

Tab 11

**National Music Publishers' Association • Inc.**  
and The Harry Fox Agency, Inc.

EDWARD P. MURPHY, *President*  
*Chief Executive Officer*

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By Facsimile and First Class Mail

Carlyle C. Ring, Jr.  
Commissioner, NCCUSL and  
Chair, UCC Article 2B Drafting Committee  
Ober, Kaler, Grimes & Shriver  
1401 H Street NW, Fifth Floor  
Washington, DC 20005

Raymond T. Nimmer  
Reporter, UCC Article 2B Drafting Committee  
University of Houston, Law Center  
4800 Calhoun  
Houston, TX 77204

Dear Messrs. Ring and Nimmer:

On behalf of the National Music Publishers' Association, Inc. ("NMPA") and its music licensing subsidiary, The Harry Fox Agency, Inc. ("HFA"), I write to express NMPA/HFA's continuing concerns regarding the proposed UCC Article 2B ("Article 2B") and to request that certain changes to the December 1998 draft of Article 2B be made to address these concerns.

NMPA is the principal trade association representing the interests of music publishers in the United States. The more than 600 music publisher members of NMPA, along with their subsidiaries and affiliates, own or administer the majority of U.S. copyrighted musical works. For over eight decades, NMPA has served as the leading voice of the American music, publishing industry in Congress and in courts. NMPA's wholly owned subsidiary, HFA, was founded in 1927, and acts as licensing agent for over 18,000 music publishers. The activities of NMPA and HFA are described in greater detail in NMPA/HFA's March 23, 1998 memorandum to the Article 2B Drafting Committee.

In the most recent revisions to proposed Article 2B, the Drafting Committee adopted changes that limit the scope of Article 2B to "computer information transactions." <sup>1</sup> As stated in the Reporter's Notes, the new scope provision is intended to leave unaffected "the many transactions in the core businesses of other information industries (e.g., print, motion picture, broadcast, sound recordings) whose business practices in their core businesses differ from those of the computer software, online, and data industries." Furthermore, by excluding certain types of entertainment industry transactions, the Drafting Committee purports to expressly exclude "core activities of the entertainment industry" from coverage under the proposed Article 2B.

Despite these stated intentions, NMPA/HFA is concerned that the core activities of music publishers and the entertainment industry are not adequately excluded from Article 2B. Any draft of Article 2B that includes certain aspects of music licensing while excluding others, as the current draft of Article 2B does, will bring needless confusion and costly litigation to an industry that currently relies on well established contractual principles tested by time and careful review by the courts.

NMPA/HFA understands that other trade associations and member companies in the entertainment industries, including the Motion Picture Association of America ("MPAA") and the Recording Industry Association of America ("RIAA"), continue to oppose the proposed Article 2B, even with the new limitations in scope. By letter dated October 8, 1998, I expressed similar objections on behalf of NMPA and HFA. Unless the concerns outlined in this letter are considered and addressed by the Drafting Committee, and music licensing is clearly excluded from Article 2B, NMPA and HFA will remain opposed to the proposed Article 2B.

With this in mind, I respectfully urge the Drafting Committee to consider the issues discussed below and to adopt the following suggested modifications.

#### Scope

Under the December 1998 draft of Article 2B, contractual transactions of music publishers and HFA would be included within the scope of Article 2B if such transactions are within Article 2B's definition of "computer information transaction"<sup>1</sup> and are not expressly excluded under Section 2B-104.

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<sup>1</sup>"Computer information transaction" is defined as " a license or other contract whose subject matter is (i) the creation or development of, including the transformation of information into, computer information or (ii) to provide access to, acquire, transfer, use, license, modify, or distribute computer information. The term does not include a contract for distribution of information in print form, such as in a book, newspaper or magazine, or to create information for the purpose of distribution in print form even if the information provided for distribution pursuant to the contract is delivered in electronic form." (Section 2B-102(9) of December 1998 draft).

Pursuant to this revised scope provision, music distributed in print form would clearly fall outside the scope of Article 2B. However, distribution of music in any form that is directly capable of being processed or used by, or obtained from or through, a computer (such as distribution of sheet music on a CD or via the Internet) appears to be within the scope of Article 2B. This means that one of the core activities of music publishers, distribution of sheet music, will be governed by two different sets of contractual rules depending on whether the distribution will occur in print form or electronically. It is unreasonable to music publishers to operate under different contracts rules determined solely by the method used to distribute their products. Furthermore, music publishers should not be compelled to change their existing customary practices, which have worked well in the music industry, to fit the new contract rules under Article 2B, which are designed for the computer industry.

Although there may be a number of ways to revise the proposed Article 2B to address this issue, I suggest that the Drafting Committee consider including "musical works" (as used under the U.S. Copyright Act) under the specific exclusions set forth under Section 2B-104.<sup>2</sup> As further discussed below, this change will also address other concerns.

#### Entertainment Industry Exclusion

As noted above, it appears that the Drafting Committee has attempted to address the concerns raised by those in the entertainment industries by narrowing the scope of Article 2B and providing an express exclusion for the core activities of the entertainment industries. The exclusions included in the December 1998 draft of Article 2B, however, are inadequate to exclude the core licensing activities of music publishers and HFA.

Under that draft, transactions involving musical works are excluded to the extent such transactions involve contracts to "include information in" audio or visual programming by broadcast, satellite, or cable, or a motion picture or sound recording. Since "information" is defined to include "works of authorship," I understand that musical works, only in so far as they are included in audio or visual programming, motion picture or sound recording, are excluded from Article 2B.

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"Computer information" is defined as "information, including software, that is in a form directly capable of being processed or used by, or obtained from or through, a computer, but does not include information referred to in Section 2B-104(2)." (Section 2B-102(8) of December 1998 draft).

<sup>2</sup>The suggested change would add the underlined words to Section 2B-104(2): "a contract to create, perform in, include information in, acquire, use, reproduce, distribute, license, display or perform:.... (B) a motion picture, a musical work or sound recording as defined in the Federal Copyright Act...."

However, the gamut of media containing music is broader than the proposed exclusions under the December draft of Article 2B -- audio or visual programming, motion pictures and sound recordings. An example of a non-excluded type of media in which music is included are audiovisual works. Under the U.S. Copyright Act, "motion pictures" are "audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any." "Sound recordings," by definition under the U.S. Copyright Act, excludes sounds accompanying a motion picture or other audiovisual work. Therefore, musical works incorporated in audiovisual works that are not motion pictures, such as video games or software programs, are not excluded from the scope of Article 2B.

The proposed Article 2B, therefore, creates the untenable concept that a license granting the right to include music in a motion picture would be governed by a different body of law than a license granting the right to include the same music in a video game -- an arbitrary distinction that is wholly irrelevant under existing copyright or contract law or actual business practice. It may be argued that, if music is included in a computer software program or other multimedia application, the licensing of music for such purpose ought to be included in the scope of Article 2B, since Article 2B covers computer transactions. However, regardless of whether music is licensed for the purpose of inclusion in a motion picture or in a video game, the main purpose of that license remains the licensing of the reproduction and/or distribution of music.

Because Article 2B was drafted with the software and data industries as the focus, the contract rules included in Article 2B do not reflect, accommodate or adequately address a variety of customary practices unique to the music industry. In fact, one of the reasons for providing an entertainment industry exclusion is stated in the Reporter's Notes as follows: "historically the different nature of liability and other issues involved in the entertainment industries as contrasted with the software and data industries leads to transactional formats that are different." As that comment suggests, it is simply not appropriate to assume that a license granting the right to use music ought to be considered with the same factors in mind as a transaction involving computer information simply because the music is to be included in a computer software program. Music is not transformed because it is included in a computer software game rather than in a motion picture.

I urge the Drafting Committee to adopt measures that will apply Article 2B only to the "computer" components of "computer information." Music elements incorporated in any "computer information" should be governed by long existing common law contract rules already in place with respect to music licensing. Again, there may be several ways to address this issue in the draft. One simple solution would be to add musical works to the excluded categories in Section 2B-104 as proposed above and, as explained in further detail below, to make clear in the notes to that section that Article 2B does not apply to musical works even where such works are incorporated in computer information products.

Compulsory License Exclusion

In response to a memorandum dated March 23, 1998 submitted to the Drafting Committee by NMPA and HFA, the Drafting Committee specifically excluded compulsory licenses under federal or state law from Article 2B. That memorandum discussed the reasons for excluding mechanical licenses issued by HFA on behalf of its music publisher clients from the scope of Article 2B. In order to avoid any confusion as to whether or not mechanical licenses are excluded from Article 2B, I request that the Drafting Committee add language in the notes to that section to expressly refer to mechanical licenses as being excluded from Article 2B.

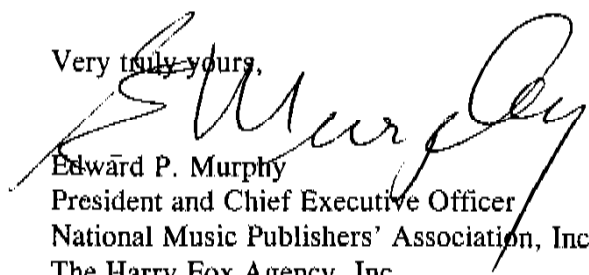
Mixed Transactions

Under the December 1998 draft, parties to a transaction may opt in or opt out of Article 2B. However, to the extent that the parties do not decide, or do not have the opportunity to decide, the Reporter's Notes suggest that the courts should apply the "predominant purpose" test to determine the applicability of Article 2B. Unless the music elements in a "computer information transaction" are excluded, NMPA/HFA are concerned that certain transactions entered into by music publishers or HFA will be deemed a mixed transaction. For example, if under one contract a licensee is granted the right to use a musical work in a motion picture, as well as in a video game based on that motion picture, that transaction would appear to be a mixed transaction. Because the "predominant purpose" test is factually based, it is unclear to know with certainty whether contract issues would be governed by Article 2B or state common law.

The problem with the potential uncertainty created by such a "predominant purpose" test is highlighted in the instance where the parties are in dispute as to whether there is in fact a contract between them. Since Article 2B's rules on contract formation include rules that differ from certain common law rules regarding contract formation, in cases where common law would apply to the contract in the absence of Article 2B, whether Article 2B or common law applies in such context could lead to significantly different results.

I urge the Drafting Committee to consider the serious concerns of music publishers discussed above and adopt the suggested changes to Article 2B. Without these changes, Article 2B will unnecessarily and adversely disrupt established practice and custom in the music industry, which reflects many years of experience and has served the entertainment industries well.

Very truly yours,



Edward P. Murphy  
President and Chief Executive Officer  
National Music Publishers' Association, Inc.  
The Harry Fox Agency, Inc.

cc:

**Gene N. LeBrun**  
President, National Conference of  
Commissioners on the Uniform State Laws  
211 E. Ontario Street, Suite 1300  
Chicago, IL 60611

**Geoffrey Hazard, Jr.**  
Director, American Law Institute  
4025 Chestnut Street  
Philadelphia, PA 19104-3099