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## U.C.C. Article 2 Warranties and Internet-Based Transactions: Do The Article 2 Warranties Sufficiently Protect Internet-Based Transactions With Unprofessional Internet Merchants?

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## ESSAYS

### U.C.C. ARTICLE 2 WARRANTIES AND INTERNET-BASED TRANSACTIONS: DO THE ARTICLE 2 WARRANTIES SUFFICIENTLY PROTECT INTERNET-BASED TRANSACTIONS WITH UNPROFESSIONAL INTERNET MERCHANTS?

*Daniel K. Wiig*<sup>1</sup>

#### I. INTRODUCTION

Since 1995, buyers and sellers have converged on eBay, the largest person-to-person online system, to bid on and auction off a variety of items.<sup>2</sup> eBay brings people together in a manner in which sellers are permitted to list items for sale, buyers can bid on items of interest, and all users can browse through the listed items in with ease. The items are arranged by category; eBay boasts roughly 4,320 different categories of items to choose from.<sup>3</sup> These items include automobiles, collectibles, antiques, toys, books, computer paraphernalia,<sup>4</sup> and even New Zealand!<sup>5</sup> On this and other similar person-to-person trading sites, buyers are compelled to shop because of the large amount of items available, and sellers are compelled to conduct business because of the large pool of buyers. Each day, nearly 4 million auctions take place and 450,000

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2. eBay is only one of a number of internet-based venues that permit unprofessional sellers to enter goods into the flow of commerce.

3. *See generally* eBay Home Page, available at <http://www.ebay.com> (last visited Apr. 14, 2007) (offering statistics about eBay).

4. *Id.*

5. *eBay Pulls Sale of New Zealand*, N.Y. TIMES, May 13, 2006 at A6.

items are added on eBay.<sup>6</sup>

Welcome to the Internet Age! It started with the “boom” in the mid-1990s and, despite a few busts here and there, continues to progress. It is the age of the desktop shopper. It is the age in which an individual can take care of shopping needs from the comfort of home or office. It is the age in which those hard-to-find items are a few mouse clicks away. But it isn’t just the age that added convenience to the buyer; it is also the age that saw the birth of a new kind of seller: the “unprofessional Internet merchant.”<sup>7</sup> It is the age that allowed individuals to conveniently sell unwanted goods by simply posting an advertisement on a website. Unlike the age of old, where such a person would have to host a garage sale or find a flea market in order to transact with potential buyers, the Internet age conveniently provides a new venue.

This has revolutionized the “distance sale,” a faceless transaction between two people set apart. Historically, established merchants conducted a faceless-distance sale via a catalogue, *e.g.*, Sears Robach & Company. Or, two established merchants conducted the distance sale between themselves, *e.g.*, the baker ordering chocolate from the chocolate factory. In both scenarios, buyer and seller knew whom they were transacting with.<sup>8</sup> But now, a distance sale is a faceless transaction between two people who know nothing about each other except their respective screen-names.

While these new faceless-distance transactions may be the logical outgrowth of the Internet age, the rules found in Article 2 of the Uniform Commercial Code<sup>9</sup> (“Article 2”), which were originally devised for face-to-face transactions, may be inappropriate.<sup>10</sup> Assume that Seller, a lawyer by profession, sells what she describes as a “rare” coin on eBay. This coin was in her possession for some time before she decided to sell the coin.<sup>11</sup> Assume that Buyer places the highest bid for the coin on

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6. See eBay Homepage, *supra* note 3.

7. The phrase “unprofessional internet merchant” was developed by this author and will be used throughout this essay.

8. An established merchant is known to both its customers and business partners.

9. U.C.C. Art. 2 (2003).

10. Article 2 is also applicable to the historical faceless-distance transaction. This will be discussed more in depth, *infra*.

11. The fact that the seller did not simply sell the coin that was still in the original package denies the seller the “sealed-box” defense. The sealed-box defense is applicable when a merchant sells a good still in its original packaging.

eBay. Buyer is notified by eBay that Buyer “won,” and then Buyer conducts the transaction with Seller.<sup>12</sup> Shortly thereafter, Buyer takes possession of the coin. The coin, however, is not “rare” as Buyer understood the term to mean. Seller was not guilty of any fraud with respect to the sale—she used the term “rare” as she honestly believed the term should be used.<sup>13</sup> Buyer then claims that the coin is not accepted as a “rare” coin in the ordinary course of the coin business.<sup>14</sup> Does Buyer have any recourse against Seller? What should the “reasonable” buyer surfing eBay expect from such a potential transaction?<sup>15</sup>

In a face-to-face transaction, the buyer likely knows with whom the buyer is transacting: is the seller a person whose business it is to sell goods of this kind? If so, the buyer can reasonably be assured that the seller has expertise in, and knowledge of, the good sold. Therefore, a reasonable buyer has certain justifiable expectations with regard to the transaction that go beyond any representations the seller makes with respect to the good sold.<sup>16</sup> The Implied Warranty of Merchantability (the “implied warranty”) provides the protective covering for such a

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12. See eBay Homepage, *supra* note 2. Sellers list a good on eBay with a minimum price and a deadline for the auction to end. Once the deadline closes, eBay notifies the winning buyer. Based upon the seller’s payment instructions, the actual purchase then follows.

13. Affirming the quality of the good amounts to an express warranty. U.C.C. § 2-313 (2003). The express warranty, unlike the implied warranty, can be made by any seller, regardless of the “type” of seller. This will be discussed in further detail, *infra*.

14. The Implied Warranty of Merchantability, U.C.C. § 2-314, deals with what is considered acceptable in the ordinary course of business. This will be discussed in further detail, *infra*.

15. Disputes over items not received or received but significantly not as described can usually be resolved by direct communication between buyers and sellers. eBay provides an online process to help facilitate communication. See eBay Help Topic “Item Not Received or Significantly Not as Described Process,” available at <http://pages.ebay.in/help/tp/inr-snad-process.html> (last visited Apr. 16, 2007). Although dispute resolution options are provided and encouraged by eBay, the user agreement does not explicitly limit a user’s traditional common law rights to seek redress for tortious activity. See *Sayeedi v. Walser*, No. 10610/06, 2007 WL 623521, at \*1 (N.Y. City Civ. Ct. Feb. 27, 2007).

16. The Implied Warranty of Merchantability is almost a second-line defense for the buyer. If the express warranty cannot protect the buyer and the transaction, the implied warranty could. But this hinges on whether the seller is a goods merchant, as defined in U.C.C. § 2-104. See U.C.C. § 2-314(1).

transaction.<sup>17</sup>

Is the seller merely attempting to dispense with unwanted Christmas gifts? If so, the buyer has little assurance, other than what is expressly stated regarding the good. Therefore, a reasonable buyer would have limited justifiable expectations with regard to the transaction beyond what was expressly promised.

In the former, the seller would be classified as a “merchant”<sup>18</sup> and therefore gives the implied warranty.<sup>19</sup> In the latter, the seller would not be classified as a merchant; the implied warranty is therefore inapplicable. But what about an Internet-based transaction, where the buyer has no knowledge of the seller and the seller’s knowledge level of the good is higher-than-average, yet does not rise to the level of the professional merchant?

This essay examines how changes in commerce brought about by the Internet have led to a need for Article 2 to evolve and adapt. Specifically, Article 2 needs to take into account the new merchant class, the “unprofessional Internet merchant,” and a new warranty that would protect transactions between this new type of merchant and a potential buyer. Warranties provide a protective covering for transactions. But knowledge and expertise, the foundational elements for Article 2’s warranties, are not necessarily present in all Internet-based transactions. Therefore, the current Article 2 warranties may not always offer sufficient protection. Part II will briefly examine the different definitions of “merchant” found in Article 2 Section 2-104. Part III will examine the history, purposes, and theories behind the concept of warranties. Part IV will examine the implied and express warranties, and some theories as to why the implied warranty applies only to a goods merchant. Part V will re-examine the hypothetical transaction described at the start of this essay under four scenarios: (1) The face-to-face transaction with a professional merchant; (2) the face-to-face transaction with an unprofessional merchant; (3) the faceless-distance transaction with a professional merchant; and (4) the faceless-distance transaction with an unprofessional merchant. Part VI will

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17. The same analysis would be applicable to the historical faceless-distance sale between established merchants or between an established merchant selling goods via a catalogue.

18. The term “merchant” is defined to include both someone who deals in the particular goods involved in the transaction and someone who holds him or herself out as having expertise in a specific good. U.C.C. § 2-104(1) (2003).

19. See U.C.C. § 2-314(1).

further analyze the faceless-distance transaction with an unprofessional Internet merchant and suggest new warranties that are more appropriate for this new type of transaction. Part VII concludes the essay with suggested additions to Article 2.

## II. ARTICLE 2 MERCHANT DEFINITIONS

An analysis of merchant qualification in Article 2 begins with Section 2-104. The section defines the term “merchant” as a person “who deals in goods of the kind or otherwise by occupation is held out as possessing knowledge or a skill set that is particular to the practice or the goods involved in the transaction.”<sup>20</sup> An individual is also deemed a merchant if this knowledge or skill set is attributed to the employment of an agent, broker, or other intermediary “who by his occupation holds himself out as having such knowledge or skill.”<sup>21</sup>

While it might appear from the outset that anyone who qualifies as a merchant under Section 2-104 must comply with all of Article 2’s default rules, the Code’s comments provide clarification.<sup>22</sup> Merchant status depends on the particular Section involved, which in turn depends on the specific legal issue involved.<sup>23</sup> The broad-stroke concept of the merchant seems to lie in the notion of professionalism: a person is a merchant because of some professional affiliation or activity. With professionalism, of course, comes knowledge. This notion of professionalism can manifest itself in two forms: professional status with respect to the trade of particular goods, or professional status with respect to general business practices.

### A. Merchant with Respect to Goods

While Article 2 defines the term “merchant,” it does not clearly define “merchants with respect to goods of a particular kind.” However, comments to the Code indicate that this is a much smaller group than simply anyone engaged in a business.<sup>24</sup> This refers only to individuals who deal in particular goods: a person who sells golf balls, a

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20. U.C.C. § 2-104(1) (2003).

21. *Id.*

22. § 2-104 Official Comment 2.

23. *Id.*

24. § 2-104 Official Comment.

manufacturer of coffee machines, and a company that manufactures widgets would all be considered merchants with respect to the specific good sold. An individual who deals strictly in a certain type of good, and not one who simply engages in general business, is classified as a goods merchant.

There are others who might appear to qualify as goods merchants, but in actuality do not. The professional sailor who sells her boat, the professional golfer who sells his golf clubs, and the auto mechanic who sells his car, all by their profession may hold themselves out to be an expert in the particular field. But their respective one-off, isolated sales cannot fit the notion of a seller with respect to goods of the kind. For example, in *Cohen v. Hathaway*,<sup>25</sup> commercial fishermen sold their boat, but the boat proved to be defective. The fisherman committed no fraud, nor did he provide any express warranties.<sup>26</sup> Since the court found that they were not in the business of selling boats, the court held that they were not merchants with respect to goods of the kind.<sup>27</sup> Likewise, the court held that an air-conditioning repair company was not a goods merchant when it sold a defective air-conditioning pump.<sup>28</sup> The air-conditioning repair company was not in the business of selling pumps, nor did it sell enough pumps over a period of time to qualify as a *de facto* air-conditioning pump merchant.<sup>29</sup>

In summary, in order to qualify as a goods merchant, the individual must display a pattern of selling a particular good over some period of time. And along with that pattern of selling comes an expertise or knowledge of that particular good.

### B. The Business-Practices Merchant

Section 2-104's comments include the merchant class of individuals who possess special knowledge related to general business practices.<sup>30</sup> This refers to almost every single person in business. This class includes the grocery store owner, the used car salesman, and the major

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25. 595 F. Supp. 579 (Mass. Dist. Ct. 1984).

26. *Id.* at 583.

27. *Id.*

28. *Storey v. Day Heating & Air Conditioning Co.*, 319 So. 2d 279, 281 (Ala. Ct. App. 1975).

29. *Id.*

30. § 2-104 Official Comment.

department store.<sup>31</sup> The grocery store owner is a business merchant when bread is sold, the used car salesman is a business merchant when a car is sold, and the department store entity is a business merchant when a sofa-bed is sold.<sup>32</sup> This distinction is limited to those situations in which the business merchant is selling in a business capacity, and not in a personal capacity.<sup>33</sup> When the grocery store owner sells his fishing rods, he is not functioning as a business merchant; he is not selling in the “official” capacity as a businessperson.<sup>34</sup>

In summary, in order to qualify as a business merchant, the transaction in question must be within the business sphere. Put simply: any person engaged in business is a business merchant under Article 2. The seller, however, must conduct the transaction in the role of businessperson within the business environment.

### III. HISTORY OF THE WARRANTY AND THE IDEA OF “MERCHANTABILITY”

Underlying any express or implied warranty is the promise that the good sold will be as promised, or meet its ordinarily-expected baseline standard.<sup>35</sup> The warranty is the “cushion”—the protection that the buyer is assured of when the transaction is made. The cushion, it can be said, is premised on the buyer’s knowledge that the seller has a certain level of expertise.

The first type of warranty given was the express warranty: goods delivered would be as promised.<sup>36</sup> An action for breach of warranty arose out of the English Commodities Markets, and protected buyers who purchased goods that did not meet the sellers’ representations.<sup>37</sup>

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31. Karl Llewellyn, *On Warranty of Quality and Society: II*, 37 COLUM. L. REV. 341, 408 (1937).

32. *Id.* It is worth noting that a merchant may satisfy the goods of the kind and business merchant qualifications simultaneously.

33. See Note 28, *supra*, at 320. *Id.*

34. Similarly, none of these aforementioned transactions could fall under the goods-merchant distinction, because none of these sellers has a particular skill or chronic sales experience with respect to the particular good.

35. Robert W. Gomulkiewicz, *The Implied Warranty of Merchantability in Software Contracts: A Warranty No One Dares to Give and How to Change That*, 16 J. MARSHALL J. COMPUTER & INFO. L. 393, 394 (1997).

36. *Id.*

37. *Id.*

The breach was first viewed as a tort under the doctrine of misrepresentation.<sup>38</sup> This seems to be rather obvious: goods purchased should be as promised. The car advertised as a 1966 Ford Mustang should be a 1966 Ford Mustang, and the jellybean jar advertised as bearing the signature of Ronald Reagan should be a jellybean jar bearing the signature of Ronald Reagan. Allowing the aggrieved buyer a remedy is equitable and just.

The tide turned in the 18th century, as businesspeople become more sophisticated (or, to be more cynical, more clever), and did not always make express warranties. Buyers frequently found themselves purchasing goods that didn't meet their expectation. A good that should have functioned in one way didn't, and buyers found themselves without recourse.<sup>39</sup> As a result, another theory surfaced: the reasonable-buyer standard.<sup>40</sup> The expectations of a reasonable buyer in the transaction were taken into account, and this reasonableness turned again on knowledge: it is reasonable for a buyer to expect something, beyond the express representations, when the seller possesses a heightened-level of knowledge in the good sold.

Warranties, and the remedies for their breach, began to fall into the contract-law area.<sup>41</sup> In order to provide a remedy for the aggrieved buyer who was not given an express warranty, the courts began to find an implied warranty in sales contracts.<sup>42</sup> Since the courts couldn't impose an express statement on what the particular good could or couldn't do, the courts began to hold that within a sales contract was an implicit promise that the good met certain minimum-quality standards.<sup>43</sup>

An early case imposing the implied warranty was *Gardiner v. Gray*.<sup>44</sup> In that case, the buyer purchased silk. The silk turned out to be of very poor quality and not acceptable within the silk trade. The buyer

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38. William L. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 118-19 (1943).

39. See generally Ingrid Michelsen Hillinger, *The Merchant in Section 2-314: Who Needs Him?*, 34 HASTINGS L.J. 747 (1983).

40. The term "reasonable-buyer standard" was developed by this author and will be used throughout the remainder of this essay.

41. Franklin E. Crawford, *Fit for Its Ordinary Purpose: Tobacco Litigation and the Implied Warranty of Merchantability*, 63 OHIO ST. L.J. 1165, 1168 (2002).

42. Ora Fred Harris, Jr. & Alphonse M. Squillante, 1 WARRANTY LAW IN TORT AND CONTRACT ACTIONS 179 (1989).

43. *Id.* at 180.

44. (1815) 171 Eng. Rep. 46 (K.B.).

wanted to rescind the contract, but the seller argued that since no express warranty was made, the contract should remain intact.<sup>45</sup> The *Gardiner* court disagreed, and allowed the buyer to rescind the contract. The court held that the “intention of both parties must be taken to be, that the goods shall be saleable in the market under the denomination mentioned in the contract between them.”<sup>46</sup> The court held that inherent in a contract naming a good was an implicit promise that the seller would deliver something that would normally be expected of the good.<sup>47</sup> The court also inferred that the seller, who was a repeat seller of silk, had a heightened-level of silk-trade knowledge. The buyer relied on the seller’s knowledge when the buyer entered the contract.<sup>48</sup>

The courts began to adopt the term “merchantable” to describe the implied warranty that they began to impose.<sup>49</sup> The term was devised to describe the comparison of the good’s worthiness to others like it in the market. Courts began to look to the good’s trade to see what was customarily expected of it.<sup>50</sup> Subsequent cases adopted this standard: if no express warranty was included, a sales contract contained an implicit promise of merchantability.<sup>51</sup> Not only must the good be of a quality that could be sold on the market, but the good must also be fit for its ordinary use. These principles were first codified in the Uniform Sales Act<sup>52</sup> and were carried over into Article 2.<sup>53</sup>

In summary, contract law evolved to include in a sales contract the implicit promise that the good sold would perform as ordinarily expected. The coffeemaker would brew coffee without a problem, the car would run smoothly, and the lawnmower would work properly. There is logic to this: consumers should expect the good to perform normally and sellers should conduct business with due care. A buyer should have confidence that a seller, in certain circumstances, possesses

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45. Implicit in every contract for the sale of goods is that the transaction is conducted in “good faith.” *Gray*, 171 Eng. Rep. at 47; *See also* U.C.C. § 1-203 (1977). In the cases cited and in the hypothetical analyzed, good faith is assumed.

46. *Gray*, 171 Eng. Rep. at 47.

47. *Id.*

48. *Id.*

49. *See* Prosser, *supra* note 38, at 121.

50. *Id.*

51. *Id.*

52. UNIF. SALES ACT § 15(2) (1906).

53. *See* U.C.C. § 2-314(1).

superior knowledge of the good sold, and that the superior knowledge is implicitly part of the bargain. It is this concept of knowledge on which the implied warranty turns. The drafters of Article 2 codified the implied warranty in Section 2-314. Article 2, however, limits the class of sellers who give this implied warranty to the goods merchant. Section 2-314's provisions and an analysis as to why the goods merchant is the only class of merchants to give this implied warranty is discussed below.<sup>54</sup>

#### IV. U.C.C. § 2-314 AND THE GOODS MERCHANT

Section 2-314 is the Article 2 section for the implied warranty. The implied warranty does not arise from any promise made by the seller, but rather arises by operation of law.<sup>55</sup> The implicit promise is that the goods sold are merchantable. Article 2 does not provide an exact definition of merchantable, but Section 2-314 instead provides a list of minimum qualities that must be met in order for goods to pass the merchantability test.<sup>56</sup> The characteristics given for merchantable goods can be summarized in three broad categories: (1) the good must be of average quality compared to other goods in the industry, (2) it must be fit for the ordinary purpose for which it will be used, and (3) it must be properly packaged and labeled.<sup>57</sup> In contrast to the express warranty,<sup>58</sup> which can be breached even if the good is not perfect but was advertised in such a way that made it closer to perfect, the implied warranty cannot be breached unless the good is defective in some way, *i.e.*, not merchantable.

Courts have found such defects in a variety of circumstances. The seller breached the implied warranty when a mobile home proved defective with a leaky roof and inadequate plumbing.<sup>59</sup> A mechanical device's poor design was a breach of the implied warranty.<sup>60</sup> Sellers

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54. See Part IV., *infra*.

55. William H. Lawrence & William H. Henning, UNDERSTANDING SALES AND LEASES OF GOODS 130, (Matthew Bender ed., 1999).

56. U.C.C. § 2-314(2) (2003).

57. See Lawrence & Henning, *supra* note 55, at 130-35.

58. See U.C.C. § 2-313(1). An express warranty is created by "an affirmation of fact made by the seller to the buyer . . ."

59. Frederick v. Dryer, 257 N.W. 2d 835 (S.D.N.Y. 1977). Real property is not governed by U.C.C. Article 2. The mobile home was deemed personal, not real property.

60. Valley Iron and Steel v. Thomas, 562 P.2d 1221 (1977).

were also liable for breach of the implied warranty when they failed to provide proper instructions on how to remove snow from a clogged snow blower.<sup>61</sup> Goods that cannot perform the task for which they were purchased do not meet the merchantability test. The seller breached the implied warranty when he sold a medical scanner that could only scan the head and not the entire body.<sup>62</sup>

Ever-present is the idea that the good must live up to the seller's implicit promise and the reasonable buyer's expectations. However, the Article 2 drafters somehow believed that only a goods merchant implicitly promises that the minimum merchantability standards are met. This, on the surface, seems to contradict the underlying purposes of a warranty. The buyer, whom the warranty is meant to protect, is protected only in certain, limited transactions.

The drafter's reasoning may be that a goods merchant has the special skill set and expertise that the business merchant would not. When a merchant deals only with one specific type of good, the merchant will develop a greater expertise in that good. Like any person who hones a craft, over time a specialist is born. It is the goods merchant who deals to such a high extent in a particular trade that the reasonable buyer's heightened expectations are justified. It is the goods merchant who by trade or by knowledge knows specifically how the good is used in the trade, what it should or shouldn't do, and the normal differences between a like-used good and a like-new good. The goods merchant makes a livelihood from this trade. This drafters' logic may be that to whom more is attributed, more is expected.

#### V. ONE TRANSACTION, FOUR POSSIBLE RESULTS

Article 2 was drafted in a time that pre-dated the Internet and the electronic-communication age.<sup>63</sup> It was drafted in an age that contemplated face-to-face transactions, when buyer and seller met to conduct business. It was drafted in an age that conceived only two types of merchants: the business merchant and the goods merchant. It was

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61. *Hayes v. Am. Co.*, 462 N.E. 2d 273 (1977).

62. *Computerized Radiological Serv. v. Syntex Corp.*, 595 F. Supp 1495 (E.D.N.Y. 1984).

63. For a concise history of the U.C.C., see Uniform Commercial Code—History, available at <http://www.referenceforbusiness.com/management/Tr-Z/Uniform-Commercial-Code.html> (last visited Apr. 14, 2007).

drafted in an age where the buyer likely knew exactly with whom the buyer was dealing with by virtue of a face-to-face transaction. The buyer at the flea market likely knew he was dealing with a person trying to empty out his attic and make some extra money. The buyer at the grocery store knew she was dealing with a person who was a “professional” in the grocery business and with respect to the goods sold in the grocery store.

When Article 2 was drafted, the concept of a faceless-distance sale existed. That earlier, faceless-distance sale was logically related to the face-to-face transaction: the faceless-distance sale involved, and could only involve, professional merchants.<sup>64</sup> The buyer knew that the person on the other end of the faceless-distance transaction was a professional merchant. The buyer, in turn, had the protection of Article 2 assurances—if the express warranty did not, or could not, protect the transaction, the implied warranty provided the necessary protection.

But the Internet has added a new dimension to the faceless-distance transaction, with the arrival of the unprofessional Internet merchant. If a merchant is not a goods merchant, the implied warranty is inapplicable. This leaves only the express warranty as the protective covering for the transaction. Express warranties, however, are not necessarily sufficient enough to protect a transaction.

Let’s return to the hypothetical at the start of this article. The buyer in a face-to-face transaction with a professional goods merchant has assurances: the buyer knows that this is a professional merchant, and that the merchant has a heightened-knowledge level in the coin. Furthermore, the buyer has the opportunity to examine the coin. If there is an indication that the coin is not “rare”, the reasonable buyer may decline the transaction. If the buyer buys the coin, the express and implied warranties protect the buyer. If, however, the express warranty is inapplicable, *i.e.*, buyer and seller attributed in good faith different meanings to the term “rare”, the implied warranty will still protect the transaction. The buyer in this transaction gets the “fullness” of Article 2’s inherent protections.

The faceless-distance transaction with a professional goods merchant is not all that different. In this situation, the buyer purchases the coin via the professional coin merchant’s mail-order catalogue or website. The buyer knows the merchant, and with that knowledge

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64. In the era that pre-dated the internet, only established merchants could financially afford to sell goods via a catalog or take any form of a “distance” order.

comes assurances. Here, however, the buyer has no opportunity to examine the coin personally. Rather, the buyer has to rely solely on the seller's representations. But again, if there is a good-faith dispute as to the meaning of the term "rare" as applied to the coin, the buyer has the added protection of the implied warranty. The buyer again has the fullness of Article 2's protections.

The face-to-face transaction with an unprofessional merchant occurs at the garage sale, flea market, or in response to a classified advertisement. The buyer in this situation has the opportunity to examine the coin to determine its "rareness," and if the reasonable buyer determines after examination that the coin is not rare, the transaction can be voided. But if the buyer purchases the coin, and if the coin is not as represented, the only Article 2-based protection is the express warranty. An honest, good-faith disagreement may exist as to the meaning of "rare." It is possible that in this one-off transaction, an aggrieved buyer may have no remedy. It is here that *caveat emptor* may still apply.<sup>65</sup>

The faceless-distance transaction with an unprofessional Internet merchant occurs when the buyer "surfs" the World Wide Web, and shops on a person-to-person site. The buyer can only rely on the seller's representations—there is no opportunity to examine the coin. The result here is essentially the same as the previous hypothetical: the seller is dealing with an unprofessional merchant and only the express warranty is available. If there is a good-faith conflict as to the meaning of "rare", the buyer is once again subject to the doctrine of *caveat emptor*. This begs the question: why the concern in this latter-day, Internet-age transaction when the possibility of this outcome has existed since the advent of the garage sale or the flea market?

The answer lies in the frequency of the activity, and the desire to make the new-found system of unprofessional-Internet-merchants transactions work. The garage sales, the flea markets, and the unprofessional seller who advertises the sale of a good in the local newspaper were in many ways one-off and sporadic. These transactions existed, but the regularity or the commercial prominence of such transactions did not exist. With the Internet-age, unprofessional-

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65. "Caveat Emptor" is a Latin proverb that means "buyer beware." See "Caveat," BLACK'S LAW DICTIONARY (8th ed. 2004). The proverb has been described as "good advice" for buyers, not necessarily a statement of some duty of buyers to ask every possible question concerning the good. Whether caveat emptor is applicable is generally on a case-by-case basis.

merchant transactions occur every day. It has essentially evolved into a new business model. The unprofessional Internet merchant has taken its place alongside the business merchant and the goods merchant.

The Article 2 drafters' world had two merchants: (1) the business merchant, and (2) the goods merchant, with the common law evolving to protect certain commercial transactions. Article 2's drafters codified common law practices with some modifications. As buyers and sellers became more sophisticated and the common law evolved, the drafters sought to give buyers the protection of law and give sellers reasonable rules to abide by.<sup>66</sup>

The commercial world continues to evolve. Just as the courts, and subsequently Article 2's drafters, conceived of the merchantability concept to protect transactions that the express warranty could not protect<sup>67</sup>, so should Article 2 contain a new protection for buyers involved in unprofessional-Internet-merchant transactions, and a new standard for unprofessional Internet merchants to adhere to. Just as the law developed over time to take into account the evolving and changing commercial world in the past, the law must continue to develop and take into account emerging and evolving commercial transactions.

#### VI. CHOOSING A NEW KIND OF WARRANTY FOR A NEW KIND OF TRANSACTION

Article 2's drafters codified the common law of commercial transactions as these rules applied at that time. Business merchants and goods merchants were contemplated. Express warranties required sellers to deliver as promised, and assured the buyer that if the buyer did not get what was promised, the buyer had a remedy. Implied warranties held specialized merchants to a higher standard, and gave buyers a heightened-level of assurances when dealing with these specialized merchants. But with the arrival of the Internet, which gave birth to the unprofessional Internet merchant, these warranties as written are not necessarily sufficient to protect the buyer. An examination of warranties in an Internet-age transaction follows.

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66. See U.C.C. § 2-314(2) (2003).

67. *Id.*

*A. The Problem with Express and Implied Warranties*

The express warranty likely protects the bulk of Internet-based transactions. The majority of goods sold on person-to-person sites can be described in terms that would get the express warranty protection. eBay and its cousins generally have a picture of the good for sale along with a description; this combination amounts to an express warranty.<sup>68</sup> If the good sold does not meet these express representations, the express warranty is thus breached and the aggrieved buyer has a remedy.

The problem with express warranties arises when terms and descriptions with less-than-clear-cut meanings are used to describe the good. What is meant exactly by describing a good as in “mint condition”? “Mint,” when used to describe a coin, may have an entirely different meaning when the word is used to describe the condition of a thirty-year-old comic book. Terms can have different meanings to different people, and can have different meanings when applied to different goods. Express warranties tend to work in generic terms. But when terms with specialized meanings are involved, notably in the faceless-distance transaction, an Internet-based seller should be obligated to take additional steps.

In the standard person-to-person site, the participating seller is generally, although not exclusively, not a professional. Therefore, the implied warranty of merchantability is inapplicable. There are situations, however, where an Internet-based seller is indeed a goods merchant and, therefore, the implied warranty is applicable. This information, however, is not disclosed; eBay et al, do not require sellers to disclose their identity.<sup>69</sup> Obviously, without disclosure, the buyer would not have knowledge about the seller, and therefore would not have the assurances that are implicit in a transaction with a professional. In order to remove the gray area, an Internet-based seller should be obligated to take additional steps.

*B. Additional Step Number 1: Identity Disclosure*

Internet-based sellers should be required to disclose their identity, profession, business and other related experiences. This disclosure

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68. See Lawrence & Henning, *supra* note 55, at 120.

69. See generally eBay Privacy Policy, available at <http://pages.ebay.com/help/policies/privacy-policy.html#Disclosure> (last visited Apr. 16, 2007).

obligation would fill the gap regarding the buyer's knowledge of the seller.

In the historical faceless-distance transaction, the buyer knows with whom the buyer is dealing. When a buyer orders from the J.C. Penny Christmas catalogue, the buyer knows that they are dealing with J.C. Penny, a professional merchant. Embedded in this transaction are the Article 2 assurances that the buyer is protected should the good not perform as promised or as ordinarily expected.

In all but one of the transaction discussed, it was only the faceless-distance transaction with the unprofessional merchant that the buyer had no knowledge of the seller. This disclosure would provide the buyer with that knowledge.

### C. Additional Step Number 2: Full Goods Disclosure

As previously mentioned, the express warranty would be sufficient to provide a protective covering in an overwhelming number of eBay transactions. A photograph and a generic description would inform the buyer of what he or she would get should the buyer decide to proceed with the transaction. If the good, upon arrival, does not conform to the description, the express warranty was breached and the buyer has a remedy.

But when terms that can have different meanings are used, or when the terms used have very specific meanings within a certain trade or course of business, the express warranty is insufficient. Conflicting understandings of a term's meaning may leave an aggrieved buyer without a remedy, and possibly allow an individual to sell without proper rules to abide by.

A full goods disclosure should require the seller to describe the good with particularity—minute details of the good should be disclosed. This is just. Since the buyer has no opportunity to examine the good, and may not have the heightened-level implied warranty protection, the seller should abide by rules that provide this added protection to the buyer.

A goods disclosure should require that the seller provide the proper meaning of certain words used in the description of the good advertised for sale or for auction. For example, in the hypothetical at the start of this essay, the seller used the term "rare" to describe the coin. Under this proposed disclosure obligation, the seller would have to provide a definition of the word "rare" as that term relates to the coin trade.

Definitions of this type are generally found in certain trade-related publications.<sup>70</sup>

## VII. CONCLUSION

The oft-stated phrase that we should first begin with the statute is applicable here. The proposed additions to the U.C.C. are as follows:

§ 2-104. Definitions: “Merchant”; “Between Merchants”; “Financing Agency”; “Unprofessional Internet Merchant”

(4) An unprofessional Internet merchant is a merchant who engages in transactions over an Internet-based venue. Such merchant does not deal in goods of the kind and does not hold himself out to having any special knowledge with goods of the kind.

### § 2-315a. Disclosures in an Internet-Based Transaction

(1) Any seller who engages in transactions over an Internet-based venue that is not the seller’s Internet-based venue but is an Internet-based venue that allows multiple sellers to sell goods must disclose:

(a) The seller’s name;

(b) Whether the seller deals in goods of the kind in the seller’s ordinary course of business; and

(c) Any specialized knowledge the seller may have in the good that the seller is attempting to sell.

(2) In regards to the good sold, the seller must disclose:

(a) A detailed description of the good;

(b) The meaning of words used to describe the good; and

(c) If the words used to describe the good have a specific meaning within the trade or usage that the good is a part of, the seller must disclose the definition of such words.

Let us return to the hypothetical that was presented at the start of this essay. If the seller disclosed that the seller is not a professional coin seller, the buyer has gained information about the seller that the buyer could have obtained if this was a face-to-face transaction. If the buyer discloses the meaning of the term “rare” as that term is used in the coin

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70. For example, the U.S. Coin Redbook defines terms as these terms relate to coins. Similar publications are available for other good types.

trade, the buyer is then given full disclosure, because rare has a specific meaning in this trade, and the seller did or did not use the term appropriately.

In each of the possible transactions conceived by Article 2's drafters, the fundamentals, as mentioned, were knowledge and reasonableness: the knowledge the seller had regarding the good; the knowledge the buyer had regarding the seller; and the seller's reasonable requirements to engage in the transaction. The new type of transaction, which involves the unprofessional Internet merchant, did not necessarily have these fundamental protections. The proposed additions to Article 2 take this into account through disclosure. Disclosure of the seller's identity and business practices gives the buyer knowledge of whom the buyer is dealing with in a faceless-Internet-based transaction. Full disclosure of the good, including the proper meaning of terms used to describe the good, gives the buyer full knowledge of the good. Both of these disclosure obligations provide reasonable rules for a seller to abide by in an Internet-based transaction. In following its historical pattern of codifying commercial practices, the Article 2's reporters should codify these proposed rules regarding these evolving commercial transactions.