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Cover Page Footnote

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Opportunity Costs of Globalizing Information Licenses: Embedding Consumer Rights within the Legislative Framework for Information Contracts

*Gail E. Evans**

INTRODUCTION

The economy of the latter twentieth century has witnessed a radical shift in production and value. We have emerged from an age in which the primary mode of production was one of mass manufacture to an age that generates and relies upon the organizing, processing and accumulation of information.¹ An information industry² has emerged spearheaded by software and publishing corporations, which are growing at a more rapid rate than the manufacturing sector of the economy.³ The value of their assets

*Professor of Law, Southern Cross University Law School, Australia. The author wishes to thank Professor Rochelle Cooper Dreyfuss, Professor Brian Fitzgerald, Professor Hugh Hansen, Professor Wendy J. Gordon, Professor J.H. Reichman and Martin Mitchell, Director, Linux & Network Solutions, for their advice and support. This paper was presented on April 8-9, 1999, at the Seventh Annual Conference on International Intellectual Property Law and Policy held at the Fordham University School of Law, New York City.

1. Frank Webster explains how the nationalistic mass production model of the Ford Motor Corporation has given way to globalization and the transnational corporation through which information has been pivotal in the development of the post Fordist information society. FRANK WEBSTER, *THEORIES OF THE INFORMATION SOCIETY* 136-40 (1994).

2. While industries such as Microsoft and IBM are often loosely characterized as copyright based, this qualification can be misleading in so far as much of the information proprietors seek to protect is not sufficiently innovative to qualify for copyright protection. See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350 (1991).

3. In the United States, software and related information technologies account for

lies in intangibles, in information. Computer networks have made possible the commodification and exchange of information. The Internet facilitates not only the indirect exchange of products in the electronic ordering of information products in tangible form on floppy or compact disk, but also the direct exchange of information products in intangible form, by means of online delivery.⁴ Consumers simply download the product to their computer. The Internet has given rise to a global marketplace in which it is possible to buy and sell information at low cost across national frontiers.

Law arises out of the needs of the commodity form of production.⁵ The information industry has fashioned a licensing contract to meet its needs in the mass market. Consumer transactions are accompanied by a shrink-wrap or clickwrap licensing agreement,⁶ which purports to restrict the ability of consumers to modify or re-

8.2 per cent of GDP. This sector has contributed one-third of all real growth in the United States in the past three years, and is growing at twice the rate of the economy as a whole. See Ministerial Council for the Information Economy, *Towards an Australian Strategy for the Information Economy*, § 1.2 (July 1998) <<http://www.noie.gov.au/strategy.html>>. Internet commerce is set to grow at a rapid pace during the next four years, with the value of goods and services traded between companies, business to business, rising from US\$8 billion this year to US\$327 billion in 2002. See *U.S. On-line Business Trade will Soar to \$1.3 Trillion by 2003, According to Forrester Research*, December 17, 1998, available at <<http://www.forrester.com/ER/Press/Release/0,1769,121FF.html>>.

4. This would be the case where a product, such as an anti-virus software program, is both delivered and consumed in real time.

5. On the notion of commodity and subject see EVGENY B. PASHUKANIS, *LAW AND MARXISM, A GENERAL THEORY* 109-20 (Barbara Einhorn trans. & Chris Arthur ed., 1989).

6. Most software is sold with a shrink-wrap agreement enclosed. The software vendor offers to sell or license the use of her software according to terms accompanying the software. The purchaser or licensee agrees by his conduct to be bound by such terms. Such conduct typically takes the form of the retention or use of the software after being provided an opportunity to review the contract's terms and return the software for a full refund if the terms are unacceptable. Click-wrap agreements are contracts formed entirely over the Internet. A party posts terms on its Web site pursuant to which it offers to sell goods or services. To buy these goods, the purchaser is required to indicate his assent to be bound by the terms of the offer by his conduct - typically the act of clicking on a button stating "I agree." Once the purchaser indicates his assent to be bound, the contract is formed on the posted terms, and the sale is consummated. No paper record is created nor is the signature of the purchaser required. See Joann Nesta Grossman, *Causes of Action On and Off the Contract in Year 2000 Litigation*, 18 REV. LITIG. 553, 557 (1999); see also John F. Delaney and Robert Murphy, *The Law of the Internet: A Summary of U.S. Internet Caselaw and Legal Developments*, 570 PLI/Pat 169, 347 (1999).

sell the information product. Licensing is the one existing concept that addresses the nature of information as a commodity. Information is an unusual commodity because it can be consumed by one person and yet still be available to others. Once commodified information is a paradox in as much as it is both a finite yet infinitely re-useable resource. Information cannot be definitively transferred or conveyed to the buyer.⁷ For example, Westlaw does not tender its entire database to its subscribers. It offers searches of information that differ each time the subscriber “signs-on.” Consequently, for the information merchant, licensing provides a means of retaining an ongoing interest in the property. In the grant of access to an electronic database the user does not receive a transfer of ownership rights in the “copy,” but simply a limited transfer of rights to use information on stated terms and conditions.⁸

Information has become one more commodity of exchange. The advent of information licensing signals a dramatic transformation in the ordering of information in our society. Since the age of the printing press, the law of copyright, a system of granting statutory monopolies for sufficiently innovative works, has been the primary form of legal protection accorded information. However, the ascendancy of contract over copyright is a reflection of information as the most valuable economic unit. In the information age, there is every indication that the legal ordering concept of contract is being used to sustain a society based on the commodification of information.

As a matter of legal principle, the information license is a device which sits uncomfortably within the paradigms of either copyright or sales law. The codification of information licenses in proposed Article 2B of the United States’ Uniform Commercial Code (UCC)⁹ only serves to accentuate the tendency for contract to as-

7. See *Simpson v. Connolly*, 2 All E.R. 474, 476 (Q.B. 1953); see also *City Motors (1933) Proprietary, Ltd. v. Southern Aerial Super Service Proprietary, Ltd.*, 106 C.L.R. 477, 486 (1961).

8. See *Ticketron Ltd. Partnership v. Flip Side, Inc.*, No. 92-C-0911, 1993 WL 214164 (N.D. Ill. June 17, 1993); *Soderholm v. Chicago Nat’l League Ball Club Inc.*, 587 N.E.2d 517, 520 (Ill. App. Ct. 1992).

9. Draft Article 2B of the Uniform Commercial Code was slated for approval in July 1999, and enactment by the states in 2000. However, agreement on a final text proved so controversial that on April 7, 1999 the National Conference of Commissioners

sume the leading role in the management of information for electronic transactions.¹⁰ It analogizes the transfer of information within society to a sale of goods transaction. It purports to render information subject to warranties as to title, fitness of purpose and merchantability.

The information industry was born global and the provisions of Article 2B, as exemplified by those pertaining to choice of law, reveal its global aspirations. While international lawmakers have yet to address the substantive aspects of buying and selling information products,¹¹ they would do well to heed the debate currently occurring in the United States concerning the potential scope of the industry's "information monopoly" under such legislation and the consequent restrictions on user and public domain rights. Considering that the information industry is one of the fastest growing sectors of the American economy,¹² the capacity of the information industry to generate export income provides the same rationale that saw minimum standards of intellectual property protection implemented worldwide by the World Trade Organization under the

on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) announced that legal rules for computer information transactions would not be promulgated as part of the Uniform Commercial Code. Instead NCCUSL, alone and therefore without need of the ALI vote, intends to promulgate the rules for adoption by states as the Uniform Computer Information Transactions Act (UCITA). See *ALI and NCCUSL Announce That Legal Rules For Computer Information Will Not Be Part of the UCC*, U.C.C. BULL. 4-5, July 1999; Uniform Computer Information Transaction Act, draft of July 23-30, 1999, (visited Sept. 9, 1999) <<http://www.law.upenn.edu/bll/ulc/ucita/citam99.htm>>. Note: all references to U.C.C. Article 2B correspond to the proposed draft of the NCCUSL and the ALI, February 1, 1999, available as at the time of writing and the author's comments are limited hereto: <<http://www.law.upenn.edu/library/ulc/ucc2b/2b299.htm>>.

10. See David E. Nimmer et al., *The Metamorphosis of Contract Into Expand*, 87 CAL. LAW REV. 17, 21-25 (1999).

11. To date, most countries, including Australia, have been largely concerned with facilitating electronic commerce by ensuring the recognition of digital signatures and the security of electronic cash transactions. See *UNITED NATIONS: UNCITRAL Model Law On Electronic Commerce*, 36 I.L.M. 197 (1997). For example, the Australian Government Report, "Electronic Commerce: Building the Legal Framework", March 31, 1998, proposes legislating to ensure the legal recognition of electronic signatures and documents. See <<http://www.law.gov.au>>.

12. See David Skidmore, *Computer World Seen Helping Economy*, U.S. Industry & Trade Outlook '99 (January 1999) <<http://www.ita.doc.gov/industry/otea/usito99/099-ap.htm>> (reporting that the computer and technology industry continues to demonstrate stellar growth and such growth is forecasted into the next century).

TRIPS Agreement.¹³ If the United States in combination with the information industry succeeds in legislating information licensing in the WTO, states would be constrained by their membership obligations from amending their national laws to take account of public policy goals in the dissemination of information.¹⁴

Article 2B-style licenses would give public endorsement to the private sector initiative in click-on licenses, accentuating the trend by the industry to claim uniform ownership rights in undifferentiated information. If we proceed to endorse such a model at the global level, we are also endorsing the balance of rights over information which gives a disproportionate power and weight to the proprietary interests of licensors. Clearly, before such a step is taken, we need to understand the nature of the Internet as a commercial environment and make an assessment of its likely impact on the balance of current rights in information between public and private domains. What we see in Article 2B is no less than the unfolding of a new information constitution. For in its broader dimensions this debate is about the distribution of power in information society. In this case, given the nature and importance of the digital medium, there should be a global consensus on the distribution of power between information rightholders and users.

I refer to the need for a global consensus since the advent of globalization has dramatically diminished the ability of the nation state to control the deployment of its resources.¹⁵ Transnational

13. See Gail E. Evans, *Intellectual Property as a Trade Issue: The Making of the Agreement on Trade-Related Aspects of Intellectual Property Rights*, WORLD COMPETITION, LAW AND ECON. REV. Sept. 1994, at 137; Gail E. Evans, *The Principle of National Treatment and the International Protection of Industrial Property*, 18 EUR. INTELL. PROP. REV. 149 (1996); Brian F. Fitzgerald, *Trade-Based Constitutionalisms: The Framework for Universalizing Substantive International Law?* 5 UNIVERSITY OF MIAMI YEARBOOK OF INT'L L. 111 (1996-97).

14. Concerning issues of substantive and procedural justice in the global regulation of intellectual property, see Gail E. Evans, *Issues of Legitimacy and the Resolution of Intellectual Property Disputes in the Supercourt of the World Trade Organization*, 3 J. OF INT'L. TRADE L. AND REG. 81-98 (1998).

15. The term globalization is primarily used to describe key aspects of economic transformation in the latter twentieth century. See THE COMMISSION ON GLOBAL GOVERNANCE, *OUR GLOBAL NEIGHBORHOOD*, 10 (1995). Concerning the meaning and concept of globalization see also H. Steiger, *Plaidoyer pour une Jurisdiction Internationale Obligatoire in THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY* 824-26 (Jerzy Makarczyk ed. 1998); see also H.G. Krenzler, *Globalization and*

corporations (TNCs) on the other hand are mobile and can self-regulate as well as choose between state regulators. The post war economic boom, coupled with the revolution in communications technology, has seen corporations and financial institutions unite to form global entities whose power and wealth rivals the nation state.¹⁶ The powerlessness of the state to legislate effectively can only be overcome by developing such cross-border structures as we see in the European Union or the World Trade Organization.¹⁷

Recognizing that contract has displaced copyright as the primary regime for the governance of information and that this shift presupposes a change in the distribution of informational rights between the private and public domains; recognizing also that states, on behalf of their citizens, can only address this situation effectively by exercising their sovereignty collectively at the transnational level - in this paper, I argue that prior to endorsing the mass market licensing of information, states should seek to address the inequality in bargaining power between producer and user by embedding consumer rights within the legislative framework for information contracts.¹⁸ Accordingly, Part I describes the private sector response to the commodification of information via digital networks in the form of standard form, click-on licensing agree-

Multilateral Rules 4 (4) J. OF INT'L. TRADE L & REG. 144, 145 (1998) (highlighting the qualitative difference between nineteenth and twentieth century trends to economic integration in three major aspects: the prodigious growth in foreign direct investment; the contribution of the services sector to gross national product and the globalization of the financial economy). By comparison, social and political scientists prefer a more comprehensive explanation. David Held and Andrew McGrew, *Globalization and the Liberal Democratic State*, in GLOBAL TRANSFORMATION: CHALLENGES TO THE STATE SYSTEM 58-59 (Yoshikazu Sakamoto ed. 1994)("[G]lobalization defines a universal process or set of processes that generate a multiplicity of linkages and interconnections that transcend the states and societies that make up the modern world system. . .").

16. During the first half of the century, major extractive, service and manufacturing firms in Europe and North America had already developed a substantial international presence. See THE COMMISSION ON GLOBAL GOVERNANCE, *supra* note 154, at 18 ("After 1945, the weight of these transnational corporations . . . in the world economy grew as the pioneers matured and were joined by Japanese and subsequently by other Asian and Latin American enterprises.").

17. STEPHEN WEATHERILL, LAW AND INTEGRATION IN THE EUROPEAN UNION 2-4 (1995).

18. Although the draft computer information licensing statute has now been removed from the Uniform Commercial Code, this argument remains valid. See *supra* note 9.

ments. It explains how this *lex mercatoria* might be codified as Article 2B of the United States Uniform Commercial Code and how, given its extraterritorial aspirations, this development would set a precedent for the global promulgation of legal protection for information licensing. In public legal institutions and information products, Part II considers the need for global policy-making towards a regulatory response to the private licensing of information that strikes a balance between private and public domain rights in information. It explains the conceptual challenges that must be addressed within the paradigm of sales law, if online information transactions are to be accommodated within such a regulatory framework. Part III examines the emergence of a new information order for the digital millennium which sees contract displacing copyright as the primary means of governing the exchange and dissemination of information in our society. It explains the ascendancy of contract in light of the commodity-exchange theory of Evgeny B. Pashukanis.¹⁹ In drawing our attention to the darker side of contractual self-rule in the new cyber-market, Part IV argues that instead of adopting a “wait-and-see” attitude to the impact of restrictive licensing practices, lawmakers should attempt to accommodate the rights embodied in consumer protection law with innovative measures designed to meet the distinctive needs of the online marketplace. Given the displacement of copyright protection, such an accommodation, it is argued, also requires a reconciliation between the fair use provisions of the copyright law and concepts of public policy and consumer rights within the legislative framework of contract law. In recommending that, as a matter of priority, law and policy makers debate information licensing and consumer protection at the transnational level of governance, Part V contains some proposals as to how that debate might begin. By way of conclusion, this Article urges both industry and user groups to realize that the legal provision for a marketplace in which consumers feel secure in their transactions is a goal which is ultimately in the interests of all stakeholders in information society.

19. Pashukanis, *supra* note 5.

I. GLOBAL INFORMATIONALISM: THE PRIVATE SECTOR AND THE CREATION OF EXTERNAL LEGAL ORDERS

Global informationalism sustains the realization of wealth through the commodification and exchange of information. Computer technology makes it possible to convert to digital form all manner of information, including text, audiovisual works and computer software. It is transferred to a binary computer format enabling a computer to process the work in the same way as simple data, in digital quality. Once digitized, the information may be simply stored on hard disk ready for instant uploading and retrieval by a mass market of worldwide consumers. The new digital distribution system fundamentally changes the one-way character of traditional methods of distribution from producer to user. Users access the internet sites provided by the producer and either download their chosen software or access and extract information from the required database. Their value does not lie in a tangible deliverable, but in information and the right to control and exploit it. The transaction that drives the information economy is the licensing of information products.

A. *Click-On Information Contracts*

The ubiquitous click-on license satisfies the needs of the industry. It has become mercantile custom for the software and computer information industries to use a standard form contract in the form of a shrink-wrap or clickwrap licensing agreement for mass market transactions. This document construes consumers breaking open the plastic shrinkwrap or installing the software on their computers as assent to the terms of the license. In placing a shrinkwrap license provision on its software product, the producer seeks not only to prohibit infringement of any intellectual property rights in the information, but also to limit liability and disclaim warranties. The shrinkwrap license commonly disclaims all warranties, denies users the authority to make backup copies, modify, or resell the software, to decompile the code and, in the event of a dispute, invokes the law of the licensor's chosen jurisdiction.

*B. Legislative Endorsement of Information Contracts under
UCC Article 2B*

Given the strength of the information industry in the United States and its importance to the nation's future prosperity, the National Conference of Commissioners on Uniform State Laws²⁰ and the American Law Institute²¹ proposed reforming the UCC²² with the addition of a new Article 2B²³ which would validate information licenses and create new rules concerning electronic contracting for information products.²⁴ Proposed Article 2B is designed to deal with transactions in computer information and applies broadly to on-line and Internet transactions in software and databases. In so far as the formal aspects of contract are concerned, Article 2B follows the UNCITRAL Model Law. Article 2B gives full recognition to contracts formed electronically²⁵ to the extent that it validates contracts made by electronic agents or pre-programmed computer programs.²⁶

In so far as the substantive aspects of information transactions

20. The National Conference of Commissioners for Uniform State Laws (NCCUSL) is comprised of commissioners appointed from every state with the aim of drafting uniform legislation for adoption by all states. See WALTER P. ARMSTRONG, JR., A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON THE UNIFORM STATE LAW 3-4 (1991).

21. The American Law Institute (ALI) is a national organization, formed in 1923, comprised of elected legal professionals, whose aim is to "promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work." THE AMERICAN LAW INSTITUTE, THE AMERICAN LAW INSTITUTE SEVENTY-FIFTH ANNIVERSARY 1923-1998 7, 210 (1998); see also *About the American Law Institute* (visited Sept. 7, 1999) <<http://www.ali.org/ali/thisali.htm>>.

22. First promulgated by the ALI and the NCCUSL in 1952, and subsequently revised, the code has been adopted in some variation by every state.

23. See *supra* note 9.

24. For an account of the project history and the drafting process, see *Draft Article 2B-Licenses*, July 1998 (visited Sept. 9, 1999) <<http://www.law.upenn.edu/library/ulc/ucc2/2b398.htm>> ; Mary Jo Howard Dively and Donald A. Cohn, *Treatment of Consumers Under Proposed U.C.C Article 2B Licenses* 16 J. MARSHALL J. OF COMPUTER & INFO. LAW 315, 318-20 (1997).

25. On the manifestation of assent and the legal recognition of electronic records and authentications, see U.C.C. §§ 2B-111, 2B-113.

26. Article 2B introduces the concept of an "electronic agent," which is a computer program or other electronic or automated means to act on behalf of a party. See U.C.C. § 2B-102(22).

are concerned, Article 2B is based on the paradigm for a contract of sale. Its provisions analogize the exchange of information to the well-known elements of a sale of goods. Article 2B deals with warranties for information products; the transfer of interests and rights; the obligations of buyer and seller in performing the contract; and remedies available to the parties in the event of a breach of the information contract. For example, while Article 2B contains provisions relating to implied warranties of title, description, fitness and merchantability, these have been modified to meet the unique character of information products.²⁷ Thus, merchantability for Article 2B mass marketed licenses consists of five minimum performance standards including the contract, fitness for the ordinary purposes and the functionality of a computer program.²⁸

*C. The Sum and Substance of Article 2B: Standard Form
Consumer Information*

As the commodification of information advances, mass-market transactions will constitute the contractual relationships at the center of the information economy. While Article 2B also provides for negotiated contracts for customized information products, the contractual relationships contemplated by Article 2B are principally mass market standard form contracts for the sale of information products. Section 102 defines “mass-market license” to mean “a standard form that is prepared for and used in a mass-market

27. See UCC § 2B-401(warranty and obligations concerning quiet enjoyment and non-infringement); UCC § 2B-402 (express warranties); UCC § 2B-403 (implied warranty of merchantability); UCC § 2B-404 (implied warranty of informational content); UCC § 2B-405 (implied warranty of purpose).

28. See UCC § 2B-403 (generally applying UCC Article 2 warranty of merchantability to computer programs, as follows: (a) Unless the warranty is disclaimed or modified, a merchant licensor of a computer program warrants: (1) to the end user that the computer program is reasonably fit for the ordinary purpose for which it is distributed; (2) to a distributor that: (A) the program is adequately packaged and labeled as the agreement or the circumstances may require; and (B) in the case of multiple copies, the copies are within the variations permitted by the agreement, of even kind, quality, and quantity, within each unit and among all units involved; and (3) that the program conforms to the promises or affirmations of fact made on the container or label, if any. (b) Unless disclaimed or modified, other implied warranties may arise from course of dealing or usage of trade. (c) A warranty created under this section does not apply to informational content, including its aesthetics, market appeal, accuracy, or subjective quality, whether or not included in or created by a computer program).

transaction;” which is “a consumer transaction, or any other transaction in information or informational rights directed to the general public as a whole under substantially the same terms for the same information with an end-user licensee.”²⁹ In effect, Article 2B codifies the custom of the information industry in online merchandising of information by means of click-on license.³⁰ Section 2B-211 sets out a series of rules which would render mass market licenses enforceable, even though they are not signed by both parties and even if the license terms are not available prior to the purchase.³¹ Section 211 endorses the use of click-on licenses by introducing the concept of “manifest assent.” Under Article 2B, mass-market licenses are enforceable if the consumer “manifests assent” to the license before or during the initial use of or access to the software. Consumers are deemed to have manifested their assent by “signing” the record or by some other affirmative conduct

29. A “mass-market transaction” is defined in UCC § 2B-102 (34) as “a transaction under this article that is: (A) a consumer transaction; or (B) any other transaction with an end-user licensee if (i) the transaction is for information or informational rights directed to the general public as a whole including consumers under substantially the same terms for the same information; (ii) the licensee acquires the information or rights in a retail transaction under terms and in a quantity consistent with an ordinary transaction in a retail market; and (iii) the transaction is not a (I) a contract for redistribution; or for public performance or public display of a copyrighted work; (II) a transaction in which the information is customized or otherwise specially prepared by the licensor for the licensee other than minor customization using a capability of the information intended for that purpose; (III) a site license; or (IV) an access contract.” UCC § 2B-102 (34). The term therefore “includes all consumer transactions and some transactions between business in a retail market. It does not include ordinary commercial transactions between businesses using ordinary commercial methods of acquiring or transferring commercial information.” U.C.C. § 2B-102, Reporter’s Notes, 28.

30. Note the intended legislative endorsement of the click-on license under UCC § 2B-207 which provides: “(a) The terms of a record may be adopted as the terms of the contract after beginning performance or use under the agreement if the parties had reason to know that their agreement would be represented in whole or in part by a later record to be agreed and there was no opportunity to review the record or a copy of it before performance or use commenced. (b) If a party adopts the terms of a record, the terms become part of the contract without regard to the party’s knowledge or understanding of individual terms in the record, except for a term that is unenforceable because it fails to satisfy another requirement of this article.” UCC § 2B-207(a),(b). Under UCC § 2B-208(mass market licenses): “A party adopts the terms of a mass-market license for purposes of Section 2B-207 only if the party agrees to the license, by manifesting assent or otherwise, before or during the party’s initial performance or use of or access to the information.” U.C.C. §§ 2B-208(a).

31. Cf. UCITA § 211.

that, under the license, constitutes acceptance, as long as they were afforded an opportunity to decline such action after reviewing the license.³² If the terms of the license are available for review only after the licensee has paid a fee, the license is not binding, and a refund is available, provided that the licensee stops using the software and returns all copies.³³ If a specific term is one that the licensor should know would cause an ordinary and reasonable licensee to refuse the license, then that term does not become part of the license unless the licensee “manifests assent” to that specific term.³⁴

*D. Contracts Choice of Law According to UCC 2B:
Legislating Information Licenses Extraterritorially*

Given the strength of the information industry in the US, and the size of its market, the default rules in proposed Article 2B-107 would have a worldwide impact on the law governing information contracts. As a general rule, and in accord with cases dealing with the issue in information-related contracts, Article 2B enforces choice of law agreements.³⁵ In the absence of an agreement on the governing law it adopts the “most significant relationship” test. However, in the case of electronic transactions or online transfers of information, Article 2B provides an important and novel qualifi-

32. According to UCITA sections 207 and 208, to be binding, the party must be afforded an opportunity both to review the contract’s terms, and to decline or accept the offer. UCITA § § 207, 208. Opportunity to review is defined in UCC 2B-112. According to UCC 2B-111 “A person or electronic agent manifests assent to a record or term in a record if the person, acting with knowledge of, or after having an opportunity to review the record, term or a copy of it, or if the electronic agent, after having had an opportunity to review: (1) authenticates the record or term.” UCC § 2B-111.

33. See UCC § 2B-112; UCC § 2B-208(b).

34. However, in a traditional shrinkwrap license, there is no practical way to assent to a specific term, since the licensee tears open the shrinkwrap only once.

35. This rule follows cases dealing with the issue in information-related contracts. See *Medtronic, Inc. v. Janss*, 729 F.2d 1395, 1398-1401 (11th Cir. 1984); *Universal Gym Equip., Inc. v. Atlantic Health & Fitness Products*, 229 U.S.P.Q. 335 (D. Md. 1985); *Northeast Data Sys., Inc. v. McDonnell Douglas Computer Sys. Co.*, 986 F.2d 607, 610 (1st Cir. 1993). See also THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1988)(proposing a similar rule, the Most Significant Relationship, for contract issues that can be resolved by agreement). In the absence of an agreement on the governing law and except for the rules in subsections (b)(1) and (b)(2), subsection (b) adopts a “most significant relationship” test. *Id.*

cation to this rule. Subsection (b)(1) selects applicable law based on the location of the licensor. While the electronic medium dictates such qualification, it has the result of enhancing the power of the licensor, as the on-line vendor makes direct access available to the entire world via the Internet by the very nature of the distribution system.³⁶ Moreover, Article 2B does not permit a court to invalidate a contract term on the ground that the chosen law is not reasonably related to the transaction. This limitation is justified on the basis that in a global information economy, limitations of that type are inappropriate and arbitrary. However, the question remains: inappropriate and arbitrary for whom? Given the reality of standard form contracts, this approach once more favors the licensor's freedom to select substantive rules governing liability. Finally, we are given some idea of the potential application and influence of information licensing under Article 2B. If the agreement does not choose an applicable law, 2B-107 (c) provides as follows:

... if the jurisdiction whose law governs under that subsection is outside the United States, the law of that jurisdiction governs only if it provides substantially similar protections and rights to a party not located in that jurisdiction as are provided under this article. Otherwise, the law of the jurisdiction in the United States which has the most significant relationship to the transaction governs.

Although the authors of 2B comment that differences between American and foreign law must be substantial and adverse to the party not located in that jurisdiction; in the enactment of such a provision, there is clearly room for abuse in the form of legal imperialism. As Professor Pamela Samuelson has wryly noted, if Article 2B achieves its global aspirations, the law of Washington State would govern all contracts.³⁷

36. The licensor's location is described in subsection (d) and does not depend on the location of the computer that contains the information. Any other rule, the Reporter stresses, would require that the information provider comply with the law of all states and all countries since under the technology it will not necessarily be clear or even knowable where the information is being sent. *See* UCC § 2B-107, Reporter's Note 4.

37. IMPRIMATUR Consensus Forum 1998, Contracts and Copyright: The Legal Framework for Future Electronic Copyright Management, London July 2-3, 1998, 52

Similarly, clauses concerning choice of forum are especially important in information contracts. The numerous decisions concerning personal jurisdiction reveal an uncertainty about when doing business on the Internet exposes a party to jurisdiction in all states and all countries. Choice of forum terms allow parties to control this issue and the risk or costs it creates. Proposed Article 2B-208 would enforce a choice of forum clause unless it is “unreasonable and unjust.”³⁸ A court may invalidate the clause if it has no valid commercial purpose and has severe and unfair affects on the other party. On the one hand this provision would prevent the licensor from enforcing a forum clause chosen solely to prevent the licensee from contesting disputes. On the other hand a contractual choice of forum which reflects valid commercial purposes, is not invalid simply because it has an adverse effect on a party, even if that party had less bargaining power than the other party.

In sum, the statutory licensing of information sees the terms and conditions agreed upon by the information industry given legal effect through an interaction of private contract-making with the legal order of the state. While this development may follow a familiar trend, given the nature of the subject matter, the global impact of information licensing and the extraterritorial aspirations of Article 2B, it is certainly not a cause for complacency among law and policy makers. Considering the singular nature of information as a resource, the influence of TNCs as lobbyists in the generation of multilateral regulatory regimes and the inequality of power between supplier and private individual consumer, the question remains whether the practice of TNCs generates conflicts of interest which demand a regulatory response.

In the generation of the information license we see the effect of the business practices of TNCs on the development of substantive rules of commercial law. The ability of the transnational informa-

para12.3.11:<http://www.imprimatur.alcs.co.uk/IMP_FTP/contract.pdf>.

38. See UCC § 2B-208; *Bremen v. Zapata Off-shore Co.*, 407 U.S. 1 (1972); *Pelleport Investors, Inc. v. Budco Quality Theaters, Inc.*, 741 F.2d 273 (9th Cir. 1984); see also *Evolution Online Sys., Inc. v. Koninklijke Nederlan N.V.*, 145 F.3d 505 (2d Cir. 1998); RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 80, cmt. c (1988). In Internet transactions, a contractual choice of forum is ordinarily enforceable. The Court’s discussion in *Carnival Cruise Lines, Inc. v. Shute*, 111 S.Ct. 1522 (1991) is relevant to determine reasonableness in Internet contracting.

tion industry to influence the nature and content of commercial legal obligations is an aspect of market power.³⁹ This proposition reaches its fullest expression in an information market dominated by standardized contracts. The information license is no more than the form of contract used by market leaders which has become the industry standard over time.

Historically of course, the influence of market leaders on the development of commercial law is not new. Consider, for example, in the field of marine insurance, that the dominance of the London market resulted in the standardization of the marine insurance policy around the Lloyds Ship and Goods Form. The law relating to marine insurance emerged in the late eighteenth century when the English courts, under the guidance of Lord Mansfield, upheld the accepted commercial meaning of the SG (Ship and Goods) Form and its specific clauses.⁴⁰ This process culminated in the codification of the common law relating to marine insurance in the Marine Insurance Act 1906.⁴¹ Likewise, in respect of information products, the acceptance by the United States Court of Appeals for the Seventh Circuit in *ProCD v. Zeidenberg*⁴² of information licenses and their proposed codification under Article 2B of the Uniform Commercial Code, signifies that the global information market will be dominated by such contracts.

II. PUBLIC LEGAL INSTITUTIONS AND INFORMATION PRODUCTS

A. *Concerning the Need for a Global Regulatory Response to the Private Licensing of Information*

We need an information constitution that strikes a balance between private and public domain rights in information. However, a just apportioning of rights in information society is a task which can only be effectively undertaken at the global level. The politi-

39. On how TNCs influence the evolution of legal orders that seek to govern their activities, see Peter T. Muchlinski, 'Global Bukowina' Examined: Viewing the Multinational Enterprise as a Transnational Law-making Community in GLOBAL LAW WITHOUT A STATE, 79, 85-86 (Gunther Teubner ed., 1997).

40. *Id.* at 86-87.

41. 6 Edw. VII, ch 41 § 55(2).

42. 86 F.3d 1447 (7th Cir. 1996).

cal reality of a global information economy means that information transactions are subject to global competition. In this threatening new world, information producers will be susceptible to the suggestion that rival traders are deriving their competitive edge from domestic institutions or policies that are yielding an unfair advantage. The fact that some states do not have the same regulations, that they do not have to meet the same consumer standards, for example, will become a common complaint in the countries that have higher standards. By the same token, it will be necessary to see that these countries, generally OECD countries, do not capture the institutions of free trade in order to protect their national interest by unfair means. The move to export Article 2B might be seen as intrinsically anti-competitive. It might be seen as an attempt by the largest of the licensor states to use the regulation of information transactions as a covert form of protectionism.⁴³ Taking account of the kaleidoscopic nature of comparative advantage,⁴⁴ to permit differences in national regimes would be to risk setting in train a deregulatory race to the bottom as each state seeks to minimize the legal obligations imposed upon business in order to attract investment and trade in information products.⁴⁵

*B. The Problem of Accommodating Information Transactions
within the Sale of Goods Regime*

Sales law is a manifestation of a manufacturing age in which goods were tangible and occupied a finite space. Case law shows that contracts for the transfer of intangible property test the limits of sales law. As a threshold matter, its application is questionable because (a) the online information products are not “goods” under

43. It is arguable that the frequent use of conventional fair trade mechanisms in the 1980s, such as the levying of antidumping and countervailing duties (designed to offset foreign subsidies), is to be explained not in terms of a genuine rise in the phenomena of predatory dumping and foreign subsidization, but as the capture of these mechanisms for protectionist purposes. See J.N. Bhagwati, *Challenges to the Doctrine of Free Trade* 25 N.Y.U. J. INT'L L. & POL. 219, 233-34 (1993).

44. *Id.* at 234.

45. On the relationship between international trade and national information policy see Gail E. Evans and Brian F. Fitzgerald, *Information Transactions Under UCC Article 2B: The Ascendancy of Freedom of Contract in the Digital Millennium*, 21 U. OF NEW S. WALES L. J. 404 (1998).

Sale of Goods legislation and; (b) the transaction itself is not a “sale,” but rather a license to use or access the work. Consequently, the current legal status of pure intangibles is confusing and ambiguous.

1. The Vienna Sales Convention

The substantive provisions of sales law are a matter for The United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG).⁴⁶ However, as the CISG contains no definition of “goods,” we therefore fall back to domestic law. Generally speaking, the courts tend to apply sales law based on the rationale that the packaged product in software and other intangibles should be treated no differently than any other labor-intensive good.⁴⁷ As defined in section 5(1) of the Sale of Goods Act (NSW),⁴⁸ “goods” includes all chattels personal or moveable property other than choses in action such as copyright. Generally, the courts interpret what constitutes “goods” broadly⁴⁹ and apply sales law to transactions far outside its substantive scope. For example, in *Toby Constructions Products Propriety. Ltd. v. Computa Bar (Sales) Proprietary. Ltd.*,⁵⁰ Judge J. Rogers held hardware and software to be goods and hence regulated by sale of goods law. In

46. Enacted in New South Wales as the Sale of Goods (Vienna Convention) Act 1986. See Halsbury's Laws of Australia, vol. 6, 196289 (1992).

47. For a discussion concerning the various tests see D. GREIG AND N.A. GUNNINGHAM, COMMERCIAL LAW 112-14 (3d ed. 1988).

48. “Goods” includes all chattels personal (broadly, moveable property other than choses in action, i.e., recoverable claims such as debts, patents, trade marks, copyrights, shares, bills of exchange, insurance policies) or money. The term includes emblements (industrial crops - wheat, potatoes, hay) and things attached and forming part of the land which are agreed to be severed before sale or under the contract of sale. Sale of Goods Act (NSW) 1986 § 5(1); cf the definition of in UCC Article 2-105: “goods” means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action.”

49. See *Toby Constrs. Prods. Proprietary Ltd. v. Computa Bar (Sales) Proprietary Ltd.* 2 N.S.W.L.R. 48, 54 (1983) (holding hardware and software to be goods). See also *Advent Sys. Ltd. v. Unisys Corp.* 925 F.2d 670, 676 (3d Cir. 1991) (holding computer software is goods, the sale of which is regulated by sale of goods legislation). With respect to software alone, the question in *Advent* was left open but UCC Article 2 includes intangibles. See KENNETH SUTTON, SALES AND CONSUMER LAW, 90-93 (4th ed., 1995).

50. 2 N.S.W.L.R. 48.

order to accommodate information products, there are decisions such as *Advent Systems Ltd. v. Unisys Corporation*,⁵¹ which go so far as to place the sale of software in UCC. Article 2, even though software is licensed and not sold and even though the focus of the transaction is not on the acquisition of tangible property, but on the transfer of intangibles.⁵²

Alternatively, perhaps the information product should be defined as the supply of a service? However, this argument, misconceives the essential nature of information products, which do not fit easily within the traditional definition of services as provided in section 4 of the Australian Trade Practices Act.⁵³ While a contract with an independent contractor to develop, support, modify, or maintain software may come within section 4, the word “services” when applied to information products, is largely used in the sense of online services or access contracts. Thus, the court in *Caslec Indus. Propriety. Ltd. v. Windhover Data Systems Propriety. Ltd.*⁵⁴—having taken into account that the “off the shelf” software package in question was accompanied by incidental services—found that the defendant had breached the implied warranty for the supply of services in section 74(2) of the Act.⁵⁵

However, with the arrival of online distribution of information products, the question whether software or other intangibles should be treated as a “good” for the purposes of section 5 is no longer susceptible to previous analysis. Without the tangible characteristics that transactions in intangibles once had, there is no longer a sale of goods within the traditional definition of the law.⁵⁶ The

51. 925 F.2d at 676.

52. See also *RRX Indus., Inc. v. Lab-Con, Inc.*, 772 F.2d 543 (9th Cir. 1985); *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737 (2d Cir. 1979); *In re Amica Inc.*, 135 B.R. 534 (*Bankr.* N.D. Ill. 1992). These cases make clear that, when confronted with the question whether the licensing and transfer of intellectual property should be treated as a “sale of goods,” courts in the United States have usually concluded that the transaction is within the scope of Article 2 of the UCC.

53. Trade Practices Act, 1974, (Cth).

54. Federal Court of Austl., 1992 (unreported) <http://www.austlii.edu.au/au/cases/cth/federal_ct/unrep5674.html>.

55. *Id.*

56. See ROY GOODE, *COMMERCIAL LAW* 50-55 (2d ed. 1995)(stating that a “pure intangible” is defined as “a right which is not in law considered to be represented by a document” and comparing dealings with goods and dealings with intangibles).

courts are then obliged to fall back on the common law of contract. The deficiency in current law regarding pure information products is highlighted in *St. Albans City Council v. International Computers Ltd.*,⁵⁷ where the English Court of Appeal found there to be no sale or hire, as an employee of International Computers went to St. Albans' premises, where the computer was installed, and taking with him a disk on which the program in question was encoded, transferred it himself into the computer.⁵⁸ Sir Iain Glidewell found that there was no transfer of "goods" and therefore no breach of the implied term in section 14 of the UK Sale of Goods Act 1979 and that the computer program should be fit for the buyer's purpose. As a result, in finding for the plaintiff, the Court had no recourse but to fall back on the common law doctrine of implied terms.⁵⁹

2. The World Trade Organization Goods and Services Regime

Under the General Agreement on Tariffs and Trade (GATT) 1994,⁶⁰ we encounter the same difficulties in characterizing information products. Once again, the goods approach proves workable as long as the information product is ultimately delivered in tangible form. For example, a book is identified in the customs classification system for goods, although the contents of a book could be transmitted electronically from one jurisdiction to another and then transformed into a book or tangible item. Since a book is *prima facie* a good, it is expedient to treat the electronic transmission of a book's contents as trade in goods. Once again, however, informa-

57. [1997] F.S.R. 251 (L.A. 1996).

58. *Id.* at 251-52.

59. *Id.* at 266-67.

60. General Agreement on Tariffs and Trade, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1A, The Legal Texts—The Results of The Uruguay Round of Multilateral Trade Negotiations 20; 33 I.L.M. 1154 (1994) [hereinafter GATT]. Incorporated into the GATT 1994 is General Agreement on Tariffs and Trade, October 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT 1947]. The GATT 1994 specifically excludes the Protocol of Provisional Application, but includes the protocols and certifications to tariff concessions, protocols to accession, the listed waivers granted under Article XXV of GATT 1947 granted before the date the WTO Agreement enters into force, and other decisions of the Contracting Parties of the GATT 1947. See GATT, para 1, 33 I.L.M. at 1154-55 (1994).

tion products, which are not ultimately delivered in tangible form, are problematic. Many digitized information flows are not readily convertible into a physical format that is recognizable as a standardized good under the trade regime. For example, statistical conventions for balance-of-payments purposes distinguish between standardized and non-standardized products. A mass market “off-the-shelf” software package is a standardized product and classified as goods, but customized data on a CD, or customized software are treated as non-standardized products and classified as services.

We can draw a similar distinction when considering electronically-delivered services, for example, where changing the product from digitized information to a physical format does not yield a product typically thought of as a good. For example, would a medical diagnosis printed on a sheet of paper be regarded as a good for customs duty purposes if it were carried physically over a frontier rather than being delivered digitally? Under the GATS regime,⁶¹ information products that are delivered between jurisdictions as digitized information flows may be classified as services. *Prima facie*, they fall within the second category pertaining to the sectors where the services can actually be delivered electronically. Indeed, a number of important services are traded electronically and in some cases Member States have already made commitments under the GATS with respect to these services.⁶² Nevertheless, once again we find that the question of application of GATS to information products is complicated by factors relating to the classification of services and nomenclature. It remains difficult to define precisely the services that fall into this category as no universally agreed classification system exists for services under GATS.⁶³ The idea that certain digitized information flows over the Internet cannot be characterized as either trade in goods or trade in services raises important issues for a trade regime based on princi-

61. General Agreement on Trade in Services, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, THE LEGAL TEXTS-THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 325; 33 I.L.M. 1168 (1994) [hereinafter GATS Agreement].

62. WORLD TRADE ORGANIZATION, ELECTRONIC COMMERCE AND THE ROLE OF THE WTO, SPECIAL STUDIES 2, Table of Commitments 53-54 (1998).

63. *Id.* at 60-66.

ples of non-discrimination.⁶⁴ The WTO Report on Electronic Commerce of 1998 recognizes that the trade regime cannot allow differential tariff rates purely on the basis of the medium of conveyance of a product without creating the risk of trade distortions or unfair trade practices.⁶⁵

C. The Problem of Characterizing Information Transactions as Sale or License

Whether we consider an information transaction as a sale or a license, in each case we find that an essential element is lacking. On the one hand, a sale requires a definitive transfer of the “good.” The classic concept of a sale is not congruent with the nature of information as capital and commodity. In the new global information market there is no longer a “sale” of goods within the traditional description of a contract of sale. According to Article 30 of the Vienna Sales Convention, a sale requires that the seller “transfer the property in the goods” to the buyer.⁶⁶ Similarly, Article 41 provides that the “seller must deliver goods which are free from any right or claim of a third party”. In a transfer of information, the concept of a sale as a complete transfer of ownership rights, affording the owner the ability to alienate the property by gift or resale, threatens the supplier’s investment in compiling, formatting, and updating the information. On the other hand, the plain meaning of license requires that the “act” to which the license refers should, in the first place, be prohibited by law. This may be the case where intellectual property rights exist in the information. However, in online transactions, the producer simply takes possession of the resource, “licensing” small parcels of information to the

64. Gail E. Evans, *TRIPS and the Sufficiency of the Free Trade Principles*, 2 JOURNAL OF WORLD INTELLECTUAL PROPERTY 707 (1999)

65. Digital products which can be rendered identical, but which might be classified as goods, services or something else, can find their way from a supplier in one jurisdiction to a consumer in another by quite different means. The WTO Report on Electronic Commerce signals the intention to prevent such distortions with a view to maintaining policy neutrality in with respect electronically delivered products. See *supra* note 59.

66. Note Article 1 which applies the Convention to “contracts of sale of goods.” Some idea of the ambit of the Convention is gained from Articles 2 and 3, dealing with types of sales or contracts which fall outside its scope. See United Nations Convention on Contracts for the International Sale of Goods, (CISG) Apr. 11, 1980, art. 1-3, U.N. Doc. A/CONF.97/19 (1981) [hereinafter C.I.S.G.].

user, without the existence of any underlying intellectual property rights.⁶⁷ This would be the case where the information fails to qualify for copyright protection. In sum, the transfer of information sits uneasily between the concepts of sale and license.

III. THE EMERGENCE OF A NEW INFORMATION ORDER FOR THE DIGITAL MILLENNIUM

A. *The Displacement of Copyright*

In the weighing of private and public rights, we must take account of the fact that the protection of information by contract stands in direct contradistinction to the way in which western society has traditionally protected information. Outside the online environment, the intellectual property regime recognizes that information also partakes of the nature of a public good or a common resource. Thus, copyright law gives creators limited property rights in their expression of ideas, but regards the information contained in a copyrighted work, like the work's ideas, to be in the public domain and available to be freely used by all. This dual mechanism that protected information has the advantage of protecting private rights as well as public domain rights in the use of information. Under copyright law the operation of the "first sale" or "exhaustion of rights" doctrine means that publishers lose the capacity to control re-distributions of copies of their works.⁶⁸ Sale involves a complete transfer of ownership rights in particular copies from the vendor to the purchaser, following which the purchaser can generally dispose of her copy as she wishes. As the

67. See Wendy J. Gordon, *Property Right in Self-Expression* 102 YALE L.J. 1533, 1577-78 (1993).

68. The "first sale" doctrine places limitations upon the exclusive rights of the copyright owner. It prevents the owner of a copyrighted work from controlling subsequent transfers of copies of that work. The exclusive right of the copyright owner to distribute work is extinguished only in respect of that particular copy. The "first sale" doctrine only limits the copyright owner's distribution rights and does not affect the reproduction right. "Notwithstanding the provisions of section 106(3) [which grants copyright owners the exclusive right to distribute copies or phonorecords of a work], the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." 17 U.S.C. § 109(a) (1994).

owner of an item of tangible, personal property she can alienate it by gift or re-sale. However, the intangibility of information products and the character of the commercial transaction changes this equation. It has the effect of diminishing existing user rights. In the grant of access to an electronic database the user does not receive a transfer of ownership rights in the “copy,” but simply a limited transfer of rights to use information on stated terms and conditions.⁶⁹ In addition, the ownership of copyright is limited by operation of law concerning those uses the public is entitled to make of the work. The scope of copyright is subject to considerations of what is fair and reasonable use of material for certain worthwhile purposes. Fair use or fair dealing provisions⁷⁰ provide the public with defenses to infringement actions when there is a fair dealing with works for research or study, criticism or review or news reporting.

B. *The Ascendancy of Contract*

The commodity-exchange theory of Evgeny B. Pashukanis serves to explain the ascendancy of contract in the digital millennium.⁷¹ In as much as the market economy consists of producers of commodities, the exchange of commodities is therefore the cell form of legal relations. The “textual” context of the Web and the interactive features of the Net are ideal preconditions for the development of a contractual culture. Contract is uniquely suited to networked systems,⁷² which allow information to be exchanged like any other commodity. The structure of the net enables information producers to engage in multiple contractual relationships directly, or through intermediaries, with end users and re-sellers. In the online exchange of information products, contract law has a

69. See *Ticketron Ltd. Partnership v. Flip Side, Inc.*, No. 92-C-0911, 1993 WL 214164 (N.D. Ill. 1993); *Soderholm v. Chicago Nat'l. League Ball Club*, 587 N.E.2d 517 (Ill. App. Ct. 1992).

70. See Copyright Act, 1968, §§ 40-42 (Austl.); see also 17 U.S.C. § 107 (1994).

71. Pashukanis, *supra* note 5, at 120-33.

72. The increasing importance of contract law in the digital networked environment is illustrated by the current European Commission (DG XV) initiative on Electronic Commerce. See *Single Market News, Commission Initiative on Services Putting Services to Work* No. 6 (January 1997) <<http://europa.eu.int/comm/dg15/en/smn/smn6/56mn12.htm>>.

singular advantage in that it allows the parties the freedom of contract to negotiate the terms of information contracts, including the use of copyrighted material. Freedom of contract permits information producers, intermediaries and end users to experiment and implement their own set of rules without intervention by the state. From this self-regulatory contractual laboratory new legal norms emerge. As the private initiatives, the shrink-wrap, web-wrap and click-on licenses demonstrate, for the information industry contract law is the instrument par excellence to fill the current legal vacuum in sales law for online information products. As endorsed by Article 2B, contract makes it possible for the industry to write its own copyright law, in other words, to privately legislate its own intellectual property rights.⁷³ Thus these licenses accord the producer a wide scope of protection while the user is commensurately restricted by the terms of usage.

Article 2B licensing contracts therefore have the capacity to extend the scope of the copyright monopoly by restricting public domain rights in fair use. In the reification of contract,⁷⁴ the potential for the ownership of information⁷⁵ may be realized into an oppressive domination. Licensing contracts under Article 2B threaten to upset the traditional ordering by creating highly restrictive and potentially indefinite monopolies in information. Article 2B would give licensors the power to severely limit the licensee's right to deal with the licensed information very likely to the exclusion of current statutory protection accorded the public in the access to, and exchange of information and ideas under the fair use provisions of the Copyright Act. This shift in the information order constitutes a significant change in the way information is con-

73. J.H. Reichman & Jonathan A. Franklin, *Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information*, 147 U. Pa. L. Rev. 875 (1999).

74. Classical contract law presupposes that the contract is a "thing" which can be "made" or "broken." The tendency to reify the contract in this way has resulted in further reinforcing of the private autonomy of the parties. "If the contract is a thing created by the parties, it is easier to see it as a relationship within defined and limited parameters. Within these parameters, concepts such as fairness, justice, reasonableness seem to have less room to operate than they do with diffuse concepts like tort or restitution." P.S. ATIYAH, *ESSAYS ON CONTRACT* 14 (1995).

75. See P.S. ATIYAH, *INTRODUCTION TO THE LAW OF CONTRACT* 357 (5th ed. 1995) (linking the notion of contract with the creation of proprietary interests in land).

ceived and protected in our society. We do not know what the consequences will bring. It is too early to calculate what the eventual impact of information licenses might be either on producer or user groups. One only need recall the reception caused by inventions such as the telephone, phonograph and video recorder, to recognize that with the appearance of every new communications technology, there has been a tendency by those with existing proprietary or user interests to dramatically overestimate and miscalculate its eventual social impact. Nevertheless, given the reality of the commodification or buying and selling of information via digital networks, there is a real risk that validated by Article 2B-style legislation, information licenses will proliferate.⁷⁶ To the extent that every piece of information could be mass market licensed, then licenses would end up essentially regulating rights between rights holders and users.

C. *The Darker Side of the New Information Order*

Contractual self-rule in the consumer cyber-market has a darker side. By delegating to individuals an ability to write personal copyright law or privately legislated informational rights,⁷⁷ the market risks the greater interests of society. In a world totally ruled by contract, weaker parties may loose out, and other fundamental freedoms may be jeopardized. Both freedom of contract as a pro-competitive principle as well as the larger interests of society in freedom of information are threatened by the terms of information licensing which fails to achieve an appropriate balance. Freedom of contract may become contractual coercion, especially when dominant undertakings abuse their market power to impose contractual rules on individual and relatively powerless consumers. In an information contract the notion of the consumer bargaining from a position of equal strength is a fiction in any but the most attenuated sense. The enforcement of contracts that permit owners to limit the use of information and the development of technological self-help measures have given the owner of information considerable means of enforcing exclusivity in the information they

76. J.H. Reichman & Jonathan A. Franklin, *supra* note 73 at 898.

77. *Id.*

produce or collect. This is true not only against those in contractual privity with the owner, but also in some contexts against the world-at-large. As individual consumers of information, we are all faced with the same array of power by information producers. As consumers of information we are relatively weak; we are individuals, while the producers are, more often than not, large corporations. Information is power, and consumers rarely have the same information as suppliers. They cannot therefore compete as equals in the market. To talk of a “free market” in this situation is meaningless. Markets are seldom “free”, not because that freedom is limited by government activity, but because of the activities of business organizations.

IV. INFORMATION CONSUMERISM: EMBEDDING CONSUMER RIGHTS WITHIN THE LEGISLATIVE FRAMEWORK FOR INFORMATION CONTRACTS

While individual free choice within the notion of freedom of contract remains an important value, in respect of the private individual consumer, the principle disregards problems of power, distributive fairness, and the need to encourage sharing and cooperation in the realization of opportunities and innovation in the information market.⁷⁸ In contrast to the *laissez-faire* model of the nineteenth century, in the face of the standard form contract, the development of modern contract law shows that the state has increasingly intervened to protect the individual consumer.⁷⁹ Statutory controls are one method that can be used by the state, in the interests of the public as consumers, to attempt to reduce the inequalities that exist.⁸⁰ The power of the state, expressed through government rule-making and regulatory power, is a counter force

78. Michael J. Trebilcock, *THE LIMITS OF FREEDOM OF CONTRACT* 20-22 (Harvard University Press 1993).

79. Statutory intervention saw the decline of freedom of contract in the direct interest of a majority, or to give effect to values which a majority believe to be of overriding importance. See P.S. ATYIAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 726 (Oxford University Press 1979); see also R. BROWNSWORD, *The Philosophy of Welfarism and its Emergence in the Modern English Law of Contract* in *WELFARISM IN CONTRACT LAW* 21, (R. Brownsword et al. eds., 1994).

80. Goode, *supra* note 56, at 9-11.

to the overweening power of the corporate private sector.⁸¹ Consumerism is a movement whose aims are consonant with our desire to give small consumers some control over the restrictions on usage within information contracts. To the licensor's unilaterally prescribed restrictive terms of use the law of consumer protection might act as an equalizing principle. The aims of consumer protection laws are similarly consonant with the intention to give individual licensees some equality of power, some redress against the corporate producers who provide them with information products.⁸² It is submitted that the series of rights embodied in consumer protection law are as appropriate for global information society as they were for the age of mass manufactures. These include consumer rights to safety, honesty, privacy, and fair agreements, as well as rights to know, to choose, to correct abuses, and to be heard.⁸³

A. Article 2B: Abdicating Consumer Rights in Favor of the Nascent Information Economy

In so far as consumer rights are concerned, the approach of Article 2B is minimalist. It does not alter the existing state consumer protection statutes.⁸⁴ While it contains a number of consumer protection rules specifically drafted for information contracts, these in fact, do not advance the interests of consumers.⁸⁵ For example, original Article 2 made disclaimer of personal injury damages in sales of consumer goods *prima facie* unconscionable. Article 2B follows that rule for computer programs contained in consumer goods. In other information contracts, however, including cases of computer programs, Article 2B relies on general contract law to create liability for personal injury. Article 2B therefore adopts the sales law presumption only in cases where that rule is established,

81. See Evans, *supra* note 45, at 430-34.

82. On the basic aims of consumer protection laws see JOHN GOLDRING ET AL., CONSUMER PROTECTION LAW 1-12 (4th ed. 1993).

83. *Id.* at 2-3.

84. With the exception of the electronic commerce rules in U.C.C. § 2B-105(e), a state's consumer protection statutes or regulations override the general contract law of this Article on the effective date of Article 2B. Thus, contract terms may be unenforceable because the term is unconscionable under U.C.C. § 2B-110.

85. *Id.*

but does not extend that rule to publishers of computer encyclopedias, interactive games and other contexts. This pattern reflects a belief that goods and information products are not the same.⁸⁶

Article 2B does not attempt to address the inequalities specific to online information transactions. On the contrary, Article 2B adopts the policy position that the differential between tangible goods and information products provides a basis for giving licensors greater freedom of contract.⁸⁷ Consequently, when the Article 2B Committee weighed the cost of creating new sources of recovery against the public interest in encouraging the distribution of information, it found the cost to be one the budding information economy could ill afford. Generally speaking, in these early years, the drafting committee has resolved to leave unfamiliar and vexing questions of unfair terms in mass-market licenses to the courts. Thus, Article 2B-105(b) defers to the general legal principle that, in certain limited circumstances, terms may be unenforceable because they violate a fundamental public policy that clearly overrides the policy favoring enforcement of private transactions as between the parties.⁸⁸ With respect to unconscionable or impermissible contracts or terms, Article 2B-105(b) states:

If a term of a contract violates a fundamental public policy, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the impermissible term, or it may so limit the application of any imper-

86. The NCCUSL, having removed information contracts from the sale of goods regime, recognizes that neither the subject matter nor the type of transactions in computer information are similar to sales or leases of goods. See UCITA, Prefatory Note.

87. See UCC § 2B-105A, Reporter's Notes. In this respect, Article 2B reflects the attitude of the Information Industry that consumers are empowered, through increased information and technological tools, to take greater responsibility for the decisions affecting their transactions. See *Fourth TABD Conference To Boost Transatlantic Marketplace, Statement of Conclusions*, Charlotte, November 5-7, 1998 (visited Sept. 8, 1999) <<http://europa.eu.int/comm/dg01/1111tab1.htm>>.

88. The principle that courts may invalidate a term of a contract on public policy grounds is recognized at common law and in the Restatement (Second) of Contracts. See *California Pacific Bank v. Small Bus. Admin.*, 557 F.2d 218, 224 (9th Cir. 1997); Restatement (Second) of Contracts § 178. This supplementary legal principle is incorporated under UCC § 1-105(b) and applies to all contract law. See U.C.C. § 1-105. U.C.C. § 2B-105 is designed to clarify the nature of the policies that have particular relevance to the subject matter governed by U.C.C. Article 2B. See U.C.C. § 2B-105, Reporter's Note 3.

missible term as to avoid any result contrary to public policy, in each case, to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of that term.

On the one hand, the advantage of an express reference to public policy is that since the concept is known to contract law and referable to the fair use of copyright works, it can encompass considerations pertaining to the restraint of trade and the limits beyond which it is unreasonable to assert a “proprietary” right in an information product. The court, however, is not a legislator. The public policy which a court is entitled to apply as a test of validity to a contract is in relation to some definite or governing principle which society has already adopted either by way of statute or informally by its general course of conduct.⁸⁹ A public policy “catch-all” is not a mechanism which the private individual consumer can easily invoke against the omnipotent corporate licensor.⁹⁰ Consumer law worldwide recognizes that it is not feasible for the consumer to contemplate the expense of litigation in the courts. That is why consumer law has established consumer claims tribunals to receive, investigate, and act upon complaints by consumers, and to assist consumers in making and pursuing those complaints.⁹¹ The Article 2B approach does nothing to either redress the bargaining imbalance or give due consideration to ways and means by which the law might adapt consumer rights as stated above to the online market for information products.

89. Moreover, U.C.C. § 2B-105 would very likely lead to inconsistency of policy in so far as a New York court may hold that a contractual restriction on reverse engineering is contrary to the public policy of the state of New York, while an Arizona court may conclude that such a restriction is not contrary to the public policy of Arizona.

90. See further Gerald Dworkin, *Judicial control of Copyright on Public Policy Grounds*, in *INTELLECTUAL PROPERTY AND INFORMATION LAW* 146-147 (Jan J.C. Kabel and Gerard J.H.M. Mom eds. 1998).

91. See *Proposal for a European Parliament and Council Directive on Certain Legal Aspects Of Electronic Commerce in the Internal Market*, 1128 PLI/Corp. 669, 687 (1999)(citing Article 17 (2) as it refers to out-of-court settlements for consumer complaints).

B. Adapting Consumer Protection Law to the Marketing of Information Products

Although consumer law deals with transactions in physical goods, the underlying rationale of its basic principles, though forged in the mass manufacturing age, is nevertheless relevant to the marketing of information products. In Australia, as in other comparable jurisdictions, the law utilizes one or more of the following means to defend consumer rights:

- a. Prescription of standards for goods and services; b. Prohibition of conduct which impedes consumers from enjoying their rights, or regulation of conduct so that it does not encroach on those rights; c. Regulation of the agreements entered into between consumers and suppliers, either as to the whole of the agreement, or as to specified parts of them; d. Dissemination of information both as to rights, and as to particular goods and services, so that consumers may exercise their rights.⁹²

In adapting the law to online marketing we might consider utilizing those measures which deal with particular sales and promotional techniques, such as those pertaining to land and motor vehicle or door-to-door sales.⁹³ These situations are distinguished from the mainstream consumer transactions by virtue of the character of the sale or the character of the marketing environment. We can analogize those situations in which the law currently provides distinctive kinds of consumer protection to the situation that prevails with respect to the online marketing of information products. First, it may be argued that the online marketing of information products requires legal scrutiny, in so far as customer goodwill is not always a high priority among online suppliers, with emphasis often being placed upon a quick, one-off sale. Second, in the online situation there is a general lack of ready comparisons in relation to the quality of the product being offered. Third, customers accessing supplier sites from their homes may not be sufficiently on guard or critical of the offer being made to them. Fourth, the exclusivity

92. GOLDRING, MAHER & MCKEOUGH, *supra* note 82, at 7.

93. See KENNETH SUTTON, SALES AND CONSUMER LAW 723-26 (4th ed. 1995).

and spontaneity of the online medium may be compared in effect to a form of high-pressure marketing. Finally, misrepresentations made by online vendors into the privacy of the home may be difficult for the consumer to prove.

In the case of larger purchases such a regulatory framework might contain one or more of the following provisions:

[T]he consumer's right to a period of reflection ("warming up") before agreeing to a contract (consumers would have to be informed 'a priori' of the contractual terms and conditions proposed by the supplier, who would then have to maintain these terms for a 14 day period); this would allow consumers to compare various offers and examine the contract adequately before giving their consent; [T]he consumer's right of withdrawal, that is, the right during a "cooling-off" period of 14 days to withdraw from the contact without penalty; [L]imitations on and conditions for the use by the supplier of certain means of communications (such as limitations on so-called "cold calling," where a consumer is contacted without her prior consent); Complaints and redress procedures for the settlement of disputes between a consumer and a supplier.⁹⁴

C. Cross-linked Paradigms: Fair Use as a Consumer Protection

In the case of information licenses it is not only a question of giving consumers greater autonomy and bargaining power, but as I have argued, a matter of redressing the ability of the licensor, in setting the terms of the contract, to create an unjustified private information monopoly. Article 2B recognizes that issues of public policy present questions of fair use or fair dealing in information. In relation to the scope of section 105, the Article 2B Reporter recognizes that there is a fundamental public interest in assuring that information in the public domain is free for all to use and in providing access to information for public purposes such as education,

94. Commission Proposal For Regulatory Framework For Distance Selling of Financial Services, last modified Oct. 14, 1998) <<http://europa.eu.int/comm/dg15/en/finances/consumer/891.htm>>.

research, and fair comment.⁹⁵ Article 2B leaves questions of contractual terms which are contrary to public policy to the courts and while the implications of this reference are not immediately obvious, it is significant that an earlier motion of Professor McManis, which would have expressly disallowed terms inconsistent with fair use, was defeated.⁹⁶ In the event we contemplate legislating for fair use in information licenses, the doctrinal difficulty in referencing issues of fair use to contract law, becomes clear. Then the question arises as to whether rules concerning fair use in information society should be effected from within the intellectual property or contract regimes. In other words, should we consider reforming the fair use provisions of the Copyright Act or should we aim to protect public domain rights within the framework of contract law.

In my view there is no question that, given we are dealing with either a common law or statutory license of information, as opposed to a statutory grant of intellectual property, substantive protection should be effected from within the same paradigm, that is, contract law. That given, the issue of restrictive licensing terms, albeit its relation to user rights, becomes essentially one of unfair trade practices or consumer protection.⁹⁷ In comparison with the fair use exemptions within the law of copyright, consumer law is, by its very nature, the more sensitive to restrictive practices. Unfortunately, consumer protection in many countries is ill-suited to the information economy. Today's consumer law deals mostly with transactions in physical goods, not information. Yet, in respect of information products, click-on standard form contracts

95. UCC § 2B-105, Reporter's Notes, 3.

96. In 1998, having failed to gain ALI approval, Professor Charles McManis' "fair use" motion led to a large majority vote for neutrality at the NCCUSL annual meeting, and was subsequently rejected by a virtually unanimous Drafting Committee after extensive debate. *See Significant Issues for Committee of the Whole*, July 1, 1998: <<http://www.law.upenn.edu/library/ulc/ulc.htm#ucc2b>>; *see further Issues List: ALI Council Meeting*, December 1998: <<http://www.law.upenn.edu/library/ulc/ucc2b/2bisd98.htm>>.

97. Note that the refusal to license intellectual property rights is unlikely to contravene section 46(a) of the Australian Trade Practices Act since the acquisition of intellectual property rights is not taking advantage of market power and a corporation with a substantial degree of market power is under no duty to license its intellectual property right to competitors. *See Trade Practices Act, 1974, (Cth), § 46(a)(Austl.)*.

threaten to make the contract of sale a museum piece. Admittedly, it requires an intellectual sidestep for those used to thinking of bundling information according to the requirements of copyright, to now conceptualize both copyright law itself as well as usage as a form of consumer protection. However, the new-sprung and rapid-paced circumstances of the digital environment require re-conceptualization of intellectual property doctrines fashioned for other times.⁹⁸

D. *Beyond Cultural Relativity: Establishing Universal Public Domain Rights*

To this proposition, copyright scholars may argue that fair use is so culturally relative that the task would inevitably founder. While cultural values undoubtedly differ, given the importance of finding common ground, we should not be so concerned with difference that we disregard what is universal in the usage of information.⁹⁹ Not so long ago the intellectual property regime was effectively exempted from the ambit of the trade regime.¹⁰⁰ So it is that the management of information was once thought of as an area so intrinsically linked with cultural heritage that its substantive regulation was a matter of national policy. It is submitted that once again we must look for what is universal rather than what is subject to cultural differences. With sufficient political will, universal grounds in the exemption of information for public use can be found, and consensus can be achieved.

As a matter of general principle, the law may forbid unduly restrictive terms in contracts in order to protect the public interest or insist that certain terms should become compulsory in contracts of a particular type. Similarly, in respect of consumer information

98. Gail E. Evans and Sarah J. Moylan, *Software as Discourse and its Implications for the Regulation of Information Society*, paper presented at the Fourth Ethicomp International Conference on the Social and Ethical Impacts of Information and Communications Technologies, LUISS Guido Carli University, Rome, 5-8 October 1999: <<http://www.luiss.it/Ethicomp99>>.

99. See *Copyright and Related Rights in the Information Society - Proposal for Directive/Background 9* (last modified Dec. 10, 1997) <<http://europa.eu.int/comm/dg15/en/intprop/1100.htm>> (concerning the compromise reached over research purposes).

100. See GATT, *supra* note 60.

contracts, we should marry principles of fair use with those of unconscionability and unfair trade practices. Here lies, perhaps, an important area of future regulation. This will necessitate going back to first principles. In tests for liability the focus and the point of reference will undoubtedly have to change. For the licensing of information we should take use and the management of use as our focal point. This may mean that the terms and reference of what is a fair dealing in information will change. Of course, such change might not necessarily be to the benefit of the user, so long as in forging a new constitution for information, in mediating the rights of supplier and consuming public, fair use or fair dealing always remain a constant.

V. TOWARDS A TRANSNATIONAL CONSUMER PROTECTION
AGAINST UNFAIR LICENSING PRACTICES:
SOME INITIAL PROPOSALS

It is submitted that, in the light of how little we know about the exchange of information products online, any thought of exporting Article 2B would be premature, not to say reckless. Thus, minimum international standards for information licenses in what might go under the “high-sounding” acronym TRIL or Agreement on Trade-Related Information Licenses, should be deferred for the time being. Instead it is submitted that lawmakers would be more usefully occupied in constructing a framework for consumer protection specifically designed to meet the needs of consumers in the online marketplace and which would also include provisions expressly adapted to the exchange of information products. The advantages of such a proposal are that it would (a) serve as a mechanism for the reconciliation of producer and user rights in public domain information and; (b) encourage consumer confidence in the online exchange of information products.

A. *Choice of International Regime*

In seeking a suitable international regime in which to locate consumer protection we might choose to follow the reasoning of the Article 2B Drafting Committee in placing information contracts within the paradigm of sales law. In this case we might consider an extension to the contractual regime established by the Vi-

enna Sales Convention.¹⁰¹ However, we would immediately run into the difficulty that it excludes consumer sales. Thus, the very contracts, which it will be important to regulate in order to protect consumers from the anti-competitive impact of the information license, are currently excluded from the legal regime.¹⁰² Even assuming that the Convention was to apply to consumer transactions, we may have problems with its global implementation and enforcement. Currently, the Convention is not of universal application and what application it does have can be further limited by agreement.¹⁰³ The role of the Convention is to provide a safety net not to set down global standards.¹⁰⁴

In contrast to agreements belonging to the classical international legal system, the WTO offers a well-defined and fully integrated governance mechanism. The one hundred and thirty-three states¹⁰⁵ who signed the WTO Agreement are bound to comply with all the multilateral agreements covering key trade sectors, the GATT,¹⁰⁶ GATS¹⁰⁷ and TRIPS Agreement.¹⁰⁸ The World Trade Organization has the capacity to compel member states to act in

101. United Nations Convention on Contracts for the International Sale of Goods (C.I.S.G.), April 11, 1980: <<http://www.jus.uio.no/lm/un.contracts.international.sale.of.goods.convention.1980/doc.html>>

102. Art. 2 limits that application by excluding consumer sales, auction sales, sales under execution, sales of stocks, shares and other securities, sales of ships, vessels, hovercraft or aircraft and sales of electricity from the Convention's ambit. See C.I.S.G. Art. 2.

103. See C.I.S.G. Art. 6 (limiting the application of the Convention by providing that the parties may exclude the application or derogate from or vary the effect of any of its provisions by agreement. It is possible to contract out of the whole or any part of the Convention); see also C.I.S.G. Art. 9 (concerning trade usage). See also Dennis J. Rhodes, *CISG: Encouraging Uniform International Law*, 5 TRANSNAT'L LAW. 387, 402-05 (1992); See JOHN CALAMARI AND JOSEPH PERILLO, *CONTRACTS* 5 (3rd ed., 1987).

104. See also A.M. Garro, *Reconciliation of Legal Traditions in the UN Convention on Contracts for the International Sale of Goods* 23 Int'l Law. 443 (1989).

105. On December 20, 1998 WTO membership rose to one hundred and thirty three with the accession of the Kyrgyz Republic. See *World Trade Organization*, (last modified Sept. 7, 1999) <<http://www.wto.org>>. There are currently 30 applicants for accession, including China and Russia. See *GATT Focus No. 34* 3-6, October, 1998 (visited Sept. 24, 1999) <www.wto.org/focus/focus34.pdf>.

106. See GATT, *supra* note 60.

107. See GATS, *supra* note 61.

108. WTO Agreement, Annex 1C, THE LEGAL TEXTS-THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 365; 33 I.L.M. 1197 (1994) [hereinafter TRIPS].

accordance with their undertakings. They are then subject to a compulsory adjudicatory system which includes an appellate procedure and automatic suspension of concessions in the absence of compliance by an offending member state.¹⁰⁹ Moreover, the WTO has evolved to provide what is, in effect, a general commercial legislature whose work is facilitated by the phenomenon of “issue linkage,”¹¹⁰ or the attachment of subject matter which may be designated as “trade related”. By just such means, private rights in intellectual property came within the competence of the trade regime. Likewise, the WTO could equally well accommodate regulations relating to consumer protection for information products. Not only does the WTO as a transnational legislature have the power to provide substantive rules for information transactions, but the formulation of policy for trade in information products has already begun. The core of a rationale, which could potentially support the construction of minimum standards for the licensing of information, already exists. The WTO study on Electronic Commerce¹¹¹ recognizes that market forces may need to be complemented by industry self-regulation and/or government intervention to secure not only the necessary infrastructure for adequate investment but also a predictable legal and regulatory environment which enforces contracts and property rights.

B. *Initiating Reform Through Global Consultations*

In the matter of global consultation, the WTO as well as transnational regional groupings such as NAFTA, MERCOSUR, and APEC are well placed to initiate debate concerning the extent to which limitations and exceptions in fair use and dealing within the Copyright Act may or may not be overridden by information contracts. To this end it is submitted that the debate among the member states of the WTO could begin with the following proposals:

109. See Evans, *supra* note 13; see also, Gail E. Evans, Lawmaking Under The Trade Constitution: A Study In Legislating By The World Trade Organization 51-54 (1999), (unpublished doctoral dissertation, University of Sydney) (on file with the author).

110. E.B. Haas, *Why Collaborate? Issue-Linkage and International Regimes* 32 WORLD POLITICS 357, 376-77 (1980).

111. WORLD TRADE ORGANIZATION, *supra* note 62.

1. That minimum standards in Restrictive Business Practices be drafted to include unfair practices in mass market contracts and licenses for information products as follows:

(a) Terms of use of information set out in mass market contracts and licenses should be regulated under consumer protection law when they restrict or eliminate consumers' rights recognized under copyright law. In such a case, consumer protection rules relating to the formation and content of standard agreements would be made applicable to mass market licenses for copyrighted material.

(b) Courts should be able to review the reasonableness of contract terms. In determining reasonableness, the court should be able to consider all of the circumstances, including whether the work is available on other terms without the restrictive terms and whether it is available in analogue formats as well as digital.¹¹²

2. That the TRIPS Agreement be amended to read:

All statutory copyright limitations, including those implemented on the basis of the promotion of education, culture or other general public interest consideration, have precedence over contractual agreements to the contrary.¹¹³

CONCLUSION

Digital networks have made possible the commodification of information. A private initiative, the click-on license demonstrates, that for the information industry, contract law is the instrument par excellence to fill the current legal vacuum. In the new information order contract has displaced copyright as the primary form of legal protection. The risk is that the contractual format for marketing information makes it possible for the industry to write its own copyright law, in other words, to privately legislate

112. IMPRIMATUR Consensus Forum 1998, Contracts and Copyright: The Legal Framework for Future Electronic Copyright Management, *supra*, note 37 at 10 para 2.3.2 and at 29-30 para 7.4.3.

113. *Id* at 10 para 2.3.2.

its own intellectual property rights.¹¹⁴ Mass market, single user information licenses restricting use to no other than domestic use must also be seen in the wider perspective of the so-called “copyright grab” by an industry, which fears the Internet is a global copying machine.¹¹⁵ The endorsement of information licensing under proposed Article 2B and latterly under UCITA,¹¹⁶ will accentuate the trend by the industry to claim uniform ownership rights in undifferentiated information. Article 2B would give legislative endorsement to this action by the information industry. The proponents of Article 2B would postpone providing private individuals with consumer protection for information products appropriately tailored to online marketing. However, the foregoing analysis has shown that this is not a prudent policy, since the legal provision of a marketplace in which consumers feel secure in their transactions, is a goal which is clearly also in the interests of the information industry and ultimately in the greater interests of information society.

114. J.H. Reichman and Jonathan A. Franklin, *supra* note 73.

115. WORLD TRADE ORGANIZATION, *supra* note 62.

116. *See supra* note 9 and accompanying text.