

What's Software Got To Do with It? The ALI *Principles of the Law of Software Contracts*

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I. INTRODUCTION

In May 2009, the American Law Institute (ALI) approved its *Principles of the Law of Software Contracts (Principles)*. The attempt to codify, or at least unify, the law of software contracts has a long and contentious history, the roots of which can be found in the attempt to add an Article 2B to the Uniform Commercial Code (UCC) in the mid-1990s. Article 2B became the Uniform Computer Information Transactions Act (UCITA) when the ALI withdrew from the project in 1999, and UCITA became the law in only two states, Virginia and Maryland. UCITA became a dirty word, with several states enacting

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“bomb shelter” provisions to ensure that UCITA would never enter those states by way of a choice of law clause.¹ Although the *Principles* was conceived, in part, as a counterweight to UCITA, the latter was dead in the water by the time the *Principles* Project became active. Nevertheless, the *Principles* Project proceeded apace. This Article examines the results of that decision.

The proponents of efforts to formulate a body of law for software contracts tend to insist that such a body of law is necessary because software transfers, as transfers of copies of information, are different from transfers of goods, and these differences make the common law of contracts and Article 2 of the UCC inappropriate bodies of law to govern software contracts.² The ALI *Principles* constitutes the latest attempt at such unification, and in this Article, we argue that there is little in the *Principles* that addresses any unique characteristics of software. Neither one of us was involved in the Article 2B/UCITA project, so we approach this problem by looking at the law as it existed at the time the *Principles* Project started instead of looking at the law at the time Article 2B was conceived.

II. WHERE’S THE PROBLEM?

In an early draft, the *Principles* justified itself as necessary to correct “disarray” in the law involving software contracts.³ This language was toned down in the final version of the *Principles*, where the law of software transactions was said to be “continu[ing] to develop” and where ultimately the *Principles* was justified in the end on the ground that software is an economically important area that needs to be “clarif[ied] and unif[ied].”⁴ Unfortunately, the commentary to the *Principles* never explained why existing law did not perform that function adequately. Nevertheless, the ALI went ahead with a project that lasted four years and occupied the efforts of

1. For a short history by the Associate Reporter for the *Principles* project, see Maureen A. O’Rourke, *An Essay on the Challenges of Drafting a Uniform Law of Software Contracting*, 10 LEWIS & CLARK L. REV. 925, 927-30 (2006); see also Deborah Tussey, *UCITA, Copyright, and Capture*, 21 CARDOZO ARTS & ENT. L.J. 319, 319 (2003) (“‘[B]omb shelter’ provisions . . . outnumber adoptions of the act itself.”).

2. See, e.g., Raymond T. Nimmer, *Through the Looking Glass: What Courts and UCITA Say About the Scope of Contract Law in the Information Age*, 38 DUQ. L. REV. 255, 257-58 (2000).

3. PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS, DISCUSSION DRAFT 1 (ALI 2007) [hereinafter DISCUSSION DRAFT].

4. AM. LAW INST., PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS (2010) [hereinafter ALI PRINCIPLES].

any number of talented persons, especially, of course, the efforts of the extremely able Reporters.

The original UCC Article 2B project began because of the view that Article 2 of the UCC itself could not apply to software. Whether Article 2 should apply to software is still debated by scholars,⁵ but courts tend to apply Article 2 uniformly to software transactions.⁶ Certainly, Article 2 is not a perfect fit, because it clearly does not cover some software-specific issues, such as the distinction between licenses and sales and the relationship between software contracts and federal intellectual property law, but the project glossed over those problems and set to tweaking Article 2 for inexplicable reasons.

III. BUT THERE WERE PROBLEMS

The *Principles* Project gave the ALI the perfect opportunity to identify the best approach to two software-specific issues: (1) whether an agreement labeled a license grants only license rights despite characteristics making it functionally equivalent to a sales agreement, and (2) the limits placed by copyright law on freedom of contract. These two issues have either not been covered at all in the *Principles* (in the former case), or have been covered in a cursory fashion (in the latter case).

A. License or Sale?

Software vendors almost always attempt to license not only their intellectual property but also the material embodiment of that intellectual property, such as the disk containing the software. There are many reasons for doing this: one is to avoid the impact of copyright law's first-sale doctrine⁷ and another is to avoid the application of Article 2 of the UCC.⁸ The characterization of a transaction as a license rather than a sale has other ramifications as

5. See, e.g., Jean Braucher, *Contracting Out of Article 2 Using a "License" Label: A Strategy that Should Not Work for Software Products*, 40 LOY. L.A. L. REV. 261, 262 (2006) (suggesting that Article 2 is appropriate for software transactions in the areas of contract formation, quality warranties, and damage remedies); Raymond T. Nimmer, *An Essay on Article 2's Irrelevance to Licensing Agreements*, 40 LOY. L.A. L. REV. 235, 237 (2006) (arguing that the rules of Article 2 "are, and should be, irrelevant to licensing").

6. See, e.g., *Advent Sys. Ltd. v. Unisys Corp.*, 925 F.2d 670 (3d Cir. 1991); *Recursion Software, Inc. v. Interactive Intelligence, Inc.*, 425 F. Supp. 2d 756 (N.D. Tex. 2006); *I. Lan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328 (D. Mass. 2002); *Wachter Mgmt. Co. v. Dexter & Chaney, Inc.*, 144 P.3d 747 (Kan. 2006).

7. See, e.g., John A. Rothchild, *The Incredible Shrinking First-Sale Rule: Are Software Resale Limits Lawful?*, 57 RUTGERS L. REV. 1, 17-18 (2004).

8. Braucher, *supra* note 5, at 275.

well, particularly in bankruptcy.⁹ While there are cases that set forth guidelines for distinguishing a license from a sale, the guidelines are by no means clear. Although courts say that they focus on the economic realities of each transaction to distinguish a license from a sale, the economic realities differ depending on the type of case. For instance, courts in bankruptcy cases will look at whether the entire obligation to pay was incurred prepetition.¹⁰ This is important in bankruptcy because if the transferee's entire payment obligation was incurred prepetition, the transaction looks like a sale on credit and the transferor is treated as a vendor who, if unsecured, would be paid only a portion of its payment claim.¹¹ If the transferor is successful in having its transaction classified as an executory license, the transferee, in order to retain its right to the software in bankruptcy, would be required to make all payments anticipated by the contract.¹²

On the other hand, sometimes the question of whether a license is really a sale arises when the transferee transfers the software in contravention of the license agreement. In those cases, the transferee wants the license characterized as a sale so that its subsequent transfer is protected by the first-sale doctrine. In cases in which first sale is the issue, courts have held that a contract requiring a single payment for a perpetual transfer of possession is a contract for sale, thus triggering the first-sale doctrine.¹³

At first blush, the bankruptcy cases appear very different from the first-sale cases, with the bankruptcy cases focusing on the amount of the transferor's payment in bankruptcy and the first-sale cases implicating the relationship between freedom of contract and federal intellectual property law. At a very basic level, however, the question in the two types of cases is the same: did the transferee acquire the property rights of an owner? If the answer is yes, the debtor/transferee

9. A license is treated as an executory contract under the Bankruptcy Code. 11 U.S.C. § 365 (2006); see *In re DAK Indus.*, 66 F.3d 1091, 1093-95 (9th Cir. 1995) (finding that a software transaction was a sale rather than a license where the debtor and Microsoft entered into a software distribution agreement under which the debtor promised to pay for the software in five installments because the debtor had acquired all rights to the software that it was to distribute before filing its bankruptcy petition).

10. See *In re DAK Indus.*, 66 F.3d at 1091.

11. See 11 U.S.C. § 726(a)(2) (2006) (stating that unsecured creditors are paid only after priority claims are paid in full); WARREN E. AGIN, *BANKRUPTCY AND SECURED LENDING IN CYBERSPACE* § 7, at 20 (3d ed. 2001) (noting that a vendor under a nonexecutory agreement of sale is a general unsecured creditor).

12. The Bankruptcy Code allows the trustee in bankruptcy to assume or reject any executory contract of the debtor. To assume an executory license, the trustee (or debtor in possession) must cure all defaults under the license and provide adequate assurance of future payment. 11 U.S.C. § 365(b).

13. *Softman Prods. Co. v. Adobe Sys. Inc.*, 171 F. Supp. 2d 1075 (C.D. Cal. 2001).

in bankruptcy keeps the software and the vendor is paid as an ordinary creditor. Likewise, the transferee who wishes to resell the software may do so because of the first-sale doctrine.

In the 1980s, when the ALI and the National Conference of Commissioners on Uniform State Laws promulgated Article 2A of the UCC to govern leases of goods, the drafters developed a test for distinguishing licenses from sales. This test focuses on the economic realities of the transaction in question.¹⁴ In developing this test, the drafters drew from a large body of case law in which courts had reclassified leases as secured sales if the lease agreements appeared to grant the transferee ownership of the “leased” goods for the entire economic life of those goods.¹⁵ The drafters also identified, and rejected, factors that had led a few courts to rule that a lease was in fact a sale, and added a subsection instructing courts that some factors, standing alone, did not transform a lease into a secured sale.¹⁶

The lack of standard guidelines in the software case law might make a similar test for distinguishing a license from a sale an inappropriate component of a Restatement project, as a Restatement sets forth settled law, or law that “might plausibly be stated by a court.”¹⁷ A Principles project, on the other hand, aims to “express[] the law as it should be.”¹⁸ Incorporating such a test into the *Principles* would have addressed an important software-specific problem. Unfortunately, that was not done.

B. *Contract or IP Law?*

The relationship between contract law and federal intellectual property law is of great importance in software transactions. The Associate Reporter for the *Principles*, Maureen O’Rourke, identified this relationship as a major software problem, because software contracts, “perhaps more than other contracts, routinely contain provisions that seek to broaden intellectual property rights.”¹⁹ Nevertheless, the *Principles* simply states that a contract term “is unenforceable if it (a) conflicts with a mandatory rule of federal intellectual property law; or (b) conflicts impermissibly with the

14. U.C.C. § 1-203 (2001).

15. See generally Corinne Cooper, *Identifying a Personal Property Lease Under the UCC*, 49 OHIO ST. L.J. 195 (1988).

16. U.C.C. § 1-203(c) & cmt. 2.

17. This description of the Restatements is from the ALI Web site. See ALI, Overview, <http://ali.org/index.cfm?fuseaction=projects.main> (last visited Apr. 1, 2010).

18. *Id.*

19. O’Rourke, *supra* note 1, at 933.

purposes and policies of federal intellectual property law; or (c) would constitute federal intellectual property misuse in an infringement proceeding.”²⁰

Dean O’Rourke explained in her article that the preemption section “focused on stating the law at a high level and providing expansive comments to provide courts with factors to evaluate in deciding whether or not to enforce a particular contractual provision.”²¹ Certainly the comments are expansive and provide factors that a court should consider in determining whether a contractual provision conflicts with federal intellectual property law. For instance, one factor that the comments suggest that courts consider is the parties’ relative bargaining power, because restrictions in standard-form agreements look more like restrictions binding on the entire world (and thus preempted by copyright law) than those in negotiated agreements.²² A Principles project can set forth best practices; indeed, the *Principles* does so in the contract formation section. It is curious, then, why these “best factors,” pulled from cases, did not make it into the “black letter,” especially given the ALI’s position that Principles projects have the goal of stating the law as it should be.²³ It would have been better if the influence of the ALI on drafters and courts had been squarely placed behind black letter provisions, rather than relegating the good stuff to the comments.

Unfortunately, the Reporters seemed hindered in their approach to preemption by the UCITA drafting history. The preemption issue was a particularly contentious one in the drafting process,²⁴ and the ultimate resolution in UCITA was not a resolution at all: UCITA states that a provision of UCITA is unenforceable to the extent that it is preempted by federal law,²⁵ and that a court may refuse to enforce a

20. ALI PRINCIPLES, *supra* note 4, § 1.09.

21. O’Rourke, *supra* note 1, at 934.

22. *See, e.g.*, ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1455 (7th Cir. 1996) (holding that a “simple two-party contract is not equivalent to any of the exclusive rights within the general scope of copyright and therefore may be enforced” (internal quotation marks omitted)). *But see* Bowers v. Baystate Techs., Inc., 320 F.3d 1317, 1337 (Fed. Cir. 2003) (Dyk, J., dissenting) (suggesting a state law giving effect to nonnegotiated contracts eliminating fair use is no different from a hypothetical state law eliminating fair use in contravention of federal law).

23. ALI, CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 12 (2005), available at <http://www.ali.org/doc/StyleManual.pdf> (stating that the *Principles* “assume the stance of expressing the law as it should be, which may or may not reflect the law as it is”).

24. O’Rourke, *supra* note 1, at 933.

25. UCITA § 105(a) (2002).

contract term if that term conflicts with a fundamental public policy.²⁶ The *Principles* was drafted ten years after UCITA. In the intervening decade, standard-form software licenses had become more common, and courts had had more opportunities to address the preemption issue. In addition, UCITA, as a uniform law, could not veer very far from rules established in case law because it had to be sold to state legislatures for enactment.²⁷ The *Principles*, on the other hand, is aspirational and could have squarely addressed the issue. The failure to do so was a major omission of the project.

IV. BUT THEY FOUND GENERIC PROBLEMS TO ADDRESS

The failure of the *Principles* to deal with serious software-specific problems stands in sharp contrast to its willingness to deal with nonsoftware issues.²⁸ Thus, there are sections on public policy, interpretation, unconscionability, choice of law, forum selection clauses, parol evidence, “whose meaning prevails,” liquidated damages, specific performance, and other problems that are well understood in contract law today. Indeed, only about twenty-two percent of the pages in the *Principles* deals with software-specific problems.²⁹ It is not clear why the Reporters addressed these issues rather than other issues that may arise in contracts—for example, mistake, impossibility, incidental damages, and so on. No attempt was made to explain the reasons why some were chosen.

Some of those sections are copied more or less verbatim from the Restatement (Second) of Contracts.³⁰ Although the commentary to the *Principles* does not explain why these provisions were needed in a

26. *Id.* § 105(b).

27. One criticism of the uniform laws drafting process is that it is not focused on producing the “best” law because of concerns about enactability. Tussey, *supra* note 1, at 355.

28. A very common phrase in the Reporters’ Notes is “courts have applied unconscionability [or other common contract law rules] in software cases.” The Notes do not explain why that commonplace occurrence is worth noting, although the frequency of that notation underscores the notion that the *Principles* contains little that is original.

29. About 61 of the 276 pages deal with software-specific problems. Sections 1.01 through 1.09 and section 4.03 are the only sections that deal with software-specific issues, and most of those provisions are definitional. *See* ALI PRINCIPLES, *supra* note 4. Two other sections, sections 3.01 (dealing with indemnification against infringement) and 4.04 (dealing with cancellation), deal with issues that are probably more prevalent in software contracts than in contracts for the transfer of goods. *Id.*

30. An example of a copied section with very minor, but unexplained, changes to the text of the Restatement is the definition of unconscionability, found in section 1.11; unfortunately, the comments to the *Principles* do not explain why the definition of unconscionability found in section 208 of the Restatement (Second) of Contracts needed to be changed. *See id.*

project devoted to software contracts, a niche of general contract law, they are probably harmless.³¹ Other parts of the *Principles*, however, do deviate from accepted law. Again, there is no explanation as to why the problems addressed by these provisions are limited to software. Instead, the proffered solutions seem to take advantage of the open ended nature of the project to set forth best principles for most anything, or at least some things that might involve software—as well as every other commercial transaction.

One example of inexplicable change can be found in the *Principles*' approach to the “battle of the forms” problem. In section 2.01, the *Principles* adopts the battle of the forms provision from amended Article 2, which is not only not the law in *any* state, but which has not even been *introduced* for adoption in any state.³² In the comments, the Reporters justify this choice by stating that the amended Article 2 provision “is clearer and simpler than original § 2-207 and is party neutral.”³³ That may very well be the case, but the choice has nothing to do with the nature of software transactions.

Other examples of changes that have little to do with software involve choice of law and choice of forum. The section on choice of law inexplicably deals only with standard-form contracts, with special provisions for consumer transactions.³⁴ Why is that? Do only those types of software contracts have choice-of-law issues?³⁵ Similarly, the choice-of-forum provision (section 1.14) is drawn from section 80 of the Restatement (Second) of Conflict of Laws but is by no means identical. Why the changes? And do they have anything to do with software? Again, these questions are not addressed.

V. THERE ARE SOME USEFUL PROVISIONS

Despite the lack of software-specific provisions, the *Principles* may provide some useful guidance in solving problems that, while not software-specific, are seen often in software transactions.

31. An irritating aspect of the *Principles* is the frequency by which it says that “courts have enforced [insert legal rule] in software agreements.” *E.g.*, ALI PRINCIPLES, *supra* note 4, § 1.13 cmt. a (referring to choice of law provisions). These “dog bites man” references have the appearance of mere filler.

32. See Uniform Law Comm'rs, A Few Facts About the Amendments to UCC Articles 2 and 2A, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucc22A03.asp (last visited Apr. 1, 2010).

33. ALI PRINCIPLES, *supra* note 4, § 2.01(b)(2) & cmt. d.

34. *Id.* § 1.13.

35. For some reason, the Reporters' Notes to section 1.13, and not the black letter, refer nonstandard form contracts to section 187 of the Restatement (Second) of Conflicts. *Id.* § 1.13 cmt. a. The Notes do not disclose the model for section 1.13 (b), although the source for section 1.13(a) is (confusingly) described. See *id.*

A. Formation

The electronic contract formation and modification sections are examples of such provisions. The major formation problem courts have faced in electronic contracting cases might be styled the “wrap” problem—whether contracts have been formed by means of “shrinkwrap,” “browsewrap,” or “clickwrap.”³⁶ Section 2.02 (b) of the *Principles*, after some initial hesitation,³⁷ adopts a general standard of reasonableness to determine formation issues. This is also the standard that courts have settled on in “wrap” cases,³⁸ and, of course, it is the general standard in contract law: that of the reasonable person.³⁹ For many years, courts have enforced paper standard terms as contracts if those terms satisfy a “reasonable communicativeness” test. Under that test, a court evaluates the physical characteristics of the form to determine whether it sends a signal that it is intended to be a binding legal document and also considers other subjective factors to determine whether the offeree had the opportunity to become meaningfully informed of the terms of the form.⁴⁰

This reasonable communicativeness test provides useful guidance to courts in deciding electronic contract formation cases. Courts in the early cases often held, with little discussion, that an offeree could be contractually bound to electronic terms simply by clicking an “I agree” icon on the Web site.⁴¹ Courts combined a number of different presentations into this “clickwrap” category: terms with an “I agree” icon at the end, terms in a pop-up box with an “I agree” icon adjacent to the box, and terms that were accessible

36. For an explanation of these terms, see Christina L. Kunz et al., *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279, 279-80 (2003).

37. An early draft of the *Principles* provided that electronically presented standard-form terms would be enforceable only if the offeree was required to click her agreement at the end of the form. See DISCUSSION DRAFT, *supra* note 3, § 2.01.

38. E.g., *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 402-03 (2d Cir. 2004); *Southwest Airlines Co. v. BoardFirst, L.L.C.*, No. 3:06-CV-0891-B, 2007 U.S. Dist. LEXIS 96230, at *15-17 (N.D. Tex. Sept. 12, 2007); see also Juliet M. Moringiello & William L. Reynolds, *Survey of the Law of Cyberspace: Electronic Contracting Cases 2007-2008*, 64 BUS. LAW. 199, 203-05 (2008) (discussing judicial approach to browsewrap).

39. See Juliet M. Moringiello, *Signals, Assent and Internet Contracting*, 57 RUTGERS L. REV. 1307, 1337-40 (2005) (discussing opinions applying the reasonable communicativeness test).

40. See *id.* (noting that courts have long required that standard-form paper contracts reasonably communicate their terms in order to be enforced as contracts).

41. See generally *DeJohn v. TV Corp. Int'l*, 245 F. Supp. 2d 913 (C.D. Ill. 2003) (upholding terms that were presented via hyperlink above the “I agree” icon); *I. Lan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328 (D. Mass. 2002) (holding that clickwrap is an acceptable way to form a contract without explaining the presentation of the contract terms).

through a hyperlink adjacent to the “I agree” icon.⁴² On the other hand, the courts were less receptive to “browsewrap,” a term used to describe a presentation that does not require any explicit manifestation of assent.⁴³ More recently, courts have recognized that the line between clickwrap and browsewrap can be blurry, especially when the terms can be reached only via a hyperlink on the same page as the “I agree” icon.⁴⁴ By endorsing a reasonableness test, the *Principles* steers courts away from a sometimes false distinction between clickwrap and browsewrap and encourages the use of well-developed, paper-world contract formation principles.

B. *Safe Harbors*

Some clickwrap presentations are better than others, and the *Principles* recognizes this. The *Principles* provides a safe harbor for formation under which a transferee will be deemed to have accepted standard form terms if certain requirements are met.⁴⁵ This safe harbor, as applied to electronic standard form terms, recognizes that standard form terms should be enforced if the offeree has reasonable notice of and access to the terms before payment and signifies her assent to the terms at the end of or adjacent to the standard form if it is presented electronically. Therefore, if a software transferor presents contract terms by way of a pop-up box and the “I agree” icon appears next to that box, the terms will be enforced. This safe harbor provides useful guidance to courts in analyzing *all* electronically presented terms, not just those in software transactions. Indeed, many of the cases cited in the Reporters’ Notes explaining the formation section have nothing to do with software.⁴⁶

42. See Ronald J. Mann & Travis Siebeneicher, *Just One Click: The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984, 990 (2008) (describing these different types of presentations).

43. See *id.*

44. See, e.g., *Hotels.com, L.P. v. Canales*, 195 S.W.3d 147, 155 (Tex. App. 2006) (explaining that the terms at issue could not be “neatly characterized as either a ‘click-wrap’ or ‘browse-wrap’ agreement”).

45. ALI PRINCIPLES, *supra* note 4, § 2.02(c).

46. In the commentary to section 2.02, the drafters cite to *Register.com v. Verio, Inc.*, 126 F. Supp. 2d 238 (S.D.N.Y. 2000), *aff’d*, 356 F.3d 393 (2d Cir. 2004), which dealt with the defendant’s unauthorized access to the WHOIS database; *Motise v. America Online, Inc.*, 346 F. Supp. 2d 563 (S.D.N.Y. 2004), which involved the terms of service for an America Online account; and *Hubbert v. Dell Corp.*, 835 N.E.2d 113 (Ill. App. Ct. 2005), *appeal denied*, 844 N.E.2d 965 (Ill. 2006), which dealt with the sale of a computer, as well as several other cases that had nothing to do with software.

C. Remote Disablement

One of the most contentious issues in the UCITA drafting process was that of remote disablement of software as a remedy for breach of the software agreement. Although the final version of UCITA does not allow such disablement,⁴⁷ much time was spent discussing the parade of horrors that would occur, including planes falling from the sky, if UCITA were to become law.⁴⁸

Remote disablement is a form of self-help repossession, and self-help is a rare remedy in American law. It exists under Article 9 of the UCC, but a creditor wishing to use that remedy must not breach the peace.⁴⁹ This rule is so strong in Article 9 that parties to a security agreement cannot vary it by contract, nor can they attempt to define breach of the peace in their contracts.⁵⁰ The possibility of breaching the peace and incurring penalties for doing so forces many secured creditors to forgo their self-help remedy and use the judicial process of replevin to foreclose on their collateral. Likewise, self-help is not permitted in landlord-tenant law. An owner who wants to recover his premises from a tenant who is violating a lease must resort to the judicial process of eviction to do so.⁵¹

The law prohibits self-help in most instances in order to preserve the peace. It is obvious that a tenant who is faced with a landlord trying to enter leased premises might react in such a way that could lead to violence. When software and other intangible assets are involved, the law today gives little guidance as to whether self-help is appropriate. Here, the *Principles* makes an important policy choice; it does not allow self-help disablement as a remedy for breach of contract under any circumstances.⁵²

47. UCITA § 605(f) (2002) (“This section does not authorize use of an automatic restraint to enforce remedies because of breach of contract or for cancellation for breach.”).

48. See Mary Jo Howard Dively, *The New Laws that Will Enable Electronic Contracting: A Survey of the Electronic Contracting Rules in the Uniform Electronic Transactions Act and the Uniform Computer Information Transactions Act*, 38 DUQ. L. REV. 209, 250 (2000) (referencing popular press accounts of the potential for electronic self-help being used to shut down air traffic control and hospital systems).

49. U.C.C. § 9-609(b)(2) (2001).

50. *Id.* §§ 9-602(6), 9-603(b).

51. See, e.g., *Berg v. Wiley*, 264 N.W.2d 145, 151 (Minn. 1978) (“We recognize that the growing modern trend departs completely from the common-law rule to hold that self-help is never available to dispossess a tenant who is in possession and has not abandoned or voluntarily surrendered the premises.”).

52. ALI PRINCIPLES, *supra* note 4, § 4.03. The *Principles* do, however, allow a transferor to build a “time bomb” into software that disables the software after an agreed-to period of time in the agreement provided that the software would only be available for that period of time. *Id.*

VI. THE GLORIES OF THE COMMON LAW

More generally, the failure of the *Principles* even to identify significant software-specific legal problems shows the resilience of existing law when faced with new technology. This should come as no surprise. One of the glories of the common law is that it has proven itself infinitely adaptable to changed circumstances—as Lord Coke famously said, “Out of the olde fields grow the new corne.”⁵³ We have read every reported decision involving electronic contracts decided since 2004.⁵⁴ Those cases show that courts have no trouble in dealing with the problems posed by new technology; they simply have applied traditional law, primarily hornbook contract law, with little or no hesitation.

The *Principles* Project combined the efforts of many enormously talented and dedicated persons, especially the efforts of the Reporters. That the project in the end has so little to offer in the way of software-specific provisions does provide a wonderful confirmation of the ability of Lord Coke’s “olde corne” to grow in “new fields.” That is a lesson that perhaps cannot be learned too often. The absence of software-specific provisions in the *Principles* may confirm that case law is getting it right.

In the end, the *Principles* shows the hazard of seeking a solution to a problem that does not exist. By the time the Project began, it should have become clear that although there were scattered statements that the relevant law was in a state of “disarray”⁵⁵ and although software transaction are of enormous economic importance, there were few serious legal issues for the project to address. We know that because there has been little litigation over software-specific issues. In fact, the cases in the Reporters’ notes generally do not involve software, suggesting how few software-specific issues have arisen. Moreover, UCITA no longer threatened anyone. There was, in short, no problem to address, and the *Principles* became, in the end, much ado about nothing.

53. SIR EDWARD COKE, PREFACE TO THE FIRST PART OF THE REPORTS OF SIR EDWARD COKE KNT. (Joseph Butterworth & Son 1826) (1727).

54. We did so for Annual Surveys on Electronic Contracting, which we published in *The Business Lawyer*. See, e.g., Moringiello & Reynolds, *supra* note 38. The opinions we read were “reported” in the sense that they were available on an electronic database.

55. See *supra* text accompanying note 3.

VII. A PATCH?

The Restatement (Second) of Conflict of Laws was published in 1971 in the middle of great ferment in the whole field. Fifteen years later, the ALI published a “patch,” a small volume that updated three dozen sections of the Second Restatement in light of the many developments during that period. Perhaps a similar patch should have been the goal of the Software Project. The *Principles*, after all, contains very few software-related provisions, and they could have been bundled together in a handy slim volume devoted only to software problems.⁵⁶

VIII. LESSONS FOR THE FUTURE

There are lessons for the ALI to be drawn from the *Software Principles*. First, be careful that new projects are chosen on their own merits, rather than as an effort to settle old scores. Second, be sure that the project addresses the issues that do need to be considered. Finally, the charter for the project—that is, the scope and coverage—should be clear, and the work should not stray from that charter.

A. *Avoid Original Sin*

Nevertheless, the project was not abandoned—in part, no doubt, because some of those who were unhappy with UCITA’s alleged failure to protect consumers wanted to rewrite the law in the area of electronic contracting, but the *Principles* seems to have continued mostly because of inertia.⁵⁷ The project teaches, therefore, that constant evaluation should be conducted during the course of any endeavor to see whether it really should be continued. In other words, a project conceived in sin may not be worth doing.

B. *Deal with Trouble-Spots*

More troubling is the failure of the project to discuss software-specific issues such as preemption and license/sale. We do not know why the *Principles* does not address those issues, but we suspect that it is because agreement could not be reached on how to resolve them.

56. This patch might have resembled the “hub-and-spoke” method originally contemplated for revising Article 2 of the UCC. See William H. Henning, *Amended Article 2: What Went Wrong?*, 11 DUQ. BUS. L.J. 131, 134 (2009).

57. The *Principles* did not neglect UCITA. It is constantly cited throughout the document, and often during the meetings of the Members’ Consultative Group old battles over UCITA were fought once again. One of us did not participate in the UCITA wars and was amazed by the frequency and intensity with which those battles were refought.

These issues are very important indeed, and we suspect that pressure for any particular solution was evenly balanced. Neither the Reporters nor the courts have been able to see their way to a definitive resolution. Perhaps it would have been wise for the Reporters to tell us such was the case; that certainly would be useful information for all lawmakers to have. In any event, the issues should have been discussed, even if they could not be resolved.

C. Keep to Your Charter

Another serious concern comes from the Reporters' constant tinkering with well-settled law that has nothing to do with software. We have mentioned such items as a different version of the battle of the forms, and provisions dealing with choice of law and choice of forum.⁵⁸ Although the solutions to generic problems proffered by the *Principles* seem reasonable enough, there is grave danger in their being addressed by a project explicitly designed to address a specific issue. Regardless of their merit, these changes now bear the imprimatur of the ALI. That is a pretty powerful brand name, and it is possible that the provisions on choice of law or forum may, as a result, have some influence in the world. That would be unfortunate, for the provisions were drafted and approved without active consideration of those who are experts in choice-of-law—conflict-of-laws scholars.⁵⁹

Similarly, the generic contracts changes were made without consideration by the larger world of contracts scholars and lawyers.⁶⁰ Facially, the *Principles* Project seems to be a “niche” project of interest to those with a specific interest in software and intellectual property. But it is a project with much wider substantive scope in that software transactions implicate broader issues of property, contract, and choice of law. Despite this broader scope, there were not many people actively involved in the project—no more than a couple of dozen attended the meetings of the Consultative Group, and the ALI session at which the Final Draft was approved was poorly attended. This is far too small a portion of the membership of the ALI to consider provisions that extend beyond the niche of software-specific contract problems.

58. See *supra* text accompanying notes 29-35.

59. One of us teaches and writes about conflicts. There were not many other conflicts experts among the Advisors or Consultative Group, and conflicts experts who were not part of the project seemed blissfully unaware of it.

60. We do not believe that it is sufficient for those experts to know of the possibility that there might be portions of a project dealing with, say, choice of law.

We do not know, of course, what the response of those worlds to the changes would have been. But we believe that that the ALI should be careful in approving generic provisions in specific projects without explicit consideration of those changes by those who are more familiar with the area. That caution is especially appropriate when the project changes black-letter sections of a Restatement. The ALI should be aware of “mission creep.”

These lessons should give some pause for the future of the ALI’s Principles projects. Their history has not been a happy one. The *Principles of Corporate Governance* drew forceful criticism from the project’s inception.⁶¹ More recently, the *Principles of the Law of Family Dissolution* has also drawn serious criticism based on its scope.⁶² Earlier, the *Complex Litigation Project*,⁶³ the result of much effort by many persons, languishes virtually uncited and unnoticed by the courts. Perhaps any attempt to capture “Best Principles” rather than to restate existing law in a project necessarily bound to take several years to complete is doomed to failure. The Restatements have been phenomenally successful, perhaps because they address subjects that were already well developed in the common law.⁶⁴ The American Law Institute should ponder the future of its Principles projects.

61. See generally Joel Seligman, *A Sheep in Wolf’s Clothing: The American Law Institute Principles of Corporate Governance Project*, 55 GEO. WASH. L. REV. 325 (1987).

62. See James Herbie DiFonzo, *Toward a Unified Field Theory of the Family: The American Law Institute’s Principles of the Law of Family Dissolution*, 2001 BYU L. REV. 923, 924 (2001) (describing that project as “the latest embodiment of a recurring tension in the ALI between its aim to harmonize the diversity of extant laws and an equal focus on the better adaptation [of the law] to social needs” (internal quotation marks omitted)); Robin Fretwell Wilson, *Undeserved Trust: Reflections on the ALI’s Treatment of De Facto Parents*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE’S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 90 (Robin Fretwell Wilson ed., 2006).

63. Although written before the Principles projects were conceived, *Complex Litigation* has much in common with them.

64. There has long been a robust debate as to whether the goal of Restatements should be descriptive or normative. See generally Kristen David Adams, *Blaming the Mirror: The Restatements and the Common Law*, 40 IND. L. REV. 205 (2007); Kristen David Adams, *The Folly of Uniformity?: Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423 (2004). The Business Roundtable noted the authoritative stature of Restatements in its criticism of the ALI’s *Principles of Corporate Governance*, which started as a Restatement project. See Seligman, *supra* note 61, at 351 (“[Restatements] are frequently cited as primary ‘precedent,’ before cases . . .”).