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THE ARTICLE 2B SYMPOSIUM: A FOREWORD

by ANN LOUSIN†

Children, create something new!

When Richard Wagner wrote that note to his young colleagues, he was exhorting them to devise new ways of staging his operas. Since that time, each generation of opera directors has tried to step beyond the bounds of the strict instructions Wagner imposed upon productions of his operas in his day.

Karl Llewellyn, chief drafter of Article 2 of The Uniform Commercial Code ("U.C.C.") and of the U.C.C. generally, might well have entertained thoughts similar to Wagner's. He always regarded commercial law, presumably including the commercial laws he created, as living works that must constantly change.

Of course, Llewellyn could not have foreseen the development of computer technology or the revolution in commerce it has begun. Nor could he have foreseen the development of a "license," as opposed to a sale or even a lease, as the legal structure for the transfer of rights in the intellectual property of computer technology. He must have known, however, that changes in technology would compel commercial law to adapt its rules to new developments.

Llewellyn died in 1962, a few months before the "Final Draft" of the U.C.C. assumed its form. In the generation or more since 1962, the U.C.C. has had to adapt to many technological changes. These have provided part of the impetus for revising Articles 3, 4, 5, and 8 and are providing part of the impetus for the current revisions in progress of Articles 1, 2, and 9.

Part of the revision of the 1962 Final Draft of the U.C.C. has resulted in the addition of two new articles: Article 2A-Leases of Goods in 1990 and the proposed Article 2B-Licenses. Admittedly, it was the

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growth of a business practice, leasing, not advances in technology, that prompted the drafting of Article 2A.

The impetus for the drafting of new Article 2B-Licenses is the revolution caused by the appearance of computers. Computers have rendered earlier incarnations of virtually every machine obsolete. The word processor has replaced the typewriter, and computers are as important as engines in running automobiles. Practically every American high school graduate knows how to operate a personal computer.

The effect of computers upon contracts law and the U.C.C. is likewise tremendous. Readers of this Journal know already that the present legal framework does not provide either a sound theoretical basis or practical framework for licensing of computer software. True, the courts and lawyers have done their best to adapt contracts law and the U.C.C., especially Article 2, to computer contracts. However, it has become clear that we must construct a totally new framework for this area of the computer revolution.

A committee appointed by the Permanent Editorial Board on the U.C.C. has been preparing drafts of Article 2B for several years and plans to have a final draft published within a few months after the publication of this Symposium.[1] If all goes well, there will be a new—completely, totally new—article in the U.C.C. at the beginning of the twenty-first century. Its impact upon the computer industry, both in law and in practice, will surely be tremendous.

It is time for a complete analysis of the problems attendant upon drafting Article 2B. While the law reviews and bar journals have published individual articles on different aspects of the drafts, this Symposium is the first law review issue dedicated totally to the issues in Article 2B.

This Symposium is the joint effort of student authors and editors, law professors, and practitioners. Two professors, five practitioners, and two student authors have joined forces with the editorial staff of *The John Marshall Journal of Computer & Information Law* to produce this issue. While each work can stand on its own, taken together they provide a detailed appraisal of the problems facing the computer industry and the drafting committee.

Four of the works address the inability of the current legal framework, particularly Article 2 of the U.C.C., to provide a truly satisfactory

1. The various drafts of U.C.C. Article 2B are available on the World Wide Web. The National Conference of Commissioners on Uniform State Laws, *Drafts of Uniform and Model Arts—Official Site* (visited Jan. 16, 1998) <http://www.law.upenn.edu/library/ulc/ulc.htm>. Many of the authors in this issue used the September 25, 1997 Draft of Article 2B. The National Conference of Commissioners on Uniform State Laws, *Uniform Commercial Code Article 2B Licenses* (Proposed Draft, Sept. 25, 1997) <http://www.law.upenn.edu/library/ulc/ucc2/ucc2b997.htm>.

framework for regulating computer software licenses. The other four address particular issues in the current drafts of Article 2B, as seen against present Article 2 and practices in the computer industry.

Raymond T. Nimmer opens the symposium with his analysis of the "law of the information age." He points out that the modern economy "emphasizes information and services," not the production of goods, as was true when Llewellyn and his colleagues began drafting the U.C.C. in the 1940s. When the economy of a half-century ago centered upon goods, the legal framework likewise centered upon the various ways to transfer rights in goods. He claims that "Article 2B provides a framework document for this new commerce."

His article analyzes the differences between goods and information/services, between sales and licenses, and between intellectual property licensing and information licensing. He then discusses how much Article 2B owes to the conceptual framework of Article 2, particularly to the concepts of contract freedom and default rules. He then explains the different types of contracts covered by Article 2B, particularly the new "mass market" contract, and concludes with a description of some of the highlights of the current draft of Article 2B.

Michael L. Rustad continues that discussion by delineating the "path of commercial law to cyberspace." He describes the history of the drafting of the U.C.C., especially Article 2. Then he argues that the "paradigm of Article 2" is not suitable for the information age. He compares the substantive provisions of the newest draft with those of Article 2A and the current Article 2. He summarizes the various options available to the drafters, particularly regarding the scope of Article 2B. One option is to "do nothing" and let the industry find its own solutions to the problems. The other option is to face the issues head-on in a comprehensive article, Article 2B.

His article also discusses specific contracts issues before the drafters, including the battle of the forms, warranties for information (which are not the same as the warranties for goods in Article 2), assignability, performance standards, the "mass market" concept, and problems of breach, particularly remedies for breach. It is clear why a July 1997 White House Report, "A Framework for Global Electronic Commerce," endorsed the Article 2B project.

The next four articles deal with specific issues in Article 2B. Mary Jo Howard Dively and Donald A. Cohn address the treatment of consumers under the proposed article. They describe the tension between purely commercial transactions and partly-consumer transactions that has existed since the beginning of the U.C.C. project in the 1940s. They describe the current drafting process, especially as it pertains to drafting

Article 2B. They note that, "[a]s much as any other group, consumers have been represented in the Article 2B drafting process."

They show how the text of proposed Article 2B affects consumers. The current draft defines "consumer" and "mass market transaction," both key terms in any statute affecting consumer licenses of information. They then analyze each provision specifically affecting consumers, who are most likely to be licensees, and the probable effect of the other provisions upon consumers. The authors conclude with recommendations to the drafting committee.

Two other articles concern warranties. Joel R. Wolfson discusses express warranties and "published information content." He describes the framework for express warranties as to goods under Article 2 and then shows why information is different from goods. Within the context of Article 2B, an express warranty could be an "express warranty for published information content." Information, unlike goods, always involves multiple deliveries or performances, is naturally edited or altered over time, and is subject to the "gentle tug" of the First Amendment. So there is a need to go beyond the borders of Article 2 to create a new framework for an express warranty, such as an express warranty for published information content.

Robert W. Gomulkiewicz discusses another traditional warranty, that of merchantability. As he says, one usually sees this warranty in the context of disclaiming it; it is the "warranty no one dares to give." It is striking that even Consumer's Union disclaims the warranty of merchantability in its software contracts. He explains why most sellers (and licensors) would want to disclaim merchantability and then suggests a revised merchantability warranty that they would be less likely to want to disclaim. If a creator of software knows the type of licensee who will most likely want the software, he can better determine the "ordinary purpose" of the software and tailor it to be "reasonably fit" for that purpose. Under U.C.C. § 2-314, a seller is much less likely to know the potential buyers' purposes and therefore is more likely to want to disclaim that warranty.

Micalyn S. Harris is one of the few lawyers who deal with contracts to develop software. Under the Article 2 paradigm mentioned above, there is no certain method of determining whether Article 2 or contracts law governs a "development" transaction. She concentrates her discussion on proposed Section 2B-617, which deals with default rules when it is not clear who has ownership of the intellectual property rights developed by the developer. She describes the business background of these contracts and then analyzes each aspect of proposed Section 2B-617 in detail. Finally, she shows how the section would affect a typical application.

The two student works discuss specific problems with the cases on licensing of software and information. Rhonda Salleé discusses attempts to apply Article 2 to agreements for the licensing of software. Because Article 2 does not apply directly—such agreements are not "sales of goods"—courts applied the Article 2 provisions by analogy. As she shows, this resulted in a jerry-built structure that could provide satisfactory results part of the time, but could never provide a sound theoretical framework.

Joseph C. Wang discusses *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996). This is a noteworthy recent federal case validating shrink-wrap licenses under an Article 2 analysis. While this appears to suggest the Article 2 can provide a sound basis for analyzing such licenses, a careful reading of the case shows that Article 2 is not a firm basis for analyzing these licenses. It would be better to have the specific underpinning of an Article 2B, and he shows how the transaction would have fared under the current draft of Article 2B.

Clearly, this Symposium makes a valuable contribution to understanding the ramifications of proposed Article 2B. Yet, it is only a beginning. We who worked on the project hope that it is only the first of many such symposia on Article 2B. We also hope that the members of the 2B drafting committee find this symposium useful. Finally, we hope that others will take up their pens (whoops! boot up their word processors) to write other articles about even more aspects of proposed Article 2B.

There is no question that the proposed article represents the greatest challenge to revising the U.C.C. since the original U.C.C. became a "final draft" in 1962. The creativity involved in devising new definitions of new terms and new solutions to new problems is enormous. This is a totally new experience, both for the drafters and for the world of business law in cyberspace.

The drafters must be hearing the voice of Karl Llewellyn echoing Wagner's mandate, "Children, create something new!"