COMPUTER SOFTWARE: SHOULD THE U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS APPLY? A CONTEXTUAL APPROACH TO THE QUESTION

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As international trade barriers to information technology begin falling, more and more companies will rely on overseas vendors.[1]

The transnational exchange of computer software[2] affects individuals, businesses, nation states and the world community as a whole.

"Globalization" is a new catchword used today to signify the trend of economic expansion through internationalization. The recent passage of the United Nations Convention on Contracts for the International Sale of Goods[3] ("Convention"), which seeks to unify international sale of goods law, and the Single European Act of 1986[4] (SEA) calling

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1. Friedman, *New Trade Rules Will Help and Hinder International I/T Sales*, 1 CHIEF INFO. OFFICER J. 61 (1989).

2. The term "computer software" is defined by various groups differently. For the purpose of this article, computer software includes operating systems and application software. Application software includes business applications, as well as, games, etc.

3. *U.N. Convention on Contracts for the International Sale of Goods, Final Act*, U.N. Doc. A/CONF. 97/18 (1980), *reprinted in* S. Treaty Doc. No. 9, 98th Cong., 1st Sess., 1 (1984), *and in* 8 J.L. & COM. 213 (1988) [hereinafter Convention].

4. BULLETIN OF THE EUROPEAN COMMUNITIES, Supp. 2/86, *reprinted in* 25 I.L.M. 506 (1986) [hereinafter BULL. EUR. COMMUNITIES]; *see also Single European Act of February 17, 1986*, O.J. EUR. COMMUNITIES (No. L 169) 1 (1987).

for the economic unification of Western Europe by 1992, will influence the transnational exchange of, *inter alia*, computer software.[5] This Article will analyze whether software should be a "good" under the Convention, and whether a license of software is sufficiently equivalent to a "sale" under the Convention.

This Article is organized along the following lines. Part I is a general discussion of the Convention. It includes a factual background, a discussion of principle provisions of the Convention, a description of the temporal and geographical spheres of application of the Convention. Part one also suggests the use of available tools for uniform application; and brings the topic of dissemination of interpretation of the Convention up to date. Although article 7 of the Convention[6] generally states an approach to interpretation, further elucidation is necessary to ensure uniformity of application. Accordingly, Part II discusses the various approaches to treaty interpretation and concludes that the New Haven School approach is best suited to carry out the mandate of article 7. Using this selected approach to treaty interpretation, Part III applies the Convention to the question of whether software should be construed as a "good" and whether a license of software should be treated as the equivalent of a "sale." As an additional element of special significance, Part IV addresses the 1992 Unification of Europe through SEA and articles 85 and 86 of the Treaty of Rome. The purpose here is to develop what may be the overriding community goals of the European Economic Community (EEC) as called for by the New Haven School approach. The focus of this paper is on the Convention. However, the Convention has never been interpreted. United States Supreme Court decisions on treaty interpretation are not very helpful in light of article 7 of the Convention, which, as ratified by Congress, is the law of the land.

The issue, then, is how does one interpret the treaty in order to apply it to a particular situation—in this case software. First, one must be

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5. This question is more than academic. Judicial decisions have raised the question whether sale-of-goods legislation applies to computer software. *See, e.g.*, RRX Industries, Inc. v. Lab-Con, Inc., 772 F.2d 543 (9th Cir. 1985) (questioning whether article 2 of the Uniform Commercial Code applies to computer software); *see also* Eurodynamic Systems Plc v. General Automation Ltd., 1983 Q.B. 2804 (1988) (LEXIS, Enggen library, Cases file) (software as "goods" is undecided).

6. Article 7

(1) In the Interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Convention, *supra* note 3.

aware of the various views on treaty interpretation. Next, one must decide which view best fulfills the mandate of law. Here, the New Haven School approach is thought to best fulfill this mandate. The New Haven School relies on community goals as discerned through the laws and policy decisions of each community as applied to software, the context of its uses and how it furthers these goals. In regard to community goals, economic expansion is hypothecated here. The sources of such hypotheses are GATT, United States' laws such as the Uniform Commercial Code, and analogous laws of the many other nation states. It is an extremely daunting task to answer: What are the views of all nation states on certain parts of the Convention? Hence, the unification of Europe and the trend of unification makes such analysis simpler and the application of the New Haven School approach increasingly feasible.

Finally, the article concludes that the Convention should be applied to the sale or license of software in the stream of international commerce.

I. GENERAL DISCUSSION OF THE CONVENTION

A. FACTUAL BACKGROUND

The Convention is a uniform international sales law of world-wide significance which went into effect on January 1, 1988.[7] In 1980, a Diplomatic Conference of sixty-two nation states gave unanimous approval to the Convention.[8] The initial group of contracting states consisted of eleven nations for whom the Convention went into effect on January 1, 1988.[9] Six additional states had deposited instruments of adoption by August 1, 1988.[10] Many other states in various regions of the world are presently completing procedures to become "contract states."

The Convention is rooted in two earlier conventions sponsored by the International Institute for the Unification of Private law.[11] Drafted

7. J. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 1 (1989) [hereinafter DOCUMENTARY HISTORY].

8. *Id.* These 62 states substantially represent the Eastern, Western, Asian, and African spheres of influence. As a result, negotiations that took place in formulating the Convention may be considered customary international law.

9. *Id.*

10. *Id.* The eleven initial Contracting States were Argentina, China, Egypt, Hungary, Italy, Lesotho, Syria, United States of America, Yugoslavia and Zambia. The ninth, tenth, and eleventh instruments of adoption were deposited simultaneously on December 11, 1986. Entry into force on January 1, 1988 for these eleven States resulted from the waiting period specified in article 99(1); a similar period for subsequent adoptions is specified in article 99(2). Additional adoptions (with date of deposit of instrument) include: Finland (December 15, 1987), Sweden (December 15, 1987), Austria (December 29, 1987), Mexico (December 29, 1987), Australia (March 17, 1988), and Norway (August 1, 1988).

11. DOCUMENTARY HISTORY, *supra* note 7.

at a diplomatic conference in the Hague in 1964, the Hague Conventions consist of a Uniform Law on the International Sale of Goods (ULIS)[12] and a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF).[13] The ULF deals with the formation of contracts for international sale, and the ULIS deals with obligations of parties to such contracts.[14] These two predecessors of the Convention were developed over the course of three decades by the leading commercial-law experts of Western Europe.[15] In spite of their fundamental importance, the 1964 Hague Conventions entered into force among only nine states and failed to receive substantial acceptance outside Western Europe.[16]

As a result, in 1969 the United Nations Commission on International Trade Law (UNCITRAL)[17] appointed a working group to revise the ULIS and the ULF in 1969.[18] The working group met between 1970 and 1977 and prepared draft texts which combined the topics covered by the 1964 Hague conventions.[19] By 1978, UNCITRAL had completed a Draft Convention.[20] Along with a commentary prepared by the UNCITRAL Secretariat, the Draft Convention was circulated to governments and international organizations for their review.[21]

In March 1980, the United Nations General Assembly convened a Conference of Plenipotentiaries in Vienna to consider the UNCITRAL 1978 Draft Convention.[22] Sixty-two countries participated in the 1980 Conference, representing English, Arabic, Chinese, French, Russian and Spanish speaking regions of the world.[23] These sixty-two countries, through their representatives, eventually adopted a revised version of the UNCITRAL draft text which became the Convention.[24]

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12. Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 107.

13. Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 169.

14. DOCUMENTARY HISTORY, *supra* note 7.

15. DOCUMENTARY HISTORY, *supra* note 7.

16. DOCUMENTARY HISTORY, *supra* note 7.

17. The United Nations Commission on International Trade Law was created in 1966 and its mandate is the unification and harmonization of international trade law in order to eliminate legal obstacles to international trade and to ensure an orderly development of economic activities on a fair and equal basis. *See* Sono, *Symposium/International Sale of Goods*, 18 INT'L LAW. 7 (1984).

18. AMERICAN BAR ASS'N, THE CONVENTION FOR THE INTERNATIONAL SALE OF GOODS: A HANDBOOK OF BASIC MATERIALS 4 (R. Kathrein & D. Magraw ed. 1987) [hereinafter HANDBOOK].

19. *Id. See generally* DOCUMENTARY HISTORY, *supra* note 7.

20. HANDBOOK, *supra* note 18, at 4.

21. HANDBOOK, *supra* note 18, at 4.

22. HANDBOOK, *supra* note 18, at 4.

23. *See* DOCUMENTARY HISTORY, *supra* note 7.

24. HANDBOOK, *supra* note 18, at 4.

The United States Senate approved the Convention on October 9, 1986.[25] On January 1, 1988, the United States, the People's Republic of China, and Italy, together with the eight countries that had earlier become parties to the Convention, ensured that the Convention would come into force by jointly depositing instruments of ratification or approval to the Convention with the United Nations Secretariat.[26]

The Convention reflects a blending of the civil and common law traditions rather than the prevalence of one over the other.[27] Combined with the great number of nation states whose input helped create the Convention, this balance of two legal traditions adds weight to the belief that wide-spread adoption of the Convention is likely.[28] If this occurs, there will finally be a private international law applicable to the international sale of goods.[29]

B. PRINCIPLE PROVISIONS OF THE CONVENTION

The Convention is divided into four parts, preceded by a prologue. Part I, entitled *Sphere of Application and General Provisions*, contains two chapters. Articles one through six pertain to the *Sphere of Application* and are within Chapter I. Articles seven through thirteen are within Chapter II and cover *General Provisions*. Part II deals with the *Formation of the Contract* and consists of articles fourteen through twenty-four. Part III is entitled *Sale of Goods* and contains five chapters. Chapter I, articles twenty-five through twenty-nine, are *General Provisions*; Chapter II, articles thirty through fifty-two, provides the *Obligation of the Seller*; Chapter III, articles fifty-three through sixty-five, concerns the *Obligations of the Buyer*; Chapter IV, articles sixty-six through seventy, deals with the *Passing of Risk*; and Chapter V, articles seventy-one through eighty-eight, concerns *Provisions Common to the Obligations of the Seller and the Buyer*. Part IV, articles eighty-nine through one hundred and one, are entitled *Final Provisions*.

C. SPHERE OF APPLICATION (TEMPORAL & GEOGRAPHICAL)

As background, a summary view of the sphere of application of the Convention is in order. The Convention applies to contracts of sale of

25. HANDBOOK, *supra* note 18, at 4.

26. HANDBOOK, *supra* note 18, at 4-5.

27. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT'L LAW. 443, 453 (1989) ("United States influence in the drafting of the Convention effected a change in the civil law bias on the law of international sales, thus resulting in a blending of common and civil law systems."). (citing Gonzalez, *Remedies Under the U.N. Convention for the International Sale of Goods*, 1 INT'L TAX & BUS. LAW. 79, 81 (1984)).

28. *Id.*

29. *Id.*

goods between parties whose places of business are in different nation states when the states are parties to the Convention ("Contracting State") or when the rules of private international law lead to the application of a Contracting State's laws.[30] As a result, a Contracting State will have a set of laws applicable to domestic sale of goods transactions and another set of laws applicable to international sale of goods transactions.[31]

The scope of the Convention is limited by a series of exclusions and exceptions based upon the nature of the goods and the purpose, form, and nature of the transaction.[32] Goods that are excepted from the Convention based upon the nature of the goods are: stocks, shares, investment securities, negotiable instruments, money, ships, vessels, hovercraft, aircraft, and electricity.[33]

Where the purpose of the transaction is a consumer sale, that transaction is excluded from the Convention.[34] The test is whether the seller neither knew nor ought to have known that the goods were bought by the buyer for personal, family or household use.[35] If the seller is able to claim that he neither knew nor ought to have known that the good purchased was intended to be used by the buyer for her personal use, the Convention is applicable.

If the sale is made by auction or on execution or otherwise by authority of law, the Convention does not apply.[36] These exclusions are best characterized as based upon the form of the transaction.

Where the nature of the transaction involves services, the Convention does not apply.[37] The test as to whether the transaction involves services is whether the preponderant part of the obligation of the seller consists of the supply of labor or other services or whether the buyer supplies a substantial part of the material necessary to produce the goods.

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30. *See* Convention, *supra* note 3, at art. 1; Garro, *supra* note 27, at 448 n.22 ("The United States and the People's Republic of China have availed themselves of the authorization granted by Article 95 of the Convention to declare that they will not be bound by Article 1 paragraph (1)(b).").

31. Garro, *supra* note 27, at 448.

32. DOCUMENTARY HISTORY, *supra* note 7, at 776; Convention, *supra* note 3, at arts. 2-3.

33. DOCUMENTARY HISTORY, *supra* note 7, at 776; Convention, *supra* note 3, at art. 2(b-d).

34. DOCUMENTARY HISTORY, *supra* note 7, at 776; Convention, *supra* note 3, at art. 2(a).

35. DOCUMENTARY HISTORY, *supra* note 7, at 776; Convention, *supra* note 3, at art. 2(a).

36. DOCUMENTARY HISTORY, *supra* note 7, at 776; Convention, *supra* note 3, at art. 2(b) & (c).

37. DOCUMENTARY HISTORY, *supra* note 7, at 776; Convention, *supra* note 3, at art. 3.

In addition to these exceptions, the scope of the Convention is limited by virtue of several issues that it does not cover. Specifically, the Convention does not cover ". . . the validity of the contract,[38] the effect the contract may have on the title to the goods sold,[39] or the liability of the seller for death or personal injury caused by the goods to any person."[40]

Finally, the scope of the Convention can be reduced by any six declarations or reservations permitted under the Convention. First, at the time of ratification, a Contracting State may declare that it will not be bound by Part II, *Formation of the Contract*, or Part III which governs the rights and obligations of the parties.[41]

Second, a Contracting State which has two or more territorial units may declare that the Convention is to apply to one or more or all of them.[42] However, the territorial units must have different systems of law according to the Contracting State's constitution.[43]

Third, two or more Contracting States having closely related legal rules on matters covered by the Convention may agree, at any time, that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those countries.[44]

Fourth, a Contracting State with closely related laws on matters covered by the Convention with a non-Contracting State may, at any time, declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those states.[45]

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38. Garro, *supra* note 27, at 447 n.19 ("The Convention does not define the term 'validity,' but most commentators agree that its common core includes issues regarding fraud, duress, unconscionability, legal capacity of the parties to enter into a contract, and error.").

39. Garro, *supra* note 27, at 447 n.20 ("The transfer of ownership over the thing sold is generally viewed as the basic purpose of a contract of sale."); *see e.g.*, CODE CIVIL [C. CIV.] art. 1112 (Fr.); CODICE CIVILE [C.C.] art. 1470 (Italy); CODE DES OBLIGATIONS [C.O.] art. 184 (Switz.) 1583. *But see* DOCUMENTARY HISTORY, *supra* note 7, at 407:

> *Article 4 paragraph b* excludes from the scope of the convention "the effect which the contract may have on the property in the goods sold." The legislative history of *Article 4 paragraph b* makes clear that this was in reference to the question of when property passes for purposes of determining who bears the burden of risk temporally. In some legal systems property passes at the time of the conclusion of the contract. In other legal systems property passes at some later time such as the time at which the goods are delivered to the buyer.

40. Garro, *supra* note 27, at 447. *See also* DOCUMENTARY HISTORY, *supra* note 7, at 776; Convention, *supra* note 3, at arts. 4-5.

41. DOCUMENTARY HISTORY, *supra* note 7; Convention, *supra* note 3, at art. 92.

42. DOCUMENTARY HISTORY, *supra* note 7; Convention, *supra* note 3, at art. 93.

43. DOCUMENTARY HISTORY, *supra* note 7; Convention, *supra* note 3, at art. 93.

44. DOCUMENTARY HISTORY, *supra* note 7; Convention, *supra* note 3, at art. 94(1).

45. DOCUMENTARY HISTORY, *supra* note 7; Convention, *supra* note 3, at art. 94(2).

Fifth, any Contracting State may declare at the time of the deposit of its ratification instrument that it will not be bound by article 1(1)(b), which states that the Convention "applies to contracts of sale of goods between parties whose places of business are in different states when the rules of private international law lead to the application of the law of a contracting state."[46]

Finally, the Convention does not require the contract of sale, its modification, termination, offer, or acceptance to be in writing.[47] However, a Contracting State whose legislation requires contracts of sale to be in writing may declare, at any time, that any provision of the Convention not so requiring writing does not apply where any party has his place of business in the state.[48]

Preexisting and future international sales contracts ordinarily contain a choice-of-law provision. Where such a provision does not exist, the parties cannot be sure which law a court will apply to resolve any disputes arising from the contract.[49] Such uncertainty may one day become extinct for international sale of goods under the convention. According to article 1(1), a Contracting State's court will apply the Convention to a contract for the international sale of goods *unless*, pursuant to article 6, the parties affirmatively exclude the application of the Convention. As a result, contracts containing a choice-of-law provision without an affirmative exclusion provision will be superseded by the Convention. Furthermore, if the forum does not belong to a Contracting State and under that State's choice-of-law rules a Contracting State's law is held to apply, the Convention should be applied unless the Contracting State has opted out of article 1(1)(b).[50]

D. TOOLS FOR UNIFORMITY OF APPLICATION

"The half century of work that culminated in the Convention was sustained by the need to free international commerce from the Babel of diverse domestic legal systems."[51] The Convention's ultimate goal is the uniform *application* of the uniform rules.[52] Professor Honnold outlines three areas in which the uniform application of the uniform rules may be influenced: (1) the Homeward Trend; (2) long-range correctives;

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46. DOCUMENTARY HISTORY, *supra* note 7; Convention, *supra* note 3, at art. 95.

47. DOCUMENTARY HISTORY, *supra* note 7; Convention, *supra* note 3, at arts. 11, 29 and Part II.

48. DOCUMENTARY HISTORY, *supra* note 7; Convention, *supra* note 3, at art. 96.

49. Garro, *supra* note 27, at 448.

50. Convention, *supra* note 3, at art. 1(1)(b).

51. DOCUMENTARY HISTORY, *supra* note 7, at 1.

52. *See* Honnold, *The Sales Convention In Action—Uniform International Words: Uniform Application?*, 8 J.L. & COM. 207, 211 (1988).

and (3) the role of legislative history.[53]

The Homeward Trend refers to the inclination of people to assimilate new ideas by relating them to the old ideas with which they are most familiar. Here, it indicates the likelihood that many people will read the text of the Convention as a mirror image of article 2 of the United State's Uniform Commercial Code. Such reflexive action is to be discouraged.

Antidotes to domestic bias include scholarly writing, legislative history, and international case law.[54] In the United States, traditional barriers to the use of scholarly writing in legal development broke down long ago.[55] It is breaking down "in citadels of literalism" elsewhere in the common-law world as well.[56] This is particularly true in the use of international legal materials.[57] "Of course, reliance on scholarly writing has long been an important resource in the civil law world."[58]

Another antidote for domestic bias is the use of international legislative history.[59] With full awareness of the Convention's multi-national background and the realization of the balance struck between common and civil law traditions, one should be dissuaded from the belief that the international text is merely a reproduction of one or another's domestic law.[60] The materials and discussions at the Twelfth International Congress of Comparative Law, held in Australia in August 1986, confirmed the receptiveness of national courts to the use of legislative history to enhance a uniform interpretation of international rules.[61]

Use of international case law will also aid uniformity in applying the Sales Convention. This resource has been employed in many countries without statutory encouragement.[62] States that adopt the Conven-

53. DOCUMENTARY HISTORY, *supra* note 7, at 1-2.

54. Honnold, *supra* note 52, at 208-09.

55. Honnold, *supra* note 52, at 208.

56. Honnold, *supra* note 52, at 208.

57. Honnold, *supra* note 52, at 208.

58. Honnold, *supra* note 52, at 208.

59. Honnold, *supra* note 52, at 209.

60. Honnold, *supra* note 52, at 208.

61. Honnold, *supra* note 52, at 209. The civil law world and the United States make free use of legislative history even for domestic enactment. Jurisdictions that have followed English restrictions against this material may now be expected to relax as a result of a 1980 decision of the House of Lords on the approach to interpreting international conventions. Fothergill v. Monarch Airlines, [1980] 2 All E.R. 696 (construing the Warsaw Convention). Rejection of narrow domestic rules is also encouraged by article 7(1) of the Convention which calls for interpretation with regard "to its international character and to the need to promote uniformity in its application . . . ." Honnald, *supra* note 52, at 209 n.6.

62. Honnold, *supra* note 52, at 211 (citing General Report: Honnold, J., Methodology to Achieve Uniformity in Applying International Agreements, Examined in the Setting of the Uniform Law for International Sales under the 1980 U.N. Convention. (Publication

tion should be certain of their responsibility to consider interpretations in other countries in view of the mandate in article 7(1) for interpretation with regard to the Convention's "international character" and "the need to promote uniformity in its application."[63]

The UNCITRAL Secretariat had plans under way for the collection and dissemination of the case-law (jurisprudence) produced under the Convention.[64] Although these plans have yet to take effect, Professor Honnold urges that there need be no delay in using legislative history to counteract the tendency of national courts to view the Convention through the lenses of their domestic law.[65] "One who examines the evolution of the uniform law will be disabused of the view that the [Convention's] statutory language is simply an awkward attempt to state one's familiar domestic law."[66] Further, the purpose and intent of the Convention's words may be clarified by reference to the legislative record.[67]

E. DISSEMINATION OF INTERPRETATION

The dissemination of the case law interpreting the Convention can only increase the possibility that it will be applied uniformly. As of this writing, there lacks an organized system to disseminate the case law making reference to the Convention.[68] Occasionally, abstracts of decisions may be made available in the form of United Nations' documents.[69] "It seems likely, however, that the limited resources of the United Nations and the UNCITRAL Secretariat will not make it possible for the United Nations to provide translations of the complete decisions into the six official languages of the U.N."[70] Translation of complete decisions is likely to remain the task of private commercial

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pending for the Conference Hosts—the Universities of Sydney and Melbourne.), at pt. IV A.(1)).

63. Honnold, *supra* note 52, at 211 ("UNCITRAL at its next session will discuss appropriate means for gathering and disseminating international case law (*jurisprudence*)—and also scholarly writing (*doctrine*) that in many jurisdictions has authority that is as great (or greater than) judicial decisions.").

64. DOCUMENTARY HISTORY, *supra* note 7, at 2 n.3 ("Ways to maximize uniformity in interpreting the Sales Convention were studied at the Twelfth International Congress of Comparative Law (Sydney & Melbourne, 1986). The general report by Honnold drew on sixteen national reports describing legislative and judicial practices relevant to construing an international statute.").

65. DOCUMENTARY HISTORY, *supra* note 7, at 2.

66. DOCUMENTARY HISTORY, *supra* note 7, at 2.

67. DOCUMENTARY HISTORY, *supra* note 7, at 2.

68. Pfund, *International Unification of Private Law: A Report on U.S. Participation - 1987-88*, 22 INT'L LAW. 1157-58 (1988).

69. *Id.*

70. *Id.* at 1158-59.

services.[71]

While courts in one country typically are not required by either international or domestic law to give binding effect to decisions by courts of other countries,[72] they are normally sensitive to the difficulties that disparities between international and domestic law can cause for the international business community, and attempt to avoid inconsistencies where possible.[73] Although no international or domestic body has jurisdiction to make binding rulings interpreting the Convention, the Convention contains tools for uniform application.[74] Article 7(1) of the Convention provides that in interpreting the Convention, "regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."[75] "This provision discourages any resort to domestic legal concepts and tries to free judges, particularly in countries of the common law tradition, from the iron chains of precedents, thus permitting them to examine foreign cases as well in order to attain uniformity in the application of the Convention."[76] As a result, article 7(1) should influence domestic courts toward uniform application of the Convention.[77]

Application of the Convention to computer software, however, should not be assumed. The term "goods" is not defined within the text of the Convention nor the legislative history.[78] Although article 7 provides a general approach to interpreting the Convention, where an issue is not expressly settled, it provides that general principles on which the Convention is based should be applied. Where no principles can be derived, issues should be settled based on private international law.[79] Therefore, courts are likely to employ one or more interpretive theories

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71. *Id.* at 1159.

72. HANDBOOK, *supra* note 18, at 10.

> A United States court interpreting the CISG [Convention] in a case before it will seek to determine the CISG's [Convention's] meaning for purposes of applying the CISG [Convention] as domestic law, rather than international law. The interpretation given the provision at issue by another country's courts or by an international tribunal 'will be given due weight,' but such interpretations, without an agreement by the United States to the contrary, are not binding on United States courts. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 reporter's note 4 (Tent. Final Draft 1985).

HANDBOOK, *supra* note 18, at 10 n.39.

73. HANDBOOK, *supra* note 18, at 10 (citing Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138 (1934)).

74. HANDBOOK, *supra* note 18, at 10.

75. Convention, *supra* note 3, at art. 7(1).

76. Sono, *The Vienna Sales Convention: History and Perspective*, INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 1, 7-8 (P. Sarcevic & P. Volken eds. 1986).

77. *Id.*

78. *See generally* Convention, *supra note* 3; DOCUMENTARY HISTORY, *supra* note 7.

79. Convention, *supra* note 3, at art. 7(2).

when determining whether an issue is settled by the CISG, and if not what the general principles of the Convention are. The case shall be made that the New Haven School's contextual approach to treaty interpretation provides the best hope for ensuring that the Convention is applied uniformly and therefore best fulfills the mandate of article 7.

II. INTERPRETING INTERNATIONAL AGREEMENTS (GENERALLY)

"Determining the precise meaning of a treaty provision is an uncertain process and involves an area of turbulent doctrinal debate."[80] Disagreements regarding how closely courts should adhere to rules and procedures and the goals of treaty interpreters are primary reasons for non-uniformity of interpretation of international treaties.

There are three divisive views regarding the adherence of the adjudicative process to rules and procedures. Some argue that there are no rules of treaty interpretation and that invoking such rules is merely an attempt to rationalize conclusions that had already been reached.[81] Invoking rules of treaty interpretation might also serve to mask judicial creativity. Another view rigidly refers to a set of "rules" of interpretation and applies those "rules" in a legal vacuum.[82] The last view, contextual in approach, suggests that rules should be interpreted broadly with regard to the context in which the issues to be adjudicated are found.[83]

The goal of the interpreter is a key element affecting the uniform application of treaties.[84] Unfortunately, four distinct views as to the interpreter's goal exist.[85] A subjective view of the interpreter's goal requires that the interpreter will want to give effect to the intentions of the parties.[86] On the other hand, some believe that the interpreter's goal should always be to objectively ascertain the meaning of treaty text

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80. HANDBOOK, *supra* note 18, at 5.

81. HANDBOOK, *supra* note 18, at 5.

82. HANDBOOK, *supra* note 18, at 5. For a list of such rules and a discussion of the difficulties of applying such rules or presumptions, see I.L. OPPENHEIM, INTERNATIONAL LAW 952-57 (H. Lauterpacht 8th ed. 1955). *See also* M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 164-65 (1984).

83. M. MCDOUGAL, H. LASSWELL & R. MILLER, INTERPRETATION OF AGREEMENTS AND WORLD ORDER 82-83 (1967) [hereinafter MCDOUGAL, LASSWELL & MILLER].

84. *See* HANDBOOK, *supra* note 18, at 5.

85. L. CHEN, INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY ORIENTED PERSPECTIVE 278 (1989) [hereinafter INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW].

86. HANDBOOK, *supra* note 18, at 6 (a view favored by the now superseded RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 146 (1962)). *See* INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW, *supra* note 85, at 278 (the principle of effectiveness).

and give effect to that meaning.[87] This is often referred to as the principle of plain and ordinary meaning.[88] Still others argue that the interpreter's goal should be to ascertain and give effect to the purpose of the treaty.[89] This view is referred to as teleological, or the principle of major purposes.[90] Finally, other commentators believe that the goal of the interpreter should be to protect the sovereignty of the state. This view is called the principle of restrictive interpretation.[91] These views regarding the goal of the interpreter "are not necessarily mutually exclusive, and rather often reflect differing emphases on the weight to be given to a particular type of evidence."[92] Nevertheless, these views can lead to differing interpretations of specific treaty provisions, and when presented without a coherent, contextual framework, tend to contradict or overlap one another in application.[93]

These competing approaches ultimately result in the inharmonious application of international agreements. Although there is no binding international law to consolidate these competing approaches, international law does exist and there are two primary sources: international agreements and customary international law.[94] The most widely followed international agreement concerning the interpretation of international treaties is the Vienna Convention on the Law of Treaties.[95] Most notable is that the United States and other non-signatory countries have stated that they intend to be bound by articles 31[96] and 32[97] of the Vi-

87. HANDBOOK, *supra* note 18, at 6 (This approach is favored at least in part by the RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 (Tent. Final Draft 1985)).

88. INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW, *supra* note 85.

89. HANDBOOK, *supra* note 18, at 6.

90. HANDBOOK, *supra* note 18, at 6; INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW, *supra* note 85.

91. INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW, *supra* note 85. *See, e.g.*, Interpretation of Peace Treaties Case, 1950 I.C.J. 65, at 226-30, *reprinted in* M. MCDOUGAL & W. REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 1203-07 (1981).

92. HANDBOOK, *supra* note 18, at 6.

93. INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW, *supra* note 85, at 278.

94. HANDBOOK, *supra* note 18, at 6.

95. Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF.39/27 (1969), *reprinted in* 8 I.L.M 679 (1969) [hereinafter Vienna Convention].

96. Article 31 of the Vienna Convention provides:

General Rule of Interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion

enna Convention.[98] As articles 31 and 32 of the Vienna Convention are the starting point of most modern international discussions of treaty interpretation, any approach used to interpret the Convention should comport with articles 31 and 32 of the Vienna Convention, as well as article 7 of the Convention.

To ensure uniform application of treaties, the goals of the interpreter, as previously discussed, should be determined by a system. Articles 31 and 32 of the Vienna Convention are the seeds of such a system. Articles 31 and 32 reflect a considerable degree of contextuality.[99] Of the various frameworks, systems or approaches to treaty interpretation, the most consistent with articles 31 and 32 of the Vienna Convention is the policy-oriented approach to international laws developed by Professor Myres S. McDougal, the late Professor Harold D. Lasswell and their associates (the "New Haven School").[100] The New Haven School is contextual, problem-solving, and multi-method in approach.[101] "It is con-

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with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Vienna Convention, *supra* note 95, art. 31.

97. Article 32 of the Vienna Convention provides:

Supplementary Means of Interpretation

Recourse may be had to supplementary means of interpretation, including preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

Vienna Convention, *supra* note 95, art. 32.

98. The State Department has stated that it will abide by the Vienna Convention. *See, e.g.*, Day v. Trans World Airlines, Inc., 528 F.2d 31, 33 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976) (citing article 31(1) of the Vienna Convention). *But cf.* Air France v. Saks, 470 U.S. 392, 396-97 (1985). The Vienna Convention is not mentioned. However, the Court states:

[T]reaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties. . . . The analysis must begin, however, with the text of the treaty and the context in which the written words are used.

99. INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW, *supra* note 85, at 279.

100. Myres S. McDougal is a Professor of Law at Yale Law School. The late Harold D. Lasswell was also a Professor of Law at Yale Law School.

101. INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW, *supra* note 85, at 15.

textual in the sense of viewing the role of law in society dynamically, by relating it to relevant social, community, and decisional variables."[102] It is problem-solving in that it recognizes the function of law as an instrument of policy for promoting a preferred social order.[103] It is multimethod in the sense that it relies upon all relevant intellectual skills, whether they derive from works of scholars or precedents of cases.[104] Notable among the scholarly writings of Professors McDougal and Lasswell, in collaboration with James C. Miller, is *The Interpretation of Agreements and World Public Order: Principles of Content and Procedure*.[105] In *The Interpretation of Agreements*, Professors McDougal, Lasswell and Miller explain that they view treaty interpretation as:

> (1) ascertaining the genuinely shared expectations of the particular parties to an agreement; (2) supplementing such shared expectations by reference to community policies when gaps, contradictions, or ambiguities exist in the parties' communication; and (3) integrating or policing, in the sense of the appraisal and possible rejection of the parties' expectations, however explicit or implicit they may be, so as to ensure their conformity with fundamental community policies.[106]

Under the New Haven School approach, all relevant signs and deeds relating to the making of an international agreement should be considered by the interpreter of the agreement.[107] The interpreter of an international agreement should remain unbiased as the facts are presented in any particular case.[108] Most important, an interpreter should give preference to all the community policies at stake and to interpretations that "harmonize most fully with public order prescriptions" and "will probably do most to influence future agreements toward harmony with public order goals."[109] By formulating overriding community goals, the New Haven School approach facilitates article 7's mandate to give full effect to the Convention's international character. At the same time, the process of devising those general principles on which the Convention is based can be guided by the application of those same overriding community goals. This effectuates article 7(2) and increases the likelihood of uniformity in application of the Convention.

As such, maximum world order is furthered through use of computer software. Maximum world order is a theory advanced by the New

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102. INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW, *supra* note 85, at 15.

103. INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW, *supra* note 85, at 15.

104. INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW, *supra* note 85, at 15.

105. INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW, *supra* note 85, at 278 (citing MCDOUGAL, LASSWELL & MILLER, *supra* note 83).

106. INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW, *supra* note 85, at 278.

107. INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW, *supra* note 85, at 279.

108. INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW, *supra* note 85, at 279.

109. INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW, *supra* note 85, at 279 (citing MCDOUGALL, LASSWELL & MILLER, *supra* note 83, at 47-48).

Haven School. The New Haven School views international laws in terms of community goals rather than focusing primarily on laws as rules which is the traditional view. Maximum world order is used in the sense of greatest shaping and sharing of all values. That is, the placing of value on common experiences among peoples of different cultures leading to, among other things, peace in the world.[110]

Individuals utilizing computer software developed in countries representing different cultures are indirectly communicating through shared experience. This is particularly true for mass marketed computer software such as WordPerfect©. For example, the retail toy company Toys-R-Us is expanding its operations internationally. As a result of this globalization,[111] children throughout the world will likely begin buying the toys designed, produced and marketed by the same toy companies. One may imagine how such shared experience on a global basis can help bring people of differing cultures together, thereby lessening the possibility of armed conflict in the future. To the extent that computer software is the equivalent of an adult toy, similar consequences may occur.

The impact of the transnational exchange of computer software on modern business' day-to-day operations is more profound. The occurrence of shared experience is of equal or greater value than on an individual level since the market system most often is the catalyst for advancement.[112] As nation states become further dependent upon each other commercially, interchangeability and familiarity with each others commercial systems on a micro level will occur thereby advancing maximum world order.

Nation states utilize computer software to various degrees depending upon the maturity and wealth of the nation state.[113] Governments of nation states which traditionally seek to control their populations severely restrict use of information technology.[114] Conversely, govern-

110. Professor Lung-Chu Chen, Professor of Law, New York Law School, has digested the New Haven approach in his book. *See* INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW, *supra* note 85.

111. McLellan, *Lawyers Enter New Markets*, NAT'L L.J., Oct. 9, 1989, at 17, col. 1.

112. M. MCDOUGAL, H. LASSWELL & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 49 (1980) [hereinafter WORLD PUBLIC ORDER] (discussing the high degree of interdependence of the world wealth process).

113. INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW, *supra* note 85, at 292 (discussing the demands made by third world countries for a new world information and communication order). *See also* Chen, *Human Rights and the Free Flow of Information*, 4 N.Y.L. SCH. J. INT'L & COMP. L. 37, 41 (1982) [herinafter *Human Rights*] (making technology, knowledge and resources available to as many countries as possible facilitates world order and human dignity).

114. *See, e.g., Human Rights, supra* note 113; McDougal, *New World Information Order Symposium (Commentary)*, 4 N.Y.L. SCH. J. INT'L & COMP. L. 31, 33-34 (1982) (dis-

ments which place the individual above society favor minimum regulation over information technology.[115] Maximum world order in the sense of a greater shaping and sharing of values is furthered by promulgating and using information technologies like computer software.[116]

Computer software will help minimize differences among nation states despite the geographical, temporal, and institutional limitations, ideally leading to an expanded international marketplace. Some have argued that information technology has had as great an impact on society as transportation technology.[117] While advances in transportation extend the physical presence, information technology permits longer stays. So too, the bridge between yesterday, today, and tomorrow is reinforced by information technology.[118] Traditional concepts should give way to forward thinking wherever maximum world order can be advanced.

For all of the aforementioned reasons, this article will interpret the Convention within the framework of the Vienna Convention using the New Haven School's contextual approach to treaty interpretation.

III. COMPUTER SOFTWARE: SHOULD THE CONVENTION APPLY?

A. GENERALLY

Whether national courts or international arbitral tribunals will apply the Convention to software depends upon two prior determinations. First, the courts must find that software is a "good" as encompassed by the Convention. Second, the courts must find that software is either sold or supplied via a sale of goods transaction within the domain of the

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cussing how enlightenment and consumption of information are critical to improving our understanding of human rights).

115. *See, e.g., Human Rights*, *supra* note 113.

116. INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW, *supra* note 85, at 293 (Modern communications (which specifically require computer software) have the tremendous potential to bind the peoples of the world.).

117. *See Human Rights*, *supra* note 113, at 40.

118. This technology provides individuals with a first step in creating auxiliary brains which can be easily and quickly shared by others. Today, a computer system consisting of a personal computer, laser printer, scanner, optical character reader ("OCR") software, desktop publishing software and document retrieval software (using fuzzy search) can be purchased for under $10,000. Such a system is capable of bypassing a computer keyboard by scanning a printed page, be it memoranda, briefs, letters, newspapers, magazines or books. The OCR software converts the image and imports it directly into a familiar word processing program for instant edit or view. The document retrieval software then permits instant access using boolean logic (i.e., and/or logic), key words and phrases to all storage media connected to the personal computer (i.e., hard drives, tape drives, floppy disks, optical readers, etc.).

Convention. The underlying policy of the Convention,[119] the United States[120] and the EEC[121] is to promote the development of international trade. To the extent that this policy is substantially representative of the policies of a majority of countries in the world, the Convention should be applied wherever it may positively affect international commercial transactions and enhance the development of international commercial law as it applies to software.

Professor Andrew Rodau points out that "confusing and contradictory usage of terminology in the computer industry has lead to disagreement as to whether software is a good."[122] "Rapid advances such as the unbundling of hardware and software[123] and the reduced need for custom software have led to the formation of independent software producers who create and mass-market over-the-counter or canned software

119. DOCUMENTARY HISTORY, *supra* note 7, at 766 (article 7(1) of the Convention provides that "[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.").

120. HANDBOOK, *supra* note 18, at 47 (In the ratification process, President Ronald Reagan, in a letter dated September 21, 1983, entitled "Letter of Transmittal," concluded that "[e]nhancing legal certainty for international sales contracts will serve the interests of all parties engaged in commerce by *facilitating international trade.*") (emphasis added).

121. As evidenced by the SEA of 1986, and anti-trust articles 85 and 86 of the Treaty of Rome. *See* BULL. EUR. COMMUNITIES, *supra* note 4.

122. Rodau, *Computer Software: Does Article 2 of the UCC Apply?*, 35 EMORY L J. 853, 861 (1986); Note, *Contracting for Performance in the Procurement of Custom Computer Software*, 13 GOLDEN GATE U.L. REV. 461, 462-63 (1983) (because of disagreement among experts with regard to meaning of computer terminology parties to a computer contract should agree on applicable definitions and include such definition in the contract); *see also* D. BENDER, COMPUTER LAW: EVIDENCE AND PROCEDURE, § 2.06, at 2-112,4 (software defined differently by different authors); T. HARRIS, THE LEGAL GUIDE TO COMPUTER SOFTWARE PROTECTION: A PRACTICAL HANDBOOK ON COPYRIGHTS, TRADEMARKS, PUBLISHING AND TRADE SECRETS 37 (1985) ("the rather elusive term *software* as used by those in the computer industry may refer to several distinct conditions or elements of a total package"); Bender, *Software Protection: The 1985 Perspective*, 7 W. NEW ENG. L. REV. 405, 407 n.3 (1985) (software defined differently by different authors); McGee, *Financial and Tax Accurietey for Computer Software*, 7 W. NEW ENG. L. REV. 651, 654 (1985) (no single accepted definition of software); Tunick, *Computer Law: An Overview*, 13 LOY. L.A. L. REV. 315, 317 n.15 (1980) (no generally accepted definition of software is of "software in computer industry"); Semple, *The Legal Incidents of Computer Software and Its Use as Collateral in Secured Transactions*, 7 CANADIAN BUS. L.J. 450, at 451 ("a general definition of software is of little use because of the diversity and breadth of meaning encompassed by the word.").

123. The large computer manufacturers in the United States originally sold hardware and software together as a package deal. Eventually, the software industry grew strong enough to assert itself through anti-trust claims. As a result, bundling became illegal under United States anti-trust laws and the computer hardware companies were forced to sell and therefore price their software separately.

which is often usable on more than one computer."[124] These rapid advances and the rapidity of technological change, generally, give impetus to the need to apply overriding community goals where long term precedential value of judicial decisions are limited as changes occur in the computer field.[125] "Confusion between intellectual property aspects of software[126] and the physical medium containing the software have also created uncertainty about whether software is a good."[127]

"In the United States,[128] despite the confusing terminology and the continual advances in technology, software embodied in a physical medium is analogous to goods such as a book or an automobile which may embody intellectual property and represent the transformation of intangible ideas and knowledge into a physical form."[129]

Under EEC law the carrier medium of a work is generally considered an item falling within the system of free circulation of goods, without distinguishing whether the item is used for the distribution of a work or whether the item is the result of the exploitation of an industrial property right.[130] Accordingly, some believe that the sale of mass market, low-priced software products will most likely be subject to the rules relating to distribution of goods.[131]

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124. Rodau, *supra* note 122.

125. Rodau, *supra* note 122, at 861 ("The slow evolution of the law coupled with the conservative nature of judges and attorneys is problematic when dealing with rapidly changing computer technology.") (quoting T. HARRIS, THE LEGAL GUIDE TO COMPUTER SOFTWARE PROTECTION: A PRACTICAL HANDBOOK ON COPYRIGHTS TRADEMARKS, PUBLISHING AND TRADE SECRETS 37 (1985).

126. Rodau, *supra* note 122, at 862. Intellectual property rights may exist in software pursuant to copyright and trade secret law. The form of the expression of the software is considered a literary work protectable via copyright. *See* 17 U.S.C. §§ 101-102 (1982). Additionally, underlying ideas upon which the software is based may be trade secrets protectable by maintaining the software as confidential material. *See* Cybertek Computer Prods., Inc. v. Whitfield, 203 U.S.P.Q. 1020, 1022 (Cal. Super. Ct. 1977) (trade secret protection applicable to software in practically all jurisdictions); J. & K. Computer Sys., Inc. v. Parrish, 642 P.2d 732, 735 (Utah 1982) (trade secret protection appropriate for software intended to be kept confidential).

127. Rodau, *supra* note 122, at 862.

128. Again, the United States is used here as representative of other countries where sale of goods legislation is liberally construed.

129. Rodau, *supra* note 122, at 862.

130. J. KEUSTERMANS & I. ARCKENS, INTERNATIONAL COMPUTER LAW 4-23 (1988) (citing Musik-Vertrieb membran GmbH and K-tel International v. Gema, 1981 E. Comm. Ct. J. Rep. 147; Coditel et. al. v. S.A. Ciné Vog Films et. al., 1980 E. Comm. Ct. J. Rep. 881; Doutrelpont, *Les arrêts Cotidel face au droit interne et au droit européen*, J. TRIBUNAUX 397 (1984); Von Gamm, *Copyright License Contracts and Restrictions Under the EEC Treaty*, I.I.C. 579 (1983); *WEA-Fili pacchi Music S.A.*, O.J. EUR. COMM. (No. L 303) 52 (1972); *Miller International Schallplatten GmbH*, O.J. EUR. COMM. (No. L 357) 40 (1976) (Commission Decision)).

131. J. KEUSTERMANS, *supra* note 130, at 4-21 (citing Gerard, *Applying the Rules of*

However, the law of the United Kingdom (U.K.) may take a more restrictive view. In the U.K., the issue of whether software is a good within the meaning of the Sale of Goods Act of 1979 was discussed in *Eurodynamic Systems Plc v. General Automation Ltd.*[132] It was first contended that regardless of the status of software as a good, a license of software was not a sale and therefore such a transaction was outside the scope of the Sale of Goods Act of 1979.[133] The court rejected this argument, stating that "[i]f one assumes that software is capable of constituting goods within the meaning of the 1979 Act, the argument based on the license provisions cannot on its own take the transaction outside the scope of the act."[134] However, the court was not prepared to hold that transactions involving the transfer of software involve goods and based its decision on the assumption that the implied terms of merchantability and fitness for an intended purpose had been established.[135] This case clearly indicates the restrictive position taken by courts in the U.K. and implicitly represents the opposing view to the liberal interpretation of goods under U.S. law.[136] One need only read Andrew Scott's four page article which so persuaded the court. In essence, Scott's argument is based upon the *nature* of software as "simply coded information" which "when information is recorded on some medium, that medium is then invested with the value of the information. Information, and therefore software, cannot be considered 'goods'. . . ."[137] This argument confuses intellectual property aspects of

EEC Competition to Software Distribution and Licensing, 1 COMPUTER LAW. 35, 39 (1984)).

132. 1983 Q.B. 2804 (1988) (LEXIS, Enggen library, Cases file).

133. *Id.*

134. *Id.*

135. *Id.* The court stated:

> Broadly speaking the US decisions reveal a fairly consistent adoption of a liberal definition of goods, and even transactions involving the transfer of only software have been held to be the sale of goods. *See, e.g.*, Communications Groups, Inc. v. Warner Communications, 138 Misc.2d 80, 527 N.Y.S.2d 341 (1988); Schroders, Inc. v. Hogan Systems, Inc., 137 Misc.2d 738, 522 N.Y.S.2d 404 (1987). Interesting as those decisions have proved to be, I am not prepared without further oral argument to decide this point. Other materials placed before me, and notably an article by Mr. Andrew Scott has persuaded me that the problem is far more complex than was realized during oral argument: *See Software as 'Goods': Nullum Simile Est Idem*, 3 COMPUTER L. & PRAC. 133 (1987). If it was of critical importance to decide this issue, I would have been bound to request further oral argument, being the only satisfactory way of exploring important issues of legal principle. Having come to the conclusion that the decision on this question is not of critical importance—I will proceed on the basis of an assumption (and without deciding the point) that the implied terms of merchantability and fitness for purpose alleged . . . have been established.

136. Rodau, *supra* note 122, at 865.

137. Scott, *Software as 'Goods': Nullum Simile Est Idem*, 3 COMPUTER L. & PRAC. 133 (1987).

software and the physical medium containing the software.[138]

Assuming that software is a "good," the Convention will apply to the sales transaction. The sale of a copy of a computer program conveys title to the purchaser enabling the purchaser to make such use of it as the purchaser thinks fit.[139] "The incorporeal right in the software is not necessarily transferred along with the transfer of ownership in the copy."[140] However, the software industry is compelled to protect the value of the software by controlling its use, typically by licensing the software to the user.[141]

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138. Under Mr. Scott's approach a "good" can be divested of its "goodliness" by the infusion of some element having intellectual property rights attached. Under this theory, a blank CD is a good, but a CD with prerecorded music is not. Likewise, a blank software diskette is a good, but once software is transferred onto the diskette, it is no longer a good. Hence, intellectual property rights swallow the rights attached to "goods." Consequently, a purchaser of software can not avail himself of the protection afforded in sale of goods legislation. Unless a court relies upon major assumptions as in *Eurodynamic*, a purchaser may be left to common law principles such as "caveat emptor." *Id.*

139. This does not mean that the purchaser may infringe on the seller's copyright therein. For a good discussion on intellectual property rights, see B. SOOKMAN, COMPUTER LAW: ACQUIRING AND PROTECTING INFORMATION TECHNOLOGY (1989).

140. *Id.* (citing Massie & Renwick Ltd. v. Underwriters Survey Bureau Ltd., [1938] 2 D.L.R. 31 (Ex. Ct.), varied [1940] 1 D.L.R. 625 (S.C.C.); Barson Computers (N.Z.) Ltd. v. John Gilbert & Co. Ltd., [1985] F.S.R. 489 (N.Z.H.C.); Time Life Int. (Netherlands) B.V. v. Interstate parcel Express Co. Pty. Ltd., [1978] F.S.R. 251 (Aus. H.C.)).

141. Rodau, *supra* note 122, at 888 n.144 (To protect . . . trade secret status, the software creator often enters into explicit license agreements with a limited number of users who promise to maintain the software as proprietary information and to pay either a one-time license fee or periodic fees during the license term.) (quoting Conley & Bryan, *Software Escrow in Bankruptcy: An International Perspective*, 10 N.C.J. INT'L & COM. REG. 579, 581 n.10 (1985)).

> Mass-marketed or canned software which is widely distributed to the public via retail and mail order outlets is also usually licensed. . . . Typically this license states that opening the package or using the software indicates acceptance of the licensing agreement. A license of this type makes it clear that the software producer retains title and ownership of the software, with the purchaser only being granted a right to use the software on a single computer. The license is generally a perpetual paid-up license since in return for a single payment the licensee has a perpetual right to use the software provided the licensee adheres to the license terms. Transfer of the software to someone else or use of the software by the purchaser on more than one computer without payment of an additional license fee violates the license agreement. The software purchaser is also not permitted to make copies of the software except for backup copies for the purchaser's personal use. Additionally, the underlying algorithms or processes employed by the software may be declared trade secrets which the purchaser of the software is required to protect. Finally, violation of any terms of the license by the software licensee allows the software producer to terminate the license and the licensee must then return the software and any copies to the software producer.
>
> Another type of licensing transaction that is being used more frequently for business users of mass-marketed software is site licenses. A site license is similar to a shrink-wrap license because it only grants the user a limited right to use the licensed software in return for a one-time license fee. However, unlike a shrink-wrap, the site license allows the licensee to make unlimited copies of the

B. LICENSE OF SOFTWARE[142]

Arguably, the Convention applies only to sales. Because of the ambiguity of the Convention on this point,[143] the issue of whether a "license" is an equivalent of a "sale" should be decided by applying the overriding community goals of economic expansion and facilitation of international trade.[144] One argument for limiting the Convention strictly to sales transactions is simply that treaties "should be taken literally, with deference to the words chosen by those who drafted the agreement."[145] A policy argument in favor of a broad scope of application for the Convention may be "that failure to apply the Convention to transactions other than sales would lead to the creation of new and unnecessary laws."[146] Establishing a separate body of law to cover each new type of non-sale transaction used in place of a sale would not only undermine the original impetus behind the Convention, which is to unify and clarify international commercial law, but would undermine the community goals as well.[147]

Generally, when software is created and marketed, the development costs are normally recouped through mass sales of the product.[148] However, software can easily be copied and cheaply sold.[149] The parties to the typical software license agreement often change the form of the transaction due to considerations that are peripheral to the sale; such as

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software provided the copies are used only at a particular location specified in the license.

Rodau, *supra* note 122, at 888 n.144 (citing Scott, *Market Analysis & Software Licensing Restrictions*, 1 COMPUTER L. & PRAC. 48, 49 (1984) (no opportunity for negotiating terms for mass-marketed software); Vale & Harding, *Practical and Legal Issues Relating to The Marketing of Microprocessor Software by Means of Site Licenses*, COMPUTER LAW. 1 (1985) (discussing site licenses)).

142. B. SOOKMAN, *supra* note 139, at 2-47:

> A license of computer software does not convey legal interest to the licensor. A licensee essentially has contractual rights only against the licensor. A license may be, and often is, coupled with a grant, which may convey an interest in property, but a license pure and simple, and by itself, never conveys an interest in property. It passes no interest in the software but merely makes lawful that which without it would be unlawful. Licensing enables the owner of software to transfer a right to use the software without transferring title or ownership to the underlying intellectual property.

143. *See generally* DOCUMENTARY HISTORY, *supra* note 7 (The text of the Convention and the legislative history fail to define the term "goods.").

144. Convention, *supra* note 3; *see also* the discussion on the New Haven School approach to treaty interpretation, *supra* notes 100-10.

145. This is the principle of plain and ordinary meaning.

146. Broccolo & Bedell, *Specific Performance in the Information System Acquisition Context: The Substantive and Procedural Issues*, 6 COMPUTER LAW. 1, 7 (1989).

147. *See generally* DOCUMENTARY HISTORY, *supra* note 7.

148. Rodau, *supra* note 122, at 902.

149. Rodau, *supra* note 122, at 902.

risk of loss, tax consequences, bankruptcy, and international intellectual property law.[150] It is international intellectual property law considerations that most often force the parties to license rather than sell.[151] Software is licensed to protect against duplication. To combat this problem in international commerce, companies rely on intellectual property law such as the Berne Convention,[152] and the various laws of individual countries.[153] In the United States, for example, companies may rely on trade secret law if the software is marketed in a manner which makes duplication impossible.[154] Products made available to a limited number of users may be confidentially licensed as trade secrets if the use of the product can be controlled to maintain secrecy.[155]

Although the typical software transaction is cast in the form of a license, and not a sale, the analogy to a sale is strong, particularly where the license term is perpetual, because the aim of the transaction is for one party to acquire the right to use the software.[156] Even similarities between a license and a sale, such as the existence of intellectual property rights and the applicability of technological transfer laws, can be viewed as distinct parts of the transaction such that it can be said that if the Convention does not apply wholesale, it should at least apply to that discernable part that results in the *supply* of a *good*.[157] In the United States this has been called a "functional equivalency"[158] test in cases in-

150. Broccolo & Bedell, *supra* note 146, at 7.

151. Brocollo & Bedell, *supra* note 146, at 7; *See also* B. SOOKMAN, *supra* note 139, at 2-48 (citing S. & H. Computer Systems Inc. v. SAS Institute Inc., 568 F. Supp. 416 (M.D. Tenn. 1983) ("A fundamental purpose of software licensing agreements is to prevent the unauthorized exploitation of the software involved.") (citing La Societe d' Informatiques R.D.G. Inc. v. Dynabec Ltee', 6 C.P.R. (3d) (Que. S.C. 1984); CBS Inc. v. Ames Records & Tapes Ltd., 2 All E.R. 812 (Ch.D 1981); Fetherling v. Boughner, 40 C.P.R. (2d) 253 (Ont. H.C. 1978) (If copies of software are sold and not licensed, without restrictions binding on the purchasers, the purchasers of the copies sold are entitled to re-sell them, give them away, hire them, or destroy them, without infringing the copyright of the owner of the software. . . . These rights can substantially affect the revenues that a software publisher can earn and impinge on its ability to maintain the confidentiality of the software. For these reasons, software is frequently licensed rather than sold to end users.")).

152. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1986, as amended by the Paris Additional Act and Declaration (1896), the Berlin Convention (1908), the Brussels Convention (1948), the Stockholm Convention (1967) and the Paris Convention (1971). For further information on the Berne Convention as it relates to computer software see J. KEUSTERMANS, *supra* note 130, at 8-10 to -12.

153. *See* J. KEUSTERMANS, *supra* note 130, at 13-2.

154. Rodau, *supra* note 122, at 902.

155. Rodau, *supra* note 122, at 902-03.

156. *See generally* Broccolo & Bedell, *supra* note 146.

157. *See generally* Broccolo & Bedell, *supra* note 146.

158. Broccolo & Bedell, *supra* note 146 (citing Communications Group, Inc. v. Warner Communications, Inc., No. 69463 (N.Y. Civ. Ct. 1987)).

volving non-sale transactions in goods.[159]

Even if patent law is applicable to a particular computer software, rapid changes in computer technology eliminate its value to a software house given the time[160] and expense[161] to obtain a patent.[162] Software may be obsolete or have a greatly reduced value if a patent takes several years to obtain.

The ease of software duplication and the questionable applicability and suitability of patent law to software, and the limited utility of trade secret law have resulted in increased reliance on copyright protection.[163] In the United States, unauthorized duplication of software is prohibited by copyright law even if the software is sold.[164] However, there are certain limitations thereafter.[165] Where the transferor of software relies solely on copyright law for protection, the buyer may freely resell or transfer the software to someone else.[166] "Copyright does not protect the underlying algorithms or processes upon which a computer program is based even if these are proprietary information of the software producer."[167] Copyright permits unlimited use of the program by the purchaser and therefore does not protect the seller where the computer system is designed to be used concurrently by more than

159. *See, e.g.*, Hertz Commercial Leasing Corp. v. Transportation Credit Clearing House, 59 Misc. 2d 226, 228, 298 N.Y.S.2d 392, 395 (1969).

160. N.Y. Times, May 9, 1989, at A1, col. 5 (Recently, patents for computer software have been granted, and rather quickly. As a result, it appears that many patents were issued when they should not have been. Litigation is likely to occur on this point. Consequently, patent grants will not be issued as quickly and the time consuming process, which used to be approximately three years, will probably return).

161. Rodau, *supra* note 122, at 903 (Patents typically cost at least several thousand dollar to obtain in the United States alone. In some cases, however, the cost can be as high as one hundred thousand dollars).

162. Rodau, *supra* note 122.

163. Rodau, *supra* note 122, at 904.

164. 17 U.S.C. § 106(1) (1982).

165. *Id.*

166. 17 U.S.C. § 109(a) (1982) (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.). The first sale doctrine of 17 U.S.C. § 106(3) (1982), which purports to give the owner of a copyrighted work the exclusive right to distribute to the public by sale or other transfer of ownership, is subject to 17 U.S.C. §§ 107-188 (1982).

167. 17 U.S.C. § 102(b) (1982). *See also* Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1252-53 (3d Cir. 1983) (copyright protects the form or the means of expression of an idea but not the underlying idea itself); Comment, *Software: A Legislative Solution to the Problem of User's and Producer's Rights in Computer Software*, 44 LA. L. REV. 1413, 1448 (1984) (copyright does not extend to ideas, algorithms, or the logic contained in the software).

one individual.[168] "Due to the limitations of copyright protection, software producers have been forced to resort to additional methods used in conjunction with copyright to protect their investments in the creation of software."[169] It is evident that the fundamental purpose of software licensing agreements is to prevent the unauthorized exploitation of the software involved.[170] If software is sold and not licensed, the buyer is entitled to re-sell it, give it away or destroy it, without infringing on the copyright of the software owner.[171] "These rights can substantially affect the revenues that a software publisher can earn and impinge on its ability to maintain the confidentiality of the software."[172]

Although licensing of software is not an actual sale, in that the software producer retains title to the software, it has many of the incidents of a sale.[173] Where software is supplied through a license transaction requiring a one time license fee and provides a perpetual license to use the software,[174] it can be said that the software is effectively sold despite retention of title where the producer has no realistic expectation of ever getting the software back.[175] The application of the Convention to such transactions seems particularly justified if one agrees that overriding community goals should be considered.

C. Relevant Convention Text and Legislative History

Once again, the issues to be treated are: First, is computer software a "good" and therefore within the scope of the Convention; and, second, even if software is a "good," are license transactions involving software a "sale" under the Convention. Unfortunately, or fortunately, depending upon one's view, the term "goods" is not defined within the text of the Convention, nor is there any attempt to define "goods" in the legislative history.[176] Nevertheless, article 2, which specifies items to be ex-

168. Rodau, *supra* note 122, at 905. For example, several personal computers may run a single program where they are "networked." This and similar multi-user systems are abundant and growing rapidly.

169. Rodau, *supra* note 122, at 905.

170. B. Sookman, *supra* note 139, at 2-48 (citing S. & H. Computer Systems Inc. v. SAS Institute Inc., 568 F. Supp. 416 (M.D. Tenn. 1983)).

171. B. Sookman, *supra* note 139, at 2-48 (citing La Societe d' Informatiques R.D.G. Inc. v. Dynabec Ltee', 6 C.P.R. (3d) 299 (Que. S.C. 1984); CBS Inc. v. Ames Records & Tapes Ltd., 2 All E.R. 812 (Ch.D. 1981); Fetherling v. Boughner 40 C.P.R. (2d) 253 (Ont. H.C. 1978)).

172. B. Sookman, *supra* note 139, at 2-48.

173. Rodau, *supra* note 122, at 907 (stating that private sale of goods legislation invariably defines "sale" as including the passing of title from seller to buyer). *See e.g.*, U.C.C. § 2-106(1) (1985) (sale requires passing of title from seller to buyer).

174. Provided there is adherence to the terms of the agreement.

175. Rodau, *supra* note 122, at 908.

176. *See generally* Documentary History, *supra* note 7.

cluded from the convention, will be discussed, as it is useful for framing arguments on both sides of the issue. Article 3, which distinguishes between "goods" and "services", may also be helpful.

Articles 2 and 3(1) exclude from the Convention several categories of items based upon the nature of the transaction, the purpose of the sale, and the nature of the goods.[177] Article 2(a) excludes consumer goods purchased for consumer use, not professional use, to avoid conflict between the Convention and national consumer protection laws.[178]

Sales by auction are excluded because they "are often subject to special rules under the applicable national law and it was considered desirable that they remain subject to those rules even though the successful bidder was from a different state."[179]

Article 2(c) excludes "sales on judicial or administrative execution or otherwise by authority of law, because such sales are normally governed by special rules in the State under whose authority the execution sale is made."[180] The rationale is that such sales represent a negligible portion of international trade.[181]

Sales of stocks, shares, investment securities, negotiable instruments or money are excluded in article 2(d) because such transactions present unique problems from the typical international sale of goods transaction.[182] "Moreover, in some legal systems such commercial paper is not considered to be 'goods.' Without the exclusion of the sales of such paper, there might have been significant differences in the application of this Convention."[183] Sales of ships, vessels or aircraft, or electricity are also excluded because of the disagreement among different legal systems as to whether or not they are "goods" or not.[184]

These exclusions, taken as a whole, may lead a court to reason that if an item is traditionally governed by special rules, offers unique problems or is not certain to be a "good" within all legal systems, then it should be excluded by analogy to article 2. However, such a reading would render the Convention impotent, and such a result was not intended by the framers. Furthermore, such a conclusion discounts overriding community goals.

Article 3(1) excludes from the Convention any contract in which the preponderant part of the obligations of the party who furnishes the

177. *See generally* DOCUMENTARY HISTORY, *supra* note 7.
178. DOCUMENTARY HISTORY, *supra* note 7, at 406, commentary 3.
179. DOCUMENTARY HISTORY, *supra* note 7, at 406, commentary 5.
180. DOCUMENTARY HISTORY, *supra* note 7, at 406, commentary 6.
181. DOCUMENTARY HISTORY, *supra* note 7, at 406 commentary 6.
182. DOCUMENTARY HISTORY, *supra* note 7, at 406, commentary 7.
183. DOCUMENTARY HISTORY, *supra* note 7, at 406, commentary 7.
184. DOCUMENTARY HISTORY, *supra* note 7, at 406, commentary 9, 10.

goods consists in the supply of labor or other services.[185] A court may find that a computer software license is a type of transaction involving a service in that most software is transferred with a promise to keep it current, competitive, and supported. On the other hand, once the software is completed, packaged and transferred upon payment, any service is incidental to that transfer. Again, overriding community goals would be best served through a more encompassing interpretation.

Whether the Convention is to cover license transactions in computer software as a "sale" may be viewed in light of articles 4, 30, 41 and 42. Article 4 deals with the substantive coverage of the Convention, while article 30 deals with the general obligations of the seller.[186] Article 41 relates to third party claims in general and article 42 specifically to third party claims based on industrial or intellectual property.[187]

Article 4, if taken literally, may lead one to conclude that licenses are covered by the Convention. Article 4 states:

> This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:
>
> * * *
>
> (b) the effect which the contract may have on the property in the goods sold.[188]

However, "the effect which the contract may have on the property in the goods sold" refers to the time at which property passes, and not whether it passes at all.[189] Although article 4 does not prescribe that title be passed, article 30 arguably does. Article 30 clearly states that "[t]he seller must deliver the goods, hand over any documents relating to them and *transfer the property in the goods*. . . ."[190] With nothing more, it would appear that licenses which cause retention of title in the seller would not be covered by the Convention.

Article 41, however, supports the proposition that the buyer may

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185. DOCUMENTARY HISTORY, *supra* note 7, art. 3(1).

186. DOCUMENTARY HISTORY, *supra* note 7, at 407, 769.

187. DOCUMENTARY HISTORY, *supra* note 7, at 425-26.

188. DOCUMENTARY HISTORY, *supra* note 7, at 407.

189. *See* DOCUMENTARY HISTORY, *supra* note 7, at 407. Secretariat Commentary was reprinted at paragraph 4:

> In some legal systems property passes at the time of the conclusion of the contract. In other legal systems property passes at some later time such as the time at which the goods are delivered to the buyer. It was not regarded possible to unify the law on this point nor was it regarded necessary to do so since [articles 41 and 42] are provided by this Convention for several questions linked . . . to the passing of property: the obligation of the seller to transfer the goods free from any right or claim of a third person. . . .

(i.e. articles 41 and 42).

190. DOCUMENTARY HISTORY, *supra* note 7, at 769 (emphasis added).

expressly agree to take property subject to the seller's claim (such as a title retaining license). Article 41 states that "[t]he seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim."[191] Third party claims as they are referred to here are "addressed to include only rights and claims which relate to property in the goods themselves *by way of ownership*, security interests in the goods, or the like."[192] The seller is liable to the buyer even if the buyer knew or could not have been unaware of the third party right or claim, unless the buyer agreed to take the goods subject to the right or claim.[193] The buyer's agreement to do so may be express, or it may be implied from the facts of the case.[194] Thus, it would be wise to formulate a clause in a license agreement that conspicuously and concisely displays the buyer's approval.

If the buyer can agree to accept goods subject to a third parties right to title, then certainly the buyer can agree to accept goods subject to the sellers right to title. At the very least, a creative and knowledgeable seller may utilize article 41 as a loophole.

IV. 1992

Under the New Haven School approach, the issue whether the Convention for the International Sale of Goods applies to computer software requires that overriding economic community goals be ascertained. The economic unification of Europe by the year 1992 is one added element of special significance and often discussed.[195] Because of the European unification, a consolidation of opinion on economic matters is likely to occur. As a result, the task of formulating overriding community goals should become less monumental. Some commentators argue that one must don the garb of the comparativist, synthesizing diverse and sometimes conflicting national and supranational policies and supporting legal rules.[196] However, the purpose of this section is to merely illuminate the overriding EEC[197] goal of international economic

191. DOCUMENTARY HISTORY, *supra* note 7, at 770.

192. DOCUMENTARY HISTORY, *supra* note 7, commentary 5 (emphasis added).

193. DOCUMENTARY HISTORY, *supra* note 7, at 425-26.

194. DOCUMENTARY HISTORY, *supra* note 7, at 425-26.

195. *See* Coe, *Western Europe: A Preface and Primer*, LEGAL ASPECTS OF DOING BUSINESS IN WESTERN EUROPE 1 (D. Campbell ed. 1983); McLellan, *supra* note 111; Meessen, *Europe en Route to 1992: The Completion of the Internal Market and Its Impact on Non-Europeans*, 23 INT'L LAW. 359 (1989); Schildhaus, *1992 and the Single European Act*, 23 INT'L LAW. 549 (1989); Sontag, *Planning for 1992 Tapestry of Laws Likely to Confuse Attorneys at First*, NAT. L.J., May 15, 1989, at 30, col. 1.

196. Coe, *supra* note 195.

197. Coe, *supra* note 195 (stating that the European Economic Community "EEC" is that confederation of states established by the Treaty of Rome "EEC Treaty." It is one of three communities embraced in the term "European Communities," which are linked by a

expansion. Sources of this EEC goal are the Single European Act of 1986 (SEA)[198] and articles 85 and 86 of the Treaty of Rome. Although there are other regions of the world in which community goals may differ, the goals of the European Community are representative of a combination of common law, civil law and hybrid systems. Thus, their system of decision-making and resultant policies will be closely analyzed to understand their "community goal."

A. 1992 AND THE SINGLE EUROPEAN ACT

Worldwide, "1992" is recognized as the symbol of the most ambitious, complex, and fascinating legislative project in the history of international law.[199] In February 1986, the twelve Member States[200] of the EEC signed the SEA;[201] on July 1, 1987 the SEA entered into force.[202] Of the four provisions of the SEA, title II is most notable since it contains major amendments to the Treaties of Paris and Rome and includes, *inter alia*, the provisions for the establishment of an internal market in Europe by the end of 1992.[203]

B. HISTORICAL BASES OF THE SEA

"Although the idea of a United Europe had been evoked in different ways many times beforehand, the Schuman Plan[204] is widely considered to have been responsible for laying the foundation of today's European economic community."[205] Using the Schuman Plan as a foundation, the Treaty of Paris was signed by what was to become known as the Europe of "the Six," i.e., Belgium, France, Germany, Italy, Luxembourg, and the Netherlands.[206]

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single Council, a single Commission and merged executives. The other two, the European Atomic Energy Community "EAEC" and the European Coal and Steel Community "ECSC," are of relatively narrow scope and purpose).

198. BULL. EUR. COMMUNITIES, *supra* note 4.

199. Schildhaus, *supra* note 195.

200. J. STEINER, TEXTBOOK ON EEC LAW 3 (1988). The Member States of the EEC are: Belgium, Denmark, France, West Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom.

201. BULL. EUR. COMMUNITIES, *supra* note 4.

202. Schildhaus, *supra* note 195.

203. Schildhaus, *supra* note 195.

204. The Schuman Plan refers to the former French Foreign Minister Robert Schuman who, along with Jean Monnet, proposed a plan for the control of coal and steel production by France and Germany and any other European country wishing to join.

205. Schildhaus, *supra* note 195 (stating that on May 9, 1950, the French Foreign Minister, Robert Schuman and Jean Monnet presented a plan for the pooling of coal and steel production by France and Germany and any other European country desirous of joining the pool).

206. Schildhaus, *supra* note 195, at 550.

On January 1, 1973, the EEC was joined by Denmark, Ireland and the United Kingdom.[207] The accession of Greece on January 1, 1981 rounded the number of members to ten.[208] By January 1, 1986, the EEC had twelve member countries as a result of the addition of Portugal and Spain.[209] The continued increase in size of the EEC will probably not continue until after integration in 1992.[210] Although Austria and Turkey have applied for membership,[211] Turkey's application has been rebuffed.[212] In addition, despite rumors of intentions to apply for membership on the part of Norway, Sweden and Switzerland,[213] those rumors should be quieted as the European Free Trade Association—comprising Austria, Finland, Iceland, Norway, Sweden, and Switzerland—and the EEC have agreed to intensify negotiations about setting up a common economic space with minimal trade barriers.[214]

The principal community institutions that perform the decision-making in the Community are the Commission and the Council of Ministers.[215] Member States jointly appoint Commissioners, whose main functions are to study problems and propose solutions in the form of legislation, and to execute duties of the EEC through regulations, directives and decisions.[216] The Commission also serves as a mediator among Member Governments.[217]

The Council of Ministers is comprised of one Minister from each Member State.[218] Generally, however, the term of any particular Minister is dependent upon the appropriateness of their given expertise with

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207. Schildhaus, *supra* note 195.

208. Schildhaus, *supra* note 195.

209. Schildhaus, *supra* note 195.

210. DiNota, *EEC Ambassador Visits NYLS*, N.Y.L. SCH. REP., Dec. 1989, at 1.

211. *See id.*

212. *Europeans Tell Turkey to Wait*, N.Y. Times, Dec. 19, 1989, at D17. The EEC rebuffed Turkey's application saying that it wanted to wait until 1993 before beginning negotiations about membership for that nation. *Id.*

213. Schildhaus, *supra* note 195, at 552.

214. Greenhouse, *European Trade Accord Advances*, N.Y. Times, Dec. 20, 1989, at D16. However, the two sides have not agreed on what mechanism or judicial body should be used to resolve disputes between them. *Id.*; *see also Europe Wary on New Ties*, N.Y. Times, Jan. 16, 1990, at D19 ("The [EEC] told the six European Free Trade Association nations today that it would not be pushed into a hasty agreement on closer ties.").

215. Coe, *supra* note 195, at 3 (citing Z. DREW, DOING BUSINESS IN THE EUROPEAN COMMUNITY 9 (1979), a very informative and practical guide by the Head of International Affairs, Rank Xerox. For a more in-depth treatment of the function and relationship of the key communities' institutions and their role in decision-making, see LASOK & BRIDGE, LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES (1976); LASOK, THE LAW OF THE ECONOMY IN THE EUROPEAN COMMUNITIES 27-50 (1980)).

216. Coe, *supra* note 195, at 3.

217. Coe, *supra* note 195, at 3.

218. Coe, *supra* note 195, at 3.

the subject being discussed.[219] In the past, legislation proposed by the Commission did not become law unless there was unanimous consent among Member States.[220] However, the SEA generally altered the unanimous consent requirement to a mere majority; hence the Commission's influence has been greatly expanded.

The SEA is intended to help achieve the general goals contained in article 2 of the Treaty of Rome, which provides that the EEC should promote "throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability [and] an accelerated raising of the standard of living."[221] Among the objectives expressed in the Treaty of Rome is the "[h]armonization of laws of the Member States sufficient for the proper functioning of the Common Market."[222]

Title II of the SEA is entitled "Provisions amending the Treaties establishing the European Communities" and is divided into four chapters, the most extensive being chapter II.[223] Chapter II amends the Treaty establishing the EEC.[224] Chapter II, section I, "Institutional Provisions," clarifies the means by which legislation shall be enacted, essentially providing that the Commission, in cooperation with the European Parliament,[225] shall propose legislation to the Council, which shall then act by qualified majority.[226] Section II contains the provisions relating to the foundations and the policy of the Community.[227] It is divided into six subsections, of which subsection I, the internal market provisions, is the most immediate and most substantive in its effects.[228]

"Subsection I—Internal Market," orders the establishment of the

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219. *See* Coe, *supra* note 197, at 3 (for example, when transport legislation is being drafted the transport minister from each Member State is sent).

220. Coe, *supra* note 195, at 3.

221. Schildhaus, *supra* note 195, at 550 (citing BULL. EUR. COMMUNITIES, *supra* note 4, art. I, para. (1)).

222. Schildhaus, *supra* note 195, at 551.

223. Schildhaus, *supra* note 195, at 552.

224. Schildhaus, *supra* note 195, at 552.

225. Coe, *supra* note 195, at 4 (The European Parliament or Assembly exercises supervisory powers over the Council of Ministers and the Commission. Each Member State elects a representative to sit in the European Parliament. It has no legislative powers and little budgetary power and is merely a deliberative and consultative body. It operates through debates, reports, specialist standing committees and working papers. The European Parliament includes an effective procedure of questioning the Commission and Council of Ministers.).

226. Schildhaus, *supra* note 195, at 553 (citing BULL. EUR. COMMUNITIES, *supra* note 4, art. 6).

227. Schildhaus, *supra* note 195.

228. Schildhaus, *supra* note 195.

internal market by December 31, 1992.[229] Subsection I states: "The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty."[230]

Impliedly, the term "goods" needs be defined uniformly throughout the EEC to effectuate the mandate of "harmonized" laws and an Internal Market. Arguably, the uniform application of the Convention is, to a degree, dependent upon a determination by the EEC whether computer software is a "good." Perhaps even more important to computer software is subsection V—Research and Technological Development. The goal of subsection V is to strengthen the scientific and technological basis of European industry and to encourage it to become more competitive at the international level.[231] This is done by, among other things, defining common standards and removing legal and fiscal barriers.[232] "The provisions provided for in this subsection are to be adopted by a qualified majority of the Council on a proposal from the Commission after consulting the Economic and Social Committee and in cooperation with the European Parliament."[233] The need to "harmonize" the definition of the term "goods" for internal market purposes, coupled with the assumed desire to improve its competitive position internationally, evinces an overriding goal of international economic growth.[234] Whether international economic growth requires a broad or narrow reading of "goods" will become clear within the context of the Convention on the International Sale of Goods.

C. 1992 AND ARTICLES 85 AND 86 OF THE TREATY OF ROME

Articles 85 and 86 of the Treaty of Rome represent the anti-trust provisions governing the European Economic Community (EEC). Article 85(1) prohibits certain "concerted practices . . . which have as their object or effect the prevention, restriction or distortion of competition."[235] These practices include: (a) price fixing; (b) limiting or controlling production, markets, technical development or investment; (c) sharing markets or sources of supply; (d) *applying dissimilar conditions to equivalent transactions with other trading parties*; and (e) tying arrangements. Article 85(1)(d) begs the question: "what are equivalent

229. Schildhaus, *supra* note 195.

230. Schildhaus, *supra* note 195 (citing BULL. EUR. COMMUNITITES, *supra* note 4, art. 6).

231. Schildhaus, *supra* note 195.

232. Schildhaus, *supra* note 195, at 554.

233. Schildhaus, *supra* note 195 (citing BULL. EUR. COMMUNITIES, *supra* note 4, art. 24).

234. The need to define "goods" is implied.

235. Peters, *International Technology Transfer*, *in* THE LAW OF TRANSNATIONAL BUSINESS TRANSACTIONS 518 (V. Nando ed. 1988).

transactions?" Further, enforcement of article 85(1)(d) among Member States seeking unification logically requires that the term "transactions" be interpreted uniformly. Hence, a uniform interpretation of "transactions" should answer the question: Whether a "sale" of software is equivalent to a "license" of software? This construction of article 85(1)(d), supports the proposition that such a uniform determination should be made.[236]

Article 86 of the Treaty of Rome sets out particularly offensive actions by one or more undertakings of a dominant position:[237]

> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets, or technical development to the prejudice of consumers; (c) *applying dissimilar conditions to equivalent transactions with other trading partners* and; (d) tying arrangements that have no connection with the subject of the contracts.[238]

Although article 86(c) has been interpreted to apply where a Member treats another Member unfairly for the same transaction there are broader applications as yet unapplied. To hypothesize for a moment, assume one Member defines "goods" broadly and equates a "sale" with a "license" while another Member defines "goods" strictly and differentiates a "sale" from a "license." Arguably, companies in these Member States doing business with each other may be legally bound to effect a distortion of trade by virtue of "applying dissimilar conditions to equivalent transactions."[239] Therefore, it seems to make sense that articles 85 and 86 evince a need to determine whether a "sale" should be the equivalent of a "license" for purposes of anti-trust law. To the extent the goals of anti-trust law are consistent with the goals of sale of goods legislation, such a determination should be applicable by analogy to the Convention.[240]

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236. Although the term "goods" may be defined differently for purposes of tax, anti-trust, intellectual property, consumer protection and sale of goods legislation (whether domestic or international), analogies across these legal boundaries are always questionable. Nevertheless, one may argue that when interpreting common terms such as "transaction" or "good," an analogy between interpretation of anti-trust legislation and sale of goods interpretation of these common terms is not unreasonable where the overriding goals of each type of legislation are sufficiently similar, and require the use of the same terms. For a good article dealing with computer software as a product for strict liability purposes under the Consumer Protection Act of 1987 (enacted by the UK pursuant to European Community Directive (85/374/EEC). *See* Hirschbaeck, *Is Software a Product?*, 5 COMPUTER L. & PRAC. 154 (1989).

237. *Id.*

238. *Id.* (emphasis added).

239. Vienna Convention, *supra* note 95. This hypothetical results in a breach of art. 85 and possibly art. 86 as well.

240. *See* Hirshbaek, *supra* note 236.

D. 1992 AND COMPUTER SOFTWARE

The SEA impliedly mandates a unified definition of "goods."[241] It would be optimistic to say that this will occur soon. Even if a directive is formulated on this subject, Members are stretching the limits and implementing laws that are not uniform prompting commentators to call this phenomenon "creative non-compliance."[242] Nevertheless, it is not impossible to formulate what overriding EEC community goals should be, and reach a conclusion of whether "goods" should be broadly or narrowly defined. Assuming that the SEA of 1986 and articles 85 and 86 of the Treaty of Rome evince a strong trend towards the unification of commercial law, the overriding economic goal of the EEC is to increase productivity and economic expansion. "The free movement of goods across intra-Community frontiers is diluted, other than by indirect taxation, through private laws that draw a narrow definition of 'goods' as opposed to private laws that broadly define 'goods.' "[243] It seems appropriate, under the New Haven School approach, that unless the EEC decides otherwise the term "good" should be broadly construed to effectuate these goals. In the same regard, for the purposes of international commerce, "sales" and "licenses" should not be differentiated where two parties contract for computer software.

V. CONCLUSION

During the Industrial Revolution, contract law generally protected the seller, hence the term "caveat emptor" (let the buyer beware).[244] This can be explained on the basis that consumers can inspect the goods prior to purchase.[245] As these members of society saturated the market place and egregious contracts were made in which buyers were severely taken advantage of, the law slowly changed to what some commentators have called "caveat vendor."[246] In time, sellers realized that improving product quality and customer satisfaction translated into greater profits.[247] Today, the transnational arena of commerce is at the brink of

241. See Schildhaus, *supra* note 195, at 553. Subsection I of the SEA impliedly requires that the term "goods" need be defined.

242. *See, e.g.*, Sontag, *supra* note 195.

243. Meessen, *supra* note 195, at 361.

244. Basso, *Reed v. King: Fraudulent Nondisclosure of a Multiple Murder in a Real Estate Transaction*, 45 U. PITT. L. REV. 877, 881 (1984) (stating that the doctrine of caveat emptor flourished in the United States during the Industrial Revolution). For a good history of the caveat emptor doctrine see Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931).

245. Lozano, *Consumer Protection*, 19 ST. MARY'S L.J. 791 (1988).

246. See *id.* The principle of caveat vender was first applied in *Greenman v. Yuba Power Prods.* 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

247. Basso, *supra* note 244.

tremendous expansion just as during the Industrial Revolution. The movement towards "caveat vendor" on a national level should not be applied to transnational commerce. Therefore, the Convention properly favors the seller in several respects.[248]

The fundamental purpose of licensing software is to protect and perpetuate the software industry, although there are other considerations such as tax, anti-trust, and technology transfer laws.[249] In reality, licensing is only effective with medium and large businesses that are especially vulnerable to law suits involving infringement of copyrights or licenses. Individuals and small businesses tend to pirate the software they need, and only purchase (through a license) when documentation, user-support, or protection from liability becomes economically significant.

Whether software is bought or licensed, the end-user is purchasing the software for a particular reason, and unless the seller/licensor is contractually limited otherwise, the seller/licensor is anxious to fulfill the contract for the original end-user hoping to market the system to others. To the extent that the end-user is getting some*thing*, that *thing* should be governed by the Convention. Legal distinctions made on the basis of tax or technology transfer laws are not helpful to a buyer in distress, nor a seller who unwittingly finds himself with an unhappy customer. It is in both parties' interests to settle their contractual disputes in a way that both may benefit. Uncertainty in the law, let alone which law applies, contributes to the parties' inability to settle disputes. The Convention does not exclude the possibility that software is a "good" nor that all non-sale transactions are not covered by the Convention. Where overriding community goals are economic expansion and the facilitation of international commerce, it would be a disservice to limit the scope of application through interpretation. The Convention should apply to software whether it is sold or licensed.

248. *See generally* Thieffry, *Sale of Goods Between French and U.S. Merchants: Choice of Law Considerations Under the U.N. Convention on Contracts for the International Sale of Goods*, 22 INT'L LAW. 1017 (1988); *see also* Friedman, *supra* note 1.

249. Rodau, *supra* note 122, at 862.