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INTANGIBLES CONTRACTS: THOUGHTS OF HUBS, SPOKES, AND REINVIGORATING ARTICLE 2

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I. INTRODUCTION

The current sources of commercial law are survivors from a different age. U.C.C. Article 2 was drafted in the 1950's. The basics of consumer law were enacted by the early 1970's. Article 9 was last revised in the early 1970's. This contract law structure has served as the status quo for decades, but this status quo ended several years ago under the weight of a radically changing economic system and a new set of political and practical realities. By the end of this decade, every article of the U.C.C. will be revised and at least two new U.C.C. articles will have been promulgated.

This Article deals with U.C.C. Article 2. Article 2 comprises the basic contract law of the U.C.C. Although Article 2 focuses on the sale of goods, its influence extends much further. Courts and commentators have interpreted what constitutes "goods" broadly and also have applied Article 2 by analogy to transactions far outside its substantive scope.¹ Yet, even as the reach of Article 2 extended, the world changed. The transactions that drive the modern economy often are not *sales*. Their subject matter often has nothing to do with "goods." In today's "service economy," the service sector outstrips the sale or manufacture of goods in economic significance. The information industry yields over \$90 billion in revenues;² it is already larger than all but a

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1. See, e.g., *Xerox v. Hawkes*, 475 A.2d 7 (N.H. 1984) (service agreement); *Dillman & Assocs. v. Capitol Leasing Co.*, 442 N.E.2d 311 (Ill. App. Ct. 1982) (equipment lease); *Hertz Commercial Leasing v. Transp. Credit Clearing House*, 298 N.Y.S.2d 392 (New York City Civ. Ct. 1969) (same); see also *LTV Federal Credit Union v. UMIC Gov't Sec.*, 523 F. Supp. 819 (N.D. Tex. 1981) (standby commitment agreement), *aff'd*, 704 F.2d 199 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 163 (1984).

2. Blowden Tarter, *Information Liability: New Interpretations for the Electronic Age*, 11 *COMPUTER/L.J.* 481, 483 (1992).

few of the hard goods sectors and is growing at a more rapid rate than any hard goods or manufacturing sector of the economy. This is an "information age."³

In March 1993, the Article 2 Drafting Committee adopted a working policy to the effect that the Article 2 revisions should encompass licensing contracts involving software and related intangibles.⁴ This working policy and the implications of the changes in our economy for the revision of Article 2 are the subjects of this Article.

Part II describes some of the reasoning that supports the decision to bring intangibles within Article 2, especially intangibles contracts that involve computer software and data. In part, this builds on the fact that many software and intangibles contracts are already governed by Article 2, even though Article 2 applies a transactional model to these contracts that is inappropriate. In part, also, the reasons to include intangibles reflect a preference for dealing with important fields of commercial contract through codification, rather than pure common law development. Codification is more likely to yield commercially relevant, supportive contract law principles. It creates a process in which commercial practice and the means for facilitating it can be examined by experts outside litigation where one must resolve specific, existing disputes.

Contract law is a practical discipline that aims to affect and shape the voluntary behavior of companies and individuals engaged in contractual relationships. However, modern contract scholarship vividly documents the difficulty of achieving this consistently in practice.⁵ We know little about how law affects

3. See J. Shoven, *Intellectual Property Rights and Economic Growth*, in *INTELLECTUAL PROPERTY RIGHTS AND CAPITAL FORMATION IN THE NEXT DECADE* 46 (Charles E. Walker & Mark A. Bloomfield, eds., 1988). This correlates to an enhanced interest in academic literature on defining the content of intellectual property law. See, e.g., Frank Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108 (1990); Wendy Gordon, *On Owning Information: Intellectual Property and the Restitutory Impulse*, 78 VA. L. REV. 149 (1992); Raymond T. Nimmer & Patricia A. Krauthaus, *Information as Property: Databases and Commercial Property*, 1 OXFORD INT'L J. LAW & INFO. SCIENCE 3 (1993).

4. Raymond Nimmer & Richard Speidel, *Hub and Spoke Concepts in Article 2: Discussion Memorandum 1* (memorandum presented to the Article 2 Revision Drafting Committee on Sept. 5, 1993).

5. See, e.g., Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and*

behavior. But, despite this uncertainty, a commercial law of contracts will continue to develop. This indicates that we should draft rules that encourage contract flexibility by allowing the parties to define their own relationship and adopt background or default rules that draw on the shared expertise of actual commercial contracting as a gauge for what rules are appropriate. The better process to develop a commercial law that accomplishes these goals is codification, where principles and process of contract can be discerned in a forum divorced from particular disputes and in a setting where experts and participants can contribute to the formulation of law.

Yet, codification is not appropriate for all types of contract or for all contract issues in any field. I suggest several criteria that identify when or whether codification should be undertaken. Applying these to intangibles contracts, a decision to formalize codification of contract law on intangibles is a natural extension of the Commercial Code to reflect national commercial behavior. Intangibles contracts involve significant national industries of commercial importance; they engage a transactional format and subject matter different from the sale of goods. Many intangibles licenses are now governed by Article 2, but Article 2 was drafted for the sale of goods.⁶ The resulting problems are numerous and the failure to fit modern law to modern commercial practice is significant. The revised Article 2 should remedy this situation. If not, the revision will fail to address the sea of change in commerce that, more than anything else, justifies revision of Article 2 at this point in time.

In Part III, I discuss the structure of Article 2, and make two basic points. The first deals with differentiation. If intangibles contracts fall within the U.C.C., separate treatment is required at least in part because commercially significant differences exist between a license and a sale as well as between intangibles and goods. All of these commercial transactions may draw on a common core of basic contract principles, but each also demands

the Optimal Choice of Legal Rules, 101 YALE L.J. 729, 733 (1992) (noting that certain default rules are "theoretically efficient" but that "there is small hope that law-makers will be able to divine the efficient rule in practice").

6. U.C.C. § 2-102 (1990).

some specially tailored rules to reflect the type of contractual relationship that exists in commercial fact. Codification, to be effective, must reflect both the commonalities and the transactional or subject matter difference.

In Part IV, I deal with the second structural point. In an era of economic and technological change, the structure of Article 2 must accommodate future growth and change. Historically, the assumption has been that discrete transactions and subject matters should be dealt with under different contract rules, reflected either in common law or in stand-alone articles of the U.C.C.⁷ This apparent belief in the categorical nature of commercial contracts belies the fact that, while there are significant differences relevant to contract law in different transactions and subject matters, we truly do not believe that commercial contracts are entirely discrete. While some aspects of transactions must draw on different contract law rules, others clearly should draw from a common core of contract theory and doctrine.

In 1993, the Article 2 Drafting Committee adopted a preliminary working policy that supports incorporation of software and related intangibles contracts into Article 2 through a "hub and spoke" configuration.⁸ The "hub" consists of general principles. Promulgated in the U.C.C., a hub of codified contract law can bring to contracts outside of sales, leases, and licenses the benefits of visible, nationally consistent rules. This would enhance the flexibility of Article 2 to provide guidance on new transactions by direct application and by analogy. The "spokes," on the other hand, reflect that different transactions require different background law principles. The spoke idea postulates that there are differences in what contract law should underlie sales contracts, leases, licenses, services contracts, and other commercial deals. The differences are important. The spokes allow transactionally relevant differences to be hung from the basic contract law hub with new frameworks evolving as the transactions mature into commercial significance.

7. See, e.g., U.C.C. art. 2A (lease of goods); *id.* art. 4A (funds transfers).

8. See Raymond T. Nimmer et al., *License Articles Under Article 2 of the Uniform Commercial Code: A Proposal*, 19 RUTGERS COMPUTER & TECH. L.J. 281 (1993); Raymond T. Nimmer, *Services Contracts: The Forgotten Sector of Commercial Law*, 26 LOY. L.A. L. REV. 725 (1993).

Under a hub and spoke model, Article 2 would cease to be a "sale of goods" article; it would become an article dealing with commercial "transfers of personal property." Since the hub and spoke concept remains to be fully explicated by the Article 2 Drafting Committee, it is premature to attempt a full discussion of its implications. Here I subscribe to a more limited goal: discussing only some issues that arise when one undertakes to define what might constitute a core of commercial contract law applicable to the hub of new Article 2.

II. INTANGIBLES

The scope of Article 2, and of the U.C.C., reflects decisions of policy, not theoretical purity. The choices made during the drafting of Article 2 in the 1950's about what should and should not be included were based on the priorities and the legal-political environment existing at that time.⁹ Those practical choices are no longer fully appropriate; they have already been altered in several respects during the last decade.¹⁰

The drafters chose "goods" as the centerpiece for commercial contract law in Article 2.¹¹ Many historical reasons supported their decision.¹² But the consequence of the choice is that the structure of Article 2 reflects a goods bias and a focus on sales—a transaction that hinges on tender and delivery of a tangible item. The goods bias has shaped basic contract law since before the 1950's and today even extends to analyses of contracts that do not involve goods.¹³ But the emphasis on goods as the centerpiece of contract law and economic exchange

9. See Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L.J. 1341, 1351-54 (1948).

10. For example, the promulgation of Article 4A on funds transfer and Article 2A on leases of goods expanded the scope of the U.C.C. On the other hand, one of the alternatives advocated in revised Article 6 on bulk sales is simply to repeal that body of law. See U.C.C. art. 6 prefatory note (1990).

11. See U.C.C. § 2-102 (1990) (defining the scope of Article 2 by stating that it "applies to transactions in goods").

12. See generally Gilmore, *supra* note 9, at 1342-37 (discussing the history of English commercial law and practice).

13. A similar "goods bias" affects traditional economic planning and international trade discussions. See KARL P. SAUVANT, *INTERNATIONAL TRANSACTIONS IN SERVICES: THE POLITICS OF TRANSBORDER DATA FLOWS* 18-22 (1986).

reflects an industrial economy that no longer exists. Services, information, and technology contracts are the driving forces of modern commerce, while manufacturing moves increasingly offshore and retail sales are governed by regulatory "consumer" laws and standard form "contracts."¹⁴

Today, Article 2 deals with transactions, primarily sales, of goods.¹⁵ Goods are all things movable at the time of identification to the contract.¹⁶ Sales are contracts that transfer "title" in goods in return for an agreed consideration.¹⁷ The definition of "goods" thus controls the scope of Article 2, while the reference to sales provides the transactional paradigm on which most Article 2 provisions are based. In contrast to this focus on tangibles, a definition of scope that covers software or similar intangibles might refer to information, data, technology, intellectual property, or software as the subject matter of a license contract. A license consists of a conditional grant of an ongoing right to use, make, access, modify, or otherwise employ the intangibles without infringing the licensor's rights in them. The paradigm called into play by this focus differs materially from a sale.

In revising Article 2 for the first time since the 1950's, the drafters face a choice about the future of the U.C.C. and Article 2. Should this "commercial code" continue to deal solely with transactions (sales) in goods or should it seek to retain center stage in commercial law? The answer requires recognition that the modern world economy is not the world of the 1950's; there have been fundamental changes in how value is created and exchanged.¹⁸ It also involves a judgment about the relationship between codes and common law. Incorporating an area into the U.C.C. reduces the scope of common law as to that area. To ar-

14. See Henry T. Greely, *Contracts as Commodities: The Influence of Secondary Purchasers on the Form of Contracts*, 42 VAND. L. REV. 133, 140-58 (1989).

15. U.C.C. § 2-102 (1990).

16. *Id.* § 2-105(1)-(2); see also *Herman v. Bonanza Bldg., Inc.*, 390 N.W.2d 539, 543 (Neb. 1986).

17. U.C.C. § 2-106(1) (1990); see also *Wells v. 10-X Mfg. Co.*, 609 F.2d 248, 254 (6th Cir. 1981).

18. See DONALD A. MARCHAND & FOREST W. HORTON, *INFOTRENDS: PROFITING FROM YOUR INFORMATION RESOURCES* 19 (1986) ("While we have been living with the consequences of the information economy for many years, our understanding of these shifts in human events has lagged behind the reality.").

gue that codification is not appropriate is to argue that common law should govern.

A. Are "Intangibles" Goods?

This is the wrong question.

The issue is not whether software or other intangibles constitute goods or whether a contract that licenses use of intangibles constitutes a sale. That question has been discussed in the literature and in case law, but has little relevance in a law revision. If one decides to bring some or all intangibles contracts into Article 2, the statute can address the issue of how to deal with licenses and software directly. The question of whether intangibles constitute "goods" is secondary. The term "goods" is a functional term intended to yield a particular result on the scope of Article 2. If the scope should change, one simply can define intangibles as goods or, more appropriately, expand Article 2 to cover not only goods, but also licenses of intangibles.

The question of whether the *current* Article 2 covers transactions in intangible property has been litigated frequently.¹⁹ The result has been a series of relatively fuzzy lines and uncertainty. The litigation frequently yields a conclusion that places many intangibles transactions within an Article 2 framework designed for the sale of goods.²⁰

Most courts apply Article 2 to distributorship arrangements.²¹ In some of these cases, the transferor sells products

19. See, e.g., *Glover Sch. & Office Equip. Co. v. Dave Hall, Inc.*, 372 A.2d 221 (Del. Super. Ct. 1977) (holding that when a cause of action involves both goods and services, the factual circumstances surrounding the transaction must be looked at to determine if Article 2 applies); *Helvey v. Wabash County REMC*, 278 N.E.2d 608 (Ind. Ct. App. 1972) (finding that intangibles are not within the scope of the U.C.C.); *Whitmer v. Bell Tel. Co.*, 522 A.2d 584 (Pa. Super. Ct. 1987) (holding that the term "goods" covers only tangible, movable property).

20. See, e.g., *Hudson v. Town and Country True Value Hardware, Inc.*, 66 S.W.2d 51, 57 (Tenn. 1984) (stating a view toward the reasonable totality of the circumstances should control and this usually means broadening the definition of what is covered as "goods").

21. See, e.g., *Monetti, S.P.A. v. Anchor Hocking Corp.*, 931 F.2d 1178, 1179, 1182-83 (7th Cir. 1991); *InterCorp, Inc. v. Pennzoil Co.*, 877 F.2d 1524, 1527 (11th Cir. 1989); see also *Zapatha v. Dairy Mart, Inc.*, 408 N.E.2d 1370, 1374-75 (Mass. 1980) (selective application of Article 2).

that are resold by the transferee under a license.²² Courts apply a "predominant purpose" test and often conclude that the goods component predominates as the transactional focus over intangibles such as the right to use trade names, trademarks, customer lists, copyrights, and similar property.²³ The transactions do not always involve goods manufactured by the transferor, however.

In *In re Amica, Inc.*,²⁴ Amica agreed to modify an existing software product and to transfer to "BB all its rights, title and interest to the Program and its documentation including copyright in the programs . . . and all trademarks."²⁵ The contract called for royalty payments based on sales of *copies* of the program to third parties.²⁶ The right to make copies was transferred. This is a conveyance of a copyright or a license to use copyrighted material.²⁷ This contract established a distributorship through an assignment of a copyright, but the court treated the transaction as a sale of goods applying Article 2 title concepts.²⁸ In contrast, the court in *Snyder v. ISC Alloys, Ltd.*,²⁹ held that a contract in which the transferee received designs, technical drawings, and professional advice along with a right to use a process for converting solid zinc metal into zinc dust was a service contract.³⁰ Based on this conclusion, the court held that no liability for wrongful death arose when an employee was injured in a plant operated by a third party under license from the defendant.³¹

22. *Monetti*, 931 F.2d at 1183.

23. *Intercorp*, 877 F.2d at 1527.

24. 135 B.R. 534 (Bankr. N.D. Ill. 1992). Interestingly, although intellectual property lawyers and business owners might have difficulty distinguishing the two settings, results such as that in *Amica* need to be contrasted to decisions reached by courts in cases involving publishing contracts that may be pure services or intangibles contracts under U.C.C. practice. See *Mallin v. University of Miami*, 354 So. 2d 1227 (Fla. Dist. Ct. App. 1978); cf. *Advent Sys. Ltd. v. Unisys Corp.*, 925 F.2d 670 (3d Cir. 1991) (finding a software distribution contract within Article 2).

25. *Amica*, 135 B.R. at 543.

26. *Id.* at 539.

27. *Id.* at 542.

28. *Id.* at 545-46.

29. 772 F. Supp. 244 (W.D. Pa. 1991).

30. *Id.* at 252-53.

31. *Id.* at 256.

What the court in *Snyder* described as a services contract would be described by most practitioners as a trade secret license.³² The operator obtained the right and the capability to employ a technology. This is much like the party in *Amica* which contracted to obtain the right and the capability to use a copyrighted program. Beyond the distinction between goods and other sources of value, the court's analysis in *Snyder* reflects a tendency, prevalent in commercial law settings, to disregard the independent value of the intangible property in a commercial transaction, assuming that value lies either in tangible items or in services.³³

Article 2 scope questions are often litigated in contracts to transfer rights in computer software. Although some contrary authority exists,³⁴ most cases hold that software licenses fall within Article 2 despite the fact that software is licensed, not sold, and the value involved resides not in the tangible item on which the software is recorded, but in the software and the right

32. RAYMOND T. NIMMER, *THE LAW OF COMPUTER TECHNOLOGY* ¶ 3.07[2][b] (2d ed. 1992).

33. See *Snyder*, 772 F. Supp. at 252-53. Compare the case in which, in the sale of a business, the parties themselves identify separate costs for tangibles and intangibles. Faced with a direct recognition that the intangibles constitute separate value, courts apply a more discriminating predominant purpose test. See *Cianbro Corp. v. Curran-Lavoie*, 814 F.2d 7 (1st Cir. 1987) (holding that the sale of a business constitutes the sale of goods); *Fink v. DeClassis*, 745 F. Supp. 509 (N.D. Ill. 1990) (finding the sale of a business not to be the sale of goods).

34. For cases excluding intangibles from Article 2, see *Computer Servicenters, Inc. v. Beacon Mfg. Co.*, 328 F. Supp. 653, 655 (D.S.C. 1970) (data processing contract), *aff'd*, 443 F.2d 906 (4th Cir. 1971); *Wharton Management Group v. Sigma Consultants, Inc.*, No. C.A. 89C-JA-165, 1990 WL 18360, at *3 (Del. Super. Ct. Jan. 29, 1990) (services contract because "[the] means of transmission is not the object of the agreement"), *aff'd*, 582 A.2d 936 (Del. 1990); *Data Processing Servs., Inc. v. LH Smith Oil Corp.*, 492 N.E.2d 1329 (Ind. Ct. App. 1986) (software development); *Geotech Energy Corp. v. Gulf States Telecommunications & Info. Sys., Inc.*, 788 S.W.2d 386 (Tex. Ct. App. 1990) (telecommunications hardware and design services a contract for services); *Micro-Managers, Inc. v. Gregory*, 434 N.W.2d 97 (Wis. Ct. App. 1988) (development contract).

to use that software.³⁵ One court captured the general tone of the case law in the following language:

Computer programs are the product of an intellectual process, but once implanted in a medium are widely distributed to computer owners That a computer program may be copyrightable . . . does not alter the fact that once in the form of a floppy disc or other medium, the program is tangible, movable and available in the marketplace.³⁶

Courts often apply Article 2 based on a recognition that a decision to treat a transaction as outside of Article 2 would leave the commercial deal subject to uncoded common law rules.³⁷ Common law provides scant guidance to commercial parties, while even an inappropriate use of sales law at least draws rules from a commercial source.

Quite clearly, however, the quoted language above cannot be squared with that "pragmatic" result. It treats software as a "good" and a "license" as a sale. While a diskette, tape, or other tangible property may be used to make software available to the end user, that tangible property becomes irrelevant shortly after the software is "loaded" into a computer in which it will be used. The act of loading (transferring) the software into the computer must be licensed, as must the subsequent acts involved in using the software. Each action results in the making of an additional copy of a copyrighted work that would violate the property rights of the licensor in that work unless the user held a license to do so.³⁸ This license will either be explicit in the contract of

35. See *Step-Saver Data Sys., Inc. v. Wyse Technology*, 939 F.2d 91 (3d Cir. 1991); *Advent Sys. Ltd. v. Unisys Corp.*, 925 F.2d 670 (3d Cir. 1991); *Hospital Computer Sys., Inc. v. Staten Island Hosp.*, 788 F. Supp. 1351 (D.N.J. 1992); *Amica*, 135 B.R. 534; *Neilson Business Equip. Ctr., Inc. v. Italo Monteleone, M.D., P.A.*, 524 A.2d 1172 (Del. 1987); *Photo Copy, Inc. v. Software, Inc.*, 510 So. 2d 1337 (La. Ct. App. 1987); *USM Corp. v. Arthur Little Sys., Inc.*, 546 N.E.2d 888 (Mass. App. Ct. 1989); *Drier Co. v. Unitronix Corp.*, 3 U.C.C. Rep. Serv. 2d (Callaghan) 1728 (N.J. Super. App. Div. 1987); *Schrodgers, Inc. v. Hogan Sys., Inc.*, 522 N.Y.S.2d 404 (Sup. Ct. 1987); *Communications Groups, Inc. v. Warner Communications, Inc.*, 527 N.Y.S.2d 341 (Civ. Ct. 1988).

36. *Advent Sys.*, 925 F.2d at 675.

37. See *Caspary v. Louisiana Land & Exploration Co.*, 707 F.2d 785, 795 (4th Cir. 1983); *Dixie Bonded Warehouse & Grain Co. v. Allstate Fin. Corp.*, 775 F. Supp. 1543, 1552 (M.D. Ga. 1991).

38. See *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993)

the parties (the license) or implicit in the fact that the licensor sold the initial copy to the licensee. In either event, the initial diskette is not relevant; it can be discarded or retained without impairing the use of the software.³⁹ Indeed, in many transactions, no diskette or tape is ever transferred; the software is simply made available to the licensee by remote electronic access to the licensor's computer.⁴⁰

Most decisions dealing with software under current law ask whether the predominant purpose of the transaction was to acquire "goods" or, as an alternative, to obtain "services" or other intangibles.⁴¹ Current case law splits in transactions involving custom developed software and those involving data processing contracts for remote processing.⁴² Some courts emphasize that the "product" as delivered is goods; others focus on the fact of extensive services, skill, and effort as the key to the transaction.⁴³ The dispute has significance in what warranties apply to

(holding that the transfer of software from storage to memory as an ordinary part of use of the software constitutes the making of a new copy which, if not licensed, infringes the software copyright). For cases in which a transferee buys a copy of the software, federal law grants several rights to the owner of the copy, including the right to make an additional copy essential to its use of the program. See 17 U.S.C. § 117 (1988).

39. This scenario is true in the ordinary "home" use of word processing and similar programs and it is ordinarily true in commercial licensing. For example, although it involved the sale of a copyright, this would certainly be true under the facts in *Amica*, which, as we have seen, involved a royalty based transfer of rights to reproduce and sell copies of a computer program. *Amica*, 135 B.R. at 539.

40. See, e.g., *Hospital Computer Sys., Inc. v. Staten Island Hosp.*, 788 F. Supp. 1351 (D.N.J. 1992).

41. See *Arlington Elec. Constr. v. Schindler Elevator Corp.*, No. L-91-102, 1992 WL 43112, at *5 (Ohio Ct. App. Mar. 6, 1992); *Systems Design & Management Info., Inc. v. Kansas City Post Office Employees Credit Union*, 788 P.2d 878, 879 (Kan. Ct. App. 1990); *Highland Rim Constructors v. Atlantic Software Corp.*, No. 01-A-01-9104CV00147, 1992 WL 184872, at *1 (Tenn. Ct. App. Aug. 5, 1992).

42. *Nimmer et al.*, *supra* note 8, at 294.

43. See *Hospital Computer Sys.*, 788 F. Supp. 1351 (remote use is goods); *Amica*, 135 B.R. 534; *Herbert Friedman & Assocs., Inc. v. Lifetime Doors, Inc.*, No. 85 C-6503, 1989 U.S. Dist. LEXIS 15239 (N.D. Ill. Dec. 19, 1989) (goods); *Austin's of Monroe, Inc. v. Brown*, 474 So. 2d 1383 (La. Ct. App. 1985) (goods); *USM Corp.*, 546 N.E.2d 888; *Communications Groups, Inc.*, 527 N.Y.S.2d 341 (goods); *Camara v. Hill*, 596 A.2d 349 (Vt. 1991). But cf. *Wharton Management Group v. Sigma Consultants, Inc.*, No. C.A. 89C-JA-165, 1990 WL 18360 (Del. Super. Ct. Jan. 29, 1990), *aff'd*, 582 A.2d 936 (Del. 1990); *Data Processing Servs., Inc. v. LH Smith Oil Corp.*, 492 N.E.2d 1329 (Ind. Ct. App. 1986) (not goods); *Geotech Energy Corp. v. Gulf States*

a contract, how to compute damages, what limitations periods apply, and how "perfect" the performance of the program developer must be.⁴⁴

These issues in software transactions reflect a broader dispute about what law applies to design contracts of all types, but the basis on which cases are decided is especially obscure in the context of software because the intangibles have characteristics of both pure intangibles and goods.⁴⁵ The lines drawn are unpredictable because the licensee's goal is both to obtain rights to use software and to receive a product that performs a useful function.

Data processing cases also present classification issues at least where the data processing company modifies software to service a particular client.⁴⁶ For example, in *Colonial Life Insurance Co. of America v. Electronic Data Systems Corp.*,⁴⁷ the court held that a contract providing for over four years of data processing and software development and modification services was within Article 2.⁴⁸ The contract involved a promise by Electronic Data Systems (EDS) to develop software (entitled the "Insurance Machine") and provide data processing services.⁴⁹ The court observed that a data processing contract is, in fact, neither a pure goods nor a pure services contract: "It is an enterprise that involves a combination of personal skills and labor, materials, equipment and time."⁵⁰ In characterizing the contract, the court emphasized that the transaction provided the end user with access to and use of software.⁵¹ "Although the

Telecommunications & Info. Sys., Inc., 788 S.W.2d 386 (Tex. Ct. App. 1990); *Micro-Managers, Inc. v. Gregory*, 434 N.W.2d 97 (Wis. Ct. App. 1988) (services).

44. *Compare USM Corp.*, 546 N.E.2d 888 (finding software to be goods and therefore subject to Article 2) with *Micro-Managers, Inc.*, 434 N.W.2d 97 (finding software to be services and therefore outside the scope of Article 2).

45. *See Milau Assocs., Inc. v. North Avenue Dev. Corp.*, 398 N.Y.S.2d 882, 884-85 (1977).

46. *Compare Hospital Computer Sys., Inc.*, 788 F. Supp. 1351 (goods) with *Computer Servicenters, Inc. v. Beacon Mfg. Co.*, 328 F. Supp. 653 (D.S.C. 1970) (services), *aff'd*, 443 F.2d 906 (4th Cir. 1971).

47. 817 F. Supp. 235 (D.N.H. 1993).

48. *Id.* at 238.

49. *Id.* at 237.

50. *Id.* at 238.

51. *Id.* at 239.

Agreement did contemplate many years of servicing, the purpose or thrust of these services was support of EDS' product . . . in accommodating Chubb's business practices."⁵²

The transaction in *Colonial Life* was clearly not a sale, but a license. The court recognized this, but found that inclusion in Article 2 was appropriate and that both remedy limitations rules and warranty disclaimers from Article 2 applied.⁵³ This, in effect, created the legal fiction of a sale that took four years after delivery to complete.

The increasing relevance of intangibles as commercial products presents this same issue in other settings. For example, the court in *Snyder* employed a classification analysis to determine whether a licensor had responsibility to third parties in circumstances resembling a products liability claim.⁵⁴ Federal courts of appeals have held that a chart or air travel map for guiding aircraft pilots was a product; strict liability was appropriate.⁵⁵ In contrast, the court in *Rosenstein v. Standard and Poor's Corp.*⁵⁶ treated a license requiring Standard and Poor's (S&P) to provide index figures for the daily closing of options prices based on the S&P index as an information contract.⁵⁷ When the data proved to be inaccurate, the court used principles of negligent misrepresentation, rather than U.C.C. warranty rules to gauge liability.⁵⁸ The court held that negligent misrepresentation law applied even though Illinois law holds that this tort does not lie against the seller of goods.⁵⁹ The court reasoned that while "S & P Indexes have been considered salable products, we do not believe that it sheds its character as information used to guide the economic destinies of others" covered by the

52. *Id.*

53. *Id.* at 242-44.

54. *Snyder v. ISC Alloys, Ltd.*, 772 F. Supp. 244, 251-52 (W.D. Pa. 1991).

55. See *Brockelsby v. United States*, 767 F.2d 1288, 1294-95 (9th Cir. 1985); *Salomey v. Jeppeson & Co.*, 707 F.2d 671, 676-77 (2d Cir. 1983); *Aetna Casualty & Sur. Co. v. Jeppeson & Co.*, 642 F.2d 339, 342-43 (9th Cir. 1981).

56. No. 1-91-3000, 1993 WL 176532 (Ill. App. Ct. May 26, 1993).

57. *Id.* at *2.

58. *Id.* at *5.

59. *Id.* at *6.

applicable tort law.⁶⁰ In this case, the license contained a disclaimer that negated liability for S&P.⁶¹

These cases have one thing in common. They reach substantively important decisions based on a classification that hinges on whether the court believed that the most important aspect of a commercial deal involved tangibles or intangibles or whether intangibles are products. Today, these questions are asked in an environment in which information, software, and other intangibles increasingly are regarded as valuable commodities in commercial practice. Yet, modern law mandates that if the intangibles dominate the contract, the commercial relationship is governed under common law, rather than under commercial codification.

Ideally, a court's choice of characterizations is based on a reasoned assessment of the equity or policy relevance of applying either common law or the U.C.C. to the transaction. Yet, this type of textured analysis does not always appear in court opinions. Even if it does, the guidance left for subsequent parties in similar transactions is minimal. The definition of "goods" and of "sale" are not reliable bases on which to gauge the law applicable to a major segment of modern commerce. Nor need we continue to do so. In a law reform, the issue is not whether or not software, information, or data processing constitute goods. That question changes into a more relevant inquiry: how should contracts involving licenses of intangibles be dealt with in the U.C.C.?

B. Codification as a Process

Software and related intangibles licensing constitute a major commercial enterprise whose contracts should be brought within relevant, tailored commercial law. Codification, both as a process and in the product it yields, offers advantages that cannot be replicated through "common law" development of contract principles.

60. *Id.* at *4.

61. *Id.* at *5.

Even before one makes that point, however, the argument that Article 2 revision should address intangibles contracts begins with an even more simple premise. Many such transactions are already within the ambit of Article 2; others are subjected to Article 2 law by analogy. Article 2 revision will *affect* software and related licensing because these contracts are governed by Article 2 principles already.

The issue of whether Article 2 should be expanded beyond software licenses poses a fundamental question about one's faith in either common law or codification as a preferred method to develop commercial contract law. If this question were addressed to lawyers in the 1880's, longstanding traditions of this country might have reflected a founded preference for common law development as a dominant approach. Yet, more recent history indicates to the contrary; many aspects of current contract law already are codified. The modern trend is to expand codification.

Many reasons support this trend. The most important lie in the pace and character of modern commercial law practice. Common law development is best suited to a slower pace and to developing law in reference to transactions that have local flavor and are characterized by shared expertise among the contracting parties. This was the commercial world of the 1700's and 1800's. Today, local transactions among limited groups of knowledgeable experts still occur, but modern technology and modern commerce have created a far less homogenous environment. In this setting, a premium exists on accessible, commercially relevant, and understandable principles that guide the transaction. Such principles reduce the effects of asymmetrical knowledge. They make the underlying rules of the game more readily accessible and fit those rules to common expectations. The alternative of common law rules is far less accessible and relevant. It sets a stage that requires substantial resources devoted to the search for underlying principles in each transaction. Uncertainty imposes costs on the contracting process and creates unintended error and inadvertant distribution of values.

Pure common law development is relatively slow and always disjointed because it evolves commercial contract principles by scattered court decisions. It often fails to provide sufficient guidance until after the need for it has passed. Furthermore, com-

mon law development is more attuned to the resolution of individual disputes in particular factual contexts than to deriving general norms or guideposts for national practice. The data and insights a court uses to solve a litigated matter come from other courts and from the litigators. They are framed to fit positions in a case rather than to discern general principles of commercial practice.

Against this background, I view codification as a process. The benefits of codification lie in the process itself and in the form of the product it produces, rather than in a particular substantive outcome that can be predicted at the outset. The substantive rules become pertinent only at the end of the process when a proposed product is submitted for enactment. In fact, substantive rules are dictated by the politics and the open dialogue that drives the codification forward, rather than by preset assumptions about what rules should govern a given commercial context.⁶² The open dialogue that characterizes modern codification is a major contribution because it enables diverse viewpoints and insights to be brought together divorced from particular disputes. While that open process may not always yield commercially beneficial results, it is more attuned to doing so than is the process of litigation in scattered courtrooms around the country.

C. *Contracts and Behavior*

Contract law is a practical legal discipline. It contemplates an impact on the behavior of contracting parties.⁶³ We evaluate contract law rules largely based on their supposed impact on the contracting process. As that suggests, the case for or against codification of commercial license contracts must be based in part on an analysis of whether favorable effects on modern commercial contracting practices are more or less likely to be attained in codification than by common law development. To explore this question, we need at least a preliminary under-

62. See Marianne B. Culhane, *The UCC Revision Process: Legislation You Should See in the Making*, 26 CREIGHTON L. REV. 19 (1992).

63. See Ayres & Gertner, *supra* note 5; Jason S. Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615 (1990).

standing of the actual relationship between contract law and contract practice.

The lively jurisprudence of modern contract law contains a number of competing perspectives on the role of courts, codes, and contracting.⁶⁴ In modern legal literature, these descriptions entail conflicting theoretical formulations. Each posits a different relationship between law and contract practice. For example, a sociological view tends to emphasize the impact of extralegal factors on behavior, defining pure legal rules as a secondary consideration.⁶⁵ In contrast, law and economics analyses of contract doctrine assume rational decisionmaking that, along with strategic factors, strongly accounts for different legal norms in establishing a contract.⁶⁶

In fact, the relationship between contract law and contract practice is not understood and this lack of understanding is central in either codification or common law development. There is little empirical evidence about contracting behavior;⁶⁷ most structured theoretical discussion posits a highly artificial environment that yields little insight into what actually occurs in the more complex world of human and corporate interaction. The vagaries and character of human behavior affected by contract

64. See, e.g., Ayres & Gertner, *supra* note 5; Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 94 (1989) [hereinafter Ayres & Gertner, *Filling Gaps*]; Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986); David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815 (1991); Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989); Richard A. Epstein, *Beyond Foreseeability: Consequential Damages in the Law of Contract*, 18 J. LEGAL STUD. 105 (1989); Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Term*, 73 CAL. L. REV. 261 (1985); Johnston, *supra* note 63; Peter Linzer, *Uncontracts: Context, Contorts and the Relational Approach*, 1988 ANN. SURV. AM. L. 139; Stewart Macauley, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); Ian R. Macneil, *Power of Contract and Agreed Remedies*, 47 CORNELL L.Q. 495 (1962); Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597 (1990).

65. See, e.g., Macauley, *supra* note 64, at 62-64.

66. See Ayres & Gertner, *Filling Gaps*, *supra* note 64, at 94.

67. For a recent effort to obtain information about contracting policy and practice through a survey questionnaire, see Russell J. Weintraub, *A Survey of Contract Practice and Policy*, 1992 WIS. L. REV. 1.

law and strategic and economic considerations create a complex matrix in even the most seemingly simple contexts.⁶⁸

Many commercial contracts result from detailed negotiations and complex drafts. Contract terms control most issues. The role of contract *law* in these transactions is indirect. Contract law provides background rules that apply in the absence of agreement and may serve as a framework for negotiation. These background rules provide a bargaining point in negotiated contracts, indicate what language and formats lead to particular results, and insure against the inability of the parties to explicate fully the terms of their relationship by providing presumptive terms that apply in the absence of agreement to the contrary.⁶⁹

While this describes one possible role of contract law, the relative strength of law as contrasted to other more tangible factors such as market power, bargaining strategy, cost, and timing considerations remains largely unknown. One illustration involves the rule in *Hadley v. Baxendale*.⁷⁰ Law and economics scholars typically treat the rule in *Hadley* as one that sharply limits the liability of a promisor for consequential damages in the event of breach.⁷¹ This is a "default" rule for which the parties can contract a different result. Some authors have justified this rule as a "penalty" or an "information forcing" rule that supposedly forces a promisee concerned about a risk of extensive consequential loss in the event of breach to signal that concern and to bargain for contract terms that make the promisor account for this concern.⁷² Arguably, this allows the promisor to take a proper level of precaution in return for a higher price.

While this incentive may exist, competing strategic considerations may offset it. Furthermore, strategic considerations that focus on obtaining a better "bargain" are more immediate and direct in the contracting party's contemplation than concerns

68. See, e.g., Ayres & Gertner, *supra* note 5, at 733.

69. See *id.* at 730.

70. 156 Eng. Rep. 145 (1854).

71. See Johnston, *supra* note 63, at 616.

72. See Ayres & Gertner, *Filling Gaps*, *supra* note 64, at 91; John C. Coffee Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1623 (1989); Scott, *supra* note 64, at 609.

about which rule would apply in the event of nonperformance, large loss, and resulting litigation. As Jason Johnston notes,

if we are talking about *bargaining* over the contract, then we are talking about a process of strategic information transmission, a process in which the promisee tries to persuade the promisor that she cannot pay a high price, and the promisor tries to persuade the promisee that she should. In this process, the promisee would generally want to convince the promisor that her value from performance is low⁷³

The promisee would not desire to communicate that nonperformance may inflict large loss. The world of commercial contracting is complex. What actually occurs in reference to consequential loss or other default rules must be filtered through an understanding of that complexity and the uncertainty of prediction that it creates.

But in the complex world of commercial contracting, there is a competing, parallel reality that is much different from the idea of fully bargained contracts. Some contracts involve complex and lengthy negotiations, but detailed negotiations are not the norm. Lengthy negotiation consumes money and time, often creates conflict, and may result in deals being hindered, rather than facilitated.⁷⁴ Most contracts cannot sustain the overhead required by such negotiation; the reality is that many commercial contracts entail little negotiation. These less negotiated contracts rely on background law to fill out the details of the relationship so that in the event of a dispute, the background rules rather than express terms of the contract will bind the parties.⁷⁵ It is not clear that the parties expressly consider these background rules. They may not seriously consider the risk of a

73. Johnston, *supra* note 63, at 616-17.

74. Many business owners view the role of lawyers in such "exquisite" negotiations as inhibiting, rather than expediting, agreement. One scholar has noted that "[a]t worst, lawyers are seen as deal killers whose continual raising of obstacles, without commensurate effort at finding solutions, ultimately causes transactions to collapse under their own weight. Lawyers, to be sure, do not share these harsh evaluations of their role." Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 242 (1984).

75. See Goetz & Scott, *supra* note 64 (noting the value of implied terms as widely useful in that they reduce certain types of errors).

breach and actual litigation in most cases. If the parties do consider the risk that a dispute may arise, default rules must provide a realistic gauge of their expectations about the contract.

D. Contractual Flexibility

In this complex environment, two assumptions should underlie substantive *commercial* contract law, both of which are more likely to be fostered in codification than in common law. The first is that contract law should preserve the freedom of contract principle where the issues affect only the immediate parties to the transaction.⁷⁶

The idea of flexibility in commercial contracting is so embedded in our contract law theory that many analyses of contract doctrine simply assume that contractual flexibility is a basic norm and then proceed to ask what shaping, facilitating, or constraining influences should be applied to a principle of party autonomy in order to mold results consistent with general economic or social policy.⁷⁷

From the perspective of a theory that posits consent of the parties as the basis for a legal principle that enforces contractual promises, the concept of contractual flexibility to choose terms represents a direct extension of the consent principle.⁷⁸ In essence, as a society we enforce contracts because they represent consensual undertakings. The ability of the parties to define their own undertaking constitutes a core aspect of the consensual nature of the relationship itself.⁷⁹

76. For example, the comments to Article 2A note:

This codification was greatly influenced by the fundamental tenet of . . . freedom of the parties to contract [L]ike all other Articles of this Act, the principles of construction and interpretation contained in Article 1 are applicable These principles include the ability of the parties to vary the effect of the provisions of Article 2A, subject to certain limitations including those that relate to the obligations of good faith, diligence, reasonableness and care.

U.C.C. § 2A-101 cmt. (1990) (Relationship of Article 2A to Other Articles).

77. See, e.g., Johnston, *supra* note 63, at 615-20 (discussing bargaining incentives and the rule in *Hadley v. Baxendale*).

78. See Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 826-27 (1992).

79. See generally Barnett, *supra* note 64.

A perspective that focuses more on the role of contract in establishing optimal trade relationships supports contractual flexibility on the basis that individuals respond to their actual situation in a way that cannot be replicated by general contract law.⁸⁰ The parties' preferences reflect a more focused assessment of their actual circumstances than mandatory rules adopted by the State. "[C]ontracting parties will often prefer different contractual provisions . . . [and] contractual flexibility can therefore increase the total gains from trade."⁸¹ Facilitating parties' ability to define and enforce their preferences promotes more optimal commercial relationships even though individual contracts may deviate wildly from the optimum because of market factors and information and skill level differences.

The emphasis on flexibility leads to a preference for contract law that establishes background rules that serve a default or gap-filling function in a commercial relationship.⁸² A default rule should mesh with expected or conventional practice in a manner that projects a favorable impact on contracting, as judged by relevant policy goals. The rule can be varied by agreement of the contracting parties.⁸³ This contrasts with an approach that favors rules that dictate terms and regulate commercial behavior. As a matter of practice, default rules are most common in commercial contexts, while consumer law contains many mandatory rules designed to protect the consumer against mercantile overreaching.⁸⁴

Contractual flexibility should not be confused with the idea of open-textured interpretation. Contractual freedom refers to the ability of the parties to define their own relationship.⁸⁵ Open-textured interpretation refers to the ability in law of a court to refer to material outside the contract to provide explanation or

80. See Ayres & Gertner, *supra* note 5, at 735-37.

81. *Id.* at 734.

82. See Ayres & Gertner, *Filling Gaps*, *supra* note 64.

83. *Id.*

84. See *id.*; see also Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683, 688 n.15 (1993) (noting that tort rules are usually immutable).

85. See generally Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293 (1975) (discussing the principle of freedom of contract).

meaning to the contract.⁸⁶ This latter view creates contract as context.⁸⁷ The concept is that contextual interpretation of a contract more accurately reflects the actual intent of the parties in all cases.⁸⁸ For example, a prior course of dealing creates a common basis of understanding for "interpreting [the parties'] expressions and other conduct."⁸⁹ Where clear signals in the contract or the context demonstrate that the parties intend to rely on express terms, these terms should control. It is a familiar rule that express contract terms trump terms implied from course of dealing,⁹⁰ while a contract intended to be the exclusive statement of the parties' bargain excludes contradictory parol evidence.⁹¹

As this shows, the idea of using context to interpret contract terms relates to a belief that the context enables a *court* to understand what the parties meant in their agreement. Yet, the context may be more important than this theory suggests; in some cases, it serves as a basis to regulate contracting practice and to shape outcomes of disputes. Professors Goetz and Scott describe an unwillingness by some courts to accept tailored contract terms as a contractual step away from implied terms.⁹² That unwillingness is seen regularly in opinions dealing with parol evidence and merger clauses that argue that a court should disregard the context in favor of the written contract.⁹³

86. Cf. Steven R. Greenberger, *Justice Scalia's Due Process Traditionalism Applied to Territorial Jurisdiction: The Illusion of Adjudication Without Judgment*, 33 B.C. L. REV. 981, 988 n.25 (1992) (discussing the nature of an "open-textured" constitutional provision).

87. Although often assumed to be the dominant approach to contract law, there is in fact a split in modern case law as to what extent the context should be employed in adding terms and qualifying meanings in commercial contracts. The contextual emphasis dates from the 1950's when the U.C.C., "now joined by the Second Restatement of Contracts, effectively reverse[d] the common law presumption Evidence derived from experience and practice can now trigger the incorporation of additional, implied terms." Goetz & Scott, *supra* note 64, at 274.

88. See *id.* at 281.

89. RESTATEMENT (SECOND) OF CONTRACTS § 223(1) (1979); see also U.C.C. § 1-205(1) (1990) (employing the same language).

90. U.C.C. §§ 1-205(4), 2-208(2) (1990); see also Goetz & Scott, *supra* note 64, at 281.

91. U.C.C. § 2-202 (1990).

92. Goetz & Scott, *supra* note 64, at 263.

93. See, e.g., *Hayward v. Postma*, 188 N.W.2d 31, 33 (Mich. Ct. App. 1971) (hold-

It is also present in both the U.C.C. and the *Restatement (Second) of Contracts*.⁹⁴ For example, comment 2 to U.C.C. section 2-202 notes that written contracts

are to be read on the assumption that the course of prior dealings between the parties and the usages of the trade were taken for granted when the document was phrased. *Unless carefully negated they have become an element of the meaning of the words used.*⁹⁵

Similarly, under the U.C.C., a contract remedy provision does not replace the statutory remedies unless the parties expressly agreed that the contract remedy is the sole and exclusive remedy for a breach.⁹⁶ As this indicates, some default rules, in order to be negated, must be carefully excluded or altered.⁹⁷ The presumption is that the default rules apply.⁹⁸ The onus is on the parties to negate that presumption.⁹⁹

As this illustrates, the idea of contractual flexibility is a core premise of modern contract law, but that premise does not support unlimited and unrestricted freedom to set contract terms. There are restraints and contextual frameworks. For our purposes, we must ask whether a proper blend will be achieved best

ing that parties must use clear and unequivocal language to shift liability for risk of loss from seller to buyer).

94. See U.C.C. § 2-202 (1990); RESTATEMENT (SECOND) OF CONTRACTS §§ 220, 222, 223 (1979).

95. U.C.C. § 2-202 cmt. 2 (1990) (emphasis added).

96. *Id.* § 2-719(1)(b).

97. See Goetz & Scott, *supra* note 64, at 274.

98. See *id.*

99. See *id.*; see also U.C.C. § 2-202 cmt. 2 (1990). The emphasis on context as a source of meaning for a contract derives from a preference for *judicial* flexibility in reinterpreting and enforcing, or refusing to enforce, a contract. In its simplest form, this reflects a conflict between litigators and contract drafters. Open-textured rules allow courts to "do justice" in the dispute presented to them. Ultimately, this emphasizes the role of litigation in commercial contract. The open-textured perspective contrasts with a perspective that argues for an ability to predict the outcome of adopting a particular form or contract term. This view presumes that the main focus of contract doctrine centers on contracting, rather than litigating. The view argues for certainty in contracting in the sense that contracted-for outcomes should not be altered in litigation. It has its greatest persuasive force in cases where parties actually negotiate and draft tailored terms of agreement.

in a codification or in common law development of contract principles.

E. Commercial Facilitation

Before discussing this issue, we need to look at the second major assumption in commercial contract law: that the proper goal of contract law is to *facilitate* commercial contract practice,¹⁰⁰ rather than to *regulate* it.¹⁰¹ This idea provides a relatively universal foundation for law pertaining to commercial contracting, but how one develops criteria for determining what rules will best facilitate contracting practice is a matter of active dispute.¹⁰² The various positions on these issues turn on what philosophical premise one brings to the analysis and on what behavioral model one bases a discussion of contracting. All of the positions suffer from a fundamental failure of knowledge; as shown earlier, we know little about the actual interaction between contract law and contract practice.

In this context, the best source of substantive contract default rules lies not in a theoretical model, but in a reference to commercial and trade practices. This is not simple faith in empirical over normative sources for commercial law. Rather, it stems from the reality that, even though we may not know how law interacts with contract practice, decisions about contract law in a codification or in common law will continue to be made. Unless countervailing policy concerns clearly appear, we should make those decisions by reference to sources that reflect an accumulation of practical choices made in actual transactions.

100. See Ayres & Gertner, *supra* note 5, at 733; Charny, *supra* note 64, at 1823-24; Craswell, *supra* note 64, at 503-05; Johnston, *supra* note 63, at 615-18.

101. Adherence to this view, of course, disintegrates as one moves away from pure commercial contracting to contracts that involve consumer or other protected interest groups or as the contract terms alter the rights or positions of third parties not involved in the agreement. In the less commercial environments or the third party settings, contract law used as a regulatory mechanism is more common. In the modern Article 2 revision, this fact of political life presents a question of whether the same contract law statute simultaneously can support commercial and consumer contract law. Are the two now sufficiently different that at least partial separation is desirable?

102. See *supra* note 64 and accompanying text.

As Grant Gilmore wrote, "[t]he principal objects of draftsmen of general commercial legislation . . . are to be accurate and not to be original."¹⁰³ Gilmore primarily was referring to contract rules that remove legal obstacles that hinder existing common commercial relationships. In essence, he was arguing that a function of commercial contract law should be to remove or re-tailor mandatory rules of law that might impede the natural flow of commercial relationships as gauged by the desired transaction patterns of commercial parties. To be accurate and not original is a goal that refers to commercial practice as an appropriate standard for gauging what activities are desirable or to be fostered as a matter of policy, unless a clearly countervailing consideration of policy indicates to the contrary, or where the contractual arrangement injures or threatens injury to third party interests that social policy desires to protect.

This goal is pertinent to default rules. Indeed, the idea that default rules should reflect commercial practice has been widely accepted. For example, one widespread belief about how default rules assist in facilitating contracting is as follows:

[T]he law supplies standardized and widely suitable risk allocations which enable parties to take an implied formulation "off the rack," thus eliminating certain types of costs and errors arising from individualized specification of terms. . . . [A]typical parties are invited to formulate express provisions that redesign or replace ill-fitting implied rules. Thus, state-supplied terms provide parties with time-tested, relatively safe provisions that minimize the risk of unintended effects . . . [while the risk of distortion] can be reduced by exercising the option to specify . . . express terms.¹⁰⁴

One suspects that the relationship between the default, or "off-the-rack," terms and the creation of a contractual relationship is far more complex. Yet, the concept hinges on default rules that are standardized and "widely suitable" such that they can be used frequently without disruption or costly negotiation: a reference geared at least in part to transactional practice.

Randy Barnett comments:

103. Gilmore, *supra* note 9, at 1341.

104. Goetz & Scott, *supra* note 64, at 266.

First, . . . default rules [that reflect the conventional or commonsense understanding existing in the relevant community] are likely to reflect the tacit . . . agreement of the parties and thereby facilitate the social functions of consent. Second, when parties have asymmetric access to the background rules of contract, enforcing conventionalist default rules will reduce subjective disagreements by providing parties who are . . . informed of the background rules with an incentive to educate those parties who are . . . ignorant of these rules.¹⁰⁵

From this view, background rules tied to the ordinary commercial behavior tend both to provide a legal base that falls within the tacit expectations of the parties and to ameliorate problems caused by asymmetrical knowledge because they supply common sense outcomes.

For many years, law and economics literature has pursued an analogous path, although based on a more structured and hypothetical assessment of contract practice.¹⁰⁶ This literature assumes that the goal of contract law is to promote contracting efficiency.¹⁰⁷ One branch of that literature further assumes that in doing so, a proper reference point is to ask what contract the parties would have entered into *in a world without transaction costs*.¹⁰⁸ This hypothetical contract model builds doctrine based on assumptions about what parties might do in an artificial environment, unconstrained and unaffected by costs, market pressure, strategic considerations, and the other variables that influence actual contracting. This model avoids the complexities of actual contracting and enables close analytical study based on assumptions about how humans might behave in the artificial environment.¹⁰⁹

105. Barnett, *supra* note 78, at 829.

106. See, e.g., Johnston, *supra* note 63.

107. See Ayres & Gertner, *supra* note 5, at 745.

108. See Charny, *supra* note 64, at 1820-21; Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1433 (1989) (discussing "costless contracting").

109. Much of this form of analysis, of course, stems from the insights of Ronald Coase, who proposed that in the absence of transaction costs, consensual arrangements would reach the same end point between contracting parties regardless of the

Of course, that is both its greatest strength and its greatest weakness. When one relaxes the artificial assumptions about costs and lack of strategic considerations, the hypothetical bargain flounders. Choices of default rules under more complex and realistic assumptions are less clear simply because the context is far more complex.

[T]he introduction of transaction costs can actually exacerbate the inefficiencies of strategic bargaining.

[Considering] even slight transaction costs will make the determination of efficient legal rules dramatically more difficult. [T]he behavior of contracting parties can change significantly in response to extremely small changes in other, more subtle underlying variables

[R]elatively simple contractual settings can give rise to enormous complexity. While . . . different default rules . . . would be theoretically efficient, our model suggests that there is small hope that lawmakers will be able to divine the efficient rule in practice.¹¹⁰

Of course, this result flows from sacrificing theoretical purity for a more complex reality and deals with a more human context, rather than an entirely abstract model. It is to be expected, even cherished, since it documents the variety of experience in human behavior.

Yet one cannot avoid making law for commercial contracts. Millions of contractual relationships must develop under some legal structure, while the thousands of litigated contract disputes must be resolved by applying some rule of law. Whether that law is made in a common law framework, in law review articles, or in a codification, a legal framework will develop. The inability to predict *theoretically accurate* results argues for an alternative reference point that engages the experiences of those involved in the commercial practice.

starting position or default rule. See generally R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

110. Ayres & Gertner, *supra* note 5, at 733.

F. Codification as a Method

On judging the relative merits of commercial law codification as against common law development, we should match the process to our primary goals. Two general points define the content of desirable commercial contract law: (1) it should preserve contract flexibility, and (2) it should provide commercially relevant background rules tailored to the contractual setting. Experience does not support a view that common law better sustains contract flexibility or that it provides commercially relevant background law. Indeed, the nature of the codification process as contrasted to the common law process indicates that codification is better suited to achieve both results.

In common law cases, regulation of terms is as common as support for contractual freedom.¹¹¹ Because a judicial proceeding presents specific disputes for resolution, it focuses on the contextual fairness of *outcome*. Today, commercial law courts disagree about the proper scope of contract freedom.¹¹² Many reported decisions opt to constrain enforcement of contract terms even in commercial contexts.¹¹³ The idea that a court (or jury) should "do justice" often conflicts with the idea that contracting parties are entitled to enforce their contract. Some courts agree that "[f]irms that have negotiated contracts are entitled to enforce them to the letter,"¹¹⁴ but not all courts accept this.¹¹⁵ The idea that contract flexibility can best be preserved through the courts ignores the history of commercial law over the past several decades.

111. See, e.g., *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890 (Tex. 1991) (placing common law limitations upon an express acceleration clause); see also ROGER M. MILGRIM, *MILGRIM ON TRADE SECRETS* 3-60 to 3-112 (12 Matthew Bender Business Organizations Series, Rel. 44, Pub. 738, 1993) (describing reasonableness limitation placed on restrictive covenants); NIMMER, *supra* note 32, ¶ 3.10[3] (discussing the reasonableness limitation placed upon noncompetition clauses).

112. Compare *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 759-60 (6th Cir. 1985) (implying additional terms to a contract so as to avoid unreasonable enforcement) with *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1357 (7th Cir. 1990) (strictly construing the terms of a contract).

113. See, e.g., *K.M.C. Co.*, 757 F.2d at 759-60.

114. *Kham & Nate's Shoes*, 908 F.2d at 1357.

115. See, e.g., *Reid v. Key Bank of Southern Maine, Inc.*, 821 F.2d 9, 13 (1st Cir. 1987); *K.M.C. Co.*, 757 F.2d at 759-60.

Similarly, when a "common law" court creates or applies a background rule, the extent to which that rule corresponds to commercial expectations is far from consistent. Whether the rule corresponds with commercial expectations hinges on the ability of an individual judge to understand the commercial world as depicted by conflicting experts or, even worse, as left to the imagination of the litigators in the case. A tentative and often awkward relationship exists between judicial opinions and commercial practice. The tentative character of that relationship cannot be cured in a system of isolated litigation and resolution of specific disputes.

In contrast, uniform law processes bring together experts and foster public discussion in a forum that identifies underlying policy and practice over a relatively extended period of time. The resulting advantages cannot be minimized, nor can they be replicated in court.¹¹⁶ Both the process and the product provide benefits not present in common law.

The codification *process* examines commercial practice, commercial law, and contract policy in an open forum over a period of years during which all interested groups can participate. In the judicial process, litigants debate specific, disputed issues. Common law evolves through shared inferences generated by numerous disputes played out in different courtrooms by different litigants. This takes time and ordinarily leaves significant gaps in reasoning and consistency. In addition, in modern "common law," judicial rulings go hand in hand with scattered state statutes. Legislatures respond to local conditions and lobbying. A national codification is better suited to develop coherent and commercially relevant standards of contract law because of the broad-based participation it engenders in a single forum over a period of time.

The difference in process is most relevant to default rules that pertain to general aspects of contracts, not context-driven infor-

116. Perhaps one can realize the same advantages in the development of restatements of law. Like uniform law processes, restatements bring together experts and foster open discussion. Restatements were once primary statements of law in commercial practice. But in a world of contract governed by statutory principles, the force of a restatement is questionable and the underlying assumptions, based on the common law evolution of commercial principles, are suspect.

mation. Compare the question of what level of carbon content is subsumed in the phrase "commercial grade steel" with the question of whether a software licensor can remotely access and erase licensed software if the licensee defaults. The first question is contextual; it cannot be answered in general terms. It involves trade use information whose admissibility depends on substantive rules of contract interpretation. The second question, on the other hand, defines the general nature of a software license. Is electronic repossession permissible? That question is better addressed in a codification process. The judicial process initially would focus on whether a particular licensor acted in a permissible manner when it erased particular software. The litigation would concentrate on the particular contract and the equities between the individual parties. The court may or may not receive evidence about the general expectations of licensors and licensees. It may or may not consider that current Article 2 does not allow for repossession without a security interest. It may or may not receive information about other types of licenses. In the actual case that ruled on this issue, the court held that erasure was permissible without referring to Article 2 or to general practice in licensing.¹¹⁷ This decision resolved the specific dispute. A general rule of national scope on which licensors can rely awaits additional litigation and additional opinions.

The same issue addressed in a codification results in a far different process and a far different end product. A codified rule would be developed in a context in which licensor and licensee representatives participate and comment concerning their expectations, the risks and safeguards that might attend a repossession right, the contract language that might create or preclude this option, and any other relevant issues. Participants could draw on experience not only from software license practices, but other forms of licensing and experience developed under Article 2A on leases. Upon resolution of the issue, the outcome would embody a rule of general application for all jurisdictions that enact the uniform law.

117. *American Computer Trust Leasing v. Jack Farrell Implement Co.*, 763 F. Supp. 1473, 1496 (D. Minn. 1991).

Far better than its common law counterpart, the codification process is more likely to draw default rules that are uniform across jurisdictions and appropriate to licensing transactions in a timeframe and in a form that will facilitate commercial practice. The *product* of codification is a document stating basic law. Because it developed in a national forum, the codification carries weight that reduces local variance and yields relative consistency from state to state. Furthermore, the enacted document enhances the accessibility of contract law, especially when gauged by reference to parties that lack the time, resources, or expertise to engage in extended legal research either for a particular deal or for general purposes.

In contrast, common law decisions and augmenting statutes often yield scattered and contradictory rulings that commercial parties can define and understand only through research and analysis by legal experts. Local variations are the norm, rather than the exception. The codification *product* yields a more readily discernible and consistent approach to contract issues than does common law as practiced today. Moreover, the greater ease of access of uniform codification offers the possibility of equalizing knowledge about applicable default rules.

G. Codification Criteria

While codification yields advantages not found in common law development, not all aspects of contract law should be codified. Codification should be reserved for situations where the area of contract achieves national scope and substantial commercial volume. We need to ask whether intangibles licensing fits this description.

Selectivity, both in subject matter and in content, is a common characteristic of U.C.C. codification. The basic principle is that the topic must be of sufficient importance to justify the effort and of such a character that the area of contract can benefit from the advantages that the codification process and its resulting product yield.¹¹⁸ The characteristics that call for codifica-

118. See Gilmore, *supra* note 9, at 1341; Raymond T. Nimmer, *Uniform Codification of Commercial Contract Law*, 18 RUTGERS COMPUTER & TECH. L.J. 465, 470 (1992).

tion are present in various forms of commercial intangibles contracting that involve national industries of substantial importance to modern commerce. Indeed, the information and software industries are among the most significant sectors of modern commerce; moreover, their importance is growing, as is that of other fields of intangibles contracting. There are three principles or criteria involved here: the volume principle, the relevance principle, and the national principle.

1. *Volume Principle*

No effort to codify an area of commercial contract law should be made unless the topic has sufficient scope to justify the effort in an era where time and resources are limited.¹¹⁹ Software and related intangibles contracts clearly fit this criterion.

While this general "volume" principle seems obvious, it is not applied consistently. Sales of goods and secured transactions were important in the 1950's and 1960's and remain so today. It is less clear that bulk sales, investment securities, and domestic letters of credit were important when included in the U.C.C.¹²⁰ The U.C.C. excludes contracts for services and transactions in real estate.¹²¹ It cannot be argued that these are less frequent, less significant, or less commercial than topics encompassed within the U.C.C.¹²²

One justification for the recent decision to draft and promulgate Article 4A was that funds transfers deal with huge amounts of money and that "[t]here is no comprehensive body of law that defines the rights and obligations that arise from wire transfers."¹²³ Yet, transactions covered by Article 4A occur in narrow economic and commercial strata. Whereas large amounts of money are transferred, few disputes arise. Relatively few reported cases deal with funds transfer disputes.¹²⁴

119. Scope includes both economic significance and generality of application.

120. Nimmer, *supra* note 118, at 480.

121. *Id.*

122. *Id.*

123. U.C.C. art. 4A prefatory note (1990).

124. For example, the *UCC Case Digest* devotes only 15 pages to reporting Article 4A disputes, whereas Article 5 on letters of credit receives 439 pages of coverage. [UCC Sections 4-407 to 8-408] *UCC Case Dig.* (Callaghan) § 4A (1991 & Supp.

The justification for Article 2A concentrated on the importance of leasing goods.¹²⁵ The value of personal property leases, however, pales in comparison to software and other intangibles contracts. Litigation about commercial leases was common prior to Article 2A, but dealt largely with tax law and the intersection between Article 2 and Article 9.¹²⁶ Article 2A goes beyond these issues, dealing with the lease relationship and third party issues.¹²⁷

Software and other intangibles contracts fit a standard of importance gauged by economic significance under any measure. The information industry accounts for over two percent of the gross national product of this country and affects a broad spectrum of commercial and individual interests.¹²⁸ Ongoing developments in information technology promise to continue the exponential growth of that field. Technology (intangibles) contracts underlie virtually all modern areas of commerce driving our present economy. Virtually every company uses one or more software products. The copyright and related industries are burgeoning and depend substantially on intangibles-based transactions.

2. *Relevance Principle*

In addition to volume, codification should only occur if it will benefit commercial practice more than continuing reliance on common law rules. In short, the relevance principle causes one to ask whether an area of contract would benefit by a process that supplants common law and a product that contains a central statement of legal principles in legislated form. Ordinarily, the answer is yes in a high volume *commercial* area unless federal or other law already has established stable and discernible *contract* rules.

1993); *id.* § 5.

125. U.C.C. § 2A-102 (1990); see also Amelia H. Boss, *The History of Article 2A: A Lesson For Practitioner and Scholar Alike*, 39 ALA. L. REV. 575, 576 (1988)

126. See generally Boss, *supra* note 125, at 579.

127. See generally U.C.C. § 2A-301 (1990) (establishing the rule regarding the enforceability of a lease between the contracting parties and with regard to third parties).

128. Nimmer et al., *supra* note 8, at 293.

In reference to software and intangibles, federal law defines *property* rules for some intangibles under copyright, patent, and trademark law.¹²⁹ Other property rights arise under state law.¹³⁰ The federal statutes specify some principles relevant to contract law and preempt state law on those issues,¹³¹ but federal law generally cedes coverage of contract principles to state law.¹³² U.C.C. codification addresses state law.

In discussing the rationale for codification of leasing law, the drafters of the U.C.C. noted that several issues were litigated repeatedly in reported cases and that resolving these issues was a major reason for the codification of lease law.¹³³ But they also noted that for commercial transactions, law can be uncertain either because of an inability to reliably predict the outcome or to readily discern the law.¹³⁴ The comments to Article 2A state:

There are reasons to codify the law with respect to leases of goods in addition to those suggested by a review of the reported cases. [For example, a lessee's remedies are important,] but that issue is not reached through a review of the reported cases. This is only one of the many issues presented in structuring, negotiating and documenting a lease of goods.¹³⁵

Prior to the growth of the information technologies and the increasing commercial value of intangibles, a small and closely related elite controlled intangibles contracting.¹³⁶ Patent and copyright lawyers formed a small segment of the bar, and they handled most commercial intangibles contracts.¹³⁷ This concen-

129. See EARL W. KINTNER & JACK LAHR, AN INTELLECTUAL PROPERTY LAW PRIMER 2-5 (1975).

130. *Id.* at 3.

131. *Id.* at 3-4.

132. See *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 828 (2d Cir. 1964) (discussing the statutory requirement that claims must "arise out of" the copyright to sustain federal jurisdiction).

133. U.C.C. § 2A-101 (1990) (Rationale for Codification); see also Steven L. Harris, *The Interface Between Articles 2A and 9 Under the Official Text and the California Amendments*, 22 UCC L.J. 99, 99-111 (1989).

134. U.C.C. § 2A-101 (1990) (Rationale for Codification).

135. *Id.*

136. See *Nimmer*, *supra* note 118, at 485.

137. *Id.*

tration of expertise reduced the need for contract principles accessible on a uniform basis because it heightened the localized knowledge and expectations surrounding intangibles deals.¹³⁸

The emergence of information technology as a fundamental part of the modern economy and the increasing recognition of the commercial value of intangibles has changed the identities of those who deal with intangibles contracts.¹³⁹ Specifically, these trends have expanded the number and variety of people and backgrounds brought to the issue.¹⁴⁰ Patent lawyers play a role, but lawyers and businesses with no patent background now also handle patent, software, and copyright licensing.¹⁴¹ This reflects the *commercialization of intellectual property*.

This change heightens the need for codification. It is more urgent to have contract principles that are accessible and certain than it may have been when only experts dealt with intangibles contracts. In a more heterogeneous context, the contract rules must be accessible to non-experts and non-lawyers. Codified and uniform contract laws better serve this need than continued reliance on common law traditions.

3. National Principle

An area of contract should be national in scope to warrant codification. The contracting field and the issues it raises must impact most states and regions of the country and should be characterized by national, rather than purely local, participation.

The national principle focuses on areas of contracting that would benefit from the accessibility and consistency of legal pre-

138. Indeed, relatively little is written about contract issues pertaining to intellectual property transactions outside of the heavily commercial field of software contracting. The intellectual property bar relied on *property* law to define rights in both a contractual and a noncontractual setting. It continues to do so, at least as gauged by the literature and educational programs. If other law was considered relevant, it tended to reside in federal antitrust law, which restricts the ability of the rights owner to do whatever it pleases with the property it controls. A review of a continuing education program on licensing would show almost no attention to basic contract issues such as damages for breach, statute of frauds, or the like.

139. See Nimmer, *supra* note 118, at 485.

140. *Id.*

141. *Id.*

mises in a uniform code. Consider what default rule would determine whether delivery of a slightly damaged product breaches a contract for the commercial sale of a television and contrast it with what default rule would determine whether a licensee whose use of a licensed patent exceeds the terms of the license commits a material breach of the contract. More to the point, how would a contracting party discover the rule in a particular state if the transaction crossed state lines? In the television scenario, Article 2 provides the reference point; the general rule under the U.C.C. will be similar in most states.¹⁴² For the license, the rule is found in state common law. One might search the *Restatement (Second) of Contracts* for an answer, but not all states have adopted the *Restatement*. The actual answer depends on local case law. In the license example, codification and uniformity would make the basic premise accessible and reasonably ascertainable on a national basis.¹⁴³

Both bodies of law can be discovered and applied, but codified rules are more readily accessible and tend to be more uniform. Each of these benefits has great impact in a contracting area that spans state lines. Uncodified law in such a case imposes avoidable costs on contracting. Variations in local law hinder, rather than facilitate, national operations; eliminating the costs, therefore, would make a significant contribution. Uniform rules level the commercial playing field for both large companies that have the expertise and the resources to undertake a search for applicable law and small firms that cannot afford to do so.

The national principle does not demand that all transactions in an area involve national actors. In all areas covered by Arti-

142. U.C.C. § 2-601 (1990). This section adopts the "perfect tender" rule, which is eroded by exceptions in the Code and in case law. *See, e.g., id.* § 2-508 (seller's right to cure); *Damashek v. Wang Lab., Inc.*, 540 N.Y.S.2d 429 (App. Div. 1989) (noting the importance of instructing the jury to apply the requirements of U.C.C. § 2-508).

143. Of course, one can argue that a federal forum is better suited to achieve national uniformity. *See* David M. Phillips, *Secured Credit and Bankruptcy: A Call for the Federalization of Personal Property Security Law*, 50 LAW & CONTEMP. PROBS. 53 (1987). The desirability of federalizing commercial contract law has been debated since at least the early 1940's. *See* Robert Braucher, *Federal Enactment of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROBS. 100 (1951); Symposium, *The Proposed Federal Sales Act*, 26 VA. L. REV. 537 (1940).

cles 2 and 2A, local transactions among local participants predominate. But a national practice exists in addition to the local practice, and it would benefit from clarifying and unifying local law in terms of both accessibility and the elimination of conflicts.

Intangibles contracting is an area of commercial contract law that certainly exists on a national, rather than purely a local, level. Software licensing occurs between companies located in different states. Data processing services are no longer tied to geographical locales. Patent, trade secret, and other forms of intangibles contracting operate at an entirely national level, no longer linked to exclusively local groups or resources.

III. TAILORED VERSUS GENERAL RULES: A LICENSE IS NOT A SALE

Whether Article 2 revisions merely cover software contracts or reach further to encompass other types of intangibles licensing, how must the structure of Article 2 be examined to accommodate intangibles contracts and other forms of commercial contracts? This raises two issues. The first focuses on whether Article 2 revisions should make any special adaptations for intangibles contracts in Article 2. Essentially: can a contract law model developed for the sale of goods fit commercial contract practice that transfers rights in intangibles? In this part of the Article, I argue that a simple force-fitting of intangibles licenses into a contract framework designed for the sale of tangible property would create significant mismatches, the potential consequences of which mandate the development of at least some special provisions of contract law for transactions involving intangibles.

The second issue concerns how the special contract provisions should be developed and promulgated in a revised Article 2. In Part IV of this Article, I discuss the idea of a hub and spoke configuration for Article 2 of the U.C.C. This approach distinguishes between generally applicable legal principles and specially tailored rules. The generally applicable rules could be applied to sales, leases, licenses, and other commercial contracts such as services contracts. The general rules provide the hub, from which spokes branch out to provide special treatment of substantively unique and important transactions. Such a

drafting style is common in many codes and blends both growth potential and fundamental stability. The Article 2 Drafting Committee adopted this concept as a tentative working policy in 1993 in order to accommodate software and related licensing transactions, while leaving the framework of Article 2 sufficiently open to deal with continuing changes in commercial practice.¹⁴⁴

A. *Tailoring and Differentiation*

Should software and similar intangibles transactions simply be incorporated into Article 2 without changes in the Article 2 sale of goods model?¹⁴⁵ The Drafting Committee has concluded that simple incorporation is not appropriate.¹⁴⁶

Essentially, the rationale is that sufficiently unique characteristics of intangibles licenses justify separate treatment of these contracts in the U.C.C. and not merely incorporation within sales law. To be effective, a codification must contain rules that are appropriate and geared to commercial practices. Where the nature of the subject matter and the commercial practice involving two types of commercial deals diverge to the extent that only the most general rule can apply consistently to each, separate treatment is appropriate. Under this standard of commercial difference, software and related intangibles transactions qualify for separate treatment. Licenses are not equivalent to sales of goods, and various aspects of software transactions require special treatment of the license and similar contract relationships. At least two aspects of an intangibles license differentiate it from a sale of goods. First, the value transferred to the buyer lies not in the physical items, but in the functionality of the information or technology *and* in the contract right to use the intangibles. The licensor who owns the intangibles simultaneously *transfers* access to and rights in the intangibles and *retains* those rights. Even in a mass market transaction, the transferee does not seek to own a diskette so much as to have

144. Nimmer & Speidel, *supra* note 4, at 4.

145. *See generally* Nimmer et al., *supra* note 8, at 313-25 (discussing the benefits and detriments of including intangibles in Article 2).

146. Nimmer & Speidel, *supra* note 4, at 4-6.

the right and the ability to employ the program or information that is initially contained on that diskette. Often, the diskette has no value to the transferee shortly after it is received because the program now resides on the customer's computer. In many deals, no diskette or tape is used at all because the software is made available electronically or written on the licensee's own computer. In short, value is not tied to the media, but rather to the right to use the media.

The second way in which intangibles contracts are different from sales of goods is that software and other intangibles are licensed rather than sold. A license agreement is a conditional contractual permit to access, make, use, copy, or otherwise employ information or other intangible property over which the licensor has proprietary or other rights of control.¹⁴⁷ Unlike a sale that is completed on delivery of the goods, commercial licenses regulate the behavior of the licensee over a period of time. As such, commercial licenses more closely resemble a lease than a sale. The license commonly deals with questions about the location of use of the program, the right to modify it, the right to allow others to use the software, the obligation to pay period fees, and the obligation to return or destroy all copies when the license terminates.¹⁴⁸

B. Licenses and Sales Compared

Codification of contract rules specially tailored to a topic and separate from rules for other types of contracts should occur only if the topic presents unique questions of law and unique patterns of commercial practice that cannot readily be accommodated under general rules applicable to other types of transactions. A balancing should be employed to gauge what should be done in reference to separate tailoring or general applicability. The contracting field need not be entirely unique, but separate treat-

147. See KINTNER & LAHR, *supra* note 129, at 63-64; see also NIMMER, *supra* note 32, ¶ 7.02[1].

148. See, e.g., *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993) (holding that the use of software by a third party service provider violated the use restrictions in the license), *cert. dismissed*, 62 U.S.L.W. 3396 (1994); *National Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc.*, 991 F.2d 426 (8th Cir.), *cert. denied*, 114 S. Ct. 176 (1993).

ment should follow differences in the types of issues faced and in their commercial solutions. Separate codification is appropriate if a *commercial uniqueness* exists relevant to contract form and expectations.

Articles 2 and 2A deal, respectively, with sales and leases of goods, while intangibles contracts typically involve a license of rights in the intangibles. As noted above, a license consists of a conditional transfer of rights to access, use, copy, or disclose information or intellectual property that the licensor controls. In form, a license grants the licensee permission to engage in conduct that would otherwise violate rights of the licensor in the intangibles.¹⁴⁹ In many cases, the license is coupled with action on the part of the licensor to make the intangibles available to and usable by the licensee. Such action may involve giving the licensee a diskette containing a copy of the copyrighted computer software, giving a licensee documentation and diagrams relating to a trade secret chemical process, or giving the licensee an access code to use in obtaining access to a remote electronic database. But these actions represent differences in *delivery* system, not differences in what value is transferred to or contracted for by the licensee.

Both the subject matter and the form of a license transaction are different from a sale or a lease. As to subject matter, whereas tangible property may be employed as a means to make the intangibles available to the licensee, this is not necessary in all cases and, in any event, the tangibles do not comprise the value that the licensee receives or anticipates. That value lies in the intangibles, the performance, or the artistic or scientific value contained in the right to use or access those intangibles. As to the form of the transaction, a nonexclusive license is a conditional permit to use, rather than a sale of, the intangibles.¹⁵⁰ Literally, the licensor retains the intangibles *and* transfers rights in them at the same time. For example, unless the contract otherwise requires, a licensor who grants a nonexclusive license to

149. See KINTNER & LAHR, *supra* note 129, at 64; see also NIMMER, *supra* note 32, ¶ 7.02[1].

150. See NIMMER, *supra* note 32, ¶ 7.02[1].

use software does not by that transfer limit, reduce, or otherwise restrict its ownership and ability to use the patent itself.¹⁵¹

Intellectual property doctrine distinguishes between the intangibles and any media on which they may be contained or transcribed for the purpose of transfer. Thus, a person who leases a machine that performs a process, the patent of which is owned by the lessor, may not be able to use the machine unless it also receives a license with respect to the patent.¹⁵² Transfer of the tangible item may, or may not, transfer rights in the *intangibles*. Similarly, a person who purchases a copy of a word processing software program receives rights to personal use of the *copy* purchased, but unless the sale is coupled with an appropriate license, the buyer of the copy does not obtain a right to transfer rights to use the intangibles contained on the copy to another party or to use those intangibles to make a new product.¹⁵³

Many obvious differences exist between a license and a sale of goods. First, licensing deals with contracts that define what an end user can *do* with intangible property of the licensor, whereas a sale involves what quality and cost are associated with tangible property delivered to a buyer. A second difference lies in the duration of the end user's obligations and the constraints under the contract. In a sale, the end user owns the delivered product with broad rights to use, resell, strip down, destroy, or otherwise handle the tangible item.¹⁵⁴ In a license, the end user may or may not "own" the tangible medium that contains the software (if any tangible media exists), but the possible ownership of the medium does not resolve what it can do with the technology.¹⁵⁵ The license and underlying intellectual property law define the restraints, opportunities, and obligations arising during a prescribed period of time.¹⁵⁶

151. See, e.g., *Refac Int'l Ltd. v. Mastercard Int'l*, 758 F. Supp. 152, 155 (S.D.N.Y. 1991) (determining that the patent owner, not the licensee, has the right to enforce a license through an infringement action); see also KINTNER & LAHR, *supra* note 129, at 64.

152. See KINTNER & LAHR, *supra* note 129, at 14.

153. See 17 U.S.C. § 117 (1988).

154. See Nimmer, *supra* note 118, at 486.

155. *Id.*

156. See *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993) (use restrictions in license), *cert. dismissed*, 62 U.S.L.W. 3386 (1994); *National Car Rental*

A transaction involving a license of intellectual property does not equate to a sale of goods in the substantive issues considered and the rights balanced.¹⁵⁷ Software licenses create ongoing relationships. These license agreements relate not only to the tangible material transferred, but to the contract right to use, operate, disclose, or modify that technology.¹⁵⁸ They deal with issues such as the basis of terminating the end user's right to use technology, the licensor's obligations to upgrade the technology, the right to access documentation, the obligations to support user training, and the duty to pay royalties.¹⁵⁹ Although not all of these issues arise in every deal, none have a clear analogue in traditional sales transactions. Unlike a sale of goods, a license that provides for delivery via a tangible medium involves two different elements *in every transaction*: (1) the allocation of intangible (use) rights, and (2) the allocation of rights in the tangible item.¹⁶⁰

In 1993, the Article 2 Drafting Committee reached two separate decisions in developing a working policy about the treatment of software and related intangibles licensing. First, the Drafting Committee determined that sufficient differences in the transactions justified, at least in part, specially tailored rules for intangibles.¹⁶¹ It also found that a number of U.C.C. Article 2 principles did not require special tailoring and could be directly applicable not only to licenses, but also to leases and other transactions in personal property.¹⁶² The Committee's second decision focused primarily on Article 2 provisions dealing with the formation and interpretation of contracts.¹⁶³ The principles of offer and acceptance, parol evidence, and the like are not unique to sales, leases, or licenses. This insight contributes to

Sys., Inc. v. Computer Assocs. Int'l, Inc., 991 F.2d 426 (8th Cir.), *cert. denied*, 114 S. Ct. 176 (1993).

157. See NIMMER, *supra* note 32, ¶ 6.02[2].

158. See *id.* ¶¶ 7.19-24.

159. See *generally id.* ch. 7.

160. *Id.* ¶ 6.02[2]. Of course, sometimes the parties transfer no tangible item, in which case there is only one relationship. But does it resemble the sale of a drill press?

161. Nimmer & Speidel, *supra* note 4, at 4-6.

162. *Id.*

163. *Id.*

the concept of a "hub and spoke" structure for revised Article 2. The formation rules are appropriate parts of a hub.

The unique character of licenses and intangibles emerges, however, in reference to issues of performance, remedies, and obligations of the contract. In discussing these, it is important to realize that, while many of us encounter the software and related intangibles industries primarily in mass market transactions, the core of the industry and the nature of the commercial contract practice lie elsewhere. Indeed, the distinction here may be very much like that between consumer and nonconsumer sales of goods. Whereas U.C.C. Article 2 applies to both types of "sales" transactions, clearly the effective rules and the practical realities associated with consumer transactions are very different from those that apply to commercial sales contracts. Article 2 has its most direct effect on the commercial environment, being largely displaced in the consumer world by federal and state consumer law.¹⁶⁴ Similarly, in intangibles contracting, the main focus lies in commercial transactions involving software and other licenses, although the same rules and conclusions may also apply to mass market licenses.

In commercial settings, there are many varieties of licensing transactions currently in the marketplace. These range from custom contracts in which a programmer develops software for an end user who is then licensed to use the product,¹⁶⁵ to transactions that involve preexisting software delivered on tape or disk under license to the licensee, to license transactions in which the licensee merely receives a right to access and use the intangibles remotely, without ever receiving possession or control of any tangible or intangible property.¹⁶⁶ All of these have in common the fact that the licensee obtains the rights and capability to use intangible property that the licensor controls.

164. See, e.g., Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312 (1988); Consumers Legal Remedy Act, CAL. CIV. CODE §§ 1750-1784 (West 1985).

165. See *USM Corp. v. Arthur D. Little Sys.* 546 N.E.2d 888, 890-92 (Mass. App. Ct. 1989); *Micro-Managers, Inc. v. Gregory*, 434 N.W.2d 97, 98-100 (Wis. Ct. App. 1988). See generally NIMMER, *supra* note 32, chs. 6-7 (discussing computer and systems sales contracts and technology licensing and computers).

166. See, e.g., *Hospital Computer Sys., Inc. v. Staten Island Hosp.*, 788 F. Supp. 1351 (D.N.J. 1992).

This variety illustrates a significant factor in intangibles contracting that differentiates it from sales or leases of goods. Because the value the transferee obtains lies in access to and rights in the intangibles, that value can be transferred to the licensee in many different ways. A number of these transactions do not involve any discernible "delivery" or "tender of delivery" to the licensee. Consider, for example, a customer who desires to obtain reports regarding and processing its accounts receivable. It can obtain these reports in a variety of ways, including (1) hiring a software company to program software directly on the customer's computer and to grant the customer a license to use that software; (2) acquiring a license to use software from a company that transfers that software to the customer on disk or by electronic downloading; or (3) licensing a right to send data by modem to a software company's own computer that has software to process the data and return relevant reports. In each case, the value received by the customer is a license and the actual ability to employ the vendor's software to process the data and compile relevant reports.

Many provisions of Article 2 assume that physical delivery represents the focal point for payment and other obligations of the parties and that physical handling of the product before and after default has great significance in gauging the rights and remedies of the parties.¹⁶⁷ Yet, as the accounts receivable transaction indicates, the idea of physical possession and delivery are not consistently relevant in intangibles contracts. In an intangibles contract, physical delivery of media may occur, but electronic transfers, remote access, written documentation, and a variety of other methods are equally viable ways of making the intangibles available to the transferee. Physical delivery is neither necessary nor always sufficient to transfer the value. The obligation of the licensor is not to deliver, but to make access available and to transfer rights in the intangibles. Accommodating this aspect of the transaction in modern law entails creating a parallel concept of "transfer of rights" that centers on access

167. See, e.g., U.C.C. § 2-401 (1990) (transfer of title to goods); *id.* § 2-602 (requiring rejection within reasonable time after delivery or tender); *id.* § 2-603 (rejecting buyer's duties concerning rightfully rejected goods).

coupled with a right to use and developing default rules for performance of a contract after access is made available.

The licensed right to use often will entail contractual obligations that last over a period of time. This durational feature of intangibles contracts differentiates them from contracts involving the sale of goods. Article 2 generally does not deal with ongoing relationships, except where the nature of the relationship involves periodic delivery of additional goods, such as in an installment or a requirements contract.¹⁶⁸ Because the basic sales model assumes that the transferee owns the goods after delivery, there is no discussion of contract terms that restrict use, location, modification, or disclosure or that establish royalty or use fees. The Code provides no default positions if the license is silent. For example, in a commercial license, if the contract does not specify the rights of the licensee, does it give the licensee a right to use the intangibles in any location that it chooses or is a single location presumed? If the contract is silent, does use of the intangibles that goes beyond the licensed terms constitute a breach of the agreement or does it only entail a potential infringement of copyright or other proprietary interests?¹⁶⁹

The court's analysis in *Hospital Computer Systems, Inc. v. Staten Island Hospital*¹⁷⁰ illustrates the point. Hospital Computer Systems contracted to develop custom software for the management of Staten Island Hospital's accounting and billing.¹⁷¹ The data management was handled off-site and payments for the use of the software were made on the basis of a monthly "management fee."¹⁷² Nevertheless, based in part on a stipulation by the parties, the court treated the contract as a sale of goods, apparently emphasizing the custom development of the software as a transaction in goods.¹⁷³ The hospital expe-

168. *Id.* §§ 2-306, 2-307.

169. See generally Phillip B.C. Jones, *Violation of a Patent License Restriction: Breach of Contract or Patent Infringement?*, 33 IDEA J.L. & TECH. 225, 240 (1992-93) (concluding that a violation of a patent license potentially could raise both causes of action).

170. 788 F. Supp. 1351 (D.N.J. 1992).

171. *Id.* at 1354-55.

172. *Id.* at 1355.

173. *Id.* at 1361-65.

rienced more than three years of continuing problems with the data processing contract before discontinuing the service.¹⁷⁴ Applying Article 2, the court recognized the problems in determining when undelivered products were treated as having been accepted, but it framed the issue by considering whether there was an effective "revocation of acceptance."¹⁷⁵ The facts were that, eighteen months after the contract began, the client signalled an intent to end the relationship, even though it did not terminate the remote access and shift to another data processing vendor for an additional eighteen months.¹⁷⁶ The court held that revocation was appropriate, but that the client was estopped from recovering fees paid during the eighteen months from when it first allegedly signalled its intent to withdraw from the contract and when it eventually did so.¹⁷⁷

The point is not that the court reached the wrong result, but that the language, concepts, and terms of Article 2 are not suited to transactions in which, after the relationship begins, performance by either party gives cause for complaint by the other. A sales model does not fit the commercial intangibles relationship. The appropriate questions concern when a right to cancel arises, whether perfect performance is required in a license, and under what circumstances does cancellation require contemporaneous notice. An Article 2 sale of goods model does not reach those issues nor does it reach the core of the problem that the hospital in *Staten Island* faced: uncertainty regarding its right to obtain a copy of the vital data in the vendor's remote computer immediately after withdrawing from the contract.

Many other aspects of intangibles licenses differ in commercially significant ways from sales of goods. For example, while a sale presumes an implied warranty that the seller has title to the goods,¹⁷⁸ in a license to use at least some intangibles, the ordinary commercial expectation does not contain an implied promise that the licensor is the sole owner of the intangibles or even that the licensee can use the intangibles without violating

174. *Id.* at 1354-56.

175. *Id.* at 1362-63.

176. *Id.* at 1354-56.

177. *Id.* at 1365-66.

178. U.C.C. § 2-312 (1990) (Warranty of Title).

proprietary rights of unknown third parties.¹⁷⁹ Under federal copyright law, a company hired to develop software for a client retains ownership of the software unless its contract expressly provides to the contrary.¹⁸⁰ Unlike in a sales transaction, title to intangibles does not pass on delivery, even if the time of delivery can be ascertained. Article 2 presumes that the rights of both parties are assignable and that performance can be delegated.¹⁸¹ In a commercial license, the contrary presumption exists for nonexclusive licenses.¹⁸² Implied performance warranties differ.¹⁸³ Licensee remedies do not necessarily involve a right to retain the property. Rather, breaches or defaults that occur after the beginning of the license ordinarily are gauged under a substantial performance standard to determine whether they enable the injured party to rescind the contract.¹⁸⁴ On the other hand, because a licensor retains some rights in the licensed intangibles, there may be an implicit right to retake or prevent continued use of the software after the license ends, more analogous to the treatment of a lessor in Article 2A, than to the treatment of a seller in Article 2.¹⁸⁵

179. See NIMMER, *supra* note 32, ¶ 7.16.

180. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737-38 (1989).

181. U.C.C. § 2-210(2) (1990) ("Unless otherwise agreed all rights of either [party] can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him . . . or impair materially his chance of obtaining return performance."). The assignability provisions of Article 2A were extremely controversial and the resulting balance achieved in the statute is complex. See *id.* § 2A-303.

182. See, e.g., *Harris v. EMUS Records Corp.*, 734 F.2d 1329, 1333-34 (9th Cir. 1984) (copyright); *In re Alltech Plastics, Inc.*, 71 B.R. 686, 689 (Bankr. W.D. Tenn. 1987) (patent); cf. *Sentry Data, Inc. v. Control Data Corp.*, 87 B.R. 943 (Bankr. N.D. Ill. 1988) (exclusive license).

183. See *Snyder v. ISC Alloys, Ltd.*, 772 F. Supp. 244, 252-53 (W.D. Pa. 1991) (holding the warranty inapplicable to intangibles); *Micro-Managers, Inc. v. Gregory*, 434 N.W.2d 97, 102 (Wis. Ct. App. 1988) (finding only a warranty of workmanlike effort in software development license).

184. See, e.g., *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 586-87 (9th Cir. 1993); *Lucasarts Entertainment Co. v. Humongous Entertainment Co.*, 815 F. Supp. 332, 336-37 (N.D. Cal. 1993).

185. In this context, the licensor may be in a position more like that of a lessor who has the right to "repossess" its property after default. See U.C.C. § 2A-525 (1990).

A wise man or woman may once have said that "by any other name, a cow is still not a horse." This is particularly apt in reference to the fit between intangibles contracts and U.C.C. law on the sale of goods. Whether courts label intangibles as goods and whether they view licenses as sales, the two patterns of transaction are not the same. They differ in very fundamental ways that any contract law structure must account for with reference to the transactions. These differences argue persuasively for a separation of the rules applicable to licenses from the rules applicable to sales.

IV. HUB AND SPOKE

If the Article 2 revision should develop at least some rules specially tailored to licenses that are distinct from sales or leases, what structure should be used to accommodate them? This question might be viewed as a mere organizational issue; however, by focusing on the future role of the U.C.C. and, especially, Article 2, it presents a more fundamental question. The structural issue relates to the environment of Article 2 and asks how an Article 2 revision might be positioned to deal with future developments in commercial contracting. In an era in which economic and technological change is a constant, it is appropriate to seek a structure for the revised Article 2 that accommodates future growth and change.

Until now, the assumption has been that discrete transactions and subject matter should be dealt with under different contract rules reflected either in common law or in stand-alone articles of the U.C.C.¹⁸⁶ This belief was most clearly demonstrated by the adoption of a separate Article 2A dealing with personal property leases,¹⁸⁷ but can also be seen in the new Article 4A on funds transfer.¹⁸⁸ Yet, the apparent belief in categorical separability of commercial contracts clearly overstates reality. The reality lies in a more mixed environment that recognizes both that there are significant differences relevant to contract law in dis-

186. These discrete transactions are subject to the common rules of U.C.C. Article 1, but Article 1 is thinly populated except by definitions.

187. See U.C.C. § 2A-101 cmt. (1990).

188. See *id.* § 4A-102 cmt.

crete transactions and subject matter, and that there are significant ways in which contract practice and appropriate commercial contract law principles overlap.

We recognize this commonality in many different contexts. For example, courts often engage in a selective application of Article 2 sales law to non-sales transactions by analogy.¹⁸⁹ Not all attributes of the sale of goods paradigm are appropriate to all other types of contracts, but some may be appropriate. This same recognition of overlap among various types of transactions is also present in the elements of the *Restatement (Second) of Contracts* that adopt Article 2 principles to restate common law rules applicable to non-sales transactions.¹⁹⁰ Finally, Article 2A, dealing with transfers of personal property, adopts a number of rules that differ from Article 2, but also carries significant portions of Article 2 forward to deal with leases in a form that involves no substantive departure from the Article 2 provisions.¹⁹¹

Regardless of the content of revised Article 2, it is clear that these patterns will continue into the future. Additionally, a revised Article 2 that brings in software licensing as an included transaction places the U.C.C. in the position of dealing with three distinct contracts that involve transfers of personal property: sales, leases, and licenses. In 1993, the Article 2 Drafting Committee adopted as a preliminary working policy the incorporation of software and related intangibles contracts into Article 2 through a "hub and spoke" configuration.¹⁹² This hub and spoke approach is designed to reflect both the overlap and the differentiation found in these three types of transactions. In a hub and spoke model, Article 2 would cease to be a "sale of goods" article and would become an article dealing with commercial "transfers of personal property" in a format that separately identifies both general contract principles applicable to various

189. See *supra* note 1 and accompanying text.

190. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979) (imposing a duty of good faith akin to that found in U.C.C. § 1-203); *id.* § 208 (forbidding the enforcement of unconscionable contracts as in U.C.C. § 2-302).

191. See, e.g., U.C.C. §§ 2-202, 2A-202 (1990) (parol evidence); *id.* §§ 2-204, 2A-204 (formation); *id.* §§ 2-208, 2A-207 (course of performance).

192. Nimmer & Speidel, *supra* note 4, at 4-6.

types of transactions and transaction-specific principles tailored to particular types of commercial contract relationships.¹⁹³

A goal of symmetry and consistency of law should drive the U.C.C. revision process. A hub and spoke framework does not guarantee this result with reference to transactions covered in the U.C.C., but it does provide a reasonable format to work toward this objective. Additionally, by placing general rules that do not depend on the particular transaction in a hub category, a single rule could be applicable to sales, leases, licenses, and any other transactions to which the U.C.C. might be extended in the future. This latter point is important. The challenge of responding to a changed economy, and to changes in which commercial relationships drive that economy, will not end simply on resolving the question of how and where software and related intangibles contracts are dealt with in the U.C.C. Rather, other types of transactions and subject matters may rise to importance in the future. A hub and spoke format potentially achieves efficiencies and substantive benefits in this context of continuing change. Also, hub provisions would be more readily applicable by analogy to transactions not squarely within Article 2, whereas the existence of differentiated "spoke" treatment of different types of transactions may yield better analogies for courts to tailor analyses to new transaction formats and subject matter.

As this Article is written, the details of the hub and spoke model, and even its feasibility as a framework for Article 2 revision, have yet to be developed by the Article 2 Drafting Committee. Rather than attempt to outline in detail the elements of a concept whose full structure has not yet evolved, I will take on a more limited task.

I focus on a general question that is engaged by an effort to develop a hub and spoke structure for Article 2: how does one define the principles to be incorporated into an Article 2 hub? I outline two different strategies. The first focuses on what provisions are common to the already codified paradigms of sales and leases of goods, along with an analysis of what contract principles should be applicable to licenses. A hub provision exists if the same principle applies to each of these three areas.

193. *Id.*

The second, more ambitious, approach supplements this analysis by looking to other potential sources of commercial law principle and developing entirely new rules for inclusion in a hub. Thus, for example, one might refer to commercially significant principles adopted in the *Restatement* or to principles that emerge from a closer scrutiny of codified rules that contain different specific applications.

Another question deals with the other side of the formulation issue: how does one define what substantive rules should go into the spoke provisions applicable to sales, leases, and licenses? As I have earlier argued, my view is that commercial contract practice should serve as the primary source of default rules to be adopted in a codification, rather than some theoretical construct about what should be commercial practice in an abstract environment. Yet, not all practices merit treatment in a codification of sales, lease, or license contract law. In defining spoke provisions we need to ask not only what aspects of these various types of transactions are commercially unique, but which aspects of contract practice have sufficient importance or sufficient uncertainty in law to be brought into a codification regime?

A. *The Concept Defined*

The "hub and spoke" idea argues that there are basic contract law principles that apply across all types of transactions that might be viewed as commercial transfers of personal property. These principles can be stated separate and apart from contract law rules that apply only to specific types of transactions (e.g., leases, sales, or licenses) or particular types of property (e.g., goods, intangibles, or services). By stating these basic principles as an identifiable body of contract law, one can facilitate the coordination and symmetry of the current drafting process and establish a more flexible base for inclusion of additional commercial transactions within the Article 2 contract law structure.

In a "hub and spoke" configuration, the general transactional principles would form the "hub" provisions of the revised Article 2. Depending on how one frames the search for "hub" provisions, these provisions will include many current Article 2 rules about contract formation and interpretation supplemented perhaps by additional topics drawn from the *Restatement* or other sources of

commercial contract law. The "spoke" provisions consist of contract law rules that are particularly applicable to specific types of transactions. These could be placed in subparts of revised Article 2, defined to apply specifically to the particular subject matter. Thus, for example, one could conceive of current Article 2A as a form of "spoke" applicable to leases. Under this structure, one spoke would be applicable to sales of goods and another spoke would be applicable to transfers involving intangibles, including software contracts. Future revisions might create additional spokes to cover transactions in other types of personal property or services as economic and other considerations justify such action.

A hub and spoke configuration might appear in the form shown in Table 1.

TABLE 1
HUB AND SPOKE STRUCTURE

Article 2: Transfers of Personal Property

PART I

GENERAL PROVISIONS (HUB)

(§§ 100-200)

- statute of frauds
- parol evidence
- offer-acceptance
- unconscionability
- etc.

PART II
SALES OF GOODS

PART III
LICENSES AND
INTANGIBLES

PART IV OR ART.2A
LEASES OF GOODS

For purposes of this discussion, Table 1 assumes that leases are brought within revised Article 2, but the hub and spoke concept does not require merger of these provisions. A hub and spoke can be achieved by leaving leases in current Article 2A, but ensuring that the terms of the "hub" provisions do not entail substantive differences not justified by the nature of the transaction.

The underlying rationale for a hub and spoke methodology stems from the radical changes that have occurred in the United States and the global economy since the promulgation of Article 2 and from projections about the directions in which that economy is headed.¹⁹⁴ These events unmistakably expand the focus of commercial transactions from goods to intangibles and services contracts of various types. The changes in these and other areas fundamentally alter the nature of commercial practice and the demands placed on commercial contract law. The changes in economic activity also have expanded the types of transactions that have economic and commercial significance.

In Article 2, the specific issue that caused the Drafting Committee to consider a hub and spoke framework involved how to deal with software and related intangibles contracts within the U.C.C. Article 2 revision.¹⁹⁵ There are essentially three ways of dealing with this issue. One approach would be to fully integrate the intangibles transactions within Article 2, making separate provisions or exceptions for intangibles licensing as appropriate. An alternative would place intangibles contracts in an entirely separate article with self-contained provisions like the format used for Article 2A. The hub and spoke structure postulates an intermediate choice that deals with intangibles separately to the extent that there are transactional or subject matter differences, but builds a set of general commercial contract principles that need not be separately restated for this subject matter.

This drafting style blends growth potential and fundamental stability. The concept accommodates software and related licensing without forcing these transactions into a sale of goods model, while leaving the framework of Article 2 sufficiently open to deal

194. Nimmer & Speidel, *supra* note 4, at 3.

195. *Id.* at 4.

with continuing changes in commercial practice. This blended approach will recognize expressly that Article 2 is not confined to sales of goods, but has broader application in terms of both the types of transactions that are governed in detail within Article 2 and the types of transactions to which general Article 2 provisions may be applied by analogy or by adoption of a broad scope for the hub provisions of Article 2.

B. Defining the Hub

Defining the hub provisions of Article 2 is important because these are likely to have extended impact on contract law outside of current Article 2 parameters whether or not a revised article specifically provides for such broader coverage. The basic premise in a hub and spoke system holds that general principles of contract law can be codified independent of the peculiarities of specific types of transactions or subject matter. This appears relatively obvious, but it forces explicit attention to several fundamental issues that center on defining what content should be provided for a set of hub principles in the U.C.C.

Consider two related questions. First, what source or sources of general law should be used to define the "hub"? Second, what distinguishes a general contract principle which should be left to "common law" from a general commercial contract law principle that should be placed in a codified "hub"? Initially, one might approach defining hub provisions in a way that avoids this fundamental scrutiny. This approach defines the hub principles of Article 2 in terms of the contract principles that have already been codified for transactions involving sales of goods and leases of personal property. Specifically, one would identify a hub by contrasting existing Article 2 with existing Article 2A, augmented by an analysis of which provisions of law common to these two U.C.C. articles could also be applied to transactions involving licenses of intangibles. Essentially, the "hub" could be defined by what aspects of contract law have already been codified and asking which of these merit designation as contract rules that (with perhaps a change in language) apply equally to sales and leases of goods, and to intangibles contracts, the three themes that are or have been considered pertinent to the U.C.C.

This approach creates a manageable task and an identifiable reference point grounded in current law because it relies on historical decisions to build a modern choice about what should be included in revised Article 2. The historical choices made in current Article 2 have stood the test of time and were at least partly adopted in Article 2A. A comparison of Article 2 and Article 2A along with a comparison of various suggestions respecting intangibles contracts provides a view of what a hub and spoke might look like under an analysis that relies on existing material and existing choices.

Thus, one could ask whether there are material reasons why contract rules dealing with parol evidence,¹⁹⁶ offer and acceptance,¹⁹⁷ firm offers,¹⁹⁸ and similar formation or interpretation rules should be specially tailored and different in content for different types of commercial contracts, rather than being made applicable in identical form to all forms of commercial transactions. If no valid reason exists to treat these rules as requiring different outcomes for different transactions, the general rules contained in Article 2 should apply uniformly at least to the types of transactions defined as being within the scope of revised Article 2.

Table 2 below shows one form of a hub combining sales, leases, and intangibles contracts. This model is based in part on current Code sections applicable to all three topics. It includes provisions of Article 2 that are substantially duplicated in Article 2A (or that at least are not contradicted in Article 2A) and that, at least as a preliminary matter, will not require substantively different treatment in codification of contract principles applicable to intangibles licenses.

196. *E.g.*, U.C.C. § 2-202 (1990); *id.* § 2A-202.

197. *E.g.*, *id.* § 2-206; *id.* § 2A-206.

198. *E.g.*, *id.* § 2-205; *id.* § 2A-205.

TABLE 2
BASIC HUB PROVISIONS

ARTICLE 2: HUB PROVISIONS	
PART A: GENERAL PROVISIONS	
101	Title "Transactions in Personal Property"
102	Scope (former 102)
103	Definitions
201	Statute of Frauds (former 201)
202	Parol Evidence (former 202)
203	Seals (former 203)
204	Formation (former 204)
205	Firm Offers (former 205)
206	Offer and Acceptance (former 206)
207	Additional Terms (former 207)
208	Course of Performance (former 208)
209	Modification, Rescission, and Waiver (former 209)
210	Obligations of Parties (former 301)
211	Unconscionability (former 302)
212	Allocation of Risks (former 303)
213	Adequate Assurance (former 609)
214	Anticipatory Repudiation (former 610)
215	Retraction of Repudiation (former 611)
216	Substituted Performance (former 614)

217 Excuse by Failed Condition (former 615)
218 Procedure: Notice Claiming Excuse (former 616)
219 Modification of Remedy by Contract (former 719)
220 Cumulation of Warranties (former 317)
221 Remedy for Fraud (former 721)
222 Proof of Market Price, Etc. (former 723)
223 Admissible Market Quote (former 724)
224 Incidental Damages: Defined (former 710; 715)
225 Consequential Damages: Defined (former 715)

Table 2 assumes changes in the language of Article 2 sections to eliminate the focus on sales and to coordinate revised Article 2 with the often slightly modified language adopted in Article 2A. As Table 2 indicates, the majority of potential hub provisions lies in areas of contract formation and contract interpretation. This includes the first twelve substantive rules noted in Table 2. Significantly, many of these same U.C.C. rules have been carried forward into the *Restatement (Second) of Contracts*¹⁹⁹ and thus state a preferred formulation of common law principles. The other common provisions relate to uncertainties in performance (e.g., repudiation, excuse) or to proof and definition issues. Again, one can identify clear parallels between these U.C.C. provisions and similar rules in the *Restatement*.²⁰⁰ The relationship between these general hub provisions and the terms of the modern *Restatement* suggests one approach to a broader formulation of an Article 2 U.C.C. hub. A discussion on that approach, however, must be prefaced by a discussion of some residual issues with respect to this first definition of hub provisions.

199. See e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 9-109 (1979) (restating the common law requirements of basic contract formation, including offer, acceptance, and consideration).

200. See, e.g., *id.* §§ 231-260 (discussing issues of performance and nonperformance).

Table 2 excludes some contract rules on which Article 2 and 2A agree. The most notable absences are the implied performance warranties.²⁰¹ The Drafting Committee has yet to review what performance warranties are appropriate in licensing transactions based on modern commercial expectations. Although many software licenses are held to be within Article 2 and thus covered under its implied performance warranties,²⁰² it is not clear that the general commercial expectation or developed case law regarding intangibles contracts generally supports this in transactions exclusive of software. As earlier noted, alternative warranty rules exist relating to information and services contracts, while standard practice in commercial software licensing involves disclaimer of the implied warranty of merchantability.

The hub model represented in Table 2 includes a statute of frauds provision, but this inclusion may be problematic. The provisions of current Article 2 and Article 2A contain statute of frauds rules,²⁰³ but the substantive terms of these rules are not identical. The discrepancies reflect the difference between a single delivery contract (a sale) and an ongoing relationship (a lease).²⁰⁴ Yet both current statutes reflect the view that a writing to evidence the transaction is a formal requisite. The difference between sales and lease law may be exacerbated, however, in the Article 2 revision. Although no final action has yet been taken, the Drafting Committee has voted at least twice to abolish the statute of frauds for sales transactions. The Study Committee that recommended revision of Article 2 suggested that this step might be desirable.²⁰⁵ Should this view continue, a coordination issue exists between Article 2 and 2A. Basically, whether framed through the window of a hub and spoke structure or not, one must ask whether there are transactional differences between leases and sales that justify repeal of the stat-

201. U.C.C. §§ 2-314, 2-315, 2A-212, 2A-213 (1990).

202. See *supra* note 35 and accompanying text.

203. U.C.C. §§ 2-201, 2A-201 (1990).

204. See *id.* § 2A-201 cmt. ("[C]hanges [from § 2-201] reflect the differences between a lease contract and a contract for the sale of goods.").

205. *Id.* § 2-201 (Discussion Draft Sept. 10, 1993) (stating that a contract is "enforceable whether or not there is a writing" thereby repealing the statute of frauds).

ute of frauds for one and retention of a statute of frauds for the other. Additionally, it will be necessary to determine where intangibles licenses fit in reference to this rule.

The relationship between the potential hub rules and the provisions of the modern *Restatement* indicates that a more aggressive approach to hub provisions for general commercial contract law may be appropriate. This approach would look beyond what already exists in the current U.C.C. and would ask which contract principles are applicable as a codified body of general commercial contract law rules. One would look to the provisions of the *Restatement*, to general common law patterns that may (or may not) conform to the *Restatement*, and to general issues of commercial law practice, perhaps as embedded in the more particularized rules of Articles 2 and 2A.

One must ask a number of questions about the basic process of codification. There should be a basic premise that states the reasons why a particular rule should or should not be codified. A decision to codify for commercial contract purposes creates a rule of decision grounded in legislative terminology and acted on by the legislatures of each state. A decision to not codify, on the other hand, leaves the contract law principle to common law judicial action perhaps, but not necessarily, based on the provisions of prevailing Restatements. As we have seen, there are many potential benefits of codification. One could argue that a contract law rule should not be brought into the U.C.C. unless that action will (or may) provide commercial benefits associated with one of the foregoing features of codification. Arguably, for example, the treatment by the *Restatement (Second) of Contracts* of rules about consideration to form a contract²⁰⁶ is not an important area for codification of commercial contract law development. Consideration rules are seldom an issue in commercial contracts as contrasted to noncommercial contract development. In an heterogeneous environment, more context driven rulings of common law courts are better suited. The existence of scattered state law statutes and deviations or differences between states is less significant than in cases where commerce occurs on a national basis.

206. RESTATEMENT (SECOND) OF CONTRACTS §§ 71-94 (1979).

Dealing with hub definitions in this broader form entails a more basic reassessment of Article 2 (and related law) than called for in merely redressing earlier mistakes and tinkering with existing language. Whether this effort is worth the cost depends in part on how one views the scope of general law provisions in revised Article 2. That scope could either be limited to the scope contained in the various spoke provisions that supplement the hub or it could be defined to encompass a broader segment of contract law.

The second formulation encourages a broader approach to the hub. It postulates that certain contract principles can be stated independently of the sales, lease, and license transactions that might be within Articles 2 and 2A and that this statement of principles in codified form would benefit commercial practice outside of the scope of a revised Article 2. The narrower formulation argues for less analysis of what should go into a hub. It would suggest that one should look only to the several areas directly governed by revised Article 2 and ask whether there are uncoded principles which if codified would benefit practice in those areas.

While the dichotomy phrased in terms of "what is covered by Article 2" suggests a clean analytical structure, in practice no such dichotomy exists. To believe that it does is to ignore how courts already use Article 2. The use of Article 2 by analogy in cases not at all within the realm of "sales" of "goods" is both an accepted and a significant practice. Use of Article 2 rules by analogy is encouraged by the Code, supported by most authors, and often seized on by courts disinclined to dwell in the vagaries and uncertainties of common law in the fifty states.²⁰⁷ This is neither surprising nor unusual. In many respects, many U.C.C. sections state what have become commercially acceptable contract law principles.

The fact that many courts use Article 2 principles outside the scope of Article 2 argues that an Article 2 revision should consider this non-Article 2 realm. The hub provides a context for

207. See *Page Petroleum Inc. v. Dresser Indus., Inc.*, 853 S.W.2d 505, 510-11 (Tex. 1993) (adopting the U.C.C.'s definition of "conspicuousness" for use in Texas business law).

this. To show how one might derive broader hub provisions, a few illustrations are useful. There are many examples, but I will consider standardized contracts and warranties of title.

1. Standard Form Contracts

Parties use standard form contracts in many commercial and consumer transactions. In some cases, the standard form is employed in what amounts to an adhesion context in which the party who does not draft or supply the form lacks bargaining power to make changes in its terms.²⁰⁸ In other settings, however, standard forms are employed even though, at least in theory, the party receiving the form could negotiate changes in some of the terms. In these latter contexts, they are employed as a matter of convenience and efficiency, rather than as an effort at over-reaching or oppression.²⁰⁹ To the extent that standard form documents are seen to raise issues separate and apart from written contracts generally, treatment of such contracts should be addressed in revised Article 2 because of the general commercial applicability of these issues.

While standard form contracts are common, current Articles 2 and 2A contain essentially no provisions that directly address the extent to which a form that has not been read or negotiated by the receiving party nevertheless should be enforceable according to its own terms. Case law considers standard form contracts in various settings, including warranty disclaimer and parol evidence rules.²¹⁰ The pattern of decision varies. Some courts adopt a view that the party must be presumed to have read and reacted to a document it receives, or to have had a duty to do so,

208. The use of a standard form contract between parties of unequal bargaining power does not invalidate the boilerplate language automatically however, unless the provision is unconscionable. *Webb v. R. Rowland & Co., Inc.*, 800 F.2d 803, 807 (8th Cir. 1986).

209. *See, e.g.*, *Modern Computer Sys., Inc. v. Modern Banking Sys., Inc.*, 871 F.2d 734 (8th Cir. 1989) (choice of law clause valid as part of standard form); *Marston v. American Employers Ins. Co.*, 439 F.2d 1035 (1st Cir. 1971) (only room for name of one insured on form for convenience of billing).

210. *See O'Neil v. Int'l Harvester*, 575 P.2d 862 (Cal. 1978) (holding that because the parol evidence rule does not restrict evidence of fraud, the buyer may argue that it is fraudulent to make an express warranty and then disclaim it in a standard form writing).

especially when both parties are merchants. These courts conclude that the entire contract is fully enforceable.²¹¹ Other courts expressly or implicitly look less favorably on form agreements, often negating some or all of the effect of the form, especially in cases involving consumers or small business owners.²¹²

Unlike current U.C.C. rules, section 211 of the *Restatement (Second) of Contracts* deals with "standardized agreements" in an effort to balance the respective interests that appear to arise in cases in which such documents are employed.²¹³ Those interests balance, on the one hand, the concept that contract law traditionally assumes agreement to written terms from agreement to the general contract without requiring proof of consent to each specific term, and, on the other hand, the belief that form contracts may involve adhesion and settings in which the actual terms of the contract unfairly surprise the other party. The *Restatement* provides:

(1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing

. . . .

(3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.²¹⁴

The *Restatement* focus on standard form terms emphasizes the extent to which the terms of the agreement are within the reasonable expectations of the party against whom the terms are being asserted.

211. See generally Donald B. King, *New Perspective on Standard Form Contracts: A Subject Revisited*, 1993 COM. LAW. ANN. 87; W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts by Standard Forms*, 46 U. PITT. L. REV. 21 (1984).

212. See, e.g., *Angus Medical Co. v. Digital Equip. Corp.*, 840 P.2d 1024 (Ariz. Ct. App. 1992).

213. RESTATEMENT (SECOND) OF CONTRACTS § 211 (1979).

214. *Id.*

In *Angus Medical Co. v. Digital Equipment Corp.*,²¹⁵ the court applied common law concepts to a contract to convert existing software to run on a different computer. An issue of fact existed about whether a contract limitation on time to bring a claim was enforceable.²¹⁶ The court used section 211 of the *Restatement* to hold that limiting the time to eighteen months might be invalid.²¹⁷ The *Restatement* standard was described in the following terms:

"Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation [A] party who adheres to the other party's standard terms does not assent to a term if the other party has reason to believe that the adhering party would not have accepted the agreement if he had known the agreement contained the particular term."²¹⁸

Article 2A does not deal with form contracts. The closest that Article 2 comes to the issues arising from the use of standard forms is its treatment of the battle of the forms problem contained in current U.C.C. section 2-207.²¹⁹ That section deals with cases in which the contracting parties exchange forms or confirming memoranda.²²⁰ The provisions of this section are controversial and undoubtedly will be altered in the Article 2 revision.²²¹ Basically, the section deals with two different situations. One involves an exchange of conflicting forms (the so-called "battle of forms"). This aspect of section 2-207 attempts to preserve an agreement between the parties despite conflicting forms, defining the agreement to have terms based on what

215. 840 P.2d 1024 (Ariz. Ct. App. 1992).

216. *Id.* at 1027.

217. *Id.* at 1029-30.

218. *Id.* at 1030 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f (1979)).

219. U.C.C. § 2-207 (1990).

220. Article 2A, although it adopts numerous provisions of Article 2, does not adopt an equivalent to § 2-207.

221. See Slawson, *supra* note 211, at 56-60 (relating the history and purposes of U.C.C. § 2-207).

language in one form matches the other and resorting to Code gap-filler rules when the two forms are materially different and acceptance of the contract is pro forma conditioned on consent to the terms of one or the other form.²²² The section also deals with forms that propose additional terms. It holds that, as between merchants, proposed additional terms become part of the contract *unless* "(a) the original offer expressly limits acceptance to the terms of the offer; (b) the additional terms materially modify it; or (c) notice of objection to the additional terms is given."²²³

The conflicting forms involved in a section 2-207 problem very often entail a purchase order and shipping invoice.²²⁴ As a matter of fact, the forms are often not read by either party, except in reference to the price and quantity terms involved in the order or shipment.²²⁵ This is due to an emphasis on efficiency and speed of processing, but it contradicts the traditional assumptions that we often make about the nature of contracting and the willingness of parties to dicker for terms or, even, to conduct substantial negotiations. In most cases involving a "battle of forms," probably no actual "battle" occurs. The parties may simply act on the ordinary business assumption that in most sales transactions there will be no problems with the delivered goods and that it is not worth the effort to conduct negotiations or disrupt business to deal with those few cases in which a problem arises and the parties cannot resolve it amicably.²²⁶

In licensing, battle of the forms problems occur between merchants frequently and standard form agreements are common. Additionally, however, there is a controversy about the enforceability of so-called "shrink wrap" licenses, which are form license agreements included within a mass market software package

222. U.C.C. § 2-207(3) (1990).

223. *Id.* § 2-207(2).

224. *See, e.g., American Ins. Co. v. El Paso Pipe and Supply Co.*, 978 F.2d 1185 (10th Cir. 1992); *Stedor Enters., Ltd. v. Armtex, Inc.*, 947 F.2d 727 (4th Cir. 1991).

225. *See, e.g., N & D Fashions, Inc. v. DHJ Indus., Inc.*, 548 F.2d 722 (8th Cir. 1976); *Bergquist Co. v. Sunroc Corp.*, 777 F. Supp. 1236 (E.D. Pa. 1991).

226. *Cf. Lawrence Kalevitch, Gaps in Contracts: A Critique of Consent Theory*, 54 MONT. L. REV. 169, 176-77 (1993) (noting that the "efficiency" theory of contract law postulates that parties "pre-consent" to efficient gap-fillers).

with the provision that, by opening the package or using the software, the licensee consents to the terms of the agreement.²²⁷ The shrink wrap agreements ordinarily do not involve a conflict of forms, but rather a standard form agreement that purports to alter the terms of the transaction to avoid it being an ordinary retail sale. In *Vault Corp. v. Quaid Software Ltd.*,²²⁸ the lower court held that a shrink wrap contract was an unenforceable contract of adhesion under Louisiana law.²²⁹ This lower court opinion reached that result with virtually no analysis.²³⁰

Standard form agreements are sufficiently ubiquitous as to suggest that treatment in revised Article 2 is appropriate. In at least some respects, issues about surprise and oppression seem to be independent of the type of transaction or property involved. Arguably, this suggests treatment in a hub provision. Alternatively, issues about mass market software licenses might be separated out as a special application of standard form contract analysis.

2. Warranty of Title

Current U.C.C. section 2-312 contains an implied warranty that the seller has transferred title that is "good" and that the transfer was "rightful."²³¹ The comments to the section indicate that it "abolished" the warranty of "quiet possession," although a pattern of challenges to title that disturbs the buyer's possession might be one of the ways to establish breach of the warranty.²³² This same section also contains a warranty that the goods will be *delivered* free of any rightful claim of infringement.²³³

227. For a discussion of these contracts, see NIMMER, *supra* note 32, ¶ 7.24[1][b].

228. 655 F. Supp. 750 (E.D. La. 1987).

229. *Id.* at 761.

230. *Id.* (stating that the shrink wrap contract was one of adhesion with no supporting analysis).

231. U.C.C. § 2-312(1)(a) (1990).

232. *Id.* § 2-312 cmt. 1.

233. *Id.* § 2-312(1)(b).

The title warranties in Article 2A, in contrast, contain an implied warranty against interference and infringement.²³⁴ Since the lessor does not transfer title, the conditions of this warranty are different from those in Article 2. The warranty provides specifically that no person holds a claim or interest to the goods "which will interfere with the lessee's enjoyment of its leasehold interest."²³⁵ This, of course, states a warranty of quiet enjoyment, but does not contain a representation about the lessor's ownership. Article 2A, however, also contains a non-infringement warranty like that of Article 2 that refers to delivery of the goods free of any infringement claim.²³⁶

In dealing with intangibles licenses, the idea of title becomes much more obscure than in reference to goods that are singular in character. A license to use software may be granted by one who owns the relevant intellectual property jointly with another person who may or may not join in the license.²³⁷ Similarly, under current general law, there is an issue about whether the transfer (license) contains a representation that the copyright (or patent, or secrecy claim) in the software is valid.²³⁸ Simply stated, one can transfer rights in software and then have a situation in which the transferee received only information or technology that is in the public domain. Finally, transfer of a right to use software (or other intangibles) will seldom involve an infringement per se. It is the actual *use* or copying of the property by the licensee that may entail an infringement.²³⁹ In common practice, it is not always the case that the licensor warrants that the licensee can use its technology without infringing the technology (patent or copyright) of another.

One conclusion from all of this might be that the title warranties are inherently different and clearly placed in a spoke pattern, different for each transaction. A broader view, however, might suggest that at least one common principle exists in all three areas and that this principle might have even broader

234. *Id.* § 2A-211.

235. *Id.* § 2A-211(1).

236. *See id.* § 2A-211(2).

237. *See* NIMMER, *supra* note 32, ¶ 7.16[2].

238. *See id.* ¶ 7.16[1].

239. *See id.* ¶ 1.03[4].

significance. For example, the broader principle may be that, in any transfer of personal property or services, the transferor impliedly warrants that it has a right to transfer the interest that it purports to convey. The details of that basic principle may differ depending on the particular type of transaction.

V. SUMMARY AND CONCLUSION

This Article has covered a lot of ground. The fundamental point that I have raised deals with the context of the modern revisions of Article 2. That context is not simply an academic exercise in upgrading an old statute and curing the intermittent problems that have been discovered in some portions of current law. It involves, rather, a needed response to a fundamentally changed economy and transactional structure. To act as if a statute from the 1950's can simply be touched up and left to govern transactions into the next century is to essentially ignore the sea of change that has occurred in how we, as a country and as individuals, do business as well as the commercial value that new forms of business represent.

Software and related intangibles licenses should be included within the revised Article 2 in an explicit and conscious manner. Technology, intellectual property, and information transfers are cornerstones of modern commerce. The contract relationships that spring up around this subject matter are important. As we have seen, the Article 2 Drafting Committee recognized this fact in its working policy to the effect that licensing contracts of software and related intangibles should be included in the Article 2 revision process and treated under a hub and spoke methodology.

This inclusionary proposition allows the Drafting Committee to handle Article 2 revision in a real world environment. It is preferable to deal with important fields of commercial contracting through codification, rather than common law development. To support that preference, we briefly discussed and compared the two *processes* and the likelihood that either will yield commercially relevant, supportive contract law principles. Modern contract scholarship documents the difficulty of deriving consistent premises about how to use law to support contracting practice in the absence of any true understanding of how contract

practice and law interact. Yet, even without an ability to gauge effects, a commercial law of contracts will evolve. This indicates that we should draft default rules that enable contractual flexibility, but that draw on the experience and shared expertise of actual commercial contracting as a gauge for what structures and expectations are appropriate. To achieve that goal, the better process is codification, rather than pure common law development.

Under any criteria one might assert for judging when a particular transaction should be brought into a codification process, software and related intangibles qualify. This is a natural extension of the commercial code reflecting national commercial behavior. Intangibles contracts involve significant national industries. The attempt to fit them into a mold developed for sales of goods creates numerous problems and a failure to fit modern law to modern commercial practice.

In many respects, intangibles licenses cannot be equated to sales or leases of goods in terms of either the type of subject matter or the type of commercial relationship created by contracts involving intangibles. This establishes a need for differentiation. Separate treatment of licenses is merited. Leases, sales, and licenses all may draw on a common core of basic contract principles, but each also demands some specially tailored rules to reflect the type of contractual relationship that exists in commercial reality.

That separate treatment should be developed initially under a hub and spoke approach to a new Article 2. Historically, the assumption has been that discrete transactions and subject matter should be dealt with under different contract rules reflected either in common law or in stand alone articles of the U.C.C. But this overemphasizes the differences and creates severe problems of coordination. Under the hub and spoke system, Article 2 would cease to be a "sale of goods" article and would become an article concerning commercial "transfers of personal property" poised to deal not only with the economy of today, but to expand into the economy of tomorrow.