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Click: Do We Have a Deal

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CLICK – DO WE HAVE A DEAL?

*We are on the verge of a revolution that is just as profound as the change in the economy that came with the industrial revolution. Soon electronic networks will allow people to transcend the barriers of time and distance and take advantage of global markets and business opportunities not even imaginable today, opening up a new world of economic possibility and progress.*¹

I. INTRODUCTION

As the twenty-first century begins, we find ourselves in a world in which electronic commerce thrives.² The Internet is the mechanism that fuels and sustains electronic commerce.³ Contracts formed online via the Internet are commonly referred to as “clickwrap” agreements, and are one of the many essential tools used in transacting business electronically.⁴ As more companies use the Internet to transact business, the need for consistent and predictable legal guidelines to support contracts governing these transactions has developed.⁵

¹ William J. Clinton & Albert Gore Jr., *A Framework for Global Electronic Commerce*, (July 1, 1997) at <http://www.iitf.nist.gov/elecomm/ecom.htm> (last visited August 16, 2000).

² See Kurt A. Wimmer, *Enforcing Click-Wrap Licenses*, 14 NO.4 CORP. COUNS. 1(1999) (discussing effect of electronic commerce on economy).

³ See Clinton & Gore Jr., *supra* note 1 (commenting on impact of Internet on economic and daily life). See *infra* note 22 (describing Internet’s capabilities).

⁴ See Fred M. Greguras, et al., *Electronic Commerce: On-line Contract Issues*, 452 PLI/Pat 11, 19 (1996) (describing practice of clicking computer mouse to form agreement). The practice of clicking a computer mouse to form agreement is referred to as a “click-wrap.” *Id.* The prompt to accept the agreement is similar to removal of shrinkwrap on software packaging. *Id.* See *infra* note 16 (explaining origin of shrinkwrap).

⁵ See Press Release, National Conference of Commissioners on Uniform State Laws American Law Institute, *NCCUSL to Promulgate Freestanding Uniform Computer Information Transactions Act ALI and NCCUSL Announce that Legal Rules for Computer In-*

As stated above, clickwrap agreements are contracts created over the Internet.⁶ Just as in other agreements, Internet contract formation consists of a bargained for exchange, mutual assent and consideration.⁷ Typically, clickwrap agreements have buttons that appear on the screen labeled "I accept" or "I decline" along with the particular onscreen terms and conditions.⁸ The potential purchaser can and choose button to complete or terminate the transaction.⁹

Neither the Uniform Commercial Code (UCC), nor the common law principles of contract provide sufficient remedies for issues arising from electronic contract formation.¹⁰ Generally, the UCC applies to transactions in goods and common law principles apply to contracts for services.¹¹ Although many Internet contracts are drafted in compliance with the UCC, the majority of Internet transactions involve services.¹² Due to the difference in remedies available, it is important when evaluating any contract to determine if the transaction involves goods, services or a com-

formation Will Not Be Part of UCC (April 7, 1999) at <http://www.nccusl.org> (observing necessity for consistent rules to govern electronic transactions); Richard S. Zembek, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 ALB.L.J.SCI.& TECH. 339, 341-42 (1996) (examining how Internet's development will effect legal principles).

⁶ See Martin H. Samson, *Click-Wrap Agreement Held Enforceable*, at <http://www.phillipsnizer.com/artnew27.htm> (last visited Jan. 26, 2000) (describing formation of online contract). See *infra* note 22 (describing Internet's capabilities).

⁷ See Karl D. Belgum, *Legal Issues in Contracting over the Internet*, (1999), at <http://www.library.findlaw.com/scripts/getfile.pl?FILE=firms/thelen/trp000045> (last visited Jan. 26, 2000) (explaining online contracts).

⁸ See Jerry C. Liu et al, *Electronic Commerce: Using Clickwrap Agreements*, 15 NO. 12 COMPUTER LAW 10, (1998) (detailing procedure of clickwrap agreement assent).

⁹ See *id.*

¹⁰ See Jody Storm Gale, *Service Over the "Net:" Principles of Contract Law in Conflict*, 49 CASE W.RES.L.REV. 567(1999) (describing lack of consistent legal principal for electronic transactions).

¹¹ See Kenneth L. Carson & Gail E. Horowitz, *Software and Computer Law: Old Questions to be Answered in the New Millennium*, 43-Oct B.B.J. 10 (1999) (discussing importance of determining if transaction is for goods or services); U.C.C. § 2-105 (1995) (defining goods under UCC).

¹² See Gale, *supra* note 10 (recognizing existing conflict in many electronic agreements); Raymond T. Nimmer, *Article 2B Preface; Meeting the Information Age* (December 1, 1995) at <http://www.lawlib.uh.edu/ucc2b/pref1201.html> (last visited October 29, 2000) (describing conflict in sales for goods versus electronic information). An apparent mismatch exists in concept between contract law principles aimed at defining relationships relating to the sale of goods (Article 2) and contract relationships in which intangible property, such as digital information and related rights, is the centerpiece of the transaction and the contract forms a license rather than a sale. *Id.*

bination of the two.¹³ Electronic transactions are unique; therefore, the law must adopt a uniform approach to fairly deal with the rights of the parties in such agreements.¹⁴

The courts and the legislature have been slow to address the issues surrounding electronic commerce.¹⁵ Although courts have enforced shrinkwrap agreements, predecessor clickwrap agreements, current caselaw has not firmly established whether clickwrap agreements are enforceable.¹⁶ In fact, clickwrap agreements have recently been the source of increased litigation.¹⁷ In response, on July 29, 1999, the National Conference of Commissioners on Uniform State Laws (NCCUSL), an organization whose purpose is to prepare statutes for uniform enactment among the states, promulgated the Uniform Computer Information Transactions Act (UCITA) to address electronic commerce transactions.¹⁸

Part II of this note discusses the issues surrounding electronic commerce transactions. Part III examines the development of case law regarding electronic commerce, with an emphasis on the UCITA. Part IV analyzes UCC and common law remedies as they relate to service con-

¹³ See Carson & Horowitz, *supra* note 11 at 10-11 (explaining that different rights and remedies apply under UCC and common law). Whether a contract is for goods or services affects the applicability of the implied warranty of merchantability, the statute of limitations, and other rights of the contracting parties. *Id.* at 10.

¹⁴ See *id.* at 11 (commenting on need for uniform law to address electronic transactions); Raymond T. Nimmer et al., *License Contracts Under Article 2 of the Uniform Commercial Code: A Proposal*, 19 Rutgers Computer & Tech. L.J. 281, 293 (describing software transactions).

¹⁵ See Gale, *supra* note 10 (indicating uncertainty in law with respect to electronic commerce).

¹⁶ See, e.g., *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d (N.Y.App.Div. 1998) (holding shrinkwrap license valid); *Hill v. Gateway 2000*, 105 F.3d 1147 (7th Cir. 1997) (finding shrinkwrap license valid); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir.1996) (finding shrinkwrap agreements enforceable unless objectionable to contracts in general); see also Carson & Horowitz, *supra* note 11 (describing how clickwraps evolved from shrinkwraps). The term "shrinkwrap" developed from retail software packages being covered in plastic or cellophane shrinkwrap and the agreements included with the software become effective once the customer tears the wrapping. *Id.* at 25. *But see Step Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91 (3rd Cir. 1991) (finding altered terms of licenses unenforceable); *Vault v. Quaid Software Ltd.*, 847 F.2d 255, 268-79 (5th Cir. 1988)(finding shrinkwrap agreement unenforceable).

¹⁷ See *Caspi v. The Microsoft Network*, 732 A.2d 528, 532 (N.J.Super. 1999) (holding online subscriber agreement valid); *Hotmail v. Van\$ Money Pie, Inc.*, 47 U.S.P.Q.2d 1020, 1998 (suggesting contract formed online is enforceable); *Compuserve v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) (suggesting online contract will be enforceable).

¹⁸ See Prefatory Note, UNIFORM COMPUTER INFORMATION TRANSACTION ACT (1999) (amended 2000).

tracts created over the Internet. Finally, this note concludes in Part V by suggesting that the UCITA is the best way to clarify the legal rules governing electronic transactions.

II. HISTORY

A contract is an agreement between two or more persons, which creates an obligation to do, or not do, a particular thing.¹⁹ The quintessential contract consists of an offer, consideration and an acceptance.²⁰ Debate continues over whether to apply classic contract concepts to contracts formed exclusively over the Internet.²¹

The Internet is a global network of interconnected computers, which communicate with one another.²² Anyone with access to the Internet can take advantage of the vast amount of information and resources that it provides.²³ Today, the Internet serves approximately ninety million individuals, linking their computers through global telecommunication lines.²⁴ The World Wide Web ("Web"), a user-friendly aspect of the Internet, allows users to search for and retrieve information stored in remote computers.²⁵ The Web compares to both a "vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services."²⁶

¹⁹ BLACK'S LAW DICTIONARY 322 (6th ed. 1990).

²⁰ *Id.*

²¹ See Liu, *supra* note 8 (questioning applicability of existing contract law to electronic commerce). See *infra* note 22 (describing Internet's many capabilities).

²² See *Reno v. American Civil Liberties Union*, 521 U.S. 844, 849 (1997) (describing functional aspect of Internet). The Internet, a global network of interconnected computers, developed from a military program called ARPANET. *Id.* The Internet allows millions of people to communicate with one another, transmitting text, video, sound and images. *Id.* See *MTV Networks v. Curry*, 867 F. Supp. 202, 204-05 (S.D.N.Y. 1994) (defining Internet's components). The Internet consists of thousands of networks linked together to share information electronically.

²³ See *Reno*, 521 U.S. at 849 (describing Internet's scope of use). Internet access enables a user to take advantage of the services and information available. *Id.*

²⁴ See *Northern Light Technology, Inc. v. Northern Lights Club*, 97 F.Supp.2d 96, 98 (D. Mass. 2000) (describing scope of Internet use).

²⁵ See *id.* at 851 (describing how users access and navigate Web).

²⁶ *Id.* at 851 (explaining scope of information available to users of Internet).

III. UCC AND COMMON LAW REMEDIES

A. Article 2 of the Uniform Commercial Code

Article 2 of the UCC applies to the sale of goods, but not to services or electronic transfers of information.²⁷ Thus, the question of whether an Internet transaction is one for goods or services acquires added importance.²⁸ In contracts that consist of a mixture of goods and services, the courts must analyze the transaction to determine the applicability of the UCC.²⁹ Massachusetts courts apply the “predominant factor” test in mixed transactions to determine if the contract is primarily one for goods with services involved, and thus governed by the UCC, or vice versa.³⁰ Many courts have held that the sale or licensing of software is a contract for services, and thus governed by the common law.³¹ However, recent case law suggests that the Massachusetts Appeals Court will treat software as a moveable good governed by UCC 2-105.³²

²⁷ See U.C.C. § 2-105 (1995) (defining goods under UCC). Under the UCC, “goods” are defined as “all things... which are moveable at the time of identification to the contract for sale...” *Id.*

²⁸ See Carson & Horowitz, *supra* note 11, at 10-11 (describing threshold issue in Y2K litigation).

²⁹ See Carson & Horowitz, *supra* note 11, at 10-11 (explaining how different standards apply under UCC and common law).

³⁰ See Carson & Horowitz, *supra* note 11, at 10. (describing predominant factor test applied in Massachusetts). In Massachusetts, the test for whether a contract that combines goods and services would be governed by the UCC or by common law was whether the “predominant factor, thrust, or purpose of the contract is (1) the ‘rendition of service with goods incidentally involved or is a transaction of sale with labor incidentally involved.’” *Id.* at 10 (quoting *Cumberland Farms, Inc. v. Drehmann Paving and Flooring Co.*, 25 Mass. App. Ct. 530, 534, 520 N.E.2d 1321, 1324 (1988)).

³¹ See Carson & Horowitz, *supra* note 11 (citing Holmes, *Application of Article II of the Uniform Commercial Code to Computer Systems Acquisitions*, 9 RUTGERS COMPUTER & TECH L.J. 1, 25 and Note, *Computer Programs as Goods under the UCC.*, 77 MICH. L. REV. 1149, 1165 (1979)).

³² See *USM Corp. v. First State Ins. Co.*, 37 Mass. App. Ct. 471, 477-78 (finding mixed contracts of hardware and software governed by UCC); see Carson & Horowitz, *supra*, note 11, at 10-11 (suggesting Massachusetts Appeals Court will find software a moveable good).

1. Shrinkwrap Agreements

The caselaw involving shrinkwraps provides useful guidelines for the analysis of Internet service contracts.³³ Software developers and publishers have attempted to extend the protections given to software under the Copyright Act by placing additional terms on the end-user (the ultimate consumer of a finished product), generally in the form of a license agreement.³⁴ These license agreements developed the name “shrinkwrap agreements” because they appear on the outside of software packages, under a layer of plastic.³⁵ The terms of shrinkwrap agreements remain somewhat hidden until the end user completes the purchase.³⁶ Such agreements typically state that, by either tearing the packaging or using the product, the consumer agrees to the terms of the license.³⁷ The consumer, however, can also decline to accept the license by returning the product and requesting a refund.³⁸

The Seventh Circuit’s decision in *ProCD v. Zeidenberg*,³⁹ authored by Judge Frank Easterbrook, provides a legal foundation for electronic contract formation.⁴⁰ The *ProCD* court directly addressed the enforceability of shrinkwraps, and found such agreements valid.⁴¹ In *ProCD*, Mat-

³³ See Gale, *supra* note 10, at 571 (discussing similarities of shrinkwrap contracts to clickwrap contracts). The transaction involved in shrinkwrap cases is similar to Internet service contracts, both involve transfers of information. *Id.*

³⁴ See Stephen J. Davidson & Scott J. Bergs, *Open, Click or Download: What Have You Agreed To? The Possibilities Seem Endless*, 557 PLI/Pat 687 (1999) (explaining how shrinkwrap license got their name).

³⁵ See Davidson & Bergs, *supra* note 34, at 700 (explaining how shrinkwrap license got their name). See Carson & Horowitz, *supra* note 16, at 24 (describing why shrinkwrap license is so named).

³⁶ See Carson & Horowitz, *supra* note 11, at 24 (describing how contract cannot be reviewed until after purchase).

³⁷ See Liu, *supra* note 8, at 10 (explaining shrinkwrap agreement).

³⁸ See *id.* at 10 (stating consumer can reject license by returning software and requesting refund).

³⁹ 86 F.3d 1447 (7th Cir. 1996).

⁴⁰ See *id.* at 1449 (holding shrinkwrap licenses are enforceable unless terms objectionable to contracts generally). A contract that violates a rule of positive law or is unconscionable would be objectionable. *Id.*

⁴¹ See *id.* at 1449 (explaining reasoning of court). The court in treating the license like an ordinary contract accompanying the sale of a product found it governed by the common law of contracts and the UCC. *Id.* at 1450. The court conducted a 2-204(1) analysis, finding that “[a] vendor, as a master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing acts the vendor proposes to treat as acceptance. And that is what

thew Zeidenberg purchased a consumer package of SelectPhone® from a retail store.⁴² The software package, a database containing over three thousand telephone directories, cost ProCD over ten million dollars to compile and maintain.⁴³ Each package containing this software states that the use of the product is governed by restrictions stated in an enclosed license.⁴⁴ The license appears in the printed manual, is encoded on the CD-ROM disks and appears every time the software runs.⁴⁵ In addition, the license limits the use of the software to non-commercial purposes.⁴⁶ Matthew Zeidenberg ignored the license, uploaded the Selectphone® information to his Web site and sold the information for a lower price than that which ProCD offered.⁴⁷

The Seventh Circuit Court of Appeals reversed the district court's decision that shrinkwrap agreements were unenforceable.⁴⁸ Instead, the Court held shrinkwrap licenses should be treated as ordinary contracts accompanying the sale of products, and therefore governed by both the common law and the UCC.⁴⁹ Thus, *ProCD* established that shrinkwrap agreements would be enforceable, unless unconscionable or objectionable on grounds applicable to contracts generally.⁵⁰

The *ProCD* court further noted that the UCC allows for contract formation in various ways.⁵¹ For instance, the UCC states that a "contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of a contract."⁵² The Appeals Court discussed the importance of the buyer both having notice of the license agreement in the package, and the right to return the software for a refund if the terms are unacceptable.⁵³

happened." *Id.* at 1452.

⁴² *Id.* at 1450 (describing software purchase).

⁴³ *Id.* at 1449.

⁴⁴ *See ProCD*, 86 F.3d at 1450 (describing shrinkwrap license terms).

⁴⁵ *Id.* at 1450.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *See id.* at 1450 (holding shrinkwrap license valid).

⁴⁹ *See ProCD*, 86 F.3d at 1450.

⁵⁰ *Id.*

⁵¹ *Id.* at 1452.

⁵² *See* U.C.C. § 2-204(1) (1995) (describing contract formation under UCC).

⁵³ *See ProCD*, 86 F.3d at 1451 (explaining purchaser's rights under contract agreement).

In a subsequent decision, *Hill v. Gateway 2000, Inc.*,⁵⁴ the Seventh Circuit again held that a shrinkwrap license was valid.⁵⁵ In *Hill*, a customer purchased a computer over the telephone, and the terms of the purchase were included within the package when the computer was shipped.⁵⁶ The agreement provided that unless the buyer returned the computer within thirty days, the terms of the license governed the purchase.⁵⁷ The court reasoned that contract formation required acceptance of the offer by keeping the computer for thirty days, but upheld the license agreement on its face.⁵⁸

2. Clickwrap Agreements

Courts have been slow to address the issue of whether clickwrap agreements are enforceable.⁵⁹ In *Compuserve v. Patterson*,⁶⁰ a Sixth Circuit case, the court suggested an online contract is formed once the consumer types in his acceptance.⁶¹ In *Compuserve*, Patterson was presented online with a shareware agreement that asked him to type “agree” at several points throughout the transaction.⁶² The court found that by typing “agree” Patterson manifested assent to the license and bound himself to its terms.⁶³

Likewise, in *Hotmail v. Van\$ Money Pie, Inc.*,⁶⁴ the United States District Court suggested that a contract formed online is enforceable.⁶⁵ In

⁵⁴ 105 F.3d 1147 (7th Cir. 1997).

⁵⁵ See *Hill*, 105 F.3d at 1151 (finding shrinkwrap license valid).

⁵⁶ See *id.* at 1148 (describing software purchase).

⁵⁷ *Id.*

⁵⁸ See *id.* at 1149–51 (explaining court’s reasoning in finding valid agreement).

⁵⁹ See Liu, *supra* note 8, at 12 (commenting on courts’ silence on clickwrap license enforceability).

⁶⁰ 89 F.3d 1257, (6th Cir. 1996).

⁶¹ See *id.* at 1260 (holding defendant agreed to be bound by terms of license displayed on screen).

⁶² *Id.* Shareware is software products available to end-users through the software’s creator or through other electronic sources. *Id.* at 1260.

⁶³ *Id.* at 1260–61.

⁶⁴ 1998 WL 388389 (N.D.Cal. Apr. 16, 1998).

⁶⁵ See *id.* at *6 (holding plaintiff likely to prevail on contract claim having agreed to terms of agreement). The court granted plaintiff’s injunction, preventing defendant from using plaintiff’s e-mail service to send spam. *Id.* The defendant registered online to use plaintiff’s service agreeing not to send spam or obscene messages. *Id.* Spam is unsolicited commercial bulk email, comparable to junk mail sent through postal mail. *Id.* at *1.

Hotmail, the defendants registered online to use Hotmail's e-mail services.⁶⁶ The defendants agreed to the Service Agreement's terms prohibiting them from sending unsolicited e-mail (often referred to as "spam") or pornographic or obscene materials.⁶⁷ The court granted the plaintiff's request for an injunction barring the defendants from sending spam and from using Hotmail accounts as mailboxes for spam reply.⁶⁸ To reach this conclusion, the court first had to find an enforceable contract existed.⁶⁹

In *Caspi v. The Microsoft Network*,⁷⁰ the Superior Court of New Jersey found that an on-screen "click" is a binding acceptance so long as the user had sufficient opportunity to review the contract.⁷¹ In *Caspi*, the plaintiffs sued the Microsoft Network, claiming the company had impermissibly raised the plaintiffs' subscription fee.⁷² Pursuant to a forum selection clause, the defendants sought to move the case to Washington state, and the plaintiffs fought the change of venue on the grounds that, because they had clicked their acceptance online, the member agreement was unenforceable.⁷³ In finding that the plaintiffs' "click" was enforceable, the court reasoned that the plaintiffs were free to scroll through all terms of the contract before they agreed to it.⁷⁴

In recognition of the need for uniformity in the law regulating commerce over the Internet, the National Conference of Commissioners on Uniform State Laws (NCCUSL), an organization formed to prepare uniform laws among the states, partnered with the American Law Institute (ALI) to prepare UCC Article 2B.⁷⁵ One of the goals of Article 2B was to

⁶⁶ *Id.* at *2 (describing formation of agreement).

⁶⁷ See *Hotmail v. Van\$ Money Pie Inc.*, 1998 WL 388389, at *2 (N.D.Cal. Apr. 16, 1998) (explaining terms of online agreement).

⁶⁸ *Id.* at *6 (holding evidence supports finding that plaintiff will likely prevail in breach of contract claim).

⁶⁹ See *Samson*, *supra* note 6 (explaining courts willingness to find click-wrap agreement valid).

⁷⁰ 732 A.2d 528 (N.J. Super.1999).

⁷¹ See *id.* at 532 (holding online subscriber agreement valid).

⁷² *Id.* at 529. The plaintiff's allege that Microsoft rolled members into a more expensive service plan and charged higher rates without notice. *Id.*

⁷³ *Id.* at 530. The plaintiffs argued the contract should not be enforced because their acceptance was the result of an unequal bargaining power, that enforcement would violate public policy and adequate notice of the terms were never received. *Id.* at 529.

⁷⁴ See *Caspi*, 732 A.2d at 532 (holding contract agreed to online was binding).

⁷⁵ See Raymond T. Nimmer, *Article 2B Preface Meeting the Information Age* (December 1, 1995) at <http://www.lawlib.uh.edu/ucc2b/pref1201.html> (last visited October 29, 2000) (seeking development of rules applicable to electronic transaction).

create legal rules to govern computer information transactions.⁷⁶ In April of 1999, however, the NCCUSL and ALI announced that this uniform act would not be a part of the UCC. Instead, the NCCUSL will promulgate the rules for adoption by the states as a stand alone act, called the Uniform Computer Information Transactions Act (UCITA).⁷⁷ In July of 1999, the NCCUSL approved the UCITA for adoption in the states in 2000.⁷⁸

Although Internet service contracts can be written in accord with both the UCC and the common law, UCITA recognizes the uniqueness of the electronic medium.⁷⁹ UCITA is a commercial code that will allow parties to conduct electronic commerce in the same manner in every state that adopts it.⁸⁰ As drafted, UCITA will apply to computer software, multimedia products, computer data and databases, online information and other related products.⁸¹

⁷⁶ See *id.* (stating purpose of proposed Article 2B). Article 2B proposes to develop tailored and effective contract law principals related to licensing and other transactions involving digital information and other intangibles. *Id.* See Wimmer, *supra* note 2. UCITA will bring uniformity to computer information transactions, provide rules for conducting electronic commerce transactions, and reduce the uncertainty that exists in current law. *Id.*

⁷⁷ See Press Release, National Conference of Commissioners on Uniform State Laws American Law Institute, *NCCUSL to Promulgate Freestanding Uniform Computer Information Transactions Act ALI and NCCUSL Announce that Legal Rules for Computer Information Will Not Be Part of UCC* (April 7, 1999) at www.nccusl.org/pressrel/2bre1.html (stating legal rules for computer information transactions will not be part of UCC).

⁷⁸ See UNIFORM COMPUTER INFORMATION TRANSACTION ACT (1999). As of October of 2000, only Virginia and Maryland have enacted adopted UCITA.

⁷⁹ See Gale, *supra* note 10 at 591 (discussing proposed Article 2B's effectiveness with Internet services contracts). Article 2B would allow the parties contracting over the Internet to avoid the different interpretation the UCC and the common law gives to terms of a contract. *Id.* at 593.

⁸⁰ See Lorin Brennan, *Through the Telescope: UCITA and the Future of E-Commerce*, 20 MISS C. L. REV 27 at 40 (describing uniform approach of UCITA). UCITA provides guidelines on the formation of electronic contracts, not what the contract is about. *Id.* See generally, UCITA Fact Sheet: Statement Developed for the Medical Library Ass'n, Ass'n of Research Libraries, American Library Ass'n, American Ass'n of Law Libraries, MLANet, (July 1999) at <http://www.mlanet.org/government/ucita/factsheet.html> (last visited Sept. 26, 2000) (discussing UCITA's details and impact).

⁸¹ See generally UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT (1999) (amended 2000).

IV. ANALYSIS

A. A New Law is Necessary

The Internet has revolutionized the way business is conducted in the United States.⁸² Since the UCC was adopted in the 1950's, the United States has shifted from a goods to a service based economy.⁸³ The UCC limits its focus to the sale of tangible goods.⁸⁴ Recently, however, a major component of our economy has been based on the sale and licensing of intangible products, such as software.⁸⁵ In a transaction for software there are typically intangible and tangible components.⁸⁶ The UCC does not address the licensing of intangible goods, nor does it address service contracts such as software development, maintenance, and access contracts.⁸⁷

Intangible transactions, especially transactions involving licensing of digital information, differ in substantial ways from transactions involving the sale or lease of goods.⁸⁸ UCITA proposes to bring uniformity and

⁸² See Clinton & Gore Jr., *supra* note 1 (discussing how Internet has affected global economy).

⁸³ See Nimmer, *supra* note 75 (characterizing shift in US economy from tangible to intangible).

⁸⁴ See U.C.C. § 2-102 (1995) (describing scope of UCC). See *supra* note 27 (defining goods under UCC).

⁸⁵ See Nimmer, *supra* note 75 (describing change in US economy).

⁸⁶ See Lorin Brennan & Glenn A. Barber, *Why Software Professionals Should Support The Uniform Computer Information Transactions Act (And What Will Happen If They Don't)* (July 15, 1999) at <http://www.2Bguide.com/docs> (last visited October 29, 2000) (describing common software transaction). In a software transaction, the intangible component is the license to use the intellectual property rights in the software, such as copyright, patent, trademark or tradeseecret, the tangible aspect of the transaction involves the actual delivered good, such as a CD. *Id.*

⁸⁷ See U.C.C. § 2-102 (1995).

⁸⁸ See Nimmer, *supra* note 75 (discussing differences of transactions involving tangible intangible goods). See generally Raymond T. Nimmer et al., *License Contracts Under Article 2 of the Uniform Commercial Code: A Proposal*, 19 Rutgers Computer & Tech. L.J. 281 (discussing transactions involving intangibles). Software transactions involve the traditional elements of a goods transaction with components involving intangible rights and services, unlike ordinary transactions for goods however, the value transferred in software transactions is often independent of the tangible item involved. *Id.* at 293. Article 2 of the UCC focuses on the sale of tangible goods, therefore, attempting to fit intangible transactions under its concepts of delivery and receipt as well as defining remedies is problematic. *Id.* at 314-15. Software is licensed, not sold, and this leads to issues regarding the ongoing nature of the relationship in a license and the presumptions that Article 2 makes on the

clarity to the law of computer information transactions, to provide rules to govern e-commerce transactions and to reduce the uncertainty that exists in the field today.⁸⁹ Without UCITA, it is unclear what laws judges should apply to electronic information transactions.⁹⁰

Courts have struggled in applying existing UCC and contract laws to Internet service and software agreements.⁹¹ The UCC defines “goods” very broadly in an effort to include many types of transactions.⁹² This broad definition allows for much interpretation as to what constitutes goods.⁹³ The shrinkwrap cases demonstrate the difficulty of applying UCC offer and acceptance theories to software transactions.⁹⁴ Although the UCC and the common law provide legal guidelines for Internet services contracts, applying rules designed for sales of goods for Internet services contracts can be problematic.⁹⁵

B. Criticism of UCITA

While many agree that legal standards are necessary in the field of electronic commerce, UCITA is not universally supported.⁹⁶ Opponents

transfer of title based on delivery. *Id.* at 315. Article 2 provides no guidance on the issues of material breach, default, cancellation and other issues faced in an ongoing contractual relationship and leaves untouched a major portion of the licensing relationship. *Id.* at 315.

⁸⁹ See Brennan & Barber, *supra* note 86 (discussing necessity for UCITA in today’s economy).

⁹⁰ See Ed Foster, *What is UCITA?* (May 5, 1999) at <http://www.infoworld.com/cgi-bin/displayStory.pl?features/990531/ucita1.htm> (last visited October 29, 1999) (explaining reasoning behind UCITA). Judges can be faced with the decision to apply either state or federal laws regarding intellectual property or consumer protection, or they may choose to apply UCC Article 2 in disputes between software publishers and users. *Id.*

⁹¹ See Gale, *supra* note 10 at 568-81 (discussing difficulty court have applying existing law to computer information transactions).

⁹² See UCC § 2-105(1) (1995) (defining goods as all things moveable at time of identification to contract for sale).

⁹³ See Gale, *supra* note 10 at 570 (describing how ambiguity in “goods” definition allows wide interpretation of meaning).

⁹⁴ See, e.g., ProCD, 86 F.3d at 1449 (finding shrinkwrap agreements enforceable unless objectionable to contracts in general); *Hill* F.3d 1147 at 1151 (finding shrinkwrap license valid); *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 676 N.Y.S.2d 569 (1998) (holding shrinkwrap license valid).

⁹⁵ See Gale, *supra* note 10 at 568, 581 (discussing difficulty courts face in Internet service contract situations).

⁹⁶ See Brennan & Barber, *supra* note 86 (explaining why UCITA should be supported).

assert that UCITA is extremely broad and biased, giving software manufacturers and information services an unfair advantage over consumers.⁹⁷ Some argue that UCITA will have the effect of shifting the balance of power in electronic transactions; giving vendors greater power over consumers by restricting consumer's right to sue for defective products, and licensors the ability to choose a forum that would make it difficult for consumers to sue.⁹⁸ Another concern with UCITA is that validating shrink-wrap and clickwrap licenses renders consumers with no ability to negotiate terms, as the terms are generally not available for review until after the purchase.⁹⁹

V. CONCLUSION

The twenty-first century has arrived, and with it has come a revolution in electronic commerce. As more products and services are offered online, the rights and remedies afforded to the participants of these electronic transactions will be questioned. UCITA has been proposed as a commercial code to bring clarity to this evolving area of law.

Standards are necessary for Internet commerce. Relying on the current forms of relief will stifle the growth of commerce on the Internet. A consistent and uniform approach to online service transaction is necessary, and the UCITA can provide the framework from which to build enforceable legal relationships online. Although UCITA may not be the perfect solution to all the issues created by electronic commerce, it does establish a set of rules that can bring consistency to this area of law. State legisla-

⁹⁷ See *UCITA Fact Sheet: Statement Developed for the Medical Library Ass'n, Ass'n of Research Libraries, American Library Ass'n, American Ass'n of Law Libraries, MLANET*, (July 1999) at <http://www.mlanet.org/government/ucita/factsheet.html> (last visited Sept. 26, 2000) (discussing controversial details of UCITA). "Computer information" under UCITA includes everything from copyrighted expression, such as stories, computer programs, images, music and Web pages to other forms of intellectual property such as trademarks, patents, and trade secrets. *Id.* UCITA states that it covers only information in electronic form, however, UCITA allows other transactions to "opt-in" to be governed by UCITA. *Id.* See also, UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT § 102 (1999)(amended 2000) (defining definitions applicable to UCITA).

⁹⁸ See *id.* at 3. (discussing concerns of consumers under UCITA); see also UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT § §105, 503 (1999) (amended 2000). Section 105 allows any provision preempted by federal law to be unenforceable to extent of pre-emption. *Id.* Section 503 allows language to be included in licenses that prohibits transfer. *Id.*

⁹⁹ See UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT § § 210, 212 (1999) (amended 2000).

tures should support adoption of UCITA. Only by widespread support can UCITA fulfill its purpose of being a uniform code.

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