

The Legal Architecture of Virtual Stores: World Wide Web Sites and the Uniform Commercial Code

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If you can buy something in person, chances are you can buy it online.¹

New models of commercial interaction are developing as businesses and consumers participate in the electronic marketplace and reap the resultant benefits.²

It is intended to make it possible for the law embodied in [the Uniform Commercial Code] to be developed by the courts in the light of unforeseen and new circumstances and practices. However, the proper construction of the Act requires that its interpretation and application be limited to its reason.³

I. INTRODUCTION

A major "selling point" of the World Wide Web⁴ is its ability to offer

1. Tracy LeBlanc, *Online Shopping Brings the Mall to You*, in PC NOVICE GUIDE TO GOING ONLINE 128, 128 (1997).

2. INTERAGENCY WORKING GROUP ON ELECTRONIC COMMERCE, A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE 2 (1997) (available on-line at *About a Framework for Global Electronic Commerce* (visited July 2, 1997) <<http://www.whitehouse.gov/WH/New/Commerce/about.html>>; cf. KIM KOMANDO, CYBERBUCK\$: MAKING MONEY ONLINE 16 (1996) ("Being online doesn't let you do new things as much as it lets you do things in a new way."); Ann Davis, *Tangled Web: How the Net Became Land of Opportunity for Legal Profession*, WALL ST. J., Oct. 13, 1997, at A1 ("Even sophisticated businesspeople," claims one attorney, "mistake the Internet for a world apart from the real world," where existing laws don't apply.").

3. U.C.C. § 1-102 cmt. 1 (1996).

4. The Internet system of computer networks was introduced by the federal government in 1969 to link "computers and computer networks owned by the military, defense contractors, and university laboratories conducting defense-related research." *ACLU v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996). It has been characterized variously as a "unique and wholly new medium of worldwide human communication," *id.* at 844, and "the most participatory form of mass speech yet developed." *Id.* at 883.

The World Wide Web (the "Web") has been characterized as "a collection of protocols and standards for accessing information on the Internet, [which is] the physical medium used to transport the data." NET.GENESIS & DEVRA HALL, *BUILD A WEB SITE* 5 (1995). The Web was created in 1990 by Tim Berners-Lee of CERN, the European Particle Physics Laboratory, and achieved enormous popularity in 1993 with the introduction of Mosaic, the first graphical "Web browser." See ROBERT H. REID, *ARCHITECTS OF THE WEB: 1,000 DAYS THAT BUILT THE FUTURE OF BUSINESS* at xxiii-xv (1997); Robert Wright, *The Man Who Invented the Web*, TIME, May 19, 1997, at 64, 66 (discussing Mr. Berners-Lee's invention of the "three technical keystones of the Web"); ADAM BLUM, *BUILDING BUSINESS WEB SITES* 5-6 (1996); DAVID ANGELL &

a "virtual storefront"⁵⁵ to anyone, from an individual to a multinational

BRENT HESLOP, *MOSAIC FOR DUMMIES* 13-14 (Windows ed. 1995). It consists of "a series of documents stored in different computers all over the Internet" whose interlinking has made it "currently the most advanced information system developed on the Internet." *ACLU*, 929 F. Supp. at 836. One author sees the thousand days beginning in late 1993/early 1994 and ending in early 1997 as a critical period during which "the Internet has been captivating the awareness if not direct participation of literally everyone in the United States . . ." Reid, *supra*, at xxxv.

5. See MAGDALENA YESIL, *CREATING THE VIRTUAL STORE* 10 (1997) ("The virtual store is a storefront in cyberspace, a place where customers can shop from their home computers and where merchants can offer merchandise and services for a fraction of the overhead required in a physical storefront."); JAMES C. GONYEA & WAYNE M. GONYEA, *SELLING ON THE INTERNET* 39-40 (1996) (defining "electronic storefront" nontechnically as "a location (i.e., an address) on the Internet from which you can electronically advertise and sell your commercial products and/or services to other Internet users all around the world").

Collections of such virtual storefronts are known, perhaps inevitably, as "cybermalls" or "virtual malls." See Tricia Curry, *Megashopping*, *INTERNET SHOPPER*, Summer 1997, at 57 (reviewing such on-line malls); LeBlanc, *supra* note 1, at 129-30 (discussing cybermalls offered by Internet service providers America Online, Prodigy, CompuServe, and Microsoft Network); GONYEA & GONYEA, *supra*, at 167-73 (distinguishing types of cybermalls and providing lists of cybermalls); YESIL, *supra*, at 66 (discussing linking of virtual stores to form virtual malls); DAVID COOK & DEBORAH SELLERS, *LAUNCHING A BUSINESS ON THE WEB* 273 (2d ed. 1996) ("These malls, similar to real-life malls, house many businesses under one roof"). See generally MICHAEL WOLFF, *YOUR PERSONAL NETSHOPPING* 34-41 (1996) (describing and listing Web addresses for different virtual malls).

A virtual storefront in one such cybermall, located at <<http://www.internetmall.com>>, is now available to anyone with as few as ten products to sell who is willing to pay a start-up fee as low as \$100. "All you have to do is add a 'Buy Now' button to your Web page and the link goes back to The Internet Mall, where all the database and credit-card authorization takes place." Sebastian Rupley & Don Willmott, *Find It, Then Buy It on the Web*, *PC MAG.*, May 27, 1997, at 29, 29 (describing the latest advances in cybershopping); see also Tim Haight, *Electronic Storefronts Made Simple*, *NETGUIDE*, July 1997, at 104-06 (discussing Viaweb, <<http://www.viaweb.com>>, a cybermall that provides, for a fee of \$100 or \$300 per month, a Web-based storefront selling up to 20 items or 1,000 items, respectively).

In recent mixtures of virtual and real shopping, the Virtual Emporium, a store with a branch in the Upper West Side of Manhattan, displays sample products and invites customers to use the store's computers to order goods from any of 180 different Web sites, whose owners pay fees to the Virtual Emporium. See David W. Chen, *New Store Offers Shopping On Line*, *N.Y. TIMES*, May 21, 1997, at B6. NetMarket, which opened in June 1997, charges membership fees of \$69.95 a year to consumers eager to obtain "price discounts of 10% to 50% off manufacturer's list prices on some 250,000 brand-name products." Susan Jackson, *Point, Click—and Spend*, *BUS. WK.*, Sept. 15, 1997, at 74-76 (discussing the prospective fortunes of netMarket). In addition, several major search engine sites are also constructing their own shopping mall services. See Heidi Brumbaugh, *Search Engines Plan Massive Shopping Malls*, *INTERNET WORLD*, Dec. 1997, at 28 (observing that the Web sites of these search engines "will have shopper's

corporation, with a product to market. Commercially available software packages enable even those computer users who are not versed in the intricacies of programming⁶ to create customized Web sites quickly⁷ and at a relatively low cost.⁸ The swift development of this technology

directories and may also link to consumer information and resources"); see *infra* notes 49, 50 and accompanying text (discussing search engines).

There are indications that the proliferation of companies' own web pages may lessen the need for virtual malls. See William M. Bulkeley, *Nets Inc. Files for Protection From Creditors*, WALL ST. J., May 12, 1997, at B4 (chronicling the failure of a company operating an electronic catalog where many industrial companies showed their wares to corporate buyers and engineers); VINCE EMERY, *HOW TO GROW YOUR BUSINESS ON THE INTERNET* 430 (1995) (noting that several leading cybermalls failed "because they offered nothing to their tenants that their tenants couldn't get on their own for a far lower cost").

6. See Lynn Ginsburg, *Put Your Business on the Web*, WINDOWS MAG., Apr. 1997, at 206, 218 ("With new tools that make Web site creation easier, it's now possible for anyone—at any skill level—to create a Web site."); Mike Hogan, *Set Up Shop in Cyberspace*, PC COMPUTING, Jan. 1997, at 106, 106. Hogan reviewed two software packages, each available for an estimated street price of under \$200, that each "provide an easy way to set up an entire site, complete with an electronic catalog, a secure commerce system, and a tight connection to your inventory." *Id.* The best part of these packages, according to Hogan, is that "[y]ou don't have to know [programming languages], you don't have to hire any expensive consultants, and with [one of the products] the entire site-building process takes only a few minutes." *Id.* One commentator has prepared a table comparing 11 web-page editing programs at prices ranging from free to \$395. Susann Philbrook, *Putting a Site Together: What You Need to Publish Online*, SMART COMPUTING, Dec. 1997, at 52, 54-55. Philbrook cautioned that although

[t]he Web site development needs for a small business are adequately supported by the same tools that are used to develop personal Web sites . . . , if your site has larger security needs or if you plan to have customers pay by credit card or if you intend to offer access to an extensive database, you'll need to consider higher priced solutions

Id. at 52.

Naturally, the cost for a large company's very sophisticated site can be much higher. See David S. Linthicum, *Open for Business: Web Storefront Creation Software*, PC MAG., Nov. 18, 1997, at 143 (reviewing 12 products ranging in cost from \$149 to \$9,995); Mark Halper, *So Does Your Web Site Pay?*, FORBES ASAP, Aug. 25, 1997, at 117, 118 (noting a consultant's estimate of initial costs for a company Web site at \$30,000 to \$100,00 and indicating that the addition of features to sites can raise the cost of launching one and running it for a year to as high as \$23 million); PAUL J. DOWLING, JR. ET AL., *WEB ADVERTISING AND MARKETING* 303-12 (1996) (estimating costs for the first year of a Web site under various scenarios, ranging up to \$436,500 for a large company with large plans and a large budget).

7. See, e.g., Edward C. Baig, *So You Want To Be a Web-Page Wizard*, BUS. WK., Apr. 7, 1997, at 162. Baig stated, "With my modest computer skills, it took about two weekends to wade through the software and manuals and create my first few Web pages. Those more computer-savvy than I might well be able to accomplish that in a single evening." *Id.* at 162.

8. See Jeff Bertolucci, *Make the Net Your Business*, PC COMPUTING, Dec. 1997, at 420, 420 (reviewing five different services that not only help one build a Web site, but that also provide hard disk space for one's site on an Internet service provider's computer, an Internet domain name, one or more e-mail addresses, on-line and phone tech support, and in most cases Web design software, all for monthly fees ranging

and a cultural shift towards encouraging on-line commerce⁹ have led to

between \$39.95 and \$500); *ACLU v. Reno*, 929 F. Supp. 824, 843 (E.D. Pa. 1996) (noting the government's expert's estimate that "creation of a Web site would cost between \$1,000 and \$15,000, with monthly operating costs depending on one's goals and the Web site's traffic"); Joseph R. Garber, *Cybermall Rats*, *FORBES*, June 16, 1997, at 122, 122 (discussing a company that will give you all the software you need to create a Web store, lease you virtual mall space and handle all of the housekeeping, including order-taking and report generation, for a fee of \$100 a month for a small shop and \$300 a month for a large one); Richard Castagna, *An Amiable Host*, *WINDOWS MAG.*, Apr. 1997, at 206, 208 (discussing an Internet service provider that allows those paying a subscription fee of \$100 per month to "set up [a] business Web site without shelling out another buck for hardware, software, and technical support [and] guarantees that you'll have a prototype of your site done within one hour"); David Seachrist, *Hanging Out an Internet Shingle*, *BYTE*, Apr. 1997, at 136, 136 (reviewing three "all-in-one, entry-level Internet-storefront packages," each including a Web server, database, and tools for creating the actual Web content, at prices ranging from \$1,495 to \$4,995); Hogan, *supra* note 6, at 106 (reviewing Peach Tree Internet Suite, a \$199 product described as "one of the easiest and cheapest ways" to create a commercial Web site); BRUCE JUDSON, *NETMARKETING: HOW YOUR BUSINESS CAN PROFIT FROM THE ONLINE REVOLUTION* 44-45 (1996) (estimating the cost of "a very basic Website" of approximately 10 pages of content, along with a simple online form for ordering or customer response, at about \$2,500, and estimating the cost of "a more complicated site," perhaps including an online catalog with graphics, audio, or multimedia, at between \$5,000 and \$50,000).

9. In 1994, one commentator wrote:

The model for buying and selling on the Internet is still evolving. In fact, there is a persistent myth that anything resembling sales activity is strictly prohibited on the network. Many companies have contracted for commercial Internet connections and yet are hesitant to consider accepting orders or delivering products, in part because they fear this will be labeled "unacceptable use."

MARY J. CRONIN, *DOING BUSINESS ON THE INTERNET* 185-86 (1994). One year later, another author commented:

Up to now, a confusing situation has confronted electronic novices: If they barrel in trying to drum up business [on the Internet], they get castigated. Yet they can see deal-making going on around them right up to the point where money has to change hands. Even more perplexing, the very same rule—no solicitation—is implemented strictly in one place and loosely in another.

MARCIA YUDKIN, *MARKETING ONLINE* 8-9 (1995).

This confusion resulted in part from the early conflict between the National Science Foundation's sponsorship of its NSFNet network for academic purposes and the growing commercial use of that network. See DANIEL MINOLI & EMMA MINOLI, *WEB COMMERCE TECHNOLOGY HANDBOOK* 449-50 (1998) (discussing and reproducing the former "Acceptable Use Policy," which generally barred for-profit use of the NSFNet, and noting that although the restrictions have been lifted, advertising on the Internet remains "a delicate issue"); EMERY, *supra* note 5, at 127 (Until May 1995 there existed "an Internet-wide policy, a vestige of the pre-commercial era of the Net when the National Science Foundation's NSFNet was the main Internet backbone. It said that NSF's part of the Net—which carried almost everybody's traffic—could not be used for profit."); REID, *supra* note 4, at xxi-xxii (noting that as a direct result of this conflict, what were

to become the major Internet service providers installed their own nationwide trunk lines that paralleled and carried traffic independent of the NSFnet); Robert Kuttner, *The Net As Free-Market Utopia? Think Again*, BUS. WK., Sept. 4, 1995, at 24, 24 (asserting that on-line commerce will boom as soon as software is perfected to assure the security of credit-card purchases, and describing Internet culture as a "distinctive hybrid, with as much in common with Jerry Garcia as with Adam Smith").

The year 1995 saw the publication of a book listing the best of the 5000 shopping sites on the Internet, World Wide Web, America Online, Compuserve, and Prodigy that its author had visited. See JACLYN EASTON, *SHOPPING ON THE INTERNET AND BEYOND* 7 (1995). Nevertheless, a contemporary commentator could very well assert that "today's Internet offers surprisingly little merchandise. You won't find a hundredth of what you can get through mail order. . . [because] [s]hopping over the net denies us the experience of visiting the business." CLIFFORD STOLL, *SILICON SNAKE OIL* 18 (1995).

As late as 1996, an analysis of on-line commerce concluded that "[a]bout half of the people we talk to still believe the Internet is not supposed to be used for commercial purposes. That may have been true a couple of years ago, but now the Internet is open for business." DOWLING, JR. ET AL., *supra* note 6, at 60. One district court commented, "The Web has extended beyond the scientific and academic community to include communications by . . . businesses." *ACLU v. Reno*, 929 F. Supp. 824, 836 (E.D. Pa. 1996). Indeed, a more recent work characterized the World Wide Web as "the Net's grand compromise with capitalism. Where the traditional Net hated and flamed attempts to advertise and achieve blatant profits from it, the Net approves of and supports the Web." GERARD VAN DER LEUN & THOMAS MANDEL, *RULES OF THE NET* 146 (1996). By late 1997 there were nearly 400,000 commercial sites on-line, of which it was estimated that nearly a third were profitable and an additional quarter expected to make money within the coming year. See Warren Cohen, *Online Malls Move Closer to Home*, U.S. NEWS & WORLD REP., Dec. 1, 1997, at 86, 86.

One of the most striking illustrations of the growing popularity of Web-based commerce is the large number of Web sites developed to facilitate the buying, selling, or trading of the wildly successful line of dozens of small stuffed animal figures known as "Beanie Babies." Although Ty Incorporated, the manufacturer of these toys, maintains its own site at *Ty Inc., The Official Home of the Beanie Babies* (visited Jan. 20, 1998) <<http://www.beaniebabies.com>>, "[i]n the past few months, a vast and growing secondary market in Beanie Babies has sprouted up online and pushed prices for the hardest-to-find items into the stratosphere." Margaret Webb Pressler, *Now on the Internet: a Collectors' Frenzy for Beanie Babies*, WASH. POST, Nov. 23, 1997, at A1. The operator of one such site recalled:

I kind of did the Web page as a way to work at home and make a few dollars. . . . [It] became so popular I was spending 8 to 10 hours a day doing it. I finally decided that my time was worth money, and I was helping other people make money, so I started charging to place ads.

Sara Nelson, *Brokering Beanie Babies*, FORBES ASAP, Dec. 1, 1997, at 213, 213. The volatility of the market for these collectibles and the rapid turnover in the supply available from each site have raised special issues of site "freshness" and notification of limited stock. See *infra* note 153 and accompanying text.

Web sites can also be used effectively by individual craftspersons. For instance, one creator of miniature teddy bears remarks that, rather than sell her bears at trade shows, [w]hen I have a bear finished, I send out an e-mail to a mailing list of about a thousand people who have expressed serious interest in buying a bear, saying "Here it is, and here's the price." Then I put the bear face-down on my scanner, scan it, and post the picture to my "Teddies for Sale" [Web] page. From the moment I hit the "send" button, I've never had it take more than 12 minutes to sell a bear.

dramatic growth in the demographics¹⁰ and dollar amounts¹¹ of the

Jack Mingo, *A Bear Market Success*, WASH. POST, Dec. 9, 1997, at D5 (quoting entrepreneur Debbie Kesling).

Perhaps not surprisingly, commentators have noted that some of the most successful commercial sites on the Web today are those providing erotic material for a fee. According to a recent estimate, "the Web boasts some 28,000 sex sites, about half of which are set up to make money." Frank Rose, *Sex Sells*, WIRED, Dec. 1997, at 218, 220. Experts have estimated the annual revenues of these sex sites all the way from \$100 million to \$3 billion. *Id.* at 221. For more on the on-line sex industry, see Vic Sussman, *Sex on the Net: Small Operators Can Make Big Killings on the Web*, USA TODAY, Aug. 20, 1997, at A1 ("[S]ex is . . . widely considered to be the Web's current top moneymaker," even though "sex-related sites make up just 2% to 3% of the Web's 200,000 commercial sites."); Joel Strauch, *The Problem With Webonomics*, SMART COMPUTING, Aug. 1997, at 82, 84 ("Erotic content sites use tactics such as addressing an international audience, vast site promotion, and distributing free samples to spread knowledge of their business by word of Web."); Thomas E. Weber, *The X Files: For Those Who Scoff At Internet Commerce, Here's a Hot Market*, WALL ST. J., May 20, 1997, at A1 ("Find a Web site that is in the black and, chances are, its business and content are distinctly blue."); Eric Schlosser, *The Business of Pornography*, U.S. NEWS & WORLD REP., Feb. 10, 1997, at 42, 49 (reporting that "Playboy's Web site, which offers free glimpses of its Playmates, now averages about 5 million hits a day"); Fred Hapgood, *Sex Sells*, INC. TECH., at 45, 46 (Vol. 18, No. 17 1996) ("[A]dult material is the first fully developed sector in Internet commerce, the first market with large numbers of buyers and sellers.").

10. See G. Christian Hill, *Adult Net Users In U.S., Canada Put at 58 Million*, WALL ST. J., Dec. 11, 1997, at A11 (stating that the number of users of the World Wide Web has risen to 48 million, up 26% from the previous spring, and that the number of people who had bought goods or services on the Web had risen to 10 million, up 50% from a half-year before); *Shopper Stats: You Are Not Alone*, INTERNET SHOPPER, Fall 1997, at 14 (citing recent survey results indicating that 20.32% of Internet users shop online, compared to 11.1% of users in October 1995); EVAN I. SCHWARTZ, WEBONOMICS 14-16 (1997) (chronicling the transition of the World Wide Web, between 1994 and 1996, from the "domain of hobbyists" and "techies," to the "new water cooler" around which corporate employees would gather); Dan Kennedy, *Who's On-Line?*, INC. TECH., at 34, 34 (Vol. 19, No. 4 1997) (citing prediction by Internet market-research company that by the year 2000 there will be 142 million on-line worldwide, including 71 million in the United States); Jim Seymour, *Making Online Commerce Work*, PC MAG., June 10, 1997, at 93, 93 ("[F]rom April to November 1996, the number of people who had bought something online had increased from 9 to 15 percent of the Web-using population, which itself had grown over that period to 47 million."); Ginsburg, *supra* note 6, at 208 (citing estimates ranging from 33 to 43 million households and from 1.1 to almost 2 million businesses online by the year 2000); John Simons, *Waiting to Download: Only Market Forces Can Unclog the Internet*, U.S. NEWS & WORLD REP., Dec. 30, 1996, at 60, 60 ("Every 30 seconds, nearly 20 Internet novices log on to the global network . . . for the first time. That translates into a doubling of Net users in the last year alone—to nearly 40 million worldwide, a number that's expected to double again this year.").

One recent survey reported that 44% of on-line users claimed that they had shopped for products on the World Wide Web by October 1996, up from 33% five months earlier. Moreover, "about 39% of users had actually ordered something on-line, while 63% had browsed without purchasing or gathered information to assist in an off-line purchase." Thomas E. Weber, *Watching the Web: Who's Buying—and What*, WALL ST. J., Mar. 27, 1997, at B6 (summarizing results of survey by Yankelovich Partners, Inc.). But see Keith H. Hammonds, *A Lot of Looking, Not Much Buying—Yet*, BUS. WK., Oct. 6, 1997, at 140, 140 (reporting that only 19% of users who responded to the magazine's survey indicated that they had used the Internet, World Wide Web, or an online service to purchase anything); Amy Cortese, *A Census in Cyberspace*, BUS. WK., May 5, 1997, at 84, 84 (summarizing results of magazine's survey that indicated that only 1% of cybercitizens frequently shop online, 9% do so sometimes, and nearly 25% of online users have purchased something either on the Internet or an online service).

Indeed, Spring 1997 saw the publication of the premiere issue of the quarterly magazine *Internet Shopper*, which discusses "How and Where to Buy Online." The magazine and its associated Web site, <<http://www.internetshopper.com>>, review sites in the general categories of Home, Office, Money, Gifts, Travel, and Entertainment. See Dan Rosenbaum, *Editor's Note: Talking 'bout a Revolution*, INTERNET SHOPPER, Spring 1997, at 7.

11. See Elizabeth Weise, *Shopping the Superhighway*, USA TODAY, Dec. 10, 1997, at D1 ("On-line sales have more than tripled, from \$707 million in 1996 to \$2.6 billion this year."); *The Shopping Season*, Editorial, N.Y. TIMES (Wash. ed.), Dec. 2, 1997, at A34 ("Internet sales may reach \$3 billion [in 1997], more than double last year's total."); *Webname* (visited June 18, 1997) <<http://www.computerworld.com/emmerce/depts/stats/html>> (summarizing financial statistics concerning electronic commerce); Linda Himelstein, *Web Ads Start to Click*, BUS. WK., Oct. 6, 1997, at 123, 123 (reporting that "[i]n the first quarter of 1997, Internet ad spending hit \$133 million for a remarkable five-fold increase over the same period last year"); *Ringin' Up Web Profits*, PC MAG., Sept. 9, 1997, at 10, 10 (reporting that profits from Web-based sales were projected to reach \$24.2 billion for 1997 and that 30% of commercial Web sites report profitable operation); Kennedy, *supra* note 10, at 35-36 (citing forecasts that by the year 2000 on-line shopping will produce almost \$6.6 billion in consumer sales annually, including \$2.1 billion for high-tech products, \$1.25 billion for on-line entertainment, and \$1.6 billion for travel-related purchases); Andrew Kantor & Michael Neubarth, *Off the Charts: The Internet 1996*, INTERNET WORLD, Dec. 1996, at 47, 50 (citing projections of \$6.6 billion and \$10 billion for World Wide Web sales in 2000); Phyllis Plitch & Carmen Fleetwood, *More Yule Shoppers Skip Malls for Net*, WALL ST. J., Dec. 23, 1996, at A5 (projecting holiday season sales on-line in the total amount of \$194 million, compared with \$46 million for the same period in 1995); YESIL, *supra* note 5, at 2-3, 9-10 (citing estimates of Web-based shopping at \$132-200 million in 1994 and \$300-350 million in 1995, and offering various projections of \$3.1 to 8 billion, or up to \$150 billion, in the year 2000); LeBlanc, *supra* note 1, at 129 (describing how Internet service provider America Online broke its one-day sales record in December 1996 with a total of \$1 million of merchandise sold in a day). Business-to-business purchases on-line are expected to dwarf consumer expenditures. See Steve Lohr, *Internet Commerce Pioneer Files for Bankruptcy*, N.Y. TIMES, May 10, 1997, at 33 (citing estimates that business-to-business commerce on the Internet will grow from \$600 million in 1996 to \$66 billion in the year 2000).

In mid-May 1997, the Internet-based bookseller Amazon.com, though it had yet to make a profit and though it faced a pending lawsuit and growing competition, had a highly successful initial public offering of stock on the Nasdaq Stock Market. See Elizabeth Corcoran, *Amazon.com a Bestseller In Its Debut on Nasdaq*, WASH. POST, May 16, 1997, at G3 (three million shares offered at \$18 each ended the day at \$23.50).

on-line marketplace, which in turn offers a challenging new context for the application of the Uniform Commercial Code's ("U.C.C.'s") established and emerging concepts of the sale of "goods."¹²

The focus by many legal commentators and by the authors of mass-market manuals¹³ on the intellectual property and payment-systems aspects of Web site design and operation has obscured the fact that for several reasons the sale of goods by means of World Wide Web sites occupies a poorly-charted but rapidly-developing niche of basic commercial law. Not only is the caselaw concerning on-line commerce sparse but the regulatory landscape is generally bare. In July 1997, a much-publicized report prepared by the Federal Government¹⁴ espoused

However, the same week, Nets Inc., an "on-line shopping mall for manufacturers," led by the former chairman of the Lotus Development Corporation, filed for bankruptcy protection. See Lohr, *supra*, at 33.

12. Article 2 of the U.C.C. "applies to transactions in goods," U.C.C. § 2-102 (1996), which are generally defined as including "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale." U.C.C. § 2-105(1) (1996).

13. See Heidi Anderson, *Legal Matters Matter*, in PC NOVICE GUIDE TO BUILDING WEB SITES (1997) at 163, 163 (characterizing "proper attention to the law" as, in most cases, "familiarizing yourself with copyright laws and what you can and can't legally include on your site"); MICHAEL ALEXANDER, NET SECURITY: YOUR DIGITAL DOBERMAN 220, 217-48 (1997) (inserting one brief mention of disclaimers in "The Law Comes to Cyberspace," a chapter largely devoted to intellectual property rights, privacy, and employee access and Internet use policies); KOMANDO, *supra* note 2, at 381-99 (devoting a chapter to "Copyrights and Other Legalities," but focusing purely on intellectual property rights); DOWLING, JR. ET AL., *supra* note 6, at 383-400 (addressing, in a chapter entitled, "The Internet and the Law," copyright, First Amendment rights, jurisdiction, advertising law, and tax law); Edward Frankel, *Legal Considerations*, in GONYEA & GONYEA, *supra* note 5, at 101-22 (focusing entirely on trademarks, trade names, and copyright law); YESIL, *supra* note 5, at 195-220 (devoting a chapter entitled "Understanding Virtual Legality" to jurisdiction, netiquette, digital identification and signatures, certificate authorities and key escrows, copyright protection, import/export laws, international money movement and currency conversion, and taxation); MICHAEL SULLIVAN-TRAINOR, WEBMASTER STRATEGIES 172-76 (1996) (devoting one to four sentences each to the topics of: substantiation of claims about a product or service; testimonials and endorsements; money-back guarantees; prices; free products or services; warranties and guarantees; order fulfillment; credit card refunds; and jurisdiction; and two pages to copyright and trade dress issues); DANIEL A. TAUBER & BRENDA KIENAN, WEBMASTERING FOR DUMMIES 14-18 (1997) (describing, without mentioning any type of law other than copyright law, the various functions of individuals charged with creating and/or maintaining Web sites, including the technical expert, the provider of site content, the site designer, and the business strategist).

14. See INTERAGENCY WORKING GROUP ON ELECTRONIC COMMERCE, *supra* note 2. The Interagency Working Group on Electronic Commerce, which drafted the paper, consisted of "high-level representatives of several cabinet agencies, including the

the general principle that "parties should be able to do business with each other on the Internet under whatever terms and conditions they agree upon."¹⁵ Although recognizing that various groups, including the National Conference of Commissioners on Uniform State Law (the "NCCUSL"), the American Law Institute, and the American Bar Association, "already are working to adapt the UCC to cyberspace,"¹⁶ the report acknowledged that even such a revised set of rules would by no means be mandatory. It stated, "Fully informed buyers and sellers could voluntarily agree to form a contract subject to this uniform legal

Departments of Treasury, State, Justice and Commerce, as well as the Executive Office of the President . . . Independent commissions including the Federal Communications Commission and the Federal Trade Commission also have been involved." *Id.* at 1.

15. INTERAGENCY WORKING GROUP ON ELECTRONIC COMMERCE, *supra* note 2, at 5. One of the founders of the Internet has characterized the efforts of the Interagency Working Group on Electronic Commerce as "a break-through in electronic commerce policy. Its perspective is properly global; its delineated goals, highly commendable." Vinton G. Cerf, *Building an Internet Free of Barriers*, N.Y. TIMES (Wash. ed.), July 27, 1997, § 3, at 12. Cerf contrasts this approach with those of other "well-meaning policy makers [who] try to extend longstanding social goals to the Internet through heavy-handed, market-distorting mandates when industry-led strategies could be more effective." *Id.*

This hands-off policy with regard to electronic commerce was also advocated by Ira C. Magaziner, senior Presidential adviser for policy development, who, in his keynote speech at a conference concerning children and on-line advertising, identified electronic commerce as "the engine of growth for the world economy and the U.S. economy in the next quarter-century." Stuart Elliott, *Advertising*, N.Y. TIMES (Wash. ed.), Nov. 4, 1997, at D13. Magaziner stated, "If we get in and regulate it, we'll just mess it up." *Id.*; see also Stuart Elliott, *Advertising: Self-Regulation in Cyberspace: the Web site for Beanie Babies Undergoes Several Changes*, N.Y. TIMES (Wash. ed.), Dec. 8, 1997, at D16 (noting instance of self-regulation by advertising industry, leading to changes in site for stuffed toys popular with children).

This preference for self-regulation of the Internet is shared by a number of academics. According to one scholar:

[T]he middle course, self-regulation, best effectuates both the vision of the founders of cyberspace and the pragmatic needs of the real world. . . .

For those dangers from which technology and individual initiative do not provide adequate protection, contract law or social enforcement mechanisms provide a sound basis for creating a "law" of cyberspace.

Llewellyn J. Gibbons, *No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace*, 6 CORNELL J.L. & PUB. POL'Y 475, 543 (1997); see also Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1752 (1995) (Only when "individuals gain an experience with this new [virtual] space that gives them the sense of what this new space is . . . should we expect law to understand enough to resolve [cyberlaw] questions rightly." Until that time, rather than enacting preemptive regulation, we should "follow the meandering development of the common law."); I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace"*, 55 U. PITT. L. REV. 993, 1054 (1994) ("Contracts can govern a wide variety of problems in cyberspace and should form the basic control mechanism for much cyberspace activity.").

16. INTERAGENCY WORKING GROUP ON ELECTRONIC COMMERCE, *supra* note 2, at 6.

framework, just as parties currently choose the body of law that will be used to interpret their contract."¹⁷

Indeed, the NCCUSL's drafting of a new Article 2B of the U.C.C. and of revisions to the current Article 2 largely addresses the licensing, rather than the sale, of intellectual property and especially of software,¹⁸

17. *Id.* at 5 (emphasis added).

18. Although the proposed Article 2B that the NCCUSL has drafted for addition to the Uniform Commercial Code covers sales of copies of software, its "paradigmatic transaction involves a *license*, rather than a sale." NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *Introduction to Uniform Commercial Code Article 2B—Licenses* 7, at 9 (Proposed Official Draft Nov. 1, 1997).

As of December 31, 1997, the most recent draft of Article 2B was dated November 1, 1997 and was available online, as the thirteenth consecutive such draft, at <<http://www.law.upenn.edu/library/ulc/ucc2/ucc2bnov97.htm>>. The pagination, section numbering and Reporter's Notes of that version of Draft Article 2B (hereinafter, Draft Article 2B) are hereinafter adopted, unless an earlier draft of Article 2B is referenced. For a useful description of the UCC drafting process, see Peter A. Alces & David Frisch, *Commenting on "Purpose" in the Uniform Commercial Code*, 58 OHIO ST. L.J. 419, 441-57 (1997) (discussing the drafting of "black letter" statutory provisions and of their corresponding Official Comments).

Article 2B is devoted to the "licensing of information and software contracts." *Introduction to Draft Article 2B*, at 17 (Proposed Official Draft Nov. 1, 1997); *see also* U.C.C. § 2B-101 rptr. note 1 (Proposed Official Draft Nov. 1, 1997) ("While the scope [of this Article] covers more than licenses, the transaction used to develop this article involves licensing of information."). Indeed, the NCCUSL has emphasized the need for this new article by noting that Article 2, as "a body of law tailored to transactions whose purpose is to pass title to tangible property can not be simply applied to transactions whose purpose was to convey rights in intangible property and information. A separate treatment of this commercially important class of transactions was needed." *Introduction to Draft Article 2B*, at 7; *see also* John C. Dvorak, *Out-of-Box Experience*, PC MAG., Dec. 16, 1997, at 87, 87 (predicting that on-line downloading of software will soon become the primary method of software distribution, and that as on-line merchandising techniques are perfected, consumers can "kiss software-in-the-box good-bye"); Draft § 2B-102(a)(22) (defining "information" as "data, text, images, sounds, and works of authorship, including computer programs, databases, literary, musical or audiovisual works, motion pictures, mask works, or the like, and any intellectual property or other rights in such information"); U.C.C. § 2B-103 rptr. note 2 (Proposed Official Draft Nov. 1, 1997) (observing that the Drafting Committee rejected proposals to limit the scope of the Article to digital information); U.C.C. § 2B-103(c) (Proposed Official Draft Nov. 1, 1997) (providing that in sales involving both "information" and goods, Article 2 or the lease-oriented Article 2A "governs standards of performance of goods other than the physical medium containing the information, packaging, or documentation pertaining to the information").

In spite of these apparent limitations, Draft Article 2B provides that "all or part of" its own rules can be adopted by parties to a transaction not governed, or partially governed, by this Article. U.C.C. § 2B-106(a)(1), (b) (Proposed Official Draft Nov. 1, 1997); *see also infra* notes 372-75 and accompanying text. Thus, by contractual arrangement of the parties, some or all of Draft Article 2B's provisions can be applied

rather than of Article 2 "goods" in general.¹⁹ Not only are Draft Article 2B and Draft Revised Article 2 nearly devoid of illustrative examples pertaining to sales of goods through Web sites, but the timing of their completion and the chances of their adoption by each of the states are largely uncertain,²⁰ and their implications for the process by which goods are sold²¹ remain largely unaddressed by commentators.

to the sale of software or other goods, so long as this agreement is "represented by a record" and is not part of a "mass market transaction." *Id.*; see also *infra* notes 203-05 and accompanying text (defining "record"); *infra* notes 224-25 and accompanying text (defining "mass market transaction").

As opposed to Draft Article 2B, whose formulation began in July 1995, formal discussions considering the revision of Article 2 began in 1989. John E. Murray, Jr., *The Emerging Article 2: The Latest Iteration*, 35 DUQ. L. REV. 533, 535 (1997) (commenting on the draft revisions of July 1996). As of December 31, 1997, the most recent draft of Revised Article 2 was a draft prepared for discussion at the NCCUSL's meeting of July 25-August 1, 1997, which had been augmented by a December 1997 "Partial Redraft" containing material to be considered by the Article 2 Drafting Committee at their March 1998 meeting. These documents were available online at <<http://www.law.upenn.edu/library/ulc/ucc2/ucc2797.htm>> and <<http://www.law.upenn.edu/library/ulc/ucc2/ucc21297.htm>>, respectively. The pagination, section numbering Reporter's Notes of the July 25-August 1, 1997 draft is hereinafter adopted (hereinafter "Draft Revised Article 2"). Sections subsequently revised by the Partial Redraft are so identified.

In their attempts to conform various elements of Article 2 to Draft Article 2B, in particular with regard to the treatment of electronic writings and signatures, the authors of the draft revisions reaffirmed that Article 2 generally does not apply to sales of "information" as defined above. See U.C.C. § 2-102(a)(20) (Proposed Official Revision July 25 - Aug. 1, 1997) (explicitly excluding "information" from the definition of "goods"); U.C.C. § 2-103(b) (Proposed Official Revision July 25 - Aug. 1, 1997) ("If a transaction involves both information and goods, this article applies to the aspects of the transaction which involve the goods and their performance and rights in the goods other than the physical medium containing the information, its packaging, and its documentation."). But see David A. Rice, *Digital Information as Property and Product: U.C.C. Article 2B*, 22 U. DAYTON L. REV. 621, 643 (1997) (attacking Draft Article 2B's distinction between licenses and sales as leading to the "confounding of rights in intellectual property with transfer of rights in a product that embodies intellectual property").

19. The introduction to Draft Article 2B observes that courts are divided on the extent to which software licensing or development contracts can be governed by Article 2, i.e., on the extent to which software can be seen as an Article 2 "good." *Introduction to Draft Article 2B* (Proposed Official Draft Nov. 1, 1997), at 6 (citing illustrative cases).

20. See Geanne Rosenberg, *Legal Uncertainty Clouds Status of Contracts on Internet*, N.Y. TIMES (Wash. ed.), July 7, 1997, at D3 ("[T]he code revision, which individual state legislatures could adopt, adapt or ignore at their own choosing, is at least a year away from completion. It could run into further delays because of criticism aimed . . . at changes and additions within the draft to sales and licensing laws").

21. This Article addresses whether Web sites qualify as "consumer contracts," "mass market licenses," and "agents," all of which concepts are introduced by Draft Revised Article 2 and/or Draft Article 2B. In addition, as discussed *infra* Part V.E.3, Article 2B's acceptance of certain so-called "shrink-wrap" contracts, electronic signatures, and "click-on agreements" would seem to render those practices more

Even if Draft Article 2B and Draft Revised Article 2 were adopted by all states, the parties to a contract or license could, as they can under today's Article 2, contract out of or around many of the statutory provisions. The creators of Draft Article 2B acknowledged their intent

not to draft rules that an individual party would draft tailored to each case, but to select an intermediate or ordinary framework whose contours are appropriate, but whose terms will be altered in the more sophisticated [transactional] environments. A UCC Article designs default rules that are acceptable in ordinary transactions where they can be frequently used without disruption or costly negotiation.²²

Another explanation for the lack of legal landmarks is that the accessibility and interactivity of Web commerce sites present a new transactional model with respect both to the contracting parties' interaction and to the documentation of the contract. Because Web-based sales usually occur between parties who have not previously agreed privately on specific standardized electronic forms and procedures, they do not generally fall within the existing frameworks of "electronic data interchange" or "EDI."²³ Although it is questionable

legitimate in connection with the sale of goods through Web sites. *See also* U.C.C. § 2B-104 rptr. note 2 (Proposed Official Draft Nov. 1, 1997) (observing that the drafters intend Article 2B to "extend the effectiveness of innovations in electronic contracting"); Wendy R. Leibowitz, *Laws on E-Sigs Inked*, NAT'L L.J., Nov. 17, 1997, at A1, A11 ("As of late October, all but five states had bills pending or laws on the books dealing with electronic signatures.").

22. *Introduction to Draft Article 2B*, at 14. The drafters further identified their "two basic assumptions about commercial contract law." *Id.* at 13. The first is "that a role of contract law is to preserve freedom of contract," and the second is that "the goal of the drafting is to identify, clarify, and, where needed, validate existing patterns of contracting to the extent that these are not inconsistent with modern social policy." *Id.*; *see also* U.C.C. § 2B-102 rptr. note 19 (Proposed Official Draft Nov. 1, 1997) (emphasizing that the Draft's "mass-market license" provisions are consistent with the position on non-regulation advanced in the White House paper on electronic commerce, which paper was discussed *supra* note 2); U.C.C. § 2B-107(b) (Proposed Official Draft Nov. 1, 1997) ("Except as expressly provided in this article or in Article 1, the effect of any provision of this article may be varied by agreement of the parties."); U.C.C. § 2-108(a) (Proposed Official Revision July 25 - Aug. 1, 1997) (providing generally that the effect of any provision of Draft Revised Article 2 may be varied by agreement).

23. In EDI, as opposed to general consumer-to-business electronic commerce, "parties with close, long-standing and continuing business relationships" transmit "condensed and highly formatted business information" to each other to negotiate and create contracts on-line. *See* BERNARD D. REAMS, JR. & L.J. KUTTEN, *ELECTRONIC CONTRACTING LAW: EDI AND BUSINESS TRANSACTIONS* 6 (1994-95); *see also* MINOLI & MINOLI, *supra* note 9, at 6 ("EDI methods have worked for rigid business-to-business applications . . . [but] will not scale to consumer-to-business applications because of

whether and when a global "law merchant" for Web-based commerce will be developed,²⁴ there have yet to emerge nationally-accepted, much

the low per-consumer volume, large consumer base, dispersed geographic scope of the customers, and the variety of products involved."); MARTIN NEMZOW, BUILDING CYBERSTORES 371, 374 (1997) (defining EDI as "the application-to-application transfer of business documents between computers," and also noting that although only the largest business and governmental agencies have implemented EDI, it may become more popular as a form of Web-based transaction system to rival digital cash); BENJAMIN WRIGHT, THE LAW OF ELECTRONIC COMMERCE 1:7-1:9, 2:6-2:10 (2d ed. 1996); AMELIA H. BOSS & JEFFREY B. RITTER, ELECTRONIC DATA INTERCHANGE AGREEMENTS: A GUIDE AND SOURCEBOOK (1993); American Bar Association Electronic Messaging Services Task Force, *The Commercial Use of Electronic Data Interchange—A Report and Model Trading Partner Agreement*, 45 BUS. LAW. 1645 (1990).

There are indications, though, that Web sales are accounting for and will account for an increasing share of business-to-business transactions. See MINOLI & MINOLI, *supra* note 9, at 76 ("[T]he introduction of Web technology to replace low-end EDI translators will greatly speed the introduction of small companies to electronic commerce."); Pamela Sebastian, *Corporate Purchasers Venture onto the Internet with Their Orders*, WALL ST. J., Nov. 13, 1997, at A1 ("About 25% of purchasing agents plan to start using or step up their use of the Internet in buying industrial supplies such as tools and motors over the next two years, a survey of 600 purchasers indicates."); Rochelle Garner, *Don't Like EDI? Try OBI*, COMPUTERWORLD EMERCE, Nov. 1997, at 6, 6 (discussing the Open Buying on the Internet (OBI) standard, created by a group of Fortune 500 companies and their key suppliers, which specifies "the processes, formats, security, and technical design for the buying and selling of [office furniture, computer and industrial supplies, and electronic components] over the Internet"); ALEXANDER, *supra* note 13, at 22 (citing a market research firm's prediction that the Web "will eliminate use of EDI over proprietary networks"); Tom Davey, *They're Still Sold on EDI*, INFO. WK., Sept. 22, 1997, at 153, 156 ("At some point, most business-to-business transactions will move to the Web, but it won't happen overnight."); Christopher Anderson, *Big, boring, booming*, ECONOMIST, May 10, 1997, at 16 (describing Trading Process Network, a Web site where General Electric now does \$1 billion worth of business a year with about 1400 of its suppliers); Steve Lohr, *Business to Business on the Internet*, N.Y. TIMES (Wash. ed.), Apr. 28, 1997, at D1 (discussing replacement of EDI, which "has remained the province of large companies and their captive suppliers," with Internet technology that has made it affordable for smaller companies to deploy information technology in ways that were once available only to the giants).

24. See *Award Winners: Our Editors Present the Top Corporate Websites*, FORTUNE TECHNOLOGY BUYER'S GUIDE 242, 243 (Nov. 1997) [hereinafter *Award Winners*] ("In the anarchistic world of the Web, there is little consensus, no official book of rules, and no established judges."); Alexandra Fisher, *A Tight Ship*, INTERNET WORLD, Jan. 1997, at 36, 36 ("[A]t the Web site level, there are no standard methods for organizing and presenting documents and services—and there probably never will be.").

To fashion a new "law merchant," one analyst has recommended that lawmakers should [first] identify actual norms that have arisen in specialized business communities. Second, lawmakers should identify the incentive structure that produced those norms. Third, the efficiency of the incentive structure should be evaluated using analytical tools from economics. Those norms arising from an efficient incentive structure, as ascertained by tests that economists apply to games, should be enforced.

Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1656 (1996).

A second commentator, examining the Uniform Commercial Code from the perspective of political theory, applauded the drafters for having "crafted a Code that is

less globally-accepted, concepts of "course of dealing" and "usages of trade" appropriate to on-line commerce.²⁵

flexible enough to accommodate changing practices and technology." According to this scholar:

[B]y selecting practice-based default rules, the drafters have found a means of respecting the liberty of individuals within the business community, whose free choices helped to evolve the underlying practices. In this manner, practice-based rules become a vehicle for resolving the apparent tension between individual and community. Moreover, to the extent that any tension remains, the Code preserves individual liberty by allowing disgruntled parties to contract out of unfavorable rules.

Kerry Lynn Macintosh, *Liberty, Trade, and the Uniform Commercial Code: When Should Default Rules Be Based on Business Practices?*, 38 WM. & MARY L. REV. 1465, 1541 (1997).

However, another academic has cautioned:

[T]he best available theory of cultural evolution . . . reveals that commercial norms will develop only if they provide merchants with a more cost-effective method of adopting commercial practices on average than the alternative of each merchant starting from scratch. Given the high costs of developing a complete set of commercial practices solely on the basis of individual experimentation, commercial norms could develop *even if the practices they prescribe were on average less efficient than the practices developed by individual merchant experimentation.*

Jody S. Kraus, *Legal Design and the Evolution of Commercial Norms*, 26 J. LEGAL STUD. 377, 378 (1997) (emphasis added). Kraus thus warns against incorporating existing commercial norms wholesale into statutory law, identifying the paper's "central claim" as the proposition that "the legal rules produced by the incorporation strategy are likely to be suboptimal." *Id.* at 379 n.5; see also Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (Or "The Economics of Boilerplate")*, 83 VA. L. REV. 713, 761 (1997) ("[A]tomistic contracting [among lawyers and underwriters] may lead to the adoption of suboptimal corporate contracts in the following ways: (a) a suboptimal term may become widely adopted and may inhibit innovation; (b) contract terms may be too standardized; or (c) contract terms may be insufficiently standardized.").

25. The commercial law, though, should be able to accommodate any such evolution: as one government task force recently observed, "As sales of goods become more common via the [World Wide Web], the U.C.C. will likely become more useful based on the flexible 'course of dealing' and 'usage of trade' definitions." INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 57 (1995).

Article 2 defines "course of dealing" as "a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." U.C.C. § 1-205(1) (1996). "Usage of trade" is defined as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." U.C.C. § 1-205(2) (1996). Article 2 further provides that course of dealing and usage of trade may "give particular meaning to and supplement or qualify terms of an agreement." U.C.C. § 1-

A further hindrance to the development of a body of law in the arena of electronic commerce is that the electronic mating dance between a commercial Web site's "owner" and a "visitor"²⁶ to that site cannot be

205(3) (1996).

One of the most important areas in the development of Web-based commerce involves "links" made to a given commercial Web site. Commentators generally recommend that businesses enter reciprocal arrangements by which visitors to either site can "mouse-click" on an icon or highlighted text and be instantly transported to the other site. One analyst commented:

If you're smart and a "people person," it should not be difficult to establish reciprocal-link agreements with other, related, noncompetitive cyberbusinesses. Unless your site is particularly obnoxious or offensive, other businesses are usually more than happy to exchange links with you. Every person who visits the other site, therefore, has the opportunity to check out your site too. It's a win-win situation.

KOMANDO, *supra* note 2, at 261; *see also* DANIEL S. JANAL, *ONLINE MARKETING HANDBOOK* 172 (1995) (identifying such "reciprocity" as "a valuable source of new products").

Questions persist, however, about whether the owner of a given site has any recourse against unwanted links to her site from others, or rights against those who want her to abandon her site's link to theirs. One pair of authors has advised:

There is one drawback with the ease of having links to your pages; you can't control who is putting links to your pages and you can't control what they say it links to. However, trust your Internet users to remember that you don't have control over who points to your page.

COOK & SELLERS, *supra* note 5, at 253.

The drafters of a pioneering project of the American Bar Association's Committee on the Law of Commerce in Cyberspace have attempted to provide guidance to "parties contemplating entering into a web linking relationship" and a "framework to draft and negotiate an agreement to suit their needs." AMERICAN BAR ASSOCIATION SECTION OF BUSINESS LAW—COMMITTEE ON THE LAW OF COMMERCE IN CYBERSPACE, SUBCOMMITTEE ON INTERACTIVE SERVICES, WEB-LINKING AGREEMENTS: CONTRACTING STRATEGIES AND MODEL PROVISIONS 3 (1997) [hereinafter COMMITTEE ON THE LAW OF COMMERCE IN CYBERSPACE]. The Committee recognized that although suggesting "that a contract or even permission is needed to establish a link from one web site might seem inconsistent with the original ethos of the Internet, . . . if anything, the opposite assumption is broadly held." *Id.* at 2; *see also* Bruce Orwall & David Bank, *Ticketmaster Sues Microsoft Corp. Over Internet Link*, WALL ST. J., Apr. 29, 1997, at B11 (discussing a suit "challeng[ing] one of the most basic operating practices of the Internet, namely that different Web sites can link to each other freely"); NEMZOW, *supra* note 23, at 263 (Links should be portrayed as "a convenience, not an endorsement. . . . Consider including a prominent disclaimer, such as: 'These links are provided as a matter of convenience only and do not endorse the sites or what you may find there.'").

Most recently, "[u]sing a combination of technology and lawsuits, a handful of companies are trying to control who can link to their Web sites. . . . [S]ome big players are . . . using special coding to block links from certain sites and demanding 'link licenses'—essentially, agreements that allow people to point to a site." Rebecca Quick, *Can't Get There From Here May Be Web's New Motto*, WALL ST. J., July 2, 1997, at B6. This topic is examined in more detail in Walter A. Effross, *Withdrawal of the Reference: Rights, Rules, and Remedies for Unwelcomed Web-Linking*, 49 S.C. L. REV. (forthcoming 1998).

26. This Article refers to a person who has developed, or caused to be developed, a Web site to sell or buy goods as the "owner" of that site and to computer users who

captured completely by comparisons to contracts formed by face-to-face negotiation,²⁷ by direct mail,²⁸ or by electronic mail sent by the parties to each other.²⁹ Not even the seller's "posting" of a message to participants of an on-line "bulletin board" or "mailing list" is directly relevant.³⁰ Instead, the most appropriate analogy may be to a seller's

look at any part of the site as "visitors" to that site. In the interests of gender equity and rhetorical clarity, this Article generally takes the site owner to be female and the visitor to be male.

In the case of a commercial Web site developed for the purpose of selling goods through the site itself (as opposed to a site that merely provides information about the owner's products and/or local outlets for the merchandise), the site's owner may be referred to as the "seller" and the visitors as the "buyers." It is less common for owners to establish Web sites for the sole purpose of buying, as opposed to selling, goods.

27. See Rosenberg, *supra* note 20 ("The . . . dearth of test cases has left many business managers, corporate lawyers and legal scholars uncertain about the enforceability of electronic agreements.").

28. One commentator has observed:

[C]onsumers [must] decide to visit a Web site, whereas they have little control over which marketing pitches they receive in the mail. For a marketer, this is both an advantage and a disadvantage. Marketers know that the people who voluntarily come to their site are good prospects, yet they don't have as much control over who those people are as they would in generating a direct-mail list.

SCHWARTZ, *supra* note 10, at 67-68; see also MARNI PATTERSON, DOING BUSINESS ON THE WORLD-WIDE WEB 24 (characterizing a Web site as unlike a magazine advertisement or a company brochure, and the World Wide Web as "an entirely different medium with new guidelines and requirements").

29. The sending of direct mail from one individual to another, whether through the postal system or over the Internet, is an example of "one-to-one" messaging, as opposed to the "one-to-many" messaging system of "automatic mailing list services" such as "listservs." See *ACLU v. Reno*, 929 F. Supp. 824, 834 (E.D. Pa. 1996). Although many Web sites incorporate features allowing visitors to correspond with the site owners by electronic mail, in most situations it is the visitor who must actively access the site himself rather than "receive" the site in the same way as he would passively receive electronic mail. But see Kevin Kelly et al., *Push! Kiss Your Browser Goodbye: The Radical Future of Media Beyond the Web*, WIRED, Mar. 1997, cover story (discussing the rise of "push technology" that threatens to create Web-based "channels" of information, much like those on television, and to render the user passive).

30. "Newsgroups," divided into major hierarchies such as comp (computers), sci (science), and rec (recreation), as well as thousands of specialized subgroups within these, are on-line discussion groups devoted to particular topics. Users of such groups can "post" messages to a "thread" of public messages already in progress (analogous to adding a message to a list of successive messages on a publicly-displayed bulletin board), communicate directly and privately with the poster of a previous message, or begin their own public "thread" of messages. See generally HEIDI STEELE, HOW TO USE THE INTERNET 99-111 (3d ed. 1996) (supplying advice on participating in newsgroup discussions). Rather than having to "subscribe" to this flow of messages in advance, users can access the on-going conversation whenever they wish. See *ACLU*, 929 F. Supp.

at 834-35. As of June 1996, there were "newsgroups on more than fifteen thousand different subjects" and an aggregate of almost 100,000 new messages were posted each day. *Id.* at 835. Special newsgroups that operate as the electronic equivalents of classified advertisements in newspapers are devoted to the sales of goods. One author advised:

If you're looking to buy or sell something not related to computers, the place to be is the group misc.forsale. . . . If you know what you want, but don't see an ad for it in misc.forsale, post a request in misc.wanted

USENET has over two dozen "forsale" groups that act as electronic yard sales for people peddling their possessions and browsing for bargains. Most of these groups deal only with computer-related items To get in on the action, check out the various misc.forsale.computers.* newsgroups.

PAUL MCFEDRIES, *THE COMPLETE IDIOT'S GUIDE TO USENET NEWSGROUPS* 198 (1995) (bold typeface in original deleted).

A related facility of the Internet is an "electronic mailing list" or "e-mail discussion group." According to one author:

You join (*subscribe* to) a mailing list by asking the person in charge, called the *list administrator* or *list owner*, to add your [e-mail] address to the list. Once you've joined, you receive copies of all the e-mail sent to the list. By the same token, [unless a human moderator intervenes,] when you send your own message to the list, it gets sent to all the other subscribers.

STEELE, *supra*, at 113; see also *ACLU*, 929 F. Supp. at 834 ("Most listserv-type mailing lists automatically forward all incoming messages to all mailing list subscribers.").

The practice of "spamming," or sending unsolicited commercial messages indiscriminately to a large number of unrelated newsgroups or individual e-mail addresses, has proven increasingly controversial. See, e.g., George Johnson, *On the Information Highway, E-Mail Litter Problem Grows*, N.Y. TIMES (Wash. ed.), May 26, 1997, at A1 (discussing efforts by legislators, on-line service providers, and recipients of junk e-mail to curb the sending of such "spam"). One commentator notes:

[M]ost Internet users are averse to spamming and respond with a flood of nasty messages An advertiser who distributed 10,000 unsolicited messages to a group mail list is likely to receive 80,000 cease and desist replies. The density of these replies frequently overloads the source site and hosting web servers, and is quite effective at limiting future Internet abuses.

NEMZOW, *supra* note 23, at 20.

The earliest and most notorious offenders in this regard promptly published their account of the firestorm of protest ignited by their on-line efforts in April 1994 to market their services as immigration lawyers. See MARTHA SIEGEL, *HOW TO MAKE A FORTUNE ON THE INTERNET* [formerly, LAURENCE A. CANTER & MARTHA S. SIEGEL, *HOW TO MAKE A FORTUNE ON THE INFORMATION SUPERHIGHWAY* (1994)] 18-29 (1996). In this book, which offers advice on how to market goods and services on-line, Siegel recounts how "[i]n a two-year period we would watch opinions shift wildly as everyone in the industry tried to reflect the ever-changing thinking on Internet commercial policy." *Id.* at 21.

Several commentators recalled the harsh reaction to Siegel's and Canter's actions. As one pair described:

In a rare fit of rage, the Net became as united as it ever gets, sent huge mail files to the [law firm's] site, crushing the server under the load, getting the accounts of the offenders killed, and creating special programs that sought out and canceled the [offending e-mail messages] wherever they appeared.

VAN DER LEUN & MANDEL, *supra* note 9, at 165; see also ROSALIND RESNICK & DAVE TAYLOR, *INTERNET BUSINESS GUIDE* 161 (2d ed. 1995) (arguing that Canter and Siegel had violated the cultural mores of the network in a "blatant fashion" by posting their advertisement to 9,000 discussion groups, most of which had nothing to do with the topic of the firm's posting); ANDREW LEONARD, *BOTS: THE ORIGIN OF NEW SPECIES*

placing a sale sign and/or the items themselves in her store window (and perhaps placing her advertising signs in other storefronts) in the hopes that prospective buyers will visit her store to window-shop and select items to purchase. Although various means such as direct mail or electronic mail may be used to notify potential customers of the store and to induce them to visit it,³¹ actual sales will generally be made only through their contact with the store itself.

A complication in determining correct practices for on-line sales is the direct conflict between the site owner's need to attract and retain the attention of visitors and her ability to inform potential buyers of all of the relevant terms and conditions of a sale. Although a visitor to a traditional store might well decline to purchase an item if the proprietor handed him a thick contract or prominently posted on one wall a large list of disclaimers, he at least would have entered that store and examined some of the items for sale. By contrast, the owner of a Web site risks alienating virtual visitors if she forces them first to view all of the legal information that a cautious lawyer might recommend. Site designers, who are commonly cautioned against including graphics that will extend the time required for their pages to be downloaded by a visitor, are also aware that the potential purchaser might not spend the extra time to scroll or "click" through screens full of disclaimers or other pertinent terms.³² In the words of one commentator, "On the Web, the

165-68 (1997) (chronicling the deployment of special "cancelbot" programs to erase these commercial messages); STOLL, *supra* note 9, at 104 ("There's no law against such things, although this kind of commercial use of the anarchistic Usenet is frowned upon by most everyone.").

Canter and Siegel reappeared on cyberlaw radar screens when their on-line advertising company sued another for breach of trademark, resulting in a Ninth Circuit decision on Web-based jurisdiction, handed down on December 2, 1997. See *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419-20 (9th Cir. 1997). *Cybersell* is discussed *infra*, notes 409-12 and accompanying text.

31. One commentator has observed:

With hundreds of thousands of sites on the World Wide Web, many on-line retailers are discovering that customers have a hard time finding them.

As a result, more Web merchants are paying a sales commission as well as an advertising fee in exchange for prominent placement on high-traffic Web sites, such as search engines and home pages of on-line service providers.

Jared Sandberg, *Retailers Pay Big for Prime Internet Real Estate*, WALL ST. J., July 8, 1997, at B1.

32. One pair of experts recommends:

If you use a lot of graphics, make sure you include some text on every page. That way, the text will load quickly and people will have something to look

main commodity in limited supply is the *attention* of busy people using it. The underlying battle in the Web economy is the ability to command and sustain that attention."³³ To this extent, the intersection of Internet technology with the principles of law and marketing produces compromises of images, inventory, interactivity, immediacy, impulse, and

at while waiting for graphics to load on the same page (if they've chosen to view the graphics).

.....

Break up information onto multiple pages rather than cramming it all onto one long page. It's easier and more natural for people to click a link or direction button to move from page to page than it is to scroll endlessly down one long document on the screen. Smaller pages also load more quickly than large ones, so it saves your visitors time to break your information up.

JAY CONRAD LEVINSON & CHARLES RUBIN, *GUERRILLA MARKETING ONLINE WEAPONS* 40 (1996).

Another pair offered this advice to designers of commercial Web sites:

Try to put all your company's key information on the first screen that appears on the visitor's computer. This way, potential customers won't have to wait until all your information loads to find out what your company is all about—or worse, click the Stop button before they get to your company's e-mail address or toll-free number.

RESNICK & TAYLOR, *supra* note 30, at 183; *see also* LeBlanc, *supra* note 1, at 131 ("The best cyberstores provide a creative yet simple home page or storefront. If a site takes too long to load in a browser, the customer may decide to shop elsewhere."); HERSCHELL GORDON LEWIS & ROBERT D. LEWIS, *SELLING ON THE NET* 189 (1997) (stating that the text of a home page should appear within five seconds, the entire page (including graphics) should download in 15 to 20 seconds, attention-grabbing information should appear within monitor boundaries (*i.e.*, be accessible without scrolling), and the entire home page should print onto a single 8 1/2" x 11" sheet of paper); DOWLING, JR. ET AL., *supra* note 6, at 15 (estimating that the average user of the World Wide Web "will view a page for only 15 seconds"); EMERY, *supra* note 5, at 322 (advising site developers to allow "a top limit of five seconds per page" for visitors to download material from a Web site); *id.* at 326 (recommending that site developers make sure all their most important information is at the top of each page so that visitors do not have to scroll down to see it); NEMZOW, *supra* note 23, at 19 (observing that as in print media and packaging, an owner has just 15 seconds to grab and retain someone's attention with her Web site content); VAN DER LEUN & MANDEL, *supra* note 9, at 154 (advising visitors that if a site takes more than thirty seconds to load, they should discontinue the process); KOMANDO, *supra* note 2, at 260 (recommending that site developers generally should limit the information they present on-screen to chunks of 200 lines or fewer); GONYEA & GONYEA, *supra* note 5, at 66 ("Some visitors may not have the computing power (*i.e.*, a fast enough computer processor, color monitor, or modem) to view the graphical elements in your storefront. Therefore, it is recommended that you offer visitors a text-only display option."); PATTERSON, *supra* note 28, at 22 (suggesting that site developers offer a text-only option "if you want to use complex graphics without inconveniencing users who have slower modems").

33. *See* SCHWARTZ, *supra* note 10, at 2 (The growth of Web-based commerce will depend on "the *quality* of the information presented there—how interesting and engaging it is, how it is presented, and how it takes advantage of the unique attributes of the medium."); LEVINSON & RUBIN, *supra* note 32, at 40 ("Time is the most precious commodity for a Net surfer."); VAN DER LEUN & MANDEL, *supra* note 9, at 155 ("Web surfers have no patience. . . . The hard currency of cyberspace is attention.").

impatience that affect the type and range of products being marketed,³⁴ as well as the nature of the contracts formed.

Against this backdrop, many of the advantages that commercial Web sites appear to enjoy over mass-mailed printed catalogs assume more complex dimensions. For example, the cost of developing a site that operates as an on-line catalog, particularly one involving a large number

34. See Rajiv Chandrasekaran & Margaret Webb Pressler, *More Shoppers Are Buying Online*, WASH. POST, Dec. 24, 1997, at C1 (observing that Internet service provider America Online reports that products selling best on-line in 1997 are "apparel, followed by food, books, flowers, and electronics"); Chris Woodyard, *Retailers Invest in Less-Stressful Shopping*, USA TODAY, Nov. 28, 1997, at 3B ("The Internet has become an established alternative for selling computers, software, flowers, books, music and travel," since these are products or services "that shoppers can sample on line, . . . or things that don't require personal inspection before purchase."); LEWIS & LEWIS, *supra* note 32, at 174 (advising that because a catalog browser has to use a "mouse" to reveal copy longer than a handful of lines, and because illustrations aren't comparable to those in conventional printing processes, the Internet cataloger is best off promoting items that lean on (a) timeliness, (b) huge bargain, (c) quick availability, (d) closeouts, and (e) extensive research prior to purchase); Thom Geier, *But You Don't Get That Nice Musty Smell*, U.S. NEWS & WORLD REP., Nov. 3, 1997, at 66, 66 (noting that that some rare book dealers have abandoned traditional bookselling altogether in favor of Web-based sales, and that because on-line consumers can comparison-shop among thousands of dealers nationwide the prices of rare books are becoming standardized); Jeanne C. Lee, *Can GM Sell Cars on the Web?*, FORTUNE, Sept. 29, 1997, at 243, 243 (stating that electronic shopping service Auto-By-Tel, which sells both new and used cars through the Internet, projects 1997 revenues of around \$20 million, up from \$5 million in 1996); Peter Huber, *Web Cheetahs and Web Hippos*, FORBES, May 19, 1997, at 254, 254 (Although it is inefficient for on-line "grazers," or "Web hippos," "[t]he Web is already a very happy hunting ground for transactional carnivores like cheetahs. . . . If you know the titles of books or CDs you want to buy, there's no quicker way to buy them than [on-line]."); SCHWARTZ, *supra* note 10, at 92 (concluding that people will actively shop for, and in many cases purchase, products on the Web that can be researched, including "books, music CDs, mutual funds, cars, consumer electronics, computers, software, travel packages, houses, and gift items"); Weber, *supra* note 10, at B6 (Of those [surveyed] who had bought something on-line, 11% reported buying software, 9% said that they had bought on-line information, and 8% said that they had bought gifts of value under \$50. Those who had not yet bought goods reported that they would be most likely to purchase hotel reservations (75%), computer software (72%), on-line subscriptions (72%), airline tickets (70%), and records, tapes, compact disks, and videos (65%)); Apple Books *\$500,000 in Orders On Line*, N.Y. TIMES (Wash. ed.), Nov. 12, 1997, at D2 (observing that Apple Computer's new Web site for selling products booked more than \$500,000 in orders in its first 12 hours of operation); Roy Furchgott, *What Moves Mel Torme? The Web*, BUS. WK., May 26, 1997, at 8, 8 (discussing the statistically-documented appeal of online compact disk buying to baby boomers and their elders); Bill Griffith, *Zippy the Pinhead* (comic strip), WASH. POST., May 17, 1997, at F20 (presenting character "Shelf-Life" as attempting to sell through the Internet "something tangible! Something I can discount!").

of pictures and descriptions of products,³⁵ can be a great deal less than that of printing and mailing a catalog to a large number of customers³⁶ or of advertising on radio, television, or other traditional media.³⁷ It is certainly much less than "the huge expense of traditional storefronts, with rent, utilities and insurance."³⁸ The accessibility of information through Web sites, whose virtual architecture and status as commercial documents are described in Part II of this Article, encourages individuals and small firms to attempt through this medium to equalize their marketing potential with that of much larger companies.³⁹ Yet Part III

35. See COOK & SELLERS, *supra* note 5, at 87-88; YESIL, *supra* note 5, at 43 (estimating that the cost of printing, handling, and shipping an average information packet is approximately \$15); JANAL, *supra* note 25, at 6 (observing that computers can display "much more information than can be found in a billboard, newspaper or magazine ad . . . or even a catalog").

36. See SCHWARTZ, *supra* note 10, at 67 ("[O]nce you make the investment and build the Web site, you don't have to spend much more if an extra 100,000 people visit the site."); JUDSON, *supra* note 8, at 138 ("In the online world, you only have to create a single copy, not as many copies as customers."). Even though, from a cost perspective, developing a site that operates as an on-line catalog seems favorable, one commentator reported, "On-line vendors in every sector report very low conversion rates, lower even than the average rate of direct-mail campaigns (about 2%)." Hapgood, *supra* note 9, at 46 (further noting that one supplier of on-line erotica estimates the "conversion" rate from browsers to customers as approximately 0.01%).

37. See SIEGEL, *supra* note 30, at 42-45 (displaying charts of the relative costs of advertising in different media and concluding that although the cheapest price to reach a thousand people only one time is \$6 in a national magazine, \$7.50 on the radio, \$32 on television, \$45 in a big city newspaper, and a whopping \$1,000 by direct mail, it costs only 3.3 cents to reach 1,000 Netters for a solid month); NEMZOW, *supra* note 23, at 2 ("Holiday Inn and others estimate that it costs \$2 on the web to generate each sales lead versus \$9 to \$24 for direct mail and cold calling."). For a compendium of illuminating statistics concerning all aspects of Internet advertising, see generally MARY MEEKER, THE INTERNET ADVERTISING REPORT (1997).

38. JANAL, *supra* note 25, at 6; see also DAVID KOSIUR, UNDERSTANDING ELECTRONIC COMMERCE 183 (1997) (estimating that an on-line catalog would save 80% of the costs of creating and distributing printed catalogs for AMP Connect, an electronics component manufacturer with over 100,000 types of electronic components in stock). Web sites also dramatically reduce the costs of processing orders received. Holt Educational Outlet, a \$10 million retailer of educational toys and teachers' supplies, estimates savings of 75% on Internet orders compared with phone, mail, or fax orders. See Clinton Wilder, *IT Overhaul Via the Net*, INFO. WK., Oct. 20, 1997, at 129, 129. This savings can be explained, according to an executive, because "[a] Web order doesn't touch an employee's hand until the warehouse." *Id.*

39. See PATTERSON, *supra* note 28, at 19 ("If you're a small business, you can finally compete with big corporations on a level playing field. The Web is the great equalizer when it comes to company size."); COOK & SELLERS, *supra* note 5, at 29 ("The casual shopper cruising the Internet will have the same opportunity to enter your storefront as the storefronts of Cartier or Chanel, which can be accessed through the Paris home page. The beauty of the WWW is that you can afford to have your business right alongside those other big-name companies."); GONYEA & GONYEA, *supra* note 5, at 45 ("Since all electronic storefronts are constructed of the same materials (computer graphics, text, etc.) and procedures, it is possible for the small 'mom and pop' store

analyzes a critical legal consequence of such apparent equality: the potential characterization of even the casual site owner as a "merchant," and her concomitant responsibilities under Article 2 of the U.C.C. and its nascent progeny.

Site owners may, as described in Part IV, allow consumers to order goods by means of electronic mail messages, electronic order forms, and virtual "shopping carts." Behind the deceptive simplicity of such interfaces, though, lurk issues of the formation and enforceability of on-line contracts. Part V addresses these concerns and analyzes the applicability to Web sites of such traditional contractual concerns as the "battle of the forms" and the statute of frauds, as well as such new issues as "web-wrap agreements."

Another advantage of Web sites is their interactivity; unlike most mail-order houses or telephone operators, they are available to accept orders worldwide, at any hour of the day or night throughout the year, even from those customers who might not otherwise request a printed catalog. The site owner can make revisions to the on-line catalog quickly rather than reprinting a paper counterpart.⁴⁰ Indeed, marketers are encouraged to identify the new features on their sites so as to keep consumers returning for fresh information.⁴¹ Yet, "unlike traditional

owner or home-based entrepreneur to create a storefront that looks and operates like the ones created by corporate giants."); JANAL, *supra* note 25, at 32 (quoting Internet service provider to the effect that Web pages can make small companies look every bit as professional and credible as a large, multinational company).

40. See *Virtual Mall: A Guide to Websites for Consumer Services*, FORTUNE TECH. BUYER'S GUIDE 262, 264 (Nov. 1997) [hereinafter *Virtual Mall*] (noting that outdoor clothing seller Lands' End has a section of its Web site devoted to discounted overstocks that is updated weekly, something the company cannot do with catalogs that only come out every month or two); JUDSON, *supra* note 8, at 138 (remarking that revision is "as easy as uploading another file to your server"); JANAL, *supra* note 25, at 6 ("Companies can quickly add products, descriptions and prices and keep them up-to-date."); KOSIUR, *supra* note 38, at 182-83 (contrasting ease and speed of updating catalogs and creating specialized catalogs on-line rather than in print).

41. See PATTERSON, *supra* note 28, at 25 (advising Web page entrepreneurs to "expect to update information at least once weekly"); JANAL, *supra* note 25, at 172 ("Every [marketer's] home page should have a 'What's New' icon leading to a page that tells consumers about new information and features. Without this device, consumers probably won't find your latest updates. If you don't regularly add new features, people will stop making return visits."); Hapgood, *supra* note 9, at 46 (Hapgood quotes a Web-based supplier of erotic images to the effect that "fresh product is a must. If you don't redesign the site regularly, people assume you don't have anything new."); DOWLING, JR. ET AL., *supra* note 6, at 170 ("Companies with sites that include a What's New page quickly find it to be the most popular page on the site. Users will often set their

methods of advertising, electronic storefronts do not stop delivering your message or disappear from view after the sales pitch has been delivered (as is the case, for example, with newspaper print advertising). In fact, storefronts remain alive indefinitely"⁴² In this context, Part III of this Article includes an analysis of the effect on Web site vendors of the Uniform Commercial Code's "firm offer" rule.

Web sites also offer sellers the ability to direct consumers to the most appropriate products through an interactive series of questions, a search engine, or on-line directories of "inventory,"⁴³ and can in addition

bookmarks to this page and never visit the site's front page, or homepage."); GREGORY H. SISKIND & TIMOTHY J. MOSES, *THE LAWYER'S GUIDE TO MARKETING ON THE INTERNET* 166 (1996) (recommending that owners display at the bottom of every page the date on which it was last revised). An easy alternative to substantive updating is to change the page's color every few weeks. "It's simple to do and makes your site look fresh and new" BRIAN JAMISON ET AL., *ELECTRONIC SELLING: TWENTY-THREE STEPS FOR E-SELLING PROFITS* 92-93 (1997).

On the other hand, the owner of a site selling items such as the collectible Beanie Babies, discussed *supra* note 9, in which there is a rapid turnover or exhaustion of stock and correspondingly frequent updating of the site, may be concerned that a repeat visitor's Web browser will access a possibly-stale version "cached" by the visitor's browser on his earlier visit, not the site's most current version. The owner can encourage the visitor to request his browser to "reload" or "refresh" the site (these options are available on the pull-down "View" item on the Netscape menu bar) so that he can be sure of seeing the most current version. See, e.g., *Gary's Beanie Babies* (visited Jan. 30, 1998) <<http://www2.topher.net/beanie/beanie.cfm>> (where the home page urges, "Please RELOAD this page as it is updated often!"); *Cindy's Beanie Babies* (visited Jan. 20, 1998) <<http://home.sprynet.com/sprynet/cindyo/Page2.htm>> (where the home page states, "Updated 12/7/97. Please reload if you have visited here before."). To ensure further that a visitor is ordering from the most recent version of a page, the site owner can place a notice, "this page last updated [date]" on certain pages of the site and require the visitor to supply this date or dates as part of his order. The visitor can accomplish this either by including the information in his e-mail to the owner or by completing a blank in an on-line order form that requests this information. The site could be programmed to reject automatically orders from outdated versions of a page, or at a minimum to flag the discrepancy for the site owner's attention.

42. GONYEA & GONYEA, *supra* note 5, at 41; see also LEWIS & LEWIS, *supra* note 32, at 168 ("Unless you pull the plug on your server, whatever you last put on it will be visible forever. Your mistakes are near-immortalized. That's not true of broadcast and it's not true of any print media."); Jared Sandberg, *At Thousands of Web Sites, Time Stands Still*, WALL ST. J., Mar. 11, 1997, at B1 ("Although businesses that neglect their Web site risk alienating customers, even big marketers let their sites pill and fray like an old sweater.").

43. See GONYEA & GONYEA, *supra* note 5, at 44; JUDSON, *supra* note 8, at 138. In fact, some well-known Web sites have little or no "inventory" of their own, preferring merely to maintain contacts with third parties who can supply it to the customer. For instance, as described by one magazine, Amazon.com consists mostly of

a collection of powerful computers, some networking gear, a giant, fast database, and a Web address. Amazon keeps only a small percentage of its books—mainly the best-sellers—in its physical inventory. For the rest, it serves as a very efficient middleman, taking your order and relaying it to the book distributors and publishing houses.

provide customer support information.⁴⁴ As discussed in Part VI, such information raises questions of express and implied warranties, particularly when companies have "create[ed] sales presentations that are tailored to each customer's individual needs."⁴⁵

The owner of a Web site can create or modify the site from anywhere on the globe, and orders may be taken from anyone who can connect with the site, wherever that person is located. Part VII analyzes the jurisdictional and conflict-of-law problems that such virtual accessibility raises, the principles that courts are applying to resolve such issues, and how they can be privately addressed through existing and draft provisions of the Uniform Commercial Code.

At this critical juncture in the evolution of on-line commerce, it seems both easy and obvious to recommend that owners of commercial Web sites take special care to indicate conspicuously and in clear language the terms and conditions of their electronic contracts. Yet the apparent simplicity of this principle is belied by the rapid, simultaneous, and sometimes-conflicting developments in the culture, technology, and law of the Internet. This Article attempts to reconcile such trends and to offer both practical and theoretical considerations for the optimal legal configuration of commercial Web sites. To accomplish this, the Article draws on judicial decisions, current and proposed statutes, legal commentaries, manuals for Web commerce, media reports, and a wide variety of existing Web sites.

II. JUST BROWSING: VISITING A COMMERCIAL WEB SITE

If the first page of a commercial Web site—its so-called "home page"—can be compared to a storefront or to the cover of a printed catalog, all of the pages of the site, taken together, can be seen as a set of virtual aisles through which visitors can wander or as a virtual catalog whose pages visitors can browse. Because of the large number of their

Virtual Mall, supra note 40, at 263; see also Randall E. Stross, *Why Barnes & Noble May Crush Amazon*, FORTUNE, Sept. 29, 1997, at 248, 248 (discussing Amazon.com's lack of physical inventory); Jay Akasie, *Imagine, No Inventory*, FORBES, Nov. 17, 1997, at 144, 145 (On-line compact disk merchant CDnow "has no inventory. When CDnow receives an order, a computer program tracks down the selection from the same distributors that supply the large retail music stores.").

44. See YESIL, supra note 5, at 43-44.

45. JANAL, supra note 25, at 130.

pages, the complexity of the pages' inter-linkages, and an architecture that encourages the visitor to view only the pages that he is interested in,⁴⁶ commercial Web sites are typically more difficult to develop than personal Web sites.⁴⁷ This Part of the Article discusses the various means by which visitors can gain access to the information displayed by a commercial Web site.

A. Reaching the Home Page

Today's most popular "Web browsers," computer programs known as Netscape Navigator and Microsoft Internet Explorer, enable their user to view, or "visit," individual "Web sites," each of which consists of one or more separate but interconnected documents or "pages." The most direct means of access to a Web page is for the visitor to type into the browser program the page's "address," also known as its "Uniform Resource Locator" or "URL," thus instructing the software to access and to display that page.⁴⁸ A visitor who does not know a page's URL

46. One commentator advises site designers to create a good table of contents and index because "not everyone is going to start at the front door and proceed in an orderly fashion through the site. Most users want to get in, grab a few pages (probably print them out), and get out." David Strom, *Five Steps for Site Success*, FORBES ASAP, Aug. 25, 1997, at 118, 118.

47. See LAURA LEMAY ET AL., *CREATING COMMERCIAL WEB PAGES* 21 (1996).

48. URLs of the home pages of commercial entities located in the United States are generally in the form of: "http://www.[some form of the company's or product's name].com." The suffix ".com" is known as the "top-level domain" of the address, and indicates that the site belongs to a commercial entity. Other top-level domains are: edu (educational institution), gov (government), mil (military), net (networking organization), and org (nonprofit organization). See STEELE, *supra* note 30, at 17. For example, the URL for CoverGirl makeup (a product of Procter & Gamble) is <http://www.covergirl.com>, and the URL for The Goodyear Tire & Rubber Company is <http://www.goodyear.com>. Thus, many users of the World Wide Web can reach the sites of these and other popular organizations by inserting the name of the firm or of one of its product lines into the general ".com" formula above. The names of some products may also result in successful searches. For example, as of January 30, 1998, the URLs <http://www.kraftfoods.com>, <http://www.velveeta.com>, and <http://www.cheezwhiz.com> corresponded to the same site, "Kraft's Interactive Kitchen."

According to the InterNIC registration service for Web sites, 88% of all domain names now end in ".com." See Clinton Wilder, *One Million Sites—And Counting*, INFO. WK., Mar. 31, 1997, at 10. In May 1997, the Internet Ad Hoc Committee proposed seven additional top-level domain suffixes, including ".firm" for businesses and ".store" for merchants. See Amy Dunlop, *Finally, New Domain Names*, INTERNET WORLD, May 1997, at 15, 16 (remarking that the new names probably won't come into use for several months yet). However, as of Fall 1997 the process remained mired in jurisdictional debates. See Rajiv Chandrasekaran, *A Pressing Matter of Addressing: Who'll Decide Domains?*, WASH. POST, Oct. 7, 1997, at D1 (discussing the federal government's opposition to allowing a foreign body to govern domain names); Steven J. Vaughan-Nichols & Gus Venditto, *Name-Calling Leads to Stone-Throwing*, INTERNET WORLD,

might attempt to find it by directing his Web browser to display the home page of a "search engine" site such as Lycos⁴⁹ or Hotbot,⁵⁰ which in turn enables the visitor to search for and retrieve any Web sites that use certain key words. Those words might include a company name, its product name, or the generic category of the product.⁵¹ For example, a visitor to <<http://www.amazon.com>>,⁵² the home page of an on-line bookstore commonly cited as one of the most successful businesses on the World Wide Web, might have proceeded to that site directly after obtaining its URL from a newspaper or hearing about it from a friend. The visitor might have also found it by using an on-line search engine to find all sites dealing with "books" or identifying themselves as "bookstores," or he might have found the site by following a "link" from another site that he had visited (e.g., a site created by an author whose book was on sale through Amazon.com).⁵³

Aug. 1997, at 15, 16 (reporting on the United States Department of State's and Network Solutions, Inc.'s opposition to the proposed plan); Department of Commerce, Request for Comments on the Registration and Administration of Internet Domain Names, 62 Fed. Reg. 35,896 (1997) (inviting comments on current and future systems for registration of domain names).

49. *Lycos; Your Personal Internet Guide* (visited Sept. 18, 1997) <<http://www.lycos.com>>.

50. *Hotbot; the Wired Search Center* (visited Sept. 18, 1997) <<http://www.hotbot.com>>.

51. See Marti LaChance, *Publicizing Your Web Site*, in NOVICE GUIDE, 170, 171 ("At Web-based search engines, surfers type in a KEYWORD QUERY (descriptor words), and the search engine responds with a list of all the sites in its database fitting the query description.").

Creators of web sites can "register" those sites with such services to make them accessible to users of those search engines. See *id.* at 171-72 (describing methods of registration); Rebecca Quick, *Web-Search Services Can Set Your Site's Visibility Higher*, WALL ST. J., Oct. 9, 1997, at B8 (describing the procedure for registering sites with search engines and with middleman registry services); PATTERSON, *supra* note 28, at 53-54; Fisher, *supra* note 24, at 38, (discussing how to register Web sites with such services); STEELE, *supra* note 30, at 228-29; JANAL, *supra* note 25, at 177-81; RESNICK & TAYLOR, *supra* note 30, at 197-201.

52. *Welcome to Amazon.com* (visited June 21, 1997) <<http://www.amazon.com>> is the home page of online bookseller Amazon.com.

53. Amazon's home page encourages the visitor to join the company's "Associates Program," in which the owners of Web sites create "links" to Amazon's site. If visitors to an "associate's" site move to Amazon's site and buy a book recommended by the associate's site, Amazon will pay the associate a referral fee. See *Associates Program Operating Agreement* (visited March 29, 1998) <<http://www.amazon.com/exec/obidos/subst/partners/associates/assoc-agreement.html/001-2304815-8413138>> (providing text of linking agreement). In early April 1997, the company claimed that more than 8000 Web sites were signed up as associates. Sreenath Sreenivasan, *Web Retailers Finding*

The first page of information that the visitor will see upon reaching a commercial Web site is usually the site's "home page,"⁵⁴ which generally identifies the organization that owns the site and provides "links" to other pages available in the site or to pages in another site.⁵⁵ Often compared to the covers of advertising brochures,⁵⁶ home pages

Allies At Sites With Nothing To Sell, N.Y. TIMES (Wash. ed.), Apr. 14, 1997, at D4 ("Almost every major retailer on the Web has a similar program either on line or in the works."); see also COMMITTEE ON THE LAW OF COMMERCE IN CYBERSPACE, *supra* note 25, at 21-26 (1997) (analyzing different types of revenue-sharing provisions for such agreements).

In the Summer of 1997, bookseller Barnes & Noble rivaled Amazon.com's Web-linking agreements with search engines Yahoo Inc. and Excite Inc. and Internet service provider America Online Inc.'s web site by establishing its own three-year marketing agreement with search-engine service Lycos, Inc. This service will not only provide an on-line searcher a list of Web sites devoted to the topic requested, but also offers the searcher a link to relevant books sold through Barnes & Noble's Web site. See Jared Sandberg, *Bookselling's Goliath Taps Lycos to Help Quell Amazon.com*, WALL ST. J., Aug. 20, 1997, at B9 (observing that Barnes & Noble would pay Lycos an undisclosed percentage of books sold through such referrals); cf. Akasie, *supra* note 43, at 145 (describing CDnow's implementation of a new arrangement with Web browser Yahoo! that links any page with a music reference to the CDnow homepage).

Some commercial linkages have proved controversial. In the Fall of 1997, for instance, various independent booksellers stopped reporting their sales results to the *New York Times* for its bestseller list, to protest the *Times*' linking its on-line version of that list to Barnes & Noble's Web site. See I. Jeanne Dugan, *Battle of the Best-Seller Lists*, BUS. WK., Dec. 15, 1997, at 38, 38 (citing estimate that 50 to 100 stores had stopped reporting their sales data to the newspaper).

54. Technically, the "virtual storefront" analogy would be more appropriate to describe a site's home page alone. The remainder of the pages, particularly those directing the user to specific products, are more directly comparable to a catalog or to the signs in store aisles rather than to notices posted in or on the front of a store.

55. One guide to designing commercial Web sites recommends that the seller: put a little toolbar at the bottom of every page. It doesn't have to have (nor should it have) many buttons. The optimum number of buttons on a toolbar is three to six; then users can, for example, return automatically to the page or area they came from, go to your main screen, go to an area toward which you are trying to direct traffic, or go to the hottest area on your site.

KOMANDO, *supra* note 2, at 261. Another such manual cautions Web page designers: On a product's individual page, avoid placing any links other than the menu and the link back to the catalog. . . . The person looking at your individual product page is probably about ready to buy. Adding extraneous links at this point could take that potential buyer down a path of no return, and you won't be able to close the sale.

LE MAY ET AL., *supra* note 47, at 112; see also PATTERSON, *supra* note 28, at 43-44 (suggesting that web page designers provide links at the bottom of each page to give the user the option of going to the top of the current page, back to the beginning page for the current section, and back to the top of the home page); RESNICK & TAYLOR, *supra* note 30, at 183 ("Most well-designed sites feature a button at the bottom of each subpage that instantly transports the visitor back to the site's home page.").

56. Cf. VAN DER LEUN & MANDEL, *supra* note 9, at 156 ("Your [personal] home page is the cover of your personal magazine. The home page only has to convey a feeling and have some pointers. Nested pages and files can provide the content.").

also function in many cases as abbreviated tables of contents of the collection of pages in their respective Web sites.

For example, the home page of Virtual Vineyards,⁵⁷ an on-line seller of wine, food, and gifts, displays the store's logo. In the left margin, as programmed by the site developer in the computer language HTML (HyperText Markup Language),⁵⁸ are the "hypertext links" to other pages of the site. A list of these subheadings appears underlined and in blue type. If the visitor uses a "mouse" or other pointing device to move the on-screen cursor to any element of this list in the Web page, the cursor's appearance changes from an arrow to a stylized hand with a pointing finger, indicating that "clicking on" the word will allow the visitor to see a linked page.⁵⁹

This home page also provides links for newcomers to "Sign In," "Create an Account," and to receive information for "First Time Visitors," or to link directly to the "Wine Shop," "Food Shop," and "Gift Shop." For those "In a Hurry," links are provided to "What's New?," "List All Wines," "List All Foods," and "List All Gifts." A visitor "scrolling down" the page will find links to several different ways to view wine (by category, varietal, winery, wines under \$15, samplers, specials, and Monthly Wine Program), food (by category and producer, samplers, and cookware), and gifts (gift certificates, gift baskets, office gifts, birthday, thank you!, congratulations!, anniversary/wedding, and romance).

57. *Virtual Vineyards* (visited June 21, 1997) <<http://www.virtualvin.com>>.

58. Designers of Web pages use HTML commands, or "tags," to mark text as headings, paragraphs, lists, quotations, emphasized, and so on. [The HTML language] also has tags for including images within the documents, for including fill-in forms that accept user input, and, most importantly, for including hypertext links connecting the document being read to other documents or Internet resources

IAN S. GRAHAM, *HTML SOURCEBOOK* at xi (1995); see also STEELE, *supra* note 30, at 15 ("To a browser, HTML code for a Web page is like an instruction sheet telling it how to display the page.").

59. Alternatively, links present on a page could be used to deliver the visitor to information available above or farther down on the same page, to prevent his having to "scroll" up or down through a lengthy page to view that material. See GONYEA & GONYEA, *supra* note 5, at 60-61.

B. "Drilling Down" to a Product

Of course, a consumer who knew the specific URL of, say, the Virtual Vineyard's "Wine Shop" page⁶⁰ could have accessed it directly.⁶¹ The majority of first-time visitors to that page, however, will reach it through a link from the company's home page. This technology allows marketers to use a "tree and branch" approach to meeting consumer needs. "In other words, a consumer can enter a company's Website through a central point, and then move to more specific levels based on their needs. . . . When a customer finally settles on a product, the company can direct them to a purchasing page."⁶² The hierarchy embedded in this system easily allows the consumer to locate a desired product.⁶³

60. *Agreement to Use the Warner-Lambert Company Websites* (visited March 30, 1997) <<http://www.virtualvin.com/vvdata/829799925/wineshop.html>>.

61. One commentator has warned:

[A] surfer may enter your site at any page, not necessarily your homepage. Make sure that every page on your site is interesting. . . . [Y]ou can control fairly well which pages will be key pages. You link to these specific pages by submitting the appropriate URLs to popular search mechanisms and by posting the specific page address in your other advertising.

DOWLING, JR. ET AL., *supra* note 6, at 111. The commentator further recommended that owners "include your company's name, logo, and, if you have one, slogan on every page of your site. . . ." *Id.* at 112.

If the visitor does not wish to retype the entire URL of a home page or other page of a site into his browser, he can use the browser's "bookmark" feature, the Web equivalent of a telephone's "speed-dialing" feature, to save this reference automatically for later use.

The ability of visitors to access directly an "internal" page of a commercial Web site without passing through the home page or a specific intermediate page has important consequences for the placement of warranty disclaimers. *See infra* note 343 and accompanying text. It has also spawned litigation brought by owners of commercial sites who object to such "deep links" to their sites without permission. *See* Martin J. Elgison & James M. Jordan III, *Trademark Cases Arise From Meta-Tags, Frames*, NAT'L L.J., Oct., 20, 1997, at C6, C6. Elgison and Jordan discuss recent cases on the matter and observe that it remains to be seen whether a case involving "surface links", i.e., links to the home page of the plaintiff's site, will be treated differently. *Id.*

62. JUDSON, *supra* note 8, at 23-24.

63. With regard to this hierarchy, commentators have observed:

Visitors need only select the Main menu item that represents the information they wish to view or the location they wish to reach in order to properly use your storefront. As visitors select more and more submenus, they are allowed deeper access into your storefront and are presented with more and more specific information.

GONYEA & GONYEA, *supra* note 5, at 59. On this same subject, others have recommended:

You create a product/price list (layer 1) that enables users to select a product page for each item (layer 2) that will then bring up a page with more detailed information (layer 3). If that isn't enough layers for you, you can take it

In general, visitors to a Web site's home page can reach a specific "internal" page by one or more of three different mechanisms: "browsing, where the user proceeds link by link to the target; searching, where the user enters keywords and is presented with a list of options; and index scanning, where the user is given an overview of the entire site structure and can quickly zero in on the desired resource."⁶⁴ Many Web sites, including the Virtual Vineyards site, contain more than one of these features.

1. Browsing

Browsing is most useful to the visitor unsure of the type and scope of the store's products or which ones are most suitable for his needs. For example, a visitor to the Virtual Vineyards home page⁶⁵ can click on "Food Shop" to see another page with links to other categories such as the Bakery, Candy, Chocolate, and Coffee & Tea. Clicking on the "Coffee & Tea" link produces a page listing a variety of coffees and teas (and, next to each item, the amount and price of the package), sorted by producer. The visitor can click on the name of each product for more information about it, or just click on a box next to the product to order it.

further, moving outward and creating a page with links to various product/price lists categorized by product line or company business area. Each layer of information enables a user to navigate among the depth of information he or she can use.

LEMAY ET AL., *supra* note 47, at 102; *see also* KOSIUR, *supra* note 38, at 123-25 (reviewing system by which Gateway Computers, through its home page at <<http://www.gw2k.com>>, allows customers to select from "over 1.6 million different configurations" of computers by choosing a pre-configured system or by modifying such a system, with the aid of on-line information about substitute or additional parts). *But see* RESNICK & TAYLOR, *supra* note 30, at 183 (The pair warn developers of commercial Web sites: "Don't create a site that's more than three or four levels deep. Internet users love to surf, but they also get bored when they can't find the information they're looking for right away."); CHUCK MARTIN, *THE DIGITAL ESTATE* 134 (1997) (Martin recommends as "a good rule of thumb" the "three-click rule: If users can't get to the core of the information they're looking for in three clicks [of the mouse], they'll abandon the search.").

64. Fisher, *supra* note 24, at 38.

65. *Virtual Vineyards* (visited June 21, 1997) <<http://www.virtualvin.com>>.

a. Profiling

One manner in which browsing can be used is for the site to recommend products to potential customers based on their personal profiles. "In this model, when the potential customer arrives at the site, he or she enters personal information, either into an online form or via a series of 'clicks' in an online questionnaire. . . . With this information the company's computer can direct the customer to relevant advice and product information."⁶⁶ However, some concerns have been raised about whether consumers concerned about their privacy will avoid sites with forms requesting such information or will submit false information to such forms.⁶⁷

For example, the Pentax home page⁶⁸ contains a link to "Which is right for me?"⁶⁹ Users clicking on this link are invited to select (without providing their names) from among the general categories of point-and-shoot cameras, single-lens-reflex cameras, and medium format cameras, whose relative virtues are detailed on-screen. If a visitor were to click on the first of these options, he would then confront another page that ranks point and shoot cameras "from the most feature-laden to the simplest." Each camera featured is itself linked to another page that describes it further and offers further links to the model's features, specifications, and price.

66. JUDSON, *supra* note 8, at 24-25; *see also* KOMANDO, *supra* note 2, at 104-05. Komando asserts that on-line catalogs have advantages of lower costs and higher "functionality." *Id.* at 104. By functionality, Komando refers to the ability to "build in interactive features that provide more detailed product information and offer other useful information and services that serve as additional benefits for your customers." *Id.*

"Middleman" Web sites have also arisen to direct a consumer to certain other sites based on his expressed preferences for type, quality, and cost of different products in which he expresses an interest. *See* Michael Krantz, *The Web's Middleman*, TIME, Feb. 17, 1997, at 67. Krantz profiled the latest project of media executive Barry Diller: the development of the Consumer's Edge Website, which offers "deep interviews"—extensive Q&As that match consumers with pretty much any product known to the free market." *Id.* at 67. Krantz noted that similar services already exist for buyers of cars and of computers. *Id.* at 68.

67. *See, e.g.*, Beth Davis, *Online Insecurity Swamps Surfers*, INFO. WK., Mar. 31, 1997, at 12, 12 (citing a Boston Consulting Group survey of 9300 consumers, 41% of whom said that they left commercial Web sites that requested personal information, and an additional 27% of whom reported that they supplied false information in response to such requests).

68. *Pentax Worldwide* (visited Oct. 27, 1997) <<http://www.pentax.com>>.

69. Other links on this page include: "What's New," "Printers and Scanners," "Dealer Information," and "Customer Service."

2. Searching

Searching techniques are most in evidence on sites that feature many different products that a knowledgeable consumer may wish to sort by certain characteristics, such as by the author of a book. For example, the booksellers Amazon.com⁷⁰ and Barnes & Noble,⁷¹ as well as the compact disk seller CD Now,⁷² allow consumers to search their databases of available products by a variety of methods. In many sophisticated commercial sites, "as the user selects each search criterion, the search engine indicates how many products meet all the criteria entered so far, so the user knows when he or she has narrowed down the search sufficiently to a particular product or set of products."⁷³

70. *Welcome to Amazon.com* (visited June 21, 1997) <<http://www.amazon.com>>. Amazon.com's home page allows visitors to search for books by author, title, subject, keyword, ISBN (International Standard Book Number), and "advanced query" (combinations of the above).

71. Barnes & Noble, a well-established bookstore chain, expanded its operations to the Internet in May 1997, opening at *BarnesandNoble.com* (visited Nov. 2, 1997) <<http://www.barnesandnoble.com>>. The company billed the site as the "world's largest bookstore online." Full-page advertisement, N.Y. TIMES, May 13, 1997, at A22. The home page advertises a search capability over "over 1 million titles" and allows a search by an author's name, by title, and by a keyword.

One day prior to the opening of its Web site, Barnes & Noble filed suit against Amazon.com, asserting that, because Barnes & Noble stocked books in its own warehouses and Amazon.com did not, Amazon.com's claim to the title of "world's largest bookstore" constituted misleading advertising. See *Barnes & Noble Sues an Internet Bookseller*, N.Y. TIMES (Wash. ed.), May 13, 1997, at D21; Patrick M. Reilly, *Barnes & Noble Sues Rival Amazon.com*, WALL ST. J., May 13, 1997, at B3 (noting that "[a] growing number of publishers and retailers have or will have Internet sites selling massive numbers of books"). Three months after suit was brought against it, Amazon.com retaliated by alleging that Barnes & Noble should charge tax on Internet sales to customers in any state in which Barnes & Noble had a physical bookstore. See *Amazon Countersues Barnes & Noble, Says Rival Must Assess Tax*, WALL ST. J., Aug. 22, 1997, at B8. Both suits were settled in October 1997. See *Two Booksellers Settle Lawsuits*, N.Y. TIMES (Wash. ed.), Oct. 22, 1997, at D5 (observing that neither party admitted wrongdoing or paid damages).

72. *CD Now* (visited July 8, 1997) <<http://www.cdnw.com>>. CD Now's home page allows visitors to search from "[o]ver 250,000 items" by artist, title, song label, or record label, and among these by alphabetical order, reverse chronological order, or "best."

73. KOSIUR, *supra* note 38, at 174 (describing Step Search™ search engine developed for the Web site of AMP Connect, located at <<http://connect.ampincorporated.com>>).

3. Index Scanning

Index scanning is most useful to the visitor who quickly wants to get an idea of the site's structure or to zero in on a particular product; it allows somewhat of an "aerial view" of browsing. Besides its browsing capability, the Virtual Vineyards site⁷⁴ contains a scannable index. By clicking on an item of the left margin of the home page, the visitor is taken to a page diagramming the layout of the other pages that make up the web site. As noted above, one such section, "In a Hurry?", links the visitor to pages such as "What's New?", "List All Wines," "List All Foods," "List All Gifts," and "Site Map." The middle three of these pages contain alphabetical lists containing links to each item, and the last of these pages contains a list of every major category in the site.

Similarly, a partial index in the left column of the "BarnesandNoble.com" home page⁷⁵ contains an alphabetical list of links to book categories such as Biography, Business, Children's & Young Adult, and Computers. Clicking on "Biography" produces a page listing "Our Top Ten" best-selling biographies as well as pictures and text discussing "Featured" biographies and "Editor's Picks." The page also contains a link to a "Search Biography" feature.

However simple or complex the structure of a commercial Web site, its owner should be aware that she has almost certainly fallen into one, if not both, of the categories of "merchant" under Article 2 and may thereby be charged with certain knowledge and responsibilities. Although Article 2 itself is less than completely clear on the distinctions between types of merchants and between merchants and non-merchants, and although there is little discussion of "merchant" status in the trade-press books offering advice to prospective owners of Web sites, the "merchant" concept has far-reaching legal implications for both buyers and sellers of goods on-line.

III. THE ON-LINE DEFINITION OF "MERCHANT"

Recognizing that "transactions between professionals in a given field require special and clear rules which may not apply to a casual or

74. *Virtual Vineyards* (visited June 21, 1997) <<http://www.virtualvin.com>>.

75. *BarnesandNoble.com* (visited Nov. 2, 1997) <<http://www.barnesandnoble.com>>.

inexperienced seller or buyer,"⁷⁶ Article 2 of the U.C.C. broadly⁷⁷ defines a "merchant" as:

a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.⁷⁸

Merchants, who can be either buyers or sellers of goods⁷⁹ (and

76. U.C.C. § 2-104 cmt. 1 (1996).

77. The U.C.C.'s lack of guidance in defining the term "merchant" has caused considerable difficulties for courts. One district court observed, "The concept of a 'merchant' is broad, and . . . it is somewhat nebulous in that there is no bright line separating those who are merchants from those who are not. . . ." *Czarnecki v. Roller*, 726 F. Supp. 832, 843 (S.D. Fla. 1989). Another court commented:

[N]owhere are the difficulties of definition more apparent than in subsections (1) and (3) of 2-104 of the U.C.C. The language in these definitions of a "merchant" and "between merchants" has been variously described as ambiguous, awkward, odd, difficult to construe, and leading to conclusions which do not make much sense.

Pecker Iron Works, Inc. v. Sturdy Concrete Co., Inc., 410 N.Y.S.2d 251, 254 (1978) (footnotes omitted). The court added that "[a] merchant question can only be answered by the facts in each case." *Id.*

As one commentator has noted, "Resolution of a party's merchant status forces courts to confront the merchant definition head-on, rarely a pleasant encounter. . . . The merchant provisions themselves offer little help in defining the class of individuals subject to them and provide no rationale for limiting their application to merchants." Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True, the Beautiful in Commercial Law*, 73 GEO. L.J. 1141, 1145-46 (1985) (footnotes omitted). Hillinger concludes that these merchant rules "do not reflect actual business conduct but rather adopt Llewellyn's ideal business conduct," *id.* at 1181, and proposes that "[t]oday, the relevant principle of discrimination may [instead] be consumer/nonconsumer." *Id.* at 1184; *See also* Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 532 (1983) (observing that in determining whether a farmer is a "merchant" for purposes of the U.C.C., most courts look to the statutory, as opposed to the dictionary, definition of a merchant, although this hardly guarantees uniformity of result or realistic distinctions); Another academic has observed that the language of the Code's definitions of "merchant" and "between merchants" "has been variously described as ambiguous, awkward, odd, difficult to construe and leading to conclusions which do not make much sense." Douglas K. Newell, *The Merchant of Article 2*, 7 VAL. U. L. REV. 307, 307 (1973) (footnotes omitted). Newell proceeds to isolate nine different interpretations of Section 2-104's definition of "merchant," *id.* at 316, and concludes that "the drafters of the Code asked too much of the merchant concept." *Id.* at 343.

78. U.C.C. § 2-104(1) (1996).

79. A "merchant," as defined by the U.C.C., can be either a buyer or seller of goods, but not all buyers or sellers are merchants. The U.C.C. defines "buyer" broadly as "a person who buys or contracts to buy goods," U.C.C. § 2-103(a) (1996), and a

indeed, some transactions in goods take place "between merchants"),⁸⁰ are deemed responsible for possessing and exercising "specialized knowledge as to the goods, specialized knowledge as to business practices, or specialized knowledge as to both."⁸¹ The determination of whether a given party to a transaction is a "merchant" of either type, or of both types simultaneously, is a question of fact.⁸² As one court explained:

Generally, case law provides that the term 'merchant' is not to be limited to any dictionary meaning of a buyer or seller of goods. Rather, the test is whether a person is so experienced and knowledgeable under the circumstances that he should be charged with the more substantial burden imposed upon a merchant.⁸³

"seller" as "a person who sells or contracts to sell goods." U.C.C. § 2-103(d) (1996).

80. See U.C.C. § 2-104(3) (1996) (defining a transaction "between merchants" as a transaction in which both the buyer and seller qualify as merchants); *D'Angelo v. Miller Yacht Sales*, 619 A.2d 689, 690 (N.J. Super. Ct. App. Div. 1993) (finding the contention that Article 2 applies only to sales between merchants "plainly wrong," since "[a] buyer [as defined by § 2-103(1)(a)] may be a merchant or a consumer"); *Hebron v. American Isuzu Motors, Inc.*, 60 F.3d 1095, 1097 (4th Cir. 1995) (Section 2-103(1)(a) definition of "buyer" "includes both retail consumers and merchant buyers.").

81. U.C.C. § 2-104 cmt. 2 (1996).

82. *Canterra Petroleum, Inc. v. W. Drilling & Mining Supply*, 418 N.W.2d 267, 270 (N.D. 1987); *Greater S. Distrib. Co. v. Usry*, 184 S.E.2d 486, 487 (Ga. Ct. App. 1971); *Bauer v. Curran*, 360 N.W.2d 88, 90 (Iowa 1984); *Ferragamo v. Mass. Bay Transp. Auth.*, 481 N.E.2d 477, 480 (Mass. 1985).

83. *Sea Harvest, Inc. v. Rig & Crane Equip. Corp.*, 436 A.2d 553, 557 (N.J. Super. Ct. Ch. Div. 1981) (citations omitted). This burden would presumably include the merchant's responsibility to take any reasonably cost-effective technological precautions necessary to discharge her duties as a "business practices" merchant or "goods" merchant, whether or not other businesspersons in general or other merchants of that type of goods had adopted these protections. In *The T. J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932), Judge Learned Hand, writing for the court, found that two tug-boat owners were liable for the loss of their cargo in a storm that the tug-boats' operators could have been warned of by properly-functioning radio equipment. Hand reached this decision in spite of his understanding that:

[it] is not fair to say that there was a general custom among coastwise carriers so to equip their tugs. . . . An adequate receiving set suitable for a coastwise tug can now be got at small cost and is reasonably reliable if kept up; obviously it is a source of great protection to their tows. . . .

. . . [A] whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission. But here there was no custom at all as to receiving sets; some had them, some did not; the most that can be urged is that they had not yet become general. Certainly in such a case we need not pause; when some have thought a device necessary, at least we may say that they were right, and the others too slack.

Id. at 739-40 (citations omitted).

Thus, while the custom of other Web site owners might be introduced as evidence concerning an owner's compliance with standards of "ordinary care," it would only be one factor to be taken into account by the jury along with the other substantial evidence

Although commentators have questioned whether the distinction between merchants and non-merchants has survived⁸⁴—and whether it should survive⁸⁵—the “business practices” merchant and the “goods” merchant will undoubtedly remain figures of enormous legal import, if perhaps still of imprecise dimensions, in cyberspace.

A. “Business Practices” Merchants

According to Official Comment 2 to U.C.C. § 2-104, the class of merchants who have “specialized knowledge as to business practices” includes “almost every person in business,” so long as he is buying or selling goods in a “mercantile capacity,” as opposed to a purely personal

relevant to their making this determination. See *Broadview Leasing Co. v. Cape Cent. Airways, Inc.*, 539 S.W.2d 553, 563 (Mo. Ct. App. 1976) (discussing a bailee’s liability for loss of aircraft and equipment due to a fire in its hangar); *Texas & Pac. Ry. Co. v. Behymer*, 189 U.S. 468, 470 (1903) (“What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.”); *American Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 434 (Tex. 1997) (“Simply because certain precautions or improvements in manufacturing technology, which could eliminate pesticide residue from cigarettes, are universally disregarded by an entire industry does not excuse their omission.”); *Low v. Park Price Co.*, 503 P.2d 291, 298 (Idaho 1972) (The court, in evaluating the care taken by a bailee for hire, referred to the RESTATEMENT (SECOND) OF TORTS § 295A cmt. c (1965) for the proposition that “[n]o group of individuals and no industry or trade can be permitted, by adopting careless and slipshod methods to save time, effort, or money, to set its own uncontrolled standard at the expense of the rest of the community.”).

In determining whether to adopt any particular protective technological measure, the owner of a commercial site would do well to keep in mind Judge Hand’s test that an actor has a duty if the cost of that measure is less than the product of the probability of harm’s occurring and the monetary amount of the damage that would result. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (enunciating this test); *R.I. Hosp. Trust Co. v. Zapata Corp.*, 848 F.2d 291, 295 (1st Cir. 1988) (applying the Learned Hand test in determining whether a bank’s practice of not examining signatures on most checks constituted a lack of ordinary care).

84. One commentator has concluded that the Code drafter’s “original conception of the merchant rules has essentially disappeared. The rules have been drastically reduced in number and effect.” Wiseman, *supra* note 77, at 537.

85. To another academic, “[S]ection 2-314’s merchant distinction is inconsistent with the Code’s overall warranty scheme and philosophy as well as with modern notions of unjust enrichment. It is not a product of considered reasoning, but an atavistic remnant of our caveat emptor past and should be eliminated.” Ingrid Michelsen Hillinger, *The Merchant of Section 2-314: Who Needs Him?*, 34 HASTINGS L.J. 747, 749-50 (1983) (citations omitted).

one.⁸⁶ For these purposes, "banks or even universities, for example, well may be 'merchants.' But even these sections only apply to a merchant in his mercantile capacity; a lawyer or bank president buying fishing tackle for his own use is not a merchant."⁸⁷

Despite the statute's reference to "knowledge or skill *peculiar* to the practices . . . involved in the transaction"⁸⁸ and despite the Official Comment's discussion of "*specialized* knowledge as to business practices,"⁸⁹ the Official Comment specifies that merchants within this category are charged with knowledge of and responsibility for discharging "*normal* business practices which are or ought to be *typical* of and *familiar* to any person in business. . . . since the practices involved in the transaction are *non-specialized* business practices such as answering mail."⁹⁰

"Business practices" merchants face special rules concerning the length of time that their written offers to buy or sell must remain open,⁹¹ and, if dealing with another merchant, concerning the applicability of the

86. U.C.C. § 2-104 cmt. 2 (1996). Merely having the financial capacity to enter into a transaction for an expensive good does not suffice to render the buyer a "merchant." See *Jones v. Wide World of Cars, Inc.*, 820 F. Supp. 132, 136 (S.D.N.Y. 1993) (A consumer's ability to purchase an \$800,000 Ferrari "is insufficient to impart a consumer with the specialized knowledge and skill that merchants are deemed to possess."). Moreover, "something more than hiring a consultant is required to move a noncommercial entity within the scope of the definition of 'merchant.'" *Church of the Nativity of Our Lord v. Watpro, Inc.*, 491 N.W.2d 1, 8 (Minn. 1992) The *Church of Nativity* court, referring to Official Comment 3 of section 2-104, suggested that having "regular purchasing departments or personnel familiar with business practices" may render a party a merchant. *Id.* at 7 (emphasis added).

Of course, the distinction between acting in a mercantile capacity and a personal one is not always clear. See, e.g., *Playboy Clubs Int'l, Inc. v. Loomskill, Inc.*, 13 U.C.C. Rep. Serv. 765 (N.Y. Sup. Ct. 1974). In *Playboy Clubs*, the court held that a club was "in the service business of purveying lodging, meals and drinks, and entertainment," and therefore was not a "merchant," but instead "an ultimate consumer," with respect to the fabric that it bought to convey to another party to make into costumes for club employees. *Id.* at 766. The court concluded, "A merchant buys for resale, not for use." *Id.*

Similarly close distinctions can be involved in determining whether a seller is a merchant "who deals in goods of the kind" at issue under U.C.C. § 2-104(1) (1996). See *infra* Part III.B (discussing such merchants). In *Hector Farms v. American Cyanamid Co.*, 18 U.C.C. Rep. Serv. 2d 1083 (D. Minn. 1992), the court held that to the extent that a farm bought an herbicide to facilitate the growth of crops that it would then sell as a part of its business, the herbicide was used as a "tool of the trade" and the farmer was a merchant "deal[ing] in goods of the kind." *Id.* at 1087.

87. U.C.C. § 2-104 cmt. 2 (1996).

88. U.C.C. § 2-104(1) (1996) (emphasis added).

89. U.C.C. § 2-104 cmt. 2 (1996) (emphasis added).

90. *Id.* (emphasis added).

91. See *id.* (referring to section 2-205's firm offer rule); *infra* Part III.G (discussing same).

statute of frauds⁹² and the effect of additional terms in a message of acceptance or confirmation.⁹³ In addition, such a merchant faces certain restrictions in the area modification, rescission, and waiver of contracts when the merchant transacts goods with either other merchants or with non-merchants.⁹⁴

Under the example given in the Official Comments to U.C.C. § 2-104, a visitor to a commercial Web site would still be subject to the test of whether his purchase was made in his personal or "mercantile" capacity. The example provides that a lawyer or bank president buying fishing tackle on-line would still not be a "merchant."⁹⁵ In the absence of a similar example relating to the qualification of a *seller* as a "business practices" merchant, it would seem that the question of whether a seller was acting in a personal or "mercantile" sense involves an examination not only of the seller's business,⁹⁶ but also of the circumstances of the sale. For instance, just as a seller of goods at a garage sale would not necessarily qualify as an expert on the goods or types of goods that she was selling, but might be seen as a "business practices" merchant responsible for certain minimum duties with regard to her commercial conduct, so could the owner of a Web site, however short its life, that was constructed for purposes of a virtual "garage sale."

92. See U.C.C. § 2-104 cmt. 2 (1996) (referring to section 2-201(2)'s rules regarding confirmatory writings between merchants); *infra* Part V.B (discussing same).

93. See U.C.C. § 2-104 cmt. 2 (1996) (referring to section 2-207's so-called "knock-out" rule); *infra* Part V.D (discussing same).

94. See U.C.C. § 2-104 cmt. 2 (1996) (referring to section 2-209(2)). Section 2-209(2) provides that "[a] signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party." U.C.C. § 2-209(2) (1996).

95. U.C.C. § 2-104 cmt. 2 (1996).

96. Arguably, for instance, a lawyer or bank president who bought two sets of fishing tackle and resold one to a friend would not be selling the second set in her "mercantile" capacity. To the extent that a buyer's or seller's chief commercial enterprise is taken into account in characterizing the transaction as "personal" or "mercantile," the test for determining a "business practices" merchant blurs with the test for determining whether the buyer or seller is the merchant who specializes in the particular type of goods at issue.

One commentator has clarified the Code's reference to "a person who . . . by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction," U.C.C. § 2-104(1) (1996), by noting that "[i]f occupation, which is not defined in the Code, is used in its commercial sense [*i.e.*, as a means of earning a living], hobbyists would seem to be excluded." Newell, *supra* note 77, at 325 (footnotes omitted).

Even if the owner of a commercial Web site did qualify as a "business practices merchant," the only "non-specialized business practice" identified by the Official Comments to U.C.C. § 2-104 is answering mail.⁹⁷ One could surmise that an on-line "business practices" merchant would have the same responsibility as her off-line counterparts. In light of the unique operational demands of the Web-based commercial environment, a site owner qualifying as a "merchant" might also be charged with the responsibilities described in Part III.A.(2)-(7), which follows, or at least with making reasonable efforts to fulfill them.

1. Answering Electronic Mail (E-mail)

Analogous to the business practice of answering normal written mail is the on-line merchant's duty to read and answer her electronic mail ("e-mail"), and the allied responsibility of keeping her on-line mailbox open and accessible.⁹⁸ These basic practices have been included in several enumerations of the on-line responsibilities and courtesies known collectively as "netiquette".⁹⁹

97. U.C.C. § 2-104 cmt. 2 (1996); *see also* American Plastic Equip., Inc. v. CBS Inc., 886 F.2d 521, 528 (2d Cir. 1989) (concluding that a television network held itself out as having sufficient familiarity with the postal system and the answering of mail to be considered a merchant under section 2-201(2)).

98. One pair of commentators advised entrepreneurs to:

CHECK FOR QUERIES AND ORDERS FREQUENTLY. Your level of store traffic will determine just how frequent "frequently" is, but never let twenty-four hours lapse without checking your store for orders or queries. In the first few weeks of operation and after any new promotional efforts, check your store every two hours. . . .

RESPOND QUICKLY. The more quickly you can respond to orders and queries, the more impressed your customers will be and the more quickly they'll come to trust you. Nobody likes doing business with someone whose business is just a part-time hobby. Your attentiveness to your store will convince customers that you're in the business full-time—even if you're not. Unless you're delivering merchandise within a day, send a confirmation message for each order so the buyer knows the order was received and that the goods are on their way.

JAY CONRAD LEVINSON & CHARLES RUBIN, *GUERRILLA MARKETING ONLINE* 107-08 (1995); *see also* NEMZOW, *supra* note 23, at 428 (suggesting that a turnaround time of one day is a good target to aim for); BARRY S. WADMAN ET AL., *THE MICROSOFT MERCHANT SERVER BOOK: THE WEBMASTER'S GUIDE TO BUILDING AN ONLINE STOREFRONT* 18 (1997) ("You should never leave your site unattended for long periods of time. This fact seems obvious, but it may not be obvious for people who aren't accustomed to the daily practices and procedures of the Internet."); LEVINSON & RUBIN, *supra* note 32, at 67-68 (advising potential on-line entrepreneurs to check for feedback messages every few hours and to respond to them within one business day); DAVID ANGELL & BRENT HESLOP, *THE ELEMENTS OF E-MAIL STYLE* 12-13 (1994) (recommending that visitors "check for mail in the morning, at lunchtime, and before you leave for the day").

99. *See* Arlene H. Rinaldi, *Netiquette Guide*, in GONYEA & GONYEA, *supra* note 5, at 175, 179 (As a principle of netiquette, "[t]he content and maintenance of a user's

2. Periodically Reviewing the Site's Integrity and Operation

Because Web sites are subject to virtual vandalism by hackers,¹⁰⁰ their owners should frequently check them, and those to which they are linked, to make sure that their integrity is intact.¹⁰¹ In addition,

electronic mailbox is the user's responsibility[:] Check e-mail daily and remain within your limited disk quota[:] Delete unwanted messages immediately since they take up disk storage[:] Keep messages remaining in your electronic mailbox to a minimum"; VAN DER LEUN & MANDEL, *supra* note 9, at 57 (advising users of the Internet that their home system and home directory do not have infinite disk space and that they should keep them clean by regularly deleting old and unused files and e-mail); MARTIN, *supra* note 63, at 199 (stating, as one of his "100 Rules of Business Netiquette," that owners of commercial sites should make sure that they have the appropriate resources to handle the traffic generated by the site, specifically with regard to e-mail).

One commentator identified certain principles of "E-mail Netiquette for Online Marketers," such as placing advertisements only on appropriate forums and newsgroups and being careful not to duplicate the same message in too many different areas. JANAL, *supra* note 25, at 81-82. Janal also recommended being "politically correct," polite, brief, grammatical and accurate, and not typing in all upper-case letters (to avoid the on-line appearance of shouting). *Id.* Finally, Janal recommended being specific and focused; summarizing part of the message to which you are replying; contributing to the on-line community by answering others' questions; and obeying the forum's rules on advertising, self-promotion, and etiquette. *Id.* at 82-83.

100. See *Hackers Penetrate Justice Dept. Home Page*, WASH. POST, Aug. 18, 1996, at A22 (recounting that hackers altered the Justice Department's home page "to include swastikas, obscene pictures and lots of criticism of the Communications Decency Act," as well as to create "links to other web sites, all unflattering," about political figures); Sewell Chan, *Electronic Vandals Tamper With Web Pages*, WALL ST. J., June 26, 1996, at B1 (noting that victims have had their Web pages defaced, erased, or, in one case, replaced, by intruders, and observing that the owner of one site has since created backups of all pages "to ensure quick repair if the site is attacked again"); Jared Sandberg, *Shimomura, Pursuer of Hackers, Finds Himself Homeless on Web*, WALL ST. J., Feb. 9, 1996, at B1 (describing how an imposter persuaded an Internet address provider to change the address of a Web site constructed by a noted Internet security expert).

101. One manual advises entrepreneurs:

CHECK YOUR OWN SERVICE. You can't fix a problem if you don't know you have it, so act like one of your own customers once in a while to make sure your store is working properly. Dial up your online service or the Net and navigate to your store. Browse around and display its information. Send in an order yourself once in a while. Try this at different times of the day and night and on different days to determine whether there are any access problems.

LEVINSON & RUBIN, *supra* note 98, at 108. Another author lists among his "Rules of Business Netiquette" that owners of commercial sites "[k]eep all links live and test periodically." MARTIN, *supra* note 63, at 198. According to Martin, these rules of business netiquette "adhere to a standard that goes beyond the more general netiquette

owners should periodically send themselves electronic mail (or have electronic mail sent to them) through the site's facility to make sure that it is working and that the messages are delivered promptly.¹⁰² Owners should also regularly insert the name of their company and possibly of

norms governing the online behavior of individual users." *Id.* at 196.

One security expert recommends that site owners:

Use the Internet to stay informed about developments such as software flaws and attack techniques. . . .

Keep current on new software updates and patches, and apply them as soon as they're released. Don't count on your vendors to alert you when security holes have been uncovered in their products.

Regularly analyze your Web traffic for signs of suspicious activity such as files uploaded to your site whose content or purpose is not apparent.

....

Counsel employees on sensible system management techniques and tools. Use access control. Limit access to files and directories to only those who really need this access. Run [specialized] security programs designed to probe for security weaknesses.

ALEXANDER, *supra* note 13, at 173-74; *see also* NET.GENESIS & HALL, *supra* note 4, at 398 ("Verifying your link integrity means ensuring that all links on every page in the site lead to a real and viable location. . . . [Y]ou must stay vigilant to keep up with the changes.").

102. *See* Jared Sandberg, *E-Mail Load Turns Zap Into Electronic Crawl*, WALL ST. J., May 29, 1997, at B1 ("Even when [Internet service providers] can avoid e-mail outages, messages can take hours or even days to reach their destination."). One journalist recently detailed the causes and effects of a five-hour failure of a proprietary system that at the time conveyed 20 million messages every day. *See* Rebecca Quick, *Surging Volume of E-Mail Brings Blackouts at AOL*, WALL ST. J., Nov. 25, 1997, at B1. Quick noted that "[o]ther on-line services are also staggering under the surging volume of e-mail" messages, which are "getting bigger and more complicated—more of them contain attachments, graphics and expanded content." *Id.*

This duty to keep a commercial site accessible extends to the owner's choice of and possible upgrading of the site's software, hardware, and Internet connection. Commentators have warned:

[Y]ou have to factor [the anticipated number of visitors] into all of the decisions you make. For example, if you're going to be getting a hundred hits a day, you can set up your site by using your PC or Mac at home on a 56K line, with little maintenance. A high volume of use might call for different machines and broader connections.

NET.GENESIS & HALL, *supra* note 4, at 64.

In some circumstances, this duty to keep a commercial site accessible also might require the merchant to gather data that will reveal who has been visiting the site and what visitors have been doing there. *See* Neil Randall, *Who Goes There?*, PC MAG., Oct. 7, 1997, at 253, 253. According to Randall, "you need reports on how many visitors you have per day and per hour, what times are most active for your site, how much data is accessed from your site per day and per visit, which pages are accessed most frequently, . . . and on and on." *Id.* Randall reviews seven different products, priced at \$129 to \$4,995, that gather such data. *Id.* at 253-63.

Of course, if this technological analysis reveals that "one of your pages is popular, you might want to focus more attention on it and use it to post important notices." NET.GENESIS & HALL, *supra* note 4, at 399. For example, to guide visitors to a little-seen page on your site, "you might post a special notice on your top-level page or some other area with more traffic." *Id.*

some of its unique products in various "search engines," then review the search results to ensure that no one is creating an "imposter" site in the company's name.¹⁰³ Finally, owners should run virus-checking programs on all software that they download or upload in connection with their sites to protect their customers from "infection" with such viruses.¹⁰⁴

3. "Backing Up" Information

Because Web sites can be subject to "crashing" (i.e., failing to operate) whether or not hackers are at fault, the operator of such a site

103. John M. Broder, *Making America Safe for Electronic Commerce*, N.Y. TIMES (Wash. ed.), June 22, 1997, § 4, at 4 (wherein Christine Varney, at that time a member of the Federal Trade Commission, posed the question: "How do [consumers] know when they click on L.L. Bean that they're getting the company and not some impostor?"); MARTIN, *supra* note 63, at 198 (counseling site owners to run test searches to make sure that their site comes up with each of the search engines).

Such a search would also reveal whether another site has without authorization included the name of the searcher's business, product line, or product in its "meta-tags" in such a manner as to be legally actionable. See Elgison & Jordan, *supra* note 61, at C7 (recommending such a search and advising that terms included in the meta-tag can be revealed by Netscape Navigator users by clicking on "view" and then "document source" while viewing the suspect site). Site owners can also use the search engine Hotbot <<http://www.hotbot.com>> to search for other Web pages that link to the URL of their site.

104. See VAN DER LEUN & MANDEL, *supra* note 9, at 58 ("If you do not use [anti-virus programs] on each and every software program you put on your computer, you are playing Russian roulette with your hard drive" and recommending that users of the Internet "[r]un virus-checking programs on all downloaded software"); MARTIN, *supra* note 63, at 201 (advising site owners to run virus scans frequently and, if they detect a virus, to alert recent correspondents); Diane Kaye Walkowiak, *How to Protect Yourself From Web Viruses*, in PC NOVICE GUIDE TO BUILDING WEBSITES, at 161, 162 (recommending that site owners use antivirus software and scan files that are uploaded to or downloaded from the site).

Draft Article 2B presently contains a provision addressing electronic viruses. It provides that "[u]nless the circumstances [including 'the express terms of the contract'] clearly indicate that . . . a duty of care could not be expected, a party shall exercise reasonable care to ensure that its performance or message when completed by it does not contain an undisclosed virus." U.C.C. § 2B-311(b) (Proposed Official Draft Nov. 1, 1997). Draft Article 2B defines a "virus" as instructions intended to direct a computer to "operate in a manner likely materially to disrupt, damage, or destroy information, or inappropriately interfere with the use of a computer or communications facility without the consent or permission of the owner." U.C.C. § 2B-311(a) (Proposed Official Draft Nov. 1, 1997).

should regularly save the information separately to minimize damage to the Web site and to customer records.¹⁰⁵

4. *Protecting Customer Information in Transit and in Storage*

Owners of commercial Web sites that take orders through electronic mail should inform customers about the extent to which their orders are secure from interception. This would be particularly important if the customer were providing a credit card number or ordering such sensitive products as, for instance, a home test for pregnancy or AIDS.¹⁰⁶ In addition, site owners should take reasonable measures to protect the privacy of customer and order information that is stored on their computers or elsewhere.

5. *Sending Confirmation by E-mail to the Customer*

The owner should either send an e-mail message to confirm the receipt and acceptance of an order or indicate on the order form itself that such messages will not be sent.¹⁰⁷

105. Levinson and Rubin have contended that mere printouts of information will not suffice because the marketer would have the laborious task re-entering the material into the computer. LEVINSON & RUBIN, *supra* note 98, at 240. Instead, the pair recommend that marketers "[b]ack up your computer's disk to save not only your data, but the software you use to go online. If you don't, a disk failure . . . can derail your [marketing efforts] for weeks or months . . ." *Id.*

Another commentator has advised, "Your [Internet service] provider should make copies of the important files on his Web server on a regular basis" to minimize the damage and disruption that a hacker attack could cause to the operation of the business. DOWLING, JR. ET AL., *supra* note 6, at 177.

106. See WADMAN ET AL., *supra* note 98, at 128-44 (reviewing methods of protecting client information); VAN DER LEUN & MANDEL, *supra* note 9, at 99-100 (observing that unprotected e-mail is not secure and recommending the use of "[t]he most widely promulgated encryption scheme, PGP (for Pretty Good Privacy)"); NEMZOW, *supra* note 23, at 279 (identifying PGP as "[t]he 'best' client-side tool" for encryption); DOWLING, JR. ET AL., *supra* note 6, at 175 ("Don't expect your e-mail to remain private. Unless you take special measures . . . , your e-mail is subject to 'eavesdropping.'"); Thomas E. Weber, *Should Only the Paranoid Get E-Mail Protection? Probably Not, As 'Encryption' Gets Easier*, WALL ST. J., Sept. 25, 1997, at B6 (explaining the advantages and implementation of PGP and other easily available encryption programs).

107. See LEVINSON & RUBIN, *supra* note 32, at 65 (On-line merchants should "[s]et up a standard order confirmation notice and send it via e-mail as soon as you receive an order. If possible, let the customer know not only that the order was received but when the product can ship and when he can expect it to arrive."); Mark Hodges, *Is Web Business Good Business?*, MIT'S TECH. REV., Aug./Sept. 1997, at 22, 28 (observing that on-line bookseller Amazon.com strives to answer every e-mail note within hours, and has continually beefed up its staff to meet this demand); NET.GENESIS AND HALL, *supra* note 4, at 390-97 (providing program code for "template files" through which a site owner can send out form responses).

6. Clarifying Ambiguities in E-mail Messages

If transacting in their "mercantile" rather than their "personal" capacity, both owners and customers of commercial sites may be charged with knowledge of the "netiquette" rules and culture surrounding the use of e-mail. To the sender's chagrin, the language of an e-mail is often taken literally rather than humorously or figuratively. One collection of advice to potential owners of commercial sites even recommends that "[i]f the message is very important, controversial, or confidential, . . . think twice about sending it by way of e-mail and consider the telephone or a face-to-face meeting."¹⁰⁸

At least one software product currently on the market offers to ease the site-owner's task of managing and maintaining responsive communication with customers via e-mail. See Chris Kinsman, *Manage Your Customer E-Mail*, PC COMPUTING, Dec. 1997, at 198, 198. That product does so "by routing, tracking, and following up on all your important business messages," including sending return e-mail with a tracking number indicating that a customer's message has been received. *Id.* Kinsman concludes that the product, available for \$1,500, is "[t]he best way to ensure that all your customer e-mail is monitored—and answered." *Id.*

108. ANGELL & HESLOP, *supra* note 98, at 13; see also EMERY, *supra* note 5, at 237 ("Sarcasm doesn't work in email, so avoid it. . . . Humor is risky. . . . Reread your message before you send it to catch things that may be misinterpreted."); MARTIN, *supra* note 63, at 201 ("Be sure to proofread a message before sending it out, not only to check for errors, but also to make sure that the content is clear.").

Along these lines, other commentators have recommended:

Take care to word things so they can be clearly understood. Often we forget that e-mail doesn't convey our facial expressions or our tone of voice. You must convey these things with your words. Limit your use of sarcasm and humor; e-mail has a way of making such things sound rude or confusing.

DOWLING, JR. ET AL., *supra* note 6, at 174.

Their colleagues have agreed:

Because of its informal nature, E-mail invites the half-baked question or quick answer or flip reply. . . .

In addition, E-mail has a conversational feel to it without the nuances that real conversation gives. Hence, tones such as sarcasm, humor, and innuendo are not readily transmitted over the medium. People need to understand that, before sending a message, they should examine their message for clarity no matter how trivial the matter seems.

VAN DER LEUN & MANDEL, *supra* note 9, at 100-01.

The limitations of e-mail messages and the responsibility and methods for clarifying them may ultimately become part of the "courses of dealing" and "usages of trade." See *supra* note 25 (with regard to on-line commerce).

7. Monitoring "On-Site" Forums

Although it is not directly related to the merchant's duties under the U.C.C., site owners should not only take care to monitor the contents of any on-line bulletin boards that they host as part of their sites, but should also require contributors to those sites to adhere to a code of conduct to prevent claims of copyright infringement, defamation, slander, or pornography. As of December 1997, few reported decisions had addressed the issue of an Internet service provider's liability for on-line defamation of a third party by one of the provider's users, and none had discussed in that context the liability of the owner of a commercial Web site. Yet, to the extent that site-owners solicit postings from their users on a range of products or subjects and depend on such material to enhance the commercial attractiveness of their sites and thus attract potential buyers, courts may be more willing than in the case of service providers to find them liable as "publishers," rather than "distributors," of offending material.¹⁰⁹

B. "Goods" Merchants

The Official Comments to the U.C.C. observe that qualification as a merchant "who deals in goods of the kind" at issue¹¹⁰ is "[o]bviously . . . restrict[ed] . . . to a much smaller group than everyone who is

109. For example, both Amazon.com's and Barnes and Noble's sites, located respectively at *Welcome to Amazon.com* (visited June 21, 1997) <<http://www.amazon.com>> and *BarnesandNoble.com* (visited Nov. 2, 1997) <<http://www.barnesandnoble.com>>, host on-line forums in which readers can post their reviews of specific books and enter into discussions of larger literary issues. An allied concern is the potential ability of commenters in these fora to insert into their posted messages links to their own or to other Web sites that might be deemed objectionable.

For decisions on Internet service provider liability, see *Zeran v. America Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997) (declining to subject a provider to liability under the Communications Decency Act as a "distributor" of allegedly defamatory statements, since the sheer number of postings on interactive computer services would create an impossible burden and would lead to the preemptive removal of messages and/or to providers' declining to review any messages); *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 141 (S.D.N.Y. 1991) (granting summary judgment for defendant because CompuServe, as a news distributor, may not be held liable if it neither knew nor had reason to know of the allegedly defamatory statements made through its network); *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710, at *5 (N.Y. Sup. Ct. 1995) (granting partial summary judgment against defendant Prodigy on the ground that "Prodigy's own policies, technology and staffing decisions . . . mandated the finding that it is a publisher. Prodigy's conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice.").

110. See U.C.C. § 2-104(1) (1996) (describing this type of merchant).

engaged in business.”¹¹¹ Indeed, it “requires a professional status as to particular kinds of goods,”¹¹² such as can be invoked by a seller’s referring to itself as a company that specializes in certain types of such goods.¹¹³

Whether or not they are dealing with other merchants of any type, “goods” merchants are found to give implied warranties of merchantability when they sell such goods.¹¹⁴ This warranty provides that “[g]oods delivered under an agreement made by a merchant in a given line of trade must be of a quality comparable to that generally acceptable in that line of trade under the description or other designation of the goods used in the agreement.”¹¹⁵ These merchants are governed by special rules if they retain possession of such goods¹¹⁶ or are entrusted with the possession of such goods.¹¹⁷

The most significant exclusion from the category of “goods” merchant is for parties engaging in an “isolated” purchase or sale of the goods in question.¹¹⁸ Examples include mothers who supplied turkey salad to

111. U.C.C. § 2-104 cmt. 2 (1996).

112. *Id.*; see also *Prenger v. Baker*, 542 N.W.2d 805, 808 (Iowa 1995) (“The requirement that the party ‘deals in goods of that kind’ is generally interpreted to mean one who is engaged in regularly selling goods of the kind at issue.”).

113. *Gulf Trading Corp. v. Nat’l Enter. of St. Croix, Inc.*, 912 F. Supp. 177, 180 (D.V.I. 1996) (finding that a company that referred to itself as specialist in lumber gave an implied warranty of merchantability to the buyer of its products).

114. *E.g., id.* (citing U.C.C. § 2-314(1) (1996)); see also *infra* note 296 and accompanying text (defining “merchantability”).

115. U.C.C. § 2-314 cmt. 2 (1996).

116. The Code insulates a merchant-seller from a fraud suit by a creditor of the merchant-seller if the merchant-seller retains goods in good faith for a commercially reasonable time after a sale or identification of goods to a contract. U.C.C. § 2-402(2) (1996).

117. The Code provides that “[a]ny entrusting of possession of goods [such as consignment] to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.” U.C.C. § 2-403(2) (1996).

118. U.C.C. § 2-314 cmt. 3 (1996). According to this Official Comment, “A person making an isolated sale of goods is not a ‘merchant’ within the meaning of the full scope of this section [setting forth the implied warranty of merchantability] and, thus, no warranty of merchantability would apply.” *Id.* Nevertheless, one commentator has cited caselaw to support the proposition that “[a] dealer in the *general* type of goods who has never sold the *specific* type of article before should be held to warrant merchantability under the spirit of 2-314(1).” Newell, *supra* note 77, at 323 (emphasis added).

a high-school band's fund-raising picnic,¹¹⁹ a one-time seller of a large number of clothing racks,¹²⁰ a real estate broker guaranteeing payment for a shipment of cheese to a third party,¹²¹ and a bank selling a boat¹²² or a golf course.¹²³ The extent to which the goods at issue are related to the alleged merchant's business is often a close question,¹²⁴ but one key factor in this regard is whether the party has

119. See *Samson v. Riesing*, 215 N.W.2d 662, 669 (Wis. 1974) (holding that although commercial restaurateurs would qualify as merchants for purposes of liability for salmonella-infected salad, mothers would not).

120. See *Morris v. Goodwill Indus., Inc.*, 1995 WL 465348, at *2 (Minn. Ct. App. 1995) (holding that a one-time liquidation sale of 250 clothing racks is insufficient, standing alone, to establish the seller as a merchant dealing in goods of that kind).

121. See *Cudahy Foods Co. v. Holloway*, 286 S.E.2d 606, 607-08 (N.C. Ct. App. 1982) ("[T]he familiarity with trade customs test is not so broad as to extend to the isolated purchase of a type of goods unrelated and unnecessary to the business or occupation of the buyer.").

122. See *Donald v. City Nat'l Bank of Dothan*, 329 So. 2d 92, 95 (Ala. 1976) (holding that a bank's isolated sale of a boat did not render the bank a merchant, especially since no evidence was offered that the bank dealt in boats or that it held itself out as having knowledge or skill peculiar to such goods).

123. See *Sievert v. First Nat'l Bank in Lakefield*, 358 N.W.2d 409, 414 (Minn. Ct. App. 1984) (holding that a bank did not qualify as a merchant involved in the sale of goods with respect to either the loan refinancing or the effort to sell the golf course on which it held a mortgage).

124. See, e.g., *Ashley Square, Ltd. v. Contractors Supply of Orlando, Inc.*, 532 So. 2d 710, 711 (Fla. Dist. Ct. App. 1988) (A contractor who supplied a special kind of stucco for the first and only time was nevertheless found to be a "merchant" who "clearly deals in goods of this kind," since "[i]ts very name indicates the nature of its business, and the record reveals that it was the local distributor of the manufacturer."); *Czarnecki v. Roiler*, 726 F. Supp. 832, 843 (S.D. Fla. 1989) (holding that even if the defendant had sold five boats during one year's time, this alone was an insufficient basis upon which to find that he was a merchant); *Blockhead, Inc. v. Plastic Forming Co., Inc.*, 402 F. Supp. 1017, 1025 (D. Conn. 1975) (finding a blow-molding equipment manufacturer and custom molder a "merchant" for purposes of plastic cases because the term "practices" indicates that one may be a merchant of goods by virtue of his involvement in the process by which those goods are produced as well as by sale of the finished goods from inventory); *Dietz Bros., Inc. v. Klein Tools, Inc.*, 19 U.C.C. Rep. Serv. 2d 694, 698 (Minn. Ct. App. 1993) (holding that a buyer who was involved in the business of erecting television and radio towers was nevertheless not a "merchant" with respect to its one-time purchase of a related tool that it had never manufactured or designed); *Chisolm v. Cleveland*, 741 S.W.2d 619, 620-21 (Tex. Ct. App. 1987) (holding that a farmer who had never previously bought or sold "green chop" cattle feed and had only occasionally bought other types of feed for his cattle was only "a casual or inexperienced buyer" of such feed and therefore not a merchant); *Ferragamo v. Mass. Bay Transp. Auth.*, 481 N.E.2d 477, 480-81 (Mass. 1985) (holding that a transit authority was sufficiently involved in the design of new trolley cars, the repair and operation of trolley cars in use, and the sale of old trolley cars for scrap to be considered a merchant with respect to trolley cars); *Perry v. Rockwell Graphics Sys., Inc.*, 42 U.C.C. Rep. Serv. 409, 411-12 (D. Mass. 1985) (finding no specialized knowledge and thus no implied warranty of merchantability, and thus distinguishing from *Ferragamo* the prior owners of an industrial machine that had injured the plaintiff, because they did not design the machine that injured plaintiff, they did not perform their own repairs, and they were

employed "an agent or broker or other intermediary who by his occupation holds himself out as having . . . knowledge or skill" peculiar to the practices or goods involved in the transaction.¹²⁵

In this context, anyone using a Web site who makes an arguably "isolated" sale of goods that are not within her true line of business should support her nonmerchant status by explicitly indicating that this is an isolated sale and that she is not an expert with respect to these goods. In addition, as discussed in greater detail below,¹²⁶ she should

involved in the same business as plaintiff's employer).

Presumably, a Web site owner whose off-line business involves the sale in a physical store of a type of good that she also sells through the site cannot deny that she is selling the goods on-line in her mercantile capacity and thereby qualifying as a "business practices" merchant, nor can she deny that she is a merchant "who deals in goods of the kind."

125. U.C.C. § 2-104(1) (1996); *see also* Regents of the Univ. of Minn. v. Chief Indus., Inc., 106 F.3d 1409, 1412 (8th Cir. 1997) (finding a university a "merchant" for purposes of buying a grain dryer, when it had purchased a number of such units over the prior 30 years, had a centralized purchasing department that solicited bids for the purchase, and had before the sale consulted a prominent expert in grain drying to determine proper specifications); National Microsales Corp. v. Chase Manhattan Bank, 761 F. Supp. 304, 305-06 (S.D.N.Y. 1991) (concluding that a bank that had disposed of nearly \$6.5 million of computer output microfilming equipment in the previous three years and that had adopted uniform procedures for purchasing new equipment and disposing of used equipment of that type was sufficiently familiar with "goods of that type" to be a merchant under section 2-201).

126. *See infra* Part VI. Although a site owner could thus attempt to disclaim her status as "goods merchant," an attempt to issue a "blanket disclaimer" of her status as a "business practices" merchant seems indefensible as a matter of policy. Not only should a prospective buyer of those goods be entitled to the reasonable expectations and protections of dealing with a business practices merchant (even if the buyer is unaware of precisely what those protections are), but the seller could attempt to avoid many of those default provisions by explicitly and conspicuously conditioning the sale of goods on the terms of her choice.

It may be to the site-owner's benefit to inquire whether a prospective buyer on-line is himself a "business practices" or "goods" merchant in order to determine whether the sale is "between merchants" or whether in selecting products the buyer would be relying on the owner's expertise. This could be done by requiring the visitor to complete an on-line questionnaire before allowing him to visit parts of the site, to order particular products, or to submit an order form at all. For an example of such a questionnaire in a slightly different context, see *Hotsex* (visited Oct. 3, 1997) <<http://www.hotsex.com>>. Visitors wishing to penetrate beyond the home page of this erotic site will confront the language: "All material I transport from HotSex is exclusively for my own personal use," and "[m]y interest in this material is personal, and not professional." Another Web site, located at *Web Counter* (visited Nov. 23, 1997) <<http://www.digits.com/top/warning.html>>, requires the visitor to agree to various terms and conditions before proceeding further, including: "I am not an officer or agent of any federal, postal, state, provincial, municipal, or local law enforcement agency."

conspicuously disclaim any implied warranty of merchantability.¹²⁷

C. "Business Practices" or "Goods" Merchants

Whether a merchant is a "business practices" merchant or a "goods" merchant, or both, she is subject to a third group of provisions of the Code, most notably including the requirement of "good faith."¹²⁸ As opposed to Article 2's general definition of good faith as "honesty in fact in the conduct or transaction concerned,"¹²⁹ good faith in the case of a merchant "means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."¹³⁰

The good faith requirement has been interpreted to require parties to be

bound by a usage common to the *place* they are in business, even if it is not the usage of their particular vocation or trade. . . . [A] usage need not necessarily be one practiced by members of the party's own trade or vocation to be binding *if it is so commonly practiced in a locality that a party should be aware of it.*¹³¹

The institution of commerce in cyberspace, however, may well lead to a redefinition of the concept of "locality" for this purpose. For example,

The purveyors of other commodities may have other reasons and methods for eliciting information about potential customers and the uses to which the goods may be put. For instance, a seller of security and surveillance devices, whose Web site is located at *Spy Zone* (visited Nov. 30, 1997) <<http://www.spyzone.com/CCSOR1.html>>, requires customers to telephone "or contact us online with a description of the problem you need to solve. . . . We do not publish prices for our products for several reasons."

127. According to the Code, "to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous . . ." U.C.C. § 2-316(2) (1996).

128. The other provisions include sections 2-327(1)(c), 2-603, and 2-605(1)(b) which, in part, address the responsibilities of merchant buyers to follow a seller's instructions; section 2-509, which addresses the allocation of the risk of loss between a buyer and a seller in the absence of breach; and section 2-609(2), which addresses the right to adequate assurances of performance.

129. U.C.C. § 1-201(19) (1996).

130. U.C.C. § 2-103(1)(b) (1996); *see also* U.C.C. § 1-201 cmt. 19 (1996) ("[W]herever a merchant appears in the case an inquiry into his observance of such standards is necessary to determine his good faith.").

The only definition of good faith offered by Draft Article 2B and Draft Revised Article 2 is quite similar to Article 2's "merchant" standard of good faith. The proposed definition is: "honesty in fact and the observance of reasonable commercial standards of fair dealing." U.C.C. § 2B-102(30) (Proposed Official Draft Nov. 1, 1997); U.C.C. § 2-102(19) (Proposed Official Revision July 25 - Aug. 1, 1997).

131. *Nanakuli Paving and Rock Co. v. Shell Oil Co., Inc.*, 664 F.2d 772, 791 (9th Cir. 1981) *Nanakuli Paving* interpreted U.C.C. § 1-205(2), which defines "usage of trade" as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." *Id.*; U.C.C. § 1-205(2) (1996).

to interpret the procedures and terms of an on-line seller of specific goods in the United States, a court might look to the common practices and colloquialisms among similarly-sized (or, perhaps, the largest) on-line sellers of those goods in this country, without further regard to the state in which those entities are incorporated or to the physical location of their headquarters or computers.

*D. Draft Revised Article 2 and Draft Article 2B
Definitions of Merchant*

The draft revisions to Article 2, to which no Reporter's Note or clarification is attached, appear largely to reparse the existing definition of merchant to render it more grammatical. The current version of Article 2 defines a merchant as:

a person who [1] deals in goods of the kind or [2] otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or [3] to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his own occupation holds himself out as having such knowledge or skill.¹³²

Draft Revised Article 2 defines a merchant as:

[1] a person that deals in goods of the kind involved in the transaction, [2] a person that by occupation purports to have knowledge or skill peculiar to the practices or goods involved in the transaction, or [3] a person to which knowledge or skill may be attributed by the person's employment of an agent or broker or other intermediary that purports to have the knowledge or skill.¹³³

The Draft Article 2B definition of "merchant" is nearly identical to this revision, except that it substitutes the term "information" for "goods."¹³⁴

1. "Consumers" and Their Transactions

Under current Article 2, Draft Revised Article 2, and Draft Article 2B, contracts can take place either between two non-merchants, between a non-merchant buyer and a merchant seller, between a merchant buyer and a non-merchant seller, or between two merchants. The increased

132. U.C.C. § 2-104(a) (1996).

133. U.C.C. § 2-102(a)(23) (Proposed Official Revision July 25 - Aug. 1, 1997).

134. See U.C.C. § 2B-102(a)(30) (Proposed Official Draft Nov. 1, 1997).

focus of the two draft Articles on the concept of “consumer,” which is undefined in current Article 2, may modify the degree to which a buyer or licensee will be deemed bound to terms in a contract or license that he has not read.¹³⁵

Draft Revised Article 2 conceives its “consumer” as the opposite of current Article 2’s “business practices” merchant seller:

“Consumer” means an individual who buys or contracts to buy goods that, at the time of contracting, are intended by the individual to be used primarily for personal, family, or household use. The term does not include an individual who buys or contracts to buy goods that, at the time of contracting, are intended by the individual to be used primarily for professional or commercial purposes.¹³⁶

In a similar vein, Draft Article 2B defines a “consumer” as

an individual who is a licensee of information that at the time of the contracting, [sic] is intended by the individual to be used primarily for personal, family, or household use. The term does not include an individual that is a licensee of information primarily for profit-making, professional, or commercial purposes, including agricultural, business management, and investment management, other than management of the individual’s personal or family investments.¹³⁷

Draft Revised Article 2 defines a “consumer contract” as “a contract for sale between a seller regularly engaged in the business of selling and a consumer.”¹³⁸ The terms and conditions of sale offered by a “business merchant’s”¹³⁹ Web site should qualify as a “consumer contract” with regard to visitors who themselves qualify as consumers. Indeed, Draft Revised Article 2’s definition of a consumer contract may defeat application of the “isolated sale” exception discussed above, since

135. See *supra* notes 220, 225-28 and accompanying text (discussing Draft Revised § 2-206 and Draft § 2B-208, respectively). On the subject of the Code’s treatment of consumer transactions, two scholars observed:

[T]o include consumer transactions in the Code, and recognize them as sufficiently different from business transactions so as to require different rules in particular situations—is the approach that the Code drafters have followed most often. . . .

....
....

Unfortunately, [this] approach is not only the best way to deal with consumer transactions in the Code, it is also the most difficult.

Kathleen Patchel & Amelia H. Boss, *Consumer Transactions and the Code: Some Considerations*, 51 BUS. LAW. 1343, 1356-57 (1996).

136. U.C.C. § 2-102(a)(8) (Proposed Official Revision July 25 - Aug. 1, 1997).

137. U.C.C. § 2B-102(a)(8) (Proposed Official Draft Nov. 1, 1997).

138. U.C.C. § 2-102(a)(9) (Proposed Official Revision July 25 - Aug. 1, 1997).

139. “[A] seller regularly engaged in the business of selling” would fit in but would not exhaust the category of merchants familiar with business practices. Also within that category are many merchants (buyers or sellers) with respect to the particular goods at issue, and buyers familiar with business practices.

arguably the very construction of a Web site from which more than a few sales are anticipated qualifies the owner as a person "regularly engaged in the business of selling" the goods in question.

Draft Article 2B does not refer to "consumer contracts," but instead incorporates its definition of "consumer" into the definition of "mass-market licenses," discussed below.¹⁴⁰

E. Attaining "Merchant" Status Through Linking to a Merchant's Site

Whether an owner's Web site is commercial or purely non-mercantile, she runs the risk of being characterized as a merchant herself if she links the site to a commercial Web site, to the extent that she can be seen under U.C.C. § 2-104(1) as having thereby employed an agent, broker, or other intermediary who by his occupation holds himself out as having knowledge or skill of business in general and/or of the goods at issue. Whether the attributed merchant status is of the "business practices" or the "goods" type depends on the status and background of the agent, broker, or intermediary. However, the example given in the Official Comments to that section relates only to the former. It reads, "[E]ven persons such as universities . . . can come within the definition of merchant if they have regular purchasing departments or business personnel who are familiar with business practices and who are equipped to take any action required."¹⁴¹

The language of the on-line bookseller Amazon.com's "Associates Program," through which the company encourages sale referrals in exchange for a percentage of the fees from the referred sites, attempts to prevent this connection from being made. The Operating Agreement that Amazon.com furnishes in conjunction with this program provides in relevant part:

You will select one or more books to list on your site. . . . You will provide a special link from each book reference on your site to the corresponding Amazon.com online catalog entry. Each link will connect directly to a single item in our online catalog, using a special link format that we give you. . . .

We will process book orders placed by customers who follow [these links]. We will be responsible for all aspects of order processing and fulfillment. . . .

140. See *infra* at Part V.C.3 (discussing U.C.C. § 2B-102(a)(29) (Proposed Official Draft Nov. 1, 1997)).

141. U.C.C. § 2-104 cmt. 3 (1996).

We will pay you referral fees on certain book sales to third parties. For a book sale to generate a referral fee, the customer must follow a special link from your site to our online catalog entry for a particular book, purchase the book using our automated order system, accept delivery of the book at the shipping destination and remit full payment to us.

....
We will make available to you a small graphic image that identifies your site as a Program participant. You will prominently display this logo or the phrase "In association with Amazon.com" somewhere on your site.

....
*You and we are independent contractors, and nothing in this Agreement will create any partnership, joint venture, agency, franchise, sales representative or employment relationship between the parties. You will have no authority to make or accept any offers or representations on our behalf.*¹⁴²

Similarly, "Cosmic Credit,"¹⁴³ a linking program offered by CDNow to grant linkers a 5% commission (in the form of store credit) on any purchases made by visitors through the link, stipulates in its relevant agreement that "[e]ach party shall act as an independent contractor and shall have no authority to obligate or bind the other in any respect."

Is this language sufficient to preclude merchant status for the referring site? Possibly not, if a visitor to the non-commercial site who then links to Amazon.com or CDNow to buy a recommended product has a reasonable belief that the actual vendor is acting as the agent of the referring site.¹⁴⁴ To prevent such apparent agency, the referring site should not rely on the vendor's site to disclaim the relationship, but should itself place such disclaimers conspicuously near the link, or should require visitors intending to link to "click through" a page that disclaims such a relationship. The vendor might contractually require the referring site to disclaim the relationship, and might insert a similar disclaimer on its own order form, along with a notation that the visitor will signal his agreement to the terms of the form by clicking to submit it.

142. *Amazon.com Associates Program Operating Agreement* (visited Oct. 31, 1997) <<http://www.amazon.com/exec/obidos/partners/associates/assoc-agreement.html/5648-8052599-712267>> (emphasis added).

143. *Cosmic Credit* (visited Oct. 31, 1997) <<http://www.cdnow.com/cosmic>>.

144. See U.C.C. § 1-103 (1996) ("Unless displaced by the particular provisions of this Act, the principles of law and equity, including . . . the law relative to . . . principal and agent . . . shall supplement its provisions."); RESTATEMENT (SECOND) OF AGENCY § 8 (1958) ("Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons."); COMMITTEE ON THE LAW OF COMMERCE IN CYBERSPACE, *supra* note 25, at 44 (suggesting that owners of linked sites contractually "disclaim any agency, joint venture, or other type of relationship" and "prohibit either party from attempting to exercise apparent authority with third parties.").

F. Attaining "Merchant" Status Through Meta-Tags

Using HyperText Markup Language, owners of Web sites can structure the "meta information" in the "header" of a page to enhance its searchability by Web search engines.¹⁴⁵ "Although this info is mostly hidden from [visitors], it's the header information that [such engines] plumb for indexing information."¹⁴⁶

Of particular relevance to the characterization of the owner as a merchant is her ability to create "meta tags" that provide keywords she expects her audience will use in conducting Web searches through a search engine.¹⁴⁷ For example, a site devoted to "[a]uto and engine refurbishment for classic car buffs and home-based automotive mechanics" might include the following key words: "car repair, engine, classic cars, automobiles, autos, grease monkey, Chevy, Ford, engine block, body work, bondo, Corvair, Corvette."¹⁴⁸ One expert advises, "One way to maximize the usefulness of [such] keywords is to use variations of your keywords. For example, 'autos,' 'automobile,' and 'automotive' will yield similar, but somewhat varying results. Use as many permutations of a keyword as you can."¹⁴⁹

145. See LaChance, *supra* note 51, at 170, 173.

146. *Id.* at 173.

147. See *id.*

148. *Id.*

149. As explained by one commentator, a less than benign use of such technology emerged

a few years ago when companies feared getting lost in the mounting clutter of the Web. Programmers began threading words like "sex" and "nudity" through sites that had nothing to do with the flesh trade—sometimes hiding them in type that matched the color of the page. They also embedded such names as "Star Trek," "Disney," "Mickey Mouse" and "Magic Kingdom" in Web-site coding in hopes that people would stumble onto their sites.

Ann Davis, *'Invisible' Trademarks on the Web Raise Novel Issue of Infringement*, WALL ST. J., Sept. 15, 1997, at B10; see also Quick, *supra* note 51, at B7 (Quick notes a search engine company's statement that "roughly half of the 20,000 or so submissions [of sites to be registered] it receives each day are 'spam'—pages designed to trick people into visiting them.").

In the wake of this spurious tagging, a new class of legal actions has emerged in which companies whose names or products' names are inserted without permission into the meta tags of other sites are bringing suits against those site-owners for unfair competition, dilution, and trademark infringement. See Elgison & Jordan, *supra* note 61, at C7 (discussing the issuance of an order for injunctive relief in one such situation and resolution of a second litigation by consent judgment); Arian Campo-Flores, *Hidden*

One could argue that by including the names of various products or product categories in her Web site's meta tags, the owner is indicating her willingness to be located by users of Web search engines who are interested in finding sites that deal with those products. The owner would in effect be identifying herself as a "merchant" with a special knowledge of those goods,¹⁵⁰ thereby creating an implied warranty of merchantability that is effective unless disclaimed on her site itself.

G. Firm Offers

A significant consequence of qualification as a merchant is that under Article 2, a merchant's signed writing to buy or sell goods "which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months"¹⁵¹ Draft Revised Article 2 and Draft Article 2B each add language to protect the offeror from a response by the offeree that seeks to include such a term applicable to the offer.¹⁵²

Tags Dispute: Playboy v. Calvin Designer Label, AMLAW TECH, Winter 1998, at 32, 33 (discussing a San Francisco federal judge's September 8, 1997 preliminary injunction against "two adult-oriented Web sites from using the words 'Playboy' and 'Playmate' in their domain names and, more significantly, in their hidden code"); Davis, *supra* (noting separate actions of this type involving plaintiffs as diverse as Playboy Enterprises, a pipeline-reconstruction company, an on-line telephone and business directory, and a law firm); Wendy R. Leibowitz, *Firm Sues for Invisible Use of Its Trademark on 'Net*, NAT'L L.J., Sept. 8, 1997, at A7 (discussing a law firm's suit against defendants whose own Web pages included the firm's name in their meta tags, and indicating that as a consequence of this suit a search for the firm's name now retrieves only the law firm's site and articles written by its attorneys).

Similar actions might be brought by companies whose names are used in the meta tags of "rogue" sites that have been "created by angry customers, disgruntled ex-employees, crusading activists and a handful of kooks" attempting to embarrass or discredit these firms. Jennifer Tanaka, *Foiling the Rogues*, NEWSWEEK, Oct. 27, 1997, at 80, 80. Tanaka remarks that "[c]ompanies can try to sue for libel, but so far the more effective weapon may be nabbing sites for trademark infringement." *Id.*

150. This argument would surely fail with respect to, as in some of the instances described by Davis, *supra* note 149, meta tags that had no direct connection with the goods sold on the site.

151. U.C.C. § 2-205 (1996).

152. Draft Revised Article 2 adds to the language of Article 2 the provision that "[a] term of assurance in a record supplied by the offeree to the offeror is ineffective unless the term is conspicuous." U.C.C. § 2-204(a) (Proposed Official Revision July 25 - Aug. 1, 1997). Draft Article 2B adds to the language of Article 2 the provision that "[a] term providing assurance that the offer will be held open that is contained in a standard form supplied by the party receiving the offer is ineffective unless the party making the offer [authenticates the term] [manifests assent to that term]." U.C.C. § 2B-205 (Proposed Official Draft Nov. 1, 1997) (brackets in original). Draft Article 2B also substitutes the term "an authenticated record" for "signed writing" and the term "90 days" for "three months." *Id.*

To avoid the application of the "firm offer" doctrine, the owner of a commercial Web site should take care to indicate the dates on which offers have been made and when each page was last updated. The owner should also specify the dates during which offers displayed on such sites will be held open (e.g., "limited offer, from [date] through [date]"), the conditions on which the offer is made (e.g., "[date] or until we sell out of this product").¹⁵³ In the case of rapidly-changing inventory, the owner should encourage visitors to "reload" or "refresh" their image of the page.¹⁵⁴ Finally, the owner might wish to specify that she will not accept provisions in acceptances or counteroffers that seek to establish that her original offer will be held open for a longer period.

153. Such terms are common on sites devoted to the selling of the "Beanie Babies" collectibles, described *supra* note 9. Such sites include *Beaniepost* (visited Nov. 23, 1997) <<http://www.beaniepost.com/daily.htm>> (offering "daily" specials); *Card Emporium* (visited Nov. 23, 1997) <<http://www.cardemporium.com>> (offering "our weekly Beanie Babies sale page. There will be new sale items each week. Be sure to check back often! Changes are made mid week. November 19th sale items. These prices good till the middle of next week."); *Beanie Babies—HTS Retail—Special Offers* (visited Nov. 23, 1997) <<http://www.homelink.clara.net/beanie/beanie6.htm>> (advertising "This Week's Special Offers 23rd November 1997").

Several sites devoted to the selling of "Beanie Babies" require potential customers to submit their orders by e-mail, subject to confirmation. For instance, the Web site *My Favorite Beanie Baby*. . . (visited Mar. 13, 1998) <<http://www.wscreation.com/beanie>> instructs:

To place an order click on [buy]. Since this is an E-mail based ordering system you must state which beanie baby you want in your email. You will then receive a confirmation that the beanie baby is available with the total cost including shipping and an address of where to send your check or money order. The beanie baby which you requested will be held for you a total of ten days. If your check or money order is not received within this time the beanie baby goes back into stock. If you have special shipping instruction [sic] please include them in your E-mail.

154. The Web sites listed *supra* note 153 commonly remind the visitor to "reload" or "refresh" the page so that he is not seeing an outdated version.

IV. CHECKING OUT: ACCEPTING ON-LINE ORDERS

A. Means of Ordering

Not all commercial sites on the Web accept orders; some exist only to display products or to provide information.¹⁵⁵ Those that do accept orders can employ one or more of several different methods.

1. Off-Line Messages

As one Web site development expert explains, among the technologically simplest methods of accepting orders from visitors to a Web site is to "put instructions on your page for visitors to submit all orders via fax or phone. This is more secure than sending credit cards over the Internet, but not nearly as convenient for your customers."¹⁵⁶ The expert later remarks:

A step up is to provide text that customers can copy, print on their computer's printer, fill out in pen or pencil and mail or fax to you. This is secure and can be simple for your customer to fill out after it's printed, but many nontechnical people have an extremely difficult time printing a Web text file.¹⁵⁷

155. One commentator has observed that "some companies create a virtual store simply for its prestige value as an on-line 'store display.'" YESIL, *supra* note 5, at 36. Yesil compares this "the practice of certain European retailers who create store windows on prestigious streets of major cities, with miniscule shops behind them—the objective isn't to generate significant income, it's to promote an upscale image." *Id.* at 36-37.

General Mills, Inc. recently opened a Web site at <<http://www.bettycrocker.com>> to provide visitors with a new form of customer service. See Stuart Elliott, *Betty Crocker Sets Up House*, N.Y. TIMES, Aug. 11, 1997, at D1. According to one of the company's executives, the site's purpose is "not to push Betty Crocker, not to sell products, but to provide content [such as recipes and personalized weekly menu plans] that offers ideas and solves problems, so people consider the site a valuable resource." *Id.* (quoting General Mills, Inc. executive Cindy Murphy).

156. EMERY, *supra* note 5, at 438.

157. *Id.* at 440. According to two authors of a 1997 book on selling goods through the Internet:

The L.L. Bean site, as of press time, not only emphasizes telephone ordering through a toll-free number. . . , it turns its lack of on-line ordering into a virtue. Expressing its concern over security, it instead provides a toll-free number, along with a cumbersome-to-use downloadable order form suitable for faxing or mailing. Disingenuous or sincere, L.L. Bean avoids the cost of creating a secure transaction environment while sidestepping any negative customer reaction.

LEWIS & LEWIS, *supra* note 32, at 208. L.L. Bean appears to have since gained confidence in the on-line transaction environment; as of November 2, 1997 the company was accepting on-line ordering. See *Submit Order* (visited Nov. 2, 1997) <<http://www.llbean.com/cgi-bin/nph-msrv/exec...mitorder.d2w/report?or->

Both of these options are offered by the Hamilton Books Web site,¹⁵⁸ whose page on "U.S. Order Instructions" provides:

To offer the lowest possible prices we do not offer credit cards. All orders must be mailed to include prepayment. You are welcome to combine titles from this website and our [hard-copy] catalog on one order.

This site is currently under development so we are providing two ways to order at this time.

Option One . . .

You may go to a specific title page [i.e., a page representing a particular book offered for sale] and select "ADD TO ORDER FORM", [sic] this title will be put in your "shopping basket" and shown on your order form. You may view your order form at any time with the "VIEW ORDER FORM" selection on the same page. To submit your order upon completion simply print your order by selecting your browsers [sic] print option while viewing the order form. Currently there is no delete option for items ordered, [sic] just cross out the appropriate title after the order is printed.

Option Two . . .

You may also order by PRINTING THIS PAGE [which itself contains an order form], or on a SEPARATE SHEET OF PAPER, listing quantity, item number, title, and price.

2. E-mail Messages

In another type of ordering procedure, the Web site instructs the visitor to submit orders by sending an e-mail message to a given address. The Web site operator receives and reviews the e-mail, places the order, and can by return e-mail acknowledge the order.¹⁵⁹

der_m=75424&logging_in=>.

158. *Welcome to HamiltonBooks.com!* (visited Oct. 5, 1997) <<http://www.hamiltonbook.com>>. In an interesting example of the conjunction of Web-based and off-line commerce, the site's home page indicates that "[t]his site is an extension of our [hard-copy] mailorder catalogs. It contains titles we no longer carry in our main catalog and many titles no longer offered in any of our catalogs." It remains to be seen whether the site will ultimately include the entire contents of hard-copy catalogs sent contemporaneously through the mail.

159. COOK & SELLERS, *supra* note 5, at 284. A sample of such an advertisement is:

For [insert product name], please send e-mail to [insert seller's e-mail address] with your name, address, and phone number. Either include your credit card number and expiration date or postal mail a check or money order in U.S. funds to: [insert seller's postal address]. You will receive [insert product name] within seven days of your funds' clearing.

Adapted from *id.*

This procedure, though simple for the seller and available even to those site owners with the most basic level of electronic ability and Internet access, has nonetheless been criticized as "highly primitive" and as prone to discourage visitors.¹⁶⁰

3. *Electronic Order Forms*

A more standardized version of taking an on-line order involves an electronic order form. Like the designs of a home page and of a site itself, the layout and substance of the electronic order form carefully balance the need to provide information to the customer with the need to make the process easy for him to negotiate. Especially in the order form context, these two considerations may reinforce each other.¹⁶¹ As one guide advises, "[a] customer who is frustrated by an order form or uncertain about how it works could easily bail out of the transaction and seek out your competition. But if you anticipate customer problems and offer reassurance during the ordering process, you'll see the customer through to a successful sale."¹⁶²

160. *Id.* at 286.

161. One commentator recommends:

As soon as you add that extra step—writing down your address or phone number, sending out a check or dialing the phone—you give [customers] another chance to reevaluate their decision to buy. When prospective clients click on your 'Order Now!' button, they'd better be able to do just that.

DOWLING, JR. ET AL., *supra* note 6, at 368.

162. LEVINSON & RUBIN, *supra* note 32, at 60. Levinson and Rubin offer the following visitor-friendly language as a sample of an on-line order form:

Welcome to the Acme Manufacturing order page. To use this form, type the correct information into the entry blanks below. You can press the Tab key to move from one blank to the next, or simply click in the blank where you want to enter information and then begin typing. No information is transmitted until you click the Send Order button at the bottom of the form, so you can correct any mistakes at any time before you send in the form. If you decide not to order, you can simply go to another Web page without sending it, or click the Clear button at the bottom of the form to wipe out any information you entered in the blanks.

Once you send the form, we'll receive it and send you an order confirmation via e-mail so you'll know your order is being processed. Usually we process orders the same day we receive them and ship them out the following day. If an item is out of stock or shipping will otherwise be delayed, we'll let you know.

If you don't see order entry blanks in the form below, you won't be able to order online. Instead, you can phone your order to us at [phone number] anytime between [business hours of opening and closing] Eastern Standard time, Monday through Saturday, or you can display our fax order form by clicking the Fax Form button. Once the fax order form is on your screen, choose the Print command from your File menu to print it out, and then fill it in and fax it to us at [fax number].

Much like a paper order form, the form displayed on-screen directs the visitor to enter his name, phone number, address, method of payment, credit card number (if appropriate), method of shipping, and order in blank spaces, or "windows."¹⁶³ While the visitor's personal data are often typed in, the seller may require the visitor to select among standardized choices, such as method of payment, shipping mode, and color of the product, by clicking the mouse to indicate the appropriate options on standardized menus.¹⁶⁴ To speed this portion of the transaction, some sites allow a visitor to "register" by completing a form with his personal information. The visitor might then be issued a password or personal identification number. When the visitor visits the

If you have any questions about our ordering process or using this form, please call us at the 800 number above and we'll be happy to help.

Id. at 61.

Many commentators have discussed the need for owners to make sure that their sites contain certain minimum information. One expert on Web pages noted that:

I've done a little shopping on the Web. More often I've been tempted to buy and have walked away because the Web site omitted very basic information. Direct marketers on TV know what buyers need to feel safe: They print those things on the final "call now" screen: item, price, shipping and handling, money-back guarantee, delivery time, address, and phone number. They know that if they satisfy these basics, they may have a sale. Every piece of comfort information they omit costs them money.

Shopping on the Net, INTERNET WORLD, Mar. 1997, 104, 104; see also Heidi V. Anderson, *Creating A Small-Business Web Site*, in PC NOVICE GUIDE TO BUILDING WEB SITES, at 106, 107-08 (advising small businesses to reassure visitors to their sites that it is extremely important to provide as much information as possible, including their address, phone number, and some background on their company, such as how long it has been around, what it does, what its mission is); Strom, *supra* note 46, at 118 ("Make sure your site has contact information that is accurate and complete. Many Web sites lack basics such as postal address, phone and fax numbers, and email address. And don't hide this stuff five levels deep in a back corner. Make it easy to find."); Yudkin, *supra* note 9, at 155 (recommending that on-line marketers offer to send additional information by mail or fax to reassure prospects by the quality of these communications that the marketer is not a twelve-year-old running a computer prank).

163. See COOK & SELLERS, *supra* note 5, at 287-90 (describing such windows).

164. *Id.* at 291-94 (discussing on-screen display of visitor's options through "radio buttons," which allow only one of each series of options (e.g., color) to be chosen, or through "select boxes," which allow either single or multiple responses (e.g., of product catalogs that the visitor would like to search through); LEMAY ET AL., *supra* note 47, at 284-85 (recommending the use of select lists or radio-button lists for visitors to select such payment options as credit card, check, phoning or faxing payment information to the seller, mailing check or credit card information to seller, using digital cash, charging an account maintained by the customer at an on-line financial company, and a merchant's accepting an order and sending the customer a bill for payment).

site again to order, he can easily access his pre-registered information.¹⁶⁵

The visitor's order can also be assembled, as at the Hamilton Books site, through virtual "shopping carts" or "shopping baskets," a feature that allows the visitor to browse through the site's various menus or submenus and order products by clicking on their images, names, or descriptions. At any time the visitor can review the contents of his virtual "shopping cart," which contains a list of the items that he has so far selected and their prices. The visitor can also "deselect," or remove, any or all of the items.¹⁶⁶ After the customer indicates the state in

165. See YESIL, *supra* note 5, at 98 ("To complete a sale, the customer need only type in the PIN number, and all the relevant information, such as name, address, and credit card number, are automatically transferred to the vendor.")

One site that offers this option is *Virtual Vineyards* (visited June 21, 1997) <<http://www.virtualvin.com>>. Its "How to Order" page allows the visitor to create a "personal account" to "simplify ordering":

It doesn't cost anything and there are many benefits. If you sign in to your account before you place your order, your billing and shipping information will automatically appear on the order form and you can keep a credit card on file with us to expedite ordering. You will also be able to review your purchase history and enter your own tasting notes for future reference.

166. See YESIL, *supra* note 5, at 325, 346-47 (discussing shopping basket services available through Netscape Merchant System and on Microsoft Merchant System, respectively); LEMAY ET AL., *supra* note 47, at 267-82 (reviewing technical details of the operation of "Web Shopping Carts").

Visitors to the Virtual Vineyards site are advised on the following procedure for "Selecting What You Want":

If there is a small check-box next to an item or items that you are interested in, mark the boxes and click on the REMEMBER CHECKED ITEMS button on the page. If there is no check-box simply click on the REMEMBER THIS ITEM button. You can browse both the wine and food shops as much as you like before you place your order; our software will remember all of the items that you have chosen. When you are ready to order, select the Order Form link from the top or bottom of any page.

... ..

Once you have selected a shipping destination and delivery method, you may want to calculate your total by selecting the CALCULATE TOTAL button on the bottom of the first page of the order form. You will see the price of your order including any tax and shipping. If you are happy with your order, you can continue by selecting a payment method. If you want to revise your order, you may change the quantities and recalculate until you have finalized your order.

Virtual Vineyards (visited June 21, 1997) <<http://www.virtualvin.com>>.

Similarly, the Barnes & Noble site advises in the "Ordering" section of its "Help" page,

There are a number of ways to add books to your Shopping Cart. Click on any linked book title and you will go to a description page about that book. From this page you can add the book to the cart by clicking the large button Add Book To Your Cart. When you perform an Author, Title, Category, or Keyword search, you will be presented with a list of books that match your search. Check the box next to each title that interests you. When you have

which he lives and his preferred method of shipping, the shopping cart program "tallies the subtotal, determines shipping and tax charges, and then calculates the grand total. The customer is sent a confirmation notice showing the items ordered, the shipping information, and the costs."¹⁶⁷ A virtual shopping cart in a virtual mall can thus allow visitors to "shop with ease by choosing products from each store as they go along, needing to check out only once at the very end."¹⁶⁸

After the visitor has completed the form and clicked on the SUBMIT button, the information is sent over the Internet to the seller's World Wide Web server. That server invokes a program that converts the contents of the form into a more accessible format and sends the form by e-mail to the seller. It can also send an e-mail acknowledgment to the buyer.¹⁶⁹ To the seller, the advantages of this method over those

finished shopping on the search results page, click the Add Selected Books To Cart button. The books you checked will be added to your Shopping Cart, and you will see a list of all the items you selected. . . .

To change the quantity of an item or remove it from your Shopping Cart, click on the Shopping Cart icon on the navigation bar. You will see all the items in your cart. After you modify the quantity or remove an item click either Continue Shopping or Checkout. These buttons will automatically update your Shopping Cart to reflect any changes you made.

. . . .

Placing books in your Shopping Cart does not obligate you to buy them. To remove one or more books from your Shopping Cart, click on the check mark beside the title and then click Checkout or Continue Shopping at the center of the page.

BarnesandNoble (visited Oct. 26, 1997) <<http://www.barnesandnoble.com>>.

167. LEMAY ET AL., *supra* note 47, at 297.

168. *Id.* at 267.

169. See COOK & SELLERS, *supra* note 5, at 297 (describing this process). The Virtual Vineyards "How To Order" page advises visitors that:

If you entered an email address in the billing information section of the order form, you will receive a confirmation by email that your order was received. After the package has been delivered, you will receive another email confirmation telling you when the package was delivered and who signed for it.

Virtual Vineyards (visited Oct. 28, 1997) <<http://www.virtualvin.com>>.

A similar page on Amazon.com, entitled "I've found the item. How do I order it?" notes that once the buyer has submitted an order by clicking on the button entitled "Press this button to submit your order," "the next screen will thank you for your order and provide a link to return to the home page. At that moment, e-mail is automatically sent to you, describing your order in detail." *Welcome to Amazon.com* (visited Oct. 26, 1997) <<http://www.amazon.com>>. Barnes and Noble's site will also confirm a customer's order via e-mail. See *BarnesandNoble* (visited Oct. 26, 1997) <<http://www.barnesandnoble.com>>.

previously examined are the ease of changing the form when necessary and the standardization of the orders.¹⁷⁰

V. CONTRACT FORMATION ON THE WEB

When a visitor, once having located the products that he wishes to purchase, communicates that fact to the Web site's owner, has a contract been formed? If so, what are its terms? These issues involve not only the ability of the parties to be bound by electronic text, but also the degree to which the contract terms emerge from such sources as their e-mail messages, the text of the Web site's pages, the default provisions of the U.C.C., the parties' course of dealing and the relevant usages of trade, and whether either or both of the parties qualifies as a "merchant."¹⁷¹

A. *Manner of Forming a Contract*

1. *Article 2: Any Manner Sufficient To Show Agreement*

Article 2 of the U.C.C. provides that "[a] contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."¹⁷² Moreover, "[u]nless otherwise unambiguously indicated by the language or circumstances . . . an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances."¹⁷³ To enable the rule inviting

One expert specifically recommends that site owners "[s]end confirmations from an email address used for confirmations and nothing else. If an order confirmation returns to you as bounced mail, you may have received a fraudulent order. . . . You need to determine why it returned before you ship your product." EMERY, *supra* note 5, at 446.

170. COOK & SELLERS, *supra* note 5, at 298-99 (examining these advantages).

171. With regard to the implications of one or both parties' being a merchant, one court noted:

The Code assumes that transactions between professionals in a given field require special and clear rules which may not apply to a casual or inexperienced seller or buyer. Because of the reasonable expectation of business knowledge, the duty owed by the merchant is higher than that of the nonmerchant. Thus, the same course of conduct which might establish a contract between merchants might be insufficient to evidence a consumer contract.

Preston Farm & Ranch Supply, Inc. v. Bio-Zyme Enter., 625 S.W.2d 295, 299 (Tex. 1981) (citations omitted) (determining that a course of conduct between merchants, including an exchange of invoices and a long course of dealing, had given rise to an agreement to pay interest).

172. U.C.C. § 2-204(1) (1996).

173. U.C.C. § 2-206(1)(a) (1996).

acceptance in any manner to remain flexible and to allow its applicability to be enlarged as new media of communication develop, Article 2 specifically rejected such "[f]ormer technical rules" of acceptance as the rule that telegraphed offers must be accepted by telegraphed acceptance.¹⁷⁴ Under this standard, it would appear that a buyer and seller could form a binding contract through the buyer's transmission of e-mail to the seller's Web site, particularly if the Web site invited this manner of communication.

a. Owner's Offer to Sell, or Visitor's Offer to Buy?

Notwithstanding the liberal tenor of U.C.C. §§ 2-204(1) and 2-206(1)(a), it should not be presumed that a Web site advertising goods is necessarily conveying the site owner's *offer to sell* those goods. Such a Web site would most likely be seen by a court as offering the visitor the opportunity to make a contract—that is, *inviting the customer to offer to buy the goods advertised*, much as would a traditional printed catalog, circular, brochure, or advertisement.¹⁷⁵ In this situation, the owner

174. U.C.C. § 2-206 cmt. 1 (1996). Courts have applied this standard to allow facsimile transmissions to replace original writings. *See, e.g.,* Pace Communications, Inc. v. Moonlight Design, Inc., 31 F.3d 587, 592 (7th Cir. 1994) (finding that facsimile transmissions exchanged between the parties constituted an offer and a counter-offer); AFP Imaging Corp. v. Philips Medizin Systeme Unternehmensbereich der Philips GmbH, 1994 WL 65210, at *5 (S.D.N.Y. 1994) (evaluating the content of facsimile transmissions exchanged between parties in determining that a contract had not been formed); Computer Sales Int'l, Inc. v. Family Guardian Life Ins. Co., 860 S.W.2d 826, 831 (Mo. Ct. App. 1993) (finding that although the agreement called for written notice to be sent by registered or certified mail, a facsimile transmission was only a "slight" deviation from this method and "served the purpose of notifying" the other party).

175. *See, e.g.,* Kiley v. First Nat'l Bank of Md., 649 A.2d 1145, 1153 (Md. Ct. Spec. App. 1994) (Newspaper advertisements, catalogues, placard circulars, handbills, and similar "advertisements are understood to be mere requests to consider and examine and negotiate; and no one can reasonably regard them otherwise unless the circumstances are exceptional and the words used are very plain and clear."); Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 539 (9th Cir. 1983) ("Trade circulars, catalogs and advertisements are uniformly regarded as mere preliminary invitations which create no power of acceptance in the recipient."); W.H. Barber Co. v. McNamara-Vivart Contracting Co., Inc., 293 N.W.2d 351, 355 (Minn. 1979) ("As a matter of law, plaintiff's price quotation letters . . . to each defendant were invitations to enter into a bargain rather than a binding offer. An examination of the letters indicates plaintiff was simply quoting prices for the applicable kind of asphalt products."); Osage Homestead, Inc. v. Sutphin, 657 S.W.2d 346 (Mo. Ct. App. 1983) (advertisement did not constitute an offer); Interstate Indus., Inc. v. Barclay Indus., Inc., 540 F.2d 868, 873 (7th Cir. 1976) (holding that a letter containing a price quotation advising a party of the availability of

would retain the ability to reject the potential customer's offer to buy. Unless otherwise unambiguously indicated, the visitor's order or other offer to buy goods will then be construed as "inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods."¹⁷⁶

The Web site *may* be construed as *offering to sell* the goods, and thus as inviting the visitor to accept the owner's offer of sale, if its language leaves nothing to be negotiated and calls for acceptance by an act.¹⁷⁷

fiberglass panels, and specifically referring to its contents as a "price quotation," was not an offer, because it contained no language that indicated that an offer was being made and failed to mention the quantity, the time of delivery, or the payment terms); *Cannavino & Shea, Inc. v. Water Works Supply Corp.*, 280 N.E.2d 147, 149 (Mass. 1972) (holding that a price quotation furnished to general contractors by a supplier of materials was not an offer but instead a request or suggestion that an offer be made to the supplier); *Thos. J. Sheehan v. Crane Co.*, 418 F.2d 642, 645 (8th Cir. 1969) (holding that prices and price factors quoted by suppliers to contractors for the purposes of aiding contractors to make bid estimates, without more specific terms, did not obligate the supplier to comply with any purchase order upon whatever terms and conditions the contractor may have chosen to offer at some undetermined date in the future); *Montgomery Ward & Co. v. Johnson*, 95 N.E. 290, 290-91 (Mass. 1911) (holding that a firearms dealer's list of prices and terms and conditions of sale was not a general offer to sell, but rather an invitation that the dealer would receive proposals for sales on the terms and conditions stated, which she might accept or reject at her option); cf. EDWARD A. CAVAZOS & GAVINO MORIN, *CYBERSPACE AND THE LAW: YOUR RIGHTS AND DUTIES IN THE ON-LINE WORLD* 35 (1994) (predicting that a general post in a newsgroup or message base that indicates that an item is for sale "is likely to be construed not as an offer, but rather as an invitation for offers"); Elizabeth S. Perdue, *Creating Contracts Online*, in *ONLINE LAW* 77, 82 (Thomas J. Smedinghoff ed., 1996) ("[A] Web site . . . that displays product information should be treated like a general advertisement. Once the buyer transmits an order, it must be accepted before there will be a contract."); Henry H. Perritt, Jr., *Dispute Resolution in Electronic Network Communities*, 38 VILL. L. REV. 349, 376 (1993) ("Considering the underlying policy concerns, it is better to conclude that the contract for [on-line] network [providers'] services is formed, not when the network user makes a request for services, but when the network accepts the request for service The commencement of service by the network is an acceptance of the offer on those terms.").

176. U.C.C. § 2-206(1)(b) (1996). This provision adds that "a shipment of non-conforming goods does not constitute an acceptance [by the seller] if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer." *Id.*

177. According to one court:

[W]here the offer is clear, definite, and explicit, and leaves nothing open for negotiation, it constitutes an offer, acceptance of which will complete the contract. . . .

Whether in any individual instance a newspaper advertisement is an offer rather than an invitation to make an offer depends on the legal intention of the parties and the surrounding circumstances. . . .

. . . [W]hile an advertiser has the right at any time before acceptance to modify his offer, he does not have the right, after acceptance, to impose new or arbitrary conditions not contained in the published offer.

Lefkowitz v. Great Minneapolis Surplus Store, Inc., 86 N.W.2d 689, 691-92 (Minn. 1957); see also *Litton Microwave Cooking Prod. v. Leviton Mfg. Co., Inc.*, 15 F.3d 790,

Such acts might include the submission of an order by phone, fax, e-mail, order form, or "shopping cart," or even through the submission of payment in a specified form (possibly including digital cash) to the owner.¹⁷⁸

The site owner thus should take care to clarify on the site itself whether the buyer's response will be construed as an offer to buy or as an acceptance of the seller's offer to sell.¹⁷⁹ One way in which the owner could accomplish this might be to specify that one or more of the terms—such as the terms of delivery requested by the visitor or the ability of the visitor to choose the quantities of the items that he wishes to buy—will remain subject to the owner's approval or to the availability of the goods. Another way for the owner to indicate that she is inviting offers to buy rather than making offers to sell would be to indicate in simple language at the beginning of the order form that the visitor's submission of a request and/or payment for the goods advertised will constitute only the visitor's offer to buy, which remains subject to the seller's approval. The form should also state that such a submission by the visitor will indicate his agreement to this term.

794-95 (8th Cir. 1994) (holding that a price quote or catalog may constitute an offer where it is clear, definite, and explicit and leaves nothing open for negotiation, including the terms of delivery and the ability of the purchaser to pick and choose quantities of the items that it wants to buy); *Bergquist Co. v. Sunroc Corp.*, 777 F. Supp. 1236, 1248 (E.D. Pa. 1991) (observing that whether a price quotation amounts to an offer is a question of fact, depending on the parties' acts, their expressed intent, and the circumstances surrounding each transaction); *Ford Motor Credit Co. v. Russell*, 519 N.W.2d 460, 463 (Minn. Ct. App. 1994) (holding that even if goods are advertised for sale at a certain price, the advertisement may be not an offer but might be construed as merely an invitation to bargain); *Harris v. Time, Inc.*, 237 Cal. Rptr. 584, 587 (Cal. Ct. App. 1987) (holding that an advertisement can constitute an offer and form the basis of a unilateral contract, if it calls for the performance of a specific act without further communication and leaves nothing for further negotiation).

178. One of the best-known sites that invites visitors to accept its offers of sale is Amazon Books, located at *Welcome to Amazon.com* (visited Oct. 28, 1997) <<http://www.amazon.com>>, which boasts a wide range of books in print available for on-line order. Another such site is CDNow, located at *CD Now* (visited July 28, 1997) <<http://www.cdnow.com>>, which offers many different compact disks for sale.

179. One commentator has noted an example of a seller's conditional offer to sell: If you come across an out-of-print book in your wanderings at Amazon.com, you can "buy" it, which tells Amazon.com to keep an eye out for a copy. If the store gets hold of one, it will contact you with conditions and a price, and then you can decide whether or not you really want it. Eric Berlin, *Battle for the Bibliophile*, INTERNET SHOPPER, Fall 1997, at 88, 92.

2. Draft Revised Article 2 and Draft Article 2B: Any Manner, Including Electronic Agents

Both Draft Revised Article 2 and Draft Article 2B provide that "[a] contract may be made in any manner sufficient to show agreement, including by offer and acceptance, conduct of both parties, or the operations of an electronic agent which recognizes the existence of a contract."¹⁸⁰ Both drafts further provide that an offer to make a contract invites acceptance in any manner and by any medium reasonable under the circumstances.¹⁸¹

180. U.C.C. § 2-203(a) (Proposed Official Partial Redraft Dec. 1997); U.C.C. § 2B-202(a) (Proposed Official Draft Nov. 1, 1997) (Note that § 2B-202(a) version speaks of "conduct by both parties" and "agent that recognizes the existence.").

181. U.C.C. § 2-205(a)(1) (Official Revision July 25-Aug. 1, 1997); U.C.C. § 2B-203(a)(1) (Proposed Official Draft Nov. 1, 1997). Notably, both Draft Revised Article 2 and Draft Article 2B reject the "mail box rule." As explained by one commentator,

The mailbox rule, a chestnut rule of contract law, holds that an acceptance to an offer is effective upon dispatch by the offeree (for instance, by placing a letter in a mailbox), rather than upon receipt by the offeror, regardless of whether it is ever received by the offeror, and regardless of whether the offeree receives a revocation from the offeror while the acceptance is in transit.

Paul Fasciano, *Internet Electronic Mail: A Last Bastion for the Mailbox Rule*, 25 HOFSTRA L. REV. 971, 972 (1997); see also U.C.C. § 1-201(26) (1996) ("A person 'notifies' or 'gives' a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it."); *Id.* § 1-201(38) ("Send" in connection with any writing or notice means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed . . .").

Fasciano recommends that "the emerging trend to discard the mailbox rule in the context of substantially instantaneous two-way methods of communication should not be applied to Internet e-mail. Rather, acceptances transmitted via Internet e-mail should receive the same treatment as postal acceptances, and should be effective upon dispatch," Fasciano, *supra*, at 973-74. However, Draft Article 2B provides that "[i]f an electronic message initiated by a party or an electronic agent evokes an electronic message in response and the messages reflect an intent to be bound, a contract exists . . . when the response signifying acceptance is received." U.C.C. § 2B-119(a)(1) (Proposed Official Draft Nov. 1, 1997) (emphasis added). A contract also exists "if the response consists of electronically furnishing the requested information or notice of access to information, when the information or notice is received unless the originating message prohibited that form of response." U.C.C. § 2B-119(a)(2) (Proposed Official Draft Nov. 1, 1997). More generally, an electronic message is effective when received, even if no individual is aware of its receipt, unless under Draft § 2B-120(1) the sender of the message has indicated that his message was conditional on receipt of an acknowledgment. U.C.C. § 2B-119(b) (Proposed Official Draft Nov. 1, 1997).

The Reporter's Notes to Draft § 2B-119 justify the new rule by asserting that in the context of electronic commerce "[a] contract principle that requires human assent would inject what might often be an inefficient and error prone element in a modern format." U.C.C. § 2B-119 rpt. note 2 (Proposed Official Draft Nov. 1, 1997). The Note

Unlike current Article 2,¹⁸² therefore, both Draft Revised Article 2 and Draft Article 2B explicitly countenance the formation of a contract by the operations of one or more electronic agents that confirm the existence of a contract or that signify agreement. An "electronic agent" is defined by both statutes as "a computer program or other electronic or automated means used, selected, or programmed by a party to initiate or respond to electronic messages or performances in whole or in part without review by an individual."¹⁸³ A new species of transaction, the

acknowledges, however, that the new rule "needs further development and coordination with the various other affected sections" of the U.C.C. *Id.*

182. See U.C.C. § 2-204(1) (1996).

183. U.C.C. § 2B-102(a)(16) (Proposed Official Draft Nov. 1, 1997); U.C.C. § 2-102(12) (Proposed Official Revision July 25 - Aug. 1, 1997). The Reporter's Notes to Draft § 2B-102 clarify:

An electronic agent is a program designed to act on behalf of the party without the need for human review. As a general rule, a party adopting use of such agents is bound by (attributable for) their performance and messages. The term plays an important role in shaping responsibilities and how parties comply with various conditions, such as an obligation to make terms conspicuous. Courts may ultimately conclude that an electronic agent is equivalent in all respects to a human agent, but this Draft does not go so far, making specific provisions relating to electronic agents when needed. In this respect, the Draft is consistent with Article 4A as well as with modern practice. The accountability of a party for actions of a computer program may hinge on different issues than accountability for a human agent.

U.C.C. § 2B-102 rptr. note 10 (Proposed Official Draft Nov. 1, 1997).

"Intelligent agents" have been defined by commentators as "software programs that perform interactive tasks personally tailored to a user's wants and needs. With a degree of independence or autonomy, the agent can perform reactive and proactive tasks without humans or other agents telling it what to do every step of the way." LESLIE L. LESNICK WITH RALPH E. MOORE, CREATING COOL INTELLIGENT AGENTS FOR THE NET 9 (1997). Lesnick and Moore described the role of electronic agents in this manner:

Buyer agents can search the Net for products matching the criteria set by the user. After the buyer agent collects the information, it can review and make recommendations for the user. Venturesome users may even let the agent place orders. Seller agents can decide what information to provide in response to a request. For example, a seller agent could give different price quotes to its preferred customers.

Id. at 18; see also FAH-CHUN CHEONG, INTERNET AGENTS: SPIDERS, WANDERERS, BROKERS AND 'BOTS 206 (1996) ("Examples of online tasks that could be automated using agents include the ordering of parts from an online catalog, the sale of information over the Internet, as well as the reservation and purchase of opera tickets on the Web."). A thorough and technical discussion of agent technology, especially with regard to issues of encryption and electronic cash, is provided by PETER WAYNER, AGENTS UNLEASHED: A PUBLIC DOMAIN LOOK AT AGENT TECHNOLOGY (1995).

"Bots" can be described in short as "agents with attitude." In his thought-provoking and entertaining look at "Bots," Andrew Leonard defines a "bot" as "a *supposedly*

"electronic transaction," is one "formed by electronic messages in which the messages of one or both parties will not be reviewed by an individual as an ordinary step in forming the contract."¹⁸⁴ This

intelligent software program that is *autonomous*, is endowed with *personality*, and usually, but not always, performs a *service*." LEONARD, *supra* note 30, at 10. Although noting that "[t]rue botness makes [an agent] more approachable, more entertaining, more user-friendly—drastically important considerations for [success in] the consumer marketplace," *id.* at 11, Leonard later envisions the rise of bots who are "[a]gents that are greedy, that only share information when they have to, that know when to lie and when to cheat" in order to negotiate effectively. *Id.* at 148.

Agents may be used for comparison shopping, or in conjunction with "collaborative filtering" techniques that identify a user's preferences by asking preliminary questions of the user and comparing his answers to those supplied by a larger database of respondents. See Elizabeth Weise, *Turning the Net Into Your Personal Shopping Valet*, USA TODAY, Nov. 25, 1997, at 4D ("[S]uch techniques make possible a future in which the Net goes from being the disorganized back room of a library to a trusted personal secretary."); *Firefly* (visited Oct. 4, 1997) <<http://www.firefly.com>> (offering to recommend entertainment products based on comparison of visitors' consumer profile with those of other visitors); Clinton Wilder & Gregory Dalton, *The World Wide Watch*, INFO. WK., Oct. 13, 1997, at 54, 58 (observing that Firefly, Inc. "no longer refers to its technology as an agent, preferring instead the phrase 'collaborative filtering'").

An experiment in the Fall of 1996 with agent-based electronic commerce "raised some of the familiar and troubling integrity issues surrounding agents: Are you responsible for your agent's purchases? How can you trust an agent? And how do you keep your agent abreast of your offline transactions?" Marguerite Holloway, *Pattie*, WIRED, Dec. 1997, at 236, 292. Dr. Pattie Maes of the MIT Media Lab, the founder of Firefly, Inc., contemplating a resolution of such problems, "foresees the development of reputation servers that would automatically verify the credibility of an agent and help earn the public's trust in the new and generally unfamiliar technology." *Id.* Such reputation servers might bring the same sense of security as do certification authorities, which are used to authenticate digital signatures. See Jon Pepper, *Can You Trust Digital Certificates?*, INFO. WK., Sept. 8, 1997, at 48, 48 (describing such certificates as "the Web version of an old-fashioned letter of credit and letter of introduction rolled into one"). Further information on the MIT Media Lab's agent-based projects is available at *MIT Media Lab: Software Agents Group: Projects* (visited Feb. 13, 1998) <<http://agents.www.media.mit.edu/groups/agents/research.html>>.

184. U.C.C. § 2B-102(a)(18) (Proposed Official Draft Nov. 1, 1997); U.C.C. § 2-102(15) (Proposed Official Partial Redraft Dec. 1997). An "electronic transaction" can result in several different ways in the formation of a contract. Once such way is by "the interaction of two electronic agents. . . if the interaction results in both agents each engaging in operations that signify agreement, such as by engaging in performance of the contract, ordering or instructing performance, accepting performance, or making a record of the existence of a contract." U.C.C. § 2B-204(a)(1) (Proposed Official Draft Nov. 1, 1997). A contract can also be formed by

the interaction of an electronic agent and an individual . . . if [the] individual has reason to know that the individual is dealing with an electronic agent and the individual takes actions she should know will cause the agent to perform or to permit future use, or that are clearly indicated as constituting acceptance regardless of other contemporaneous expressions by the individual to which the electronic agent cannot react.

Id. § 2B-204(a)(2).

The Reporter's Notes to this section elaborate that

category would appear to include not only EDI transactions formed by computers acting pursuant to protocols arranged by their respective owners, but also transactions created when a pre-programmed Web site accepts the offer of a customer or of a customer's electronic agent to buy.¹⁸⁵

even if the agents "negotiate", they are acting within parameters set by their principals and, if an "agreement" occurs within those parameters signified by performance, ordering performance, or instructing performance to occur, that suffices. The terms of the contract would be determined as indicated, allowing for prior agreement, terms reflecting "consensus" of the two agents, and default rules. Terms in one agent's system that are not capable of being reacted to by the other are not part of the contract.

Id. § 2B-204 rptr. note 2.

185. Although it focuses primarily on the treatment of EDI-related computers as "agents," the analysis of one recent commentary can be applied as well to Web commerce. See John P. Fischer, Note, *Computers as Agents: A Proposed Approach to Revised U.C.C. Article 2*, 72 IND. L.J. 545, 546 (1997) ("[T]he provisions chosen by the drafters of the revised Article 2 reach the same result, whether intentionally or not, as application of the long-standing legal principles of writing, signature, and agency to electronic contracting would reach.")

Fischer asserts that "the accuracy of computers, and their ability to follow directions precisely, makes them arguably better suited to the role of agent, in the limited circumstances posited here, than humans." *Id.* at 558. Moreover, "[t]he kind of authority a computer agent has to act on behalf of its principal most closely resembles actual authority." *Id.* at 560. To the extent that electronic agents follow literally the programming of their "principals," the typical problems of apparent authority are indeed avoided.

The Restatement (Second) of Agency provides that actual "authority to do an act can be created by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account." RESTATEMENT (SECOND) OF AGENCY § 26 (1957). Although there is no question of an electronic agent's "belief," it seems clear that, as Fischer suggests, the content of the agent's programming invests that agent with actual authority to undertake the programmed actions.

Yet Draft Article 2B also appears to support the concept of an agent's apparent authority, as defined by the Restatement (Second) of Agency. The Restatement provides:

[A]pparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.

Id. § 27. "Any other conduct" might include the principal's programming and deployment of an electronic agent: Draft Article 2B indicates that "[o]perations of an electronic agent constitute the authentication or manifestation of assent of a party if a party designed, programmed, or selected the electronic agent for the purpose of achieving results of that type." U.C.C. § 2B-118(b) (Proposed Official Draft Nov. 1, 1997). Moreover:

B. Statute of Frauds

Article 2's Statute of Frauds provision, the direct descendant of seventeenth-century English law stating that certain contracts for the sale of goods would not be enforced by the courts unless the contracts were in writing, attempts not only to encourage the parties to reduce their agreement to writing but to prevent the introduction of perjured testimony in litigation.¹⁸⁶ Central to the application of this doctrine in

[A]n electronic authentication, message, record, or performance is attributable to a party if . . . it was in fact the action of . . . the party's electronic agent [or] the other party, in good faith and in compliance with an attribution procedure for identifying a party concluded that it was the action of . . . the party's electronic agent.

Id. § 2B-116(a)(1)-(2).

Ultimately, however, in this context agency concerns may be trumped by "presumptions and risk allocation built directly on concepts of reasonable care and on following agreed to procedures." Raymond T. Nimmer & Patricia Krauthouse, *Electronic Commerce: New Paradigms in Information Law*, 31 IDAHO L. REV. 937, 947 (1995). According to Nimmer and Krauthouse:

[E]lectronic systems require a contracting model that employs a paradigm independent of hypothetical human choices and artificial human assent to specific agreements. . . .

. . . [W]e ask not whether the parties agreed to a particular contract, but who bears the risk of loss for particular types of errors. We answer that question by reference to the electronic system itself, including consideration of available electronic security devices, negligent use of systems, and other loss allocation principles.

Id. at 949.

This is certainly true of the UCC's Article 4A, which governs the electronic transfers of very large monetary amounts among banks. The Article's drafters made "[a] deliberate decision . . . to use precise and detailed rules to assign responsibility, define behavioral norms, allocate risks and establish limits on liability, rather than to rely on broadly stated, flexible principles." U.C.C. § 4A-102 official cmt. (1990). The drafters also indicated that "a critical consideration was that the various parties to fund transfers need to be able to predict risk with certainty, to insure against risk, to adjust operational and security procedures, and to price funds transfer services accordingly." *Id.*; see also Thomas C. Baxter, Jr., *The UCC Thrives In the Law of Commercial Payment*, 28 LOY. L.A. L. REV. 113, 118 (1994) ("The liability imposed by Article 4A is purposeful. It is imposed to give a real incentive to the receiving bank to employ prudential devices . . . that will control credit exposure."); Walter A. Effross, *Mechanisms, Mistakes, and Molasses: The Emerging Caselaw of Article 4A*, 50 CONSUMER FIN. L. Q. REP. 251 (summarizing cases).

186. See JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* 66-67 (3d ed. 1988) (discussing the history and purpose of the statute of frauds).

cyberspace¹⁸⁷ is the characterization of electronic text, whether on a Web page or in an e-mail message, as a "writing" or "record."

1. Article 2

With certain exceptions, Article 2 provides that "a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker."¹⁸⁸ That is, any party that has reduced elements of the contract to writing cannot deny that the contract has been made.¹⁸⁹

A "writing" is broadly defined as including "printing, typewriting or any other intentional reduction to tangible form."¹⁹⁰ "Signed" is defined equally liberally, to include "any symbol executed or adopted by a party with present intention to authenticate a writing."¹⁹¹ The drafters were not particular about the nature of the "writing," noting that "[i]t may be written in lead pencil on a scratch pad."¹⁹²

187. Although the writing requirement has been attacked since the inception of the statute of frauds, *see id.*, and was the subject of dispute among the members of the Revised Article 2 Drafting Committee, *see* U.C.C. § 2-201 note 1 (Proposed Official Partial Redraft Dec. 1997), it has been incorporated into both Draft Revised Article 2 and Draft Article 2B. The drafters of the latter statute recognized that this doctrine has been "controversial" and that "[n]either British contract law nor the Convention on International Sales of Goods . . . require a record" for the contract to be enforceable. U.C.C. § 2B-201 rptr. note 1 (Proposed Official Draft Nov. 1, 1997). Nevertheless, according to the drafters, "the need for statute of frauds protection is greater in information contracts than in the sale of goods . . . because of the intangible character of the subject matter, the threat of infringement, and the split interests involved in [such] a license . . ." *Id.*

188. U.C.C. § 2-201(a) (1996). The writing does not have to have been communicated or delivered to the other party, but must only have been made by the party against whom enforcement is sought. U.C.C. § 2-201 cmt. 6 (1996).

189. "Prior to a dispute no one can determine which party's signing of the memorandum may be necessary but from the time of contracting each party should be aware that to him it is signing by the other which is important." U.C.C. § 2-201 cmt. 6 (1996).

190. U.C.C. § 1-201(46) (1996).

191. U.C.C. § 1-201(39) (1996). The Official Comments to that section state that "[n]o catalog of possible authentications can be complete and the court must use common sense and commercial experience in passing upon these matters. The question always is whether the symbol was executed or adopted by the party with present intention to authenticate the writing." U.C.C. § 1-201 cmt. 39 (1996).

192. U.C.C. § 2-201 cmt. 1 (1996).

Does the text of an e-mail message exchanged by a visitor and a site-owner constitute a "signed" "writing" under Article 2? Although the answer to this question "is not crystal clear,"¹⁹³ there is "a growing chorus of authorities . . . ruling in favor of electronic messages in specific contexts," such as securities filings and financing statements forwarded by e-mail.¹⁹⁴

The satisfaction of the "signature" requirement may be made through confirmation or acknowledgments sent to the other party, or by a separate agreement between the parties concerning what constitutes a "signature." If none of these resolutions is available, "the sufficiency of the electronic message depends on the manner in which one finds it stored or produced"¹⁹⁵ and whether this manner implicates Article 2's definition of a "writing" as including an "intentional reduction to tangible form."¹⁹⁶ One commentator has stated, "In purely electronic transmissions that did not begin or result in printed or other tangible manifestations adequate for the statute of frauds, the enforceable status of the transactions remains unclear."¹⁹⁷ The status of an e-mail as a "writing" for purposes of Article 2 would be bolstered if the e-mail had as a matter of course been retained in a computer file,¹⁹⁸ and possibly if the electronic message had been printed.

Another important matter to consider is whether a Web site's text itself satisfies Article 2's statute of frauds. Under reasoning analogous to that above, it should. Accordingly, a visitor to the site would have an

193. See WRIGHT, *supra* note 23, at 16.5.

194. *Id.* at 16:19; see also Deborah L. Wilkerson, *Electronic Commerce Under the U.C.C. Section 2-201 Statute of Frauds: Are Electronic Messages Enforceable?*, 41 U. KAN. L. REV. 403, 409 (1993) ("Case law concerning the paperless transmission of documents through telex, telegraph, and facsimile supports the legitimacy of electronic messaging in contract formation."). In Wright's discussion on the statute of frauds, he notes that the U.S. Securities and Exchange Commission interprets the word "written" to include "magnetic impulses or other forms of computer data compilation." Wright, *supra* note 23, at 16:19 (citing 17 C.F.R. § 230.405 (as amended in 1993)). Wright also refers to certain commentary offered by the Permanent Editorial Board to the U.C.C. The Board found that, in the case of an electronically transmitted financing statement, "the signature requirement is satisfied by the signer's adoption of a symbol that is transmitted electronically to the filing office." *Id.* (citing PERMANENT EDITORIAL BOARD OF THE U.C.C., COMMENTARY NO. 15 (July 16, 1996)).

195. Raymond T. Nimmer, *Electronic Contracting: Legal Issues*, 14 J. MARSHALL J. COMPUTER & INFO. L. 211, 227 (1996).

196. U.C.C. § 1-201(46) (1996).

197. Nimmer, *supra* note 195, at 227.

198. One expert recommends that a user "keep a log of transactions as sent and received. Ideally, records would archive data in a format as close as possible to that in which they were communicated." Wright, *supra* note 23, at 6:2. This commentator observes, "It is generally agreed that relevant information from reliable computer records may be admitted as evidence in court." *Id.* at 7:11.

incentive to print out a "hard copy" of the relevant pages of the site for his own records, in the event of a dispute concerning the enforceability of the contract against the site owner. Given the \$500 threshold for the application of this principle, however, the statute of frauds might be relevant to relatively few on-line transactions. In those to which it does apply, both the visitor and the owner may be making such printed copies almost instinctively.

a. The "Merchant's Exception"

The "merchant's exception" to the statute of frauds provides that a "business practices" merchant¹⁹⁹ satisfies the statute of frauds' "writing" requirement (*i.e.*, can have a contract enforced against her) if (1) she does not give written objection to the contents of a writing sent to her by another merchant (whether a "goods" merchant, a "business practices" merchant, or both) in confirmation of a contract within ten days after she receives it, (2) she has reason to know of the confirmatory memorandum's purpose, (3) she receives the confirmatory memorandum within a reasonable time, and (4) the confirmatory memorandum is sufficient against the sender.²⁰⁰ That is, because a merchant is deemed to be responsible for reading her mail and for responding to any writing erroneously indicating that a contract was formed, her "failure to answer a written confirmation of a contract within ten days of receipt is tantamount to a writing" that would satisfy the "writing" requirement of the statute of frauds,²⁰¹ thereby denying the merchant a statute of frauds defense to the enforcement of the contract against her.

For purposes of transactions over the World Wide Web, the concept of "writing" should include an e-mail message sent by one party to another confirming the transaction. Many commercial Web sites, including Amazon.com,²⁰² make a practice of sending such confirmation notices to their customers, some of whom are undoubtedly merchants themselves, usually within a day of the customer's placing the order.

199. See U.C.C. § 2-104 cmt. 2 (1996) ("Section[] 2-201(2) . . . rest[s] on normal business practices which are or ought to be typical of and familiar to any person in business.").

200. U.C.C. § 2-201(2) (1996).

201. U.C.C. § 2-201 cmt. 3 (1996).

202. *Welcome to Amazon.com* (visited Oct. 28, 1997) <<http://www.amazon.com>>.

2. Draft Revised Article 2 and Draft Article 2B

The NCCUSL drafts of Article 2B and revised Article 2 would by several means resolve Article 2's current ambiguity concerning electronic writings and signatures. First, in both Draft Revised Article 2 and Draft Article 2B the Article 2 concepts of "writings" and "signatures" are replaced by that of a "record," defined 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."²⁰³ In particular, to "avoid any uncertainty about the efficacy of electronic records and signatures under state law as they apply to transactions covered by Article 2B,"²⁰⁴ Draft Article 2B specifically provides that "[a] record or signature shall not be denied legal effect, validity, or enforceability solely on the grounds that it is an electronic record or signature accomplished electronically."²⁰⁵ Under this definition, both the contents of a Web page and of an e-mail message should qualify as "records."

Although current Article 2 does not define a signature's required element of "authentication," that term would replace the concept of "signed" in Draft Revised Article 2 and Draft Article 2B. According to Draft Revised Article 2:

"Authenticate" means to sign, or to execute or adopt a symbol, or encrypt a record in whole or in part with present intent to identify the authenticating party, or to adopt or accept a record or term, or to establish the authenticity of

203. U.C.C. § 2-102(a)(26) (Official Revision July 25-Aug. 1, 1997); U.C.C. § 2B-102(35) (Proposed Official Draft Nov. 1, 1997). The Reporter's Notes to Draft Article 2B clarify that the eventual Official Comments "will indicate that there is no requirement of permanent storage or that there be anything beyond temporary recordation." Draft § 2B-102 rptr. note 20(a). The Official Comments will also make clear "that perception can be either directly or indirectly with the aid of a machine." *Id.*

204. U.C.C. § 2B-114 rptr. note (Proposed Official Draft Nov. 1, 1997).

205. U.C.C. § 2B-114 (Proposed Official Draft Nov. 1, 1997). According to the Introduction to Draft Article 2B:

Article 2B uses . . . "record" . . . in lieu of the traditional reference to "writing" as a reflection of the fact that electronic recordation and transmission stands parallel to or more significant than writing in modern practice. This term is now standard U.C.C. terminology. . . [and] divorces concepts associated with writings from the traditional paper environment, making electronic records fully equivalent to paper records.

Introduction to Draft Article 2B, at 18; see also Patricia Brumfield Fry, *X Marks the Spot: New Technologies Compel New Concepts for Commercial Law*, 26 LOY. L. REV. 607, 622, 619 (1993) ("A number of words have been suggested, but at the moment 'record' is favored as a label for the concept" of "a defined term which would incorporate both paper and nonpaper media" for purposes of modernizing the Code's approach to "writings.").

a record or term that contains the authentication or to which a record containing the authentication refers.²⁰⁶

Draft Article 2B supplies a virtually identical definition, adding only the principal that a "sound" could be adopted rather than a symbol.²⁰⁷ Under these definitions, a party could authenticate its message by displaying its name or symbol in its e-mail message or on its Web page, or by encrypting text with a specialized code "key" that identifies it as the unique sender of the message.²⁰⁸ The parties can agree on an "attribution procedure," such as the use of a certain encryption standard, to authenticate their documents with regard to one another.²⁰⁹

The current version of Draft Revised Article 2 raises the *de minimis* amount for the operation of the statute of frauds from \$500 to \$5000 and substitutes the term "record" for "writing."²¹⁰ Under the proposed revision, therefore, a claim for breach of contract would be unenforceable where the price is \$5000 or more, "unless there is a record authenticated by the person against which the claim is asserted as the record of that person and which is sufficient to indicate that a contract was made."²¹¹

206. U.C.C. § 2-102(a)(1) (Proposed Official Revision July 25-August 1, 1997).

207. See U.C.C. § 2B-102(3) (Proposed Official Draft Nov. 1, 1997).

208. A prime example of this type of encryption is the "Pretty Good Privacy," or PGP, encryption system. See PHILIP R. ZIMMERMAN, THE OFFICIAL PGP USER'S GUIDE 16-17 (1995) (describing PGP's method of using a "secret key" to sign a message); see also BRUCE SCHNEIER, E-MAIL SECURITY 63-65 (1995).

209. The Reporter's Notes to Draft Article 2B state:

This Article replaces the traditional idea of "signature" or "signed" with a term that incorporates modern electronic systems, including ALL forms of encryption or digital symbol systems. Basically, the fact of authentication can be proved in any manner including proof of a process that necessarily resulted in authentication. Use of an "attribution procedure" agreed to by the parties per se establishes that a symbol or act constitutes an authentication.

U.C.C. § 2B-102 rptr. note 2 (Proposed Official Draft Nov. 1, 1997). Draft Article 2B defines an "attribution procedure" as "a procedure established by law or agreement or adopted by the parties for the purpose of verifying that electronic authentication, records, messages, or performances are those of the respective parties or for detecting changes or errors in content, if the procedure is commercially reasonable." *Id.* § 2B-115(a); see also *id.* § 2B-116 and U.C.C. § 2-211 (Proposed Official Revision July 25 - Aug. 1, 1997) (both addressing the attribution to a party of an electronic message, record, or performance).

210. U.C.C. § 2-201(a) (Proposed Official Partial Redraft Dec. 1997).

211. *Id.* This revision followed a controversy among the Permanent Editorial Board Study Group, the Drafting Committee, and the NCCUSL regarding whether to abolish the statute of frauds. According to the Reporter's Notes to section 2-201 in the the

The merchant's exception would survive in Draft Revised Article 2, but with an important difference:

If an authenticated record in confirmation of a contract is sufficient against the sender and is sent within a reasonable time to the other party, the record is sufficient against the *other party who is a merchant*, unless the merchant sends a notice of objection to the record within 10 days after the record is received.²¹²

In this revision, the confirmatory message does not have to be sent from one merchant to another; in order for the merchant's exception to the statute of frauds to apply, "*only the recipient* of the confirmation must be a merchant."²¹³ The status of the other party is irrelevant.

Draft Article 2B retains the statute of frauds, though without any merchant's exception and with the substitution of the concepts of "authentication" and "record" for Article 2's "signature" and "writing," respectively.²¹⁴ However, Draft Article 2B raises the monetary threshold even higher, excluding from the statute of frauds' purview those agreements in which the "total value of any payments to be made and any affirmative obligations incurred, excluding payments for options to renew or buy, is less than \$20,000."²¹⁵

Although the electronics-friendly and high-threshold approaches of Draft Revised Article 2 and Draft Article 2B render Article 2's statute of frauds often inapplicable to sales accomplished through Web sites, more practical problems are the enforceability of unread standard terms and the "battle of the forms." Underlying the various resolutions to these problems under the existing, draft revised, and draft statutes is the

December 1997 Partial Redraft, "[t]he Drafting Committee agreed, some grudgingly, that Article 2 should have a statute of frauds. . . . A plurality of the Drafting Committee selected \$5,000 as the threshold and that figure is inserted in subsection (a). One member selected \$20,000, three members were happy with \$10,000 and two members selected \$3,000." *Id.* § 2-201 notes 1-2; see also Murray, *supra* note 18, at 545 (reviewing the history of the controversy in the context of the revisions to Article 2 and concluding that on balance, few should suffer from the repeal of the statute of frauds).

212. U.C.C. § 2-201(b) (Proposed Official Revision July 25 - Aug. 1, 1997) (emphasis added).

213. *Id.* § 2-201 note 3 (emphasis added).

214. The relevant provision reads:

Except as otherwise provided in this section, a contract is not enforceable by way of action or defense unless there is a record authenticated by the party against which enforcement is sought or to which the party manifested assent sufficient to indicate that a contract has been made between the parties and describing the copies or subject matter.

U.C.C. § 2B-201(a) (Proposed Official Draft Nov. 1, 1997).

215. *Id.* § 2B-201(c)(1); see also *id.* § 2B-201 rptr. note 5 ("The \$20,000 limit was chosen to exclude coverage of the large number [of] small value transactions that do not require formalities. Focusing on dollar amount is too narrow here; the draft uses a 'value' standard instead.").

concern that one party, realizing that the other is unlikely to read a message thoroughly, will attempt to surprise the other by including in the message an additional or contradictory term to which the other party, if alert, would object.

C. *Binding the Unwary Consumer*

Questions of enforceability arise when a visitor to a Web site accepts the site's terms without reading them thoroughly.

1. *Article 2: Unconscionability*

Although "[t]he obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract,"²¹⁶ a court may, if it finds any clause "as a matter of law . . . to have been unconscionable at the time it was made," strike that clause, construe it so as to limit an unconscionable result, or refuse to enforce the contract.²¹⁷

The principles of fairness underlying the unconscionability doctrine also find expression in certain other provisions of Draft Revised Article 2 and Draft Article 2B.

2. *Draft Revised Article 2: Consumer Contracts*

In addition to including a section on unconscionability,²¹⁸ Draft Revised Article 2 specifies that in the case of a "consumer contract,"²¹⁹ "if a consumer agrees to a record, any non-negotiated term that a reasonable consumer in a transaction of this type would not reasonably

216. U.C.C. § 2-301 (1996).

217. U.C.C. § 2-302(1) (1996). According to the Official Comments, "[t]he basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." *Id.* § 2-302 cmt. 1.

218. See U.C.C. § 2-105 (Proposed Official Revision July 25 - Aug. 1, 1997). Prior to the December Partial Redraft, the drafters had contemplated diverging from U.C.C. § 2-302 (1996) and awarding equitable relief not only for unconscionable terms, but also for terms induced by unconscionable conduct. See *id.* § 2-105 notes 1-2. The Partial Redraft removed this language "to conform to U.C.C. § 2-302 in the 1995 Official Text." See U.C.C. § 2-105 rpr. note 2 (Proposed Official Partial Redraft Dec. 1997).

219. See *supra* note 138 and accompanying text (discussing consumer contracts).

expect to be in the record is excluded from the contract, unless the consumer had knowledge of the term before agreeing to the record.”²²⁰

3. Draft Article 2B: Mass-Market Licenses

Draft Article 2B contains its own unconscionability provision.²²¹ It also defines a “mass-market license” as “a standard form”²²² that is prepared for and used in a mass-market transaction.²²³ Although subject to some exclusions, a “mass-market transaction” is defined as:

a transaction in a retail market involving information directed to the general public as a whole under substantially the same terms for the same information, and involving an end-user licensee that acquired the information under terms and in a quantity consistent with an ordinary transaction in the general retail distribution.²²⁴

220. U.C.C. § 2-206(a) (Alternative A) (Proposed Official Partial Redraft Dec. 1997). The Notes to this provision in the Partial Redraft indicate that the drafters were “not satisfied with the current draft of 2-206.” A majority appeared to support a proposed amendment that would, under one of the alternative provisions of the Partial Redraft, allow a court to exclude a term “only if it finds that the term is bizarre or oppressive . . . by industry standards or commercial practices, abrogates or substantially conflicts with other essential negotiated terms, eliminates the dominate [sic] purpose of the contract, or conflicts with other consumer protection laws.” *Id.* § 2-206(b) (Alternative A). The other alternative, Alternative B, is “based upon [Draft Article 2B’s] distinction between standard form and other records with terms incorporated by manifesting assent after an opportunity to review.” *Id.* § 2-206 note 1.

221. See U.C.C. § 2B-111 (Proposed Official Draft Nov. 1, 1997). The Reporter’s Notes to section 2B-111 state that the provision “follows current law in Article 2.” *Id.* § 2B-111 rptr. note 1. The Reporter’s Notes also comment that “[t]he argument for extending the doctrine [of unconscionable inducement of a contract beyond Article 2A] is not clear and is especially unpersuasive beyond consumer contracts (the limit adopted in current Article 2A).” *Id.* § 2B-111 rptr. note 2.

222. See *infra* note 242 and accompanying text (discussing standard forms).

223. U.C.C. § 2B-102(a)(28) (Proposed Official Draft Nov. 1, 1997). The Reporter’s Notes explain that “[s]ince the decision was made to use the mass market concept in lieu of the concept of consumer in a number of situations where a form may not be involved, the broader term ‘transaction’ was necessary to avoid excluding these transactions from various consumer protections.” *Id.* § 2B-102(a)(28). The Introduction to Draft Article 2B states:

the differentiation between consumer and mass market constructs as to when they should apply turns on whether the goal is to protect individuals who presumably lack the expertise to understand contract issues (e.g., consumer) [sic] and cases where the goal is to identify and define a marketplace by reflecting presumed assumptions applicable in that marketplace. The [drafters] opted to apply the concept of “mass market” as the theme in all but a few sections in which the issue arises.

Introduction to Draft Article 2B, at 20. Of course, Draft Revised Article 2’s “consumer contract” concept, discussed *supra* note 138 and accompanying text, focuses only on the status of the seller and the buyer without addressing the terms of the contract itself.

224. U.C.C. § 2B-102(a)(29) (Proposed Official Draft Nov. 1, 1997). One the specific exclusions from this category of transactions is “a transaction between parties neither of which is a consumer in which either the total consideration for the particular

Clearly, a commercial Web site dealing in non-customized information products would fit this pattern. Itself a standard form, it generally offers the same terms to potential visitors (all members of the "general public as a whole") who would not in turn be responding with their own standard forms.²²⁵

The most important application of this concept is that a party is generally taken to adopt the terms of a mass-market license if he "agrees, including by manifesting assent, to the license before or in connection with the initial performance or use of or access to the information."²²⁶

However, if the party does not have the opportunity to review the terms of such a license before becoming obligated to pay and, once having had that opportunity, does not agree, he is entitled to void the contract and recover his reasonable expenses and compensation for any foreseeable harm caused to his information or his system by the licensed information.²²⁷ Moreover, even if assent is given, a term will not become part of the contract if it is unconscionable or, subject to the rules of parol or extrinsic evidence, if it conflicts with the parties' negotiated terms of the license agreement.²²⁸

item of information or the reasonably expected fees for the first year of an access contract exceeds [an amount to be specified by the drafters]."²²⁵ *Id.* § 2B-102(a)(29)(A). The other exception is "a transaction in which the information is customized or otherwise specially prepared for the licensee."²²⁶ *Id.* § 2B-102(a)(29)(B). The Reporter's Notes to this provision add:

Article 2B will be the first UCC article to extend consumer-like protections to business transactions in any form and the first to tailor at least some default rules based on that concept. The goal is to do this in a limited manner, reflecting the innovative nature of the concept, while confining the risk created by focusing on small transactions for information oriented toward the broad general public.

Id. § 2B-102 rptr. note 19.

225. The Reporter's Notes to section 2B-208, a section entitled "Mass-Market Licenses," state that "[t]his section deals with single-form cases. In that situation, case law affirms the enforceability of standard forms." U.C.C. § 2B-208 rptr. note 5 (Proposed Official Draft Nov. 1, 1997).

226. *Id.* § 2B-208(a).

227. *Id.* § 2B-208(b).

228. *Id.* § 2B-208(a). According to the Reporter's Notes to this provision:

Prior drafts had presented variations of a "refusal term" concept which allowed courts to invalidate certain, unidentified clauses in a mass market license unless those clauses were brought to the attention of and assented to by the other party. Among the reasons for rejecting this concept was that it allowed

To protect herself under Draft Revised Article 2 and Draft Article 2B, a site owner should identify potentially objectionable terms in her contracts, present them conspicuously to visitors, and require visitors submitting an order to assent specifically to these terms. Both conspicuousness and assent are discussed at greater length below.

D. The Battle of the Forms

In the context of electronic commerce, one may question the legal effect of a visitor's sending to the site's owner a message with terms different from those specified on the site's pages. Is a contract formed in this instance and, if so, what are its terms?

1. Article 2

Article 2 provides:

A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.²²⁹

In this situation, "[t]he additional terms are to be construed as proposals for addition to the contract."²³⁰ Moreover:

Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.²³¹

Because a divergence in the parties' writings as to a given term renders both versions of this term invalid, this section of the Code has become known as the "knockout rule."

a court to invalidate terms that were *acceptable* under the doctrine of unconscionability and not obtained fraudulently, but that it gave no clear guidance as to how such terms can be identified. Also, the concept was essentially a disclosure rule, but gave no guidance on what terms should or must be disclosed. This Draft . . . returns to traditional commercial law approaches.

Id. § 2B-208 rptr. note 1.

229. U.C.C. § 2-207(1) (1996).

230. *Id.* § 2-207(2).

231. *Id.* § 2-207(3).

In this context, it is crucial to determine whether the owner of a commercial Web site is inviting offers to buy or is offering to sell.²³² If the site specifies the terms (*e.g.*, price, payment method) subject to which the owner invites visitors to submit offers to buy goods, the owner should carefully note whether the offers that she receives attempt to vary any of these terms. If any does, she should respond with a message repeating that her acceptance of the visitor's offer to buy is conditional on the visitor's agreement to her original terms, and inviting the visitor to indicate such agreement.

On the other hand, if the site is used by the owner to offer goods for sale, the owner should examine any acceptances for terms that conflict with those specified on her site. If an acceptance does contain additional terms, the owner might respond with a message indicating that she is treating her offer to sell as accepted under U.C.C. § 2-207, but that she is rejecting the additional or different terms contained in the visitor's acceptance. The parties' contract will then consist of the terms on which the Web site's offer and the e-mail's acceptance agree, plus the terms provided by the Code's default provisions.

In either case, the owner should explicitly note on the site's order form the owner's reservation of the right to change prices and, correct typographical errors, limit quantities of the goods that will be sold to any one visitor.²³³

232. See *supra* Part V.A.4 (discussing this distinction).

233. For example, on a Web page entitled "Download Catalog Disclaimer," retailer Computer Discount Warehouse provides the following notice:

IMPORTANT NOTICE

Please be aware that you are downloading a digital copy of our latest printed catalog. Due to constantly changing market conditions, there may be discrepancies in the information or pricing contained in this catalog and on our World Wide Web site. For the most up to date pricing and product information, please refer to our online catalog, or contact a CDW account manager at [phone number].

TERMS AND CONDITIONS

For all prices, products and offers, CDW reserves the right to make adjustments due to changing market conditions, product discontinuation, manufacturer price changes, errors in advertisements or other extenuating circumstances. CDW is not responsible for manufacturer price changes. Monitors are not included with computer systems unless specified.

BY ACCEPTING, I ACKNOWLEDGE THE ABOVE INFORMATION.

[ACCEPT]

[DECLINE]

Download Catalog Disclaimer, (visited Feb. 2, 1998) <<http://www.cdw.com/service/catalog/disclaim.htm>>. See also *infra* note 293 (concerning disclaimer of typographical

2. Draft Revised Article 2

As in the current version of Article 2, the proposed revised version would specifically allow the methods of acceptance to include "a definite expression of acceptance in a record that also contains terms varying from the offer."²³⁴ Specifically, Draft Revised Article 2 contemplates three separate situations relevant to sales of goods through Web sites, which themselves clearly constitute "records."

In the first situation, the site owner *offers goods for sale* and the visitor accepts the offer in some fashion that does not create a record—for example, by a telephone call to the owner—but that introduces additional or different terms. In this case, the contract formed between the owner and visitor contains only those terms of the Web site's offer to which the visitor has expressly agreed.²³⁵

In the second situation, the site owner *invites offers to buy* the goods and the visitor makes such an offer in some fashion that does not create a record. If the owner in turn makes a definite acceptance of this offer in an e-mail message that contains terms that vary from the offer, a contract is formed, but the varying terms are not part of the agreement.²³⁶

In the third situation, whether or not the site owner is offering goods for sale or inviting offers to buy, the owner and visitor exchange records so that both the offer and acceptance are in records (that is, since the site already constitutes a record, the visitor accepts by sending a letter, e-mail, fax, or other record of his own). In this case, the contract formed between the parties contains those "terms in the records of the parties to the extent that the records agree,"²³⁷ any terms supplied in one party's record to which the other party has agreed by performance,²³⁸ terms to which the parties have agreed even though they do not appear in either

errors).

234. U.C.C. § 2-205(a)(1) (Official Revision July 25-Aug. 1, 1997); *see also* U.C.C. § 2-207(1) (1996).

235. *See* U.C.C. § 2-207(b)(4) (Proposed Official Revision July 25 - Aug. 1, 1997). This provision provides:

If a contract is formed by offer and acceptance and the acceptance is by a record containing terms varying from the offer or by conduct of the parties that recognizes the existence of a contract but the *records* of the parties do not otherwise establish a contract for sale, the contract includes . . . terms in a record supplied by a party to which the other party has expressly agreed.

Id. (emphasis added).

236. *Id.*

237. *Id.* § 2-207(b)(1).

238. *Id.* § 2-207(b)(4).

record,²³⁹ and terms supplied or incorporated by other provisions of the Article.²⁴⁰ The site owner may therefore be returned to the Code's default provisions with respect to terms on which the parties' records disagree.

This draft revision also qualifies the effect of a party's expressly conditioning acceptance on adherence to its terms. The Official Notes read, "[A] party who expressly conditions its willingness to contract on agreement to specific terms and then ships the goods or accepts the goods without first obtaining that agreement should be precluded from relying on the condition."²⁴¹ Therefore, an owner who wishes to avoid the battle of the forms under Draft Revised Article 2 should not only impose such conditions but should ensure, by means of site architecture prohibiting the submission of disapproved terms or by a "Web-wrap" agreement or similar mechanism, that the owner's terms have been agreed to by the other party.

3. *Draft Article 2B: Standard Forms*

Draft Article 2B's treatment of the "battle of the forms" situation hinges on its concept of "standard form," defined as

a record, or a group of linked records presented as a whole, prepared by one party for general and repeated use and consisting of multiple contractual terms used in a transaction without negotiation of or changes in most of the terms. Negotiation or customization of price, quantity, method of payment, standard performance options, or time or method of delivery does not preclude a record from being a standard form.²⁴²

239. *Id.* § 2-207(b)(2).

240. *Id.* § 2-207(b)(3).

241. *Id.* § 2-207, subsection (f) of a note entitled "A Road Map".

242. U.C.C. § 2B-102(42) (Proposed Official Draft Nov. 1, 1997). The Reporter's Notes to section 102 elaborate:

Existing Article 2 does not contain any express treatment of forms. In the revision process, initially both Article 2 and 2B contained provisions dealing with when a party assents to a form. Subsequently, the Article 2 committee deleted the concept. Subsequently, [the American Law Institute] Council recommended that this decision be reversed. . . . The reference in this definition is to forms (*e.g., groupings* of standard terms) whose use in modern commerce is not only widespread, but virtually ubiquitous. The idea expressed does not hold that a record that contains language previously used in other transactions falls within the term and it does not focus on individual "standard terms." The record, which contains a composite of terms [and] must have been prepared for repeated use is a standard form whose legal significance is

A commercial Web site clearly qualifies as such a "standard form," because the "linked records" in question are its individual pages, which are "prepared . . . for general and repeated use," even though they may allow for negotiation of critical terms of the sale of goods. However, the "standard forms" treatment of Draft Article 2B seems to add little to the analysis of typical Web site transactions. The key section of Draft Article 2B concerning conflicting terms is devoted entirely to situations in which the parties *exchange* "standard forms" and thereafter form the contract in question "by conduct or otherwise."²⁴³ "Identifying the contract terms involves considering all of the terms of all of the writings and reconciling them in light of the circumstances."²⁴⁴

Neither of the two prototypical situations of Web-based sales of goods addressed here fits squarely into the situation described by the exchange of forms. In the first situation, the visitor to a Web site responds to its standard form by sending an *individualized* e-mail message of his own. Whether he is accepting an offer to sell or submitting an offer to buy, his message does not constitute a generalized standard form. In the second situation, the visitor indicates his offer or acceptance by choosing his goods and terms from those presented on the Web site's standardized order form and/or its virtual shopping basket. Even if his submission of the completed order form or shopping basket is somehow seen as a "standard form" and the transaction as thus being completed by the exchange of standard forms, these very features of the Web site might

judged accordingly.

Id. § 2B-102 rptr. note 22. The draft also provides that "a definite and seasonable expression of acceptance may create a binding obligation even if it is in a record standard form that contains terms that vary from the terms of the offer unless it conflicts with the offer concerning a material term." *Id.* § 2B-203(c). "Material term" is not defined by Article 1, Article 2, Draft Revised Article 2, or Draft Article 2B.

243. *Id.* § 2B-209(a) (providing rules governing cases in which the parties exchange standard forms which contain varying terms, and a contract is formed by conduct or otherwise).

244. *Id.* § 2B-209 rptr. note 2. The Reporter's Notes to section 2-209 also state: Current Article 2-207 is not limited to standard forms, but the cases and literature concentrate largely on the problem of the exchange of forms that disagree on important matters. If the exchanged forms create a contract, this section does not apply. Instead, under 2B-203, a contract forms around the terms of the offer with whatever additional terms are permitted there or, in the case of an effective conditional offer, around those terms.

Id. § 2B-209 rptr. note 3. Subsections 2B-209(a) and (b) provide a priority order for the assemblage of a contract from two conflicting standard forms.

The exchange of standard forms and the subsequent creation of a contract by conduct or otherwise will probably occur most often in the context of an electronic agent's submitting a "standard form" offer or acceptance of its own to another agent or to a Web site.

well constrain his choice of products and terms to those that agreed with products and terms contained in the seller's standard form.

More directly relevant to these situations is the draft of section 2B-203(2)(c), which provides that "a definite and seasonable expression of acceptance may create a binding obligation even if it is in a record standard form that contains terms that vary from the terms of the offer unless it conflicts with the offer concerning a material term."²⁴⁵ As under Article 2 and Draft Revised Article 2,²⁴⁶ an offeror or acceptor can couch his terms on the condition that they not be changed by the other party. Draft Article 2B provides:

[L]anguage in a standard form which makes an offer or acceptance expressly conditional on assent by the other party to the terms of the form precludes the formation of a contract based on the absence of such assent only if the party proposing the form acts in a manner consistent with the stated conditions, such as by refusing to perform . . . until its terms are accepted.²⁴⁷

In other words, the site owner who chooses to impose such conditions on the visitor's actions in forming a contract must herself ensure that she does not ship the goods if the visitor has disobeyed those conditions. To do so, the owner could configure the site to refuse inappropriate responses, such as a visitor's request that, contrary to the site's explicit terms, he wants a very large number of the goods or wants the goods delivered overseas.

E. Assent and Conspicuousness: Enforceability of "Shrinkwrap" and "Webwrap" Agreements

The means by which a party can "assent" to a contract²⁴⁸ or license

245. U.C.C. § 2B-203(2)(c) (Proposed Official Draft Nov. 1, 1997). The major exception to this principle is that no contract is formed if the records exchanged by the parties disagree on the scope of the license, unless "from all the other circumstances it appears that an agreement, including with respect to the material term, scope, existed." *Id.*

246. See *supra* notes 229, 241 and accompanying text.

247. U.C.C. § 2B-203(d) (Proposed Official Draft Nov. 1, 1997).

248. The Reporter's Notes to the draft of section 2B-112 contrast the terms "assent" and "acceptance" as follows:

While manifesting assent will also often indicate acceptance of a contract, acceptance is the broader concept. . . .

In contrast to accepting an offer, manifesting assent focuses on assent to the terms of a record. It deals with what are the terms of the contract. The concept of manifesting assent creates procedural protections to ensure fairness.

is crucial to resolving questions concerning the enforceability of "shrink-wrap" and "Web-wrap" contracts or licenses under Article 2, Draft Revised Article 2, and Draft Article 2B.

1. Article 2

Courts have not yet definitively resolved whether, under current Article 2, a "Webwrap" agreement, analogous to a "shrinkwrap"²⁴⁹ or "boxtop" agreement for computer software, should be upheld. In the earliest reported decision concerning this issue, the Third Circuit held that a license agreement that appeared on the top of the box containing the software and which the buyer, Step-Saver, encountered for the first time upon delivery of the software did not bind the buyer.²⁵⁰ The court found that to enforce the license at issue would violate U.C.C. § 2-207, which excludes terms proposed unilaterally from addition to a contract between merchants if they "materially alter" the terms upon which the parties had already agreed.²⁵¹

Two years after the *Step-Saver* decision, on "very similar, though not identical" facts, the district court in *Arizona Retail Systems, Inc. v. Software Link, Inc.*²⁵² similarly invalidated a "shrinkwrap" license agreement that the buyer first saw through the plastic "shrink wrap" covering the product that he had ordered for delivery.²⁵³ The license stated that by opening the material covering the disk the user would agree to these new terms.²⁵⁴ As had the Third Circuit, the *Arizona Retail* court "assume[d] that package disclaimers, that arrive only after

Id. § 2B-112 rptr. note 2.

249. "The 'shrinkwrap license' gets its name from the fact that retail software packages are covered in plastic or cellophane 'shrinkwrap,' and some vendors . . . have written licenses that become effective as soon as the customer tears the wrapping from the package." *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996). Although the visitor can read the agreement through the plastic, in many instances the user sees these terms for the first time upon the delivery of the software that she has ordered.

250. *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 104 (3d Cir. 1991). The *Step-Saver* court stated:

[E]ven though Step-Saver would not be surprised to learn that [the seller] desires the terms of the box-top license, Step-Saver might well be surprised to learn that the terms of the box-top license have been incorporated into the parties's agreement.

. . . The seller's unwillingness or inability to obtain a negotiated agreement reflecting its terms strongly suggests that . . . those terms are not a part of the parties's commercial bargain.

Id.

251. *Id.* at 104 n.44.

252. 831 F. Supp. 759, 761 (D. Ariz. 1993).

253. *Id.* at 761, 766.

254. *Id.* at 761.

the parties have reached a general agreement under section 2-207, constitute proposals to modify the agreement," rather than a condition that the seller has imposed on its acceptance of the buyer's order.²⁵⁵

In *ProCD, Inc. v. Zeidenberg*,²⁵⁶ another district court rejected such a boxtop license, even though the buyer, who had purchased the software on three separate occasions, might have been aware of the terms of this agreement after the first such transaction.²⁵⁷ "Like any other parties to a contract," the district court held, "computer users should be given the opportunity to review the terms to which they will be bound each and every time they contract. Although not all users will read the terms anew each time under such circumstances, it does not follow that they should not be given this opportunity."²⁵⁸

The Seventh Circuit reversed, however, holding that in light of the difficulties of printing all of the relevant terms of the sale on the box, it would be sufficient for the seller to give "[n]otice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable."²⁵⁹ Citing Section 2-204's liberal policy on recog-

255. *Id.* at 766.

256. 908 F. Supp. 640 (W.D. Wis. 1996).

257. *Id.* at 654.

258. *Id.*

259. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996). The court noted that "[t]he 'Read Me' file included with most software, describing system requirements and potential incompatibilities, may be equivalent to ten pages of type; warranties and license restrictions take still more space." *Id.*

Seven months after handing down *ProCD*, the Seventh Circuit extended this reasoning to mail-order products. See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997). In *Hill*, Gateway 2000, a computer retailer, shipped computers with the same sort of accept-or-return offer *ProCD* made to users of its software. *Id.* at 1149. In holding that the Hills, who had ordered the computer by credit card through a telephone call to Gateway 2000, were bound by the terms contained in the box shipped to them, Judge Easterbrook commented:

Practical considerations support allowing vendors to enclose the full legal terms with their products. Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff at the other end of the phone for direct-sales operations such as Gateway's had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rage over the waste of their time. And oral recitation would not avoid customers' assertions (whether true or feigned) that the clerk did not read term X to them, or that they did not remember or understand it. Writing provides benefits for both sides of commercial transactions. Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple

nizing the formation of contracts, the *ProCD* court held that “[a] vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance.”²⁶⁰

In *ProCD*, the seller splashed the license on the screen when the program was run and would not let the buyer proceed without indicating acceptance.²⁶¹ This would appear to be the most defensible way for the creators of Web sites to ensure that customers have accepted warranty and other terms. As one commentator has observed, “The problem with shrink-wrap agreements is that software customers usually buy the software before they get a look at the license terms, and have no option to back out of the deal after they have paid for it and opened the box.”²⁶² If customers of a Web site were compelled to indicate their agreement to the terms contained on the site’s initial pages before they could engage in any commercial transactions, the operator of the site would presumably be better protected.

In two recent decisions involving on-line services rather than Web pages, courts have, with no explicit analysis, appeared to acknowledge the validity of such agreements. In *Computer Services, Inc. v. Patterson*,²⁶³ the Sixth Circuit focused on an on-line subscriber’s assent

approve-or-return device. Competent adults are bound by such documents, read or unread.

Id.

Of course, this same impatience of potential customers discourages Web site operators from forcing visitors to “click through” screens full of legal terms. See *supra* note 33 and accompanying text. Yet the “Web-wrap” procedure would not only preclude customers from asserting that they had not seen these terms but it would bind them to those terms, “read or unread.” For example, using an approve-or-return device like Gateway 2000’s on a Web site’s click-through pages would bind the customers to the applicable terms on those screens whether the customers had read them or not.

260. *Id.* at 1452.

261. *Id.*

262. LANCE ROSE, *NETLAW* 78 (1995); see also Jeanne E. Longmuir & Daniel J. McMullen, *Online Content Providers Search for Protections*, NAT’L L.J., May 20, 1996, at C32 (“[T]o maximize their prospects for enforcement, Web-wrap agreements may best be situated as gateways to the proprietary content they cover, requiring users to review—or at least page through—their terms as a condition to gaining access to such content.”).

At a minimum, Web sites should conspicuously alert visitors to the existence of additional legal terms, if not actually containing a link to a page or pages with these terms or, at the highest level of protection, forcing the visitor to indicate his agreement by “clicking through” the pages containing such terms. In *Gateway 2000*, discussed *supra* note 259, the Seventh Circuit speculated that “[p]erhaps the [plaintiffs] would have had a better argument if they were first alerted to the bundling of hardware and legalware after opening the [computer] box and wanted to return the computer in order to avoid disagreeable terms, but were dissuaded by the expense of shipping.” *Gateway 2000*, 103 F.3d at 1150.

263. 89 F.3d 1257 (6th Cir. 1996).

to a shareware registration agreement provided by the Internet service provider CompuServe, noting that the subscriber was required "to type 'AGREE' at various points in the document, '[i]n recognition of your on line agreement to all the above terms and conditions.'"²⁶⁴ In *Microstar v. Formgen, Inc.*,²⁶⁵ a case before the District Court for the Southern District of California, a videogame that encouraged users to build their own game levels and incorporated a "build editor" for this purpose, noted on the opening screen of that tool that the editor and associated tools could not be repackaged and sold.²⁶⁶ The opening screen also indicated that the user should refer to an incorporated document for further information on the levels that could be built with these tools.²⁶⁷

One commentator has recommended that, in addition to forcing the visitor through the contract term screens, the owner of an on-line service (or, for our purposes, the designer of a commercial web site) should:

Give the user the option to leave the contract screen sequence at any point. They cannot become registered or accepted users, though, until they do go through the whole sequence.

Make the user show consent to the contract terms in an unambiguous way, demonstrating that he or she really agrees to the terms just displayed. For instance, after showing the contract term screens, tell the user that to indicate contract acceptance, he or she must type a lengthy unambiguous character string like: "I, _____, hereby accept the contract terms of Acme Online." (The blank line is for the user's first and last name.)

Keep a well-organized record of user acceptances of the agreement terms. One way, conceptually simple and effective, is to keep a log of the sequence of contract screens shown to each user together with the user's acceptance response. With this approach, the online system can change standard contract terms from time to time, and show exactly which set of terms each user agreed to when they first entered the system, without having to perform any involved file management or correlations.

264. *Id.* at 1260-61. It appears that part of this agreement provided for the application of Ohio law. *Id.* at 1264-65. See also Walter Effross, *Contact Through Internet Sufficient for Jurisdiction Over Nonresident*, COMPUTER L. STRATEGIST, Aug. 1996, at 5. *Compuserve* held that Patterson, a Texan who claimed never to have visited Ohio, where CompuServe's headquarters were located, was nonetheless subject to jurisdiction in Ohio because of his contacts with the state through e-mail to CompuServe. *Compuserve*, 89 F.3d at 1260, 1268-69.

265. 942 F. Supp. 1312 (S.D. Cal. 1996) (involving a game developer's allegations of copyright infringement against a distributor of a package of additional levels created by users).

266. *Id.* at 1315.

267. *Id.* For a discussion of this case and its implications for software copyright law, see Walter Effross, *Share, But Be Fair: Copyrightability of New Video Game Levels*, MULTIMEDIA & WEB STRATEGIST, Dec. 1996, at 1, 1.

If the on-line system wants to change its user contract terms upon occasion, there are two things it can do to make sure they are effective for all users. First, the basic agreement with each user should specify that the service provider can change terms upon some number of days notice, and if the user does not like it, he or she can terminate the agreement and leave the system before the change takes effect. Second, every time there is a change, all users should be alerted in a manner that will definitely reach them, such as a combination of e-mail and opening-screen bulletins.²⁶⁸

2. Draft Revised Article 2

Draft Revised Article 2 recognizes that under current Article 2, "either party can condition the formation of a contract upon agreement by the other party to terms proposed."²⁶⁹ However, when that condition is expressed in a record, "[t]he condition is not effective unless conspicuous language is used."²⁷⁰ Significantly, the drafters recognized that whether such a condition is conspicuous or not "may depend upon whether the language is in standard terms or 'boilerplate.'"²⁷¹ This reference to "standard terms" appears to connote a synonym for "boilerplate" and should not be confused with the terms of a "standard form" under Draft Article 2B.²⁷²

Indeed, perhaps for this reason, the drafters "decided to eliminate all references to 'standard forms' and 'standard terms' in the language of various sections of the Proposed Official Revision of Article 2."²⁷³

The Partial Redraft of Article 2 defines "conspicuous" as

(A) . . . so written, displayed or presented that a reasonable person against whom it is to operate would likely have noticed it or, in the case of an electronic message intended to evoke a response without the need for review by an individual, in a form that would enable a reasonably configured electronic agent to take it into account or react to it without review of the message by an individual.

(B) In a written record:

(i) A heading is conspicuous if it is all capitals (as: NEGOTIABLE BILL OF LADING) equal to or greater in size than the surrounding text;

(ii) A term or clause in the body of a record or display is conspicuous if it is in larger or other contrasting type or color than other language;

(iii) Any term or clause in a telegram or other similar communication is conspicuous.

268. ROSE, *supra* note 256, at 78-79.

269. U.C.C. § 2-203(a)(a) rptr. note 2 (Proposed Official Revision July 25-Aug. 1, 1997).

270. *Id.*

271. *Id.*

272. See *supra* note 242 and accompanying text (discussing the definition of "standard forms" under Draft Article 2B).

273. U.C.C. § 2-103(a)(1) rptr. note 4 (1996).

- (C) In an electronic record or display a term or clause is conspicuous if it is so positioned that a party cannot proceed without taking some additional action with respect to the term or any prominent reference thereto.²⁷⁴

The last of these alternatives clearly countenances "Web-wrap" or "click-wrap" agreements. Yet, Draft Revised Article 2 would also reduce many consumers' concerns about being bound to shrinkwrap terms, by providing them an opportunity to review and reject these terms:

[I]f, after the buyer has become obligated to pay for or taken delivery of the goods, the seller proposes terms in a record additional to or different from those *already* agreed to, the terms do not become part of the contract unless the buyer, with knowledge of the terms or after having an opportunity to review the record proposing the terms, authenticates the record or engages in other affirmative conduct that the record or the circumstances clearly indicate constitutes an acceptance. In this section, a party has an opportunity to review a record or term if it is made available in a manner that calls it to the attention of the party and permits review of its terms or enables the electronic agent to react.²⁷⁵

3. Draft Article 2B: "Manifesting Assent" Electronically

Draft Article 2B includes a special section, section 2B-112, to describe the ways in which a party can "manifest assent" to the terms of a

274. U.C.C. § 2-102(a)(7) (Proposed Official Partial Redraft Dec. 1997). Compare the revision's definition of conspicuous with the definition supplied by Article 1:

"Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous." Whether a term or clause is "conspicuous" or not is for decision by the court.

U.C.C. § 1-201(10) (1996). The Official Comments to section 1-201 add that the definition "is intended to indicate some of the methods of making a term attention-calling. But the test is whether attention can reasonably be expected to be called to it." *Id.* § 1-201 cmt. 10.

Unlike current Article 1-201(10), neither Draft Revised Article 2 nor Draft Article 2B specifies that the court is to determine whether a term is "conspicuous" or not. U.C.C. § 2-102 note 1 (Proposed Official Partial Redraft Dec. 1997). The Official Notes to section 2-102 of the Partial Redraft also observe that "[t]he safe harbor language [of this section] is derived from but is somewhat narrower than UCC 2B-102(a)(7) (Dec. 1997)." *Id.* § 2-102 note 2.

275. *Id.* § 2-203(e) (emphasis added).

contract.²⁷⁶ A party or electronic agent manifests assent to a record or term in a record if, with knowledge of the terms or after having had an opportunity to review the record or term, and after having had an opportunity to decline to manifest assent, it "authenticates the record or term, or engages in other affirmative conduct or operations that the record conspicuously provides or the circumstances, including the terms of the record, clearly indicate will constitute acceptance of the record or term."²⁷⁷

Among the examples provided by the Reporter's Notes of valid manifestations of assent is "an affirmative act of clicking on a displayed button in response to an on-screen description that this act constitutes acceptance of a particular term or an entire contract."²⁷⁸ Another example is opening a diskette envelope on which is printed:

"OPENING THE ENVELOPE CONTAINING THE DISKETTE WILL CONSTITUTE YOUR AGREEMENT TO THE LICENSE WHICH IS CONTAINED ON THE OUTSIDE OF THE ENVELOPE. WE CALL YOUR ATTENTION SPECIFICALLY TO: CONTRACT TERM NO. 5, PRECLUDING USE AT HOME, and CONTRACT TERM NO. 16, IMPOSING A \$100 ANNUAL FEE IF YOU CHOOSE TO USE THE HELP LINE."²⁷⁹

"Conspicuousness" is defined by Draft Article 2B in much the same way as it is in the Partial Redraft of Draft Revised Article 2. Both proposed articles set forth a high standard for a conspicuous term's appearance, indicating that a reasonable person against whom such a term is to operate "ought to have noticed it."²⁸⁰ Like Draft Revised

276. The Reporter's Notes to section 2B-112 distinguish "manifesting assent" from the concepts of offer and acceptance. The Notes provide:

Offer and acceptance create a contract. While manifesting assent will also often indicate acceptance of a contract, acceptance is the broader concept. . . .

In contrast to accepting an offer, manifesting assent focuses on assent to the terms of a record. It deals with what are the terms of the contract. The concept of manifesting assent creates procedural protections to ensure fairness. U.C.C. § 2B-112 rptr. note 2 (Proposed Official Draft Nov. 1, 1997).

277. *Id.* § 2B-112(a). The drafters recognized that allowing "affirmative conduct to supplant a signature . . . is especially important in electronic commerce where actual signatures are not always required or feasible." *Id.* § 2B-112 rptr. note 1.

278. *Id.* § 2B-112 rptr. note 3. Illustration 1 furnished by this Note describes a Web-based procedure for licensing an on-line newspaper. The first screen seen by the user asks him to click on a provided "button," or hypertext link, to view the terms of the license. The screen also informs him that he can signify his agreement with the terms of the license by clicking on the "I agree" button provided at the end of the license. If the visitor, having clicked on the first button to read the license, then clicks on the second button to indicate assent to the terms, "[his] conduct, by moving forward to use the information resource also indicates that [he] accepted the offer for a contract and that, therefore, a contract was formed." *Id.* § 2B-112 rptr. note 3, illus. 1.

279. *Id.* § 2B-112 rptr. note 3, illus. 2.

280. *Id.* § 2B-102(a)(7); U.C.C. § 2-102(a)(7) (Proposed Official Partial Redraft Dec. 1997).

Article 2, Draft Article 2B goes far beyond current Article 1²⁸¹ in providing "safe harbor" guidelines for conspicuousness.²⁸²

According to Draft Article 2B, a term or clause is conspicuous if it is:

- (A) a heading in all capitals (as NON-NEGOTIABLE BILL OF LADING) equal or greater in size to the surrounding text;
- (B) language in the body of a record or display in larger or other contrasting type or color than other language, but in a telegram or other similar communication any stated term is conspicuous;
- (C) prominently referenced in the body or text of an electronic record or display that can be readily accessed from the record or display;
- (D) language so positioned in a record or display that a party cannot proceed without taking some additional action with respect to the term or the reference thereto; or
- (E) language readily distinguishable in another manner.²⁸³

Agreeing with current Article 1, but apparently not with Draft Revised Article 2, Draft Article 2B states that the "conspicuousness" of a given term in a given agreement is a question of law and not a question for the trier of fact.²⁸⁴

VI. WARRANTY ISSUES

The disclaimer of warranties, which might appear relatively straightforward in the context of "real-world" sales, takes on new dimensions, both figuratively and literally, in the context of commercial Web-sites. Although the principles analyzed above, particularly with regard to

281. See U.C.C. § 1-201(10) (1996).

282. The drafters of Draft Article 2B insisted that their definition's inclusion of "safe harbor" elements follows existing law. U.C.C. § 2B-102 rptr. note 5 (Proposed Official Draft Nov. 1, 1997). The drafters further stated:

Current law in U.C.C. 201(10) contains three safe harbors for making a clause conspicuous; these have been part of law for over fifty years. They serve a critical role in planning and drafting documents. As a general rule, a term that conforms to a "safe harbor" provision is held to be conspicuous

.... The theme of conspicuousness blends both a notice function and a planning function giving certainty to the party preparing and using the term. It is equally important to ensure that the recipient of a record receives notice of the contents and that the party who reasonably desires to rely on the terms of the record can do so. Taking out all safe harbors eliminates the second objective and jeopardizes the first.

Id.

283. *Id.* § 2B-102(a)(7).

284. *Id.* § 2B-102 rptr. note 5; see also U.C.C. § 1-201(10) (1996); U.C.C. § 2-102(a)(7) note 2(a) (Proposed Official Revision July 25-August 1, 1997).

"Web-wrap" agreements,²⁸⁵ offer apparently effective means of disclaiming warranties, the sophisticated sites of several major international corporations display a more "user-friendly," though more legally risky, approach.

A. Types of Warranties and Their Disclaimer

1. Article 2

a. Express Warranties

Under Article 2 the seller of goods, whether merchant or not, is deemed to have given express warranties by making (1) "any affirmation of fact or promise . . . to the buyer which relates to the goods and becomes part of the basis of the bargain," (2) furnishing to the buyer "[a]ny description of the goods which is made part of the basis of the bargain," or (3) providing "[a]ny sample or model which is made part of the basis of the bargain."²⁸⁶ The seller need not use the words "warrant" or "guarantee" to create an express warranty.²⁸⁷ Of particular import to the commercial Web site context is the caselaw concerning printed catalogs, whose descriptions of products have often been found to constitute express warranties.²⁸⁸

285. See *supra* Part V.E.

286. U.C.C. § 2-313(1) (1996). Courts are divided on the issue of whether the buyer must have relied on the specific representation in purchasing the product in question to recover under an express warranty theory. See Robert S. Adler, *The Last Best Argument For Eliminating Reliance From Express Warranties: "Real-World" Consumers Don't Read Warranties*, 45 S.C. L. REV. 429, 444 (1994) (observing that despite the ambiguity of U.C.C. § 2-213 in this regard, the majority of courts have interpreted the section as requiring reliance in some form).

Adler argues that because studies have revealed that many consumers do not read the warranties, the reliance requirement "provides crafty sellers with the means to take advantage of their misrepresentations to the public and avoid the consequences of their misrepresentations in more cases than is justified." *Id.* at 475. However, the proposed revisions to Article 2 may strengthen, rather than eliminate, the reliance requirement. See *supra* note 303 and accompanying text (discussing same).

287. U.C.C. § 2-313(2) (1996). However, "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." *Id.*

288. See, e.g., *Crest Container Corp. v. R.H. Bishop Co.*, 445 N.E.2d 19, 24 (Ill. App. Ct. 1982) (holding that affirmations made in a catalog may constitute express warranties, and that such affirmations made during a bargain become a basis of the bargain unless clear affirmative proof shows otherwise); *Overstreet v. Norden Lab., Inc.*, 669 F.2d 1286, 1290-91 (6th Cir. 1982) (A catalog description or advertisement may create a warranty in appropriate circumstances, *i.e.*, when the seller assumes to assert a fact of which the buyer is ignorant, as opposed to merely stating an opinion or expressing a judgment about a thing as to which they may each be expected to have an

Sellers may disclaim express warranties explicitly (e.g., "No express warranties"),²⁸⁹ but the disclaimer language is only effective to the

opinion and exercise a judgment.); *Eddington v. Dick*, 386 N.Y.S.2d 180, 181-82 (N.Y. City Ct. 1976) (holding that a classified newspaper advertisement for a used refrigerator in "good condition" goes beyond mere affirmation of value, opinion, or commendation but relates inherently to the condition of the goods and thus creates an express warranty); *Wisconsin Elec. Power Co. v. Zallea Bros., Inc.*, 606 F.2d 697, 700 (7th Cir. 1979) (holding that statements contained in advertising may create express or implied warranties); *State Farm Ins. Co. v. Nu Prime Roll-A-Way of Miami, Inc.*, 557 So. 2d 107, 108 (Fla. Dist. Ct. App. 1990) (observing that a seller's representations in newspaper advertisements, catalogues, circulars, etc., may become part of a contract of sale and constitute an express warranty); *Interco Inc. v. Randustrial Corp.*, 533 S.W.2d 257, 261 (Mo. Ct. App. 1976) (holding that a statement in a sales catalogue that a floor-covering product would "absorb considerable flex" created a warranty on seller's part); *Drier v. Perfection, Inc.*, 259 N.W.2d 496, 502 (S.D. 1977) (holding that a description of a printing press's capabilities, furnished to potential buyers by the manufacturer, contained express warranties because they described the specific capacity of the goods and certainly amounted to more than mere "puffing" or opinion); *Auto-Teria, Inc. v. Ahern*, 352 N.E.2d 774, 781-82 (Ind. Ct. App. 1976) (stating that a description in an advertising brochure for automatic carwash equipment could have been found by the lower court to have created express and implied warranties); *Dilenno v. Libbey Glass Div.*, 668 F. Supp. 373, 376 (D. Del. 1987) (holding that an action for breach of an express warranty requires some reliance by the buyer on the warranty and that, here, there was no evidence the buyer saw the catalog in question, let alone relied upon it); *Mennonite Deaconess Home and Hosp., Inc. v. Gates Eng'g Co., Inc.*, 363 N.W.2d 155, 161-62 (Neb. 1985) (holding that representations made in advertising brochures can create express warranties where the seller assumes to assert a fact of which the buyer is ignorant or on which it is intended that the buyer shall rely in making the purchase); *Community Television Services, Inc. v. Dresser Indus., Inc.*, 586 F.2d 637, 640 (8th Cir. 1978) (holding that a statement made in the seller's catalog to the effect that the broadcasting towers for sale could withstand some of the roughest weather and continue to give dependable, uninterrupted service formed part of the basis of the bargain); *AES Tech. Sys., Inc. v. Coherent Radiation*, 583 F.2d 933, 939 (7th Cir. 1978) (holding that a catalog's specifications for the power output of a laser system constituted a warranty on which the system's buyer could rely).

289. U.C.C. § 2-316(1) (1996). Sellers can disclaim errors and omissions in their catalogs under certain circumstances. A New York Supreme Court discussed how this might occur:

While Yonkers Raceway undertook the responsibility to publish the catalog, it clearly set forth that it could not warrant the veracity of the printed matter. For its own protection, the Raceway insulated itself from liability for errors or omissions published in the catalog through a conspicuous disclaimer contained therein. Paragraphs 7 and 10 of the catalog further disclaim warranties on the part of the Raceway for misstatements given to it; and errors or omissions published in the catalog. The prospective buyers are further cautioned to verify statements made therein. The disclaimer is clear and conspicuous and fully relieves Yonkers Raceway from any liability concerning errors or omissions and statements regarding horses placed for sale at the auction (UCC § 2-316).

extent that it is not "inconsistent with language of express warranty."²⁹⁰

b. Implied Warranty of Title

Article 2 reads into every contract for the sale of goods a warranty by the seller that "the title conveyed shall be good, and its transfer rightful; and . . . the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge."²⁹¹ This warranty "will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or

Greenberg v. Resnick, 25 UCC Rep. Serv. 1270, 1272 (N.Y. Sup. Ct. 1979); see also Chase Resorts, Inc. v. Johns-Manville Corp., 476 F. Supp. 633, 638 (E.D. Mo. 1979) (finding a catalog's disclaimer of express and implied warranties effective); T.T. Exclusive Cars, Inc. v. Christie's, Inc., 1996 WL 737204, at *3 (S.D. N.Y. 1996) (finding that an auction catalogue's description of an antique car was expressly disclaimed, numerous times, in unambiguous language in the same catalogue and could not be relied upon by a sophisticated buyer such as the plaintiff).

290. U.C.C. § 2-316 cmt. 1 (1996). The full text of section 2-316(1) provides:

Words or conduct relevant to the creation of express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence . . . negation or limitation is inoperative to the extent that such construction is unreasonable.

Id. § 2-316(1); see also Weisz v. Parke-Bernet Galleries, Inc., 351 N.Y.S.2d 911, 912 (N.Y. App. Div. 1974) (per curiam) (holding that a buyer should "act with the caution of one in circumstances abounding with signals of *caveat emptor*" when the seller had placed prominent disclaimers in its catalogue); Olathe Mfg., Inc. v. Browning Mfg., 915 P.2d 86, 95 (Kan. 1996) (observing that in order to make the buyer aware of any limitation of remedy, the seller's product brochure should have at least referred to one of the prior catalogs which included such a limitation, or the seller should have put a remedy limitation in the product brochure that referred to the product at issue, or the seller's representative should have pointed out to the buyer that the seller had limited the remedies in regard to all of the seller's products).

It should be noted that each of the three leading catalog purveyors of outdoor clothing and equipment offers its products with an unconditional guarantee. See *About L.L. Bean* (visited Jan. 26, 1998) <<http://www.llbean.com/about/guarantee.noframes.html>> ("Our products are guaranteed to give 100% satisfaction in every way. Return anything purchased from us at any time if it proves otherwise. We will replace it, refund your purchase price or credit your credit card, as you wish."); *Guaranteed. Period.* (visited Jan. 26, 1998) <<http://www.landsend.com/spawn.cgi?EDITGUARXXXX&GRAPH-IC&NODECOMP0795&0885811145248>> ("If you are not completely satisfied with any item you buy from us, at any time during your use of it, return it and we will refund your full purchase price."); *Creed & Guarantee* (visited Jan. 26, 1998) <<http://www.eddiebauer.com/eb/EBhq/creedguarantee.asp>> ("Every item we sell will give you complete satisfaction or you may return it for a full refund."); see also *Let's Go Shopping*, PC MAG., Nov. 18, 1997, at 124, 126-27 (praising these three sites for their "style").

291. U.C.C. § 2-312(1)(a)-(b) (1996).

that he is purporting to sell only such right or title as he or a third person may have."²⁹²

c. Implied Warranty Against Infringement

A seller who is a "goods" merchant, that is, "a merchant regularly dealing in goods of the kind" at issue, warrants that, unless the goods were manufactured by her in compliance with the buyer's specifications, "the goods shall be delivered free of the rightful claim of any third person by the way of infringement or the like . . ."²⁹³ This warranty can be disclaimed only by agreement of the parties.²⁹⁴

d. Implied Warranty of Merchantability

The seller, if a "merchant with respect to goods of that kind," conveys an implied warranty to the buyer that the goods are merchantable,²⁹⁵ that is, "of a quality comparable to that generally acceptable in that line of trade under the description or other designation of the goods used in the agreement."²⁹⁶ To be effective, any attempted disclaimer of this type of warranty must mention merchantability and, if in writing, must be "conspicuous."²⁹⁷ The court determines the "conspicuousness" of

292. *Id.* § 2-312(2).

293. *Id.* § 2-312(3).

294. *Id.*

295. *Id.* § 2-314(1).

296. *Id.* § 2-314 cmt. 2. The warranty of merchantability promises that the goods "must be at least such as":

- (a) pass without objection in the trade under the contract description; and
- (b) in the case of fungible goods, are of fair average quality within the description; and
- (c) are fit for the ordinary purposes for which such goods are used; and
- (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
- (e) are adequately contained, packaged, and labeled as the agreement may require; and
- (f) conform to the promises or affirmations of fact made on the container or label if any.

Id. § 2-314(2).

The determination of whether the goods in question are merchantable "depends upon the facts of each individual case." *Ford v. Starr Fireworks, Inc.*, 874 P.2d 230, 233 (Wyo. 1994).

297. U.C.C. § 2-316(2) (1996).

a disclaimer by asking whether "it is so written that a reasonable person against whom it is to operate ought to have noticed it."²⁹⁸

e. Implied Warranty of Fitness for a Particular Purpose

Under Article 2:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless otherwise modified under [2-316] an implied warranty that the goods shall be fit for such purpose.²⁹⁹

There is no requirement that the seller be a merchant to extend to the buyer this particular warranty.³⁰⁰ To exclude or modify this implied warranty, the disclaimer "must be by a writing and conspicuous."³⁰¹

298. U.C.C. § 1-201(10) (1996). The Code's general definition of "conspicuous" also states, "A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is 'conspicuous' if it is larger or other contrasting type or color. But in a telegram any stated term is 'conspicuous.'" *Id.*

The issue of disclaimers' conspicuousness has frequently been litigated. In relation to an attempted disclaimer in a catalog, a district court stated:

The disclaimer language on which [the seller] relies, appears some 12 pages away from the express warranty upon which [the buyer] bases its action. There is no device used to draw attention to this disclaimer, and, although "conspicuousness" is not an issue with an attempted disclaimer under the UCC, this hidden disclaimer does underscore one of the policy reasons for the UCC position that express warranties cannot be disclaimed.

Campus Sweater and Sportswear Co. v. M.B. Kahn Constr. Co., 515 F. Supp. 64, 96 (D. S.C. 1979); *see also* *LWT, Inc. v. Childers*, 19 F.3d 539, 543 (10th Cir. 1994) (holding that a limited warranty printed on both sides of a full-size page, surrounded by a white and then a colored border, printed on a green background on a different grain of paper than the rest of the catalog, and whose disclaimer language was set out in capital letters is "conspicuous as a matter of law"); *Architectural Aluminum Corp. v. Macarr, Inc.*, 333 N.Y.S.2d 818, 823 (N.Y. Sup. Ct. 1972) (holding that a catalog's disclaimer that is "separately set forth from the other matter contained therein, is framed with a heavy black line, and is surrounded on all four sides by an approximately one inch blank margin" is conspicuous under the Code); *Travis v. Washington Horse Breeders Assoc.*, 759 P.2d 418, 421-22 (Wash. 1988) (en banc) (holding that a buyer at an auction was bound by catalog notices in large bold type, wherein the catalog reference was made specifically to those pages containing conditions of sale, and wherein the catalog the conditions of sale were placed prior to the listing of the horses for sale and were legible and easy to read).

299. U.C.C. § 2-315 (1996).

300. *Bevard v. Ajax Mfg. Co.*, 473 F. Supp. 35, 38 (E.D. Mich. 1979); *International Petroleum Services, Inc. v. S & N Well Serv., Inc.*, 639 P.2d 29, 33 (Kan. 1982). The *International Petroleum* court added, however, that "the seller at the time of contracting must have reason to know the goods are being purchased for a particular purpose, and the seller must know further that the buyer is relying on the skill and judgment of the seller to select or furnish suitable goods." *International Petroleum*, 639 P.2d at 33.

301. U.C.C. § 2-316(2) (1996). "Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend

2. *Draft Revised Article 2*a. *Express Warranties*

The draft revisions to Article 2 retain the concept of express warranties derived from a "representation or promise relating to the goods" that was made by the seller to the "immediate buyer,"³⁰² but clarify that such representations and promises include those "made in a medium for communications to the public, including advertising, if the immediate buyer had knowledge of [and believed] them at the time of agreement."³⁰³ This reference to communications made "in a medium for communications to the public" would certainly include representations and promises made through Web sites.

Disclaimers of express warranties by words or conduct must be construed wherever reasonable as consistent with the words or conduct relevant to the creation of express warranties.³⁰⁴ Therefore, according to the Reporter's Notes,

if the agreement contained both an express warranty that a car's mileage was 25,000 and a disclaimer of all express warranties, the express warranty would prevail. If, however, the seller, in contract negotiations, stated that "this car has not been driven more than 25,000 [miles]" and a subsequent integrated record [i.e., one which states that it contains all of the terms agreed to by the parties and that it trumps any alleged oral agreement] stated "This car is sold without

beyond the description on the face hereof." *Id.*

302. U.C.C. § 2-403(a) (Proposed Official Partial Redraft Dec. 1997). An exception exists for those representations or promises with regard to which "a reasonable person in the position of the immediate buyer would not believe . . . became part of the agreement or would believe that the representation was merely of the value of the goods or purported merely to be the seller's opinion or commendation of the goods." *Id.* Factors tending to support that seller's contention that her representations were mere "puffing" rather than an express warranty include whether they:

- (1) were verbal rather than written, (2) were general rather than specific, (3) related to the consequences of buying rather than the goods themselves, (4) were "hedged" in some way, (5) related to experimental rather than standard goods, (6) concerned some aspect of the goods but not a hidden or unexpected non-conformity, (7) were phrased in terms of opinion rather than fact, or (8) were not capable of objective measurement.

U.C.C. § 2-403 note 2 (Proposed Official Revision July 25 - Aug. 1, 1997).

303. U.C.C. § 2-403(c) (Proposed Official Partial Redraft Dec. 1997) (brackets in original).

304. *Id.* § 2-406(a).

express warranties," evidence of the oral express warranty should be excluded under the parol evidence rule.³⁰⁵

In consumer contracts, however, the disclaimer in a record would be excluded from the contract if a reasonable consumer under the circumstances would not expect to find it in the contract,³⁰⁶ "unless the consumer had knowledge of the term before agreeing to the record."³⁰⁷ Thus, a site owner seeking to disclaim express warranties should do so explicitly and conspicuously.

b. Implied Warranties

Draft Revised Article 2 contains counterparts substantially similar to, and at times identical to, Article 2's implied warranty of title,³⁰⁸ implied warranty against infringement,³⁰⁹ implied warranty of merchantability,³¹⁰ and implied warranty of fitness for a particular purpose.³¹¹

The disclaimer of implied warranties is also generally the same,³¹² with the exceptions of references to "records" instead of "writings."³¹³

305. U.C.C. § 2-406 note 1 (Proposed Official Revision July 25 - Aug. 1, 1997).

306. *Id.*

307. U.C.C. § 2-206(a) (Proposed Official Partial Redraft Dec. 1997) (Alternative A).

308. U.C.C. § 2-402(a)-(b) (Proposed Official Revision July 25, 1997 - Aug. 1, 1997); U.C.C. § 2-312(1)-(2) (1996).

309. U.C.C. § 2-402(c) (Proposed Official Revision July 25 - Aug. 1, 1997); U.C.C. § 2-312(3) (1996).

310. U.C.C. § 2-404(b) (Proposed Official Partial Redraft Dec. 1997); U.C.C. § 2-314 (1996).

311. U.C.C. § 2-405 (Proposed Official Revision July 25 - Aug. 1, 1997); U.C.C. § 2-315 (1996).

312. Draft Revised Article 2 provides that "an implied warranty is disclaimed or modified by words [language] or an expression that, under the circumstances, makes it clear that the implied warranty has been disclaimed or modified. An implied warranty may also be disclaimed or modified by course of performance, course of dealing, or usage of trade." U.C.C. § 2B-406(b) (Proposed Official Partial Redraft Dec. 1997) (brackets in original). *But see* U.C.C. § 2-316(2)-(3) (1996).

313. U.C.C. § 2-406(c) (Proposed Official Partial Redraft Dec. 1997); U.C.C. § 2-316(b) (1996). According to the Drafting Committee, "[t]he language of disclaimer need not be in a record. If the disclaimer is in a record, however, the language, if conspicuous and following the suggested wording ['There is no warranty of title or against infringement in this sale'] secures a 'safe harbor' for the disclaimer." U.C.C. § 2-402 note 4 (Proposed Official Revision July 25 - Aug. 1, 1997).

The focus on "records" rather than "writings" is also evident in section 2-406(c) of Draft Revised Article 2, which provides:

[W]ords [language] in a record disclaiming or modifying an implied warranty is sufficient . . . if the words [language] are are conspicuous and (1) in the case of the implied warranty of merchantability, mentions [sic] merchantability; (2) in the case of the implied warranty of fitness, states [sic] that 'the goods are not warranted to be fit for any particular purpose', [sic] or words of

The major difference is that the language of a consumer contract can disclaim or modify an implied warranty if "[c]onspicuous language in a record states: 'Unless we say otherwise in the contract, we make no promises about the quality or usefulness of the product you are buying. It may not work or it may not be fit for any specific purpose that you may have in mind.'"³¹⁴

Draft Revised Article 2's definition of "conspicuous" is substantially similar to current Article 1's, but notes that the term in question may be "displayed or presented," as opposed to merely written.³¹⁵ The revision also adds that a term is conspicuous if "in the case of an electronic message intended to evoke a response without the need for review by an individual, [it is] in a form that would enable a reasonably configured electronic agent to take it into account or react to it without review of the message by an individual."³¹⁶

3. *Draft Article 2B*

a. *Express Warranties*

Draft Article 2B "adopts existing law with edits to more closely conform to the text of current Article 2 except where differences in subject matter and approach are intended. It preserves current law relating to express warranty obligations in reference to published

similar import; (3) [u]nless the circumstances indicate otherwise, states that the goods are sold "as is" or "with all faults" or words of similar import. U.C.C. § 2-406(c) (Proposed Official Partial Redraft Dec. 1997).

314. *Id.* § 2-406(d)(2); see also *id.* § 2-406(d)(1) (providing another exception for the case in which conspicuous language alerts the consumer that he is receiving an express warranty obligation from another seller instead of any implied warranty of merchantability or fitness from the particular seller).

315. *Id.* § 2-102(a)(7); U.C.C. § 1-201(10) (1996).

316. U.C.C. § 2-102(a)(7) (Proposed Official Partial Redraft Dec. 1997).

information content."³¹⁷ Its provision for the disclaimer of an express warranty substantially mirrors that of Article 2.³¹⁸

b. Implied Warranties of Authority and Non-Infringement

Draft Article 2B's warranty of authority takes language from Article 2 (authority) and 2A (interference and enjoyment) to create a "warranty broader than either of the other two articles."³¹⁹ The licensor essentially represents that it has the authority to make the transfer and warrants that it will not interfere with the licensee's exercise of rights under the contract.³²⁰ If the licensor purports to convey exclusive rights in the information, she warrants that the intellectual property rights pertaining to this information are valid and exclusive.³²¹ In addition, a licensor who is a merchant regularly dealing in information of the kind warrants that it is noninfringing, and a party acting merely as a conduit for

317. U.C.C. § 2B-402 rptr. note 1 (Proposed Official Draft Nov. 1, 1997); *see also id.* § 2B-402 rptr. note 2 ("The section retains the 'basis of the bargain' standard from current law relating to transactions in goods."). Section 2B-402 provides for the creation of express warranties by "an affirmation of fact, promise, or description of information made by the licensor to its licensee in any manner, including in a medium for communication to the public such as advertising, which relates to the information and becomes part of the basis of the bargain," *id.* § 402(a)(1), by "[a]ny description of the information which is made part of the basis of the bargain," *id.* § 402(a)(2), or by "[a]ny sample, model, or demonstration of a final product which is made part of the basis of the bargain." *Id.* § 2-402(a)(3). It is not necessary that the licensor use formal words such as "warranty" or "guarantee," or that the licensor state a specific intention to make a warranty. *Id.* § 2B-402(b).

More generally, the drafters have indicated:

Article 2B warranties blend three different legal traditions. ONE tradition stems from the UCC and focuses on the quality of the product. This tradition centers on the *result* delivered: a product that conforms to ordinary standards of performance. The SECOND tradition stems from common law, including cases on licenses, services contracts and information contracts. This tradition focuses on how a contract is performed, the *process* rather than the result. The obligations of the transferor are to perform in a reasonably careful and workmanlike manner. The THIRD tradition comes from the area of contracts dealing with informational content and essentially disallows implied obligations of accuracy or otherwise in reference to information transferred outside of a special relationship of reliance. Current law selects the applicable tradition in part based on characterizations about whether a transaction involves *goods* or not. That distinction is not reliable in information contracting, especially in light of the ability to transfer intangibles information [sic] electronically without the use of any tangible property to carry the intangibles.

Id. § 2B-403 gen. note 1.

318. *See id.* § 2B-406(a); U.C.C. § 2-316(1) (1996).

319. U.C.C. § 2B-401 rptr. note 1 (Proposed Official Draft Nov. 1, 1997).

320. *Id.* § 2B-401(a)(1).

321. *See id.* § 2B-401(a)(2).

information of another warrants only that it has no knowledge or notice of such infringement.³²²

As under current Article 2,³²³ these implied warranties can be disclaimed, excluded, or modified "only by express specific language or by circumstances . . . which give the licensee reason to know" of the exclusion.³²⁴ For these purposes, language in a record that will be viewed by a human being (as opposed to an electronic agent) "is sufficient if it states 'There is no warranty of quiet enjoyment or against infringement', or words of similar import."³²⁵

In general, Article 2B's other implied warranties can be disclaimed by course of performance or course of dealing,³²⁶ or by language of disclaimer in a record. Language sufficient to disclaim the warranty of merchantability or of fitness for a particular purpose in a transaction governed by Article 2 is sufficient to disclaim the warranties of the Article 2B analogs of these warranties.³²⁷ In the case of a mass-market license, the language that disclaims or modifies an implied warranty must also be conspicuous.³²⁸

322. *Id.* § 2B-401(a)(3).

323. *See* U.C.C. § 2-312(2) (1996).

324. U.C.C. § 2B-401(d) (Proposed Official Draft Nov. 1, 1997). This section also provides that "[i]n an electronic transaction that does not involve review of the record by an individual, language is sufficient if it is conspicuous as to that term." *Id.*

325. *Id.*

326. *Id.* § 2B-406(b)(5).

327. *See id.* § 2B-406(b)(2)-(3). Specifically, to disclaim the warranty of merchantability, "language that mentions 'quality' or 'merchantability' is sufficient as to Section 2B-403 and language that mentions 'accuracy', or words of similar import, is sufficient as to Section 2B-404." *Id.* § 2B-406(b)(2). To disclaim a warranty of fitness, "it is sufficient to state 'There is no warranty that this information or my efforts will fulfill any of your particular purposes or needs', or words of similar import." *Id.* § 2B-406(b)(3).

Moreover, unless the circumstances indicate otherwise, all implied warranties are disclaimed by language stating that the information is provided "as is" or "with all faults," or other language that in common understanding calls the licensee's attention to the exclusion of all warranties and makes plain that there is no implied warranty. *Id.* § 2B-406(c)(1).

328. *Id.* § 2B-406(d). This provision provides:

To disclaim all implied warranties in a mass-market license, other than [those concerning authority and noninfringement under Draft § 2B-401], language in a record is sufficient if it states: "Except for express warranties stated in this contract, if any, this [information] [computer program] is being provided with all faults, and the entire risk as to satisfactory quality, performance, accuracy, and effort is with the user," or words of similar import.

Id. (second and third bracketed material in original). The drafters noted:

c. *Implied Warranty of Merchantability*

Draft Article 2B's counterpart to Article 2's warranty of merchantability similarly applies only in the case of a merchant's providing the product at issue. In a mass-market transaction for the license of information, a licensor that is a merchant with respect to information of the kind that it provides in a computer program makes an implied warranty that the computer program and media are merchantable.³²⁹ If the licensor is a merchant with respect to computer programs of that kind, but the transaction is not a mass-market transaction, the implied warranty of merchantability applies only to the physical medium on which the program is transferred.³³⁰

In either case, the implied warranty of merchantability "pertains to the functionality of a computer program, but does not pertain to informational content in software, or to the quality, aesthetic appeal, marketability, accuracy, or other characteristics of the informational content."³³¹

d. *Implied Warranty of Informational Content*

Draft Article 2B states:

[A] merchant that provides informational content in a special relationship of reliance or that provides services to collect, compile, transcribe, process, or transmit informational content, warrants to its licensee that there is no

[I]f the intent is to disclaim all warranties in a single sentence, [this] subsection sets out a common language disclaimer based on proposals by the software industry as a means of giving more disclosure to the consumer of what is disclaimed. That language is a safe harbor, rather than a required statement.

Id. § 2B-406 rpt. note 4 (mischaracterized by the drafters as Reporter's Note 3).

329. *Id.* § 2B-403(a). The definition of "merchantable" for these purposes closely parallels that of current U.C.C. § 2-314(2), with the exception of the omission of that section's criterion that "in the case of fungible goods, [they] are of fair average quality within the description." U.C.C. § 2-314(2)(b) (1996).

330. U.C.C. § 2B-403(b) (Proposed Official Draft Nov. 1, 1997). The licensor in these cases "warrants to its licensee that any physical medium on which the program is transferred is merchantable and that the computer program will perform in substantial conformance with any promises or affirmations of fact contained in the documentation provided by the licensor at or before the delivery of the program." *Id.* The exception to this provision are representations that can be dismissed as the licensor's mere "puffing." *Id.* The Official General Notes to this provision observe that most licenses substitute a warranty of conformance to documentation for an implied warranty of merchantability. *Id.* § 2B-403 gen. note 5. The draft section treats this as the presumed warranty and rejects the argument that Draft Article 2B should "maintain a congruence" with Articles 2 and 2A. *Id.*

331. *Id.* § 2B-403(c).

inaccuracy in the informational content caused by its failure to exercise reasonable care and workmanlike effort in its performance.³³²

Notably, this warranty does not apply to "published informational content,"³³³ defined as "information made available without being customized for a particular business situation of a particular licensee and where no 'special relationship' of reliance exists between the parties."³³⁴ To that extent, non-customized information licensed through a Web site should not invoke an implied warranty of informational content.

e. Implied Warranty of Fitness

Article 2B's counterpart to Article 2's implied warranty of fitness for a particular purpose provides:

[I]f a licensor at the time of contracting has reason to know any particular purpose for which the information is required and that the particular licensee is relying on the licensor's skill or judgment to select, develop, or furnish . . . suitable information . . . there is an implied warranty that the information will be fit for that purpose.³³⁵

The warranty only exists, however, "if, from all the circumstances, it appears that the contract is for a price for performance which will not be fully paid if the end product is not suitable for the particular purpose."³³⁶

332. *Id.* § 2B-404(a); see also *id.* § 2B-404 rprr. note 1 (observing that this warranty "reflects case law on information contracts"); *Milau Assoc. v. North Ave. Dev. Corp.*, 368 N.E.2d 1247, 1251 (N.Y. 1977) (stating that unless the licensee contractually binds the expert to a higher standard, the licensee will only have a legitimate expectation that the expert will not be negligent in her work, not that the expert will be infallible); cf. *Broyles v. Brown Eng'g Co., Inc.*, 151 So. 2d 767, 771 (Ala. 1963) (recognizing that in the absence of an express contract, courts are reluctant to construe contractual dealings and services of lawyers, physicians, architects, and probably some other professions as implying a guaranty of favorable results).

333. U.C.C. § 2B-404(b)(2) (Proposed Official Draft Nov. 1, 1997).

334. *Id.* § 2B-404 rprr. note 3. As an illustration of "published informational content," the Reporter's Notes mention a newspaper's or Web site's review of or information about particular restaurants. *Id.* § 2B-404 rprr. note 3, illus. 1. As a counterexample, the notes mention a list of restaurants tailored by a reviewer to the specific purposes of a specific client. *Id.* § 2B-404 rprr. note 3, illus. 2.

335. *Id.* § 2B-405(a)(1).

336. *Id.*

On the other hand, if a special purpose were enunciated but “from all the circumstances, it appears that the licensor was to be paid for the amount of its time or effort regardless of the suitability of the end product,” there would be an implied warranty only to the effect that “there is no failure to achieve the licensee’s particular purpose caused by the licensor’s failure to exercise workmanlike effort to achieve the licensee’s purpose in its performance.”³³⁷

In connection with the implied warranty for a particular purpose, Draft Article 2B provides:

If an agreement requires a licensor to provide or select a single or integrated system consisting of computer programs, hardware or similar components and the licensor has reason to know that the licensee is relying on the skill or judgment of the licensor to select the components, there is an implied warranty that the components selected will function together as a system.³³⁸

B. Disclaiming Warranties Through a Web Site

On many commercial Web sites the disclaimers of warranties, and even the existence of such disclaimers, are far from “conspicuous” under Article 1, Draft Revised Article 2, and Draft Article 2B. The link to most disclaimers, while itself appearing in a different color than the other text on a page, is not automatically thereby distinguished from other links, which may appear in the same distinctive color (often, dark blue).³³⁹ The link itself, even when labeled “Disclaimers,” is often in

337. *Id.* § 2B-405(a)(2). Neither of the two warranties provided by the draft of section 2B-405(a)(1) applies to “the aesthetic value, commercial success, or market appeal of the informational content.” *Id.* § 2B-405(a). The Reporter’s Notes indicate that these two warranties build on current U.C.C. § 2-315 but that they substantially alter the concepts contained in that section to fit the diverse traditions that exist in the various information industries that are covered by Draft Article 2B. *Id.* § 2B-405 rptr. note 1. In development and design contract litigation, reported decisions concerning software choose between a warranty of result and a warranty of effort based on whether the court views the transaction as involving goods (result) or services (effort). The reported cases split on this issue, often turning on the subjective impressions of the court, rather than on any differences in the actual transactions.

Id.

338. *Id.* § 2B-405(b). The Reporter’s Notes add that this warranty “differs from the fitness concept, but is closely related to that concept. The obligation is that the selected components will actually function as a system. That is an additional step beyond the obvious fact that the components themselves must be separately functional in a manner consistent with the contract.” *Id.* § 2B-405 rptr. note 4.

339. Draft Article 2B indicates that a “safe harbor” for conspicuousness included a heading in all capitals such as “NON-NEGOTIABLE BILL OF LADING,” which heading is equal or greater in size to the surrounding text. *Id.* § 2B-102(a)(7)(A). Another “safe harbor” would include language in the body of a record or display if it is larger or in contrasting type or color than the other language. *Id.* § 2B-102(a)(7)(B).

small text and "buried" at or near the bottom of a home or internal page. In order to see the disclaimer link, therefore, a visitor would have to "scroll down" through the material—perhaps including other links—already visible on his computer screen.³⁴⁰

In the absence of caselaw on the issue, the site owner should indicate conspicuously on the site's home page that use of the site is subject to terms and conditions that are either spelled out on that page or on a page to which the home page provides a *conspicuous* link. A careful owner could force a visitor to "click through" a page containing the necessary disclaimers before the visitor can submit his order (or, at the risk of scaring him off, before he can even start to browse through the content of the site), thereby denying the visitor any excuse that he did not have the opportunity to read them.³⁴¹ In the case of sites selling or displaying erotica, the disclaimers or warnings usually occur very early in the visit; such sites "typically include[] several disclaimer screens warning away those who may have accidentally stumbled upon" the material.³⁴²

340. See *id.* § 2B-102(a)(7)(C) (indicating that a "safe harbor" for conspicuousness includes a term prominently referenced in the body or text of an electronic record or display that can be readily accessed from the record or display).

341. See *id.* § 2B-102(a)(7)(D) (indicating that "safe harbors" for conspicuousness include "language so positioned in a record or display that a party cannot proceed without taking some additional action with respect to the term or the reference thereto"). Under the "safe harbor" described in this section, it is questionable whether, for example, disclaimers appearing at the bottom of the introductory pages of a Web site offering to sell term papers would be "conspicuous." At the bottom of the page of one such Web site, the site states:

The intended purpose of our example term papers is that they be used as study aids or as models of what a term paper should look like. We encourage students to use our reports to help them in quickening their research. Pursuant to New Jersey Statutes 2A:170-17.16-18 and similar statutes that exist in other states, The Paper Store Enterprises, Inc. will *NEVER* offer its services to *ANY* person giving *ANY* reason to believe that he or she intends to either wholly or partially submit our work for academic credit in their own name . . . Plagiarism is a *CRIME* !

Term Papers On EVERY Subject! (visited Feb. 15, 1998) <<http://www.paperwriters.com/intro.htm>>.

342. Vic Sussman, *Search Engines May Uncover More Than Parents May Want*, USA TODAY, Aug. 20, 1997, at 7D. Sussman remarks that "anybody can click on a button that says 'Yes, I am over 18' to enter a world of sexual images." *Id.* It should be noted that such disclaimers often attempt to provide maximum protection for the owner by requiring the visitor to agree generally that he is not offended by *any* kind of sexual material, without indicating the specific content or orientation of the site itself.

For an example of such disclaimer language, see *HotSex* (visited Oct. 3, 1997) <<http://www.hotsex.com>>, the top of whose home page provides:

We provide stories, articles, pictures, sounds, videos, live chat, and other SEXUALLY EXPLICIT content for adult entertainment. If you enter our site, this means that you accept and understand a simple visitor's agreement. So, please take a moment to read the following:

- I understand that HotSex offers a variety of sexually explicit material for adult entertainment and I do not find sexual material to be offensive or objectionable.
- I am at least 18 years of age and have the legal right to possess adult material in my community.
- I understand the standards and laws of the community to which I am transporting this material, and am solely responsible for my actions.
- All material I transport from HotSex is exclusively for my own personal use.
- I agree to respect the copyrights of the owners of the material I find on HotSex.
- My interest in this material is personal, and not professional.

Immediately below the last of these statements are two links, one ("Accept and Enter") indicating that the visitor agrees to the above representations, and the other ("Decline and Go Away") indicating that he does not agree and wishes to be returned to the last site that he had viewed. The highlighted link that this site contains on the bottom of its home page, "Copyright © 1995, 1996, 1997, HotSex Productions," links to a page stating that "All the text on this site is protected by copyright. In particular, you may not copy the text from here and use it on your own site."

Disclaimers like HotSex's are prevalent on Web sites catering to adults. For instance, the bottom of another erotic site's home page provides links to "Yes, I'm 21 years old!," which allows visitor access to internal pages, and "No, I'm not 21 years old!," which transports visitor to the home page of the Disney site. *Fetish.Com* (visited Nov. 23, 1997) <<http://www.fetish.com>>. An on-line purveyor of narcotics paraphernalia provides visitors an option to leave if not "legally allowed to view adult material" and an agreement if continuing. *Online Head Shop* (visited Feb. 15, 1998) <http://fwservices.com/destination_unknown>.

Another erotica site's home page seeks to protect itself in several different ways. The link to inner pages, found at the top of the home page, contains both an indication of explicit content and a warning to "[CLICK] Here ONLY if over 18!" *Hardcore* (visited Feb. 8, 1997) <<http://www.hardcore.com>>. The middle of the page contains links to screening software such as SurfWatch and Cybersitter and professes that Hardcore.com "is committed to preventing minors from accessing Adult Content on the Internet." The bottom of the page indicates, "If you are presently accessing us from Florida, Kentucky, North Carolina, Tennessee, or Utah, YOU MUST EXIT RIGHT NOW!" The last four words are a link to a web search engine.

As opposed to erotic sites, sites selling alcoholic package goods need not require the visitor to affirm his age before reaching an internal page; they should, however, force visitors to make such a representation before submitting an order. The owners of such sites have been criticized for not verifying the representations of their customers. See Beth Berselli, *Online Beer, Wine Ads Gain Teens' Attention*, WASH. POST, Dec. 13, 1997, at F1. According to Berselli, the operators of such sites "say they police their sales, asking customers if they're 21 when they place the order and requiring them to show identification when the products are delivered." *Id.* Notwithstanding the operators' assurances, the New York State Attorney General recently embarked on a "cyberbooze" sting to stop sales to underage drinkers. See *id.*

Regardless of the goods that they purvey, site owners in general may wish to insert two different forms of disclaimers on their home pages (and perhaps on all pages). The first form of disclaimer would refer to the sites to which the owner's site links,

disclaiming any endorsement of the opinions or warranties of any products to be found on those sites. This concern is addressed by many sites only in the relatively inaccessible page on legal terms and not next to the links themselves. For example, the Apple Computer Site's legal terms specifically state:

Apple makes no representation whatsoever regarding the content of any other web sites which you may access from the Apple Web site. When you access a non-Apple web site, please understand that it is independent from Apple and that Apple has no control over the content on that web site. A link to a non-Apple web site does not mean that Apple endorses or accepts any responsibility for the content or use of such web site.

Apple Computer, Inc. Legal Information and Notices (Nov. 14, 1997) <<http://www.apple.com/legal>>. However, this page is far from "conspicuous" to the user of the Apple site. See *supra* notes 274, 283 (exploring what makes a term "conspicuous"). Similarly, the legal terms on Kraft Foods site, at *A Message from Our Lawyers* (visited Feb. 22, 1998) <<http://www.kraftfoods.com/html/main/legal.html>>, include the disclaimer, "We sometimes provide access to other World Wide Web sites from our sites. But we don't endorse or approve any products or information offered at sites you reach through our site." One might compare Kraft's site with that of the Department of Justice, located at *Department of Justice* (visited Feb. 15, 1998) <<http://www.usdoj.gov/cgi-bin/outside.cgi?http://www.officer.com/agencies.htm>>. This site warns any visitor attempting to use a link not on the Department of Justice Web server that the Department of Justice takes no responsibility for, and exercises no control over, the organizations, views, or accuracy of the information contained on that server.

The second type of link-related disclaimer operates with regard to the views and products of sites linking to the site in question. Such language may be desirable because visitors to a site, particularly those new to the World Wide Web, may not fully understand that generally a site cannot or does not block links made to it from other sites, and thus that a link from Site A to Site B should not necessarily be taken as indicating B's agreement to this affiliation. B's posting of a disclaimer of an endorsement or warranty of the products of A (or, perhaps with certain agreed-upon exceptions, of the owners of all linking sites) might clarify their relationship.

Few sites address this concern in their legal pages, although the language of some disclaimers that broadly refer to "off-site pages" might be broad enough to cover both types of linking disclaimers. For example, the Anacin legal terms provide that the site owner "has not reviewed all of the sites that may be linked to the Site and is not responsible for the content of any off-Site pages or any other sites linked to the Site. Your linking to any other off-Site pages or other sites is at your own risk." *Legal Stuff* (visited Nov. 3, 1997) <<http://www.anacin.com/legal.html>>. Among the sites including similar warnings in their terms and conditions are *Agreement to Use the Warner-Lambert Company Websites* (visited Sept. 20, 1997 <<http://www.warner-lambert.com/legal.html>>) and *Ty Inc.* (visited Nov. 29, 1997) <<http://www.beaniebabies.com>>.

Issues of the site owner's liability are only intensified when she not only links to another site but also incorporates advertising material for that site into her own. Commentators on drafting the agreement between the owner and the advertiser recommend that the owner "investigate the background of the advertiser and its product" and contractually "maintain the right, in its sole discretion, to prevent any product that it finds distasteful, unsafe, offensive, or otherwise unsuitable from being sold or promoted on its site." Mark A. Brand & Mark Kaminsky, *Site Owner Must Retain Web Advertising Control*, NAT'L LAW J., July 21, 1996, at B10. The owner should require the advertiser to "forward samples of all products being offered for sale to the site owner

For disclaimers to be most effective, the remainder of the pages of a site should not be accessible to an individual who has not passed through the home page and its disclaimers, but who simply types the individual URLs of these pages into his Web browser.³⁴³ Allowing visitors to bypass the "locked front door" and its disclaimers will undoubtedly weaken the argument that the visitor had agreed to those terms. Concerned site owners should therefore attempt to restrict access to the site's internal pages to those visitors who have clicked on the disclaimers on the home or linked pages. They might also, at the risk of annoying visitors, insert additional disclaimers on appropriate internal pages of the site.

Of course, disclaimers and other relevant legal terms could for maximum effect be repeated on the "order page" that contains the form that visitors will send to the site owner. The owner could specify on this page that by submitting his order the visitor is agreeing to the stated terms. Yet in spite of the apparent shield from liability that conspicuous disclaimers would provide site owners, they appear to be the exception to Web practice.³⁴⁴

for evaluation and express approval," warrant that "the products being offered or sold are merchantable and of high grade, nature, and quality" and that they do not "infringe the trademarks or service marks of any third party." *Id.* The owner should also require the advertiser to "maintain adequate products liability insurance," supply to the owner "a written copy of the advertiser's warranty protection for the products being offered and its policy for merchandise returns, exchanges and refunds," and release the site owner "from liability for any special, indirect, or consequential damages of any kind, whether in contract, warranty, tort, negligence, strict liability, or otherwise." *Id.* It would seem safest for the site owner to include a prominent disclaimer on her site as well.

343. See *supra* note 61 and accompanying text (discussing direct access to "internal" pages of a site). Some owners restrict access to their sites to participants in "age verification services." See *Persian Kitty's Adult Links* (visited Dec. 21, 1997) <<http://www.persiankitty.com/indexb.html>> (providing links to the home pages of more than two dozen such services, and to lists of the sites accessible through each service).

For a more general examination of the role of "trusted third parties," see A. Michael Froomkin, *The Essential Role of Trusted Third Parties in Electronic Commerce*, 75 OR. L. REV. 49, 67-83 (1996) (discussing the role of certification authorities in facilitating on-line sales).

344. Closer than most to a "click-through," if not a conspicuous, set of disclaimers is Disney's link at the bottom of its home page (which visitors must scroll downwards to reach). It reads, "PLEASE CLICK HERE FOR LEGAL RESTRICTIONS AND TERMS OF USE APPLICABLE TO THIS SITE." *Disney.com—the Web Site for Families* (visited sept. 23, 1997) <<http://www.disney.com>>. Underneath that link the following notice appears: "USE OF THIS SITE SIGNIFIES YOUR AGREEMENT TO THE TERMS OF USE."

Following the link of this Disney Web site leads the visitor to a page with the bold-face heading: "CONDITIONS OF USE. PLEASE READ THESE TERMS OF USE CAREFULLY BEFORE USING THIS SITE. By using this site, you signify your assent to these terms of use. If you do not agree to these terms of use, please do not use this site." The terms include disclaimers and limitations of liability.

1. The "Copyright Sign" Dodge

One emerging custom appears to be to hide a link to disclaimers in a very unlikely position on the home page—the copyright logo—which only the most curious or bored visitors might feel compelled to explore. In most cases, this link is situated at the bottom of the site's home page, which is often beyond the display capability of most computer screens. This requires the avid seeker of legal information to scroll down to the relevant link—assuming, of course, that he can identify it on sight.

For instance, the home page of the computer hardware purveyor Internet Network³⁴⁵ provides a link to its warranty disclaimers through the blue phrase "Copyright 1997" on the bottom half of its home page. Similarly, Mobil links its legal terms to a "Copyright 1997 Mobil Corporation. All Rights Reserved." notice at the bottom left of its home page.³⁴⁶ Although this link may well be visible even if the visitor does not scroll down, by chance or design Mobil has effectively "camouflaged" this link by displaying these words in the same shade of deep blue as much of the rest of its home page.

Of particular note in this context is the Betty Crocker home page,³⁴⁷ the bottom of which contains visible links from the highlighted phrases "bettycrocker.com (tm)" and "Copyright (c) 1997 General Mills, Inc." Although that page does not indicate the nature of the linked informa-

Less vulnerable in this regard is Ty Inc., whose "Beanie Babies" site contains in the middle of its home page, *above* the area in which any other links appear, a prominently placed link in red type, instructing the visitor to "Click here to read the terms and conditions that apply to your use of Ty Inc.'s website." Directly below this link appears a notice in all-capital blue letters, indicating that "USE OF THIS SITE SIGNIFIES YOUR AGREEMENT TO OUR TERMS AND CONDITIONS." Ty Inc. (visited Nov. 29, 1997) <<http://www.beaniebabies.com>>.

345. *International Shopping Network* (visited Sept. 23, 1997) <<http://www.internet.net>>; see also *Aiwa* (visited Sept. 23, 1997) <<http://www.aiwa.com>> (consumer electronic equipment), *Canon* (visited Sept. 23, 1997) <<http://www.usacanon.com>> (cameras), *Eli Lilly and Company* (visited Sept. 23, 1997) <<http://www.lilly.com>> (pharmaceuticals), *Reebok* (visited Sept. 23, 1997) <<http://www.reebok.com>> (athletic shoes).

346. *Mobil* (visited Sept. 23, 1997) <<http://www.mobil.com/start.html>>. Apple Computer's home page likewise links to legal disclaimers through the highlighted phrase "All rights reserved," located at the bottom right of the page. *Apple Computer* (visited Nov. 14, 1997) <<http://www.apple.com>>.

347. *Welcome to Betty Crocker* (visited Sept. 23, 1997) <<http://www.bettycrocker.com>>.

tion, visitors clicking on either of these links will encounter disclaimer language whose preface appears to be half-baked rather than hard-baked:

Hello. *I'm glad you clicked on this page, but I must admit that I'm a bit surprised.* Most people poke around this site for good recipes, tasty food ideas and sound kitchen advice, but *not too many check out the legal stuff.* But they should, because by using the site, you agree to abide by a few simple guidelines, as set forth in the legal terms below. Let's put it this way: if this were a restaurant, this page would read: "No shoes. No shirt. No service." Instead, it's my web site, and there are a few basic rules. . .³⁴⁸

The incongruous folksiness of this message is outdone only by its stunning admission that the disclaimer itself is far from "conspicuous" in the senses discussed above.³⁴⁹

2. The Small "Legal" or "Disclaimer" Notice

In the interests of accessibility some sites have home pages with a link specifically identified as a path to legal material. This link usually is not entitled "Disclaimers," and in many cases the visitor still must scroll down to see it. These links run the gamut from Coca-Cola's icon of a gavel³⁵⁰ to Amazon.com's "Copyright and disclaimer" link,³⁵¹ to Sony's "Legal/Trademarks" link,³⁵² to Gateway 2000's very tiny print reading "Please see our Legal Information."³⁵³

Special mention in this category should go to the Simon & Schuster SuperStore, which disarmingly creates a link at the bottom of its home

348. *Id.* (emphasis added) (ellipses in original).

349. See *supra* Part V.E.; *Award Winners*, *supra* note 24, at 244 ("[M]any [commercial] sites avoid any semblance of the hard sell, preferring a forthright and even whimsical approach to counteract any notion of a corporate association.").

350. *Coca-Cola* (visited Mar. 13, 1998) <<http://www.cocacola.com>>.

351. *Welcome to Amazon.com* (visited Sept. 23, 1997) <<http://www.amazon.com>>.

352. *Sony* (visited Mar. 13, 1998) <<http://www.sony.com>>.

353. *Gateway 2000* (visited Sept. 23, 1997) <<http://www.gateway2000.com>>. Those who click on this link are offered a choice between the "Formal Version of our Disclaimer," the "Informal Version of our Disclaimer," and "Copyright Information." Matching Betty Crocker's *faux* coyness, the "Informal Version" begins, "Wow! You actually came to this page. Our lawyers made us include it." This level of "informality" does not bode well for any argument by the Crocker team that these terms were, or were intended to be, conspicuous.

In another vein, the "Terms and Conditions" link at the bottom of the CompUSA home page leads the visitor to a page that itself begins with the boldface, large-type warning that "continuing from here is your acceptance of the terms and conditions as set forth below." *CompUSA's Terms and Conditions* (visited Oct. 29, 1997) <<http://www.compusa.com>> (emphasis added). A similar "Read our Terms of Use" link appears in tiny print at the bottom of the pages of the eToys site for children's toys, located at *eToys On-Line Toy Store!* (visited Nov. 25, 1997) <<http://www.etoys.com>>.

Inviting but not compelling the visitor to view such "terms" pages may leave the site owner legally vulnerable, particularly where the link itself is not conspicuous.

page with the sentence: "Our lawyers made us put this here."³⁵⁴ Similarly, Kraft's "Interactive Kitchen" site contains at the bottom of its home page and in smaller type than its copyright notice, a link for "A message from our lawyers."³⁵⁵

3. *Warranties of Fitness for a Particular Purpose: Personal Products*

Two noteworthy sites with regard to disclaimers of warranties of fitness for a particular purpose are those created by Revlon and by Warner-Lambert. Caselaw suggests that purveyors of personal products, and of pharmaceuticals in particular, should give special consideration to disclaiming express and implied warranties because their products might provoke allergies or other reactions in a statistically significant number of people.³⁵⁶

354. *Simon & Schuster* (visited Sept. 23, 1997) <<http://merchant.superlibrary.com:8000/>>; see also the Kraft Web site, located at *Kraft Foods, Inc.* (visited Sept. 23, 1997) <<http://www.velveeta.com>>, which bears, at the bottom of its home page, a link to "A message from our lawyers."

355. *Kraft Foods, Inc.* (visited Oct. 2, 1997) <<http://www.kraftfoods.com>> or <<http://www.velveeta.com>>. When accessed, Kraft's comprehensive and plain-language "User Agreement for Kraft Foods-Operated Web Sites" asks a visitor to "abide by the Terms and Conditions that follow. Please read them carefully, because WHEN YOU USE OUR SITES, YOU AUTOMATICALLY AGREE TO THEM." *Id.*

356. See Bob Van Voris, *Drug Ads Could Spell Trouble*, NAT'L L.J., July 21, 1997, at B1 ("Except in the rare case of a manufacturing defect, a drug is defective for products liability purposes only if the drug company fails to provide adequate instructions and warnings."); *Newmark v. Gimbel's Inc.*, 246 A.2d 11, 17 (N.J. Sup. Ct. App. Div. 1968) (stating that the mere fact that only a small proportion of those using a certain product would thereby suffer injury does not absolve the seller from liability on the basis of implied warranty); *Rubin v. Marshall Field & Co.*, 597 N.E.2d 688, 693 (Ill. App. Ct. 1992) (holding that an idiosyncratic reaction is not a defense when the warranty implied by the circumstances of the transaction is specific in nature, as was the warranty in this case that a box of eye makeup remover was "recommended for all skin types"); *Griggs v. Combe, Inc.*, 456 So. 2d 790, 793 (Ala. 1984) (holding that, in the case of a nonprescription topical analgesic, where plaintiff was the only person who had suffered this type of injury in the long history of the use of the drug in question, a product must adversely affect at least some significant number of persons before a question of "merchantability" arises); *Robbins v. Alberto-Culver Co.*, 499 P.2d 1080, 1085 (Kan. 1972) (stating that the concept of foreseeability is the key in determining liability on the part of one who manufactures or sells a fabricated product which causes an allergic reaction in a person who may be susceptible to it).

Revlon's Cover Girl³⁵⁷ makeup site offers the visitor a home page that has clear links to "Legal Terms" and "Guarantee Limitations" pages but does not compel the visitor to visit those pages. The major attraction of this site is its ability to supply personal make-up recommendations. By submitting information regarding her (or a friend's) skin color, hair color, eye color, skin type, and skin tone, a visitor can discover that person's general cosmetic category. Rather than merely attempting to locate the label for this category from among the Cover Girl makeup available at a cosmetics counter, the visitor can link to further pages to identify the specific shades of Cover Girl products appropriate for face, eyes, lips, and nails.

The Warner-Lambert pharmaceuticals site, which recommends allergy, cold, cough and sinus products to visitors based on their symptoms,³⁵⁸ does have a statement and link at the bottom of every page that "[t]he use of and access to the information on this site is subject to the terms and conditions set out in the Agreement to use the Warner-Lambert Company Web sites. Please review this Agreement prior to proceeding further." However, as in the Cover Girl site, no visitor is compelled to read these disclaimers.

357. *Cover Girl* (visited Sept. 23, 1997) <<http://www.covergirl.com>>.

358. *Warner-Lambert* (visited Sept. 23, 1997) <<http://www.warner-lambert.com>>.

Another interactive recommendation system, this one for different types of Tylenol-brand products to relieve cold, flu, sinus, and allergy symptoms, appears as part of the Web site *Tylenol* (visited Nov. 3, 1997) <<http://www.tylenol.com>>. The site's home page states that "[w]e want to be a reliable source of health-care information that you can turn to whenever you have a question about your health. It's a task we take seriously. After all, it's all about your health." Only by clicking the copyright notice, which appears on the bottom of each page of the site and in the lower part of the "frame," will the visitor find the disclaimer. According to this disclaimer, the manufacturer

will use reasonable efforts to include up-to-date and accurate information in this Internet site, but makes no representations, warranties, or assurances as to the accuracy, currency or completeness of the information provided [and] shall not be liable for any damages or injury resulting from your access to, or inability to access, this Internet site, or from your reliance on any information provided at this Internet site.

A site that does not provide a symptom match but that may be vulnerable in other respects is that of Whitehall-Robins, makers of Advil, Anacin, Preparation H, and other pharmaceuticals. See *Healthfront.com* (visited Mar. 13, 1998) <<http://www.healthfront.com>>. Although the home page contains a "legal link" that links to two pages of standard disclaimers, the visitor does not have to pass through these disclaimers to link to the "Our Products" page, which itself states that "[t]his section contains as much as you'll ever need to know about our products." The "Our Products" page features links to pages describing various products, none of which contains a link to the legal page.

VII. JURISDICTIONAL AND CHOICE-OF-LAW ISSUES

As the District Court for the Eastern District of Pennsylvania recently recognized, in contrast with a speaker employing another medium, there is no technologically feasible way for an Internet speaker to limit the geographical scope of his speech (even if he wanted to), or to implement an automatic system for screening the locale of incoming requests.³⁵⁹ Shortly thereafter, the federal government indicated its own readiness to "work closely with other nations to clarify applicable jurisdictional rules and to generally favor and enforce contract provisions that allow parties to select substantive rules governing liability."³⁶⁰

Jurisdictional issues arise for commercial Web site owners in three different but interrelated contexts: questions of contractual choice of law, issues of contractual choice of forum, and concerns about the site-owner's being subject to jurisdiction in another forum.

A. *Current and Draft Revised Article 2*

Under Article 1 of the U.C.C., contracting parties generally remain free to specify in the contract that their rights and duties are governed by any state or nation to which the transaction at issue "bears a

359. *ACLU v. Reno*, 929 F. Supp. 824, 878 (E.D. Pa. 1996).

360. INTERAGENCY GROUP ON ELECTRONIC COMMERCE, *supra* note 2, at 6. The contractual approach to choice-of-law issues has also been endorsed by a number of academic commentators. See, e.g., Matthew R. Burnstein, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, 29 VAND. J. TRANSNAT'L L. 75, 101 (1996) ("Forum selection clauses can bring order and stability to cyberspatial contracts by substituting the highly-developed real-space legal order for the uncertain and almost haphazard regime likely to result if courts are left to choose law in cyber-disputes."); Eric J. McCarthy, *Networking in Cyberspace: Electronic Defamation and the Potential for International Forum Shopping*, 16 U. PA. J. INT'L BUS. L. 527, 566 (1995) ("Instead of searching for an international solution to cyberspace defamation, cyberspace citizens should choose for themselves what type of regulation should govern their travels.").

reasonable relation."³⁶¹ Draft Revised Article 2, like its model, "does not deal with choice of law or choice of forum."³⁶²

B. Draft Article 2B

The drafters of Article 2B acknowledge that because many transactions in information are not easily related to tangible locations, "the ability to fix an appropriate choice of law provides an important contract drafting premise."³⁶³ Building on this premise, Draft Article 2B provides that "[a] choice-of-law term in an agreement is enforceable,"³⁶⁴ and furnishes default rules governing the choice of law for agreements that do not specify this term.³⁶⁵

361. U.C.C. §1-105(1) (1996); *see also* IHP Indus., Inc. v. Permalert, 947 F. Supp. 257, 260 (S.D. Miss. 1996) (finding that under U.C.C. § 1-105, the parties' contractual choices of law will be upheld unless the transaction lacks a normal connection with the state whose law was selected); Ward Transformer Co., Inc. v. Distrigas of Mass. Corp., 779 F. Supp. 823, 824 (E.D. N.C. 1991) (ruling that under North Carolina law, if a transaction bears a reasonable relation to both North Carolina and to another state or nation, the parties may agree that either the law of North Carolina or of the state or nation shall govern their rights or duties); Ritchie Enter. v. Honeywell Bull, Inc., 730 F. Supp. 1041, 1046 (D. Kan. 1990) (holding that the express wording of the parties' choice of law provision reveals only an agreement as to what law would govern their contract, rather than any agreement on what law should apply to tort claims arising from the circumstances of their contractual relationship); PC Com, Inc. v. Proteon, Inc., 946 F. Supp. 1125, 1129 (S.D. N.Y. 1996) (holding that under New York law, the contractual selection of governing law is generally determinative so long as the chosen state has sufficient contacts with the transaction, absent fraud or violation of public policy); *Kathenes v. Quick Chek Food Stores*, 596 F. Supp. 713, 714-15 (D. N.J. 1984) (holding that under New Jersey law, the parties may contractually agree as to which forum's laws will govern their respective rights and duties, with the sole restriction being that the forum chosen must bear a "reasonable relationship" to the transaction involved); *Maxwell Shapiro Woolen Co. v. Amerotron Corp.*, 158 N.E.2d 875 (Mass. 1959) (characterizing U.C.C. § 1-205 as a "legislative recognition of the wisdom of permitting parties to give added certainty to a contract by expressly stipulating reasonably the governing law").

362. U.C.C. § 2-104 note 1 (Proposed Official Revision July 25 - Aug 1, 1997). The Reporter's Notes further observe that "[a]lthough Article 2 assumes that a court will adjudicate the dispute, the parties may select the forum by agreement or agree that the dispute will be adjudicated in arbitration." *Id.* § 2-104 note 6.

363. U.C.C. § 2B-108 rptr. note 2 (Proposed Official Draft Nov. 1, 1997). *See also id.* § 2B-108 rptr. note 4 (Article 1-105 "reflects law that existed when the UCC was adopted five decades ago, but that has little merit in modern electronic transactions and does not fit with modern scholarship about choice of law as reflected in the Restatement (Second) [of Conflict of Laws] and elsewhere."); *Id.* § 2B-108 rptr. note 5 ("Under general law, choice of law principles are often driven by litigation concerns and refer to questions about 'reasonable relationship', 'most substantial contacts', and 'governmental interest.' In the online environment, this does not support commercial development and creates substantial uncertainty.").

364. *Id.* § 2B-108(a).

365. If under any of the default rules of proposed section 2B-108(b) the jurisdiction whose law would apply is outside the United States, that choice-of-law rule

First, a contract that provides for the delivery of a copy of the information product by electronic communication "is governed by the law of the jurisdiction in which the licensor is located when the contract becomes enforceable between the parties."³⁶⁶ Without such a default provision or an explicit contractual term governing choice of law, the Web site owner licensing information products would be compelled "to comply with the law of fifty states and 170 countries since it will often not be clear where the information is being sent."³⁶⁷

Second, a consumer contract that does not fall under the first rule and that "requires delivery of a copy on a physical medium to the consumer" (i.e., so that the licensor is aware of the jurisdiction in which delivery will occur) is governed by "the law of the jurisdiction in which the copy is located when the licensee receives possession of the copy or, in the event of nondelivery, the jurisdiction in which receipt was to have occurred."³⁶⁸

Finally, in any other case "the contract is governed by the law of the State with the most significant relationship to the contract."³⁶⁹

applies only if the laws of that jurisdiction provide substantially similar protections and rights to the party not located in that jurisdiction as are provided under [Draft Article 2B]. Otherwise, the rights and duties of the parties are governed by the law of the jurisdiction in the United States which has the most significant relationship to the transaction.

Id. § 2B-108(c).

This rule anticipates situations

of foreign choices of law where the effect of using the licensors [sic] location would be to place the choice of law in a harsh, under-developed, or otherwise inappropriate location. This is intended to protect against conscious selections of location designed to disadvantage the other party and forum shopping by U.S. companies who have virtually free choice as to where to locate. It is especially important in the context of the global Internet.

Id. § 2B-108 rptr. note 8.

366. *Id.* § 2B-108(b)(1). For purposes of proposed section 2B-108, [a] party is located at its place of business if it has one place of business, at its chief executive office if it has more than one place of business, or at its place of incorporation or primary registration if it does not have a physical place of business. Otherwise, a party is located at its primary residence.

Id. § 2B-108(d).

367. *Id.* § 2B-108 rptr. note 6. The drafters contend that proposed section 2B-108(b)(1) is the "most important" of the default rules. *Id.*

368. *Id.* § 2B-108(b)(2); see also *id.* § 2B-108 rptr. note 7 (noting that the same jurisdiction "would typically be chosen under any choice of law regime, but this section makes the choice clear").

369. *Id.* § 2B-108(b)(3). The Reporter's Notes state that this provision adopts the standard of the Restatement (Second) of Conflicts, even though this standard is not

In addition to proposed section 2B-108, another important provision of Draft Article 2B allows the parties to agree contractually on an exclusive judicial forum, so long as that agreement is express.³⁷⁰ The exception is that in the case of a consumer contract "the choice is not enforceable if the chosen jurisdiction would not otherwise have jurisdiction over the consumer, and the choice is unreasonable and unjust as to the consumer."³⁷¹

uniformly accepted. *Id.* § 2B-108 rptr. note 7. Among the factors to consider in applying this standard are:

(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location and subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties, (f) the needs of the interstate and international systems, (g) the relevant policies of the forum, (h) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (i) the protection of justified expectations, (j) the basic policies underlying the particular field of law, (k) certainty, predictability, and uniformity of result, and (l) ease in the determination and application of the law to be applied.

Id.

370. *See id.* § 2B-109.

371. *Id.* Acknowledging that "earlier case law viewed forum choices with some disfavor," the drafters nonetheless concluded that "the trend of modern case law enforces choice of forum clauses, even if in standard form contracts, so long as enforcement does not unreasonably disadvantage a party." *Id.* § 2B-109 rptr. note 1.

The "unjust and unreasonable" language of the exception

has become the dominant standard to measure enforceability and, indeed, most courts now suggest that choice of forum clauses are presumptively enforceable unless this standard is proven. The intent is to conform to Supreme Court and other holdings The comments will spell out the case law development in greater detail.

Id. § 2B-109 rptr. note 5.

In this context, one commentator on commercial law has observed:

Many of the arguments supporting the party autonomy model in choice of law and forum ultimately rest on one's opinion of how serious a problem the requirement of a connection to the parties or transaction really is. There is little in the case law to suggest that the requirement has spawned unnecessary litigation, and no one has performed any empirical study that identifies the requirement of a connection as an impediment to making contracts or to contractual certainty.

William J. Woodward, Jr., "Sale" of Law and Forum and the Widening Gulf Between "Consumer" and "Nonconsumer" Contracts in the UCC, 75 WASH. U. L.Q. 243, 257 (1997). Woodward concludes that "[t]he evolving mass-market license construct in Article 2B shows much promise [in redrawing the line between consumers and nonconsumers], provided that the definition is broad enough to encompass the realities of contracting . . . or, if it is not, that strict party autonomy rules are not the only alternative." *Id.* at 285.

C. Adopting Draft Article 2B Contractually

In a move "analogous to a choice of law term selecting the law of a particular State,"³⁷² the drafters provided that although by its terms Draft Article 2B applies only to transactions in "information,"³⁷³ all or part of it can be adopted in an agreement represented by a record, except in a mass-market transaction.³⁷⁴ In addition, if that Article covers part of a transaction and the remainder is governed by other law, the parties can provide that the transaction will be governed entirely either by Article 2B or by the other law.³⁷⁵

D. Reasonable Relation

In the context of jurisdiction and choice of law, courts are now turning to the question of when a state bears a "reasonable relation" to a contract formed through the World Wide Web. Recent decisions, surely the harbingers of a plethora of opinions concerning Internet-based personal jurisdiction, are instructive.

In interpreting state "long-arm" jurisdictional statutes in the age of the Internet, courts are generally tending to find the "likelihood" of jurisdiction over the defendants directly proportional to the nature and quality of commercial activity that the defendant conducts with the forum in question over the Internet.³⁷⁶ Yet a number of these decisions involved the defendant's contribution to interstate electronic bulletin boards or the defendant's alleged infringement of intellectual property by choice of domain name, not the interactions between visitors

372. U.C.C. § 2B-106 rptr. note 1 (Proposed Official Draft Nov. 1, 1997).

373. See *supra* note 18 and accompanying text.

374. U.C.C. § 2B-106(1) (Proposed Official Draft Nov. 1, 1997). The Reporter's Notes to this provision state that "[t]his section expresses an approach generally assumed to be current law based on the theory of party autonomy in contracting." *Id.* § 2B-106 rptr. note 1. To justify the exclusion of mass-market licenses from the scope of this provision, the drafters contend that "the party to a mass market agreement is not likely to understand differences in law . . . This section . . . implements a form of extended consumer protection and applies it to both consumers and businesses operating in the mass market." *Id.* § 2B-106 rptr. note 2.

375. *Id.* § 2B-106(2).

376. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1996) (justifying this "sliding scale" as "consistent with well developed personal jurisdiction principles").

and the site itself. In addition, questions remain concerning the difference between, and the degree of, the "activity" or "passivity" of various commercial Web sites.

1. *General Jurisdiction*

"General jurisdiction," grounded on a defendant's being domiciled in a state *or* on the defendant's "substantial" or "continuous and systematic" activities in the state, enables a court to exercise personal jurisdiction over the defendant with regard to a cause of action, whether or not that cause of action is related to the defendant's contacts with the jurisdiction.³⁷⁷ To date, few courts have commented on whether general jurisdiction can be asserted over a foreign defendant whose only contacts with the forum are those initiated by forum residents who contact the defendant's Web site.³⁷⁸ One court has rejected predicated such jurisdiction on this level of contact, reasoning that "[b]ecause the Web enables easy world-wide access, allowing computer interaction via the Web to supply sufficient contacts to establish jurisdiction would eviscerate the personal jurisdiction requirement as it currently exists."³⁷⁹ Another court similarly concluded:

[A] finding of personal jurisdiction in New York based on [a foreign] Internet web site would mean that there would be nationwide (indeed, worldwide) personal jurisdiction over anyone and everyone who establishes an Internet web site. Such nationwide jurisdiction is not consistent with traditional personal jurisdiction case law nor acceptable to the Court as a matter of policy.³⁸⁰

377. See *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414-16 (1984) (setting forth this standard).

378. See *Edias Software Int'l v. Basis Int'l Ltd.*, 947 F. Supp. 413, 417 (D. Ariz. 1996) (suggesting that a defendant's personal visits, sales, communications (including e-mail), and "Internet activities," including the defendant's maintenance of a CompuServe-base Web page and bulletin board accessible in plaintiff's jurisdiction, provide a "strong argument" for general jurisdiction); *Panavision Int'l, L.P. v. Toeppen*, 938 F. Supp. 616, 620 (C.D. Cal. 1996) (finding general jurisdiction unavailable because defendant, who had registered a domain name that contained the plaintiff's trademark, was domiciled in a foreign state and because his activities in the forum state were not "substantial, systematic, or continuous."); *Cal. Software Inc. v. Reliability Research, Inc.*, 631 F. Supp. 1356, 1360 (C.D. Cal. 1986) (declining to base general jurisdiction solely on defendant's participation with plaintiff in a nationwide electronic bulletin board, since the mere act of transmitting information through the use of interstate communication facilities is insufficient to establish jurisdiction over the sender).

379. *McDonough v. Fallon McElligott Inc.*, 40 U.S.P.Q.2d 1826, 1828 (S.D. Cal. 1996).

380. *Hearst Corp. v. Goldberger*, 1997 U.S. Dist. LEXIS 2065, at *2 (S.D.N.Y. 1997). Another district court has noted, but not resolved, the issue of whether *any* Web activity, by anyone, absent commercial use, absent advertising and solicitation of both advertising and sales, absent a contract and sales and other contacts with the forum state, and absent the potentially

However, a New York state court found no difficulty in asserting general jurisdiction over a defendant who was physically located in New York and whose New York-based business allegedly committed consumer fraud by sending misrepresentations by electronic mail to various "listservs," or discussion groups conducted through e-mail.³⁸¹

2. *Specific Jurisdiction*

When the level of the defendant's contacts with the state does not satisfy either prong of the general jurisdiction standard, the court may nonetheless assert "specific jurisdiction" over the defendant if the defendant's activities in the forum with regard to the plaintiff's cause of action are sufficient to establish jurisdiction for purposes of the litigation³⁸² and the exercise of such jurisdiction would not offend the defendant's right to due process. The Ninth Circuit, for example, applies for this purpose a three-factor test, of which all factors must be satisfied. Under this test, specific jurisdiction may be asserted against a nonresident defendant only if that party: (1) performs some act or consummates some transaction with the forum state or "perform[s] some act by which he *purposefully avails himself* of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws"; (2) the claim arises out of or results from the defendant's forum-related

foreseeable harm of trademark infringement, would be sufficient to permit the assertion of jurisdiction over a foreign defendant.

Digital Equip. Corp. v. AltaVista Tech., Inc., 960 F. Supp. 456, 463 (D. Mass. 1997).

381. See *People v. Lipsitz*, 663 N.Y.S.2d 468, 474 (N.Y. App. Div. 1997). The *Lipsitz* court concluded:

[F]or Internet consumer fraud claims, the Internet medium is essentially irrelevant, for the focus is primarily upon the location of the messenger and whether the messenger delivered what was purchased. In some cases, it might be necessary to analyze the location of certain other business operations, such as the site used or the place orders were received. Such refinements are unnecessary here for the entire enterprise was firmly based in New York State.

Id.

382. See *Helicopteros*, 466 U.S. at 414-16; *Hanson v. Denckla*, 357 U.S. 235 (1958) ("[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.").

Notably, "in cases arising from contract disputes, merely contracting with a resident of the forum state is insufficient to confer specific jurisdiction." *Panavision*, 938 F. Supp. at 620-21; see also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985).

activities; and (3) the exercise of jurisdiction over the defendant is reasonable.³⁸³ The first of these tests, often called the "minimum contacts" or "purposeful availment" test, might well be satisfied by a certain level of electronic communication with those in a forum state.³⁸⁴

*a. Trademark Infringement, Without "Active/Passive"
Considerations*

In determining whether jurisdiction can be asserted over a foreign defendant for an alleged infringement of intellectual property, courts have looked to the forum's long-arm statute and examined whether harm was caused to the local plaintiff. Thus, specific jurisdiction was granted in the case of a defendant who had allegedly registered domain names with knowledge that these names contained the plaintiff's trademarks and with the intent to interfere with plaintiff's business. The plaintiff suffered the economic harm of not being "able to establish an easily located web site."³⁸⁵ Likewise, in another trademark infringement case

383. See *Panavision*, 938 F. Supp. at 620 (quoting *Omeluk v. Langsten Slip & Batbygerri A/S*, 52 F.3d 267, 270 (9th Cir. 1995)) (emphasis added). A Florida court of appeals has held that jurisdiction over a New York-based lessee of a computer system was not proper in Florida where the lessee's only contacts with Florida were forwarding payments to the lessor's Florida billing office and accessing a database on the lessor's computer terminals located in Florida. *Pres-Kap, Inc. v. Sys. One, Direct Access, Inc.*, 636 So. 2d 1351, 1353 (Fla. Ct. App. 1994). The court commented that allowing users of . . . "on-line" services [to] be haled into court in the state in which supplier's billing office and database happen to be located, even if such users, as here, are solicited, engaged, and serviced entirely in-state by the supplier's local representatives . . . is wildly beyond the [ir] reasonable expectations . . . and . . . offends traditional notions of fair play and substantial justice.

Id.

384. See *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (requiring an inquiry into whether the defendant exercised the privilege of conducting activities within the state); *Hall v. LaRonde*, 66 Cal. Rptr. 2d 399, 402 (Cal. Ct. App. 1997) ("The speed and ease of . . . communications [in business transactions] has increased the number of transactions that are consummated without either party leaving the office. There is no reason why the requisite minimum contacts cannot be electronic.").

385. *Panavision*, 938 F. Supp. at 620-22. The court emphasized that it was not holding that the defendant was "doing business" in the forum state via the Internet. *Id.* at 622. The court distinguished decisions such as *Bensusan Restaurant Corp. v. King*, 126 F.3d 25 (2d Cir. 1997), *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996), and *Pres-Kap, Inc. v. Sys. One, Direct Access* 636 So. 2d 1351 (Fla. Dist. Ct. App. 1994), because "[t]he issue in those cases was whether contacts with the forum state via the Internet (or, in *Pres-Kap*, via a computerized airline and hotel reservation system) were sufficient to confer specific jurisdiction." *Panavision*, 938 F. Supp. at 622.

Similarly, in the Lanham Act decision *LA, Inc. v. Thermacell Tech., Inc.*, 1997 U.S. Dist. LEXIS 18386, (E.D. Mich. 1997), the defendant's Web site enabled visitors to "view the alleged misrepresentations concerning the insulation system, request more information about Thermacell, and even request a direct personal contact from a

a Massachusetts court found specific jurisdiction warranted when the defendant's Web site "over time more and more mirrored the site of a Massachusetts corporation, arguably in violation of [that corporation's] trademark rights and licensing agreement."³⁸⁶ Because this site "plainly would attract Massachusetts residents, and did so, [the defendant] should have anticipated being haled into a Massachusetts court to answer for its acts."³⁸⁷

However, in a closely-watched decision, the Second Circuit Court of Appeals recently held that jurisdiction was *not* proper in New York over the operator of a Missouri jazz club whose name, the "The Blue Note," allegedly infringed the trademark of the legendary New York jazz club of the same name.³⁸⁸ The Court found that the defendant's operation of a "Blue Note" Web site in Missouri was not within the scope of New York's long-arm jurisdiction statute:

The acts giving rise to Bensusan's lawsuit—including the authorization and creation of King's web site, the use of the words "Blue Note" and the Blue Note logo on the site, and the creation of a hyperlink to Bensusan's web site—were performed by persons physically present in Missouri and not in New York.³⁸⁹

Nor could the plaintiff show that King had satisfied an alternative long-arm test, which required that the defendant not only have expected (or should reasonably have suspected) the tortious act to have consequences in New York but also that he derived substantial revenue from interstate

Thermacell sales representative" *Id.* at *7. Although the court conceded that precedent concerning the ability of a forum's residents to make purchases or contact corporate representatives through interactive web sites was

not directly on point, they are still instructive, and ultimately support a finding that venue is proper in this district as to Thermacell. The cases are based on the proposition that the Lanham Act claims are properly brought where the confusion relating to the "passing off" occurs. The alleged misrepresentations that underlie the Lanham Act claim appear on an interactive web site in Michigan, which is also where the plaintiff's similar products are located.

Id. at *9-*10.

386. *Digital Equip. Corp. v. AltaVista*, 960 F. Supp. 456, 470 (D. Mass. 1997).

387. *Id.* The court added, "Every day, potentially thousands of Massachusetts residents visit [the defendant's] Web-site; and each 'call' is 'answered' by the display of allegedly tortious materials that cause harm here, there, and everywhere (but especially here)." *Id.*

388. *Bensusan*, 126 F. Supp. at 26.

389. *Id.* at *4.

commerce. King's club, the Court held, "was unquestionably a local operation."³⁹⁰

By contrast, the previous year the Court of Appeals for the District for Columbia had in a trademark infringement case found personal jurisdiction over a foreign defendant proper under the District's long-arm statute because "the instant case involves an advertisement placed specifically in the forum's local newspaper, not in a national newspaper or trade publication which happens to circulate there."³⁹¹ The defendant charity also maintained a home page that not only contained the "allegedly infringing trademark and logo," but also provided a toll-free number for visitors inclined to make contributions and invited visitors to send e-mail.³⁹² Though acknowledging that "the home page is certainly a sustained contact with the District,"³⁹³ the court found that it "need not decide whether the defendant's home page by itself subjects the defendant to personal jurisdiction in the District."³⁹⁴ Through the combination of the local advertisements and its home page the defendant had "purposefully availed itself of the privilege of conducting activities within the District, and could reasonably anticipate the possibility of being haled into court there."³⁹⁵

b. Web-Based Advertising and Contracting

In determining whether Internet-related specific jurisdiction is proper, courts have distinguished two main situations.

i. Repeated Active Contacts With Forum Residents

The first, and less ambiguous, situation involves "a defendant [who] clearly does business over the Internet" by "enter[ing] into contracts with residents of a foreign jurisdiction that involve the knowing and repeated

390. *Id.*

391. *Heroes, Inc. v. Heroes Found.*, 958 F. Supp. 1, 3 (D.D.C. 1996).

392. *Id.* at 4-5.

393. *Id.* at 5. The court also observed that "it has been possible for a District resident to gain access to [the Web site] at any time since it was first posted." *Id.*

394. *Id.*

395. *Id.* The Court of Appeals found as an alternative ground for jurisdiction that the defendant qualified under the District's long-arm statute as having caused tortious injury in the District of Columbia by any act or omission outside the District. The court concluded, "As for the [test's] 'plus factor' which requires 'persistent contact' with the District, the Court finds that the defendant's home page, which is always accessible in the District, constitutes a 'reasonable connection between the defendant and the forum' and therefore satisfies this requirement." *Id.* (citation omitted).

transmission of computer files over the Internet.”³⁹⁶ Thus, specific jurisdiction in a trademark infringement case could be asserted in Pennsylvania over a defendant who had contracted with approximately 3,000 individuals and seven Internet access providers in Pennsylvania in order to effect the downloading of electronic messages,³⁹⁷ even though the defendant’s contacts with the state had “occurred almost exclusively over the Internet.”³⁹⁸ The court observed that the defendant

repeatedly and consciously chose to process Pennsylvania residents’ applications and to assign them passwords. . . . [to enable] the transmission of electronic messages into Pennsylvania. . . . If a corporation determines that the risk of being subject to personal jurisdiction in a particular forum is too great, it can choose to sever its connection to the state. . . . [The defendant] could have chosen not to sell its services to Pennsylvania residents.³⁹⁹

Similarly, the Sixth Circuit found that Ohio, the home state of plaintiff CompuServe, Inc., had specific jurisdiction in a declaratory judgment action against a Texan user of CompuServe, Patterson, who had earlier contracted with CompuServe to make his own software available nationwide for sale and downloading.⁴⁰⁰ The court reached this conclusion because “Patterson chose to transmit his software from Texas

396. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). Of course, a certain level of direct electronic mail messages alone, without the accompanying transmission of attached or separate computer files, would be sufficient to support jurisdiction. In *Resuscitation Technologies, Inc. v. Continental Health Care Corp.*, 1997 U.S. Dist. LEXIS 3523, at *17 (S.D. Ind. 1997), the court found that the foreign defendants’

“footfalls” [in Indiana] were not physical, they were electronic. They were, nonetheless, footfalls. The level of Internet activity in this case was significant.

Certainly, one or two inquiries about some Indiana goods or services would not support local jurisdiction. Here, however, the electronic mail messages were numerous and continuous over a period of months. The purpose of that activity was for the defendants and the plaintiff to unite in a joint venture to capitalize production of certain medical devices. Without question, [the defendants] reached beyond the boundaries of their own states to do business in Indiana. It is not unreasonable for them to be haled into an Indiana forum.

397. See *Zippo*, 952 F. Supp. at 1126. In rejecting claims that the defendant was merely “operating a Web site” or “advertising,” see *id.*, the district court noted that the defendant’s Web site, located on a computer in California that operated under the domain names “zippo.com,” “zippo.net,” and “zipponews.com,” allowed visitors from any state to access information about, apply for, pay for, and receive access to the newsgroup operating through this computer. *Id.* at 1121.

398. *Id.*

399. *Id.* at 1126-27.

400. *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1264 (6th Cir. 1996).

to CompuServe's system in Ohio, . . . myriad others gained access to Patterson's software via that system, and Patterson advertised and sold his product through that system."⁴⁰¹ In this ongoing relationship, "CompuServe, in effect, acted as Patterson's distributor, albeit electronically and not physically."⁴⁰²

Specific jurisdiction was also warranted over a foreign defendant who had tortiously interfered with contract by posting communications on a nationwide electronic bulletin board in order to "intentionally manipulate[] third persons to interrupt their plans to purchase plaintiffs' product,"⁴⁰³ even when the third persons were themselves not in the forum state.⁴⁰⁴ Although general jurisdiction could not be asserted over the defendant,⁴⁰⁵ the court observed, "[n]ot only did defendants act intentionally but, by communicating through the [bulletin board] network, they made their messages available to an audience wider than those requesting the information."⁴⁰⁶

ii. Providing "Passive" Web Sites

The second, and more complex, situation in Web-based jurisdiction involves a defendant who "has simply posted information on an Internet

401. *Id.*

402. *Id.* at 1265. Patterson may also have agreed contractually that he would submit to jurisdiction in Ohio. See *supra* note 264 and accompanying text.

403. *California Software, Inc. v. Reliability Research, Inc.*, 631 F. Supp. 1356, 1361 (C.D. Cal. 1986). The communications system in question was a nationally disseminated computer based information service known as the Computer Reliability Forum (the "CRF"), which is operated by defendants. Operators of large computer installations [are licensed to] utilize the CRF to share information regarding computer hardware and software. Although one may use the CRF to respond to a specific inquiry, the system acts as a bulletin board, its messages being available and visible to all users.

Id. at 1358.

404. The court held that defendants' "intentional 'manipulation' of third persons who thereby refrain from consummating a contemplated transaction in California constitutes a forum-related activity by the defendants. As such, they subject themselves to the laws of the State of California and avail themselves of the privilege of doing business there." *Id.* at 1362.

405. The defendant had no license to do business in the forum state of California, and "no offices, agents, employees, telephone listings, bank accounts, or property within the State." *Id.* at 1360. Nor could general jurisdiction be grounded in the defendants' use of the bulletin board network to maintain regular communications with California users, since "[t]he mere act of transmitting information through the use of interstate communication facilities is not . . . sufficient to establish jurisdiction over the sender." *Id.*

406. *Id.* at 1363. Specific jurisdiction might also be authorized when the forum is based on the foreign defendant's Web site. See *Edias Software Int'l, L.L.C. v. Basis Int'l, Ltd.*, 947 F. Supp. 413 (D. Ariz. 1996) (discussed *supra* note 378 and accompanying text).

Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction *[sic]*.⁴⁰⁷ Several courts have thus held that sites that contain only advertising information and do not take orders directly will not subject the site owners to personal jurisdiction in other states from which computer users can gain access to the site.⁴⁰⁸

This view was espoused in December 1997 by the Ninth Circuit, which declined to exercise personal jurisdiction over "an allegedly infringing Florida web site advertiser who has no contacts with Arizona other than maintaining a home page that is accessible to Arizonans, and everyone else, over the Internet."⁴⁰⁹ The Court observed:

[S]o far as we are aware, no court has ever held that an Internet advertisement alone is sufficient to subject the advertiser to jurisdiction in the plaintiff's home state. Rather, in each, there has been "something more" to indicate that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the forum state.⁴¹⁰

The court continued:

Here, [the defendant] has conducted no commercial activity over the Internet in Arizona. All that it did was post an essentially passive home page on the web, using the name "CyberSell," which [the plaintiff] was in the process of

407. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997); *see also* *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295, 301 (S.D.N.Y. 1996) ("Creating a site, like placing a product into the stream of commerce, may be felt nationwide—or even worldwide—but, without more, it is not an act purposefully directed toward the forum state.").

408. *See* *Weber v. Jolly Hotels*, 977 F. Supp. 327, 333 (D.N.J. 1997) (finding jurisdiction inappropriate because the defendant placed information about its hotels on the Internet as an advertisement, not as a means of conducting business, and advertising on the Internet falls under the same rubric for jurisdictional purposes as advertising in a national magazine); *Hearst Corp. v. Goldberger*, 1997 U.S. Dist. Lexis 2065, at *32 (Defendant's "Internet web site may be viewed by people in all fifty states (and all over the world too for that matter), but it is not targeted at the residents of New York or any particular state"); *Smith v. Hobby Lobby Stores, Inc.*, 968 F. Supp. 1356, 1365 (W.D. Ark. 1997) (holding that defendant's advertisement in a trade publication that appears on the Internet without a contract to sell any goods or services to any citizen of Arkansas over the Internet site, is simply an insufficient "contact" with Arkansas to support hailing this Hong Kong business into the courts of Arkansas); *Agar Corp., Inc. v. Multi-Fluid, Inc.*, 45 U.S.P.Q.2d 1444, 1448 (S.D. Tex. 1997) (declining to assert jurisdiction over a Web site created by a Norwegian defendant, because the site was "largely passive" and almost "entirely informational").

409. *Cybersell, Inc v. Cybersell, Inc.*, 130 F.3d 414, 415 (9th Cir.1997).

410. *Id.* at 418 (citation omitted).

registering as a federal service mark. While there is no question that anyone, anywhere could access that home page and thereby learn about the services offered, we cannot see how from that fact alone it can be inferred that [the defendant] deliberately directed its merchandising efforts toward Arizona residents.⁴¹¹

The Ninth Circuit's conclusion that the defendant had not satisfied the "purposeful availment" prong of the specific jurisdiction test identified, by negative implication, various methods of interactivity that would support a finding of jurisdiction, one of which was the extent to which forum residents accessed the site and availed themselves of its services. The court stated:

No Arizonan except for [the plaintiff] "hit" [the defendant's] web site. There is no evidence that any Arizona resident signed up for [the defendant's] web construction services. It entered into no contracts in Arizona, made no sales in Arizona, received no telephone calls from Arizona, earned no income from Arizona, and sent no messages over the Internet to Arizona. The only message it received over the Internet from Arizona was from [the plaintiff]. [The defendant] did not have an "800" number, let alone a toll-free number that also used the "Cybersell" name. The interactivity of its web page is limited to receiving the browser's name and address and an indication of interest—signing up for the service is not an option, nor did anyone from Arizona do so. No money changed hands on the Internet from (or through) Arizona.⁴¹²

iii. *Questioning "Passivity": A Sliding Scale?*

Despite some courts' having found that a "passive" Web site will not subject the site owner to personal jurisdiction, other courts have construed a purportedly "passive" Web site as "repeatedly solicit[ing]" or "regularly doing or soliciting" business within their jurisdiction and thus as falling within that jurisdiction's long-arm statute.⁴¹³ Under this

411. *Id.* at 419.

412. *Id.*

413. *See, e.g.,* Telco Communications v. An Apple A Day, 977 F. Supp. 404, 406-07 (E.D. Va. 1997). In *Telco*, the court held that the Missouri-based defendant's posting of two press releases on its Web site constituted the regular conduct of business over the Internet so as to subject it to jurisdiction for purposes of a defamation action brought in Virginia by a Virginia corporation. *Id.* The court reasoned, "[I]f a Virginia investment bank saw the press release and called the Defendants, Defendants would not have refused the call. Thus, they should not be likened to an individual consumer who hits a certain Web site." *Id.* at 406. The court also observed that even "posting a [single] Web site advertisement or solicitation constitutes a persistent course of conduct" for these purposes. *Id.* at 407.

Another district court has found a seller of Internet services subject to personal jurisdiction in a state to which the seller had transmitted requested information through a Web site approximately 131 times, not counting the occasions on which the plaintiff had accessed the site. *Maritz, Inc. v. CyberGold, Inc.*, 947 F. Supp. 1328, 1333 (E.D. Mo. 1996); *see also* *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 164-65 (D. Conn. 1996) (concluding that use a URL that allegedly infringed upon a trademark

analysis, a Web site is much less "passive" than is a Venus flytrap plant waiting for a fly to alight on it. As described by one court, the site owner

seeks to develop a mailing list of internet users . . . [and] has obtained the website for the purpose of, and in anticipation that, internet users, searching the internet for websites, will access [its] website and eventually sign up on [its] mailing list. Although [the owner] characterizes its activity as merely maintaining a "passive website," its intent is to reach all internet users, regardless of geographic location. . . . Through its website, [the owner] has consciously decided to transmit advertising information to all internet users, knowing that such information will be transmitted globally.⁴¹⁴

constituted "advertising via the Internet [that] is solicitation of a sufficiently repetitive nature" to justify long-arm jurisdiction, and that "since [the defendant] purposefully directed its advertising activities towards this state . . . , it could reasonably anticipate being haled into court here").

414. *Maritz*, 947 F. Supp. at 1333. In a case involving a Web site of this nature, a Minnesota court of appeals concluded that by advertising in English on an American commercial Web site and by advertising their gambling services with a toll-free number, the defendants indicated not only an intent to reach the American market but "to solicit responses from all jurisdictions within that market, including Minnesota." *Minnesota v. Granite Gate Resorts, Inc.*, 568 N.W. 715, 720 (Minn. Ct. App. 1997). This advertising provided "minimum contacts of a nature and quality sufficient to support a threshold finding of personal jurisdiction" and implicated the state's strong interest in maintaining the enforceability of its consumer protection laws. *Id.*

The *Granite Gate* court further questioned the "passivity" of even an "advertising" site by recalling that the District Court for the Southern District of New York had found that, for purposes of an injunction, a "distribution" of images contained on an Italian Web site had occurred even though the site could be viewed as

an "advertisement" by which [the foreign corporation] distributes its pictorial images throughout the United States. That the local user "pulls" these images from [the corporation's] computer in [in that case] Italy, as opposed to the [corporation] "sending" them to this country, is irrelevant. By inviting the United States users to download these images, [the corporation] is causing and contributing to their distribution within the United States.

Id. at 719 (quoting *Playboy Enter., Inc. v. Chuckleberry Publ'g, Inc.*, 939 F. Supp. 1032, 1044 (S.D.N.Y. 1996)).

Although doubts may be raised as to the conspicuousness or effectiveness of the notice, the Office of the Attorney General of the State of Minnesota has posted on its own Web site a "Memo on Jurisdiction," which begins:

WARNING TO ALL INTERNET USERS AND PROVIDERS

THIS MEMORANDUM SETS FORTH THE ENFORCEMENT POSITION OF THE MINNESOTA ATTORNEY GENERAL'S OFFICE WITH RESPECT TO CERTAIN ILLEGAL ACTIVITIES ON THE INTERNET.

PERSONS OUTSIDE OF MINNESOTA WHO TRANSMIT INFORMATION VIA THE INTERNET KNOWING THAT INFORMATION WILL BE DISSEMINATED IN MINNESOTA ARE SUBJECT TO JURISDICTION IN MINNESOTA COURTS FOR VIOLATIONS OF STATE CRIMINAL AND CIVIL LAWS.

To these courts, there would appear to be no "middle ground" reserved for cases that "involve interactive Web sites where a user can exchange information with the host computer [and in which] the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of commercial information that occurs on the Web site."⁴¹⁵ Indeed, as of late 1997 few courts had attempted to quantify the "level of interactivity" that would ground specific jurisdiction.⁴¹⁶

Warning to all Internet Users and Providers (visited Dec. 12, 1997) <<http://www.ag.state.mn.us/consumer/news/OnlineScams/memo.txt>> (proceeding to discuss Minnesota statutes and caselaw relating to general criminal jurisdiction, gambling, lotteries, and accomplice liability).

415. *Id.* Legal categorization of Web-based jurisdiction cases is further complicated by situations in which the foreign defendants not only advertise on their sites but also engage in other activities. See *Edias Software Int'l v. Basic Int'l, Ltd.*, 947 F. Supp. 413, 420 (D. Ariz. 1996) (finding specific jurisdiction reasonable, in part, because of defendant's operation of an interactive Web site on which it advertised and on whose "forum" bulletin board section it also posted allegedly defamatory remarks about plaintiff).

The argument for a "middle ground" of jurisdiction has also been made in the context of 1-800 telephone numbers obtained by nonresident defendants. The general rule, as described by one commentator, is that

a defendant seller's operation of a 1-800 telephone number, which is accessible from any number of forums and is maintained for the use of foreign consumers, does not alone constitute purposeful availment to subject the seller to jurisdiction in a foreign forum.

... [But], [w]here active interstate telephone negotiations lead to a contract, long arm jurisdiction may be upheld if the transaction or the defendant has other significant forum contacts.

Richard S. Zembek, Comment, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 ALB. L.J. SCI. & TECH. 339, 371-72 (1996).

416. The Ninth Circuit's *Cybersell* decision, discussed *infra* notes 409-12, implied that a measure of this "middle ground" might be the degree to which residents of the forum state had accessed the site and engaged in commercial activity through this channel. See *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419. The court stated, "Some courts have also given weight to the number of 'hits' received by a webpage from residents in the forum state, and to other evidence that Internet activity was directed at, or bore fruit in, the forum state." *Id.* The court concluded:

[T]he essentially passive nature of [the defendant's] activity in posting a home page on the World Wide Web that allegedly used the service mark of [the plaintiff] does not qualify as purposeful activity invoking the benefits and protections of Arizona. As it engaged in no commercial activity and had no other contacts via the Internet or otherwise in Arizona, [the defendant] lacks sufficient minimum contacts with Arizona for personal jurisdiction to be asserted over it there.

Id. at 420; see also *Resuscitation Tech., Inc. v. Continental Health Care Corp.*, 1997 U.S. Dist. Lexis 3523, at *17 (holding that one or two inquiries from Indiana residents to a foreign Web site about some Indiana goods or services would not support local jurisdiction).

In a recent trademark infringement case in which the only alleged contacts concerned defendant's use of the Internet, the record did not reveal the number of "hits" that the

E. Recommendations

As a recent commentator has noted, site owners can by several different means attempt to limit jurisdiction over themselves.⁴¹⁷ First, they can "limit the site's interactivity" and thus the applicability of states' long-arm jurisdiction by not providing visitors with services, with the ability to send e-mail, or with the ability to order products through the site.⁴¹⁸ However, from the cases discussed above, it is unclear whether this will suffice to render the site "passive" in the eyes of all courts.

Site owners can also attempt to block visitors from certain states, for instance "[b]y requiring users to identify their state or zip code" and then restricting access or ordering ability to those visitors from states in which the owner intends to submit to jurisdiction.⁴¹⁹ Alternatively, the owner could insert in its home page and other pages language to the effect that by clicking on the link provided and proceeding further the visitor represented that he or she was not a resident of, or ordering the products from, the states in question. This tactic has been used by some sites devoted to erotic material.⁴²⁰ However, in that context its effectiveness could be undermined by visitors' ability to access internal pages of the site without passing through the home or disclaimer page. Thus, short of technologically blocking access to visitors who did not proceed through the home site, owners might want to include the relevant disclaimer language conspicuously at the top of every page.

Third, the site could allow access to all visitors but "purport to be for the benefit only of residents of the company's home state."⁴²¹ Although this technique is undoubtedly weaker than the second option

foreign defendant's Web sites had generated from the forum state or how much of its product had been sold in that state. *SuperGuide Corp. v. Kegan*, 1997 WL 754467 (W.D.N.C. 1997), at *5. In denying the defendant's motion to dismiss for lack of personal jurisdiction, the court held nonetheless that "a reasonable inference which arises is that such ["hits"] are numerous inasmuch as North Carolina is one of the populated states; however, should discovery reveal that the hits from North Carolinians are insubstantial, the jurisdictional issue may be revisited." *Id.* at *6.

417. See Carl W. Chamberlin, *Recent Case Holds: E-Mail is Minimum Contact*, NAT'L L.J., Oct. 20, 1997, at C8, C10.

418. *Id.*

419. *Id.*

420. See *supra* note 342 (discussing provision on *Hardcore* home page).

421. Chamberlin, *supra* note 417, at C10.

alone, it could be applied in conjunction with that strategy merely by adding such a statement to a screen that already requested the visitor's location or home state or warned off visitors from other states.

Contractually, site owners can insert a forum-selection clause and/or choice-of-law clause in their pages.⁴²² However, it should be noted that a choice-of-law clause may be considered by a court as a factor in determining jurisdiction.⁴²³

VIII. CONCLUSION

The continued evolution of the World Wide Web's technology, commercial culture, and statutory, regulatory, and judicial governance will certainly create more clearly-defined and standardized practices for business conducted through virtual stores. In the interim, to maximize her "net profits," a site owner should ensure that visitors proceeding to certain pages or submitting orders have not only seen but assented to contractual terms acceptable to her. To some extent, this process will make commercial sites more difficult for visitors to navigate. For instance, a "Web-wrap" page that must be "clicked through" poses more of a barrier and sets a different tone for the interactive shopping experience than a relatively inconspicuous "legal information" link that is hidden at the bottom of a page. However, the owner seeking full legal protection might well decide that the slight inconvenience to visitors is a risk worth taking.

Sixty years ago, Karl Llewellyn, one of the principal drafters of the Uniform Commercial Code, wrote that "[t]oday's policy or principle will be outdated, doubtless, within a generation. But guidance it gives when, and as long as, it fits the facts. And surely the lesson remains that policy and principle must fit the facts, and must be rebuilt to fit the

422. *Id.*

423. See *CompuServe v. Patterson*, 89 F.3d 1257, 1266 (6th Cir. 1996) (noting, to support Ohio jurisdiction, that Patterson "entered into a contract which expressly stated that it would be governed by and construed in light of Ohio law"); *Digital Equip. Corp. v. AltaVista Tech., Inc.*, 960 F. Supp. 456, 464 (D. Mass. 1997) (citing as one of the "jurisdictional facts necessary and sufficient to support personal jurisdiction" over the defendant the fact that the contract at issue "includes a clause requiring this contract to be interpreted 'under and in accordance' with the laws of Massachusetts"); *Edias Software Int'l, L.L.C. v. Basis Int'l, Inc.*, 947 F. Supp. 413, 422 (D. Ariz. 1996) ("Because the parties signed the contract in New Mexico and agreed to have New Mexico law govern the contract . . . a New Mexico court might provide an alternate forum."); cf. *Pres-Kap, Inc. v. Sys. One, Direct Access, Inc.*, 636 So. 2d 1351, 1352-53 (rejecting Florida jurisdiction over foreign defendant, in part on the grounds that a provision in past contracts, subjecting the defendant to suit in Florida in the event of a dispute, was deleted from the contract being sued upon).

changing facts.”⁴²⁴ Yet even more rapidly than the policies and principles of on-line sales change, commercial Web sites can—and should—be rebuilt to anticipate and resolve legal problems.

APPENDIX

CHECKLIST OF COMMERCIAL LAW ISSUES FOR WEB SITE OWNERS

I. Business Practices

- A. Answer E-Mail
 1. Check for E-mail regularly.
 2. Keep E-mail boxes open and accessible.
- B. Periodically Review the Site's Integrity and Operation
 1. Check E-mail facility regularly.
 2. Check regularly, through search engines, for “imposter sites.”
 3. Check all uploaded or downloaded software for viruses.
- C. “Back Up” Information Regularly.
- D. Protect Customer Information in Transit and in Storage
- E. Send Confirmation By E-Mail to the Customer
- F. Clarify Any Ambiguities in E-Mail Messages
- G. Monitor On-Site Forums

II. Means of Setting Terms of Contract

- A. Conspicuous Language in Home Page
 1. Visitors forced to enter at home page and agree to its terms by proceeding (“web-wrap”)
- B. Conspicuous Language in Separate Page —
 1. To which home page conspicuously links;
 2. To which all pages conspicuously link; or
 3. That visitor must “click through” to submit order (“web-wrap”)
- C. Conspicuous Language next to Appropriate Link or Graphic

424. Karl Llewellyn, *On Warranty of Quality and Society: II*, 37 COLUM. L. REV. 341, 409 (1937).

III. Considerations Concerning Site's Disclaimers and Clarifications

- A. Disclaimers of Merchant Status
 - 1. Disclaimer of "merchant in such goods" status
(i.e., indication of "isolated sale")
 - 2. Disclaimer of merchant status potentially arising
from links to or from other sites
 - 3. Avoidance of merchant status through meta-tags
 - 4. Limitation of time during which offer is held open
 - a. Reminder to visitors to "reload" or "refresh" the
site's image
- B. Clarification of Whether Site Offers Goods for Sale or
Solicits Offers to Buy
 - 1. Implications for the battle of the forms
- C. Clarification of Means by which Contract Must Be
Formed and Terms Assented to
 - 1. Web-wrap agreements
- D. Threshold for Applicability of Statute of Frauds
- E. Unenforceability of Unconscionable Terms Unless
Explicitly Assented To
- F. Disclaimer of Warranties
 - 1. Express warranties
 - 2. Implied warranties
 - 3. Disclaimer of warranties for sites to which site links
 - 4. Disclaimer of warranties for sites that link to site
 - 5. Conspicuousness
- G. Choice of Law
- H. Choice of Forum
- I. Disclaimer of Site's Availability to Certain Classes of
Visitors (e.g., Those Underage or from Certain
Jurisdictions)