Reinventing the Wheel

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I. INTRODUCTION

Revision of the uniform commercial law rolls on. The keepers of the Uniform Commercial Code flame, namely the American Law Institute (ALI) and the National Conference of Commissioners for Uniform State Laws (NCCUSL), most recently have turned their attention to Article 2 of the U.C.C. They have used the occasion of the Sales article revision to revisit the scope and mission of the uniform commercial law, and the Reporters of the revision have found opportunity to suggest bringing additional transactions within Article 2 through a "hub and spoke" arrangement.

In this Essay, two curmudgeons throw cold water on the Article 2 revision project, but do not merely pick nits. Rather, we strive to undermine the fundamental conceptions informing the revision Reporters' "hub and spoke" approach to the codification of commercial transactions law. We argue that the approach is

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1. The American Law Institute began in 1921 as a project proposed by the Association of American Law Schools. The ALI was envisioned as a "jurisprudential centre for the betterment of the law," and "its first major undertaking should be to prepare a 'Restatement of the Law.'" WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 273-74 (1973).
2. The NCCUSL was formed in 1892 and is composed of unpaid commissioners appointed by state governors. It prepares, primarily in commercial law, acts for possible adoption by state legislatures. Id. at 272.
3. Professor Raymond T. Nimmer is the Reporter on Technology Issues to the Drafting Committee to Revise U.C.C. Article 2, and Professor Richard E. Speidel is the Reporter to the Drafting Committee to Revise U.C.C. Article 2.
inconsistent with the realities of the commercial and contract law world, and, even if feasible, would not accommodate the continued expansion of commercial practices. Its efforts to classify and compartmentalize would prove stultifying. This Essay evaluates the hub and spoke approach in terms of, first, the extant uniform commercial law, and second, the common law of contract.

II. OF HUBS AND SPOKES AND THE UNIFORM COMMERCIAL LAW

The hub and spoke approach assumes certain over-arching fundamental principles of commercial contracts\textsuperscript{5} which are formulated as a "hub."\textsuperscript{6} From that hub emanates a series of "spokes," each pertaining to a different and distinguishable species of transaction, each sufficiently distinct from the transactions covered by the other spokes to support separate treatment, and each sufficiently similar to the other spokes to warrant application of the same hub principles.\textsuperscript{7} The hub could consist of basic contract formations principles, such as a writing requirement, extrinsic evidence rules, and unconscionability.\textsuperscript{8} The spokes would concern topics as broad as sales of intangible personal property, leases of personal property, licenses of intellectual property, and intellectual property service agreements.\textsuperscript{9}

A. The Object: "Symmetry and Coordination"

The object of the Article 2 Revision Committee is, and indeed should be, to achieve symmetry and coordination within the commercial law. That goal contemplates, necessarily, emphasizing similarities and resolving discontinuities across transactions governed by a revised Article 2. Insofar as Articles 2A through 9 already have brought symmetry and coordination to the transactions that are within the scope of those articles, what remains for Article 2 is the codification of the contract law governing sales of goods and, as well, codification of the commercial con-

\textsuperscript{5} It also may contemplate consumer contracts.
\textsuperscript{6} Nimmer & Speidel, supra note 4, at 1.
\textsuperscript{7} Id. at 2.
\textsuperscript{8} Id. at 1.
\textsuperscript{9} Id. at 2.
tract law governing forms of property other than goods and transactions other than sales. While the Article 2 revision ultimately may involve the re-coordination of Article 2A with a revised Article 2, that task is not being addressed currently by the Article 2 Revision Committee.

For the sake of argument, and to support concrete examples, assume that the application of a hub and spoke approach would result in at least three spokes: sales of goods, leases of goods, and transactions involving at least some form of intellectual property. In such a statutory arrangement, it is not clear what portions of existing Articles 1, 2, and 2A would be assembled as hub principles from which the transactional spokes would proceed. Nor is it clear whether there would be multiple hubs. Would there be a hub of general principles such as those currently in Article 1 as well as a separate hub containing the common Article 2 and 2A principles? Furthermore, contour(s) of the hub(s) and spokes might be determined not by (or at least not solely by) the subject matter of the transaction in issue, but by reference to the sophistication of the transactors. Thus we would need a body of consumer protection principles. But would those principles be formulated in a hub or in a single spoke or, to differing degrees, in each of the several spokes?

Would an intellectual property spoke proceed from the Article 2 model, from the Article 2A refinement of Article 2, or from some entirely new body of commercial contracting principles currently only the province of those in the software contracting industry? In that regard, is there more affinity between the buyer of goods and the licensee of software than there is between the buyer of goods and the lessee of goods?

It seems that the Article 2 Revision Committee would have to appreciate the property rights of a buyer and seller in ways not currently contemplated in order to formulate the proper accommodation of the intellectual property and Article 2 principles:

10. For example, by separating into separate spokes contracts for computer software and other related intangibles from contracts that require a delivery of hard goods, two subjects that may fall generally under the same hub are appropriately differentiated. See Nimmer & Speidel, supra note 4, at app. 4. See generally PETER A. ALCES & HAROLD F. SEE, THE COMMERCIAL LAW OF INTELLECTUAL PROPERTY ch. 2-7 (1994) (surveying forms of intellectual property).
the current Article 2 is premised on conceptions of tangible personal property, which resides at one place or another. Intellectual property is, to an extent, defined by its intangible, incorporeal nature. Indeed, the very fact that the Reporters propose different spokes for sale, leases, and software contracts intimates that there may not be sufficient congruency to justify bringing additional areas of commercial law within Article 2. If the Reporters endeavor to do so merely because they perceive a need to do something, they risk encroaching on the commercial law conceptions developed in the other substantive articles of the Code. The several articles of the U.C.C. proceed from different formulations of fundamental principles. It is not clear why or how a revision of Article 2 should or could accomplish a comprehensive restructuring of such fundamental, or "hub," conceptions.

B. Integration of Principle

Karl Llewellyn's jurisprudential vision formed Article 2. Llewellyn recognized that realistic jurisprudence provided the means for commercial contract law to sever the fetters of formalism.\(^1\) His object was to provide the certainty and predictability that commercial transactors need in order to engage in the wealth maximizing exchanges that are the engine of capitalism. But perhaps his most important contribution to the jurisprudence was his appreciation of what statutory law cannot do. The more complex and inflexible the interrelation among statutory rules, the less likely that substantial certainty and predictability, rather than merely cosmetic certainty, will result. The good courts simply will not be restrained by rigid rules that produce unjust results upon application in particular situations.\(^2\)

The hub and spoke approach, in its current conception, endeavors to impose upon courts and contracting parties rigid categories of transactions rather than to discern the commercial contracting principles that apply across different property inter-


\(^{2}\) For example, Justice Cardozo acknowledged the need for fluid legal concepts that are able to adjust to continuing situations. Llewellyn, who envisioned the U.C.C. as the source of law for then-present, as well as future, commercial transactions, was impressed by Cardozo's regard for such concepts. *Id.* at 543.
ests. The next generation of commercial lawyers will sell their clients a narrow sophistication—a topography of the trees without any appreciation of the forest. The commercial lawyer practicing in a hub and spoke regime will become a “tax lawyer,” whose overspecialization currently causes problems for the bankruptcy bar.

The drafters of Article 9 realized that secured credit could best mature if the affinities among personal property financing devices were emphasized. Professor Hal Scott’s Uniform New Payments Code, a victim of politics rather than principle, was sensitive to the congruities among the various value transfer media and systems. Both of these efforts demonstrate that uniform commercial law can unify without ignoring fundamental dissonance. The hub and spoke approach is a move in the opposite direction; it will fragmentize the law, leaving it scattered among the special interests that certainly will undermine the hub (or hubs) by adjustment of the spokes, the patience of state legislatures willing.

C. Sources of Principle

If the revisers of Article 2 proceed with a hub and spoke approach, consider the sources of principle from which the Drafting Committee could choose to frame the new world. They are numerous, and the choice will determine the shape of commercial contract law perhaps well into the next century. The decision to pursue a hub and spoke approach is not the end of the inquiry; it is the beginning.

It is unremarkable that the Drafting Committee would consider the hub and spoke approach, for such an approach is arguably that of the vast body of commercial legislation. The disintegration of commercial principles began well before the advent of

15. Indeed, in the current formulation of the U.C.C., one can discern hub and spoke mechanics. See infra text accompanying notes 25-38.
hub and spoke theory, but the revisers of Article 2 would hasten the disintegration, turning crevices into chasms.

1. Property Conceptions

Article 2 of the U.C.C. was drafted at a time when lawyers and law professors were more concerned with tangible than intangible property. Certainly Article 2 is limited in its scope to the sale of goods, but it is difficult to discern in the statute's provisions concern for excluding less tangible forms of property. The drafters of Article 2 sought to allay the concerns of the real property bar, as did the drafters of Article 9, but this concern was certainly more a matter of political expediency than a jurisprudential conclusion.

With the promulgation of Article 2A, "Leases," the keepers of the commercial law flame confronted the division of property interests that distinguishes the use of personal property from the ownership of personal property. On a continuum, the lease interest is less tangible than the ownership interest, but, importantly, property interests are a continuum. Professor Jack Ayer has noted this, but the rest of the commercial community has had trouble appreciating his point.

This is neither the place nor the time to rehash the Ayer arguments and the responses to them, but it is necessary in any consideration of a hub and spoke approach to understand that the uniform commercial law, at least as currently formulated, has organized spokes along lines determined by the delineation of property interests. If you own and are transferring enough sticks from the bundle, then your transaction is a sale, or a security interest; if you own and/or are transferring a lesser (or,

16. ALCES, supra note 11, at 8-9.
17. U.C.C. § 9-313 (1990) (determining when to classify goods as fixtures which are related to real estate).
18. The lease/security interest issue was also crucial in the formulation of Article 9, though for perfection reasons.
20. E.g., Amelia H. Boss, Leases and Sales: Ne'er or Where Shall the Twain Meet?, 1983 ARIZ. ST. L.J. 357, 358 (arguing that transactions may be identified that require different treatment).
at least, different) number of sticks, then your transaction is a lease or some analogous bailment.

2. Transactor Sophistication

The spokes of commercial law may also be understood as related to the sophistication of transactors. For example, several articles of the U.C.C. now distinguish consumers from other commercial transactors,21 and Article 2 recognizes that there are different degrees of merchants.22 Furthermore, in the degrees of merchant status there may be a way for courts to further allow for varying sophistication levels without resorting to so-called deal-policing mechanisms.23

It is not clear, though, whether the sophistication of a transactor in a comprehensive hub and spoke regime would determine the contours of a hub, or instead would be a spoke matter. If the transactors' sophistication matters at fundamental agreement levels—that is, matters with regard to ability, will, or understanding to enter into a transaction—then perhaps there should be a separate hub for consumer or other nonmerchant transactions. Then, of course, the question of the malleability of such hub principles arises: whether the “parties” could reach agreements that alter the terms of the hub, à la U.C.C. section 4-103, notwithstanding the transactors' lack of sophistication?24

There may be both hub and spoke treatment of transactor sophistication issues, in which case the issue of adjustment of rights by contract could be complicated in terms of the relationship between the hubs and the spokes, as well as the relation-

21. E.g., U.C.C. § 2A-103 (1990) (defining consumer leases as a separate class of leases); id. § 9-109 (classifying consumer goods as a separate class of goods).
22. Ingrid M. Hillinger, The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True, the Beautiful in Commercial Law, 73 GEO. L.J. 1141 (1985) (examining the Code's distinction between merchants and nonmerchants).
23. These mechanisms include unconscionability, U.C.C. §§ 2-302, 2A-108 (1990); impracticability, id. §§ 2-615, 2A-406; and fraud, id. §§ 1-103, 2-721.
ship among the hubs and the spokes, a problem treated separately below.

3. Transaction Focus

The U.C.C. is currently drafted along lines that might be described as a hub and spoke approach; indeed, there might be something inevitable about the conception in the science (or the description) of commercial statute drafting. Certainly, insofar as each substantive article of the U.C.C. contains scope provisions that focus on the nature of the transaction while Article 1 contains general provisions, the outline of a wheel emerges.

Further, and more fundamentally, there is room to argue that within each substantive article of the Code there is a hub (or hubs) and spokes. Article 9 accommodates this view most clearly, as the extended comment to section 9-102 demonstrates very effectively. Article 9 also contains provisions concerning the perfection of collateral interests in different forms of personal property, the tangible as well as the less tangible. There are default provisions pertinent to one form of collateral but not another, to one type of transactor but not another, and to one type of transaction but not another. It is not difficult, then, in the framework of Article 9, to find a hub of fundamental principles and spokes that radiate from them.

If Article 9 were the only example of a hub and spoke approach in uniform commercial law, that might militate in favor


26. Compare, e.g., id. § 9-505 (applying only to consumer collateral) with id. § 9-504(3) (governing nonconsumer collateral).

27. E.g., id. § 9-505(1) (applicable to consumers only). If a debtor has paid 60% of the cash price for consumer goods, the secured party must dispose of the goods within 90 days of repossession. If the secured party fails to do so, the debtor, at his option, may recover the goods in conversion or under § 9-507(1). Id.

28. For example, a sale of accounts receivable is differentiated from a loan against accounts receivable, id. § 9-502(2), and purchase money security interests are distinguished from non-purchase money security interests, id. § 9-312(4)-(5).

29. For example, all secured transactions are subject to the writing requirement, id. § 9-203(1)(a), and the elements of attachment are the same for all transactions, id. § 9-203(1).
of extending the approach to revision of Article 2. But Articles 2 and 2A in their present form already reveal a hub and spoke approach, only not in the terms of the Article 2 Drafting Committee's agenda. Articles 2 and 2A formulate fundamental principles, unconscionability for one example, contract formation for another. Additionally, both articles include statutes of frauds, though their terms differ in some respects.

There are spokes as well in the sales and leases articles: rules that apply in the case of breach, rules that apply in the absence of breach, rules that apply to installment contracts, and rules that apply to single delivery contracts. Further, courts have spent some time determining the apposite spoke, e.g., was the contract installment or single delivery?

Thus, the argument may be made that Articles 2 and 2A already adopt a hub and spoke approach, so there is nothing revolutionary about extending the model. The deficiency of the revisers' hub and spoke approach is not that it contemplates the formulation of fundamental principles complemented by more specific rules in specific contexts. Rather, the deficiency is that the distinctions between the hubs and spokes and among the spokes of the extant uniform commercial law proceed from judgments concerning the different commercial principles vindicated in different commercial contexts. There is nothing artificial about a rule that divides the liability of the parties one way in the case of a breach and another in the absence of breach. There is something quite troublesome about a commercial statute that provides Internal Revenue Code-like rules for transactions dis-

30. Id. §§ 2-302, 2A-108.
31. Id. §§ 2-204, 2A-204.
32. Id. §§ 2-201, 2A-201.
33. For example, the threshold amount that triggers the statute of frauds with regard to contracts is $500, id. § 2-201(1), while with regard to leases it is $1,000, id. § 2A-201(1).
34. E.g., id. §§ 2-601, 2A-501.
35. Id. §§ 2-509, 2A-219.
36. Id. §§ 2-612, 2A-510.
37. Id. §§ 2-601, 2A-509.
tistinguishable more on the basis of attorneys’ vocabulary than on fundamental premises.

The single most significant problem with the revisers’ attraction to multiplication rather than consolidation is that by creating different spokes, they have avoided the focus on principle and fundamental affinities that should animate a comprehensive codification of the commercial law. It is easier to create a new spoke than it is to come to terms with how different ways of doing things, different transactor expectations, are really complementary rather than dissonant. If software contracting people do something one way, it is easier to codify their understanding than it is to appreciate how it is not substantially different from the way those who sell tangible products do things.

The revisers’ hubs and spokes are, therefore, insidious insofar as those who are interested in maintaining the integrity of the big picture are concerned. The revisers’ approach is not, however, just a matter of laziness or avoiding hard questions by multiplying the answers. There is a tremendous political and jurisprudential price as well.

D. Result-Determinative Analyses

Assume a world of uniform commercial legislation that follows a hub and spoke pattern. Imagine as well that the current transactional and property conceptions are not the final truth. Acknowledge that the way people create (and transfer) wealth is dynamic, with change (perhaps even development) inevitable. How would hub and spoke commercial legislation respond to such inevitable change?

First, there is no reason to believe that increased specialization will soon go out of vogue, allowing a return to the general practice of the lawyers of the early twentieth century. At least so far as commercial practice is concerned, all indicators are that our specialization will become finer and finer, our areas of expertise narrower and narrower. There will be more, not fewer, reasons to know less, not more, about areas of the law not within the scope of daily practice.

The intellectual property lawyer of today will be the software contracting lawyer of tomorrow and the consumer software lawyer of the next day. We will each see a smaller and smaller piece
of the whole, until we have lost all sense of the whole; the trees will overwhelm us and obscure the forest completely. Even law professors show signs of this type of devolution. 39

Rather than raising the bridge to bring more transactions, transactors, and property interests within the scope of uniform commercial principles, proponents of the hubs and spokes would lower the river, interrupting the flow of commerce with the detritus of special interests. They would enact a regime in which scope determinations are emphasized, in which courts would be constrained to reach a result based on essentially artificial conceptions of scope. Those conclusions would necessarily be incon siderate of the "big picture." There would be, in sum, a disintegration of doctrine, an abandonment of principle in favor of political accommodation.

III. HUBS AND SPOKES AND THE COMMON LAW OF CONTRACT

The current discussion of the Article 2 hub and spoke concept by those involved in the Article 2 revision process has been directed primarily toward transfer of computer software and related informational technology. 40 However, some of the discussion suggests that the hub and spoke approach might be used to encompass large portions of contract law through coverage of sales—including licensing and leasing of intellectual property—of intangibles and sales of services. 41 If the hub and spoke

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39. For example, commercial law casebooks originally covered all commercial law subjects. As the field of commercial law grew, the various areas were broken down into separate texts. Perhaps this reflects the fact that commercial law attorneys were specializing in one or two areas rather than practicing in all areas of commercial law. Recently, however, commercial law textbooks have been returning to multi subject treatment. The authors wonder whether this is a sign of despair or of lack of expertise?

40. See, e.g., Nimmer & Speidel, supra note 4, at 3-5.

41. See, e.g., id. at 3. Nimmer and Speidel contend that:

The changes that have occurred in [transportation and communications] an [sic] other areas fundamentally alters [sic] the nature of commercial practice and the demands placed on commercial contract law. These changes lessen the importance of transactions in goods as the sole or primary form of commercial exchange relationships by creating new forms of property and exchanged value, while enabling a commercial expansion of information and other services contracts. The changes in economic activity have also expanded the types of transactions that have economic
idea were to be extended so broadly, the authors would strongly oppose it. The use of the hub and spoke concept will lead to balkanization of the law, with ever more refined and narrow rules being adopted to cover the perceived differences between various types of transactions. Objections to extension of the hub and spoke concept to codify the law of sales transactions for goods and services beyond computer software and related intellectual property are similar but broader.

A hub and spoke codification of commercial contract law would be difficult to accomplish, would likely produce complex and divergent statutory rules, would be difficult to amend to correct initial flaws or to bring the statute into congruence with subsequent technological, economic, or social change, and would constrict the ability of courts to reach just results and to modify the law to respond to subsequent developments. There has been no showing of a need for a wide-ranging codification; furthermore, the difficulties and costs of a hub and spoke expansion of the U.C.C. is so great that there should be no major expansion of the coverage of the Code in the foreseeable future.

A. Difficulty of Codification

1. Diversity of Contract Transactions

The types of contracts which might be covered by a codification of the law relating to the sale, licensing, or leasing of intellectual property to include many contractual relationships other than traditional sales.

The changes create pressure on the U.C.C. and especially in respect to Article 2 and other transactionally oriented aspects of the Code to expand beyond the original parameters of a Code that was initially promulgated under vastly different economic conditions. There is an underlying premise here that sustains the entire enterprise related to the U.C.C. That premise is that codification of commercial contract law fosters and makes more effective the conduct of commercial contract relationships. As new forms of transaction and new types of property come to dominate the commercial landscape, the U.C.C. should incorporate at least some of these within commercially relevant contract law principles. *Id.* Presumably sales of real estate and loans of money (except as covered by Articles 3, 4, 4A, or 9) would not be covered. Extending a codification to large parts, but not all, of contract law inevitably will present problems of definition and line drawing.

42. For a discussion of the licensing and leasing of intellectual property, see
tangibles and services are numerous and diverse. Some examples of different types of transactions which might be covered include: construction contracts including those between owners and general contractors and between general contractors and subcontractors; architect and engineer services contracts; sales of copyrights, trademarks, or patents; sales (assignments) of rights under contracts; employment contracts; professional services contracts; carriage of goods contracts; carriage of persons contracts; repair contracts large and small; surety contracts; insurance contracts of various kinds; and franchise agreements. This limited list of transaction types suggests the large number of spokes which might be necessary. A contract for the licensing of rights under a patent and a contract under which a shipping company agrees to carry iron ore on the Great Lakes for twenty years are quite dissimilar, as are a contract for the construction of a $50 million building and a contract for the sale of $100,000 of receivables.

2. Codification in the Face of Diversity

If a codification of contract law is to cover contracts for the sale of many different types of intangibles or services, there are two routes which might be taken regarding the depth and complexity of the codification. On the one hand, the codification might try to avoid, except to a minor degree, stating specific rules which would be applicable only to one or a few types of contracts. That is, the codification might contain a large hub and small, or no, spokes. The first and second Restatements of Contracts give a reasonable idea of how such a codification might look. The Restatement rules are stated at a sufficiently high level of generality that nearly all of them could be applied to all the diverse types of transactions just described. The alternative

Nimmer & Speidel, supra note 4, at 44-45, 50-51. This Essay, therefore, incorporates those terms here. In the rest of this Essay only the term sale will be used, but the reader should assume that the word "sale" also includes leasing and licensing as appropriate to the context.

43. The authors are uncertain whether suretyship, insurance, or franchising involve sales of services. That uncertainty could be avoided by defining those types of contracts and excluding them. Such a course, however, obviously has its own problems of definition.
approach is to identify a number of types of sales of services or intangibles and draft specific rules applicable to each of the transaction types. In other words, the codification might consist of a small hub and many spokes.

Given the nature of the present Code articles and of the present drafting process, the small hub/many spokes alternative is more likely to be the one adopted. The present Code is a collection of articles covering specific transactions or specific commercial instruments or documents: sales of goods, leases of goods, negotiable instruments, bank collections, electronic funds transfers, letters of credit, bulk sales, warehouse receipts and bills of lading, investment securities, and security interests in personal property. The rules in the different articles are formulated to govern the specific type of transaction, often without regard to whether the rules are consistent with the cognate rules developed for similar situations in other articles of the Code.

Extending the original scope of the Code to cover leases of goods and electronic funds transfers was not accomplished by broadening the scope and rules of Article 2 to cover leases or of Articles 3 and 4 to cover electronic funds transfers, but rather by preparing entirely separate articles dealing with the new subject matters. An effort in the 1980's to develop a more unified treatment of all payments mechanisms in the New Payments Code project, which would have replaced Articles 3 and 4 and what is now Article 4A with a single article dealing with all three subjects, and would have applied similar rules to each, died un-

44. U.C.C. art. 2 (1990).
45. Id. art. 2A.
46. Id. art. 3.
47. Id. art. 4.
48. Id. art. 4A.
49. Id. art. 5.
50. Id. art. 6.
51. Id. art. 7.
52. Id. art. 8.
53. Id. art. 9.
54. Compare the "for value" requirements for holder in due course status under U.C.C. § 3-303 (value given only to the extent of actual performance of the agreed exchange) with the value for requirement for bona fide purchaser status under U.C.C. §§ 1-201(44), 2-403 (promise is value).
55. See PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, UNI-
der withering attack. A major reason for the unacceptability of the New Payments Code was its attempt to unify all payments mechanisms within a single analytical and legal framework. Whether or not the rejection of the New Payments Code was sound, the rejection reinforces the conclusion shown by the present structure of the U.C.C.: any expansion of coverage of the U.C.C. is likely to contain separate articles or parts for different transaction types.

The differences between Articles 2 and 2A of the present Code probably give a good indication of how a hub and spoke arrangement bringing additional transactions within the scope of the Code might apportion matters between the hub and the spokes. There are substantial similarities between a sale of goods and a lease of goods, nevertheless, only fifteen out of eighty-seven Article 2A sections are identical to those of Article 2.57 Many of the differences are based upon differences in the transactions that made the existing Article 2 provisions inappropriate.58 The differences between the articles that are based

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57. The sections that are identical or identical except for minor style changes are: §§ 2A-202 and 2-202 (parol evidence); §§ 2A-203 and 2-203 (seals inoperative); §§ 2A-204 and 2-204 (formation in general); §§ 2A-205 and 2-205 (firm offers); §§ 2A-210 and 2-313 (express warranties); §§ 2A-212 and 2-314 (warranty of merchantability); §§ 2A-213 and 2-315 (warranty of fitness for particular purpose); §§ 2A-215 and 2-317 (accumulation of warranties); §§ 2A-221 and 2-613 (casualty to identified goods); §§ 2A-403 and 2-611 (revocation of repudiation); §§ 2A-404 and 2-614 (substituted performance); §§ 2A-405 and 2-615 (excused performance); 2A-513 and 2-508 (cure); §§ 2A-520 and 2-715 (incidental and consequential damages); and §§ 2A-530 and 2-710 (incidental damages). Two sections, §§ 2A-309 and 2A-311, are identical to §§ 9-313 (fixtures) and 9-316 (subordination), respectively.

Compare the risk of loss provisions of §§ 2-509 and 2-510 with the risk of loss provisions of §§ 2A-219 and 2A-220. The remedies provisions of the two articles are quite different: compare Part 7 of Article 2 with Part 5 of Article 2A. These differences are based upon differences in the underlying transaction that require different rules, at least if the rules are stated with the level of specificity with which they are stated in Articles 2 and 2A.

58. The same language could be used in both articles only if they were moving to a higher level of generality. Under Article 2, the risk of loss shifts from the seller to the buyer at some point in the physical transfer of the goods from the seller to the buyer. See U.C.C. §§ 2-509, 2-510 (1990). Article 2A, except in the use of a finance
on differences between a lease and a sale, such as those just described, could be avoided by promulgating rules that are sufficiently general that they work reasonably in both cases. For example, an effort might be made to keep the damages rules of Articles 2 and 2A at a level of generality that is sufficiently high that the stated general rule is as easily applicable to a lease as to a sale. However, drafters of statutes covering a particular type of transaction are much more likely to draft specific rules that are applicable only to the transaction type. For example, the Restatement rules do not state the circumstances under which a seller or lessor may force the goods on an unwilling buyer or lessee. Articles 2 and 2A do. Similarly, Articles 2 and 2A state that a buyer or lessee may measure damages by the cost of procuring replacement goods if the seller or lessor refuses to deliver or delivers goods that the buyer or lessee is justified in

lease, see id. § 2A-103(g) (defining "finance lease"), adopts the traditional bailor-bailee rule that in the absence of agreement the risk of loss stays on the lessor even after delivery of the goods to the lessee. See id. § 2A-219. A finance lease is a lease in which the lessor is in substance merely a financier of the acquisition of the use of the goods by the lessee. Because the finance lessor is really merely providing the money for the deal, Article 2A treats the finance lessor like a seller for risk of lose purposes. See id. § 2A-219(1)-(2). Under Article 2 a seller can force a buyer to pay the price of goods accepted, id. § 2-709; under Article 2A, a lessee, by tendering back goods accepted, can force the lessor to mitigate damages by reletting or selling the goods, id. § 2A-529. The Article 2A rules as to assignment of rights of the parties to a lease are very different from those of the parties to a sales contract under Article 2 because of the greater continuing relationship that exists between a lessor and lessee compared with that existing between a seller and buyer after the sale. See id. §§ 2A-303, 2-210. The damages rules of Article 2A are more elaborate than those of Article 2 because the drafters tried to deal specifically with the more complex situation arising when a lessor or lessee breaches a lease agreement. Compare the 44 lines of U.C.C. § 2A-529 (Lessor's Action for the Rent) with the 21 lines of U.C.C. § 2-709 ([Seller's] Action for the Price).

59. Because Article 2 already existed and was not being redrafted, and because it contained rules specifically applicable to sales but not appropriated to leases, drafting of rules that were sufficiently general to cover both sales and leases was not a feasible option in the actual Article 2A. The sponsoring organizations were not ready, at that time, to undertake a drafting process that would involve a redrafting of Article 2 to cover both sales and leases of goods.

rejecting. However, detailed rules that can apply only to a specific transaction create complexity and rigidity.

More troubling are the differences between Articles 2 and 2A that exist because the two articles were drafted at different times by different groups who made different policy choices on issues for which different results are not justified by differences in the transactions. For example, Article 2A omits section 2-207 concerning the battle of the forms, largely because of doubts about the soundness of the section 2-207 rules. Also, Article 2A requires that disclaimers of the warranty of merchantability be in writing, rejecting the Article 2 rule that an oral disclaimer can be effective. Article 2A, going beyond Article 2, gives a court the power, in consumer leases, to grant relief for unconscionable conduct that induces a lease contract or for unconscionable conduct in collection of a claim arising from a lease contract. Also, under Article 2A a court must award attorney's fees to a prevailing consumer plaintiff in an unconscionability action. No such right is given under Article 2.

3. The U.C.C. Drafting Process

The preceding Section demonstrated that the present Code contains specialized rules for the different types of transactions it covers and suggested that any additions to the Code will continue that course. This Section describes the Code drafting process and the implications of that process for a major "hub and spoke" expansion of the Code.

All acts drafted by the NCCUSL, including additions to or revisions of the U.C.C., are drafted by special ad hoc drafting committees appointed for the particular act from among the

61. See id. §§ 2-712, 2A-518. Some of the rules of Articles 2 and 2A are not only more specific than those of the Restatement, in some cases they are different from those of the Restatement. The Restatement rejects the rules of U.C.C. § 2-207 in favor of the traditional rule that a response to an offer which varies the terms of the offer is not an acceptance, but a counteroffer. RESTATEMENT (SECOND) OF CONTRACTS § 39 (1979).
63. Compare id. § 2-302 with id. § 2A-108(2).
64. Id. § 2A-108(4).
65. See id. § 2-302.
Uniform Laws Commission membership. Because the U.C.C. is a joint project of the NCCUSL and the ALI, the ALI also appoints several of its members to Code drafting committees. The size of drafting committees varies between five and fifteen. In the four present Code drafting projects, Articles 2, 5, 8, and 9, a total of forty-one different people are committee members, only five of whom serve on more than one committee. There are three reasons for the lack of overlap between committees: (1) the areas are sufficiently unrelated that different people have expertise in the different areas; (2) the workload of a committee member is heavy, therefore serving on more than one committee at a time is a greater burden than most people desire; and (3) the NCCUSL spreads committee assignments among various members to allow a larger number of commissioners to participate in drafting projects.

In Code projects, one or more reporters do most of the actual drafting. The reporters, also, are different for each act. Usually, the reporter prepares a draft that is then reviewed by the full committee at a two or three day meeting. Less frequently, the reporter merely identifies a series of questions that should be addressed in the Act and the group engages in a general discussion of possible treatments of the issues. The drafting committee meetings are open; anyone can attend. However, most attendees are advisors who have been invited by the NCCUSL and the ALI.

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66. Uniform Laws Commissioners are appointed to the Commission from the various states, usually by the governors of the states. The majority of commissioners are practicing lawyers, but some are professors or judges. For a listing of commissioners by state, see NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1993-94 REFERENCE BOOK [hereinafter NCCUSL REFERENCE BOOK].

67. Four drafting committees are presently working on Code projects. The Article 2 Drafting Committee has 14 members, 12 from the NCCUSL and two from the ALI. The Article 5 Drafting Committee has 10 members, nine from the NCCUSL, and two from the ALI (one member represents both the ALI and the NCCUSL). The Article 8 Drafting Committee has 10 members, eight from the NCCUSL and two from the ALI. The Article 9 Drafting Committee has 12 members, nine from the NCCUSL and three from the ALI. See id. at 54-57.

68. In the present Code projects, all Reporters are professors: Richard E. Speidel of Northwestern University, assisted by Raymond T. Nimmer of the University of Houston for the Article 2 revision; James J. White of the University of Michigan for the Article 5 revision; James S. Rogers of Boston College for the Article 8 revision; and Steven L. Harris of the University of Illinois and Charles W. Mooney, Jr. of the University of Pennsylvania for the Article 9 revision.
to participate in the drafting process. Advisors and observers usually participate in the committee discussions and their views are given substantial weight. Often votes will be taken in which all those present participate.

After each meeting of the drafting committee, the reporter drafts or redrafts sections of the act to take into account decisions made at the meeting, and the process is repeated again. It is not unusual for a single section to go through five or more versions as the result of successive meetings of the drafting committee. Toward the end of the process, the draft act is read line by line at an annual meeting of the NCCUSL before the full membership of the Conference. At that reading, any member of the Conference can criticize provisions of the act and offer amendments from the floor. Under NCCUSL rules, acts must be read at two annual meetings of the full membership before being approved by the Conference. However, it is not unusual for acts to be read before the full Conference three or more times before final approval. Because the ALI is a participant in the Code drafting process, Code revisions or additions must also be presented to the Council of the ALI and to one or more annual meetings of the full membership of the ALI.

The drafting of the U.C.C. is not immune from the political pressures and lobbying efforts that affect any legislative process. In Code drafting, as in any legislative drafting, it is important that all the affected parties believe that the statute being drafted is reasonably balanced and fair, and, if that is sometimes not possible, it is essential that the drafters at least know that some affected group believes that the act is not fair and balanced. Advisors, therefore, play a major role in the drafting process. First, they provide a range of experience and expertise that may not exist within the committee. Second, they represent different

69. One of the authors of this Article is a member of the Article 5 and Article 9 Drafting Committees. At Article 5 Drafting Committee meetings he has attended, some 30 to 40 advisors are present. A similar number of advisors attended the first meeting of the Article 9 Drafting Committee that recently commenced its work.

70. The total membership of the NCCUSL is approximately 325.

71. See § 8.1 of the NCCUSL Constitution, which is reprinted in NCCUSL REFERENCE BOOK, supra note 66, at 93-94.

constituencies or points of view that are important to the development of a fair, balanced, and passable act. In the Article 5 drafting process, for example, the advising group includes substantial representation from letter of credit issuers, primarily banks, and from letter of credit users, primarily large corporations with substantial international business. The interests of the issuers and users are not always identical and a major challenge is securing an agreement between both users and issuers on proper rules. The Article 9 advisors represent a much more varied range of interests than the Article 5 advisors. They represent, among others, consumers, consumer lenders, inventory financiers, small business borrowers, accounts receivables financiers, and secondary market lenders on, and buyers of, debt secured by personal property. Representatives of each group will have issues of special interest to them, and may take different, possibly opposite, views on the resolution of some problems.

The description of the drafting process just given suggests that the process is long and complex. It is. The amendments to existing Code articles during the last decade, the addition of new articles to the Code, and the present revision efforts, have taken, and will take, extraordinary amounts of time and resources. During this period, amendments to Articles 3, 4 and 6 of the Code have been promulgated and two Articles, 2A (Personal Property Leasing) and 4A (Funds Transfers) have been added to the Code. Presently, revisions of Article 5 and of Article 8 are nearing completion, the Article 2 revision project is well under way, and a revision of Article 9 is just beginning. The following is a brief history of each project.

Article 2A on personal property leasing was recommended by a NCCUSL study committee in 1981. That recommendation was preceded by substantial work by a committee of the American Bar Association (ABA). The drafting committee held its first meeting in 1983. Article 2A was finally completed and offered for adoption in 1987, but substantial amendments were

74. See id. at 584-88.
made in 1990 after the original act was strongly criticized by a number of commentators.

Repeal of, or alternatively, amendment of, Article 6 (Bulk Transfers) was recommended by the NCCUSL in 1988 and the ALI in 1989. Consideration of revision of Article 6 began in an ABA committee in 1975. In 1985, a NCCUSL-ALI drafting committee was appointed. In 1988, the committee completed its work.

The Article 3, 4, and 4A drafting project was commenced in 1985 and was not completed until 1991. The effort took that long, in spite of the fact that the earlier attempt to create a "New Payments Code" had substantially narrowed the field of work. The New Payments Code effort itself commenced in 1976 and expired under attack from all sides in 1985. Therefore, it can be said that the revision of Articles 3 and 4 and the production of new Article 4A, in total required about fifteen years effort on the part of hundreds of people. The prefatory note to revised Article 3 reports that the drafting committee met twenty times between 1985 and 1990 and that the average attendance was fifty or more.

As of this writing, the Drafting Committee to revise Article 5, "Letters of Credit," has been working for more than three years

75. For the 1990 amendments to Article 2A, see SELECTED COMMERCIAL STATUTES 927-96 (West 1993).

76. See generally Boss, supra note 73, at 600-03 (noting criticism of Article 2A on the grounds that it perpetuated mistakes in Article 2 by directly importing Article 2's language).


78. Id. at 678-79.

79. Id. at 682-83.

80. The committee recommended and the NCCUSL and the ALI approved alternative proposals. The alternative recommended to the states was repeal of Article 6. A revised Article 6 was promulgated for states that chose not to repeal. For a discussion of the Article 6 drafting project, see Steven L. Harris, Article 6: The Process and the Product—An Introduction, 41 ALA. L. REV. 549 (1990); Winship, supra note 77.


82. See Miller, New Payments Code, supra note 81, at 1008.

83. SELECTED COMMERCIAL STATUTES, supra note 75, at 302.
and has produced at least seven drafts but has not yet produced a final draft, though that may be accomplished soon. An ABA committee previously prepared an extensive report that served as a starting point for the drafting committee work. The Article 5 drafting effort has involved approximately seven two-and-a-half-day meetings attended by upwards of forty participants, plus innumerable days spent by the participants and others in considering drafts and making comments and proposals. The huge expenditure of effort has been necessary even though the coverage of Article 5 is limited and the draft revision contains only sixteen sections.

A drafting committee to revise Article 8 was appointed in 1991 and has not yet completed its work, though drafts have been read at two NCCUSL annual meetings, in 1992 and 1993. Before the committee was appointed, an ABA committee spent several years considering the need for revisions to Article 8.

A drafting committee to prepare amendments to Article 9 has just been appointed, as noted above, and has had one committee meeting. Prior to the appointment of that drafting committee, the Permanent Editorial Board for the U.C.C. in 1990 appointed a sixteen member study group to review Article 9. That group, with the assistance of various Sections of the ABA, produced no less than eighty-three different "documents" dealing with various Article 9 issues. Those documents appear in thirteen paper-backed volumes that total more than a thousand pages. The group also produced a 247 page final report in December 1992. That report states that the group had six two-day meetings and a one-and-a-half-day meeting over about a two-and-a-

84. That committee was appointed in 1986 and reported in 1989. See James E. Byrne, An Examination of U.C.C. Article 5 (Letters of Credit), A Report of the Task Force on the Study of U.C.C. Article 5, 1989 A.B.A. BUS. L. SEC. i.
86. PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP UNIFORM COMMERCIAL CODE ARTICLE 9 REPORT 1 (1992) [hereinafter PEB ARTICLE 9 REPORT].
87. The first volume, PEB Study Group, Uniform Commercial Code, Article 9, Documents Nos. 1-2 is dated August 14, 1990. The last volume, PEB Study Group, Uniform Commercial Code, Article 9, Document Nos. 82-83 is dated October 1, 1992.
88. PEB ARTICLE 9 REPORT, supra note 86.
half-year period. Eight committees, either appointed by an ABA Section or by the group, assisted the group on specialized matters.

Except for Articles 2A and 4A, the drafting projects described above do not break new ground. Articles 3, 4, and 5 have been in force in most states for about twenty-five years. The problems of policy and of interpretation have had this period of time to surface and be discussed. Article 2A is based on Article 2 and in substantial part merely modifies the sales rules of Article 2 in order that they better fit lease transactions. Even so, the drafting projects have taken much time and effort.

This description of the U.C.C. drafting process emphasizes several points. First, in the past a different committee has undertaken each drafting project with a reporter who works only on that project, not on other Code projects. Second, dozens of people outside the drafting committee participate in the drafting process. They participate because of their expertise and experience in the area and because they represent constituencies that will be affected by the proposed revisions or additions. Third, the process is a long one involving a number of years of meetings,

89. Id. at 4.
90. Those committees were: the Article 9 Task Force of the ABA Section of Business Law, Committee on Commercial Financial Services, Subcommittee on Agricultural and Agri-Business Financing (14 members); the Task Force on Statutory Liens of the ABA Section of Business Law, Committee on Commercial Financial Services, Subcommittee on Agricultural and Agri-Business Financing (4 members); the Committee's Advisory Subcommittee on Deposit Accounts as Original Collateral (19 members); the Article 9 Filing System Task Force of the ABA Section of Business Law, Uniform Commercial Code Committee, Subcommittee on Secured Transactions (11 members); the Task Force on Security Interests in Intellectual Property of the ABA Section of Business Law, Committees on Technology and Intellectual Property and Uniform Commercial Code, and the ABA Section of Patent, Trademark and Copyright Law, Ad Hoc Committee on Security Interests (24 members); the Working Group on Article 5 Revision of the ABA Section of Business Law, Uniform Commercial Code Committee, Subcommittee on Letters of Credit (8 members); the Task Force of Oil and Gas Finance of the ABA Section of Business Law, Uniform Commercial Code Committee (23 members); and the Committee's Advisory Group on Real Estate-Related Collateral, and the ABA Section of Real Property, Probate and Trust Law, Committees on Uniform Acts Concerning Land Transfer and Transactions, Enforcement of Creditors Rights and Bankruptcy, and Securitization (13 members). Id. at 13-16.
drafting, and discussion, before promulgation of a revision or addition.

4. The Product of the U.C.C. Drafting Process

The U.C.C. drafting process outlined above encourages specific and detailed statutory rules rather than more general rules. Lawyers who have spent years of practice honing their skills in specific areas become advisors to the drafting committee. Also, the reporters typically will have spent years working in an area and thinking about the problems they are dealing with in the drafting process. That background often leads to the proposal of complex rules that attempt to provide definite answers to questions that have been raised in judicial decisions or in ruminations of lawyers and law professors.

The revision process illustrates this tendency. The revision of Article 3 substantially lengthened that article and many of its sections. Compare, for example, original U.C.C. section 3-303 with revised section 3-303(a). Both deal with taking a negotiable instrument for value. Original section 3-303 contains three subsections and eighty words while revised 3-303(a) contains five subsections and 113 words. Also compare original section 3-405 with revised 3-404. Both deal with impostors and fictitious payees, but revised section 3-404 has more than twice the words of original section 3-405. The additional length has a purpose: the revised statute provides answers to issues that were unclear under the original statute.

The drafting process also can lead to different positions on similar issues in different articles of the Code. In the original

91. Article 4 was not extensively revised, but even so, it became somewhat longer in revision.

92. It is likely, if not certain, however, that the new language will in turn be found to have created new uncertainties.

93. This Article is not concerned with the soundness of the drafting decisions made in the revisions of Article 3 or that will be made in the revision of Article 9. This discussion merely emphasizes that Code drafting is likely to be a detailed and intricate process.

94. See, e.g., supra notes 57-65 and accompanying text (discussing differences be-
Code, differences exist between articles on some central issues such as when value is given for bona fide purchaser purposes, or the definition of good faith. At the time of this writing, the Article 5 Drafting Committee has concluded that "good faith" should be defined in Article 5 as "honesty in fact in the conduct or transaction concerned" even though the recently completed revisions of Articles 3 and 4 define "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing." That difference may be justified because of the differences in the transactions involved. On the other hand, the difference may result only from the fact that a different committee, with a different group of advisors, at a different time, is dealing with the issue. Of course, the participants in the drafting process argue that while the rule with which they disagree may be appropriate in another article of the Code, it is not appropriate for the particular transactions covered by Article 5.

Appointment of an oversight committee whose task is to bring congruence to the rules proposed by the various drafting committees would not be without its own difficulties. The members of the drafting groups are likely to be strong-willed people with substantial experience and well-formed opinions. Members of an oversight committee would be hesitant to reject the judgment of the experts in the field who have debated the issue and reached a conclusion. Also, as is true of the good faith definitions in Articles 3 and 5, work on one article may have been completed and the revisions adopted in many states. If an article of the Code already has been promulgated, it is difficult to conform its rules to those of a later completed article, especially if the first article has already been adopted in a number of states.

The Permanent Editorial Board of the Code, which has general oversight of the Code as a creature of the NCCUSL and the ALI, might be thought of as a body that could prevent or reduce divergence between different articles. However, the Board, like any oversight group, may not be able to convince a drafting com-

95. See supra note 54.
committee to abandon its position. If the drafting committee persists in its opinion, it is the full bodies of the NCCUSL and the ALI, not the PEB, that make the final decision on whether variations between articles will be allowed to stand. They, too, are likely to defer to the Drafting Committee.

5. **Dealing with Diversity in a Hub and Spoke Approach to Code Expansion**

In a hub and spoke drafting effort that encompasses sales of some services as well as sales, leases, or licenses of intangible property, it is folly to try to state specific governing rules that distinguish between various transaction types without receiving input from specialists in the specific areas being covered. Securing that input requires that transaction types with sufficient similarities be identified and covered by a single set of rules. This is difficult. Computer software, for example, may be a sufficiently discrete area, with sufficiently identical problems across all transactions to justify a single set of statutory rules. The authors are not specialists in the area, but are wary of an attempt to state rules generally for the sale, leasing, or licensing of intellectual property beyond computer software. Professor Nimmer, who has been an advocate of the hub and spoke treatment of computer software and "related intangibles contracts" or of transactions in "intangibles," has written about information as a commodity. 98 In that article, footnote four lists forty-four types of "information products." 99 The list includes such diverse

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99. *Id.* at 105-06 n.4. These information products include periodical publishers, book publishers, database providers, magazines, encyclopedias, title insurance, telephone directories, white pages, newsletters, securities analysts, newspapers, computer networks, literature searches, service directories, professional listings, labor listings, yellow pages, abstracting services, economic consultants, indexing services, forecasting services, current awareness services, clearinghouses, medical treatment information, census, parts catalogues, real estate multi-lists, clerical functions, bookmaking services, land surveys, sports statistics, document acquisitions, environmental consultants, mailing lists, records management, management consulting, financial market data, opinion sur-
products as newspapers, management consulting, accounting services, engineering information, title insurance, and land surveys in addition to such whimsical listings as horoscopes and sports statistics. 100 It is extremely unlikely that title insurance companies would think of themselves as being similar to newspapers or management consultants, and it is probably unlikely that providers of engineering information and management consultants would consider that they have a great deal in common. Any endeavor to draft statutory contract rules, other than general Restatement of Contracts-type rules, that cover the diverse types of information businesses listed by Professor Nimmer would be very difficult. Certainly, if an attempt is made to extend an expanded Article 2 to many types of services contracts, more spokes would be necessary.

After discrete spoke areas are identified, expert and representative advisors must be found and brought into the process of developing rules for that spoke. To do the job well, a drafting committee will have to meet with advisors and interest groups regarding each spoke. Unless the project is to be spread over a substantial number of years, separate committees or subcommittees of the drafting committee would seem to be required. It is unlikely that the members of a drafting committee will be able to prepare for and attend more than, at most, three or four committee meetings a year. Similarly, a separate reporter may be required for each spoke. 101 Various subcommittees and different reporters will create difficult problems in controlling and coordinating the positions being hammered out by the various individual industry groups.

In some industry groups it will be very difficult to achieve a consensus among interested parties as to the appropriate statutory rules. Also, unless the industry involved supports codification, any spoke actually drafted is likely to have difficulty in the

veys, market analyses, engineering information, horoscopes, accounting services, television news, astronomical charts.

Id.

100. Id.

101. Presently, in the Article 2 project, Professor Nimmer, Reporter for Technology Issues, presumably would be primarily responsible for drafting a computer software or intellectual property spoke.
legislatures. All of the current Code revision projects were preceded by substantial studies of the area by one or more groups in the American Bar Association.102 Such work within the ABA can determine whether the relevant industry groups would support codification and whether various interest groups within the industry are likely to reach sufficient consensus that an act can be drafted that has a reasonable chance of successful enactment. At a minimum, any expansion of the Code through the addition of spokes to Article 2 should not proceed without prior investigation in the ABA or in other groups that suggest need for, and support of, a drafting effort in the area, as well as sufficient consensus as to the scope and substance of the drafting effort to make it reasonable to believe that a statute in the area could be adopted in the various states.

6. Lack of Statutory Precedent

Codification of the law relating to spokes for intellectual property or other services contracts would not build, except to a minor degree, on existing codification. It would involve the difficult task of trying to ascertain the existing common law positions on issues that arise and then deciding which of the various positions is more sound or most acceptable, or, perhaps rejecting all common law positions in favor of a new statutory rule. The present Code articles, with the exception of original Article 5, and additional Articles 2A and 4A, cover areas in which there had been prior codification.103 Article 5 dealing with letters of credit is short and does not purport to deal with all letter of credit issues.104 Article 2A on personal property leasing is

102. For a discussion of the various Code projects, see supra notes 73-90 and accompanying text.

103. See JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1, at 3 (3d ed. 1988) (listing the prior uniform acts that the Uniform Commercial Code replaced).

104. See U.C.C. § 5-102(3) (1990) ("This Article deals with some but not all of the rules and concepts of letters of credit as such rules or concepts have developed prior to this act or may hereafter develop . . . "); id. § 5-102 cmt. 2. The draft of revised Article 5 does not continue the sentence found in the original § 5-102(3), as quoted above, but the revision does not greatly increase the coverage of Article 5 and the revision comes after nearly 40 years of experience under original Article 5.
largely based on Articles 2 and 9 of the Code, though there was no prior statutory law that governed leases generally. Article 4A is really largely "new" law in a type of transaction that is so new that there is little relevant case law. Article 4A is very complex and was prepared after substantial input from banks and from users of the electronic funds transfer system. 105 Possibly sale or licensing of computer software is sufficiently new and sufficiently discrete from other transactions as to justify treatment as a spoke in Article 2. However, that basic question should be answered by persons in the industry who are familiar with the problems, not by a drafting committee.

To conclude, a project that extends coverage of the U.C.C. to additional areas, except possibly computer software transactions, would require extraordinary effort. Even if the money and people could be found to support such a project, successful completion would not by any means be assured because of the complexity of the project and possible divergent interests of various groups.

B. Difficulty of Correcting Flaws and Keeping a Complex Statute up to Date

Even if the difficulties recited above are overcome and an expanded U.C.C. is promulgated containing specialized coverage of a number of sales, leasing, and licensing transactions, a further problem arises. It will be very difficult to maintain oversight of the statute to correct flaws, adapt it to changes in the relevant industry, and secure adoptions of changes in the legislature. The NCCUSL and the ALI do maintain some oversight of the Code through the Permanent Editorial Board. Nevertheless, some serious problems in the existing Code have remained unsolved for decades.

Even when problems are resolved through recommended amendments, securing adoption of the amendments is a long and uncertain process. In 1972, substantial amendments to Article 9 were proposed, but ten years later, only thirty-seven

105. See the prefatory note to U.C.C. Article 4A for a statement as to its need and a statement of its general operation that proves that the Act is complex. Id. art. 4A prefatory note.
states had adopted those amendments, and today, Vermont still has not adopted them. In 1977, substantial amendments were proposed to Article 8. Ten years later nineteen states still had not adopted those amendments, and today, after sixteen years, two states still have not adopted them. The adoption record of Article 2A has been somewhat better. After six years, it has been adopted in thirty-nine states and the District of Columbia, but not in the major commercial state of New York. After five years, the Article 6 recommendations have been adopted in twenty-nine states (twenty-four states have repealed the Article, and five have adopted the amended version). Article 4A, promulgated in 1989, has been adopted in all but three states in the three years since its promulgation. This very rapid progress is explained largely by the fact that Article 4A is highly specialized legislation dealing with banks and large users, and has no opposition. Nineteen states and the District of Columbia have yet to enact the 1990 amendments to Articles 3 and 4. This history of prior enactments of amendments to the Code indicates that it will usually take a decade or two to secure relatively complete state adoptions of amendments recommended by the NCCUSL and the ALI.

The difficulty of approving and passing amendments is an important factor in determining whether to engage in a major expansion of commercial code coverage. It is too much to expect that an expanded U.C.C. will be free of provisions that are soon seen to be ill advised. Even the original Code, which received an extraordinary amount of review and criticism before promulgation, was not free of such problems. Three examples, one each from Articles 2, 3, and 4, are illustrative. Section 2-601 states a perfect tender rule for single delivery sales contracts under

107. Id. at xi (Table of State Enactments of 1977 Amendments).
108. Id. at xiii (Table of State Enactments of 1987 Amendments).
109. Id. at xv (Table of State Enactments of 1988 Amendments).
110. Id. at xvii (Table of State Enactments of 1989 Amendments).
which a buyer can reject for "any defect." In the ordinary case, such a rule does no serious harm to a seller because the rejected goods can be resold to another buyer. If, however, the goods are specially manufactured for the buyer, a perfect tender rule can cause serious harm to a seller because it may be unable to resell the goods. However, section 2-601 makes no distinction between specially manufactured goods and other goods. In spite of the lack of statutory support for a distinction between specially manufactured and other goods, in D.P. Technology Corp. v. Sherwood Tool, Inc., the court held that "where the nonconformity involves a delay in the delivery of specially manufactured goods, the law in Connecticut requires substantial nonconformity for a buyer's rejection under 2-601 ...." That court clearly reached a just result but only by disregard for the statutory language.

Probably the most famous and most wrong of the "wrong" rules of the original Code is section 3-419(3), which protects a depositary bank from a direct claim by the owner of a stolen instrument when the bank takes the instrument for deposit under a forged indorsement, even though the bank is liable in warranty to a drawee bank that pays the check. The only consequence of the rule is to make it more difficult for the person from whom the check is stolen to recover for the value of the stolen instrument, because she has to pursue the various drawers or drawees, rather than the depositary bank in which, typically, the wrongdoer deposits a number of stolen checks.

114. Id. at 1044.
115. Perhaps § 2-601 will be amended in revised Article 2 to either abandon the perfect tender rule or to make it inapplicable to specially manufactured goods that are not readily resalable.
116. The subsection reads:
Subject to the provisions of this Act concerning restrictive endorsements a representative, including a depositary or collecting bank, who has in good faith and in accordance with reasonable commercial standards applicable to the business of such representative dealt with an instrument or its proceeds on behalf of one who is not the true owner is not liable in conversion or otherwise to the true owner beyond the amount of any proceeds remaining in his hands.
U.C.C. § 3-419(3) (1987).
117. Under original § 3-419(1)(c) an instrument is converted when it is paid on a
few courts refused to believe that the drafters meant to create such a peculiar indirect liability system and allowed the owner of the stolen instrument to sue the depositary bank; others said the law is the law and we must follow it, bad as it may be. In spite of the obvious unfairness, even absurdity, of the rule, it took more than thirty years, and a full revision of Article 3, to secure a legislative change of the rule.

In Article 4, the original rule that a bank has finally paid an item when it completes the process of posting the item to the account of its customer surfaced very early as a problem in modern computer check processing systems. Under the rule, whether a stop order on the check, a garnishment on the account, or other action with respect to the account comes too late to affect the check being processed depends on the internal procedures of the bank. Those procedures are largely automatic procedures and are, in any event, within the entire control of the bank. Again, it was not until the revision of Articles 3 and 4 that the difficulty was removed by replacing the completion of

forged indorsement. U.C.C. § 3-419(1)(c) (1987). Therefore, the owner from whom a check is stolen has an action against the drawee bank. However, under original § 4-207, a depositary bank warrants to the drawee bank that it has good title. U.C.C. § 4-207 (1987). It does not have good title because it took under a forged indorsement.

Generally, conversion law applies to instruments and a person who takes under a forged indorsement is liable to the true owner from whom the instrument was stolen just as if the instrument were an automobile or television set. The rule of original § 3-419(3) exempted depositary banks from that usual liability, even though original § 4-207 subjected them to warranty liability.

118. The absurdity of the rule was seen early. See Ervin v. Dauphin Deposit Trust Co., 38 Pa. D. & C.2d 473 (1965) (managing to avoid the clear meaning of the statute). Most courts did not apply it, however, notwithstanding their disagreement with the policy of the section. See WHITE & SUMMERS, supra note 103, § 15-5. For an excellent opinion criticizing the section but applying it, see Denn v. First State Bank, 316 N.W.2d 532 (Minn. 1982).

119. The section was not amended until the revision of Article 3 was promulgated in 1990. Revised § 3-420(c) reads:

A representative, other than a depositary bank, who has in good faith dealt with an instrument or its proceeds on behalf of one who was not the person entitled to enforce the instrument is not liable in conversion to that person beyond the amount of any proceeds that it has not paid out.

U.C.C. § 3-420(c) (1990) (emphasis added).

120. The rules appeared in original §§ 4-109, 4-213(1)(c), and 4-303(1)(d).
posting as a cut off time by a specific hour to be fixed by the drawee bank.\textsuperscript{121}

It should be noted that these three examples of inappropriate statutory rules in the original Code probably were not mere oversights or drafting goofs, but rather were probably the result of inadequate analysis or errors in judgment by the original drafting group. The drafting process through which uniform laws, and particularly the U.C.C., goes, is thorough. But nevertheless, as in all human endeavors, errors of analysis and failures of judgment occur. When they do occur, it is not easy to correct them.\textsuperscript{122}

In addition to the problem of mistakes in the original drafting, a perhaps greater problem with statutes is the difficulty of changing them when technology, business practice, or societal views change. One of the driving forces behind the present revision of Article 2 is the belief that the current Article 2 does not sufficiently deal with changed technology and changed business practice. Similarly, the Article 4 revisions now take account of the available efficiencies of modern communications systems by drafting so that the statute is compatible with retaining checks at the bank of deposit and transmitting the information on the check electronically to the drawee bank.\textsuperscript{123} The original Code articles for the most part have been “cast in stone” for thirty years. After revisions are made, the revised articles probably will be “frozen” for a similar period. But we can be certain that there will be technological, economic, and social changes that will make changes in the U.C.C. desirable.

\begin{footnotesize}
\textsuperscript{121} See revised U.C.C. §§ 4-215(a), 4-303(a)(5) (1990).
\textsuperscript{122} The authors do not agree with recent criticisms of the Commercial Code drafting process. It may not be perfect, but we believe no better system is in operation anywhere and that the Code process cannot reasonably be expected to be any better. For some recent criticism of the Code or uniform laws drafting process, see Kathleen Patchel, \textit{Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code}, 78 MINN. L. REV. 84 (1993); Edward Rubin, \textit{Efficiency, Equity and the Proposed Revision of Articles 3 and 4}, 42 ALA. L. REV. 551 (1991).
\textsuperscript{123} See revised § 4-406 and the comments thereto. Revised § 4-406 permits banks to provide customers with periodic statements that do not include paid checks, but rather with information about those checks. U.C.C. § 4-406 (1990).
\end{footnotesize}
In sum, there are a number of factors that lead us to oppose a hub and spoke expansion of the U.C.C. These include: first, the time, expense, and difficulty of the project; second, the certainty that inappropriate rules will find their way into the codification with adverse consequences for courts and litigating parties; third, the rigidity of any statute that often interferes with the goal of achieving a fair result in a particular case; and fourth, the difficulty of amending the statute when errors appear or when changes in circumstances require a modification.

As suggested above, an alternative approach to codification of commercial law that avoids at least some of the difficulties discussed would be a codification of general contract principles similar in detail of coverage (or lack thereof) to the Restatement of Contracts.

Such an approach might have some value. If as widely adopted as the U.C.C., it would provide lawyers all over the country, at least initially, with a common basis for argumentation and a common approach to analysis of problems. However, given the necessary generalization and imprecision of general rules that cover all types of contracts, uniformity of result over a substantial period is not likely as different courts interpret the general and relatively high level abstractions of the statute in different ways.

In 1965, the newly created British Law Commission undertook as a first major project a codification of contract law.\footnote{124. \textit{The Law Commission, First Annual Report, 1965-66}, at 7.} Eight years later, the Commission reported that it was abandoning its work on a codification of contract law and was rather going to “publish a series of Working Papers on particular aspects of the English law of contracts with a view to determining whether and if so what amendments of general principles are re-
quired.... When [the work] is complete, it is our intention to consider afresh the production of a contract code.”125 Between 1975 and 1977, the Commission completed working papers on firm offers, penalty clauses and forfeiture of monies paid, pecuniary restitution on breach of contract, the parol evidence rule, and implied terms in contracts for the supply of goods.126 Thereafter, up to 1992, only three additional working papers on contract issues were completed, one on minors' contracts in 1982, one on sale and supply of goods in 1983, and one on contracts for benefit of third parties in 1991.127 The Commission work resulted in the adoption of five very limited pieces of legislation dealing with the following subjects: exemption clauses in contracts (1973), contribution (1977), contract interest (1982), implied terms in contracts for supply of goods (1982), and minors' contracts (1987).128

In 1973, in announcing that it was abandoning its effort to produce a codification of contract law, the Law Commission stated: “We think... that the question whether the general principles of contract law require amendment, and if so, in what way, is logically anterior to codification and should be disposed of first.”129 Exactly so. Codification of the common law of commercial contracts is justifiable only if there are problems that a codification can cure and, of course, only after those problems have been identified. However, even if problems are identified that a statute could cure, a statute is not necessarily the best way to deal with the problem. Often, it is just as well to offer the courts a fresh approach in a less binding and constricting vehicle than a statute.

The restatements are a better way to attempt to develop a consensus on general contract principles than a codification of those principles. In general, we should be extremely reluctant to codify additional specific areas of commercial law. A Code can provide a unified, internally consistent set of rules that serve as a starting point for analysis. However, a Code also invites a

127. Id. at 36, 38.
128. Id. at 41, 45-46, 50.
sterile, exegetical mode of analysis that focuses more on the rules of the Code than on the reasonable and just resolution of a problem. A Code freezes the stated principles until a recodification is completed and adopted. A restatement merely provides a new beginning for common law development. Also, a Code, even though drafted at a high level of generality, is likely to state some rules or principles that will not be appropriate to some of the fact situations to which they seem literally to apply. In such a case, courts may feel compelled to follow the stated rule or principle even though they are convinced that it produces an unjust result, or they may avoid the rule by more or less disingenuous misreading of the Code language. Either result is not a particularly happy one.\(^3\) If the formulation of a rule or principle merely provides a new beginning for common law development, the courts can accept the basic principle stated, but mold or change it to fit varying circumstances and can also mold or change it as the economy, society, and technology change.

In the early years of the American Law Institute when the restatement projects were being formulated, the possibility that they should be prepared for adoption by the various states was considered and explicitly rejected.

If the “principles” in the restatement of the law were made with a view to their adoption by legislatures as a formal statutory codification of the law, one or the other of these two distinctive features of the common law, its flexibility or its fullness of detail, would have to be sacrificed . . . . We fear that if the law stated in this detail were given the rigidity of a statute, injustice would result in many cases presenting unforeseen facts.\(^3\)

In early drafts of the Revised Uniform Sales Act (later Article 2 of the U.C.C.), Karl Llewellyn proposed that the statute be treated as common law. Section 1-A(1) of the Second Draft of the

130. See supra notes 116-19 and accompanying text (discussing briefly the experience under the original U.C.C. § 3-419(3)).
Revised Sales Act stated: "In the construction of this Act, it shall be deemed to state the common law principles of sales and of contracts to sell; and its provisions may be applied, developed or limited as in the application, development or limitation of common law principles by judicial decisions..."132 The comment on section 1-A stated in part:

(a) The comprehensive treatment in an Act of a whole field of law must either be developed by the Courts in the light of unforeseen circumstances, or else become a straitjacket.  
(b) An Act intended as semi-permanent, and intended not to be amended in detail as occasion may arise, requires to provide its own machinery for expansion or gradual alteration.133

Llewellyn then argued in the comment that the better courts had already been treating the Sales Act in just that way, "[b]ut it is bad engineering to force all such matters into the framework of a supposedly fixed and absolute legislative intent, when the circumstances require, instead, that such intent be confined to the essential reason of the rules laid down, as in the case of common law principles."134

By the 1944 draft, the language of previous section 1-A had disappeared,135 but the idea that the statute should be treated as an expression of the common law was continued in a long comment to new section 1 of the Act.136 By the 1949 draft—now called the Uniform Commercial Code—the earlier long comment had been reduced to a few paragraphs that suggested that the courts be flexible in interpretation of the Code, but that no longer suggested that the Code be treated as common law. Presently, the first and last paragraphs of comment 1 to section 1-102 of the Code are all that remain of Llewellyn's effort to make the Code statutory common law.137
It appears that the members of the National Conference of Commissioners on Uniform State Laws and the American Law Institute found Llewellyn’s idea of a common law statute too radical for acceptance. And, of course, it may very well have been a bad idea. In cases where the Code rejects the existing common law or prior statutory formulations, or makes a difficult choice between competing policies, it may have been unwise to invite the courts to treat the issue as it would a common law decision. At the same time, however, Llewellyn saw clearly a major difficulty with statutes, and tried to deal with it. Llewellyn’s solution for the difficulty permitted courts to deal with statutes that are too broadly or too narrowly drafted and with statutes whose rules become inappropriate as changes in business, society, and technology occur. Both problems could be dealt with by prompt amendment of the offending statutes, but experience teaches us that many clearly broken statutes do not get fixed for a very long time.\(^\text{138}\)

As noted, Llewellyn’s “common law statute” could have been changed by a court to meet changed circumstances, thereby reducing the difficulty created by failure of legislatures to update legislation. Jack Davies, now a judge on the Minnesota Court of Appeals, in 1979 made a proposal similar to Llewellyn’s to deal with the obsolescence of statutes. Judge Davies, at that time a professor of law and a member of the Minnesota legislature, proposed a statute reading in part as follows:

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This Act is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen or new circumstances and practices. However, the proper construction of the Act requires that its interpretation and application be limited to its reason.

. . . This Act should be construed in accordance with its underlying purposes and policies. The text of each section should be read in the light of the purpose and policy of the rule or principle in question, as also of the Act as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.


138. See, e.g., supra notes 116-19 and accompanying text.
Subdivision 1. To reduce the potential for obsolescence in the law and to serve justice, courts adjudicating cases and controversies may modify and overrule statutes described in subdivision 2 in the manner they modify and overrule principles and precedents of common law.

Subdivision 2. Subdivision 1 applies to a statute: (1) that has been in effect for more than 20 years prior to the event or transaction to which it is being applied, and (2) that imposes rules of private, rather than public, law.\textsuperscript{139}

The proposed act went on to define private law to include, inter alia, contract law.\textsuperscript{140} As one can imagine, the act was too radical for acceptance.

Much better known than Judge Davies' proposal is that of Dean Guido Calabresi that generally "common law courts have the power to treat statutes in precisely the same way that they treat the common law."\textsuperscript{141} Calabresi would extend to all statutory law, therefore, the rule proposed by Llewellyn in the Revised Uniform Sales Act. Calabresi's proposal is more sophisticated and subtle than the above quote suggests: the full flavor of the proposal can only be gained by reading Calabresi's book in which he sets forth the proposal and elaborates upon it. For our purposes, the point is that both Davies and Calabresi have tried to find a remedy for the inevitable obsolescence of statutes.

However, the idea of treating a statute as if it were common law arose much earlier than the proposals of Davies and Calabresi. In 1872, the California legislature codified the common law in a "Field" Code.\textsuperscript{142} John Norton Pomeroy proposed that the courts should treat the codification as they would the common law itself with the power to modify the statutory rules that that implied.\textsuperscript{143} In what may involve some hyperbole, Grant Gilmore reports that "[w]hat came to be known as the Pomeroy rule was enthusiastically supported by all concerned.

\textsuperscript{139} Jack Davies, A Response to Statutory Obsolescence: The Nonprimacy of Statutes Act, 4 VT. L. REV. 203, 204 n.7 (1979).
\textsuperscript{140} Id.
\textsuperscript{141} CALABRESI, supra note 131, at 82.
\textsuperscript{142} Id. at 83.
\textsuperscript{143} For a discussion of this proposal, see id.
For the next hundred years, the law in California developed in much the same way that it developed in the rest of the country without benefit of codification."\textsuperscript{144} While Gilmore may somewhat overstate the case, there is no doubt that the California courts have been willing to change the rules stated in the Code. Gilmore cites as an example the adoption of comparative negligence by the California Supreme Court in 1975, even though section 1714 of the 1872 Code adopted a contributory negligence rule.\textsuperscript{145}

Llewellyn, Davies, Calabresi, Gilmore, and Pomeroy were all concerned with either the inflexibility, the obsolescence, or both, of statutes. They all proposed a similar solution: judicial freedom to modify the statutory rules. We suggest a simpler solution, also suggested by Gilmore: legislatures should not adopt so many statutes. As stated by Gilmore: "The next generation of lawyers may be able to see more clearly than our own generation has done the virtue of leaving problems to a common law development instead of rushing in with a ready-made statutory solution."\textsuperscript{146}

IV. CONCLUSION

To return to the specific issue dealt with in this Article, the sponsoring organizations of the U.C.C. should be hesitant about extending the Code to cover additional types of transactions. The urge to "do something" is not always an urge that should be satisfied. Statutes do good and are necessary when there is a desire to impose restraints on contracting parties in specific ways, or when an administrative structure is being set up to deal with a particular industry, or perhaps when courts have taken many different and inconsistent positions with respect to an issue, or when experts in an area believe that courts are reaching the wrong result because they do not thoroughly understand the transaction in question.

\textsuperscript{144} Grant Gilmore, Putting Senator Davies in Context, 4 VT. L. REV. 233, 242 (1979).
\textsuperscript{145} Id. at 242-44 (discussing Li v. Yellow Cab Co., 532 P.2d 1226 (Cal. 1975)).
\textsuperscript{146} Id. at 245.
However, in general, the common law with its richness of ideas, its extreme diffusion of law making power, and its flexibility, have served the country well. We do not need to reinvent the commercial contracts wheel, or even remanufacture many of its spokes.