Potentials for Uniform Treatments of E-Commerce

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Abstract

The Internet is a wonderland that can be enjoyed by the young, old, and those in-between. It is also a vast commercial market where many contracts are formed every second. The Internet and E-Commerce have created new situations that have generated sweeping proposals for fundamental changes in contract law. During the first half of the 20th Century, when many businesses expanded their geographic scope, there was a tremendous desire for uniform treatment of contracts for the sale of goods throughout the U.S.A. and the whole world. That same dynamic is now occurring in E-Commerce. There is a general recognition of the desirability of uniform contract law to govern E-Commerce, but to date that does not exist, though there are extensive proposals for reform of contract law on the Internet.

E-Commerce is currently plagued by some of the same problems that led to the passage of the UCC. In the absence of uniform legislation, state-by-state differences are inevitable with respect to E-Commerce. State-by-state differences in E-Commerce contract law is widely viewed as undesirable. To deal with this problem, a number of uniform bills have been proposed including UCITA, UETA, and revisions to Article 2 of the UCC (Subpart B). The thrust of these uniform acts is to create legal parity between paper records and electronic records. There is considerable resistance by consumer groups to this parity and progress towards Passage of UCITA , UETA, and revised Article 2 has been slow.

The UCITA covers licenses of computer software but does not cover the sale oil goods on the Internet. The scope of the UCITA includes computer software, multimedia interactive products, computer data and databases, and Internet and online information, The UETA deals comprehensively with E-Commerce and contract law. The UCC covers the sale of goods, which does not necessarily involve E-Commerce. The basic principles of contract law are modified to deal with Internet transactions. Intent is inferred from the operations of electronic agents and "signatures" can occur with a response to an invitation to click to accept.

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I. Preface

The Internet is a wonderland that can be enjoyed by the young, old, and those in-between. It is also a vast commercial market where many contracts are formed every second. The Internet and E-Commerce have created new situations that have generated sweeping proposals for fundamental changes in contract law. During the first half of the 20th Century. when many businesses expanded their geographic scope, there was a tremendous desire for uniform treatment of contracts for the sale of goods throughout the U.S.A. and the whole world. That same dynamic is now occurring in E-Commerce. There is a general recognition of the desirability of uniform contract law to govern E-Commerce, but to date that does not exist, though there are extensive proposals for reform of contract law on the Internet.

As we know, the common law of contracts evolved from cases and precedent. As a consequence. each state in U.S. and countries had its own unique contract law based on the cases and precedents in that state and country. When most companies were small and sold most of their output intrastate and intranation, the fact that each state and country had slightly different contract laws was not a major commercial inconvenience. But as companies grew larger in U.S.. dissatisfaction of contract law became more evident, particularly in the sale of goods. Expecially companies based in state in U.S. that were selling goods nationwide had to be prepared to defend themselves against claims in every state in which they had sales because, if the company sold direct to purchasers in another state. minimum contacts and jurisdiction were established. So, if a customer in North Dakota claimed their vacuum cleaner did not work properly, they could sue the New York vacuum cleaner company for breach of contract in North Dakota, taking advantage of any peculiarities of North Dakota contract law. Even less palpable contacts with buyers in other states in U.S., such as owning an office, directing advertisements, or hiring sales representatives in another state, satisfied the minimum contacts jurisdiction test. Eventually, dissatisfaction with contract differences across states led to the Passage of the Uniform Commercial Code (UCC) by all 50 states in U.S. during the 1950s and 1960s. The impact of the UCC was to increase certainty on the part of interstate sellers and so facilitate interstate commerce.

With a focus on contract law applicable to product sales, the UCC does not apply to the many other forms of contract law not involving the sale of goods. This includes contracts for employment, real estate, and indeed, most other transactions. For many of these(nonproduct) transactions, state by

state differences in contract (and other branches of) law still exist. For the past 100 years a group of judges and attorneys, concerned with differences among the states in U.S. in various branches of law have formed the National Conference of Commissioners of Uniform State Laws(NCCUSL). The NCCUSL is dedicated to reducing or eliminating state by state differences in many areas of law from child adoptions to trade secret protection.[1] The major project of the NCCUSL lately has been development of uniform contract law for the · Internet. NCCUSL has developed and revised the Uniform Computer Information Transactions Act (UCITA) and the Uniform Electronic Transactions Act (UETA). Also the NCCUSL has proposed significant revisions of the UCC to accommodate E-Commerce. All of these proposals for change are discussed below.

Ⅱ Overview

There are four major issues related to E-Commerce contract law. Of coures there are other E-Commerce contract law issues that undoubtedly will surface in the future and are present currently. The four issues have been the subject of much controversy and legal resolution of these issues is not clear at this point. The four issues we look at are :

1. **Parity between Electronic and Paper Records**: The prospect of treating electronic records the same as paper records is opposed by many groups who are advocates of consumer interests. "Record" is the term now used to replace "document" or "writing".
2. **Enforceability of Shrinkwrap, Clickwrap, and Boxtop Licenses**: There are significant contract formation issues associated with shrinkwrap, clickwrap, and boxtop licenses and terms of contracts that are added after a buyer has agreed to purchase a product subject to such licenses.
3. **Attribution Procedures**: With electronic (mouse-click) purchases, a vendor needs secure mechanisms to be assured that the order that they have received is legitimate. Accompanying concerns revolve around the conditions under which a vendor can sue a person for an order received online.
4. **Digital Signatures and Certificates**: With standard paper contracts, signatures have operated to uniquely identify parties to a contract. Obviously, that is a problem in E-Commerce transactions, too. Recent legislation by Congress attempts to provide several acceptable substitutes to traditional signatures in electronic commerce, but not without remaining concerns.

1) www.nccusl.org

1. Uniform Commercial Code

In U.S.A. during the first part of the 20th Century, dissatisfaction with differences in contract law among the states in the sale of goods led to the composition and passage of the Uniform Commercial Code. As the name indicates, the UCC deals with commercial contracts and it deals exclusively with the sale of goods. When U.S. companies began selling to customers located in many different states and countries, the demands for uniform contract treatment became more intense and work began on the Uniform Commercial Code. Dissatisfaction with the status quo was so universal that all 50 states have adopted the UCC.[2)]

Still, there are many commercial transactions not subject to the UCC including those associated with service contracts and licenses of information. Since computer services, including management of information systems and information technology, have become increasingly important, the beneficial impact of the UCC has lessened. Hence, a return to the "bad old days" of state-by-state differences in contract law is a concern of the business and legal communities. To deal with this unpleasant reversal of progress, an ambitious set of new "uniform" laws has been proposed. but has not yet been enacted by most states. It should be noted, too, that there is considerable resistance from some consumer groups to the adoption of these new "uniform" acts.

Also in some cases, computer software has been treated as a good for purposes of the UCC in the same way that a book is a good. The contents of a book are intellectual property of an author, but the book itself is classified as a book (that is, a good). In some cases the courts have made the same analogy with computer software

〈Table 1〉 Classifications of the Contract Law

UCC	Universal Commercial Code-applies to anything dealing with interstate commerce
Article 2	The sale of goods
Article 2B	Electronic transactions
Section 2-207	Additional terms
Section 2-210(a)	Legal recognition of electronic records and authentications
Section 2-212	Forming contracts electronically
NCCUSL	National Conference of Commissioners on Uniform State Laws
UCITA	Uniform Computer Information Transactions Act
Section 212	Efficacy and Commercial Reasonableness of the Attribution Procedure
Section 213	Determining Attribution
Section 214	Electronic Error: Consumer Defenses
UETA	Uniform Electronic Transaction Act (proposed)
Section 103	Applies to electronic records and signatures for commerce purposes
Section 104	Excludes transactions covered by other laws
Section 106	Electronic signatures are valid
Section 204	Legal recognition of electronic records

2) The only state that has adopted UCC with some significant differences is Louisiana, which has a continental law tradition.

2. UCC Revisions: Proposed Article 2 Subpart 2B Electronic Records and Intent

Article 2 of the UCC, which governs the sale of goods, has been rewritten and is in the process of being reenacted to accommodate E-Commerce. Under the proposed revisions to Article 2 of the UCC, a new Subpart B: Electronic Transaction has been added to Article 2 to make clear that it is the controlling law with regard to electronic sales of goods.[3] Proposed Section 2-210(a)(of Subpart B), Legal Recognition of Electronic Records and Authentications, declares that electronic records are to be treated the same as other records(written documents) germane to contracts. This is a bone of contention between the NCCUSL and attorneys representing consumer groups. The NCCUSL wants parity between electronic records and paper records, while consumer groups cite numerous situations in which electronic records fail to protect consumers as well as paper records do.

Proposed Section 2-212(of Subpart B) states that contracts can be formed with the aid of electronic agents "even if no individual is aware of its receipt(of an electronic message)." These two changes,(1) legal recognition of electronic records and (2) contract formation when one or both sides to the contract are electronic agents, are also present when electronic contracts are formed not involving the sale of goods. Proposed Article 2 of the UCC (which deals with the sale of goods), UCITA, and UETA all agree that electronic records should be given equal weight with paper records and that contracts can be formed electronically when one or both of the parties is represented by software and electronic agents.

3. The Uniform Computer Information Transactions Act[4]

In trying to address the many challenges posed to the UCC by E-Commerce, the Commissioners at the NCCUSL decided not to revise the UCC with respect to the licensing of computer information as had originally been proposed. Instead of completing a new section of the Uniform Commercial Code, the authors have re-named the proposed uniform statute the Uniform Computer Information Transactions Act (UCITA). The scope of

3) www.nccus l.org/draftingprojects.htm#cc2.

4) A U.S group that works to unify state laws today overwhelmingly approved a controversial proposal to adopt common licensing rules for software and other information technology transactions that critics contend would hold IT companies hostage to the whims of software venders . The Uniform Computer Information Transactions Act (UCITA) was voted on during a meeting in Denver of the National Conference of Commissioners on Uniform State Laws (NCCUSL), a private group of more than 300 lawyers, judges and law professors. Under NCCUSL guidelines, draft legislation has to be approved by a majority of states present when votes are taken, and that majority must include representatives from at least 20 states.
Source: Excerpt from: July 29, 1999, Jack Mccarthy and Nancy Weil, IDG News Service/Boston Bureau: www.nccusl.org.

UCITA includes computer software, multimedia interactive products, computer data and databases, Internet and online information. UCITA deals with the lease of computer information, which occurs whenever you "purchase" software. Most people are aware that a purchaser of software is actually purchasing the right to use the software within the constraints of the software license. You can "purchase" software at a store or online but there are restrictions in most licenses that prevent you from copying the software and reselling it to several friends.

UCITA will not be part of the UCC but, instead, is being put forward separately by the National Conference of Commissioners on Uniform State Laws[5]. With this approach, the Uniform Law Commissioners will attempt to have each state enact UCITA as a stand-alone statute that will uniformly regulate a category of computer law applicable to certain transactions in U.S.A.. To date UCITA has been adopted by only two states, Virginia and Maryland. UCITA is the source of considerable controversy as groups purporting to represent consumers and business interests, particularly high-tech business interests, have a number of concerns over UCITA content.

By design, UCITA will cover licenses of computer software, but the sale on goods in the Internet will still be subject to the UCC.[6] As with the UCC, UCITA is a substantive, gap-filling statute. If the parties to a contract do not have a particular term in the contract regarding an issue such as implied warranties, UCITA supplies that term. For example, if nothing is said in the contract licensing the software to a purchaser about implied warranties, UCITA requires that, "a licensor that is a merchant with respect to computer programs of the kind warrants: (1) to the end user that the computer program is fit for the ordinary purposes for which such computer programs are used;……" This is the UCITA equivalent to the UCC's implied warranty of merchantability[7]. A draft of UCITA is available at www.law.upen.edu/bll/ulc/ulc_frame.htm.

In the absence of laws dealing specifically with computer-conducted commerce, courts in the Fast have dealt with cases involving computer transactions by applying the UCC. The fit between the UCC and computer software disputes is often deficient, as the Advent case[8] indicates.

4. Uniform Electronic Transaction Act

The NCCUSL is also proposing the Uniform Electronic Transaction Act

5) see www.nccusl.org
6) Section 103 of UCITA, which excludes any transaction involving the sale of goods for which the primary purpose of the sale is the goods and not transfer of information.
7) Section 403 (a)(1) of UCITA
8) Advent Systems Limited v. Unisys Corporation United States Court of Appeals, Third Circuit 925 F.2d 670(1991)

(UETA)[9]. According to Section 103 of the UETA, "this Act applies to electronic records and electronic signatures generated, stored, processed, communicated or used for any purpose in any commercial or governmental transaction." Section 104. however, excludes from the coverage of UETA the transactions that are subject to other law Including UCITA. The essence of the UETA is contained in Section 201: Legal Recognition of Electronic Records. According to subsection (a), "a record may not be denied legal effect, validity or enforceability solely because it is in the form of an electronic record." Subsection (b) indicates that, "[I]f a rule of law requires a record to be in writing, or provides consequences if it is not, an electronic record satisfies that rule." The bottom line is that e-mails could supply evidence of a written agreement that is require by the Statute of Frauds, UETA's treatment of the effect of electronic records is the same as proposed in both, Section 2B of the proposed revision of the UCC and UCITA.

UETA is a uniform law approved July 1999 by the National Conference of Commissioners on Uniform State Laws (NCCUSL). If adopted by state legislatures, UETA will elevate electronic records and signatures to the same legal status accorded records and handwritten signatures. UETA is grounded on three premises:

- That most state law requirements for a writing can be satisfied by an electronic record, including an email.
- That most state law requirements for a signature can be satisfied by an electronic signature.
- That, in most cases, the parties to a contract can agree to any form of electronic communication.

Often, however, these premises do not apply in consumer contracts. The first premise will be true in only some consumer situations. An electronic record may be just as good as a written record for an inexpensive transaction that is completed in a short time. On the other hand, a consumer entering into a five-year car loan or a 30-year mortgage needs the note and contract in a form which he or she can keep. Home computers are replaced every few years, and previously downloaded contracts are unlikely to be copied over to a new system. Change-of-terms notices for a service provider operating only on the Internet probably can be delivered by email, but a notice that your car is being recalled for a safety problem should arrive in the mail.

The first premise also assumes that email arrives at least as reliably as regular mail, which is contrary to the experience of many consumers. Consumers currently may change email addresses more frequently than they move. Those with email addresses seem to check them either far more

9) the text of which Is available at the same website http://www.law.upenn.edu/libray ulc/uecicta/etal197.htm

frequently or far less frequently than their daily check of the regular mail. In addition, an Internet email provider may go out of business, leaving a consumer with no choice but to obtain a new email address.

As to the second premise, an electronic signature for not always fully serve the purposes of a written signature. Where there is a risk of forgery, a written signature may provide additional safeguards because it may be harder to forge than a purported electronic signature. An electronic click made at home may not serve the purpose of emphasizing the seriousness or the particular risks of a transaction as well as a written signature.

The third premise of UETA is reflected in the broad deference it gives to the autonomy of contracting parties It defers to the agreement without distinguishing between negotiated agreements and standard form contracts or contracts of adhesion. This approach could give wide latitude to drafters of standard form contracts to define and impose the conditions of electronic communication.

UETA permits the parties to the contract to vary these definitions so that "sent" and "received" can be redefined to be anything. Under UETA, a web seller could define information to have been received by the buyer at the moment that the seller posts that information to its own web site–even if the customer is not aware of its posting.

Ⅲ Relationships between Proposed Section 2B of the UCC, UCITA and UETA

UETA is a procedural statute that applies to a transaction as long as the parties to the contract agree to use electronic commerce for that transaction. Both revised Article 2 of the UCC (Section 2B) and UCITA are substantive statutes that supply terms to contracts when such terms in the contract are absent. UETA deals comprehensively with E–Commerce and contract law, while the revised Article 2 of the UCC deals[10] mainly with the sale of goods, which may involve E–Commerce but may not. NCCUSL staff who are developing revisions of Article 2 of the UCC and those composing UETA and UCITA have made efforts to coordinate the three acts so that the same behavior under the three acts has the same legal consequences. Also there are a number of categories of laws that are excluded from the coverage of UETA including laws relating to real estate transactions, trusts, other than testamentary trusts, Articles 3, 4, 4A, 5, 6, 7, 8, or 9 of the Uniform

10 Comments to Revised Article 2–207: Fourth, gaps in agreements where a contracts is formed are filled by 'terms' supplied by or incorporated from the UCC.

Commercial Code, and other more recent statutes which address the use of electronic records. This list of exclusions under UETA is not exhaustive.

As noted above, the UCC and UCITA are substantive gap-fillers in contract law. If the contract between two parties (businesses or end users) is silent on a point of law, such as responsibility for the risk of loss for mistransmission of an electronic response (say the consumer clicks on the wrong button), the aforementioned statutes will govern unless the parties agree on a different provision. If businesses or customers do not like the outcomes provided by the aforementioned statutes, they are free, with very few limitations, to fashion their own contract terms. A major criticism of UCITA and the other E-Commerce contract revisions is that they treat consumers and businesses as equals in terms of negotiating contracts-in fact, most vendors on the Internet offer contract terms to collsumers on a "take it or leave it" basis.

A major thrust of proposals for E-Commerce contract law is to provide electronic records with parity to paper records. The least controversial of the three proposed revisions (Revised Article 2B, UCITA, and UETA), UETA has been attacked by the widely respected Consumers' Union.[11] To date 40 states have adopted UETA. Needless to say, promoters of UETA, including the NCCUSL, are hoping for a 50-state adoption.

The NCCUSL maintains a legislative list of how many states have adopted their proposed uniform laws along with explanations of why states should adopt these uniform laws. The included article Insert is a recent NCCUSL statement of its position on why all states should adopt UETA. In light of the two previous articles, consider the confusion generated by the following case because of the ambiguous status of electronic records. If electronic records are treated the same as paper records, thell consumers are bound by paragraphs buried in subscriber agreements. which are regularly ignored by most people. If consumers are not bound by membership agreements, then vendors would be reluctant to enter into agreements with customers because customers would not be bound and limitations of liability would not be enforceable.[12]

11) The position of the Consumers Union is reflected in the statement above, which has been excerpted from their website at http://www.consumerunion.org/contract.htm.

12) in Re Realnetworks, Inc., Privacy Litigation United States District Court N.D. illinois, Eastern Division 2000 WL 631341 (N.D.m.) (2000)

Ⅳ Potentials for Uniform Treatments by the Internet and E-Commerce

1. Formation of Contracts: Common law

The common law theory of contract presupposes that an offeror mainfests (1) intent to make an offer, (2) that contains certain terms that are reasonably definite, and (3) that the offer is communicated to the offeree. The offeree also is assumed to manifest intent to be bound by certifying assent to the terms in the offer.

The aforementioned basic principles of contract law must be substantially modified to deal with the commercial realities of Internet transactions. Sometimes intent must be gleaned from electronic agents that operate based on artificial intelligence. Signatures are generally used in written contracts to memorialize intent and yet signatures are not easily facilitated on the internet, thought there is something called "digital signature". Intent is just one of the thorny issues that has had to be dealt with in attempting to meld traditional contract law with E-Commerce. Both UCITA and revised Article 2 of the UCC allow intent to be inferred from the operations of electronic agents, and signature (called authentications) can occur with a response to an invitation to click to aeccpt.

Electronic Data interchange (EDI) is a closed system in which one company's computer communicates with another computer from a different company. EDI is closed because it is net accessible by outsiders, as is a website on the World Wide Web. EDI has proved to be a very effcient means of doing business between two large companies that have a large volume of business that is expected to continue for an indefinite duration. EDI orders (contracts) for the replacement inventory items described arc formed electronically · without human intervention and are legally enforceable based on whichever of the current UCC or the Revised Section 2B applies to the transaction.

2. Contract Formation Issues involving Computer Software

It is virtually impossible to browse the Internet without encountering offers. Indeed, the opening frames shown by Internet Service Providers (ISPs). such as America OnLine (AOL), are accompanied by legally binding offers to contract. The offeror in this case is a company whose offer is out there for all to see. If the member uses search engines, (s)he will be exposed to banners that include additional offers to sell various products. The offer is

electronic, though prospective customers could print it out. There is a question as to what the offer actually is, however. Assume that the offeror is trying to sell software that recognizes human voices or a digital camera. There are generally both narrative and various visual descriptions of the product(s) and the prospective customer is invited to purchase the product on-line. Often the seller will request credit card information to effect the sale, but generally other methods of payment are accepted such as checks or money orders.

1) Additional Terms and Acceptances with a Click

Under the common law of contracts an acceptance must be complete and unqualified, meaning that the offeree agrees to each and every term in the offer and does not add additional terms. If the offeree adds additional terms in the acceptance or requests a change in the offer, the offeree has made a counter offer and becomes the offeror. In the past, the absolutist approach of the common law of contracts clashed with commercial practice that often involved company forms such as invoices (from the seller) and purchase orders (from the buyer) that each contained contract terms. When the UCC was enacted, it specifically allowed for additional terms in the acceptance and that allowance has been continued under the proposed revisions under Article 2 (Section 2-207).

In fact, the proposed Section 2-207 of the UCC make it easier (than in the current Article 2 of the UCC) to include additional terms in the contract that were not in the offer. Proposed Section 2-207(b) states that, "if a contract is formed by offer and acceptance and the acceptance is by a record containing terms ofditional to or different from the offer ... the terms of the contract Include:

1. terms in the records [offer and acceptance] of the parties to the extent that they agree;
2. nonstandard terms, whether or not in a record. to which the parties have otherwise agreed;
3. standard terms in a record supplied by a party to which the other party has expressly agreed: and
4. terms supplied or incorporated ulider any provision of the UCC."

Under the current Article 2. additional terms in the acceptance were not part of the contract if these terms materially altered the contract[13]. When the new Article 2 is passed. additional terms in the acceptance will be part of the contract even if they materially alter the contract. The bottom line is that additional terms in the acceptance are firmly established in commercial practice and the UCC. The case of Step-Saver Data Systems, Inc. v. Wyse

13) Section 2-207(2) "between merchants such terms become part of the contract unless: ....(b) they materially alter in: or,"...

Technology U.S. Court of Appeals,3rd Circuit 939 F.2d 91, (1991) illustrates the difficulties of applying "old" UCC law to E-Commerce transactions.

2) When Additional Terms in the Acceptance (or Offer) Are Enforceable

When the customer signifies wiilingnees.j to purchase an item online, he or she is often confronted with additional terms of the "offer" Among these terms are various clauses regarding warranties, return Policies. reproductions or duplications of the product if it is soft ware and other "fine print". The purchaser is cautioned that assent to purchase the Item means that the purchaser agrees to each term in the fine print. These terms are often called " clickwrap" agreements and their enforceability is crucial to the transaction, particularly if the item is purchased over the Internet. In effect, the offer to sell is accompanied by terms that are not apparent to the purchaser before the decision to purchase is made. Much the same situation occurs if software is purchased over the counter at a retail outlet at a computer store. In a "shrinkwrap" agreement. the customer is bound by the terms of the contract even though the customer cannot know what many of the terms are until she has paid her money and breaks open the (shrink) wrapping around the CDs or diskettes that contain the software program. A " boxwrap" (or boxtop) agreement has simiiar characteristics in that the consumer can only discover the term of the contract by opening the box and reading the terms of the contract, usually at the bottom of the box next to the product. The Hill case[14] illustrates the need for customers to read boxtop agreements and respond promptly. Note that there is no requirement for an arbitration clause to be highlighted among the clauses in the boxtop agreement.

3. Modern Contract Law: Layers of Terms

The distinctions between the specifics of many e-contracts and traditional requirements for valid contracts should be clear. In E-Commerce, intent is presumed by the electronic offer made by the vendor. The offeree's intent to assent to the terms of the contract provided by the offeree is manifested by a click from the customer or even by the operation of an electronic agent. As we have seen, the offeree often cannot know the terms of contract until after physical transfer of the product has occurred. In effect, the buyer learns what he or she has assented to after paying money and receiving the product. Once these conditions have been satisfied, the legal question becomes, "Is the customer bound by terms of an agreement that he or she learns about after purchase?" The

14) Rich and Enza Hill v. Gateway 2000, Inc. U.S. Court of Appeals for the Seventh Circuit 105 F.3d 1147(1997)

answer is yes provided several conditions are met. These include:

1. The customer must be given clear notice of the additional terms, which must be written in understandable English.
2. The customer must be given clear notice as to what constitutes acceptance. Acceptance could be manifested by a click at the appropriate button, breaking the wrapping around software, or by choosing not to return a product in a specified time interval.
3. The customer must have an of opportunity to inspect are terms in the wrap agreement.
4. The customer has an unqualified right to return the merchandise for a full refund if the customer does not agree to the terms contained in the clickwrap, shrinkwrap, or boxwrap.
5. The customer cannot be bound by terms that are unconscionable in light of ordinary commercial standards.

Much software can be purchased over the Internet and, when such purchases occur, the buyer is technically a licensee and not owner of the software so that UCITA applies. The software vendor (really a licensor) will generally have terms in the contract restricting what the licensee can do with the software. Examples are provided by the Hill and Step-Saver cases.[15] ZDNet has a clickwrap agreement for its software.[16] There have been several cases that illustrate the enforceability of clickwrap agreements (as well as shrinkwrap and boxwrap). The evolution of these cases shows that the courts are increasingly receptive to the enforceability of these agreements.

UCITA explicitly deals with additional terms in comments to Section 210. Adopting Terms of Records. In Comment 3, the composers of UCITA make the following observation, "In ordinary commercial practice, while some contracts are formed and their terms fully defined at a single point in time, many commercial transactions involve a rolling or layering process. An agreement exists, but terms are clarified or created over time. That principle is acknowledged in various portions of original Article 2 of the U.C.C." The comments go on to cite Section 2-207 of the U.C.C. "that later records presented to the other party are treated as proposed modifications or confirming memorandum only in cases of 'a proposed deal which in commercial understanding has in fact been closed.'"

According to the UCITA comments to the same section, "Often, the commercial expectation is that terms will follow or be

15) Step-Saver Data Systems, Inc. v. Wyse Technology U.S. Court of Appeals, 3rd Circuit 939 F.2d 91, (1991).
16) e.g., http://www.zdnet.com/filter.terms/

developed after performance begins. While some courts seem to hold that an initial agreement per se concludes that contracting as a single even: notwithstanding ordinary practice and expectations that terms will follow, other courts recognize layered contract formation and term definition, correctly viewing contracting as a process, rather than as a single event." The bottom line Is that the trend that began in Section 2-207, which recognizes the possibility of additional terms in the acceptance, is fully endorsed and accentuated in UCITA. Following commercial practice, after a deal is struck, additional terms dealing with warranty, maintenance, and other standard provisions arc added to the contract, "without having to consider all such terms in the first interaction of the automated contracting system."

V Attribution Procedures and Consumer Defenses

According to Section 102(5) of UCITA "'Attribution Procedure' means a procedure established by law, administrative rule, or agreement, or a procedure otherwise adopted by the parties, to verify that an electronic event is that of a specific person or to detect changes or errors in the information. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers (passwords), encryption, callback or other acknowledgment or any other procedures that are reasonable under the circumstances." Translated into English, it means a procedure for attributing to a specific individual a specific electronic event such as ordering software over the Internet.[17]

1. Attribution in the Absence of special Arrangements

We can view attribution in two cases, with the second by far being the preferred situation for legitimate vendors. In case one, attribution, in the absence of any special arrangement, requires the person relying on attribution to prove it. In other words, if a vendor receives an order for an item from a customer and bills the customer, the vendor has the burden of showing that the customer placed the order if the customer denies responsibility. Section 213(a) of UCITA states that,

[An electronic event] is attributed to a person if it was the act of that person or its electronic agent, or the person is otherwise bound by it under the law of agency or other law. The party relying on attribution ···· has the burden of establishing attribution.

17) Source: PC World, Sep99. Vol. 17 Issue 9, p33, 2p, 1c. Furger, Robert, "Washington Tackles Internet Law".

As pointed out by Professor Nimmer, just because the vendor has the burden of establishing attribution, does not mean all is lost. If the vendor has evidence that the goods ordered were shipped to the website visitor's address and goods are found on the premises of the visitor, the burden of proof is probably met. Professor Nimmer suggests that shifting the burden of proof is more difficult when the items ordered are computer information or services.

2. Attribution When a Reasonable Procedure Is Used

If the attribution procedure is reasonable, then the person pointed to by the attribution procedure must pay for the software or other product ordered, unless the person can show that they did not order the products. Section 214 of UCITA requires that an attribution procedure be commercially reasonable and defines commercial reasonableness "in light of the purposes of the procedure . . . " In other words, a vendor must have a procedure for determining who the purchaser is and that procedure must be reasonable in light of the importance of the transaction. Similar provisions exist in both UETA and the UCC. According to the Reporter's notes for UCITA, "[t]he general requirement of com mercial reasonableness is that the procedure be a commercially reasonable method of identifying the party as compared to other persons, . ." The Reporter goes on to note that vendors are not required to use "state of the art procedures."

3. The Importance of Signatures

At common law signatures are made valid in a number of ways. They can occur through agents, stamps, plinted signatures, or engraved signatures. With EDI, the overall agreement between the partnering companies effectively substitutes for signatures. The UCC is even more liberal in accepting as a signature, "any symbol executed or adopted by a party with present intention to authenticate a writing." According to Section 102(6) of UCITA, authenticate means:

A. to sign, or

B. otherwise to execute or adopt a symbol or sound, or to use encryption or another process with respect to a record, with intent of authenticating person to:

i. identify that person; or

ii. adopt or accept the terms or a particular term of a record that includes or is logically associated with, or linked to, the authentication, or to which a record containing the authentication refers.[18]

18) Source: "Business Bureau seeks input on Intemet ethics," Enterprise/Salt Lake City. 06/21/99, Vol.28 Issue 52. p9.

UCITA addresses using technology to substitute for signatures that are unique to individuals. Signing a document is allowed to authenticate intent to contract, but other ways such as encryption are contemplated as a means of substituting for signatures.

1) Attribution under UETA and UCITA

Under Section 1-108(a) of UETA, "[a]n electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be proved in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attriblttable." Section 1-108(b) indicates that, "(T)he effect of an electronic record or electronic signature attributed to a person under subsection (a) is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law." If a purchaser gives her name and credit card number to execute a purchase, that combination of acts is likely to be adequate attribution by that person.

Who is signing is discussed in Section 213 of UCITA. As stated above, subsection (a) of Section 213 reads, "An electronic event is attributed to a person if it was the act of that person or its electronic agent ···· The party relying on attribution of an electronic event to another Person has the burden of establishing attribution." The section goes on to state that, "if there is an attribution procedure between the parties with respect to an electronic event. the following rules apply:

1. The effect of compliance with an attribution procedure established by other law or administrative rule is determined by that law or rule.
2. In all other cases, if the parties agree to or otherwise knowingly adopt, after having had an opportunity to review, the terms of an attribution procedure to verify the person from which anelectronic event comes, the record is attributable to the person identified by the procedure. if theparty relying on that attribution satisfies the burden of establishing that:
   A. the attribution procedure is commercially reasonable; (boldface added)
   B. the party accepted or relied on the electronic event in good faith and in compliance with the attribution procedure and any additional agreement with or separate instructions of the other party; and
   C. the attribution procedure indicated that the electronic event was that of the person to which attribution is sought."

In other words, except if there is a lall established by a governmental body that

provides otherwise for attribution. the vendor can rely on commercially reasonable attribution procedure as long as the other qualifications are present, which include assent of both parties to the attribution procedure. Of course it is the vender who normally sets up the attribution procedure and is the party in charge of securing assent of the other party (generally a customer). Assent is generally secured by clicking a dot on a website signifying assent.

Sally is interested in Purchasing a book from Amazon.com. Sally participates in supplying Amazon information about herself as well as a credit card number. Sally orders the book and her credit card is debited the purchase price of the book. Sally is liable for the value of the book even if she claims that she did not order the book. She would have the burden of proof to show she did not order the book.

4. Electronic Errors and Consumer Defenses under UCITA

If the consumer makes an error by clicking on the wrong dot, and if there is no reasonable method for immediate detection and/or correction of this error, "the consumer is not bound by an electronic message that the consumer did not intend and which was caused by an electronic error, if the consumer……" does several things upon learning of the error or the reliance by the other party [the vendor], whichever occurs first:

1. notifies the other party of the error; and
2. causes delivery to the other party of all copies of the information [generally software] or pursuant to reasonable instructions from the other party, delivers to another person or destroys all copies; and
3. has not used or received any benefit from the information or caused the information or benefit to be made available to a third party.

In ordinary English, the consumer is required to act promptly when (s)he discovers an error. Suppose the consumer was ordering 10 video games from a website that featured such games, but, inadvertently, the consumer typed in 110 for quantity. Upon discovering the error, the consumer must promptly notify the vendor, return the unordered merchandise, and not use it or gain advantage, and not allow others to do the same. The same consumer defenses apply to UETA, which is the overlay for Article 2 of the UCC.

Ⅵ Conclusion

E-Commerce is currently plagued by some of the same problems that led to the passage of the UCC. In the absence of

uniform legislation, state-by-state differences are inevitable with respect to E-Commerce. State-by-state differences in E-Commerce contract law is widely viewed as undesirable. To deal with this problem, a number of uniform bills have been proposed including UCITA, UETA, and revisions to Article 2 of the UCC (Subpart B). The thrust of these uniform acts is to create legal parity between paper records and electronic records. There is considerable resistance by consumer groups to this parity and progress towards Passage of UCITA , UETA, and revised Article 2 has been slow.

The UCITA covers licenses of computer software but does not cover the sale oil goods on the Internet. The scope of the UCITA includes computer software. multimedia interactive products, computer data and databases, and Internet and online information, The UETA deals comprehensively with E-Commerce and contract law. The UCC covers the sale of goods, which does not necessarily involve E-Commerce. The basic principles of contract law are modified to deal with Internet transactions. Intent is inferred from the operations of electronic agents and "signatures" can occur with a response to an invitation to click to accept. EDI contracts can be formed electronically without human intervention. Surfing the Internet most likely means that you will encounter opportunities for binding offers to contract.

The revised Section 2-207 of the UCC makes it easier to include additional terms in contracts that are not in the offers. Clickwrap agreements are additional terms in an agreement that may involve warranties, return policies, reproductions, and other "fine print." Shrinkwrap agreements bind the customer to the terms in the contract even though the customer cannot know what many of the terms are until the software, CD, or diskette is purchased.

The customer is bound by the terms of an agreement that (s)he leans about after purchase when the customer has been given clear notice of the additional terms, clear notice as to what constitutes acceptance, an opportunity to inspect the terms in the wrap agreement, and an opportunity to return the goods if the customers objects to the additional terms. With click-on acceptances, if the clicker is a minor, the vendor is subject to having the contract disaffirmed. If a person, or his or her agent, commits an electronic act, then the event is attributed to that person. The burden of establishing attribution falls on the party relying on attribution of an electronic event, unless a commercially reasonable attribution procedure is agreed to by both parties and is used. The consumer is not bound to an agreement made in error by clicking the wrong dot if the consumer notifies the other party of the error, returns the misordered merchandise, and does not

use it to gain advantage. The identification process must be commercially reasonable.

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