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# Licensing on the Global Information Infrastructure: Disharmony in Cyberspace

*Raymond T. Nimmer*

## INTRODUCTION

The past several decades witnessed an explosion of international interest in the legal treatment of intellectual property and digital information. Motivated largely by undeniable changes in the global economy and led politically by the United States, these intangibles and the rights associated with them became not only a focus of global trade, but a central point of debate in law harmonization worldwide. The recently completed WTO agreement for the first time spells out trade-related obligations concerning intellectual property rights, an explicit recognition of the importance of this type of material in modern world trade.

The attention centered on intangible property highlights the commercial importance of this type of property. In addition, it brings to the forefront of international commerce the various types of transactions within which intangible property and the rights related to that property are conveyed. Unlike goods, most transactions involving intangibles occur under a license contract, rather than a sale. The law and practice of license contracts, therefore, play a major role in modern commerce. The fact that this area of law remains undeveloped nationally and internationally reflects a corresponding need for systematic consideration about the appropriate contours of a contract law structure.

The evolution of the global information infrastructure (GII) accentuates the importance of contract as well as intellectual property law issues. It heightens the need to harmonize how problems are ad-

dressed on an international level. It does so, of course, because the property traded (information in digital form) and the messages exchanged across the networks move rapidly across national lines and, in a single transaction, may affect many countries in the space of seconds. Developing a concept of contract law for this environment that has stability in international venues is essential to the development of the GII. In the absence of stable, predictable rules governing contract relationships as well as intellectual property rights, the vision of a flourishing and commercially vibrant global information system will be seriously impeded, if not blocked.

This article explores some of the issues in international licensing and, particularly, in the evolution of information-based contracts centered on the GII. Part 1 describes the basics of intellectual property law. Along with communications law, privacy rules and criminal law theories, intellectual property concepts provide a baseline of what rights exist to be licensed or otherwise transferred on the GII. What we find, not surprisingly, is a complex web consisting of not only similarities, but also of conflicting details and conflicting general themes across the countries of the world. This is a standard international law observation, but it becomes accentuated in modern information practice in the GII because the subject matter and methodology of the transactions in this electronic milieu are more truly international and internationally bound than in traditional systems of ordering, shipping and receiving hard goods from other countries.

Part 2 provides an overview of licensing law. Under current contract law regimes, much of the basic contract principles of licensing consist of general law not tailored to the particulars of licensing practice and, in many cases, not readily identifiable in the applicable national law regime. In this respect, I point out not only the uncertainty of the law today, but also the existence of a project in the U.S. to develop uniform and coherent rules for intangibles licensing.

Part 3 describes several issues of contract law in the electronic world of licensing of electronic rights and digital product. Here we have a special convergence of contracts, contract performance and immediate international accessibility. At essentially all levels of the analysis, the material handled is in purely electronic transactions (computer to computer creation and performance), and the underlying principles of contract law are unknown or obscure. Such circumstances suffice for transactions in intermittent or casual relationships, but they create potentially huge problems in a truly commercial global marketplace. The problems need to be addressed at an international

as well as a local level using principles of contract and property that fit the modern digital world of the GII.

PART 1

PROPERTY RIGHTS BASE

The GII consists of a network of computer networks and separately owned computers connected by virtue of agreements, cooperative ventures, transmissions or access capability and the like.<sup>1</sup> Transmission of information and messages across this network entails passing packets of data from one computer to another through an environment that enables the message and data, or the request for data, to reach a destination bounded not by physical limits, but by electronic and cyber connections. Unlike airline or physical routes, however, the paths are generally not subject to regulation by external forces; the path taken may vary widely even for messages sent to and from similar locations. In international transmissions, a packet of electronic data may pass through several countries en route to a destination.

Because of this, all GII transactions potentially engage the underlying intellectual property, human rights and contract laws of multiple countries. The belief that a global economy exists in this setting changes from image to undeniable reality. In discussing the GII we move from questions about how goods move from state to state to questions about what are the international dimensions of digitized information products shunted from country to country with the push of a button not only by major corporations, but by individuals with access to a simple, readily obtainable computer.<sup>2</sup>

Much of the value and opportunity related to property moving along this network infrastructure will be shaped by communications law, criminal law, privacy, and related concerns.<sup>3</sup> In addition, some (perhaps a major share) of the basic property rights involved will be defined by intellectual property law on national and international basis.

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<sup>1</sup> See generally ALBERT GORE, *GLOBAL INFORMATION STRUCTURE: AGENDA FOR COOPERATION* (1995).

<sup>2</sup> Of course, many messages on the GII will relate ultimately to a purchase and sale of goods with the network serving as a form of telecommunications. See generally Electronic Messaging Task Force, *The Commercial Use of Electronic Data Interchange: A Report and Model Trading Partner Agreement*, 45 BUS. LAW 1645 (1990).

<sup>3</sup> See RAYMOND T. NIMMER & PATRICIA A. KRAUTHAUS, 55 *LAW & CONTEMP. PROBS.* 103 (1992); Edmund Kitch, *The Law and Economics of Rights in Valuable Information*, 9 *J. LEGAL STUD.* 683 (1980).

While this article cannot cover the world of intellectual property regimes, it is important to understand the nature and the degree of conflict and uncertainty that subsists in the current global information network in order to understand the relationship between this context and the advent of international information licensing law regimes. Although patent, trade secret and similar intellectual property regimes play important roles, much of the rights picture and the international complexity involved can be grasped by focusing simply on copyright law.

Copyright systems are territorial in nature; they cover acts and rights only within the country of their origin.<sup>4</sup> Within each country, fundamental differences in approach and application are likely to be found in both details and in general principles. As a general point for discussion, there are three underlying themes that define general differences among various countries.

The first is utilitarian.<sup>5</sup> In the United States and other anglo-american or common law tradition countries, copyright rights are viewed as part of an intellectual property "bargain." As part of this bargain, law provides economic and control incentives for authors with the goal of enhancing the overall production of works of invention and authorship,<sup>6</sup> while leaving unprotected and available for free public use important aspects of works, such as the idea content, the factual references, and processes described in a work.<sup>7</sup> This public benefit analysis leads away from a focus on the unique attributes of a person and toward a focus on levels of originality or inventiveness adequate to justify protection.

The second, competing approach arises in civil law countries and views copyright as deriving more from the natural or personal rights of the individual as an author than from a social goal of promoting scientific or creative productivity.<sup>8</sup> As a matter of practice, the differences between this approach and the common law approach, at least with respect to economic rights, have tended to be eliminated by international convergence. Yet, the civil law approach creates an emphasis on many important individual rights which, in some cases, cannot be effectively transferred. These involve the so-called "moral rights" of an author, such as an author's right to prevent harmful mod-

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<sup>4</sup> See DAVID NIMMER & MELVILLE NIMMER, *NIMMER ON COPYRIGHT* § 17.02 (1983).

<sup>5</sup> See *id.*

<sup>6</sup> *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 109 (1989).

<sup>7</sup> See *Feist Publ., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

<sup>8</sup> See generally S. STEWART, *INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS* (2d ed 1989); NIMMER & NIMMER, *supra* note 4.

ification of the work ("integrity") and the right to attribution for involvement in the work ("paternity").<sup>9</sup>

A third category refers broadly to countries who have no effective copyright-related traditions. As a social matter, copying of material prepared by another does not represent wrongful conduct. During years of active political effort, many countries who fit this category, either socially or pragmatically, have been forced into positions more in line with the two other dominant standards, at least in reference to formal law development.<sup>10</sup>

The degree of divergence in detail among these approaches and within the countries that fit a particular model defines a significant variable in the GII. For example, in the United States, particular facts cannot be protected against duplication under copyright law no matter how difficult the effort in finding and compiling the facts.<sup>11</sup> This creates a significant obstacle for the development and commercial exploitation of electronic databases which, in the United States, may be subject to correction through the application of communications, privacy and similar law.<sup>12</sup> In the European Union (EU), however, a directive on database law would create a *sui generis* right to prevent wrongful extraction of data not otherwise protected by copyright law.<sup>13</sup> The significance of the difference for the GII and licensing in that environment is large. In the U.S., factual material can be taken from the original compiler if access to the electronic database does not violate law. In the EU, on the other hand, factual materials are protected if the owner of the database can show substantial investment in the creation of the work.

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<sup>9</sup> These rights are provided for in the Berne Convention as well as in the respective national laws of the affected countries. BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (1886).

<sup>10</sup> See generally RAYMOND T. NIMMER, THE LAW OF COMPUTER TECHNOLOGY ¶¶ 5.08-5.10 (1992).

<sup>11</sup> See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 310 (1991); *Bellsouth Advertising & Publishing Co. v. Donnelly Info. Publishing Inc.*, 999 F.2d 1436 (11th Cir. 1993) (Yellow pages organization not copyrightable; even though numerous categories used, they were all obvious or ordinary).

<sup>12</sup> See generally Raymond T. Nimmer and Patricia A. Krauthaus, *Information as a Commodity: New Imperatives of Commercial Law*, 55 LAW & CONTEMP. PROBS. 103 (1992); Raymond T. Nimmer and Patricia A. Krauthaus, *Copyright on the Information Superhighway: Requiem for a Middleweight*, 6 STAN. L. & POL'Y REV. 25 (1994).

<sup>13</sup> See *Amended Proposal for a Council Directive on the Legal Protection of Databases*, COM(93) 464 final — SYN 393 OJ93/C 308/01. For a discussion of this Directive, see Christopher Millard, *Comments on the Proposed EC Database Directive*, 6 WORLD INTELLECTUAL PROPERTY REPORT (1992).

National divergence on these issues is accentuated by the creation, over the years, of various copyright-related rights that may, or may not, fall within the copyright law of a particular country or be governed by international copyright conventions. These are neighboring rights. The most significant in reference to the GII involves rights in sound recordings which, when first encountered in law, fit none of the existing copyright regimes.<sup>14</sup> In the United States, rights in sound recordings exist under copyright law. However, that approach does not occur throughout the world. The divergence affects in what way a commercial entity on the GII can rely on enforcing rights in sound recordings (or ignoring those rights) in countries around the world.

Several treaty regimes link general traditions and the specific variations into a semblance of an international web. Historically, the most important in international copyright flow from the variations of the Berne Convention on Copyright.<sup>15</sup> Administered by the World Intellectual Property Organization (WIPO), a potentially functional web of international principles stems from a number of treaties related to the international copyright and neighboring rights. The conventions and, most specifically, the Berne Convention, achieved relatively wide acceptance in the international community. However, that acceptance is not universal. For example, the United States first joined Berne in 1989 (currently over 110 countries are signatories).<sup>16</sup>

The Berne Convention does not generally regulate the substantive content of international copyright. It mandates only minimum levels of protection. Otherwise, the main contribution that Berne makes is to establish a principle of so-called "national treatment."<sup>17</sup> The premise of national treatment lies in the commitment that a foreign national receives the same copyright protection in a particular country as is available to nationals of that country.

A contrasting approach to international rights law, "reciprocity," sets out the premise that nationals of one country receive the benefits

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<sup>14</sup> See, e.g., Geneva Convention for the Protection of Producers of Phonograms Against the Unauthorized Reproduction of their Phonograms, 25 U.S.T 309 (1971).

<sup>15</sup> Berne Convention for the Protection of Literary and Artistic Works of Sept. 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on Nov. 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971. The Berne Convention entered into force in the United States on March 1, 1989. See Berne Convention, *supra* note 9.

<sup>16</sup> A parallel copyright convention, adopted primarily to deal with the fact that the United States and some other countries required formalities to establish a copyright, is the Universal Copyright Convention with membership of over ninety countries. Universal Copyright Convention, 25 UST 1341 (1971).

<sup>17</sup> See *supra* note 9, at 5(1) & 5(2).

of the other country's law only if their national origin creates similar rights or obligations in its own law. While the Berne Convention adopts an aggressive national treatment position, several recent enactments or proposals in the United States and in the EU adopt a reciprocity framework, presumably as a wedge to encourage other countries to follow the policy decisions reached in the country adopting the idea of reciprocity.<sup>18</sup>

A second major regime for international intellectual property law harmonization stems from the development of intellectual property principles under the multinational trade agreement that resulted in the creation of the World Trade Organization (WTO) at the culmination of the negotiations relating to the General Agreement on Tariff and Trade.<sup>19</sup> The intellectual property principles adopted as part of this agreement create a number of obligations on the trading partners who become part of the treaty. These obligations include: to protect computer software under copyright law; to protect trade secret and sound recording owner's rights; and, with some exceptions, to develop a national treatment principle consistent with the Berne Convention.

This combination of national variation and limited international harmonization affects the treatment of digital property transfers implemented through the GII in various ways. If one conceives of the GII as merely a way of augmenting the transfer of goods across national boundaries, the difference between telex, telephone and computer has marginal relevance.<sup>20</sup> There are important issues of ensuring that international treatment of the enforceability of electronic messages (offers and acceptance) reflect reasonable and consistent principles. However, the fundamental ability to close commercial deals electronically represents only a small step away from what occurred before the GII.

The more basic change and challenge that the computer networks create involves the handling of information as the direct subject of commerce and trade. The ability to transmit information assets from company to company and company to customer through the network

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<sup>18</sup> See, e.g., *Amended Proposal for a Council Directive on the Legal Protection of Databases*, COM(93) 464 final - SYN 393 OJ93/C 308/01. The reciprocity approach was previously used by the United States with reference to intellectual property protection of semiconductor mask works. See 17 U.S.C. §§ 901-912 (1995).

<sup>19</sup> See OFFICE OF THE U.S. TRADE REPRESENTATIVE, *TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF THE MULTILATERAL TRADE NEGOTIATION* (1993).

<sup>20</sup> But see UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, *DRAFT MODEL LAW ON EDI* (1995) (proposing various statutory provisions to clarify the effectiveness of electronic messages and deal with other aspects of international EDI deals).



and the GII, presents an entirely new and different problem for international and national law. Information assets differ in basic content and structure from assets definable by a particular item located in a particular place.<sup>21</sup> The information asset can be transferred and simultaneously retained.<sup>22</sup> It also can be duplicated virtually without limitation.

Equally important, digital information assets are subject to property law rules that differ substantially from the tangible property law rules that affect when, or whether, one company can transfer a product (tangible) to another company. While they both deal with "property," the law of ownership of goods differs fundamentally from the intellectual property laws of "ownership" of information.<sup>23</sup> On an international scale, the difference affects the fundamental question of whether any property right exists and whether it can be transferred. This is largely uncharted territory for legal analysis. Consider, for example, a packet of data obtained by a Boston company from a German database through a remote access which passes through a Mexican computer. If the data is purely factual materials and the EU Directive had been implemented, the German company "owned" a right to prevent or control extraction of the material from its database. On the other hand, in the United States, a principle of national treatment would indicate that no rights exist in a purely factual database. The circumstances in Mexico might fit either model or a third one. Has an infringement occurred? Under which set of laws will it be litigated?

Remember that in electronic worlds, the entire transaction, access and duplication (Canada and Boston) of the data, occurs within moments. Conceivably, given the territorial character of intellectual property laws, the answer is that the law of all three countries applies separately and defines separate infringing or non-infringing acts. If that answer is correct in the GII, vendors and users of the digital information assets transferred within that system will be immediately and recurrently subject to multiple, perhaps inconsistent legal regimes

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<sup>21</sup> See Raymond T. Nimmer and Patricia A. Krauthaus, *Information as a Commodity: New Imperatives of Commercial Law*, 55 *LAW & CONTEMP. PROBS.* 103 (1992); Frank H. Easterbrook, *Intellectual Property is Still Property*, 13 *HARV. J. L. & PUB. POL'Y* 108 (1990); Edmund Kitch, *The Law and Economics of Rights in Valuable Information*, 9 *J. LEGAL STUD.* 683 (1980).

<sup>22</sup> Information is often described in economic theory as a form of public goods because of these attributes. See Otto Davis and Andrew Whinston, *On the Distinction Between Public and Private Goods*, 57 *AM ECON. REV.* 360 (1967).

<sup>23</sup> See Raymond T. Nimmer and Patricia A. Krauthaus, *Information as Property: Databases and Commercial Property*, 1 *OXFORD J.L. & INFO. TECH.* 1 (1993).

in each transaction they undertake. The potential for blockage of the GII as a commercial venue is apparent.

That potential becomes even more explicit when we add to the intellectual property mix the various political, free speech, privacy, and other social concerns that shape the law. These combine to create laws related to handling information which may differ from how a country's norms shape the simple question of how one person can sell a television from Japan to a buyer in Paris.<sup>24</sup> Information considered obscene, irreverent or politically unacceptable in one country may reach that country from a jurisdiction in which entirely different judgments would be made about the content of the information. To reconcile the potential liability in such cases is no less difficult than to apply the multiple conflicting intellectual property law principles to the GII.

## PART 2

### LICENSE CONTRACT LAW

#### Defining a License

The paradigmatic transaction in intellectual property and digital information practice entails a license, rather than a sale. A license transfers rights to employ the underlying intangibles: rights or information assets. In general terms, a "license" resembles a lease of tangible property, but the general analogy holds only superficially. While the capability to use the underlying intangible property may be created through a transfer of some tangible property such as a tape, a diskette or a film, the transaction focuses on the permission granted in the contract with respect to what rights the licensor holds in the underlying information or intellectual property.<sup>25</sup> A "license" is an "agreement for a transfer of conditional or limited rights in [information or intellectual property]."<sup>26</sup>

A license may be "exclusive" or "nonexclusive," with the latter being the most common commercial transaction.<sup>27</sup> A grant of a nonexclusive license grants the licensee no property rights in the underlying

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<sup>24</sup> See generally Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757 (1995); Fred H. Cate, *The First Amendment and the National Information Infrastructure*, 30 WAKE FOREST L. REV. 1 (1995).

<sup>25</sup> See, e.g., ANTHONY W. DELLER, *DELLER'S WALKER ON PATENTS* § 538 (1981) [hereinafter *DELLER*].

<sup>26</sup> Proposed Article 2B: Licenses, Proposed U.C.C. § 2B-102(28) (1995) [hereinafter *Article 2B Proposal*].

<sup>27</sup> NIMMER, *supra* note 10, ¶ 7.02.

intangibles.<sup>28</sup> The transaction is in the nature of a permission to use information. The contract grant relates to activities such as a right to use, copy, modify, display, disclose, perform, access or to any of a number of other actions associated with proprietary or control rights in intangibles.

In a license, the rights granted are conditional or limited, generally less than the licensor's entire rights or interests in the underlying intangibles. The manner in which the grant is viewed, however, varies somewhat depending on the type of intellectual property or information asset involved.

Under patent law, a license constitutes, in effect, an agreement not to sue the licensee for using patented technology.<sup>29</sup> The patent law of most countries does not grant the patent holder an affirmative right to use its patented technology, only the right to prevent others from doing so. This underlying intellectual property concept affects the understanding of the contractual relationship. At least under U.S. law, a patent license does not typically contain an implied representation that the technology can be used without infringing technology rights held by other parties.

A copyright license, on the other hand, might be viewed as a more affirmative grant, enabling the licensee to utilize by copying or other action, the work of authorship to which the copyright extends.<sup>30</sup> Copyright law focuses on the creation of "exclusive" rights. This ordinarily entails a right to use and otherwise exercise what property was granted. The existence of blocking patents or technology that might be infringed by use does not typically arise in copyright law. However, it may become increasingly common in computer software. Arguably, there is an affirmative covenant here that the licensed work does not *in itself* infringe another work of authorship.

A trade secret license entails an additional variation because the license actually involves a limited disclosure of otherwise secret or confidential information.<sup>31</sup> As in the realm of patents, there are no implicit representations about the licensee's right to use the information without infringing other technology rights, but the transaction does not actually involve a mere waiver of the right to sue the licensee for use of otherwise exclusive rights. The license entails, rather, a con-

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<sup>28</sup> 17 USC § 101 (1995). See also *Harris v. Emus Records Corp.*, 734 F.2d 1329 (9th Cir. 1984); *In re Alltech Plastics, Inc.*, 71 B.R. 686 (Bankr. W.D. Tenn. 1987).

<sup>29</sup> See generally *DELLER*, *supra* note 25.

<sup>30</sup> See *NIMMER & NIMMER*, *supra* note 4, § 10.13A.

<sup>31</sup> See generally *ROGER MILGRIM, TRADE SECRETS* § 12.13.

ditional disclosure and compliance with the conditions or limits represents the primary obligation of the licensee.

A fourth form of license deals with intellectual property in a less direct way. This license form grants access to an information asset, typically an electronic or digital information asset.<sup>32</sup> Licenses of this type deal less with an underpinning of intellectual property law and focus instead on the licensee's right to make use of an asset which may or may not be created under any intellectual property law regime. Indeed, for these assets, the critical value that is being traded may be safeguarded under communications law, criminal law or any of a variety of other regimes that give the "owner" a right to control access to her property. This access license is often an affirmative grant, rather than a negative proposition.

Despite the differences, two central features exist in all of these information license transactions. First, the licensee does not acquire ownership or absolute control over the information asset involved. Ownership of the intangible asset remains in the licensor. For example, when a party in Germany accesses a commercial database in the United States, the implied or explicit contract between the parties allows the German customer access to the digital information, and if applicable, allows the customer to make a copy of some part of the asset in Germany. The data proprietor in the United States does not relinquish the asset. Second, after the copy is made, the U.S. owner retains the database as it previously existed with no diminishment. This last point constitutes the second central characteristic of licensing as contrasted to other forms of transaction. In dealing with intangibles, the vendor can and typically does have its cake and eat it too. The asset does not diminish or deplete because a licensed transfer occurred.

Typical licenses vary depending on the underlying intellectual property or digital information. They also vary in terms of the collateral actions that the licensor takes under the agreement. In a "pure" license, especially in context of patent licensing, executing a naked grant of a right or privilege (permission) is often the only action taken in the transfer. Details about the patent are available on public record. In some cases, the transferee does not truly desire to use the patented invention, but merely wants to be free from possible claims of infringement. In other more "commercial" licenses, the licensor is

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<sup>32</sup> The draft of the proposed U.C.C. Article 2B defines this as a "access contract," defined as a contract that transfers a right to have access to an intangible, data system, or other facility under the control of the licensor. Article 2B Proposal, *supra* note 26.

obligated to take steps that enable the transferee to exercise the transferred rights.<sup>33</sup> This portion of the transaction entails many different possibilities such as: providing staff to communicate information to the transferee; delivering a diskette that contains a copy of the software in which rights are conveyed; providing access codes for a remote database; delivering specifications and designs; electronically transferring a manuscript or written description; etc.

### What Law Applies

Whether they pertain to software, databases, digital information or any other type of intangibles, license agreements are commercially important contracts. The licensing paradigm states the appropriate model under which to develop concepts of transactional law applicable to intangible property displayed on or accessible through the GII. Indeed, it is difficult to visualize what other model might apply because the intangible assets scattered across the GII are so unlike goods and often unrelated to any personal services.

What law currently applies to a license contract and what substantive rules shape the terms of the agreement? Answering this question within the United States presents immense problems. Answering the question across the GII verges on impossibility.

This article concerns contract law and practice, but influences from many other legal venues affect contract terms. Intellectual property law directly affects substantive terms by defining what rights exist that can be made the subject of the agreement and, in some cases, stating limits on what transactional effects can be achieved. The international variance is especially broad, a fact that greatly influences the fluidity of the GII as a forum of international commerce;<sup>34</sup> it produced the international accord represented in the agreement on trade-related aspects of intellectual property in the recently concluded GATT treaty.<sup>35</sup> In the United States, for example, some cases hold that license terms that extend a licensor's control of the licensee beyond the underlying intellectual property right violate intellectual property pol-

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<sup>33</sup> See discussion in *Burkert v. Petrol Plus of Naugatuck*, 216 Conn. 65, 579 A.2d 26 (1990).

<sup>34</sup> See Charles J. Meyer, *National and International Copyright Liability for Electronic System Operators*, 2 GLOBAL LEGAL STUDIES 497 (1995).

<sup>35</sup> GATT (Uruguay Round), Agreement of Trade-Related Aspects of Intellectual Property Rights (1995).

icy.<sup>36</sup> In a number of European countries, purported transfers of so-called moral rights are invalid, but waivers can be obtained.<sup>37</sup>

Competition or antitrust laws also directly affect contract law. U.S. antitrust law affects permissible license provisions in some respects.<sup>38</sup> Additionally, especially in reference to digital information products, potentially strong influences are likely from the various constitutional and privacy law spheres that roughly comprise individual rights law. For example, the European Union recently approved a directive on data protection rules.<sup>39</sup> The Directive calls for laws restricting and regulating the use and the transfer across national borders of personal information about individuals without meeting various consent obligations. In the United States, both privacy law and constitutional considerations limit the liability of information providers who commit errors. In sum, the applicability of these doctrines to the digital information industry remains uncertain.<sup>40</sup>

Rather than being an unregulated community, the GII is subject to immense and often intrusive regulation throughout the world.<sup>41</sup> The array of issues presented is, in itself, an argument for a contract-based environment in which at least the basics of the contractual framework arising on GII can be outlined and handled by agreement of the parties.<sup>42</sup> Yet, in the United States, it is difficult to identify what area of contract law applies to a license. In many respects, the available alternatives do not provide a commercially sound or readily discernable basis for contracting practice.

Four or five possible sources of contract doctrine exist in the United States which might govern licenses. These include sales of

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<sup>36</sup> See *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488 (1942) (patent misuse); *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970 (4th Cir. 1990) (copyright misuse).

<sup>37</sup> See Ann Moebe, *Copyright Protection for Audiovisual Works in the European Community*, 15 HASTINGS COMM/ENT. L.J. 399 (1993); Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347 (1993).

<sup>38</sup> See, e.g., *Digidyne Corp. v. Data Gen. Corp.*, 734 F.2d 1336 (9th Cir. 1984).

<sup>39</sup> Amended Proposal for a Directive on Data Protection, COM(94) 128 final - COD 288 (June 13, 1994).

<sup>40</sup> See *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033 (9th Cir. 1991) (publisher of book not accountable for wrong information).

<sup>41</sup> Christopher Millard and Robert Carolina, *Commercial Transactions on the Global Information Infrastructure: A European Perspective*, 269 J. MARSHALL J. COMPUTER & INFORMATION TECHN. LAW. 272 (1996).

<sup>42</sup> Several commentators have suggested that governance issues in the internet or the GII should be viewed from a contract-based model overall. See, e.g., Henry H. Perritt, *Dispute Resolution in Electronic Network Communities*, 38 VILL. L. REV. 349 (1993); David R. Johnson and Kevin A. Marks, *Mapping Electronic Data Communications onto Existing Legal Metaphors: Should we Let our Conscience (and our Contracts) be our Guide?*, 38 VILL. L. REV. 487 (1993).

goods law under UCC Article 2, personal property leasing law under Article 2A of the UCC, and the common law of contracts. However, within the common law different traditions and doctrines arise with respect to services contracts and contracts involving information assets. Of these, on first blush, the least likely to apply would be UCC Article 2. The statute focuses on tangibles (rather than information) and on transactions that divest the vendor of title to the asset, placing the asset into the ownership and control of the buyer. Yet, Article 2 has a profound effect on licensing law if only because many courts in the United States have held that the sale of goods statute applies to licenses of computer software.<sup>43</sup> Article 2A deals with personal property leases. The conditional delivery model in such transactions appears more similar to licensing. Although the statute invites expansive application,<sup>44</sup> only one court has suggested that a license could be treated as a lease.<sup>45</sup> Indeed, many of the rules in Article 2 reflect the focus on the tangible, rather than intangible, property.

Internationally, there is a similar, albeit more complex and uncertain picture. Obviously, national contract laws differ and make many subclassification decisions as to applicable contract law principles. On a global basis, a widely adopted, but infrequently used, international convention has been promulgated dealing with the sale of goods.<sup>46</sup> Of potentially broader application, UNIDROIT promulgated a statement

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<sup>43</sup> *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91 (3d Cir. 1991); *Advent Systems Ltd v. Unisys Corp.*, 925 F.2d 670 (3d Cir. 1991); *Systems Design & Management Information, Inc. v. Kansas City Post Office Employees Credit Union*, 14 Kan. App.2d 266, 788 P.2d 878 (1990); *Herbert Friedman & Assoc., Inc. v. Lifetime Doors, Inc.*, 1989 US Dist. LEXIS 15239 (ND Ill. 1990); *RRX Industries, 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); *Chatlos Sys., Inc. v. Nat'l Cash Register Corp.*, 635 F.2d 1081 (3d Cir. 1980); *Carl Beasley Ford, Inc. v. Burroughs Corp.*, 361 F. Supp. 325 (E.D. Pa. 1974); *Neilson Business Equipment Center, Inc. v. Italo Monteleone, M.D.*, 524 A.2d 1172 (Del. 1987); *The Drier Co. v. Unitronix Corp.*, 3 UCC Rep. Serv. 2d 1728 (NJ Super. App. Div. 1987); *Austin's of Monroe, Inc. v. Brown*, 474 So.2d 1383 (La. Ct. App. 1985); *Schroders, Inc. v. Hogan Sys., Inc.*, 137 Misc.2d 738, 522 N.Y.S.2d 404 (N.Y. Sup. Ct. 1987); *Photo Copy, Inc. v. Software, Inc.*, 510 So.2d 1337 (La. Ct. App. 1987); *Systems Design & Management Information, Inc. v. Kansas City Post Office Employees Credit Union*, 14 Kan. App.2d 266, 788 P.2d 878 (1990); *Communications Groups, Inc. v. Warner Communications, Inc.*, 136 Misc.2d 80, 527 N.Y.S.2d 341 (NY Civ. Ct. 1988); *USM Corp. v. Arthur Little Sys., Inc.*, 28 Mass. App. 108, 546 N.E.2d 888 (1989); *Hospital Computer Sys., Inc. v. Staten Island Hosp.*, 788 F. Supp. 1351 (D.N.J. 1992); *In re Amica*, 135 Bankr. 534 (B.R. ND Ill. 1992); *Camara v. Hill*, 596 A.2d 349 (Vermont 1991).

<sup>44</sup> U.C.C. § 2A-102, Comment. ("A court may apply this Article by analogy to any transaction, regardless of form, that creates a lease of personal property other than goods . . .").

<sup>45</sup> See *Communications Groups, Inc. v. Warner Communications, Inc.*, 136 Misc. 2d 80, 527 N.Y.S.2d 341 (County Ct. 1988).

<sup>46</sup> See generally Peter Winship, *Changing Contract Practice in the Light of the United Nations Sales Convention: A Guide for Practitioners*, 29 THE INT'L LAW. 525 (1995).

of basic international commercial contract principles which is similar to U.S. Restatements of Law.<sup>47</sup> However, neither work addresses GII licensing issues.

In part because of the importance of the subject matter and the lack of clear contract law, a proposal by the United States would bring license contract law into the UCC as Article 2B: Licenses.<sup>48</sup> Commenting on this project, the recent *Report of the Working Group on Intellectual Property Rights* (White Paper) of the U.S. Commerce Department noted:

The challenge for commercial law, as for intellectual property law, is to adapt to the reality of the NII by providing clear guidance as to the rights and responsibilities of those using the NII. . . . Historically, the U.C.C. has been extremely successful in clarifying the law. However, as technology advances, the way in which business is conducted places strains upon the U.C.C. . . . therefore, the Working Group supports the efforts presently underway to revise . . . the U.C.C. to encompass licensing of intellectual property.<sup>49</sup>

The harmonization issues here involve both dealing with inconsistencies of result across different jurisdictions and clarifying what results obtain as a matter of basic principle. In respect to both issues, the GII and its local twin, the NII (National Information Infrastructure), create an environment in which state borders, already being made less and less relevant by trade and geopolitical considerations, become even more marginal because of a technology capable of drawing valuable property across the globe instantaneously.

### PART 3

#### ELECTRONIC LICENSES ON THE GII

A global information system network entails true global behavior. Transactions, property rights and regulations are, at least potentially, all determinable on a multi-national basis *in each transaction*. The movement of information and messages through this network not only transcends national boundaries, but also makes them irrelevant unless the law of a country forces that relevance back into the commercial and economic mix. For example, I can transfer or sell data as easily from Houston to London as from Houston to Dallas. If the law of the particular destination or of any intermediate country permits, I

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<sup>47</sup> UNIDROIT, *Principles of International Commercial Contracts* (Rome, 1994).

<sup>48</sup> Article 2B Proposal, *supra* note 26, at Preface.

<sup>49</sup> Report of the Working Group on Intellectual Property Rights, Intellectual Property and the National Information Infrastructure 58-59 (Sept., 1995) (hereinafter White Paper).



will build my business and personal behavior around exactly that premise — I am in an immediate and efficient international marketplace even if I reside in Podunk, Idaho.

When discussing GII licensing, it is helpful to distinguish among possible contracting activities based on variations in two overlapping factors. The first deals with the subject matter of the contract, and the second deals with its formation. On the first issue, electronic contracts can deal either with material outside of the computer (e.g., goods) or subject matter in a computer system (e.g., access to digital information). The distinction is significant. A purely electronic transaction can be contracted for *and* performed *within* the electronic systems; it involves information, not goods. What law governs this transaction? In cases involving transactions in goods in the United States, Article 2 of the UCC applies. In an international deal within the scope of the U.N. Sales Convention, that transaction applies internationally unless excluded by the agreement of the parties. In contrast, when we deal with transactions that are purely electronic (created and performed within the computer systems), the impact of the GII structure is dramatic. Dealing with purely electronic subject matter means transacting with information (or services) rather than goods. Within the United States, this shift yields a change of law from the UCC to general common law, including the local variations it produces in reference to critical issues involving enforceability and warranty or other concerns.

The second distinguishing dimension concerns the extent of direct human involvement in particular deals. International contract law theory reflects the assumption that a human being will initiate and respond to the paper, message or other event that causes a contract to occur. Dual involvement will be common on the GII. Equally or more common, however, will be cases in which one side or both sides of the digital transaction involve a computer operating on a program, rather than immediate human control. The law must accommodate such cases to reflect a modification of a humanistic assumption in contracting.

We need in cyberspace a body of contract principles that cope with the absence of human interaction in an electronic venue. This will not be easy. Today, in many countries, a battery of legal principles flow from the assumption that at least one party engages in the transaction through direct human involvement. Thus, a consumer must *consent* to a particular clause. A licensee accepts or rejects an offer. The parties *intend* a particular result. A warranty disclaimer is

*conspicuous* to the buyer if it is in LARGE CAPS or otherwise made NOTICEABLE to the other party.<sup>50</sup> All of this presumes human interaction, but the essential economies of the digital marketplace make recurrent and direct human involvement inefficient and likely to be avoided if possible.

### Choice of Law

It is impossible to discuss all of the contract issues that might arise on the GII. Instead, a brief look at two critical issues must suffice. The first deals with choice of law: what country's contract law regime applies to a cyberspace transaction?

Commercial parties may select a body of law applicable to their contract. However, absent explicit agreement in the contract, in subsequent litigation a court or other decision-maker will determine what law applies.<sup>51</sup> Generally, choices will be enforced if they do not conflict with the basic underlying policy of a forum state. In negotiated, global commercial arrangements, usually the parties will determine what law applies to the deal. This will also likely be true in cases where a GII transaction is preceded by an agreement of the parties enabling the use of and reliance on GII principles.<sup>52</sup>

The importance of the choice of law issue in GII transactions, however, arises in two other settings. The first involves situations where the material being received or transmitted engages an important or fundamental social policy against transfer or receipt, and the contract choice attempts to make that state's law inapplicable. This could occur, for example, if the material is obscene under the law of the receiving state or where the transfer across state lines of private information violates the data protection laws of another state through which the information passes. In either case, a contractual provision could not alter the application of the local law.

This is especially true where the applicable policy applies to the countries at either end of the deal. Arguably, a country whose contact

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<sup>50</sup> U.C.C. § 1-201 (defining conspicuous). In electronic transactions, this concept needs revision to reflect that the difference between large and small type may have no relevance to a computer system working on bits and bytes of information. The proposed Article 2B on licensing suggests a redefinition of the term to incorporate that, in a computer based contract, the critical issue is whether or not the receiving computer can read the field and respond to it. See Article 2B § 2B-102.

<sup>51</sup> For a discussion of background choice of law principles dealing with copyright in international venues. See NIMMER & NIMMER, *supra* note 4, § 17.11.

<sup>52</sup> See, e.g., *Model Electronic Data Interchange Trading Partner Agreement and Commentary*, 45 BUS. LAW. 1717 (1990).

with the transfer was solely in the role of hosting a computer systems that served briefly as a conduit between receiving and sending systems should not have an over-riding influence on the contract performance. Its interest in the transaction and the data is at best very limited. Indeed, this approach to the applicability of the law of conduit sites could be a general principle of transactional law in the GII applicable not only to contract, but also to intellectual property. It averts the potentially stultifying impact of an electronic packet passing through numerous countries whose laws will almost inevitably differ.

The second situation where choice of law rules have major impact are those where no negotiated choice of law occurs. This will be very common on the open GII marketplace because many digital transactions will involve consumer, rather than commercial, transactions. It is as easy for an individual on the internet to acquire data from a vendor in New York as it is to acquire it from a vendor in Chile. Yet, if I am resident in Seattle, the one transaction appears to be purely domestic, while the other is clearly international.

There are many ways to approach solution of the choice of law issue. One option, suggested by both the U.N. Convention on the Sale of Goods (Sales Convention) and the UNIDROIT Principles of International Commercial Contracts, is to view the applicable law as international contract rules, rather than a particular state's law.<sup>53</sup> The UNIDROIT rules, for example, purport to apply only to international contracts. The rules distinguish between domestic and international contracts:

The international character of a contract may be defined in a great variety of ways. The solutions adopted in both national and international legislation range from a reference to the place of business or habitual residence of the parties in different countries to the adoption of more general criteria such as the contract having "significant connections with more than one State," "involving a choice between the laws of different States," or "affecting the interests of international trade." . . . The assumption [here] is that the concept of "international" contracts should be given the broadest possible interpretation so as ultimately to exclude only those situations where no international element at all is involved. . . .<sup>54</sup>

Such an approach cannot be used unless the potentially applicable states (or parties) adopt a relevant convention or treaty taking into

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<sup>53</sup> My assumption here is that a state's law must be chosen. Some have suggested that the internet establishes an independent regime vested in cyberspace that could be viewed as autonomous and self governing. See, e.g., Henry Perritt, *Dispute Resolution in Electronic Network Communities*, 38 VILL. L. REV. 349 (1993).

<sup>54</sup> UNIDROIT Principles 2.

account the international nature of GII transactions. Such a convention exists with respect to the sale of goods. The Sales Convention applies to "contracts of sale of goods between parties whose places of business are in different States [if] the States are [signatory] States; or [the] rules of private international law lead to the application of the law of a [signatory] State."<sup>55</sup> Significantly for GII purposes, however, the Sales Convention only applies to sales of goods. It expressly excludes transactions involving goods bought for personal, family or household purposes unless the seller neither knew nor ought to have known that this was the case. Many GII transactions will involve consumers and many will involve digital information, rather than purchases of goods. Perhaps an analogue to the Sales Convention, but applicable to digital information licensing, is a better approach to this problem.

Absent an international treaty or compact applying a general set of rules, the issue is which state's law will govern. Generally, the primary choice is between the state where the information resides and is sent from (sending state) or the state where the copies are received or the access to the database initiated (receiving state). A focus on the sending state's law would tend to stabilize and simplify the relevant legal issues for the licensor/vendor. That choice was made in the EU broadcast directive.<sup>56</sup> In some cases, however, the malleability of the information systems in the GII make the actual location of the data immaterial. An alternative solution, suggested in draft UCC Article 2B focuses on the licensor's location (not that of the data). Section 2B-106(a) suggests:

(a) . . . the rights and duties of the parties . . . are determined by the law of the State of the place where the licensor is located at the time that the transfer of rights occurred or was to have occurred.

. . .

(c) A party to a contract is deemed located at its place of business if it has one place of business, or at its chief executive office, if it has more than one place of business, or its place of incorporation or other charter authorization if it has no physical place of business. Otherwise, a party is deemed located at its primary residence.<sup>57</sup>

As a matter of supporting commercial certainty, this approach best enables the information vendor to design contracts around a single state's law, rather than having the rules vary depending on where the

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<sup>55</sup> Sales Convention art. 1.

<sup>56</sup> Council Directive 93/83/EEC of Sept. 27, 1993, OJEC L. 248/15, art. 1.2(b). *See also* ITSI T.V. Productions, Inc. v. California Auth. of Racing Fairs, 785 F. Supp. 854 (E.D. Cal. 1992).

<sup>57</sup> Article 2B Proposal, *supra* note 26, § 2B-106.

licensee resides or receives the information. It would also allow licensees to discern what law governs without the difficult task of identifying where the information asset happens to be placed.

There are other policies potentially at work in cases involving consumers that may influence the applicable choice of law. For example, in the United Kingdom, applicable law generally validates contractual choices of law, but does not invariably do so. For consumer contracts, the law hinges validation on whether the choice deprives the consumer of protection that would be applicable in the country in which the consumer resides.<sup>58</sup> Absent a contractual choice of law, the applicable law is the country in which the consumer is habitually a resident.

Similarly, the Proposed Article 2B limits the effectiveness of choice of law clauses in consumer transactions. Section 2B-107 provides:

(b) In a mass market license involving an individual [as licensee], the choice of law in the parties' agreement is not enforceable if [it] chooses the law of a jurisdiction other than the jurisdiction in which the individual resides when the agreement becomes enforceable; or section 2B-106 places the choice of law.

As this indicates, the manner of choosing what law to apply in a digital information license on the GII entails a number of conflicting policy themes and alternative approaches. Through the malleable nature of its subject matter and speed of transmission, these issues are intensified in the GII milieu and call out for development of a consensus approach internationally or at least a sensible coordination.

### Performance Obligations

A second area of potentially conflicting rules involves the question of what performance obligations a GII license creates. Here, again, a general, although not universal, rule exists that the parties may expressly contract for whatever obligations they choose.<sup>59</sup> Failing that, what implied terms of obligation arise in a digital information license executed on the internet or the GII? What obligations should be present?

The answers are relatively determinable if the transaction involves the acquisition or sale of goods. In U.S. law transactions, Article 2 of the UCC provides an implied warranty that the goods, when

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<sup>58</sup> Contract Act of 1990 art. 5.2.

<sup>59</sup> See UNIDROIT Principles art. 5.1.

received, will be of merchantable quality.<sup>60</sup> That standard basically requires a product delivered with a quality that meets ordinary standards applicable to the contract description. It can be disclaimed, although the disclaimer must be "conspicuous" and the meaning of that phrase in a digital contract does not readily appear because the concept is oriented to a term being noticeable to a human actor. In international sales, unless excluded, the Sales Convention may apply. The Sales Convention requires the seller to deliver goods that are free of intellectual property claims of which it should have known and to deliver goods that conform to the contract.<sup>61</sup> Conformance to the contract requires various elements of quality, including that they be fit for the purposes for which goods of the same description would *ordinarily* be used, and fit for any particular purpose expressly or impliedly made known to the seller.

Different law applies if the transaction entails a license, sale or contract for digital information, images or data. Sales of goods law does not apply, nor generally does any idea of there being implied merchantability or other warranties. Instead, in the United States we deal with common law contract governed by cases that entail consideration of free speech and similar limits on what liability or obligation should be imposed in an information contract.

In the U.S., UCC Articles 2 and 2A assume the vendor will deliver a *product* of acceptable quality. For services and information contracts, however, most courts reject the position that a licensor or other provider of discretionary services commits to produce an accurate result in its contract unless it *expressly* undertakes to do so.<sup>62</sup> Many courts hold that no warranty exists.<sup>63</sup> The licensor commits only that it possesses the skill that it represents itself to have and that it will exercise that skill in a workmanlike and reasonably careful manner.<sup>64</sup> A workmanlike effort warranty does not create strict liability, but resembles negligence theories. For example, the *Restatement (Second) of Torts* § 299A provides: "one who undertakes to render services in the practice of a profession or trade is required to exercise the skill

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<sup>60</sup> U.C.C. § 2-314.

<sup>61</sup> Sales Convention art. 35.

<sup>62</sup> See *Milau Assoc., Inc. v. North Avenue Devel. Corp.*, 42 N.Y.2d 482, 398 N.Y.S.2d 882, 368 N.E.2d 1247 (N.Y. 1977); *Chemical Bank v. Title Services, Inc.*, 708 F.Supp. 245 (D. Minn. 1989).

<sup>63</sup> See *Rosos Litho Supply Corp. v. Hanson*, 123 Ill. App.3d 290 (Ill. App. 1984).

<sup>64</sup> See *Diversified Graphics, Ltd. v. Groves*, 868 F.2d 293 (8th Cir. 1988); *Micro Managers, Inc. v. Gregory*, 147 Wis.2d 500, 434 N.W.2d 97 (Wis. Ct. App. 1988). Compare *Southwestern Bell Telephone Co. v. FDP Corp.*, 811 S.W.2d 572 (Tex. 1991).

and knowledge normally possessed by members of that profession or trade . . . .” The reasonable care standard does not apply to a contract for goods; it is supplanted by product quality warranties that create a presumption of a warranty of result.<sup>65</sup> Mirroring this standard in a contract context, the court in *Data Processing Services, Inc. v. LH Smith Oil Corp.*<sup>66</sup> noted: “Those who hold themselves out to the world as possessing skill and qualifications in their respective trades or professions impliedly represent they possess the skill and will exhibit the diligence ordinarily possessed by well informed members of the trade or profession . . . .”

Cases on information providers whose information proves to be inaccurate involve both contract and tort theory. As a general rule, however, transactions in information do not create liability without fault. The pending *Restatement of Torts: Products Liability* makes this point in commentary:

Although a tangible medium, itself clearly a product, delivers the information, the plaintiff’s grievance [is that] the information [is defective], not the tangible object. Most courts, expressing concern that imposing strict liability for the dissemination of false and defective information would significantly impinge on free speech have, appropriately, refused to impose strict liability in these cases.<sup>67</sup> For liability, the information provided must be inaccurate or incomplete, but the error must relate to some culpable conduct by the licensor. Even with fault (negligence), publishers may have no responsibility for any of the content of their published material when that material is held out to the public for a fee.<sup>68</sup>

The Article 2B proposal makes an effort to codify these cases in the following terms:

(a) If a licensor provides services, access, data, data processing, or the like, the licensor warrants that there is no inaccuracy, flaw or other error in the informational content caused by a failure of the licensor to exercise reasonable care and workmanlike effort in its performance in collecting, compiling, transcribing, or transmitting the information or data.

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<sup>65</sup> See *Air Heaters, Inc. v. Johnson Electric, Inc.*, 23 UCC Rep.Serv. 39, 258 N.W.2d 649 (N.D. 1977); *USM Corporation v. Arthur D. Little Sys. Inc.*, 28 Mass. App. 108, 546 N.E.2d 888 (Mass. App. 1989).

<sup>66</sup> *Data Processing Serv’s Inc. v. L.H. Smith Oil Corp.*, 492 N.E.2d 314, 319 (Ind. Ct. App. 1986).

<sup>67</sup> RESTATEMENT OF TORTS: PRODUCTS LIABILITY § 4, Comment d (Tentative Draft No. 2, March 13, 1995).

<sup>68</sup> See *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033 (9th Cir. 1991) (publisher of book not accountable for wrong information); *Walter v. Bauer*, 109 Misc 2d 189, 439 N.Y.S.2d 821 (SCt 1981). Compare *Brockelsby v. United States*, 767 F.2d 1288 (9th Cir 1985); *Saloomey v. Jeppeson & Co.*, 707 F.2d 671 (2d Cir 1983); *Aetna Casualty & Surety Co. v. Jeppeson & Co.*, 642 F.2d 339 (9th Cir. 1981).

(b) The warranty under subsection (a) is not breached merely because the services do not yield a result consistent with the objectives of the transferee or because the information, data, or other content is not accurate or is incomplete.

This approach to liability, grounded in U.S. rules and policies, may not apply with equal force or persuasion in other countries. In this respect, while one might argue that the UNIDROIT principles will provide a potential international backdrop, how those principles approach a digital information contract on the issue of performance obligations is far from clear. They provide:

Where the quality of performance is neither fixed by, nor determinable from, the contract a party is bound to render a performance of a quality that is reasonable and not less than average in the circumstances.<sup>69</sup>

How this would apply to a digital information license is entirely unclear, but the better conclusion is that it would adopt a workmanlike, non-negligent performance standard. Whether a free speech or similar over-lay further reduces the licensor's obligation depends on the country whose law applies and whether preservation of free flow of information represents a major theme in that country's law.

The issue has obvious relevance to digital information providers on the GII and to those who make use of the digital information assets. For the vendor, defining the level of care or performance required in the underlying transactions in the absence of a specific contract term affects pricing and risk calculations. Wide variations in exposure or unknown risks amplify the difficulty of employing GII as a marketplace. For the licensee of information, the issue involves a question of reliability. While massive amounts of digital information suddenly made available on the GII represent a potentially valuable resource, data provided without assurances of reliability at even a minimal level lacks the element that would otherwise give it value. A proper, international balance of standards here would be an important contribution to the evolution of the GII as an information resource.

#### PART 4

#### CONCLUSION

The simple premise revealed in this discussion is that the multinational character of GII-related property and contract law creates potentially huge problems for the development of commercial relationships relating to information and other intangible property moved through and around the GII. More so here than in any prior

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<sup>69</sup> UNIDROIT Principles art. 5.6.



commercial/economic context, an enhanced degree of harmonization and simplification is needed to enable the transactions made possible by the technology to occur.

If a contract law regime applicable to GII were to be developed, its fundamental premise must reflect the diversity of subject matter and the variety of social background involved in this global system. The correct premise relies on the freedom of commercial parties to adjust their contractual relationship to fit their own purposes.<sup>70</sup> Beyond that, a second *commercial law* premise defines the goal of uniform law or harmonization efforts as being to facilitate commercial practice. Grant Gilmore expressed this in the following terms:

The principal objects. . . [are] to be accurate and not to be original. [The] intention is to assure that if a given transaction . . . is initiated, it shall have a specified result; they attempt to state as a matter of law the conclusion which the business community apart from statute . . . gives to the transaction in any case. But achievement of those modest goals is a task of considerable difficulty.<sup>71</sup>

This rings appropriate and true in the context of GII license contracting. In the upcoming era, true international trade in digital information products can occur with resources already available and being deployed. In that era, a stabilization of contract (as well as intellectual property) law would provide immense advantages to the commercialization of cyberspace.

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<sup>70</sup> U.C.C. § 2A-101, Comment.

<sup>71</sup> Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L. J. 1341 (1957).