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Express Warranties and Published Information Content Under Article 2B: Does the Shoe Fit?, 16 J. Marshall J. Computer & Info. L. 337 (1998)

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EXPRESS WARRANTIES AND PUBLISHED INFORMATION CONTENT UNDER ARTICLE 2B: DOES THE SHOE FIT?

by JOEL R. WOLFSON†

I. INTRODUCTION	338
II. PUBLISHED INFORMATION CONTENT UNDER ARTICLE 2B—WHAT IS IT?.....	340
III. EXPRESS WARRANTIES UNDER ARTICLE 2 OF THE UCC.....	344
A. WHY ARE THERE EXPRESS WARRANTIES—WHAT MAKES THEM DIFFERENT FROM IMPLIED WARRANTIES AND CONTRACT OBLIGATIONS?	344
B. THE CONNECTION OF EXPRESS WARRANTIES AND PRODUCT LIABILITY LAW	348
C. STATEMENTS THAT CREATE EXPRESS WARRANTIES UNDER SECTION 2-313 OF ARTICLE 2.....	351
D. THE BASIS OF THE BARGAIN REQUIREMENT FOR EXPRESS WARRANTIES UNDER ARTICLE 2.....	354
E. REMEDIES FOR BREACH OF EXPRESS WARRANTIES UNDER ARTICLE 2	355
IV. WHY IS INFORMATION DIFFERENT FROM GOODS .	357
A. CONTINUOUS PERFORMANCE	357
B. THE VALUES OF THE FREE SPEECH.....	361
V. A TRANSLATION OF THE EXPRESS WARRANTY MODEL TO PUBLISHED INFORMATION CONTENT—WOULD IT WORK?	364
A. PRODUCTS LIABILITY AND PUBLISHED INFORMATION CONTENT	364

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1. <i>Tort Liability and Defective Published Information Content</i>	364
2. <i>Personal Injury Liability for Mass Information Provider as Publisher—the Aeronautical Chart cases</i>	367
3. <i>The Restatement of Products Liability Discussion</i>	371
4. <i>Economic Damages and Published Information Content</i>	372
B. THE POLICY REASONS FOR NOT APPLYING EXPRESS WARRANTY TO PUBLISHED INFORMATION CONTENT	375
1. <i>What and When?</i>	375
2. <i>The Two-Way Nature of Modern Information Content</i>	377
3. <i>Basis of the Bargain</i>	379
C. WHEN SHOULD INFORMATION PROVIDERS BE SUBJECT TO EXPRESS WARRANTIES?	379
1. <i>The Seal of Approval Cases</i>	379
2. <i>Demonstrations—What Do They Show for Published Information Content?</i>	381
3. <i>Summary: The Express Warranty Test for Published Information Content—the Current 2B Test Needs a Change</i>	383
D. REMEDIES FOR EXPRESS WARRANTIES NEED ALSO TO FIND THEIR OWN	385
E. REMEDIES—THE DEFECT IS INHERENT	385
F. REMEDIES—THE ARTICLE 2 FORMULA AT WORK.....	386
G. REMEDIES—THE COST OF COVER/PRIOR RESTRAINT ...	387
1. <i>The Prohibition Against Unusual Remedies</i>	389
2. <i>Summary: The Remedies for Breach of An Express Warranty for Published Information Content—the Current 2B Test Needs a Change</i> ..	391
VI. CONCLUSION	391

I. INTRODUCTION

Buyers and Sellers of goods make all kinds of statements to each other about the nature of the contract between them. They make promises and state conditions that relate to price, quantity, means of delivery, remedies, repairs and maintenance, and a whole host of other terms. Interestingly, Section 2-313 of Article 2¹ of the Uniform Commercial Code (“U.C.C.”) takes one kind of statement, express warranties, and

1. Section 2-313 of U.C.C. Article 2 currently provides:

(1) Express warranties by the seller are created as follows:

treats it in a very special manner. This article will examine the reason for this different treatment and ask whether such different treatment should be extended into the draft of Section 2B-402, EXPRESS WARRANTIES,² of the new U.C.C. Article 2B³ as it is to apply to licenses⁴ of Pub-

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

U.C.C. § 2-313(1)-(2) (1995).

2. This article is based on the June 18, 1997 draft of Article 2B. The draft is available from NCCUSL or at Software Industry Issues, *What's New in The 2B Guide* (modified on a regular basis) <<http://www.SoftwareIndustry.org/issues/guide/whatsnew.html>> (an excellent site that also contains extensive commentary and participants comments on the draft), or at Uniform Law Commissioners, *The National Conference of Commissioners on Uniform State Laws: Drafts of Uniform and Model Acts* (modified on a regular basis) <<http://www.law.UPenn.edu/library/ulc/ulc.htm>>, or *Uniform Commercial Code Article 2B Revision Home Page* (visited Dec. 11, 1997) <<http://www.lawlib.UH.edu/uss2b/>>. U.C.C. § 2B-402 (Proposed Draft, June 18, 1997) provides:

(a) Subject to subsection (c), a licensor creates an express warranty as follows:

(1) An affirmation of fact, promise, or description of information made by the licensor to its licensee in any manner, including in a medium for communication to the public such as advertising, which relates to the information and becomes part of the basis of the bargain creates an express warranty that the information and any services required under the agreement will conform to the affirmation, promise, or description.

(2) A sample, model, or demonstration of a final product which is made part of the basis of the bargain creates an express warranty that the performance of the information will reasonably conform to the performance illustrated by the model, sample, or demonstration, taking into account such differences between the sample, model, or demonstration and the information as it would be used as would be apparent to a reasonable person in the position of the licensee.

(b) The licensor need not use formal words, such as "warrant" or "guarantee", or state a specific intention to make a warranty. However, a mere affirmation or prediction of the value of the information, a display of a portion of the information to illustrate the aesthetics or market appeal of informational content, or a statement purporting to be the licensor's opinion or commendation of the information does not create a warranty.

(c) This section does not create any express warranty for published informational content, but does not preclude the creation of an express warranty for published informational content under other law. If an express obligation in contract is established for published informational content and that obligation is breached, the remedies of the aggrieved party arise under this article.

Id.

lished Information Content.

II. PUBLISHED INFORMATION CONTENT UNDER ARTICLE 2B—WHAT IS IT?

Article 2B introduces a new definition into U.C.C. vocabulary: Published Information Content. The draft Article 2B uses the term Published Information Content in a number of areas related to warranties and liability. Before discussing those areas, including express warranties, we need to understand the definition of Published Information Content. U.C.C. Section 2B-102(33) defines Published Information Content as:

3. Over the last few years, lead by Reporter Ray Nimmer, the National Conference of Commissioners on Uniform State Law ("NCCUSL") and the American Law Institute ("ALI") have been involved in a joint effort to create a new article to the Uniform Commercial Code ("U.C.C.") to govern all transactions in computer programs and licenses of information (regardless of media). Article 2B is scheduled for final consideration by ALI in May, 1998 and NCCUSL in July, 1998. If approved by its co-sponsors, the new Article 2B of the U.C.C. would be ready for introduction to the 50 state legislatures (and the District of Columbia) by the fall of 1998.

4. U.C.C. § 2B-103 (Proposed Draft, June 18, 1997). Section 103 of draft Article 2B provides that the statute is to apply to licenses of information:

(a) This article applies to *licenses of information* and software contracts whether or not the information exists at the time of the contract or is to be developed or created in accordance with the contract. The article also applies to any agreement related to a license or software contract in which a party is to provide support for, maintain, or modify information . . .

(c) If a transaction involves both information and goods, this article applies to the information and to the physical medium containing the information, its packaging, and its documentation, but Article 2 or 2A governs standards of performance of goods other than the physical medium containing the information, packaging, or documentation pertaining to the information. If a transaction includes information covered by this article and services outside this article or transactions excluded from this article under subsection (d)(1) or (2), this article applies to the information, physical medium containing the information, and its packaging and documentation. A transaction excluded from this article by subsection (d)(3) is governed by Article 2 or 2A.

(d) This article does not apply to:

(1) a contract of employment of an individual who is not an independent contractor, a contract for performance of entertainment services by an individual or group, or a contract for performance of professional services by a member of a regulated profession;

(2) a license of a trademark, trade name, or trade dress, or of a patent or and know-how related to the patent unless the license is or is associated with part of a software contract, a motion picture license, an access contract, or database contract; or

(3) a sale or lease of a copy of a computer program that was not developed specifically for a particular transaction and which is embedded in goods other than a copy of the program or an information processing machine, unless the program was the subject of a separate license with the buyer or lessee.

Id. (emphasis added).

(33) "Published informational content" means informational content that is prepared for, distributed, or made available to all recipients or a class of recipients in substantially the same form and not provided as customized advice tailored for the particular licensee by an individual acting on behalf of the licensor using judgment and expertise. The term does not include informational content provided within a special relationship of reliance between the provider and the recipient.

In turn, "information content" is defined in Section 2B-102(23) as: "(23) 'Informational content' means information which is intended to be communicated to or perceived by a person in the ordinary use of the information."

Finally, Section 2B-102(22) defines "information" as: "(22) 'Information' means data, text, images, sounds, and works of authorship, including computer programs, databases, literary, musical or works, audiovisual works, motion pictures, mask works, or the like, and any intellectual property or other rights in information."

While a lengthy discussion of the derivation of this definition is beyond the scope of this article,⁵ a brief introduction to the concept may be made. The definition of Published Information Content is primarily used both in the warranty section⁶ and in one remedy section⁷ of Article 2B.

5. A lengthy discussion of the common law underlying the concept of published information content can be found in Joel Wolfson, *Electronic Mass Information Providers and Section 552 of the RESTATEMENT (SECOND) OF TORTS: The First Amendment Casts a Long Shadow*, 29 RUTGERS L. REV. 67 (1997).

6. U.C.C. § 2B-402(c) (Proposed Draft, June 18, 1997) provides:

This section does not create any express warranty for published informational content but does not preclude the creation of an express warranty for published informational content under other law or the creation of an express contractual obligation. If an express obligation in contract is established for published informational content and that obligation is breached, the remedies of the aggrieved party arise under this article.

Id. U.C.C. § 2B-404(b)(2) (Proposed Draft, June 18, 1997) provides: "(b) A warranty [there is no inaccuracy in the informational content caused by the licensor's failure to exercise reasonable care and workmanlike effort in its performance] does not arise . . . for . . . (2) published informational content;" U.C.C. § 2B-405(c) (Proposed Draft, June 18, 1997) states: "A warranty that the information will be fit for a particular purpose] does not apply to published informational content, but if the conditions of the subsection are met, may apply to the selection among different items of existing published informational content for the purposes of the particular licensee." U.C.C. § 2B-406(a) (Proposed Draft, June 18, 1997) notes:

Except for information made available as published informational content, a warranty made to a licensee extends to persons for whose benefit the licensor intends to supply the information, directly or indirectly, and which use the information in a transaction or application in which the licensor intends the information to be used.

Id.

7. U.C.C. § 2B-707(d) (Proposed Draft, June 18, 1997) states: "In a case involving published informational content, neither party is entitled to consequential damages unless the agreement expressly so provides." *Id.*

Basically, Article 2B declares that, in line with existing case law, errors in the content of information are not subject to liability unless the information was prepared either: (1) by one in a "special relationship" with the recipient; or (2) the content amounts to fraud, libel, slander, or "fighting words."

There are a long series of cases supporting this result, beginning with *Jaillet v. Cashman*.⁸ There, the Dow, Jones & Company stock ticker service incorrectly reported to its contractual subscribers that the Supreme Court had ruled that stock dividends were taxable income. The plaintiff (a stock broker who subscribed to the Dow, Jones service) saw the report and, believing that the market was about to fall, sold his stock. In fact, the stock market rose in reaction to the actual decision, which ruled that dividends were *not* taxable as ordinary income. Jaillet sued to cover his trading losses. The court denied the claim stating:

I think that the relation of the defendant association to the public is the same as that of a publisher of a newspaper, and that its duties and obligations are to be measured by the same standard. . . . There is a moral obligation upon everyone to say nothing that is not true, but the law does not attempt to impose liability for a violation of that duty unless it constitutes a breach of contract obligation or trust, or amounts to deceit, libel, or slander. . . . He is but one of public to whom all news is liable to be disseminated. His action can be sustained only in case there was a liability by the defendant to every member of the community who was misled by the incorrect report. There was no contract or fiduciary relationship between the parties, and it is not claimed that the mistake in the report was intentional.⁹

Courts later expounded upon the "contract or fiduciary relationship between the parties" language by declaring that the relationship must be more than that of a seller and buyer of information. The contractual relationship giving rise to liability for incorrect content must amount to that of a fiduciary, semi-fiduciary, or other "special relationship" in order that an information provider be liable for error in its content.¹⁰ Except for certain very special cases (the aeronautical chart¹¹ and the "seal of approval"¹² cases being the most relevant for this article), that is basically the state of the cases imposing liability for incorrect content.

8. *Jaillet v. Cashman*, 189 N.Y.S. 743 (N.Y. Sup. Ct. 1921), *aff'd*, 194 N.Y.S. 947 (N.Y. App. Div. 1922), *aff'd*, 139 N.E. 714 (N.Y. 1923).

9. *Jaillet*, 189 N.Y.S. at 744.

10. See *Daniel v. Dow Jones & Co., Inc.*, 520 N.Y.S.2d 344 (N.Y. Civ. Ct. 1987); *First Equity Corp. of Fla. v. Standard & Poor's Corp.*, 670 F. Supp. 115, 117 (S.D.N.Y. 1987), *aff'd*, 869 F.2d at 179 (2d Cir. 1989); *Gale v. Value Line, Inc.*, 640 F. Supp. 967 (D.R.I. 1986).

11. See text at notes 75-100, *infra*.

12. See text at notes 119-22, *infra*.

The Reporter for Article 2B obviously felt uncomfortable limiting liability for information content only to those situations where there was this kind of "special relationship." He attempted to expand the scope of liability by permitting contractual causes of action for breach of warranty for inaccurate information content not only where (1) there is a special relationship between the parties, but also (2) where the information is "provided as customized advice tailored for the particular licensee by an individual acting on behalf of the licensor using judgment and expertise." This is based on the logical argument that whatever the courts may have held to date, if an entity undertakes to provide its customer with customized advice, then it should be required to "exercise reasonable care and workmanlike effort" in the "services to collect, compile, transcribe, process, or transmit" the information.

One might argue with the Reporter's approach in the age of the Internet. The beauty of the Internet is that everyone with a computer has a low cost means to be a mass information provider. This new breed of publisher is composed of high school and college students, homemakers, and small businesses who have no means to pay lawyers to fight warranty suits and no means to pay large judgments for inaccuracies in their information content. Of course, where such publishers purvey information that amounts to libel, slander, or fraud, few would argue that tort remedies should be available against them.

The issue for the U.C.C. Article 2B is whether contractual claims for incorrect information content be permitted, even where there is no inaccuracy that rises to the level of a tort. Needless to say, these small publishers would quickly be chilled in their speech should a serious threat of suit arise for incorrect content on web pages. The free flow of information, even incorrect information, over the Internet has greatly benefited the nation and the world. Given the availability of so many sources of information and such easy means of correction and rebuttal for incorrect information, Article 2B should permit the fewest possible suits for incorrect information under contract law. Article 2B should let liability flow only under the limited remedy of tort liability. In essence, the growth of the Internet depends on permitting lay publishers to carefully check every fact on their web site the way well-heeled print publishers have in the past. We should foresee that consumers of information now and will continue to understand that information on the Internet is to be taken with a grain of salt and that absent an explicit guarantee of accuracy, Article 2B should not impose a statutory requirement of accuracy that the marketplace does not reflect.

In any event, whether one agrees with the Reporter or not, the Reporter's approach is quite middle of the road. The Article 2B states that if one is preparing customized advice, then contractual liability may arise for inaccuracies in the content produced.

Having seen how the Article 2B treats Published Information Content, the article now asks, "Is this a better model than the Article 2 model that imposes liability for any statement that is the basis of the bargain that relates to quality of a good?" In order to evaluate which model is better, one must review the theory and practice of Article 2, review the common law of liability for inaccurate information, then question how to mold Article 2 model to fit the common law of information liability. I start with a review of Article 2.

III. EXPRESS WARRANTIES UNDER ARTICLE 2 OF THE U.C.C.

A. WHY ARE THERE EXPRESS WARRANTIES—WHAT MAKES THEM DIFFERENT FROM IMPLIED WARRANTIES AND CONTRACT OBLIGATIONS?

U.C.C. Article 2 denotes two types of warranties: express and implied. Implied warranties are terms inserted into every contract by force of law. They reflect certain basic assumptions that arise by the very nature of the transaction, such as, that the seller provides a warranty of good title, freedom from infringement, and merchantability whenever it sells goods. These added-in terms arise despite the fact that the parties never even discussed the topic; they exist even in the face of a merger clause. Implied warranties can be disclaimed by the parties, remedies for breach of the warranty may be modified or limited,¹³ and for any warranty that requires a standard of care, the parties can "determine the standards by which the performance of such obligations is to be measured."¹⁴

Express warranties, by contrast, arise because a party has expressly made a statement to the other. Such statement must be an "affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain." This article will discuss what statements do and do not become warranties in a later section.¹⁵

However, Article 2 provides express warranty treatment only to statements made by the seller,¹⁶ just as it implies warranties only to duties of the seller. There is no logical reason for this. After all, one could make the argument that the buyer implies a warranty to the seller

13. See generally U.C.C. § 2-316 (1995).

14. See generally U.C.C. § 1-102(c) (1995). "[T]he obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable." *Id.*

15. See generally *infra* Section III.C.

16. U.C.C. § 2-313 begins, "Express warranties by the seller are created as follows" (emphasis added).

that it has the legal capacity to perform its duties under the contract. Similarly, one could make the argument that a buyer who promises to pay a certain amount for the goods by a particular date (or upon delivery) creates an express warranty that the buyer has the financial wherewithal to complete the transaction. Article 2, of course, does not create buyer warranties. Perhaps this is because, as noted in *Williston On Sales*: "the purpose of a warranty, generally speaking, is best described as an attempt to 'ameliorate the harsh doctrine of caveat emptor and in some measure to impose a reciprocal obligation on the seller to beware.'"¹⁷

This one-way model, that it is the buyer of goods who is the principal one who must beware and protected by warranties under Article 2, reflects some basic truths about goods sales. First, seldom does the buyer's principal obligation include much more than timely payment of moneys due. Second, it is quite unusual for the buyer to be a manufacturer of the goods it is buying. That is, the goods are made to specification of some entity, by the manufacturers, sold directly or through middlepeople, and then directly through middlepeople or on retailers, then on to the buyer. While a single entity may perform more than one role, each layer in the sales process has a distinct role to play and the flow goes in one direction—specification to manufacture to selling to purchase.

The one partial exception to the rule that a buyer is not the manufacturer of the goods is where the buyer provides the specifications to the manufacturer or retailer. In this case, the buyer is involved in the pre-manufacturing stage of the good. The buyer is at the headwaters of the sale of goods process and undertakes certain responsibilities for the final defects in the product. Needless to say, this complicates the issues related to express warranties. The buyer will argue that the seller-manufacturer should have chosen a way of implementing the specifications that did not produce a defective product. The buyer will argue that it relied on the expertise of the manufacturer to review the specifications, advise it on areas where the specifications would produce defects, and/or correct the manufacturing process to make up for the problems in the specifications. After all, while the buyer knows what it wants, it is not normally an expert in how to make a product that meets the specified business need. The seller, on the other hand, will argue that the buyer tied the seller's hands by specifying the goods and the seller had no choice but to manufacture to the buyer's demands.

For this article, it is important to understand that the analysis used by the courts to determine who bears liability for bad specifications depends on whether the subject of the contract is defective goods (that are

17. 2 WILLISTON ON SALES 450 (D. L. Nelson & J.L. Howiczedz., 5th ed. 1995).

subject to product liability law principals) or services, (such as house construction, that are not subject to product liability law principals).

Where there are goods that are defective due to poor specifications, courts often refuse to allow the manufacturer to escape liability. For example, in *Bacile v. Parish of Jefferson*,¹⁸ a child was hurt when her foot got stuck in a curb drain cover that was designed with excessively wide openings. The opening size was specified by the Parish who bought the drain covers and the manufacturer correctly built the drain to the buyer's specifications. However, the court found the manufacturer (and the Parish) liable for the injury, holding that "a manufacturer who knows the intended use cannot join in creating an unreasonable risk of injury by manufacturing a thing that presents such a risk in its intended use."¹⁹

The same result occurred in *Michalko v. Cooke Color & Chemical Corp.*²⁰ There, the buyer asked an independent contractor to modify a piece of equipment to its specifications and then a foreseeable person was injured by the lack of certain safety devices in the rebuilt product. The court held that the rebuilder could be liable both for a failure to warn of the buyer of the effect of a defective design that it should have seen in the design and even for the defects in the product itself.

A number of other cases have held that an buyer's specifications cannot relieve the manufacturer of its product design duties. This is particularly true where innocent third parties are injured by the design defect. Courts reason that if the theory of defective product law is to spread the cost of defectively manufactured products over all units made by the manufacturer and introduced into commerce regardless of negligence or fault and to make manufacturers particularly careful in creating products, then imposing liability even for defects caused by buyer specifications serves such societal purposes.²¹

There are some goods cases that have refused to impose liability, particularly where the buyer is an expert. For example, in *Repco Products Corp. v. Reliance Electric Co.*,²² the court was faced with the issue of who was liable for defects in a boiler where the buyer submitted blueprints to the manufacturer. The question is whether the manufacturer warrants that the castings will adhere precisely to the blueprints submitted by the buyer, even if the specifications do not match the way the manufacturer (in its expertise) normally produces like products. In a

18. *Bacile v. Parish of Jefferson*, 411 So.2d 1088 (La. Ct. App. 1981).

19. *Id.* at 1090.

20. *Michalko v. Cooke Color & Chemical Corp.*, 451 A.2d 179 (N.J. 1982).

21. *See e.g.*, *Rawlings v. D.M. Oliver, Inc.*, 159 Cal. Rptr. 119 (Cal. Ct. App. 1979); *DeLeon v. Commercial Manufacturing and Supply Co.*, 195 Cal. Rptr. 867 (Cal. Ct. App. 1983); *Alm v. Aluminum Company of America*, 687 S.W.2d 374 (Tex. Ct. App. 1985).

22. *Repco Products Corp. v. Reliance Electric Co.*, 100 B.R. 184 (Bankr. E.D. Pa. 1989).

situation where the manufacturer seems damned if it does and damned if it doesn't, the court concluded that the manufacturer was warranting conformance to the buyer's specifications even where the specifications produce a defective boiler that would not have been defective if manufactured by the manufacturer's normal processes. The buyer was a large buyer with expertise in its own manufacturing processes.

A similar case is *DeRosa v. Remington Arms Co., Inc.*²³ In *DeRosa*, a police officer was injured because the shotgun in his possession was alleged to have been designed with a trigger that required too little pressure to fire the gun. The manufacturer defended on the ground that police departments specify the manufacture of such of gun, and the gun complied with that specification. The normal version of the gun had a much higher trigger pressure. The court concluded that the buyer, the police department, had made a design choice, as had numerous other police departments, based on their legitimate needs to have a gun with a particularly low trigger pressure. The departments compensated for risk imposed by their design by imposing and training its officers on certain extra precautions in use of the gun. In this case, the officer violated three such precautions. The court concluded that the manufacturer was not liable for injury caused by the police department's design choice.

Thus, where goods are involved, the courts are encased in product liability and loss spreading analyses, and so manufacturers are often stuck with liability for poor user design. Moreover, good that involve buyer specifications are relatively rare in goods transactions. Most goods are manufactured in mass and buyers choose between competing models or brands of those goods. Goods, in order to be priced economically, usually require a certain amount of tooling, mass procurement of the raw materials, and training of staff in the particular methods needed to produce this article (an assembly line). Thus, imposing manufacturer liability has little commercial impact.

The cases are vastly different in construction contracts. Construction contracts are usually held to be services are therefore not within the scope of Article 2.²⁴ Buyer specification is relatively common, and there is no mass procurement, no tooling, and mass production. As a result, the analysis is vastly different as noted in an A.L.R. annotation on the subject:

[T]he rule has become well settled in practically every American jurisdiction in which the matter has been involved, that a construction contractor who has followed plans or specifications furnished by the

23. *DeRosa v. Remington Arms Co, Inc.*, 509 F. Supp. 762 (E.D.N.Y. 1981).

24. See, e.g., *Boddie v. Litton Unit Handling System*, 455 N.E.2d 142 (Ill. App. Ct. 1983); *Chlan v. KDI Sylvan Pools, Inc.*, 452 A.2d 1259 (Md. Ct. Spec. App. 1982); *Niagara Mowawk Power Corp v. Graver Tank & Manufacturing Co.*, 470 F. Supp. 1308 (N.D.N.Y. 1979).

contractee, his architect, or engineer, and which have proven to be defective or insufficient, will not be responsible to the contractee for loss or damage which results, at least after the work is completed, solely from the defective or insufficient plans or specifications, in the absence of any negligence on the contractor's part, or any express warranty by him to their being sufficient or free from defects.²⁵

The annotation even notes that Williston argues that there is no cause of action since there is no breach of contract by the manufacturer. That is, as long as the building conforms to the specifications, there is no theory on which the buyer, or anyone else can complain. Also in construction cases, the specifications are usually drawn by a professional architect or engineer and the courts then are even more prone to permitting the contractor to simply rely on the professional's plan. After all, the buyer can always sue for malpractice.²⁶

The question for this article is which model better fits the information industry. As I will examine later, particularly with the Internet, the one-way goods model fails to reflect reality in the information content market. In the information business, buyers (that is, licensees) are often intimately involved in the manufacture of the information; much information does not require mass purchase of raw materials, or tooling, or an assembly line. These features argue against imposing the goods express warranty model to information. These features argue for a services model like that used in construction cases.

Returning to the theme of this section of the article, there are certain assumptions about the nature of the goods production process that underlie Article 2 express warranty liability theories. Parenthetically, we have seen that these assumptions cause courts to hold manufacturers liable even for poor specification by buyers. We have seen that this appears to be related to the fact that warranties in goods are inextricably intertwined with product liability law. It is to fleshing out that feature of the theory of express warranty law to which this article turns next.

B. THE CONNECTION OF EXPRESS WARRANTIES AND PRODUCT LIABILITY LAW

As a number of commentators have concluded, "the law of warranty in general and the warranty provisions of Article 2 in particular are but part of the much larger and far more complex field of products liability

25. S. Bernstein, Annotation, *Construction Contractor's Liability to Contractee for Defects or Insufficiency of Work Attributable to the Latter's Plans and Specifications*, 6 A.L.R.3d 1394, 1397 (1966 & Supp. 1995).

26. Annotation, *Responsibility of One Acting as Architect for Defects or Insufficiency of Work Attributable to Plans*, 25 A.L.R.2d 1085 (1952 & Supp. 1996).

law."²⁷ *White and Summers*, express it this way:

It is difficult to know how much or how little one should say about warranty liability under the Code. Others have written books and articles on the topic and the personal injury cases in particular tend to present a seamless web running from express warranty through the implied warranty of merchantability to strict liability in tort or negligence. Only because our space is limited do we omit strict tort liability and negligence, for we well appreciate that those claims are often difficult to distinguish from liability for breach of warranty.²⁸

The conclusion that warranty law contains the same social principles as product liability law is vital to analyzing whether it is right to try to impose the express warranty model from Article 2 onto Published Information Content. One can see how courts view the relationship between express warranty and strict liability in tort from two famous product liability cases, *Seeley v. White Motor Co.*²⁹ and *Greenman v. Yuba Power Products, Inc.*³⁰

In *Greenman*, the court was faced with a defective design of machinery that caused personal injury to the plaintiff. The suit sounded both in warranty and negligence. The manufacturer raised the defense that the plaintiff failed to give timely notice of a breach of warranty. After rejecting the defense, the court noted the ancestry between warranty and strict liability tort law:

Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law . . . and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products . . . makes clear that the liability is not one governed by the law of contract warranties but by the law of strict liability.³¹

In effect, the *Greenman* court was saying that while the courts had once relied only on warranty theories to cover defective products, they had found certain defenses and limits in warranty liability that they believed unjust for defective goods. Therefore, the courts simply created, out of warranty concepts, a new tort that was free of those warranty law limitations where necessary to grant relief to the injured plaintiff.

The inevitable question raised by *Greenman*, whether this new tort was meant to replace or supplement, side-by-side, warranty law was ad-

27. 1 T.M. QUINN, QUINN'S UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST 2-205 (2nd ed. 1991).

28. J.J. WHITE & R.S. SUMMERS, UNIFORM COMMERCIAL CODE 447 (4th ed. 1995) (emphasis added).

29. 403 P.2d 145 (Cal. 1965).

30. 377 P.2d 897 (Cal. 1963).

31. *Id.* at 901.

dressed in *Seeley*. There, the court discussed *Greenman* and then concluded:

It is contended that the foregoing legislative scheme of recovery [express warranties] has been superseded by the doctrine of strict liability in tort set forth in *Greenman v. Yuba Power Products*. We cannot agree with this contention. The law of sales has been carefully articulated to govern the economic relations between suppliers and consumers of goods. The history of the doctrine of strict liability in tort indicates that it was designed, not to undermine the warranty provisions of the sales act or the Uniform Commercial Code but, rather, to govern the distinct problem of physical injuries

The fact that the warranty theory was not suited to the field of liability for personal injury, however, does not mean that it has no function at all. In *Greenman* we recognized only that "rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by defective products unless those rules also serve the purposes for which such liability is imposed."

Although the rules of warranty frustrate rationale compensation for physical injury, they function well in a commercial setting. These rules determine the quality of the product the manufacturer promises and thereby determines the quality he must deliver. In this case, the truck plaintiff purchased did not function properly in his business. Plaintiff therefore seeks to recover his commercial losses; lost profits and the refund of the money he paid on the truck.³²

The teaching of *Seeley* is that both strict liability in tort and express warranty are aimed at giving compensation for defective goods. If one seeks a remedy for personal injury, one sues in tort; if one seeks economic losses, then one sues in express warranty. This analysis of the difference between tort and warranty is supported by the commentators.

The crux of this article, and of the law, is that a defective Published Information Content (like a medical text or cook book) is not to be treated like a defective toaster, even if buyers rely on their safety in the same way and both directly cause the same kind of personal injury. If the law refuses to analogize between liability for defective goods and liability for defective Published Information Content, then Article 2B should not be drafted to make anew this analogy. This is not to say that there is no liability on Published Information Content providers for false representations and descriptions about the quality, description, and title of Published Information Content—because there is—only that Article 2 express warranty liability theory, in an unmodified version, is not the proper vehicle to impose such liability.

32. *Seeley*, 403 P.2d at 949-50. (citations omitted, emphasis added).

Put another way, what we will see later in this article is that in contrast to permitting economic recovery for defective goods, courts have almost uniformly denied economic recovery for defective Published Information Content, even where there is a breach of an express statement about the product itself—with one exception, the seal of approval cases. Parenthetically, we will also see that courts shield Published Information Content providers from liability even where the defective product causes personal injury—with one exception, the aeronautical chart cases. The fact that the Article 2 express warranty section is molded out of a liability for defective product model, while the common law of information denies liability for that same kind of defect, it is argued that Article 2B needs to permit the courts to form their own law about express warranties and remedies for breach of express warranties in Published Information Content.

There are other more practical arguments about why the Article 2 model will not fit unmodified for Published Information Content. Before we can explore these other arguments, we must first delve further into the law of express warranties for goods.

C. STATEMENTS THAT CREATE EXPRESS WARRANTIES UNDER SECTION 2-313 OF ARTICLE 2

Under Article 2, not every statement by a seller gives rise to an express warranty. As Section 2-313 notes, “[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.” Thus, there are two basic elements to an express warranty: (1) it must be an affirmation of fact which relates to the goods; and (2) it must be the part of the basis of the bargain.

As to the first element, Hawkland, in *Uniform Commercial Code Series*, is not the only commentator to have noted that only terms related to “quality, description, and title,” “relate to the goods”:

According to section 2-313(1)(a) it is only those affirmations of fact or promise “which relate to the goods” that become express warranties. This limitation should be construed only to mean that express warranties relate exclusively to quality, description, and title of goods and have nothing to do with other terms of the contract.³³

33. 2 W.D. HAWKLAND, *UNIFORM COMMERCIAL CODE SERIES* 434 (1992 & Supp. 1996). See also, e.g., 2 WILLISTON ON SALES *supra* note 17, at 451 (“Under the provisions of the Code, there are only two types of warranties, warranty of title and warranty of quality”); 1 AMERICAN LAW OF WARRANTIES 95 (1991) (“Basically, a warranty relates to title, character, quality, identity, or condition of the goods”).

Section 2-313(2), however, states an outer limit for what statements can be taken as "affirmations of fact" intended to create express warranties. It provides, "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." In other words, puffing and opinions do not create express warranties. A great number of cases in this area concentrate on the question of whether a particular statement was intended for mere puffing or to create an express warranty.

After reading such cases, one may be tempted to conclude that they understand what courts view as express warranties. The antidote to such a conclusion is found in *White and Summers, Uniform Commercial Code*:

The lesson for a lawyer from these cases and others like them is obvious. Only a foolish lawyer will be quick to label a seller's statement as puffs or not puffs, and only a reckless one will label a seller's statement at all without carefully examining such factors as the nature of the defect (was it obvious or not) and the buyer's and seller's relative knowledge.³⁴

As we shall examine later in this article, courts are reluctant to impose liability that might chill speech where unclear duties are set under law. This principal should make one cautious about applying Article 2 law to Published Information Content.

Regardless of the court's reluctance with regards to other express statements, if there was one kind of statement that might seem clear enough to state a test for an express information warranty, it would be the statement of the product description. After all, a product description is most clearly an express statement of fact made by the seller which is the most basic basis of the bargain. For example, in *Fairbanks, Morse & Co. v. Consolidated Fisheries Co.*,³⁵ the description of the product was "1-1420KVA—1136 KW at 807." The buyer argued that the description itself, referencing "1136 KW," meaning 1136 Kilowatt generation capacity, alone created an express warranty. The court agreed that an express warranty was formed by merely describing the product.

Similarly, as suggested by Quinn's commentary on the Uniform Commercial Code,³⁶ a description of a car as a "1985 Buick," despite express statements that the car was sold "AS IS," and with otherwise effective disclaimers of all warranties, was held to create a warranty that the vehicle was suitable for use as a car.

My commercial law professor, Peter Hogan, used to illustrate the power of product descriptions to create express warranties with the fol-

34. J.J. WHITE & R.S. SUMMERS, *supra* note 28, at 336.

35. 190 F.2d 817 (3d Cir. 1951).

36. 1 QUINN, *supra* note 27, § 2-313[A][2].

lowing story. At first, railroad car manufacturers created invoices that stated "1 Pullman Car." Courts found that if the car was defective, that the express warranty that a "Pullman Car" was being delivered was breached. So, the manufacturers created invoices that read "1 Pullman Car Serial No. 135526789." Again, the courts found that the object with a serial number 135526789 did not function as a Pullman Car. Finally, the manufacturers made invoices reading "1 serial number 13556789." Then Professor Hogan would pause and say, "and we wonder why the railroads are in such bad shape." Apocryphal or not, the story summarizes a line of cases under Article 2.

Article 2 explicitly singles out certain special kinds of product description as express warranties to make the point that product descriptions must be construed as express warranties. Section 2-402 states that statements made on labels or packaging, descriptions of the product that accompany the sale, and samples and demonstrations are express warranties.³⁷

As will be discussed below, if there were an easy analogy between goods law and the law of Published Information Content, one would expect that something described as a "Mushroom Cookbook" would be held to create an express warranty that no recipe inside used a poisonous mushroom. In fact, no liability was imposed in that case.³⁸ Similarly, one would expect that a science textbook meant for children and sold to schools could hardly be said to conform to the express warranty of its title if it contained defective instructions for science experiments that caused personal injury—one would expect that, but one would be wrong.³⁹ Likewise, where a nursing text described an enema treatment that proved harmful, one would expect that liability would follow—it did not.⁴⁰ For reasons discussed below, the law of Published Information Content diverges from the law of warranty in goods.

37. U.C.C. § 2-313 provides:

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

Id.

38. See text at notes 58-65, *infra*.

39. See text at notes 73-74, *infra*.

40. See text at notes 89-90, *infra*.

D. THE BASIS OF THE BARGAIN REQUIREMENT FOR EXPRESS WARRANTIES UNDER ARTICLE 2

The other major feature of an express warranty is that it must "become part of the basis of the bargain." One commentator has explained the requirement this way:

The concept of being the basis of the bargain can best be understood if stated as relating to a matter that was essential to the making of the contract. The label on the can that says "house paint" is essential to the contract between the customer and the store if the customer is seeking a can of house paint, for the obvious reason that the customer would never make the purchase, that is, the contract, if he knew or thought that the can did not contain house paint as stated on the label. The truth of the statement on the label is therefore essential to the making of the contract.⁴¹

The cases under Article 2 have not had much of a problem understanding the broad outline of the test. Many of the cases have revolved around the amount of reliance that buyer must show in order to demonstrate that a statement was the basis of the bargain. This question reflects a continuing legal issue that arose from the predecessor Uniform Sales Act. The Sales Act had taken the view that reliance was necessary for an express warranty. The U.C.C. weakened that requirement.

One of the innovations of Article 2 over the prior Uniform Sales Act was the substitution of the "basis of the bargain" test for the "reliance" element in express warranties. However, reliance, if the plaintiff could prove reliance, was not made irrelevant under Article 2. As the court stated in *Royal Typewriter Co. v. Xerographic Supplies Corp.*,⁴² the basis of the bargain test is essentially a reliance requirement and is inextricably intertwined with the initial determination as to whether given language may constitute an express warranty since affirmations, promises and descriptions tend to become part of the basis of the bargain. It was the intent of the drafters of the U.C.C. not to require a strong showing of reliance.

For example, in *Interco, Inc. v. Randustrial Corp.*,⁴³ the question was whether a statement in a catalogue stating that a flooring material could "absorb considerable flexing without cracking" could become the basis of an express warranty. The court agreed that it could, as long as the buyer had read the statement before purchase. That is, as long as the statement had been read, it could become the basis of the bargain, regardless of actual reliance. A number of cases have held that advertisements can likewise form express warranties as long as they are read

41. 1 AMERICAN LAW OF WARRANTIES *supra* note 34, at 102.

42. 719 F.2d 1092 (11th Cir. 1983).

43. 533 S.W.2d 257 (Mo. Ct. App. 1976).

before purchase.⁴⁴

As we shall examine later, while basis of the bargain is an element that applies equally to purchases of Published Information Content, as in the mushroom cookbook case, courts refuse to impose liability for inaccurate Published Information Content even where reliance is clear and justifiable. This makes the U.C.C. Article 2 model a poor model for Published Information Content warranties.

E. REMEDIES FOR BREACH OF EXPRESS WARRANTIES UNDER U.C.C. ARTICLE 2

One reason why sellers of goods are more concerned about warranties than other types of contractual commitments is that there is a different formula for damages under warranty law and regular contract law. Under U.C.C. Section 2-714:

The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.⁴⁵

This statement of value-received-versus-value-promised contrasts with the Code's statement of the formula for a buyer's damages for breach of any other promise in an agreement. Three types of contractual remedies are provided under Article 2. U.C.C. Section 2-714 states a very general rule that:

Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.⁴⁶

That is, under U.C.C. Section 2-714, the buyer may sue for damages as "determined by any manner that is reasonable." While Section 2-714 might have invited the courts to devise new tests of direct damages, in fact, the Code has not changed the basic test for damages for contract breach—one gets damages that place them in as good a position as if the contract had been performed as promised. This reliance on traditional means of damage calculation is bolstered by several sections of the U.C.C. First, Section 1-106 of Article 1 of the U.C.C. (Article 1, GENERAL PROVISIONS, governs all transactions under all Articles of the U.C.C.), provides:

44. See, e.g., *DiIenno v. Libbey Glass Div.*, 668 F. Supp. 373 (D. Del. 1987); *Ciba-Giegy Corp. v. Alter*, 834 S.W.2d 136 (Ark. 1992).

45. U.C.C. § 2-714 (1997).

46. *Id.*

The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law.⁴⁷

U.C.C. Section 2-713 states the normal common law “market price recovery” rule for a buyer’s damages total failure to deliver:

The measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (Section 2-715), but less expenses saved in consequence of the seller’s breach.⁴⁸

U.C.C. Section 2-711 permits the buyer to cancel the contract in certain circumstances:

Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid.⁴⁹

U.C.C. Section 2-712 introduces the innovative concept of “cover” as a remedy:

(1) After a breach within the preceding section the buyer may “cover” by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2-715), but less expenses saved in consequence of the seller’s breach.

(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.⁵⁰

Finally, Article 2 contains certain provisions regulating other types of remedies in the sale of goods context, such as specific performance⁵¹ and liquidated damages.⁵²

Later in this article, we shall see that a value-received-versus-value-promised formula may form a generally good rule for recovery where a court finds an express warranty for Published Information Content. The

47. U.C.C. § 1-106 (1995).

48. U.C.C. § 2-713.

49. U.C.C. § 2-711.

50. U.C.C. § 2-712.

51. U.C.C. § 2-716.

52. U.C.C. § 2-718.

issue will be limiting the remedy to that and cautioning the courts against fashioning remedies that would interfere with the free flow of ideas or cause a chilling of the speech contained in the Published Information Content.

Before contrasting the law of goods liability with that of Published Information Content, we should pause to consider why information is fundamentally different from goods and so why we would expect the law of Published Information Content to be fundamentally different from the law of goods.

IV. WHY IS INFORMATION DIFFERENT FROM GOODS?

A. CONTINUOUS PERFORMANCE

Information is different from goods in two fundamental ways. First, information often involves a continuing performance obligation. Except where complete copies of the information services are delivered on a one-time-only basis (such as an encyclopedia on CD-ROM), delivery of information services involves multiple performances of changing information over time. For example, WESTLAW does not tender its entire database to its subscribers. It offers searches of information that is different each time the subscriber signs-on. America Online involves access to information in chat rooms where the information changes every instant that the user has access. Real-time information providers (such as stock quote services, movies on the internet, and audio broadcasters) provide a data stream that may never leave the user with a permanent copy (in goods terms, "a delivery") of the information.

One cannot overestimate the effect of a continuing performance obligation on the part of the licensor on the make-up of Article 2B. When Raymond Nimmer produced a feasibility study in the early 1990's on the possibility of adapting existing Article 2 to cover licenses of software, he produced a relatively short and manageable list of sections that needed to be revised; the remaining sections of Article 2 would apply as they were, or with slight changes. This led to a model of "hub and spoke"—that is Article 2 would have a large hub of sections that could be applied across the sale of goods ("Article 2"), the leasing of equipment ("Article 2A"), and the licensing of software ("Article 2B"). Then, in February 1995, Professor Nimmer expanded the scope of Article 2B to include licensing of information, not just software. The number of sections from Article 2 that needed major redrafting to fit Article 2B skyrocketed. In fact, in late 1995, in part I believe because of the needs of the information industry, NCCUSL formally abandoned a hub and spoke model for Article 2 and created an entirely new Article 2B Drafting Committee that included relatively few members who would also serve on the Article 2 or Article 2A Drafting Committees.

Innumerable sections of the current draft of Article 2B have been tailored to deal with the continuing obligation needs of the information business. Everything from contract formation to remedies has been affected. As one example, U.C.C. Section 2B-307(b) now provides for the potential formation of a contract over time, through a series of layered records, in which some performance is interspersed:

If the parties commence performance or use the information with the expectation that their agreement will be represented in whole or in part by a record that a party has not yet had an opportunity to review or that has not yet been completed, the party adopts the terms of the later record if the party agrees to or manifests assent to that record.⁵³

This section overcomes, for information, the common law presumption that partial performance by a party is a basis for concluding that a contract has been formed by the parties. That presumption makes sense in the goods context because one rarely begins manufacturing or delivery of a good until a contract has been formed. In the publishing and movie businesses, for example, the paradigm is often different. An author approaches the publisher with an idea for a movie or manuscript. The publisher may not be ready to commit to a contract, but encourages the author to prepare an outline. The outline is approved and the author is asked to do a sample chapter or scene. The sample chapter or scene can be followed by edits from the publisher and suggestions on how to revise or shape the work. Finally, the author creates the entire work, with the encouragement and even hard work of the publisher or producer, and yet the publisher or producer has yet to begin to consider whether to form a contract with the author. Even at this late stage, the publisher or the author would be free under Section 2B-307 to withdraw, without promissory estoppel or other contractual obligation to the other. U.C.C. Section 2B-307(b) explicitly provides that even where the parties perform or use the information, where the usage of the trade or the understanding of the parties is that there is no contract until a later record is created and agreed to by the parties, the court will not use mere performance or promises to create a contract.⁵⁴

53. U.C.C. § 2B-307(b) (Proposed Draft, June 18, 1997).

54. *Id.* This is not the normal way in which the publishing industry conducts business. Normally, before any serious effort is expended by either the author or the publisher, the parties form a binding contract. The contract, then, provides that any acceptance for the work by the publisher is at the end of the process and any duty to publish the work is in the sole subjective discretion of the publisher. Section 2B-602(a), SUBMISSIONS OF INFORMATIONAL CONTENT governs that situation:

(a) If a party submits informational content to a licensee under an agreement that requires that the information be to the subjective satisfaction of the licensee, the following rules apply:

(1) Sections 2B-607 through 2B-613 and 2B-619 do not apply.

The layering of contracts approach is reinforced in U.C.C. Section 2B-612:

If an agreement requires performance in stages to deliver the complete information product, this section applies separately to each stage. If the agreement contemplates delivery of a product in stages, rather than repeated separate performances under an overall agreement, acceptance of any stage is conditional until acceptance of the activation of rights in the completed information.⁵⁵

In essence, U.C.C. Section 2B-612 permits a party, like a publisher or a producer of a movie, to review and accept chapters one at a time or scenes of a movie from a director, without foregoing its right to reject those same chapters or scenes when viewed as part of the finished whole. While one might need the same type of relief in dealing with goods that are specially manufactured, a piece at a time, to the buyer's sole satisfaction and acceptance, this situation occurs so seldom in goods that Article 2 is silent on the issue. On the other hand, the situation occurs so often in information, that Article 2B is forced to mold itself in a different manner in order to recognize the effect of this way of doing business.

Another manifestation of the need to change terms over time long after the tender of the first delivery is U.C.C. Section 2B-304, CONTINUING CONTRACTUAL TERMS:

(a) Terms of an agreement involving repeated performances apply to all later performances unless modified in accordance with this article, even if the terms are not subsequently displayed or otherwise brought to the attention of the parties or electronic agents in the context of the later performance.

(b) A modification in good faith of a continuing contract made pursuant to a term in a contract providing that the contract may be modified as to future performances by compliance with a described contractual procedure is effective if:

- (1) compliance with the procedure reasonably notifies the other party of the change; and
- (2) in a mass-market license, the procedure permits the licensee to terminate the contract if the modification deals with a material term and the licensee in good faith determines that the modification is unacceptable.

(2) If the informational content is not satisfactory to the licensee, the parties may engage in efforts to correct the deficiencies over a period of time and in a manner consistent with the ordinary standards of the trade or industry.

(3) Neither refusal nor acceptance occurs unless the licensee makes an express, affirmative indication of refusal or acceptance of the submission to the licensor.

(4) Refusal terminates the agreement and does not constitute a breach of contract.

Id.

55. U.C.C. § 2B-612 (Proposed Draft, June 18, 1997).

(c) A contractual term that specifies standards for reasonable notification is enforceable unless the standards are manifestly unreasonable in light of the commercial circumstances.⁵⁶

In the sale of goods model, one has a contract before delivery and then the contract governs the delivery of all goods under the contract. In access contracts for information, the situation is that there is a contract, but over the years and years involved in the relationship between the parties, the terms and obligations of the parties slowly change due to changes in the information, the identity of the parties, and the effect of court decisions and new statutes. Because it is rare in the goods industry, but an everyday fact in the access information business that today's WESTLAW contract will not fit next year's usage, Article 2B recognizes a safe-harbor mechanism for changing terms. In the goods area, courts are reluctant to permit such frequent changes since goods involve a delivery of a physical object that, at least for that object, has a single delivery. Since access to the same information or its successors over and over is the essence of the information contract, courts must be willing view contractual changes in a vastly different light.

While there are changes throughout Article 2B that reflect the continuing performance nature of information, this article will highlight only one other, 2B-608, the relation of inspection/rejection/revocation rights and information delivered over time. In goods, there is a single delivery of the final product or of each installment of the product. Each delivery is granted a right in the buyer to inspect, and each delivery is accompanied by a right to reject or revoke acceptance for defects. Since Article 2 incorporates a "perfect tender" rule, any defect found at time during the inspection permits cancellation of the contract and return of the product. In information, the value of the information is often delivered at inspection time. Imagine the situation where one could execute a search on WESTLAW or LEXIS/NEXIS, read the entire set of cases delivered, yet because of a few misspelled words, at that point, after receiving the entire value of the licensor's performance, demand the right to return the entire product and cancel the contract. Imagine the same situation for the viewers of a documentary. At the end, after watching for two hours, the viewer notices a factual error. To permit cancellation of the contract and suit against the movie producer would quickly end that industry. In recognition of this fact, the draft has a special section, 2B-608, that relates to inspections of information:

(a) If performance involves delivery of informational content, entertainment, or related artistic, personal or professional services that because of their nature provide the licensee substantially with the value of the information and that value cannot be returned once delivery or per-

56. U.C.C. § 2B-304 (Proposed Draft, June 18, 1997).

formance is received by the licensee, Sections 2B-609 through 2B-613 and Section 2B-619 do not apply and the rights of the parties are determined under Section 2B-601 and the ordinary practices of the applicable business, trade, or industry.

(b) In a contract governed by subsection (a), before payment, a party may inspect the media and label or packaging of a performance but may not view or receive the performance unless the agreement provides otherwise.⁵⁷

As we have seen, the continuing tender obligation often makes the analogy to a large number of solutions drawn from Article 2 inapposite. Article 2B reflects that difference. In analyzing the use of express warranties for Published Information Content, as we shall see later, one needs to keep the assumptions underlying all of Article 2B in mind.

B. THE VALUES OF THE FREE SPEECH

Second, information is unlike goods in that liability imposed on information services threatens the free flow of information and a robust debate—the values inherent in the First Amendment. Unlike goods, the Constitution and the courts have long recognized that information content, particularly Published Information Content has a special place in society. It deserves protections that are afforded to no other product. There are rules against imposing liability on speakers that are afforded no other producer of products. This fact must drive sections of Article 2B.

The best known special treatment of Published Information Content is in the libel and slander area. There, beginning with *New York Times v. Sullivan*⁵⁸ and continuing with a series of complex decisions, the court noted that liability on Published Information Content provided was to be severely restricted. The Court held that mere error through negligence could not be the basis of a damage award were the speaker was involved in Published Information Content. In so doing the Supreme Court noted:

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people . . . [I]t is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions,” and this opportunity is to be afforded for “vigorous advocacy” no less than “abstract discussion.” The First Amendment, said Judge Learned Hand, “presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and

57. U.C.C. § 2B-608 (Proposed Draft, June 18, 1997).

58. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

always will be, folly; but we have staked upon it our all."⁵⁹

Similarly, the Court has gone out of its way to praise and protect speech, shielding it from liability imposed on similar merchants of other products. For example in *Time, Inc. v. Hill*⁶⁰ the court unequivocally stated:

[S]anctions against either innocent or negligent misstatement would present a grave hazard of discouraging the press from exercising the constitutional guarantees. Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society. Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to "steer . . . wider of the unlawful zone And thus create the danger that the legitimate utterance will be penalized.

As this article will highlight below, this special status has been explicitly recognized as applying to inaccuracies in the content of published information, despite harm—even personal injury and death—directly caused. Article 2B tries, in numerous sections, to cope with these cases and give Published Information Content this special status. Two sections most obviously present this treatment.

First and foremost is Section 2B-404, IMPLIED WARRANTY: INFORMATIONAL CONTENT:

(a) Subject to Sections 2B-406, 2B-407, and 2B-408, and to subsections (b) and (c), a merchant that provides informational content in a special relationship of reliance or services in collecting, compiling, transcribing, processing, or transmitting informational content, warrants to its licensee that there is no inaccuracy in the informational content caused by its failure to exercise reasonable care and workmanlike effort in its performance.

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

- (1) the aesthetic value, commercial success, or market appeal of the content;
- (2) published informational content;
- (3) informational content in manuals, documentation, or the like, which is merely incidental to a activation of rights and does not constitute a material portion of the value in the transaction; or
- (4) informational content prepared or created by a third party, if the party distributing the information, acting as a conduit, provided only editorial services with respect to the content and made the informational content available in a form that identified it as being

59. *Id.* at 269-70.

60. *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

the work of the third party, except to the extent that the lack of care or workmanlike effort that caused the loss occurred in the party's performance in providing the content

(c) The liability of a third party that provides the informational content is not avoided by the use of a conduit described in subsection (b)(4) or by the fact that the conduit is not liable for errors under that subsection.⁶¹

Section 2B-404 recognizes that for the one-on-one personal human information provider, there is imposed by law an implied warranty and duty to exercise reasonable care and workperson-like effort in "collecting, compiling, transcribing, processing, or transmitting informational content." In stark contrast, Section 2B-404(a)(2) exempts Published Information Content from any such duty. The case law basis for this section is long and consistent.⁶²

The other section that is required by these cases is Section 2B-707(d): "(d) In a case involving published informational content, neither party is entitled to consequential damages unless the agreement expressly so provides."⁶³

In Section 2B-707(d), the statute recognizes that unlike the rule in Article 2, Article 2A, or common law, and unlike the situation for any other type of good, product, service, or delivery, Published Information Content must be exempt from the specter of consequential damage awards unless there is a clear and explicit agreement to the contrary. Parenthetically, Section 2B-707(d) makes the exemption reciprocal. This reciprocity is based both on notions of fair play—giving one side an exemption unless there is a clear promise to the contrary—should be granted to the other party, regardless of the case law precedence. Second, Article 2B recognizes that licensee and licensor in information are not wholly distinct roles and that in a single transaction, or a single transmission or performance, a party may exercise licensor and licensee roles. The statute wants to minimize litigation over whether the liability might be being imposed on a party by technically considering them a licensee. As Article 2B provides, and as is the better rule, a blanket covers the entire transaction in the absence of an agreement between the parties that spells out when and where consequential damages are properly awarded.

The need to maintain an environment that nurtures and protects the free flow of information from liability is mandated by the existing case law. Article 2B, in other sections recognizes the need to make special rules and refrain from imposing liability on Published Information

61. U.C.C. § 2B-404 (Proposed Draft, June 18, 1997).

62. *See generally*, Wolfson, *supra* note 5.

63. U.C.C. § 2B-707(d) (Proposed Draft, June 18, 1997).

Content. The question for this article is whether the same special treatment is needed from express warranty liability.

V. A TRANSLATION OF THE EXPRESS WARRANTY MODEL TO PUBLISHED INFORMATION CONTENT—WOULD IT WORK?

As highlighted above, there are a number of features of goods law are relevant to a discussion about whether the express warranty model from Article 2 should be exported into Article 2B. This article now turns to exploring those issues one-by-one.

A. PRODUCTS LIABILITY AND PUBLISHED INFORMATION CONTENT

1. *Tort Liability and Defective Published Information Content*

The first question is whether defects in Published Information Content would fit well in the “seamless web running from express warranty through the implied warranty of merchantability to strict liability in tort or negligence.” As noted above, strict liability in tort is used by courts either where there is personal injury or where there is lack of privity between the entity creating the defect and the plaintiff. Thus, we first ask, “Has there been tort liability imposed on defective information providers where there is personal injury and/or where the entity introducing the defect is contractually remote from the use?” The answer—with one exception, the aeronautical chart cases—is a uniform no. The reasoning of the courts focuses on the unique role the information and its free and unfettered flow plays in our democracy. Courts emphasize this role even where the information is negligently false or where the information is clearly commercial speech.

In *Winter v. G.P. Putnam's Sons*,⁶⁴ a publisher of a book about collecting and cooking mushrooms was sued for negligent misrepresentation. The book incorrectly identified a poisonous mushroom as edible. The court denied liability against the publisher for the personal injury directly caused by the inaccurate information:

In order for negligence to be actionable, there must be a legal duty to exercise due care We conclude that the defendants have no duty to investigate the accuracy of the contents of the books it publishes Were we tempted to create this duty, the gentle tug of the First Amendment and the values embodied therein would remind us of the social costs.⁶⁵

64. *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033 (9th Cir. 1991).

65. *Id.* at 1037. See also Note, *Products Liability Law—Freedom of Speech—Ninth Circuit Holds that California's Liability Law Does Not Cover False Statements in A Book—Winter v. G.P. Putnam's Sons*, 938 F.2d 1033 (9th Cir. 1991), 105 HARVARD L. REV. 1147 (1992).

A very similar case is *Cardozo v. True*,⁶⁶ which involved a lack of warning about one of the wild ingredients in a recipe (an "elephants ears" plant), which is poisonous until cooked. The court refused to impose liability for breach of implied warranty on the book seller, Ellie's Books and Stationery, even though the court admitted that books are within the scope of goods under the U.C.C. Citing *Yugas* and *MacKown* among other cases, the court concluded:

The common theme running through these decisions is that ideas hold a privileged position in our society. They are not the equivalent to commercial products. Those who are in the business of distributing the ideas of other people perform a unique and essential function. To hold those who perform this essential function liable, regardless of fault, when an injury results would severely restrict the flow of ideas they distribute. We think that holding Ellie's liable under the doctrine of implied warranty would, based upon the facts as certified to us, have the effect of imposing a liability without fault not intended by the Uniform Commercial Code.⁶⁷

*Roman v. City of New York*⁶⁸ involved a suit against Planned Parenthood for alleged false information in a booklet about tubal ligation. The book contained the question "Should contraceptives be used after tubal ligation?" The answer given was "No. There is no possibility of pregnancy and contraceptives are not necessary."⁶⁹ In fact, the plaintiff had a ligation and later became pregnant. Her expert indicated that there is a rare failure rate which was not warned of in the booklet.⁷⁰ Nonetheless, the court refused to impose liability:

That defendant pointedly intended the booklet to provide information to the general public, including, plaintiff, and the fact that it could have reasonably foreseen plaintiff's reliance thereon, does not change the result. One who publishes a text cannot be said to assume liability for all "misstatements", said or unsaid, to a potentially unlimited public for a potentially unlimited period.⁷¹

In *MacKown v. Illinois Publishing & Printing Co.*,⁷² the court, quoting and following *Jaillet*, denied liability against a newspaper where a formula for curing dandruff, published in a newspaper, but written by a free lance agent of the newspaper, caused personal injury. In the court's words, the cases "all rest on the principle that negligent words are not actionable unless they are uttered directly, with knowledge or notice that they will be acted on, to one to whom the speaker is bound by some rela-

66. *Cardozo v. True*, 342 So.2d 1053 (Fla. Dist. Ct. App. 1977).

67. *Id.* at 1056-57 (emphasis added).

68. *Roman v. City of New York*, 442 N.Y.S.2d 945 (1981).

69. *Id.* at 946.

70. *Id.*

71. *Id.* at 948.

72. *MacKown v. Illinois Publishing and Printing Co.*, 6 N.E.2d 527 (Ill. App. Ct. 1937).

tion of duty, arising out of public calling, contract or otherwise, to act with care if he acts at all."⁷³

Barden v. HarperCollins Publishers, Inc.,⁷⁴ involved a suit against a publisher where the book contained a list of attorneys that "could be consulted to assist women survivors of child abuse. Plaintiff . . . read defendant's book . . . contacted one of the attorneys listed."⁷⁵ The plaintiff contended that that attorney's qualifications, as listed in the book, were false and that the publisher was negligent not to have verified their truth. After citing *Winter*, *First Equity*, and *Gutter*, the court concluded there was no liability:

[T]he Court concludes that plaintiff is attempting to recover under a[n] untenable legal theory. Simply put, allowing plaintiff to seek relief under a negligent misrepresentation claim would open a pandora's box that might be difficult to close. The burden placed upon publishers to check every fact in the books they publish is both impractical and outside the realm of their contemplated legal duties . . . Finally, any temptation for the Court to create such a duty is tempered by the 'gentle tug of the First Amendment' and the values embodied therein.⁷⁶

The court in *Walter v. Bauer*,⁷⁷ noted that "in a novel theory, plaintiff contends that the defendant, Charles E. Merrill Publishing Company, is subject to a cause of action in strict liability in tort, because the experiment it published in *Discovering Science 4* allegedly led to injury." In this case, an injury to plaintiff's eye while performing the experiment. The court quickly disposed of the matter:

This Court concludes that the theory of action grounded upon strict tort liability is not applicable to the current situation . . . Strict liability in tort is meant, however, to protect the customer from defectively produced merchandise. *Discovering Science 4* cannot be said to be a defective product, for the infant plaintiff was not injured by use of the book for the purpose for which it was designed, i.e., to be read. More importantly perhaps, the danger of plaintiff's proposed theory is the chilling effect it would have on the First Amendment—Freedoms of Speech and Press. Would any author wish to be exposed to liability for writing on a topic which might result in physical injury? E.g. How to cut trees; How to keep bees?⁷⁸

These are just a sample of the cases that have refused to impose liability for defect Published Information Content and have refused to analogize to the law of defective products. Before concluding that, Article 2B should not use the Article 2 express warranty model, we must

73. *Id.* at 530 (emphasis added).

74. *Borden v. HarperCollins Publishers, Inc.*, 863 F. Supp. 41 (D. Mass. 1994).

75. *Id.* at 42.

76. *Id.* (emphasis added), quoting from *Winter*, 938 F.2d at 1037.

77. *Walter v. Bauer*, 439 N.Y.S.2d 821 (N.Y. Sup. Ct. 1981).

78. *Id.* at 822-23 (emphasis added).

review a line of cases where product liability law was applied to Published Information Content, the aeronautical chart cases.

2. *Personal Injury Liability for Mass Information Provider as Publisher—The Aeronautical Chart Cases*

In what has been described as an “aberrant line of cases,”⁷⁹ there are a few decisions that have held mass information providers can be held liable where the subject matter of the information is aeronautical charts, nautical charts, and weather information.

In *De Bardeleben v. United States*,⁸⁰ a tugboat sustained damage and injury to crew when its anchor ruptured a gas pipeline not marked on a nautical chart. The court held that the elements of a cause of action for negligent misrepresentation of the information had been stated. The question that most troubled the court was whether the government should be held liable given the fear that this would lead to unlimited liability to an indeterminate number of people. The court found this not to be a factor:

[T]he usual publishers of newspapers, treatises, and maps lack the financial resources to compensate an indeterminate class who might read their work. Potential liability would have a staggering effect on potential purveyors of printed material. Although we are not suggesting that the purse of the Government is either unlimited or should be dissipated by largess at the hands of judicial opinions, this factor is of no significance here

These are not just casual publications which may be of interest to or fall into the hands of an indeterminate number of users Sailing without a chart or with an obsolete one ranks as more than a mere indiscretion. Many Courts have found such ships to be unseaworthy. Others have found mariners who follow such practice guilty of “glaring” or “gross” fault

The Government must therefore bear the burden of using due care in the preparation and dissemination of such charts and notices.⁸¹

In a few cases, courts expanding *De Bardeleben* created a duty on private publishers and republishers of the same data.⁸² The courts have found the charts to be “unreasonably defective products” subject to strict liability in tort for their errors.⁸³ In *Saloomey*, for example, the court reasoned that the charts were products because:

79. *Winter*, 938 F.2d at 1036, quoted with approval, *Birmingham v. Fodor's Travel Publications, Inc.*, 833 P.2d 78 (Haw. 1992).

80. *De Bardeleben v. United States*, 451 F.2d 140 (5th Cir. 1971).

81. *Id.* at 148-49 (emphasis added).

82. *See, e.g.*, *Saloomey v. Jappesen & Co.*, 707 F.2d 671, 676-67 (2d Cir. 1983); *Aetna Casualty and Surety Co v. Jeppesen & Co.*, 642 F.2d 339, 342-43 (9th Cir. 1981).

83. *See, e.g.*, *Brocklesby v. United States*, 767 F.2d 1288, 1294-95 (9th Cir. 1985).

The charts . . . reached Wahlund without any individual tailoring or substantial change in contents—they were simply mass produced. The comments to 402A envision strict liability against sellers of such items in these circumstances. By publishing and selling the charts, Jeppesen undertook a special responsibility, as seller, to insure that consumers will not be injured by the use of the charts; Jeppesen is entitled—and encouraged—to treat the burden of accidental injury as a cost of production to be covered by liability insurance. This special responsibility lies upon Jeppesen in its role as designer, seller and manufacturer.⁸⁴

One might have expected the *De Bardeleben* cases to become the basis for overturning the line of cases discussed in the last section. This has not been the case. The *De Bardeleben* line has been narrowed to its facts, aeronautical charts. Numerous courts have distinguished and refused to follow *De Bardeleben* outside of its narrow scope.

DeBardeleben was distinguished in *Birmingham v. Fodor's Travel Publications, Inc.*⁸⁵ There, liability was denied against the publisher of Fodor's travel guide books for alleged failure to warn about hazardous conditions at Kekaha beach in Hawaii, where the plaintiff suffered injury. The court found no liability against the publisher for a failure to warn. The court gave three main reasons for refusing to find a duty: (1) that the cost of investigating every publication would be uneconomic;⁸⁶ (2) that such a duty would "extend liability to an undeterminable number of potential readers;"⁸⁷ and (3) the First Amendment.⁸⁸

The court was confronted with the aeronautical chart cases. After reviewing *Broklesby*, *Saloomey*, and *Fluor*, the court simply concluded that the "'aeronautical chart cases' were an aberration."⁸⁹

The court chose instead to place a "high priority on the unfettered exchange of ideas" by finding that, "[t]he threat of liability without fault (financial responsibility for our words and ideas in the absence of fault or special undertaking or responsibility) could seriously inhibit those who wish to share thoughts and theories."⁹⁰

This distinction was made clearer in *Jones v. J.B. Lippincott Co.*⁹¹ There, the plaintiff (who was injured while following a nursing texts direction for a hydrogen peroxide enema), mindful of the previous cases

84. *Saloomey*, 707 F.2d at 676-67. See also *Fluor Corp. v. Jeppesen & Co.*, 216 Cal. Rptr. 68 (1985).

85. *Birmingham v. Fodor's Travel Publications, Inc.*, 833 P.2d 70 (Haw. 1992).

86. *Id.* at 75, (quoting *Alm v. Van Nostrand Reinhold Co.*, 480 N.E.2d 1263, 1267 (Ill. App. Ct. 1985) and *Lewin v. McCreight*, 655 F. Supp. 282, 284 (E.D. Mich. 1987)).

87. *Id.* at 75 (quoting *Alm*, 480 N.E.2d at 1267).

88. *Id.* at 75-76 (quoting *Alm*, 480 N.E.2d at 1267 and *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1037 (9th Cir. 1991)).

89. *Birmingham*, 833 P.2d at 78.

90. *Id.* at 79.

91. 694 F. Supp. 1216 (D. Md. 1988).

denying liability to mere publishers, tried to allege that a copy editor's functions of reading the entire manuscript and making suggestions relating to style and content to the author constituted the publisher as a joint author for tort purposes. The court refused to make such a finding, holding that Lippincott's activities were limited to publishing, and therefore there was no liability for personal injury. Similarly, the court refused to follow the analogy to the aeronautical chart cases, stating that:

The underlying theory for these rulings is the analogy of a nautical chart or an airline chart to other instruments or navigation such as a compass or radar finder which, when defective, will prove to be dangerous. No case has extended Section 402A [of the RESTATEMENT (SECOND) OF TORTS] to the dissemination of an idea or knowledge in books or other published material. Indeed to do so would chill expression and publication which is consistent with fundamental free speech principals.⁹²

Smith v. Linn,⁹³ involved a suit, against a publisher, following the death of a relative who had followed the "Last Chance Diet." The court readily distinguished the chart cases by holding:

Additionally, we agree with the trial court that the cases cited by appellant as imposing liability under Section 402A upon publishers of aviation and navigation charts is not akin to the problem involved herein, especially since the first amendment concerns are not present in those cases. In those cases, extremely technical and detailed materials were involved, upon which a limited class of persons imposed absolute trust having reason to believe in their unqualified reliability. As such they took on the attributes of a product and are not protected by the first amendment.⁹⁴

To see that *Winter* and *Fodor's* were right that the chart cases are such "an aberration,"⁹⁵ one only need review a host of other cases that have otherwise denied liability even in the face of personal injury.

In *Alm v. Van Nostrand Reinhold Co.*,⁹⁶ a publisher of a "how to" book on woodcarving was sued by a reader who was injured by a shattered tool while allegedly following directions in the book. The court noted that "Plaintiffs concede that they have discovered no case in any jurisdiction which has imposed liability on a publisher for negligent misrepresentation merely because of the publication of material written by a third party."⁹⁷ As in other cases, the court was concerned that imposing a duty of care would cause "The scope of liability [to] extend to an un-

92. *Id.* at 1217.

93. 563 A.2d 123 (Pa. Super. 1989), *aff'd*, 587 A.2d 309 (Pa. 1991).

94. *Id.* at 127 (emphasis added).

95. *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1036 (9th Cir. 1991), *quoted with approval Birmingham*, 833 P.2d at 78.

96. 480 N.E.2d 1263 (Ill. App. Ct. 1985).

97. *Id.* at 1266.

determinable number of potential readers.”⁹⁸ Thus, the court concluded:

More important for our purposes, however, is the chilling effect which liability would have upon publishers, an effect recognized in the cases and not denied by plaintiff. Even if liability could be imposed consistently with the Constitution, we believe that the adverse effect of such liability upon the public’s free access to ideas would be too high a price.⁹⁹

In *Lewin v. McCreight*,¹⁰⁰ a plaintiff was injured while mixing a mordant from a “how to” book on Metal smithing. Concentrating on the fact that the defendant was a mere publisher, he court distinguished *Saloomey*, and agreed with the reasoning in *Alm*:

This Court agrees with the court in *Alm* that given the tremendous burden such a duty would place upon defendant publishers, the weighty societal interest in free access to ideas, and potentially unlimited liability, it would be unwise to impose a duty to warn of “defective ideas” upon publishers of information supplied by third party authors.¹⁰¹

Perhaps the most interesting distinction explanation of the chart cases is found in *Brocklesby*.¹⁰² The court stated that:

If, for example, a trade journal had accurately published the government’s instrument approach procedures in text form and a pilot had used the procedure as printed in the journal, the journal would be immune from strict liability. This case, however does not present that situation. Jeppesen’s charts are more than just a republication of the text of the government’s procedures. Jeppesen converts a government procedure from text to graphic form and represents that the chart contains all necessary information. For example, Jeppesen’s catalog contains the following statements:

. . . . Every necessary detail is clearly indicated

Jeppesen approach plates include . . . EVERYTHING you need for a smooth transition from enroute to approach segment of your flight.¹⁰³

This quotation from *Brocklesby* casts the case as a seal of approval or breach of an express warranty of accuracy case. As discussed elsewhere where a publisher makes an express warranty of accuracy or impresses its product with an explicit seal of approval, liability may be

98. *Id.* at 1267.

99. *Id.*

100. 655 F. Supp. 282 (E.D. Mich. 1987).

101. *Id.* at 284. Interestingly, the court then notes: “The balance might well come out differently, however, if the publisher contributed some of the content of the book Similarly, publishers may have greater responsibilities where the risk of harm is plain and severe such as a book entitled *How to Make Your Own Parachute*.” *Id.*

102. *Brocklesby v. United States*, 767 F.2d 1288 (9th Cir. 1985).

103. *Id.* at 1297-98 (emphasis added).

warranted.¹⁰⁴

3. *The Restatement of Products Liability Discussion*

The *Restatement of Torts: Products Liability* contains a discussion of the Brocklesby cases noted in (f) to Section 19. The comment notes:

One area in which courts have imposed strict products liability involves false information in maps and navigational charts. In these cases, the courts emphasized that navigational charts are used for their physical characteristics rather than for the ideas contained in them. *Aetna Casualty and Surety Co. v. Jeppesen & Co.*, 642 F.2d 339, 341-42 (9th Cir. 1981) ("The [landing] specifications prescribed are set forth by the FAA in tabular form. Jeppesen acquires this FAA form and portrays the information therein on a graphic approach chart. This is Jeppesen's 'product'"); *Brocklesby v. United States*, 767 F.2d 1288, 1298 (9th Cir. 1985), cert. denied, 474 U.S. 1101 (1986) ("Jeppesen's charts are more than just a republication of the text of the government's [landing] procedure. Jeppesen converts a government procedure from text into graphic form and represents that the chart contains all necessary information"). The courts also noted that the total reliance placed by pilots on navigational charts directly links the charts to the accidents. In differentiating navigational charts from a magazine supplement, the Texas Appellate Court, in *Way v. Boy Scouts of America*, observed in dictum: "In those cases, the charts were physically used in the operation of the aircraft at the time of the accident. The inaccurate data directly caused or was alleged to have caused the accidents in question in the same manner in which a broken compass or an inaccurate altimeter would have caused a plane to crash." 856 S.W.2d 230, 238-39 (Tex. Ct. App. 1993); see also *Fluor Corp. V. Jeppesen & Co.*, 216 Cal. Rptr. 68, 71 (Cal. Ct. App. 1985) ("[A]lthough a sheet of paper might not be dangerous, per se, it would be difficult indeed to conceive of a salable commodity with more inherent lethal potential than an aid to aircraft navigation that, contrary to its own design standards, fails to list the highest land mass immediately surrounding a landing site"); *Saloomey v. Jeppesen & Co.*, 707 F.2d 671(2d Cir. 1983) (applying Colorado law).¹⁰⁵

Clearly the authors of the *Restatement* recognized there was a line of defective information cases that were analyzed as traditional strict liability cases. Also, the authors also were quite aware that the cases had never been extended to any other information subject matter outside of aeronautical charts. Therefore, the authors properly chose to point out the reasoning of the cases, that in some circumstances, information may be considered the equivalent of a physical good and therefore subject to

104. See notes 117-20, *infra*, for discussion of *Hanberry v. Hearst*, 81 Cal. Rptr. 519 (1969) (discussing seals of approval).

105. RESTATEMENT OF TORTS: PRODUCTS LIABILITY 348 (emphasis added) (Final Draft, May 21, 1997).

the same liability as the identical good for defects. However the authors refused to argue that the case line must be extended to other types of information.

Whether the aeronautical cases are correctly decided, they must and have been strictly limited to their facts.

4. *Economic Damages and Published Information Content*

As mentioned in the last section, courts typically use strict liability in tort where the plaintiff has suffered personal injury damages. The courts typically use express warranty where the plaintiff claims economic damages. Thus, the second question is, "Has tort liability been imposed on defective information providers where there is economic damage from defect information?" Here, again, the resounding answer is "no," and the reasoning is the same—protection of the free flow of information.

In *Demuth Development Corp. v. Merck & Co.*,¹⁰⁶ the publisher of the Merck Index was sued by a manufacturer of a chemical listed in the Merck Index for lost sales when the Index incorrectly described the chemical as toxic. The court first failed to find any duty to plaintiff under a test similar to that announced in *Jaillet*:

Not every casual response, not every idle word, however damaging the result, gives rise to a cause of action Liability in such cases arises only where there is a duty, if one speaks at all, to give the correct information. And that involves many considerations. There must be knowledge, or its equivalent, that the information is desired for a serious purpose; that he to whom it is given intends to rely and act upon it; that if false or erroneous, he will because of it be injured in person or property. Finally, the relationship of the parties, arising out of contract or otherwise, must be such that in morals and good conscience the one has the right to rely upon the other for information, and the other giving the information owes a duty to give it with care."¹⁰⁷

The court then analyzed the facts of the case against its criteria for liability. The court agreed with the plaintiff that Merck was in the business of providing information for a serious purpose, that its readers had a right to rely and act on the *Index* as "an authoritative source of accurate information."¹⁰⁸ Nonetheless, the court denied recovery because the plaintiff could not point to any "'relationship of the parties arising out of contract or otherwise' which 'in morals or good conscience' placed Merck under any duty towards plaintiff or its business."¹⁰⁹

106. 432 F. Supp. 990 (E.D.N.Y. 1977).

107. *Id.* at 992-93 (quoting *International Products Co. v. Erie Railroad Co.*, 155 N.E. 662, 664 (N.Y. 1927)).

108. *Demuth Dev. Corp.*, 432 F. Supp. at 993.

109. *Id.*

Moreover, the court stated that a ruling denying recovery:

[I]s required in order to avoid '[t]he specter of unlimited liability, with claims devastating in number and amount crushing the defendant because of a momentary lapse from proper care

To hold there is liability in such a case would confer upon an "unforeseeable plaintiff," to use Prosser's apt term, a right heretofore denied by the New York courts and not sanctioned by the Restatement of Torts. Such a holding, moreover, would serve neither justice nor the public interest because of its manifestly chilling effect upon the right to disseminate knowledge.¹¹⁰

The court made more explicit its First Amendment concerns in another portion of the opinion:

Merck's right to publish free of fear of liability is guaranteed by the First Amendment . . . and the overriding societal interest in the untrammelled dissemination of knowledge. The right is circumscribed only by laws such as those respecting national secrets, copyright, obscenity, defamation, and unfair competition.¹¹¹

In *Gale v. Value Line, Inc.*,¹¹² a non-professional investor relied on information in a Value Line publication in purchasing call options sufficient to cover warrants on TWA debentures convertible into TWA common stock. The Value Line information did not note that TWA had a right to accelerate the expiration date on the convertible debentures. TWA did accelerate the date, and the investor lost money. In this case, the information was not inaccurate, but incomplete in that it did not mention the early redemption feature. Nonetheless, the court refused to impose liability. After expressing some reservation that the omission even amounted to negligence, and after noting that the plaintiff claimed to have relied on the information about the warrants, but admittedly rejected Value Line's recommendation against purchasing the subject debentures, the court stated:

The plaintiff would hold the defendant to a duty of complete accuracy with respect to every detail of its publication. . . . The application of this extraordinary duty to those who peddle commercial information would bring the business of information distribution to a standstill. Furthermore, the imposition of a duty that required absolute and completely correct information as to every detail, including the requirement that nothing be left out would establish an intolerable and probably unachievable standard of conduct.¹¹³

110. *Id.* at 993-94 (citation omitted, emphasis added, quoting from W. PROSSER, LAW OF TORTS 225 (4th ed. 1971)).

111. *Id.* at 993 (citations omitted, emphasis added).

112. 640 F. Supp. 967 (D.R.I. 1986).

113. *Id.* at 971 (emphasis added). While there is discussion that resounds with the chilling of speech, the First Amendment is not specifically cited and relied upon. Rather, the court merely cites this general public policy language.

In *Gutter v. Dow Jones, Inc.*,¹¹⁴ the plaintiff relied on incorrect information (the omission of the letter "f") about whether certain bonds were trading with interest, in the *Wall Street Journal*, in purchasing the bonds. The court began by stating that, "The general view is that '[n]o action for damages lies against a newspaper for merely inaccurate reporting when the publication does not constitute libel.'"¹¹⁵ The court first questioned both whether readers of a newspaper are within any special limited class of foreseeable persons to whom defendant intends to supply the information. Secondly, whether relying on financial information from a newspaper without rechecking it can ever be justifiable reliance. However, the court rested its opinion elsewhere, on the public policy of exempting mass information providers from liability for negligent information:

More importantly, we believe that public policy and constitutional constraints support protection to newspapers for a negligent misstatement of fact such as the error made in the case sub judice. "Accuracy in news reporting is certainly a desideratum, but the chilling effect of imposing a high duty of care on those in the business of news dissemination and making that duty run to a wide range of readers or TV viewers would have a chilling effect which is unacceptable under our Constitution."

In this case, we similarly conclude that a complaint alleging that a newspaper reader or subscriber relied to his detriment on making securities investments based on a negligent and inaccurate report in a newspaper does not state a cause of action in tort against the newspaper's publisher for 'negligent misrepresentation.'¹¹⁶

The Second Circuit Court of Appeals made a similar ruling in *First Equity Corp. of Fla. v. Standard & Poor's Corp.*,¹¹⁷ in a case involving a subscriber to *Corporation Records*, a corporate bond information service. The plaintiffs claimed a \$200,000 loss based on justifiable reliance on the incorrect information that redemption of the bonds would include certain accrued interest, which the bonds actually did not. The court specifically declined to use the First Amendment to support its ruling. The court held that "we believe this case can be disposed of on tort law grounds and therefore do not address the First Amendment issue."¹¹⁸ After citing the precedents of *Jaillet*, *Gutter*, and *Gale*, the court focused on its primary concern, unlimited liability for mass information providers.

The class of potential plaintiffs is numerous. Even the most careful preparation will not avoid all errors. The potential for meritless or even

114. 490 N.E.2d 898 (Ohio 1986).

115. *Id.* at 900.

116. *Id.* at 901-02, (quoting from *Tumminello v. Bergen Evening Record, Inc.*, 454 F. Supp. 1156, 1160 (D.N.J. 1978)).

117. 869 F.2d 175 (2d Cir. 1989).

118. *Id.* at 178-79.

fraudulent claims is high. The cost of even successful defenses may be prohibitive if publishers are to be exposed to discovery and trial based solely on allegations that a plaintiff relied upon an erroneous summary. These summaries serve many purposes, with varying risks so far as inaccuracies are involved.¹¹⁹

Therefore, the court concluded that the argument was not that the First Amendment prohibited the imposition of liability on mass information providers. Instead, the court concluded that the tort itself could not be read to include a duty running from a mass information provider defendant to its myriad of readers.¹²⁰

B. THE POLICY REASONS FOR NOT APPLYING EXPRESS WARRANTY TO PUBLISHED INFORMATION CONTENT

One could argue that despite the legacy of cases, U.C.C. Article 2B is a chance to set up a new regime, one that imposes liability for express warranties on information content using Article 2 concepts. There are several policy reasons why express warranties in information should not be imposed using concepts from Article 2. As will be argued in a later section, this does not mean that purveyors of Published Information Content should not be held liable where their products do not match important statements made by them which relate to the quality or a description of the information. The argument here is that only Article 2 express warranty concepts do not fit well with the problems of deciding what and when to impose liability on information providers.

1. *What and When?*

The first problem of translating express warranty law into information is "When would an express warranties related to Published Information Content stop being effective?" When one buys a car, a hammer, or a nuclear reactor, there is a definitive point of time where there is delivery of a product against which the express warranties can be measured. One can gather all the advertisements, products packaging, descriptions, manuals, samples, and other candidates for express warranties and compare them side-by-side against the product they are supposed to warrant at the time of delivery.

For much Published Information Content, there is no such single point of time. When one signs up for America On-Line ("AOL"), Com-

119. *Id.* at 180.

120. *See also* Sacco v. Herald Statesman, Inc., 223 N.Y.S.2d 329 (N.Y. App. Div. 1962) (false newspaper report of an assault, liability denied); Advanced Music Corp. v. American Tobacco Co., 53 N.Y.S.2d 337 (N.Y. App. Div. 1945) (failure to mention plaintiff's songs in list of top ten songs carries no liability as there is no duty owed the public or plaintiff to be correct).

puServe, LEXIS/NEXIS, or WESTLAW, one is no doubt induced to subscribe by the list of current databases, the identity of the current editors for forums, the current list of hosts of chatlines, etc. However, the next time one signs on, the databases may be changed, may be no longer available, may not have the same editors, may have the chatlines dropped, or may even have changed ownership of the on-line service. If tens of thousands of subscribers gain a cause of action every time the access service changes, the express warranty section of Article 2B would become a litigation trap rather than a means to say, "What you promise, you deliver."

This is not to say that an access provider has no accountability for dropping an essential portion of its service, it is just that express warranty is not a tool well tuned to govern a provider's actions. First, users keep vendors accountable through a market that does not support long term contracts. Users are smart enough to demand and not to sign up for services that require a long term commitment where the nature of the service can change so quickly. This is the history of the industry and nothing on the horizon appears to indicate that the historical trend will end. In today's competitive marketplace, any attempt to reverse the short term contracting reality would quickly be met with wide-spread user dissatisfaction and a rapid loss of customers. Second, even if customers were stuck with a particular vendor, a user could sue for breach of the contract. In other words, if a vendor promises certain things in order to entice a user into a long term commitment, and then fails to deliver the promised product, they could be sued for breach. Finally, the user could seek rescission for failure of consideration. If the basis for the consideration being given to the licensor really is the continued availability of a particular part of a service, and that portion goes away, there would normally be a cause of action for rescission. These traditional market and breach remedies are more than adequate to deal with breaches caused by changes in Published Information Content and they do not suffer from the problem inherent in express warranty theory.

Even where multiple performances are not involved, information changes over time in a way that physical goods do not. Take a 1940s black and white movie. Over the years the movie with the same title has been: edited for television; colorized; remastered in stereo; had Betamax and VHS videotape versions made; had the soundtrack dubbed over in a number of languages; had subtitles added in a number of languages; there are digitized versions of the movie; and there are master versions and versions meant for home use, theater use, or broadcast use. Each version is sold with the same description, the movie title. Parties make assumptions about the version that is the subject of the license of the movie, but the licensor does not expect that a user could sue it for not producing a copy of the original 1930s celluloid. In Published Informa-

tion Content, services change over time, and there is simply no clean way to line up the product against its express warranties for action by a court.

Further, unlike products, the contract in information defines the product. That is, one may take possession of a CD-ROM with 1,000 databases and 50 software access programs on it. The same CD-ROM may be the one supplied to home users, business users, LAN users, service bureaus, or internet providers. The databases that can be used, the software that can be used to access the databases, the uses that can be made of the information, the ability to print out data, the ability to retransmit the data to others, the ability to permit others to use the software, the ability to permit the user to supply the information for others (as a service bureau), the duty of the licensor to correct errors in the information or software, the limitation of liability of the licensor, and a myriad of other terms, conditions, and limitations related to the information vary according to the characteristics of the physical CD-ROM. The license is the product. This is not analogous to goods where the goods are altered in manufacturing to give them special characteristics. A commercial version of a lawn mower is not the same physical entity as the home version of the same lawn mower. In information, the difference between the commercial and home version of a product are mere words in a contract.

This does not mean that a licensee cannot sue a licensor for the failure of the product to meet the things said on the package or in sales presentations or in advertisements about the product. It only means that the "basis of the bargain" test used in Article 2 to determine when a statement becomes an express warranty is not sensitive enough to accurately determine the intent and liability of the parties.

2. The Two-Way Nature of Modern Information Content

As discussed above, warranties under Article 2 are premised on the fact that there are distinct roles in the sale of the goods. The goods follow a distinct process which goes through the manufacturer, wholesaler, retailer, and buyer. Each layer has a distinct function and seldom are buyers intimately involved in manufacturing the product that they are buying. This is an essential assumption underlying express warranty theories in Article 2. This one-way model does not work for much Published Information Content.

The internet and on-line services have turned the goods manufacturing model completely on its head. When a subscriber—that is a retail buyer—of AOL or CompuServe signs on to a chat-line or uploads a poem to a bulletin board, he or she is the manufacturer of that information. That information is instantly and inextricably intertwined into the fabric

of the service that is, at that very moment, being delivered to the same subscriber in its role as buyer. When an LEXIS subscriber, who is a merchant in information (for example, a lawyer), browses a website, downloads, and then forwards to one of its clients or customers the downloaded information along with its own introduction, its own advice, or as part of its own compilation of a series of these downloaded files, he or she acts simultaneously as the manufacturer of part of the information, the wholesaler for other parts and the retailer of the rest of the information. In essence, under the same agreement with AOL or WESTLAW, the user acts in all the roles simultaneously that are so distinct in the goods area. The user acts these roles without any visible change in its mode of doing business. Warranties that are now applied are really only to those who are geared up to the mass production of goods. The warranties being imposed on everyone of every size and sophistication in an information business model that is diametrically different from the goods business model.

The two-way model also complicates litigation issues on express warranties. The plaintiff may be held to have given and breached some of its express warranties to the very defendant it is seeking to sue. In that case, how do the normal rules for remedies under Article 2 apply? The Article 2 statement of remedies for breach of an express warranty simply does not have the language complex enough to deal with the web of roles that are inherent in the Published Information Content interactive market. For example, in the goods model, (except perhaps for some comparative award jurisdictions), a simultaneous breach of duty between the plaintiff-to-defendant and the defendant-to-plaintiff completely cuts off the rights of the plaintiff.

Similarly, the theory of express warranties in goods is premised on the assumption that the retailer can always sue upstream. In essence, the retailer knows or should know its supplier or goods manufacturer because there is a physical chain of possession, one-to-one. In the information age, this is no longer necessarily the case. The database manufacturer is an example. The manufacturer may be receiving data from a variety of sources, much of it forwarded to it from a trusted source, but not one that itself created or verified the information. The information may be from a source that no longer exists and so there is no means to verify the information. The information may contain a statement that under goods law would clearly be an express warranty (such as a description of what the database contains). The retailer then incorporates the information into its database, as is, noting as much about the source as it knows, and sells the package of on to a user. What happens under the Article 2 formulation if the express warranty, from that no longer existent third party, is breached, particularly if neither the manufacturer (*e.g.* AOL), nor the user can determine who the third party was that

made the express warranty in the first place? Is the effect of an Article 2 express warranty liability to force the known manufacturer to shoulder the entire burden of the warranty it never made? If that is the result, then we would be dooming compilers of databases and providers of third party information on the internet, in general, to passing on information only where the author is well known and well healed enough to be sued upstream? This has not been the culture of the internet or of the database industry to date. To change that culture for the sake of harmonization of Article 2B and Article 2 would be an unfortunate result.

3. *Basis of the Bargain*

One of the important elements in current Article 2 express warranty law is the "basis of the bargain" limitation for express warranties. The problem with Published Information Content is that the courts have overwhelmingly denied liability for errors in the accuracy of information content even where the accuracy was the "basis of the bargain." In information litigation terms, the courts usually refer to the user as "reasonably relying" on the accuracy of the information, rather than using the term "basis of the bargain." As was discussed above, reliance encompasses "basis of the bargain" under Article 2. That is, if a good buyer can show it reasonably relied on the seller, it has shown the matter was part of the basis of the bargain.

As discussed above, in many cases users have relied and had a reasonable right to rely on the quality of an information source in taking actions that have huge economic or personal injury consequences. Nonetheless, the courts, in order to keep society's price of information low, and to protect the free and robust debate of facts, have not imposed liability on the provider. Any scheme that holds providers liable must impose a test that not only takes into consideration the basis of the bargain but will also reconcile the result with current Published Information Content case law. We turn now to ask what the results would be under that case law.

C. WHEN SHOULD INFORMATION PROVIDERS BE SUBJECT TO EXPRESS WARRANTIES?

Although I argue that the Article 2 test of express warranties should not be imported into Article 2B, there are clearly situations where liability would be justified. Some already exist under current case law.

1. *The Seal of Approval Cases*

Without calling it an express warranty, liability was imposed on a

magazine in *Hanberry v. Hearst*.¹²¹ There, the plaintiff purchased shoes that carried the "Good Housekeeping Consumers' Guaranty Seal" that meant, "we have satisfied ourselves that products advertised in Good Housekeeping are good ones and that the advertising claims made for them in our magazine are truthful."¹²² While finding liability in negligence (but not on the product liability theory advanced by the plaintiff, because Good Housekeeping was not involved in the chain of manufacture or distribution),¹²³ the court noted the very special circumstances of the case, circumstances that have not been found in any subsequent case:

Respondent's endorsement and approval of a product is not confined to the pages of its own magazine. It permits the manufacturer or retailer of a product which has been approved by Good Housekeeping Magazine to advertise that fact in other advertising media and permits its seal to appear in such ads and to be attached to the product itself. While the device used by respondent enhances the value of Good Housekeeping Magazine for advertising purposes, it does so because its seal and certification tend to induce and encourage consumers to purchase products advertised in the magazine and which bear that seal and certification. Implicit in the seal and certification is the representation respondent has taken reasonable steps to make an independent examination of the product endorsed, with some degree of expertise, and found it satisfactory. Since the very purpose of respondent's seal and certification is to induce consumers to purchase products so endorsed, it is foreseeable certain consumers will do so, relying upon respondent's representations concerning them, in some instances, even more than upon statements made by the retailer, manufacturer or distributor.

Having voluntarily involved itself into the marketing process, having in effect loaned its reputation to promote and induce the sale of a given product, the question arises whether respondent can escape liability for injury which results when the product is defective and not as represented by its endorsement. In voluntarily assuming this business relationship, the respondent Hearst has placed itself in the position where public policy imposes the duty to use ordinary care in the issuance of its seal and certification of quality so that members of the consuming public who rely on its endorsement are not unreasonably exposed to the risk of harm.

Even though Hearst is not in privity of contract with those who, relying on its endorsement, purchase the products the company endorses, does not mean Hearst is relieved from the responsibility to exercise ordinary care toward them.

121. 81 Cal. Rptr. 519 (1969).

122. *Id.* at 521.

123. *Id.* at 524.

Privity of contract is not necessary to establish the existence of a duty to exercise ordinary care not to injure another. However, such a duty may arise out of a voluntarily assumed relationship if public policy dictates the existence of such a duty.¹²⁴

The *Hearts* court did not speak of imposing liability in terms of an express warranty. Rather it analyzed the statements made, made determinations about the intent of the parties, and using the full panoply of tort and contract theory, determined to impose liability. Where an information provider expressly giving its seal of approval or its guarantee, then it should be held to the consequences of its words. Parenthetically, it should be noted that a seal of approval is understood and should be treated differently from general expressions about the quality of one's own product. A later section will deal with that issue.

2. *Demonstrations—What Do They Show for Published Information Content?*

A second area where express warranties should arise in Published Information Content are for samples, models, and a new cousin of these concepts, the demonstration. Section 2-313(1)(c) of the express warranty section of Article 2 provides that “[a]ny sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.”¹²⁵ As the Official Comments make clear, “[t]his section includes both a “sample” actually drawn from the bulk of goods which is the subject matter of the sale, and a “model” which is offered for inspection when the subject matter is not at hand and which has not been drawn from the bulk of the goods.” That is, in goods, one may be shown a representative sample of bulk goods with the intent of giving a fair representation of the goods or be given a model that that is offered for inspection. Where information is likewise sold using samples and models, there is no reason not to impose express warranty liability on the provider. In information, however, the far more common course is to present a demonstration.

A demonstration perfectly fits with the sample or model Article 2 idea. A demonstration is a version of a portion of the database or information that is used to allow the licensee to decide whether to enter into an access contract. A number of things may well be different about a demonstration. First, a demonstration may have a sample database of 10 entries, when the entire database has millions of entries. This means that the user cannot reasonably draw conclusions about the performance of the actual database and related software based on searches performed with the demonstration.

124. *Id.* at 522 (emphasis added, citations omitted).

125. U.C.C. § 2-313(1)(c) (1997).

Secondly, the licensor is likely to review the contents of the sample demonstration database to ensure that it is completely accurate. This is easily done for a sample of, say 10 records. However, both the user and licensor may know that the actual database of millions of records will statistically contain thousands of errors that may be impossible to detect and/or correct. The inability to detect and correct errors is clearest in the case of a third party database. One may know that the New York Times contains libels, mis-printings, incorrect prices in advertisements, wrong facts in stories, and even wrong sailing times for ships, yet, the users and the licensor demand that the New York Times on-line be the original error-ridden version that is published in print. Similarly, a Department of Motor Vehicle database, particularly one from ten years ago, may contain numerous errors. However, the online vendor has little, if any, ability to detect specific errors, let alone the correct information in the database. Add to that the fact that like the New York Times database user, the user will demand, and should have the right to demand, that the error-ridden motor vehicle database be presented "as is" or face a claim that it has breached its express warranty that the database was the official motor vehicle database. If a demonstration of the motor vehicle database has dummy records or records known by the licensor to be correct, it is not fair to ask the licensor, to be forced to warrant that the totality of the actual database be of a like quality based on a demonstration diskette of the database. Especially when this is based on the database supplied with the demonstration.

This is not to say that some kind of express warranty should not arise from demonstrations. After all, there are affirmations about the information and they clearly can be the basis of the bargain. Article 2B, however, contains a special Section, 2B-402:

(2) A sample, model, or demonstration of a final product which is made part of the basis of the bargain creates an express warranty that the performance of the information will reasonably conform to the performance illustrated by the model, sample, or demonstration, taking into account such differences between the sample, model, or demonstration and the information as it would be used as would be apparent to a reasonable person in the position of the licensee.¹²⁶

The changes to the existing Article 2 language are small but extremely significant. The section recognizes a new category, demonstrations. It then creates an express warranty from the demonstration, but requires the "taking into account such differences between the sample, model, or demonstration and the information as it would be used as would be apparent to a reasonable person in the position of the licensee." In this way, Article 2B's provision draws a fair line—it imposes liability

126. U.C.C. § 2B-402 (Proposed Draft, June 18, 1997).

on the licensor for a demonstration, yet seeks to prevent unreasonable warranties being drawn from demonstrations.

3. *Summary: The Express Warranty Test for Published Information Content—the Current 2B Test Needs a Change*

It seems logical that if a vendor guarantees a quality about its service or product, then it should logically be held responsible for its words.

However, more needs to be said in Article 2B. In sales transactions, law, there has been a tendency of courts to see if the claim is one involving a defective product and if the damages alleged are economic, then to find that the matter must involve a breach of express warranty as to the goods. Importing such law wholesale into Article 2B would lead to results that would contradict a large number of decisions that have denied liability for economic damages for errors in Published Information Content.

Examples abound of statements routinely made by publishers and authors that if they were made in the goods area could well lead to a finding that an express warranty had been given. There are books that proclaim that they contain the “truth behind the Kennedy assassination,” the “real facts behind the death of Princess Diana,” or “the complete guide to birds,” “the authoritative reference,” “guaranteed blockbuster movie” and similar statements. The First Amendment gives breathing room to Published Information Content so that these kinds of statements are not found to be the basis of liability on the publisher or author.

Of course one might be able to imagine that such statements are mere “puffing” or opinion, and therefore do not create express warranties. However, puffing defenses are very fact intensive and, thus, are poor candidates for summary judgment; that is, the cost of winning can be very high. As the court noted in *New York Times v. Sullivan*, the mere threat of suit and the costs of defense, even where the publisher or author might win, impose too chilling an effect on the right of free speech to be permitted. Occasional misstatements must be permitted in order for freedom of speech to be a viable right.

In addition, there are formidable obstacles to formation of a coherent express warranty that are not present in goods law. There is the question of which statements about quality a vendor should be held liable given that the inherent nature of Published Information Content is that it can change so frequently. Currently, existing sales law is built on a one-way model of sales transactions that do not fit well in the complex relationships that form an interactive Published Information Content service. Finally, courts dealing with inaccurate information have denied liability even where there is a clear and reasonable reliance on the accu-

racy of the information, in order to protect the values of protecting the free flow of information and a robust debate.

The present draft of Article 2B attempts to highlight this tension in its first sentence of Section 2B-402(c):

This section does not create any express warranty for published informational content, but does not preclude the creation of an express warranty for published informational content under other law or the creation of an express contractual obligation.¹²⁷

The sentence basically concludes that an express warranty can be found for Published Information Content if one can find a case "under other law" that has declared the statement to be an express warranty. The problem with this interpretation is that there are no lines of cases under "other law" that talk in terms of express warranties. I would propose a better formulation of the issue, by suggesting that the first sentence of 2B-402 be changed to read:

(c) This section does not create any express warranty for published informational content but does not preclude the imposition of liability under other law or the creation of an express contractual obligation.

The changes in the language of the first sentence of Section 2B-402(c) are small, but better capture the law in this area. There is no history of express warranties being imposed on Published Information Content products. The current version of Section 2B-402(c) seems to invite courts, therefore, to create this new law of express warranty for Published Information Content but does not set out any factors or give any guidance to the courts on how to form such a body of law. A better approach is simply to point directly to that other law. There are two clear areas in that other law. The first is the law of negligent and actual misrepresentation and fraud. This law is set forth in the numerous cases involving Published Information Content and there are clear lines between those cases where liability is imposed and those where it is not. The other law is the general law of contract. In information, where the information changes over time, and the license is the contract, it seems the better route to let the entire body of contract law determine when a licensor has made an express obligation, what the nature and scope of the commitment is, and whether other factors, such as First Amendment-like concerns, must override the normal tendency to find liability for breach.

Having dealt with the first sentence of present Section 2B-402(c), the question is "Is the second sentence of Section 2B-402(c), dealing with remedies for express warranties in Published Information Content, acceptable?" The short answer is "almost;" a discussion of the longer answer follows.

127. U.C.C. § 2B-402(c) (Proposed Draft, June 18, 1997).

D. REMEDIES FOR EXPRESS WARRANTIES NEED ALSO TO FIND
THEIR OWN

Having understood that express warranty-like responsibility is derived from the published information providers in certain limited circumstances, the question next is "Should the Article 2 remedies be permitted for breach of the warranty." Again, there is a unique role that Published Information Content plays in our society. The imposition of appropriate remedies needs to be limited in a manner that takes into account this unique role. Before reviewing some of those limitations, a review of why Article 2 remedies do not neatly fit the information model should be discussed.

E. REMEDIES—THE DEFECT IS INHERENT

Anderson on the Uniform Commercial Code makes a considerable point of distinguishing between "product" liability and "products" liability. He explains it this way:

In the preceding section and in this text the term "product" liability is used rather than the plural form "products liability." It appears preferable to use the singular form in view of the fact that the defendant is not being held liable with respect to all defendant's products or to a product generally but only as to one particular item with proximately caused the harm to the plaintiff. Where the problem is that of the liability of the manufacturer or seller for violating governmental standards, "products" liability might be appropriate, but an injured plaintiff is only concerned with the one item, or the "product" which causes the plaintiff harm.¹²⁸

This statement conveys a crucial assumption that underlies the remedies formula in Article 2. Article 2 assumes, as does strict tort liability, that the definition of defect is something that typically affects only this item. This means, while this car may have a defective axle because an air bubble was introduced into the mold during manufacture, other copies of the same car will likely not have that defect. The usual remedy for this breach of warranty is the cost of the repair or replacement of the axle.¹²⁹ Strict liability in tort in particular (but express warranty remedies as well) are part of the "seamless web" of product liability. Remedies have been consciously fashioned, as a matter of social engineering, to spread the cost a catastrophic damage visited upon a random buyer among all buyers through a slightly increased price. The remedies for breach of express warranty in goods is built on the assumptions that: (1)

128. 3 ANDERSON ON THE UNIFORM COMMERCIAL CODE 16 (3d ed. 1995 & Supp. 1996).

129. See generally 1 J.J. WHITE AND R.S. SUMMERS, UNIFORM COMMERCIAL CODE 554-55 (4th ed. 1995); *Tartar v. MonArk Boat Co.*, 430 F. Supp. 1290 (E.D. Mo. 1977), *aff'd*, 574 F.2d 984 (8th Cir. 1977); *Clark v. International Harvester Co.*, 581 P.2d 784 (Idaho 1978).

the cost of making the product conform to the express warranty, or of cover to allow the buyer to gain a defect-free product, is small compared to the cost of the normal transaction; and (2) a breach of the warranty occurs in only a few copies of the product and can be fixed by normal repair or replacement. This assumption breaks down when it comes to Published Information Content.

The problem in Published Information Content is that if there is a defect in one copy of the information, there is likely to be that same defect in every one of the millions of copies that exist or are created in the future. This can make the imposition of normal warranty damages in Article 2 an unreasonable remedy. Unlike goods, each copy must be manufactured from physical raw products information which, can simply be flawlessly copied. In information, defects are almost assured to be part of every copy. Thus catastrophic liability has no unaffected users over which it can be spread. Similarly, unlike goods, information is often intended and often is copied and incorporated into information products downstream. Imagine a lawyer who downloads a copy of a case from WESTLAW in which a portion of text from another case has negligently been introduced. The lawyer then quotes that language in a brief to a court and posts the brief on the internet. Other lawyers read the brief, and quote it in their law review articles and in their own advice to clients. Assume that the WESTLAW agreement permits users to download cases and use short quotations in their works to others. In this way, WESTLAW could be held to know and intend that their are certain third parties who can also rely on its express warranties. Assume that WESTLAW somehow is held to have made an express warranty as to the information content. How is the manufacturer, once it discovers the defect, going to recall, repair, replace, or even notify all users of all instances where its defective information lies? In goods the vendor can take physical possession of the goods, repair or replace them and be assured that its has done a complete repair and ended its potential damages. In information, no one, not the manufacturer, the original lawyer, or the website operator can perform this function. This means that liability can grow very quickly without being able to be ended.

This is, again, not to say that no remedy should be had against WESTLAW, only that the Article 2 express warranty formulation may not be appropriate.

F. REMEDIES—THE ARTICLE 2 FORMULA AT WORK

In goods, if a item is defective, the value of the defective good is diminished approximately relative to the size of the defect. That is, normally, if there is a small scratch on the hood of a car, the car's value with the defect is almost the same as without the defect. Similarly, if the de-

fect is a major crack in a major component, like the engine, the value of the car is greatly diminished. This is because the value of a defective good as delivered does not affect the remainder of the value of the good which is still used and usable by the buyer.

In information, this assumption may not hold. For example, if one uses LEXIS/NEXIS extensively, and 1% of the words are misspelled, then the value of the defective product may be just slightly less than the value of the delivered product. On the other hand, if you are the same subscriber using LEXIS/NEXIS for the first time and are searching for a case, and the search word in that case is the one word that is misspelled, the case will not be found. If that case is the controlling case in your jurisdiction, then value of the service as delivered versus as promised (assuming LEXIS/NEXIS, for example is held to have made an express warranty by stating in its brochures that it can search every case in your jurisdiction), is enormous. That is, in information, the equivalent of a scratch on the hood, a misspelled word, sometimes has little effect and sometimes can have catastrophic effect, even to the same user.

To be fair to the current draft of Article 2B, the vast majority of these non-proportionate damages are consequential damages and Section 2B-707 explicitly excludes the award of consequential damages in breaches involving Published Information Content. Nonetheless, the fact that differences in value in information may be greatly affected by errors that are objectively very slight, argues against a simple importing of the remedies from Article 2.

G. REMEDIES—THE COST OF COVER/PRIOR RESTRAINT

For the most part, once an information provider is found to have made an express warranty, the formula of Section 2B-709(a) should work:

(1) as [direct] [general] damages, the value of any payments made or other consideration provided to the licensor for performance that has not been rendered, plus

(c) if the licensee has accepted performance from the licensor and not revoked acceptance, the present value, at the time and place of performance, of the difference between the value of the performance accepted and the value of the performance had there been no defect, not to exceed the agreed contract fee or other contractual consideration required for the performance; and

(2) the present value of incidental and consequential damages, as permitted under the agreement or this article, resulting from the breach as of the date of the entry of judgment.

There are two sets of issues with the formulation that the damages create as an analogue to the standard formula from Article 2—the difference between the value of the product as delivered and as promised—

plus incidental and consequential damages as permitted by the agreement or under the U.C.C. The first deal with the difficulties, some of which plague the goods context also, with applying the formula to particular fact situations. The second deal with cautioning courts that certain kinds of remedies that might be appropriate in the goods context would violate the principles that underlie the law of information. To cure this later set of issues, there should be a small phrase change to the present proposed Section 2B-402.

In the goods context, the courts have long struggled with the issues of when to measure the market value of the goods as they were promised. This issue becomes extremely complex in information. Where a good has a latent defect that inspection would not have revealed, does the buyer get the measure the value of the goods when the defect is discovered or when the good was delivered? In a situation where the defect is so significant that the buyer must reprocure the goods, the issue becomes critical. For example, a CD-ROM of credit information contains, among its millions of reports, a incorrect report of a bankruptcy by a business. Assume further that the provider has guaranteed the 100% accuracy of the service, so that a clear express warranty exists. The defect clearly exists at the time of delivery. If the user discovers the inaccuracy on its first search, it might well conclude that the CD-ROM had no value and so the difference between the CD-ROM as delivered and as promised was the entire contract price. Would it matter if the error were discovered only after 1000 access to the database, and after the user had based millions of dollars of correct lending decisions on the information of the service? Would it matter if the provider had issued a corrected CD-ROM, but the user had chosen not to purchase the newer version of the CD-ROM? Would it matter if the provider had issued a correct initial copy of the CD-ROM and only later caused the error to appear in an update? These issues are clearly harder than those in goods, but are analogous to a latent defect in a good discovered after a lengthy use of the good. It seems proper that since trust in the accuracy of the entire product is relevant, that the court would distinguish between a defect found on the first, versus the 1000 search. This result would not come from goods law cases, but from a new law of remedies in information warranty law. The question of whether a later version that corrects the defect is relevant is harder. Unlike goods, information user can reasonably be expected to replace its CD-ROMs with newer versions and agreements typically limit liability to the latest version. The issue becomes more complex if the user has purchased the older and newer version and is using both and happens to access the old, erroneous information. In the goods context, it does not matter that a the user owns two copies of the same good, each carries an independent warranty. Obviously in information, the reverse holding must be made, as information is constantly under correction and

the provider is justified in relying on the fact that the user will only rely on the latest version even if it has a license to use the older version. To hold otherwise will force providers to limit every license to a CD-ROM to a limited period of usage. Such an unnecessary limitation should and can be avoided.

The issue goes completely beyond goods cases when the incorrect information is contained in an online or internet service. There, the question is when is delivery? When the user gets first gets access to the service? That would be the closest analogy to the goods cases, but is clearly not the proper time. One could set it as the time when the user downloaded the report. However, that would be completely unfair where the user only looks at the report months later when the online database has been corrected.

The issues are no less troublesome when the court looks to the market value of the service. Does the court look to the value of the defective product, given the fact that no database of 1,000,000 records can be completely correct, even if technically warranted as such, and if compared to the standard of the industry and in line with the expectation of users, this database is far more accurate than any substitute?

Finally we ask, "Does the court look to the value of the product as of the date the access was first delivered, or the value of the database at the time the defect was discovered?" Unlike goods, the value of database can actually rise over time given the faith that users have in the vendor and the accuracy of its data. That is, the online service, when a database is paid for on a monthly basis, does the court only look to the value paid for the month the defect is received, the month downloaded, the month used, or the month the defect was discovered, or to the total consideration paid under the contract? Does the court deduct from the consideration the value the user otherwise can or has made of the database?

All of these differences argue that the language of Article 2B must alter the normal calculation of express warranty remedies to permit courts the flexibility to account for these problems.

1. *The Prohibition Against Unusual Remedies*

While White and Summers argue that "in our view, Sections 2-713 and 2-712 on the one hand and 2-714 on the other are mutually exclusive"¹³⁰ and therefore that Section 2-714 ought to state the exclusive remedy formula for breach of an express warranty, courts have occasionally given other relief. Care must be taken to warn courts that some of these unusual forms of relief could violate the First Amendment or at

130. 1 J.J. WHITE AND R.S. SUMMERS, UNIFORM COMMERCIAL CODE 551-52 (4th Ed. 1995).

least the state law values inherent in the free flow of ideas that underlies the same public policy as the First Amendment.

Two examples will suffice. In *Colorado-Ute Electric Association v. Envirotech Corp.*,¹³¹ the court found a breach of an express warranty related to air pollution control equipment. Given that the equipment was unique, large, and complex, the court ordered the buyer to specifically perform its contract, rather than simply give money damages for the difference between the value of the goods as delivered and as warranted. In the Published Information Content area, such a precedence would be dangerous. Almost every information source is unique in some manner. Often the cost of finding and correcting an error in a database, for example, can amount to millions of dollars whereas the cost to the individual subscriber is but a few dollars. This market result reflects the fact that goods are basically proportionate in cost to their raw materials, but information has almost a zero marginal cost of production. Therefore, unlike goods, each copy of the information reflects a small fraction of the cost of its raw materials. Thus, there may be a temptation for courts to order specific performance, that is correction, instead of a nominal refund. Such orders of specific performance would amount to forcing the unwilling seller to perform services in the future without compensation. Further, where the injunction is not for specific performance but for an injunction against future dissemination of information, the injunction would be a prior restraint of speech, forbidden by the First Amendment. Thus, outlying specific performance goods cases must be carefully scrutinized before being applied in the Published Information Content area.

Similarly, there are cases where punitive damages have been granted in defective goods cases. Again, in these cases it is sometimes hard to distinguish whether the punitive damages are due to a tort liability or an express warranty breach.¹³² In any case, punitive damages for incorrect Published Information Content would raise issues that the Supreme Court in the *Sullivan* case had highlighted as forbidden under the First Amendment in the defamation area.¹³³

131. 524 F. Supp. 1152 (D.C. Colo. 1981).

132. Cf. *Tratchel v. Essex Group, Inc.*, 452 N.W.2d 171 (Iowa 1990); *Wheeler v. General Tire & Rubber Co.*, 419 N.W.2d 331 (Wisc. Ct. App. 1987).

133. See generally, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

2. *Summary: The Remedies for Breach of An Express Warranty for Published Information Content—the Current 2B Test Needs a Change*

The second sentence of the present draft of Article 2B attempts to formulate remedies for express warranty breaches in Published Information Content by importing the Article 2 remedy formula, wholesale:

If an express obligation in contract is established for published informational content and that obligation is breached, the remedies of the aggrieved party arise under this article.¹³⁴

As discussed above, the general formula for breach of a goods express warranty might appear at first to be a good beginning for a remedy formula for Published Information Content. But, similar to the change above, the second sentence of Article 2B should be dropped and a new section should be added to the warranty remedies section of Article 2B. Section 2B-709(e) should read:

If an express contractual obligation is established for published information content and that obligation is breached, the remedies of the aggrieved party arise under this article.

Again, the changes proposed to the present draft of Section 2B-402(c) are small but significant. The current sentence seems to indicate that once an obligation, an express warranty—has been found for Published Information Content, then the normal Article 2 warranty remedies are available, without qualification, under Article 2B. As the above discussion has noted, the importation of such law, without qualification could lead to bad results. The proposed language makes it clear that the general body of contract law remedies, and the limitations that have been build into that common law with respect to Published Information Content, must be reviewed by the court after finding a breach of an “express contractual obligation.”

VI. CONCLUSION

If one were a natural law proponent and were to sit in a room and ask, “Should express warranties in Published Information Content be formed by any statement that is the basis of the bargain that is related to the quality, description, or title of the information, and should breach of that warranty be subject to the remedy of an award of the difference between the value of the information as delivered versus as warranted?” one would likely answer “Yes, it seems logical.” However, once one came out of the room, reviewed the extensive case law, one would be forced to conclude that liability should not be imposed on providers for inaccurate Published Information Content in the same manner as goods suppliers.

134. U.C.C. Article 2B (Proposed Draft, June 18, 1997).

Information fills a vital role in the our society related to the free flow of information and the promotion of a robust debate. One would have to say that express warranty law for goods does not form a firm foundation for the development of a law related to statements made about the quality of Published Information Content. The courts should look to liability imposed by other law and to general principals of “express contractual obligation” in assessing the impact of statements about an information products. This article has proposed modest changes to Article 2B’s language to accomplish this result.