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FOREWORD: RIDING THE LONG WAVE OF DEVELOPING LAW

Michael F. Fleming[†] and Christina L. Kunz[††]

For attorneys seeking to advise clients with electronic commerce concerns, the over-riding challenge lies in how to "read the tea leaves" of developing law: to guess where issues might arise or morph in the future—sometimes the near future. Although some tea leaves can be discerned by reading about recent developments in blogs and listservs, the larger trends are not always visible from close range. But as we witness the growing inability of the law to keep up with a rapidly evolving cyberspace environment, those larger trends are becoming more visible, even if we are still trying to discern what they mean.

In the early years of cyberspace and electronic transactions via the Internet, some lawyers who ventured into the new world of law in cyberspace thought they were on the edges of a revolution—not just in communication, but of law itself. Some thought the unique atmosphere of cyberspace would lead to irresolvable problems under the existing forms of law that would give us an opportunity to examine and recast the law to deal with the very new spaces in which we found ourselves. Professor Lessig mused,

> Should the law change in response to these differences? Or should the law try to change the features of cyberspace, to make them conform to the law? And if the latter, then what constraints should there be on the law's effort to change cyberspace's 'nature'? What principles should govern the law's mucking about with this space?

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Or, again, how should law regulate?[1]

On the other hand, since the dawn of cyberspace law, many lawyers have responded by trying to work within the existing norms. Attorneys usually lean toward working within known structures, avoiding change for the simple sake of change. Indeed, one of the authors of this foreword said in 2010, "[C]yberspace law is most often just the application of old, time-tested laws applied to new technologies and situations."[2]

But it is becoming more apparent that simple application of existing law will not always lead to societal acceptance of the result. From a microeconomic perspective, we may be willing to accept a lop-sided contract because one party had more leverage, and we may be willing to accept a contract with inadequate protection for one party where no such protection existed in a non-electronic world. However, as those results aggregate and lead to seemingly unfair macroeconomic results, we begin to question the underpinnings and presumptions of the law. In recent years, trends have emerged in consumer-level intellectual property, in jurisdictional power to reach across national boundaries that are oft ignored in cyberspace, in notions of privacy, and in the security of the data that many of us—including the governments that rule us—wish to remain out of sight.

Sometimes, a trend plays out earlier in one setting and then reappears later in another setting. For instance, a party in "possession" of a data stream for a limited purpose has often claimed "ownership" of the data (notwithstanding the long-standing rule in the United States[3] against sui generis rights in the underlying data in a database). That issue has arisen over and over again—in the early 1990s in electronic data interchange (EDI) arrangements with value-added networks (VANs), again in the late 1990s in the dot-com bubble burst and subsequent bankruptcies of

1. Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 505 (1999) (discussing the reasons for teaching cyberspace law).

2. Michael F. Fleming & Kristine F. Dorrain, *Survey of the Law of Cyberspace: Introduction*, 66 BUS. LAW. 155, 155 (2010) (introducing the articles in the cyberspace survey issue).

3. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 359–60 (1991) (rejecting "sweat of the brow" protection under copyright of database information). Contrast the United States' position with that of the European Union, which recognizes a sui generis right under copyright for underlying data contained within certain databases created by persons. Council Directive 96/9/EC, art. 3, 5, Legal Protection of Databases, 1996 O.J. (L 77).

various online service providers, and yet again in the current concerns about health care data agreements that subject third parties' data to claims that their data is "owned" by the service providers with whom they did not contract.

In other instances, a trend involves seemingly unrelated issues coalescing into a single complex issue with many facets. Such is the case with the topics discussed in three articles in this issue of the *William Mitchell Law Review*. Privacy protection (or its absence) has become intertwined with the alarming increase in data breaches, which have become intertwined with cyber-security concerns, which in turn have amplified the inadequacy of privacy protection. Although it is possible that each of these concerns could have been addressed separately by evolving laws and regulatory structures over the past decade, the law's slow response has allowed each concern to increase in magnitude and complexity, while exacerbating concerns in previously unrelated areas. The resulting triumvirate of privacy, data breaches, and cyber-security is now far more complex than each of the individual issues and dominates much of the discourse about electronic commerce.

In "Putting the Genie Back in the Bottle: Leveraging Private Enforcement to Improve Internet Privacy," Jonathan D. Frieden, Charity M. Price, and Leigh M. Murray delve into the timely area of internet privacy. The article outlines the current federal regulatory and statutory schema, describes privacy statutes from multiple states, compares privacy legislation in the United States with several foreign nations, and reviews notable internet privacy litigation. The authors argue that, because the FTC is unable to devote adequate resources to internet privacy enforcement, Congress must enact omnibus legislation that relies on enforcement by private citizens.

James P. Nehf, a co-chair of the Consumer Issues Task Force of the Cyberspace Law Committee of the Section of Business Law of the American Bar Association (ABA CLC), provides an article that continues the exploration of internet privacy. "The FTC's Proposed Framework for Privacy Protection Online: A Move Toward Substantive Controls or Just More Notice and Choice?" is a critical analysis of the FTC's December 2010 proposed framework. Nehf argues that the emphasis on self-regulation and the notice and choice framework do not protect consumers in modern-day settings, and, instead, the FTC should more aggressively push substantive controls in its "privacy by design" concept.

The next article focuses on the critical issue of cyber-security and was written by the co-chairs of the Internet Governance Task Force of the ABA CLC—David Satola and Henry L. Judy. "Towards a Dynamic Approach to Enhancing International Cooperation and Collaboration in Cybersecurity Legal Frameworks: Reflections on the Proceedings of the Workshop on Cybersecurity Legal Issues at the 2010 United Nations Internet Governance Forum" is a comprehensive and well-written piece that explores the themes and global best practices in cyber-security. The authors advocate a modular and layered approach to tackling the complex questions of cyber-security and propose a number of factors that policymakers should consider.

The law—as an institution—is rarely able to get ahead of or even keep pace with societal developments. It tends to lag behind, awaiting the debates about the correct response to a growing problem. In electronic commerce, the rapid pace of technological developments has caused the law to lag even further behind. In some commercial sectors, that gap has been filled by contract terms drafted by the party with the upper hand—usually the service provider or vendor. The resulting "tilt" in terms often becomes more pronounced over time as the drafter refines the terms to increasingly favor its position.

Justin A. Kwong's article, "Getting the Goods on Virtual Items: A Fresh Look at Transactions in Multi-User Online Environments," tackles the cutting-edge area of law around virtual items purchased in virtual worlds and social games. It describes the history of virtual items and clarifies the definitions and context in which virtual items arise, including revenue models and licenses. Because of the explosive growth in this area, the author advocates the need for creation of simple, standard-form contracts that can be easily understood by consumers, and he provides specific provisions that should be included in these agreements.

The final article addresses shortfalls in the law's response, but these particular shortfalls have been generated by the growth of user-generated content in blogs and the like. Some of the complexity has been generated by the intersection of large business entities (e.g., media organizations) and individual actors (e.g., the blog authors) whose actions have the potential to harm third parties. The strength and resources of the business entity give the individual actors the ability to affect third parties more profoundly than they could otherwise if left to their own devices. This final

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article suggests laws to protect the interests of the third parties and to allocate the risks in a more predictable fashion.

In "Crowdsourcing the News: News Organization Liability for iReporters," Virginia A. Fitt provides an interesting analysis of a novel area of law—the potential liability of news organizations for user-generated content. The article describes media organizations' attempts at format integration through solicitation and use of user-generated content, discusses the gap in the law for dealing with the increased potential for tort liability, and proposes guidelines for when liability should be extended to the organization.

In electronic commerce law, attorneys must give advice and draft contracts for clients on a day-by-day basis, using whatever legal doctrines exist at that time, despite the inadequacy of some of those doctrines. This need for "business-as-usual" has led to a rich range of adaptations of existing laws to fit the new situations arising in electronic commerce settings. Some of these adaptations have worked well, whether by applying law smoothly to new situations or by creating analogies from rules of law whose scope did not originally include the electronic commerce issue. Other adaptations have not worked as well, creating "square-pegs-in-round-holes" because the analogies into the electronic realm have led to unfair results or have left important concerns unaddressed. We may now well be at the beginning of an era when business-as-usual practice will begin to give way to new underpinnings and assaults on our fundamental presumptions of the law and the environment in which we live. This issue of the *William Mitchell Law Review* highlights some of the areas needing additional attention from courts, legislatures, agencies, and international organizations.

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