

# Licenses and Information Policy: An Update on UCC Article 2B

by Laurel Jamtgaard

At the October 1997 ARL Membership Meeting, Robert Oakley, Director of the Georgetown Law Library, gave a thoughtful and informative presentation about a proposed model law known as Article 2B of the Uniform Commercial Code.<sup>1</sup> This law is poised to shape the legal landscape for transactions in information products, including copyrighted works, databases, and computer software. It is therefore likely to directly impact the operations of all libraries and academic institutions.

## Some Background

In the United States, Uniform State Laws are drafted by committees of attorneys, reviewed by two organizations—the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL)—and then, if approved, sent around to the fifty states for adoption in whole or in part. Adopting a model law helps to facilitate interstate commerce because market participants can then be confident that they are operating under a similar body of law from one state to the next. Currently, areas of law encompassed in the Uniform Commercial Code include contracts for goods, leases, banking agreements, and secured lending transactions.

The intention of the drafters of Article 2B is to provide standard rules for regulating licenses of information products and intellectual property rights. The hope, as with all Uniform State Laws, is to codify *existing* case law.<sup>2</sup> Current case law varies, however, across states and federal circuits, so this process is not trivial.

Although many agree that the idea of codifying the law of licenses is a good one, there has been an amazing amount of controversy involved in the effort. The drafting process for Article 2B has been underway for more than five years. In the past year, the draft of Article 2B, a 200-page document, has been updated approximately every eight weeks. The April 1998 draft of Article 2B addresses, among other things:

- contract formation (includes offer and acceptance requirements for electronic agents and mass-market licenses—a.k.a. “shrink-wrap” licenses);
- construction and interpretation of license terms;
- warranties (includes implied warranty of merchantability of a computer program);
- contract performance; and
- remedies (including the right for licensors to employ “self-help” measures to retrieve or disable information products if licensees breach the license).

Article 2B is in many ways a moving target and entering the debate over specific provisions involves a steep learning curve, but more entrants are important to the process.

## Concerns

In March of this year, Geoffrey Hazard, Chair of the American Law Institute (ALI), distributed a letter outlining some reasons why ALI would not submit 2B to a member vote at its May Annual Meeting in Washington, D.C.<sup>3</sup> The first concern expressed was that the scope of 2B was so broad that there were likely many voices still to be heard from and many who may be unaware that they will be affected. The example he gave hits close to home—he queried whether a library card constituted an “access contract” under 2B and whether the library community had voiced an opinion one way or another.<sup>4</sup>

## Scope

Article 2B began as an effort to standardize software licenses, but its scope has expanded (and contracted) at various times to include motion picture, broadcast, publishing, banking, and other industries. Representatives from several of these sectors have only recently chimed in. Many parties who will be dramatically affected have yet to even put Article 2B on their radar screens.

The April 1998 draft of Article 2B covers “licenses and software contracts,” defining a license as “an agreement that authorizes access to or use of information or of informational property rights....” “Information” is defined as “data, text, images, sounds, mask works, or works of authorship.”

A motion by Stephen Chow, an attorney with Smith & Sohen in Massachusetts, to reduce the scope of Article 2B was discussed at the ALI Annual Meeting in May. The motion had sought to limit the scope to:

- 1) Software contracts;
- 2) access contracts; and
- 3) such other transactions that are included expressly and defined with sufficient clarity to avoid surprise to affected parties.<sup>5</sup>

However, Mr. Chow withdrew the motion without putting it to a member vote on the understanding that the Drafting Committee had plans to revisit the question of scope during the summer.

## Intersection with Federal Law

Another concern of Mr. Hazard, the relationship of Article 2B to federal law, was the focus of a three-day conference at the University of California at Berkeley in April.<sup>6</sup> Some argue that if non-negotiated licenses (a.k.a. “shrinkwrap licenses”) are honored as provided in Article 2B, licensors will use licenses to strip away fair use rights from consumers and thus jeopardize the delicate balance struck by copyright law. Conference participants also raised questions about the interaction of Article 2B with trade secrecy law, patent law, competition policy, and the First Amendment.

To what extent does federal copyright law preempt license terms that interfere with copyright limitations such as fair use and first-sale rights? This is a tough question and one courts have struggled with on a case-by-case basis.<sup>7</sup> Article 2B has been drafted with the stated intent of “staying neutral” with regard to the issue of federal preemption. This stance was criticized at the Berkeley Conference by David Nimmer, co-author of the *Nimmer on Copyright Treatise* (and no relation to Raymond Nimmer, Reporter for Article 2B). He sees Article 2B’s “neutrality” as disingenuous because it fails “to protect even... obvious user rights” but blesses “as presumptively valid provisions that would rob users of those rights.”<sup>8</sup>

Although Article 2B admittedly creates federal preemption problems, the drafters are looking to Congress and the courts to solve them. At this time, attempts to pass clarifying language in Congress have not been successful.<sup>9</sup>

## Impact on Libraries

At the Berkeley Conference, Peter Lyman of the University of California at Berkeley spoke of the potential impact of Article 2B on research libraries and the broader research community. He described the already spiraling costs of periodicals and online database fees and expressed frustration at what he perceived to be Article 2B’s contribution to increasing the bargaining power of information publishers in contract negotiations.

For example, as Bob Oakley mentioned in his talk a year ago, 2B-502 declares that license terms that restrict the transfer of informational property rights are enforceable. Does this affirm a position that licenses can cast aside first-sale rights granted under copyright law?<sup>10</sup> I believe the answer is an oblique “yes.”

The explanatory notes to the April 1998 Draft state that 2B does not apply to the *sale* of books, but only to *licenses* of information products. As Professor Charles McManis pointed out in Berkeley, most printed books already contain onerous language prohibiting the copying of *any* portion for *any* purpose, but such statements have not been found to trump “fair use.”<sup>11</sup> Well, it is time to take another look because “[a]ll that is missing from books is the snap [to seal them closed]—and a law saying that a snap creates an enforceable contract.”<sup>12</sup> With a snap and Article 2B, what in the past has been a *sale* of a book could, with the blink of an eye, become a *license* (could there be a more dramatic reason for libraries to pay attention to Article 2B?).

Access contracts as defined in 2B-615 will be extremely important to libraries because these contracts are dealt with daily. 2B-615 provides that a license can place use restrictions on the information accessed. And where does fair use fit in here? Well, it doesn’t unless you put the rights in the contract explicitly or Congress acts to resolve the preemption question in favor of fair use.

It is crucial that the library community enter into the Article 2B conversation. The statute, when/if adopted, will provide *default* rules that can be overcome by language in the contract itself so familiarity with Article 2B may therefore enable librarians to overcome the most problematic defaults during license negotiations. But be forewarned—with the affirmation of mass-market licenses, Article 2B will transfer considerable bargaining power to the publisher’s side of the table.

## **Where Does Article 2B Stand?**

ALI has announced plans to review the progress on Article 2B at its November Council meeting and may at that time recommend the Article for a final vote at its 1999 Annual meeting.

As late as April, NCCUSL had planned to submit 2B to its membership for a final vote at its Annual Meeting, July 24, 1998. It has stepped back somewhat from that position and has announced plans to read “non-controversial” aspects of 2B into the record at the July meeting and to entertain motions and debate on specific sections. NCCUSL will not submit Article 2B to a final state-by-state member vote until its 1999 Annual Meeting at the earliest.

The Drafting Committee had planned that no further drafting committee meetings would be needed after May, but with the concerns raised by ALI and others, more meetings have been scheduled.

There is an increasing awareness of Article 2B and discussion forums are popping up where librarians and other members of the research community enter the debate. For example, attorney Carol Kunze’s “2B Guide” site offers the most comprehensive online information about Article 2B.<sup>13</sup> It includes html versions of most comments submitted to ALI, NCCUSL, and the Drafting Committee, as well as links to online news articles on the topic. In addition, Ed Foster of *InfoWorld* has recently started hosting a discussion page on Article 2B.<sup>14</sup>

More voices from the library and educational communities need to be heard. One way to do so is to submit comments to the NCCUSL Commissioner from your home state. Letters can also be submitted directly to the leadership of NCCUSL, the Article 2B Drafting Committee, and ALI.<sup>15</sup>

## The Bigger Information Policy Picture

The significance of Article 2B should be considered in conjunction with the various copyright and database bills currently working their way through Congress. The battle waging over the appropriate direction of domestic and international information policy has reached a frenzy this summer.

Some content providers are reacting to the proliferation of digital technology with a push for stronger legal protection of information products. Not satisfied with advances in existing legal and emerging technological means to protect information, these media, Hollywood, and publishing interests are driving bills through Congress to extend the term of copyright,<sup>16</sup> provide for a new right in databases wholly outside of copyright law,<sup>17</sup> and create a “traveling right of trespass” (my phrase, not theirs) for technologically protected works.<sup>18</sup> Each of these efforts is a truckload of cement primed to pave the road to a “pay-per-view” digital age.

Others, including the library community, seek to protect the balance between information as property and information as a public resource. There has been support from this group for a digital age copyright bill sponsored by Representatives Boucher (D-VA) and Campbell (R-CA)<sup>19</sup> that seeks to preserve the fair use and first-sale doctrines and to provide a clear signal to courts about federal copyright preemption of non-negotiated license terms. The challenge in this effort, besides facing the incredible financial resources of the media, motion picture, and publishing industries, is how best to translate these balancing principles into the digital world.

Although Article 2B is a state-based law, it is a critical front in the battle because it strengthens content providers’ ability to use “shrinkwrap” and “clickwrap” licenses to control their information products’ post-distribution. As currently drafted, it is yet another avenue enabling increased private “fencing” of information.

### Try to Imagine...

At the Berkeley Conference, Peter Lyman painted a grim picture of a university environment in which all information products are licensed. He shuddered as he described the revelation that nothing in Article 2B prohibits the application of the proposed license regime to printed books and periodicals. With that in mind the crystal ball view became one in which archiving was too costly to continue; all information was available only on a pay-per-view basis and only to university students and professors; students were unable to re-sell text books; something akin to “fair use rights” were available only for the least valuable resources thanks to a loss of bargaining power; and university libraries would no longer be the catalyst for community-wide entrepreneurial research efforts. Innovation suffers. The economy suffers. Etc.

*{You get the idea.}*

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### About the Author

Laurel Jamtgaard is an attorney and member of the State Bar of California. She has just completed a six-month research fellowship at UC-Berkeley with Professor Pamela Samuelson focused upon intellectual property policy issues. She is currently working with ARL and the Special Libraries Association on information policy and scholarly communication issues. She will return to California in October to practice law.

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## Endnotes

<sup>1</sup> Robert L. Oakley, *UCC Article 2B: Some Preliminary Comments on a New Issue for the Library Community*, October 16, 1997. Available online at <http://www.arl.org/arl/proceedings/131/oakley.html>. All references to the text of Article 2B in this article are to the April 1998 Draft, available at <http://www.law.upenn.edu/bll/ulc/ulc.htm>.

<sup>2</sup> Today when judges decide disputes involving licensing transactions (such as publishing contracts, database access contracts, and contracts for motion picture rights) they base their decisions upon applicable *case law precedents*. If Article 2B is adopted by the states, then judges will look to the statute for initial direction on how to decide similar disputes.

<sup>3</sup> Geoffrey C. Hazard Jr., Letter to Gene N. Lebrun, President of NCCUSL, and Charles Alan Wright, President, The American Law Institute, March 26, 1998. Available online at <http://www.2BGuide.com/docs/ghmar98.html>.

<sup>4</sup> An “access contract” is defined in 2B-102(a)(1) to involve access to electronic resources but if a library card is used to enable access to electronic resources in the library, it may qualify.

<sup>5</sup> Revised Motion of Stephen Y. Chow, American Law Institute 1998 Annual Meeting, May 14, 1998.

<sup>6</sup> See *Intellectual Property and Contract Law in the Information Age: The Impact of Article 2B of the Uniform Commercial Code on the Future of Transactions in Information and Electronic Commerce*, April 23-25, 1998, Berkeley Center for Law & Technology, <http://www.law.berkeley.edu/bclt/events/ucc2b/>.

<sup>7</sup> *Compare Vault Corp. v. Quaid Software Ltd.*, 847 F. 2d 255 (5th Cir. 1988) and *ProCD v. Zeidenberg*, 86 F. 3d 1447 (7th Cir. 1997).

<sup>8</sup> David Nimmer, Elliot Brown, and Gary N. Frischling, *The Metamorphosis of Contract Into Expand*, (DRAFT) Conference Proceedings, Berkeley Conference *supra* note 7.

<sup>9</sup> See e.g., House Bill 3048, 105th Congress, the Digital Era Copyright Act (1998), introduced by Representative Rick Boucher of Virginia.

<sup>10</sup> The First Sale doctrine, codified in [[section]] 109 of the Copyright Act, allows libraries or other owners of a copy of a copyrighted work to transfer ownership or possession of the copy. This enables library lending practices as well as donations of materials to libraries.

<sup>11</sup> See *Bobbs-Merrill v. Isidor Straus*, 210 U.S. 339 (1908).

<sup>12</sup> Charles McManis, *The Privatization (or “Shrink-wrapping”) of American Copyright Law (DRAFT)*, Proceedings of the April 1998 Berkeley Conference on Article 2B, *supra* note 7.

<sup>13</sup> See <http://www.2BGuide.com/>.

<sup>14</sup> See <http://forums.infoworld.com/threads/get.cgi?56033/> [link no longer active].

<sup>15</sup> Comments on the draft are encouraged by ALI and NCCUSL and the Drafting Committee itself. Send letters to NCCUSL at 211 E. Ontario Street, Suite 1300, Chicago, Illinois 60611; to the Article 2B Drafting Committee care of Reporter, Ray Nimmer, Law Center, University of Houston, 4800 Calhoun, Houston, TX 77004; and/or to the American Law Institute at 4025 Chestnut Street, Philadelphia, PA 19104-3099.

<sup>16</sup> H.R. 2589, 105th Congress, Copyright Term Extension Act (1998).

<sup>17</sup> H.R. 2652, 105th Congress, The Collections of Information Anti-Piracy Act (1998). This bill, which creates broad new protection for compilations, states that its provisions will not preempt the state law of contract and thus increases the potential power of a licensing regime.

<sup>18</sup> H.R. 2281, [[section]]1201(a), 105th Congress, WIPO Copyright Treaties Implementation Act (1998). The anti-circumvention provision of this bill creates a new right for information providers to control post-distribution *access* to their works.

<sup>19</sup> H.R. 3048, *supra* note 10.

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[Table of Contents for Issue 198](#) | [Other Federal Relations Articles](#)



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