

ATTACHMENT B

RECOMMENDATIONS ON SCOPE OF ARTICLE 2B

Task Force Report
June 1, 1998

At the Drafting Committee meeting of May 1-3, a number of proposals for revisions or clarification of the Scope of proposed Article 2B were discussed. After extended discussion, a Task Force was appointed to review several existing proposals and to receive any additional proposals that might be made as to scope and to make recommendations to the Drafting Committee.

This is the Report of that Task Force. In general, the recommendations contemplate a series of clarifications to relevant terms in the definition of scope. The clarifications are intended to clarify the focus of the Article on licensing transactions where the license is more than a mere incident of another relationship and on transactions in computer-related (digital) information. The recommended changes include:

1. modify the title of the Act;
2. modify the definition of "access contract";
3. introduce a new definition of "computer";
4. modify definition of "computer program";
5. resulting change in the scope of the term "software contract";
6. modify the term "license" to require express contractual restrictions;
7. clarify and expand "opt in" provisions;
8. alter "incidental" exclusion to "only an incident of" another transaction; and
9. modify exclusion of embedded software.

The net effect of these changes is to clarify the contours of the scope of the article, while leaving the broad coverage that has been requested by more of the affected areas of commerce.

Task Force Membership

The Task Force members and their affiliation are as follows:

Connie Ring (Chair, Drafting Committee; NCCUSL and ALI)
Ray Nimmer (Reporter, ALI)
Boris Auerbach (NCCUSL, ALI)
Neil Cohen (ALI)

David Bartlett (Drafting Committee, ALI)
Fred Miller (Executive Director, NCCUSL and ALI)

The Task Force held two meetings by telephone conference; one half-day meeting in person on Thursday morning, May 14; and one all-day meeting in person on May 30.

Proposals Reviewed

The following proposals had been suggested at the May 1-3 Drafting Committee meeting along with some suggested alternatives from Task Force members. These were reviewed, analyzed, and considered by the Task Force:

Article 2B Draft of April 15, 1998 (2B-103 and 2B-103A)
Proposal of David Bartlett dated April 29, 1998 (Revised 5/22/98)
Auerbach suggested outline and approach of April 27, 1998
MPAA proposals dated April 29, 1998
Alternatives outlined by Ray Nimmer 5/27/98
McKay proposal dated 5/7/98

These proposals are appended as Attachment A hereto.

In addition to the oral comments given by many attending the May 1-3 Drafting Committee, the Task Force considered written comments received as set forth in Attachment B hereto.

Principles Considered

The comments received reflect a general concern that the scope provision was too imprecise making it difficult in some instances to determine whether particular transactions were in or out of Article 2B. Some would have substantially changed the approach of defining the scope and upon review the Task Force concluded that these approaches would result in issues of difficult line drawing and anomalies.

Both the Task Force and the majority of those persons who submitted comments on scope approached the scope issue with certain general principles in mind. These include:

- Level Playing Field. Those competing in the same marketplace should be guided by the same default (gap-filler) rules.

- Different Rules For Transactions. Transactions to the extent possible should either be all in or all out of Article 2B to avoid the difficulties of being under common law for some transactions and under Article 2B for others.
- Technology Neutrality. The coverage of a transaction or a group of transactions should not hinge on the technology used to make available the information in that all of the areas of commerce affected by this Act are converging around digital and related technology systems.
- Clarity of terms. To the extent possible, the key scope-defining terms in the Act should be clear in their content and capable of distinguishing covered and excluded transactions with minimal difficulty.

Recommendation

The Task Force recommends the following Scope provisions which as explained in the next section, substantially improve the precision, clarity and certainty of what is included or excluded as well as using more precise headings. The redraft indicates what has been deleted and added to the April 15, 1998 draft:

June 1, 1998
Draft

UNIFORM COMMERCIAL CODE
ARTICLE 2B
LICENSES OF INFORMATION
AND SOFTWARE CONTRACTS

With Notes

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AND
NATIONAL CONFERENCE OF COMMISSIONERS ON
UNIFORM STATE LAWS

SECTION 2B-101. SHORT TITLE. This article may be cited as Uniform Commercial Code - Licenses of Information and Software Contracts.

SECTION 2B-102.

(a) In this article:

(1) “Access contract” means a contract ~~for electronic to obtain electronically~~ access to or ~~for electronic information in electronic form~~ from an ~~electronic~~ information processing system. The term does not include a contract for physical access to a place such as a theater or a library.

(6) “Computer” means an electronic device that can perform substantial computations, arithmetic operations or logic operations without human intervention during the computation or operation.

(6) “Computer Program” means a set of statements or Instructions to be used directly or indirectly ~~in an information processing system~~ a computer in order to bring about a certain result. ~~The term does not include informational content.~~

(7) “License” means an agreement that authorizes access to or use of information

or of information ~~property~~ rights if the agreement expressly limits the scope of the rights or permissions granted, expressly prohibits or controls uses, or ~~affirmatively~~ expressly grants less than all informational rights in the information. An agreement may be a license whether the information or informational ~~property~~ rights exist at the time of agreement or are to be developed, created, or compiled thereafter, and whether or not the contract transfers title to a copy. The term includes an access contract and consignment of copies of information. The term does not include a contract to the extent that contract is an unconditional transfer of ownership of all information ~~property~~ rights; or a reservation or creation of a financier's interest.

SECTION 2B-103.

(a) Except as otherwise provided in Section 2B-104 on excluded transactions and in subsection (b), this article applies to:

(1) any transaction that creates a software contract, access contract, or license; and

(2) agreements to provide support for, maintain, or modify information related to a contract covered by this article.

(b) If this article governs part of a transaction and other contract law governs part of the transaction, the following rules apply:

(1) Article 2 or 2A govern as to any other goods in the transaction and to subject matter excluded under Section 2B-104(3), but this article applies to the information, informational rights, and copies that contain the information, its packaging, and its documentation.

(2) The rules of this article on forming a contract apply to the entire transaction if:

(A) the agreement includes services that are not within this article, but the information that is within this article is the predominant purpose of the transaction; or

(B) the parties agree to be bound by those rules. ~~formation rules~~
of

~~this article~~

(c) The parties may agree ~~elect to have~~ that the provisions of this article ~~or other~~

applicable law governing contractor rights or remedies for the entire transaction; govern in whole or in part a transaction or a part thereof not otherwise within the scope of this article. The agreement is not effective to the extent it;

(1) would alter mandatory consumer protections rules that apply under otherwise applicable law; or

(2) deals with a transaction to which this article does not otherwise apply but that is governed by Article 2 or Article 2A of (the Uniform Commercial Code).

SECTION 2B-104. TRANSACTIONS EXCLUDED FROM ARTICLE. This article does not apply to the extent that a transaction:

(1) is a license or software contract that as between the licensor and licensee is ~~merely incidental to~~ only an incident of subject matter not governed by this article;

(2) is a license of a trademark, trade name, trade dress, patent, or related know-how not associated with a license or software contract that is otherwise covered by this article;

(3) is a sale or lease of a copy of a computer program that is contained in goods that are sold or leased unless:

(A) the goods are merely a copy of the program;

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

(C) a primary material purpose of the transaction is to give the purchaser of the goods access to or use of the computer program.

(4) provides access to, use, transfer, clearance, settlement, or processing of:

(A) a deposit, loan, funds or monetary value represented in electronic form and stored or capable of storage electronically and retrievable and transferable electronically, or other right to payment to or from a person;

(B) an instrument or other item;

(C) a payment order, credit transaction, debit card transaction, or a funds transfer, automated clearing house transfer, or similar wholesale or retail transfer of

funds;

(D) a letter of credit, document of title, financial asset, investment property, or similar asset held in a fiduciary or agency capacity; or

(E) related identifying, verifying, access-enabling, authorizing, or monitoring information;

(5) is a contract for personal or entertainment services by an individual or group of individuals, other than a contract of an independent contractor to develop, support, modify, or maintain software; or

(6) is a license for regularly scheduled audio or video programming by broadcast or cable as defined in the Federal Communications Act as that Act existed on January 1, 1998, or any similar regularly scheduled programming service; or

(7) is a compulsory license under federal or state law;

[(8) is a license of a linear motion picture or sound recording or of information to be included therein, except in connection with providing access to such motion picture or sound recording under an access contract covered by this article.]

Basis for Recommendation

The Task Force came to the conclusion that principles of fair competition and common rules for emerging technologies are best achieved by more precision to the definitions on digital and future electronic technologies. The changes are drawn from a number of the proposals and comments. As discussed below, in light of these changes some of the exclusions might be deemed unnecessary and number (8) is placed in brackets for that reason.

Access Contract. The term contemplates a circumstance where the license acquires information from or access to a facility and does not cover broadcast technology. The changes further clarify that the term does not encompass contracts for access to physical locations, such as motion picture theaters.

Computer Program. A definition of “Computer” is added and “computer” inserted for “information processing system” in the definition of “computer program.” This change is important in limiting the scope of “Software Contract” again to electronic (digital) technologies.

License. The definition has been changed to clarify that a grant of less than all rights is a license only if the contract expressly grants less than all rights. This clarification implements the intent of the committee that the Act not apply to a transaction involving the sale of a book or magazine simply because copyright law gives the buyer some rights, but retains other rights in the transferor. This implied by law limitation does not create a license for purposes of the Act.

Option Provision. The option provision has been substantially clarified so that in mixed transactions it is clear that parties can agree to opt-in for formation rules but not to avoid consumer protection rules or to make transactions wholly governed by Article 2 or 2A subject to 2B.

Incident of. The change in 2B-104 from “merely incidental to” to “only an incident of” subject matter not governed by Article 2B is significant in rejecting one optional meaning of “incidental” (small in size) and adopting the other meaning “an

inherent part of.” This clarification gives more precision to the exclusion from scope of licenses that are not important to the subject matter covered by other law.

Embedded software. Changes in the exclusion for copies of computer programs sold as part of goods clarify that such programs are not excluded if the goods are a computer. See 2B-104(3). Use of the word “materials” provides guidance in cases where the processing power of the program is an important aspect of the transaction.

Other exclusions. The Task Force had not made a judgment on the exclusion (8). The changes in definitions in part draws on suggestions of MPAA and with the added clarifications, the exclusion of the traditional core business may not be necessary.

Exclusion (4) and the option provisions addresses concerns of the banking industry.

Exclusion (6) excludes the broadcast and cable business that is embraced in current federal regulation.

Exclusion (7) addresses a concern of the recording industry.

Respectfully submitted,

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