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Progressing Towards a Uniform Commercial Code for Electronic Commerce or Racing Toward Nonuniformity?

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PROGRESSING TOWARDS A UNIFORM COMMERCIAL CODE FOR ELECTRONIC COMMERCE OR RACING TOWARDS NONUNIFORMITY?

By Maureen A. O'Rourke[†]

ABSTRACT

The Magaziner Report encourages the development of a consistent commercial law environment against which electronic commerce transactions may take place. The author considers the current legal landscape, noting that while many efforts are underway to codify aspects of electronic commerce, these efforts are piecemeal in nature and may lead to the very lack of uniformity against which the Magaziner Report counsels. The author then briefly considers what lessons may be learned from the drafting history of the original U.C.C. as well as proposed Article 2B (now the Uniform Computer Information Transactions Act) governing transactions in computer information. She argues that Article 2B could benefit from some synthesis with efforts by the European Union and that the Clinton Administration should focus on identifying and harmonizing mandatory rules of law as it moves from broad statements of principle to practical implementation of a legal regime for electronic commerce.

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I. INTRODUCTION

As the Clinton Administration recognized in its 1997 *Framework for Global Electronic Commerce* ("Magaziner Report" or "Report"), the Internet is transforming all aspects of life—from changing the way we think about what constitutes a community, to how we conduct research, to how we enter into and perform commercial transactions.¹ As its official title suggests, the Magaziner Report as well as the Presidential Directive accompanying it both emphasize the latter transformation. They consider primarily how the Internet affects global trade in goods, services and information and what the government's role should be in facilitating that trade.

The Report's premise is fairly straightforward. The Internet is characterized generally by both low barriers to entry and low transaction costs. These and other qualities, like the Internet's dynamic technology and global nature, should lead to a highly competitive market resulting in greater choice for consumers at lower prices than in conventional markets. The animating philosophy behind the Report is that this is a desirable state and therefore the law should be drawn to encourage parties to engage in electronic commerce. In the Report's view, the law may do this best by establishing technology-neutral, framework principles to provide a certain, uniform legal environment against which the market may work.² Establishing such a framework would include both dismantling existing legal barriers to electronic commerce and enacting as necessary new rules to support the use of technology. Moreover, consistent with the historical

1. WILLIAM J. CLINTON & ALBERT GORE, JR., A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE (1997), available at <<http://www.iitf.nist.gov/elecomm/ecommm.htm>> [hereinafter FRAMEWORK]. The Magaziner Report comments:

No single force embodies our electronic transformation more than the evolving medium known as the Internet.... [T]he Internet has emerged as an appliance of every day life.... Students across the world are discovering vast treasure troves of data via the World Wide Web.... Citizens of many nations are finding additional outlets for personal and political expression. The Internet is being used to reinvent government and reshape our lives and our communities in the process. As the Internet empowers citizens and democratize societies, it is also changing classic business and economic paradigms.

Id. at 1-2.

2. See *id.* at 5. In the Report's words, the primary role for government "should be to support and enforce a predictable, minimalist, consistent and simple legal environment for commerce." *Id.* This recognizes that "government agreements may prove necessary to facilitate electronic commerce and protect consumers." *Id.*

conception of Internet governance as decentralized, the Report argues that any regulation necessary to achieve its goals should be implemented in a decentralized rather than top-down manner.³

In the area of law traditionally viewed as commercial or contract law,⁴ the Report generally supports the freedom of parties to contract as they see fit.⁵ The government's role is primarily to supply a set of background rules against which parties may contract.⁶ The Report also notes that the fluid, borderless nature of the medium requires consistent global rules on contract formation and enforcement to encourage parties to enter into electronic commerce transactions.⁷ Simply put, parties will be less willing to conduct transactions electronically if they are uncertain about the governing law or its contents. Thus, a uniform, readily understood legal environment is essential for fostering electronic commercial transactions.

The high-level policy objectives and underlying principles of the Magaziner Report seem to follow quite sensibly from its vision of the Internet as a low-cost medium. The devil, as always, has been in the details of implementing those high-level objectives. This implementation is still in its infancy and is proceeding on a national as well as international stage. While policymakers continue to avow fidelity to the objectives of the Report, the legislative drafting process codifying those objectives has often been characterized by discord.

The following briefly summarizes some of the major efforts to codify aspects of electronic commerce law and highlights various obstacles that may block uniformity. It then examines an example of such legislation—the Uniform Computer Information Transactions Act in its earlier form as

3. *See id.* (“[G]overnments should establish a predictable and simple legal environment based on a decentralized, contractual model of law rather than one based on top-down regulation.”).

4. Note that the overriding principles and policies of the Report apply not only to contract law but also to all facets of electronic commerce including, for example, such diverse concerns as privacy, taxation and maintenance of an adequate telecommunications infrastructure.

5. *See* FRAMEWORK, *supra* note 1, at 10 (“In general, parties should be able to do business with each other on the Internet under whatever terms and conditions they agree upon”).

6. *See id.* (arguing that the government should “support the development of ... [a] legal framework that recognizes, facilitates, and enforces electronic transactions worldwide”).

7. *See id.* at 2 (noting that Internet commerce occurs globally and that for its potential to be realized, “governments must adopt a non-regulatory, market-oriented approach to electronic commerce, one that facilitates the emergence of a transparent and predictable legal environment to support global business and commerce”).

proposed Article 2B of the Uniform Commercial Code ("U.C.C.").⁸ Finally, this paper considers how the experience of the original drafters of the U.C.C. informs the controversy surrounding Article 2B, and attempts to draw some lessons from that history to help policymakers as they continue to implement the Magaziner Report's recommendations.

II. CODIFICATION EFFORTS

Certainly, an initial difficulty in codifying principles of electronic commerce is in defining the term "electronic commerce" in a particular context. For example, it could be defined expansively as all transactions in which electronic means are used in some manner however inconsequential, or, more narrowly, as a transaction performed entirely electronically. Between these two extremes are a range of transactions to which the term might refer. The lack of any uniform definition has perhaps contributed to the piecemeal efforts to codify particular aspects of electronic commerce that characterize today's legal landscape.

For example, before the Magaziner Report was even issued, the United Nations Commission on International Trade Law ("UNCITRAL") had adopted a Model Law on Electronic Commerce ("Model Law").⁹ The intent of the law was to facilitate electronic commerce by providing for essentially equivalent treatment of electronic and paper records.¹⁰ The

8. As this article went to press the National Conference of Commissioners on Uniform State Laws ("NCCUSL") and the American Law Institute ("ALI") announced that the rules set forth in Article 2B will henceforth be promulgated as part of a stand-alone act—the Uniform Computer Information Transactions Act—rather than as part of the U.C.C. See NCCUSL & ALI, *NCCUSL to Promulgate Freestanding Uniform Computer Transactions Act: ALI and NCCUSL Announce that Legal Rules for Computer Information Will Not be Part of U.C.C.* (visited Apr. 14, 1999) <<http://www.nccusl.org/pressrel/2brel.html>>. This article, however, will continue to refer to Article 2B because there is no indication that the new uniform act will change the substance of the proposed rules and no version of the uniform act was available at the time this article went to press. Moreover, the lessons that can be learned from the U.C.C.'s drafters still apply regardless of the manner of promulgation of rules for transactions in information.

9. *Model Law on Electronic Commerce of the United Nations Commission on International Trade Law*, G.A. Res. 162, U.N. GAOR, 51st Sess., Annex, Agenda Item 148, U.N. Doc. A/RES/51/162 (1996), available at <<http://www.un.or.at/uncitral/english/texts/electcom/ml-ec.htm>>.

10. *Id.* at Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, para. 6 ("The objectives of the Model Law, which include enabling or facilitating the use of electronic commerce and providing equal treatment to users of paper-based documentation and to users of computer-based information, are essential for fostering economy and efficiency in international trade.").

Magaziner Report refers to the Model Law favorably, "support[ing] the adoption of [its] principles ... by all nations as a start to defining an international set of uniform commercial principles for electronic commerce."¹¹

A number of individual states, drafting bodies and countries are considering adopting all or part of the Model Law as they update their legislation for the electronic world.¹²

In the United States, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") has been working on a Uniform Electronic Transactions Act ("UETA") against the backdrop of the UNCITRAL Model Law, as well as state enactments on the use of electronic records and digital signatures. As a promulgator of the U.C.C. and other uniform acts, NCCUSL historically has been influential in enabling low-cost transactions across state borders by encouraging the states to adopt uniform laws drafted by NCCUSL, often with the assistance of other bodies such as the American Law Institute ("ALI"). However, NCCUSL's current UETA effort may suffer from tardiness. A number of states are in the process of adopting or have already adopted laws based on the Model Law.¹³ This approach is consistent with the Magaziner Report's suggestion of a decentralized model of regulation but may prove less desirable than states' adoption of the UETA. Individual state enactments, although generally premised on the principles of the Model Law and UETA, will likely differ in their details, potentially frustrating the uniformity essential to the free flow of electronic commerce.¹⁴

Perhaps because of the potential for lack of uniformity among the states and certainly because of a fear of lack of uniformity internationally, the Clinton Administration recently proposed that UNCITRAL consider preparing an International Convention on Electronic Transactions.¹⁵ The

11. FRAMEWORK, *supra* note 1, at 11.

12. See U.S. GOV'T WORKING GROUP ON ELEC. COMMERCE, FIRST ANNUAL REPORT 13 (1998), available at <<http://www.doc.gov/ecommerce/E-comm.pdf>> (noting that "a number of countries and most U.S. States are using the Model Law as a basis for updating their commercial laws") [hereinafter FIRST ANNUAL REPORT].

13. See *id.*

14. This lack of uniformity of course could be avoided by individual state's accompanying their enactment of the UETA with repeal of these prior acts. This approach has been successful in other areas. See, e.g., U.C.C. § 9-102 (1998) (stating that enactment of Article 9 of the U.C.C. "should be accompanied by the repeal of existing statutes dealing [with security interests in personal property]").

15. See FIRST ANNUAL REPORT, *supra* note 12, at 15 (noting that "[a] few governments ... are establishing detailed rules for electronic authentication, which the United States considers to be premature, burdensome or unnecessary").

Convention would eliminate legal barriers to electronic transactions by treating electronic messages as paper equivalents and would provide a framework for authentication rules. In addition, it would synthesize the Model Law and new provisions in pursuit of a coherent whole.¹⁶ In its proposal, the Administration recognized that although different nation-states likely will have varying approaches to authentication, an internationally accepted framework may assure contracting parties that their transactions will be respected despite differing laws at the local level.¹⁷ Although acknowledging that a Convention might be desirable, UNCITRAL has chosen instead to focus on drafting uniform rules regarding digital and electronic signatures to supplement the already existing Model Law.¹⁸

In late 1998, the European Commission ("Commission") presented a Proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the International Market ("Commission Proposal").¹⁹ The Commission Proposal is intended to implement some of the objectives announced by the Commission in its 1997 European Initiative on Electronic Commerce.²⁰ That document, although published before the Magaziner Report, bears some similarities to the latter report, including an emphasis on market-driven solutions and a basic belief that the law should encourage global electronic commerce.²¹ In the new Commission Proposal, the Commission has included a provision that directs member states to:

ensure that their legislation allows contracts to be concluded electronically. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither prevent the effective use of electronic contracts nor result in such

16. *See id.* (indicating that the Convention should use provisions of the Model Law to remove barriers to electronic transactions and couple such provisions with an approach to authentication).

17. *See id.*

18. *Proposal by the United States of America*, U.N. GAOR Comm'n on Int'l Trade Law, 33rd Sess., Note by the Secretariat, at 1, U.N. Doc. A/CN.9/WG.IV/WP.77 (1998) available at <http://www.un.or.at/uncitral/english/sessions/wg_ec/wp-77.htm> (stating that the Committee did not wish to be distracted from focusing on digital signature rules but leaving open the possibility of a later Convention).

19. COM(98)586 final [hereinafter Commission Proposal].

20. COM(97)157.

21. *See id.* at 14 (setting forth principles for regulation of electronic commerce including "No regulation for regulation's sake"); *see also id.* at 4 (noting opportunities for Europe to participate in the global technological revolution).

contracts being deprived of legal effect and validity on account of their having been made electronically.²²

This proposal is consistent with the approaches of UNCITRAL and the UETA.

III. OBSTACLES TO UNIFORMITY

The movement to treat electronic communications as paper equivalents thus seems to be well underway. UNCITRAL has provided a model that much of the world is using to fashion its own legislation. The hope is that the overriding principle of accepting electronic communications will remain consistent across jurisdictions, rendering differing details of individual national or state enactments less likely to frustrate global electronic commerce.

However, it is far from clear whether or not this is occurring. It is relatively uncontroversial in these days of advanced technology that parties should be able to form contracts electronically. But there is widespread disagreement on when an electronic message may be attributed to a person and what legal effect such attribution should have. UNCITRAL, the European Union, the Organisation for Economic Co-operation and Development ("OECD"), the individual states of the United States, NCCUSL, and the American Bar Association are just some of the organizations working on the authentication problem. While these bodies often confer with each other, exchanging ideas and building on each other's work, the coordination among them is incomplete. For example, a number of states are in the process of adopting or have already adopted digital signature laws.²³ These laws lack uniform definitions and vary in their approach to a number of issues.²⁴

There is a risk then that the Magaziner Report's approach of seeking international agreement on a broad framework with details to be implemented at the local level may not achieve the desired uniformity. The need

22. Commission Proposal, *supra* note 19, at Art. 9.

23. For a collection of state enactments, see *Summary of Electronic Commerce and Digital Signature Legislation* (last modified Mar. 8, 1999) <http://www.mcb.com/ds_sum.html>.

24. See Thomas J. Smedinghoff, *Overview of State Electronic and Digital Signature Legislation*, Glasser Legal Works (1988), available in Westlaw, TP-ALL Library, EL-CEC GLASS-CLE 407 (noting that among the states there is "little consensus" on how to approach digital signature issues).

for high-level agreement, not just on overarching principles, but also on some details, is becoming apparent.

The Administration's proposal for an International Convention seems to recognize this.²⁵ As different organizations attack facets of electronic commerce in a piecemeal fashion, the risk of a lack of uniformity increases. An International Convention addressing the issues of removing barriers to electronic commerce and agreeing on authentication principles could provide guidelines within which individual states could act without compromising uniformity. As Professor Amelia Boss notes, the law's focus is shifting toward a symbiosis between national and international codification efforts for a number of reasons, including (i) the lack of any existing body of law governing electronic commerce, (ii) the globalization of such commerce, and (iii) the number of nations addressing electronic commerce issues at the same time.²⁶ Old paradigms in which law was drafted domestically and later harmonized with international efforts are giving way to a new paradigm of coordination geared toward creating legal systems that are unified in their approach if not in the details of their rules.²⁷

This suggests that the Clinton Administration's approach should continue to evolve. It has largely been successful in obtaining global agreement on the broad principles outlined in the Magaziner Report. It should now turn its attention both to process matters and to the details of substantive rules. The Clinton Administration should work to ensure that coordination across countries and within the United States occurs, resulting in rules that are consistent with the Magaziner Report's philosophy. This is not likely to be an easy task as nations and states may be reluctant to cede sovereignty to a coordinated effort. Additionally, cultural differences suggest that an overarching consensus will never be reached; and certainly, no consensus will be reached on the minutiae. The key is to work to implement framework principles with enough detail to allow electronic com-

25. See *supra* notes 14-17 and accompanying text.

26. See Amelia H. Boss, *Electronic Commerce and the Symbiotic Relationship Between International and Domestic Law Reform*, 72 TUL. L. REV. 1931, 1943-46 (1998) (identifying a new paradigm for lawmaking in electronic commerce and stating, "A number of identifiable factors have contributed to the symbiosis that exists between international and domestic legal developments in the area of electronic commerce. The relative state of development of law, the timing of the processes, the globalization of commerce and the evolution of new commercial practices are all contributing factors").

27. See *id.* at 1943 ("With the advent of electronic commercial practices, ... the focus shifts from harmonization to coordination, from efforts to bring disparate legal systems together to efforts to create legal systems that are unified in their approach.").

merce to proceed in an environment of legal certainty while not depriving local jurisdictions of the ability to enforce local values through their own laws.

The difficulty in achieving this balance is already apparent in the debates over U.C.C. Article 2B. The high-level policies of the Magaziner Report do not provide much assistance in determining how—or if—to adapt common law contract and U.C.C. rules to a digital environment. There are a multiplicity of contexts in which the law will have to determine the validity of online contract formation and the terms of that contract. For example, online contracts may be for the purchase of tangible goods, intangible information, access to information, or performance of services, just to name a few. Moreover, these contracts and their subject matter may be standard form or highly individualized and between two businesses, a business and a consumer, or two consumers. How—and, more particularly, should—legislators at the state, national or international level draft a law or set of laws to deal with such diverse electronic transactions under current or future technology?

The United States' answer has been to attack aspects of the problem under different legal rubrics. Historically, contracts have been governed primarily by state law. Transactions in goods have been governed by Article 2 of the U.C.C. while contracts for services and information have been governed by common law contract rules. Additionally, contracts for information have always been subject to federal intellectual property laws that preempt state contract law in the case of conflict.²⁸ As electronic commerce has grown, both the individual state governments and the federal government have recognized the need to adjust the relevant law to account for the special concerns it raises.

In the contract law area, NCCUSL's proposed revision of Article 2 would apply to electronic purchases of goods while its proposed Article 2B would cover computer information transactions. Computer information transactions include licenses and other contracts involving software, other information, or access to such information.²⁹ Article 2B applies to these

28. See U.C.C. § 2B-105, Reporter's Notes 2-3 (Dec. 1998 Draft) (noting that federal intellectual property law may preempt state contract law).

29. See *id.* § 2B-102(a)(9). This provision states:

Computer information transaction means a license or other contract whose subject matter is (i) the creation or development of, including the transformation of information into, computer information or (ii) to provide access to, acquire, transfer, use, license, modify, or distribute computer information. The term does not include a contract for distri-

transactions regardless of whether they are entered into on- or off-line or whether the information is delivered electronically or through more conventional means. The revision of Article 2 is scheduled for completion in 1999.³⁰ NCCUSL originally also planned to hold a final vote on Article 2B in 1999.³¹ However, the ALI, citing a number of concerns with the then-current draft, indicated that it would not vote on Article 2B in 1999 and might not even discuss it at its annual meeting.³² In a late-breaking development, on April 7, 1999, the ALI and NCCUSL announced that the rules set forth in Article 2B would no longer be presented as part of the U.C.C.; rather they would form an entirely new and separate enactment—The Uniform Computer Information Transactions Act (“UCITA”).³³ The ALI will not vote on this Act but NCCUSL plans to introduce it to the states for enactment in Fall 1999.³⁴ There is no indication that NCCUSL plans to change the substance of Article 2B’s rules as they are incorporated in the UCITA. Thus, the debate over Article 2B continues to be relevant.

The ALI is not the only group that has expressed reluctance to present Article 2B to the states for enactment. Legal academics, consumer and government groups, and certain industries have voiced numerous objections to Article 2B over the course of its drafting.³⁵ A detailed analysis of Article 2B’s particular provisions and objections to them is beyond the scope of this paper. However, a broad overview of the critical literature indicates that objections run the gamut from suggesting that Article 2B’s

bution of information in print form ... or to create information for the purpose of distribution in print even if the information provided for distribution pursuant to the contract is delivered in electronic form.

Id.

30. See Kathleen Patchel, *The Uniform Commercial Code Survey Part 1: Introduction*, 53 BUS. LAW 1457 (1998) (stating that revised Article 2 and 2B are “slated for final approval by the ALI and NCCUSL in 1999”).

31. See *id.*

32. See ALI *Concerns About Scope, Public Policy Delay Vote on New Software Licensing Law*, ELECTRONIC COM. & L. REP. (BNA) NO. 48, at 1424-25 (Dec. 23, 1998).

33. See *supra* note 8.

34. See *id.*

35. See, e.g., Symposium, *Intellectual Property and Contract Law in the Information Age: The Impact of Article 2B of the Uniform Commercial Code on the Future of Transactions in Information and Electronic Commerce*, 13 BERKELEY TECH L.J. 809 (1998) (devoting an entire issue of the law journal to articles largely critical of Article 2B); Symposium, *Intellectual Property and Contract Law for the Information Age: The Impact of Article 2B of the Uniform Commercial Code on the Future of Informational and Commerce*, 87 CALIF. L. REV. 1 (1999) (same); NCCUSL, *U.C.C. Article 2B Licenses* (visited Mar. 17, 1999) <<http://www.law.upenn.edu/library/ulc/ulc.htm#ucc2b>> (referencing drafts of Article 2B and correspondence revealing controversial issues).

proposed scope is overbroad to challenging its provisions on standard form contracts and its alleged inadequate attention to public policy concerns.³⁶

The sheer volume of commentary criticizing and defending Article 2B illustrates its importance. It is the first effort to codify the law on transactions in information. As such, it is likely to provide a model not only for other countries individually, but also for international movements to unify laws applicable to cross-border transactions. Moreover, as the law that establishes substantive rules for contract formation and enforcement, it will likely prove the linchpin in the effort to encourage global electronic commerce. The already occurring, universal acceptance of the principle of electronic contracting is a necessary first step to facilitating electronic commerce. However, such commerce, particularly in the information transactions that Article 2B would regulate, is unlikely to reach its full potential in the absence of a legal environment that sets forth coherent, consistent rules.

This makes the acrimony over Article 2B all the more troubling. Commentators widely accept the need for uniform principles, particularly to facilitate online delivery of information.³⁷ Why then is Article 2B faltering? The answer lies in an appreciation both of history and of the nature of the transactions Article 2B is attempting to regulate. A brief overview of the U.C.C.'s history considered in light of current legislative efforts helps to explain why Article 2B has been so controversial and also offers some suggestions for how to arrive at a more satisfactory proposal.

IV. THE LEGACY OF LLEWELLYN: LESSONS FOR THE DRAFTERS OF ARTICLE 2B AND OTHER LAWMAKERS

A. A Brief History of Article 2

Current Article 2 of the U.C.C. was subject to a crucible of debate similar to that now engulfing Article 2B. Like Article 2B, Article 2's drafting process proceeded over a number of years, with the draft being revised to reflect comments received from diverse groups.³⁸ The goals of Article 2's drafters were similar to those of Article 2B's and anticipated by

36. *See id.*

37. *See, e.g.,* FRAMEWORK, *supra* note 1, at 2 (discussing online provision of services and information).

38. *See* Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 799-804 (1958) (describing the iterative process of presenting drafts, receiving comments and criticism, and redrafting).

50 years the policy recommendations that the Magaziner Report would make with respect to electronic commerce. As stated in the statute,

Underlying purposes and policies of [the U.C.C.] are

(a) to simplify, clarify and modernize the law governing commercial transactions;

(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions.³⁹

The drafters sought to make commercial contracting more efficient, reducing costs by eschewing reliance on formalistic and legalistic common law contract rules, and instead giving effect to the parties' agreement as revealed in the particular transaction. Generally, the drafters' philosophy and particularly that of Article 2 Reporter Karl Llewellyn was labeled "legal realism."⁴⁰ Legal realists believe that law can—and should—be revealed by the practices of parties actually engaged in commercial transactions.⁴¹ In translating this philosophy into law, the drafters intended courts to be informed by a "situation sense" and to interpret the parties' agreement in all of the circumstances of the transaction including usage of trade, course of dealing and course of performance.⁴² This orientation reflected the drafters' belief that the parties are best suited to determine their agreement and the law should honor that agreement. Thus, the principle of freedom of contract is enshrined in Article 2 and reflected in its drafting style.⁴³ Under Article 2, parties can make their own bargain by contracting

39. U.C.C. § 1-102(2) (1998). This statement of purpose, set forth in Article 1, applies to each of the following articles, including Article 2 on Sales. See U.C.C. § 1-102, cmt. 1 (1998).

40. See generally WILLIAM TWining, KARL LLEWELLYN AND THE REALIST MOVEMENT 302-40 (1973) (describing the philosophy and Llewellyn's adherence to it in drafting the U.C.C.).

41. See Maureen A. O'Rourke, *Rethinking Remedies at the Intersection of Intellectual Property and Contract: Toward a Unified Body of Law*, 82 IOWA L. REV 1137, 1153 n.70 (collecting authorities to this effect).

42. See *id.* at 1153-54 n.70.

43. See U.C.C. § 1-102(3) & cmt. 3 (1998) (stating in the statutory text that "[t]he effect of provisions of this Act may be varied by agreement" and explaining in the accompanying comment that "freedom of contract is a principle of the Code").

around most of the statutory rules or simply opt to rely on these default rules as the terms of their contract.⁴⁴

Although not without its problems, Article 2 has been widely regarded as a success, particularly in business-to-business transactions.⁴⁵ It has been adopted in most United States jurisdictions,⁴⁶ offering a measure of national uniformity that has facilitated the growth of a national economy. It would seem then that Article 2B could do much worse than to proceed along the same lines as Article 2.

However, it is by no means clear that the approach which informed Article 2 is appropriate in drafting a law to govern computer information transactions. First, the scope of the two articles is much different. Article 2 governs transactions in goods, defined as "all things ... which are movable at the time of identification to the contract for sale."⁴⁷ Whether standardized or specially manufactured, goods are tangible. The product is physically defined, and the buyer obtains all rights to that physical manifestation on completion of a sale. The same rules that govern the sale of standardized commodities like shampoo or canned corn also are effective to govern the sale of, for example, sophisticated airplane parts that are designed specially for a particular buyer. The fit may be imprecise but it is workable. In attempting to decrease the costs of commercial transactions, Article 2's philosophy was to adopt as the default those rules to which most parties would agree.⁴⁸ Thus, generic contracting parties could save costs by relying on those default rules while parties with special needs could contract around some or all of them as appropriate.

44. *See id.*

45. Commentators as well respected as James J. White and Robert S. Summers have called the U.C.C. "[t]he most spectacular success story in the history of American law." Fred H. Miller, *The Uniform Commercial Code: Will the Experiment Continue?*, 43 *MERCER L. REV.* 799, 808 (1992) (citing JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* 3 (3d ed. 1988)). *But see* Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 *U. PA. L. REV.* 1765, 1821 (1996) (contending that the U.C.C.'s approach to defining the agreement has some undesirable effects on merchant transactions).

46. *See* ALAN SCHWARTZ & ROBERT E. SCOTT, *COMMERCIAL TRANSACTIONS-PRINCIPLES AND POLICIES* 2 (2d ed. 1991) (noting that at least parts of the U.C.C. have been adopted in all 50 states).

47. U.C.C. § 2-105(1) (1998).

48. *See* SCHWARTZ & SCOTT, *supra* note 46, at 21 (explaining the economic theory informing the choice of default rules).

B. Article 2B and Information Transactions

The computer information transactions governed by Article 2B are different. As Article 2B itself notes, the product it governs is intangible, not defined physically, but rather by the bundle of rights granted under a license.⁴⁹ The rules that govern a license of software protected by a copyright or patent may not be suitable for a license of information protected by a trade secret, or for agreements granting access to information. The "one size fits all" approach of Article 2 simply may not work.

Article 2B's drafters have recognized this, setting forth different rules depending on the nature of the transaction. For example, the rules for access contracts differ from the rules for software licenses.⁵⁰ Article 2B is an umbrella statute covering diverse transactions. This makes it quite unlike Article 2 which deals with the fairly unitary transaction of the sale of goods. The net result is that Article 2B, in trying to be all things to all types of computer information transactions, has reached a level of complexity that is at odds with both the U.C.C.'s and the Magaziner Report's goals of simplicity and clarification.

This complexity becomes all the more apparent when one compares Article 2B to the Commission Proposal. The Commission Proposal applies to "Information Society services," an overarching concept that includes "all services normally provided against remuneration, at a distance by electronic means," including the online sale of goods and services and the license of information.⁵¹ Thus, the unifying factor is the means of contracting rather than the subject matter of the contract. This approach has some intuitive appeal and may be simpler as well as more coherent than Article 2B's scope definition.⁵² This suggests that Article 2B might benefit from some synthesis with the Commission Proposal—a competition between the two approaches might ultimately lead to a "better" law than if each were drafted without reference to the other.

49. See U.C.C. § 2B-102, Reporter's Note 38 (Dec. 1998 Draft) ("Scope provisions in a license define the product.").

50. See *id.* § 2B-615 (setting forth the rules for access contracts).

51. See Commission Proposal, *supra* note 19, at 14-15.

52. Note, however, that Article 2B's drafters considered a number of approaches including a "hub and spoke" approach under which the "hub would consist of general contract principles and the scope rules for particular types of transactions like sales, licenses or leases." See Raymond T. Nimmer, *Intangibles Contracts: Thoughts of Hubs, Spokes, and Reinvigorating Article 2*, 35 WM. & MARY L. REV. 1337, 1340-1341 (1994). However, the eventual result was to draft Article 2B as a stand-alone article containing all of the substantive contract rules relating to computer information transactions.

C. Article 2B and Intellectual Property Law

The intricacy of Article 2B is also caused by its need to account for federal intellectual property law and the practices of knowledge-based industries, a concern that Article 2 never had to face. Some of the main criticisms leveled against Article 2B focus on its alleged failure to adequately accommodate federal intellectual property policy considerations.⁵³ Critics argue that Article 2B is attempting to preempt federal law through the mechanism of state contract law, a clearly impermissible approach.⁵⁴

Article 2B contains a provision stating the obvious proposition that federal law preempts state law as well as a rule giving courts' broad freedom to reform contracts containing terms that violate "fundamental public policy."⁵⁵ The "public policy" exception is a compromise provision intended to redress some parties' objections that Article 2B did not go far enough to enshrine the federally-struck balance between the rights of creators to protect their information and the rights of the public to use it.⁵⁶ The problem for Article 2B's drafters is that the very debate that resulted in this provision itself illustrates that there is no consensus on how that balance has been struck.

This graphically illustrates the internal conflicts of the U.C.C. Its goals of flexibility and uniformity can be at war with each other. This conflict historically has been papered over in the Article 2 context. Article 2 uses a number of flexible concepts like good faith and commercial reasonableness in its statutory wording.⁵⁷ The states enact uniform wording but interpretations vary. Good faith in Maine may not be the same thing as good faith in Texas which may differ from good faith in California. Results may vary across jurisdictions despite the fact that the different locales are in-

53. See Raymond T. Nimmer, *Breaking Barriers: The Relation Between Contract and Intellectual Property Law*, 13 BERKELEY TECH. L.J. 827 (1998) (defending Article 2B's treatment of intellectual property rights).

54. Cf. Jessica Litman, *The Tales that Article 2B Tells*, 13 BERKELEY TECH. L.J. 931, 941 (1998) (contending that Article 2B encourages licensors to assert by contract rights which are not afforded under copyright law).

55. U.C.C. § 2B-105(a)-(b) (Dec. 1998 Draft).

56. The "McManis motion" brought forward by Professor Charles McManis began the debate which culminated in § 2B-105. See J. Thomas Warlick IV, *A Wolf in Sheep's Clothing? Informational Licensing and De Facto Copyright Legislation in U.C.C. 2B*, 45 J. COPYRIGHT SOC'Y U.S.A. 158, 165-166 (1997) (describing the evolution of § 2B-105).

57. See, e.g., U.C.C. § 2-706(1) (1998) (setting forth the calculation of an aggrieved seller's remedy "where the resale is conducted in good faith and in a commercially reasonable manner"); see also *id.* § 1-203 ("Every contract or duty within the Act imposes an obligation of good faith in its performance or enforcement.").

interpreting exactly the same statutory language. This flexible approach to law left room for local values to be enforced and for the statute's meaning to change with time, obviating the need for continual revisions to the statutory text, but sacrificing some degree of uniformity in the process.

Article 2B's drafters are continuing this approach in striking a balance with federal intellectual property law. The flexible language that they have proposed makes it more likely that individual states will enact the statute and enables varying interpretations across these states. The point of contention is that there is a substantive difference between allowing states to have varying interpretations of contract law concepts like good faith and commercial reasonableness and allowing states to have varying interpretations of the intellectual property rights granted under federal law. A more explicit delineation of which intellectual property rights and obligations may be contracted away and which may not, is more likely to ensure that individual states respect the federal balance.

The Magaziner Report is silent on this debate. It does not specifically address the relationship between intellectual property and contract law. It does separately advocate freedom of contract and sufficient protection for intellectual property rights to provide incentives for creators to commercialize their works electronically.⁵⁸ However, it also notes that nations may want to allow for exceptions to such rights like fair use.⁵⁹ It does not state whether a party can give up its fair use rights by contract.

Its framework approach, global orientation, and belief in freedom of contract suggest that it might advocate the drafters' flexible approach. However, this is by no means clear and it is likely that other groups, such as the European Union, would disagree. In the last several years, the European Union has begun to make more explicit what provisions of its Directives—including those related to intellectual property—may not be contracted around.⁶⁰ It has also frequently conditioned protection for the information of non-Union entities on principles of national treatment.⁶¹

58. See *supra* note 5; see also FRAMEWORK, *supra* note 1, at 12 (stating that providers will not make works available electronically if they believe that their intellectual property will be stolen).

59. See FRAMEWORK, *supra* note 1, at 13.

60. For example, the European Directive on the Legal Protection of Computer Programs provides that parties may not contract around the limited decompilation right granted under the Directive. See Directive 91/250/EEC of the Council of 14 May 1991 on the Legal Protection of Computer Programs, art. 6, 1991 O.J. (L 122) 42.

61. For example, the EC Database Directive conditions certain database protections on "third countries offer[ing] comparable protection to databases produced by nationals of a Member State." Directive 96/9/EC of the European Parliament and of the Council of

These two European trends indicate that clarifying domestic law and harmonizing it with other nations' laws has assumed added importance. The opposition to Article 2B has identified an important issue, and the Administration's role now should be to consider how best to address it—in Article 2B, in intellectual property statutes, or in an international forum.

D. Article 2B, the "Agreement," and Consumer Protection

The difference in subject matter that has made Article 2B a much more complex endeavor than Article 2 is exacerbated by the fast-moving nature of the industries that would be subject to its provisions. Under both Articles 2 and 2B, agreement is defined as "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance."⁶² Article 2 was drafted against the backdrop of hundreds of years of commercial law development from Roman law through the Middle Ages to the English Sale of Goods Act of 1893 and finally to state enactments in the United States.⁶³ It made sense for the statute to talk about usage of trade because longstanding practices had grown up that were consistently observed within particular industries. These practices formed the backdrop against which parties contracted. Incorporating such usage into an agreement was truly a cost-saving device. The parties expected such terms to apply and were freed from memorializing them in the contract by the U.C.C.'s default incorporation of them into the "agreement."

In many industries which would be governed by Article 2B, it is premature to refer to a usage of trade. Customs are rapidly evolving, and deference to a particular norm at a particular time may not be appropriate. In some ways this offers a great opportunity to the drafters of Article 2B that Article 2's drafters lacked. Article 2B could channel norms toward the development of desirable practices.

For example, Article 2B sanctions "pay now, terms later" contracts or shrinkwraps as well as online contracts in which the customer manifests assent by clicking on an icon.⁶⁴ However, the governing contractual terms

11 March 1996 on the Legal Protection of Databases, preamble para. 56, 1996 O.J. (L 77) 20.

62. U.C.C. § 1-201(3) (1998).

63. See ROBERT BRAUCHER & ROBERT A. RIEGERT, INTRODUCTION TO COMMERCIAL TRANSACTIONS 19-21 (1977) (outlining pre-U.C.C. sources of law.).

64. See, e.g., U.C.C. § 2B-207, Reporter's Note 3 (Dec. 1998 Draft) (discussing "layered contracting" in which terms follow performance and how 2B sanctions such contracts).

themselves may not be displayed, but simply available to the customer if it chooses to "click-through" to another page to read them. The assent is effective regardless of whether the customer actually clicks through or not.

Under Article 2, the use of terms that were provided after payment could enable a mass market. Often in faceless transactions, it is difficult for the seller to communicate terms to the buyer or to incorporate all of them visibly on the exterior of the packaging to be read before purchase. Thus, it might be reasonable to have a legal rule that allowed the seller to put terms inside the box, but gave the buyer a right to reject those terms once he saw them.

But should such a rule apply to online transactions? The transaction is still faceless but the difficulty of communication no longer applies. The seller can easily provide the terms on the screen for the buyer's examination. Moreover, the seller can easily, through technology, assure that the buyer cannot assent to the terms without those terms having first been presented on the screen. Should it be enough for the seller to have the terms available someplace on the site or should the seller be required to place the terms before the buyer prior to assent?

In other words, should not the fact that Articles 2 and 2B are dealing with different markets matter?⁶⁵ Rules that facilitate mass markets in tangible goods may not be ideal for the electronic mass market. Already available technology makes it possible for the electronic market to inform customers about the terms of a deal much more easily than in the tangible world. But the current usage of trade (to the extent one exists) may be to place the terms on another part of a website rather than on the customer's screen prior to assent. Should the law enshrine such usage of trade or encourage adoption of another one? Certainly, many believe that the electronic market can be very competitive, offering greater choice to customers.⁶⁶ Would it not be consistent with the Report to draft legal rules that enhance the market's efficiency by providing more information to customers, correcting for information asymmetries that might otherwise exist and distort market performance?

65. Keep in mind, however, that Article 2 would apply to electronic contracts for the sale of goods. It too may need some adjustment to account for the unique ability of the electronic media to allow buyers to view terms prior to purchase. However, a critique of the Revised Article 2 is beyond the scope of this article. The unique capabilities of electronic contracting do though offer further support to the European approach in contrast to that of the United States. See *supra* text accompanying notes 51-52.

66. See Commission Proposal, *supra* note 19, at 6 (stating that electronic commerce offers the potential to provide a wider variety of goods and services at lower prices).

Does it not also matter who the “customer” is? Article 2B’s drafters would do well to learn from Article 2’s history. Article 2 does not contain many consumer protection provisions. Over the years, federal and non-uniform state enactments in the consumer protection area effectively either preempted or modified parts of Article 2,⁶⁷ reflecting emerging views of relevant differences between business-to-business transactions and business-to-consumer transactions. Article 2B has the opportunity to incorporate consumer protection into its text, avoiding the later preemption that characterized Article 2. Certainly, Article 2B’s drafters would argue that they have already done so.⁶⁸ The point, though, is that Article 2 provides a lesson—consumer protection included now might avoid nonuniformity later.

The Magaziner Report is largely silent on consumer protection, simply acknowledging that government agreements may be required to protect consumers. However, the OECD has recently issued a Draft Declaration on Consumer Protection in the Context of Electronic Commerce.⁶⁹ The Declaration emphasizes the need for effective consumer protection and discloses the OECD’s intent to develop guidelines for such protections.⁷⁰ The Administration should continue to work closely with OECD on this topic and consider whether or not Article 2B is the appropriate venue for consumer protection or whether it should be enacted in some other form.

E. Summary: Striking a Balance Between Uniformity and Flexibility

The problem that Article 2B faces on the consumer protection front is the same as it faces with respect to virtually all of the issues it is addressing. It is also the same as the Administration is currently facing in the area of digital signatures. What is the appropriate balance between flexibility and uniformity? How does one arrive at a statute that sets a framework on which there is broad national and international agreement while providing enough detail so that local enactments do not frustrate uniformity?

There is no simple answer to this question. However, the sheer difficulty of the task suggests that the key in enabling global electronic commerce may be in obtaining agreement on jurisdictional issues including

67. One area in which supplementary laws have often been enacted is warranty. *See* SCHWARTZ & SCOTT, *supra* note 46, at 225 (noting both state and federal enactments in the warranty area).

68. *See e.g., infra* notes 73-76 and accompanying text (setting forth Articles 2B’s choice of law rules that ensure that the consumer retains protection under his state’s law).

69. Doc. DSTI/CP(98)12/REV2 (Oct. 8-9, 1998).

70. *See id.*

what contractual choice of law and choice of forum clauses will be enforceable. If parties can choose the law that will govern their transaction and know that a court will respect their choice, transaction costs should decline. An information supplier would not have to know the minute details of every local law but simply the law which governs its particular transactions. It may then estimate its liability exposure with more certainty, decreasing its costs and increasing its willingness to market to a broader audience.

Unfortunately, matters are not so simple. Any discussion of choice of law provisions must also address what rules various jurisdictions consider mandatory. Mandatory rules may be defined as those that may not be contracted around either explicitly, through a specific contractual clause, or implicitly, through a choice of law provision that selects a jurisdiction which has not adopted a particular rule as the governing law. For example, under the Commission Proposal, "the country in which an online merchant is 'established' has the exclusive authority to regulate its conduct."⁷¹ However, consumer contracts are governed by rules requiring online merchants to comply with the mandatory rules (usually including consumer protection laws) of the consumer's jurisdiction.⁷² Online merchants may thus have to incur the costs of learning the mandatory rules of each jurisdiction from which a consumer may transact business with them over the Internet—an expensive proposition which may decrease their willingness to market online.

Article 2B, even more than the European Union, explicitly adopts this "know all laws" approach. Article 2B's default choice of law is the "jurisdiction in which the licensor is located when the agreement is made."⁷³ However, a "consumer transaction that requires delivery of a copy on a physical medium is governed by the law of the jurisdiction in which the copy is or should have been delivered to the consumer."⁷⁴ Moreover, while the parties are free to contract around these provisions, "in a consumer transaction the [parties'] choice is not enforceable to the extent it

71. See Mathew S. Yeo & Marco Berliri, *Conflict Looms Over Choice of Law in Internet Transactions*, ELECTRONIC COM & L. REP. (BNA) NO. 4, at 87 (Jan. 27, 1999) (describing the European approach and noting that it is based on the "country of origin" principle).

72. See *id.* at 86-88 (explaining how the Rome Convention, Distance Selling Directive and Electronic Commerce Directive lead to the conclusion that consumers receive the benefit of the protection of "mandatory rules" of their own jurisdiction).

73. U.C.C. § 2B-107(b)(1) (Dec. 1998 Draft).

74. *Id.* § 2B-107(b)(2).

would vary a rule that may not be varied by agreement under the law of the jurisdiction whose law would apply in the absence of the agreement.”⁷⁵ The drafters recognized that this approach may be expensive for online merchants but argued that the consumer protection choices of individual states should be recognized.⁷⁶

Under both the European and the Article 2B approaches, merchants may be less willing to sell online if they will be subject to widely varying consumer protection laws. If they do sell electronically, they will have an incentive to “zone” customers by country of origin, offering terms complying with the particular country’s law. Smaller firms that cannot incur the costs of knowing the laws of every country may adopt a high-tech version of exclusionary zoning, refusing to sell to customers residing in countries with laws the merchant either does not know or does not like.⁷⁷

75. *Id.* § 2B-107(a).

76. *Id.* § 2B-107, Reporter’s Note 4. (“This rule imposes significant costs on Internet commerce, but this article adopts the view that the fundamental policy of freedom of contract should be varied to preserve consumer rules when individual states, having addressed that cost separately, determine that the applicable rule is of a mandatory, non-waivable nature.”).

77. There may be another alternative for small firms. These firms could rationally choose to remain ignorant of most of the world’s laws and still sell globally, so long as they knew the law of those countries where the majority of their customers are likely to reside. Even on the global medium of the Internet, a firm is likely to be able to estimate in what jurisdictions the majority of its customers are likely to reside. The firm can then protect itself by learning the law of these jurisdictions, a much smaller subset of rules than the laws of all countries. For example, a small U.S. firm is likely to have or obtain some sense of U.S. federal and state laws. Before marketing on the Internet, it might also seek to understand the law of the European Union. Depending on the firm’s product, these two markets may be likely to drive most of the firm’s sales. The firm could then quite rationally choose to remain ignorant of the rest of the world’s laws yet still sell globally. This firm would compare the cost of understanding those laws and adjusting the terms of sale for citizens of other countries through technological means with the likely loss it would incur defending against suits brought by citizens outside its target markets. The likely loss would include the sum of the costs of both successful and unsuccessful consumer suits. The cost of successful suits would be a function of the probability that a customer from a remote country would purchase from the firm and the probability that a consumer would sue and succeed, multiplied by the costs to the firm, including damages. The cost of an unsuccessful suit would be a function of the probability of purchase and the probability of a non-successful suit multiplied by the costs to the firm of defending against suit. Because both the probabilities and costs may be quite low, the expected loss may also be quite low, far outweighed by the cost of adjustment. Thus, a firm could rationally sell globally while remaining relatively ignorant of other jurisdictions’ laws. This strategy may become less feasible as larger non-U.S. and European Union markets, like China and Africa, become major sources of customers for Internet-based firms.

This situation illustrates the problem that Article 2B and any other legislation that is not international in character may have in achieving uniformity in a global medium. It suggests that the Clinton Administration should adopt a two-pronged approach to global electronic commerce.

The first facet of the strategy would focus on the international harmonization of laws which nation-states regard as mandatory. For example, if the mandatory and varying nature of consumer protection laws should begin to hamper electronic commerce, the Clinton Administration should seek international agreement on a minimum level of consumer protection. Nations would be free to enact greater levels of protection, but merchants would be bound only by the minimum. This does not mean that all merchants would gravitate to that minimum. Many might "opt in" to the laws of nations with a higher degree of consumer protection to signal to their customers that their product possesses qualities superior to those sold under the lower standard.⁷⁸

Admittedly, it would be quite difficult to obtain international agreement on a minimum level of consumer protection.⁷⁹ However, if requiring that the laws of either the merchant's establishment or the consumer's residence govern prevents the Internet from realizing its electronic commerce potential, then this approach would still be preferable. The former would risk a race to the bottom among jurisdictions' consumer protection laws,⁸⁰ while the latter would impose substantial burdens on global electronic commerce.⁸¹

The second prong of the Clinton Administration's approach should be to bring Article 2B issues out into the international arena. As already demonstrated, Article 2B alone cannot guarantee global uniformity. By subjecting Article 2B to the crucible of international debate in conjunction with other efforts like the Commission Proposal, however, the Clinton

78. This is similar to the signaling function that the warranty law serves. Sellers often make quality assurances in excess of those imposed under Article 2 of the U.C.C. in order to signal to buyers that their product is superior. See SCHWARTZ & SCOTT, *supra* note 46, at 106 (explaining the signaling function of warranties).

79. See Yeo & Berliri, *supra* note 71, at 89 (arguing for an international consumer protection harmonization effort while noting that "one can hardly minimize the political and procedural complexities of negotiating a uniform law for Internet-based transactions...").

80. See *id.* at 88 (stating that, while allowing merchants to choose the governing law has the virtue of simplicity, "it poses the obvious problem that unscrupulous online merchants could locate themselves in countries with 'favorable' laws, to the likely detriment of their customers").

81. See *id.* at 89 (rejecting the "mandatory rules" approach as too expensive).

Administration may be better able to realize its goals of facilitating global economic commerce. In addition, substantially better rules may result from the competition among different proposals.

This is not to say that Article 2B is a failure. While its complexity, provisions on manifestation of assent, and broad view of contract formation may be at odds with the Magaziner Report, it contains many provisions consistent with that Report. For example, it is drawn to be technology-neutral,⁸² and to allow for new developments like contract formation and performance through the use of electronic agents.⁸³ Additionally, its drafting process has been characterized by a great deal of private sector involvement.⁸⁴ The authors of the Magaziner Report would approve of all of these traits.

The point is that Article 2B's work should not be abandoned. Rather, it should provide the basis for a national and international discussion of how best to reconcile the sometimes conflicting goals of flexibility and uniformity in the context of an overarching desire to encourage global electronic commerce.

V. CONCLUSION

The Magaziner Report's overall philosophy is alive and well in the United States and other countries. It is the implementation of that philosophy that is proving controversial. The risk is that discussions will disintegrate into nonuniform law that will frustrate the growth of global electronic commerce.

Fortunately, no parties to the debate have an interest in seeing such a breakdown. This should help to make domestic and international discussions more fruitful as the common goal dominates. The Administration should continue its work informed by a sense of history such as that involved in drafting Article 2, and with an understanding of when the unique

82. See, e.g., U.C.C. § 2B-102, Reporter's Note 3 (Dec. 1998 Draft) (noting that Article 2B's approach in the digital signature area is intentionally drawn to be "technologically neutral").

83. See, e.g., *id.* § 2B-204 (providing rules for offer and acceptance by electronic agents).

84. However, some commentators argue that the drafting process is subject to capture by powerful interest groups. See generally Jean Braucher, *The U.C.C. Gets Another Rewrite, Just When You Thought You Really Knew the Uniform Commercial Code, Almost Every Article Is Undergoing Changes in a Major Revision*, 82 A.B.A. J. 66, 68 (1996) (noting that an early draft of Article 2B was criticized as too favorable to software providers).

nature of the Internet requires special rules and when it does not. It should also carefully consider, issue-by-issue and transaction-by-transaction, whether or not international agreement is needed. Moreover, it should consider when parties should be allowed to opt out of legal rules and when those rules should be mandatory. Throughout these inquiries, the symbiosis between domestic and international legal development should continue, hopefully leading to a time when any "Update on the Magaziner Report" can say that its goals—at least in the area of commercial law—have been fully realized.