2-103. SCOPE
   (a) This article applies to transactions in goods.
   (b) If a transaction includes goods and a copy of a computer program, the following rules apply:
               (1) This article applies to the goods.
               (2) If appropriate, this article, including provisions that by their terms are applicable to "goods," also applies to the product consisting of the goods and the copy considered as a whole. Factors that may be considered in deciding whether it is appropriate to apply this article to that product include whether acquiring the copy is incidental to acquiring the goods, the manner in which the copy is associated with the goods, the nature of and circumstances surrounding the transaction, and whether the copy is subject to a license.
               (3) Unless otherwise agreed, with respect to a copy of a computer program that is part of a product to which, considered as a whole, this article applies:
                       (A) warranties created pursuant to Section 2-312 are limited in application to the buyer's right to use the copy of the computer program as part of the goods; and
                       (B) any provision of this article that would transfer title or any other ownership rights to goods is limited in effect to transferring to the buyer the right to use the copy of the computer program as part of the goods.
   (c) This article does not apply to a foreign exchange transaction.
   (d) If there is a conflict between this article and another article of [the Uniform Commercial Code], that article governs.

Preliminary Comment

   1. **Transactions in goods.** The phrase "transactions in goods" in subsection (a) means a contract for the sale of goods in sections where the word "contract" is used. In sections where "contract" is not used, the underlying transaction is usually a contract for sale and, in any event, does not include a lease of goods (*see* Article 2A) or a security interest in goods (*see* Article 9).

   A "transaction in goods" does not include a bailment or a consignment of goods. These transactions are not contracts within the scope of Article 2, although its rules might be extended by analogy to transactions involving goods that are not specifically covered. This Article does contain provisions governing the rights of certain good faith purchasers for value, including buyers in ordinary course in entrustment situations (2-403).

   2. **When Article 2 applies to product consisting of goods and copy of computer program.** Modern "smart goods" use copies of computer programs that function as if they were merely a part of the goods with which they are associated. Examples include the computer program that controls the antilock brake system of a car and the computer program that presets the channel choices on a television set. Under subsection (b)(2), when a computer program functions as an ordinary part of the goods, this Article applies to the product consisting of the goods and the copy considered as a whole.

   At the other extreme are copies of computer programs that are associated with goods but that should not be considered a part of the goods. For example, pre-loaded operating system and application programs in a computer, which are readily removable and exchangeable, are not

normally considered a part of the goods; instead, the computer functions as a vehicle to access the information in the programs. Accordingly, it would be inappropriate to apply directly this Article to the computer programs.

In many cases, goods incorporate a copy of more than one computer program. In these situations, it is possible for there to be a product consisting of some, but not all, of those programs.

In most cases, the question whether to apply this Article to a copy of a computer program will not be difficult. In close cases, subsection (b)(2) encourages an examination of all relevant factors, including: 1) whether the buyer in a typical transaction acquires the computer program as an incident of the goods or acquires the goods to access the program; 2) the manner in which the program is associated with the goods, including whether its range of functions is pre-set and cannot be modified during operation; 3) the nature of and circumstances surrounding the transaction, including whether the transaction occurs in the consumer market and whether an alternative program that performs the same or a similar function is readily available from a source other than the seller of the goods; and 4) whether the copy of the computer program is licensed separately from the goods.

This list of factors is not intended to be exclusive, and while no single factor is dispositive the first two articulated factors should be accorded additional weight.   In many cases those factors will so strongly point to the appropriate result that no other inquiry is necessary. For example, in the case of a car that contains a copy of an antilock brake program, the first two factors clearly dictate application of Article 2 to the product consisting of the goods and the copy considered as a whole. Similarly, in the case of a copy of an operating program pre-loaded into a computer, the first two factors clearly dictate that this Article does not apply to the copy. A court may take judicial notice of any relevant factor.

The manner in which computer programs are associated with goods at the time of delivery to a buyer and the methods by which new or additional programs are provided after delivery are in a state of change. Accordingly, any attempt to regulate the precise boundaries of this Article as applied to computer programs creates a risk that this Article might hinder the development of new commercial distribution processes. This result would be at odds with the purposes of the Uniform Commercial Code. *See* Section 1-102(2). Therefore, while some guidance is suggested by these comments, prudence dictates not only that these issues be examined on a case-by-case basis but also that prior determinations be considered anew in light of new developments.

3. Manner of application of Article 2 to product consisting of goods and copy of computer program. Once the decision has been made to apply this Article to the entirety of a transaction involving goods and a copy of a computer program (*see* Preliminary Comment 2), care must be taken in the application of the provisions of this Article to the computer program. The provisions of this Article should not be applied to the computer program in isolation. Rather, subsection (b)(2) requires that this Article be applied to the product consisting of the goods and the computer program considered as a whole. The following example describes how the "considered as a whole" concept works in the context of the implied warranty of merchantability:

Example: Seller, a merchant, sells Buyer an automobile that is equipped with an antilock brake system. The warranty of merchantability on the goods (the car) is not excluded or modified. The antilock brake system is controlled by a copy of a computer program that functions as an ordinary part of the goods. In the context, to be merchantable an automobile so described should be fit for the ordinary purposes of a car with antilock brakes. If the automobile is not fit for those purposes it is not merchantable, and the consequences of that lack of merchantability are determined by this Article. This is the case whether the reason for the automobile's failure is (i) a defective brake rotor or (ii) a defective brake computer program. In either case, the appropriate test is whether the goods (the car) are merchantable when viewed as a whole with the computer program. It would not be appropriate to look only or separately at the computer program.

Subsection (b)(3)(A) makes clear that, with respect to the computer program that is part of the product, unless otherwise agreed the warranties created by Section 2-312 are limited in their application to a warranty that the buyer has the right to use the copy as part of the goods. Similarly, subsection (b)(3)(B) makes clear that unless otherwise agreed the title provisions of Part 4 are limited in their effect to transferring to the buyer the right to use the copy as part of the goods.

Care should be exercised in the application of this Article to a copy of a computer program to ensure the protection of any intellectual property rights associated with the program. These rights arise under other law, and the provisions of this Article do not create rights or obligations that infringe on intellectual property rights. For example, in a car with a computer program that controls the antilock brakes, Section 2-312 does not give the buyer of the car a property interest in the intellectual property rights associated with the computer program, the seller's retention of title under Section 2-401(1) does not give the seller a security interest in the intellectual property rights of a third person, Section 2-513 does not give the buyer the right to reverse engineer the computer program or otherwise gain access to the source codes or object codes, and the buyer's special property under Section 2-501 does not extend to intellectual property rights.

While a requirement that a buyer of goods assent to a license agreement before using a computer program associated with goods is a factor in determining whether Article 2 applies to the program, this factor is not dispositive (*see* Preliminary Comment 1). Thus, Article 2 may govern a transaction that includes terms common to licenses, such as terms that preclude the buyer of the goods from transferring the copy of the computer program or that otherwise limit the buyer's right to use the copy. Nothing in this Article invalidates such terms. If these terms would be effective under other law, general principles of freedom of contract render them effective under this Article, subject to Sections 1-102(3) and 2-302. Moreover, application of this Article to a copy of a computer program that is part of a product that consists of the goods and the copy does not convert what would otherwise be a license of the copy under other law into a sale under that law.

4. When Article 2 applies to goods but not to copies of computer programs acquired in the same transaction. Subsection (b) expresses the recognition that in many instances this

Article will not apply to a copy of a computer program that is acquired in a transaction that also involves goods. The most obvious examples are a transaction in which a person buys a computer and also acquires a copy of an operating system or application program, or a transaction in which a person buys a CD-ROM that contains a computer program. In these instances, this Article applies to the goods but other law applies to the computer program.

Many courts have applied a "predominant purpose" test to mixed transactions that involve both goods and services or goods and some other type of property. Under this approach, if the predominant purpose of the transaction is the sale of goods, the rules of Article 2 are applied to the entire transaction; if the predominant purpose is other than the sale of goods, other law is applied to the entire transaction. *See, e.g.,* Insul-Mark Midwest, Inc. v. Modern Materials, Inc., 21 UCC Rep. Serv. 2d 219, 612 N.E.2d 550 (Ind. Ct. App.1993) (not applying Article 2 to a transaction in which coating material was applied to rustproof screws). In contrast, some courts have treated mixed transactions as divisible to reflect better their concern about applying inappropriate law. *See, e.g.,* Garcia v. Edgewater Hospital, 21 UCC Rep. Serv. 2d 595, 244 Ill. App. 3d 894, 613 N.E.2d 1243 (1993) (supplying a defective heart valve constituted a sale divisible from the services that predominated in the transaction). This approach, often referred to as the "gravamen of the action" test, allows application of Article 2 to the goods aspect of a mixed transaction when the dispute relates to the goods even though the predominant purpose of the transaction is other than the sale of goods.

The gravamen of the action test is well suited to transactions involving goods and information. For example, Article 2 should apply to disputes about the quality of the paper or the binding of a book even though other law should apply to disputes about the book's informational content. A computer program is a type of information, and while this subsection does not address transactions involving information generally, it adopts the gravamen of the action test for transactions involving goods and copies of computer programs that are not part of the kind of product discussed in Preliminary Comments 1 and 2.

The gravamen of the action test does not preclude application of a provision of Article 2 by analogy. For example, as indicated above, in a transaction for a CD-ROM that contains a computer program, law other than Article 2 applies to the program. In appropriate circumstances, however, the program should be subject to an implied warranty of merchantability. Before making that decision, however, other law should be considered, such as a statute that explicitly governs computer information transactions but that is not directly applicable to the transaction, which may provide a solution that is better tailored to the dispute.

5. Exclusion of foreign exchange transactions. Subsection (c), which is new, excludes "foreign exchange transactions", defined in Section 2-102(a)(__), from the scope of Article 2. Although a contract where currency is the commodity exchanged is a sale of goods and not usually excluded from the scope of this Article, an exchange where delivery is "through funds transfer, book entry accounting, or other form of payment order, or other agreed means to transfer a credit balance" is not governed by Article 2. Rather, Article 4A or other applicable law applies. *See* Section 2-102(a)(__), which excludes the subject matter of foreign exchange transactions from the definition of goods. On the other hand, if the parties agree to a forward

transaction where, after January 1, 2002, dollars are to be physically delivered in exchange for the delivery of Euros, the transaction is not within the "foreign exchange" exclusion and Article 2 applies.

6. Relationship with other UCC articles. Subsection (d) is new and replaces the language in former Section 2-102 that Article 2 "does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a secured transaction." That language applied to "either-or" transactions and did not deal with cases where two or more articles applied to the same transaction. These overlaps occur when the buyer's payment obligation is represented by a promissory note (Article 3) or is paid by check (Articles 3 and 4), funds transfer (Article 4A), or letter of credit (Article 5). They also occur where either the parties or creditors of the parties create security interests in the goods.

There is no tension between articles if, for example, the transaction is a contract for sale and no security interest is created in the goods or if the transaction is exclusively a security agreement. Similarly, if the transaction is a "true lease" rather than a sale of goods or a secured transaction, Article 2A alone applies.

In a contract for sale, the most likely overlap is with Article 9. The seller, the buyer, or some third person may create a security interest in the goods sold or a security interest may arise under Article 2. In these cases, Article 9, not Article 2, applies to the creation, perfection, priority and enforcement of the security interest. For example, a security interest arising when the seller ships under reservation (Section 2-505) is subject to Article 9, but Section 9-110 expressly refers some aspects of perfection and enforcement back to Article 2.

In cases where Article 2 gives the seller or buyer interests in the goods that are not security interests, Article 2 rather than Article 9 governs the rights and remedies between seller and buyer. These rights, however, may be subject to security interests in the same goods perfected under Article 9 by third persons. For example, a reclaiming seller under Section 2-702 is subject to the rights of a good faith purchaser for value.

If payment is by letter of credit, Sections 2-325 and 2-506 deal with the duty of the buyer to provide and the effect of furnishing or not of the letter of credit, but Article 5 defines the critical terms and covers all aspects of the transaction between the seller and buyer until the letter of credit is paid or dishonored. Even then, Article 5 prescribes the effect of payment or dishonor between the issuing bank and its customer, the buyer or seller.

Subsection (d) is intended to operate in one direction only; that is, to subordinate Article 2 to any inconsistent rule found in another Article. It should not be construed to permit a provision from Article 2 to be injected into another Article.