

Under the Surrounding Circumstances: Amended Article 2's Redundant (or Worse) Electronic Commerce Provisions

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This Article takes aim at the unnecessary (at best) electronic commerce provisions of proposed Amended Article 2 of the Uniform Commercial Code. With federal and uniform state law already in place, these additional provisions would only introduce complexity, confusion, and dubious policy tilts on a few issues. So far this particular commercial calamity has been averted by the commercial catastrophe of the failed Article 2 amendment project, which has not been enacted anywhere. If Amended Article 2 can ever be fixed to address its many other problems, this Article argues that its electronic commerce provisions should be deleted.

I. INTRODUCTION

The entire fifteen-year Article 2 project, first conceived as a revision and then reconceived as amendments,¹ is a leading candidate for Commercial Calamity Number One. However, the word “calamity” does not quite capture the magnitude of that sad saga. It is more a commercial catastrophe, one that soiled the reputations of its sponsors, soured the relationship between them, and put in doubt the future of the Uniform Commercial Code (UCC),² particularly the ability of the UCC process to produce legislation that serves

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¹ For accounts of the process by the initial reporters, see Richard E. Speidel, *Introduction to Symposium on Proposed Revised Article 2*, 54 SMU L. REV. 787 (2001); Linda J. Rusch, *A History and Perspective of Revised Article 2: The Never-Ending Saga of a Search for Balance*, 52 SMU L. REV. 1683 (1999); Linda J. Rusch, *Is the Saga of the Uniform Commercial Code Article 2 Revisions Over? A Brief Look at What NCCUSL Finally Approved*, 6 DEL. L. REV. 41 (2003). The Study Group for the project was formed in 1988 and issued a report in 1990. See PERMANENT EDITORIAL BOARD STUDY GROUP, UNIFORM COMMERCIAL CODE ARTICLE 2, PRELIMINARY REPORT (1990). The final step by the sponsoring organizations was American Law Institute (ALI) membership approval, by a closely divided voice vote, at the May 2003 ALI Annual Meeting.

² Official Text, Uniform Commercial Code (2005) [hereinafter UCC Official Text] (incorporating Amended Article 2 into the UCC Official Text, so that all citations to Article 2 of the Official Text are to Amended Article 2). The UCC is sponsored jointly by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the ALI, and their approval process for Amended Article 2 was completed in May 2003. See *supra* note 1. More than three years later, no jurisdiction had enacted Amended Article 2. An Amended Article 2A, concerning leases of goods, was drafted at the same time as Amended Article 2, and it raises most of the same electronic commerce issues. Leases, however, are beyond the explicit scope of this Article.

the public interest. The story has played out predictably, with a frosty reception in the legislatures, not one of which has even moved the proposed legislation out of committee.³

This brief Article will not take on that leviathan but rather has some smelt-sized fish to fry, specifically the electronic commerce provisions in Amended Article 2.⁴ These range from pointless to nasty. Venting is good clean fun when the stakes are fairly low, as with these provisions. Furthermore, it is possible that the Article 2 amendments will be dusted off at some point and an effort will be made to turn them into something completely inoffensive and inconsequential to get them enacted and forgotten.⁵ With that possibility in mind, my purpose is to illuminate the questions how and why to fix the electronic commerce provisions in Amended Article 2.

II. THE FIX

Fixing the dedicated electronic commerce provisions is remarkably simple: delete them. The provisions that should go are new sections 2-108(4), 2-204(4) and 2-211 through 2-213, as well as the changes in section 2-204(1).⁶ The content of these provisions is discussed below.

III. THE REASONS

A. *Redundancy*

1. *Replacing "Writing" with "Record"*

The only changes in Amended Article 2 concerning electronic commerce that arguably should be retained are those that substitute the word "record"

³ Introductions have been made in Nevada, Kansas, and Oklahoma. S.B. 200, 2005 Leg., 73d Sess. (Nev. 2005); H.B. 2454, 81st Leg., Reg. Sess. (Kan. 2005); H.B. 3129, 2006 Leg., Reg. Sess. (Okla. 2006).

⁴ UCC Official Text, *supra* note 2, §§ 2-108(4), 2-204(1), 204(4), & 2-211 through 2-213. The amendments also substitute the word "record" everywhere that Article 2 used the word "writing." *See id.* §§ 2-201, 2-202, 2-205, & 2-316(2).

⁵ A proposal to cut back Amended Article 2 substantially was presented in Oklahoma in 2006 by Professor Fred Miller, a former president and executive director of NCCUSL. However, the proposal did not satisfy any affected interest, and the bill died in committee. (As a pro bono representative of Americans for Fair Electronic Commerce, the coalition of digital product customers, *see* <http://www.affect.ucita.com>, I was present in April 2006 for a discussion of this proposal at the Oklahoma City Chamber of Commerce.)

⁶ *See* UCC Official Text, *supra* note 2.

for “writing” everywhere it appears in the article.⁷ Even those changes are unnecessary, but they probably do little harm in themselves. They are unnecessary because the federal Electronic Signatures in Global and National Commerce Act (E-SIGN)⁸ authorizes use of electronic records and signatures for any writing or signature requirements applicable to a transaction in or affecting interstate commerce.⁹ There is no such thing as a sales transaction under Article 2 that is not in or affecting interstate commerce and thus subject to E-SIGN, especially when electronic communications over the Internet are involved.¹⁰ Even if there were, as of early 2007, forty-eight states and territories have enacted the Uniform Electronic Transactions Act (UETA),¹¹ which authorizes use of electronic records and signatures to meet state writing and signature requirements.¹² UETA applies to Article 2 transactions: UETA’s scope provision includes Article 2 by excluding it from the general exclusion of the UCC.¹³ The National Conference of Commissioners on Uniform State Laws (NCCUSL), which sponsors uniform laws and jointly sponsors the UCC with the American Law Institute (ALI), has a better chance of completing the job of getting universal state enactment of UETA than of getting Amended Article 2 enacted anywhere.

With belt and suspenders already in place, Amended Article 2 proposes to add an elastic waistband. Other than elegance, perhaps little is sacrificed. Unfortunately, however, changing the writing requirements of original

⁷ See *supra* note 4 (listing sections substituting “record” for “writing”).

⁸ 15 U.S.C.A. §§ 7001–31 (West Supp. 2006).

⁹ *Id.* § 7001(a).

¹⁰ The Supreme Court has in recent years rejected congressional use of the Commerce Clause power to enact criminal laws addressing primarily policing concerns, such as possession of a firearm in a school zone, *see United States v. Lopez*, 514 U.S. 549 (1995), and gender-motivated crimes of violence, *see United States v. Morrison*, 529 U.S. 598 (2000), but the reasoning of these cases does not suggest that even intrastate commercial transactions such as sales of goods between two parties in the same state would be outside the realm of activity that is in or affecting interstate commerce and thus subject to congressional regulation under the Commerce Clause of the U.S. Constitution, Art. I, § 8, cl. 3. Local sales affect interstate commerce in myriad ways. When electronic commerce is the subject of regulation, it seems particularly unlikely that the affected transactions are not in or affecting commerce.

¹¹ Official Text, Uniform Electronic Transactions Act, 7A U.O.A. 225 (1999). [hereinafter UETA Official Text]; Uniform Law Commissioners, A Few Facts About The Uniform Electronic Transactions Act, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ueta.asp (last visited Jan. 27, 2007) (listing forty-eight jurisdictions that have enacted UETA, including the District of Columbia and U.S. Virgin Islands, thus indicating by NCCUSL’s count that four states have not enacted UETA).

¹² UETA Official Text, *supra* note 11, § 7.

¹³ *Id.*

Article 2 to record requirements in Amended Article 2 creates the need to deal with the potential impact on the applicability of E-SIGN as well as UETA. E-SIGN section 7001(c), for example, provides consumer protection by requiring consumer consent for use of electronic records and making recorded phone calls, which do not have sufficient cautionary effect, insufficient substitutes for writings: these provisions only apply if some other law requires use of a writing.¹⁴ When this problem was pointed out during the drafting of Amended Article 2, some bizarre language was added in section 2-108(4), a provision that reflects NCCUSL's frantic fight for a continuing role in the law of electronic commerce after the enactment of E-SIGN.¹⁵ Section 2-108(4) provides that "nothing in this article modifies, limits or supersedes Section 7001(c) of [E-SIGN] or authorizes electronic delivery of any of the notices described in Section 7003(b) of that Act."¹⁶ This language raises doubt about the continuing applicability of other valuable E-SIGN protections that may not be saved by section 2-108(4), such as section 7001(e), applicable to nonconsumer as well as consumer transactions and providing that records are not effective to meet writing requirements if "not in a form that is capable of being retained and accurately reproduced for later reference by all parties."¹⁷ Furthermore, the language referring to E-SIGN section 7003(b) makes little sense in Article 2, since section 7003(b) preserves writing requirements outside Article 2, creating an implication that the new Article 2 electronic commerce provisions are meant to reach beyond Article 2, a problem that will be discussed below.¹⁸ The best

¹⁴ 15 U.S.C.A. § 7001(c)(1), (6) (West Supp. 2005). See Jean Braucher, *Rent-Seeking and Risk-Fixing in the New Statutory Law of Electronic Commerce*, 2001 Wis. L. REV. 527, 546-49 [hereinafter Braucher, *Rent-Seeking*] (describing the E-SIGN consumer consent requirements, including a test of ability to receive electronic records).

¹⁵ See *id.* at 528-30 and 557-64 (discussing commercial interests' desire for federal legislation to address not only state but also federal writing requirements such as the Federal Arbitration Act's requirement of a "written agreement" to arbitrate, 9 U.S.C. § 2 (2000), and also setting forth the arguments that E-SIGN does not permit states to opt out of E-SIGN's protections, although it does save some additional protections in UETA from preemption); UCC Official Text, *supra* note 2, § 2-108(4). Some states have incorporated the substance of the E-SIGN consumer consent provisions into their versions of UETA to avoid any implication of opt out. See, e.g., N.C. GEN. STAT. § 66-327 (2005); N.J. STAT. ANN. § 12A: 12-21(a) (West 2004); and VT. STAT. ANN. tit. 9, § 287 (2005).

¹⁶ UCC Official Text, *supra* note 2, § 2-108(4).

¹⁷ 15 U.S.C.A. § 7001(e) (West Supp. 2006). This protection is also provided by UETA, see UETA Official Text, *supra* note 11, § 8(c). However, UETA has not been enacted in four states. See *supra* note 11. Also, enactment of Amended Article 2's electronic commerce provisions might be interpreted as making UETA no longer applicable to Article 2 transactions. See *infra* notes 22-25 and accompanying text.

¹⁸ See *infra* note 25 and accompanying text.

solution to the Amended Article 2 drafting question concerning use of the word “writing” may be, for simplicity’s sake, to leave that word as is, subject to the overlays of E-SIGN and UETA making electronic records effective as writings. Substituting the word “record” would require replacement of section 2-108(4) with a subsection preserving the otherwise applicable substance of E-SIGN and UETA in full, not just the substance of E-SIGN section 7001(c).

2. *The Dedicated Electronic Commerce Provisions Taken from UETA*

Turning to the dedicated electronic commerce provisions of Amended Article 2 that are in exact or similar form to UETA provisions (those in sections 2-211(1)–(3) and sections 2-212 through 2-213), the best that can be said for them is that they, too, are unnecessary. Some of them repeat provisions of the UETA word for word. This is true of the first three subsections of section 2-211, which are copies, respectively, of UETA sections 7(a), 7(b), and 5(a). These provide:

“A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.”¹⁹

“A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.”²⁰

“This article [“Act” in UETA] does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed by electronic means or in electronic form.”²¹

Even for these sections copied exactly from UETA, their inclusion in Amended Article 2 creates confusion by raising the question: why are these sections included, while other UETA sections are omitted from Amended Article 2? For example, UETA section 5(b) states that UETA is only applicable to transactions when each party has agreed to conduct transactions by electronic means.²² Amended Article 2 does not repeat this provision, raising such questions as whether an electronic change order would suffice if the parties had entered into a paper agreement providing for no oral modification or whether an electronic confirmation would meet the statute of

¹⁹ UCC Official Text, *supra* note 2, § 2-211(1); UETA Official Text, *supra* note 11, § 7(a).

²⁰ UCC Official Text, *supra* note 2, § 2-211(2); UETA Official Text, *supra* note 11, § 7(b).

²¹ UCC Official Text, *supra* note 2, § 2-211(3); UETA Official Text, *supra* note 11, § 5(a).

²² UETA Official Text, *supra* note 11, § 5(b); *see also* Braucher, *Rent-Seeking*, *supra* note 14, at 543–46 (discussing the strengths and weaknesses of this provision).

frauds requirement if the parties had not otherwise used electronic records.²³ It is unclear whether UETA section 5(b) would be direct authority in such cases. The selective inclusion of some of UETA's provisions creates a negative pregnant, an implication that there is an intention to make only some of UETA applicable to Article 2. This creates a risk that courts would treat enactment of Amended Article 2 as meaning that the UETA scope provision's reference to Article 2 refers to pre- but not post-amendment Article 2, so that the sections of UETA not incorporated into Amended Article 2 would no longer apply to sales transactions. A UETA comment seems to invite this interpretation.²⁴ Courts might conclude that it would make no sense to enact some UETA provisions as part of Amended Article 2 if they applied anyway.

Another concern is the scope of the dedicated electronic commerce provisions in Amended Article 2 that do not specifically refer to requirements of Article 2 (sections 2-211(1)–(2) and 2-212 through 2-213, as well as section 2-204(4)). It is not clear whether they just refer to record and signature requirements within Amended Article 2, or whether they refer to all record and signature requirements applicable to Amended Article 2 transactions, or perhaps go even further and apply to all record and signature requirements in state law. Nothing in the language of sections 2-204(4), 2-211(1)–(2), 2-212, or 2-213 limits their effect to Amended Article 2 records; they might also refer to writing requirements under a host of other state laws and even to transactions not governed by Article 2.²⁵ Given this potential

²³ See UCC Official Text, *supra* note 2, §§ 2-209(2), 2-201(2).

²⁴ UETA Official Text, *supra* note 11, § 3 cmt. 7 (“In the event that Articles 2 and 2A are revised and adopted in the future, UETA will only apply to the extent provided in those Acts.”).

²⁵ See UCC Official Text, *supra* note 2, §§ 2-204(4), 2-211(1)–(2), 2-212, 2-213. The scope provision of Article 2, § 2-102, unchanged by Amended Article 2, begins: “Unless the context otherwise requires, this Article applies to transactions in goods.” It is thus plausible that the Amended Article 2 electronic commerce provisions apply to writing requirements applicable to transactions in goods that are stated in other state law. Somewhat less plausible, although possible, is the interpretation that the Amended Article 2 electronic commerce provisions apply to state writing and signature requirements generally; the argument would be that the context requires this reading because nothing in the sections limits them to Article 2 transactions; they are written without reference to sales, buyers, sellers, or even goods, as most Article 2 sections are. Furthermore, § 2-108(4) supports this reading by saving the E-SIGN § 7003(b) exceptions for notices that have nothing to do with sales transactions, such as those involving notices required in court proceedings, utility terminations, home mortgage foreclosures, and insurance cancellations. See 15 U.S.C.A. § 7003(b)(1), (2)(A)–(C); even the provisions in § 7003(b) that could relate to a sales transaction do not involve Article 2 notices, but rather concern non-Article 2 notices such as those relating to product recalls and hazardous materials. See *id.* § 7003(b)(2)(D), (3).

reach of these electronic commerce provisions beyond Article 2, the implication that the rest of UETA no longer applies to transactions or records under state law might be broad indeed.

In addition to making exact copies of some UETA provisions, Amended Article 2 picks up several electronic commerce provisions from UETA but makes fairly subtle changes in wording, raising the question whether the intention is to displace UETA or to require that both UETA and Amended Article 2 be met. Section 2-212 slightly changes UETA section 9, while section 2-213 does the same to UETA sections 15(e)–(f).

Section 2-212 provides:

“**ATTRIBUTION.** An electronic record or electronic signature is attributable to a person if it was the act of the person or the person’s electronic agent or the person is otherwise legally bound by the act.”²⁶

UETA section 9 provides:

ATTRIBUTION AND EFFECT OF ELECTRONIC RECORD AND ELECTRONIC SIGNATURE.

(a) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

(b) The effect of an electronic record or electronic signature attributed to a person under subsection (a) is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties’ agreement, if any, and otherwise as provided by law.²⁷

Neither attribution provision is the least bit necessary, something the UETA drafters recognized. Comment 1 to UETA section 9 states: “Although the rule may appear to state the obvious, it assures that the record or signature is not ascribed to a machine, as opposed to the person operating or programming the machine.”²⁸ When drafters of a statute feel compelled to write a comment about why a section does not state the obvious and cannot come up with a better explanation than this, they ought instead to delete the section. The comment’s explanation is silly. The use of the word “machine” should have triggered the realization that the problem is hardly novel or even real; no one worried that a record produced on a typewriter or a commercial

²⁶ *Id.* § 2-212.

²⁷ UETA Official Text, *supra* note 11, § 9.

²⁸ *Id.* § 9 cmt. 1.

signature affixed by a printing press²⁹ would be attributed to the machines rather than to persons using them.

The drafting is bad in both attribution provisions. Of course, when you have nothing to say, it is hard to say it well. Section 2-212's compound subjects and predicates cry out for rewriting using several sentences. UETA section 9(a) awkwardly indicates that a record might be the "act" of a person, rather than the product or result of a person's act.

In particular, we must pause to reflect on the cringe-inducing usage "surrounding circumstances" in the statutory text of UETA section 9(b), somehow as distinct from "the context." It is worth considering how drafting standards have descended so low. Lest the reader think that the influence of the ALI has been salutary in deleting this language from the UCC,³⁰ the same triple redundancy turns up in official comment 7 to section 2-212: "Once it is established that a record or signature is attributable to a particular person, the legal significance of the record or signature is determined by *the context and surrounding circumstances* . . . including the parties' agreement, if any."³¹

The word "circumstance" is from the Latin "circumstantia," meaning something that stands around. Thus the phrase "surrounding circumstances" means surrounding things that stand around, a locution approved by the Department of Redundancy Department of the NCCUSL-ALI operation. The style is perhaps fitting, given that section 2-212 is redundant in substance, based as it is on UETA section 9. But it does not seem too much to ask NCCUSL and especially ALI, with its elitist aura, to insist that circumstances never be redundantly modified by "surrounding." Also, the style committee should take note for future reference: "the circumstances" in a prepositional phrase referring to any possible aspect of context should be introduced by "in," not "under," because circumstances are three-dimensional and may be under, over, or on the same horizontal plane. For example, hostages dangled over a pit of ravenous beasts are over rather than under their most compelling circumstances; in any event, they are in some distressing ones.

In a substantive comparison of the similar provisions on attribution in UETA and Amended Article 2, there arises the question whether there is a difference between "attributable" in section 9(a) and "is attributed," in section 2-212, with the former permissive of the conclusion, while the latter seems to direct it. The UETA permissive approach is better; the context might dictate that a record or signature not be attributed to a person even

²⁹ See UCC Official Text, *supra* note 2, at § 1-201(b)(37) (defining "signed" broadly to include any symbol adopted with present intention to authenticate) & cmt. 37 (noting that a printed symbol, including a letterhead, can suffice).

³⁰ ALI and NCCUSL jointly sponsor the UCC, while only NCCUSL is responsible for uniform laws such as UETA.

³¹ UCC Official Text, *supra* note 2, § 2-212 cmt. 7 (emphasis added).

though it was produced by the person, perhaps because the record itself indicates that it or a signature in it was produced for someone else. Amended Article 2's drafters seem to have tinkered with the wording of the UETA provision to produce a less accurate description of the obvious, and then they reverted to the UETA language, "attributable," in a comment.³² Both provisions ultimately are complicated and unnecessary; they seem first to make attributions formally and second to provide for courts to reach sensible results under the heading of "effect"³³ or "legal significance" of an attributed record or signature.³⁴ The obvious should have been left unstated.

The second pair of repetitive provisions involving slight variations in wording are, if anything, worse in the degree of confusion they would cause if Amended Article 2 were enacted.

Section 2-213 provides:

ELECTRONIC COMMUNICATION.

(1) If the receipt of an electronic communication has a legal effect, it has that effect even if no individual is aware of its receipt.

(2) Receipt of an electronic acknowledgment of an electronic communication establishes that the communication was received but, in itself, does not establish that the content sent corresponds to the content received.³⁵

UETA section 15, on time and place of sending and receipt, provides in relevant subsections:

(b) Unless otherwise agreed between a sender and the recipient, an electronic record is received when:

(1) it enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and

(2) it is in a form capable of being processed by that system.

....

³² See *id.*

³³ See UETA Official Text, *supra* note 11, § 9(b).

³⁴ See UCC Official Text, *supra* note 2, § 2-212 cmt. 7.

³⁵ UCC Official Text, *supra* note 2, § 2-213.

(e) An electronic record is received under subsection (b) even if no individual is aware of its receipt.

(f) Receipt of an electronic acknowledgment from an information processing system described in subsection (b) establishes that a record was received but, by itself, does not establish that the content sent corresponds to the content received.

(g) If a person is aware that an electronic record . . . purportedly received under subsection (b), was not actually sent or received, the legal effect of the sending or receipt is determined by other applicable law. Except to the extent permitted by the other law, the requirements of this subsection may not be varied by agreement.³⁶

The most deliciously bad drafting in this pair of provisions is that of section 2-213(1): “If the receipt of an electronic communication has a legal effect, it has that effect even if no individual is aware of its receipt.”³⁷ The brilliant fusion of tautology, redundancy, and circular reasoning exquisitely enhances the malevolent bureaucratic intent of its substantive thrust (“substance” would overstate the case).

Section 2-213(1) is based on UETA section 15(e), but without incorporation of the detail in section 15(b) that provides some room for a purported recipient to protest that receipt did not in fact occur, even if demonstrated presumptively by damning lack of awareness of it. An example, in the context of e-mail, is a message not routed by the internet service provider (ISP) to the recipient’s system because of ISP-level security filtering; the recipient is not able to retrieve such a message and has a good argument for non-receipt under section 15(b)(1), but no similar handle under section 2-213(1). UETA section 15(b)³⁸ also provides an argument for non-receipt based on the fact that the recipient neither designated nor uses the system for messages of the type sent. However, neither UETA nor Amended Article 2 does enough to make allowances for a conclusion of non-receipt due to use of reasonable spam-filtering after messages reach a recipient’s system.³⁹

Section 2-213(1) seems to presume fault on the part of a “recipient” who was unaware of a message. A comment refers to a definition of “receipt” in

³⁶ UETA Official Text, *supra* note 11, §§ 15(b), (e)–(g).

³⁷ UCC Official Text, *supra* note 2, § 2-213(1).

³⁸ UETA Official Text, *supra* note 11, § 15(b).

³⁹ To make some allowances, a court might make use of the reasonableness standards in Article 1, § 1-202(e) directly or by analogy. *See infra* notes 43–44 & accompanying text.

Article 1,⁴⁰ apparently a reference to the sub-definition of “receives”⁴¹ within the definition of “notice.”⁴² The notice definition pervasively incorporates reasonableness standards for actions and procedures of both senders and recipients;⁴³ perhaps courts would arrive at that approach when applying section 2-213, at least in the context of notices, because of the comment reference to Article 1,⁴⁴ but sufficient care has not been taken to encourage an approach based on reasonableness. Even though section 2-213 is intended to be broad and cover communications other than notices, it fails to provide a definition of receipt for its broader context.⁴⁵ Section 2-213 should be deleted to clearly defer to UETA section 15, which is better, if not ideal.⁴⁶

It is telling that section 2-213 does not incorporate UETA section 15(g),⁴⁷ sometimes referred to as the “bounce-back” message provision.⁴⁸ UETA section 15(g) qualifies receipt under section 15(b) in cases where a sender gets back a message indicating the intended recipient likely will not in fact receive the communication, a provision that seems to have introduced too much reasonableness for the drafters of section 2-213. This omitted UETA provision is another good example of one whose continuing applicability to Article 2 transactions would be thrown in doubt by partial incorporation of UETA into Amended Article 2.⁴⁹ It is unclear whether the intent of Amended Article 2 is to make UETA provisions that were not incorporated into it no longer applicable to sales transactions.

B. Worse

Objection to some of the electronic commerce provisions in Amended Article 2 goes beyond redundancy, slight variation, and the confusion thus caused. Two provisions are more troublesome than UETA for buyers

⁴⁰ UCC Official Text, *supra* note 2, § 2-213 cmt. 3.

⁴¹ *See id.* § 1-202(e).

⁴² *See id.* § 1-202.

⁴³ *See id.* §§ 1-202(d), 1-202(e)(2), & 1-202(f).

⁴⁴ *See id.* § 2-213 cmt. 3.

⁴⁵ *See id.* § 2-213 cmt. 2 (“This section deals with electronic communications generally.”).

⁴⁶ *See supra* notes 35–46 and accompanying text (discussing why UETA Official Text, *supra* note 11, § 15 is superior to UCC Official Text, *supra* note 2, § 2-213).

⁴⁷ UCC Official Text, *supra* note 2, § 2-213; UETA Official Text, *supra* note 11, § 15(g).

⁴⁸ *See Braucher, Rent-Seeking, supra* note 14, at 564 (discussing this provision as applying when a message is bounced back).

⁴⁹ *See supra* notes 22–24 and accompanying text for another example (discussing UETA § 5(b), another provision not incorporated into Amended Article 2, raising the question whether it would continue to apply).

interacting with electronic agents. Section 2-204(4) involves significant change from current Article 2 and has some negative implications, compared to UETA subsections 14(1) and (2).⁵⁰ As will be explained below, it is closer to section 206(b) of the Uniform Computer Information Transactions Act (UCITA).⁵¹ The other bad provision for buyers is section 2-211(4), which has no analog in UETA but rather comes from UCITA section 206(c) and has the typical producer tilt of that law.⁵²

Section 2-204 of Amended Article 2 makes some changes in subsection (1) (indicated by the underlining below) and adds a new subsection (4):

FORMATION IN GENERAL.

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including offer and acceptance, conduct by both parties which recognizes the existence of a contract, the interaction of electronic agents, and the interaction of an electronic agent and an individual.

....

(4) Except as otherwise provided in Sections 2-211 through 2-213, the following rules apply:

(a) A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements.

(b) A contract may be formed by the interaction of an electronic agent and an individual acting on the individual's own behalf or for another person. A contract is formed if the individual takes actions that the individual is free to refuse to take or makes a statement, and the individual has reason to know that the actions or statement will:

⁵⁰ See UCC Official Text, *supra* note 2, § 2-204(4); UETA Official Text, *supra* note 11, §§ 14(a)–(b).

⁵¹ See Official Text, Uniform Computer Information Transactions Act (2002), § 206(b) [hereinafter UCITA Official Text].

⁵² See *id.* § 206(c); UCC Official Text, *supra* note 2, § 2-211(4). Concerning the UCITA bias toward digital product producers and against customers, see Jean Braucher, *New Basics: Twelve Principles for Fair Commerce in Mass-Market Software and Other Digital Products*, in CONSUMER PROTECTION IN THE AGE OF THE INFORMATION ECONOMY 177, 179–83 (Anita Ramasastry & Jane K. Winn eds., 2006) [hereinafter Braucher, *Principles for Software Commerce*] (concerning flaws in UCITA, its bias toward producers and its intertwined history with the Article 2 project; also describing the refusal of the ALI to continue with the project, once conceived as UCC Article 2B, and the American Bar Association's study of UCITA and subsequent refusal to endorse it).

(i) cause the electronic agent to complete the transaction or performance; or

(ii) indicate acceptance of an offer, regardless of other expressions or actions by the individual to which the electronic agent cannot react.⁵³

UETA section 14 provides:

AUTOMATED TRANSACTION. In an automated transaction, the following rules apply:

(1) A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements.

(2) A contract may be formed by the interaction of an electronic agent and an individual, acting on the individual's own behalf or for another person, including by an interaction in which the individual performs actions that the individual is free to refuse to perform and which the individual knows or has reason to know will cause the electronic agent to complete the transaction or performance.

(3) The terms of the contract are determined by the substantive law applicable to it.⁵⁴

Both sections only apply if at least one party uses an electronic agent; this is a defined term that refers to automated use of pre-programmed communications without human review in the course of making them.⁵⁵

The significant difference in the provisions is the way that the second sentence of UCC section 2-204(4)(b) changes the "may be formed" in UETA section 14(2) into an "is formed," so that: "A contract is formed if the individual takes actions that the individual is free to refuse to take . . . and the individual has reason to know that the actions . . . will . . . indicate acceptance of an offer." The nasty move from "may be formed" to the more mechanical, formalistic "is formed" comes from UCITA section 206(b).⁵⁶ In addition, both subsections (1) and (4) of UCC section 2-204 add references to offer and acceptance.

⁵³ UCC Official Text, *supra* note 2, §§ 2-204(1), 2-204(4).

⁵⁴ UETA Official Text, *supra* note 11, § 14.

⁵⁵ UETA Official Text, *supra* note 11, § 2(6); UCC Official Text, *supra* note 2, § 2-103(1)(g) (both defining an electronic agent as an automated means to initiate an action or respond without review or action by an individual).

⁵⁶ See UCITA Official Text, *supra* note 51, § 206(b).

The trouble with the “is formed” language is that section 2-204(4) nowhere explicitly takes into account *when* the individual is taking the action. The individual may have already ordered, paid, and taken delivery and only then be presented with clickwrap embedded in the product indicating that clicking means the buyer accepts an offer on the seller’s terms. This analysis may sound outlandish, and it is, but alas, reasoning even more outlandish was used by the Seventh Circuit in the infamous case of *Hill v. Gateway*, finding acceptance of terms inside a computer package when the buyer did not return the computer within thirty days, the method indicated by the document containing the terms to avoid acceptance of them.⁵⁷ The technical flaws in the analysis of that case under current Article 2 are well laid out in *Klocek v. Gateway*,⁵⁸ but an analysis that clicking is effective to “accept” delayed terms would be more plausible under Amended Article 2. Section 2-204(4)(b) arguably provides a template for a seller to get “acceptance” of delayed terms using delayed clickwrap, although a sensible court could conclude that an individual has no reason to know that an action after delivery will indicate acceptance of an offer, since the individual made the offer when ordering and the seller accepted at the latest by delivering.⁵⁹

A comment⁶⁰ indicates that section 2-204 as amended would still only govern contract formation and not the more fraught issue what the terms are, a question supposedly left to section 2-207.⁶¹ Section 2-207 has been amended to cover all contracts under Article 2, including those formed by “offer and acceptance,” and it makes the terms of sales contracts those to which the parties “agree.”⁶² This language, together with the references to offer and acceptance added in section 2-204(1) and (4)(b), tilt the litigation arguments in favor of sellers who label their delayed terms as “offers” that will be accepted by the action of the customer in clicking on terms for a product already paid for and received.

⁵⁷ *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148–49 (7th Cir. 1997).

⁵⁸ *See Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000). Current Article 2 provides that a contract is formed when a seller ships in response to an order; the text does not provide for later alterations to come into transactions with nonmerchants or for material alterations to come into transactions between merchants, with “express agreement” necessary for these later terms to become part of the contract, according to a comment. *See Uniform Commercial Code, Official Text (2002) §§ 2-206(1)(b), 2-207(2), 2-207(2) cmt. 3.*

⁵⁹ UCC Official Text, *supra* note 2, § 2-206(1)(b); *see also supra* note 58.

⁶⁰ UCC Official Text, *supra* note 2, § 2-204 cmt. 5 (“This provision does not, however, provide for a determination of what terms exist in the agreement. That question is governed by Section 2-207.”).

⁶¹ *Id.* §§ 2-204 cmt. 5, 2-207.

⁶² *Id.*

While Amended Article 2 would newly exclude “information” from the definition of goods,⁶³ and thus from the scope of the article,⁶⁴ the new comment to the goods definition clearly contemplates that some and perhaps all mixed hardware and software transactions would be within the direct scope of the article, and it might be applied even to pure software, downloaded over the Internet, by analogy.⁶⁵ Of course, courts could come to the sensible conclusion that there is no real agreement to delayed terms, where rejection would put the customer to considerable trouble and the need to start over in searching for a product. Unfortunately, Amended Article 2 does little to push courts in that direction.

I have elsewhere detailed what is wrong with delayed terms.⁶⁶ To summarize, this practice is contrary to contract, commercial, and consumer law norms of advance disclosure.⁶⁷ Advance disclosure has been made easier not harder by the advent of the Internet.⁶⁸ For the market in non-negotiated

⁶³ See *id.* § 2-103(1)(k).

⁶⁴ See *id.* § 2-102 (providing that Article 2 applies to “transactions in goods”).

⁶⁵ See *id.* § 2-103(1)(k) cmt. 7 (stating that automobiles, even though they contain a great deal of software, are wholly within Article 2). In other mixed hardware and software transactions, the courts would be left to sort out the applicability of Amended Article 2, and they could use it by analogy even beyond its scope. Beyond the scope of this Article is a full discussion of the problems with the exclusion of downloaded “information” from the definition of goods and thus from the direct scope of Amended Article 2. A better approach would be to have Article 2 apply to these transactions, but to develop other law to apply to issues of use and transfer rights. See Braucher, *Principles for Software Commerce*, *supra* note 52, at 181, 197 (discussing the approach of having Article 2 apply to software transactions, with an overlay of a statute addressing issues that arise in mass-market software transactions).

⁶⁶ See Braucher, *Principles for Software Commerce*, *supra* note 52, 184–86, 191–94 (concerning importance of advance disclosure, along with specific regulation of abusive terms); see also Jean Braucher, *Amended Article 2 and the Decision to Trust the Courts: The Case Against Enforcing Delayed Mass-Market Terms*, 2004 WIS. L. REV. 753; Jean Braucher, *The Failed Promise of the UCITA Mass-Market Concept and Its Lessons for Policing of Standard Form Contracts*, 7 LEWIS & CLARK J. OF SMALL & EMERGING BUS. L. 393 (2003); Jean Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice*, 46 WAYNE L. REV. 1805 (2000) [hereinafter Braucher, *Delayed Disclosure*].

⁶⁷ See Braucher, *Principles for Software Commerce*, *supra* note 52, at 192–93 (concerning recent efforts to overturn longstanding commercial, contract, and consumer law norms favoring advance disclosure); see also Braucher, *Delayed Disclosure*, *supra* note 66, at 1818–24 (concerning recent assault on principle of advance disclosure of contract terms).

⁶⁸ *Hill* focused on the difficulty of reading terms over the telephone, but because it was decided before the full flower of the Internet, it did not consider the possibility that advertisements could provide a web site with the terms and also that the employee taking telephone orders could state, “If you wish to see the terms before proceeding, you could

transactions to work even weakly, customers need information on terms before making a purchase decision. Advance disclosure is a necessary although not a sufficient condition for a working market in mass-market terms.⁶⁹ Providing the terms after payment and delivery is a way to grease the skids for bad terms. It amounts to a more burdensome form of bait and switch, in which the customer has to go to the trouble and expense of unwinding a transaction before looking for a new one.⁷⁰

Another nasty electronic commerce provision in Amended Article 2 comes directly from UCITA.⁷¹

Section 2-211(4) provides:

“(4) A contract formed by the interaction of an individual and an electronic agent under Section 2-204(4)(b) does not include terms provided by the individual if the individual had reason to know that the agent could not react to the terms as provided.”⁷²

This comes from the final clause of UCITA section 206(c), which provides that in a contract formed by the interaction of an electronic agent and an individual, the terms “do not include a term provided by the individual if the individual had reason to know that the electronic agent could not react to the term.”⁷³

The idea seems to be to protect sellers offering contracts of adhesion in the electronic context from individuals’ creative efforts to engage in resistance. The bias is transparent in the one-sided solicitude of the provision, protecting sellers operating web sites from their customers. There is no similar concern for the individual who cannot as a practical matter avoid terms of a seller. Increasingly, digital products maintain connections to the Internet while in operation; producers often send updates with new terms.⁷⁴ The updates typically include security patches and other corrections of flaws, yet providing them becomes an opportunity for the seller to try to get new terms. The customer is under pressure to click to minimize system security

go to our web site and either order there or call us back.” *See Hill v. Gateway 2000*, 105 F.3d 1147, 1149 (7th Cir. 1997).

⁶⁹ *See Braucher, Delayed Disclosure, supra* note 66, at 1809–18 (concerning importance of both advance disclosure and regulation of overreaching substantive terms in mass-market contracts).

⁷⁰ *See id.* at 1807, 1852–53 (comparing traditional bait and switch to practice of first disclosing terms after payment and delivery); *see also Braucher, Principles for Software Commerce, supra* note 52, at 185 (discussing delayed disclosure of terms as a “more virulent form of bait and switch”).

⁷¹ *See UCITA Official Text, supra* note 51, § 206(c).

⁷² UCC Official Text, *supra* note 2, § 2-211(4).

⁷³ *See UCITA Official Text, supra* note 51, § 206(c).

⁷⁴ *See supra* note 65 (concerning applicability of Amended Article 2 to mixed hardware and software products, directly or by analogy).

problems and to fix flaws. The seller using an “electronic agent” to get the click knows this, but section 2-211(4) does nothing for the buyer. If it is important to protect security of contract against changes that cannot be avoided as a practical matter, this principle should be a two-way street.

Indeed, section 2-213(1) provides an interesting contrast; a recipient of a message cannot generally use lack of awareness of a message as an excuse.⁷⁵ Yet a seller can build its web site so as not to become aware of buyer responses and in this way can make itself immune from them. This is one more asymmetry in Amended Article 2.

IV. CONCLUSION

The dedicated electronic commerce provisions in Amended Article 2 are a commercial calamity, creating confusion and complexity with a third source of law, repeating provisions in E-SIGN and UETA, sometimes in slightly different language.⁷⁶ The good news is that so far this calamity has been swallowed up by the commercial catastrophe of the whole project, with the result that Amended Article 2 appears unlikely to be enacted anywhere. The project lacks a major efficiency gain that could justify the transition costs involved in adapting to it; thus, it is bad for all affected interests, sellers and buyers alike.⁷⁷ If that problem is ever solved, this Article suggests a simple way to fix the electronic commerce provisions: delete them because they are at best redundant and, in a few places, worse than E-SIGN and UETA. Particularly unfortunate is section 2-204(4), because it arguably provides a roadmap for sellers to make delayed terms enforceable using clickwrap embedded in software products or in digital components of hard goods.

⁷⁵ UCC Official Text, *supra* note 2, § 2-213(1). *See supra* notes 35–46 and accompanying text discussing this provision.

⁷⁶ *See* UETA Official Text, *supra* note 11; 15 U.S.C.A. §§ 7001–31 (West Supp. 2006).

⁷⁷ Amended Article 2 does nothing significant to improve conditions for sales of goods; all affected parties view it as inferior to existing Article 2. *See* Speidel, *supra* note 1, at 791 (discussing view that current Article 2 is “not broke”). In comparison, for example, Revised Article 9 provided for central filing of most financing statements, providing a major efficiency gain. UCC Official Text, *supra* note 2, § 9-301(1) & cmt. 4 (making location of the debtor the general rule of law governing perfection for tangible as well as intangible collateral). More dubiously, Revised Article 9 more easily allowed all-assets financing, thus more fully subordinating non-adjusting creditors to secured creditors. *See generally* Symposium, *The Priority of Secured Debt*, 82 CORNELL L. REV. 1279 (1997) (listing articles in symposium on the impact of Revised Article 9).

