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THE WANING IMPORTANCE OF REVISIONS TO U.C.C. ARTICLE 2

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INTRODUCTION

Just over ten years ago, the National Conference of Commissioners on Uniform State Laws (NCCUSL)[1] decided that Article 2 of the Uniform Commercial Code (U.C.C.)[2] had become dated and needed

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1 NCCUSL is a non-profit organization organized in 1892 for the purpose of drafting model state laws and persuading state legislatures to enact them. Its membership includes over 300 lawyers, judges, and law professors. It has had great success in its many endeavors. *See* Nat'l Conference of Comm'rs on Unif. State Laws, About Us, *at* http://www.nccusl.org/nccusl/aboutus.asp (last updated June 18, 2002).

2 U.C.C. art. 2 (2002).

a complete revision to meet the demands of modern commerce.[3] This determination had potentially momentous consequences. Article 2 is a model law, drafted in the 1950s and enacted in forty-nine states and various territories and possessions.[4] Because Article 2 governs almost all contracts for the sale of goods,[5] its revision could affect the legal rules applicable to consumer and non-consumer transactions worth trillions of dollars each year.[6]

Since the time of NCCUSL's decision to modernize Article 2, two successive drafting committees have worked ardently on the revision project.[7] Their labors have produced more than a dozen detailed drafts.[8] The initial drafts sought to update nearly all aspects of Article 2.[9] This approach, however, proved too controversial. NCCUSL was worried that some state legislatures might refuse to enact the contemplated changes because of potential opposition from consumer or business groups.[10] NCCUSL did not want to destroy the present uniformity of Article 2 by advancing amendments that some jurisdictions might reject.[11]

Accordingly, several years ago, NCCUSL began scaling back its plans for revision.[12] At long last, on August 5, 2002, it announced its final approval of a rather modest set of amendments to Article 2.[13]

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3 *See* Richard E. Speidel, *Introduction to Symposium on Proposed Revised Article 2*, 54 SMU L. REV. 787, 789 & n.12 (2001) (describing the decision to revise Article 2 and the appointment of a drafting committee).

4 *See* UNIF. COMMERCIAL CODE, Table of Jurisdictions Wherein Code Has Been Adopted, 1B U.L.A. 1 (Supp. 2002).

5 *See* U.C.C. § 2-102 (defining the scope of Article 2).

6 Statistics on retail and merchant wholesale sales are available from the U.S. Census Bureau. *See* U.S. Census Bureau, *at* http://www.census.gov (last updated Nov. 11, 2002).

7 *See* Speidel, *supra* note 3, at 790–91.

8 For the full text of these drafts, see Nat'l Conference of Comm'rs on Unif. State Laws, Drafts of Uniform and Model Acts, *at* http://www.law.upenn.edu/bll/ulc/ulc_frame.htm (last updated Sept. 14, 2002).

9 The 1999 Annual Meeting Draft, for example, sought to rewrite large portions of Article 2. *See id.*

10 *See* Linda J. Rusch, *A History and Perspective of Revised Article 2: The Never Ending Saga of a Search for Balance*, 52 SMU L. REV. 1683, 1684 (1999).

11 *See id.*

12 *See* Bureau of Nat'l Affairs, *NCCUSL Accepts Compromise on Scope but Rejects Bid To Finalize Art. 2 Changes*, 70 U.S.L.W. 2099, 2099–100 (Aug. 21, 2001) (describing how the drafting committee has scaled back its ambition for revising Article 2) [hereinafter *NCCUSL Accepts Compromise*].

13 For the press release announcing NCCUSL's decision, see Nat'l Conference of Comm'rs on Unif. State Laws, Revision to Key Articles of the Uniform Commercial Code Completed, *at* http://www.nccusl.org/nccusl/pressreleases/pr080502_UCC.asp (Aug. 5, 2002). For the actual text of the approved amendments, see Proposed

The proposed revisions facilitate electronic commercial transactions and make minor corrections and adjustments but otherwise avoid significant substantive changes.[14]

The approved amendments will not become law until they overcome two hurdles. First, the American Law Institute (ALI)[15], with whom NCCUSL traditionally has collaborated when drafting and revising the U.C.C., must approve the changes. This approval is highly likely but not certain because NCCUSL and the ALI have disagreed about Article 2 in the past.[16]

Second, and more significantly, state legislatures must enact the amendments. NCCUSL has an impressive record of persuading states to pass its model laws, but it may have some difficulty persuading legislators of the need to make the proposed revisions, scaled back as they are. Even if all goes well, the process will take years to complete.

The decision not to revise Article 2 from top to bottom as originally planned raises an important question: how significant is NCCUSL's failure to achieve what it set out to accomplish when it decided to undertake a complete modernization of Article 2 in 1991? In other words, will the commercial law suffer a great deal, or is the scaling back of the project not so very important?

Assessing the need to revise Article 2 is very difficult, if not impossible. Commentators and participants in the revision process have had widely different opinions.[17] This Article, accordingly, does not

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Amendments to Uniform Commercial Code Article 2—Sales (2002), *at* http://www.law.upenn.edu/bll/ulc/ucc2/annual2002.htm (last visited Nov. 6, 2002) [hereinafter Annual Meeting 2002 Draft].

14 Commentators generally agreed that more ambitious changes had little likelihood of passing. *See* Fred H. Miller & William H. Henning, *The State of the Uniform Commercial Code—2001*, SG043 ALI-ABA 1, 8–9 (2001) (discussing Article 2's uncertain future, and concluding, "While a number of fixes in amended Article 2 would be nice, an amendment effort that goes too far to cover minor matters or takes too regulatory a stance will fail").

15 The ALI is a private organization of lawyers, judges, and law professors. Founded in 1923, the ALI has devoted its energy to improving the law by publishing restatements of the law and working with NCCUSL on model laws. *See* American Law Institute, About the American Law Institute, *at* http://www.ali.org (last visited Sept. 23, 2002).

16 In 2001, the ALI approved a set of revisions, but NCCUSL withheld its approval. *See NCCUSL Accepts Compromise*, *supra* note 12, at 2099–100.

17 The decade-long work of the ALI and NCCUSL's drafting committees demonstrate the continuing support of these organizations for the idea of revising Article 2, although they have not always agreed on every detail. Prominent industry opposition came from General Electric and the Software Publishers Association. *See* Michael Rustad & Lori E. Eisenschmidt, *The Commercial Law of Internet Security*, 10 HIGH TECH. L.J. 213, 274 n.301 (1995). Professor James J. White led much of the academic opposition

argue either for or against revision. Instead, it has a more limited goal. It strives to demonstrate only that events of the past decade have made changing the law increasingly less important. In other words, it seeks to show that, however urgent the need to modernize Article 2 was in 1990, this need ironically has waned with the passage of time. Article 2 requires less change now than it did a decade ago to meet the requirements of modern commerce.

This Article supports this claim by looking at three very significant developments that have occurred since 1990. The first is the emergence of "electronic commerce"—the buying and selling of goods in transactions formed using computers.[18] The widespread introduction of a new way of creating contracts for the sale of goods, at first blush, might seem to increase the need for revising Article 2. Yet, as explained more fully below,[19] the recent growth of electronic commerce actually tends to diminish the importance of Article 2's present contract formation rules because it removes many sales transactions from the coverage of those rules. Moreover, although electronic commerce raises new legal issues, the states and federal government already have enacted separate legislation to deal with them.[20]

The second development relates to an important decision that NCCUSL made regarding the scope of Article 2. In particular, when NCCUSL began the revision process, it wanted to make Article 2 govern all aspects of contracts for the sale of computer software.[21] During the past ten years, however, NCCUSL has changed its mind. It

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to Article 2. *See* Richard E. Speidel, *Revising UCC Article 2: A View from the Trenches*, 52 HASTINGS L.J. 607, 617 n.32 (2001) (asserting that Professor White "opposed much of Revised Article 2 in print, on the floor of the ALI and NCCUSL, and in strategy sessions with strong sellers outside of the process"). For examples of criticism, see Patricia A. Tauchert, *A Survey of Part 5 of Revised Article 2*, 54 SMU L. REV. 971, 972 (2001) (noting that the strongest concerns include the application of Article 2 to software, the relationship to the Uniform Electronic Transactions Act, federal legislation on electronic contracting, and warranty rights); James J. White, *Form Contracts Under Revised Article 2*, 75 WASH. U. L.Q. 315, 322–26 (1997) (criticizing proposed revision requiring sellers to disclose all terms and obtain informed consent on form contracts); and James J. White, *Comments at 1997 AALS Annual Meeting: Consumer Protection and the Uniform Commercial Code*, 75 WASH. U. L.Q. 219 (1997) (arguing against consumer protection provisions).

18 For general information on electronic commerce, see DAVID BAUMER & J.C. POINDEXTER, CYBERLAW AND E-COMMERCE (2002); SUSAN SINGLETON, ECOMMERCE: A PRACTICAL GUIDE TO THE LAW (2001); BARRY B. SOOKMAN, COMPUTER, INTERNET AND ELECTRONIC COMMERCE LAW (1991 & Supp. 2000); and BENJAMIN WRIGHT & JANE K. WINN, THE LAW OF ELECTRONIC COMMERCE (3d ed. 2000).

19 *See infra* Part II.

20 *See infra* Part II.

21 *See infra* text accompanying notes 156–57.

now has chosen to deal with the sale of computer information through a separate body of law, the Uniform Computer Information Transaction Act (UCITA).[22] Although UCITA has obtained only minimal legislative approval and remains highly controversial,[23] the decision to treat the subject of computer software sales outside of Article 2 lessens the importance of revising Article 2 for reasons explained below.

The third development is that a decade of precedent has accumulated since NCCUSL decided to revise Article 2 in 1991. The numerous new cases have significance because NCCUSL wanted to revise Article 2 in large part to resolve unsettled issues that had arisen under its current text.[24] The numerous decisions interpreting Article 2 during the past decade have gone a long way in settling many of these questions. Article 2, accordingly, has become more certain and less in need of revision with the passage of time.

The remainder of this Article consists of five parts. Part I describes Article 2 and the lengthy attempt to revise it. Parts II, III, and IV then address the three developments that have lessened the need for rewriting Article 2. A brief conclusion follows.

I. ARTICLE 2 AND THE REVISION PROCESS

A. *Creation of the Original Article 2*

The common law governed contracts for the sale of goods for most of this nation's history.[25] In 1906, however, this tradition began to end. In that year, NCCUSL promulgated the "Uniform Sales Act,"[26] a model state law seeking to codify important sales rules.[27] Drafted by Professor Samuel Williston, the Uniform Sales Act quickly received widespread approval.[28] Eventually, the legislatures of more than two-thirds of the states enacted it.[29]

In the 1940s, inspired by the success of the Uniform Sales Act and other uniform state laws, NCCUSL and the ALI decided to create

22 *See* UNIF. COMPUTER INFO. TRANSACTIONS ACT, 7 U.L.A. 11 (Supp. 2002).

23 *See infra* Part III.

24 *See infra* Part III.

25 *See* 1 WILLIAM D. HAWKLAND ET AL., UNIFORM COMMERCIAL CODE SERIES § 1-102:3 (1998) (describing common law history).

26 *See* UNIF. SALES ACT, 1 U.L.A. 1 (1950).

27 *See* 1 HAWKLAND ET AL., *supra* note 25, § 1-103:3 n.1.

28 *See id.*

29 *See id.*

what eventually became the U.C.C.[30] The U.C.C. is a massive model law that governs a variety of commercial topics, including sales. As part of the U.C.C. drafting project, NCCUSL and the ALI chose to replace the Uniform Sales Act with what is now Article 2. NCCUSL and the ALI published the first official draft of U.C.C. Article 2 in 1951.[31] The last set of major amendments to Article 2 took place in 1958.[32]

Article 2 has breathtaking scope. The article governs transactions in "goods,"[33] which it defines to include all things which are movable plus several other types of things.[34] It covers contracts made by both merchants and non-merchants, although it contains some special rules applicable only to merchants.[35] Every year, Article 2 governs innumerable sales, ranging from small transactions at vending machines and grocery stores to sales of extraordinarily expensive equipment like aircraft and supercomputers.

B. The Ongoing Effort To Revise Article 2

Academic writers began questioning whether the ALI and NCCUSL should modernize Article 2 in the mid-1980s.[36] In 1986, their scholarship came to the attention of Professor Geoffrey Hazard, who was serving as the chair of the Uniform Commercial Code's Permanent Editorial Board (PEB)[37] and the Director of the ALI.[38] In these capacities, Professor Hazard asked Professors Charles Mooney and Richard Speidel to prepare a memorandum on whether Article 2 of the U.C.C. required revision.[39]

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30 *See* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1, at 3 (3d ed. 1988) (describing U.C.C. history).

31 *See id.* at 4.

32 *See* Speidel, *supra* note 3, at 788.

33 *See* U.C.C. § 2-102 (2002).

34 *Id.* §§ 2-105, 107.

35 *See id.* § 2-104(1) (defining the term merchant); *id.* § 2-104 cmt. 2 (discussing the fourteen merchant rules in Article 2).

36 *See, e.g.*, Fairfax Leary, Jr. & David Frisch, *Is Revision Due for Article 2?*, 31 VILL. L. REV. 399 (1986).

37 The Permanent Editorial Board of the U.C.C. is a committee with twelve members. It monitors the U.C.C., seeking to discourage non-uniform amendments or interpretations and to detect needs for modernization. *See* Peter Winship, *Law Making and Article 6 of the Uniform Commercial Code*, 41 ALA. L. REV. 673, 677 n.17 (1990) (describing the composition of the PEB and its functions in 1986).

38 *See* Speidel, *supra* note 3, at 788–89.

39 *See id.*

Professors Speidel and Mooney completed this memorandum in 1987, expressing the view that Article 2 needed various changes.[40] In response to their memorandum, the PEB appointed a Study Group to consider the matter further, and named Professor Speidel to chair this Study Group.[41] In the fall of 1990, the PEB Study Group prepared a "preliminary report" on the subject.[42] Then, in the spring of 1991, the Study Group completed a more focused report, which it called an "executive summary."[43] These documents, discussed more fully below, expressed the view that Article 2 needed revision.

In the fall of 1991, based on the recommendation of the PEB Study Group, NCCUSL appointed a drafting committee to prepare a proposed revision.[44] It selected Professor Speidel to serve as the Chief Reporter.[45] Later, it appointed Professor Linda Rusch to serve as the Associate Reporter.[46] The Article 2 drafting committee produced its first draft of the revised article in 1994 and then produced subsequent drafts every year through 1999.[47]

The committee's July 1995 draft marked a turning point in the revision project. In that draft, the committee made an important choice when deciding how to address contracts for computer software. In particular, the drafters proposed to turn Article 2 into a general "hub" that would contain provisions important for both the sale of goods and the licensing of software, and then to create an Article 2B as a "spoke" that would contain special provisions for computer software.[48]

The "hub and spoke" experiment lasted only about a year. In 1996, the committee produced a revised draft that abandoned the approach.[49] It made this decision because NCCUSL chose to handle licensing of computer information in a separate uniform law that

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40 *See id.* at 789.

41 *See id.*

42 *See* ABA Task Force, *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981, 986–98 (1991).

43 *See* PEB Study Group, *Uniform Commercial Code, Article 2 Executive Summary*, 46 BUS. LAW. 1869 (1991).

44 *See* Speidel, *supra* note 3, at 789.

45 *See id.*

46 *See* Rusch, *supra* note 10, at 1683 n.*.

47 *See* Speidel, *supra* note 3, at 789–90.

48 Nat'l Conference of Comm'rs on Unif. State Laws, Uniform Commercial Code Article 2B: Dec. 12, 1996 Draft, at 7, *available at* http://www.law.upenn.edu/bll/ulc/ucc2/uccart1.htm (last visited Dec. 2, 2002).

49 *See id.*

eventually became known as the Uniform Computer Information Transactions Act (UCITA).[50]

In May 1999, the ALI approved a proposed final draft.[51] At the ALI meeting, the Executive Director and President of NCCUSL supported the proposal.[52] NCCUSL, however, later decided not to vote on the draft because it feared that the draft would not win support of all the state legislatures.[53] At this point, Professors Speidel and Rusch resigned from the drafting committee in protest.[54]

NCCUSL then appointed a new drafting committee. The current reporter is Professor Henry Deeb Gabriel.[55] This new committee worked on the project with diligence and obtained NCCUSL's final approval for a draft in August 2002. As noted above, this draft greatly has scaled back the drafting goals.[56] Instead of completely revising Article 2, the committee has sought only to amend a few provisions.[57] It has decided to add provisions on electronic commerce and rewrite a few troublesome provisions, while leaving most of the article intact.[58]

As of the time of this writing, the future of even these less ambitious changes remains in doubt. The ALI must approve them, and no one knows for sure how state legislatures will react. It is likely, however, that they will become law in the next few years.

C. The Difficulties of Revision

Professor Speidel has offered a convincing explanation for why the NCCUSL and ALI have taken so long in approving a final revision of Article 2.[59] He does not lay the blame at the feet of any one person or organization. Instead, he identifies five factors that each have made changing the current law difficult.

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50 *See* Speidel, *supra* note 3, at 790 n.13.

51 *See Revised U.C.C. Sales Provisions Considered, Electronic Commcerce Issues Still Troubling*, 68 U.S.L.W. 2714, 2714 (May 30, 2000) (describing the final draft history).

52 *See* Speidel, *supra* note 17, at 611 & n.15.

53 *See id.* at 611 & n.17.

54 *See* Speidel, *supra* note 3, at 790.

55 *See* Nat'l Conference of Comm'rs on Unif. State Laws, NCCUSL Committees/Members, *at* http://www.nccusl.org (last updated June 18, 2002). Professor Gabriel served as a member of the original drafting committee. *See* Speidel, *supra* note 17, at 612 n.18.

56 *See* Annual Meeting 2002 Draft, *supra* note 13.

57 *See id.*

58 *See id.*

59 *See* Speidel, *supra* note 3, at 791–93.

First, Professor Speidel points out that, from the outset, no important group of commercial buyers or sellers was demanding a revision of Article 2.[60] Most businesses felt content with the status quo and viewed every proposed change with skepticism.[61] The drafters thus faced an uphill battle from the start.

Second, Professor Speidel believes the effort to draft a "hub and spoke" version of Article 2 had lingering negative effects even after its abandonment.[62] When the drafters attempted to turn Article 2 into the "hub," they renumbered and rewrote many of its provisions.[63] The 1999 draft continued to reflect many of these changes, giving Article 2 an unfamiliar visage that troubled opponents of the revision.[64]

Third, Professor Speidel observes that removing the subject of computer information licenses from the scope of the revision did not eliminate controversy about them.[65] Although NCCUSL decided to deal with licenses in UCITA, questions about the interaction between UCITA and Article 2 remain.[66] Any proposed revision of Article 2 must address these changes.

Fourth, Professor Speidel notes that the Article 2 drafting committee ran into great difficulty in addressing consumer protection issues.[67] In his view, the committee never could provide sufficient measures to satisfy the desires of consumer groups.[68] Yet, at the same time, commercial interests found excessive even the limited consumer protection provisions under consideration.[69]

Fifth, Professor Speidel explains that the entire process became very political.[70] Commercial interests persuaded NCCUSL that they would lobby state legislatures against adopting the revision if they did not get what they wanted.[71] NCCUSL took these warnings seriously because it did not want to propose legislation that would not enjoy

60 *See id.* at 791.

61 *See id.*

62 *See id.* at 791–92.

63 *See id.*

64 *See id.* at 792.

65 *See id.*

66 *See id.*

67 *See id.*

68 *See id.*

69 *See id.* On the merits, Professor Speidel strongly disputes the claim that the drafting committee exalted the rights of consumers over the rights of sellers. *See* Speidel, *supra* note 17, at 614–16.

70 *See* Speidel, *supra* note 3, at 792.

71 *See id.*

universal adoption.[72] The ALI, however, felt more reluctant to change its views based on commercial interests.[73]

Professor Speidel's analysis is persuasive. In fact, to bolster his position, he might have compared the Article 2 revision process to the recent drafting efforts that produced Article 4A on funds transfers and revised Article 5 on letters of credit. The ALI and NCCUSL had little difficulty approving these revisions, and they sailed through the state legislatures.[74]

The committees working on Articles 4A and 5 did not face any of the factors that Professor Speidel believes impeded the revision of Article 2. Commercial interests strongly favored the creation of Article 4A because no legislation comprehensively addressed funds transfers,[75] and they favored revising Article 5 because it did not reflect the realities of modern letter of credit usage.[76] Consumer groups, moreover, did not oppose these articles because funds transfers and letters of credit have little impact on consumers. In addition, neither Article 4A nor Article 5 suffered from the difficulties similar to those that arose from the aborted "hub and spoke" draft revision of Article 2.

In any event, the effort to revise Article 2 has not yet achieved success. As noted above, the final draft approved in August 2002 did not include very many significant changes. The question therefore remains whether the need to revise Article 2 has increased or decreased during the past ten years. If the need has grown, then the failure of the revision process to accomplish more of NCCUSL's original goals is more serious than if the need has diminished.

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72 *See id.*

73 *See id.*

74 *See* Nat'l Conference of Comm'rs on Unif. State Laws, Introductions & Adoptions of Uniform Acts: UCC Article 4A, *at* http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ucca4a.asp (last visited Nov. 6, 2002) (showing widespread adoption of these recently revised articles); Nat'l Conference of Comm'rs on Unif. State Laws, Introductions & Adoptions of Uniform Acts: UCC Article 5, *at* http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ucca5.asp (last visited Nov. 6, 2002) (same).

75 *See* U.C.C. art. 4A prefatory note (1994) (explaining that Article 4A was needed because there was "no comprehensive body of law that defines the rights and obligations that arise from wire transfers").

76 *See id.* art. 5 prefatory note (explaining how "the customs and practices for letter of credit" have changed in the past fifty years, requiring a revision of Article 5).

II. THE EMERGENCE OF ELECTRONIC COMMERCE

Article 2 contains a number of rules regarding the formation of contracts for the sale of goods.[77] Accordingly, in deciding whether the need to revise Article 2 has increased or decreased during the past decade, one important question is whether the methods of forming contracts to buy and sell goods have changed. The answer to this question is decidedly yes. In fact, of all the changes that have occurred in sales of goods in the past ten years, the methods of forming sales contracts have seen the most innovation.

Although people still mostly use traditional methods to buy and sell goods, a significant amount of electronic commerce has emerged. The term "electronic commerce" refers to contracts made by means of computers or other electronic devices.[78] It typically includes transactions conducted over the Internet, either at vendors' websites or through email.

At first blush, the growth of electronic commerce might seem to necessitate substantial changes to Article 2. After all, Article 2 came into being in the 1950s before anyone contemplated electronic transactions. Article 2, therefore, unsurprisingly contains no provisions specifically designed to deal with them.

The reality, however, differs for two reasons. First, because the provisions in Article 2 concerning the formation of contracts have little to say about electronic commerce, the growth of electronic commerce has made them less important. Second, to the extent that electronic commerce raises new legal issues, legislation outside of the U.C.C. already has addressed most of them. The following discussion elaborates these points.

A. How Parts of Article 2 Are Becoming Less Relevant

To observe how electronic commerce is making parts of Article 2 less relevant, consider the following example. Suppose that a law school is running short on supplies. It wants to purchase a hundred boxes of pens, markers, and chalk. It knows an office supply company that might have these items. Consider how the law school would go about purchasing the items.

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77 *See id.* §§ 2-201 to -210 (2002) (stating rules concerning the "Form, Formation and Readjustment of Contract").

78 The term "electronic commerce" (or sometimes "e-commerce") refers to "transactions conducted over the Internet, either by consumers purchasing goods and services, or directly between businesses." MICROSOFT ENCARTA WORLD ENGLISH DICTIONARY, *at* http://encarta.msn.com/encnet/features/Dictionary/DictionaryHome.asp (last visited Dec. 2, 2002).

In 1960, 1970, or 1980, if a buyer like the law school wanted to purchase a bulk order of goods, it might call a seller on the telephone. The seller might provide a price quote, a description of the goods, and a statement of the terms on which the seller wished to sell them. The buyer then would fill out one of the buyer's purchase order forms and mail it to the seller. The seller would send back an acknowledgment and, at the same time or a little while later, would ship the goods.

This routine once pervaded the economy. You can imagine the law school and the office supply company taking these actions, not just once, but hundreds of times over the past decades. Similarly, many thousands of other businesses and institutions were buying and selling goods in this manner every day.

In 1990, the transaction probably would follow the same pattern, with one possible change resulting from a technological advance that became ubiquitous in the 1980s. In particular, the law school probably would fax its purchase order to the office supply company rather than mail it. The office supply company might then return a confirmation by fax, as well. Very little else would change. The terms of the forms exchanged probably would remain the same.

When the ALI and NCCUSL were drafting the U.C.C. in the late 1940s and early 1950s, they recognized that this simple but seemingly timeless type of transaction occurred thousands of times a day. They also realized that it could be important to determine whether parties had created a contract and, if they did, what the terms of the contract might be. Accordingly, they included in part 2 of Article 2 a number of very detailed rules to address issues that might arise when contracts for the sale of goods are formed in this manner.[79]

Section 2-206(1)(b), for instance, makes clear that a buyer's purchase order will be construed as an offer to buy goods, unless it says otherwise.[80] This rule saves parties (and later the courts) the

79 *See* U.C.C. §§ 2-201 to -210 (stating rules concerning the "Form, Formation and Readjustment of Contract").

80 *See id.* § 2-206(1)(b). The U.C.C. states,

> Unless otherwise unambiguously indicated by the language or circumstances . . . an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

Id.; *see also* Harper Trucks, Inc. v. Allied Welding Supply, Inc., 2 U.C.C. Rep. Serv. 2d (CBC) 835 (D. Kan. 1986).

trouble of scrutinizing the possibly ambiguous or pithy language of a purchase order to determine whether it constitutes an offer or merely preliminary negotiations.[81] The seller knows that it can accept the purchase order and form a contract.

Section 2-206(1)(b) not only specifies that purchase orders are offers, but also indicates two ways that the seller may accept them. One way the seller can accept is simply to ship the goods.[82] Indeed, as an example of their foresight, the drafters of the U.C.C. even thought to say in section 2-206(1)(b) that a shipment of non-conforming goods would constitute an acceptance.[83] That way, if the goods turned out to be defective, the seller could not escape liability by claiming not to have accepted the contract.[84]

Another way to accept is for the seller to promise to ship the goods, such as by sending or faxing back a confirmation.[85] If the seller chooses this method, however, another issue may arise. If the buyer drafted its purchase form, and the seller drafted its confirmation, the two may contain discrepancies in their terms. A question may arise whether the differences in the forms prevent formation of a contract.

Under the common law mirror-image rule, a purported acceptance that differs from the offer in any way constitutes an implied re-

81 *See* 1 WILLIAM D. HAWKLAND ET AL., UNIFORM COMMERCIAL CODE SERIES § 2-206:2 (2002). The common law of contracts generally requires courts to determine whether the offeror "manifest[ed] . . . a willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981). Outside of the law of sales, this process often is ambiguous. *See, e.g.*, Owen v. Tunison, 158 A. 926 (Me. 1932) (holding that the defendant's letter was a general invitation to negotiate and not an offer to sell property).

82 *See* U.C.C. § 2-206(1)(b).

83 *See id.*

84 Professor Hawkland explains,

> Under the pre-Code law, if the offeror, usually the buyer, specified shipment of goods as the mode of acceptance, he would have no remedy if nonconforming goods were shipped by the offeree (seller), because the offeree could argue either (a) that the goods shipped did conform to the contract and therefore did not breach it, or (b) that the goods did not conform to the contract, and therefore their shipment did not constitute an acceptance, because acceptance of an offer to enter into a unilateral contract is accomplished only if the offeree does the act requested by the offeror (here, by shipment of conforming goods).

1 HAWKLAND ET AL., *supra* note 81, § 2-206:3.

85 *See* U.C.C. § 2-206(1)(b).

jection and a counter-offer.[86] This rule ensures that parties are not bound to terms to which they do not assent. But the mirror-image rule also has drawbacks. If the parties do not pay careful attention to the forms, they may think that they have a contract, only to discover later that minor differences have prevented the contract's formation.[87] Either party then can back out of the transaction without liability for breach, despite potential harm to the other party.[88]

The drafters of the U.C.C. sought to address this problem by creating exceptions to the mirror-image rule. Under section 2-207(1),[89] a contract may be formed even if the purported acceptance contains additional or different terms, unless the acceptance specifically requires the offeror to assent to these terms.[90] If the parties formed a contract despite differences between the offer and acceptance, section 2-207(2) specifies the legal effect of any additional terms contained in a purported acceptance.[91]

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86 *See* RESTATEMENT (SECOND) OF CONTRACTS § 59 ("A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer.").

87 Note, *Offeree's Response Materially Altering an Offer Solely to Offeror's Disadvantage Is an Acceptance Conditional on Offeror's Assent to the Additional Terms Under Section 2-207 of the Uniform Commercial Code*, 111 U. PA. L. REV. 132, 133 (1962).

88 *See id.*

89 *See* U.C.C. § 2-207(1). The U.C.C. states,

> A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

Id. The U.C.C. further states,

> Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

Id. § 2-207(3).

90 *See id.* § 2-207(1).

91 *See id.* § 2-207(2).

> The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: (a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

Id. For discussion of the problem of different terms, see *infra* notes 197–200 and accompanying text.

Even if the exception in section 2-207(1) does not apply, formation may occur under the first sentence of section 2-207(3) as a result of conduct recognizing the existence of a contract.[92] For example, the seller could ship the goods and the buyer could accept and pay for them, notwithstanding a statement in the acceptance requiring the offeror to accept additional terms.[93] In this case, the second sentence of section 2-207(3) would specify that the terms of a contract include any terms upon which the two forms agree.[94]

A contract formed, either by the forms exchanged or by conduct, might raise another issue that the drafters of the U.C.C. carefully addressed. In particular, the contract might leave unstated important issues like the time of delivery or the price of the goods. This possibility is especially likely if the contract was formed by conduct under section 2-703(3) where the forms did not agree. The absence of clear terms on these topics could present a problem at common law because the contract might not be sufficiently definite to enforce.[95]

Yet again, the drafters of the U.C.C. had the foresight to address this difficulty. Section 2-204(3) adopts a more permissive standard than the common law traditionally did with respect to indefiniteness.[96] The section says that a contract does not fail for indefiniteness so long as the evidence shows that the parties had an agreement and a reasonably certain basis exists for granting an appropriate remedy.[97]

The analysis of this kind of typical transaction under Article 2, however, would not necessarily end at this point. On the contrary, questions about the terms of the agreement also might arise because of the buyer and seller's telephone conversation prior to the shipment. The law school or office supply store might allege that they had

92 *See* U.C.C. § 2-207(3) ("Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract.").

93 *See, e.g.*, Luria Bros. & Co. v. Pielet Bros. Scrap Iron & Metal, Inc., 600 F.2d 103 (7th Cir. 1979).

94 *See* U.C.C. § 2-207(3) ("In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act."); Dresser Indus. v. Gradall Co., 965 F.2d 1442 (7th Cir. 1992) (applying this provision).

95 *See* RESTATEMENT (SECOND) OF CONTRACTS § 33(1) (1981) ("Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.").

96 *See* U.C.C. § 2-204(3) ("Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.").

97 *See id.*

formed an oral agreement regarding the terms of the contract, and that for some reason the purchase order and the confirmation do not reflect this oral agreement. The drafters of the U.C.C. included the parol evidence rule in section 2-202 to specify the extent to which the contract might include the unwritten terms.[98]

Finally, the promises to buy and sell the goods would be enforceable only if the parties satisfied the requirements of the statute of frauds in section 2-201(1).[99] This provision generally requires promises to buy or sell goods for a price of $500 or more to be evidenced by a signed writing.[100] The section, however, contains several exceptions.[101] For example, the receipt of the goods or the payment could satisfy it.[102]

This illustration shows something significant about the importance of the formation provisions in Article 2. From the 1960s to the 1990s, all of the different sections discussed were needed to provide definite answers to basic questions about whether a typical business transaction formed a contract and what the terms of the contract might be. The existence of Article 2's formation provisions during these decades would seem an absolute necessity.

But now move ahead to the present. Law schools and other businesses still purchase goods, but there is a new way of doing it. Instead

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98 *See* U.C.C. § 2-202. That section provides,

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented (a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

Id.

99 *See id.* § 2-201(1).

> Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

Id.

100 *See id.*

101 *See id.* §§ 2-201(2)–(3) (stating exceptions to the statute of frauds).

102 *See id.* § 2-201(3)(c) ("A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable . . . (c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Sec. 2-606).").

of buying supplies with a written purchase order, the law school more likely than not would use a computer to gain access to the Internet website of its office supply company. The two leading office supply store chains in the United States, Staples and Office Depot, offer all of their products online and encourage corporate customers to purchase in this manner.[103]

The website would provide a complete description of the goods. The law school user simply would click on the items sought, receive an immediate confirmation (perhaps both on the screen and by email), and the seller would ship the goods shortly afterward. This process has become quite common. Despite the economic downturn and the failure of many Internet companies, aggregate Internet sales continue to grow.[104] At the busiest times of the year, total online sales may reach $220 million in a single day.[105]

What do Article 2's formation provisions say about the formation of contracts for the sale of goods over the Internet? The reality is not very much at all. As described above, the formation provisions in Article 2 were designed to handle contracts formed in the traditional manner of exchanging phone calls and written purchase orders and confirmations. For the most part, these specialized rules have no application in the context of electronic commerce.

Consider, for instance, each of the provisions described at length above. Section 2-206(1)(b), on the characterization of purchase orders as offers,[106] does not apply to the typical online sale. No need arises to characterize a purchase order sent by the buyer as an offer because an Internet buyer does not send a purchase order. Instead, the buyer indicates assent to a sale merely by clicking on a button on the seller's website. Likewise, because the buyer does not send a purchase order, the Internet seller does not accept a purchase order. Accordingly, section 2-206(1)(b)'s rules on what constitutes a proper acceptance of the purchase order[107] are similarly irrelevant.

In a typical online transaction, no battle of conflicting forms occurs. Again, the Internet buyer does not send a form to the seller, but instead merely clicks a website button. Accordingly, section 2-207(1) and (3) on the formation of contracts involving different forms have

103 *See* Staples, *at* http://www.staples.com (last visited Oct. 17, 2002); Office Depot, *at* http://www.officedepot.com (last visited Oct. 17, 2002).

104 Statistics on retail e-commerce sales are available from the U.S. Census Bureau. *See* U.S. Census Bureau, *at* http://www.census.gov (last updated Nov. 22, 2002).

105 *See Online Shoppers Spent $220 Million Monday in Holiday Sales Spike*, WALL ST. J., Nov. 28, 2001, at J1.

106 *See* U.C.C. § 2-206(1)(b).

107 *See id.*

no relevance.[108] Morever, because these provisions do not apply, section 2-207(2) and section 2-207(3)'s second sentence, which concern the terms that such a contract might have, also do not apply.[109]

In most situations the requirement of definiteness also would not come into question. As noted above, indefiniteness most often becomes a problem when parties form contracts by conduct when their forms do not agree.[110] In online transactions, the parties do not exchange conflicting forms, and therefore do not create contracts by their conduct. Little doubt arises over the terms of their agreement because the seller's website typically spells them out. For this reason, section 2-204(3)'s relaxing of the requirement of definiteness has little consequence for online sales.[111]

The parol evidence rule in section 2-202 also has no application to typical Internet transactions. The law school would not call or otherwise communicate with the office supply company to gather information about the sale. Instead, the law school would browse the seller's website, learn the details, and then just click a box indicating a desire to purchase the goods. The parties, accordingly, would not reach any prior understandings or agreements that the parol evidence rule might affect.

In fact, if a court had to answer the question of whether the law school and the supplier had a contract, it would need to look at only one provision of the U.C.C., namely, section 2-204(1).[112] This section says a "contract for sale of goods may be formed in any manner sufficient to show agreement."[113] This really is not saying much; as one of the leading U.C.C. commentators has remarked, "The rule is a fairly obvious one, because there has never been any doubt that contracts of sale can be made in a manner other than a writing."[114] The terms of the contract formed over the Internet would be those stated in the website because the buyer does not indicate anything to the contrary.

This simple example illustrates how the development of electronic commerce in many ways makes Article 2 less relevant. A large number of highly specialized Article 2 provisions that have governed innumerable sales for over four decades do not apply to sales made using the new method. Accordingly, to the extent that electronic commerce replaces ordinary commerce, the provisions of Article 2 are

108 *See id.* §§ 2-207(1), (3).
109 *See id.* §§ 2-207(2)–(3).
110 *See supra* notes 97–98 and accompanying text.
111 *See* U.C.C. § 2-204(3).
112 *See id.* § 2-204(1).
113 *Id.*
114 1 HAWKLAND ET AL., *supra* note 81, § 2-204:1.

becoming less relevant. The need for revising them thus diminishes because they affect a decreasing amount of commerce.

B. New Issues Raised by Electronic Commerce

Even if electronic commerce has made existing Article 2 rules less important, a separate question is whether electronic commerce raises any new legal issues that Article 2 must address. The answer to this question, as the following discussion will show, is no. Although electronic commerce does give rise to several very important new issues, new federal and state statutes already handle these issues satisfactorily.[115]

1. Statute of Frauds

Section 2-201(1) says that contracts for the sale of goods for a price of $500 or more generally must be evidenced by a signed writing to be enforceable.[116] Electronic commerce raises two important questions about this very important Article 2 provision. First, if a buyer and seller enter a contract by making electronic communications over the Internet, do their electronic communications constitute a "writing" within the meaning of section 2-201(1)? Second, even if their communication qualifies as a writing, how can the parties sign this writing?

Article 2 at present does not answer either of these questions. Two statutes outside the U.C.C., however, already address them: the Uniform Electronic Transaction Act of 1999 (UETA), a model state law enacted in forty-one states,[117] and the federal Electronic Signatures in Global and National Commerce Act of 2000 (ESIGN).[118] Both statutes create exceptions to statutes of frauds so that they do not prevent enforcement of electronically formed contracts.[119]

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115 *See* Miller & Henning, *supra* note 14, at 8 (observing that these laws have reduced the urgency of revising Article 2).

116 *See* U.C.C. § 2-201(1).

117 The National Conference of Commissioners of Uniform State Laws drafted and published UETA. For information and state adoption statistics, see Nat'l Conference of Comm'rs on Unif. State Laws, A Few Facts About the Uniform Electronic Transaction Act, *at* http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ueta.asp (last visited Oct. 17, 2002). The full text of UETA is available at http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.htm (last visited Nov. 6, 2002).

118 15 U.S.C. §§ 7000–7013 (2000).

119 Only one reported case has addressed either UETA or ESIGN as of November 25, 2002. *See* Specht v. Netscape Communs. Corp., 306 F.3d 17, 26 n.11 (2d Cir. 2002).

UETA, the state legislation, eliminates obstacles to electronic commerce that section 2-201(1) (and other statutes of frauds) might impose by establishing the following four rules:

(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
(c) If a law requires a record to be in writing, an electronic record satisfies the law.
(d) If a law requires a signature, an electronic signature satisfies the law.[120]

Pursuant to these principles, electronic records and signatures may take the place of traditional paper and ink under section 2-201(1).[121]

ESIGN, the federal legislation, accomplishes the same result. ESIGN says that, notwithstanding any previously existing statute of frauds, "a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form."[122] It thus also allows electronic commerce to take place without hindrance from statutes of frauds.[123]

In light of UETA and ESIGN, Article 2 does not need to be revised to address issues raised by the statute of frauds. Nothing illustrates this point better than NCCUSL's decision to replicate UETA's provisions in the August 2002 approved amendments to Article 2.[124]

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120 UETA § 7 (1999), *available at* http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.htm (last visited Nov. 6, 2002).

121 UETA defines a record as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." *Id.* § 2(13). It defines an electronic record as "a record created, generated, sent, communicated, received, or stored by electronic means." *Id.* § 2(7).

122 15 U.S.C. § 7001(a)(1).

123 Although ESIGN is a federal statute, it does not preempt UETA. *See* Patricia Brumfield Fry, A Preliminary Analysis of Federal and State Electronic Commerce Laws, *at* http://www.nccusl.org/nccusl/uniformact_articles/uniformacts-article-ueta.asp (last visited Sept. 29, 2002) (providing an in-depth analysis of the ESIGN's preemptive effects). On the contrary, ESIGN specifically provides that, if a state has enacted UETA, then UETA rather than ESIGN will govern exceptions to state statutes of frauds. *See* 15 U.S.C. § 7002(a)(1). Although the similarity of the statutes generally makes it irrelevant which law applies, a number of subtle difference do exist. *See* Fry, *supra*, § 2.B. (discussing these differences).

124 NCCUSL expressed the intent to replicate UETA's provisions in Article 2 in a prefatory note that accompanied the Annual Meeting 2001 Draft. *See* Amendments to Uniform Commercial Code Article 2—Sales, prefatory note (2001), *at* http://www.law.upenn.edu/bll/ulc/ucc2/ucc0612.htm (last visited Nov. 6, 2002) [hereinafter Annual Meeting 2001 Draft] (indicating that, consistent with UETA and ESIGN,

2. Attribution of Electronic Records

A second issue raised by electronic commerce concerns the attribution of electronic records to the persons who made them. Recalling the hypothetical above, suppose that someone visits an office supply company's website and purchases office supplies in the name of the law school. The office supply company ships the goods and then demands payment. The law school refuses to pay, insisting that the supplier prove that the law school (as opposed to some unknown interloper) actually placed the order.

How can the supplier attribute the order to the law school? What proof is legally sufficient? These are new and important questions raised by electronic commerce. Yet, NCCUSL did not need to revise Article 2 to address them. Again, legislation outside the U.C.C. already supplies the answers.

UETA addresses the issue of attribution with the following provision:

> [a]n electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.[125]

Although no cases have yet applied this provision, the UETA commentary confirms that an electronic record and electronic signature would be attributable to a person if the "person types his/her name as part of an e-mail purchase order."[126] The commentary also makes clear that the plaintiff would have to overcome any evidence presented by the defendant of fraud or forgery.[127] Because of this provision, Article 2 does not need revision to address the question of attribution.[128]

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all references to "writing" are being changed to "record" and that the terms "record" and "sign" will be defined to permit electronic records and signatures). The Annual Meeting 2002 Draft, to which NCCUSL gave its final approval in August 2002, replicates the relevant provisions but does not contain a prefatory note. *See* Annual Meeting 2002 Draft, *supra* note 13.

125 UETA § 9(a), *available at* http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.htm (last visited Nov. 6, 2002).

126 *Id.* § 9 cmt. 1.

127 *See id.*

128 *See* Annual Meeting 2002 Draft, *supra* note 13, § 2-212 (copying almost verbatim UETA § 9).

3. Authority and Capacity of Electronic Agents

Electronic commerce also raises questions about the authority and capacity of computers to make contracts. For example, returning again to the hypothetical above, suppose that a law school employee visits the supply company's website and makes a purchase. A computer processes the sale for the supply company and sends a confirmation without any human intervention. Could the office supply company later argue that its computer lacked either authority or capacity to bind it to a contract?

Article 2 does not need revision to answer this question. The U.C.C. generally has left questions of agency and capacity to non-U.C.C. law.[129] Here again, state legislatures and the federal government already have stepped in with alternative legislation. UETA and ESIGN each contain provisions designed to remove any doubt that electronic agents may form contracts. UETA says, "A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements."[130] ESIGN contains a similar provision.[131]

These provisions in UETA and ESIGN do not, in fact, purport to change existing law. Instead, as the UETA commentary asserts, they merely confirm that machines may act as agents.[132] No cases have yet

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129 *See* U.C.C. § 1-103 (1994).

130 UETA § 14(1), *available at* http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.htm (last visited Nov. 6, 2002). UETA further states,

> (2) A contract may be formed by the interaction of an electronic agent and an individual, acting on the individual's own behalf or for another person, including by an interaction in which the individual performs actions that the individual is free to refuse to perform and which the individual knows or has reason to know will cause the electronic agent to complete the transaction or performance. (3) The terms of the contract are determined by the substantive law applicable to it.

Id. §§ 14(2)–(3).

131 15 U.S.C. § 7001(h) (2000). The Code provides,

> A contract or other record relating to a transaction in or affecting interstate or foreign commerce may not be denied legal effect, validity, or enforceability solely because its formation, creation, or delivery involved the action of one or more electronic agents so long as the action of any such electronic agent is legally attributable to the person to be bound.

Id.

132 *See* UETA § 14 cmt. 1, *available at* http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.htm (last visited Nov. 6, 2002).

addressed these sections, but they appear to dispel most questions that might arise. Any amendment to Article 2 would be redundant.[133]

In sum, the growth of electronic commerce over the past decade has not increased the need to amend Article 2. On the contrary, it may have decreased the need. Many of Article 2's current provisions address traditional methods of making contracts, and the growth of electronic commerce makes these provisions less relevant now than they were in 1991. Accordingly, any problems they may contain have become less significant. Although electronic commerce raises new and important issues, Article 2 does not need to address them because other legislation already performs that function.

III. THE DECISION TO TREAT COMPUTER SOFTWARE SEPARATELY

Almost no private sales of computer software were taking place when NCCUSL and the ALI approved the first version of Article 2 in the 1950s.[134] During the past fifty years, however, sales of computer software have become very important. Business and consumers purchase well over $50 billion in software annually, and the total volume continues to grow.[135] When disputes have arisen, courts sometimes have had to consider whether to apply Article 2's rules to software sales.[136]

Computer software does not fit comfortably within Article 2 for two reasons. First, Article 2 applies to contracts for the sale of goods,[137] and the definition of "goods" applies problematically to software.[138] Article 2 says that goods include "things which are mova-

133 *See* Annual Meeting 2002 Draft, *supra* note 13, § 2-204(4) (copying almost verbatim UETA § 14).

134 *See* Graeme Browning, *Software Hardball*, 24 NAT'L J. 2062, 2062 (1992) (explaining how software was bundled with the first simple computers sold in the 1950s).

135 *See* Elizabeth MacDonald, *CPA Group's Plan Would Standardize the Accounting for Software Expenses*, WALL ST. J., Dec. 19, 1996, at B2 (reporting estimate that off-the-shelf software purchases, which stood at $47.9 million, will grow to $79 billion in 2000).

136 *See, e.g.*, Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670 (3d Cir. 1991) (holding that Article 2 does apply to software); Sys. Design and Mgmt. Info., Inc. v. Kan. City Post Office Employees Credit Union, 788 P.2d 878, 882 (Kan. Ct. App. 1990) (holding that software is a good and is subject to the U.C.C.); USM Corp. v. Arthur D. Little Sys., Inc., 546 N.E.2d 888, 894 (Mass. App. Ct. 1989) (holding that contract dealing with turnkey computer system was subject to Article 2).

137 *See* U.C.C. § 2-102 (2002) ("Unless the context otherwise requires, this Article applies to transactions in goods . . . .").

138 Scholars have long struggled with issues raised by the application of Article 2 to computer software. For some early and influential thoughts, see David A. Owen, *The Application of Article 2 of the Uniform Commercial Code to Computer Contracts*, 14 N. KY. L.

ble."[139] This definition clearly includes tangible items, like books, even if they contain copyrighted material.[140] The definition, however, generally excludes intangibles—like legal rights or services—because they lack physical properties that would make them movable.[141]

Sometimes vendors subsume computer software into a physical object before selling it.[142] For example, a business might record a program onto a disk, and then sell the disk. Although the program itself may lack tangible physical properties, the disk has them, and the disk therefore clearly is a "thing which is movable." In this situation, courts have not had difficulty deciding to apply Article 2.[143]

Yet, not all sales of computer software involve the transfer of physical objects. For example, when a person buys a program by downloading it from the Internet, the seller does not provide anything tangible to the buyer. Although the buyer may store the program on one of the buyer's own disks, no title to the disk or to any other tangible item passes from the seller to the buyer.[144] In this situation, deciding to apply Article 2 becomes much more difficult.[145]

REV. 277 (1987) (describing the various approaches courts use to determine whether a transaction in the computer industry is one for goods or services); Andrew Rodau, *Computer Software: Does Article 2 of the Uniform Commercial Code Apply*, 35 EMORY L.J. 853 (1988) (arguing that judicial interpretation and the tangible and intangible property aspects of software show that it is a good); Note, *Computer Programs as Goods Under the U.C.C.*, 77 MICH. L. REV. 1149 (1979) (concluding that contracts for computer program copies are typically within the scope of the U.C.C.).

139 U.C.C. § 2-105(1) ("'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale . . . .").

140 *See* Cardozo v. True, 342 So. 2d 1053, 1055 (Fla. Dist. Ct. App. 1977) (definition of goods under U.C.C. includes books).

141 *See* 1 HAWKLAND ET AL., *supra* note 81, § 2-105:2 ("The exclusion of 'things in action' and the inclusion of 'things which are movable' suggests that Section 2-105 limits goods to tangible personal property.").

142 *See, e.g.*, Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670, 675 (3d Cir. 1991).

143 *See id.* The court explained,

> An analogy can be drawn to a compact disc recording of an orchestral rendition. The music is produced by the artistry of musicians and in itself is not a "good," but when transferred to a laser-readable disc becomes a readily merchantable commodity. Similarly, when a professor delivers a lecture, it is not a good, but, when transcribed as a book, it becomes a good.

Id. at 675.

144 *See* U.C.C. § 2-106(1) (defining a sale to consist of the "the passing of title from the seller to the buyer for a price").

145 *See* Lorin Brennan, *Why Article 2 Cannot Apply To Software Transactions*, 38 DUQ. L. REV. 459, 465 (2001) (presenting this difficulty as one reason for concluding that Article 2 does not apply to software).

Second, even if software falls within the definition of goods, many software sales occur in "hybrid" transactions. A hybrid transaction involves both the sale of goods plus the undertaking of other contractual obligations.[146] For example, a contractor might agree to sell and install a new window. The sale of the window is a sale of goods, but the promise to perform the service of installation is not.[147] Hybrid transactions long have complicated application of Article 2 because its scope provision does not address them.[148] Sales of computer software often are hybrids because they typically go beyond merely conveying title to goods from the buyer to the seller for a price.[149] Instead, the seller and buyer often agree on some set of terms and conditions for the use of the software.

The terms and conditions on the use of software can take two forms. In some instances, these terms give the buyer rights that the buyer would not acquire merely by purchasing the software. For example, if the terms include a "site license," the buyer may copy the software for use throughout seller's office.[150] In the absence of this license, federal copyright laws might prevent the copying.[151]

In other instances, the terms included with the sale of the software may limit the buyer's rights.[152] For example, the terms may say that the buyer cannot use the software for commercial purposes or

146 *See* Valley Farmers' Elevator v. Lindsay Bros., 398 N.W.2d 553, 555–56 (Minn. 1987) (explaining hybrid transaction in depth).

147 *See, e.g.*, Coakley & Williams, Inc. v. Shatterproof Glass Corp., 778 F.2d 196, 198 (4th Cir. 1985), *cert. denied*, 475 U.S. 1121 (1986).

148 *See* U.C.C. § 2-102.

149 *See generally* Andrew G. Rodau, *The Extension of UCC's Article 2 to "Hybrid" Software Transactions*, NAT'L L.J., June 22, 1987, at 23 (discussing the confusion over whether computer software is a "good" under Article 2).

150 *See* Lothar Determann & Aaron Xavier Fellmeth, *Don't Judge a Sale by Its License: Software Transfers Under the First Sale Doctrine in the United States and the European Community*, 36 U.S.F. L. REV. 1, 101–02 (2001) (describing site licenses).

151 *See, e.g.*, Geoscan, Inc. v. Geotrace Techs., Inc., 226 F.3d 387, 392 (5th Cir. 2000) (analyzing plaintiff's claim that business violated copyright by copying software for numerous computers without proper site license).

152 One important point of terminology is that, for some reason, the software industry refers to all terms regarding the use of software as "licenses," whether they increase or decrease the rights the buyer ordinarily would have under applicable copyright and other laws. This usage is both novel and somewhat confusing. Traditionally, when a copyright holder grants a license, the copyright holder gives the licensee additional rights. But in the sale of software, even restrictions on what the buyer could otherwise do with the software are called licenses.

cannot resell the software to certain types of users.[153] Sometimes these terms even attempt to restrict what subsequent third-party purchasers of the software can do with it. Absent these terms, nothing in the federal copyright law would prevent the buyer from selling the software.[154]

The hybrid nature of computer software sales poses a couple of serious problems for Article 2. If the terms and conditions predominate over other aspects of the contract, then most courts would say that Article 2 should not govern the transaction at all.[155] In addition, even if Article 2 does apply to the transaction, nothing in Article 2 says anything about contractual terms regarding the use of computer software. Its application, accordingly, has ambiguous consequences at best.

For these reasons, devising rules for computer software sales was a high priority when NCCUSL's initial drafting committee began work on Article 2. As explained above, the committee tentatively embarked on a complicated scheme to put this recommendation into effect; they were going to treat the sales portion of the transaction in Article 2, and terms regarding the use of software in an integrated Article 2B.[156] Eventually, however, NCCUSL abandoned this plan, promulgating UCITA instead of amending the U.C.C.[157]

UCITA has not resolved the question of how the law should treat terms regarding the use of computer software. At this time, only two states—Virginia and Maryland—have adopted UCITA.[158] Although

153 *See, e.g.*, Adobe Sys. Inc. v. One Stop Micro, Inc. 84 F. Supp. 2d 1086, 1093 (N.D. Cal. 2000) (recognizing that the license restricted resale of software only to educational users).

154 Federal copyright law contains a "first sale" doctrine. Under this doctrine, "a sale of a 'lawfully made' copy terminates a copyright holder's authority to interfere with subsequent sales or distribution of that particular copy." Parfums Givenchy, Inc. v. Drug Emporium, Inc., 38 F.3d 477, 480 (9th Cir. 1994). Accordingly, the purchaser of a copyrighted item—like a book, music CD, or computer program—can resell the book without violating the copyright law. The extent to which the copyright holder may restrict the resale by contract (as opposed to copyright law) remains subject to doubt.

155 Most courts will apply the U.C.C. to a hybrid transaction when the sale of goods predominates over aspects of the transaction. *See, e.g.*, Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974); Zapatha v. Dairy Mart, Inc., 408 N.E.2d 1370, 1374 n.8 (Mass. 1980).

156 *See supra* Part II.

157 *See supra* Part II.

158 *See* Nat'l Conference of Comm'rs on Unif. State Laws, Introductions & Adoptions of Uniform Acts, *at* http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ucita.asp (last visited Dec. 2, 2002); *see also No Votes Taken on Amendments to UCITA; Decisions To Be Made During Conference Call*, 70 U.S.L.W. 2339 (Dec. 4,

NCCUSL is working on revising the Act to give it broader appeal,[159] the question of whether or how Article 2 might govern persists in the rest of the states. Moreover, UCITA leaves unsettled important questions about the scope of Article 2 in hybrid transactions. For example, suppose that a person buys a DVD player that contains a computer chip loaded with software. Doubt remains about the extent to which Article 2 and UCITA would govern the transaction.[160]

Yet, even if UCITA has not solved the problem of computer software, the decision to address computer software outside of Article 2 has reduced the need to revise Article 2. Put another way, a decade ago, the drafters believed that they had to amend Article 2 to address issues raised by the sale of computer software. That is no longer true because of the decision to deal with these problems in a separate way. Accordingly, one of the main reasons for revising Article 2 has disappeared.

IV. A Decade of Precedent

More than a decade has passed since NCCUSL made its decision to revise Article 2 in 1991.[161] During this time, numerous precedents interpreting Article 2 have accumulated. These precedents have addressed and clarified a large number of ambiguities in Article 2's provisions. Although they have not eliminated all conflicts among jurisdictions, they have improved the situation a great deal. The need to revise Article 2 to address problems in its drafting accordingly has diminished over this time.

A. Examples of Clarification

As explained above, NCCUSL decided to revise Article 2 largely on the basis of a report prepared by a PEB Study Group.[162] A significant portion of this report focused on problems with Article 2's draft-

2001) (summarizing some of the reasons that many consider UCITA to be too controversial).

159 *See* Report of UCITA Standby Committee, *at* http://www.law.upenn.edu/bll/ulc/ucita/UCITA_Dec01_Proposal.htm (Dec. 17, 2001).

160 Under one recently proposed compromise, "Article 2 would apply to goods that included software as a part of their operation, but would not govern the software itself." *NCCUSL Plans To Present Draft Without Final Approval to ALI Council in December*, 70 U.S.L.W. 2193 (Oct. 2, 2001). The amendments to Article 2 approved in August of 2002 do not purport to change the scope of Article 2 other than expressly excluding "information" from the definition of goods. *See* Annual Meeting Draft 2002, *supra* note 13, § 2-103(k)(1).

161 *See supra* Part I.B.

162 *See supra* Part I.B.

ing.[163] The PEB Study Group identified a number of sections that were causing confusion in the courts.[164]

Even without amendments to Article 2, judicial decisions during the past decade have ameliorated many of the problems identified by the PEB Study Group. A few examples illustrate this point. One of the first recommendations in the PEB Study Group's report concerned section 2-601,[165] which states the so-called "perfect tender rule."[166] Under section 2-601, a buyer may reject tendered goods if they "fail in any respect to conform to the contract."[167] The buyer then may assert against the seller the full panoply of remedies made available by Article 2 for breach of contract.[168]

Section 2-601, at first glance, may appear to state a rather extreme rule. Its text would seem to allow a buyer to reject goods even if they deviate from the contract in the most minor ways. The drafters of the U.C.C., however, did not intend to give buyers unlimited power to reject goods because of defects. On the contrary, in section 1-203, they specified that every contract within the scope of the entire U.C.C. contains an implied "obligation of good faith in its performance and enforcement."[169] Accordingly, when exercising the right to reject goods under section 2-601, a buyer must act in good faith even though section 2-601 does not itself expressly state a requirement of good faith.[170] If a buyer is a merchant, the requirement of good faith means that the buyer must act honestly and must observe "reasonable commercial standards of fair dealing in the trade."[171] These standards of fair dealing may preclude rejections based on trivial defects.

The PEB Study Group worried that the general implied obligation of good faith in section 1-203 might go overlooked.[172] In other words, buyers might act in bad faith, and courts might not see the problem. Accordingly, the PEB Study Group suggested amending section 2-601 to make clear that a buyer had to act in good faith when

163 *See* PEB Study Group, *supra* note 43, at 1872–75.

164 *See id.*

165 *See id.* at 1872–73.

166 U.C.C. § 2-601 (2002) ("[I]f the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may (a) reject the whole; or (b) accept the whole; or (c) accept any commercial unit or units and reject the rest.").

167 *Id.*

168 *See id.* § 2-711 (listing these remedies).

169 *Id.* § 1-203 ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.").

170 *See* 2 WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-601:3 (2002) (describing good faith limitations on § 2-601).

171 U.C.C. § 2-103(1)(b).

172 *See* PEB Study Group, *supra* note 43, at 1877.

deciding whether to reject goods.[173] Although the PEB Study Group's report did not specify how to make the change, an amendment simply could insert words directly into section 2-601 saying that rejection may occur "subject to the requirement good faith." Although this amendment would not change the law (given section 1-203's present general duty of good faith), it would bring clarity to the law.

In the past decade, potential confusion over section 2-601 has diminished because precedent has clarified that the requirement of good faith limits the buyer's ability to reject. Indeed, a number of courts have applied section 2-601, and all of their opinions correctly recognize the duty of good faith imposed by section 1-203.[174] Accordingly, even if some misunderstanding of the issue persists, the need to amend section section 2-601 has waned. Indeed, the drafting committee in its most recent draft apparently did not see a continuing need to alter section 2-601 to specify a requirement of good faith.[175]

A second example concerns the statute of frauds in section 2-201.[176] Section 2-201, as discussed at length above, generally makes promises to buy or sell goods for a price of $500 or more unenforceable "unless there is some writing sufficient to indicate that a contract for sale has been made."[177] One longstanding issue under section 2-201 is whether a party who has detrimentally relied on a promise may overcome the requirement of writing under a theory of promissory estoppel.[178] The PEB Study Group suggested in its report that a revision of Article 2 should address the issue of reliance under section 2-201.[179]

Two competing considerations complicate this issue. On one hand, many courts have allowed parties to overcome other statutes of

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173 *See id.* at 1873 ("At a minimum, § 2-601 should be revised to state that rejection is limited by the duty of good faith.").

174 *See, e.g.*, Bellsouth Telesensor v. Info. Sys. & Networks Corp., No. CA-90-1553-S, 1995 WL 520978, at *8 (4th Cir. Sept. 5, 1995); Subaru Distrib. Corp. v. Subaru of America, Inc., No. 98 CIV. 5566 (CM), 2002 WL 413808, at *8, *37 (S.D.N.Y. Mar. 18, 2002); *In re* Crysen/Montenay Energy Co., 156 B.R. 922, 926 (S.D.N.Y. 1993); Figueroa v. Kit-San Co., 845 P.2d 567, 577 (Idaho Ct. App. 1992); Y & N Furniture, Inc. v. Nwabuoku 734 N.Y.S.2d 382, 385 (N.Y. Civ. Ct. 2001); Domanik Sales Co., Inc. v. Paulaner-North America Corp., No. 00-0669, 2000 WL 1855144, at *1 (Wis. Ct. App. Dec. 20, 2000).

175 *See* Annual Meeting 2002 Draft, *supra* note 13, § 2-601.

176 *See* U.C.C. § 2-201.

177 *Id.* § 2-201(1).

178 *See* 1 HAWKLAND ET AL., *supra* note 81, § 2-201:8 (discussing whether promissory or equitable estoppel may provide an exception).

179 *See* PEB Study Group, *supra* note 43, at 1874.

frauds using promissory estoppel.[180] On the other hand, section 2-201 lists several exceptions to its writing requirement, but does not say anything about reliance.[181] This omission may suggest that the drafters of Article 2 specifically rejected the promissory estoppel theory.[182]

At the time the Study Group made its recommendation that a revision should address reliance,[183] great uncertainty surrounded this issue. Some courts were willing to enforce promises based on reliance, others were not, and still other courts had not reached the issue.[184] The problem, for this reason, called for legislative attention.

During the past ten years, the rift among jurisdictions has not disappeared. Yet, uncertainty about the issue largely has diminished. Through numerous decisions, previously undecided states have reached one conclusion or another.[185] Although the problem of nonuniformity among jurisdictions remains, the need to amend the statute to bring about clarity has waned. The amendments NCCUSL approved in August 2002, perhaps for this reason, do not address reliance.[186]

A third example concerns the infamous section 2-207,[187] a provision that alters the common law's "mirror-image rule." The mirror-image rule says that a purported acceptance of an offer that has different or additional terms is not an acceptance but is in reality a counter-

180 *See* RESTATEMENT (SECOND) OF CONTRACTS § 139(1) (1981) ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise."); Gregory E. Maggs, *Ipse Dixit:* The Restatement (Second) of Contracts *and the Modern Development of Contract Law*, 66 GEO. WASH. L. REV. 508, 523–25 (1998) (discussing acceptance of section 139 among different jurisdictions).

181 *See* 1 HAWKLAND ET AL., *supra* note 81, § 2-201:8 ("Given the liberalizing force of the rules of Section 2-201(2) and (3), it is somewhat difficult to imagine situations where additional relief should be given by way of estoppel." (footnote omitted)).

182 *See, e.g.*, Lige Dickson Co. v. Union Oil Co., 635 P.2d 103, 103, 107 (Wash. 1981) (rejecting promissory estoppel in a case involving section 2-201 of the U.C.C.).

183 *See supra* note 179 and accompanying text.

184 *See* Allied Grape Growers v. Bronco Wine Co., 249 Cal. Rptr. 872, 878 (Ct. App. 1988) (listing cases conflicting on the issue and noting that the majority recognize reliance as an exception).

185 *See* Christopher M. Bellomy, *Estoppel and Section 2-201 of the Uniform Commercial Code*, 100 COM. L.J. 536 (1995) (identifying different approaches).

186 *See* Annual Meeting 2002 Draft, *supra* note 13, § 2-201.

187 U.C.C. § 2-207(1) (2002) ("A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.").

offer.[188] Section 2-207(1) strives to create a major exception to this rule for contracts concerning the sale of goods. The section says that a purported acceptance is an acceptance even if it states additional or different terms, "unless acceptance is expressly made conditional on assent to the additional or different terms."[189]

Courts have had difficulty applying section 2-207 because it contains a number of ambiguities. For example, at the time that the PEB Study Group wrote its report, jurisdictions disagreed about what the offeree must say to make acceptance "expressly conditional" under section 2-207(1). In the leading case of *Dorton v. Collins & Aikman Corp.*,[190] one court held that the conditional nature of the acceptance must be so clearly expressed that the offeror has notice that the offeree is unwilling to proceed with the transaction unless the additional or different terms are included in the contract. In contrast, in the famous decision of *Roto-Lith Ltd. v. F.P. Bartlett & Co., Inc.*,[191] another court held that merely including a term materially altering the offer amounts to a conditional acceptance. The PEB Study Group believed that section 2-207(1) required revision to address this kind of problem.[192]

Two important developments have occurred in the past ten years in relation to this particular issue. First, over a dozen cases have considered the question, and they all have accepted the *Dorton* view and rejected the *Roto-Lith* approach.[193] Many of these decisions expressly describe the split between *Roto-Lith* and *Dorton*, indicating that the courts thought carefully about the question.[194] Second, the First Circuit has decided to overrule its decision in *Roto-Lith*.[195] Accordingly,

188 *See* RESTATEMENT (SECOND) OF CONTRACTS § 59 (1981) ("A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer.").

189 U.C.C. § 2-207(1).

190 453 F.2d 1161 (6th Cir. 1972).

191 297 F.2d 497 (1st Cir. 1962).

192 *See* PEB Study Group, *supra* note 43, at 1874 (noting that "application of § 2-207 has generated confusion in the courts, excessive litigation, and continuing criticism from the commentators").

193 *See, e.g.*, Frank M. Booth, Inc. v. Reynolds Metals Co., 754 F. Supp. 1441, 1447 (E.D. Cal. 1991); Polyclad Laminates, Inc. v. VITS Maschinenbau GmbH, 749 F. Supp. 342, 344 (D.N.H. 1990); St. Charles Cable TV, Inc. v. Eagle Comtronics, Inc., 687 F. Supp. 820, 828 (S.D.N.Y. 1988).

194 *See, e.g.*, Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332, 1341 (D. Kan. 2000); Gardner Zemke Co. v. Dunham Bush, Inc., 850 P.2d 319, 323–24 (N.M. 1993); Stanley-Bostitch, Inc. v. Regenerative Envtl. Equip. Co., Inc., 697 A.2d 323, 327–28 (R.I. 1997).

195 *See* Ionics, Inc. v. Elmwood Sensors, Inc., 110 F.3d 184 (1st Cir. 1997).

the need to revise Article 2 to address this problem largely has disappeared. The amendments NCCUSL approved in August 2002 modify section 2-207, but would preserve this result.[196]

B. Limitations of Precedent

The foregoing discussion has shown how precedent has ameliorated some of the problems identified by the PEB Study Group when it recommended revising Article 2. Judicial decisions have addressed not just these three problems, but many, many other issues under Article 2. Yet, precedents do have at least three important limitations that deserve mention.

First, precedents over the past ten years have not clarified all issues under Article 2. For example, another battle of the forms issue is whether different terms in a proposed offer become part of the contract created by section 2-207(1). Article 2 provides no express answer.[197] At the time NCCUSL decided to revise Article 2, courts had expressed three different views on the subject.[198] Since then, however, only a few cases squarely have confronted the question.[199] The topic, like many others, remains subject to doubt.[200]

Second, amending the statute would insure uniformity among the states in a way that judicial precedents cannot reasonably be expected to do. For instance, even if a dozen new cases address the effect of reliance on the statute of frauds in section 2-201(1), these

196 The draft, which moves section 2-207(1) to section 2-206(3), would eliminate the "unless" clause. *See* Annual Meeting 2002 Draft, *supra* note 13, § 2-206(4). The drafters evidently believe that an acceptance that falls within the high standard imposed by the *Dorton* case would not amount to a purported acceptance. *See* Annual Meeting 2001 Draft, *supra* note 124, § 2-206 prelim. cmt. 2. The comment states,

> The "unless" clause that appeared at the end of the sentence that is now subsection (3) when that sentence was a part of original Section 2-207(1) has been omitted as unnecessary. Subsection (3) rejects the mirror image rule, but any responsive record must still be fairly regarded as an "acceptance" and not as a proposal for such a different transaction that it should be construed to be a rejection of the offer.

Id.

197 Section 2-207(2) addresses additional terms, but not different terms. *See* U.C.C. § 2-207(2) (2002) ("The additional terms are to be construed as proposals for addition to the contract.").

198 *See* Daitom, Inc. v. Pennwalt Corp., 741 F.2d 1569, 1579–80 (10th Cir. 1984) (discussing three different approaches to this issue).

199 *See, e.g.*, Superior Boiler Works, Inc. v. R.J. Sanders, Inc., 711 A.2d 628, 635 (R.I. 1998) (discussing the battle of the forms approaches taken by various courts and adopting the "knock-out rule" as Rhode Island's approach).

200 The latest draft would resolve this ambiguity. *See* Annual Meeting 2002 Draft, *supra* note 13, § 2-207.

cases might not all reach the same conclusions on every point. The law, moreover, would remain unsettled in jurisdictions that have not addressed the issue.

Third, although judicial precedents can clarify ambiguities, they cannot make necessary substantive changes to the law. For example, throughout the revision process, the two drafting committees have sought to raise the threshold price for the statute of frauds from $500 to $5000 to reflect inflation since the 1950s.[201] Courts have not felt free to make this type of change. The PEB Study Group wanted the drafting committee to make numerous revisions of this kind.[202] These three limitations suggest that some need for amendment still may remain, but do not negate the observation that the need to revise Article 2 has diminished.

CONCLUSION

This Article has not attempted to argue that NCCUSL erred in deciding to revise U.C.C. Article 2 in 1991. The statute plainly had a number of problems. Skillful drafting and substantive changes clearly could have improved the law in some places.

The Article also has not attempted to criticize the choices that the drafting committees have made during the decade-long revision process. The committees have come up with many good ideas. Even if some did not make it into the draft revision approved in August 2002, the law has benefitted from their work.

Furthermore, this Article has not claimed that Article 2 no longer needs revision. On the contrary, as indicated in several places, numerous problems still remain. For example, precedents have addressed only some of the issues that concerned the drafters a decade ago. Moreover, the treatment of computer software remains a difficult subject.

This Article, however, has sought to demonstrate that, for a variety of reasons, the need to revise Article 2 has diminished over the past decade. This observation should provide some comfort to both those who supported revision and those who opposed it. Supporters of revision can take solace in knowing that their inability to achieve comprehensive modernization ultimately may not have had serious consequences. Opponents of revision may see this diminishing need as a further argument for their view.

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201 *See id.* § 2-201(1) (proposing the change for inflation).

202 *See* PEB Study Group, *supra* note 43, at 1872–75 (recommending numerous substantive changes).

This demonstration that the urgency of revising Article 2 has waned also may have implications when state legislatures decide whether to enact the amendments that NCCUSL finally has approved. These amendments are not very controversial. Yet, as this Article has shown, they also are not tremendously urgent.