

## THE TALES THAT ARTICLE 2B TELLS

By Jessica Litman<sup>†</sup>

### ABSTRACT

*Proposed article 2B's description of its own relationship with copyright law is at best confused, and at worst disingenuous. The Preface to Article 2B insists that its purpose is not to create new rights in information or informational works, but only to facilitate transactions in rights deriving from some other source of law. The statutory language, however, contemplates the assertion of rights beyond those provided by any branch of intellectual property law. Ultimately, the Preface appears to contemplate that an enforceable license may be based solely on the fact that the licensor "has control over the source of information that the licensee desires to utilize," without regard to intellectual property rights. Such a rule would be inconsistent with current law, and dubious as a matter of intellectual property and informational policy. It leaves the reader at sea as to which, if any, of the statements in the Preface she should consider reliable.*

Perhaps we should call this the age of disingenuousness. The baby boom generation grew up with the idea that advertisers shade the truth to persuade consumers to buy their products.<sup>1</sup> We have learned that politicians sometimes speak with the intent to mislead.<sup>2</sup> Recently, I have seen some proposed laws that fit right in to the pattern. Laws ought to be immune from the sins of false advertising; after all, if they aren't clear about what it is they seek to do, how likely is it that they will work? But, wise or not,

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1. See generally, VANCE PACKARD, *THE HIDDEN PERSUADERS* (1957).
2. See, e.g., *id.* at 155-207; *United States v. Nixon*, 418 U.S. 683 (1974); *U.S. v. Dean*, 55 F.3d 640 (D.C. Cir. 1995); *Mecham v. Gordon*, 156 Ariz. 297 (1988).

it is easy to point out laws that purport to accomplish one goal while apparently seeking to achieve a very different one. Perhaps it is not so great a leap, after all, to draft proposed laws and explanatory language that seek to convey a misstatement or two about what the law is intended to do.

In 1988, for example, the United States Congress enacted the Berne Convention Implementation Act.<sup>3</sup> That Act sought to avoid an international treaty obligation to establish authors' "moral rights"<sup>4</sup> by claiming, insincerely, that a pastiche of U.S. federal and state laws already protected authors' moral rights,<sup>5</sup> and then providing expressly that the Act would not give any author enforceable moral rights.<sup>6</sup> Ten years ago, that sleight of hand struck some observers as a scandalous departure from legislative morality.<sup>7</sup> Today, it seems less surprising.

Today, it is not hard to identify a number of apparently disingenuous proposals to improve current law that are making the rounds. The legislative history of the Digital Millennium Copyright Act<sup>8</sup> ("DMCA"), for example, is riddled with that sort of thing.<sup>9</sup> The DMCA began as a gleam in

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3. Pub. L. No 100-568, 102 Stat. 2853 (1988).

4. See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 6 *bis*, reprinted in WORLD INTELLECTUAL PROPERTY ORGANIZATION, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (Paris Act, 1971) 177 (1978).

5. See S. REP. NO. 352, 100th Cong. (1988); 134 CONG. REC. H3079, H3082, H3084 (daily ed. May 10, 1988) (remarks of Rep. Kastenmeier and Rep. Berman); *Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 COLUM.-VLA J.L. & ARTS 513 (1986).

6. See Berne Convention Implementation Act, 134 CONG. REC. H3079, § 3 (1988); S. REP. NO. 352, Part III.A (1988); 134 CONG. REC. S14549, 14557 (1988) (citing remarks of Senator Hatch). It was not until 1991 that the United States made a feeble and incomplete attempt to comply with its international obligations under the Berne Convention. See Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (1994).

7. See, e.g., *Berne Convention Implementation Act of 1987: Hearings on H.R. 1623 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 100th Cong. 408, 519-21 (1988) (testimony of Sidney Pollack, Directors Guild of America and colloquy); Jessica Litman, *Amerika Gasshukoku no Berunu Joyaku Kanyu* (Accession of the United States to the Berne Convention), 16 CHOSAKUKEN KENKYU 1 (1989).

8. Pub. L. No. 105-304 (1998). To review the DMCA's legislative history, see, for example, H.R. REP. NO. 551 (1998) and S. REP. NO. 190 (1998).

9. The most notable example in the DMCA's tortured history is the effort to constrain the exercise of the fair use privilege while insisting that the law would do nothing of the sort. Despite repeated assurances in the legislative history and in the language of the bills themselves that the DMCA does not in any way contract the fair use privilege, the bills' anti-circumvention provisions were intended to narrow fair use. The bill's proponents refused to accept any statutory language that would have provided that users could continue to make fair use of copyrighted works despite those provisions. *Compare*,

the eye of the White House Information Infrastructure Task Force, which in the summer of 1994, released a Green Paper draft report<sup>10</sup> that was widely and bitterly criticized for its misleading characterization of extant law.<sup>11</sup> The allegedly minor legal changes that draft recommended have in the intervening four years grown into a 30,000 word neoplasm that appears to have obfuscation as its primary purpose. The kindest thing one can say about such proposed laws is that someone responsible for part of the writing is more than a little confused about the laws' intended effect.

The current version of Article 2B seems to belong to that family, particularly in the relationship it envisions with U.S. federal copyright law. That is, just about the nicest thing I can bring myself to say about Article 2B's apparent relationship with copyright law is that the proposed model law reflects great confusion about that relationship is envisioned to be.

The text of the proposed law speaks of copyright only glancingly.<sup>12</sup> The accounts of the interrelationship between Article 2B and the copyright law appear almost entirely in the Preface to Article 2B and the Reporter's Notes.<sup>13</sup> As the Preface would have it, proposed Article 2B will make *no* new law relevant to contracting in works subject to copyright. That law already exists, the Preface tells us, and has been enforced by the courts. (The Preface cites, here, a number of examples in which courts gave effect to contractual terms imposed by copyright owners on end-users, and care-

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*e.g.*, S. REP. NO. 190, 23-24 (1998) ("The bill does not amend section 107 of the Copyright Act, the fair use provision. The Committee determined that no change to section 107 was required because section 107, as written, is technologically neutral, and therefore, the fair use doctrine is fully applicable in the digital world as in the analog world.") *with*, *e.g.*, H.R. REP. 551, at pt. 2 (1998). *See generally* *Hearing on H.R. 2281 Before The Telecommunications, Trade And Consumer Protection Subcomm. of the House Commerce Comm.*, 105th Cong. (1998) (testimony of Robert L. Oakley).

10. *See generally* INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: A PRELIMINARY DRAFT OF THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1994).

11. *See, e.g.*, Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENTERTAINMENT L.J. 29 (1994); Diane Leenheer Zimmerman, *Copyright in Cyberspace: Don't Throw Out the Public Interest with the Bath Water*, 1994 ANN. SURV. AM. L. 403; James Boyle, *Overregulating the Internet*, WASH. TIMES, Nov. 14, 1995, at A17; Pamela Samuelson, *The Copyright Grab*, WIRED 4.01, Jan. 1996, at 134.

12. Copyright is mentioned expressly in the draft in only three places. *See* U.C.C. §§ 2B-101(27); 2B-101(32)(B); 2B-105(a) (concerning preemption by federal law); 2B-501(c)(2)(B) (Aug. 1, 1998 Draft).

13. *See id.*, Preface at 7-17; Reporters Notes to §§ 2B-103; 2B-104; 2B-105; 2B-107; 2B-111; 2B-112; 2B-201; 2B-206; 2B-208; 2B-307; 2B-308; 2B-310; 2B-401; 2B-501; 2B-502; 2B-503; 2B-506; 2B-507; 2B-615; 2B-617; 2B-618; 2B-702; 2B-708. The details of the accounts have changed with each successive draft, but the bottom line appears to have remained constant.

fully omits to cite any of the cases in which courts held similar or indistinguishable contractual restrictions unenforceable.<sup>14</sup>) That law arose, it would seem, the first time the owner of an intellectual property right decided to distribute information by means of a restrictive license rather than the sale of copies embodying that information; it has now apparently evolved to the point that merely denominating something a license will permit the attachment of a variety of restrictions, even when a transaction in all other ways seems to be a sale. Thus, rather than making new contract law, Article 2B simply recognizes contract law that is already out there, or so the Preface would have us believe.

On examination, that claim seems implausible. It appears to derive either from a misapprehension or a mischaracterization of current law. Since the draft's relationship with copyright law was among its most controversial features, an impressive variety of experts have suggested repeatedly that the drafters got it wrong.<sup>15</sup> The successive drafts have gone through a variety of important changes in the way extant copyright law is characterized, but the bottom line has remained constant. If confusion is to blame, then, it is confusion of the deepest and most tenacious sort.

At times, Article 2B suggests that its substantive terms have been shaped by the constraints that it perceives applicable copyright decisions impose—although it is highly selective, and sometimes misleading, in the decisions it chooses to deem authoritative.<sup>16</sup> At other points, Article 2B concedes that its choices are intended to “push against explicit federal

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14. One example is the Preface's repeated reference to *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996). *See, e.g.*, U.C.C. 2B, Preface at n.18 (Aug. 1, 1998 Draft). *ProCD* is the leading case to enforce a shrink-wrap license, because it is the first case to do so. Before *ProCD*, most courts deemed shrink-wrap licenses unenforceable. *See, e.g.*, *Step Saver v. Wyse*, 939 F.2d 91 (3d Cir. 1991); *Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255 (5th Cir. 1988). Since *ProCD*, the case law has been mixed. *See generally* Mark Lemley, *Beyond Preemption: The Federal Law and Policy of Intellectual Property Licensing*, 87 CALIF. L. REV. 113 (1998); Pamela Samuelson, *Intellectual Property and Contract Law for the Information Age, Forward to a Symposium*, 87 CALIF. L. REV. 1 (1998). The Preface and Reporter's Notes, however, cite none of the cases going the other way.

15. *See, e.g.*, Dennis Karjala, *Federal Preemption of Shrinkwrap and On-Line Licenses*, 22 U. DAYTON L. REV. 511 (1997); David A. Rice, *Digital Information as Property and Product, UCC Article 2B*, 22 U. DAYTON L. REV. 621 (1997); Pamela Samuelson, *Legally Speaking: The Never Ending Struggle for Balance*, 40 COMMUNICATIONS OF THE ACM, May 1997, at 17; Jerome Reichman & Jonathan A. Franklin, *Privately Legislated Intellectual Property Rights: The Limits of Article 2B of the UCC* (Apr. 4, 1998) (unpublished manuscript).

16. *See* Pamela Samuelson, *Legally Speaking: Does Information Really Have to be Licensed?*, 41 COMMUNICATIONS OF THE ACM, Sept. 1998, at 15.

rules insofar as reasonably possible.”<sup>17</sup> Perhaps that’s the reason why Article 2B sometimes incorporates language from the copyright statute into its own definitions, although, as Professor Ginsburg notes, it uses that language in ways that are different and sometimes inconsistent with its use in Title 17.<sup>18</sup>

Article 2B insists, repeatedly, that its purpose is not to create any new rights in information or informational works, but merely to provide a structure to facilitate transactions in rights that derive from some other sources of law. That, of course, inspires the questions: “what rights?” “derived from what sources?” Article 2B offers a handful of different and sometimes inconsistent answers. The Preface mentions copyright law as one such source, indeed the “dominant” source, but contemplates the assertion of rights over material—ideas, facts, information<sup>19</sup>—that the copyright law provides may not be privately owned. The Preface invokes patent law but, again, imagines itself controlling transactions over matter not within the scope of patent. Indeed, Article 2B as a general matter excludes patent licenses (and licenses of “related know-how”) from its coverage.<sup>20</sup> It invokes trademark law, but similarly excludes licenses of trademark rights.<sup>21</sup>

So what is the source of these “informational rights?” Section 2B-102 (27) defines them as including:

... all rights in information created under laws governing patents, copyrights, mask works, trade secrets, trademarks, publicity rights, or any other law that permits a person, independently of contract, to control or preclude another person’s use or disclo-

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<sup>17</sup> Jane C. Ginsburg, *Authors as* 17. U.C.C. Article 2B, Preface at 10 (Aug. 1, 1998 Draft).

<sup>18</sup> See *id.* (“Even though a purchaser acquires a copy of the work, the producer retains rights and control *with respect to various uses of the copy*, including uses that make additional copies or alterations.”) (emphasis added); U.C.C. § 2B-102 (Aug. 1, 1998 Draft) (defining “Copy,” “License,” “Information,” “Published Informational Content,” and “Termination”); Jane C. Ginsburg, *Authors as “Licensors” of “Information Property Rights” under UCC Article 2B*, 13 BERKELEY TECH. L.J. Error! Bookmark not defined. (1998).

<sup>19</sup> See U.C.C. Article 2B, Preface at 5 (Aug. 1, 1998) (“The terms of a license also typically provide for express grant of rights (or permission) *to use information* and express limitations on use.”) (emphasis added); *id.* § 2B-103, Reporter’s Note 1 (“The covered transactions involve information and rights to use information.”).

<sup>20</sup> See *id.* § 2B-104(2).

<sup>21</sup> See *id.*

sure of information on the basis of the rights holder's interest in the information.<sup>22</sup>

We have seen that licenses of trademark rights, patent rights, and “related know-how” are excluded by section 2B-103. That suggests that patent and trademark law are unlikely sources for the informational rights intended for licensing under Article 2B. As other papers published as part of *The Impact of Article 2B Symposium*<sup>23</sup> make clear, copyright law creates no property rights in information, as opposed to expression.<sup>24</sup> Indeed, the copyright law dedicates the information embodied in copyright-protected works to the public domain.<sup>25</sup> Clearly, then, the sort of informational rights that Article 2B envisions as its bread and butter subject matter do not derive from the federal copyright, patent, and trademark statutes.

What sources of law does that leave? Section 102 (27) suggests that the source of informational rights might be found in laws protecting mask works, trade secrets, or the right of publicity.<sup>26</sup> All three of these are distinguished legal doctrines, but they are all limited in scope to particular and uncommon cases, too narrowly defined to supply much subject matter for a legal regime that imagines itself governing all online mass market transactions.<sup>27</sup> Indeed, I can't call to mind a single instance in which a consumer was sued for unauthorized exercise or consumption of trade secrets, rights of publicity, or the rights guaranteed by the Semi-Conductor Chip Protection Act.<sup>28</sup>

If patent law, trademark law, copyright law, mask work protection, trade secrecy, and the right of publicity all seem to be inapt sources for Article 2B's information property rights, where do those rights come

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<sup>22</sup> *Id.* 22. See *id.* § 2B-102(27).

<sup>23</sup> See generally Jane Ginsburg, *supra* note 19, at 945; David Nimmer et al., *The Metamorphosis of Contract into Expand*, 87 CALIF. L. REV. 17 (1998) (forthcoming 1999).

<sup>24</sup> Section 2B-102 evades this point by defining “information” broadly as “data, text, images, sounds, mask works, or works of authorship.” U.C.C. § 2B-102 (Aug. 1, 1998 Draft) (emphasis added).

<sup>25</sup> See *Feist Publications v. Rural Tel. Serv.*, 499 U.S. 340 (1991); *Baker v. Selden*, 101 U.S. 99 (1879).

<sup>26</sup> See U.C.C. § 2B-102(27) (Aug. 1, 1998 Draft).

<sup>27</sup> Trade secrecy seems the most promising of the remaining doctrines, but Article 2B clearly envisions the assertion of rights over material far too widely disseminated to qualify as a trade secret under the law of most states. I assume that the drafters don't intend to rely on the discreditable and largely discredited notion of mass market trade secrecy raised some years ago in support of a trade secrecy justification for shrink wrap licenses. *But see, e.g., id.* § 2B-110, Reporter's Note 4.

<sup>28</sup> See 17 U.S.C. §§ 901-14 (1984).

from? The remaining language in the definition in section 2B-102 (27) refers to “any other law that permits a party independently of contract to control or preclude another party’s use or disclosure of information ...”<sup>29</sup> The definition requires some legal source for informational rights that is independent of contract. Thus, Article 2B is not itself to be deemed a source of informational rights. The Reporter’s Notes to the definition repeat that “[t]his article does not create property rights; the definition references other law to determine when rights exist.”<sup>30</sup>

Let’s take another look at the Preface. As an alternative for a license predicated on rights supplied (or, as I argue, *not* supplied) by intellectual property law, the Preface to Article 2B appears to contemplate that licenses that do not depend on intellectual property law would be based on “the fact that a licensor has control over the source of information that the licensee desires to utilize.”<sup>31</sup> This is, presumably, what I’ve taken to calling the “my-painting-may-be-in-the-public-domain-but-I-don’t-have-to-let-you-into-my-house-to-see-it” property right. If it works with the copyrightable and uncopyrightable stuff in my house, why shouldn’t it work with the copyrightable and uncopyrightable stuff on my web site?

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29. U.C.C. § 2B-102(27) (Aug. 1, 1998 Draft).

30. *Id.* § 2B-102 (27), Reporter’s Note 25.

31. *Id.*, Preface at 10. The August, 1998 draft talks about a license of these sorts of rights as an “access contract.” Section 2B-102(1) defines access contract as “a contract to electronically obtain access to, or information in electronic form from, an information processing system. The term does not include a contract for physical access to a place, such as a theater or building.” *Id.* § 2b-102, Reporter’s Note 1. The fact that access to information is subject to an access contract does not itself create any informational rights; rather, the established rights to impose conditions on access to information make access contracts enforceable. What is the source of these rights? The Reporter’s Notes, somewhat confusingly, tell us that access rights are “fundamental”:

An access contract is a contract that authorizes access to an electronic facility, including a computer or an Internet site, or a contract that authorizes obtaining information from that type of facility... An “access contract” is typified by “on-line” services and Internet transactions. It also includes contracts for remote data processing, third party E-mail systems, and contracts allowing automatic updating from a remote facility to a database held by the licensee....

Access contracts do not depend on intellectual property rights. The owner of a computer system has a fundamental right recognized in criminal law and property law to exclude others from access to its system and to condition the terms on which it permits access to occur. Access contracts may distribute rights on the basis of informational rights, but they also reflect the right to control use and access.

*Id.*

Non-lawyers get this wrong all the time, but I would expect the drafters of Article 2B to be more careful. The trouble with control-based rights is that they're circular: they depend for their legitimacy on the existence of some extrinsic legal system that the proponents of control-based rights often assume away. The legal control of the painting in my house, for example, is based on the laws governing real property and chattels, and those laws give me an almost unqualified legal entitlement to exclude strangers. The physical control of the painting is based on the solidity of my house, my own personal strength (possibly augmented by the strength of such guards as I can hire), and the effectiveness of stay-away devices—locked doors, burglar alarms, electrified fences, vicious attack dogs — that I may elect to employ in my painting's defense. The only thing preventing strangers from circumventing my physical control, though, are the real and personal property laws I mentioned earlier. Without such laws, there's no reason in the world why people can't break in to see the painting without my permission. This becomes obvious if one imagines that the informational rights I wish to assert are based on my employing a stay-away device (my well-trained attack dog, say) to prevent strangers from viewing some painting I don't own (perhaps the Mona Lisa in the Louvre Museum).

The Preface, nonetheless, insists that the property rights it proposes to cover are not created by the proposed draft, but exist today, are the subject of extant contracts, and are routinely and uncontroversially enforced by courts all over. While unable to identify a legal source, independent of contract, for some of the rights it insists it is not creating, the Reporter's Notes resort to the concept of "a fundamental right recognized in criminal law and property law to exclude others from access to its system,"<sup>32</sup> which, as I've suggested, assumes the existence of the very property interest it seeks to validate.

Despite the Reporter's repeated assurances that the informational rights that are the subject of its licensing regime are extant, well-established, and uncontroversial, the named sources for informational rights do not seem to supply them. Instead, these rights appear to arise (out of nowhere, I would suggest) whenever a would-be proprietor of ideas or information elects to denominate any transaction affecting those rights as a "license", rather than a loan, lease, or sale. So long as the transaction is

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32. *See id.* When lawyers term something "fundamental" without citation of authority, it is tempting to conclude that there is no authority to cite.

denominated a license, the licensor may attach whatever terms it chooses to the transaction, and those terms will be legally enforceable.<sup>33</sup>

As a characterization of current law, that's pretty dubious. Should I elect to sell books that I publish with a prominent label on the front cover reading:

This book is licensed rather than sold; it may not be resold or re-read without my express written permission. Opening this book after reading this notice shall be deemed assent to the terms of this license ...

I would not be able to enforce it. Book publishers, after all, have tried that; that's how we got the first sale doctrine.<sup>34</sup>

The implicit assumption in the Preface seems to be that so long as the work I am selling is in digital form, as software is, such a license should and would be enforced. But case law on that particular question is mixed, at best. Software shrinkwrap licenses have been held to be worthless as often as they have been upheld.<sup>35</sup> Every software license I've ever seen prohibits reverse engineering, but case law tells us that such prohibitions are often unenforceable.<sup>36</sup> The Preface invokes the case of a videotape that is rented or sold subject to a license restricting the tape's public performance.<sup>37</sup> But that's not it at all. The tape is rented or sold. The *public* per-

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33. Indeed, the Preface appears to suggest that if a copyright owner elects to distribute its work through licensing, it can thereby avoid any statutory privileges that the copyright statute affords to the public. This seems curious since U.C.C. § 2B-102(27) *excludes* rights created by contract.

34. See *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908).

35. The Reporter's Notes cite one case upholding a shrink wrap license, *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996). See U.C.C. Article 2B, Preface at n.16 (Aug. 1, 1998 Draft). However, the Notes omit citation of cases holding such licenses unenforceable. See *Step Saver v. Wyse*, 939 F.2d 91 (3d Cir. 1991); *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255 (5th Cir. 1988); Mark Lemley, *Intellectual Property and Shrink Wrap Licenses*, 68 S. CAL. L. REV. 1239 (1995).

36. See generally *Vault Corp. v. Quaid Software*, 775 F.2d 638 (5th Cir. 1985); Julie Cohen, *Reverse Engineering and the Rise of Electronic Vigilantism: Intellectual Property Implications of "Lock Out" Technologies*, 68 S. CAL. L. REV. 1091 (1995).

37. See U.C.C. Article 2B, Preface at 10 (Aug. 1, 1998 Draft) ("[I]n the consumer market, copies [of motion pictures] are either sold or rented under terms that preclude public performance."). In general, the Reporter's Notes seem to proceed from the erroneous assumption that copyright law gives the copyright owner control over specific *uses of copies* of the work rather than exclusive rights that are independent of the ownership of copies of the work. The distinction isn't trivial. It leads the author of the Reporter's Notes to some characterizations of rights under copyright that are at best peculiar, and in any event confusing. See, e.g., *id.* ("A sale relinquishes some rights *with respect to the copy*. A license tailors what rights are granted.") (emphasis in original).

formance right, which does derive from the copyright law, is entirely separate, and would need to be licensed in any event. If the tape rental or sale purported to prohibit some subset of *private* performances by claiming that the rental or sale transaction was actually a license, I think that that attempt would fail.<sup>38</sup>

I've seen electronic contracts purport to limit everything from reverse engineering to use.<sup>39</sup> Most people never challenge them; indeed, many never read them. I have heard proponents of Article 2B claim that that fact, without more, demonstrates widespread assent to the validity and enforceability of such terms. That claim, although central to the licensing structure Article 2B tries to ordain, remains unproven. I have also heard arguments that if people are willing to enter into contractual relationships to pay for commodities that they would be legally entitled to take for free, the law should enforce those deals.<sup>40</sup> But the Preface and Reporter's Notes don't appear to rely on those arguments; instead they insist, repeatedly, that the rights subject to license under Article 2B arise completely independently of contracts or of contract law.<sup>41</sup> They simply can't seem to locate them in any plausible legal source.

So, if I'm just looking at the proposed UCC Article 2B that portrays itself as creating no new rights but merely facilitating license transactions in rights already recognized and enforced by the law now on the books, I think I have to conclude either that Article 2B is a little confused, and

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38. *Accord* Nimmer et al., *supra* note 24, at 26.

39. For example, the Westlaw copyright license insists that even for material over which West has no copyright interest,

No part of a Westlaw transmission may be copied, downloaded, stored in a retrieval system, further transmitted or otherwise reproduced, stored, disseminated, transferred *or used, in any form or by any means*, except as permitted in the Westlaw Subscriber Agreement or with West's prior written agreement.

WEST GROUP, COVERSHEET FOR WESTLAW COMPUTER PRINTOUT, on file with Berkeley Technology Law Journal (emphasis added).

40. Entire industries can be based on such customs. Hollywood commonly purchases "life story rights" from individuals whose true stories are envisioned as the basis for a film or television movie. Courts have so far resisted the syllogism that because so many studios purchase such rights, a project "based on a true story" may not legally proceed without them. *See, e.g.,* Seale v. Gramercy Pictures, 964 F. Supp. 918 (E.D. Pa. 1997).

<sup>41</sup> *See* U.C.C. 2B Preface at 7-14.

<sup>41</sup> *See id.*; Reporter's Notes to U.C.C. § 2B-105.

41. *See*, U.C.C. Article 2B, Preface at 14-25 and accompanying text (Aug. 1, 1998 Draft).

more than a little confusing, about what it is that it is doing. Either that, or someone has made the marketing decision to airbrush away the law's controversial aspects.

Article 2B takes some pains to insist that it is independent of copyright law; it coexists with, but in no way alters, the balance that copyright law strikes.<sup>42</sup> According to this story, there are copyrights and there are contracts, and owners of the first have always used the second as a means of exploiting their intangible property. Courts enforce such contracts because they recognize that they don't normally conflict with federal copyright policy.<sup>43</sup> Thus, Article 2B creates no new substantive law whatsoever; it merely supplies a convenient procedure to allow what happens now to happen more expeditiously.

That's a soothing story, but one that doesn't seem to have an analogue in the real world. Courts enforce some contracts for rights in information and refuse to enforce others. The federal copyright statute cuts a wide preemptive swathe through state laws used to make an end-run around the limitations woven into the copyright law, precisely because the policies intrinsic to copyright constrain the ways content owners may legally exploit their works, and must do so in order for the system to work.<sup>44</sup> If Article 2B were truly intended to be neutral on issues of intellectual property policy, as the Preface and Reporter's Notes insist, it might be expected to avoid encouraging contracts whose chief apparent purpose was to evade copyright's restrictions. Instead, at every opportunity, the draft appears to encourage prospective licensors to assert control over "informational rights" that they don't own, with the apparent intention that, by making a contract to license those rights, they will by some magic come to own them, and therefore be legally entitled to enforce the license contracts.

One can sympathize with commercial lawyers who would prefer that familiar commercial law rather than federal copyright law governed transactions in information, and sought to draft a law that would achieve it. Copyright lawyers, after all, are trying to do a very similar thing in using a copyright template to draft laws governing all transactions on the Inter-

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42. *See id.* at 7-14.

43. *See id.* § 2B-105, Reporter's Note 2.

44. *See* *NBA v. Motorola*, 105 F.3d 841 (2d Cir. 1997); *Rano v. Sipa Press*, 987 F.2d 580 (9th Cir. 1993); *Baltimore Orioles v. Major League Baseball Players Ass'n*, 805 F.2d 663 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1593 (1987); *Harper & Row v. Nation Enters.*, 723 F.2d 195 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985). *Cf.* *Bonito Boats v. Thundercraft Boats*, 489 U.S. 141 (1989) (finding patent preemption of state plug molding laws).

net.<sup>45</sup> But, if one sought to replace copyright policies and rules with their counterparts from commercial law, one would hardly be entitled to claim neutrality on matters of copyright policy.

The vision of copyright law reflected in the draft, further, is distorted in other ways. It portrays copyright owners' rights as required and the limitations and exclusions on copyright owner control as precatory. Article 2B selectively incorporates copyright terms and decisions it likes, while encouraging the abandonment of those it does not. It accomplishes this trick by insisting that some copyright principles are invariable and inviolate, and the provisions of Article 2B must therefore be designed to accommodate them. Other copyright principles would constrain Article 2B licenses only in cases where the license transgresses particular, narrow restrictions imposed by federal law. The Preface assures us that that would be rare.<sup>46</sup>

Finally, a third category of copyright principles seems to reflect ideas that the drafters of Article 2B find attractive, but susceptible of improvement.<sup>47</sup> Instead of defining "copies" the way the copyright law does, for example, as

material objects, other than phonorecords, in which a work is fixed [that is, "when its embodiment ... is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration" ] by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device ...<sup>48</sup>

Article 2B elects to define them as:

The medium on which information that is fixed *on a temporary or permanent basis* and in a medium from which the information can be perceived, reproduced, used, or communicated, either directly or with the aid of a device. The term includes a phonorecord.<sup>49</sup>

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45. I refer here to H.R. 2281, 105th Cong. (1997) as it passed the House of Representatives on August 4, 1998. *See generally* Jessica Litman, Reforming Information Law in Copyright's Image, 22 DAYTON L. REV. 587 (1997).

<sup>46</sup> *See* Nimmer, Frischling & Brown, *supra* note 38.46. *See* U.C.C. Article 2B, Preface at 13 (Aug. 1, 1998 Draft).

47. *See* Nimmer et al., *supra* note 24, at 29-30.

48. 17 U.S.C. § 101 (1976).

49. U.C.C. § 2B-102(a)(14) (Aug. 1, 1998 Draft) (emphasis added).

As the Reporter's Notes explain, the question whether a temporary reproduction is a copy within the meaning of the copyright law has been controversial;<sup>50</sup> Article 2B avoids that problem by defining "copy" to encompass temporary as well as permanent reproductions.<sup>51</sup>

Since a copyright owner has rights over the creation of permanent, stable reproductions of protected material, but no copyright rights over the creation of reproductions that are not "fixed" within the meaning of the copyright statute, the effect of the improvement is to allow licensors to license acts the copyright law does not place within their control.<sup>52</sup>

If a law is advertised using implausible accounts of its purpose and effect, assessing its wisdom is complicated at best. First, of course, there is the problem of deciding what to believe about the law's intended effect. Is the apparent confusion limited to the description of extant law, or does it extend to the proposed law's likely operation? If the law's drafters are genuinely confused about current law, is it likely that their proposed solu-

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50. *See id.*, Reporter's Note 12.

51. This is another case of assuming the truth of the proposition one is attempting to prove. The controversy alluded to by the Reporter's notes is not whether reproductions that are neither permanent nor stable are fixed copies within the meaning of the statute; everyone would agree that they are not. The controversy is instead over the correctness of decisions that reproductions in computer Random Access Memory are sufficiently permanent and stable to be fixed under the statutory definition. By expanding its definition of copies to encompass even temporary reproductions, the draft of U.C.C. § 2B-102 goes further. That decision conceals another instance of sleight of hand. In the Preface, the Reporter notes that computer software and electronic databases differ from books because one can read a book without creating a copy, but cannot use a computer program or digital information source without creating a copy or accessing it from a remote site. *See id.* § 2B, Preface at 7. If one uses the definition of copy in U.C.C. § 2B-102, that seems true, but if one instead refers to the definition in the copyright statute at 17 U.S.C. § 101, the question is far from settled.

52. At the same time, the promiscuous use of improved definitions and terms seems calculated to throw established business practices out of whack. When contracts refer to "copies" do they mean "copies" as the copyright statute defines them or as defined by Article 2B? Should we assume that hard copy contracts mean one thing by "copy," while electronic contracts mean the other? Is a contract that arrives as an e-mail attachment or by fax an electronic contract, or a conventional one? Prevailing copyright law has informed and shaped settled trade practice in what Article 2B calls the "copyright and information industries." *Id.* § 2B-103, Reporter's Note 1. How will Article 2B's overlay of sometimes augmented, sometimes improved, and sometimes flatly inconsistent "licensing" provisions change the way that transactions will be interpreted? Perhaps it is for that reason that, in the spring of 1998, the broadcast industry, the cable television industry, the motion picture industry, and the recording industry requested, and were promised, express exclusions from the scope of Article 2B for transactions relating to their core business. *See id.* § 2B-104, Reporter's Note 7.

tion to problems real and imagined is legally sound? If the implausibility results not from confusion but from cautious shading of the truth, on the other hand, who is it that the drafters might desire to mislead, and why might they have resolved to do so? And why can't the draft keep its story straight? The one conclusion that seems inescapable is that, whether from confusion or design, the tales that Article 2B tells us about its relationship with copyright law are an unreliable guide to what that relationship is likely, or is intended, to be.