NOTE

PRICE DISCRIMINATION AND SOFTWARE LICENSING: DOES THE ROBINSON-PATMAN ACT FAIL TO ACCOMMODATE MODERN TECHNOLOGY?

Personal computer sales exploded in the 1980s.[1] As the personal computer market grew, the software industry increased production and offered a larger variety of software to meet the needs of new computer users.[2] Both small independent merchants and large chain stores often specialize solely in software without selling any computer hardware.[3] Despite the growing importance of the software industry in the United States, uncertainty exists as to whether the Robinson-Patman Act (RPA) protects small software retailers against price discrimination.[4] The RPA

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1. R. RAYSMAN & P. BROWN, COMPUTER LAW: DRAFTING AND NEGOTIATING FORMS AND AGREEMENTS 1.13 (1990).

2. As used in this Note, "software" means a computer program embedded in a storage device such as a diskette or magnetic tape. In other contexts, the term "software" includes documentation supporting the computer program and data bases readable by a computer. 1 D. BENDER, COMPUTER LAW: SOFTWARE PROTECTION § 2.06[1], at 2-115 (1990).

In 1988, domestic retail sales of consumer software totaled $465 million, an increase of 26% since 1987. Software Publisher's Association, Business Wire, Inc. (March 14, 1989). "Consumer software" is software that consumers purchase for home use on personal computers. *Id.* From 1984 to 1988, consumer software sales increased 177%. *Id.* The chart below organizes the sales according to the computer operating system and the type of software sold. *Id.*

Percentage Growth of Consumer Software Sales 1984-1988

	Recreational	General Home	Home Education	Total Consumer
MS-DOS	1752.62%	1197.80%	517.07%	1214.43%
Apple II	155.73%	39.16%	144.74%	119.77%
Macintosh	98.64%	465.32%	130.51%	196.93%
Commodore	46.92%	44.81%	−75.66%	15.93%
Other	89.08%	540.19%	−75.80%	47.20%
Total	213.57%	275.39%	79.57%	177%

Id.

3. Computer hardware consists of the central processing unit (CPU), which performs the computer's functions, and peripherals. Peripherals are hardware, such as disk drives, that store information used in the CPU's functioning; printers that create a readable printout of computer information; and a variety of other devices. R. RAYSMAN & P. BROWN, *supra* note 1, at 1.01[1]-[2].

4. Section 13(a) of the RPA provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce,

applies to "sales" of "commodities,"[5] but because the statute defines neither term it is unclear whether a consumer software license is a commodities sale.

Congress passed the RPA to preserve the American tradition of the small independent merchant.[6] The increasing number and size of chain stores during the 1920s and 1930s threatened small retailers[7] because the chains used their buying power to procure discriminatorily low prices

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> either directly or indirectly, to discriminate in price between different purchasers of *commodities* of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such *commodities* are *sold* for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: . . . *And provided further*, That nothing herein contained shall prevent persons engaged in selling *goods, wares, or merchandise* in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the *goods* concerned, such as but not limited to actual or imminent deterioration of perishable *goods*, obsolescence of seasonal *goods*, distress sales under court process, or *sales* in good faith in discontinuance of business in *goods* concerned.

15 U.S.C. § 13(a) (1988) (amending Clayton Act, § 2) (emphasis added).

5. The RPA "applies only if two or more consummated sales of commodities of like grade and quality are made at discriminatory prices by the same seller to two or more different purchasers contemporaneously . . . ." Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 FORDHAM L. REV. 1113, 1125-27 (1983).

6. J. MCGEE, THE ROBINSON-PATMAN ACT AND EFFECTIVE COMPETITION 99-106 (1979).

7. The Clayton Act did not combat price discrimination effectively because it exempted price differences based on quantity. E. KINTNER & J. BAUER, FEDERAL ANTITRUST LAW III: THE ROBINSON-PATMAN ACT 45-46 (1983). This exemption permitted discounts that exceeded the cost savings of large quantity sales. Note, *The Distinction Between the Scope of Section 2(a) and Sections 2(d) and 2(e) of the Robinson-Patman Act*, 83 MICH L. REV. 1584, 1589-90 (1985). Another problem was that courts only applied the Clayton Act to the anticompetitive activities of sellers in relation to one another and not to the anticompetitive effects among buyers. E. KINTNER & J. BAUER, *supra*, § 19.1, at 45. Furthermore, the Clayton Act provided no penalty for buyer-induced discrimination. *Id.* at 46. These drawbacks resulted from Congress' failure to foresee the emergence of chain stores. Note, *supra*, at 1590.

During the 1930s, chain stores became prominent in the United States, with sales increasing from four percent of total retail sales in 1919 to twenty-five percent in 1933. E. KINTNER & J. BAUER, *supra*, § 19.1, at 44-45.

The emergence of chain stores posed a considerable risk to small independent retailers. Chains used their size and buying power to undercut the prices of their small competitors in the following ways: 1) they reduced costs by performing many of the wholesalers' functions themselves; 2) used their size to leverage low prices from suppliers; and 3) exploited their power to obtain promotional allowances by using the allowances for other purposes. *Id.* at 44. Confronted with this growing

from wholesalers.[8] Small retailers and many members of Congress perceived the chain stores' leverage as unfair.[9] In response, Congress passed the RPA.[10]

The RPA prohibits price discrimination in the sale of commodities that produce anticompetitive effects at either the buyer or seller level.[11] Price differentials are justified only if they result from cost savings,[12] meeting competitors' prices,[13] or if market conditions have changed.[14] By eliminating the price discrimination resulting from buying power, Congress intended to allow small retailers to compete fairly with chain stores.[15]

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crisis, small independent retailers turned to their state legislatures and Congress for help. F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON PATMAN ACT 8 (1962).

Independent retailers used the distress of the Depression and propaganda to create an anti-chain store mood in the country. *Id.* (citing J. PALAMOUNTAIN, THE POLITICS OF DISTRIBUTION 160 (1955)). On the state level, the independent retailers' organized campaign against the chains resulted in state taxes aimed at chain stores. *Id.* (citing J. PALAMOUNTAIN, *supra*, at 235-53). The states' actions, however, were not very effective and therefore Congress ordered the FTC to investigate the chain stores. *Id.* at 8-9.

In 1928, Congress amended the Clayton Act to remove the exemptions that had made the statute ineffective in combating price discrimination. F.T.C. FINAL REPORT ON THE CHAIN-STORE INVESTIGATION, S. DOC. NO. 4, 74th Cong., 1st Sess. 96-97 (1935) [hereinafter CHAIN STORE REPORT]. The amendment eliminated the meeting competition and quantity discount exemptions of section 2 of the Clayton Act. *Id.* Congress removed these exemptions to create an unqualified prohibition against price discrimination. *Id.*; E. KINTNER & J. BAUER, *supra*, § 19.1, at 48. Specifically, its purpose was to "protect the independent merchant, the public . . . and the manufacturer . . . from exploitation by his chain competitor." 79 CONG. REC. 9077 (1935) (statement of Rep. Patman).

8. J. MCGEE, *supra* note 6, at 26-38.

9. *See supra* notes 7-8 and accompanying text.

10. *See supra* note 4 and accompanying text.

11. *Id.* A seller whose price discrimination harms competitors engages in primary-line discrimination. Secondary-line discrimination occurs when the discriminatory seller's customers suffer because one customer must pay a higher price than another. E. T. SULLIVAN & H. HOVENKAMP, ANTITRUST LAW POLICY AND PROCEDURE: CASES AND MATERIALS 709 (1984). For a discussion of the economic effects of price discrimination, see AMERICAN BAR ASSOCIATION ANTITRUST SECTION, THE RPA: POLICY AND LAW VOLUME I (1980); R. POSNER, THE ROBINSON-PATMAN ACT: FEDERAL REGULATION OF PRICE DIFFERENCES (1976).

12. Section 13(a) of the RPA does not prohibit price differentials that "make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are . . . sold . . ." 15 U.S.C. § 13(a) (1988).

13. If a seller meets the prices of a competitor then no anticompetitive effect exists. *See supra* note 4.

14. Section 13(a) does not "prevent price changes from time to time . . . in response to changing conditions affecting the market . . . of the *goods* concerned . . . ."

15. Many people believed it was unfair for sellers to give discounts to chain stores but not independent retailers when the sellers' costs of servicing each was the same. J. MCGEE, *supra* note 6, at 106.

The RPA and the values it reflects are significant to the software industry because the problems faced by small retailers in the software industry parallel those posed by chain stores during the 1930s.[16] When software specialty stores first appeared, most consumers were unfamiliar with computer hardware; therefore, the stores emphasized providing customer service through knowledgeable salespeople.[17] The latest trend,[18] however, is away from service-oriented software stores and toward superstores and boutiques which target a narrow market of consumers.[19] This trend is in part the result of increased consumer sophistication and price sensitivity.[20] The superstores opening in major cities thrive on their ability to provide low prices and wide variety.[21] Forecasts project a market dominated by superstore chains with boutiques occupying distinct niches.[22] Such a scenerio threatens small independent retailers with extinction.[23]

This Note contends that the RPA should apply to software transactions. Part I examines the definition of "commodity" and analyzes the likelihood that the RPA will be applied to the software industry.[24] Part II considers how the UCC and state sales tax cases define "goods" and similar terms in the context of software transactions.[25] Part III follows courts' development of "sale" under the RPA and analyzes how courts are likely to react to a software transaction.[26] Part IV investigates how courts define "sale" with regard to software under the UCC.[27] To reflect the policy underlying the RPA, Part V argues that courts should define "commodity" and "sale" in software cases consistent with the UCC and

16. *See* Deutsch, *A Shakeout for Software*, N.Y. Times, Sept. 3, 1989, § 3, at 1, col. 4 (software industry is poised for a "shakeout").

17. *Id.* An example of a service-intensive software company is Egghead Software. The Seattle-based Egghead opened in the mid-1980s, and provided a friendly environment and knowledgeable salespeople who demonstrated software products. *Id.*

18. Today, over 12,000 retail stores specialize in software. *Id.*

19. *Id.* Other chain stores that do not classify as super-stores are also doing extremely well. Fourth quarter sales for Babbage's, Inc. ending February 3, 1990, rose 56%. Wall St. J., Feb. 9, 1990, § B, at 7, col. 3. At Egghead Discount Software, revenue rose 18% in the first quarter of 1990. L.A. Times, Aug. 30, 1990, (Business), at D6, col. 3.

20. Deutsch, *supra* note 16.

21. *Id.*

22. *Id.*

23. *Id.*

24. *See infra* notes 30-81 and accompanying text.

25. *See infra* notes 82-103 and accompanying text.

26. *See infra* notes 104-126 and accompanying text.

27. *See infra* notes 127-132 and accompanying text.

state sales tax cases.[28] This Note concludes that the nature of software transactions and the software industry require that courts adopt a flexible approach for interpreting "commodity" and "sale" in order to permit application of the RPA to software transactions.[29]

I. DEFINING "COMMODITY"

A. Statutory Language and Legislative History

The RPA forbids a seller from "discriminat[ing] in price between different purchasers of commodities. . . ."[30] Although the RPA contains no express definition of "commodity," it refers to "goods, wares or merchandise" and "products" as though these terms are interchangeable with "commodities."[31] Congress' interchangeable use of these terms indicates an intent to limit the definition of commodity to tangible goods.[32]

The legislative history of the RPA does little to clarify the definition of "commodity."[33] The legislative history contains no discussion of "commodity." However, members of Congress involved in the hearings used

28. *See infra* notes 133-35 and accompanying text.

29. *See infra* notes 136-38 and accompanying text.

30. 15 U.S.C. § 13(a) (1988).

31. Section 13(a): "nothing herein contained shall prevent persons engaged in selling *goods, wares, or merchandise* . . . from selecting their own customers . . ." 15 U.S.C. 13(a) (1988) (emphasis added).

Section 13(c): "It shall be unlawful for any person . . . to pay or grant, or to receive or accept, anything of value as a commission . . . except for services rendered in connection with the sale or purchase of *goods, wares, or merchandise* . . ." 15 U.S.C. § 13(c) (1988) (emphasis added).

Section 13(d): "It shall be unlawful for any person . . . to pay or contract for the payment of anything of value to or for the benefit of a customer . . . as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any *products or commodities* manufactured . . . for sale by such person . . ." 15 U.S.C. § 13(d) (1988) (emphasis added).

32. In its report on nonsale and noncommodity transactions, the American Bar Association points out that the definition of "commodity" is not necessarily limited to tangible goods. American Bar Association Section of Antitrust Law, *Report on Price Discrimination in Non-sale and Non-Commodity Transactions* 9 (1973) [hereinafter *ABA Report*]. The ABA Report refers to dictionary definitions that typically define "commodity" as "anything . . . which affords convenience or profit, especially in commerce." *Id.* (quoting WEBSTER'S NEW COLLEGIATE DICTIONARY 166 (1961)). However, the ABA Report asserts that Congress intentionally used the materialistic language "goods, wares, and merchandise" and "products" interchangeably with "commodities" to limit "commodity" to tangible goods. *Id.*

See also Reeves, *Toward a Coherent Antitrust Policy: The Role of Section 5 of the Federal Trade Commission Act in Price Discrimination Regulation*, 16 B.C. INDUS. & COM. L. REV. 151, 192 (1975) (the use of words such as "goods, wares or merchandise" probably reflects the types of transactions common at that time and on the minds of legislators).

33. E. KINTNER & J. BAUER, *supra* note 6, at 67.

"commodity" interchangeably with terms such as "goods."[34] Representative Patman later confirmed this assessment of "commodity" by stating that he intended the term to cover "any movable or tangible thing."[35]

B. Judicial Interpretation

Courts have limited the definition of commodity, including in the definition only "goods, wares, merchandise, machinery or supplies" and excluding services.[36] This definition is difficult to apply to mixed transactions that include both goods and services aspects.[37] Furthermore, while a narrow definition of commodity arguably follows from the legislative history and statutory language, it is counter to a Supreme Court mandate that the RPA be construed liberally.[38]

To decide whether the RPA applies to a mixed transaction, courts concentrate on the dominant nature of the transaction.[39] To differentiate

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34. For instance, when Rep. Patman introduced the bill to the House of Representatives, he exemplified groceries, dry goods, and hardware as commodities. *Id.*

35. W. PATMAN, COMPLETE GUIDE TO THE ROBINSON-PATMAN ACT 33 (1963).

36. CBS v. Amana Refrigeration, Inc. 295 F.2d 375 (7th Cir. 1961), *cert. denied*, 369 U.S. 812 (1962), exemplifies the cases that approached the RPA with a limited definition of commodity. In *CBS*, the Seventh Circuit held that sales of television programming sponsorship did not fall within the RPA because "commodity" only includes "goods, wares, merchandise, machinery and supplies . . . ." *Id.* at 378. *See also ABA Report*, *supra* note 32, at 11; United States v. Investors Diversified Services, Inc., 102 F. Supp. 645 (D.Minn. 1951) (a contract for a loan secured by real estate mortgages is not a commodity).

37. The Fifth Circuit recognized the problems created by the deceptively simple definition of commodity when it stated that "[v]irtually no transfer of an intangible in the nature of a service, right, or privilege can be accomplished without the incidental involvement of tangibles . . . ." Tri-State Broadcasting Co. v. UPI, 369 F.2d 268, 270 (5th Cir. 1966) (footnote omitted).

38. Abbott Laboratories v. Portland Retail Druggists Ass'n, 425 U.S. 1, 11 (1976).

39. *Tri-State* was the first court to articulate the dominant nature test. 369 F.2d at 270. *Tri-State* cited General Shale Prod. Corp. v. Struck Constr. Co. 132 F.2d 425 (6th Cir. 1942), *cert. denied*, 318 U.S. 789 (1943) to support the dominant nature test, but the test was not enunciated in *General Shale*. The *General Shale* court held that a construction contract "was not divisible into a contract for work and labor and a contract for the sale of brick." *Id.* at 428. The contract price was adjustable, depending on the amount of brick needed, and whether the purchaser chose brick or Speedbrik, a substitute masonry unit. *Id.* at 427-28. However, the court reasoned that the parties would not have agreed to merely a sale of bricks. *Id.* at 428. The court concluded that the agreement was "clearly a construction contract" rather than a sale. *Id.* Although the *General Shale* court's analysis compared the service and tangible aspects of the contract, the court performed the analysis in the context of determining whether the contract was a *sale*, not whether the contract was one for *commodities*. *See* Note, *Running Away from Robinson-Patman: The "Commodities" Limitation, Newspaper Advertising, and Small Distributors*, 13 U.C. DAVIS L. REV. 723, 737 n.78 (1980) (*Tri-State*'s dominant nature test "is not supported by precedent"). Although no precedent supported the Fifth Circuit's dominant nature test used in *Tri-State*, courts accept the test as the standard used to measure mixed transactions. May Dept. Store v. Graphic Process Co., 637 F.2d 1211,

goods from services, courts focus on whether the tangible or intangible components dominate the transaction.[40] If the the tangible goods component dominates the transaction, courts apply the RPA.[41]

Courts encounter difficulty when ascertaining factors relevant to determining the dominant nature of a transaction.[42] The relative costs of the tangible and intangible aspects of a transaction furnish one standard for measuring dominance.[43] However, as the Fifth Circuit noted in *Aviation Specialties, Inc. v. United Technologies Corp.*,[44] cost is not the sole determinant of the dominant nature of a transaction.[45]

In *Aviation Specialties*, the court held that a contract for engine repair that included supplying parts was predominantly a service contract.[46]

1215-16 (9th Cir. 1980) (artwork created for producing newspaper advertisements is predominantly a service); Aviation Specialties, Inc. v. United Technologies Corp., 568 F.2d 1186, 1191 (5th Cir.), *reh'g denied*, 570 F.2d 1391 (5th Cir. 1978) (contract for the repair of aircraft engines was predominantly a service contract despite the cost of the tangible parts exceeding the cost of the labor); Freeman v. Chicago Title & Trust Co., 505 F.2d 527, 531 (7th Cir. 1974) (title insurance is predominantly a service); Morning Pioneer, Inc. v. Bismarck Tribune Co., 493 F.2d 383, 389 n.11 (8th Cir.), *cert. denied*, 419 U.S. 836 (1974); Advanced Office Systems, Inc. v. Accounting Systems Co., 442 F. Supp. 418, 422-23 (D.C.S.C. 1977) (contract to print billing statements was predominantly a contract for intangible services).

40. *Tri-State Broadcasting*, 369 F.2d at 270. *But see* In the Matter of the Times Mirror Co., 92 F.T.C. 230, 233 (1978) (arguing that "the proper course is to construe the term 'commodities' in light of the fundamental purposes and structure of the statute, rather than becoming preoccupied with metaphysical considerations about what is or is not a tangible product").

41. *Tri-State Broadcasting*, 369 F.2d at 270.

42. "A major weakness of the dominant nature test in mixed transactions is that it provides no concrete criteria for deciding whether the service or the commodity component dominates." Note, *supra* note 39, at 741.

43. *Aviation Specialties*, 568 F.2d at 1191. *See also* Note, *supra* note 39.

Using cost as the primary factor of the dominant nature test creates problems because the value of most tangible objects originates from the intangible ideas of the object's creator. When the Tennessee Supreme Court held that motion pictures are tangible personal property under the Tennessee Sales Tax Law, the court said: "There is scarcely to be found any article susceptible to sale or rent that is not the result of an idea, genius, skill and labor applied to a physical substance. A loaf of bread is the result of the skill and labor of the cook who mixed the physical ingredients and applied heat at the temperature and consistency her judgment dictated." Crescent Amusement Co. v. Carson, 187 Tenn. 112, 116, 213 S.W.2d 27, 29 (1948).

The Seventh Circuit echoed the Tennessee Supreme Court's observation when it said: "No doubt one could dissect any service arrangement and find tangible results akin to commodities. Likewise one could label each level of any manufacturing process as a service with incidental tangible results." First Comics, Inc. v. World Color Press, 884 F.2d 1033, 1038 (7th Cir. 1989).

44. 568 F.2d 1186, 1191 (5th Cir. 1978).

45. *Id.*

46. *Id.* In *Aviation Specialties*, the defendant refused to make the plaintiff a distributor. *Id.* at 1189. As a result, the plaintiff could only obtain airplane parts through distributors for a 20% discount while the distributors received a 40% discount for the same parts. *Id.* at 1188-89. The

Although the cost of the tangible engine parts outweighed the cost of the intangible maintenance service, the Fifth Circuit rejected a cost analysis.[47] Unfortunately, the Fifth Circuit did not articulate the factors relevant to its dominant nature analysis or how a court should weigh them.[48] Likewise, none of the remaining circuits have elucidated other relevant factors.

Courts encounter a second problem with the dominant nature test when they attempt to differentiate the tangible and intangible aspects of a transaction.[49] Courts easily distinguish the tangible from the intangible when the two are simple to separate conceptually, as when a contractor provides bricks as part of a construction contract.[50] Problems arise, however, when the tangible and intangible aspects are interdependent, for example, in newspaper advertisements.[51] The advertisement provides the valuable intangible communication service to consumers through distribution of the newspaper.[52] Yet, the value of the advertisement depends on its tangible nature.[53] To label one aspect as dominant lacks meaning because neither aspect would be valuable without the other.[54] Thus, the dominant nature test clearly fails when the tangible and intangible aspects of a transaction are inseparable.[55]

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plaintiff alleged RPA violations, but because the service aspects of the contract at issue in *Aviation Specialties* predominated, the Fifth Circuit held that the RPA did not apply. *Id.* at 1191.

47. *Id.* The idea that the RPA may not cover situations in which the service is a significant portion of the contract was echoed in Advanced Office Systems, Inc. v. Accounting Office Systems Co., Inc., 442 F. Supp. 418 (D.C. S.C. 1977) and General Glass Co., Inc. v. Globe Glass and Trim Co., 1978-1 Trade Cas. 61,998 (N.D. Ill. 1978).

48. *Aviation Specialties*, 568 F.2d at 1191.

49. In the Matter of Times Mirror Co. 92 F.T.C. 320 (1978). *See also* Note, *supra* note 39, at 742-43.

50. General Shale Prod. Corp. v. Struck Constr. Co., 132 F.2d 425 (6th Cir. 1942).

51. Note, *supra* note 39, at 743.

Although this Note addresses the interdependence of the tangible and intangible aspects in terms of value, it does not necessarily mean monetary value. No matter how courts measure value, the value of a transaction of an item like a computer diskette depends on the existence of the intangible component imbedded in the diskette.

52. *Id.* at 739-41.

53. *Id.*

54. *Id.* at 742-43.

55. In such a situation, courts can be caught up in impossible inquiries. *See* In the Matter of the Times Mirror Co., 92 F.T.C. 230, 233 (1978) (the difficulty with the dominant nature test arises when the transaction cannot easily be categorized as either a service or a tangible product because the court becomes preoccupied "with metaphysical considerations about what is or is not a tangible product").

D. Software

Courts have never applied the RPA to computer software transactions.[56] Yet the spectacular growth in the software industry and the resulting competition among software retailers makes an RPA claim inevitable.[57] Because Congress has not defined "commodity," courts must decide whether software constitutes a commodity for the purposes of the RPA. Yet, the dominant nature test provides little guidance to courts faced with software transactions because the test fails when the tangible and intangible aspects of a transaction are interdependent.[58]

Courts experience complications when applying legal principles to computer software transactions because of misunderstanding about software.[59] Much of the confusion results from focusing on the incorrect stage of software production.[60] Software begins as a programmer's intangible idea.[61] The programmer then translates the idea into computer language.[62] Ultimately, the computer language is embedded in a tangible medium.[63] Because software retailers transfer software in its tangible

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56. LEXIS and WESTLAW searches produce no cases addressing whether the RPA applies to software transactions.

57. *See supra* notes 2, 16-23 and accompanying text.

58. *See supra* notes 42-56 and accompanying text.

59. This misunderstanding begins with the definition of software itself. For the purposes of this Note, which focuses on software mass marketed to consumers, software is defined as a computer program imbedded in a diskette. *See supra* note 2.

60. One problem is that courts are technically illiterate. Ethyl Corp. v. EPA, 541 F.2d 1, 67 (D.C. Cir. 1976) (en banc) (concurring opinion, Bazelon, C.J.), *cert. denied*, 426 U.S. 941 (1976). In his concurrence, Judge Bazelon stressed the unreliability of judicial review of scientific evidence. *Id.* To remedy this unreliability, Judge Bazelon suggested strengthening the administrative process. *Id.* For a further discussion of Judge Bazelon's ideas regarding courts' competence to evaluate scientific evidence see Bazelon, *Coping With Technology Through the Legal Process*, 62 CORNELL L. REV. 817, 817 (1977).

Second, experts cannot agree on a single definition for software. Rodau, *Computer Software: Does Article 2 of the Uniform Commercial Code Apply?* 35 EMORY L.J. 855, 866; D. BENDER, *supra* note 2, § 2.06 at 2-114.

Both courts and experts use the word "software" to describe computer programs regardless of the software's stage of development or medium. Rodau, *supra*, at 867-70 (flowcharts, source code, and object code as well as programs embodied in a hard disk, diskette, magnetic tape, or a deck of punched paper cards called software). For an in-depth discussion of the different stages of software development and types of media upon which it can be contained, see *id.* at 868 n.57.

61. Software begins as a programmer's idea for instructing a computer to complete a certain task. *Id.*

62. Because a computer cannot understand a pure idea, a programmer's idea must be translated into a form that a computer understands. *Id.*

63. *Id.* at 874-75.

This Note focuses solely on mass-marketed software. Because retailers usually transfer such

form, courts should focus on this form when deciding whether the RPA applies.[64]

Based on the RPA's sparse legislative history[65] and statutory language,[66] software in its final form appears to meet the "goods, wares or merchandise" definition of a commodity.[67] However, like other mixed transactions, software transactions involve the transfer of both tangibles and intangibles.[68] Courts faced with an RPA action involving a mixed transaction will apply the dominant nature test.[69]

Application of the dominant nature test to software transactions, however, produces anomalous results. The majority of software's value derives from its intangible intellectual property.[70] Therefore, courts balancing only the values of the tangible and intangible aspects of the software will classify software as a noncommodity. This result, however, undermines earlier cases that designate books and movies as commodities under the RPA.[71] Like software, books and movies derive most of their value from their intellectual property.[72] While the Fifth Circuit ac-

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software using a diskette, this Note restricts its discussion of software's tangible medium to diskettes. *See* Note, *Software and Sales Taxes: The Illusory Intangible*, 63 B.U.L. REV. 181, 189 (1983) (with regard to whether sales tax laws apply to software, courts should focus on software in its final form because it is this form of software that retailers transfer to consumers). *See also* Rodau, *supra* note 60, at 875. Software is similar to a book or phonograph record. Each begins as an idea that in its final form is a tangible, movable good containing intellectual property. *See id.*

64. *Id.*

65. *See supra* notes 33-35 and accompanying text.

66. *See supra* notes 30-32 and accompanying text.

67. *See supra* note 36 and accompanying text.

68. Software consists of intangible intellectual property that comprises the computer program and the tangible diskette in which it is embedded.

69. *See supra* notes 39-56 and accompanying text.

70. Rodau, *supra* note 60, at 879.

71. Morning Pioneer, Inc. v. Bismarck Tribune Co., 493 F.2d 383, 389 n.11 (8th Cir.), *cert. denied*, 419 U.S. 836 (1974) (newspapers are commodities); Reid v. Harper & Brothers, 235 F.2d 420 (2nd Cir. 1956) (books are commodities).

72. Rodau, *supra* note 66, at 879.

Books, like software, begin as intangible ideas. However, once translated into a physical medium, the book exists as a tangible good like any other product. The same argument can be made vis-a-vis phonographs and motion pictures. One may argue that software is different because it can be embodied on different media such as diskettes, magnetic tapes, or punch cards. This argument fails, however, because books can be written on paper or recorded onto phonograph records or magnetic tape as well. One also cannot argue that software is different because it requires the use of a machine to be valuable. Like software, casette tapes and phonograph records require the use of a machine to be able to hear the music recorded on them. *Id.* at 879-80. *But see* McGee, *Sales, Use, and Property Taxation of Computer Software*, 8 HAMLINE L. REV. 307, 314-15 (1985) (arguing that the tangible medium used for a motion picture is distinguishable from software in that the celluloid film is a

knowledged that courts should not consider cost alone in applying the dominant nature test,[73] no court has articulated other material factors upon which to base an inquiry.

Further, the tangible-intangible distinction in the context of computer software falters because of the medium's interdependent tangible and intangible aspects.[74] As is true of newspaper advertisements,[75] the tangible-intangible distinction reduces courts to "metaphysical considerations about what is or is not a tangible product."[76] When a court divides the tangible and intangible aspects, it assumes that the value of each is independent and separable.[77] Under this assumption, courts will label software a noncommodity on every occasion because the value of the intangible intellectual property will always be greater than the value of the tangible diskette. However, for courts to balance costs means nothing because the value of the idea embodied in software and the value of the tangible diskette depend upon one another.[78]

E. Proposed Analysis

The narrow judicial definition of "commodity" and the dominant nature test fail to incorporate the technological advances of computer software. When an individual obtains software from a software retailer, the transaction resembles any other purchase of goods. As a result, one would expect the RPA to cover software transactions. However, it is unlikely that courts would apply the RPA to software under current definition of "commodity" because its intangible intellectual property is the dominant component.[79]

Courts should adopt an approach to "commodity" consistent with the Supreme Court's mandate that courts construe the RPA liberally.[80] Instead of bifuracting transactions into tangible and intangible components, courts should examine software transactions pursuant to the concerns of the RPA. Congress' focus on tangible commodities resulted

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critical artistic element of the movie); Kuo, *Sales/Use Taxation of Software: An Issue of Tangibility*, 2 HIGH TECH. L.J. 125, 131 (1987).

73. *See supra* notes 44-47 and accompanying text.
74. *See supra* notes 42-56 and accompanying text.
75. *See supra* notes 54-56 and accompanying text.
76. In the Matter of the Times Mirror Co., 92 F.T.C. 230, 233 (1978).
77. Note, *Software and Sales Taxes: The Illusory Intangible*, 63 B.U.L. REV. 181, 188 (1983).
78. *See supra* note 55 and accompanying text.
79. *See supra* notes 71-79 and accompanying text.
80. *Abbott Laboratories*, 422 U.S. 1, 11 (1976).

from the context in which the perceived need for the RPA arose.[81]

Although some characterize mass-produced consumer software as an intangible noncommodity, it does not present the same problems as pure service transactions excluded from RPA protection. When a retailer transfers software to a consumer, each software package transferred is identical to the last. Pure service transactions, however, vary greatly from one transaction to the next. Because consumer software packages have the same fungible properties like other consumer goods to which the RPA applies, courts should protect independent software retailers by applying the RPA to software transactions.

II. ANALOGOUS SITUATIONS

The application of Article Two of the Uniform Commercial Code (UCC) and state sales tax law to software transactions suggest that the RPA should apply to software transactions.

A. UCC Cases Defining "Commodity"

Article Two applies to "transactions in goods,"[82] and defines "goods" as all "movable" things.[83] Like the definition of "commodity" under the RPA, applying the seemingly simple UCC definition of a "good" under the UCC is difficult in a mixed transaction.[84]

Under the UCC, courts utilize a predominant purpose test to determine whether the goods or service aspect of a transaction dominates.[85]

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81. *See supra* notes 6-10 and accompanying text.

82. U.C.C. § 2-102 (1987) provides:

> Unless the context otherwise requires, this Article applies to *transactions in goods*; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

U.C.C. § 2-102 (emphasis added).

83. (1) "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 . . . and things in action . . . .

U.C.C. § 2-105 (1987) (emphasis added).

84. *See supra* note 37 and accompanying text; J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 2-2, at 45 (1972); 67 AM. JUR. 2D *Sales* § 63, at 319-20 (1985).

85. The predominant purpose test is equivalent to the dominant nature of the transaction test. If the intangible services are incidental to the transaction, then it is predominantly a transaction for goods as defined in § 2-102 and the UCC applies. *Id.*; Owen, *The Application of Article 2 of the Uniform Commercial Code to Computer Contracts*, 14 N. KY. L. REV. 277, 278-83 (1987). The

Like the RPA's dominant nature test, a court will hold that the goods aspect of a transaction predominates when the service aspect is incidental to the transaction.[86] Given the similarity between the tests used to analyze mixed transactions under the RPA and UCC, one can reasonably expect courts to treat software similarly in each situation.

Though few cases address whether Article Two applies to software, courts faced with the issue consistently have applied the UCC.[87] In many of these cases, courts have held that hardware and software sold together in a single transaction are goods.[88]

The Ninth Circuit in *RRX Industries, Inc. v. Lab-Con, Inc.*,[89] applied the predominant purpose test to a transaction that involved only software.[90] The court applied the predominant nature test, holding that the software contract was one for goods because the service aspects were incidental to the total transaction.[91] The similarity of the Article Two

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dominant nature of the transaction test likewise focuses on whether the service aspects of an item are incidental to the whole transaction. *Tri-State Broadcasting*, 369 F.2d at 270.

86. Chatlos Systems, Inc. v. National Cash Register Corp., 479 F. Supp. 738, 742-43 (D.N.J. 1979), *aff'd*, 635 F.2d 1081 (3d Cir. 1980), *cert. dismissed*, 457 U.S. 1112 (1981); Triangle Underwriters, Inc. v. Honeywell, Inc., 457 F. Supp 765, 769 (E.D.N.Y. 1978), *aff'd in part and rev'd in part*, 604 F.2d 737 (2d Cir. 1979).

87. *Chatlos Systems*, 479 F. Supp. at 742-43 (goods aspect of a contract for the sale of computer hardware and software predominates over the incidental services included in the contract); *Triangle Underwriters*, 457 F. Supp. at 769 (sale of computer system including hardware and software covered by the UCC because the design, installation, and maintenance services proved incidental to the sale).

For a general discussion on the applicability of the UCC to software, see Note, *Computer Programs as Goods Under the U.C.C.*, 77 MICH. L. REV. 1149 (1979).

88. *See supra* note 88.

89. 772 F.2d 543 (9th Cir. 1985).

90. RRX entered a contract for a software system under which Lab-Con promised to work out all the "bugs" in the system. *Id.* at 545-46. When Lab-Con failed to correct problems that arose with the software, RRX sued Lab-Con for breach of contract and fraud. *Id.* at 545. The court held that whether RRX received consequential damages on their breach of contract claim depended on whether the transaction constituted one for goods under the California Commercial Code. *Id.* at 546. The Ninth Circuit confused the issue by determining that the sale aspect of the transaction dominated over the service aspect. *Id.* Under the predominant purpose test, the court should have compared the *goods* aspect of the transaction with the service aspect. Nonetheless, the holding clearly implies that the transaction was one for goods. Rodau, *supra* note 60, at 883; Owen, *supra* note 86, at 282.

91. *RRX Industries*, 772 F.2d at 546. Other courts have held that software meets the goods requirement in Article Two but offered no explanation of the holding. *See, e.g.*, Compu-Med Systems, Inc. v. Cincom Systems, Inc., slip opinion No. 83 Civ. 8729 (S.D.N.Y. Aug. 30, 1984) (available on LEXIS, Genfed Library, Dist. file) (UCC applied to software contract with no discussion of whether software is a good); Hi Neighbor Enterprises, Inc. v. Burroughs Corp., 492 F. Supp. 823 (N.D. Fla. 1980) (modification of the implied warranty of merchantability is enforceable because the

"goods" test to the "commodities" test under the RPA indicates that courts should consider software a commodity under the RPA.

B. State Sales Tax Cases Defining "Commodity"

Whether software falls within the state sales tax laws depends upon whether software qualifies as tangible or intangible.[92] Like the RPA "commodity" cases, the shortcomings of the tangible-intangible distinction result in confusion in state sales tax cases.[93]

Before 1983, state courts agreed that software was intangible and therefore not subject to sales tax.[94] The rationale of some courts resembled a dominant nature of the transaction analysis. These courts held that tangible diskettes are incidental containers utilized to transfer intangible computer programs.[95] Courts' views on software began to change in 1983 when the Maryland Supreme Court held that software is tangible personal property.[96]

In *Comptroller of the Treasury v. Equitable Trust Co.*, the Maryland

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UCC applies to a software and hardware contract); W.R. Weaver Co. v. Burroughs Corp., 580 S.W. 2d 76 (Tex. Civ. App. 1979) (UCC applies to contract for hardware and software); Communications Groups, Inc. v. Warner Communications, Inc., 527 N.Y.S.2d 341, 344 (N.Y. City Civ. Ct. 1988) (relying on *RXX*, *Chatlos*, and *Triangle Underwriters* and holding that software is a good).

92. Note, *supra* note 78, at 181.

93. *Id.* at 186.

94. *See infra* notes 96-97 and accompanying text.

95. The District of Columbia Circuit held that software is intangible and, thus, is not subject to sales tax in District of Columbia v. Universal Computer Assocs., 465 F.2d 615, 619 (D.C. Cir. 1972). In *Universal Computer*, the software involved was punch cards, which could be fed through the computer and then discarded or returned to the seller. *Id.* at 618. The court concluded that the punch cards were no more than an incidental device used to transfer knowledge to the buyer. *Id.*

Commerce Union Bank v. Tidwell, like *Universal Computer*, held that software constitutes knowledge and is therefore not tangible. 538 S.W.2d 405 (Tenn. 1976). The Tennessee Supreme Court found it significant that the computer program could be transferred to the computer by means other than magnetic tape and that in this particular case, the buyer did not retain the software tapes. *Id.* at 408.

The Texas Court of Civil Appeals used an "essence of the transaction test" to determine that software is intangible and, thus, not subject to state sales tax. First National Bank v. Bullock, 584 S.W.2d 548, 550 (Tex. Civ. App. 1979). Like *Tidwell*, the court in *Bullock* concentrated on software's capacity to be transferred by many means other than magnetic tape, some of which were wholly intangible such as transfer by telephone lines. *Id.*

The Missouri Supreme Court held that sales tax does not apply to software because the magnetic tapes containing the software were incidental containers and therefore the contract was in essence one for services. James v. TRES Computer Systems, Inc., 642 S.W.2d 347, 348 (Mo. 1982).

96. Comptroller of the Treasury v. Equitable Trust Co., 296 Md. 459, 464 A.2d 248 (1983); *See* R. RAYSMAN & P. BROWN, *supra* note 1, at § 7.13[1].

Supreme Court rejected the dominant nature of the transaction test.[97] The court repudiated earlier cases designating software as intangible.[98] The court also renounced a distinction drawn by previous courts between software and phonograph records.[99] The court perceived no difference between phonographs and software because without their tangible containers, the intangible information encoded on records and software has no value.[100]

The difficulty the Maryland Supreme Court confronted when analyzing the distinction between records and software is the same problem faced by courts under the UCC and RPA. The problem stems from the assumption that the tangible and intangible aspects of transactions are always separable.[101] As the Maryland Supreme Court found, it is inappropriate to sever the tangible from the intangible aspects of a transaction involving software products.[102]

The increasing number of sales tax cases holding that software is a tangible good and the similar trend in UCC cases leads one to believe that courts should also incorporate software within the RPA's definition of "commodity." However, given the courts' strict reading of the RPA and adherence to the dominant nature test, the result of a price discrimination claim involving software remains uncertain. Courts should adopt an approach to the definition of commodity under the RPA commensurate with state sales tax cases and UCC cases which recognize that software transactions are indistinguishable from other consumer transactions.[103]

III. DEFINING "SALE"

Section 13 of the RPA applies only to "sales," but the RPA does not define "sale." Finding little guidance in the legislative history, courts

97. 464 A.2d 248, 261 (Md. 1983). The court in *Equitable Trust* actually rejected an "essence of the transaction test," which is the same as the dominant nature of the transaction test. For the purpose of consistency, this Note will continue to refer to both tests as the dominant nature of the transaction test.

98. *Id.*

99. *Id.*

100. *Id.*

101. Note, *supra* note 78, at 188.

102. *Equitable Trust Co.*, 464 A.2d at 261 ("the sales tax statute in Maryland has never been viewed as conceptually severing the copy of the performance from the tangible carrier").

103. *See supra* notes 80-82 and accompanying text.

have defined "sale" narrowly and excluded license transactions.[104] The difficulty in applying the RPA to software transactions is that software is not sold, but licensed, to its users.[105] However, consumer software licenses closely resemble sales transactions although no title passes.[106] For the RPA to cover software licenses, courts must read the definition of "sale" more broadly than in the prior case law.

A. Statutory Language and Legislative History

Section 13[107] of the RPA, which applies only to sales, strongly indicates that Congress intended the RPA to apply only to transactions in which title passes.[108] The legislative history of the Act further supports the idea that the RPA originally contemplated only sales because the hearings preceding the passage of the RPA do not mention license agreements.[109] However, the statutory language and legislative history are not dispositive because at the time of its passage no existing license agreements resembled sales as closely as software licenses do.

B. Judicial Interpretation

Courts define "sale" pursuant to the RPA narrowly to include only those transactions in which title passes.[110] According to precedent, neither leases, licenses, consignment arrangements, nor agency transactions fall within the definition of "sale."[111] This narrow definition tends

104. *ABA Report*, *supra* note 32, at 5; *see also infra* notes 111-17 and accompanying text.

105. Rodau, *supra* note 60, at 887-88. Retailers transfer computer software through a license as a means of protecting the software's trade secrets. By using a license instead of a sale, the manufacturer retains ownership of the software. For a discussion on the software protection through trade secret law and copyright, see D. BENDER, *supra* note 2, at §§ 4.01-4.09, 4A.01-4A.03 (1989); R. RAYSMAN & P. BROWN, *supra* note 1, at §§ 5.01-5.09, 6.01-6.12.

106. *See infra* notes 118-25 and accompanying text; *see also*, Rodau, *supra* note 60, at 907; D. BENDER, *supra* note 2, at § 4A.02[4].

107. *See supra* note 4 and accompanying text.

108. *ABA Report*, *supra* note 32, at 5.

109. *Id.* at 5-6; Reeves, *supra* note 32, at 192 ("The legislative history of the Robinson-Patman Act indicates that the coverage of the law was limited to conventional sales . . . . This probably reflects the types of business transactions most common at that time, and those foremost in the minds of the legislators").

110. *ABA Report*, *supra* note 32, at 6; J. VON KALINOWSKI, *supra* note 90, at § 24.03[2].

111. Export Liquor Sales, Inc. v. Ammex Warehouse Co., 426 F.2d 251 (6th Cir. 1970) (a real estate lease is not a "sale"); Loren Specialty Mfg. Co. v. Clark Mfg. Co., 241 F. Supp. 493 (N.D. Ill. 1965), 360 F.2d 913 (7th Cir. 1966) (no RPA violation where agent was given a larger commission than distributor's discount), *cert. denied*, 385 U.S. 957 (1966); Students Book Co. v. Washington Law Book Co., 232 F.2d 49 (D.C. Cir. 1955) (RPA not violated because campus bookstores received preferred prices on consignment), *cert. denied*, 350 U.S. 988 (1956); Record Club of America, Inc. v.

to exclude software transactions from RPA protection because retailers typically license software instead of selling it.[112]

Record Club of America, v. Columbia Broadcasting System,[113] presents a typical example of the licensing cases brought under the RPA. *Record Club* involved a license agreement between licensors and Columbia Broadcasting Systems (CBS) for unfinished phonograph records.[114] The plaintiff sought relief under the RPA, asserting that he bought finished records for a price higher than CBS paid for its license.[115] The court held that the RPA applies only to sales, and dismissed the plaintiff's claim because he sought to compare his sale price with CBS's license price.[116]

C. *Software*

Although strong precedent exists for excluding nonsale transactions from the RPA's protection,[117] no court addressing an RPA claim has encountered a software license.[118] Retailers cannot negotiate individual licenses for mass-marketed consumer software.[119] Therefore, manufacturers utilize shrink-wrap licenses.[120] A shrink-wrap license is a perpetual one-time fee license that can be read through the shrink-wrap package.[121] Opening the software package constitutes an agreement to abide by the terms of the license.[122] Software manufacturers use these

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CBS, 310 F. Supp. 1241 (E.D. Pa. 1970); La Salle Street Press, Inc. v. McCormick and Henderson, Inc., 293 F. Supp. 1004 (N.D. Ill. 1968) (licensing of a patented proofreading process is not within the scope of the RPA because the transaction involved neither a "sale" nor a "commodity"); Gaylord Shops, Inc. v. Pittsburgh Miracle Mile Town & Country Shopping Center, Inc., 219 F.Supp. 400 (W.D. Pa. 1963) (discrimination in lease prices between tenants by a shopping center landlord did not violate the RPA); County Theatre Co. v. Paramount Film Distrib. Corp., 146 F. Supp. 933, 934 (E.D. Pa. 1956) (licensing of motion pictures not subject to the RPA). *See also infra* notes 114-17 and accompanying text.

112. *See infra* notes 120-25 and accompanying text.

113. 310 F. Supp. 1241 (E.D.Pa. 1970).

114. *Id.* at 1243.

115. *Id.*

116. *Id.* at 1246.

117. *See supra* notes 111-17 and accompanying text.

118. WESTLAW and LEXIS searches find no such cases; *See also* Vawter, Larue and Lewis, *Panel Discussion - Questions and Answers*, 53 ANTITRUST L.J. 915, 917 (1984) (in reference to the question whether software licensing is a commodity, "my understanding of the general case law is that it would not be a commodity, it would simply be a licensing situation").

119. R. RAYSMAN & P. BROWN, *supra* note 1, at § 7.11A[1].

120. *Id.*

121. *Id.*

122. *Id.*

licenses to protect the intellectual property and trade secrets contained in their computer programs.[123]

Although title does not pass in a license agreement, the RPA should apply to software licenses because they bear a striking resemblance to sales.[124] First, because of the difficulty in policing consumer use of mass-marketed software, it is highly unlikely that a consumer's license will be terminated.[125] Second, consumers believe that that they are buying software because software is licensed for a one-time fee.[126] Thus, the software consumer's expectancy is the same as the expectancy of a consumer who actually receives title of a good.

IV. UCC CASES DEFINING "SALE"

Courts have looked at the similarity of some leases[127] and licenses[128] to a sale when applying the UCC. Article Two applies solely to contracts "relating to the present or future sale of goods."[129] However, precedent

123. *Id.*

124. Rodau, *supra* note 60, at 907.

Shrink-wrap licenses are especially relevant to this Note because they are the most common method used by retailers to transfer software to consumers.

Software manufacturers use shrink-wrap licenses to market software to the public while protecting the trade secrets contained in the software. A shrink-wrap license is a perpetual license paid in full with a one time payment which grants the licensee a right to use the software. However, the license transfers no ownership rights to the licensee. The terms usually limit the user's ability to make copies of the software to the creation of backup copies. A license also typically limits the use of the software to one computer and one user. Furthermore, it requires the user to protect the trade secrets. If a user violates any term of the license, the licensor may terminate the license and demand the return of all copies of the software. Rodau, *supra* note 60, at 888-89 n.144; R. RAYSMAN & P. BROWN, *supra* note 1, at § 7.11A[1]; D. BENDER, supra note 2, at § 4A.02[4]. Whether courts will enforce shrink-wrap licenses will, in part, depend on whether tearing open the packaging constitutes acceptance of the contract. D. BENDER, *supra* note 2, at § 4A.02[4]. Enforceability will also depend on whether the license is unconscionable. *Id.* A consumer may fail to read the license agreement on the software packaging, thinking that it is nothing more than advertising. *Id.* If this is the case, it is likely that, at least for UCC purposes, courts would hold that a sale has occurred. *Id.*

For a discussion of the unconscionability of shrink-wrap licenses, see Ryan, *Offers Users Can't Refuse: Shrink-Wrap License Agreements as Enforceable Adhesion Contracts*, 10 CARDOZO L. REV. 2105 (1989).

125. Rodau, *supra* note 60, at 908.

126. *Id.* at 908 & n.251.

127. Hertz Commercial Leasing Corp. v. Transportation Credit Clearing House, 59 Misc.2d 226, 298 N.Y.S.2d 392 (Civ. App. 1969), *rev'd on other grounds*, 64 Misc. 2d 910, 316 N.Y.S. 2d 585 (App. Div. 1970) (holding that the UCC can be extended by analogy); Sawyer v. Pioneer Leasing Corp., 244 Ark. 943, 428 S.W.2d 46 (1968) (the UCC applies when the lease is analogous to a sale).

128. *See infra* note 133 and accompanying text.

129. U.C.C. § 2-106 (1987) provides:

In this Article unless the context otherwise requires "contract" and "agreement" are lim-

indicates a trend toward applying Article Two to leases of bundled computer hardware and software.[130] This extension of Article Two follows from courts' focus on whether the lease is analogous to a sale, not on the transaction's label.[131] The same reasoning behind the judicial extension of Article Two to leases applies to software licensing transactions, bringing them within the scope of the UCC.[132]

The similarity between licenses and sales that extends Article Two to software transactions is equally applicable under the RPA. As they have done in the UCC context, courts should look at the similarity between software transactions and other consumer sales when determining the applicability of the RPA.

V. PROPOSED CHANGES IN THE RPA

One alternative that would bring the RPA in line with modern technology would be an amendment defining "commodity" and "sale." Congress should define "commodity" as all tangible, movable goods irrespective of the relative value or importance of their tangible and intangible components. This definition would eliminate the problem created by mixed transactions like software, while still excluding services from RPA protection.[133] Congress should also expand the definition of "sale" to include leases and licenses where the only difference from a sale is that title does not pass. Unfortunately, a proposed amendment stands little chance of passing. General hostility toward the RPA has kept Con-

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ited to those relating to the present or future sale of goods. "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price. A "present sale" means a sale which is accomplished by the making of the contract.

130. United States Welding, Inc. v. Burroughs Corp., 587 F. Supp. 49 (D. Colo. 1984) (applying Article Two to a lease of hardware and software without discussion); Office Supply Co. v. Basic/Four Corp., 538 F. Supp. 776 (E.D. Wis. 1982) (applying Article Two to sale of computer and lease of software); *But see In re* Community Medical Center, 623 F.2d 864, 868 n.4 (3d Cir. 1980); W.R. Weaver Co. v. Burroughs Corp., 580 S.W.2d 76 (Tex. Civ. App. 1979).

131. Rodau, *supra* note 60, at 898 & n.192.

132. *Id.* at 901. In Communications Groups, Inc. v. Warner Communications, Inc., the New York City Civil Court applied Article Two to perpetual software licenses and held that they were equivalent and analogous to sales. 138 Misc. 2d 80, 527 N.Y.S.2d 341, 344 (N.Y. City Civ. Ct. 1988); Computer Network Corp., v. Compmail Systems, Inc., No. 84 C 6813 (N.D. Ill. July 10, 1985) (WESTLAW, Allfeds library, Dist. file) (UCC applies to perpetual licenses by analogy to sales).

133. Services must be excluded because the portion of the RPA requiring that the goods be of like grade or quality would lead to enormous difficulty if applied to services.

gress from amending it in the past.[134] Therefore, it does not seem likely that Congress will expand the scope of the RPA by amendment.

The more practical solution is for courts to expand the definition of "commodity" and "sale" on a case-by-case basis. This approach will allow courts to keep the RPA commensurate with its underlying policies. This approach is better than a congressional amendment because it avoids the possibility that a statutory definition might exclude future technology, and it will give courts the necessary flexibility to determine which transactions are essentially equivalent to the sales of commodities under the RPA. Whether this solution changes the current state of the law under the RPA will depend on courts' willingness to follow the Supreme Court's mandate to construe the RPA flexibly.[135]

VI. CONCLUSION

Congress enacted the RPA in response to the Clayton Act's failure to adapt to the trend in retail toward chain stores.[136] Today, it is the RPA that has failed to adapt to the development of new technologies in commerce. The problem is not that Congress did not intend the RPA to apply to transactions like software licensing, but that in defining the Act's jurisdictional elements, courts failed to foresee products such as software. When applied to software, the dominant nature test produces a result inconsistent with the RPA's policy.[137] Likewise, the courts failed to recognize the development of the perpetual licenses necessary to protect software trade secrets.[138] Software transactions require a more flexible approach to the definition of both "commodity" and "sale." Either an amendment to the RPA or a more flexible judicial interpretation of the terms that focuses on the policies and purpose of the RPA is necessary to avoid the elimination of independent software retailers.

John J. Voorhees, Jr.

134. *See* 1 American Bar Association, Section of Antitrust Law, THE ROBINSON-PATMAN ACT: POLICY AND LAW 8-19 (1980).

135. *Abbott*, 422 U.S. at 11.

136. *See supra* notes 6-10 and accompanying text.

137. *See supra* notes 39-56 and accompanying text.

138. *See supra* notes 118-25 and accompanying text.