



AFFECT Opposes Proposed Amendments to UCC Article 2

While continuing to oppose UCITA, AFFECT must also speak out against proposed amendments to Article 2 of the Uniform Commercial Code. Existing law, including Article 2, contract law and federal intellectual property law, has proven reasonably adequate to address legal issues regarding computer information transactions and to balance the interests of producers and users. Explicitly stating that software is not goods covered by Article 2 would cause courts to turn to UCITA as persuasive authority, even in states where legislatures have declined to enact UCITA. However, simply deleting the new exclusion of “information” in the definition of goods would not be a sufficient solution to our objections to Amended Article 2. Unfortunately, other proposed amendments would make Article 2 less clear and less balanced when applied to software transactions.

1. The amendments exclude “information” from the definition of goods in Article 2, increasing uncertainty and non-uniformity in the law of software and in the law covering products that include software. Section 2-103(1)(k). There is no definition of information. A confusing new comment suggests that the undefined term refers to at least some software, particularly downloaded software and possibly other software as well. The comment also indicates that the concept of “information” has been left vague, deliberately leaving courts to determine the scope of Article 2. This approach is inconsistent with the UCC goal that seeks to clarify the law and make it more uniform.

Most existing case law concerning software transactions uses Article 2 as a source of the law. The amendments would invite re-litigation of the approach taken by a majority of the courts. This, in turn, could mean that software contracts would be treated as governed not by Article 2, but by each state’s common law of contracts. In any software dispute, there would be an initial issue about whether Article 2 applies, before getting to the merits of the case. In addition, the exclusion of information would create a new argument for UCITA, which is unacceptable in myriad ways explained in AFFECT materials that can be found on our website: www.ucita.com

2. Amended Section 2-207 concerning form terms is even less clear than the existing provision and more likely to be interpreted as authorizing delayed material terms, even in consumer transactions. Section 2-207 is another section that has been deliberately left vague giving courts greater discretion to determine what terms have been agreed to. It could be argued that the amended section approves of delayed “click-wrap” and “shrink-wrap” terms, even in consumer transactions. The provision fails to clearly require pre-transaction disclosure of terms so that business and consumer customers can avoid terms that they would not agree to if known to them.

3. In electronic contracting, a new subsection underscores the idea that clicking forms a contract even if the terms weren’t available until after payment or delivery. Section 2-204(4)(b). This is another provision that undermines the norm of pre-transaction disclosure, even in consumer contracts.

4. Amended Article 2 would confuse the law of electronic transactions. Electronic contracting is already authorized by federal law, the E-Sign Act, and also, in most states, by the Uniform Electronic Transactions Act (UETA). Amended Article 2 repeats, in slightly different language, points already made in these pieces of legislation. The result would be added confusion. These Article 2 provisions are not only unnecessary but counterproductive if the aim is to facilitate electronic commerce. See Sections 2-211 to 2-213.

AFFECT is a broad-based coalition of sixty retail and manufacturing businesses, consumers, financial services institutions, technology professionals and libraries that has been deeply engaged in the policy debate about UCITA and other policy related issues. Our members have been politically active in every state where UCITA has been discussed.

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Proposed change to UCC 2-103 (1) (k)

Amended Section 2-103(1)(k).

"Goods" means all things that are movable at the time of identification to a contract for sale. The term includes future goods, specially manufactured goods, the unborn young of animals, growing crops, and other identified things attached to realty as described in Section 2-107. The term does not include **information**, the money in which the price is to be paid, investment securities under Article 8, the subject matter of foreign exchange transactions, or choses in action.

First Paragraph of Comment 7.

The definition of "goods" in this article has been amended to exclude information not associated with goods. Thus, this article does not directly apply to an electronic transfer of information, such as the transaction involved in *Specht v. Netscape*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001), *aff'd*, 306 F. 3d 17 (2d Cir. 2002). However, transactions often include both goods and information: some are transactions in goods as that term is used in Section 2-102, and some are not. For example, the sale of "smart goods" such as an automobile is a transaction in goods fully within Article 2 even though the automobile contains many computer programs. On the other hand, an architect's provision of architectural plans on a diskette would not be a transaction in goods. When a transaction includes both the sale of goods and the transfer of rights in information, it is up to the courts to determine whether the transaction is entirely within or outside of this article, or whether or to what extent this article should be applied to a portion of the transaction. While this article may apply to a transaction including information, nothing in this Article alters, creates, or diminishes intellectual property rights.