

UCC Article 2B

Some Preliminary Comments on a New Issue for the Library Community

by Robert L. Oakley

Revisions to Article 2B of the Uniform Commercial Code (the UCC, governing contracts across all 50 states) will be of critical importance to us as librarians as we rely more and more on licenses as a mechanism for the acquisition of information.

I will begin with a brief description of Article 2B of the UCC, which deals with electronic information, then review five issues that are of particular concern to librarians as 2B is being drafted.

The existing Article 2 of the Uniform Commercial Code governs contracts for the sales of goods. During the centuries over which contract law developed, most contractual transactions were just that: a sale of crops from a farmer to a store owner, a sale of raw materials to a manufacturer, a sale of a car or a house to a consumer. And in that type of economy—based on the sale of tangible objects—common law contract and eventually the Uniform Commercial Code worked just fine. But a number of years ago it began to be recognized that our economy was no longer based simply on the sales of goods; the economy was rapidly evolving into one that was highly dependent on contracts for intangibles—the creation, production, or access to information. Issues of contract formation, performance, and warranties that worked for the sale of tangible products didn't work the same way when networks were involved or when the issue related to intangibles such as the development of software or the licensing of information.

As a result, it began to be felt that a new commercial law governing such transactions was needed if the information economy was going to flourish. A drafting committee was appointed with Professor Ray Nimmer as the Reporter. The Committee began its work four or five years ago, meeting several times a year to develop the proposal for a uniform state law on the licensing of information. Since Article 2 dealt with contracts for the sales of goods, contracts for the licensing of information were inserted right after it—hence the designation Article 2B.

The information industry has been represented at the drafting meetings throughout the process, both through its trade association, the Information Industry Association (IAA), and through the presence of a number of individual member companies. Until the last few months, however, there has been little or no representation from consumer groups or the library community.

Having worked on this legislation for several years, the drafters now believe the process is nearing a conclusion. The draft was presented to the annual meeting of the American Law Institute (ALI) last spring. At that meeting, one of the members raised the question about the interface between this proposal and copyright—in other words, can copyright owners use a contract mechanism to change the balance of rights they have under the Copyright Act? After some debate, the group passed a motion to the effect that in mass market licenses (more on that concept below), a contract term that is inconsistent with the applicable copyright law is void. Such a provision would make it harder for

libraries or individuals to contract away their fair use rights or other rights granted under the copyright act, and I supported the motion.

When that same matter was presented to the National Conference of Commissioners on Uniform State Laws (NCCUSL) meeting in July, after some sustained lobbying by the industry, the Conference respectfully asked the ALI to reconsider its decision, based on a freedom of contract notion, and asked the drafters to remain neutral on the issue of whether or not the Copyright Act should pre-empt such contracts.

Formally, that's where matters stand at the moment. There was another drafting committee meeting in Minneapolis at the end of September where some of these issues were discussed at length. On the pre-emption issue, the drafters remained neutral by simply inserting a section that said, in effect, "any section of this Act that is pre-empted by any applicable federal law, is pre-empted." That doesn't get us very far, frankly, and it leaves all the other issues unresolved.

AALL feels libraries should not lose their rights through mass-market licenses unless they are clearly on notice that that is what they are doing.

Let me then highlight some of the issues that I have found in the draft as it stands now. Some of these have been debated and discussed; some of them haven't.

Before I go through the issues, it is necessary to provide a little bit of detail about what the legislation

covers. The law, like its Article 2 counterpart, does two things. First it talks about the formation of a contract—what does it take to constitute a valid agreement between the parties? Second, it supplies some default terms in case the contract is silent or omits some key elements. Such default terms might include terms about warranties, what constitutes performance of the contract, and remedies in case one of the parties defaults. I have uncovered problems in the formation section, some of the default terms, and perhaps rather significantly, the overall scope of the law. Let me walk through those concerns with you.

Mass-Market Licenses

The heart of the controversy around these proposals is in the section on formation. This proposed state legislation endorses the creation of what the drafters call mass-market licenses. Controversy has surrounded the issue of shrink-wrap licenses for the last several years. Shrink-wrap licenses are the licenses that typically accompany a piece of software and state that if the purchaser opens the shrink-wrap or breaks the seal on the software envelope, he/she is bound by the terms of the license whether or not he/she had a chance to read the whole agreement. Most of the courts that have reviewed such contracts have concluded that they are not valid because they do not reflect a true meeting of the minds between the parties since the license

couldn't be reviewed and agreed to before the software was purchased. One court—the seventh circuit—has endorsed such licenses, essentially because once the box was opened the purchaser could have rejected the terms of the license and taken the software back for a refund.

The 2B drafting committee has endorsed shrink-wrap licenses. Further, it has broadened the concept in recognition of the need for clickable licenses for parties to be able to create valid contracts over the Internet. Calling them by the more general term *mass-market licenses*, the committee has stated that a valid manifestation of assent to a license may be found with the click of a mouse on a button that says "I agree," or other words to that effect, so long as the party had an opportunity to review the terms and whether or not the party actually ever had the terms on the screen.

Such validation of shrink-wrap and other mass-market licenses is obviously fairly controversial. But the larger issue for libraries comes up in the context of whether or not there are any limits to what may be agreed to. Most of the publishing industry believes that so long as the terms are not unconscionable—that's a pretty high standard—they should be valid. But this is where the McMannis motion and the library community come in. The library community has been worried that individuals and libraries might inadvertently be signing away fair use rights, interlibrary lending rights, preservation rights, or other rights granted to them under the copyright act, without even knowing it.

In general, AALL has tended to think that although it wasn't particularly comfortable with shrink-wrap licenses, it could understand the need for clickable licenses on the Internet. On the other hand, the library community has thought that if such licenses are necessary for electronic commerce, then people ought not to be bound to terms that remove rights they have under copyright unless they at least know that's what they are doing and agree to it. As a result, AALL has tried to argue that if mass-market licenses are going to be validated, when licensees give up rights granted to them under the Copyright Act, at the very least it should be called to their attention that that is what they are doing, and they should have to separately indicate their agreement to such a term. This idea can be thought of as similar to the car rental contracts where the renter has to specifically indicate an intention to waive certain insurance coverage. On the other side, the information provider industry is worried that such a requirement would make the creation of such a contract unduly cumbersome. AALL thinks that's a minimal requirement for someone to give up rights that are expected under copyright.

That is the first issue—mass-market licenses. It is of concern to librarians both because it will affect the rights of our users and also because the way "mass-market" is defined in the statute, it will also apply to some library transactions. AALL has felt that libraries should not lose their rights through this kind of mass-market license unless they are clearly on notice that that is what they are doing.

Standard Form Contracts

The second issue is related. Another section of the statute covers "standard form contracts." This is the more typical way in which libraries obtain licenses today—although the clickable license is clearly the way for the future. A standard form contract is what happens now when a vendor presents the buyer with a form and says "that's it. Sign." Suppose you do and you later learn that the fine print precludes your users from making fair use copies of the information in the database. Or suppose it says that under no

What are uniform laws? And how are they created? And what is the Uniform Commercial Code?

The need for state laws that are essentially the same across all 50 states is a by-product of our federal system of government. The U.S. Constitution enumerates certain powers for the federal government and leaves everything else to the states. Some examples of things that are left to the states include family law—marriage, divorce, adoption, child custody, and so on—most criminal law, the laws pertaining to wills, trusts, and estates, and most commercial law.

In the early years of the nation, these areas and others developed largely through the common law method of individual cases resolving individual disputes and, in some cases, by statutes adopted separately by the different states. With 50 different court systems and 50 different state legislatures each taking a different approach to these different topics, it eventually became very difficult to understand the law, or transact business, or settle an estate, or deal with custody issues where more than one state was involved. In any single state, the law could seem settled and rational, but when a business transaction crossed state lines or a child custody dispute involved two states, the differences in the laws made everything difficult.

As a result of these concerns, it was decided that where possible it would be a good idea to unify the laws of the 50 states in certain key areas. Since commerce between and among the 50 states was so important to the future of the nation, among the most important areas needing attention were the laws affecting the way business is conducted. These laws included the laws related to contracts, the laws related to banks and banking, and the debtor-creditor laws of secured transactions. To make a very long story very short indeed, we eventually wound up with the Uniform Commercial Code governing all of these different types of business transactions and some others. Article 2 of the Uniform Commercial Code deals specifically with contracts for the sales of goods.

How do we get a Uniform code? The draft laws are major efforts to harmonize the existing laws of the 50 states. They are written as a joint effort by two different groups: The American Law Institute, which is a prestigious body, primarily of scholars and legal academics, and the National Conference of Commissioners on Uniform State Laws (sometimes known as NCCUSL), which is equally prestigious and has representatives from each of the 50 states. They go through an iterative process that usually takes years to arrive at a proposed law that can be accepted by as many states as possible. The drafting is done by a committee whose work is reviewed by each of the two parent groups in turn. When everyone is in relative harmony over the draft, it is finally adopted by the Commissioners as a proposed Uniform Law and sent to the states for adoption.

Because of the length and complexity of the process, because of the care with which it is approached, and because of the inherent prestige of the parent organizations, most state legislatures approach such proposals with a good deal of deference. As a result, many of the proposals have, in fact, been widely adopted. The Uniform Commercial Code has been adopted in all 50 states.

circumstances may any part of the information contained in this database be shared with another library. You may well be willing to agree to such a term, but AALL has argued that such terms must be clearly brought to the attention of the licensee so that you are not later surprised by such limitations.

Those two issues are related to the creation of the contract in the first place. The next issue is the use of the statute to validate a potentially controversial contract term. Strictly speaking, it shouldn't be necessary to have such a provision in the law since an agreement between the parties is presumptively valid unless something is unconscionable. Presumably, then, the drafters have felt that someone might argue that such a term is unconscionable, and they want to remove that possibility by validating it legislatively ahead of time.

Impact on First Sale

This issue is related to first sale, on which libraries are so dependent. Under the Copyright Act, the First Sale doctrine allows libraries or other owners of a copy of a work to transfer ownership or possession of the copy. It permits libraries to lend copies of things they purchase, and it permits individuals to lend or give away or even sell copies of what they have purchased.

Section 503 of the draft is very difficult to parse, but it seems to say that a contract term that precludes a transfer is valid and enforceable. Moreover, such a term could be part of a mass market license and never have come to the attention of the purchaser. As a result, an individual user might download something, pay the price, test the program and decide he/she can't really use it. But he/she can't give it away either. A book could be passed on to a friend. Under the terms of a license, however, the software purchaser may be precluded from doing so. Similarly, a library might buy an item—say a CD-ROM directory—and replace it a year later with a newer edition.

If it were a book, the library could sell the old one in the library booksale. A license term authorized by Section 503 would preclude the library from doing that—or even from lending the item as part of the collection.

Impact on Fair Use

The next issue deals with one of the default terms that are supplied by the Act. These are terms to which the licensee will be bound under the terms of the Act, if the contract is simply silent on the issue. The purchaser might not even be aware of it unless he/she were familiar with the statute. A contrary contractual provision will override the statute, as always, but the licensee needs to be aware of what is in the Act in order to know that he/she might want a contrary provision.

Section 614 of the draft deals specifically with "access contracts." These are types of contracts that will be of great interest to libraries, since they are defined as being "a contract for electronic

access to a resource containing information, a resource for processing information, a data system, or other similar facility ..." (See sec. 2B-102 (1).) That is our bread and butter. Those are the kinds of contracts we deal with now on a very regular basis.

Section 614 says first that except as otherwise provided by the contract, information obtained is free of any use restrictions except restrictions already covered by the intellectual property rights of the licensor. It goes on to say, however, "The licensee may make a transitory copy for purposes of viewing or other agreed use only but may make a permanent copy of the information accessed only if authorized by the agreement." I read that and I wonder whatever happened to fair use. I wonder about library preservation. This provision makes it clear that one can't take basic copyright rights for granted. If this legislation passes and a library wants the ability to allow its users to make copies, or to make an archival copy for preservation, the library needs to be sure that it looks for and puts such rights in the contract.

Scope of the Legislation

Finally, the last issue concerns the overall scope of the legislation. It is very broad indeed, maybe broader than we are comfortable with. Section 103 says that the Article covers "licenses of information and software contracts." "Information" is defined to mean "data, text, images, sounds, and works of authorship, including computer programs, databases, literary, musical or audiovisual works, motion pictures, mask works, or the like, and any intellectual property or other rights in information."

That definition is broad enough to include everything that is now covered by copyright, including books and other more traditional tangible forms of information. Under this legislation we can easily envision the licensing and shrink-wrapping of books. In the market place, that is not a very likely scenario. But it is possible. More important, perhaps, is the inclusion in this definition of the word "databases." It is clear that this bill is yet another way for the publishing industry to find a means to protect databases. By now, it is well known that databases enjoy only limited protection under copyright, and some may not be protected at all. It may yet be that some form of database protection bill will still pass Congress, but that is by no means certain. In the meantime, publishers are clearly looking to contract law to provide them with the protection they want.

Speaking very personally, now, I am not yet sure how I feel about that. Law librarians all opposed the database protection bill last year because it was over-inclusive and did not carve out any reasonable exceptions for libraries or education. On the other hand, I do understand that the industry is investing millions of dollars in the creation of databases that are valuable to us. I have some sympathy with the notion that even while I want to assure our users of the right to access and make fair use of the information in those databases, I can understand that the creator of such a database wouldn't want to see it ripped off and distributed over the Internet without further compensation to the person whose work created the database in the first place. On this issue, I can see that database owners do have a point worth considering.

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