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PRIVATE LAW AND PUBLIC INTEREST

MY KINGDOM FOR A HORSE: REINING IN RUNAWAY LEGISLATION FROM SOFTWARE TO SPAM

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I. INTRODUCTION—OF CARTS AND HORSES

Throughout the history of Western jurisprudence, the law has struggled to keep up with changing human behaviors. The inevitable lag as common law develops and becomes predictable is an uncomfortable and uncertain time during which inequitable and surprising decisions can impact the law and commerce detrimentally. Traditionally this was viewed as merely a necessary settling out period, after which, if necessary, a codification project could be contemplated. The timing of such an undertaking is important. Acting too precipitously leads to ill-advised, often unnecessary statutes; waiting too long increases the period of uncertainty with all of its attendant drawbacks. This balance becomes perhaps even harder to strike in an age of information and e-commerce where significant developments occur at speeds unimaginable to our horse and wagon forebearers. Nevertheless, there is a key difference between quickly developing law and that which is prematurely crafted. Sadly, in recent years, that distinction has been ignored and an ill-advised rush to codification has led to unfortunate, un-

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wieldy, and unworkable results. Just as the proverbial cart is best employed behind its equally proverbial horse, so is new law, even that involving cyberspace and cyberspeed, best only after sufficient time for development and evolution.

Those horse and wagon concepts also fit in with the topic of this conference, because it was after all, horses and wagons that played an important part in the case of *Hadley v. Baxendale*.[1] More important than the historic tie, however, is the lesson to be learned from the continued relevance of the *Hadley* case. The very fact of this conference celebrating the sesquicentennial of this landmark case gives proof to the enduring legacy of soundly reasoned and well grounded cases. Common law doctrine is not and should not be viewed as inferior to code. There are many familiar reasons for seeking a uniform code: predictability of results, interjurisdictional application, and certainty of practice. These and others like them are both valid and persuasive, especially in the commercial realm. However, a certain evolution of understanding and custom is an absolute prerequisite for a meaningful statute. If, for instance, some theorist had tried to anticipate a reasonable rule for foreseeability of damages that would apply in a logical way to a replacement mill shaft gone astray, but tried to do so before trade and commerce had developed between neighboring English regions (and certainly before the large scale commercial shipping of grain that was involved in the Hadley Mill), any resulting theory would have been unlikely to be either rational or reasonable. At the very least, it would have been woefully inappropriate to the merchants of the day. Until commercial shipping developed, the rule of *Hadley* could not be contemplated. Useful codification was even further removed in time. Until the common law and related merchant practices solidified into a general, workable context, no codification was possible.

In order to benefit commercial practice, a statute must be based on established merchant practice and understanding, including common law foundations. Certainly the foundations can be shaped and tem-

1. Being asked to speak at the sesquicentennial of *Hadley v. Baxendale* held special meaning for me. This case and I have a bit of our own history. In my first year summer clerkship at a large Atlanta firm, I was asked to write a memo about the current Georgia law on incidental and consequential damages. This would have been a more successful project had I understood the difference between a research paper/law journal comment and a legal memo for a litigation partner. It would also have been more successful had I already learned damages as part of the first year curriculum. Then perhaps I would not have been so thoroughly impressed with myself when I uncovered this obscure old English case that seemed to be the foundation for all the current rules on incidental and consequential damages . . . The good news is, my research was accurate. The bad news of course was the truly underwhelming response from the partner and his (to me) incomprehensible failure to be impressed by my brilliant research. I remained fairly clueless that summer, but began to have an inkling of the truth upon opening my casebook that Fall on the first day of Contracts II—only to be faced, on page one, with this obscure old English case . . . .

pered. Consumer protection concepts, for instance, can be grafted onto the general practice. Divergent results in differing jurisdictions can be reconciled. Many things can be done to improve or temper the developed common law, but any attempt to do so before the common law and the relevant commercial practice have evolved is fruitless at best. A well-drafted code may greatly improve the status quo but cannot anticipate it.

Putting the cart before the horse is to us an old-fashioned cliché. To a hunter-gatherer from a tribe without domesticated draft animals, it would be incomprehensible gibberish. To ask that same hunter-gatherer to create rules of conduct for a carting business is obviously a foolish proposition, yet equivalent undertakings are common today.

The legal profession has always seemed unduly challenged by technology. We have all worked with partners who even today have their secretaries print out their e-mail for them and type up the dictated reply. Many law professors are now on the leading edge and are incorporating Power Point into their lectures—now that it is a safely outdated program. As a profession, we change slowly, and given the nature of our calling, that is perhaps not a bad thing.

Nevertheless, a disturbing trend seems to be developing, especially in the field of technology related commerce. This trend is one of legislatures and academic drafting committees rushing in to dominate and codify nascent fields long before they can develop their own *Hadley v. Baxendale*s and other well tested common law rules. This is a disturbing trend which operates much to the detriment of the developing marketplace. Patience may not be the mounting block for a brilliant academic or political career, but as the proverb reminds us, it *is*, nevertheless, a virtue. This Article considers three examples of failing to "look before you legislate."

The first section addresses one of the first major statutory treatments of software, the 1980 amendment to the Copyright Act of 1976. These amendments expressly included software within the sphere of copyrightable material for the first time. Although some human readable forms of computer programs fit comfortably within the bounds of copyright law, the Copyright Act's express exclusion of useful processes makes the blanket inclusion of all software, including machine readable binary code, shake the foundation of the balance between encouraging innovation and ensuring access to a meaningful public domain.

The second section addresses the more recent, failed attempt to proactively draft commercial rules for software related transactions. Although it began as an attempt to amend Article 2 of the UCC, the effort ultimately yielded the stand alone, Uniform Computer Information Transactions Act (UCITA). In undertaking UCITA, the drafters unwisely abandoned the approach that Karl Llewellyn used in creating Article 2. Llewellyn's Article 2 was based on the merchant prac-

tices of the day. These practices had evolved beyond the depth of the then current Sales Act and needed a more sophisticated commercial code to reflect the modern complexity of business relationships. Karl Llewellyn referred to this updating of the law as the "unhorsing" of sales law.[2] He was adamant on the need for this reform, but he was also clear that the purpose of the law was to reflect the actual practices common among merchants. The UCITA movement, however, although commonly invoking the name and authority of Llewellyn, completely abandoned his philosophy and thereby avoided his success. UCITA is overly broad, anti-consumer, and inspires widespread opposition. This result seems virtually to have been inevitable when one realizes that the drafters were seeking to delineate rules for technological events and practices that were not yet widely used or in some cases even possible. Shy of following Jules Verne's example rather than that of Karl Llewellyn, one questions how the drafters of UCITA could have reasonably hoped for meaningful success.

The final statute examined is the 2003 CAN SPAM Act[3] that took effect January 1st of 2004. This silly monikered statute imposes financial burdens and risks on legitimate businesses by threatening draconian penalties for even a single missent e-mail. The impact on its target, the unsolicited junk mail that clogs the nation's e-mail inboxes, has been virtually nonexistent. The statute is new, and little of its potential for misuse has yet become actual, but the best that can be said of this Act is that it will hopefully do little harm in the long run. Its short run effects are even now being felt by web-based businesses, which have faced enough financial challenges in recent years without this addition by Congress.

Each of these statutes is burdened with the same flaw: legal minds trying to predict and control technical innovation. This Article concludes with the suggestion that even in the quick moving technological age, sometimes inaction and observation are superior to hasty legislation.

II. PARKING CARS IN THE BARN—1980 REVISIONS TO THE COPYRIGHT ACT OF 1976

Modern copyright law in the United States is governed by the Federal Copyright Act of 1976; however, copyright protection was an established concept even at the founding of the nation. Copyright, along with patent, was expressly included in the Constitution by the Framers as an incentive provided by the federal government to encourage the progress of the arts and sciences in the new nation. Al-

2. Karl Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725 (1939); Karl Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873 (1939).

3. Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 15 U.S.C. §§ 7701–13, 18 U.S.C. § 1037 (Supp. 2004).

though copyright protection has evolved over time and developed to embrace new technologies from piano rolls to photographs and copying machines, the basic tenets and foundations of the law remain both relevant and effective. Or at least they did until the 1980 amendments to the Act. In a precipitous attempt to predict and direct the new technology represented by early computers, Congress muddied the waters of copyright law in a way that is likely incapable of remedy.

A. *CONTU and Its Aftermath*

In the roughly twenty years before 1976 during which Congress worked to draft a new Copyright Act to replace the then current 1909 Act, computers were still mainly creatures of graduate studies and *Star Trek*. They did not sit on secretaries' desks; they were not set up for easy access in public libraries; and they were not on the required list for matriculating college freshmen. The computer industry was, however, developing during that time period, and Congress had been alerted to the pending issue of how to address the intellectual property aspects of software and computer programs.[4] In hopes of crafting a learned solution to the issue, Congress authorized the creation of the Commission on New Technological Uses of Copyrighted Works (CONTU) to study software and copyright law. The Commission was chartered in large part to help resolve the issue of whether an author's copyright extended to digitalization and storage of a work on a computer.[5] The Commission, however, quickly found that a digital copy was clearly within the author's rights under Section 106 of the new Copyright Act, and it then moved on to the more contentious issue of copyright protection for software.[6]

At the time, software was mainly the creature of computer experts, none of which were included on the Commission.[7] The personal computer had not become a fixture of professional life; few non-computer experts had any significant experience with computers of any kind. Lacking technical expertise, the Commissioners were left to muddle through a very unfamiliar world of abstract concepts as best they could. Their fundamental failure to understand the distinctions be-

4. For purposes of this presentation, I will use the terms software, computer program, and code interchangeably. This serves the purposes of today's discussion sufficiently, but I do wish to note that it is not technically correct. To be technically correct: "'Code' signifies merely a series of instructions for a computer, whereas a 'computer program' is a self-contained body of code designed to achieve a certain result. 'Software,' by contrast, encompasses not only computer programs but also the data processed by them and the accompanying documentation." Mathias Strasser, *A New Paradigm in Intellectual Property Law? The Case Against Open Sources*, 2001 STAN. TECH. L. REV. 4, 7.

5. Pamela Samuelson, *CONTU Revisited: The Case Against Copyright Protection for Computer Programs in Machine-Readable Form*, 1984 DUKE L.J. 663, 665.

6. *Id.*

7. *Id.* at 699.

tween object code and source code and to comprehend the mechanical nature of some software led them to their ill-considered recommendation for the blanket inclusion of software within the Copyright Act. Having chartered CONTU to answer the question, Congress predictably followed the Commission's recommendations. Unfortunately, since that time no attempt has been made to revisit the wisdom of the decision, and the pre-technology decision still stands and still undermines the essence of copyright law today.

B. *Copyright Basics*

Copyright law is based in the U.S. Constitution, which expressly authorizes Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[8]

This language authorizes the creation of government granted monopolies of copyright and patent for the purposes of both encouraging innovation, creation, and discovery through the incentive of the limited monopoly and promoting the disclosure or publication of these innovations, creations, and discoveries. For purposes of copyright,[9] the relevant language is "writings of authors." The Copyright Act has interpreted "writings" to cover eight statutory categories[10] which reflect how the interpretation of "writings" over the years has been expanded to include such items as artwork, sculpture, musical compositions, and photographs.[11] One fundamental characteristic that all of these writings share is that of being a conveyance of some sort. All of the writings exist to convey information, images, sounds, or other tangible impressions rather than to do something in themselves.[12] A writing, no matter how broadly construed, is distinct from useful or utilitarian objects, which are instead covered under patent law.[13] This distinction was clarified in the seminal case of *Mazer v. Stein*,[14] which addressed the protectability of a popular lamp with a base shaped like a partially clad female dancer. The Court found that original works of art, like the statuette of the dancer did not lose their copyrightability by virtue of being part of a useful item. However, the Court made clear that no part of the utilitarian object itself was cov-

8. U.S. CONST. art. I, § 8, cl. 8.

9. *Id.* (authorizing the issuance of patents).

10. 17 U.S.C. § 102(a) (1994). "Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works." *Id.*

11. *Id.*

12. *See generally* 17 U.S.C. §§ 101–02 (1994); Samuelson, *supra* note 5, at 749.

13. *See* 17 U.S.C. §§ 101, 102(b) (1994).

14. 347 U.S. 201 (1954).

ered.[15] The application may be fuzzy around the edges,[16] but the rule is clear: artistic elements are protectable under copyright law; useful or utilitarian elements and objects are not. This distinction is emphasized in Section 102(b)'s list of items expressly excluded from copyright: "in no case does copyright protection . . . extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery."[17] This distinction is important. The rights granted and the standards for protection vary greatly between copyright and patent. Both sets of doctrine have been purposefully developed to best serve the Constitutional goals of encouraging innovation for the benefit of the common good.

Unlike patent requirements, copyright's threshold standards are fairly low. This does not, however, imply that they are unimportant. The first, mentioned above, is that the work fall within one of the statutorily defined categories of "writing." The second Constitutional requirement is that of authorship. The Copyright Act refers to "original works of authorship" as a requirement of a copyrightable work. This simply means that in order to be protectable, the work must have been created by the author and must reflect at least a modicum of creativity. As the Court made clear in *Feist Publications v. Rural Telephone*, it must owe its origin to that individual and it must have required some small spark of creativity in its creation:

> The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, "no matter how crude, humble or obvious" it might be. Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. To illustrate, assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable.
>
> Originality is a constitutional requirement. The source of Congress' power to enact copyright laws is Article I, § 8, cl. 8, of the Constitution, which authorizes Congress to "secur[e] for limited Times to Authors . . . the exclusive Right to their respective Writ-

15. *Id.* at 218.

16. *See, e.g.*, Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co., 74 F.3d 488 (4th Cir. 1996); Masquerade Novelty, Inc. v. Unique Indus., Inc., 912 F.2d 663 (3d Cir. 1990); Carol Barnhart, Inc. v. Econ. Cover Corp., 773 F.2d 411 (2d Cir. 1985); Kieselstein-Cord v. Accessories By Pearl, Inc. 632 F.2d 989 (2d Cir. 1980).

17. 17 U.S.C. § 102(b) (1994). The text of the Code goes on to emphasize that this exclusion will apply regardless of the form in which the idea, procedure, etc. is "described, explained, illustrated or embodied in such work."

> ings." In two decisions from the late 19th century. . . this Court defined the crucial terms "authors" and "writings." In so doing, the Court made it unmistakably clear that these terms presuppose a degree of originality.[18]

It need not be unique or non-obvious or even clever or tasteful, but in order to earn a copyright a work must fall within one of the eight statutory categories; it must be an original, creative work of authorship and it must not fall within the proscribed list of excluded items.[19]

In analyzing the copyrightability of software, then, one first looks to the threshold requirements. Doing so, one may easily conclude that some software should fall within the copyright's boundaries. A program can be viewed accurately as a set of instructions, which can fit within the first statutory category, Literary Works. The programmer created it, so it is an original work of authorship, and so long as there is sufficient detail of expression, one can easily imagine a protectable program. This is not, however, the same as concluding that all software is presumptively protectable. A program must undergo the same scrutiny that any literary work does before it may be deemed suitable for copyright. As has been discussed above, ideas and information are not protectable. Under patent law, any use of the protected information or process must be with the patent holder's permission. In copyright, however, the written expression that conveys the information may be copyrighted, but the underlying information is freely useable by any party. The *Hadley v. Baxendale* of this idea/expression dichotomy is the 1879 case *Baker v. Selden*.[20]

In *Baker v. Selden*, which Congress incorporated into Section 102(b) of the Copyright Act, the Court conclusively outlined the key distinction between an unprotectable idea and protected expression in copyright law. In *Baker*, the work at issue was a book detailing a new form of accounting. It was a fairly revolutionary advance in accounting procedures and was described in detailed text and tables so that any reader of the book would be able to understand and use the accounting system. The defendant produced a competing book describing the same accounting system. The chapters were not copied verbatim, but some of the tables were exactly reproduced in the second work.[21] There was no question that the author of the second book had copied both the information about the new accounting method and the exact tables from the original work. Nevertheless, the Court found that no infringement had occurred because the copyright

18. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345–46 (1991) (citations omitted).

19. The requirement of fixation in a tangible medium, while equally required by the Copyright Act in Section 101 is not discussed here for the sake of brevity. It is well and correctly established that any of the digital media are sufficient to satisfy the fixation requirement. 17 U.S.C. § 101 (1994).

20. 101 U.S. 99 (1879).

21. *Id.* at 99–101.

of the original work extended only to the author's expression of the new system, not to the system itself and the use thereof.

The actual idea of the system, including the details of its function and how to use the system, were not covered by copyright. Even the exact copying of the tables was permitted, because in order to use the accounting method, one must use tables substantially like those in the original work. The Court reasoned that the tables were necessary to the unprotected method, and to protect the tables would in effect extend protection to the method as well. This is commonly referred to as the merger doctrine. Where there is only one (or limited) ways of expressing an idea, no such expression will be protected. If there is really only one way to describe the process of combining flour, sugar, eggs, chocolate chips, and so forth in a way that will result in a certain savory cookie, then that set of instructions[22] will not be protected. The underlying process is excluded from coverage both by *Baker* and by Section 102(b),[23] and if there is really only one way to describe the process or portion thereof, that expression is deemed to be merged with the idea and is therefore unprotectable.[24]

C. *Galloping Into the Future—Applying Copyright to Computers*

These fundamental copyright concepts could be applied to software without undue difficulty, and once judges became sufficiently familiar with the basics of computer technology, a line of cases would have developed which would have applied the familiar copyright doctrines to the new technology. Courts could distinguish between idea and expression in software cases as they had in previous cases, although this would likely involve some expert technical advice. This is not a departure from established copyright law, merely a new extension. The *Baker* court was able to distinguish between the copyrightable expression and the uncopyrightable idea in the accounting books and copyright has adapted to new technology throughout its history. Lithographs, photographs, phonographs, and video recording, among other illustrative new technologies, each forced the courts to apply old doctrine to new situations. While there were, of course, some false starts and purely bad cases, the ultimate result was a rational development of sound common law, which was over the years codified in a series of Copyright Acts. With the advent of the computer, however, instead of allowing the law to develop naturally, Congress rushed in to

22. This is the case for most recipes.

23. It is important to note that this does not leave all processes totally without protection. Patent is the correct place for useful processes, machines, etc., but the higher standards and more complicated application process leave copyright a tempting option to many erstwhile applicants.

24. For a more detailed overview of the idea/expression dichotomy and the merger doctrine, see 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[B][3] (2004); MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW § 2.13 (3d ed. 1999).

stake out the parameters of software protection while the technology was still in its infancy and the common law had not yet settled out. This preemption of the natural process resulted in the inclusion not just of expression-based software that correctly can be analyzed as a literary work, but also of machine-based software that is nothing more than a part of a machine process. The traditional copyright tests and doctrines cannot intelligently handle these types of non-expressive software. They are machine like, not literary, and are properly addressed in a patent inquiry. Unfortunately, in its rush to legislate, Congress used too broad a brush and included both types of software within its definition of copyrightable literary works.

The heart of the conceptual problem lies in both the function and the structure of software code. Code can be in either human readable source code or machine readable object code. Source code is the lines of programming language that programmers create. Object code is the millions of ones and zeroes (or more accurately, electronic pulses and absences of electronic pulses) that causes the desired output. Programmers cannot read object code. It is incomprehensible except to the computer it is directing. In effect then, the object code is not "expression" as much as it is a functioning part of a machine. It is this object code that runs HVAC systems and cell phones and digital cameras. It is really the functioning aspect of the program. To the extent there is protectable expression, it is found in the human readable code or in the output of the program. Source code is the version of a program that is written by a person. It is commonly in a computer language rather than normal English, so when it is referred to as readable by humans, only technologically skilled humans proficient in the particular language will really be able to understand it. Nevertheless, this is fundamentally distinct from object code, which cannot be read by any humans, technologically proficient or otherwise. Object code is what results from running the human drafted source code through a standard piece of component software called a compiler which translates the program into a string of 1s and 0s which instruct the computer to take a desired action, like highlighting text, playing solitaire, accessing the internet, or rebooting. This object code has no purpose or application outside of causing the computer to act in certain ways. Potentially, if a human created a string of 1s and 0s, it could be a copyrightable work whether or not it caused any particular reaction from a computer. But object code is not created by a human; it is an internal computer process which lacks the requisite authorship.[25] It seems to be this distinction which was lost on CONTU and Congress.

25. This is not to say that computer aided output can never be protected. Protecting artwork created using a drawing program does not require any greater stretch than protecting a novel created on a word processing system. Where the computer is merely a tool in the hands of an author, no problem arises.

Today if I explain the process of programming, including the actions of the compiler, operating system, and hardware, the average law student, usually diligently typing into a laptop rather than taking notes longhand, will have enough basic familiarity with at least the result of the process to be able to follow along. Even a technologically unsophisticated individual like myself can follow a technical description (eventually) from a tech expert, because at least some of what is being described is familiar. I can mentally hook the new technical details to a process or result that I am familiar with from long personal use. The CONTU Commissioners and members of Congress had no such familiar hooks from which to hang the technically framed arguments about the nature of software, and as a result, they failed to distinguish source code as the real copyrightable work. This failure has led to the inclusion of both forms of code as copyrightable matter, but this result is one that does irreparable harm to the inherent concept of copyright law and its related doctrine.[26]

To justify this over inclusive decision, many different theories have been advanced to explain how object code can be classified as copyrightable subject matter. These vary from defining the object code as a derivative work, a copy, or even an independent work.[27] There are problems with each of these theories,[28] but the underlying issue is that there is no independent authorship in object code. Period. The programmer creates the source code. The compiler, with no guidance whatsoever from human hands, translates it into the requisite 1s and 0s for the computer to use to carry out whatever process was described by the programmer in the source code. In the intervening years since the Act, courts have developed rules for computer assisted and computer created work.[29] These cases make clear that some human guidance must be present in order for the constitutionally mandated "authorship" to be present. The program source code is the underlying work. There is no authorship of the object code independently from the source code; therefore, there is no additional copy-

26. *See* Samuelson, *supra* note 5, at 704; CONTU Final Report, *infra* note 31 Concurring Opinion of Commissioner Nimmer.

27. These theories have been discussed quite thoroughly in many other sources. *See, e.g.*, I. Trotter Hardy, Jr., *Six Copyright Theories for the Protection of Computer Object Programs,* 26 ARIZ. L. REV. 845 (1984); Strasser, *supra* note 4. A repeat of these theories is beyond the scope of this brief presentation, but I highly recommend a perusal of the different theoretical justifications as a fascinating venture through theoretical copyright application.

28. Because the source code cannot really be "perceived," even with the aid of a machine from the object code, it is technically incorrect to call the object code a copy. 17 U.S.C. § 101 (1994); *see also* Hardy, Jr., *supra* note 27, at 860.

29. *See* 37 C.F.R. § 202 (2004); James Thomas Duggan & Neil V. Pennella, *The Case for Copyrights in "Colorized" Versions of Public Domain Feature Films*, 34 J. COPYRIGHT SOC'Y 333 (1987).

right in the object code. The actual 1s and 0s should be no more protected than the actual grooves in an album are.[30]

A different analogy is that of blueprints. A set of blueprints for a model ship could clearly be covered by a copyright. The copyright owner, however, would have no control over my use of the blueprints nor over the ship I build using the blueprints. If it were a sufficiently unique building process, the author could perhaps patent it, but copyright does not cover the process itself, only the expression conveyed in the blueprints. Source code, like blueprints or other instructions, may properly be protected by copyright; object code, like other machines or processes, however, should not.

Nevertheless, the 1980 amendments include "Software" and the definition of software in Section 101 includes both object and source code.[31] By using this broad definition, CONTU and Congress in effect extended copyright to cover the building of the model ship in the example above. As a result, courts have struggled unduly with the inherently practical process based nature of programs while trying to stretch the boundaries of the Copyright Act around subject matter it was never intended to address. Adding processes to copyright not only conflicts with Section 102, but also inherently begins to erase the important line between copyright and patent law. Patent protection is more limited than copyright and has higher standards for protection. This is reasonable because patent, unlike copyright, allows the author to prevent others from using the patent holder's invention. Copyright allows anyone to use the idea underlying a work, but only the author may reproduce the actual expression. The two systems are well designed for their distinct arenas, but they share the underlying constitutional purpose of encouraging the spread of intellectual and artistic development by providing the incentive of limited monopoly protection for inventors and authors. To allow a clever programmer to protect the underlying process of his or her program with copyright instead of patent is to short circuit the protection regime and undercut the constitutional authority and intent of both patent and copyright. Unfortunately, this is exactly what is allowed under the 1980 amendment to the Copyright Act.

The program that causes the HVAC system in a law school to maintain the classrooms at a consistent temperature[32] may well be nonobvious and useful enough to qualify for a patent. It is not, however, copyrightable—or at least would not have been but for the precipitous action of Congress in including the entire breadth of software, before

30. *See supra* notes 27–28 and accompanying text.

31. 17 U.S.C. § 101 (1994); NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, FINAL REPORT 3–8 (1979); Samuelson, *supra* note 5, at 665.

32. Traditionally, this temperature is arctic cold in summer and swelteringly hot in winter.

anyone could truly say what that breadth would be. The market was already developing ways of protecting proprietary software before the mantle of copyright was draped around it. A bit of patience on the part of Congress would have allowed a much more reasoned approach to software protection and avoided the creation of bad law which strikes at the heart of copyright, its essence and its constitutional foundations.[33]

D. *Licensing Away the Public Domain*

A second result of the inclusion of software in the Copyright Act has not yet fully manifested itself, but nevertheless looms as a significant threat to the public domain. Although piracy has always been a concern of copyright holders, the digital nature of computer code makes it especially prone to easy and exact copying.[34] As a result, the computer industry has developed extra protection for their wares in the form of standard form licensing agreements. A surprising number of otherwise sophisticated individuals are unaware that they do not in fact "own" the software on their computer. That no one actually reads the terms that fall out of the software box or pop up on the screen during installation is so presumptively true as to be fodder for stand up routines and comic strips.[35] These terms, commonly referred to as shrinkwrap and clickwrap licenses respectively, present a remarkable number of legal ramifications, many of which are directly at odds with traditional sales doctrine. Nevertheless, the agreements are enforceable.[36] They are also expansive to the point of not only severely restricting the user's rights well beyond the restrictions imposed by copyright law but even to the point of disclaiming responsibility for nuclear holocaust resulting from unapproved use of the code (to quote Dave Barry, "I am not making this up.").[37]

33. *See* Samuelson, *supra* note 5, at 694; CONTU Final Report, *supra* note 31, at Nimmer Concurrence; Hersey Dissent.

34. The same of course is true of digital media for music and video. The Napster cases and debate thereon give insight into some of the record industry's concerns about widespread piracy. *See* A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001); *In re* Napster, Inc., 191 F. Supp. 2d 1087 (N.D. Cal. 2002). While the analysis of infringement is not terribly illuminating or engrossing, the issue of remedies and prevention is a fascinating one. The current architecture of the file swappers seems to be advancing beyond the rights-holders' ability to protect their work, and the legal strategies available or even possible to the recording industry are quite interesting, but also beyond the scope of this presentation.

35. I especially recommend the series of Dilbert strips by Scott Adams in which Dilbert unwittingly becomes contractually obligated to serve as Bill Gates's towel boy through an unread EULA. *See* Scott Adams, *Bill Gates' Towel Boy*, *at* http://www.mevis.de/~meyer/MISC/di/a.htm (last visited Jan. 31, 2005) (on file with the Texas Wesleyan Law Review).

36. ProCD v. Zeidenberg, 86 F.3d 1447, 1455 (7th Cir. 1996).

37. I have attached a severely edited version of a standard clickwrap agreement that came with a Microsoft software product currently installed on my PC. End-User

License Agreement (EULA) for Microsoft Works Suite 2002, *available at* http://www.microsoft.com/msagent/licensing/eula.asp (last visited Mar. 11, 2005) (on file with the Texas Wesleyan Law Review). If you have not read one of these before, please do so now. Some of the terms are truly amazing. Although not specifically relevant to our discussion today, I did leave in the section disclaiming responsibility for any death or nuclear holocaust resulting from an unauthorized use in a government facility. *See* EULA, *infra* note 37, at section 9.

END-USER LICENSE AGREEMENT FOR MICROSOFT(R) WORKS SUITE 2002

NOTE: This product may not set up on your computer unless or until you accept the terms of the applicable End-User License Agreement ("EULA"). The terms of a printed, paper EULA, which may accompany the product, supersede the terms of any on-screen EULA found within the product. For your future reference, you may print the text of the EULA, or refer to a copy of the EULA that can be found either online in or with this product. If you are accessing an online version of the EULA and would like to print the EULA before proceeding, please exit set-up by pressing the "disagree" button and then print the EULA from the online file. You may resume set-up at any time.

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the COMPUTER. (ii) Notwithstanding the preceding, if Manufacturer has elected to provide You with a Multiple-Language Pack ("MLP") for certain language versions with additional language version support (for example, Arabic with English and French language support, English with Hebrew language support, English with Korean language support, English with Pan-Chinese language support, or English with Thai language support) of the SOFTWARE PRODUCT, the preceding limitation to select and use only one language version of the SOFTWARE PRODUCT shall not apply, so long as (A) You acknowledge that the MLP, and the language support contained therein, is a part of the SOFTWARE PRODUCT, (B) You only use the MLP with the SOFTWARE PRODUCT, and (C) You comply with all of the other terms and conditions of this EULA.

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* Multiple Processor Version Selection. The CD or diskette(s) on which the SOFTWARE PRODUCT resides may contain several copies of the SOFTWARE PRODUCT, each of which is compatible with a different microprocessor architecture, such as the x86 architecture or various RISC architectures ("Processor Version(s)"). You may install and use only one copy of one Processor Version of the SOFTWARE PRODUCT on the COMPUTER.

* No Rental, Leasing or Commercial Hosting. You may not rent, lease, lend or provide commercial hosting services to third parties with the SOFTWARE PRODUCT.

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* Separation of Components. The SOFTWARE PRODUCT is licensed as a single product. Its component parts may not be separated for use on more than one computer unless expressly permitted by this EULA.

* Single COMPUTER. The SOFTWARE PRODUCT is licensed with the HARDWARE as a single integrated product. The SOFTWARE PRODUCT may only be used with the HARDWARE as set forth in this EULA.

* Single EULA. The package for the SOFTWARE PRODUCT may contain multiple versions of this EULA, such as multiple translations and/or multiple media versions (e.g., in the user documentation and in the software). In this case, You are only licensed to use one (1) copy of the SOFTWARE PRODUCT.

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Unconscionability issues aside, the enforceability and legality of these agreements allow copyright owners to extend their rights beyond those provided in the Copyright Act. This seems at first as if it should violate the doctrine of federal preemption.[38] Generally, however, although states or other jurisdictional entities are proscribed from varying in any way the federally defined bundle of rights,[39] it has been deemed appropriate to allow private parties to arrive at whatever private deal they choose.[40] The theory held that while it would be improper to allow states to change the scope of the rights provided by the federal government, private deals between individuals

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may be protected by applicable intellectual property laws and treaties. This EULA grants You no rights to use such content. Use of any on-line services which may be accessed through the SOFTWARE PRODUCT may be governed by the respective terms of use relating to such services. If this SOFTWARE PRODUCT contains documentation that is provided only in electronic form, You may print one copy of such electronic documentation. You may not copy the printed materials accompanying the SOFTWARE PRODUCT. All rights not specifically granted under this EULA are reserved by MS and its suppliers (including Microsoft Corporation).

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9. NOTE ON JAVA TECHNOLOGY. The SOFTWARE PRODUCT may contain support for programs written in JAVA. JAVA TECHNOLOGY IS NOT FAULT TOLERANT AND IS NOT DESIGNED, MANUFACTURED, OR INTENDED FOR USE OR RESALE AS ON-LINE CONTROL EQUIPMENT IN HAZARDOUS ENVIRONMENTS REQUIRING FAIL-SAFE PERFORMANCE, SUCH AS IN THE OPERATION OF NUCLEAR FACILITIES, AIRCRAFT NAVIGATION OR COMMUNICATION SYSTEMS, AIR TRAFFIC CONTROL, DIRECT LIFE SUPPORT MACHINES, OR WEAPONS SYSTEMS, IN WHICH THE FAILURE OF JAVA TECHNOLOGY COULD LEAD DIRECTLY TO DEATH, PERSONAL INJURY, OR SEVERE PHYSICAL OR ENVIRONMENTAL DAMAGE. Sun Microsystems, Inc. has required the inclusion of this disclaimer.

10. ADDITIONAL PROVISIONS. FOR THE LIMITED WARRANTIES, LIMITATION OF LIABILITY, AND OTHER SPECIAL PROVISIONS, PLEASE REFER TO THE ADDITIONAL PROVISIONS PROVIDED BELOW AND/OR WITH OR IN THE SOFTWARE PRODUCT. SUCH LIMITED WARRANTIES, LIMITATION OF LIABILITY AND SPECIAL PROVISIONS ARE AN INTEGRAL PART OF THIS EULA.

38. *See* 17 U.S.C. § 301 (1994).

39. *Id.*; *see, e.g.*, Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997); *ProCD, Inc.*, 86 F.3d at 1453; Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663 (7th Cir. 1986); Ehat v. Tanner, 780 F.2d 876 (10th Cir. 1985). For a general discussion of copyright preemption doctrine, see 1 NIMMER & NIMMER, *supra* note 24, at § 1.01[B][1]; MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW Ch. 11 (3d ed. 1999).

40. *See ProCD, Inc.*, 86 F.3d at 1455; Nat'l Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc., 991 F.2d 426 (8th Cir. 1993); Taquino v. Teledyne Monarch Rubber, 893 F.2d 1488 (5th Cir. 1990); Acorn Structures, Inc. v. Swantz, 846 F.2d 923, 926 (4th Cir. 1988).

are more a matter of freedom of contract than of federal concern.[41] This idea is not a new one, but in the past it was not applied to mass market standard form contracts as it is now. Standardized End User License Agreements (EULAs) are not a matter of private contract. They apply to all users of virtually any computer code; the computer industry very quickly adopted the use of EULAs as standard practice, and as a result, none of us actually owns any of the software we use. Thus, we are all restricted well beyond the bounds of copyright law in how we are allowed to use what we commonly, albeit incorrectly, think of as "our" software.

EULAs are thick with restrictions.[42] Some of the most common terms that have significant copyright implications include the following: that only one copy of the software be installed, (if the user has more than one computer, she must purchase more than one copy), that no one else be allowed to use the software, that the software may not be resold, rented, or loaned, and that any failure of the user to abide by any terms of any EULA or other license agreement with the software company renders all such contracts void (in other words, miss a payment on one product and you lose your right to use any of that company's products you may have on your system). Most of these provisions, to which users all blithely agree by ripping open a box or clicking "I Agree," run directly counter to Section 109 of the Copyright Act, the First Sale Doctrine.[43]

The First Sale Doctrine, simply stated, provides that once an individual has purchased a copy of a copyrighted work, that individual may dispose of that copy without the permission of the copyright holder. This includes reselling the copy, loaning it out, burning it, or any of a number of other similar actions. This right is not unlimited and is balanced by the express rights of the copyright holder.[44] For instance, although the owner of a book may sell or give away his copy, he may not make copies of his book, nor may he prepare a new work based on the book, such as a sequel or a screenplay. The balance of rights is carefully drawn and allows the owner of the copy maximum dominion over that physical copy without undermining the copyright protection provided to the underlying intangible work. This long standing balance between the rights of the copyright holder and a purchaser of a copy of the work take on new aspects with the inclusion of software and EULAs in the copyright equation. The vehicle of a software license neatly sidesteps the limitations of the First Sale Doc-

41. *See ProCD, Inc.*, 86 F.3d at 1454.

42. *See generally* sample EULA, *supra* note 37.

43. *See* 17 U.S.C. § 109(a) (2000) ("Notwithstanding the provisions of section 106(3) the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.").

44. *See id.* § 106.

trine by avoiding any sale transaction. A license does not trigger the sale and ownership based First Sale Doctrine, so the software company is able to take advantage of copyright protection by virtue of the 1980 amendments. It is also able to avoid some of the most significant restrictions on that protection through the fiction of a software "license" rather than sale.

In addition to upholding this result by finding license agreements survive preemption, Judge Easterbrook's widely discussed *ProCD v. Zeidenberg* opinion also opened the door for protection of materials previously unprotectable under the Copyright Act.[45] In *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, the Court held that in a dispute between competing producers of white pages phone books, the plaintiff's listings were not protectable under copyright law due to a lack of originality.[46]

> Because Rural's white pages lack the requisite originality, Feist's use of the listings cannot constitute infringement. This decision should not be construed as demeaning Rural's efforts in compiling its directory, but rather as making clear that copyright rewards originality, not effort. As this Court noted more than a century ago, "'great praise may be due to the plaintiffs for their industry and enterprise in publishing this paper, yet the law does not contemplate their being rewarded in this way.'"[47]

This expressly overruled the so-called "sweat of the brow" doctrine, under which argument for relief was based on the tremendous effort required to prepare the work.[48] It also made clear that a white pages style directory, no matter how useful or valuable, was exactly the sort of fact-based work that the Copyright Act expressly left in the public domain. *ProCD*, however, ignores this rule and allows the de facto protection of a digital white pages listing through the vehicle of the license agreement.[49] In *ProCD*, the plaintiffs were the producers of a digital database of names, addresses and phone numbers which is licensed for limited individual use. The defendant obtained a copy of the licensed database and used it for commercial purpose in clear violation of the terms of the license agreement.[50] So by virtue of a shrinkwrap agreement, unprotectable material may be mass marketed with copyright equivalent protection. There is no substantive reason that the same could not apply to the standard white pages supplied to each of us by the phone company each year. In fact, they are generally now delivered in shrinkwrap; the addition of a form agreement inside the wrap would be simple and under the law of *ProCD*, en-

45. *See* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996).
46. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).
47. *Id.* at 364 (quoting Baker v. Selden, 101 U.S. 99, 105 (1879)).
48. *Id.*
49. *See ProCD, Inc.*, 86 F.3d at 1455.
50. *Id.* at 1449–50.

forceable and legal. The shrinkwrapping of copyright is the next step if the logic of *ProCD* is followed.

Nevertheless, in large part, Judge Easterbrook got it just right.[51] *ProCD* is one of the companies forging the new rules of digital commerce. The traditional rules really do not provide a good fit. Both copyright law and sales law are awkward around these new forms of works and commerce. The old rules and standards cannot fully envelop the new issues presented by digital works and digital commerce, so Judge Easterbrook made a significant step in setting down a basic rule that does make sense for this type of transaction. This is exactly how the common law is supposed to develop along with the merchants and their new practices. His rule of enforceability of shrinkwrap agreements just formalized what the players already knew; the deal is not on an invoice slip anymore. When you click "I agree," it means you agree. It is a questionable result under both copyright and sales law, but the right one for the new commerce. Circumspect judges and subsequent legislators could ensure that *ProCD*'s progeny do not run wild. *ProCD* should have been just one step in the development of common law in this area. Unfortunately, Congress has already leapt ahead with the 1980 amendments and shortly thereafter, instead of learning from the errors of impatient action in the Copyright Act, the ALI and NCCUSL repeated the mistake with a similarly premature attempt to redraft sales law for computer transactions.

III. Rushing Your Fences and the Resulting Crash: The Uniform Computer Information Transactions Act

Commercial law, of course, has a long and vibrant history. It has followed each step in the development of civilizations and has grown in complexity along with commerce itself. *Hadley* itself is a prime example of the growth and development of both law and commerce. In commerce, perhaps more than in other areas, the predictability of law is key for the success of the people the law intends to serve. No merchant of any era is comfortable in an uncertain legal environment. A uniform code is an obvious way to attempt to create the certainty craved by the commercial players, and in the United States, the modern era of commercial law has seen multiple attempts at such codification. By far the most successful is Article 2 of the Uniform Commercial Code.

A. *Karl Llewellyn Takes the Reins*

It is impossible to speak of the development of the modern law of sales in the United States without reference to Karl Llewellyn, chief

51. I have not discussed his interesting interpretation of the mailbox rule and contract formation in general, but my general conclusion applies to those aspects of his opinion as well.

architect of the UCC and most particularly, Article 2 Sales.[52] It was with his guidance and direct drafting that Article 2 was able to become such a success.[53] Jettisoning the law's previous reliance on arcane title issues, Llewellyn saw to it that not only was the need for a uniform sales act recognized, but that the act would not just be uniform, it would also be beneficial to the merchants whose lives would be ruled by its strictures. The historic spirit of the Law Merchant was revived in Article 2; Llewellyn's guidance and familiarity with actual commercial practices of the day led to the familiar document which still controls commercial sales today.

One of the main reasons that a new sales act was necessary was the evolution of commerce itself. The industrial revolution had transformed how business was done; a revolution in banking was riding right along side. By the early part of the last century, industrial practices were fairly well established, but it had not been a smooth ride. In his article *The First Struggle to Unhorse Sales*,[54] Llewellyn described some of the synthesis that had brought American sales law to its then modern state and made clear that the process had not only been one of extraordinary change and development in commercial practice but also had been one of uneven progress and tumultuous movement:

> The first struggle to unhorse Sales law, and to make conscious a proper merchants' law of wares moving to and through a merchants' market, is . . . typical of American history; it is typical peculiarly of American legal history. Of our history, because, without too much planning and with considerable cross-purposing, some rather adequate adjustments were worked out—only to find themselves superseded, then misunderstood or forgotten before their full unfolding. Such is our 19th century economic history. Which of us, for instance, would know the extraordinary institutional perfection won by the Mississippi pilots, if Mark Twain had not written? How many of us still recall that each time a practice in moving fatted beef to the Eastern city consumer grew firm enough to warrant heavy investment in the stages of the process, either grazing ground further West or new transportation promptly disrupted the scheme and bankrupted the men? So here: by the time the law of merchant-to-merchant factorage had come to approach adequate analytical adjustment, and get its legal issues focused and almost solved, direct dealings by contract and commitment flooded in to swamp courts' attention, to obscure the fact-picture, to shift the issues, and to throw the whole back into confusion. And the result is then typical of our legal as distinct from our more material history, because legal history is so largely ideological. A newer technology displacing or shouldering out its predecessor under such conditions has a good

52. *See* William A. Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1, 4 (1967).

53. *Id.*

54. *The First Struggle to Unhorse Sales*, *supra* note 2.

> chance of setting its own premises, and of going on from there; or of salvaging what there is to salvage of the technical false-work it displaces. Not so in law. *To be carried forward, emerging legal ideas need first to be shaped, then to be* fixed in doctrine *before the facts which call them forth lose sway. To be fixed in doctrine, amid our tens and scores of highest courts, they must have persuasion-time, adoption-time.*[55]

Continuing on in the same vein, in this and later articles,[56] he makes clear his argument that both the technology of sales and the law had developed sufficiently on their own by his time. The law had been both "shaped" and "fixed in doctrine" sufficiently that the time was then ripe to codify and unify the law of the merchants and to fix it in its modern state, untainted by the remnants of the horse and farm based law and commerce that had preceded it and still flavored it.[57]

Reviewing the paired development of commerce and commercial law and the lingering fingers of horse and farm law from an earlier era, Llewellyn, and others of his era, saw that it was time to codify the rules in a form that would be understandable to the merchant, acceptable to the legislator, and applicable across the nation. Thus the push for the creation of a Uniform Commercial Code began. The results of that Olympian effort are in large part still governing us today. Revisions have been made over time,[58] but the concepts set down by Llewellyn and the others still resonate today.

It is one of the ironies of commercial practice that most merchants really do understand and know the provisions of the UCC. This is not to say they have ever read or necessarily even heard of that law, but when they describe their expectations with respect to contracts formed through purchase orders and invoices or a dispute over an imperfect tender, they generally get it right. As lawyers, we like to think that we bring added wisdom and knowledge to our clients; in commercial areas we often just provide the citations.[59] This was the intention of Karl Llewellyn. He intentionally incorporated existing and estab-

55. *Id.* at 883–84 (emphasis added).

56. *See* Karl N. Llewellyn, *Why We Need the Uniform Commercial Code*, 10 U. FLA. L. REV. 367 (1957).

57. *Id.*

58. The current, widely held belief that the recent attempt of widespread revision of Article 2 was mainly unsuccessful due in large part to the influence of narrowly defined interest groups is troubling and, if true, calls into question the ability of the drafting system that created the original U.C.C. to repeat its contribution to the development of law. *See* Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783, 1789–90 (1994) ("Unlike the reformer-dominated processes that characterized the initial drafting and enactment of Article 2, the recent revision process saw the emergence of cohesive and competing interest groups."). *But see* Henry Gabriel, *The Revision of the Uniform Commercial Code—How Successful Has It Been?*, 52 HASTINGS L.J. 653, 660 (2001).

59. This is not the result of a substantial quantitative research project, rather it is based on my personal experience with a variety of clients, both complex and sophisticated corporations and sole proprietorship start ups.

lished commercial practices into Article 2 so that the code reflected well tested and wise rules rather than a new or pet ideology or trend in legal thought. Commercial sales is a practical matter; Article 2 is a practical code.

B. *The Thundering Hooves of Commerce*

Commerce, however, has not stood still. The industrial revolution has been followed by the information or the digital revolution, and the law will need to move along with these changes. Clearly law that is based on tangible sales exchanges does not neatly align with practices still evolving quickly today. It is unremarkable today for an inventory computer in a warehouse to recognize a shortage of a particular item, order a new shipment from the regular supplier, and pay for the received shipment all without the action of human overseers. How can the familiar dance of new or changed terms in a contract apply? With respect to the mass licensing of software, consumers expect quick shipment from a website or phone order. Does it make sense to force them to slow down to negotiate the terms of their intended use? Innovations continue on a daily basis. A few years ago, the use of electronic agents, such as the inventory control computer referenced above was a cutting edge application understood and used by relatively few intrepid and technologically savvy firms. As such tools and procedures come into common usage, common merchant understanding and trade practices evolve apace. Doubtlessly, the evolution of widely held merchant usage and fairly well vetted common law applications and interpretations thereof will occur much more quickly than they did in the last industrial upheaval.[60] Nevertheless that development does take time.

Still, as information commerce developed, it became clear that the old law did not fit neatly with the new transactions and that the new transactions would not be shepherded meekly into the bounds of the existing law.[61] Article 2 deals with the sale of goods. Information transactions tend not to be sales at all, and although software's tangible disk format can be viewed as a good, there are inherent differ-

60. Note however that in the passage quoted from Llewellyn, *supra* note 56, at 883, Llewellyn describes eloquently the fast and frenetic pace of evolving technologies and commercial practices in the 19th century. We may view all of preceding history as a lazy progression eventually reaching the suddenly frantic pace of our current information revolution, but clearly those closer to the earlier process saw it as turbulent and fast paced—just as we view our world today.

61. *See, e.g.*, Raymond T. Nimmer, *UCITA and the Continuing Evolution of Digital Licensing Law*, 21 COMPUTER & INTERNET LAW 10 (Feb. 2004) (In fact, nearly any of the many articles written by Raymond Nimmer in support of UCITA tend to make a fairly compelling summary of the argument supporting the need for new law.); Lorin Brennan, *Why Article 2 Cannot Apply to Software Transactions*, 637 PLI PATENTS COPYRIGHTS TRADEMARKS & LITERARY PROP. COURSE HANDBOOK SERIES 1127 (2001).

ences that cause problems in the application of standard laws of goods just as in copyright law. Professor Dreyfuss suggests that the only good that information resembles is toothpaste; once it is squeezed out, there is no meaningful way to re-contain either the paste or the digital genie.[62]

ProCD, discussed above for its copyright implications, is also an excellent example of the problems of force fitting existing sales law onto the new transactions. Under the UCC, notwithstanding the *ProCD* holding to the contrary, no contract for the sale of consumer goods would include material and unknown terms unilaterally added by the seller and not disclosed until after delivery of the goods. Nevertheless, these after-included terms are a keystone of the modern software license. They may not be consumer friendly, but as the information market expanded, participants accepted and now expect to order their product with a minimum of fuss and to receive it as close to instantly as possible. The terms of the transaction which either fall out of the box with the ripping of the shrinkwrap or which are clicked past during installation may be rather draconian, but if that is the price of simple transactions and quick delivery, so far consumers seem willing to pay it. Over time, that balance is likely to shift or can be shifted by appropriately timed consumer protection legislation. *ProCD*'s holding is at best a generous reading of the UCC, but it is nevertheless the correct one in a broader sense. This is how the merchants and consumers currently want to do business; Judge Easterbrook correctly followed the spirit of the UCC in allowing them to do so. This does not mean that pro-consumer revisions should not be contemplated in the future, but it does show that the law was developing along with the new transactions—just as common law is supposed to do. To borrow Llewellyn's term, the law was being shaped. It was not, however, fully formed.

Unfortunately it was at this point that the move to codify the rules for the new information age gained steam.

C. *Breakneck Speed Down the Wrong Track*

In his article *Why We Need the Uniform Commercial Code*, Karl Llewellyn set forth four of the key attributes of the UCC. From this listing it is clear that he never viewed the UCC as a tabula rasa effort. He finds most compelling among the UCC's attributes and contributions to the law that it would "put into clear and accessible form,"

62. Rochelle Cooper Dreyfuss, *UCITA in the International Marketplace: Are We About To Export Bad Innovation Policy?*, 26 BROOK. J. INT'L L. 49, 50 (2000) ("Once toothpaste is squeezed out of the tube, it cannot be returned. Similarly, once information is delivered, it is difficult for the recipient to ignore what he or she has learned. Moreover, even if a recipient *claims* to have effectuated a return, no one can ever be sure, for it is difficult to monitor the performance and utilization of intellectual labor.").

"clear up confusion," "reorganize," and "make available" various aspects of commercial law.[63] None of this envisions or encompasses creating new rules out of nothing. Unfortunately, that is exactly what happened with the attempt to create a uniform law for the digital age.

Ray Nimmer, one of the ring-leaders of that attempt, suggests that "The mark of good contract law is that it produces little change in practices or litigation; it tends to codify what is already going on."[64] That sounds remarkably in line with the Llewellyn era approach described above. In fact, this sort of remark is peppered throughout the literature written in support of the Uniform Computer Information Transactions Act (UCITA), and the name of Karl Llewellyn is invoked constantly. A closer inspection, however, makes it clear such invocations are not those of true believers, but of clever minds using a higher authority for their own purposes in a calculated effort to lend weight to their own arguments.[65]

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63. Llewellyn, *supra* note 56, at 381. The full text of this portion of his argument is as follows:

> (1) If all the Code did had been to put into clear and accessible form *some* rule on the several thousand points it covers, that would alone, in the present state of the bar's knowledge and of the law's inaccessibility, make it worth adoption.
> (2) If all the Code did had been to clear up confusion and pick the wiser rule and cure obsolete and unfair rules which lay traps, in regard to the hundreds of points on which it does one or all of these things, that would also, in the present condition of the commercial law, make the Code worth adoption.
> (3) If all the Code did had been to reorganize the law of sales, collections, investment securities, and chattel security to fit modern need and for easy use, that would alone make it worth adoption.
> (4) If all the Code did had been to elicit and make available that body of accessible wisdom on how to handle the counseling phases of commerce and commercial finance which has been built around the Code, that alone, in the present state of legal literature, would make the code worth adoption.

But the Code does each of these things. It does them all at once.

64. Nimmer, *supra* note 61, at 11.

65. *See* UNIF. COMPUTER INFO. TRANSACTIONS ACT, July 23–30, 1999 draft prepared for the 1999 Annual Meeting of the National Conference of Commissioners on Uniform State Laws (amended 2004). The following quote is from the Prefatory Remarks, in the subsection headed "Of Horses, Goods and Computer Information":

> Sixty years ago, Karl Llewellyn argued that it was important to develop a contract law framework for commercial sales of manufactured goods that departed from law applicable to commerce in horses and similar chattels which shaped prior law. The rules for the one (horses) did not adequately apply to the other (manufactured goods). While insightful judges might be able to surmount the difference, Llewellyn argued, some might not and, in any event, use of a wrong paradigm (horses) yielded uncertainty, complexity and risk of error when applied to mercantile goods. Llewellyn's insight was initially resisted. Over decades of vitriolic debate, however, his insight eventually won out, resulting in Article 2 of the Uniform Commercial Code. Article 2 emanated from the change in our economy from an agrarian commerce to an industrial commercial society and a desire to tailor commercial contract rules to that new type of commerce. Llewellyn's era was marked by controversy and a desire by many to reject the idea that changes in commerce were relevant to contract law. Then, the common "sense" was

UCITA began its controversy filled life as an amendment to Article 2 of the UCC.[66] It was to be called Article 2B and was to address software licensing. After the withdrawal of the ALI from the troubled project, it continued on with the support of NCCUSL as the stand alone statute, UCITA. NCCUSL adopted the Act on July 29, 1999 at their annual meeting in Denver Colorado, and UCITA began being introduced to state legislatures shortly thereafter. At the time of this writing, it has been adopted in only two states, and in spite of some recent attempts at reworking some of its most objectionable provisions, the project is pretty much dead in the water.

Opposition to UCITA was vehement and broad throughout the period of its drafting.[67] Consumer advocates were among the most vociferous of the opposition due to the draconian powers with which UCITA endowed software companies and licensors. Among the more vocal critics were the Recording Industry Association of America, Motion Picture Association of America, National Association of Broadcasters, National Cable Television Association, Magazine Publishers of America, various banking and Wall Street groups, librarians, and even Coca-Cola.[68]

Different interest groups opposed different sections of UCITA that directly impacted their constituencies, but the Act was also flawed at a more fundamental level. Many of the types of products and transactions that the drafters were attempting to regulate were not yet well defined or in common use. A rather disturbing example was a discussion of the basic scope of the Act which took place mere hours before the formal adoption vote by the NCCUSL commissioners. The definition of "computer information transaction" on which the basic scope

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that decades-old rules derived on one focus could be adequately manipulated in court to fit modern commerce. That common "sense" was wrong. The economy has changed again. Goods-based transactions remain important, but transactions in intangibles of computer information are a central element of commerce. UCITA embraces a judgment that Llewellyn would have understood: changes fundamental to the type of transactions in an economy require newly tailored commercial contract rules to fit computer information commerce. Neither the subject matter nor the type of transactions in computer information are similar to sales or leases of goods. The law of toasters, televisions and chain saws is not appropriate for contracts involving on-line databases, artificial intelligence systems, software, multimedia, and Internet trade in information.

66. For a thorough overview of UCITA's tortured development, see Deborah Tussey, *UCITA, Copyright and Capture*, 21 CARDOZO ARTS & ENT. L.J. 319 (2003).

67. For a sampling of some of that opposition, see, for example, *Bad Software: A Consumer Protection Guide*, *at* http://www.badsoftware.com/ (last visited Jan. 31, 2005) (on file with the Texas Wesleyan Law Review) or Ass'n of Research Libraries, *Unif. Computer Info. Transactions Act (UCITA)*, *at* http://www.arl.org/info/frn/copy/ucitapg.html (last visited Feb. 8, 2005) (on file with the Texas Wesleyan Law Review).

68. I met and ate lunch with many of these groups' representatives at various drafting meetings. *See also* Bruce H. Kobayashi & Larry E. Ribstein, *Uniformity, Choice of Law and Software Sales*, 8 GEO. MASON L. REV. 261, 262 (1999); Ass'n of Research Libraries, *supra* note 67.

of the Act hung was broad to the point of swallowing all commercial transactions. Potentially, any good with a computer chip somewhere embedded could be swept into UCITA rather than fall under Article 2. Attempting to refute this often-voiced concern, the reporter and several of the drafters sought to clarify the scope by use of example. A digital camera was at the time fairly unfamiliar to most of those present, so it was unclear whether that particular product would be included. Software, of course, was within the scope. There was disagreement over the fate of cars, but the reporter was repeatedly adamant that toasters would never be included.[69]

By my reading of the Act, however, each of the examples discussed that day, including the lowly toaster could be governed by UCITA. My toaster certainly takes input from me in the form of my selections for the heating of a particular slice of bread, and on good days it follows those instructions and calculates, or heats, according to the input I give it. Computer chips in cars right down to the airbag in my steering wheel seemed clearly within the definition, and by the terms of UCITA, any component fitting within UCITA could be enough to bring the entire product with it. Digital cameras are beyond a doubt within the scope, but they offer an interesting perspective on how quickly digital products have become mainstream commercial goods in the intervening few years. I doubt any of the drafters today would be hesitant to include digital cameras within the scope; I suspect they, like most of us each now own one. In fact, shy of focusing on deliberately low-tech items like paper and pencils, it becomes more difficult to list items that would definitively fall outside the scope of UCITA than to give example of those falling within.

The toaster dialogue was not a new one; it had been played out many times at previous sessions, but the lack of resolution just prior to presenting the "finished" product was, to me at least, rather unsettling. Of similar concern to the apparent lack of well defined understanding of the very scope of the Act was the very real possibility that it could swallow virtually all of sales law. If only goods existing completely without digital impact would remain outside the UCITA walls, the ever increasing number of "smart chips" would seem to make the group inside those walls numerous indeed. A good argument could be made, in fact, that the new computer chip inventory tracking systems which include a small chip in the UPC sticker would bring even the lowly pencil and paper combo inside the crowded walls.

Another significant criticism of UCITA was that by adopting and expanding the *ProCD* view of the relationship between copyright and software licensing, the Act effectively replaced copyright law, and did so in a way that eliminated many of the important user protections

69. *See* UCITA drafting comm. meetings, Denver, Colorado (N.C.C.U.S.L. July 23–30, 1999).

currently in the law. Librarians were concerned that UCITA would eliminate their fair use rights with respect to all digital media.[70] Various other groups also feared the virtual elimination of fair use by UCITA and objected to UCITA's anti-use bias. Other criticisms included UCITA's broad adoption of self-help provisions which would have had the effect of allowing large software companies to remotely and unilaterally shut down entire private networks over any license dispute.[71] The attempt by UCITA to define the parameters of acceptable software was criticized quite vocally by software consumer representatives including Cem Kaner, whose Bad Software website has publicized much of the controversy surrounding UCITA throughout its evolutions. One of Kaner's specific complaints during the drafting process was that UCITA's definitions of software locked software standards to an unnecessarily low level. The Act in effect legislated low standards for software companies even by the then current standards and did so unilaterally instead of allowing the marketplace to define acceptability standards. Many consumer groups objected vehemently to UCITA's virtually unchecked endorsement of the enforceability of shrinkwrap licenses. Consumer ability to receive meaningful redress for bad software is virtually eliminated by the combination of aggressive shrinkwrap terms and UCITA's acceptance thereof. The quantity and intellectual quality of the opposition to UCITA was truly staggering.

Perhaps most notable was the withdrawal of ALI support from the project. The ALI had been involved from the start, but withdrew all support before the July 1999 NCCUSL meeting.[72] Amelia Boss, one of the ALI representatives involved in the UCITA process, describes the withdrawal of the ALI:

> [E]vents occurring in 1999 were undoubtedly to have the most significant impact on Article 2B (soon to become UCITA) and its chances of enactability: attempts to include the treatment of information within the Uniform Commercial Code (as Article 2B Licensing) were abandoned, the American Law Institute withdrew from the process, and the National Conference reformulated the draft as a free-standing uniform act. The only "official" reason given for the split, according to the joint press release of the two organizations, was that "this area [computer information transactions] does not presently allow the sort of codification that is represented by the

70. *See, e.g.*, Letter from Library Associations to Gene N. Lebrun, President, National Conference of Commissioners on Uniform State Laws, *available at* http://www.arl.org/info/letters/Lebrun7.12.html (last visited Feb. 8, 2005) (on file with the Texas Wesleyan Law Review).

71. *See, e.g., Bad Software: A Consumer Protection Guide, supra* note 67; Ass'n of Research Libraries, *supra* note 67.

72. For an interesting and moderate reflection from a commercial law expert who was one of the ALI representatives, see generally Amelia H. Boss, *Taking UCITA on the Road: What Lessons Have We Learned? in* 673 PLI PATENTS COPYRIGHTS TRADEMARKS & LITERARY PROP. COURSE HANDBOOK SERIES 121 (2001).

> Uniform Commercial Code." The problem was much more fundamental. The decision to part ways on Article 2B came after several years of mounting tension between the two organizations. In 1998 and again in 1999, the American Law Institute refused to put Article 2B on the agenda for approval at its annual meetings. Even in its stance as a "discussion draft," Article 2B attracted much criticism at the annual ALI meetings, precipitating significant motions for changes in substance. While the National Conference believed that "the proposed statute is currently ready to provide a viable legal framework for the evolution of sound business practices in computer-information transactions," the American Law Institute Council "continued to have significant reservations about both some of its key substantive provisions and its overall clarity and coherence." Following the withdrawal of the ALI from the process, the three ALI members of the drafting committee were asked to remain as advisors, but declined, citing "a number of underlying concerns including matters of substance, process, and product."[73]

UCITA was an attempt to create law that would proscribe the actions of players in the technology field, but by design or by unintended consequence, the reach of that statute could have been enormous. To replace not only sales law but also large segments of intellectual property law with the new Act would have been a dramatic result. At a time when digital commerce was just beginning to be explored by the more cutting edge of the dot com-ers, the UCITA drafters were determining how many errors would be acceptable in a downloaded program. They were also making dramatic pronouncements about the breadth of "self-help" a software licensor would be allowed to use in the event of non-payment by a licensee. The resulting spectre of a Wall Street trading firm's network being shut down without warning by an overzealous provider of word processing software lead many previously unconcerned interest groups to jump on the anti-UCITA bandwagon. The amount of opposition to UCITA from the very parties who would be most directly affected was both dramatic and illuminating. Trade groups representing interests from librarians to rock musicians to consumer advocates unified to oppose the imposition of this sprawling Act.[74] Few were actually doing business in some of the rarified technological frontiers the drafters were attempting to control, but the sweeping effect of UCITA ran counter to what merchant practice there was, and it was the vocal outcry from representative groups of these very merchants that drew widespread attention to the

73. *Id.* at 135–37 (footnotes omitted).

74. As an observer at several of the drafting meetings, including the final meeting in Denver just prior to NCCUSL's adoption of UCITA, I was struck by the number and variety of hostile observers in the room. Of the interested parties keeping track closely enough to send representatives, very few were there with the goal of improving the Act. Most were there to object to particular provisions, have them deleted if possible, and keep track of the Act's provisions so they knew when to begin lobbying against it in the state legislatures.

flaws of this Act. This opposition, more than any of the myriad drafting or philosophical flaws of the Act, may have been responsible for its ultimate demise.[75] Without the opposition from the merchants, the ill-advised attempts of the drafting committee to regulate and define practices involving technology that was little more than theoretically possible could have succeeded, much to the detriment of the developing technology market. Had the drafters followed instead of ignoring Karl Llewellyn's example, UCITA would never have been attempted until the norms of information transactions had already been established by the merchants involved. The resulting code would have been very different, and the ultimate fate of that Act may have been a happier one.

IV. THE CAN SPAM ACT[76]

The most recent of the ill-considered acts is the CAN SPAM Act of 2003.[77] This Act took effect January 1, 2004 and was supposed to control the flood of spam that we all deal with on a daily basis. I am sure we all noticed a welcome halt to the annoying offers for remarkably unlikely personal services that occurred promptly on the January 1 effective date of the statute. Or not. In fact, recent studies show a 30 percent increase in spam this year so far, a number that surprises no user of e-mail. The CAN SPAM Act is neither as far reaching nor as potentially harmful as UCITA or the 1980 amendments to the Copyright Act. On the other hand, it uses language and refers to technology that, according to industry experts, was outdated before the Act went into effect.[78] It also imposes a significant burden on legitimate providers of subscription based e-mail newsletters and corporate mailing lists.[79] This results in extra costs and less effective distribution of information to those who request it.[80] All of this at a time when the market was becoming increasingly effective at battling the unwanted e-mail missives. Filters offered by most commercial e-mail providers and used by office based information technology specialists do an increasingly effective job of removing unwanted spam, and they do so

75. There is some reason to fear that stories of UCITA's demise are premature. UCITA was adopted in both Virginia and Maryland, and it contains some remarkable choice of law provisions. Its potential impact could still be surprising. Nevertheless, currently, the adoption of anti-UCITA legislation, so called "bomb shelter" provisions, outnumber actual adoptions of UCITA itself. *See* Tussey, *supra* note 66, at 319.

76. The equestrian theme breaks down here. No combination of horses and spam is anything less than uncomfortable.

77. Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 15 U.S.C. §§ 7701–13, 18 U.S.C. § 1037 (Supp. 2004).

78. Telephone Interview with Simms Jenkins, CEO, Bright Wave Marketing (May 22, 2004).

79. *Id.*

80. It has also resulted in a mushrooming cottage industry in CAN SPAM compliance consulting.

without threatening to jail and fine the commercial providers of legitimate, online, subscription only, technical journals.

It is too soon to see the full effect, but the possibility of CAN SPAM being used as a harassment tool by disgruntled ex-employees or colleagues is a real one due to the heavy penalties imposed by Congress. As the Act currently stands, penalties can be imposed for each e-mail that is deemed spam under the statutory definition. In addition to fraudulent messages or misleading *re:* lines, a single failure to remove an individual from a mailing list following a removal request can result in the sender running afoul of the law. So although offshore and fraudulent businesses have continued to operate and thrive, legitimate e-mail users and content providers are facing the very real fear of prosecution for a clerical oversight. These penalties of course will never reach the anonymous and off-shore sources of the most prolific and obnoxious spam messages.

Instead of stopping the endless flow of personal enhancement offers, CAN SPAM has sent entrepreneurs like Simms Jenkins of BrightWave Marketing into a frantic search of ways to insulate their legitimate mailings and client based newsletters from potential liability under the new law.[81] Much of the Act sounds impressively technological to those who are not always on friendly terms with their computers, but industry experts like Simms suggest that it is mainly meaningless and already outdated jargon. Not meaningful business terms like those incorporated into Llewellyn's Article 2, but techno babble that became outdated faster than the expensive computer system you just bought.

The CAN SPAM Act has attracted numerous critics, many of whom have varying complaints about the law.[82] Among the notable individuals objecting to the law is Stanford Law Professor Lawrence Lessig who, in an address to a Spam and the Law conference in January 2004[83] remarked "(Can-Spam) is an abomination at the federal level. . . It's ineffective and it's affirmatively harmful because it preempts state legislation."[84] In addition to federalism concerns, this preemption eliminates the previous ability of individuals to sue spammers in many states with broad anti-spam laws. The federal act shifts

81. Jenkins Interview, *supra* note 78.

82. *See, e.g.*, Grant Gross, *CAN-SPAM Law: Little Impact So Far*, InfoWorld, *at* http://www.infoworld.com/article/04/05/20/HNcanspamimpact_1.html (May 20, 2004) (on file with the Texas Wesleyan Law Review); Grant Gross, *First CAN-SPAM Charges Filed*, PCWorld, *at* http://www.pcworld.com/news/article/0,aid,115925,00.asp (April 29, 2004) (on file with the Texas Wesleyan Law Review); Amit Asaravala, *With This Law You Can Spam*, Wired News, *at* http://www.wired.com/news/politics/0,1283,59840,00.html (Jan 23, 2004) (on file with the Texas Wesleyan Law Review); Ryan Singel, *Antispam Bills: Worse Than Spam?*, *available at* http://www.wired.com/news/0,1294,59840,00.html (last visited Mar. 5, 2005) (on file with the Texas Wesleyan Law Review).

83. Asaravala, *supra* note 82 (quoting Professor Lessig).

84. *Id.*

the onus onto the state and federal authorities, but there is concern that many of the state officals lack the expertise and budget to meaningfully prosecute spammers.[85]

Less notable than Professor Lessig perhaps, but also less restrained, Internet group "Spamhaus" minced no words in its response to the bill's passage through both houses of Congress. "Against the advice of all anti-spam organizations, the U.S. House of Representatives has passed the CAN-SPAM Act, a bill backed overwhelmingly by spammers and dubbed the 'YOU-CAN-SPAM' Act because it legalizes spamming instead of banning it. Spam King Alan Ralsky told reporters the passage of the House bill 'made my day.' Spammers say they will now pour money into installations of new spam servers to heavily ramp up their outgoing spam volumes 'all legally.'"[86]

Other critics include the ACLU, which raises concerns over the effect of criminalizing anonymous discussion on the internet.[87] At first blush, it seems unlikely that such a result will stem from CAN SPAM, which focuses only on commercial e-mail. However, a closer reading of the statute does leave open the possibility of proscecution for "mulitiple" e-mails intended as personal correspondence. Many provisions of the Act require the completion of various studies before terms will be fully defined.[88] One of the studies is instructed to determine how to define the "primary purpose" of an e-mail. If the study comes back with the sort of loose language that the ACLU fears, it is not at all certain that personal e-mails could not be swept into the category of "commercial" and thereby made subject to the penalties of the Act.

Another, presumptively unintended, result of the CAN SPAM Act can be uncovered by a cursory GOOGLE search. A cottage industry is springing up specializing in CAN SPAM compliance consulting. Currently there is a great deal of concern, but very little actual knowledge in the industry of how exactly the law will impact legitimate e-mail and how to be safe with respect to compliance issues. The market is already responding, and consultants are standing by. While the actual spammers have continued unabated, by finding both jurisdictional and technological ways around the law, legitimate businesses are now paying large sums to these consultants to insure that the corporate newsletters are CAN SPAM compliant. One missed request to be dropped from a mailing list could conceivably leave a manager open to jail time, and that is the sort of penalty guaranteed to attract attention in today's market.

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85. *Id.*

86. United States Set To Legalize Spamming on January 1, 2004, The Spamhaus Project, *at* http://www.spamhaus.org/news.lasso?article=150 (Nov. 22, 2003) (on file with the Texas Wesleyan Law Review).

87. *See* Singel, *supra* note 82.

88. *See* 15 U.S.C. § 7702(2)(c) (Supp. 2004).

Ironically, this Act lurched out of Congress at a time when most e-mail providers have been making great strides on their own to combat spam. Both Yahoo and Hotmail, large providers of free, web-based e-mail accounts, have greatly improved their spam filters in the past several months, and corporate network managers have generally been enjoying increasing success with various anti-spam measures.

All in all, the CAN SPAM Act is not likely to have the significant deleterious effects of the two other codifications discussed above; however, as pointed out by Professor Lessig, the statute, while adding no positive impact to the problems of spam, does lessen the rights of individuals to receive redress in the courts. It also adds unnecessary and unproductive expense and exposure to legitimate businesses such as e-mail marketing providers. What it does not do is stop, or even slow down, the flood of spam. Market forces are pushing e-mail providers like Hotmail and Yahoo to be ever vigilant in filtering out spam. Their filter systems are much better than they were a year ago, and they are free services. Individuals wishing stronger protection have a variety of filter software and services available for a charge. Congress, however, proved unable to abstain from taking action where no helpful result was possible.

In the time since the original drafting of this article, a new and unanticipated consequence of CAN SPAM has developed. Not surprisingly, spammers have become aware of the potentially harsh federal penalties resulting from the new law; however, rather than ceasing their illegal activity, they have developed new ways around it. In one newly popular attempt to avoid liability, spammers have adopted the practice of sending their millions of unwanted missives from domains that they have not yet registered. The insulating legal effect of this action is questionable at best, but the effect on Internet Service Providers like Mindspring and AOL, as well as smaller providers, has been dramatic. Because the spam is coming from an unregistered domain, the ISPs' Domain Name Servers (DNS) are becoming overloaded as they attempt to identify the unlisted address on each piece of spam and are unable to do so. As the DNS repeatedly tries to identify the origination address of each piece of the spam flood, all other mail gets caught in a hopeless bottleneck. The result has been serious slowdowns and failures of service, which, in turn, have necessitated expensive efforts to program around this problem or add capacity to accommodate it. The problem affects both large ISPs and smaller hosting enterprises, which in turn hits all of us. Sadly, as the spammers continue to seek creative ways around the new law, the economic burden and the inconvenience of service disruptions inevitably will be borne by each of us.[89]

89. *See, e.g.,* Dennis Fisher, *Spammers' New Tactic Upends DNS*, eWEEK *at* http://www.eweek.com/article2/0,1759,1749328,00.asp (Jan. 20, 2005) (on file with the Texas Wesleyan Law Review); Aunty Spam's Net Patrol, *New Spam Tactic Wreaks Havoc*

V. CONCLUSION–COOLING DOWN A TIRED MOUNT

Well, then, what can we do?
By and large, nothing.
If you don't know what is best, let people make their own arrangements.
Next after nothing is: keep doing what you have been doing.[90]

Although inaction is often uncomfortable, especially in a world that increasingly expects immediate results and seems to feed on legislative action and new drafting projects, in the case of technological developments in our society and our markets, the wisest course may well be to wait and see where the development leads. Article 2 dawned at a time when modern commercial practice was well established, and it was those practices which were codified. The merchants developed the rules; the academics and politicians merely refined them. Attempts by legal scholars and experts to proscribe and define future practices among merchants are as ill advised as merchants drafting complex contracts without legal counsel. Both are equally doomed to failure. There is a role for academics and legislation, but establishing commercial norms out of nothing is not it.

One hundred and fifty years ago, a dispute over the shipment of a mill part was resolved. Today, intervening technological advances notwithstanding, we are here for the academic version of a birthday party for that decision. Our presence here in Gloucester shows, among other things, that sound rules endure. *Hadley v. Baxendale* clearly is an example of such a rule. Karl Llewellyn built effective code on the shoulders of cases like *Hadley*. It strains the imagination to contemplate how he could have equaled his accomplishments had he decided to draft arbitrary, new rules in advance of merchant practice and without the *Hadley v. Baxendale*s of the common law. Others certainly have failed in their attempts to match his contributions but without his foundations. Unfortunately, I suspect they will keep trying.

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with DNS, Aunty-Spam.com *at* http://www.aunty-spam.com/new-spam-tactic-wreaks-havoc-with-dns/ (Jan. 10, 2005) (on file with the Texas Wesleyan Law Review); Larry Seltzer, *Could We Actually Be Winning the Spam War?*, eWEEK *at* http://www.eweek.com/print_article2/0,2533,a=142079,00.asp (Jan. 5, 2005) (on file with the Texas Wesleyan Law Review).

90. Frank H. Easterbrook, Cyberspace and the Law of the Horse, 1996 U. CHI. LEGAL F. 207, 210 (alteration in original) (emphasis added).