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The License Is the Product: Comments on the Promise of Article 2B for Software and Information Licensing

Robert W. Gomulkiewicz
University of Washington School of Law

THE LICENSE IS THE PRODUCT: COMMENTS ON THE PROMISE OF ARTICLE 2B FOR SOFTWARE AND INFORMATION LICENSING

By Robert W. Gomulkiewicz †

ABSTRACT

Article 2B promises to draw together contract principles for software and information licensing that, at present, are spread among various bodies of law. This Article argues that Article 2B must affirm industry standard licensing practices in order to prove beneficial. For example, Article 2B's affirmation of industry standard mass market licensing is important for both publishers and end users. Article 2B must also provide the flexibility to accommodate new distribution and licensing models that will arise as electronic commerce matures. Any other approach would fundamentally disrupt the software and information industries.

Moreover, this Article urges the drafters of Article 2B to resist remaining too wedded to the hard goods-centric rules of Article 2 in crafting default rules. Article 2B's default rules should be specifically tailored to the software and information industries. The Article 2B drafting committee has achieved varying degrees of success in formulating default rules that *fit* those industries for warranties, duration of contracts, and interpretation of exclusive license grants, at times imposing rules better suited to the sale of goods.

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† Mr. Gomulkiewicz is a senior corporate attorney for Microsoft Corporation. He also chairs the Article 2B Working Group of the Business Software Alliance. The views expressed in this article are the personal views of the author, not those of Microsoft or the Business Software Alliance. The author would like to thank J.D. Fugate, Hosea Harvey, John Lange, Robert B. Mitchell, and Martin F. Smith for their contributions to this Article.

I. INTRODUCTION

A contract statute like proposed Article 2B of the Uniform Commercial Code holds great promise for software and information licensing. Licensing law can be chaotic for both licensors and licensees. To draft a license agreement for software or an information product, a lawyer must be conversant in numerous areas of law, including the common law of contracts, Uniform Commercial Code Article 2, state and federal intellectual property rules and overlays, bankruptcy law, and competition law, not to mention various electronic commerce, data privacy, and digital signature statutes. Article 2B, which draws from all these areas of law, could clarify licensing law and thereby promote commerce in software and information products. Doing so, however, will be difficult.

Despite its promise, both scholars and practicing lawyers have approached the Article 2B project with a degree of wariness, though for decidedly different reasons. Scholars tend to approach Article 2B with suspicion because it appears to "remake"[1] the contract law they know from reported cases,[2] existing contract statutes,[3] and scholarly writings.[4] For

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1. Mark A. Lemley, *Beyond Preemption: The Federal Law and Policy of Intellectual Property Licensing*, 87 CALIF. L. REV. 113, 114 (forthcoming 1999) ("Proposed Uniform Commercial Code Article 2B will remake the law of software and intellectual property licensing in a radical way."). *See also* Dennis J. Karjala, *Federal Preemption of Shrinkwrap And On-Line Licenses*, 22 U. DAYTON L. REV. 511 (1997) (arguing Article 2B is unconstitutional); David A. Rice, *Digital Information As Property And Product: U.C.C. Article 2B*, 22 U. DAYTON L. REV. 621 (1997); J. Thomas Warlick, *A Wolf In Sheep's Clothing? Information Licensing and De Facto Copyright Legislation in UCC 2B*, J. COPYRIGHT SOC'Y U.S.A. 158, 172 (1997) ("2B appears poised to be the impetus for a deluge of oppressive licenses and litigation against hapless licensees."). Software and information licensing has been around for a long time (Dunn & Bradstreet has been licensing information for over one hundred years) and needs no further impetus, though licensing law could certainly benefit from more clarity. While Article 2B does not represent new licensing law or practice, it *is* different than Article 2. As explained *infra*, therein lies much of the promise of Article 2B.

2. Until *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), no reported case had determined the enforceability of a mass market license agreement between a software publisher and an end user. The cases that touched on mass market licenses involved contracts between a software publisher and a distributor. In those cases, the software publisher tried (without success) to use the end user license to amend or alter the distribution agreement between the parties. *See* Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91 (3d Cir. 1991); Arizona Retail Sys., Inc. v. Software Link, Inc., 831 F. Supp. 759 (D. Ariz. 1993). *Arizona Retail*, however, actually anticipates the court's ruling in *ProCD*. In *Arizona Retail*, the distributor, a value-added retailer, initially acquired an evaluation version of the software that was accompanied by an "evaluation license." In this context, the retailer was more like an end user than a distributor of the software. The court held

practitioners, Article 2B is not new[5] law; it broadly accords with the law that is practiced today in the information and software industries. However, practitioners fear that a group of people unfamiliar with the customs and practices of the industry, or those with political and intellectual axes to grind, will create an ill-fitting contract regime.[6] These practitioners would rather live with the un-codified, chaotic body of law they are working with today than have to cope with codified contract rules that do not make sense.

Many challenges stand in the way of creating a uniform law for software and information licensing. One challenge arises from the nature of the law-making process. Putting together a uniform law through the process sponsored by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") and the American Law Institute ("ALI") is a

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that the retailer was bound by the terms of the evaluation license. *See Arizona Retail*, 831 F. Supp. at 766.

3. *But see* Jeffery Dodd, *Art. 2B Offers Jurisprudence for All Forms*, NAT. L.J., Sept. 21, 1998, at B13, B16 (criticizing the "mechanistic approach" to contract formation rules that makes "choreography"—timing and sequence—all-important); Robert B. Mitchell, *Restoring Realism in Software Licensing Law*, MULTIMEDIA & TECH. LICENSING L. REP., Apr. 1996, at 4, 7 (arguing that courts have departed from the "legal realist" roots of the U.C.C. when applying it to software licenses).

4. The *ProCD* ruling may have surprised some scholars because they mistakenly believed that the body of critical commentary on mass market licenses was more compelling than the overwhelming industry practice and the economics that drive the industry. *See* Robert W. Gomulkiewicz & Mary L. Williamson, *A Brief Defense of Mass Market Software License Agreements*, 22 RUTGERS COMPUTER & TECH. L.J. 335 (1996) (describing the importance of mass market licenses for both publishers and users, and citing critical commentary); Wayne D. Bennett, *Legal and Blinding*, CIO MAGAZINE (Oct. 1, 1998) (visited Nov. 23, 1998) <http://www.cio.com/archive/webbusiness/100198_gray_content.html> (criticizing the critics of Article 2B who claim that it represents new legal principles).

5. The goal of uniform law makers should be, as Grant Gilmore put it, "to be accurate and not to be original." Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L.J. 1341 (1948). The drafters of Article 2B have expressed support for this drafting philosophy. *See* U.C.C. Article 2B, Preface at 9 (Mar. 1998 Draft). Though Article 2B is not new law, it is fair to say it has caused a new focus on software and information licensing.

6. The Article 2B project did not begin at the behest of the software industry. Indeed, software industry trade associations voiced their disapproval of such a project. Once the project began, however, initially as part of the Article 2 re-write and then as a separate U.C.C. article, the software industry as well as other information product industries began to participate in the process. *See* U.C.C. Article 2B, Prefatory Note at 5-7 (July 24-31, 1998 Draft) (describing the history of the Article 2B project); Raymond T. Nimmer et al., *License Contracts Under Article 2 of the Uniform Commercial Code: A Proposal*, 19 RUTGERS COMPUTER & TECH. L.J. 281 (1993); Thom Weidlich, *Commission Plans New U.C.C. Article*, NAT. L.J., Aug. 28, 1995, at B1.

slow moving exercise in consensus building.[7] To further complicate matters, the drafting committee used as its starting point Uniform Commercial Code Article 2, a hard goods-centric, sales-oriented set of rules. Though some observers believe a license for software in packaged-goods-form resembles a sale of goods, these transactions differ in many ways from a sale of goods and represent only a fraction of licenses for software and information products.[8]

Article 2B also faces an additional challenge: digital convergence. While the initial focus of Article 2B was software, the Article 2B drafting committee soon realized that the software, data, fixed media publishing, on-line publishing, motion picture, television, and music industries and their products are converging. These industries are in the midst of convergence, not at the end of it. This means that Article 2B must meld the licensing practices of the different industries, account for their differences, or attempt to deny that convergence is occurring by focusing the statute upon a subset of these industries. Article 2B's attempt to meld and account for various licensing traditions can be viewed either as an important strength or a fatal flaw,[9] or, in software parlance, as either a "feature" or a "bug."

This Article provides a perspective on how the authors of Article 2B have fared in their attempt to create a useful contract code for the licensing of software and information products. To do so, it first discusses mass market licensing, which has been a focal point of Article 2B. It concludes that codification of industry standard mass market licensing practices is the proper approach for Article 2B and that any other approach would fundamentally disrupt the software and information industries. It points out that licensors as varied as the Free Software Foundation (with its

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7. *See generally* Marianne B. Culhane, *The UCC Revision Process: Legislation You Should See in the Making*, 26 CREIGHTON L. REV. 29 (1992).

8. Software licensing is often divided into two general categories: upstream licensing and downstream licensing. Upstream licensing refers to licenses a publisher receives to create its product. Downstream licensing refers to licenses a publisher gives to users or distributors of its product. An example of an upstream license would be a license for spell checking software that a publisher receives to include the spell checking software in the publisher's word processing product. An example of downstream licensing would be an end user license or a license with a computer manufacturer to install and distribute system software on its computers. Article 2B applies to both types of licenses.

9. *See* Brenda Sandburg, *Commercial Code Upgrade May Fall Apart*, THE RECORDER, Sept. 28, 1998, at 1 (describing the qualms of the entertainment and communications industries about a contract statute with one set of rules for all transactions in information).

"copyleft" license),[10] Consumers Union,[11] and the University of California at Berkeley[12] employ mass market licenses. The Article also points out that Article 2B's affirmation of mass market licenses has come at a cost for publishers: namely, the codification of new end user rights.

The Article then evaluates Article 2B's attempt to reshape current Article 2 default rules to fit software and information licensing and to account for different licensing practices among the converging information industries. The Article observes that, while the Article 2B drafting committee has made progress toward reshaping Article 2 default rules, in several fundamental ways Article 2B remains too wedded to Article 2 and thus threatens to *remake* licensing law by forcing hard goods-centric sales rules on software and information licensing. It also observes that Article 2B may need additional changes to accommodate varied licensing practices among the converging information industries.

II. ARTICLE 2B AND MASS MARKET LICENSES

Mass market licensing is not new.[13] Software companies have been using mass market licenses, and legal commentators have been writing

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10. The Free Software Foundation does not make its software "free" by placing it in the public domain. Rather, it does so via mass market licensing. *See* Free Software Foundation, *What is Copyleft?* (visited Nov. 5, 1998) <http://www.fsf.org/copyleft/copyleft.html>. According to the Debian organization, publisher of the Debian GNU/Linux "free software" operating system, "[t]ruly free software is always free. Software that is placed in the public domain can be snapped up and put into non-free programs, and be free no more. To stay free, software must be copyrighted and licensed." Debian GNU/Linux, *What Does Free Mean? or What Do You Mean By Open Software?* (visited Nov. 5, 1998) <http://www.debian.org/intro/free>.

11. *See* Consumer Reports ONLINE, *User Agreement* (visited Nov. 11, 1998) <http://www.consumerreports.org/Functions/Join/tos.html>.

12. *See* U.C. Berkeley Office of Technology Licensing, *Software Copyright Notice and Disclaimer* (visited Nov. 5, 1998) <http://www.socrates.berkeley.edu/~otl/Copnoti.html>.

13. Relatively new, however, are court decisions clearly articulating the value of mass market licensing. *See* Hill v. Gateway 2000, 105 F.3d 1147 (7th Cir. 1997), *cert. denied* 118 S.Ct. 47 (1997) (upholding contract terms presented to the user post-payment in a mixed software and computer hardware transaction); ProCD v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996); Hotmail v. Van$ Money Pie, Inc., 47 U.S.P.Q.2d 1020 (N.D. Cal. 1998) (assuming enforceability of mass market license); Arizona Retail Sys. v. Software Link, 831 F. Supp.759, 766 (D. Ariz. 1993) (holding a mass market license enforceable in the initial transaction between a value added reseller and a software publisher, but unenforceable in a subsequent transaction); Brower v. Gateway 2000, 676 N.Y.S.2d 569 (1998) (upholding contract terms presented to the user post-payment in a mixed software and computer hardware transaction).

about them, for decades.[14] The software industry is thriving in large part because of what mass market licenses enable: a diversity of innovative products provided to end users at attractive prices.[15] For most software products, the license *is* the product; the computer program provides functionality to the user, but the license delivers the use rights.[16]

The court's ruling in *ProCD v. Zeidenberg*[17] affirming the enforceability of mass market licenses may have surprised some legal scholars, but a contrary ruling would have devastated the software and electronic information industries. It is far better that the *ProCD* case merely provoked a few critical law review articles[18] than forced a radical change in

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14. Standard form contracts are not an innovation of software publishers. The use of standard form contracts is commonplace in virtually all lines of business. *See* 3 LAWRENCE A. CUNNINGHAM & ARTHUR J. JACOBSON, CORBIN ON CONTRACTS § 559A(B) (rev. ed. Supp. 1998); 1 E. A. Farnsworth, FARNSWORTH ON CONTRACTS § 4.26 (1990). Software publishers have been innovative, however, in the various ways they allow users to manifest assent to the terms. *See* Gomulkiewicz & Williamson, *supra* note 4, at 339-41. Software publishers have also been unique in their efforts to actually draw contract terms to the user's attention and require manifestation of assent. *Id.* at 352.

15. *See id.*

16. *See ProCD*, 86 F.3d at 1453 ("In the end, the terms of the license are conceptually identical to the contents of the package."). The use of mass market licenses enables the publisher to tailor a collection of rights to particular types of uses, so that the license, rather than merely the underlying software, becomes the product acquired by the user. This practice has analogies to other industries, such as the airline industry. An airline ticket is nothing more than a right to ride on a given flight, in a certain class of seat, on a certain day and time, to a certain location. The ticket price and associated rights vary from passenger to passenger, depending on the ticket the passenger acquired. For example, one passenger in coach may have paid twice as much as the passenger sitting across the aisle, but the higher priced ticket may entitle the passenger to a confirmed seat on another flight in case the airline cancels the regularly scheduled flight.

17. 86 F.3d 1447 (7th Cir. 1996).

18. *See, e.g.*, Karjala, *supra* note 1; Apik Minassian, *The Death of Copyright: Enforceability of Shrinkwrap Licensing Agreements*, 45 UCLA L. REV. 567 (1997); Kell Corrigan Mercer, Note, *Consumer Shrink-Wrap Licenses and Public Domain Materials; Copyright Preemption and Uniform Commercial Code Validity in* ProCD v. Zeidenberg, 30 CREIGHTON L. REV. 1287 (1997). Some commentators disparage the *ProCD* decision by saying that it has been severely criticized or that most commentators disagree with the court's opinion. *See, e.g.*, David A. Rice, Memorandum to Article 2B Drafting Committee (Mar. 18, 1998) (on file with author) (Professor Rice is a member of the Article 2B Drafting Committee). This count-up-the-law-review-article method of evaluating *ProCD* is a poor basis to judge the merits of the decision. Most commentators write to critique cases, not to praise them, so seeing more criticism than accolades is normal in legal scholarship. Even at that, one might quarrel with whether particular articles are, on balance, supportive or critical. *See* Maureen A. O'Rourke, *Copyright Preemption After the* ProCD *Case, a Market-Based Approach*, 12 BERKELEY TECH. L.J. 53 (1997) (agreeing with the court on contract grounds, while offering criticism on preemption grounds). An-

the way software and information publishers do business. Without an effective contracting method to license software and electronic information to the mass market, the value and choice of products would have diminished significantly, and some companies would have had no viable products at all.[19] Today, a wide variety of organizations employ standard form contracts to provide software and information to the mass market,[20] including Consumers Union,[21] Consumer Net,[22] University of California at Berkeley,[23] Dartmouth College,[24] Massachusetts Institute of Technology,[25] Texas Classroom Teachers Association,[26] Public Broadcast Service,[27] Free Software Foundation,[28] The Robert Woods Johnson Foundation,[29] The Partnership For Food Safety Education,[30] National Pediatric And Family

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other mode of criticizing *ProCD* is to call it, pejoratively one would suppose, an Easterbrook decision, implying that the court's opinion was the work of one rogue judge. Both *ProCD* and the *Gateway* case that followed, were unanimous opinions of the court, neither of which the 7th Circuit reconsidered *en banc*. *See* Hill v. Gateway 2000, 105 F.3d 1147 (7th Cir. 1997).

19. *See* Joel Rothstein Wolfson, *Contracts and Copyright are not at War: A Reply to "The Metamorphosis of Contract into Expand,"* 87 CALIF. L. REV. 79 (forthcoming 1999).

20. In Article 2B nomenclature, many of these contracts would be called "Access Contracts" rather than "Mass Market Licenses," although they are every bit mass market licenses in the normal sense of the term. Article 2B distinguishes between the two types of contracts so that the statute can apply context-specific rules to access contracts. *Compare* U.C.C. § 2B-102(1) (July 24-31, 1998 Draft), *with* U.C.C. § 2B-102(31) (July 24-31, 1998 Draft) and see U.C.C. § 2B-102, Reporter's Note 28 (July 24-31, 1998 Draft).

21. *See supra* note 11.

22. *See* Consumer Net, *Consumer Net Rules of Operation* (visited Sept. 17, 1998) <http://www.consumernet.org/html/online_rules.html>.

23. *See supra* note 12.

24. *See* Jim Matthews, *BlitzMail* (visited Nov. 5, 1998) <http://www.dartmouth.edu/pages/softdev/blitz.html>; Jim Matthews, *Fetch—Licensing* (visited Nov. 5, 1998) <http://www.dartmouth.edu/pages/softdev/fetch.html>.

25. *See* MIT Information Systems, *MIT Information Systems* (visited Nov. 5, 1998) <http://web.mit.edu/is/help/maczephyr/license.html>.

26. *See* Texas Classroom Teachers Association, *TCTH Internet Site Disclaimer: Terms and Conditions* (visited Sept. 17, 1998) <http://www.tcta.org/disclaimer.htm>.

27. *See* Shop PBS, *Terms and Conditions for Use of Shop PBS* (visited Sept. 17, 1998) <http://www.pbs.org/insidepbs/rules/shop.html>.

28. *See supra* note 10.

29. *See* The Robert Wood Johnson Foundation, *Terms and Conditions of Use* (visited Sept. 17, 1998) <http://www.rwjf.org/trmscon.htm>.

30. *See* The Partnership for Food Safety Education, *Usage Guidelines* (visited Sept. 17, 1998) <http://www.fightbac.org/word/guidelines.html>.

HIV Resource Center,[31] National Institutes of Health Library,[32] National Kidney Foundation,[33] Guggenheim Museum,[34] Wisconsin Bar Association,[35] First Baptist Church (Rochester, MN),[36] and Catholic Online Webmail.[37]

Standard form contracts are not only ubiquitous in modern commerce; they are also regarded as an efficient method of distribution under the RESTATEMENT (SECOND) OF CONTRACTS[38] and universally upheld under Article 2 of the Uniform Commercial Code.[39] There are, to be sure, some important differences between mass market software licenses and standard form contracting in other industries, but those differences benefit licensees. First, licensors have a strong incentive to draw the user's attention to license terms and to get a manifestation of assent. If the user is not aware of the contours of the license or does not feel bound by them, the licensor (who must rely largely on self-policing in the mass market) cannot count on the user to abide by the license. Second, software users are not a docile lot. They are particularly unforgiving of companies that try to license software on unreasonable terms, and the Internet has given them a powerful tool to express their views.[40] Software end users have formed associa-

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31. *See* National Pediatric Family HIV Resource Center, *Terms and Conditions of Use: Liability Statement* (visited Sept. 17, 1998) <http://www.pedhivaids.org/disclaimer.html>.

32. *See* National Institutes of Health Library, *Copyright, Disclaimers and Access Restrictions* (visited Sept. 17, 1998) <http://libwww.ncrr.nih.gov/disclaim.html>.

33. *See*, AM. J. KIDNEY DISEASES, *Terms and Conditions of Use* (visited Sept. 17, 1998) <http://www.ajkdjournal.org/terms.html>.

34. *See* Solomon R. Guggenheim Museum, *Internet Legal Page* (visited Sept. 17, 1998) <http://www.guggenheim.org/legal.html>.

35. *See* The State Bar of Wisconsin, *State Bar of Wisconsin Web Site: Terms, Conditions and Disclaimers* (visited Sept. 17, 1998) <http://www.wisbar.org/gendisclaimer.html>.

36. *See* First Baptist Church, *Legal Information* (visited Sept. 17, 1998) <http://www.firstb.org/copyright.html>.

37. *See* Catholic Online, *Catholic Online WebMail/EdgeMail User Agreement* (visited Nov. 5, 1998) <http://webmail.catholic.org/terms.htm>.

38. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. A (1981).

39. *See* 3 CUNNINGHAM & JACOBSON, *supra* note 14, § 559A(B).

40. Even publishers of market-leading products are susceptible to the wrath of end users in controversies over mass market license terms. *See* Gomulkiewicz & Williamson, *supra* note 4, at 345 n.40 (user objections to WordPerfect license); Micalyn Harris, *Decloaking Development Contracts*, 16 J. MARSHALL J. OF COMPUTER & INFO. LAW 403, 407 (1997) (user objections to Borland license); DAVID BRIN, THE TRANSPARENT SOCIETY 165-70 (1998) (explaining the potentially valuable effects of "flame mail").

tions to monitor and influence software license terms.[41] Information industry research organizations, such as the Gartner Group,[42] as well as the trade press,[43] keep a watchful eye on licensing practices, sounding the alarm when they see a change that they believe negatively affects end users.

Critics of mass market licensing try to paint a picture of software or information licensing as amounting to nothing more than a collection of me-too forms in which licenses simply mirror a copyright first sale. Nothing could be farther from the truth. Today's mass market licensing is characterized by contract variety and a variety of license terms.[44] It is common for mass market licenses to provide users with more rights than the user would have acquired had the user simply bought a copy of the software, including reproduction, derivative works, and distribution rights. As new products have been developed and brought to market, such as multimedia software, client-server products, and web site "products," contract variety and customer choice have also flourished via mass market licensing.[45]

Innovative mass market licensing practices have played a key role in the success of many popular Internet products. The Netscape Navigator browser achieved early success because it permitted non-commercial users to freely use, copy, and distribute the software. Microsoft licenses free, unlimited copying and distribution of its Internet Explorer browser software. The Apache[46] web server and the Sendmail[47] e-mail router have become Internet standbys, and the Linux operating system has a strong fol-

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41. *See* Lauren Paul, *Tug-of-War—User Groups Leverage Clout to Influence Agreements*, PC WK., Nov. 7, 1994, at 21-24. Librarians have established a website setting out their views on preferred terms and conditions for acquiring information products. *See* International Coalition of Library Consortia, *Statement of Current Perspective and Preferred Practices for the Selection and Purchase of Electronic Information* (visited Sept. 17, 1998) <http://www.library.yale.edu/consortia/statement.html>; Liblicense, *Licensing Digital Information: a Resource for Librarians* (visited Nov. 5, 1998) <www.library.yale.edu/~llicense/index.shtml>.

42. *See* GARTNER GROUP INTERACTIVE (visited Nov. 5, 1998) <http://gartner12.gartnerweb.com/public/static/home/home.html>.

43. *See, e.g.*, Randy Weston, *Microsoft profits from license changes* (visited Nov. 5, 1998) <http://www.news.com/News/Item/0,4,26061,00.html?st.ne.ni.lh>.

44. See the Appendix to this Article, which sets forth a sampling of the rich assortment of license terms being offered today for software and information products.

45. *See* Gomulkiewicz & Williamson, *supra* note 4, at 352-56, 361-65.

46. *See* The Apache Group, *Apache HTTP Server Project* (visited Sept. 17, 1998) <http://www.apache.org>.

47. *See* Sendmail Consortium, *Welcome to Sendmail.org* (visited Sept. 17, 1998) <http://www.sendmail.org>.

lowing,[48] based on "open source" licensing.[49] Open source licensing is the practice of freely licensing the creation of derivative works and, in turn, requiring that the source code for these derivatives also be freely licensed for the creation of further derivatives.[50] Netscape has recently implemented a variant of open source code licensing for its Navigator and Communicator software.

Critics of mass market licenses also argue that such licenses must be regulated because a few mass market licenses contain objectionable terms, and more such terms could, in the future, find their way into mass market licenses.[51] That argument is misguided. It is no more appropriate to judge mass market licenses by their worst clauses than it is to judge all of litera-

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48. *See* Robert Lemos, *Linux maker lands big investors*, ZDNN (visited Nov. 5, 1998) <http://www.msnbc.com/news/200767.asp>; Josh McHugh, *Linux: the making of a global hack*, FORBES (Aug. 10, 1998) <http://www.forbes.com/forbes/98/0810/6209094s1.html>; Glyn Moody, *The Greatest OS that (N)ever Was*, WIRED 5.08 (Aug. 1997) <http://www.wired.com.wired/5.08/linux.html>; Sebastian Rupely, *Linux builds momentum*, PC MAGAZINE (Sept. 15, 1998) <http://www.zdnet.com/zdnn/stories/zdnn_smgraph_display/0,4436,2137588,00.html>; Randy Weston, *Linux gaining respect*, CNET NEWS.COM (visited Nov. 5, 1998) <http://www.news.com/News/Item/0,4,24436,00.html?st.ne.ni.rel>.

49. *See* Eric S. Raymond, *The Cathedral and the Bazaar* (visited Feb. 4, 1998) <http://www.redhat.com/redhat/cathedral-bazaar/>; Eric S. Raymond, *Homesteading the Noosphere* (visited Aug. 15, 1998) <http://www.sagan.earthspace.net/esr/writings/homesteading/>.

50. *See* Josh McHugh, *For the Love of Hacking: A Band of Rebels Think Software Should be as Free as the Air We Breathe*, FORBES, Aug. 10, 1998, at 94; Debian GNU/Linux, *What Does Free Mean? or What Do You Mean By Open Software?* (visited Nov. 5, 1998) <http://www.debian.org/intro/free>.

51. *See generally* Cem Kaner, *A Bad Law For Bad Software* (visited Sept. 10, 1998) <http://lwn.net/980507/a/ucc2b.html> [hereinafter Kaner, *A Bad Law*] (quoting a non-disclosure agreement for a McAfee anti-virus product: "The customers will not publish reviews of the product without prior consent from McAfee."); Cem Kaner, *Bad Software: What to do When Software Fails* (visited Nov. 23, 1998) <http://www.badsoftware.com/uccindex.htm> (highlighting objectionable license terms); Letter from Jean Braucher & Peter Linzer to Members of the American Law Institute (May 5, 1998), *available at* <http://www.ali.org/ali/Braucher.htm> (visited Nov. 22, 1998) (moving ALI to return Article 2B to the drafting committee for fundamental revision). Some license terms seem more reasonable than their critics might suggest when viewed in context, such as the terms for the Microsoft Agent software product. *See* Charles C. Mann, *Who Will Own Your Next Good Idea*, ATLANTIC MONTHLY, Sept. 1998, at 80 (criticizing the license for Microsoft Agent). The Agent software grants the user the right to use certain "cutesy" animated figures, which are copyrighted by Microsoft. These figures are akin to Mickey Mouse or Barney. You can be certain that Disney would never license a third party to use Mickey Mouse in a product in which Mickey says disparaging things about Disney. *Cf.* Deere & Co. v. MTD Prod.s, Inc., 41 F.3d 39 (2d Cir. 1994) (holding that an attempted parody of Deere's deer character constituted trademark dilution).

ture by tabloid journalism or trashy novels. Just as free speech does not deserve to be regulated because some speech is objectionable, so mass market licenses do not deserve to be regulated because some publishers use them as a vehicle for objectionable terms. Mass market licenses should be judged on the basis of the tremendous benefits they provide to software publishers and users,[52] not on the few provisions critics can find to ridicule. The market will punish those who employ harsh terms. Consumer protection laws and doctrines such as unconscionability,[53] construing contract terms against the drafter,[54] and copyright misuse[55] provide powerful checks as well.[56]

Other critics of mass market licenses worry about the theoretical costs of mass market licenses that are attributable to the effects of (to use their misnomer) "private legislation."[57] A critique of the "private legislation" theory is beyond the scope of this Article.[58] Even if such costs really exist,[59] however, they are far outweighed by the extraordinary costs that publishers and users alike could incur if Article 2B eliminates or overly encumbers mass market licensing.

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52. Customer satisfaction with software products is quite high. *See, e.g.*, John Morris, *Readers Rate Software & Support Satisfaction*, PC MAG., July 1997, at 199 ("As in previous years, the results were generally positive. Most respondents give the products they use ratings of 8 or higher on a scale of 1 to 10 for satisfaction, and—with a few exceptions—give vendors solid ratings for technical support as well."); Peggy Watt, *How Happy Are You...Really?*, PC MAG., July 1993, at 311-12 ("Are customers satisfied? You Bet.").

53. *See* U.C.C. § 2-302 (West 1989); U.C.C. § 2B-110 (July 24-31, 1998 Draft); 1 E.A. FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.28 (1990).

54. *See* RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981); 1 FARNSWORTH, *supra* note 53, § 4.24.

55. *See, e.g.*, DSC Communications v. DGI Techs., 81 F.3d 597 (5th Cir. 1996); Lasercomb v. Reynolds, 911 F. 2d 970 (4th Cir. 1990).

56. *See generally* Raymond T. Nimmer, *Breaking Barriers: The Relation Between Contract and Intellectual Property Law* 13 BERKELEY TECH. L.J. 827 (1998).

57. *See, e.g.*, Lemley, *supra* note 1, at 23; David A. Rice, *Public Goods, Private Contract and Public Policy: Federal Preemption of Software License Prohibitions Against Reverse Engineering*, 53 U. PITT. L. REV. 543 (1992).

58. For criticism of the private legislation theory, see Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557, 607 n.226 (1998) (criticizing "private legislation" as a metaphor that tends to mislead); Richard Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1359 (1982). Contrary to the assumptions underlying the term "private legislation," contract diversity in mass market software licenses is rampant, and software publishers actively attempt to bring terms to the user's attention rather than burying them. *See* Gomulkiewicz & Williamson, *supra* note 4, at 348-50.

59. *See* Bell, *supra* note 58, at 591.

Finally, critics complain that licenses can limit the user's ability to use the licensed software or information. That is, of course, true—indeed, it is the very essence of licensing. But it is overly simplistic, and usually wrong, to think that licenses are merely tools to take away rights.[60] They are necessary to convey many affirmative rights as well.[61]

Critiquing mass market licensing is interesting as an intellectual exercise, but what are the real alternatives for Article 2B? Four alternatives exist: (1) provide that contracts are enforceable only if negotiated and/or signed; (2) force publishers to base their transactions solely on background rules of intellectual property law, such as the first sale doctrine, rather than contract; (3) dictate the specific terms that may or may not be included in standard form contracts; and (4) give courts greater leeway to strike contract terms. These four alternatives are not practicable.

The transaction costs associated with requiring negotiation or a signature would be prohibitively high.[62] For this reason, standard term contracts

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60. *See infra* Appendix of Selected License Terms; Gomulkiewicz & Williamson, *supra* note 4, at 352-56, 361-65. Another objection seems to be to license terms that prohibit reverse engineering or de-compiling software. While some may have philosophical objections to these terms, they have been standard industry practice for many years among companies of all sizes. Article 2B is not the proper place to resolve this debate—Article 2B should not dictate the enforceability of any given contract term, except an unconscionable or otherwise unenforceable one. In some cases, courts have upheld prohibitions on reverse engineering as reasonable, and in others, such as when the user's goal is merely to achieve interoperability, courts have refused to uphold them on various grounds. *See, e.g.*, ProCD v. Zeidenberg, 86 F.3d 1447, 1454-55 (7th Cir. 1996) (enforcing prohibition on reverse engineering); DSC Communications v. DGI Techs., 81 F.3d 597 (5th Cir. 1996) (copyright misuse); Vault Corp. v. Quaid Software, 847 F.2d 255 (9th Cir. 1988) (preemption). In reality, reverse engineering is seldom critical to the innovation necessary to advance the state of the art for personal computer software. *See* Gomulkiewicz & Williamson, *supra* note 4, at 359 n.97. The feature set and other characteristics of a software product are readily ascertainable in the normal use of the product or via publicly available information. The information one can glean from de-compiling is of limited use in any event. *See* Andrew Johnson-Laird, *Software Reverse Engineering in the Real World*, 19 U. DAYTON L. REV. 843, 902 n.4 (1994); Pamela Samuelson et al., *Symposium: A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2308, 2336 n.90 (1994).

61. The software publisher holds the exclusive right to copy, create derivatives, distribute, and publicly perform or display its software. The end user can only acquire these rights by license, as users do in numerous mass market licenses. *See infra* Appendix of Selected License Terms.

62. *See Pro CD*, 86 F.3d at 1451 (discussing the inefficiencies of requiring a signature on every contract); RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. A (1981) (describing the benefits of standard forms); 1 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 1.4, at 13-15 (rev. ed. 1993) (noting that we could not function as a fast-paced, industrialized nation if every contract had to be negotiated); Gomulkiewicz &

are the norm in today's economy, not the exception,[63] and contract law does not generally require a signature to create a contract. Contracting parties have always had the flexibility to manifest assent in a variety of ways, from nodding their head, to shaking hands, to making an "X," to clicking an "I agree" button.[64]

Background rules of intellectual property, such as copyright's first sale doctrine, provide woefully inadequate transaction models for software and information products. A copyright first sale is, in effect, a one-size-fits-all transaction model. As I have described in detail elsewhere, forcing a software publisher to sell software like a newspaper or book does not permit the publisher to provide various packages of rights desired by end users at attractive price points.[65] If Article 2B constrains mass market software licensing, product prices will increase and product variety and choice will decrease.

If Article 2B dictates the specific terms which may or may not be in standard form software contracts, it will impinge on the important principles of freedom of contract and contract certainty. If Article 2B gives courts greater leeway to strike contract terms, it will likely freeze development of new contract forms, decrease contract certainty, and potentially increase litigation over licenses. Hence, these approaches should be pursued very cautiously. While there is a rightful place for some limits on freedom of contract, the better approach is to start by affirming the value of mass market licensing and then apply any regulation with care and precision. Regulation is always possible so long as those proposing it can convince lawmakers it is good public policy overall.[66]

Williamson, *supra* note 4, at 341-56; Maureen A. O'Rourke, *Drawing the Boundary Between Copyright and Contract: Copyright Preemption on Software License Terms*, 45 DUKE L.J. 479, 495 (1995).

63. 1 FARNSWORTH, *supra* note 53, § 4.26-27, at 478-95 (1990). Literally to require dickering would create the absurd result that in order to have an agreement you would first have to have a disagreement.

64. *See* U.C.C. § 2-204 (West 1989); U.C.C. § 2B-202 (July 24-31, 1998 Draft).

65. *See* Gomulkiewicz & Williamson, *supra* note 4, at 352-56, 361-65.

66. Ralph Nader's Consumer Technology Project has proposed that software "lemon laws" be passed in every state. *See* Consumer Project on Technology, *Protest Page on: Uniform Commercial Code Article 2B* (visited Sept. 17, 1998) <http://www.cptech.org/ucc/ucc/html>; Brian McWilliams, *Venders' Right to Ship Buggy Software Under Fire*, PC WORLD ONLINE (Mar. 25, 1998) (visited Nov. 23, 1998) <http://www.pcworld.com./news/daily/data/0398/980325081609.html>. *But see supra* note 52 (customer satisfaction with software products is quite high). Several bills have been introduced in Congress to invalidate contractual prohibitions on reverse engineering. *See, e.g.*, Digital Era Copyright Enhancement Act, H.R. 3048, 105th Cong. (1997). The European Union has also passed legislation on this issue. *See* Council Directive

What is Article 2B doing about mass market licenses? End users should be cheering.[67] Article 2B contains protections against hidden license terms; it requires an opportunity to review the terms and a manifestation of assent to the terms.[68] Article 2B does not enforce mass market license terms that conflict with expressly agreed terms.[69] Section 2B-208 conditions enforceability of mass market licenses on the giving of a refund when contract terms are presented to the user after payment.[70] It also allows the user to recover any costs associated with returning the software or for harm caused to the user's system in the event the user must install the software in order to view the terms of the mass market license.[71] The addition of 2B-208 and other consumer protections to Article 2B prompted the co-chairs of the American Bar Association's Business Law Subcommittee on Information Licensing to observe: "The current draft of Article 2B affords more protections for consumers than any existing commercial statute."[72] Not only do consumers receive enhanced protections for software and information licensed via standard forms in the mass market, but also Article 2B takes the unprecedented step of applying many of these protections to businesses.[73]

III. MOLDING AND SHAPING ARTICLE 2 RULES IN ARTICLE 2B

Though Article 2B's treatment of mass market licenses has been a focal point of the drafting process, Article 2B primarily addresses other aspects of licensing. Fundamentally, Article 2B should provide sensible, industry standard default rules for day to day licensing transactions. In creating the Article 2B default rules, the drafters of Article 2B began with the default rules of Article 2. The utility of Article 2B will depend in large

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91/250/EEC of 14 May 1991 on the Legal Protection of Computer Programs, art. 6 (permitting reverse engineering in EC countries to obtain information to create interoperable products in certain cases and overriding any contrary contractual provision).

67. *See* Mary Jo Howard Dively & Donald A. Cohn, *Treatment of Consumers Under Proposed U.C.C. Article 2B Licenses*, 16 J. MARSHALL J. COMPUTER & INFO. L. 315, 327-28, 334 (1997). Ms. Dively and Mr. Cohn are co-chairs of the ABA Section of Business Law Subcommittee on Information Licensing.

68. *See* U.C.C. § 2B-111 (July 24-31, 1998 Draft) ("Manifesting Assent"); *id.* § 2B-112 ("Opportunity To Review; Refund").

69. *See id.* § 2B-208(a)(2).

70. *See id.* § 2B-208(b)(1).

71. *See id.* § 2B-208(b)(2)-(3).

72. Dively & Cohn, *supra* note 67, at 334.

73. *See* U.C.C. § 2B-208, Reporter's Note 2 (July 24-31, 1998 Draft) (commenting that U.C.C. § 2B-208 "is not limited to consumer transactions").

part upon how the drafters of Article 2B mold and shape the hard goods-centric rules of Article 2 to fit software and information contracting, and the default rules they add to resolve issues specific to license agreements. To provide a perspective on how Article 2B rates in this regard, I will briefly examine Article 2B's treatment of warranties, duration of contracts, and interpretation of exclusive license grants.

A. Warranties

A major failing of Article 2B to date is that the drafting committee has remained too wedded to ill-fitting rules found in Article 2. In other words, Article 2B actually threatens to *remake* software and information licensing law by imposing contract rules on it that are better suited to sales of goods. A good example of this is Article 2B's treatment of warranties.[74]

Representatives from both software publishers and end user groups have commented that the Article 2 merchantability and non-infringement warranties do not reflect software industry practice.[75] In the case of the implied warranty of merchantability, a representative of consumer interests and this author collaborated on a re-drafted warranty, which was presented to the drafting committee.[76] The drafting committee has yet to adopt this proposal, however, even though it knows that the current Article 2 formulation is flawed by the reckoning of software publishers and users alike.

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74. *See id.* U.C.C. § 2B-401 ("Warranty and Obligation Concerning Quiet Enjoyment and Noninfringement"); *id.* § 2B-403 ("Implied Warranty: Merchantability of Computer Program").

75. *See* Robert W. Gomulkiewicz, *The Implied Warranty of Merchantability in Software Contracts: A Warranty No One Dares to Give and How to Change That*, 16 J. MARSHALL J. COMPUTER & INFO. LAW 393 (1998); Jeffery C. Selman & Christopher S. Chen, *Steering the Titanic Clear of the Iceberg: Saving the Sale of Software from the Perils of Warranties*, 31 U.S.F. L. REV. 531 (1997); Edward G. Durney, Comment, *The Warranty of Merchantability and Computer Software Contracts: A Square Peg Won't Fit in a Round Hole*, 59 WASH. L. REV. 511 (1984).

76. *See* Cem Kaner & Robert W. Gomulkiewicz, *Moving Toward a Usable Warranty of Merchantability*, presented to the Article 2B Drafting Committee (May 31, 1997) (on file with author); Cem Kaner, *Bad Software: What to do When Software Fails* (visited Nov. 23, 1998) <http://www.badsoftware.com/uccindex.htm> ("Bob Gomulkiewicz (Microsoft's lawyer) and I worked together on the warranty of merchantability. Our goal was to write something that consumers could support and that Microsoft would actually be willing to offer. *We succeeded....* The Committee chose not to vote on the proposal, even in the face of repeated advice that if they left the current implied warranty alone, no sane software publisher would provide it. The Committee chose not to vote on that compromise.").

The implied warranty of non-infringement that Article 2B carries over from Article 2 is a far cry from industry practice. Unlike licenses typically used in the software industry, Article 2B places the risk of infringement completely on the licensor. Some argue this is *fair* because the licensor is in the best position to know of and prevent infringement.[77] Anyone who has negotiated a software license has undoubtedly heard this argument.

In practice, of course, this argument seldom carries the day—it is very common in negotiated transactions to allocate infringement risk between licensor and licensee, or for the licensee to assume all risk of infringement. The sheer number of issued patents, the difficulty of conducting patent searches, and the fact that any given patent can be interpreted dozens of ways, makes placing the risk on the licensor inequitable in many cases. Often the licensor cannot obtain insurance or will not receive enough income from the license to offset the risk of providing a non-infringement warranty (in many transactions, the licensee will receive much more income through use of the software than the licensor who supplied it). The smaller the software developer or publisher, the more likely the developer or publisher is to resist shouldering the risk of a full blown non-infringement warranty. Thus, in the case of the non-infringement warranty, the drafters of Article 2B have created a default rule that runs contrary to industry practice and to the expectations of the very parties (small developers and publishers) most likely to be subject to the default rule.

The warranty of non-infringement is also an area in which Article 2B may need to distinguish between the licensing traditions of the software industry and other information industries. Observers from the book publishing industry have informed the drafting committee on several occasions that a full-blown warranty of non-infringement is standard practice in their industry.[78] If that is so, then melding licensing traditions may be the wrong approach. The drafting committee should consider an approach that incorporates different default rules for different industries or creates a mechanism[79] that achieves the same result.

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77. This may be the case with respect to copyright infringement and trade secret misappropriation, but it is less true or simply not true with respect to patent infringement.

78. Paul J. Sleven of St. Martin's Press has made this observation at several drafting committee meetings in response to this author's observations about software industry trade practices concerning the warranty of non-infringement. In the book publishing industry, patents are seldom at issue.

79. Default rules can be varied by usage of trade, but the burdens involved with proving usage of trade in order to overcome a black letter law default rule give pause to the industry whose industry practice is not reflected in the black letter law. *See* U.C.C. §§ 1-201(3), 1-205 (West 1989).

B. Duration of Contracts

In contrast to Article 2B's default rules for warranties, the Article 2B default rule for duration of contracts is a good example of the drafting committee's attempt to recognize the need to craft a different rule for software and information licensing than for traditional sales of goods.[80] However, as described below, the default rule chosen by the Article 2B drafting committee ignores important nuances and, in the end, causes more harm than good.

Under Article 2, if the parties do not specify the duration of their contract, the term is a "reasonable" time in light of the commercial circumstances.[81] The contact may be terminated as to future performances on reasonable notice to the other party. This rule works well for services contracts in the information industries, such as a contract to provide support services or develop software code.

A weakness of the Article 2 default rule in the software and information license agreement context, however, is the implication that certain grants of rights are terminable at will. For most off-the-shelf, mass market software products, the user expects a perpetual license subject only to cancellation for breach. The same expectation is true for licensed informational content that the licensee integrates or combines with other information to create a single product: the licensee does not expect to have to rip the combined product apart at the behest of the licensor. The default rule in section 2B-308 captures and melds these industry practices which are consistent across information industries. So far, so good.

However, in its present form, section 2B-308 does not work well for software source code[82] licensing. Source code often contains highly valuable trade secret information. It is common for software publishers to license proprietary source code to other software companies (including competitors, on occasion), computer hardware manufacturers, customers, and other third parties. These source code licenses are seldom for a perpetual term. Under the present formulation of section 2B-308, if the software publisher neglects to specify a contract duration, the default rule results in a perpetual license grant.[83] This "bug" in section 2B-308 is no

80. *See* U.C.C. § 2B-308 (July 24-31, 1998 Draft).

81. *See* U.C.C. § 2-309 (West 1989).

82. *See* COMPUTER DICTIONARY 324 (1991) ("Source code is human readable program statements written in a high-level or assembly language, as opposed to object code, which is derived from the source code and designed to be machine readable.").

83. U.C.C. § 2B-308 (July 24-31, 1998 Draft).

small matter: it exposes unsophisticated licensors to inadvertent licenses of valuable technology in perpetuity.

C. Interpretation of Exclusive License Grants

One of the most important aspects of Article 2B is its ability to provide contract certainty by resolving license interpretation issues that are ambiguous in current licensing law practice. One basic meddlesome issue is whether an exclusive license grant means the grant is exclusive as to everyone *including* the licensor or simply everyone *but* the licensor.[84] The careful licensing lawyer would take care of this in crafting the language of the license grant,[85] but Article 2B, like Article 2, assumes a lawyer-free transaction. Article 2B resolves the current ambiguous state of the law by taking the position that an exclusive license grant means exclusive as to everyone, including the licensor.[86] Thus, the Article 2B default rule for interpreting exclusive license grants shows how Article 2B can make a positive contribution to bringing order to the current disarray in licensing law.

IV. CONCLUSION

The software and information industries are thriving and fueling significant economic growth, despite the chaotic state of contract law for licensing transactions. A uniform contract law for software and information licensing could provide significant benefits to providers and users of information products. To be truly beneficial, however, the law must affirm the basic principle of freedom of contract, increase contract certainty, be attuned to the unique practices of the affected industries and the coming digital convergence, and allow for innovative products and methods of distribution. A regulatory statute, a statute based on antiquated rules and distribution methods, or a statute which provides even less contract certainty than today's world of licensing law chaos, is probably best left unwritten.

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84. *See, e.g.*, 8 DONALD S. CHISUM, CHISUM ON PATENTS §§ 21-266, 21-267 (1998); MICHAEL EPSTEIN, MODERN INTELLECTUAL PROPERTY § 15-5 (3d ed. 1997); 2 ROGER MILGRIM, MILGRIM ON LICENSING § 15-33 (1998).

85. *See* 1 STEVEN Z. SZCZEPANSKI, ECKSTROM'S LICENSING IN FOREIGN AND DOMESTIC OPERATIONS 3-18 (1998).

86. *See* U.C.C. § 2B-307(f)(2) (July 24-31, 1998 Draft).

V. APPENDIX OF SELECTED LICENSE TERMS[87]

A. 3Com

1. PalmPilot Pro End User Software License Agreement

Multiple Copies: "With respect to the PalmPilot Desktop Software, you may reproduce and provide one (1) copy of such Software for each personal computer or PalmPilot product on which such Software is used as permitted hereunder. With respect to the PalmPilot Device Software, you may use such Software only on one (1) PalmPilot product."

B. 3G Graphics, Inc.

1. Art à la Carte

Derivative Works; Distribution: "You may use the contents of your 3G Graphics product as illustrative or decorative material that is included as part of a total graphic design for print or multimedia communication, produced for you, your employer, or a client."

C. Adobe Systems, Inc.

1. Acrobat Reader 3.01 Electronic End-User License Agreement

Unlimited Copies and Distribution: "You may make and distribute unlimited copies of the Software, including copies for commercial distribution, as long as each copy that you make and distribute contains this Agreement, the Acrobat Reader installer, and the same copyright and other proprietary notices pertaining to this Software that appear in the Software."

Install on Network or Multiple Computers: "You may ... install and use the Software on a file server for use on a network for the purposes of (i) permanent installation onto hard disks or other storage devices or (ii) use of the Software over such network."

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87. The following license terms were collected from the license agreements accompanying various information products. The headings immediately preceding the quotes are provided by the author. Copies of the original license agreements are on file with the author.

2. *PageMaker 6.5 End User License Agreement*

Home Use: "The primary user of each computer on which the Software is installed or used may also install the Software on one home or portable computer. [So long as there is no concurrent use]."

Copying and Distribution Rights for Font Software: Rights include the ability to download the fonts to a printer, take a copy of the fonts to a commercial printer (if the commercial printer also has a license for the fonts), and "convert ... the font software into another format for use in other environments, subject to [additional] conditions." For example, this section would allow TrueType fonts to be converted to Bitmap fonts.

3. *Type on Call Electronic End User License Agreement*

Authorized to Use Unencrypted Software: "Notwithstanding anything else in this Agreement, you acknowledge that although Type On Call contains Software for a number of typefaces and other product(s), you agree that you will use, and that the licenses set forth below apply to, only that Software which has not been encrypted or for which you have received access codes from Adobe."

Choice in Network Configuration: "Provided the Software is configured for network use, [you may] install and use the Software on a single file server for use on a single local area network for either (but not both) of the following purposes:

(1) permanent installation onto a hard disk or other storage device of up to the Permitted Number of Computers; or

(2) use of the Software over such network, provided the number of different computers on which the Software is used does not exceed the Permitted Number of Computers. For example, if there are 100 computers connected to the server, with no more than fifteen computers ever using the Software concurrently, but the Software will be used on 25 different computers at various points in time, the Permitted Number of Computers for which you need a license is 25."

Home Use: "The primary user of each computer on which the Software is installed or used may also install the Software on one home or portable computer. However, the Software may not be used on the secondary computer by another person at the same time the Software on the primary computer is being used."

Copy Fonts to Printer: Licensee may "[d]ownload the font software to the memory (hard disk or RAM) of one output device connected to at least one of the computers on which the font software is installed for the purpose of having such font software remain resident in the output device."

Allows Conversion of Font to Different Format (limited right to create derivative works): Licensee may "[c]onvert and install the font software into another format for use in other environments, subject to the following conditions: A computer on which the converted font software is used or installed shall be considered as one of your Permitted Number of Computers. You agree that use of the font software you have converted shall be pursuant to all the terms and conditions of this Agreement, that such font software may be used only for your own customary internal business or personal use and that such font software may not be distributed or transferred for any purpose, except in accordance with Paragraph 3 below."

D. Apache Group

1. Apache Web Server (Distributed as Freeware)

Unlimited Distribution: "Redistribution and use in source and binary forms, with or without modification, are permitted provided that the following conditions are met: [maintain copyright notice, acknowledge in all advertising that distributed product contains software developed by the Apache group, and not use Apache name]"

E. "Artistic License" [88]

1. Alternative Free Software License

Copying and Distribution: "You may make and give away verbatim copies of the source code form of the Standard Version of this Package [collection of software files covered by the license] without restriction, provided that you duplicate all of the original copyright notices and associated disclaimers."

Modification: "You may otherwise modify your copy of this Package in any way, provided that you insert a prominent notice in each changed file stating how and when you changed the file and provided that you do at least ONE of the following [place modifications in the Public Domain, use the modified Package only within your organization, rename non-standard executables so that they do not conflict, or make other distribution arrangements with the copyright holder]."

F. Asymetrix

1. Pocketbook License Agreement for Daybook+ for Windows 3.0

Derivative Works: The agreement allows you too make derivative works if you are a licensed user of "ToolBook." Modifications are only for internal use unless a separate distribution license is obtained.

G. Autodesk, Inc.

1. General Shrink Wrap License Agreement

Concurrent Use: "[I]f this Software is being licensed to you for use on a networked system (certain products only), you may operate the Software as a multiple-user installation with either: [the maximum use being one person at one time, or the maximum number of concurrent users being the number of people authorized by additional licenses]."

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88. The Artistic License is a form of "freeware" software license designed to encourage the distribution of source code and maintain the user's ability to modify the code. The most popular product distributed under the Artistic License is the scripting language Perl.

Multiple Versions: "If the software Package contains versions designed for use on more than one operating system, ... you may install all versions of the Software but only on one computer at one location at any one time ...."

License Packs: "If the Software is licensed to you as a Lab Pack (certain products only) and you have paid the Lab Pack license fee, then you may make four copies of the enclosed Software and Documentation. The Software may be used on a maximum of five computers simultaneously."

Copies: "You may make unlimited copies of the .DWG files and other associated parts data contained in the Software for the exclusive purpose of incorporation into your own engineering drawings and designs."

2. Kinetix™ Software (division of Autodesk)

Multiple Installations: "[Y]ou may install 3D Studio Software on more than one computer for the exclusive purpose of network rendering of your files.

Modifications and Copies: "You may modify and make unlimited copies of the source code examples contained in the Software (3D Studio Max™) and any resulting binary files for the exclusive purpose of incorporation into your own works and you may treat the User Works as your own creations with [some restrictions.]"

Distribution: "You may distribute the resulting binary files of the Source Examples in User Works that are commercially distributed software applications only if [programs require 3D Studio Max to operate and you have increased the functionality]."

Other Programs: Autodesk provides for unlimited copying, modification, and distribution rights similar to the above for its Hyperwire™, 3D Props™, and Texture Universe™ products.

H. Blizzard Entertainment

1. Starcraft End User License Agreement

Concurrent Use: "[T]he Program has a multi-player capability that allows up to eight players per registered version of the Program to play concurrently."

Multiple Copies: Allows installation of "Spawned Versions" (copies made from a registered version). "You may install Spawned Versions of the Program on an unlimited number of computers. However, Spawned Versions of the Program must be played in conjunction with the registered version of the Program from which they were spawned."

Create Derivative Works: "The Program also contains a Campaign Editor (the 'Editor') that allows you to create custom levels or other materials for your personal use in connection with the Program ('New Materials')."

I. Berkeley Systems-style licenses[89]

Unlimited Copying and Distribution Allowed: "Redistribution and use in source and binary forms, with or without modification, are permitted provided that the following conditions are met: [maintain copyright notices and include 'as is' disclaimer]."

89. BSD-style licenses are another variation of a "freeware" license that allows free distribution of the source and object code of the program with few restrictions. This style of license is used for programs such as the Apache web server as well as various freeware versions of Unix. The BSD license requires that the copyright owner be listed in all advertising for distributed products using the licensed software. Modified-BSD licenses have dropped the advertising clause.

J. Free Software Foundation

1. GNU General Public License[90]

Copying and Distribution: "You may copy and distribute verbatim copies of the Program's source code as you receive it, in any medium, provided that you conspicuously and appropriately publish on each copy an appropriate copyright notice and disclaimer of warranty ... [and provide a copy of the GPL license]."

Modifications: "You may modify your copy or copies of the Program or any portion of it, thus forming a work based on the Program, and copy and distribute such modifications [so long as you note the modified files, license the modifications at no charge under the GPL, and provide a conspicuous copyright notice]."

2. GNU Library General Public License ("LGPL")

Use, Copying and Distribution: The LGPL is intended to promote the same "freeware" software ideals contained in the GPL. The LGPL, however, allows a software product to use an unmodified "free" library without requiring the software product to be licensed as "freeware." Software licensed under the LGPL may be copied and distributed in combination with a "non-free" product, but the distribution must include both the object and source code of the LGPL-covered software.

K. Id Software, Inc.

1. Quake II

Derivative Works: "ID grants to you the non-exclusive and limited right to create additional levels (the 'Levels') which are operable with the Software. You may include within the Levels certain textures and other images (the "ID Images") from the

90. Many software programs are licensed under the GNU General Public License ("GPL") or the GNU Library General Public License ("LGPL"). Linux is perhaps the most popular and currently the most well known program licensed under these licenses. The intent of the GPL is that software should be "free" in the sense that everyone can use and modify the software as they like. If code licensed under the GPL is incorporated into software, then such software must also be licensed under the terms of the GPL. Thus, the license, through its terms and conditions, creates a system in which the source code of the software remains available to be copied, modified, and distributed by others.

Software." [Such Levels may only be used for personal use but may be distributed to others at no charge.]

L. Info Electronics

1. Postal Union/SMTP™

Multiple Copies: "[Y]ou are permitted to: Non-exclusive use of the enclosed software and install one copy of the service on a single machine and 3 copies of the configuration control panel."

M. Inprise (Borland)

1. License Terms for Development Products

Compiled Programs: "If you are the licensed, registered user of this product, you may use, reproduce, give away, or sell any program you write using this product, in executable form only, without additional license or fees, subject to all of the conditions in this statement."

Redistribution: "Under Borland's copyright, and subject to all of the conditions in this statement, Borland authorizes the licensed, registered user of this product to reproduce and distribute exact copies of the files designated as 'Redistributables' for this product, provided that such copies are made from the original disks in this package."

N. LEXIS-NEXIS

1. CompareRite 7.0 Software License Agreement

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