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Proposed UCC 2-103 of the 2000 Version of the Revision of Article 2

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PROPOSED UCC 2-103 OF THE 2000 VERSION OF THE REVISION OF ARTICLE 2

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IN any statute, particularly any statute as complex and broad as The Uniform Commercial Code (UCC), the most fundamental issue is the scope of the statute. Only when we know the extent of the statute, its "scope," can we define the terms and determine the basic principles of the statute. Therefore, it is not surprising that some of the most important cases interpreting Article 2 of the UCC in the last forty years have concerned current UCC 2-102, the "scope" provision.

The Article 2 drafting committee has admitted that one of the greatest obstacles it has faced has been the re-definition of the scope of Article 2. In the prefatory note to the July 2000 version of the draft revision of Article 2, the committee highlighted its proposed scope section as one of the "sections that are either new or controversial." It said:

> Scope is listed first because it has been the most difficult issue facing the Drafting Committee. Current Article 2's scope provision refers simply to "transactions in goods." It does not address whether computer information falls within the definition of goods. The Study Report that preceded the drafting project identified this as an area that required change given that many courts have applied Article 2's rules to computer information transactions, either directly or by analogy, in ways that lead to inappropriate results.[1]

The July 2000 version of the draft of Article 2 addresses the overriding issue of the scope of Article 2: the role of computers and computer information in an article normally reserved for "sales of goods." The revolution in information technology requires a change in the legal underpinning of sales of goods.

The text of the current scope provision, UCC 2-102, reads as follows:

> Sec. 2-102 Scope; Certain Security and Other Transactions Excluded From This Article.
> Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction which although in

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1. Revision of Uniform Commercial Code Article 2-Sales With Prefatory Note and Reporter's Notes, National Conference of Commissioners on Uniform State Laws and American Law Institute (Draft for Approval, 2000) (NCCUSL), *available at* http://www.law.upenn.edu/bll.

the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.[2]

The proposed scope section in the July 2000 draft reads as follows:

Section 2-103. Scope.

(a) This article applies to transactions in goods.

(b) If a transaction includes computer information and goods, this article applies to the goods but not to the computer information or informational rights in it. However, if a copy of a computer program is contained in and sold or, pursuant to Section 2-313A or 2-313B, leased as part of goods, this article applies to the copy and the computer program unless:

(1) the goods are a computer or computer peripheral; or

(2) giving the buyer or lessee of the goods access to or use of the program is ordinarily a substantial purpose of transactions in goods of the type sold or leased.

(c) In a transaction that includes computer information and goods, then with regard to the goods, including any copy of a computer program constituting goods under Section 2-102(a)(23), the parties may not by agreement alter a result that would otherwise be required by this article.

(d) This article does not apply to a foreign exchange transaction.

(e) If there is a conflict between this article and another article of [the Uniform Commercial Code], that article governs.

[(f) If a transaction includes computer information and goods and there is a conflict between this article and [the Uniform Computer Information Transactions Act] over the extent to which this article applies to a copy of a computer program under subsection (b), [the Uniform Computer Information Transactions Act] governs.]

[(g) If there is a conflict between this article and [the Uniform Electronic Transactions Act], this article governs.][3]

Clearly, the drafting committee sought to retain the core of the present scope provision, the phrase "transactions in goods." It also sought to specify the role of computer technology in Article 2 and to indicate the relationship between Article 2 and other articles of the UCC, as well as Uniform Computer Information Transactions Act (UCITA) and Uniform Electronic Transactions Act (UETA).

This symposium article has three purposes: (1) to analyze the current scope provision of Article 2 and some of the most important issues raised in connection with cases arising in the last forty years; (2) to explain the new material in the July 2000 draft, particularly the part relating to computer transactions; and (3) to explain the new material in the November 2000 and February 2001 drafts.

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2. U.C.C. § 2-102 (1999).

3. U.C.C. § 2-103 (Proposed Draft July 2000).

I. THE CURRENT ARTICLE 2 SCOPE PROVISION

There are two types of cases on the scope of Article 2: those defining "transactions" and those defining "in goods."[4]

The prototype "transaction" is, of course, a *sale* of goods. Indeed, the title of Article 2 is "Sales." Most of the cases on "transactions" have involved "leases" of goods. In some cases courts applied Article 2, either directly or by analogy, while in other cases they applied the law relating to bailments of personal property.[5] The adoption of Article 2A-Leases of Goods as part of the UCC has rendered these cases obsolete. However, there have been conflicting cases involving bailments of goods,[6] and there is no reason to believe that bailments will no longer be a scope issue under the current or proposed Article 2. Theoretically, it is also possible for a court to apply Article 2 to a donation, an exchange of goods for goods and even taking from a decedent's estate, either by will or by intestacy. Such cases, however, do not seem to arise.

Most litigation on the scope of Article 2 continues to revolve around "in goods." Sometimes a sale of goods is combined with a provision or sale of service. At other times, there are goods and real estate in the same sale, or goods and intangibles, such as good will; there are sales of going business concerns, with goods and non-goods joined together; and there are sales or licenses of utilities or computer software.

The principal method of deciding whether Article 2 governs these cases is the "predominant feature test" or "predominant factor test." The test requires the court to determine whether the principal part of the transaction is a sale of goods. From the earliest cases enunciating the predominant feature test,[7] the courts have had great leeway in determining the factors they will examine in making the determination. The cases involving both a sale of goods and the providing of service are decidedly mixed. If there is one clear trend, it would be that the service of installing purchased goods is merely "incidental" to the predominant feature of selling goods to the buyer.[8]

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4. To a lesser extent, there is a third type, cases attempting to divided Article 2 transactions from Article 9 transactions, which involve security interests. Since these cases do not seem to be part of the Article 2 revision, they are not part of this discussion.

5. There were even splits within a state. In Illinois, for example, there were *Walter E. Heller & Co., Inc. v. Convalescent Home of the First Church of Deliverance*, 365 N.E.2d 1285 (1997) and *Dillman & Associates, Inc. v. Capitol Leasing Co.*, 442 N.E.2d 311 (1982), in both of which cases the court applied Article 2 by analogy to leases of goods. But there was also *Builder's Concrete Co. of Morton v. Fred Faubel & Sons, Inc.*, 373 N.E.2d 863 (1978), in which the court applied ordinary contracts law, as it would have done for an ordinary bailment contract.

6. *Compare* Mieske v. Bartell Drug Co., 593 P.2d 1308 (1979) (holding that a bailment to splice camera film fell within Article 2) *with* Carr v. Hoosier Photo Supplies, Inc., 422 N.E.2d 1272 (Ind. App. 1981) (holding that bailment to develop camera film fell outside Article 2).

7. The most famous early case is *Epstein v. Giannattasio*, 197 A.2d 342 (1963).

8. The two most recent "supply and install" contracts held that Article 2 applied. Fournier Furniture, Inc. v. Waltz-Holst Blow Pipe Co., 980 F. Supp. 187 (W.D. Va. 1997) (involving the "design, fabrication and installation of a furnace"); EMSG Sys. Div., Inc. v.

The predominant feature test has also played a role in deciding whether a sale of goods and other objects, not just services, falls under Article 2. For example, a majority of the courts have applied the predominant feature test in deciding whether Article 2 applied to the sale of a going business concern or a sale of goods and real estate or other non-goods.[9] On the other hand, at least one court divided the items to be sold into goods and the various non-goods components and then applied Article 2 to the sale of the goods, real estate or contracts law to the sale of the real property and other laws to the sale of other items.[10]

The "gravamen of the action" test is an alternative to the predominant feature test. This theory, proposed by Professor William D. Hawkland, requires the court to determine which part of the contract—the goods or the service or other non-goods—caused the alleged breach of contract or harm. If the goods caused the breach or harm, then the court should apply Article 2; if the non-goods caused the breach or harm, it should apply the appropriate law other than Article 2. Although some judges have approved of this test,[11] it has never achieved the acceptance that the predominant feature test has enjoyed.

In short, the drafting committee apparently intends to continue the case law interpreting "transactions in goods." By adopting the exact language that has been the subject of forty years of litigation and commentary, the committee has validated the current state of the case law. Under the current case law, the predominant feature test enjoys more popularity than either the "dividing the items" test or the "gravamen of the action" test. Presumably, therefore, the case law will continue to develop as before.

The exception to this statement will be the cases involving computers and computer information. Those cases will give way to the specific new provisions on computer technology in subsections (b) and (c) of proposed UCC 2-103.

II. THE COMPUTER TECHNOLOGY AND INFORMATION PROVISIONS OF PROPOSED UCC 2-103

Subsections (b) and (c) of proposed UCC 2-103 address the issues relating to whether computer information (software) is truly "goods" and whether a hybrid sale of "goods" and computer-related items falls under Article 2 or is treated in a different fashion.

The definition of "goods" in the present Article 2 is in UCC 2-105. The first sentence reads: "(1) 'Goods' means all things (including specially

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Miltope Corp., 37 U.C.C. Rep. 2d 39 (E.D.N.C. 1998) (concerning the special manufacture of circuit boards, presumably with installation).

9. *E.g.*, Field v. Golden Triangle Broad., Inc., 305 A.2d 689 (1973).

10. Foster v. Colorado Radio Corp., 381 F.2d 222 (10th Cir. 1967).

11. As recently as in 1999, in a case concerning the purchase of oil, with certain non-goods aspects also involved, the court applied this test, although it is not clear whether non-Code law would have changed the result. Allapattah Serv., Inc. v. Exxon Corp., 61 F. Supp. 2d 1308 (S.D. Fla. 1999).

manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action."[12]

The touchstone of "movability" solves most issues on the definition of "goods" and clearly separates sales of personal property from sales of real property. However, movability does not help in deciding situations involving computer technology and information. The definition of "goods" in proposed UCC 2-102(a)(23) reads:

> (23) 'Goods' means all things, including specially manufactured goods, that are movable at the time of identification to the contract for sale. The term includes the unborn young of animals, growing crops, other identified things to be severed from realty under Section 2-107, and a copy of a computer program to which this article applies under Section 2-103(b). The term does not include money in which the price is to be paid, other computer information, the subject matter of foreign exchange transactions, documents, letters of credit, letter-of-credit rights, instruments, investment property, accounts, chattel paper, deposit accounts, or general intangibles.[13]

The Preliminary Comment to this definition says that the purpose of this revision was "to make it clear that 'goods' includes a copy of a computer program that is subject to this Article pursuant to Section 2-103(b) but does not include other computer information."[14] Although the new matter raises the issue of definitions of several new words,[15] the key definition seems to be that of "computer program." Proposed UCC 2-102(a)(8) defines it as: "'Computer program' means a set of statements or instructions to be used directly or indirectly in a computer to bring about a certain result. The term does not include separately identifiable informational content."[16]

The Preliminary Comment to this definition says that a "computer program is a type of computer information" and indicates that the first sentence of the definition is related to U.S. copyright law.[17] Although computer technology changes at the drop of a disc, these definitions should remain stable and useful for some time to come.

The case law on whether computer technology (whether computer programs or informational content) can fall under the present definition of "goods" is mixed, even garbled. One of the most recent cases, *Triple Point Technology, Inc. v. D.N.L. Risk Management, Inc.*,[18] illustrates the

12. U.C.C. § 2-105 (1999).
13. U.C.C. § 2-102(a)(23) (Proposed Draft July 2000).
14. U.C.C. § 2-102(a)(23) prelim. cmt. (Proposed Draft July 2000).
15. The Proposed Draft listing several new and important definitions states: "[o]ther definitions relevant to this issue are computer information (Section 2-102(a)(7)), computer program (Section 2-102(a)(8)), copy (section 2-102(a)(14)), goods (Section 2-102(a)(23)), information (Section 2-102(a)(24)), informational content (Section 2-102(a)(25)), and informational rights (Section 2-102(a)(26)).
16. U.C.C. § 2-102(a)(8) (Proposed Draft July 2000).
17. U.C.C. § 2-102(a)(8) prelim. cmt. (Proposed Draft July 2000).
18. 41 U.C.C. Rep. 2d 421 (D.C.N.J. 2000) (unpublished opinion).

difficulties. The defendant agreed to sell its "intellectual property rights" in a software program, including the "proprietary products, all source codes of software products . . . as well as all trademarks, copyrights and patents. . . ."[19] The court applied a "primary purpose" test and held that the subject of the bargain was "ownership of the program itself" and that containing the program "on a floppy disk or CD-ROM for transfer does not bring this agreement under the purview of the U.C.C."[20] The court discussed several cases on the sale of computer information. Notably, it distinguished *Advent Systems Ltd. v. Unisys Corp.*,[21] which included a sale of hardware and software, as well as the provision of ongoing technical assistance. The *Triple Point Technology* court emphasized that the *Advent Systems* buyer "bargained for software on disk to resell," while Triple Point "bargained for ownership of the program itself."[22] While some might say this is a difference without a true distinction, the result was that Article 2 did not apply in *Triple Point Technology* because the subject of this sale was intellectual property, not "goods."

Both the proposed scope section, especially proposed Section 2-103(b) and (c), and the proposed definitions of "goods" (proposed Sec. 2-102 (a)(23)) and "computer program" (proposed Sec. 2-102 (a)(8)) offer a way out of this confusion.

What would have been the results in *Advent Systems and Triple Point Technology* if proposed Section 2-103 had been in effect? The first sentence of proposed Section 2-103(b) seems tailor-made for *Advent Systems*, since both "computer information" and "goods" (hardware) were the subjects of the sale. Therefore, the proposed Article 2 would apply to the situation in that case, just as the court held that present Article 2 applied to it. Moreover, as the report to proposed Section 2-103 indicates, "[if] a copy of a computer program is embedded in goods that are sold, the first sentence of subsection (b) provides that the sale of the goods is governed by this Article."[23]

The major difficulties in interpreting proposed Section 2-103(b) begin with the second sentence. In reading its complicated rules and exceptions, it is necessary to refer to the report of the drafting committee.[24] The following appear to be the results:

1. If the copy of the computer program is contained in goods that are sold or leased to a remote buyer or lessee, proposed Article 2 applies to both the copy and the computer program.

2. However, point 1 is not true if the "goods" involved are a "computer" or "computer peripheral." Proposed Section 2-102(a)(6) defines "computer." There is apparently no statutory definition of "computer peripheral." The report says, "The test for application of this Article is

19. *Id.* at 424.
20. *Id.* at 424-25.
21. 925 F.2d 670 (3d Cir. 1991).
22. *Triple Point Tech.*, 41 U.C.C. Rep. 2d at 425.
23. U.C.C. § 2-103 (Proposed Draft July 2000).
24. *Id.*

never satisfied, however, if the goods themselves are a computer or computer peripheral."[25] Can this mean that a computer—a machine, hardware—is not within Article 2? Surely not, but the text and report are confusing here.

3. Also, point 1 is not true if "giving the buyer or lessee of the goods access to or use of the program is ordinarily a substantial purpose" of this type of goods transaction. The report indicates that the source of this exception is UCITA, Sec. 103(b)(1) and that the only difference from UCITA is the substitution of "substantial" for "material."[26] The report suggests "more than merely nontrivial" as a definition of "substantial."[27]

Subsection (c) of proposed Section 2-103 completes the section's treatment of computer-related matters that may or may not fall within the scope of proposed Article 2. It addresses a "transaction that includes computer information and goods." Under subsection (c), as far as the "goods" are concerned, the parties may not agree to "alter a result" otherwise required by the proposed article. This prohibition extends to a "copy of a computer program constituting goods."[28]

Although this language might be broad enough to forbid parties to opt in or opt out of Article 2, the report suggests a more limited reading. It says that the language prevents parties from opting out of the mandatory rules in UCC § 1-102(3).[29] If this is so, one has to wonder why subsection (c) of proposed Section 2-103 is necessary.

III. THE FOREIGN EXCHANGE TRANSACTION PROVISION OF PROPOSED UCC 2-103

Proposed Section 2-103(d) is new. Under present UCC § 2-102 and UCC § 2-105(1), money can be either a "commodity," *i.e.*, the subject of the sale, or the "price to be paid." In the former situation, the money is considered "goods," and the transaction falls within present Article 2, while in the latter situation, the money is not "goods," and the transaction falls outside present Article 2. It has not been difficult to distinguish between the two situations. In the 1990's the reported cases have dealt with foreign currency.[30]

Proposed Article 2 continues this distinction through the definition of "goods" in proposed Section 2-102(a)(23), which in this respect continues the present definition in UCC § 2-105(1). That new definition also specifically excludes "foreign exchange transactions" from the definition of

25. *Id.*
26. *Id.*
27. *Id.*
28. U.C.C. § 2-103(c) (Proposed Draft July 2000).
29. U.C.C. § 2-103 note (Proposed Draft July 2000).
30. All arose in New York and apparently held that foreign currency exchange contracts fall within Article 2. Saboundjian v. Bank Audi (USA), 157 A.D.2d 278 (1990); Intershoe, Inc. v. Bankers Trust Co., 571 N.E.2d 641 (1991); *In re* Koreag, Controle et Revision S.A., 961 F.2d 341 (2d Cir. 1992); Compania Sud-Americana de Vapores, S.A. v. IBJ Schroder Bank & Trust Co., 785 F. Supp. 411 (S.D.N.Y. 1992).

"goods." However, proposed Section 2-103(d) specifically adds another exclusion: "foreign exchange transactions." The definition of "foreign exchange transactions" in proposed Section 2-102(a)(20) centers upon the medium of delivery, that of "through funds transfer, book entry accounting, or other form of payment order, or other agreed means to transfer a credit balance."[31]

The report to this proposed section indicates that Article 4A "or other applicable law" would apply.[32] The report specifies, however, that an exchange of U.S. currency for foreign currency—the example given is Euros—would not be a "foreign exchange transaction" and would fall within Article 2.[33] Presumably, the recent case law, the clear language of the proposed text and the report will combine to prevent significant confusion over this new exclusion.

IV. THE RELATIONSHIP OF PROPOSED ARTICLE 2 WITH OTHER ARTICLES OF THE CODE

Proposed Section 2-103(e) provides that in case of a "conflict" between the proposed article and another article of the Code, the other article "governs."[34] The report says that the provision is new and suggests that the most likely area for "overlap," if not actual "conflict," would be with Article 9.[35] The only assistance it gives in defining "conflict" is the last paragraph: "Subsection (e) is intended to operate in one direction only; that is, to subordinate Article 2 to any inconsistent rule found in another Article. It should not be construed to permit a provision from Article 2 to be injected into another Article."[36]

Presumably, the courts will follow their usual practice and try hard not to find any "inconsistency" and therefore a "conflict" between the proposed Article 2 and other articles of the Code.

V. THE RELATIONSHIP BETWEEN PROPOSED ARTICLE 2 AND UCITA

Proposed Sections 2-103(f) and (g) are the two optional subsections. If a state has adopted the Uniform Computer Information Transactions Act (UCITA), it should adopt subsection (f) in order to reconcile "conflicts" between proposed Article 2 and UCITA. If a state has adopted the Uniform Electronic Transactions Act (UETA), it should adopt subsection (g) in order to reconcile "conflicts" between proposed Article 2 and UETA. The drafters of proposed Article 2 adopted opposite stances on the relationship between Article 2 and UCITA and between Article 2 and UETA.

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31. U.C.C. § 2-102(a)(20) (Proposed Draft July 2000).
32. *Id.* § 2-103 note.
33. *Id.*
34. U.C.C. § 2-103(e) (Proposed Draft July 2000).
35. *Id.*
36. *Id.*

According to proposed Section 2-103(f), if there is a conflict between the proposed Article 2 and UCITA, UCITA governs. The report indicates that the "narrower" definition of "computer" in the 1999 version of proposed Article 2 was

> consistent with UCITA's corresponding definition. Since then, the definition in UCITA has been broadened. The 2000 Draft differs from UCITA in that it retains the narrower definition. Section 2-102(a)(6).
>
> The 'material' purpose test of UCITA has been modified to a 'substantial' purpose test in the 2000 Draft; that is, Article 2 applies to an embedded computer program unless the goods are a computer or computer peripheral or gaining access to or use of the program itself is ordinarily a *substantial* purpose in transactions of the type at issue. Section 2-103(b)(2).
>
> The change was made to avoid the historical baggage associated with 'material,' which generally means nontrivial. 'Substantial' requires that the purpose of gaining access to or use of the program be more than merely nontrivial. It does not require that the purpose be dominant.[37]

Apart from the differing definitions of "computer" and the difference between "substantial" and "material," it is unclear when a "conflict" between proposed Article 2 and UCITA would arise. UCITA is a specialized uniform act that took a decade to produce.[38]

The scope provision of UCITA echoes parts of proposed Section 2-103, especially proposed Sections 2-103(b) and (c). Subsections (a) and (b) of Section 103 of UCITA reads:

> (a) This [Act] applies to computer information transactions.
> (b) Except for subject matter excluded in subsection (d) and as otherwise provided in Section 104, if a computer information transaction includes subject matter other than computer information or subject matter excluded under subsection (d), the following rules apply:
> (1) If a transaction includes computer information and goods, this [Act] applies to the part of the transaction involving computer information, informational rights in it, and creation or modification of it. However, if a copy of a computer program is contained in and sold or leased as part of goods, this [Act] applies to the copy and the computer program only if:
> (A) the goods are a computer or computer peripheral; or

37. *Id.* § 2-103 note.

38. In the early 1990's, those involved in re-drafting Article 2 considered a "hub and spokes" organization under which topics common to all, or almost all, contracts somewhat related to sales of goods would be in the core or "hub" of the article. More specialized kinds of contracts would have been in "spokes" of the article. Under this plan, computer topics would have been in a "spoke." When this concept failed, it was proposed that there be an Article 2B in the U.C.C. However, there was opposition to inserting an article on computer transactions into the U.C.C. The substance of Article 2B is now UCITA, a uniform act completely separate from the U.C.C.

(B) giving the buyer or lessee of the goods access to or use of the program is ordinarily a material purpose of transactions in goods of the type sold or leased.[39]

Clearly, the key to the scope of UCITA is the definition of a "computer information transaction" in Section 102(11). As the Official Comment indicates, these transactions are "agreements that deal with the creation, modification, access to, license or distribution of computer information."[40] Another key to understanding the scope of UCITA, especially as it relates to proposed Article 2, is this part of the Official Comment: "[I]f a transaction is a computer information transaction, but also involves other subject matter, this Act ordinarily applies only to the aspects of the transaction that involve 'computer information.'"[41]

In short, the scope of the proposed Article 2, as it relates to computers, is inextricable from the scope of UCITA. Proposed Section 2-103(b) may now be read as attempting to divide some kinds of "mixed" computer transactions so that the proposed Article 2 will apply to the "goods" part and UCITA will apply to the "computer information" part. In effect, there may be a built-in "gravamen of the action" test for certain "mixed" computer transactions. Yet, subsection (f) of proposed Section 2-103 clearly gives the advantage to UCITA in case of a "conflict" with the proposed Article 2. When could there really be a "conflict" (or "inconsistency") if the transaction is truly to be divided into two discrete parts? The answer is not clear.

VI. THE RELATIONSHIP BETWEEN PROPOSED ARTICLE 2 AND UETA

In contrast, the drafters of the proposed Article 2 decided to subordinate the Uniform Electronic Transactions Act to the proposed Article 2 in case of conflict. The report to proposed Section 2-103(g) suggests that the drafters adopted some UETA provisions "sometimes directly and sometimes with modifications," but does not specify which adoptions occurred.[42] Then the report adds what amounts to a plea to judges for harmonization between the two statutes:

Because the application of that Act to transactions within the scope of this Article has been carefully considered, it is appropriate that this Article govern in the event of conflict. Subsection (g). Every effort should be made to construe the relevant provisions in a consistent manner before determining that a conflict exists.[43]

This might suggest that the drafters saw more potential for a conflict between the proposed Article 2 and UETA than between the proposed Article 2 and UCITA. There is no provision for "dividing the items of the

39. U.C.I.T.A. § 103(a), (b), (2000) *available at* http://www.law.upenn.edu/bll.
40. *Id.* § 103, cmt. 2 (2000).
41. *Id.*
42. U.C.C. § 2-103 note (Proposed Draft July 2000).
43. *Id.*

transaction" as there is in an Article 2 versus UCITA transaction. However, when one reads the scope provision of UETA, there actually seems to be less potential for conflict with the proposed Article 2.

UETA "applies to electronic records and electronic signatures relating to a transaction."[44] The exceptions to that statement of coverage and the Official Comment make it clear that virtually all commercial transactions fall within UETA, while non-commercial transactions fall outside UETA.[45] The scope of UETA is fundamentally similar to, if perhaps slightly broader than, that of the Electronic Signatures in Global and National Commerce Act (E-sign) adopted by the federal government in 2000.[46]

The purpose of UETA and the federal E-sign statute is to facilitate electronic signatures and to make them equal to ordinary signatures in force and validity. This purpose and the provisions of both UETA and E-sign are thus much narrower in application than either UCITA or the proposed Article 2. Therefore, despite the hints of greater potential conflict contained in the report to the proposed Article 2, there really does not seem to be much potential conflict between UETA (or E-sign) and the proposed Article 2.

VII. THE DRAFTS AFTER THE JULY 2000 DRAFT

The third purpose of the article is to explain the changes in the "scope" provision in the two drafts written since July 2000. In its November 2000 draft, the Article 2 Revision Drafting Committee made no changes to proposed UCC § 2-103 of the July 2000 draft.[47] However, the February 2001 draft of proposed Article 2 suggests a substantial change from both present UCC 2-102 and the proposed UCC § 2-103 in the July 2000 draft.

The February 2001 draft proposed the following scope provision:

2-103 SCOPE

(a) This article applies to transactions in goods.

(b) If a transaction includes goods and a copy of a computer program, the following rules apply:

(1) This article applies to the goods.

(2) If appropriate, this article, including provisions that by their terms are applicable to "goods," also applies to the product consisting of the goods and the copy considered as a whole. Factors that may be considered in deciding whether it is appropriate to apply this article to that product include whether acquiring the copy is incidental to acquiring the goods, the manner in which the copy is associated with the goods, the nature of and circumstances

44. U.E.T.A. § 3(a) (2000).

45. U.E.T.A. § 3(b)(c), (d) and Official Comment 1, which reads in part: "The scope of this Act is inherently limited by the fact that it only applies to transactions related to business, commercial (including consumer) and governmental matters."

46. 15 U.S.C. § 7001-6, 7021, 7031.

47. U.C.C. § 2-103 preliminary comment (Proposed Draft Nov. 2000) (indicating no change to the scope provision).

surrounding the transaction, and whether the copy is subject to a license.

(3) Unless otherwise agreed, with respect to a copy of a computer program that is part of a product to which, considered as a whole, this article applies:

(A) warranties created pursuant to Section 2-312 are limited in application to the buyer's right to use the copy of the computer program as part of the goods; and

(B) any provision of this article that would transfer title or any other ownership rights to goods is limited in effect to transferring to the buyer the right to use the copy of the computer program as part of the goods.

(c) This article does not apply to a foreign exchange transaction.

(d) If there is a conflict between this article and another article of [the Uniform Commercial Code], that article governs.[48]

The February 2001 draft replicates only the "transactions in goods" language of the current "scope" provision, UCC 2-102. The February 2001 draft retains some parts of the July 2000 draft regarding "scope," but makes substantial changes in the treatment of transactions involving computers, UCITA and UETA.

Section 2-103(a) of the February 2001 draft continues the language regarding "transactions in goods" in Section 2-103(a) of the July 2000 draft. Section 2-103(c) of the February 2001 draft continues the exclusion of "foreign exchange transactions" in Section 2-103(d) of the July 2000 draft. Section 2-103(d) of the February 2001 draft continues the subordination of Article 2 to other articles in case of conflict that was contained in Section 2-103(e).

However, the February 2001 draft omits all references to UCITA and UETA, thereby eliminating the substance of Section 2-103(f) and (g) in the July 2000 draft. The deletion of these references is combined with a substantial revision of Section 2-103(b) and (c) in the July 2000 draft. In effect, the detailed provisions regarding the applicability of a sales article to computer software are much simplified. Clearly, there is no way to specify the situations in which it would be "appropriate" to apply Article 2 to sales of goods plus "a copy of a computer program." However, the "factors" listed in Section 2-103(b)(2) of the February 2001 draft attempt to give guidance to the interpreter.

One is left with the impression that the drafting committee is now content to apply a version of the "predominant feature" test to a sale of goods and a copy of a computer program. If the goods are the predominant feature and the copy of the computer program only incidental to the sale of the goods, then Article 2 would govern both parts of the sale: the goods and the copy of the computer program. Part 4 of the Preliminary Comment to Section 2-103 of the February 2001 draft even discusses the

48. U.C.C. § 2-103 (Proposed Draft Feb. 2001), *available at* http://www.law.upenn.edu/bll.

"predominant purpose" test and the cases employing it.[49] However, the same comment also discusses a possible application of the "gravamen of the action" test, which may be a hint that this less-frequently-used test could also apply to a sale of goods and a computer program.[50]

One is also left with the impression that the drafting committee decided it is wise to conform the proposed Article 2 to the revision of Article 9 due to become effective July 1, 2001. Revised UCC § 9-102(a)(44) defines "goods," a key term in secured transactions law, to "include"

> a computer program embedded in goods and any supporting information provided in connection with a transaction relating to the program if (1) the program is associated with the goods in such a manner that it customarily is considered part of the goods, or (2) by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods. The term does not include a computer program embedded in goods that consist solely of the medium in which the program is embedded.[51]

Although the language suggested by the Article 2 Revision Drafting Committee is not identical to that in the revised Article 9 definition of "goods," it is close enough that one might conclude that the intent is the same: a computer program that is an integral part of the "goods" simply becomes part of the "goods" for purposes of discussing definitions and scope. Computer programs that run functions in certain goods—the anti-lock braking systems of cars, for example—are, in effect, part of the "goods."

This approach is a distinct departure from that taken by the Article 2 Revision Drafting Committee in July 2000. Clearly, the debate over how to treat the subject of computers—copies of computer programs, UCITA and UETA—goes on.

VIII. CONCLUSION

The drafters of the proposed Article 2 have decided to retain the basic scope provision in present UCC § 2-102: "transactions in goods." However, by changing the definition of "goods" in present UCC § 2-105(1) to a certain extent, they are, in effect, changing the scope somewhat.

The most dramatic change they propose concerns the area of computers. By inserting definitions relating to computers from other statutes—specifically UCITA and UETA—and attempting to mesh those statutes with the proposed Article 2, the drafters have entered the wonderful world of computer law. The text and report of the July 2000 draft of the proposed Article 2 is not entirely clear about where Article 2 will govern computer-related transactions and where other statutes, especially

49. *Id.*
50. *Id.*
51. Revised U.C.C. 9-102(a)(44).

UCITA, will govern. The February 2001 draft is also not clear. If a future draft does not clarify the line between the proposed Article 2 and the computer-related statutes, eventually the courts will have to draw that line.