

AMENDING THE UNIFORM COMMERCIAL CODE: HOW WILL A CHANGE IN SCOPE ALTER THE CONCEPT OF GOODS?

I. INTRODUCTION

The continued rise in electronic commerce has changed the way that the world does business.¹ Instead of traditional methods of sale, where buyers physically inspect and approve goods before payment and delivery, the character of sales transactions is now less straightforward and certainly much less hands-on than it had been in the past. Frequently, digital products are sent electronically with nothing tangible ever touching the hands of either the buyer or the seller.² Software sales, for example, often require buyers to accept the terms of a contract before they have even been made aware of the nature of those terms.³ These and other changes in commercial transactions have created the need for a revision of Article 2 of the Uniform Commercial Code (“UCC”), which regards sales.⁴ At the time of this writing, the American Law Institute (“ALI”)⁵ and the National Conference of Commissioners on Uniform State Laws (“NCCUSL”)⁶ had

1. Amelia H. Boss, *Taking UCITA on the Road: What Lessons Have We Learned?*, 673 PLI/PAT 121, 129–30 (2000).

2. Sellers of an intangible product often just send the product electronically. On the other end, the purchaser receives the electronic transmission, and then wires money from his own bank account and directly deposits the payment in the account of the seller. In such a transaction, no product was ever physically in the hands of either buyer or seller, and no tangible form of money ever changed hands—the entire transaction was conducted electronically.

3. Americans for Fair Electronic Commerce Transactions, AFFECT: *What is UCITA? Glossary of Terms*, at http://www.ucita.com/what_glossary.html (last visited Jan. 26, 2003). Software manufacturers often use what is known as a “shrink-wrap” license or a “click-on” license. *Id.* These licenses are contracts that are created when a user opens the plastic wrapping on the outside of the software packaging (in the case of shrink-wrap licensing) or when a user clicks a box indicating agreement with the terms of the contract, which (in the case of click-on licensing) commonly occurs during the initial set-up of the program. *Id.* In each of these cases, users are not made aware of the terms of the contract until after they have given their assent. *Id.*

4. U.C.C. § 2 (2001). In its entirety, the UCC governs numerous other types of commercial transactions: leases (Article 2A); commercial paper (Article 3); bank deposits and collections (Article 4); funds transfers (Article 4A); letters of credit (Article 5); bulk transfers (Article 6); receipts, bills of lading and other documents of title (Article 7); investment securities (Article 8); and secured transactions, sales of accounts and chattel paper (Article 9). See U.C.C. (2001).

5. The American Law Institute is an organization of lawyers which drafts and revises the UCC and produces restatements on subjects such as contracts and torts. See generally The American Law Institute, at <http://www.ali.org> (last visited Jan. 26, 2003).

6. The National Conference of Commissioners on Uniform State Laws is an organization of lawyers who are appointed by the executive branch of each state. NCCUSL drafts and revises the UCC in cooperation with ALI and also drafts uniform laws on various other subjects. See generally The

recently agreed to amend⁷ Article 2 to expressly exclude the term “information” from the definition of goods.⁸

Though the proposed amendment to Article 2 has been approved,⁹ a substantial amount of uncertainty is likely to exist regarding the Article’s scope.¹⁰ In the past, some courts have considered information such as software to be a good and therefore they have applied the law of Article 2 in ruling upon such transactions.¹¹ For these courts, the propriety of characterizing information as a good was even more apparent when the product was a hybrid of sorts—part tangible good, part information.¹² However, post-amendment the treatment of these hybrid products is a

National Conference of Commissioners on Uniform State Laws, at <http://www.nccusl.org> (last visited Jan. 26, 2003).

7. See *infra* notes 103–23 and accompanying text. The copyright to the UCC is jointly held by ALI and NCCUSL. The National Conference of Commissioners on Uniform State Laws, *Information About the Text of the U.C.C.*, at <http://www.nccusl.org/nccusl/informationaboutucc.asp> (last visited Mar. 31, 2004). An editorial board, made up of members of each of the two organizations, is responsible for formulating policy regarding the text of the UCC. *Id.*

8. The American Law Institute, *New Prefatory Note and Language on Scope for UCC Article 2 Amendments Approved by NCCUSL*, at <http://www.ali.org/ali/pr081402NCCUSL.htm> (last visited Jan. 26, 2003) (reviewing amendments proposed by NCCUSL and outlining future plans for the proposal); The National Conference of Commissioners on Uniform State Laws, *Amendments to Uniform Commercial Code Article 2—Sales*, at <http://www.law.upenn.edu/bll/ulc/ucc2/2002act.htm> (last modified August 2, 2002) (proposing the express exclusion of information from the definition of goods). The proposal also contained several amendments unrelated to the definition of goods. The National Conference of Commissioners on Uniform State Laws, *Amendments to Uniform Commercial Code Article 2—Sales*, at <http://www.law.upenn.edu/bll/ulc/ucc2/2002act.htm> (last modified Aug. 2, 2002).

9. See *infra* notes 121–24.

10. The American Law Institute, *New Prefatory Note and Language on Scope for UCC Article 2 Amendments Approved by NCCUSL*, at <http://www.ali.org/ali/pr081402NCCUSL.htm> (last visited Jan. 26, 2003). NCCUSL’s Preliminary Comment gave an extremely limited amount of guidance, stating that “transactions often include both goods and information: some are transactions in goods as that term is used in Section 2-102, and some are not.” *Id.* The question, however, is which transactions are goods and which transactions are not. Obviously, the definition of what is and what is not a good is still unclear.

11. See Micro Data Base Sys., Inc. v. Dharma Sys., Inc., 148 F.3d 649 (7th Cir. 1998); Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670 (3d Cir. 1991); RRX Indus., Inc. v. Lab-Con, Inc., 772 F.2d 543 (9th Cir. 1985); ePresence, Inc. v. Evolve Software, Inc., 190 F. Supp. 2d 159 (D. Mass. 2002); Softman Prod. Co. v. Adobe Sys., Inc., 171 F. Supp. 2d 1075 (C.D. Cal. 2001); Newcourt Fin. USA, Inc. v. FT Mortgage Cos., 161 F. Supp. 2d 894 (N.D. Ill. 2001); Architectronics, Inc. v. Control Sys., Inc., 935 F. Supp. 425 (S.D.N.Y. 1996). The issue of software as a good has been heavily debated. See generally Amelia H. Boss & William J. Woodward, *Scope of the Uniform Commercial Code; Survey of Computer Contracting Cases*, 43 BUS. LAW. 1513 (1988); Jeffrey B. Ritter, *Scope of the Uniform Commercial Code: Computer Contracting Cases and Electronic Commercial Practices*, 45 BUS. LAW. 2533 (1990); Jeffrey B. Ritter, *Software Transactions and Uniformity: Accommodating Codes Under the Code*, 46 BUS. LAW. 1825 (1991); Andrew Rodau, *Computer Software: Does Article 2 of the Uniform Commercial Code Apply?*, 35 EMORY L.J. 853 (1986); Bonna Lynn Horovitz, Note, *Computer Software as a Good Under the Uniform Commercial Code: Taking the Byte Out of the Intangibility Myth*, 65 B.U. L. REV. 129 (1985).

12. See *supra* note 11.

foreseeable source of uncertainty.¹³ Considering the wide range of current products that incorporate software and other types of information into a core good,¹⁴ much uncertainty exists as to what law is best suited to govern such transactions.¹⁵ The purpose of this Note is to discuss, considering traditional judicial reasoning regarding what constitutes a good as defined by Article 2, how the change in scope will likely affect judicial decisions with respect to the applicability of Article 2 to transactions involving a mix of information and goods.¹⁶

Part II of this Note examines the history of the Uniform Commercial Code, specifically of Article 2, and its application. Part III analyzes the methods of past judicial reasoning regarding the legal nature of particular goods. Part IV of this note proposes how courts should interpret the term “information” under the revised definition of goods and what law should be applied to those transactions involving both goods and a component of information. Part V proposes that courts use a “predominant purpose” test¹⁷ to determine what law should govern transactions involving mixed products containing both goods and information.

II. HISTORY

In the middle of the twentieth century the idea to draft a uniform code governing consumer transactions in sales and other financial areas was formed.¹⁸ The drafters intended for the code to “foster freedom of contract and to facilitate the creation of, and reliance upon, commercial contractual relationships.”¹⁹ The drafters proposed to achieve these goals by having

13. The American Law Institute, *New Prefatory Note and Language on Scope for UCC Article 2 Amendments Approved by NCCUSL*, at <http://www.ali.org/ali/pr081402NCCUSL.htm> (last viewed Jan. 26, 2003) (stating that Article 2’s application will be for courts to determine). The uncertainty lies in contemplating what mixed-goods products will fall within the scope of Article 2. *Id.*

14. The list is nearly infinite: “smart cars,” refrigerators, palm pilots, computers, security alarms, climate control systems, heart monitors, books, telephone directories, and numerous others. At a local department store, a walk down one aisle alone could reveal many products that would fall into the grey area that exists between pure good and pure information.

15. Courts have the option of resolving the matter using Article 2, the common law, or the Uniform Computer Information Transactions Act (“UCITA”). For a discussion of UCITA, see *infra* notes 89–102 and accompanying text.

16. This Note focuses on the contractual side of mixed-goods transactions. While this Note does incorporate select concepts from the field of intellectual property, the issues and perspectives are analyzed with the goal of examining governing law, rather than focusing on issues of ownership based on copyright or patent.

17. See *infra* notes 145–59.

18. Raymond T. Nimmer, *Images and Contract Law—What Law Applies to Transactions in Information*, 36 HOUS. L. REV. 1, 5 (1999).

19. *Id.* at 4. With the safeguards of the Code in place, consumers could be more secure in

contract rules “serve a background function, providing rules appropriate to the commercial relationship.”²⁰ These background rules, however, were meant to fill in the missing gaps in the contract, and therefore were to be “subject to the dominant effect of the parties’ agreement.”²¹

Karl Llewellyn drafted Article 2 in order to distinguish law regulating the sale of goods from general contract law.²² The Article was designed to be flexible²³ and it allowed parties to a contract to “adapt its provisions by agreement.”²⁴ Such agreements included “course of performance, course of dealing, and usage of trade . . .”²⁵ Parties subject to the Code then relied on courts to “apply its provisions sensibly.”²⁶ While drafted to govern only sales law, Article 2 eventually influenced other areas of contract law, as many courts applied it by analogy to transactions other than those involving goods.²⁷

Article 2 defines goods as “all things . . . which are moveable at the time of identification to the contract for sale . . .”²⁸ This definition was

entering into transactions. *Id.* The UCC could be relied upon to protect their interests. *Id.*

20. *Id.* at 5.

21. *Id.* The Code was only designed to be a default set of provisions, giving parties some minimal level of protection. *Id.* at 12. If parties wanted to agree to waive certain provisions of an applicable article, in most circumstances they were able to do so. *Id.* In addition, parties were given the freedom to add to a contract any clauses which were more stringent than those imposed by the Code. *Id.* The Code was meant to be a starting point, with the parties free to take the transaction in the direction they so desired. *Id.* Karl Llewellyn initiated a general approach to contracting, expressing the belief that “default rules should mesh with expected or conventional practice in a manner that projects a favorable and predictable result if the parties’ agreement does not alter the rule.” *Id.*

22. *Id.* at 7–8.

23. *Id.* at 12.

24. The American Law Institute, *New Prefatory Note and Language on Scope for UCC Article 2 Amendments Approved by NCCUSL*, at <http://www.ali.org/ali/pr081402NCCUSL.htm> (last visited Jan. 26, 2003). As Professor Nimmer pointed out, “a rule which does not reflect reasonable commercial understandings in a particular area of commerce penalizes parties who did not negotiate or otherwise deal with the issue by forcing recourse to courts for . . . a commercially reasonable result.” Nimmer, *supra* note 18, at 14.

25. The American Law Institute, *New Prefatory Note and Language on Scope for UCC Article 2 amendments Approved by NCCUSL*, at <http://www.ali.org/ali/pr081402NCCUSL.htm> (last visited Jan. 26, 2003).

26. *Id.*

27. Nimmer, *supra* note 18, at 17. See also Raymond T. Nimmer, *Through the Looking Glass: What Courts and UCITA Say About the Scope of Contract Law in the Information Age*, 38 DUQ. L. REV. 255, 264 (2000) (stating that Article 2 influences transactions where courts treat the transaction “as if it were a transaction in goods when it is not, where courts apply the law of sales by analogy to a transaction admittedly not a transaction in goods, and by shaping views of what is appropriate common law for transactions other than transactions in goods”).

28. U.C.C. § 2-105(1) (1998). The provision in full states that:

“[g]oods” means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. “Goods” also includes the

written at a time when the United States operated in a pure goods-based economy.²⁹ A typical transaction of the time period in which the Code was drafted involved a tangible physical good.³⁰ Because these products fell clearly within the definition of “goods,”³¹ they were unquestionably covered by the provisions of Article 2.³² Such tangible goods could usually be inspected by the buyer prior to purchase³³ and were often protected by the warranty of merchantability.³⁴

Less certain to be considered goods were products consisting of both a physical good and a service.³⁵ When a transaction such as this occurred,

unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).

Id.

29. Nimmer, *supra* note 18, at 3.

30. “[L]and ownership and agrarian production were primary sources of wealth and income . . . and contracts for the exchange of horses and grain dominated the commercial landscape.” UNIF. COMPUTER INFO. TRANSACTIONS ACT, Prefatory Note, 7 U.L.A. 196. “Following the industrial revolution, manufactured goods assumed center stage.” *Id.* This change prompted Karl Llewellyn to implement a revision of the then-current law of sales. *Id.* at 187.

31. *See supra* note 28 and accompanying text.

32. *Id.*

33. U.C.C. § 2-513(1) (1989). The provision states that:

Unless otherwise agreed and subject to subsection (3), where goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. When the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival.

Id. The accompanying comment elaborates, noting that the buyer:

[M]ay exercise his right of inspection at any reasonable time or place and in any reasonable manner. It is not necessary that he select the most appropriate time, place or manner to inspect or that his selection be the customary one in the trade or locality. Any reasonable time, place or manner is available to him and the reasonableness will be determined by trade usages, past practices between the parties and the other circumstances of the case.

Id. at Official Comment, n.3.

34. U.C.C. § 2-314 (1989). The provision, in part, states that

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . .

(2) Goods to be merchantable must be at least such as (a) pass without objection in the trade under the contract description; and (b) in the case of fungible goods, are of fair average quality within the description; and (c) are fit for the ordinary purposes for which such goods are used; and (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and (e) are adequately contained, packaged, and labeled as the agreement may require; and (f) conform to the promises or affirmations of fact made on the container or label if any.

Id. at § 2-314(1) and (2). Purchasers of covered goods could therefore rely on the warranty of merchantability to ensure that the goods they bought were quality products that were able to function as intended.

35. *See infra* notes 36–55 and accompanying text. Examples of this type of mixed-product are contracts for computer systems with accompanying troubleshooting, contracts for building and

most courts used one of two methods to determine whether the product qualified as a good under Article 2's definition: the predominant purpose test³⁶ or the gravamen test.³⁷

The test most commonly used by the courts was the predominant purpose test.³⁸ Under this test, the court first identified the predominant element of the transaction.³⁹ This was accomplished by examining several factors including "the terminology of the contract, the objective of the parties in entering the contract, the ratio of the price of the goods to the whole price of the contract, the nature of the business of the supplier, and the intrinsic value of the goods without the service."⁴⁰ Consideration of multiple factors was consistent with the underlying purpose of Article 2—to provide flexibility by allowing parties to enter into transactions based on their own terms.⁴¹

After the predominant element was identified, the court used that identification to determine whether the predominant purpose of the transaction was to sell goods or to sell services.⁴² The progression from predominant element to predominant purpose is a sensible interpretation, as a party should not be governed by an unfavorable law simply due to the fact that a service component was included, for example, in the washing machine that the party purchased.⁴³ Reason follows that those transactions of which the predominant purpose was to sell goods fall under the governance of Article 2;⁴⁴ those meant to sell services are governed otherwise.⁴⁵

installation, sales of home appliance with warranty and service packages, and the like.

36. *Id.* at 279.

37. Nimmer, *Through the Looking Glass*, *supra* note 27, at 278.

38. *Id.* See USM Corp. v. Arthur D. Little Sys., Inc., 546 N.E.2d 888 (Mass. App. Ct. 1989) (applying the predominant purpose test to the design, installation, and service of a computer 'turnkey' system); Neibarger v. Universal Coops., Inc., 450 N.W.2d 88 (Mich. Ct. App. 1989); Design Data Corp. v. Maryland Cas. Co., 503 N.W.2d 552 (Neb. 1993) (applying the predominant purpose test to the sale of computer equipment); Kirkpatrick v. Introspect Healthcare Corp., 845 P.2d 800 (N.M. 1992) (applying the predominant purpose test to an interior design and subsequent decorating contract); Cincinnati Gas & Elec. Co. v. Goebel, 502 N.E.2d 713 (Ohio Misc. 1986); Tacoma Athletic Club, Inc. v. Indoor Comfort Sys., Inc., 902 P.2d 175 (Wash. Ct. App. 1995) (applying the predominant purpose test to the sale and installation of a dehumidification system).

39. Nimmer, *Through the Looking Glass*, *supra* note 27, at 278.

40. HENRY D. GABRIEL & LINDA J. RUSCH, THE ABCS OF THE UCC, ARTICLE 2: SALES 5 (Amelia M. Boss ed., 1997).

41. See *supra* notes 19–21 and accompanying text.

42. GABRIEL & RUSCH, *supra* note 40, at 5.

43. A seller should not be able to select governing law merely by including a service or a good component in the overall product package.

44. Nimmer, *Through the Looking Glass*, *supra* note 27, at 278.

45. *Id.*

In *Neibarger v. Universal Cooperatives, Inc.*,⁴⁶ the Michigan Court of Appeals used the predominant purpose test to determine whether mixed contracts for goods and services were governed by Article 2.⁴⁷ In performing the test, the court adopted the prior decision of the Eighth Circuit in *Bonebrake v. Cox*.⁴⁸ The *Bonebrake* court described the determinative test as not one testing “whether [goods] are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose reasonably stated, is the rendition of service with goods incidentally involved . . . or is a transaction of sale, with labor incidentally involved”⁴⁹ Based on the application of the predominant purpose test, the *Neibarger* court held that a contract for the installation of a milking system for dairy cows was a transaction for the sale of goods, with services incidentally involved.⁵⁰ The contract was therefore governed by Article 2.⁵¹

A minority of courts, on the other hand, have used the gravamen test.⁵² Rather than attempting to determine the predominant purpose of the transaction, these courts have examined the grounds for a party’s complaint.⁵³ Under the predominant purpose test, one law governs both the goods and services components; in the gravamen test, however, a different law applies to each component.⁵⁴ If a party’s dissatisfaction is aimed at the portion of the product involving goods, Article 2 applies; if the complaint concerns the services included, common law governs.⁵⁵

46. 450 N.W.2d 88 (Mich. Ct. App. 1989).

47. *Id.*

48. 499 F.2d 951 (8th Cir. 1974).

49. *Neibarger*, 450 N.W. 2d at 90 (quoting *Bonebrake*, 499 F.2d at 860). As an example of a contract for service with goods involved only incidentally, the *Bonebrake* court described a contract with an artist for a painting. *Bonebrake*, 499 F.2d at 960. As an example of a transaction of sale with labor incidentally involved, the court described the installation of a water heater for a bathroom. *Id.* Note the distinction: in the former example, where the skill and imagination of each artist is different, the purchaser is most interested in having that particular artist create a painting. In the latter, however, the underlying desire is a water heater. As long as the water heater is properly installed, the particular company or individual that performed the installation and service is of little matter.

50. *Id.* at 90. This is similar to the water heater example discussed *supra* in note 49. The service of the milking system is not the fundamental part of the package—it is the milking device that the owner needs to operate his business.

51. *Id.*

52. Nimmer, *Through the Looking Glass*, *supra* note 27, at 279.

53. *Id.* The advantage to a split-application of law is that the correct law would govern each part. *Id.* This is in contrast to the predominant purpose test, where incorrect law will always apply to at least one part of the transaction. *Id.* at 278.

54. *Id.*

55. *Id.* Should the dispute involve both aspects of the product, each would be governed by its applicable authority. *Id.*

While courts have become quite proficient in determining Article 2's application to transactions involving either goods, services, or mixed-goods comprised of both goods and services,⁵⁶ a rise in electronic commerce has presented a new brand of exchange—that of information, both computer-based and tangible.⁵⁷ Article 2 is not tailored to these new types of commerce.⁵⁸ “[U]nlike tangible goods, computer information is very easily copied and, therefore, susceptible to piracy.”⁵⁹ Scholars have feared that “without new rules, there would be few protections for software publishers from unauthorized copying.”⁶⁰ Nonetheless, some courts have applied Article 2 to these new products,⁶¹ despite the fact that transactions in software, computer output, and data are neither supported by the policies underlying the Article⁶² nor do they fit neatly within the traditional notion of a good.⁶³

In 1991, ALI and NCCUSL decided to amend Article 2 to make the law of sales more applicable to these new forms of transactions occurring

56. Courts sometimes provide surprising determinations however. *See Hedges v. Pub. Serv. Co.*, 396 N.E.2d 933, 936 (Ind. Ct. App. 1979) (declaring that electricity used in the home is a good, but that raw voltage is not); *Southwestern Bell Tel. Co. v. FDP Corp.*, 811 S.W.2d 572, 574 (Tex. 1991) (declaring the predominant purpose of a sale of advertising space is to sell a service contract, putting it outside the scope of Article 2). These surprising decisions have served to further blur the already-fuzzy line dividing those products included in the scope of Article 2 from those that are excluded.

57. Boss, *supra* note 1.

58. *Id.* at 129–30. Initially, the focus and main concern regarding Article 2 was on its applicability to warranties and remedies in the software context. *Id.* at 130. Later, the concern expanded to encompass other intellectual property concepts as well. *Id.* at 131. To illustrate an example of the changes in commerce that have emerged since the Code was originally drafted, Professor Nimmer poses the following question: “What . . . is the role of a ‘right to inspect’ before payment . . . in a contract to view a motion picture at a theatre?” Nimmer, *supra* note 18, at 21. For example, once one has “inspected” a motion picture and other similar goods, the seller cannot reclaim the product. He may take the physical movie reel, but he cannot reclaim the picture that the buyer saw with his own eyes.

59. Riva F. Kinstlick, *Overview of UCITA*, 673 PLI/PAT 59, 65 (2001). Computer goods present different challenges than tangible goods, most of which cannot be copied, at least in the short term, and usually cannot be pirated. *Id.* at 66. Such concerns did not commonly appear in transactions occurring before the rise of use of electronic data.

60. *Id.* at 65.

61. *See, e.g., Rocky Mountain Microsystems, Inc. v. Pub. Safety Sys., Inc.*, 989 F. Supp. 1352 (D. Colo. 1998); *Chatlos Sys., Inc. v. Nat'l Cash Register Corp.*, 479 F. Supp. 738 (D.N.J. 1979); *Richard Haney Ford, Inc. v. Ford Dealer Computer Servs.*, 461 S.E.2d 282 (Ga. Ct. App. 1995). The application of Article 2 by analogy, as described in note 27, *supra*, appears to continue in those courts which hold that pure information without a tangible component is also governed by Article 2.

62. *See supra* notes 59–60 and accompanying text.

63. *Id.* *See also* Nimmer, *supra* note 18, at 21 (arguing that while judges might be able to bend and stretch the UCC far enough to encompass new types of transactions, such an analogy approach would not produce necessary consistency or predictability in the outcomes of litigation). *See generally* Nimmer, *Through the Looking Glass*, *supra* note 27, at 266.

in the marketplace.⁶⁴ The amendment process was designed to “update the Article to accommodate electronic commerce and to reflect development of business practices, changes in other law, and interpretive difficulties of practical significance.”⁶⁵ The process lasted more than ten years,⁶⁶ but both ALI and NCCUSL have finally given the formal approval necessary to amend the Code.⁶⁷

In the initial stages of the amendment attempt, Professor Raymond Nimmer proposed a “hub and spoke” approach.⁶⁸ This approach left general contract law principles in place to govern all types of sales.⁶⁹ While the general principles provided the hub, the “licensing of intangibles and the sale of goods would be treated in separate chapters,”⁷⁰ acting as spokes of the hub.⁷¹ This method of revision recognized that “in the generic area of contracting, there was a great deal of overlap between contracts for the transfer of goods and contracts for the transfer of information.”⁷² Although certain facets of information contracts would require different provisions, the similarities “[justif]ied a core set of provisions governing both goods and information contracts, with special rules as necessary to deal with the unique aspects of each.”⁷³

64. The American Law Institute, *New Prefatory Note and Language on Scope for UCC Article 2 Amendments Approved by NCCUSL*, at <http://www.ali.org/pr081402NCCUSL.htm> (last visited Jan. 26, 2003).

65. *Id.* “Revolutions in telecommunications and computer technology have made geography increasingly irrelevant to modern commerce. The Internet enables small firms as well as large ones to provide products and services throughout the country and around the world.” UNIF. COMPUTER INFO. TRANSACTIONS ACT, *supra* note 30, at Prefatory Note.

66. The ALI Reporter (Summer 2002), *UCC Update*, at http://www.ali.org/ali/R2404-3_UCC.htm (last visited Jan. 26, 2003).

67. The amended code can now be sent to the states for proposal and enactment because the membership of both NCCUSL and ALI have approved identical drafts. Kinstlick, *supra* note 59, at 65. See also Amelia H. Boss, *Summary of NCCUSL Changes to the Scope of Article 2*, The American Law Institute, at <http://www.ali.org/forum4/902SCOPE.htm> (last visited Jan. 26, 2003).

68. Kinstlick, *supra* note 59, at 66.

69. *Id.* According to Professor Nimmer, there are several generic themes underlying contract law. One theme is a requirement that interpretation of contracts apply concepts of practical construction. Nimmer, *supra* note 18, at 19. This means that courts are to “consider usage of the trade, course of dealing, and course of performance in interpreting [an] agreement and its terms.” *Id.* See generally U.C.C. § 2-208(1) (1998). Another central theme is vesting courts with the authority to nullify a contractual term believed to be unconscionable. Nimmer, *supra* note 18, at 20. The authority to invalidate unconscionable terms is to be used when “in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.” U.C.C. § 2-302 cmt. 1 (1998). Beyond generic themes, however, provisions drafted with a focus on sales law become much less applicable to other types of contracts. Nimmer, *supra* note 18, at 21.

70. Kinstlick, *supra* note 59, at 66.

71. *Id.*

72. Boss, *supra* note 1, at 131.

73. *Id.* at 132.

After a relatively brief attempt at making the proposal work, the leadership of NCCUSL rejected the hub and spoke approach.⁷⁴ The abrupt abandonment was justified not on the basis that “information and software were significantly different,”⁷⁵ but “on the basis that the logistics of restructuring Article 2 into a hub with spokes would require extraordinary time and resources.”⁷⁶

During the same period that ALI and NCCUSL began attempts to amend Article 2, the software industry also underwent a major transformation.⁷⁷ Large mass-marketing software publishers, such as Microsoft, were beginning to dominate small custom developers.⁷⁸ These large publishers were also starting to exercise political influence over the drafting process.⁷⁹

After rejecting the hub and spoke proposal, NCCUSL’s Executive Committee adopted the Business Software Alliance’s⁸⁰ proposal to draft a separate article designed to govern software contracts.⁸¹ The Alliance’s proposal argued that, because computer information usually took the form of a conferred license rather than an outright sale, Article 2 did not have the flexibility to deal with the issues involved.⁸² This distinction, according to Professor Nimmer, was based on the fact that “information

74. *Id.* The decision was made with little input from the ALI, NCCUSL’s supposed partner in the revision process. *Id.*

75. *Id.*

76. *Id.* It is somewhat ironic that the hub –and spoke approach was abandoned to save time and effort, especially since the revision remained in the works for over ten years. Boss finds it likely that an “unarticulated motive” was behind the departure from the hub and spoke approach, namely pressure from the software industry. *Id.* Article 2 was seen as liberal, in contrast to the conservative ideas and nature of software companies. *Id.* at 133.

77. Kinstlick, *supra* note 59, at 66.

78. *Id.*

79. *Id.*

80. Founded in 1988, the Business Software Alliance has programs in 65 countries across the globe. The Business Software Alliance, *at* <http://www.bsa.org> (last visited Jan. 26, 2003). The Business Software Alliance describes itself as “the voice of the world’s commercial software before governments and in the international marketplace.” *Id.* Members of the Alliance “represent the fastest growing industry in the world,” and include such notable names as Microsoft, Apple, and Adobe Systems. *Id.* The purpose of the Business Software Alliance is to “educate[] consumers on software management and copyright protection, cyber security, trade, e-commerce and other internet-related industries.” *Id.* For a complete listing of all world wide members, *see* The Business Software Alliance, *BSA Members*, *at* <http://www.bsa.org/usa/about/members> (last visited Jan. 26, 2003).

UCITA is accused of heavily favoring the interests of software sellers and manufacturers, which seems to be a legitimate concern given the level of contribution and input from software companies. *See infra* notes 97–102 and accompanying text.

81. Kinstlick, *supra* note 59, at 66.

82. *Id.*

and other license contracts entail far different commercial and practical considerations than can be addressed under a sale of goods model.”⁸³

The separate section, Article 2B, was formally named “Licensing.”⁸⁴ Unfortunately, the two organizations could not agree on the language of the proposed amendment.⁸⁵ Although NCCUSL was slated to approve the new section, ALI delayed taking any action on the proposed section because of “significant reservations about both some of its key substantive provisions and its overall clarity and coherence.”⁸⁶ In 1999, ALI withdrew its support from the project,⁸⁷ citing concerns “including matters of substance, process, and product.”⁸⁸

Rather than letting the concept of a code governing software contracts disappear entirely, NCCUSL went forward with the project, renaming it the Uniform Computer Information Transactions Act (“UCITA”).⁸⁹ The Act was designed to “codif[y] rules governing commercial transactions, usually licenses, in computer information.”⁹⁰ These rules were designed to encompass “software licensing, online access and other transactions in computer information.”⁹¹

Despite its attempt to reform the law governing modern computer transactions, UCITA has not been met with open arms.⁹² In fact, UCITA

83. *Id.* This is in direct contrast to the hub and spoke model, which was based on the belief that the amount of overlap between contracts governing goods and information was substantial enough to justify a core group of provisions regulating both, with differences being addressed by different spokes.

84. Boss, *supra* note 1, at 135.

85. Kinstlick, *supra* note 59, at 67 (citing The ALI Reporter (Spring 1999), at http://www.ali.org/ali/R2103_Art2b.htm).

86. *Id.*

87. Boss, *supra* note 1, at 135.

88. Kinstlick, *supra* note 59, at 67. The committee further stated that “[i]n terms of product, the draft . . . sacrificed the flexibility necessary to accommodate continuing fast-paced changes in technology, distribution, and contracting. In terms of process, the guiding principle appeared to be the Conference’s desire to expedite approval and commence enactment of the draft.” *Id.*

89. NCCUSL did not have the option of unilaterally amending Article 2, because approval must be given by the bodies of both NCCUSL and ALI. See *supra* note 67. NCCUSL was not, however, restricted from undertaking the abandoned project on its own, as long as it was formed as a separate law to those already existing as part of the UCC. UCITA should not be confused with the Uniform Electronic Transactions Act (“UETA”), which governs individuals who contract electronically. Boss, *supra* note 1, at 158.

90. Kinstlick, *supra* note 59, at 67. The language of UCITA is thought to have been heavily influenced by the software industry who sought to make shrink-wrap licenses enforceable. *Id.*

91. Americans for Fair Electronic Commerce Transactions *AFFECT: What is UCITA? Frequently Asked Questions*, at http://www.ucita.com/what_faq.html (last visited Jan. 26, 2003).

92. See generally Americans for Fair Electronic Commerce Transactions, at <http://www.ucita.com> (last visited Jan. 26, 2003). A group known as Americans for Fair Electronic Commerce Transactions (“AFFECT”) has been one of UCITA’s most outspoken opponents. *Id.* The group has launched a full-scale attack on UCITA, encouraging others to become involved and resist

has thus far been enacted in only two states: Virginia and Maryland.⁹³ However, even these two states which have adopted UCITA have taken steps to determine what amendments to the Act are desirable⁹⁴ and to discuss further legislation.⁹⁵ While individual state amendments to UCITA could improve consumer rights, any substantial change in the language of UCITA will destroy the entire purpose of the Act: to have uniformity in all states.⁹⁶

what the group sees as an extremely unfair and disadvantageous law. *Id.* AFFECT argues that "American copyright law has balanced the interests of creators with the needs of the society to use and create new information. UCITA upsets this balance." Americans for Fair Electronic Commerce Transactions, *AFFECT: What is UCITA? Myths and Facts*, at http://www.ucita.com/what_myths.html (last visited Jan. 26, 2003). See also <http://www.badsoftware.com> (maintained by Cem Kaner, Professor of Software Engineering at Florida Institute of Technology) (last visited Jan. 26, 2003).

93. Americans for Fair Electronic Commerce Transactions, *Myths and Facts*, *supra* note 91. According to AFFECT, UCITA has been opposed or criticized by 32 State Attorneys General, the Federal Trade Commission, 11 different software developers, six different consumer advocates (one of the six is an individual), more than 12 different industry associations, five separate library organizations, two independent information content developers, 50 intellectual property professors, 43 contract law professors, and one intellectual property law bar association. *Id.* See Americans for Fair Electronic Commerce Transactions Website, *AFFECT: What is UCITA? What Others Say—Comprehensive List*, at http://www.ucita.com/say_list.html (last visited Jan. 26, 2003), for a complete list of organizations which oppose UCITA. But see Kinstlick, *supra* note 59, at 75 (stating that motion picture and broadcast industries dropped opposition to UCITA after "securing packages of exemptions they had sought for some years").

Although only Virginia and Maryland have actually enacted UCITA, several other states have shown some form of interest regarding UCITA. See The American Library Association, at <http://www.ala.org/ala/washoff/WOissues/copyrightb/ucita/states.htm> (last visited Feb. 8, 2004). States such as Texas, Washington, Oregon, Oklahoma, New Hampshire, Nevada, and Arizona have had legislation introduced in the past. *Id.*

94. Americans for Fair Electronic Commerce Transactions, *Myths and Facts*, *supra* note 91.

95. *Id.* The Virginia legislature alone received 74 proposals on how UCITA should be amended for Virginia law. *Id.* One additional section that was added deals with licenses to nonprofit libraries, archives, or educational institutions. The addition, in pertinent part, reads:

(a) To the extent that the conduct is not otherwise unlawful or restricted under the Copyright Act, 17 U.S.C. § 101 et seq., or other law, in a standard form contract for the use of a tangible copy of informational content to a licensee that is a nonprofit library or archive or a nonprofit educational institution, the licensee may, without any purpose of direct or indirect commercial advantage: (1) make the tangible copy available to library or archive users . . . ; (2) make a copy of the tangible copy for archival or preservation purposes; (3) engage in inter-library lending . . . ; and (4) make classroom and instructional use of the tangible copy.

(b) The provisions of subsection (a) may be varied by a term in a standard form contract only if: (1) the term varying the provision is conspicuous; (2) the nonprofit library, archive or educational institution specifically manifests assent to the term. . . .

VA. CODE ANN. § 59.1-503.10 (Michie 2001). The Virginia provision appears to be an attempt to eliminate the troubles for libraries that are so strongly pointed to by AFFECT. See *supra* note 92.

96. Americans for Fair Electronic Commerce Transactions *AFFECT: What is UCITA? What's Wrong With UCITA?*, at http://www.ucita.com/what_problems.html (last visited Jan. 26, 2003). Consumers will still be dealing with a large number of differing laws, requiring knowledge of each in order to properly protect their rights in transactions.

Some states, such as Iowa, Vermont, West Virginia,⁹⁷ and North Carolina,⁹⁸ have gone so far as to take proactive steps by enacting “bomb-shelter” laws to ensure that UCITA will never be applied to consumers in those states.⁹⁹ The main impetus behind such statutes is that UCITA allows software licensors to select the law of any state to resolve license disputes and to choose any state as the location where disputes will be resolved.¹⁰⁰ Without bomb-shelter laws, even citizens of states that choose not to enact UCITA will be subject to UCITA’s choice of law provision.¹⁰¹ The negative treatment states give UCITA is likely based on UCITA’s

97. See W. VA. CODE § 55-8-15 (Michie Supp. 2003). The West Virginia statute states that:

A choice of law provision in a computer information agreement which provides that the contract is to be interpreted pursuant to the laws of a state that has enacted uniform computer information transactions act, as proposed by the national conference of commissioners on uniform state laws, or any substantially similar law, is voidable and the agreement shall be interpreted pursuant to the laws of this state if the party against whom enforcement of the choice of law provision is sought is a resident of this state or has its principal place of business located in this state. For purposes of this section, a "computer information agreement" means an agreement that would be governed by the uniform computer transactions act or substantially similar law as enacted in the state specified in the choice of laws provision if that state's laws were applied to the agreement.

Id.

98. See N.C. GEN. STAT. § 66-329 (2003). The North Carolina statute is very similar to the West Virginia provision; *see supra* note 97. The North Carolina statute states:

A choice of law provision in a computer information agreement which provides that the contract is to be interpreted pursuant to the laws of a state that has enacted the Uniform Computer Information Transactions Act, as proposed by the National Conference of Commissioners on Uniform State Laws, or any substantially similar law, is voidable and the agreement shall be interpreted pursuant to the laws of this State if the party against whom enforcement of the choice of law provisions is sought is a resident of this State or has its principal place of business located in this State. For purposes of this section, a "computer information agreement" means an agreement that would be governed by the Uniform Computer Information Transactions Act or substantially similar law as enacted in the state specified in the choice of law provisions if that state's law were applied to the agreement. This section may not be varied by agreement of the parties. This section shall remain in force until such time as the North Carolina General Assembly enacts the Uniform Computer Information Transactions Act or any substantially similar law and that law becomes effective.

N.C. GEN. STAT. § 66-329 (2003).

99. See the American Library Association, at <http://www.ala.org/ala/washoff/Woissues/copyright/ucita/states.htm> (last visited Feb. 8, 2004). See also Jean Braucher, *When Your Refrigerator Orders Groceries Online and Your Car Dials 911 After an Accident: Do We Really Need New Law for the World of Smart Goods?*, 8 WASH. U. J.L. & POL'Y 241, 243 n.10 (2002). Such bomb-shelter statutes protect residents of enacting states from being subjected to the choice of law provisions of UCITA. *Id.* at 243.

Another possible bomb-shelter state is Massachusetts, where Representative Mariano introduced an anti-UCITA bill in December of 2002.

100. ALA American Library Association Washington Office, *UCITA Flash Report: Some States Targeted Early for 2003 Introductions*, January 2003.

101. *Id.*

liberal provisions, which overwhelmingly favor sellers, and the lack of recourse available to buyers.¹⁰²

Still convinced that the law of modern consumer transactions needed to be updated and unsupportive of UCITA, ALI resumed its efforts to amend Article 2.¹⁰³ The primary issues to be resolved were “articulating what combinations of goods and computer programs should be considered within the scope of Article 2, the limitations on the application of Article 2 to the computer programs included in ‘smart goods,’ and the extent to which Article 2 should apply to mixed transactions other than smart goods.”¹⁰⁴ One common example is an automobile containing a computer chip that controls the automatic braking system of the vehicle:¹⁰⁵ “The consensus was that, in the event of a failure of the breaking [sic] system, the buyer of the car be able to proceed under Article 2, and not have its remedies depend upon its proof of whether the hardware or the software was the cause.”¹⁰⁶

There have been many developments along the way to reaching formal approval. Numerous drafts were considered. “[S]ome . . . attempted to draw clear, hard lines; others were more flexible. Some drafts included detailed tests and careful definitions; others did not. Some drafts had extensive black letter outlining covered transactions; others were short and simple.”¹⁰⁷ The Drafting Committee eventually determined that the proposed amendments should not include a modification of Article 2’s

102. Braucher, *supra* note 99, at 250 (highlighting UCITA’s favoritism of software producers, shown through “explicit approval to holding back terms” until after a product is received, low standard of performance that “cuts off certain customers’ right to exit the transaction,” and, in some cases, “not allow[ing] recovery of consequential and incidental damages”); Kinstlick, *supra* note 59, at 68–74 (mentioning unfair default rules such as validation of shrink wrap licenses, limited duration of licenses, limited number of eligible users, restrictions on transferability of licenses, and acceptance of self-help measures used by sellers if they believe licensees have violated the rules); Americans for Fair Electronic Commerce Transactions, *AFFECT: What is UCITA? What’s Wrong With UCITA?*, at http://www.ucita.com/what_problems.html (last visited Jan. 26, 2003) (citing problems including end user liability for infringement on a third party’s intellectual property rights, allowing license fees to be required after the software is used for a designated period of time, enabling sellers to avoid suit for breach of contract, and allowing sellers to remotely shut off the software necessary to operate a buyer’s computer system).

103. The American Law Institute, *New Prefatory Note and Language on Scope for UCC Article 2 Amendments Approved by NCCUSL*, at <http://www.ali.org/pr081402NCCUSL.htm> (last visited Jan. 26, 2003).

104. Amelia H. Boss, *Summary of NCCUSL Changes to the Scope of Article 2*, The American Law Institute, at <http://www.ali.org/forum4/902SCOPE.htm> (last visited Jan. 26, 2003).

105. Boss, *supra* note 1, at 145 n.47.

106. *Id.*

107. Boss, *supra* note 104.

scope.¹⁰⁸ ALI membership approved the proposed amendments, presented without a change in Article 2's scope, at its annual meeting in 2001.¹⁰⁹

The ALI-approved amendments were then sent to NCCUSL, which, though the primary backer of UCITA, had again teamed up with ALI in an attempt to amend Article 2.¹¹⁰ At its meeting, NCCUSL made "significant changes to the scope provision of Article 2."¹¹¹ The new provision "attempted to articulate a line between those transactions within the scope of Article 2 and those outside."¹¹² The stated scope was still defined as "transactions in goods,"¹¹³ but the definition of goods was changed to expressly exclude the term "information."¹¹⁴ This exclusion of information was meant only to encompass "information not associated with goods."¹¹⁵

108. Boss, *supra* note 1, at 146.

109. *Id.*

110. The ALI Reporter (Summer 2002), *UCC Update*, at http://www.ali.org/ali/R2404_3_UCC.htm (last visited Jan. 26, 2003).

111. *Id.* NCCUSL also made two other unrelated changes to other provisions affecting statute of frauds and liquidated damages. The American Law Institute, *Report of ALI Council Consideration of UCC Projects*, at http://www.ali.org/forum4/ALIReport_Liebman1002.htm (last visited Jan. 26, 2003).

112. Amelia H. Boss, *Summary of NCCUSL Changes to the Scope of Article 2*, The American Law Institute, at <http://www.ali.org/forum4/902SCOPE.htm> (last visited Jan. 26, 2003).

113. National Conference of Commissioners on Uniform State Laws, *Amendments to Uniform Commercial Code Article 2—Sales*, at <http://www.law.upenn.edu/bll/ulc/ucc2/2002act.htm> (Aug. 2, 2002).

114. *Id.* The amendment defines "goods" as:

[A]ll things that are movable at the time of identification to a contract for sale. The term includes future goods, specifically manufactured goods, the unborn young of animals, growing crops and other identified things attached to realty as described in Section 2-107. The term does not include information, the money in which the price is to be paid, investment securities under Article 8, the subject matter of foreign exchange transactions, and choses in action.

Id. at § 2-103(k). See also Amelia H. Boss, *Summary of NCCUSL Changes to the Scope of Article 2*, The American Law Institute, at <http://www.ali.org/forum4/902SCOPE.htm> (last visited Jan. 26, 2003). In the amendment, the definition of goods was moved from Section 2-105 to Section 2-103. National Conference of Commissioners on Uniform State Laws, *Amendments to Uniform Commercial Code Article 2—Sales*, at <http://www.law.upenn.edu/bll/ulc/ucc2/2002act.htm> (last modified August 2, 2002). In addition, a similar change was made to the definition of goods as defined in Article 2A: Leases. The ALI Reporter (Summer 2002), *UCC Update* at http://www.ali.org/ali/R2404_3_UCC.htm (last visited Jan. 26, 2003).

115. The ALI Reporter (Summer 2002), *UCC Update* at http://www.ali.org/ali/R2404_3_UCC.htm (last visited Jan. 26, 2003). Excluding only information not associated with goods leaves information that is associated with goods within the possible scope of Article 2. The fact that minimal further guidance was given regarding mixed products is a large contributor of the uncertainty regarding where the scope will eventually settle.

While NCCUSL did not approve the amendments in 2001,¹¹⁶ it gave the necessary approval at its 2002 annual meeting.¹¹⁷

The approval recognized the fact that, in general, Article 2 continues to serve very well the needs of those engaged in commercial transactions.¹¹⁸ The proposed amendments also reflected, however, “an inability to reach reasonable consensus on some issues.”¹¹⁹ On contested issues, the responsibility was left to the courts to “continue to develop the law through cases that respond to the circumstances under which the issues are presented for resolution. . . .”¹²⁰

The Council of ALI then considered and approved the amendments, as modified by NCCUSL, at its fall meeting.¹²¹ Because the text differs from the text approved by ALI at its 2001 annual meeting,¹²² the proposal again went before the full body of the ALI at its 2003 annual meeting, where it was approved.¹²³ Approved amendments are then proposed for enactment by the states.¹²⁴

116. Amelia H. Boss, *Summary of NCCUSL Changes to the Scope of Article 2*, The American Law Institute, at <http://www.ali.org/forum4/902SCOPE.htm> (last visited Jan. 26, 2003).

117. *Id.* NCCUSL was apparently willing to approve to proposed amendments in 2001, but ALI members of the Drafting Committee stated they would not recommend ALI approval of a draft which included the new scope provision. *Id.* The Drafting Committee considered other options and in 2002 presented a new proposal with a modified definition of goods, which a majority of ALI members of the Committee supported. *Id.*

118. The American Law Institute, *New Prefatory Note and Language on Scope for UCC Article 2 Amendments Approved by NCCUSL*, at <http://www.ali.org/pr081402NCCUSL.htm> (last visited Jan. 26, 2003). The Prefatory Note bases the success of Article 2 on its flexibility in allowing parties to adapt various provisions by agreement, “including course of performance, course of dealing and usage of trade.” *Id.* Success was also attributed to the courts, which have “appl[ied] its provisions sensibly.” *Id.*

119. *Id.*

120. *Id.* The Prefatory Note also indicated that “the fact that a particular issue is not addressed by these amendments does not necessarily reflect approval or disapproval of existing cases addressing that issue.” *Id.*

121. The ALI Reporter (Fall 2002), *Council Approves Article 2 Amendments*, at http://www.ali.org/ali/R2501_01_Art2.htm (last visited Apr. 2, 2004). The Council of ALI is responsible for giving preliminary approval or disapproval and sending the recommendation on to the full body of ALI. *Id.*

122. Amelia H. Boss, *Summary of NCCUSL Changes to the Scope of Article 2*, The American Law Institute, at <http://www.ali.org/forum4/902SCOPE.htm> (last visited Jan. 26, 2003). The text differs in three significant ways: (1) scope, (2) statute of frauds, and (3) liquidated damages. *Id.*

123. The ALI Reporter (Summer 2003), *Institute Approves UCC Drafts*, at http://www.ali.org/ali/R2504_02-drafts.htm (last visited Apr. 2, 2004).

124. Amelia H. Boss, *Summary of NCCUSL Changes to Scope of Article 2*, The American Law Institute, at <http://www.ali.org/forum4/902SCOPE.htm> (last visited Jan. 26, 2003).

III. ANALYSIS

If the amendment excluding information from the definition of goods is enacted by the states, the scope of Article 2 will initially be very uncertain.¹²⁵ This predicted uncertainty is due to the fact that the Code will contain no guidance as to what constitutes information.¹²⁶ ALI and NCCUSL have already indicated that it will be for the courts to determine a definition¹²⁷ and to apply it in deciding what products should be considered information rather than goods.¹²⁸

The treatment of electronic transfers of information, such as software, downloaded items, and other forms of information is not likely to be disputed.¹²⁹ Pure data and downloaded products and files are clearly information, since they have no tangible existence.

Mixed goods, on the other hand, will once again provide a problem for courts.¹³⁰ Like their predecessors that combined goods and services,¹³¹ products that contain both a good and an information component fall neither clearly within Article 2 nor clearly without.¹³² NCCUSL suggested in its proposed Preliminary Comment to the amended Article 2 that “the sale of ‘smart goods’ such as an automobile is a transaction in goods fully within Article 2 even though the automobile contains many computer programs. On the other hand, an architect’s provision of architectural plans

125. The amendment is made to clarify Article 2’s scope, which it will do to the extent that information is clearly excluded. The problem, however, will lie in the initial application of the new scope. It is difficult to predict how the courts will articulate the definition of information, and what distinctions will be drawn between pure information and information associated with a good.

126. The amendment deliberately fails to articulate a definition of information. *See supra* notes 110–24. Perhaps one reason for the exclusion is to enable the definition of information to change as the field of data and electronics expands. Such flexibility may be desired in the long term, but the short-term effects of choosing to forego a definition of information will likely cause differences of opinion and judicial headaches.

127. The American Law Institute, *New Prefatory Note and Language on Scope for UCC Article 2 Amendments Approved by NCCUSL*, at <http://www.ali.org/pr081402NCCUSL.htm> (last visited Jan. 26, 2003).

128. *Id.*

129. *Id.* In stating that the amended Article 2 would not apply to electronic transfers of information, NCCUSL’s preliminary comment cites *Specht v. Netscape*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001), as an example of products to which the Article would not apply. *Id.* ALI has also taken the stance that “Article 2 would not directly apply to a download of information.” The ALI Reporter (Summer 2002), *UCC Update*, at http://www.ali.org/ali/R2404_3_UCC.htm (last visited Jan. 26, 2003). *See also* Lorin Brennan, *Why Article 2 Cannot Apply to Software Transactions*, 38 DUQ. L. REV. 459 (2000).

130. The American Law Institute, *New Prefatory Note and Language on Scope for UCC Article 2 Amendments Approved by NCCUSL*, at <http://www.ali.org/pr081402NCCUSL.htm> (last visited Jan. 26, 2003).

131. *See supra* notes 35–55 and accompanying text.

132. *Id.*

on a diskette would not be a transaction in goods.”¹³³ The Prefatory Note states that “smart goods” such as cars will be covered by Article 2, but does not articulate why this is so.¹³⁴ This leaves the question of where to draw the line regarding what constitutes information. Another question that should be asked ponders how consumers are to distinguish between those products covered by Article 2 and those that are not. NCCUSL’s Comment goes on to state that, “[w]here a transaction includes both the sale of goods and the transfer of rights in information . . .,”¹³⁵ courts have the responsibility of, yet again, devising a workable test to determine which law governs.¹³⁶ The test, and its subsequent determination, is to be based on all the facts and circumstances surrounding the transaction.¹³⁷

Three options appear to be available: (1) exclude all goods incorporating information from Article 2 coverage, (2) include all goods incorporating information in Article 2 coverage, or (3) examine each situation on a case-by-case basis.

The first option the courts could take would be to exclude all products containing information from the scope of Article 2. This rule would exclude information-only products, as well as mixed-goods products that include information. An all-exclusive approach is not likely to be taken, however, because it would exclude many transactions that consumers expect to be covered by Article 2.¹³⁸ An automobile, for example, is a good that most consumers would expect to be under the protection of Article 2. The bottom line, however, is that NCCUSL has stated that

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* The courts are back to a similar situation as the situation faced in determining governing law in transactions involving products consisting of both good and service components. *See supra* notes 35–55 and accompanying text.

137. Amelia H. Boss, *Summary of NCCUSL Changes to the Scope of Article 2*, The American Law Institute, at <http://www.ali.org/forum4/902SCOPE.htm> (last visited Jan. 23, 2003).

138. An exclusion of this sort is in line with AFFECT’s arguments against UCITA. Under UCITA, a computer is defined as “an electronic device that accepts information in a digital or similar form and manipulates it for a result based on a sequence of instructions.” Americans for Fair Electronic Commerce Transactions, *AFFECT: What is UCITA? Glossary of Terms*, at http://www.ucita.com/what_glossary.html (last visited Jan. 26, 2003).

The importance of such a definition is that many products consumers would consider goods and would expect to be governed by the UCC could in fact be considered computers and therefore fall outside the scope of the amended Article 2. *Id.* AFFECT gives the example of a pacemaker—a device most consumers would consider a tangible good regulated by the UCC. *Id.* In actuality, because a pacemaker uses software to regulate heart beats, it would be considered a computer under the UCITA definition. *Id.* Without an articulated definition of information contained in the text of amended Article 2, it is foreseeable that outside definitions, including the UCITA definition, may influence courts’ decisions as to the scope of Article 2.

Article 2 will apply to automobiles.¹³⁹ Therefore, to implement an all-exclusive approach, the courts would have to completely disregard NCCUSL's guidance.¹⁴⁰

The second option available to courts is to include all products containing information in the scope of Article 2. An all-inclusive approach has some initial appeal. The fact that so few states have adopted UCITA indicates that an alternate governing law is desired in those jurisdictions. An application of general contract law is possible,¹⁴¹ but would not give consumers the confidence they may otherwise have under the formal governance of the UCC.

The all-inclusive approach presents a problem, however, because including all products would mean including those which consisted of solely information. This is an unworkable rule, because the purpose of modifying the language of Article 2 was to exclude information.¹⁴² Additionally, NCCUSL's Preliminary Comment expressly states that "Article 2 would not directly apply to an electronic transfer of information. . . ."¹⁴³ This option, therefore, would have to be modified to include only those products that are mixed. Information-only products would be excluded, while goods containing any component of information, no matter how large or how small, would be automatically included and thus governed by Article 2. The problem with an all-inclusive approach is that too many products that the amendment meant to exclude would be included.¹⁴⁴

139. The American Law Institute, *New Prefatory Note and Language on Scope for UCC Article 2 Amendments Approved by NCCUSL*, at <http://www.ali.org/ali/pr081402NCCUSL.htm> (last visited Jan. 26, 2003).

140. *Id.*

141. This would, in effect, be very similar to applying Article 2, since its influence pervades nearly all aspects of general sales law. *See supra* note 27 and accompanying text.

142. See Amelia H. Boss, *Summary of NCCUSL Changes to the Scope of Article 2*, The American Law Institute, at <http://www.ali.org/forum4/902SCOPE.htm> (last visited Jan. 26, 2003). The stated purpose of the amendment was to upgrade the law to accommodate modern computer transactions, which was determined to be most plausible through an explicit elimination of information from the definition of goods. *Id.*

143. The American Law Institute, *New Prefatory Note and Language on Scope for UCC Article 2 Amendments Approved by NCCUSL*, at <http://www.ali.org/ali/pr081402NCCUSL.htm> (last visited Jan. 26, 2003).

144. The driving force behind the amendments to Article 2's scope was to adapt the Code to new types of transactions that had emerged. *Id.* The amendments were meant to update the Article to "accommodate electronic commerce and to reflect development of business practices, changes in other law, and interpretive difficulties of practical significance." *Id.* If courts were to continue automatically applying Article 2 to mixed goods transactions, the entire effort put into creating the amendments will have been wasted.

A third option also exists for courts.¹⁴⁵ Rather than adopting a bright-line rule including or excluding information, courts could select the governing law on a case-by-case basis. This option is, in most ways, simply an extension of the predominant purpose test.¹⁴⁶ A case-by-case examination would have courts looking at various factors¹⁴⁷ and determining the underlying purpose for initially entering into the contract. If the purpose was to sell the goods, Article 2 applies; if the purpose was to sell information, Article 2 does not.¹⁴⁸

IV. PROPOSAL

After considering the options available for courts, this Note proposes that the predominant purpose test be applied to products comprised of both goods and information.

Courts are already familiar with this method of determining applicable law.¹⁴⁹ For many years the predominant purpose test has been used to discern which products that also contain services should be considered goods and therefore which products should be governed by Article 2.¹⁵⁰ Judges have extensive experience analyzing the relevant factors,¹⁵¹ weighing those factors,¹⁵² and formulating a reasoned decision as to what law applies.¹⁵³ Extending this process to products containing both goods and information will assist in providing certainty to consumers, as various courts will not be interpreting and applying a new standard in differing ways. Instead, the test used will be consistent among judicial divisions. While time is necessary for case law to develop, once precedent and guidance do evolve, buyers and sellers will have a more concrete set of decisions that can help guide behavior in commercial transactions.

Allowing for flexibility,¹⁵⁴ as the predominant purpose test does, would also discourage law-shopping. If the determination of what products were

145. The gravamen test is also an option, but because it has been used by only a minority of the courts in the goods-services context, it is unlikely to be considered more applicable in the current situation. *See supra* notes 52–55 and accompanying text.

146. *See supra* notes 38–51 and accompanying text.

147. Various factors would be considered toward the end of understanding the background characteristics of the contract. The contract could then be analyzed to see if, based on policy considerations, Article 2 should govern. *See supra* note 40 and accompanying text.

148. *See supra* notes 38–45 and accompanying text.

149. *See supra* notes 38–51 and accompanying text.

150. *See supra* notes 38–51 and accompanying text.

151. *Id.*

152. *Id.*

153. *Id.*

154. Allowing for flexibility was one of the stated reasons for declining to expressly define

governed by Article 2 was made by a hard-and-fast rule, parties would then have an incentive to structure the transaction such that it served their own individual interests and provided a greater personal benefit. If all products containing information were included, for example, and an information seller would profit more by having Article 2 apply, the seller could easily manipulate governing law. By either characterizing the product as a good which contained information or by including a minute tangible item which qualified as a good, the entire product, even though it was comprised substantially of information, would be governed by Article 2. Law-shopping by modifying the components of a product is not something that courts should promote, encourage, or allow. Law-shopping ignores the economic realities and the underlying motivation of the transaction.

Additionally, the predominant purpose test would take into account the policy reasons for which the UCC was originally drafted.¹⁵⁵ The initial purpose for the Code was to provide consumers with laws which would be applied uniformly in regions of the country in which they may do business.¹⁵⁶ The exclusion of information is primarily due to the fact that the provisions of Article 2 simply do not lend themselves to products such as software and data.¹⁵⁷ Pure information and similar types of products will be best served if governed by a separate law.¹⁵⁸

The provisions of Article 2 do apply, however, to some products comprised of a portion of information. A car, for example, while containing computer programs that perform functions essential for driving, is still capable of being inspected for quality assurances, accepted as complete by a purchaser, or returned to a seller without fear that it has been copied or pirated.¹⁵⁹ Using the predominant purpose test, a court

information. Using the flexibility of the predominant purpose test will also help in achieving the vision of the amendment's drafters.

155. See *supra* notes 18–34 and accompanying text.

156. Nimmer, *supra* note 18, at 4–5.

157. See *supra* notes 56–63 and accompanying text. These products cannot be inspected beforehand and cannot be returned after delivery because there is no way to guarantee that the product has not been duplicated. Pure informational products are able to be copied easily and oftentimes are not even owned by a consumer, but instead are licensed. Kinstick, *supra* note 59, at 66. The guarantees of Article 2 cannot be readily applied in situations such as these.

158. The law that will eventually govern transactions involving pure information is still unclear. UCITA was an attempt to create a separate law to govern these alternate types of transactions. See *supra* notes 89–102 and accompanying text. Unfortunately, UCITA has not been accepted by more than a handful of states. *Id.* Whether UCITA is embraced by a greater number of states or if software and data are simply to be governed by the common law remains to be seen.

159. Consumers with access to the necessary technology can still reverse engineer and duplicate products, but that option is only available over a long-term period. The UCC, in protecting buyers and

would likely see such a car as a good—after all, the purpose of the product is to enable consumers to drive, not to determine their position via the car's Global Positioning System or to monitor the miles remaining before the gas tank is empty.

V. CONCLUSION

The amendment to Article 2 of the UCC expressly excludes information from the definition of goods.¹⁶⁰ Because information is not defined in any manner within Article 2 itself, however, the future scope of the Article's application is uncertain.¹⁶¹ The responsibility will fall on the courts to determine what constitutes information, especially in the case of a mixed product.

Using previous lessons learned, the courts will likely handle the new controversy smoothly.¹⁶² The transition should be eased because the situation can easily be analogized to one that arose in the past—products involving a combination of both goods and services.¹⁶³ For products containing both goods and services, the courts have applied a predominant purpose test.¹⁶⁴ Where mixed products combining goods and information are involved, the courts should apply the predominant purpose test as well. The underlying issues as to reasons for inclusion or exclusion from the Article's scope are the same. Just as services cannot be inspected or returned if dissatisfactory, neither can information. Courts are already familiar with the predominant purpose test and can provide consumers with that same security Karl Llewelyn envisioned more than a half-century ago: a law that would be applied uniformly across the country, so that buyers and sellers were given the protection necessary to build a thriving economy.

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sellers, is more focused on the short term; therefore, concerns over duplications which may take many months or years are not especially relevant.

160. See *supra* notes 103–24 and accompanying text.

161. *Id.*

162. See *supra* notes 35–55 and accompanying text.

163. *Id.*

164. *Id.*

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