The Legal Report

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Boon or Boondoggle? UCC Article 2B

Gene Lebrun has reason for concern. As president of the private sector U.S. body known as NCCUSL, the venerable National Council of Commissioners on Uniform State Laws, he knows that objectivity is paramount in preserving the Council's continued good name. In recent years, that objectivity has been brought increasingly to question; most significantly in the drafting process for its new software licensing law. Today's ripple of concern may become next year's tidal wave when NCCUSL's version of the licensing law hits state legislatures.

First the background. NCCUSL is the body that drafted the widely admired Uniform Commercial Code (UCC) over 40 years ago. The UCC is the primary source for U.S. commercial law. It was prepared as a non-partisan effort by NCCUSL and the American Law Institute (ALI), and presented to the state lawmaking bodies for uniform enactment, on the rationale that a body of uniform state law was preferred over the likely alternatives: federal pre-emption or disharmony. NCCUSL has remained active, updating each of the articles of the UCC as times and business practices change, while also drafting significant non-UCC uniform laws. UCC Article 2, covering transactions for the sale of goods, is a commercial law mainstay and perhaps the most successful and influential of the various UCC articles. UCC Article 2A, covering leases, was completed in the late 1980s and then enacted by the vast majority of the 50 states between 1989 and 1996. For current versions of the new drafting efforts, see NCCUSL's official page at http://www.law.upenn.edu/library/ulc/ulc.htm.

Software licensing caught the commercial law world unprepared, says Mr. Lebrun. See his May 6, 1998 article, "Who's Writing the New Licensing Law?" at http://www.SoftwareIndustry.org/issues/guide/docs/glebrunww.html;. When UCC Article 2 was written in the 1950s, business transactions were recorded using carbon paper, not email and fax. Personal computers were not yet invented.

Initially, the idea was to make long-overdue revisions to UCC 2. In March of 1995, the committee charged with drafting these revisions recommended a hub-and-spoke approach: essential issues concerning transfers of personal property would be in the Article 2 hub, and issues specific to individual types of transactions, such as the lease of goods, the sale of goods, and the licensing of software and other electronic technology, would be in the spokes. One "hub" issue would be the rules for when consumers and commercial buyers would be bound by standard form contracts.

The software industry objected to this approach. It wanted its own rules for standard form contracts, rather than a general statement of law. Specifically, it wanted to validate what became known as "shrinkwrap" licenses, non-negotiable boilerplate terms and conditions that come sealed inside physical software diskette packages, and which often cannot be read until after the package is purchased. The analogy that has developed online are known as "clickwrap" licenses. The Software Publishers Association and others lobbied to remove software transactions from

the scope of Article 2, and place them in their own article. Thus was born UCC Article 2B.

The two most contentious issues with shrinkwraps were that, first of all, they should arguably not be considered part of the agreed-upon purchasing deal, since they could not even be read until after the purchase was completed. The law is well-established that unilateral terms and conditions issued after a deal has been reached are unenforceable, since there is no "consideration" (i.e., no receipt of an exchange as a condition of accepting the new terms). Second, consumer advocates argued that many shrinkwrap license agreements contained what they considered inequitable terms and conditions, such as a prohibition on the right to pass on to another person the original copy of the software, or a limitation of the manufacturer's maximum liability in the event of system damage to the software's purchase price.

Now in its third year of drafting, UCC 2B has had fourteen drafting meetings. These are multi-day meetings, held at various locations around the U.S. The meetings are open to the public, and observers in attendance are given generous opportunity to present their views. There is even a privately run web site and email list to join. http://www.SoftwareIndustry.org/issues/guide/. The problem, however, is that it takes non-negligible financial resources to attend meetings at one's own expense and to keep up with the drafting progress. Those most able to keep up tend to be advocates for industries with an interest in the outcome, such as the software industry. Those least able to keep up tend to be consumer interest groups, and even the very state law commissions that NCCUSL was created to advise. As might be expected, some of the resulting drafts have been heavily tilted to protecting the software industry and other groups in attendance.

After criticism from ALI and others, some redrafting efforts were made to better achieve balance between the software industry and consumers. However, the perception among some outsiders to the process, and even some insiders, is that the creation of rules for shrinkwrap and clickwrap agreements, and the 2B drafting process that would validate them in all 50 states, has been given over to industry, at the expense of end user interests. James Gleick, founder of the Pipeline ISP, warns in his recent column in the New York Times that "under a proposed change in commercial law, software users could lose not just the right to a refund but also their constitutional rights." He cites egregious examples: users who download Network Associates' antivirus software must 'agree' -- with a click -- that "the customer will not publish reviews of the product without prior consent." The agreement that comes with Microsoft Agent holds that you may not use the interactive animated figures produced by Agent "to disparage Microsoft, its products or services." Even the suggested contract language set out in 2B itself would explicitly allow manufacturers to disclaim warranties: "This [information][computer program] is being provided with all faults, and the entire risk as to satisfactory quality, performance, accuracy and effort is with the user." See James Gleick, "It's Your Problem, (Not Theirs)", The New York Times Magazine, May 10, 1998, page 16, reprinted at http://www.around.com/agree.html.

Steven Newcomb, President of software developer TechnoTeacher, Inc., pleaded with the Chair of the Article 2B Drafting Committee in a letter dated October 27, 1997, "I hope you will do all that you can to make sure that [Article 2B] encourages those who try to provide quality software products and services rather than reinforcing the software industry in its worst practices."

For examples of other variously critical articles, see Dan Gilmor, "Software industry wields fine-print attack", San Jose Mercury News, May 26, 1998, http://www.mercurycenter.com/premium/business/docs/gillmor26.htm; Jonathan Tasini, President, National Writers Union (UAW Local 1981), "What Planet Are You On?: The Working Lives of Writers and the UCC2B Committee, April 1998, http://www.SoftwareIndustry.org/issues/guide/docs/berkjtas.html; and Susan Barbieri Montgomery & Robin Maisashvili, "UCC 2B Could Result In Ambiguous IP Rights", Law Journal Extra!, May 18, 1998, http://www.ljx.com/practice/intellectualproperty/express/051398/revucc.htm

Two powerful industries that have come forth of late with criticisms of UCC 2B have been given substantial incentive to walk away quietly -- by excluding them (in whole or part) from the scope of the new rules. Financial transactions software has recently been exempted from UCC 2B, after financial industry criticism of the confusion that would result from incompatible federal and state regulation. The broadcast and cable community let its feelings be known that "many in our industry feel uncomfortable with 2B as it is presently drafted", March 18, 1998 email from Michael Rose, Co-Chair, Broadcast and Cable Committee, New York State Bar Association, to Professor Ray Nimmer, Reporter for UCC 2B. Soon afterwards, their products, too, were excluded from the scope of 2B.

In part due to these criticisms, Gene Lebrun has been compelled to announce a delay in this freight train. In a May 6, 1998 letter to NCCUSL Commissioners, American Bar Association Advisors, and Other Interested Parties, Mr. Lebrun wrote: "In absence of the opportunity for review and to suggest further changes, unsatisfied parties may elect to oppose Article 2B's enactment. With that in mind, the Conference will not take a final vote by States on Article 2B at its 1998 Annual Meeting. Rather, it will schedule an additional Drafting Committee meeting in early November, shortly after the October ALI Council meeting, to consider any changes suggested by interested parties that will facilitate acceptance of the Article." Final consideration of UCC 2B would be put off for a year, until NCCUSL's Annual Meeting in the summer of 1999. The Article would then be ready for introductions into State legislatures and enactments in 2000.

How will the State legislatures react? Remember, there is tremendous momentum in the U.S. to accommodate electronic commerce, and that especially means the software industry. States are pressured by the Clinton administration from above, which supports prompt consideration of these proposals, and the adoption of uniform electronic commerce legislation by the states. See "A Framework For Global Electronic Commerce", July 1997, at http://www.whitehouse.gov/WH/New/Commerce/read.html. The unspoken threat is that if the states do not act, the power to legislate in this area will be taken away from them and moved to the federal government. States also feel pressure from their neighbors: if they are seen as less accommodative to these industries than their neighboring states, or other countries, then local business activity may quickly migrate away.

On the other side of this coin, end users vote. They also have begun to recognize the lobbying effectiveness of the very technologies that the software industry has brought to life. With privacy, database and copyright brought to the fore as topics of national debate, odds are that the perceived horrors of software licensing are sure to follow. It is a debate that not only can NCCUSL ill afford to lose when it finally presents its Article 2B, for the sake of its continued persuasiveness as an objective advisory body it cannot afford to let it get started.