their nature, often distinct or unique, the options of "cover" is seldom viable and always uncertain of application. In this Draft, alternative transactions are to be given "due weight" in determining market value under subsection (c), but a failure to effect an alternative transaction does not bar recovery.

3. This section gives the licensee a choice between computing damages based on a contrast between contract value and market value or based on the difference in value promised as contrasted to performances actually delivered

4. Given a court's general overview to prevent excessive damages, there is no reason to make one option preferred over the other. Also, unlike in goods, the type of breach involved here is more varied; greater flexibility is needed.

5. Article 2A (and Article 2) focus remedies on the handling of goods, their delivery or non-delivery. This draft is more extensive because of the nature of the contracts that are covered by this article. The focus on goods is inappropriate. The language is drafted to clarify that the applicable damages measure can be used for various types of situations (e.g., the transfer, the performance, or the entire contract).

6. The Restatement (Second) of Contracts defines recoverable damages as consisting of three elements:

(a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus

(b) any other loss, including incidental or consequential loss, caused by the breach, less

(c) any cost or other loss that he has avoided by not having to perform.

Restatement (Second) of Contracts § 347.

7. Courts have applied a flexible approach to licensee damages outside the UCC. If the damages are proven with reasonable certainty, they can include lost profits in this context. In Western Geographic Co. of America v. Bolt Associates, 584 F.2d 1164 (2d Cir. 1978) the court approved a lost profit recovery gauged by the profits that the licensor earned from licensing following breach. In Cohn v. Rosenfeld, 733 F.2d 625 (9th Cir. 1984) a company was entitled to recover lost profits when a California distributor of motion pictures breached licensing agreement where California distributor knew that the owner was attempting to obtain films for redistribution in Europe and should have known that owner and company intended to resell films. In Ostano Commerzanstalt v. Telewide Sys., Inc., 880 F.2d 642 (2d Cir. 1989) the court approved a lost profit recovery based on a failure of a licensor to make available to the licensee various films for showing in European markets. In Fen Hin Chow Enterprises, Ltd. v. Porelon, Inc., 874 F.2d 1107 (6th Cir. 1989) a licensee brought action for breach of contract and for wrongful termination of license related to trademarks and manufacturing know how. The contract breach consisted in part of actions taken by the licensor in violation of the territorial exclusivity provisions of the license. The court approved an award of lost profits for breach of contract based on estimates of lost sales, but reversed on the basis of how the profits were computed requiring computation of profits based on a marginal cost approach. Compare William B. Tanner Co., Inc. v. WIOO, Inc., 528 F.2d 262 (3rd Cir. 1975) (lost profit not proven).

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.
Coordination meeting: Subject matter differences are appropriate.
Reporter's Note:
Subsection (a) adopts language from Article 2 and Article 2A. It recognizes that the injured party can employ self-help by diminishing the amount that it pays under the contract. Subsection (b) applies that principle to the case of nonmaterial breaches, recognizing the different interests that are involved in ongoing performance contracts and minor breaches. Article 2 does not deal with this because it generally does not focus on ongoing contracts or recognize a distinction between material and nonmaterial breach. Importantly, this Article creates an obligation to cure nonmaterial breaches where the cost of that cure is not disproportionate to the harm. The nonmaterial breach use of recoupment is limited by the cure obligation.

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) Subject to Section 2B- --- (waiver of objection), the licensee may pursue remedies with respect to accepted transfers or performance, including the right of recoupment.

(3) The licensor's rights and remedies remain in effect as if the licensor had not been in breach.

Reporter's Note:
This section makes clear the consequences of a licensee's decision to accept flawed performance by the licensor and pursue remedies that do not involve a cancellation of the contract obligate the licensee to continued performance of the intangibles contract itself. A licensee faced with breach by the licensor can elect to continue the contract and claim damages for the breach. This section clarifies that, if this choice is made, the licensee is bound by the contract terms.

SECTION 2B-717. LICENSOR=S LIABILITY OVER.

(a) If a licensee is sued by a third party other than for infringement or other claims under subsection (b), and the licensor is answerable over to the licensee, 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 it will be bound in any action between the licensor and the licensee by any determination of law or fact in the litigation if it does not do so, 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, [defamation and similar claims relating to information provided by the licensor], or claims of the like in reference to the information, the following rules apply:

(1) The licensee shall seasonably notify the licensor 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 a record 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 and the demand states that the licensor will 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. The licensor may obtain control of the action by appropriate legal remedies unless the licensee after seasonable receipt of the demand turns over control. A licensor who takes 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; 2-607. Revised.
Reporter's Note:

This section adapts the answerable over rules of current Article 2 to the context of intellectual property and other licenses. In reference to intellectual property rights, where the issue involves a nonexclusive license or a obligation over to the licensee, the licensor's interests in protecting against an adverse infringement claim are often dominant. Hence, the provisions of (b) give it a right to control the litigation.