2002

Unifying Commercial Law in the New Century

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I join enthusiastically in the applause for Fred Miller's service as Executive Director of the National Conference of Commissioners on Uniform State Laws (NCCUSL). Without question, Fred is the outstanding contemporary embodiment of the passion that led fifty years ago to the achievement of a uniform commercial law among the American states. His work serves a worthy cause, and the American Law Institute (ALI) is proud to have been a partner in the venture and to have played its appropriate instruments in the orchestra that Fred has been conducting.

That said, and Fred's integrity, intelligence, and steadfastness appropriately noted, it is also the case that the Uniform Commercial Code (UCC) religion has today more different sects, doctrines, and perhaps even heresies than the orthodox faith that Fred has so ably shepherded.

I wrote about this one year ago,[1] and the events of the past twelve months have confirmed some of my intuitions and generated other deviant speculations.

I. LOBBYING BY SPECIAL INTERESTS

In modern conditions, statutory law cannot be revised without awareness that organized interests will fight fiercely for their preferences. The original UCC was the law of merchants and banks. The consumer movement alone requires accommodation among legitimate but incompatible positions. For one among hundreds of other examples, see the differences of view between those who "own" intellectual property (for example, software) and those who consume it (for example, insurance companies who "lease" computer programs and librarians who make them available to their "borrowers"). As Robert

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1. *See generally*, Lance Liebman, Symposium, *The ALI and theUCC*, 52 HASTINGS L.J. 645 (2001).

Scott and Alan Schwartz predicted,[2] large institutional lenders turned out to be strong enough to succeed quickly with the new Article 9, but differences among competing organized groups have so far halted what started out to be Article 2B of the UCC and ended as a freestanding Uniform Computer Information Transactions Act (UCITA), and even Article 2.

II. NEW TECHNOLOGY

Fast-changing technology is a problem. The economic transactions governed by the original code were reasonably stable and understood. When electronic banking occurred, drafting new law proved difficult. Computer technology seems complex and dynamic. In truth, the transfer of a computer, a computer program, or a "smart" good is little different from the sale (or lease) of a lawn mower or an automobile. For example, think about three of the topics on which Karl Llewellyn is regarded as having made major intellectual strides. One is the question of a contracting party's knowledge, and the matter of whether all important terms are communicated or available before an agreement is reached. Another is the relevance of business practice as legislatures and judges craft law. And a third is the attempt to distinguish legal doctrines that function as default rules from those that cannot be waived by agreement. These are hard questions to be sure. But it is difficult to see why one would come to different conclusions about them depending on whether one is thinking about the cooling work of the refrigerator or about the computer embedded in the refrigerator or indeed about the software package that a user pays for by credit card and then downloads from the Internet. But the apparent complexity and newness of computer software and related new forms of "information" have allowed those who make these products to argue (successfully, up to a point) for exemption from some of the responsibilities with which those who sell "old" goods have long lived. The one true difference is that some goods now are or contain intellectual property. The buyer of a washing machine never obtained the right to violate the patent of the seller, and the buyer of a Coke™ could not violate the seller's trademark. It is a challenge to draft statutory language to govern the transaction itself within the limits set by laws of intellectual property that the transferor is entitled to impose on the transferee. When that is attempted in a statute (such as today's

2. *See*, Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislature*, 143 U. PA. L. REV. 595, 647 (1995).

UCITA) separate from the one that regulates the associated good (the refrigerator with a computer and computer program, or the laptop computer that comes with software), then the two statutes need sophisticated and coordinated "scope" language to delineate correctly the full law of the transaction. So far, that effort has defeated the uniform law process. This was a smaller problem when the "good" was a Coca-Cola™ or a Whirlpool™ washing machine. With electronically movable intellectual property, the owner's rights in the words, music, or data can be infringed readily and globally. This property, so high in potential value and yet so evanescent, forces hard questions about statutory protection.

III. LEAVE IT TO THE COURTS

This leads to the heretical thought that it may be too soon to affix this area of law in a uniform statute. Why not let the law develop through the evolution of judge-made doctrine? One reason for the absence of passion on behalf of the latest amendments to Article 2, diligent and intelligent as the two drafting committees and the three reporters have been over the past decade, is that many hard issues have been finessed, and therefore left to the courts. The work of the judges on the new questions presented by the latest technology has by and large been sound. Indeed, it would be hard to disagree with the conclusion that courts have done their job much more satisfactorily than the uniform law process. As of today, it appears that we will let the courts continue this work—either by halting the process of Article 2 amendments, thus keeping the UCC where Llewellyn put it, or by amending Article 2 with the old scope language or with new language sufficiently open-ended to encourage the courts to continue the evolution of judge-made doctrine.

IV. GLOBALIZATION

Finally, as to some of these issues, the day of state law will soon be over. If we truly need national uniformity—and in the virtual marketplace for software and intangible information there may be such need—then Congress must act. But for the next period of new-technology law, even the United States is only one jurisdiction. Note that the Framers, so long ago, assigned protection of intellectual property to the national government. Note also that the United States has behaved for the past decade as if it must bring its law of intellectual property into alignment with European and, indeed, world trends. Also, certain issues of property, privacy, and even free speech will inevitably migrate to

transnational fora, where only the national government can speak effectively for our federal republic.

None of these predictions diminishes the value or the quality of the effort that Fred Miller has been leading and will continue to lead. But after fifty years of essentially a single process of ALI and NCCUSL partnership in the UCC, I suspect there will now come into existence new ways in which the concerns of companies, consumers, professors, and thoughtful lawyers are heard in the formulation of American policy and in the decisions made by international institutions. We must find ways to assure that the values that NCCUSL and the ALI have brought (and will continue to bring) to the UCC process are transplanted to the new fora. And indeed I am reasonably confident that both of these venerable and evolving organizations will have a significant role as new procedures develop.