



Electronic commerce in Kansas

Contract formation and formalities under Article 2

By Christopher R. Drahozal

Electronic commerce is booming. Computer prices continue to fall, and almost half of all American households own a personal computer.¹ Microsoft, a producer of computer software, has the largest market capitalization of any company on the New York Stock Exchange.² New and established companies are setting up Internet sites that not only provide information about their products but also permit purchasers to buy online.³ Total commerce over the Internet is estimated to have been upwards of \$50 billion in 1998, with perhaps three-quarters involving transactions between businesses, and the total will continue to grow.⁴ Internet sales to consumers are rising as well, with holiday sales during the past year more than triple those in 1997.⁵

As is common when technology changes, the law is having to adapt to this new business environment. Doctrines and statutes that worked just fine with pen and paper sales do not always transfer to sales by mouse clicks. This article attempts to trace a part of the transformation of contract law being worked by the microchip. It focuses on Article 2 of the Kansas Uniform Commercial Code ("UCC") and how Article 2 deals with issues of contract formation and formalities in electronic commerce. Part I provides a brief description of what I mean by electronic commerce. Part II addresses whether Article 2 applies to transactions involving electronic commerce. Part III discusses contract formation issues in electronic commerce. Part IV examines whether electronic communications can satisfy the writing requirement of the statute of frauds. Each part discusses the current state of Kansas law, and also looks ahead to see how pending revisions to Article 2 and the adoption of new Article 2B on computer information transactions would alter the analysis.

I. What is electronic commerce?

Two leading commentators explain that "[t]he term 'electronic commerce' generally refers to the conduct of trade by means of electronic technologies in which computers play some integral role."⁶ In other words, electronic commerce involves transactions in which the means of transacting are electronic: e.g., when a buyer buys goods over the Internet or by means of electronic data interchange (EDI).⁷ Because my focus here is Article 2 of the Uniform Commercial Code, I use the phrase "electronic commerce"

both more narrowly and more broadly than this definition. "Electronic commerce," as used in this article, has a more narrow meaning because it does not include all forms of trade that may be the subject of electronic transacting, such as financial transactions.⁸ Instead, consistent with the scope of Article 2, it involves transactions in goods. On the other hand, as I use the phrase here, it has a broader meaning because I include commerce as "electronic commerce" when the subject of the transaction is related to electronics — e.g., when the buyer is buying a computer or software for that computer — even though the means of contracting are not electronic.⁹

II. Scope of Article 2

Article 2 of the Uniform Commercial Code applies to "transactions in goods."¹⁰ "Goods" means all things ... which are movable at the time of identification to the contract for sale.¹¹ Although Article 2 extends to "transactions" in goods, its main thrust is limited to sales of goods. Thus, the short title of the article is "sales,"¹² and most of its provisions refer to a "contract for the sale of goods"¹³ or the "buyer" or "seller."¹⁴

For many transactions involving electronic commerce, Article 2 plainly governs. A purchase of a computer monitor or blank diskettes certainly is a transaction in goods. Similarly, a purchase of goods of any sort is subject to Article 2 even if the sale is done through electronic means, such as over the Internet. For other transactions involving electronic commerce, however, Article 2 either does not govern or its scope is less clear.

FOOTNOTES

1. Gary McWilliams, *Lower-Priced PCs Drove Strong Sales for Holiday Month*, WALL ST. J., Jan. 8, 1999, at A3. Average computer prices fell 22 percent in 1998. *Id.*

2. On Jan. 19, 1999, Microsoft's market capitalization, which equals its stock price times the number of shares outstanding, was \$450 billion. G. Christian Hill & Lee Gomes, *Microsoft's Profit Surged 75 percent in Quarter*, WALL ST. J., Jan. 20, 1999, at A3, A10. In mid-September 1998, Microsoft for the first time topped General Electric Co. as the company with the largest market capitalization. David Bank, *Microsoft Tops GE in Market's Version of Homer Derby*, WALL ST. J., Sept. 15, 1998, at B11.

3. George Anders, *Click and Buy: Why and Where Internet Commerce is Succeeding*, WALL ST. J., Dec. 7, 1998, at R4.

4. *Id.*

5. Rebecca Quick, *AOL's Members Spend \$80 Each Shopping on the Web*, WALL ST. J., Jan. 5, 1999, at B7; Larry Kudlow, *Why the Internet Had a Merry Christmas*, WALL ST. J., Jan. 6, 1999, at A22. One technology consultant predicts that retail sales over the Internet will reach \$108 billion by 2003. *Internet Shares: When the Bubble Bursts*, ECONOMIST, Jan. 30, 1999, at 23.

6. Amelia H. Boss & Jane Kaufman Winn, *The Emerging Law of Electronic Commerce*, 52 BUS. LAW. 1469, 1472 (1997); see also Craig W. Harding, *Trends in Electronic Commerce: Doing Business Over the Internet*, 452 PLI/PAT 509, 514 (1996) ("Electronic commerce involves the automation of business-to-business transactions through the use of telecommunications and computers to exchange and process electronically commercial information and business transaction documents").

7. For a description of electronic data interchange, see Electronic Messaging Services Task Force, *The Commercial Use of Electronic Data Interchange — A Report and Model Trading Partner Agreement*, 45 BUS. LAW. 1645, 1649 (1990):

Electronic data interchange ("EDI") is the method by which business data may be communicated electronically between computers in standardized formats (such as purchase orders, invoices, shipping notices, and remittance advices) in substitution for conventional paper documents. ... Over time, EDI will likely become the predominant method of sales contracting.

8. E.g., K.S.A. 84-4a-101 et seq. (1996) (governing funds transfers); *id.* 84-5-101 et seq. (governing letters of credit); Official Comment 2 to K.S.A. 84-5-102 ("The definition of 'document' contemplates and facilitates the growing recognition of electronic and other nonpaper media as 'documents'").

9. See Raymond T. Nimmer, *Selling Product Online: Issues in Electronic Contracting*, 467 PLI/PAT 823, 825 (1997) ("electronic commerce elevates intangibles to a position parallel to goods"); John Anecki, *Selling in Cyberspace: Electronic Commerce and the Uniform Commercial Code*, 33 GONZ. L. REV. 395, 397 (1997-1998) ("electronic commerce not only represents a change in contract formation through the use of telecommunications and computers; but it also includes commerce in which the sale of intangible products, such as information and software, are either sold by themselves or 'imbedded' into goods").

10. K.S.A. 84-2-102 (1996).

11. *Id.* 84-2-105(1). Unless the parties agree otherwise, identification occurs "when the contract is made if it is for the sale of goods already existing and identified" or "if the contract is for the sale of future goods other than those described in paragraph (c) [crops or animals], when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers." *Id.* 84-2-501(a) & (b).

12. *Id.* 84-2-101.

13. See, e.g., *id.* 84-2-201(1), 84-2-204; see also *id.* 84-2-205 ("offer ... to buy or sell goods").

14. See, e.g., *id.* 84-2-312(1); 84-2-313(1); 84-2-314(1); 84-2-315; 84-2-502; 84-2-504, 84-2-505(1); 84-2-507(1); 84-2-508; 84-2-601; 84-2-602(1); 84-2-702 to 84-2-719.

Leases. One such transaction is a lease of goods, such as computer hardware. In 1991, Kansas adopted Article 2A of the UCC, which governs "any transaction, regardless of form, that creates a lease."¹⁵ A "lease" is "a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease."¹⁶ Thus, so long as the transaction is a "true lease" and not a disguised sale subject to a security interest,¹⁷ the provisions of Article 2A would govern rather than Article 2.¹⁸

First, is computer software a good? ... Second, are licenses of computer software 'transactions' goods?

International sales. A second such transaction is an international sale of goods. With the growth of Internet-based commerce, international sales of goods will only continue to increase.

Many international sales transactions, however, are not subject to Article 2 but instead are governed by the Convention on Contracts for the International Sale of Goods (CISG).¹⁹ The United States ratified the CISG in 1986, and it became effective Jan. 1, 1988.²⁰ As a treaty, the CISG pre-empts the UCC when it is applicable.²¹ The CISG "applies to contracts of sale of goods between parties whose places of business are in different States" when both States are parties to the convention.²² The CISG applies only to commercial transactions; it does not apply to "goods bought for personal, family or household use."²³ Thus, a contract for the sale of goods between an American business and a business located in another country that is party to the convention would be governed by the CISG, not Article 2.²⁴

Licenses of computer software. A third scope issue involves

contracts by which parties license the use of computer software. The scope questions are twofold.²⁵ First, is computer software a good? Computer software is an intangible. Parties acquiring software are not interested in the disk (which clearly is a good), but rather the information or instructions contained on that disk. Second, are licenses of computer software "transactions" in goods? Customers purchasing computer software ordinarily do not acquire title to the software but instead obtain a license to use the software. Licenses would seem to be "transactions," but, as noted above, many provisions of Article 2 only apply to the "sale" of goods,²⁶ which Article 2 defines as "the passing of title from the seller to the buyer for a price."²⁷

Despite these uncertainties, most courts have applied Article 2 to licenses of computer software.²⁸ In *Systems Design & Management Information Inc., v. Kansas City Post Office Employees Credit Union*,²⁹ the Kansas Court of Appeals concluded that a credit union's purchase of computer software for processing account data was governed by Article 2.³⁰ The court distinguished contracts for the "analysis, collection, storage, and reporting of data" and contracts for the sale of custom designed software, which, at least in some cases, courts have held to be service contracts not governed by Article 2.³¹ The court concluded that the software was a good: The software was movable at the time of identification to the contract because the credit union was able to attend a demonstration of the software before agreeing to purchase it. Furthermore, the modifications to the program made by the seller were services that were merely incidental to the sale of the software, so that the sale of goods predominated.³²

The issue of the law applicable to computer software would be mooted if Kansas were to adopt new Article 2B of the UCC, currently being prepared by the American Law Institute and the National Conference of Commissioners on Uniform State Laws.³³ New Article 2B applies to "computer

15. *Id.* 84-2a-102.

16. *Id.* 84-2a-103(1)(f).

17. *Id.* 84-1-201(37) (defining "security interest"); see also Kansas Comment 1996 to K.S.A. 84-1-201(37); WILLIAM H. LAWRENCE & JOHN H. MINAN, *THE LAW OF PERSONAL PROPERTY LEASING* ¶ 2.01[2][c] (1993 & Supp. 1998).

18. The drafters chose Article 2 as the appropriate "statutory analogue" for Article 2A, Kansas Comment 1996 to K.S.A. 84-2a-101, so that many substantive provisions of the two articles are similar.

19. United Nations Convention on Contracts for the International Sale of Goods, reprinted in 52 Fed. Reg. 6262 (Mar. 2, 1987) (hereinafter CISG).

20. As of March 1, 1999, 54 countries were parties to the CISG. See <www.cisg.law.pace.edu/cisg/countries/cntries.html>.

21. *Filanto S.p.A. v. Chlewick Int'l Corp.*, 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992), appeal dismissed, 984 F.2d 58 (2d Cir. 1993).

22. CISG, art. 1(1)(a). Parties to international sales contracts can opt out of the CISG, in whole or in part. *Id.* art. 6.

23. *Id.* art. 2(a).

24. The CISG differs from Article 2 in important respects. For example, the CISG, unlike Article 2, does not contain a statute of frauds, *id.* art. 11, unless the Contracting State declares that its domestic statute of frauds will apply, *id.* art. 96. The United States has not made such a declaration.

25. For a general discussion, see Andrew Rodau, *Computer Software: Does Article 2 of the Uniform Commercial Code Apply?*, 35 EMORY L.J. 853 (1986).

26. See *supra* text accompanying notes 13-14.

27. K.S.A. 84-2-106(1) (1996).

28. See, e.g., *Micro Data Base Sys. Inc. v. Dharma Sys. Inc.* 148 F.3d 649, 654-55 (7th Cir. 1998) (holding custom computer software is a good); *Advent Sys., Ltd. v. Unisys Corp.*, 925 F.2d 670, 675-76 (3d Cir. 1991) ("once in the form of a floppy disc or other medium, the [computer] program is tangible, moveable and available in the marketplace"); see also, e.g., *RRX Indus. Inc. v. Lab-Con Inc.*, 772 F.2d 543, 546-47 (9th Cir. 1985) ("employee training, repair services, and system upgrading were incidental to sale of the software package and did not defeat characterization of the system as a good"). Compare *Architectronics Inc. v. Control Sys. Inc.*, 935 F. Supp. 425, 432 (S.D.N.Y. 1996) (contract for distribution of software to public not governed by Article 2: "the predominant feature of the [agreement] was a transfer of intellectual property rights").

29. 14 Kan. App.2d 266, 788 P.2d 878 (1990).

30. The court of appeals distinguished the Kansas Supreme Court's decision in *In re Proiest of Strayer*, 239 Kan. 136, 716 P.2d 588 (1986), which held that application software programs were intangible personal property and so not subject to personal property taxation. The court of appeals in *Systems Design* concluded that *Strayer* was inapplicable because "[t]he U.C.C. is ... a totally different statutory scheme with a purpose quite different from the tax code." 14 Kan. App. 2d at 270.

31. 14 Kan. App. 2d at 271.

32. *Id.* at 272.

33. Uniform Commercial Code Article 2B: Computer Information Transactions. All references to new Article 2B to are the draft of Feb. 1, 1999. Current and previous drafts of new Article 2B (and revised Article 2 as well) can be found on the Internet at <www.law.upenn.edu/library/ulc/ulc.htm>.

information transactions."³⁴ A "computer information transaction" is defined as "a license or other contract whose subject matter is (i) the creation or development of computer information or (ii) to provide access to, acquire, transfer, use, license, modify, or distribute computer information."³⁵ "Computer information," meanwhile, "means electronic information that is in a form directly capable of being processed by, or obtained from or through, a computer."³⁶ Accordingly, if adopted, new Article 2B rather than Article 2 will govern most transactions involving computer software. Article 2B will not apply, however, "to a copy of software contained in and transferred as part of other goods unless: (A) the goods are a computer or computer peripheral; or (B) giving the purchaser of the goods access to or use of the software is a material purpose of the transaction."³⁷

III. Contract formation

Article 2 provides that "[a] contract for the sale of goods may be made in any manner sufficient to show agreement."³⁸ Common law contract doctrine generally assumed that assent would take the form of an offer followed by an acceptance.³⁹ Electronic commerce has tested this traditional doctrine in a variety of ways.

A. Shrinkwrap licenses

Vendors of computer software commonly package their software with standard form contracts that grant the customer the right to use the software subject to various restrictions.⁴⁰ These contracts are referred to as "shrinkwrap licenses" because at least some vendors enclosed the box containing the software in plastic wrap and specified that, by opening the plastic, the customer accepted the license terms.⁴¹

A key issue is whether a shrinkwrap license is binding on the customer as a matter of contract law.⁴² The limited case law, none of which is from Kansas, has split on the issue. In *Step-Saver Data Systems Inc. v. Wyse Technology*,⁴³ the plaintiff purchased copies of a computer program from the defendant in the following manner. The plaintiff would order copies of the software by phone. The defendant would accept the order while on the phone and promise to ship the software promptly. After placing the telephone order, the plaintiff would send a purchase order listing the items purchased, price and shipping and payment terms. The defendant would ship the software with an invoice reflecting the terms of the purchase order.⁴⁴ In addition, printed on the box in which the software was packaged was a license containing additional terms that disclaimed express and implied warranties and excluded liability for direct and consequential damages.⁴⁵ The license provided: "Opening this package indicates your acceptance of these terms and conditions. If you do not agree with them, you should promptly return the package unopened to the person from whom you purchased it within fifteen days from date of purchase and your money will be refunded to you by that person."⁴⁶ The software allegedly did not work as promised and the plaintiff filed a breach of warranty action against the defendant. The district court held that the shrinkwrap license was the complete agreement between the parties and effectively disclaimed all express and implied warranties.⁴⁷

Accordingly, if adopted, new Article 2B rather than Article 2 will govern most transactions involving computer software.

34. U.C.C. § 2B-103(a).

35. *Id.* § 2B-102(a)(9). The definition continues that "[t]he term does not include a contract to distribute or create for purposes of distribution information in print form." *Id.*

36. *Id.* § 2B-102(a)(8). New Article 2B defines "information" to mean "data, text, images, sounds, mask works, or works of authorship," and makes clear that "[t]he term includes software." *Id.* § 2B-102(a)(26). It defines "electronic" as "of or relating to technology having electrical, digital, magnetic, wireless, optical, or electromagnetic, or similar capabilities." *Id.* § 2B-102(a)(21). "Computer information" does not include broadcast programming, *id.* § 2B-104(2)(A), or motion pictures or sound recordings, *id.* § 2B-104(2)(B); see *id.* § 2B-102(a)(8).

37. *Id.* § 2B-103(b)(1).

38. K.S.A. 84-2-204(1) (1996).

39. Restatement (Second) of Contracts § 22(1) (1981).

40. The reason for the development of shrinkwrap licenses is explained in *Step-Saver Data Sys. Inc. v. Wyse Technology*, 939 F.2d 91, 96 n.7 (3d Cir. 1991):

Under the first sale doctrine, once the copyright holder has sold a copy of the copyrighted work, the owner of the copy could "sell or otherwise dispose of the possession of that copy" without the copyright holder's consent. See *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350 (1908); 17 U.S.C. § 109(a) (1977). Under this doctrine, one could purchase a copy of a computer program, and then lease it or lend it to another without infringing the copyright on the program. ... By characterizing the original transaction between the software producer and the software rental company as a license, rather than a sale, and by making the license personal and non-transferable, software producers hoped to avoid the reach of the first sale doctrine ...

In 1990, Congress revised the first-sale doctrine as applied to computer software, see 17 U.S.C. § 109(b), so that this reason for the use of shrinkwrap licenses is "largely anachronistic." *Step-Saver*, 939 F.2d at 96 n.7. For a description of other terms commonly contained in shrinkwrap licenses, see Darren C. Baker, Note, *ProCD v. Zeidenberg: Commercial Reality, Flexibility in Contract Formation, and Notions of Manifested Assent in the Arena of Shrinkwrap Licenses*, 92 Nw. U. L. Rev. 379, 391-96 (1997).

41. A variation on the basic shrinkwrap license is the "webwrap" license. A software vendor permits a customer to download software from the vendor's web site, but subject to a license agreement. The vendor provides an opportunity for the customer to review the terms of the license and then requires the customer to click on an on-screen "button" by which the customer agrees to accept the terms of the license. Such licenses are less legally problematic than shrinkwrap licenses because they require assent before the customer is able to obtain any access to the software. See generally Gregory E. Maggs, *Internet Solutions to Consumer Protection Problems*, 49 S.C. L. Rev. 887, 893-97 (1998) (arguing that Internet reduces costs to companies of "informing consumers about the contents of form contracts").

42. Other arguments are available to challenge specific terms of shrinkwrap licenses. A term may be unconscionable. K.S.A. 84-2-302 (1996). The Kansas Consumer Protection Act provides that no implied warranties may be disclaimed in a consumer case and prohibits the limitation of remedies for breach of implied warranties in such a case. *Id.* 50-639(a) & (e) (1994).

43. 939 F.2d 91 (3d Cir. 1991).

44. *Id.* at 95-96.

45. *Id.* at 96.

46. *Id.* at 97.

47. *Id.*

The Third Circuit reversed and held that the plaintiff was not bound by the license. The court of appeals looked to section 2-207 of the U.C.C. to determine whether the terms contained in the shrinkwrap license became part of the parties' agreement.⁴⁸ As the court explained, the shrinkwrap license "is best seen as one more form in a battle of forms, and the question of whether [the plaintiff] has agreed to be bound by the terms of the ... license is best resolved by applying the legal principles detailed in section 2-207."⁴⁹ The court rejected the defendant's argument that any acceptance by it was merely conditional on the plaintiff's assent to the terms contained in the shrinkwrap license: the defendant "did not clearly express its unwillingness to proceed with the transactions unless its additional terms were incorporated into the parties's agreement."⁵⁰ Finally, to determine the terms of the parties' agreement, the court looked to section

2-207(2), which provides that between merchants, which both parties were, any additional terms automatically become part of the contract "unless: (a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received."⁵¹ Because the warranty disclaimer and limitation of remedies terms in the shrinkwrap license were material alterations of the offer, the plaintiff was not bound by those terms.⁵²

*Arizona Retail Systems Inc. v. Software Link Inc.*⁵³ involved facts very similar to those in *Step-Saver*; indeed, The Software Link was a defendant in both cases.⁵⁴ The acquisition of the software in the two cases was done in largely the same manner, with the software being ordered

by phone and the software being shipped to the purchaser together with an invoice. The license terms at issue were printed on the software packaging.⁵⁵ Again, the software did not work as expected and the defendant relied on the warranty disclaimers contained in the shrinkwrap license. The district court, with one limited exception, refused to enforce the license.⁵⁶ The court determined that the shrinkwrap license was a proposed modification of the parties' existing contract under section 2-209 of the UCC.⁵⁷ The court concluded that there was no assent to the proposed modification, because "assent must be express and cannot be inferred merely from a party's conduct in continuing with the agreement."⁵⁸ Accordingly, the court held that the license was not enforceable.⁵⁹

The leading case upholding the validity of shrinkwrap licenses is *ProCD Inc. v. Zeidenberg*.⁶⁰ The plaintiff in ProCD compiled 3,000 telephone directories into a computer database; the database cost more than \$10 million to compile. It licensed the directories to differing users at differing prices — *i.e.*, it price discriminated among customers. It sold the directories at high prices to commercial users and at low prices to consumers. For price discrimination to work, the seller must prevent arbitrage between low-price and high-price buyers. The plaintiff used a shrinkwrap license for this purpose, limiting consumer use of the database to non-commercial uses.⁶¹ The license was contained in the user guide to the software, which provided that "[b]y using the discs and the listings licensed to you, you agree to be bound by the terms of this License. If you do not agree to the terms of this License, promptly return all copies of the software ... to the place where you obtained it."⁶² The box containing the software indicated that license restrictions were enclosed, and the software, on installation and repeatedly when used, displayed a notice that use was subject to the license terms.⁶³

The defendant purchased a copy of the software from a retail outlet. He proceeded to make the data available on the Internet for a lower fee than that charged by the plaintiff. The plaintiff filed suit seeking to enjoin the defendant

48. Section 2-207 deals with two broad types of cases. The first is "battle of the forms" cases in which the form acceptance does not match the form offer as to all terms and so, under the common law mirror image rule, would not be an effective acceptance. The second "is the written confirmation, where an agreement has been reached either orally or by informal correspondence between the parties and is followed by one or both of the parties sending formal memoranda embodying the terms so far as agreed upon and adding terms not discussed." Official Comment 1 to K.S.A. 84-2-207 (1996).

49. 939 F.2d at 99-100. Alternatively, the shrinkwrap license could be "treated as a written confirmation containing additional terms," *id.* at 105-06, and thus subject to section 2-207 for that reason.

50. *Id.* at 103.

51. K.S.A. 84-2-207(2) (1996).

52. 939 F.2d at 106.

53. 831 F. Supp. 759 (D. Ariz. 1993).

54. *Id.* at 760.

55. *Id.* at 761.

56. The court indicated that the shrinkwrap license likely was enforceable as to plaintiff's initial purchase of the software at issue. Although the facts were not entirely clear, *id.* at 763, the court concluded that "if [plaintiff] requested an evaluation diskette and then, by keeping the live disk, agreed to purchase the copy of [the software] that accompanied the evaluation diskette after evaluating [the

software], the license agreement applies to the initial transaction." *Id.* The defendant made an offer by including a copy of the live software with the evaluation diskette; the plaintiff accepted that offer on the defendant's terms by opening the envelope containing the live software. *Id.* at 764. Unlike the rest of the transactions between the parties and the facts in *Step-Saver*, in which a contract was formed by ordering and shipment of the software, in this one instance no contract was formed until the plaintiff decided to keep the live copy of the software. *Id.* at 763.

57. See K.S.A. 84-2-209 (1996): "An agreement modifying a contract within this article needs no consideration to be binding."

58. 831 F. Supp. at 764.

59. In a subsequent case, *Novell Inc. v. Network Trade Center Inc.* 25 F. Supp. 2d 1218 (D. Utah 1997), the district court, after citing the relevant cases but with little other analysis, held that "software transactions do not merely constitute the sale of a license to use the software. The shrinkwrap license included with the software is therefore invalid as against such a purchaser insofar as it purports to maintain title to the software in the copyright owner." *Id.* at 1230.

60. 86 F.3d 1447 (7th Cir. 1996).

61. *Id.* at 1449-50.

62. *ProCD Inc. v. Zeidenberg*, 908 F. Supp. 640, 644 (W.D. Wis.), *rev'd*, 86 F.3d 1447 (7th Cir. 1996).

63. *Id.* at 644-45.

from the allegedly unauthorized use of its product. The district court held that the license was not binding,⁶⁴ but the Seventh Circuit, in an opinion written by Judge Frank Easterbrook, reversed. The court concluded that (1) section 2-207 did not apply because there was no exchange of forms — only a single form (the shrinkwrap license) was at issue; (2) the plaintiff invited acceptance by conduct, and defendant accepted by using the software after having an opportunity to read the terms of the license; and (3) the defendant could have prevented formation of the contract by returning the package, but it did not. The court explained that “[t]ransactions in which the exchange of money precedes the communication of detailed terms are common,” giving as examples insurance binders, airplane tickets, consumer electronics (with warranty terms), and medicines (with package inserts).⁶⁵ According to the court, the terms of the license, like the number of phone books included in the database, are all parts of the package purchased by the buyer. “Competition among vendors, not judicial revision of a package’s contents, is how consumers are protected in a market economy.”⁶⁶ The Washington Court of Appeals recently followed *ProCD* in enforcing a shrinkwrap license in *M.A. Mortenson Co. v. Timberline Software Corp.*, borrowing extensively from its analysis.⁶⁷

New Article 2B addresses shrinkwrap licenses as part of its broader treatment of what the Official Comments call “layered contracting” or “rolling contracts.”⁶⁸ As the Comments explain:

The concept that all contracts arise at one single point in time and that this single event defines all terms of agreement is not consistent with modern commercial practice. Contracts are often formed over a period of time, and contract terms are often developed during performance, rather than before performance occurs.

The comments expressly approve of *ProCD*, which “correctly view[ed] contracting as a process, rather than a single event.”⁶⁹

Under new Article 2B, a party is bound by the terms con-

tained in a “record” — a broader term than “writing,” which includes electronic documents — if it “agrees to the record, by manifesting assent or otherwise.”⁷⁰ A person “manifests assent” if, “acting with knowledge of, or after having an opportunity to review” the record, it “authenticates the record” or “in the case of the conduct or statements of a person,⁷¹ the person intends to engage in the conduct or make the statement and has reason to know that the other party may infer from the conduct or statement that the person assents to the record.”⁷² An “opportunity to review” requires that a record be “made available in a manner that ought to call it to the attention of a reasonable person and permit review.”⁷³ Even after performance has begun the parties may adopt the terms of a record as “the terms of the contract,” but only “if the parties had reason to know that their agreement would be represented in whole or in part by a later record to be agreed and there was no opportunity to review the record or a copy of it before performance or use commenced.”⁷⁴ The “reason to know” standard can be met by examining “the entire circumstances, including routine or ordinary practices of which a party is or should be aware” — which may well include shrinkwrap licensing.⁷⁵ If the record can be reviewed by a person only after the person has begun performing or is obligated to pay, the person must be given “a right to a return if it rejects the terms of the record.”⁷⁶ Thus, new Article 2B appears as a general matter to validate shrinkwrap licenses, so long as the customer has reason to know in advance and has the right to return the software if it rejects the license terms.

New Article 2B imposes some additional restrictions on shrinkwrap licenses in the case of “mass-market licenses.” A mass-market license is defined as a “standard form that is

The concept that all contracts arise at one single point in time and that this single event defines all terms of agreement is not consistent with modern commercial practice.

64. *Id.* at 650-56.

65. 86 F.3d at 1451.

66. *Id.* at 1453. In a case decided after *ProCD*, the United States District Court for the Northern District of California held that a shrinkwrap license could not modify the parties’ agreement when their prior written contract provided that any modifications must be signed by both parties. *Morgan Laboratories Inc. v. Micro Data Base Sys. Inc.*, 1997 WL 258886 (N.D. Cal. 1997).

67. 970 P.2d 803, 808-10 (Wash. Ct. App. 1999). The court also relied on *Hill v. Gateway 2000 Inc.*, 105 F.3d 1147 (7th Cir.), cert. denied, 118 S. Ct. 47 (1997). See *infra* text accompanying notes 86-99.

68. Official Comment 4 to U.C.C. § 2B-202.

69. Official Comment 3 to U.C.C. § 2B-207.

70. U.C.C. § 2B-207(a).

71. An electronic agent manifests assent if, “after having an opportunity to review” the record, it “authenticates the record” or “engages in operations that the circumstances clearly indicate constitute acceptance.” *Id.* § 2B-111(a)(1) & (3).

72. *Id.* § 2B-111(a)(1) & (2). Official Comment 5 to new U.C.C. § 2B-111 provides the following example of manifesting assent:

The registration screen for NY Online prominently states:

‘Please read the license. It contains important terms about your use and our obligations with respect to the information. Click here to review the License. If you agree to the license, indicate this by clicking the “I agree” button. If you do not agree to the license, click the “I decline” button.’ The on-screen buttons are clearly identified. The underlined text is a hypertext link which, if selected, promptly displays the license. *A party that indicates “I agree” manifests assent to the license and adopts the terms of the license.*

73. U.C.C. § 2B-112(a). For electronic agents, an opportunity to review requires that the record be made available in a manner that “would enable a reasonably configured electronic agent to react to the record.” *Id.* § 2B-112(b).

74. *Id.* § 2B-207 (b).

75. Official Comment 3 to U.C.C. § 2B-207.

76. U.C.C. § 2B-112(c). No right to return is required, however, if the record proposes to modify the contract, provides the particulars of performance, or, “in a case that does not involve a mass-market license, the parties at the time of contracting had reason to know that a record or terms would be presented at or prior to the initial use or access to the information.” *Id.*

prepared for and used in a mass-market transaction.”⁷⁷ A “mass-market transaction” includes both a consumer transaction — a contract in which an individual is licensing

In the case of mass-market licenses, then, Article 2B seems to validate many shrinkwrap licenses, subject to added protections for licensees who do not wish to accept the license terms.

information for personal, family or household purposes⁷⁸ — as well as a transaction with an end-user that “is for information or informational rights directed to the general public as a whole including consumers under substantially the same terms for the same information” and “the licensee acquires the information or rights in a retail transaction under terms and in a quantity consistent with an ordinary transaction in a retail market.”⁷⁹ In other words, all consumer transactions and some business transactions — those that involve “information aimed at the general public as a whole, including consumers” — are mass-market transactions within the meaning of Article 2B.⁸⁰

For mass-market licenses, a party adopts the terms of a record “only if the party agrees to the license, by manifesting assent or otherwise, before or during the party’s initial performance or use of or access to the information.”⁸¹ Assent is not possible

thereafter. Moreover, if a party has no opportunity to review a mass-market license before being obligated to pay, and if the party “does not agree, by manifesting assent or otherwise, to the license after having that opportunity,” the party is entitled to return the item and be reimbursed for reasonable costs.⁸² As Official Comment 4 to section 2B-208 explains: “In cases where the form is presented to the licensee after it becomes initially obligated to pay, it must be given a cost free right to say no.”⁸³ But the Official Comments further explain that opening a package may manifest assent to the license terms, eliminating the right to return the software.⁸⁴ In the case of mass-market licenses, then, Article 2B seems to validate many shrinkwrap licenses, subject to added protections for licensees who do not wish to accept the license terms.

B. Related assent issues

Sellers have applied some of the techniques involved in shrinkwrap licensing to other aspects of electronic commerce. The leading case involves Gateway 2000 Inc. a personal computer seller, and thus is appropriate to discuss in an article on electronic commerce.⁸⁵

In *Hill v. Gateway 2000 Inc.*⁸⁶ consumers purchased a home computer over the phone, paying with a credit card. Contained in the box when the computer arrived was a form providing that “[t]his document contains Gateway 2000’s Standard Terms and Conditions. By keeping your Gateway 2000 computer system beyond thirty (30) days after the date of delivery, you accept these Terms and Conditions.”⁸⁷ Included among the Standard Terms and Conditions was an arbitration clause. The consumers did not return the computer within 30 days of delivery. The computer allegedly did not work as promised, and the consumers filed suit alleging breach of contract, fraud and racketeering. Gateway 2000 sought to have the district court compel arbitration. The district court refused.

The Seventh Circuit, in another opinion by Judge Easterbrook, reversed and enforced the arbitration clause. The court concluded that *ProCD* was controlling⁸⁸ and that the consumers were bound by the arbitration clause. It was not legally relevant, according to the court, that *ProCD* involved computer software instead of computer hardware.⁸⁹ By continuing to use the computer more than 30 days after delivery, the consumers had accepted Gateway 2000’s offered terms, which included an arbitration clause. The court emphasized that practical considerations supported allowing phone sellers to include their terms of sale with the product rather than reciting the terms on the telephone before the goods are shipped.⁹⁰ The court noted that plaintiffs might have had a stronger case had they wanted to return the computer but found shipping costs to be too high.⁹¹

Gateway 2000 has proven to be very controversial among commentators.⁹² The legal argument in favor of Gateway’s position (and the court’s ultimate decision) is that ordinarily the offeror is master of the offer and can specify how acceptance is to be made.⁹³ Here, Gateway specified that use of the computer would be an acceptance of its offered terms. In a subsequent case involving Gateway 2000, *Brower v. Gateway 2000 Inc.*⁹⁴ the New

77. *Id.* § 2B-102(a)(33).

78. *Id.* § 2B-102(a)(13), (14).

79. *Id.* § 2B-102(a)(34). Transactions for public display or performance of a copyrighted work, in which information is customized, or for site licenses or access contracts are not mass-market transactions. *Id.* § 2B-102(a)(34)(B)(iii).

80. Official Comment 28 to U.C.C. § 2B-102.

81. U.C.C. § 2B-208(a).

82. *Id.* § 2B-208(b). The section contemplates that a licensor may have a similar right to a return if it becomes obligated to deliver or delivers information before having an opportunity to review the terms. *Id.* § 2B-208(c).

83. Official Comment 4(c) to U.C.C. § 2B-208.

84. *Id.* (“if the licensee manifests assent to the license because it has reason to know that opening the packet holding the disk of the software constitutes assent to the license, the return right does not apply”).

85. Electronic commerce need not be involved in such transactions,

however. See *infra* text accompanying notes 100-104.

86. 105 F.3d 1147 (7th Cir.), cert. denied, 118 S. Ct. 47 (1997).

87. See *Brower v. Gateway 2000 Inc.* 676 N.Y.S.2d 569, 570 (App. Div. 1998).

88. 105 F.3d at 1148-50 (citing *ProCD Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996)).

89. *Id.* at 1149.

90. *Id.*

91. *Id.* at 1150.

92. See Jean R. Sternlight, *Gateway Widens Doorway to Imposing Unfair Binding Arbitration on Consumers*, FLA. BAR J., NOV. 1997, at 8, 10-12 (“The outcome in Gateway ... is questionable on federal statutory, common law, and constitutional grounds” and “is unwise as a matter of policy”); Thomas J. McCarthy et al., *The Uniform Commercial Code Survey Part I: Sales*, 53 Bus. Law. 1461, 1465-66 (1998).

93. E.g., RESTATEMENT (SECOND) OF CONTRACTS § 30(1) & cmt. a (1981).

94. 676 N.Y.S.2d at 569.

York Appellate Division followed the Seventh Circuit's decision, reasoning as follows:

[I]n such transactions, there is no agreement or contract upon the placement of the order or even upon the receipt of the goods. By the terms of the Agreement at issue, it is only after the consumer has affirmatively retained the merchandise for more than 30 days — within which the consumer has presumably examined and even used the product(s) and read the agreement — that the contract has been effectuated.⁹⁵

The policy argument in favor of the company's position is that requiring assent to all terms before the computer is shipped is costly: it could require the phone representative to read all of the terms over the phone, or require further correspondence between the parties before Gateway ships the computer.⁹⁶ The form of contracting followed by Gateway avoids those costs.

The legal argument in favor of consumers begins with the premise that a contract was formed either over the telephone (if Gateway 2000's representative promised to ship the computer) or when Gateway 2000 in fact did ship the computer. Support for this argument comes from section 2-206 of the UCC, which provides that "an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of non-conforming goods."⁹⁷ If the parties had a contract at that point, then the terms sent with the computer would be proposals for additional terms under section 2-207 contained in a confirming memorandum. For the additional terms to become part of the contract, the consumers would have to assent expressly to those terms; mere continued use of the computer, which the consumer already had the right to do, would not be enough.⁹⁸ The policy argument in favor of the consumers is that permitting contracting in the way done in Gateway unfairly "binds consumer buyers, and other unfortunates who do not use forms in the contracting process, to unread form clauses."⁹⁹

As indicated above, the rationale of *Gateway 2000* is not limited to electronic commerce. Indeed, in *United States Surgical Corp. v. Orris Inc.*¹⁰⁰ a case from the United States District Court for the District of Kansas, a manufacturer of surgi-

cal instruments made, albeit unsuccessfully, a similar argument. In *U.S. Surgical*, the manufacturer filed suit against a company that reesterilized surgical instruments sold by the manufacturer to hospitals. The manufacturer argued that labeling on the surgical instruments stating "for single use only" was a contractual restriction on the hospital's ability to reuse the instruments.¹⁰¹ The court rejected the argument. The manufacturer argued, and the court agreed, that a contract was formed upon receipt by the manufacturer of an order to purchase the instruments.¹⁰² The court then proceeded to analyze the alleged single-use restriction as a proposed modification to that contract. Quoting *Arizona Retail*, the court made clear that assent to the proposed modification "must be express and cannot be inferred merely from a party's conduct in continuing with the agreement."¹⁰³ Thus, the "hospital's mere compliance with the previously entered agreement did not constitute assent or indicate any intent to adopt the 'single use only' language as a modification to the agreement."¹⁰⁴ Because the hospital did not expressly assent to the restriction, the hospital was not precluded by contract from reusing the instruments.

U.S. Surgical is similar to the shrinkwrap license cases and to *Gateway 2000* in that it involves an argument that continued use of goods constitutes assent to terms contained in the packaging. *U.S. Surgical* is a weaker case for enforcing those terms, however, because the manufacturer there did not expressly provide that use of the medical instruments constituted assent to the single-use restriction.¹⁰⁵ Perhaps if the manufacturer had done so the result would have been different. However, the court's reliance on *Arizona Retail*¹⁰⁶ rather than *ProCD* or *Gateway 2000* suggests that it would have reached the same result even if the manufacturer had so provided.

In its current form, revised Article 2¹⁰⁷ effectively reverses the rule of *Gateway 2000*.¹⁰⁸ Revised section 2-207(d) provides as follows:

U.S. Surgical is similar to the shrinkwrap license cases and to Gateway 2000 in that it involves an argument that continued use of goods constitutes assent to terms contained in the packaging.

95. *Id.* at 572. The *Brower* court did find that the provision of the arbitration clause requiring arbitration under the rules of the International Chamber of Commerce was unconscionable. *Id.* at 573-75.

96. Interestingly, my understanding (provided by students who have recently purchased Gateway 2000 computers) is that Gateway 2000 phone representatives now inform purchasers that additional terms will be sent with the computer and that if the purchasers object to the terms they should send back the computer.

97. K.S.A. 84-2-206(1)(b) (1996).

98. Or the terms could be treated as proposed modifications under section 2-209 to the same effect.

99. McCarthy et al., *supra* note 92, at 1466; see also Sternlight, *supra* note 92, at 11-12.

100. 5 F. Supp. 2d 1201 (D. Kan. 1998) (Van Bebber, C.J.).

101. *Id.* at 1205.

102. *Id.* at 1205-06.

103. *Id.* at 1206 (quoting *Arizona Retail*, 831 F. Supp. at 764).

104. *Id.*

105. The manufacturer's position surely was not helped by the fact that the language was required by F.D.A. regulation. *Id.* at 1203-04.

106. The *U.S. Surgical* court also relied on *Step-Saver* in rejecting an argument that the single-use restriction became part of the contract under section 2-207. See *id.* 1206.

107. Revision of Uniform Commercial Code Article 2 — Sales. References unless indicated otherwise are to the draft of March 1, 1999. See *supra* note 33.

108. Official Comment 5 to revised section 2-207 makes clear that the section applies to the *Gateway 2000* facts. Indeed, it explains that court decisions, apparently referring to cases such as *Gateway 2000*, "arguably misinterpret Article 2 and create the risk either that the buyer will be unfairly surprised by the terms or put in a position where return of the goods is so inconvenient and costly that no objection will be made to the terms." *Id.*

If at the time of full or partial payment for goods by a buyer, a seller intends the agreement to contain additional terms and after payment but not later than delivery of the goods those terms are proposed to the buyer, the following rules apply:

(1) If it was reasonable under the circumstances for the seller to disclose or make available [a source of] the terms to the buyer at or before the time of payment and it fails to do so, the terms provided after payment do not become part of the agreement [contract] unless the buyer expressly agrees to them;

(2) If it was not reasonable under the circumstances for the seller to disclose the terms or make available a source of the terms to the buyer, the seller shall inform the buyer at or before the time of payment that additional terms will be proposed.

(A) If the buyer is not informed by the seller, the subsequently proposed terms do not become part of the agreement [contract] unless expressly agreed to by the buyer.

(B) If informed by the seller, the buyer may either accept the subsequently proposed terms by agreement or reject them by promptly notifying the seller. If the terms are rejected, the buyer, subject to paragraph (3), must return the goods within a reasonable time.

(3) Upon returning the goods to the seller under subsection (2)(B), the buyer has:

(A) a right to a refund of the price;

(B) a right to reimbursement of any reasonable expenses incurred related to the return and in compliance with any instructions of the seller for return or, in the absence of instructions, return postage or similar reasonable expenses in returning the goods;

(C) the rights and duties of a buyer who has rightfully rejected goods. ...¹⁰⁹

Under this section, if it is reasonable for the seller to disclose the terms at the time of purchase, it must do so or the buyer is not bound by the terms unless it expressly agrees. Notably, the section makes clear that "a term is not expressly agreed to by the mere retention or use of goods."¹¹⁰ Even if it is not reasonable for the seller to disclose the terms, it still must inform the buyer no later than the time of payment that additional terms will be proposed. If the seller informs the buyer, the buyer may reject the terms and return the goods to the seller. Or it may accept the terms by agreement, which apparently can be indicated by retention or continued use of the goods.¹¹¹ If the seller fails to inform the buyer, express assent is once more required. The section also provides that when the buyer rejects the terms and returns the goods to the seller, it is entitled to a refund of the purchase price plus reimbursement of its reasonable expenses in returning the goods.

Traditional contract law, and current Article 2, are based on the assumption that human beings ... take the actions that determine whether a contract is formed.

C. Electronic agents and timing

Traditional contract law, and current Article 2, are based on the assumption that human beings (either as principals or acting as agents for legal entities such as corporations) take the actions that determine whether a contract is formed. With the growth of electronic commerce, that assumption is becoming increasingly attenuated. Computers communicate directly with other computers in ordering products or shipping goods. It is true that a human being programmed the computer to do what it is doing, but that raises, not answers, the question of whether the actions of the programmer are sufficient to form a binding contract when the computer later acts without any review by a human being.¹¹²

Revised Article 2 makes contracts by "electronic agents" legally binding.¹¹³ It defines "electronic agent" as "a computer program or other automated means used by a person to independently initiate or respond without review by an individual to electronic messages or performances on behalf of that person."¹¹⁴ New section 2-218 then makes clear that "[a] contract may be formed by the interaction of electronic agents ... if the interaction results in the electronic agents engaging in operations that confirm or indicate the existence of a contract."¹¹⁵ Section 2-216 provides

109. Revised U.C.C. § 2-207(d). The March 1, 1999, draft indicates that this provision and the accompanying comments are under review.

110. *Id.* § 2-207(e).

111. See Official Comment 5 to Revised U.C.C. § 2-207 ("the informed buyer could agree to proposed terms simply by paying the price or using the goods").

112. See Tom Allen & Robin Widdison, *Can Computers Make Contracts?*, 9 HARV. J.L. & TECH. 25 (1996); Raymond T. Nimmer, *Electronic Contracting: Legal Issues*, 14 J. MARSHALL J. COMPUTER & INFO. L. 211, 212-13 (1996).

113. The provisions of revised Article 2 on electronic contracts are taken essentially verbatim from new Article 2B. The Feb. 1, 1999, draft of Article 2 incorporates the provisions of Article 2B from the August or December 1998 drafts. The March 1, 1999, draft of revised Article 2 indicates simply that these provisions are under review. Quotes from the Official Comments in this section come from the Feb. 1, 1999, draft of Article 2B.

114. Revised U.C.C. § 2-102(a)(17) (§ 2B-102(a)(21)).

115. *Id.* § 2-218 (1) (§ 2B-204(1)). Section 2-218(2) addresses interactions between an electronic agent and an individual.

that actions by an electronic agent "constitute the authentication or manifestation of assent or performance of a person if the person used the electronic agent for that purpose."¹¹⁶ Unlike human agents, where

Cases dealing with technologies such as telegrams, telexes, and faxes generally have found the requirement of a writing satisfied, but in those cases the result of the communication was a message printed on paper.

the common law inquiry is whether the agent acted in the scope of his or her authority, for electronic agents the revisions to the Code direct that the inquiry is whether "the agent was used for the relevant purpose."¹¹⁷ This new Code section should resolve any uncertainty about whether contracts entered by electronic agents are legally enforceable.¹¹⁸

Revised Article 2 also "rejects the mailbox rule for electronic messages."¹¹⁹ Under the common law, an acceptance is effective when sent (*i.e.*, placed in the mailbox).¹²⁰ Under revised Article 2, "an electronic message is effective when received even if no individual is aware of its receipt."¹²¹ The drafters give two reasons for the change: first, that electronic communications are "relatively instantaneous," and, second, that it is appropriate to "place[] the risk on the sending party of ensuring that receipt occurs."¹²² The provision that no individual need be aware of receipt for the message to be effective is consistent with the general approval of contracting by electronic agents in revised Article 2.¹²³

IV. Contract formalities and the statute of frauds

Article 2 requires that to be enforceable, "a contract for the sale of goods for the price of \$500 or more" must be evidenced by some sort of a "writing."¹²⁴ The writing must be "sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought,"¹²⁵ and state a quantity.¹²⁶ Subsections (2) and (3) of section 2-201 set out various exceptions to the statute of frauds;¹²⁷ other exceptions may be available under the common law.¹²⁸

The issues posed for the statute of frauds by electronic commerce are twofold. First, is an electronic communication a writing? The Code defines "writing" as "includ[ing] printing, typewriting or any other intentional reduction to tangible form."¹²⁹ An electronic communication plainly is not printing or typewriting. Moreover, although electronic communications can result in printed output, such as when a recipient prints out an e-mail message, they do not inevitably do so. Indeed, having to store electronic communications in paper form to satisfy the statute of frauds would eliminate at least some of the cost savings that technology has made possible. Current case law is unclear as to whether an electronic communication constitutes a "writing."¹³⁰ Cases dealing with technologies such as telegrams, telexes, and faxes generally have found the requirement of a writing satisfied,¹³¹ but in those cases the result of the communication was a message printed on paper.¹³² The cases are split on whether a tape recording can constitute a writing.¹³³

Second, is an electronic communication signed? "Signed" is defined in the Code to "include[] any symbol executed or adopted by a party with present intention to authenticate a writing."¹³⁴ The Official Comments explain that a "complete

116. *Id.* § 2-216(a) (§ 2B-119(a)).

117. Official Comment 2 to U.C.C. § 2B-119.

118. Revised Article 2 also contains extensive provisions addressing the attribution of electronic messages to senders, also based on Article 2B. See Revised U.C.C. §§ 2-211 to 2-215. This article does not discuss those provisions.

119. See Official Comments 1 & 2 to U.C.C. § 2B-120. An "electronic message" is "an electronic record or display that is stored, generated, or transmitted by electronic means for purposes of communication to another person or electronic agent." Revised U.C.C. § 2-102(a)(18) (§ 2B-102(a)(22)).

120. RESTATEMENT (SECOND) OF CONTRACTS § 63(a) (1981).

121. Revised U.C.C. § 2-217(a) (§ 2B-120(a)). For electronic offers that evoke an electronic message in response, a contract is formed either when the acceptance is received or, "if the response consists of furnishing the information or access to the information, when the information or notice of access is received," unless the offer requires another form of acceptance. *Id.* § 2-217(a)(1) & (2) (§ 2B-120(b)).

122. Official Comment 2 to U.C.C. § 2B-120.

123. If the sender of an electronic message expressly conditions its effectiveness on an electronic acknowledgment by the recipient, the message "does not bind the originator until acknowledgment is received." Revised U.C.C. § 2-217(b)(1) (§ 2B-120(b)(1)).

124. K.S.A. 84-2-201(1) (1996).

125. *Id.*

126. Section 2-201(1) provides that "[a] writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing." *Id.* Official Comment 1 to section 2-201 makes clear that one of the "definite and invariable requirements as to the memorandum" is that "it must specify a quantity."

127. Section 2-201(2) contains the merchants' exception, whereby a confirming memorandum sent from one merchant to another may satisfy the statute of frauds even though not signed by the party to be bound. K.S.A. 84-2-201(2) (1996). Section 2-201(3) contains exceptions for specially manufactured goods, admissions, and part performance. *Id.* 84-2-201(3).

128. *Decatur Coop. Ass'n v. Urban*, 219 Kan. 171, 547 P.2d 323 (1976) (holding that promissory estoppel is available as exception to statute of frauds). *But see* K.S.A. 84-2-201(1) (providing that writing is required "[e]xcept as otherwise provided in this section," perhaps excluding nonstatutory exceptions).

129. K.S.A. 84-1-201(46) (Supp. 1998).

130. See generally R.J. Robertson Jr., *Electronic Commerce on the Internet and the Statute of Frauds*, 49 S.C. L. REV. 787, 798-809 (1998); Deborah L. Wilkerson, *Comment, Electronic Commerce Under the U.C.C. Section 2-201 Statute of Frauds: Are Electronic Messages Enforceable?*, 41 U. KAN. L. REV. 403 (1993).

131. *E.g.*, *Apex Oil Co. v. Vanguard Oil & Serv. Co.*, 760 F.2d 417, 423 (2d Cir. 1985); *Interocean Shipping Co. v. National Shipping & Trading Corp.*, 523 F.2d 527, 537-38 (2d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976); *Howley v. Whipple*, 48 N.H. 487 (1869).

132. Robertson, *supra* note 130, at 808.

133. *Compare Sonders v. Roosevelt*, 476 N.Y.S.2d 331 (App. Div. 1984), *aff'd*, 476 N.E.2d 996 (N.Y. 1985) (holding tape recording did not satisfy writing requirement of statute of frauds) and *Roos v. Aloi*, 487 N.Y.S.2d 637 (Sup. Ct. 1985) (same) with *Ellis Canning Co. v. Bernstein*, 348 F. Supp. 1212, 1228 (D. Colo. 1972) (holding that "when the parties to an oral contract agree that the oral contract shall be tape recorded, the contract is 'reduced to tangible form' when it is placed on the tape").

134. K.S.A. 84-1-201(39) (Supp. 1998).

signature is not necessary" and that the ultimate question "always is whether the symbol was executed or adopted by the party with present intention to authenticate the writing."¹³⁵ Thus, "in appropriate cases" a signature "may be found in a billhead or letterhead."¹³⁶ At least one recent case, however, held that a machine-generated name at the top of a fax did not qualify as a signature under the statute of frauds.¹³⁷ Moreover, the court rejected "plaintiff's contention that the intentional act of programming a fax machine, by itself, sufficiently demonstrates to the recipient the sender's apparent intention to authenticate every document subsequently faxed."¹³⁸ Thus, it remains an open question whether a machine-generated name and address on an e-mail message would satisfy the signature requirement of the statute of frauds.¹³⁹

The issue whether an electronic communication is signed has been resolved in at least some cases by the Kansas Digital Signature Act.¹⁴⁰ Enacted in 1997, the act provides that "[a] digital signature may be accepted as a substitute for, and, if accepted, shall have the same force and effect as any other form of signature."¹⁴¹ Accordingly, a digital signature within the meaning of the act could satisfy the Article 2 requirement that a writing be "signed." The Digital Signature Act defines a "digital signature" as "a computer-created electronic identifier" that meets five additional requirements: the digital signature must be "(1) [i]ntended by the person using it to have the force and effect of a signature; (2) unique to the person using it; (3) capable of verification; (4) under the sole control of the person using it; and (5) linked to data in such a manner that it is invalidated if the data are changed."¹⁴² The Kansas act has the advantage over a number of digital signature acts of not being tied to any particular technology.¹⁴³ A party's name on the address line of an e-mail message, however, likely does not satisfy the requirements of the Kansas act.¹⁴⁴

Revised Article 2 takes a broader approach to the enforceability of electronic communications.¹⁴⁵ Initially, revised Article 2 retains the statute of frauds, although the drafters considered eliminating a writing requirement altogether. The revision increases the minimum under which no writing is required to \$5,000, requires the party against whom enforcement is sought to "den[y] facts from which an

agreement can be found," and no longer requires a quantity to be stated for the contract to be enforceable.¹⁴⁶ The revision also modifies some of the exceptions to the statute of frauds.¹⁴⁷

More importantly for present purposes, the revision makes two changes that recognize the increasing importance of contract formation through electronic technologies. First, revised section 2-201(a) replaces the requirement of a "writing" with the requirement of a "record."¹⁴⁸ Revised Article 2 defines "record" as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form."¹⁴⁹ The Official Comments to Article 2B explain that "[e]lectronic text recorded in a computer memory that could be printed from the memory constitutes a record."¹⁵⁰ The comments further explain that storage can be only temporary — no permanent storage of the record is required. The record merely need be "perceivable," which "can be either directly or indirectly with the aid of a machine."¹⁵¹

The second change is to replace the requirement of a signature with the requirement that the record be "authenticated by the party against which enforcement is sought."¹⁵² To "[a]uthenticate" means to sign, or to execute or adopt a symbol, or encrypt a record in whole or in part, with present intent to (i) identify the authenticating party; and (ii) adopt or accept a record or term, or (iii) establish the authenticity of a record or term that contains the authentication refers."¹⁵³ These two changes, which "blend the new electronic technology with the traditional,"¹⁵⁴ should go far toward resolving any uncertainties about whether electronic communications are enforceable under the statute of frauds.

Enacted in 1997, the act provides that [a] digital signature may be accepted as a substitute for, and, if accepted, shall have the same force and effect as any other form of signature.'

135. Official Comment 39 to K.S.A. 84-1-201.

136. *Id.*

137. *Parma Tile Mosaic & Marble Co. v. Estate of Short*, 663 N.E.2d 633 (N.Y. 1996).

138. *Id.* at 635.

139. If the sender typed his or her name in the body of the message, the signature requirement would be satisfied. See *Bradley v. Dean Witter Realty Inc.*, 967 F. Supp. 19, 26-27 (D. Mass. 1997) (handwritten or typed name on fax cover sheet can satisfy signature requirement).

140. K.S.A. 60-2616 (Supp. 1998).

141. *Id.* 60-2616(c).

142. *Id.* 60-2616(b).

143. E.g. Daniel J. Greenwood and Ray A. Campbell, *Electronic Commerce Legislation: From Written on Paper and Signed in Ink to Electronic Records and Online Authentication*, 53 Bus. Law. 307, 337-38 (1997). Greenwood and Campbell provide a good introduction to technological issues underlying digital signatures, *id.* at 309-16, as well as an overview of alternative legislative approaches, including the draft Uniform Electronic Transactions Act, *id.* at 321-37.

144. Robertson, *supra* note 130, at 822. For a more general

discussion of the Kansas Digital Signature Act, see Anthony Martin Singer, Note, *Electronic Commerce: Digital Signatures and the Role of the Kansas Digital Signature Act*, 37 WASHBURN L.J. 725, 737-44 (1998).

145. Even under current law, parties to EDI transactions frequently will include provisions in their master trading party agreements seeking to avoid any statute of frauds defense. See Electronic Messaging Services Task Force, *supra* note 7, at 1680-94. The effectiveness of such provisions has not been resolved.

146. Revised U.C.C. § 2-201(a).

147. *Id.* § 2-201(b) & (c).

148. *Id.* § 2-201(a). In addition, the merchants' exception of section 2-201(b) now makes enforceable a contract evidenced by a "record in confirmation of a contract and sufficient against the sender" that is not objected to by "notice in a record." *Id.* § 2-201(b).

149. *Id.* § 2-102(a)(22).

150. Official Comment 35 to U.C.C. § 2B-102.

151. *Id.*

152. Revised U.C.C. § 2-201(a).

153. *Id.* § 2-102(a)(1).

154. Official Comment 2 to Revised U.C.C. § 2-102.

V. Conclusion

Technology is revolutionizing the way contracts are formed and the form in which they are preserved. Unless the law keeps up, it risks stifling further innovation. This brief survey identifies some ways in which Article 2 has dif-

ficulty in dealing with electronic commerce and some provisions of revised Article 2 and new Article 2B that will affect electronic commerce. From it we can see both how courts have struggled when faced with these issues under Article 2 and how the drafters of revised Article 2 and new Article 2B have responded to those difficulties.



About the author

Christopher R. Drabozal is an associate professor of law at the University of Kansas. He teaches contracts, sales and commercial arbitration. Drabozal drafted the 1996 Kansas Comments to Articles 2 and 2A of the Kansas Uniform Commercial Code. Before coming to KU, he practiced law with Sidley & Austin in Washington, D.C., and was a law clerk for Chief Judge Charles Clark of the United States Court of Appeals for the Fifth Circuit, Justice Byron R. White of the United States Supreme Court, and Judge George H. Aldrich of the Iran-United States Claims Tribunal in The Hague, The Netherlands.



Passing the gavel

From left, KBA President David J. Waxse, Overland Park, Rep. Tim Carmody, R-Olathe, Rep. Mike O'Neal, R-Hutchinson, and KBA General Counsel Ron Smith. Carmody, outgoing chair of the House Judiciary Committee passed the KBA's ceremonial Judiciary chair's gavel to O'Neal, the incoming chair at a March 24 luncheon in Topeka. The gavel contains the names of all House Judiciary chairs since Kansas became a state. Each time the chairmanship changes the gavel is passed on. The Senate Judiciary Chair has a similar gavel, but that chairmanship did not change this year.

From the President: More thoughts on professionalism

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instead of trying to make sure lawyers don't violate the rules, this person would work on persuading lawyers that professionalism pays.

We can determine what responsibilities this administrator would have using the components of professionalism I have discussed before:

- Ethics and integrity and professional standards,
- Competent service to clients while maintaining independent judgment,
- Continuing education,
- Civility,
- Obligations to the rule of

law and the justice system, and

- Pro bono service.

The professionalism administrator should have responsibility for all of these with the exception of ethics, which is the responsibility of the disciplinary administrator, and continuing education, which is the responsibility of the CLE administrator. More specifically, this person would concentrate on promoting "integrity and professional standards, competent service to clients while maintaining independent judgment, civility, obligations to the rule of law and the justice system, and pro bono service." Education and motivation, as the primary tools, will probably be most effective.

The professionalism administrator would additionally have the responsi-

bility of suggesting ways to improve professionalism. One suggestion might include, setting up methods of keeping track of each attorney's and law firm's pro bono service and publishing that information. We might find more attorneys willing to carry out their ethically required pro bono service if that information was publicly available and celebrated. Another example would be the establishment of a process for judges and lawyers to regularly report attorneys that demonstrate civility and integrity instead of just reporting negative behaviors. These reports could be used by the Supreme Court to make awards in each of these categories. Perhaps if the public were made more aware of the good deeds lawyers do, the perception of the profession would improve. Let's all think of ways to improve professionalism instead of merely bemoaning its decline.