

# AUTHORS AS “LICENSORS” OF “INFORMATIONAL RIGHTS” UNDER U.C.C. ARTICLE 2B

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## ABSTRACT

U.C.C. Article 2B of the Uniform Commercial Code was designed primarily to regulate online and mass market transactions, particularly the licensing of computer software. Its effects, however, will extend to authors of works other than computer software. This Article considers the effects Article 2B would have on dealings between those authors and the exploiters of the authors' works. By reducing procedural barriers to the formation of licenses, Article 2B would make it all too easy for an author to assent to contract terms that may heavily favor an exploiter of the author's work. On the other hand, default contract terms contained in Article 2B would provide substantive protections to authors who enter into informal licenses. Authors and their representatives, who have not closely followed the evolution of Article 2B, would do well to contribute their perspectives to the drafting process.

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## I. INTRODUCTION

First, a fact proposition: like computer programs, most, if not all, copyrighted works may today be expressed in 1s and 0s. Second, a warning to resist the looming syllogism: if all works can be expressed in 1s and 0s, that does *not* make all copyrighted works computer programs. Some have suggested that proposed Article 2B of the U.C.C., having started with software, but then extended its reach to "the copyright industries" generally,<sup>1</sup> has sunk into that syllogism, and, as a result, may disserve authors, publishers, and other participants in the exploitation and use of copyrighted works other than software.<sup>2</sup> One may wonder whether a commercial code conceived primarily to regulate online and mass market transactions, particularly with respect to information "deliverables"<sup>3</sup> appropriately or sensibly extends to individual authors' grants of incorporeal rights under copyright.

My task is to consider how authors of works other than software fare under the current (August 1998) draft of Article 2B. Do the proposals make a difference to individual authors' dealings with publishers/exploiters? To what extent does Article 2B enhance authors' ability to control the exploitation of their works? To what extent does Article 2B increase authors' vulnerability toward their exploiter/co-contractants? In responding to these questions, Part II inquires whether Article 2B applies to author/exploiter contracts. Part III identifies author-relevant provisions of Article 2B, and their implications. Part IV considers whether Article 2B *should* apply, in light of its impact on authors' contracts.

Aside from Article 2B's effect on contracts between authors and the exploiters of their work, Article 2B presents other issues of concern to authors, particularly to authors who self-publish, as perhaps more and

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1. See, e.g., U.C.C. Article 2B, Preface at 5 (Aug. 1, 1998 Draft); *id.* § 2B-103, Reporter's Note 1; *id.* § 2B-102(a)(26) and accompanying Reporter's Note 23 (defining informational content and distinguishing "information" not meant to be perceived by human beings from "informational content" that is meant so to be perceived; a database of images offers informational content with respect to the images, and information with respect to the computer program that makes the images accessible).

2. See, e.g., Letter from Allan Adler, *Association of American Publishers*, to Article 2B Drafting Committee (Feb. 17, 1997), available at <<http://www.2Bguide.com/docs/aap.html>> (visited Mar. 30, 1998); Letter from Gary L. Griswold, *American Intellectual Property Law Association*, to Article 2B Drafting Committee (Nov. 18, 1997), available at <<http://www.2Bguide.com/docs/sycaipla.html#aipla>> (visited Nov. 23, 1998).

3. See, e.g., Memorandum from Stephen Y. Chow on Avoiding Confusion of Information and Intellectual Property Rights (Feb. 12, 1998), available at <<http://www.2Bguide.com/docs/chowip.pdf>> (visited Nov. 23, 1998).

more authors will do on the Internet. These issues, however, I believe, are not specific to authors as *creators* of copyrighted works; they are relevant to *disseminators* of copyrighted works, be they the works' authors, their publishers, or third-party authorized distributors. Thus, this discussion will not address the impact of Article 2B on the relationship of disseminators of works of authorship and the consuming public. Other contributors will take up that issue, and related controversies.<sup>4</sup>

With respect to the issues that I do cover, I conclude that Article 2B can be both good and bad for authors, depending on the level of detail that informs their agreements. Article 2B can offer some valuable safeguards to authors whose dealings with exploiters are so informal that its default rules would fill in the substance of their agreements. On the other hand, Article 2B's provisions governing the formation of enforceable agreements can be detrimental to authors who may end up assenting all too easily to detailed exploiter-written grants. This leaves me ambivalent about the inclusion of non-software authors within Article 2B's coverage. If these authors are to remain subject to Article 2B, then Article 2B's drafters should consider adopting further substantive and procedural protections. The conclusion of this Article offers some proposals for improvement of the "fit" between Article 2B and the copyright interests of individual authors.

## II. DOES ARTICLE 2B APPLY TO AUTHOR-EXPLOITER CONTRACTS?

While Article 2B purports to apply to "the copyright industries," I think it is fair to observe that the copyright law's perspective does not pervade Article 2B's text or notes. Article 2B governs "licenses,"<sup>5</sup> and a license is defined as "a contract that authorizes access to or use of information or of informational rights ...."<sup>6</sup> "Informational rights" are defined to "include all rights in information created under laws governing ... copyrights ...."<sup>7</sup> Finally, "information" means "... works of authorship ...."<sup>8</sup>

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4. See, e.g., Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089 (1998); Mark A. Lemley, *Beyond Preemption: The Federal Law and Policy of Intellectual Property Licensing*, 87 CALIF. L. REV. 113, 128-31 (forthcoming 1999); David F. McGowan, *Free Contracting, Fair Competition, and Article 2B: Some Reflections on Federal Competition Policy, Information Transactions, and "Aggressive Neutrality,"* 13 BERKELEY TECH. L.J. 1173 (1998).

5. U.C.C. § 2B-103(a)(1) (Aug. 1, 1998 Draft); *id.* at Reporter's Note 1.

6. *Id.* § 2B-102(a)(28).

7. *Id.* § 2B-102(a)(27).

8. *Id.* § 2B-102(a)(24).

From a copyright perspective, Article 2B's nomenclature is anomalous, since copyright does not protect "information;" it protects the "expression" of ideas and facts.<sup>9</sup> Similarly, copyright owners do not license "use" of their works, they grant rights "to do and to authorize" acts enumerated in the statute.<sup>10</sup> Moreover, while copyright addresses incorporeal rights, rather than physical objects,<sup>11</sup> Article 2B's terminology better fits transactions in copies than in copyrights. Despite the breadth of its reach, Article 2B's text seems primarily preoccupied with transfers of copies of software: grants of intellectual property rights are most relevant to the extent that copyright (or other) permission is necessary to allow the transferee to enjoy the copy.<sup>12</sup>

That said, Article 2B's literal coverage of rights in works of authorship beyond software is not inadvertent.<sup>13</sup> The rationale for broad-based coverage relies on the impending "convergence" of modes of communicating and delivering all kinds of copyrighted works.<sup>14</sup> That is, if any kind of copyrighted work can be expressed in 1s and 0s, and thus can be the object of an electronic transaction, then transactions in all copyrighted works require uniform treatment, even if particular works are not in fact in digital form. Suppose, for example, that I license both a digital compilation of text or graphics and the search program that accompanies it. The program comes within the core subject matter of Article 2B; arguably, it does not make sense for one contract regime to govern the program, and another the compilation. Once software-appurtenant digital works are covered, one

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9. See 17 U.S.C.A. § 102(b) (West 1998); *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991).

10. See 17 U.S.C.A. § 106 (West 1998). See also Pamela Samuelson, *Allocating Ownership Rights in Computer Generated Works*, 47 U. PITT. L. REV. 1185, 1219 (1986) ("Concerning an exclusive use right, the copyright law differs from the patent law, which does give the owner of the intellectual property interest an exclusive right to use (or authorize use of) the protected work."). Samuelson cites the statement of Dorothy Schrader, general counsel of the U.S. Copyright Office, *Hearings on S. 1201 Before the Subcomm. on Patents, Copyright and Trademark of the Senate Comm. of the Judiciary*, 98th Cong., 1st Sess. 20 (1983). *Id.* at 1219 n.141 ("[T]he new use right ... is a right that, as far as we are aware, has absolutely no equivalent in copyright law ...."). Cf. 35 U.S.C.A. § 271 (West 1998) (defining patent infringement: as "whoever without authority makes, uses, offers to sell, or sells any patented invention ...") (emphasis added).

11. See 17 U.S.C.A. § 202 (West 1998) (distinguishing ownership of copyright from ownership of physical object).

12. See Chow, *supra* note 3 (distinguishing "information deliverables" from incorporeal copyright).

13. See U.C.C. Article 2B, Preface at 4 (Aug. 1, 1998 Draft).

14. See, e.g., *id.* § 2B-103, *id.* at Reporter's Note 1; Joseph Verdon, *Article 2B: Transactions in Software and 'Information'*, N.Y. L.J., Aug. 13, 1997, at 1.

may as well cover other digitally expressed works, since these are destined for digital distribution, and Article 2B particularly targets online "access contracts."<sup>15</sup> Once digitally expressed works are covered, it may not make sense to make the contract regime turn on media discrimination, with Article 2B reaching transfers of rights in works in digital form, but common law contract rules governing transfers of rights in the same work when it is in analog form.

Thus, given Article 2B's definition of "information" as including "works of authorship,"<sup>16</sup> it would at first appear that Article 2B covers all authors who grant rights in copyrighted works. In fact, however, the current draft of Article 2B specifies significant exclusions from its scope. As a result, Article 2B's coverage of authors and their works is neither comprehensive nor predictable. For example, section 2B-104(5) excludes "a contract for personal or entertainment services by an individual or group." By "personal services," Article 2B appears to mean employment contracts generally.<sup>17</sup> If so, then Article 2B would exclude employee-creators of works made for hire, but these creators are not considered "authors" under the Copyright Act in any event.<sup>18</sup>

What counts as performance of "entertainment services?" Article 2B does not define the term. The concept would appear to exclude from Article 2B's scope contracts for live performances, for example, by musicians or actors. What about agreements to record a performance of a musical composition or dramatic work? Earlier drafts of Article 2B would have included these, because the production of a sound recording would have transferred the performers' informational rights.<sup>19</sup> By contrast, had the recording occurred at the live concert, Article 2B would have covered the recording agreement, but not the agreement to render the entertainment services of performing at the live event at which the recording was made.

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15. U.C.C. § 2B-103(a)(1) (Aug. 1, 1998 Draft); *id.* at Reporter's Note 2b.

16. *Id.* § 2B-102(a)(24).

17. See *id.* § 2B-104(5), *id.* Reporter's Note 6 ("Subsection (5) deals with services contracts."). The exclusion was clearer in the February draft. See U.C.C. § 2B-103(c)(4) (Feb. 1998 Draft) (excluding a "contract of employment of an individual other than as an independent contractor ....").

18. See 17 U.S.C.A. § 201(b) (West 1998). In addition, unreserved transfers of all rights under copyright are not within 2B's scope. See U.C.C. § 2B-102(a)(28) (Aug. 1, 1998 Draft). This would also exclude work for hire contracts. See discussion *infra* Part II.

19. The production of the sound recording requires a license from the performers of their rights under 17 U.S.C.A. § 1101 to authorize the fixation of their musical performance. The commercialization of the sound recording requires a license or assignment of the performers' reproduction and distribution rights in their fixed performances.

The August draft excludes contracts both for live and for recorded performances, not only with respect to sound recordings, but, more significantly, with respect to motion pictures. Section 2B-104(8) excludes

a license of a linear motion picture or sound recording or of information to be included therein, except in connection with providing access to such motion picture or sound recording under an access contract covered by this article.<sup>20</sup>

The current proposal thus removes from Article 2B's scope a broad class of contracts transferring rights to include works of authorship<sup>21</sup> in "linear motion picture[s]" and in sound recordings. With respect to sound recordings, any musical composition subject to the Copyright Act's compulsory license to make and distribute phonograms,<sup>22</sup> is already excluded under section 2B-104(7).<sup>23</sup> Section 2B-104(8) expands the exclusion to cover other works of authorship, whose sound recording rights their copyright owners may freely license, for example, dramatic musical compositions licensed for sound recordings, or literary works licensed for books-on-tape. This means that a contract to publish a novel would be subject to Article 2B with respect to exploitation of the literary work as a text, but not with respect to licenses of derivative work rights to create a recorded version of a reading of the book.<sup>24</sup>

If Article 2B excludes licenses of audio rights in the novel, what about licenses to create *audiovisual* exploitations? If the publishing contract grants rights to make a film adaptation of the novel, does this aspect of the contract fall outside Article 2B on the ground that it effects a license to include the novel (or a screenplay based on it) in a "linear motion picture?" The August Article 2B draft does not define that term, but the Reporter's Note to section 2B-104(8) refers to "movies," and states that section 2B-104(8) "excludes traditional licensing in the motion picture ... industr[y] .... The exclusion is limited to *traditional* activities and ... is not an exclusion of the industry. As companies move into on-line systems,

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20. U.C.C. § 2B-104(8) (Aug. 1, 1998 Draft). This text appears in brackets in the Aug. 1998 draft.

21. See *id.* § 2B-102(a)(24) (defining "information" as including "works of authorship").

22. See 17 U.S.C.A. § 115 (West 1998) (subjecting nondramatic musical compositions to compulsory license following first authorized sound recording).

23. See U.C.C. § 2B-104(7) (Aug. 1, 1998 Draft) (excluding a license that is "a compulsory license under federal or state law").

24. On the other hand, were the resulting sound recording to be offered to consumers on-line, the contract to deliver the sound recording to the consumer would be governed by Article 2B.

software, multi-media, and similar licensing, Article 2B applies.”<sup>25</sup> This appears to mean that licensing movie rights in the novel escapes Article 2B, but licensing CD-ROM rights comes within Article 2B. One may wonder whether these divisions make sense. At least, they seem inconsistent with the goal of uniformity of a contracts regime in a world of “converging” modes of expression and communication, because they make application of Article 2B turn on media discrimination.

Thus, with respect to the same author and the same work, Article 2B may apply to some licenses of rights, but not to others. Article 2B marks a further distinction between “licenses” and other grants of rights. The text confines a “license” to a contract that “expressly limits the contractual rights or permissions granted, expressly prohibits, limits, or controls uses, or expressly grants less than all informational rights in the information.”<sup>26</sup> Article 2B thus excludes *assignments* of “all right, title and interest in and to the copyright,” as well as work made for hire agreements regarding commissioned works. Arguably, an assignment of copyright made in return for percentage royalties might still fall within Article 2B, at least if the transfer is subject to the condition that the grantee continue to pay royalties during the term of the copyright. Nonpayment of royalties would be a material breach, resulting in reversion of the copyright to the author.<sup>27</sup>

How does Article 2B treat lump-sum assignments? These would not contain an express limitation on the contractual rights granted. The 1976 Copyright Act, however, imposes a limitation on all transfers of exclusive rights, including assignments, in all works of authorship other than works made for hire. These grants are subject to the author’s right to terminate the transfer during a five-year period beginning thirty-five years from the date of execution of the grant.<sup>28</sup> While the author is not obliged to exercise this right, neither may she contract it away.<sup>29</sup> Does this mean that assignments that are subject to termination are “licenses” under Article 2B? Ar-

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25. U.C.C. § 2B-104 (Aug. 1, 1998 Draft); *id.* at Reporter’s Note 7.

26. *Id.* § 2B-102(a)(28).

27. See MELVILLE B. NIMMER & DAVID NIMMER, 3 NIMMER ON COPYRIGHT §10.15[A], n.20 at 10-124 (1997).

28. See 17 U.S.C.A. § 203(a)(3) (West 1998).

29. See *id.* § 203(a)(5) (“Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.”). Note that 2B-308’s provision for the perpetuity of informational property rights licenses conflicts with the author’s inalienable right under copyright to terminate exclusive licenses, and therefore would be preempted. See U.C.C. § 2B-105 (Aug. 1, 1998 Draft); *id.* at Reporter’s Note 2. By contrast, since there is no right under copyright to terminate non-exclusive licenses, section 2B-308 is not incompatible to that extent. See discussion *infra* Part III.A.1.

ticle 2B's current language suggests otherwise. It appears that the limitation on the scope of the grant must be expressly set forth in the contract, not merely inherent in the copyright law. If so, Article 2B does not cover lump-sum assignments. Perhaps, however, if the assignment expressly stated that it was "subject to the § 203(b) termination right" (or something to that effect), it would come within Article 2B.

Similarly, a work for hire agreement is not a "license" under Article 2B because it too transfers ownership of all informational rights in the commissioned work. Moreover, grants of rights in works made for hire are not subject to termination.<sup>30</sup> Arguably, a commissioned work for hire agreement transfers not copyright ownership, but authorship status. The commissioned creator of a work made for hire is not a statutory author.<sup>31</sup> If she is not an author, she cannot be an initial copyright owner, so she has no ownership rights to transfer. This reading, however, seems hypertechnical. The effect, after all, of a properly executed work for hire agreement is to vest rights in the non-creator contractant; absent the contract, the creator remains the copyright owner.<sup>32</sup> If a commissioned work for hire agreement is treated as an assignment not subject to termination, it would come within the exclusion from the scope of Article 2B.<sup>33</sup>

Finally, Article 2B treats authors whose contracts it reaches as "merchants." The characterization has significant consequences: if an author is a "merchant," s/he is presumed to warrant that the licensed work does not infringe others' copyrights.<sup>34</sup> "Merchants" are also subject to less stringent formal requirements under Article 2B's statute of frauds.<sup>35</sup>

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30. See 17 U.S.C.A. § 203(a) (West 1998).

31. See 17 U.S.C.A. §§ 101, 201(b) (West 1998).

32. See also NIMMER & NIMMER, *supra* note 27, § 6.03[c][2][A] at 6A-21 (contending that works made for hire should be considered implied assignments of copyright).

33. Practices in certain of the "copyright industries," however, may call for nuancing that conclusion. For example, the ASCAP membership agreement requires that composers and lyricists receive 50% of the performance right royalties, regardless of the work for hire status of the nondramatic musical composition. See Susan Stager, *Musical Performing Rights in the Television Industry: Has the Blanket License Finally Seen Its Demise?*, 14 SW. U. L. REV. 569, 585 (1984) (although composers are television producers' employees for hire, the producer's music publishing company distributes the "writer's share" (50%) of the royalties to the composer); ASCAP, *ASCAP membership agreement*, Art. 7 (visited Mar. 30, 1998) <<http://www.ascap.com/membership/agreement/agreement.html>>.

34. See U.C.C. § 2B-401(a) (Aug. 1, 1998 Draft). Section 2B-404(b)(1) makes it clear, however, that the licensor does not warrant the work's "aesthetics, market appeal, or subjective quality." *Id.* § 2B-404(b)(1).

35. See *id.* § 2B-201(d).



What makes an author a "merchant" under Article 2B? The warranty provision concerns merchants "regularly dealing in information or rights of the kind:" this might suggest that veteran authors are merchants for purposes of section 2B-401, but neophytes are not. Article 2B, however, defines a "merchant" as "a person that deals in information or informational rights of the kind or that otherwise by the person's occupation holds itself out as having knowledge or skill peculiar to the practices or information involved in the transaction, whether or not the person previously engaged in such transactions ...."<sup>36</sup> The last phrase in the definition suggests that the drafters are seeking to avoid distinguishing between first-time and seasoned licensors. Moreover, it is clearer than in prior drafts that this provision does target authors. The author will have "knowledge or skill peculiar to the information" because the "information" is the copyrighted work the author created. In addition, an author could be said to "deal in" works of authorship and in "informational rights" (i.e., copyright); indeed, if the author is a professional, those dealings furnish her livelihood.

### III. WHAT AUTHOR-RELEVANT MANDATORY OR DEFAULT RULES DOES ARTICLE 2B SET FORTH, AND HOW WOULD THEY APPLY?

Traditionally, the exploitation of works of authorship is contract-intensive, employing highly detailed agreements, particularly in the areas of publishing and performing rights. As a result, Article 2B will make the greatest difference to authors to the extent that its rules are mandatory rather than default. Examination of the current text, however, shows that there are no relevant mandatory substantive rules,<sup>37</sup> although there are relevant rules requiring that any departure from those rules be introduced in an authenticated record.<sup>38</sup> This means that the domain of Article 2B with respect to authors is limited to situations where there is either no written contract at all, or where Article 2B introduces contract rules when the parties had provided none, or where the terms are ambiguous. The domain of Article 2B is further limited by its recognition that federal copy-

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36. *Id.* § 2B-102(a)(33).

37. *See id.* § 2B-106.

38. *See* U.C.C. § 2B-106(6) (Aug. 1, 1998 Draft); *id.* § 2B-201. The rules requiring written derogation concern the scope of a transfer, and transfers of non-exclusive rights. Both of these are of considerable interest to authors. *See* the discussion, *infra* Part III.A.1. For a discussion of authenticated records under Article 2B and "signed writings" under the Copyright Act, *see infra* Part III.A.

right policies prevail over state law provisions.<sup>39</sup> For example, Article 2B's provisions cannot displace the federal copyright requirement of a signed writing to transfer exclusive rights.<sup>40</sup> On the other hand, Article 2B may lend content to the terms "signed" and "writing."

The authors most implicated by Article 2B may be freelance writers, photographers, and artists who contribute to periodicals or other publications whose publishers do not systematically execute detailed contracts with the contributors.<sup>41</sup> But to the extent that informality or imprecision prevail in other areas of the "copyright industries," many authors may be touched by Article 2B's default rules.

#### A. Default Rules that May Enhance Authors' Control Over Their Works

Section 2B-106 states the basic principle of freedom of contract, but also sets forth certain rules that the parties may not vary.<sup>42</sup> These rules include "the limitations on enforceability in section 2B-201."<sup>43</sup> Section 2B-201 is Article 2B's statute of frauds. It requires, for agreements whose total value requires "payment of \$5,000 or more ..." and "is a license for an agreed duration" of one year or more, a record "authenticated"<sup>44</sup> by the party against whom the agreement is to be enforced. Where, however, the

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39. See U.C.C. § 2B-105 (Aug. 1, 1998 Draft).

40. See 17 U.S.C.A. § 204(a) (subjecting the validity of a transfer of copyright ownership to execution by the grantor of a written and signed "instrument of conveyance or a note or memorandum of the transfer."); U.C.C. § 2B-105 (Aug. 1, 1998 Draft); *id.* at Reporter's Note 2.

41. For example, setting forth the terms of the "agreement" on the back of the freelance author's payment check, thus purporting to equate endorsement of the check with execution of the contract, appears to be a frequent means of dealing with freelance writers, photographers and artists. See, e.g., *Playboy Enters. v. Dumas*, 53 F.3d 549, 552 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 567 (1995), *on remand*, 960 F. Supp. 710 (S.D.N.Y. 1997); *Tasini v. New York Times Co.*, 981 F. Supp. 841 (S.D.N.Y. 1997).

42. See U.C.C. § 2B-106(a)-(b) (Aug. 1, 1998 Draft).

43. *Id.* § 2B-106(b)(6).

44. *Id.* § 2B-201(a)(1)-(2). The August 1998 draft differs significantly from the April 1998 and earlier drafts, in making the dollar value and duration of the agreement cumulative, rather than alternative criteria for application of the authentication requirement. It is not clear that this change is intentional or desirable. The effect of the change is to validate non-authenticated licenses of *any* dollar amount, so long as its duration is less than a year. Not only does this change seem incompatible with consumer protection concerns; but also it is inconsistent with U.C.C. Article 2's statute of frauds, which requires a writing if the price of the goods sold is \$500 or more. See *id.* § 2-201(1) (1996). But see, RESTATEMENT (SECOND) OF CONTRACTS: CLASSES OF CONTRACTS COVERED § 110(1)(e) (1979) (applying the statute of frauds to contracts "not to be performed within one year from the making").

co-contractants are merchants, as would be the case between an author and a commercial exploiter, subsequent dispatch of a "record in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents" will bind the recipient unless she notifies her objection in a record within ten days of receipt of the confirmation.<sup>45</sup> Second, and more significantly, section 2B-201 imposes more stringent formal requirements on variations from a provision of particular concern to authors: section 2B-307 regarding the scope of licensing agreements. What are the consequences of this rule for authors?

1. *Copyright Licenses Whose Value Exceed \$5,000 and Which Endure for One Year or More*

Federal copyright law requires that any transfer of exclusive rights must be in writing and signed by the grantor.<sup>46</sup> Article 2B does not purport to detract from that requirement.<sup>47</sup> As a result, a transfer of exclusive rights for \$5,000 or less whose duration is for less than one year must still be effected by a signed writing. By contrast, a grant of *non-exclusive* rights under copyright need not be in writing; an oral agreement, or conduct from which an agreement can be inferred, suffice.<sup>48</sup> Hence, as a matter of copyright law, a grant of non-exclusive rights whose value exceeds \$5,000, and which endures for at least one year, need not be in writing. Under section 2B-201, however, that grant would be subject to the formal requirement of a record which the party to be charged has authenticated.

Article 2B's statute of frauds provision provokes two questions. First, if Article 2B may not authorize *fewer* formal requirements than the Copyright Act mandates, may it nonetheless impose *greater* formality than the copyright law demands? Second, with respect to grants of non-exclusive licenses, would section 2B-201, in fact, afford more protection to authors than current case law extends?

Another way of posing the first question is to inquire whether federal or state law governs the validity of a grant of non-exclusive rights under copyright. Section 2B-105 recognizes that a provision of Article 2B is not enforceable to the extent that it is preempted by federal law. Thus, where

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45. U.C.C. § 2B-201(d) (Aug. 1, 1998 Draft).

46. See 17 U.S.C.A. § 204(a) (West 1998).

47. See U.C.C. § 2B-105 and Reporter's Note 2 (Aug. 1, 1998 Draft).

48. See, e.g., *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 775 (7th Cir. 1996); *Avtec Systems, Inc. v. Peiffer*, 21 F.3d 568 (4th Cir. 1994); *Effects Assocs. v. Cohen*, 908 F.2d 555, 556 (9th Cir. 1990), *cert. denied*, 498 U.S. 1103 (1991) (finding that, absent a written agreement, delivery of a special effects video for inclusion in audiovisual work evidences a grant of non-exclusive rights, but not a transfer of exclusive rights).

federal copyright law sets forth specific substantive or formal protections for authors, Article 2B cannot derogate from those guarantees. But where federal law is silent, is there more room for state regulation that would enhance the protection of authors? A grant of non-exclusive rights is not a transfer of copyright *ownership*;<sup>49</sup> given the lesser consequences of granting non-exclusive rights, Congress perhaps determined that authors do not require the copyright law to impose as much protection in the contract process with respect to non-exclusive licenses as authors may need from the copyright law regarding alienating copyright ownership. But it is one thing to infer that federal copyright policy does not *mandate* a formal prerequisite to the validity of a grant of non-exclusive rights, and another to conclude that, therefore, Congress sought to *prohibit* states from according additional protection to the process of licensing lesser rights. It seems more reasonable to conclude instead that federal copyright law does not "occupy the field" of non-exclusive rights licensing, that the state law here at issue is compatible with general federal policies, and that states may therefore attach formal requirements to the validity of non-exclusive grants.<sup>50</sup>

Assuming federal law does not preempt the section 2B-201 formal requirements with respect to non-exclusive licenses worth more than \$5,000, and that endure for one year or more, would section 2B-201 in fact make a difference to authors? The one year minimum could be significant, because many non-exclusive licenses may cover a longer period. For example, suppose nothing was said about the license's duration, but the nature of the exploitation inherently exceeds one year. This characterization would apply to many publishing agreements (even agreements to publish in a monthly periodical could be affected, if, for example, the publisher continues to distribute back issues past one year), as well as to performing or exhibition rights agreements. Setting aside one-time uses, which would remain uncovered, Article 2B would, at least at first blush, seem to inject

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49. See 17 U.S.C.A. § 101 (West 1998) (defining "transfer of copyright ownership" as explicitly excluding non-exclusive licensees).

50. See, e.g., *Grappo v. Alitalia Linee Aeree Italiane, S.p.A.*, 56 F.3d 427 (2d Cir. 1995); *Freedman v. Select Info. Systems, Inc.*, 1983 U.S. Dist. LEXIS 19664, at \*11 (N.D. Cal. Jan. 30, 1983) (applying state statute of frauds to non-exclusive license); *Myers v. Waverly Fabrics*, 475 N.Y.S.2d 860, 861 (N.Y. App. Div. 1984), *aff'd as modified* by 489 N.Y.S.2d 891 (1985) (holding a non-exclusive license incapable of performance within one year statute of frauds). But see, *NIMMER & NIMMER*, *supra* note 27, § 10.03[A][8].

potentially author-protective formality into the process of contracting for many grants of non-exclusive rights.<sup>51</sup>

Now consider the \$5,000 floor. Perhaps not many non-exclusive licenses for individual author-owned works other than software are worth more than \$5,000; for those that are, perhaps, few authors would be granting such rights without a written contract in any event. But there may be a relevant class of works and authors. Consider the following hypothetical, inspired by a real case. MegaROM Company offers Fred Effex \$10,000 to prepare a special effects sequence for inclusion in MegaROM's impending interactive CD-ROM videogame, "It Came From the Titanic."<sup>52</sup> Fred creates the sequence and delivers it to MegaROM. No written agreements have been concluded; like their Hollywood antecedents, CD-ROM producers "do lunch, not contracts."<sup>53</sup> MegaROM takes the sequence and runs; Fred, who has not been fully paid, seeks an injunction and damages against MegaROM's distribution of the videogame, on the ground that it violates Fred's copyright in the incorporated sequence.

As a matter of federal copyright law, MegaROM's first defense, that Fred transferred his reproduction and distribution rights to MegaROM, will fail, because there is no signed writing. On the other hand, MegaROM's second defense, that Fred granted non-exclusive rights, will succeed, because the non-exclusive grant may be manifested by conduct, and Fred's delivery of the sequence to MegaROM evidences his agreement to the sequence's incorporation and distribution. Fred has only a state law claim for breach of contract to recover the unpaid portion of the \$10,000.<sup>54</sup>

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51. However, to the extent state statutes of frauds already apply to non-exclusive grants of copyright, Article 2B will represent a net gain to authors only if its version is more protective than most state versions. To the extent that Article 2B's statute of frauds is *less* protective than state versions, Article 2B will, by displacing state statutes of frauds, leave authors worse off. See U.C.C. § 2B-105 (Aug. 1, 1998 Draft). For example, by making the duration and dollar amount criteria cumulative, the August 1998 draft will not require authentication of a license costing more than \$5000 if its duration is less than a year, where an applicable state statute that turned on price, independently of duration, might otherwise have applied.

52. Because the videogame is interactive, it would not seem to be a "linear motion picture;" a contract to include an interactive video sequence within the game thus would not be covered by the 2B-104(8) exclusion. This would be true even though videogames are considered "audiovisual works" under the Copyright Act. See, e.g., *Williams Elecs. v. Arctic Int'l*, 685 F.2d 870, 872 (3d Cir. 1982); *Stern Elecs. v. Kaufman*, 669 F.2d 852, 856 (2d Cir. 1982). The category of "audiovisual works" is broader than that of "motion pictures," see 17 U.S.C.A. § 101 (defining both terms), and *a fortiori* is broader than that of "linear motion pictures" (the latter term does not appear in the Copyright Act).

53. See *Effects Assocs. v. Cohen*, 908 F.2d 555, 556 (9th Cir. 1990).

54. See *id.*

Under section 2B-201 (which applies because MegaROM intends to distribute the game for a period longer than a year, and its agreement with Fred called for payment exceeding \$5,000), MegaROM could not allege a grant of non-exclusive rights in defense to Fred's copyright infringement claim, unless there was a "record" that MegaROM "authenticated,"<sup>55</sup> or, if Fred is considered a "merchant," a "record in confirmation" that Fred received from MegaROM "within a reasonable time" of the conclusion of their agreement.<sup>56</sup> Section 2B-102 defines a "record" as "information inscribed on a tangible medium or stored in an electronic or other medium and retrievable in perceivable form."<sup>57</sup> Under the facts of our hypothetical, there is no "record;" MegaROM can only allege Fred's conduct in support of the existence of the agreement. If, absent the record, there would be no enforceable grant, then MegaROM would not be a non-exclusive licensee; it instead would be a copyright infringer, and Fred could enjoin the video game's distribution.<sup>58</sup>

MegaROM, however, is likely to succeed in showing the existence of a non-exclusive license under either of two of Article 2B's exceptions to the requirement of a record. First, an agreement is enforceable "if a performance was tendered or the information was made available by one party and the tender was accepted or accessed by the other ..."<sup>59</sup> Second, no record is required if "the party against which enforcement is sought admits in its pleading or testimony or otherwise in court that a contract has been formed ...."<sup>60</sup> The hypothetical's facts indicate that performance was tendered and accepted, because Fred delivered the commissioned special effects video, and MegaROM incorporated it. This litigation exception may also apply to Fred, because the agreement would be recounted in the pleadings or testimony. The litigation exception appears in somewhat convoluted form in Fred's case, however, because Fred is not seeking enforcement of the contract against MegaROM; he is claiming the contract is invalid, and that he, therefore, has an infringement action. MegaROM would be the party to allege the validity of the contract, in effect seeking

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55. U.C.C. § 2B-201(a)(1) (Aug. 1, 1998 Draft).

56. *Id.* § 2B-201(d).

57. *Id.* § 2B-102(a)(39).

58. This construction "favors" authors to the extent that it invalidates the agreement, thus leaving the way open to the author to allege copyright infringement. But if the agreement is unenforceable, the author will not be paid the contract price (unless it becomes the measure of damages in a successful infringement action). On the other hand, an author who can enjoin the exploiter's use is in a stronger bargaining position than one who merely has a claim for contract damages.

59. *Id.* § 2B-201(c)(1)-(2).

60. *Id.*

its enforcement against Fred, to prevent him from enjoining the distribution of the video game.

If either exception overrides the requirement of a record, then Fred may be no better off than before Article 2B intervened. On the other hand, MegaROM's best defense against the infringement claim is to insist on the existence of the contract; in so doing it not only confirms its obligation to pay Fred, but it acknowledges that the content of the contract includes all the default rules associated with an Article 2B agreement. As we will see, some of these rules may favor Fred.

So far, perhaps, so good for authors. To the extent that there is no "record" of the transaction (and the transaction is worth more than \$5,000 and the grant endures for at least one year), authors may be better off with Article 2B than without it. But any exploiter who takes a break from lunch to send or acknowledge a record of the deal can easily help himself under section 2B-201. Consider the following variations on the Fred E-fex/MegaROM relationship. Suppose Fred sent the interactive video sequence to MegaROM by e-mail, together with a cover note to the effect that the sequence MegaROM commissioned Fred to make for \$10,000 is attached. That e-mail would count as a record.<sup>61</sup> MegaROM can authenticate the record in a return response.<sup>62</sup> Or suppose that Fred e-mails the sequence without a cover note (or physically delivers a disk); now no record originates with Fred. But, if Fred is a "merchant," then MegaROM, having taken a reasonable time to wake up from lunch, can send an e-mail (or other tangible medium of communication) to Fred confirming the agreement. If, within ten days, Fred has not sent a record objecting to the contents of MegaROM's confirmation, MegaROM will have rendered its agreement enforceable, and can therefore assert that it is the grantee of non-exclusive rights in Fred's sequence.<sup>63</sup>

## 2. *Substantive Limitations on the Licensee's Rights*

Let us suppose that Fred and MegaROM have a contract that is enforceable because, despite the absence of a record, performance was tendered and accepted, or because MegaROM's subsequent confirmation satisfied Article 2B's formal requirements. What is the substance of their

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61. If the record is not "authenticated," for example, by a digital signature or other form of encryption, then it probably would not be considered a "signed writing" under the Copyright Act; Fred thus will not have transferred exclusive rights.

62. The August draft is more restrictive than the February version, which validated an agreement set forth in a record "to which that party manifested assent." U.C.C. § 2B-201(a)(2) (Feb. 1998 Draft).

63. See U.C.C. § 2B-201(d) (Aug. 1, 1998 Draft).

agreement? We know only that the parties agreed on the preparation and delivery of a special effects sequence to be incorporated in the "It Came From the Titanic" videogame for \$10,000. For example, the parties specified neither the scope of the agreement, nor its duration, nor whether MegaROM could also transfer the special effects sequence to another producer. The more informal (not to say, sloppy) the parties' dealings, the greater Article 2B's role in supplementing the details of the agreement.<sup>64</sup>

With respect to the scope of an agreement and the transferability of the rights conveyed, Article 2B sets forth default rules which may be varied "only by a record that is: (1) sufficient to indicate that a contract has been made; and (2) authenticated, or prepared and delivered to the other party, by the party against which enforcement is sought."<sup>65</sup> For agreements such as Fred's, where the "record" (to the extent there is one) does not specify its scope, this means that section 2B-307 will define the extent of the rights licensed. Indeed, even where the parties' agreement is sufficiently formal to transfer exclusive rights under copyright, section 2B-307 will still define its scope, unless the parties specify otherwise in an authenticated record. There is no conflict with federal copyright law, because questions going to the scope of a grant of copyright (as opposed to its validity) are considered matters of state contract law.<sup>66</sup> Section 2B-307 provides, *inter alia*, that

A license contains an implied limitation that the licensee shall not exceed the expressly granted contractual rights or exercise informational rights in the information other than [those "expressly described" or which are "necessary in the ordinary course to exercise the expressly granted contractual rights"]. However, use of the information or informational rights in a manner inconsistent with this implied limitation is not a breach of contract if the use would be permitted under applicable law in the absence of the limitation.<sup>67</sup>

Suppose that Alice Author granted exclusive rights to publish her article in MagnaMagazine, but the written publication contract did not men-

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64. If the agreement was silent as to whether Fred was representing to MegaROM that the sequence did not violate third parties' copyright or related interests, 2B-401 would supply a warranty from Fred, if Fred is a "merchant," that "the information and informational rights shall be delivered free of the rightful claim of any third person by way of infringement or misappropriation ...." *Id.* § 2B-401(a).

65. *Id.* § 2B-201(e)(1)-(2).

66. See, e.g., *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150 (2d. Cir. 1968), cert. denied, 393 U.S. 826 (1968).

67. U.C.C. § 2B-307(b) (Aug. 1, 1998 Draft).



tion electronic rights. Suppose also that Magna now wishes to publish CD-ROM versions of selections from back issues of the magazine, as well as to license to Noxis Data Corp. the rights to include the article in an online electronic database containing a vast collection of articles from many newspapers and periodicals. Which, if any, of these additional exploitations would be permissible under section 2B-307?

Do CD-ROM and database rights "exceed the expressly granted contractual rights" in Alice's publishing agreement? Arguably, the agreement to publish in a magazine is not medium-specific; at least, Alice's agreement is not expressly limited to print media. If, however, at the time of the agreement, MagnaMagazine existed only in print form, the medium limitation may be implicit in the agreement, and the subsequent electronic version would exceed the rights granted. The rights Magna seeks to exercise or license do not involve a simple medium transposition of the magazine in which the article was published, but, rather, in the case of the CD-ROM, a new compilation of selected, previously published articles, and, in the case of the online database, a compilation of separately accessible articles from multiple sources.

Moreover, it seems unlikely that Magna could successfully claim to exercise or license the electronic rights on the ground that these exploitations are "necessary in the ordinary course to exercise the expressly granted contractual rights."<sup>68</sup> These exploitations involve different uses, not mere medium updates of the magazine issue in which Alice's article appears. While licensing inclusion of magazine articles in electronic databases may be a frequent business practice, it is not "necessary" to publication of the magazine itself. Therefore, CD-ROM exploitation exceeds the scope of the grant. By contrast, as the Reporter's Note suggests, some alteration of the article in order to conform it to the magazine's style or format, may implicate the author's derivative works right, but is reasonably necessary to the specific exploitation that the author permitted.<sup>69</sup>

Section 2B-307 offers a final basis that MagnaMagazine might invoke to justify its CD-ROM and database exploitations. Magna might assert that these exploitations "would be permitted under applicable law in the absence of the [implied] limitation." The Reporter's Note cites reverse engineering of licensed computer software as an example of a use exceeding the scope of the contract, but that might be a fair use under copyright law,

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68. *Id.* § 2B-307.

69. *See id.* § 2B-307, at Reporter's Note 1 (citing example of film clip licensed for inclusion in a CD-ROM product; license reasonably includes "right to crop or modify the size of the clip to fit the media ....").

and therefore "authorized" under Article 2B.<sup>70</sup> Would the Copyright Act permit MagnaMagazine to publish its CD-ROM compilation or license database rights to Noxis? The Act grants copyright owners of "collective works," such as encyclopedias and periodicals, a special privilege to reproduce and distribute the contributions to the collective work (whose separate copyrights the collective works proprietor does not own) "as part of that collective work, any revision of that collective work, and any later collective work in the same series."<sup>71</sup> Since the CD-ROM is a new compilation corresponding to none of the individual issues of the magazine, it would not qualify under the "*that* collective work" criterion.<sup>72</sup> By contrast, the question whether licensing the entire contents of magazine issues to a third party database comes within the collective work copyright owner's "privilege" is currently unsettled.<sup>73</sup> Assuming that the Copyright Act neither authorizes the collective work proprietor to license *others* to exploit the contributions, nor characterizes as a "revision" of the proprietor's particular *collective* work a multi-source compilation whose contents consumers may *separately* access, then Article 2B would not permit MagnaMagazine to engage in these exploitations without Alice Author's further accord.

Section 2B-307's "necessary to exercise" standard also compares favorably (for authors) with current case law construing the scope of copyright licenses. Decisions addressing the application of "old licenses" to "new media" when the language of the grant is ambiguous (for example, whether a pre-VCR-era grant of rights to record music onto the soundtrack of a motion picture includes the right to make and distribute videocassettes of the film<sup>74</sup>) do not uniformly attribute the benefits of the new mode of exploitation to grantors or to grantees. While the First and Ninth Circuits appear to presume that authors retain those rights, the Second Circuit has held that grantors who reasonably could have foreseen the new mode of exploitation must bear the burden of reserving rights in related future uses.<sup>75</sup> The section 2B-307 "necessary in the ordinary course to exercise the expressly granted contractual use" standard appears more restrictive

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70. See *id.* at Reporter's Note 2.

71. 17 U.S.C.A. § 201(c) (West 1998).

72. See *Tasini v. New York Times Co.*, 972 F. Supp. 804, 820 (S.D.N.Y. 1997).

73. See *id.*

74. See, e.g., *Boosey & Hawkes v. Disney*, 145 F.3d 481 (2d Cir. 1998); *Cohen v. Paramount*, 845 F.2d 851 (9th Cir. 1988).

75. Compare *Cohen*, 845 F.2d 851, and *Rey v. Lafferty*, 990 F.2d 1379 (1st Cir. 1993), *cert. denied*, 510 U.S. 828 (1993), with *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150 (2d Cir. 1968), *cert. denied*, 393 U.S. 826 (1968), and *Boosey & Hawkes v. Disney*, 145 F.3d 481 (2d Cir. 1998).

than the Second Circuit's approach, because availing oneself of a related new mode of exploitation (for example, videocassettes) is generally not *functionally* "necessary"—as opposed to economically desirable for the licensee—to exercising rights in the old mode of exploitation (theatrical motion picture exhibition). Article 2B thus appears to leave authors in a better position than under the Second Circuit's approach, and in at least as good a position as under the First and Ninth Circuits' analyses. Courts applying section 2B-307 might also look to European copyright contract case law for further guidance: several European Union member countries' copyright laws provide that, in the absence of contractual specification otherwise, the scope of a grant of rights is limited to those exploitations that are necessary to accomplish the purpose of the grant.<sup>76</sup>

Suppose that, instead of acquiring exclusive rights from Alice, MagnaMagazine had received only a non-exclusive license. What then of Magna's ability to exercise CD-ROM and database rights? If exercising these rights requires Magna to sublicense them, section 2B-502 defers to the general copyright principle that a grantee of non-exclusive rights may not transfer them without the licensor's consent.<sup>77</sup> By contrast, if MagnaMagazine sought to exercise these rights itself, section 2B-307's rules should apply; it would be anomalous were the scope of the non-exclusive grant deemed broader than the grant formalized in an authenticated record. Indeed, the broader Magna's non-exclusive rights, the narrower Alice's copyright ownership as a practical matter, since Magna's successful assertion of non-exclusive CD-ROM or database rights, for example, means that any "exclusive" CD-ROM license Alice grants in her article must co-exist with Magna's non-exclusive rights.<sup>78</sup>

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76. See, e.g., P. Bernt Hugenholtz, *Electronic Rights and Wrongs in Germany and the Netherlands*, 22 COLUM.-VLA J.L. & ARTS 151 (Winter 1998) (addressing the application of this principle in German and Dutch copyright law).

77. Section 2B-502(1)(A) makes transfers of non-exclusive rights ineffective "if prohibited under other applicable law." See § 2B-502(1)(A) (Aug. 1, 1998 Draft); *id.* at Reporter's Note 1. The Reporter's Notes recognize that under federal copyright policy, the licensee of non-exclusive rights may not sublicense those rights without the licensor's consent. The licensee may pass along her physical copy of a work of authorship, but not together with any copying privileges, unless the licensee effaces or surrenders any additional copies she had made. Cf. 17 U.S.C.A. § 117 (West 1998). Section 2B-502(1)(A) does not, however, set forth how the requisite "consent" must be expressed.

For a discussion of non-transferability of non-exclusive copyright licenses, see, for example, *In re Patient Educational Media*, 210 Bankr. 237, 240 (Bankr. Ct. S.D.N.Y. 1997), and decisions cited therein.

78. Query whether this co-existence is inconsistent with the warranty that author-"merchants" are presumed to extend under section 2B-401(b)(2), that the exclusive rights are indeed exclusive.

Moreover, it appears that this coexistence would endure for the term of the copyright: section 2B-308 provides that when the agreement does not specify its duration,

the duration of a license is perpetual as to the contractual rights and contractual use restrictions if ... the license authorizes the licensee to integrate the licensed information or informational rights into a product intended for distribution or public performance by the licensee.<sup>79</sup>

Because Alice's agreement authorized MagnaMagazine to incorporate the article into an issue of the magazine that will be publicly distributed, it appears that the non-exclusive license will be perpetual (subject to cancellation for breach, and, implicitly, expiration of the copyright); the perpetuity of Magna's license undermines the value to other potential licensees of Alice's "exclusive" rights in the article.<sup>80</sup>

Finally, Article 2B may modestly help bind publishers to the authors with whom they contract. Section 2B-502 permits the parties to provide for the non-transferability by the licensee of informational rights.<sup>81</sup> This implies, however, that the default position permits publishers to assign their rights and obligations. Thus, for example, Alice Author may have signed with Prestige Publisher, but if their agreement does not prohibit Prestige from assigning its rights, Prestige may hand Alice's manuscript off to Pulp Publisher. On the other hand, section 2B-505 sets a different default: the licensee may not delegate or subcontract if the licensor has a substantial interest in the actual promisor's performance.<sup>82</sup> From the author's point of view, there may be some tension between the free assignability principle on the one hand, and the protection of a party's "substantial interest" in obtaining performance from the original co-contractant. Perhaps section 2B-502 should incorporate the *substantial interest* bar to assignability.

So far, we have considered how Article 2B may help authors when their agreements tend toward the informal. The combination of rules that promote the easy formation of enforceable agreements with Article 2B's substantive default rules can supply some meaningful protections (as well

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79. U.C.C. § 2B-308(2)(B) (Aug. 1, 1998 Draft).

80. By contrast, if the license granted exclusive rights, it would be subject to termination, 35 years following execution of the grant, under section 203(a)(3) of the 1976 Copyright Act. Since 2B-308's provision for perpetuity of the license can conflict with the Copyright Act termination right, the federal right must prevail.

81. *See id.* § 2B-502(2).

82. *See id.* § 2B-505(a)(2).

as some pitfalls). But how do authors fare under Article 2B when the contracts—written by the exploiter party—are highly detailed? Here, the same formation-promoting rules can work to authors' detriment when the contract's contents override the substantive defaults: authors may end up assenting all-too-instantly to disadvantageous terms.

### **B. Rules that Increase Authors' Vulnerability to Exploiters**

Section 201(d) of the Copyright Act confirms the divisibility of rights under copyright; it permits authors to subdivide and transfer any of the exclusive rights. Section 204(a) subjects the validity of a grant of exclusive rights to the signing by the grantor of a "note or memorandum of the transfer." Together, these provisions are intended to ensure that the author does not blindly grant exclusive rights.<sup>83</sup> Compared with the friction that the Copyright Act builds in, does Article 2B make it too easy for authors to license rights in their works?

With respect to non-exclusive rights, Article 2B does, indeed, pose the risk that authors may too easily be bound to onerous terms. Suppose, for example, that a publisher sent an e-mail to an author proposing to disseminate the work, and asking the author to click on the "I agree" box. The terms of the agreement are not included in the e-mail, but the author is referred to the publisher's web page for the content of the terms. Under section 2B-111, the clicking author will be deemed to have "assented" to the contract, whether or not she actually reads the terms.<sup>84</sup> As a result, if the terms provide for a non-exclusive license in all media, now known or later developed, for the duration of the copyright, and any renewals and extensions thereof, the author is bound. Since, however, the Copyright Act does not grace non-exclusive grants with the same paternalistic attention, and limitations, as transfers of exclusive rights, this result, however unfortunate, does not conflict with the copyright law.

The same conclusion applies to "releases" of non-exclusive rights under copyright pursuant to section 2B-206. Suppose, for example, that a publisher announced a contest for the most distinctive food preparation photograph, and set forth as part of the terms of participation, that all

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83. See, e.g., *Effects Assocs. v. Cohen*, 908 F.2d 555, 557 (9th Cir. 1990); *Eden Toys v. Floralee Undergarments*, 697 F.2d 27, 36 (2d Cir. 1982); *Pamloff v. Giant Records*, 794 F. Supp. 933, 937 (N.D. Cal. 1992) (The purpose of section 204(a) is "to provide protection for the author and creator of copyrighted material against fraudulent claims of transfer. Thus we understand the policy underlying section 204(a) to be tipped somewhat in favor of the original holder of the copyrighted material.").

84. See U.C.C. § 2B-111 (Aug. 1, 1998 Draft). According to Reporter's Note 3, Illustration 1, the contract's terms can be in another, hyperlinked, document that the contractant need not in fact read, so long as the party had the opportunity to review the terms.

contestants granted the publisher the right to reproduce, distribute and transmit the images, in all media now known or later developed. Under Article 2B, the act of participating constitutes manifesting assent if the release language was prominent and called the party's attention. No writing or even a click-on is necessary here; sending the work in will suffice.<sup>85</sup>

Holding non-exclusive licenses, however, may not be enough for the exploiter parties, since non-exclusive licensees may not sublicense without consent,<sup>86</sup> nor do they have standing to sue for copyright infringement.<sup>87</sup> Since Article 2B does not specify how formal the consent to sublicensing must be, the exploiter party may well be able to secure that consent through the same click-on assent that validated the non-exclusive license. For example, the hyperlinkable terms of the agreement might include the required consent to sublicense. The standing problem is more intractable: only copyright owners have standing to sue for copyright infringement, and a non-exclusive licensee is not a copyright owner.<sup>88</sup>

Suppose, therefore, that the e-mail's referenced terms are the same, except that the grant is of exclusive rights; will a click-on assent or an act of participating suffice? Not unless the clicking or participating constituted a "signature" under copyright law.<sup>89</sup> Under Article 2B's own terms, more than merely clicking is required: Article 2B equates a "signature" not with mere "assent" but with an "authentication." "Authenticate" means to sign, or otherwise to execute or adopt a symbol or sound, or encrypt or similarly process a record in whole or part, with intent of the authenticating person to ... adopt or accept the terms or a particular term of a record that includes or is logically associated or linked with the authentication or to which a record containing the authentication refers ...<sup>90</sup> According to the Reporter's Notes, an authentication "expands on the traditional idea and general effect of a signature .... Adoption or execution of electronic or other text or a symbol with intent [to] authenticate a

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85. See U.C.C. § 2B-206(a)(1) (Aug. 1, 1998 Draft); *id.* at Reporter's Note 2. The illustration in the Note concerns participation in a chat room, and the participants' release to the chat-room operator of the right to publish their comments. But if no consideration is offered for the license, then, as a matter of copyright law, the license is revocable.

86. See *id.* § 2B-502.

87. See, e.g., *I.A.E. v. Shaver*, 74 F.3d 768, 775, 776 n.10 (7th Cir. 1996); PAUL GOLDSTEIN, COPYRIGHT § 4.4.1.1 (2d ed. 1998).

88. See 17 U.S.C.A. § 501(a) (West 1998) (identifying an infringer as "[a]nyone who violates any of the *exclusive rights* of the *copyright owner* ...") (emphasis added). The section 101 definition of "transfer of copyright ownership" excludes non-exclusive licenses. *Id.* § 101.

89. See *id.* § 204(a).

90. U.C.C. § 2B-102(a)(3) (Aug. 1, 1998 Draft).

record that would be a signature under prior law is an authentication under Article 2B. This includes use with requisite intent of identifiers such as a PIN number.”<sup>91</sup> The emphasis on intent suggests that Article 2B was not designed to facilitate authors’ inadvertent transfers of copyright ownership. But is there nonetheless a significant risk that an author might “authenticate” a record that she would not “sign?”<sup>92</sup>

If authentication may be made more easily than a traditional “signature,” is there a conflict between the copyright law and Article 2B, so that the copyright law should preempt Article 2B with respect to exclusive licenses? Put another way, which law, federal copyright law or state contract law, defines what a “signature” is? Does the Copyright Act give any indication that the term “signature” has independent federal content distinct from the term’s meaning at state law?

The case law on these issues is sparse, but those few courts that have addressed the issue perceive independent federal content to the section 204(a) requirements, rather than a *renvoi* to state law standards; courts have held, for example, that the standard for a “note or memorandum” under section 204(a) was more stringent than that imposed by the state statute of frauds.<sup>93</sup> Arguably, any appearance of a term in the Copyright Act that the Act does not itself define calls for development of a federal common law definition, rather than an interstitial resort to state law norms.<sup>94</sup> Thus, for example, in *CCNV v. Reid*, the U.S. Supreme Court articulated a federal law definition of “employee” for purposes of determining whether a commissioned work created by a hired party is an “employee”-created

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91. *Id.* § 2B-102, at Reporter’s Note 3.

92. There may also be a danger that authors, as “merchants,” could be bound without authenticating an agreement: 2B-201(d) provides that the authentication requirement may be met, between merchants, if one party sends a record to the other, and the recipient does not timely object to the record’s contents. Applied to author contracts, this could mean that the publisher could convert a non-exclusive license into an exclusive license if the publisher sent the author a record characterizing the license as exclusive, and if the author failed to object. Even if that result might be possible under Article 2B, however, it is inconsistent with the Copyright Act’s formal requirements: an unresponded-to “confirmation” from the grantee is not a “writing” “signed by the owner of the rights conveyed,” 17 U.S.C.A. § 204(a) (West 1998).

93. See *Konigsberg Int’l., Inc. v. Rice*, 16 F.3d 355, 357 (9th Cir. 1993); *Pamilo v. Giant Records*, 794 F. Supp. 933, 936 (N.D. Cal. 1992).

94. Under the 1909 Act, one test of whether a contract claim “arose under” the federal copyright law, thereby justifying the development of a “federal common law” of contracts, was whether the controversy “presents a case where a distinctive policy of the Act requires that federal principles control the disposition of the claim.” *Harms v. Eliscu*, 339 F.2d 823, 828 (2d Cir. 1964) (Friendly, J.). If that analysis still applies to the 1976 Act, the question remains whether section 204(a) implicates distinctive federal policies.

work made for hire.<sup>95</sup> The Court looked to state common law sources (the Restatement of Agency) to devise the federal standard, but it is clear that the court was applying newly-stated federal criteria to the statute's interstices, rather than perceiving a Congressional delegation to state law to complete the statutory scheme.<sup>96</sup> But even if courts agreed that federal common law supplies the meaning of the terms "signature" and "note or memorandum of the transfer," we still do not know if federal courts would end up adopting the standards of Article 2B as part of the federal common law, as the Supreme Court adopted the standards of the Restatement of Agency.

Adopting Article 2B's standards would arguably be consistent with the technology-neutrality that characterizes much of the Copyright Act. For example, the Act specifies that "[c]opyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, *now known or later developed* ...."<sup>97</sup> The provisions on transfers of copyright, however, may not anticipate the technology of digital signatures or transitory digital "records." The most revealing provision is section 205(a) on recordation of transfers, which provides:

Any transfer of copyright ownership or other document pertaining to a copyright may be recorded in the Copyright Office if the document filed for recordation bears the *actual signature* of the person who executed it, or if it is accompanied by a sworn or other official certification that is a true copy of the original, signed document.<sup>98</sup>

Given the "actual signature" requirement of 205(a), the same quality of signature is implicit in 204(a)'s requirement that the note or memorandum of the transfer be "in writing and signed." That is, it seems unlikely that the signature necessary to *effect* a transfer of copyright ownership should be less "actual" than the signature necessary to *record* the effected transfer.

The Copyright Act's signature requirements thus are not technology-neutral; a photocopy of a handwritten signature will not suffice.<sup>99</sup> Autopen

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95. 490 U.S. 730, 751-52 (1989).

96. *Compare* DeSylva v. Ballentine, 351 U.S. 570, 580 (1956) (looking to state law to complete definition of "children" under 1909 Act).

97. 17 U.S.C.A. § 102(a) (West 1998) (emphasis added).

98. U.C.C. § 205(a) (Aug. 1, 1998 Draft) (emphasis supplied).

99. The photocopied signature may be accepted for recordation, if it is properly certified, but the certification requires that the recorded document be a "true copy of the original, signed document;" that implies that the original document bore an original, not a



and similar mechanical facsimile signing devices probably are also excluded. But these exclusions are not necessarily inconsistent with Article 2B. The concept of "actual signature" may mean handwriting, or it may mean reliable evidence that the copyright owner herself executed the document.<sup>100</sup> Handwriting is a proxy for the latter concept, but may not be the exclusive means of ensuring and proving that the copyright owner agreed to the transfer. Article 2B's authentication provisions strive to achieve the same result.<sup>101</sup>

If an "authentication" is as reliable as a traditional signature, Article 2B's electronic substitutes would meet copyright norms, unless one interprets the Copyright Act's signed writing standard to require not only that the author herself execute the transfer, but also that the author reflect on the consequence of entering into the contract. While I believe the latter proposition underlies section 204(a) to some extent, I must acknowledge that if the Act is occasionally paternalistic, it does not assume full custody of all authors' alienations. For example, there would be no section 204(a) challenge to a transfer effected by an author who physically signed the document without reading it.

Might Article 2B yield to the Copyright Act's other formal prerequisite to the validity of a transfer of exclusive rights? Where copyright law requires "an instrument of conveyance or a note or memorandum of the transfer," Article 2B demands a "record." The Reporter's Note to section 2B-102(a)(39) tells us that a "record" "does not require permanent storage or anything beyond temporary recordation."<sup>102</sup> For Article 2B, a "record" corresponds to the Copyright Law concept of a "copy;"<sup>103</sup> "copies" in copyright are "material objects in which a work is fixed ...;" a fixation need only be "sufficiently permanent or stable to permit [the work] to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."<sup>104</sup> But saying that a "record" is a "fixation," does

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photocopied, signature. In the Article 2B context, query what would be a "true copy" of the "authenticated record"?

100. See, e.g., *Valente-Kritzer Video v. Pickney*, 881 F.2d 772 (9th Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990) (rejecting document executed by author's lawyer; even if lawyer intended to memorialize production agreement, author's own signature or express authorization still required).

101. See U.C.C. §§ 2B-102(a)(3), 2B-113, 2B-116, 2B-119 (Aug. 1, 1998 Draft).

102. *Id.* § 2B-102, at Reporter's Note 34.

103. See *id.* (explaining that the definition of "record" "broadens the traditional reference to 'writing,' and incorporates electronic records. It does not require permanent storage or anything beyond temporary recordation. Fixation can be fleeting and perception can be either directly or indirectly with the aid of a machine.").

104. 17 U.S.C.A. § 101 (West 1998).

not resolve the question whether, as a matter of copyright law, "an instrument of conveyance or a note or memorandum of the transfer" need be merely a fixation, or whether the Copyright Act requires a more permanent attestation. Certainly, the recordation provisions of section 205 anticipate more than a temporary fixation, but recordation is not a prerequisite to validity of the transfer. So perhaps recordability of the transfer document is not a prerequisite to validity either. On the other hand, one might infer from the absence of the words "copy" or "fixed" in section 204(a), that the drafters expected that the signed writing would be in a medium that was not only tangible, but also persistent.<sup>105</sup> To that extent, Article 2B may be more liberal than the Copyright Act, in which case, the more stringent standard of the Copyright Act should prevail.<sup>106</sup>

### 1. Two Test Cases

To assess Article 2B's potential to promote or to compromise authors' interests, let us consider two test cases. In the first, the editor of NEW GREED FINANCIAL NEWS magazine calls Frances Freelance to ask her to write a 2500-word article on off-shore gambling for the next issue of the magazine; he tells her NEW GREED will pay her \$1500. Frances researches and writes the article, which she e-mails to NEW GREED with a note: "As requested, here it is; you owe me \$1500." NEW GREED e-mails back to confirm its receipt of the article and to inform Frances that if she wants her check to be processed, she must click her assent to an agreement that the article is a work for hire; or, failing that, a total assignment, or, failing that, an exclusive license for all print and electronic media.

Article 2B would not, in fact, cover the first two purported grants, since these are not "licenses," but rather grants of all informational rights.<sup>107</sup> Because there is no "signature," there would be no valid transfer as a matter of copyright law.<sup>108</sup> As for the third term in NEW GREED's response, Article 2B would apply, but would also require an authentication; the click-on would not of itself suffice.<sup>109</sup> If Frances refused to click her assent, what would be the terms of her agreement? If one refers to the e-mails, Frances' "record" does not disclose very much detail, apart from

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105. The contrast in terminology between § 201(d)(1), which states "the ownership of copyright may be transferred ... *by any means of conveyance*" (emphasis supplied), and section 204(a)'s "instrument of conveyance" does not aid resolution of the question whether the memorialization of the transfer need be more stable than a temporary fixation.

106. See U.C.C. § 2B-105, Reporter's Note 5 (Aug. 1, 1998 Draft).

107. See discussion, *supra* Part II.

108. See 17 U.S.C.A. § 204(a) (West 1998).

109. See U.C.C. § 2B-102(a)(3) (Aug. 1, 1998 Draft).

the price term. It would be necessary to refer back to NEW GREED's phone call.<sup>110</sup> The terms of the oral communication referred only to publication of the article in the next issue. Under section 2B-307's approach, one may argue that non-print media are not "necessary" to the use specified, and therefore should not be deemed included. Thus, even if Frances, fearing she would never be paid, did click on her agreement to NEW GREED's subsequent terms, NEW GREED would in fact only receive a one-time non-exclusive, non-assignable right to publish her article in the next issue of the print magazine.<sup>111</sup> In this instance, Article 2B appears to work in the author's favor.

In the second case, suppose an online bookstore, Hypolita.com, sponsors a short story writing contest. The winner will receive fame, fortune, and hardcopy publication; all participants, whether or not selected as winners, are asked to click assent to the following terms (if they do not assent, their submission will not be considered):

By participating in this contest, you grant Hypolita and its successors the right to use your short story, including, but not limited to, its characters, as revised or edited by Hypolita in its sole discretion and under its name, in any medium.<sup>112</sup>

According to section 2B-206, this is a valid release of the authors' "informational rights," not only with respect to the winner, who receives the consideration of the announced prize, but with respect to the losers, since section 2B-206 specifies that "a release in whole or in part is effective *without consideration* if it is in a record to which the releasing party agrees, by manifesting assent or otherwise, and which identifies the infor-

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110. Necessary recourse to oral communications to fill in essential terms of the agreement should not make it vulnerable under 2B-201, since the payment is less than \$5,000, and the duration is less than one year (at least, if one understands the license to grant only one-time print publication rights). See U.C.C. § 2B-201 (Aug. 1, 1998 Draft).

111. As for whether NEW GREED could obtain its objective by sending a check with language on the back proclaiming that Frances' endorsement constituted an execution of a work made for hire agreement, or an assignment, or an exclusive license, the copyright cases are somewhat inconsistent. Compare *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410 (7th Cir. 1992) (holding that a work for hire agreement must be executed *before* the work is completed), with *Playboy Enters. v. Dumas*, 53 F.3d 549 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 567 (1995), *on remand*, 960 F. Supp. 710 (S.D.N.Y. 1997) (holding that a work for hire agreement may be executed after delivery of the work, so long as oral agreement on work for hire status preceded the work's creation.) Note that these standards would not assist NEW GREED, since the work for hire "agreement" was not proposed, orally or otherwise, until after delivery of the work.

112. This example is inspired by U.C.C. § 2B-206, Reporter's Note 2, Illustration 1 (Aug. 1, 1998 Draft).

mational rights released.”<sup>113</sup> What “informational rights” are implicated? “Use” (assuming that means “reproduction” and “distribution”), “revis[ion]” and “edit[ing]” all involve rights under copyright,<sup>114</sup> but since the “release” grants only non-exclusive rights, it is valid as a matter of federal copyright law. On the other hand, lack of consideration for the release also makes it revocable as a matter of copyright law.<sup>115</sup> Because the copyright norm should override, then, notwithstanding their release, the participants should be able to recall the non-exclusive grant of reproduction, adaptation, and distribution rights.

State law intellectual property rights may also be at issue here. With respect to character rights, for example, some ambiguity persists, at least in the Ninth Circuit, as to whether literary characters are copyrightable.<sup>116</sup> In *Warner v. CBS* (the “Maltese Falcon” case),<sup>117</sup> the Ninth Circuit suggested that literary characters might not be copyrightable (unless they constituted the “story being told”), and that a transfer of copyright in a novel therefore would not convey sequel rights in the characters. If character rights are outside copyright, then, in releasing character rights to Hypolita, the participants have surrendered control over the characters, and may not be able to revoke the release. Revocation may not be possible because section 2B-105 appears to override *state*-based (as opposed to federally-based) intellectual property rights. That provision preserves certain state statutes that conflict with Article 2B, but character rights are not among them.<sup>118</sup> Indeed, the beneficiaries of these exceptions are not authors, but consumers.<sup>119</sup> Thus, even if the Ninth Circuit had found, as a matter of California law, that a grant of character rights requires consideration separate from the consideration for the transfer of copyright, section 2B-206 eliminates the need for consideration for a “release.”<sup>120</sup> This result would compromise the author’s efforts to license the literary work; it suggests

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113. U.C.C. § 2B-206(a)(1)(A) (Aug. 1, 1998 Draft) (emphasis added). Reporter’s Note 1 characterizes a “release” as a “form of a license.” *Id.* at Reporter’s Note 1.

114. *See* 17 U.S.C.A. § 106(1)-(3) (West 1998).

115. *See, e.g.,* I.A.E. Inc. v. Shaver, 74 F.3d 768, 772, 776 n.10 (7th Cir. 1996); Avtec-Sys. Inc. v. Peiffer, 21 F.3d 568, 571 n.12 (4th Cir. 1994); MacLean Assocs., Inc. v. Wm. Mercer-Meidinger-Hansen, Inc., 952 F.2d 769, 778-79 (3d Cir. 1991); NIMMER & NIMMER, *supra* note 27, §§ 10.01[C][5], 10.02[B][5].

116. *See, e.g.,* RICHARD WINCOR, THE ART OF CHARACTER LICENSING, 19-25, 238-48 (1996).

117. *Warner Bros. Pictures, Inc. v. Columbia Broad.*, 216 F.2d 945 (9th Cir. 1954), *cert. denied*, 348 U.S. 971 (1955).

118. *See* U.C.C. § 2B-105(d) (Aug. 1, 1998 Draft).

119. *See id.* § 2B-105(d) (explaining that in case of conflict between Article 2B and state consumer protection measure, the latter prevails).

120. *See id.* § 2B-206(a)(1).

that state-based rights in the content of copyrighted works (to the extent any survive copyright preemption)<sup>121</sup>, should benefit from the same overrides of Article 2B as copyright.<sup>122</sup>

Other state-based rights that may come within this category are moral rights to the integrity of the work, and to attribution of authorship.<sup>123</sup> In granting Hypolita sole discretion to revise or edit the story, and to disseminate the results under its own name, the participants also are surrendering whatever moral rights to the integrity of the work and to attribution that they may enjoy under state laws. Here again, however, even if a state law moral rights waiver would require consideration, section 2B-105 may prevail.<sup>124</sup> It seems, therefore, to the extent that state law may afford authors additional protections, licensees may too easily avoid their application by resort to releases under section 2B-206.

#### IV. *SHOULD ARTICLE 2B COVER INDIVIDUAL AUTHOR-EXPLOITER CONTRACTS?*

If the "fit" between non-software authors and Article 2B is highly imperfect, would authors be better off in or out of Article 2B? We have seen that Article 2B can create anomalous or undesirable situations for authors, although it can also supply helpful default rules that control when rampant informality characterizes the author-exploiter relationship. Significantly, while many potentially affected industries have participated intensively in the Article 2B drafting process, it appears that authors or their representatives have not closely followed Article 2B's evolution.<sup>125</sup> (If anything, it may be a surprise to many traditional authors that Article 2B would cover

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121. See 17 U.S.C.A. § 301 (West 1998).

122. This result also suggests that this aspect of the "Maltese Falcon" decision, if it ever was good law, no longer should be.

123. State-based moral rights of integrity may, however, be held preempted under section 301 of the Copyright Act, on the ground that the moral right to preserve the work against alteration or distortion is "equivalent" to the exclusive right under copyright to derivative works. The moral right to attribution, by contrast, has no copyright law analogue, aside from the specific provisions of 17 U.S.C. § 106A, the Visual Artist's Rights Act, which protects only "works of visual art" (physical originals, or limited editions signed and numbered up to 200, of the art works).

124. See, e.g., JANE C. GINSBURG, JESSICA LITMAN ET AL., *TRADEMARK AND UNFAIR COMPETITION LAW* Chapter 9A, "Authors' and Performers' Rights of Attribution" (2d ed. 1996) (discussing the extent to which section 43(a) of the Lanham Federal Trademarks Act protects authors' attribution interests). Query whether a 2B-206 "release" is consistent with that protection.

125. See Interview with Jonathan Tasini, President, the National Writer's Union (Mar. 6, 1998).

them.) Yet, if authors are to be covered, it would be best if the drafters could, with authors' assistance, work through in detail how Article 2B's provisions would apply, and how those provisions might be changed as a result. (This paper has attempted to raise some issues and questions, but undoubtedly there are many more instances of concern to traditional authors whose analysis would instruct Article 2B's drafters.)

If authors (or their representatives) were to participate in the drafting process (if it is not too late), there may be good reason to maintain Article 2B's coverage. As some commentators have observed or feared, non-Article 2B contracts may be affected by judicial reasoning by analogy from Article 2B.<sup>126</sup> If authors are to end up covered by Article 2B through the back door, maybe it would be better for authors to come in through the front entrance, and to endeavor to improve the "fit."

How might Article 2B be amended to authors' advantage? For those copyright-related areas that remain within the purview of state law, such as the scope of copyright grants and at least certain moral rights, Article 2B could include author-protective rules, for example, a default (if not mandatory) obligation to credit the author as the creator (or, in the case of joint works or adaptations, a creator) of the work. Article 2B might also provide a default rule that the exploiter will disseminate the work as the author created it, although the parties may specifically contract to permit the exploiter to modify the work. (Any such agreement should be subject to the author's "authentication," and not merely to her "assent.")

In some other respects, however, current Article 2B presents too many "traps for the unwary" author because of the ease with which non-exclusive rights may be conferred. One possible response to this danger would be to subject non-exclusive licenses and releases of rights under copyright to an authentication requirement. Section 2B-206 should also specify that when the "release" is of informational property rights in works of authorship, and there has been no consideration, the author is always free to revoke.

Finally, one might return to the question of Article 2B's scope: should Article 2B address only licenses, and not assignments, or, most significantly, work-for-hire agreements? It may seem anomalous that techniques that Article 2B would validate for a transfer of an exclusive license would not also apply to more drastic reductions of the authors' rights. But that may also be just as well. The November 5, 1996 comments of "the Enter-

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126. See, e.g., Letter from Gary L. Griswold, *American Intellectual Property Law Association*, to Article 2B Drafting Committee (Nov. 18, 1997), available at <<http://www.2Bguide.com/docs/sycaipla.html#aipia>> (visited Nov. 23, 1998).

tainment Industry” perceived Article 2B as an opportunity to facilitate the conclusion of work for hire agreements;<sup>127</sup> Article 2B’s drafters have so far declined the invitation. May they continue to do so.

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127. The document can be found on the software industry web site, but appears to have no credited author. *See Article 2B—More than Software* (visited Nov. 4, 1998) <<http://www.2BGuide.com/docs/elposition.pdf>>.

