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David A. Rice

Roger Williams University School of Law

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Symposium – Information and Electronic Commerce Law: Comparative Perspectives

Introduction

David A. Rice*

Information technologies and electronic commerce present domestic and international law challenges on many dimensions. The Internet, World Wide Web and telecommunications technologies facilitate information dissemination, access and use without regard for national boundaries. Technological innovations infuse commercial markets and transactions with changes that present new prospects, risks and legal issues. Software and database protection issues challenge traditional intellectual property paradigms. Personal data collection, freedom of information access and freedom of communication pose new questions within domestic and international political realms.

Other critical issues arise in the course of adapting private contract law to electronic contracting and from the extension of intellectual property licensing notions to the distribution of digital information products. Standard form contract regulation of copy use transfer and restriction raise anew issues that have long-vexed the law in what now seem like more mundane sale of goods contract exclusion or disclaimer of warranties and contractual reduction of remedies for breach. Use of standard forms and terms now pose issues about the efficacy of contract to negate the first sale doctrine of copyright law as well as the right under state trade se-

* Professor, Roger Williams University School of Law. B.B.A., University of Wisconsin; LL.B., Columbia University School of Law. Professor Rice was the organizer of this symposium.

cret law and the fair use doctrine of copyright law to reverse engineer computer program object code.

Moving further into the contractual realm, digital information technology has introduced on-line business-to-business, consumer-to-business, citizen-to-government, and government-to-citizen electronic transactions. "Digital signature" and electronic document authenticity issues are the focus of state and national lawmaking, European Community legislation and international model laws and treaties.

Substantial economic interests are at stake. Making the market safe for distribution of digital content and works is essential to development of new and evolving industries. It is critical to the realization of benefits offered by greater access to information content, functional works and entertainment products made possible by digital and communications technologies. Equally, legal certainty and harmonization concerning authenticity, or risk of inauthenticity, of digital signatures and document contents are essential to stability and development of electronic contracting.

The tensions between private and public interests characterize all debate on these issues, and differing perspectives exist both within and among diverse cultures and differing legal systems. Recognition of this was the inspiration for my organization of the April 20, 2001 Scholarly Symposium *Information and Electronic Commerce Law: Comparative Perspectives* and the informal speakers' and moderators' Roundtable discussion the following morning. The event featured eight leading United States, Portuguese and Australian law scholars. Four prominent and highly regarded information and electronic commerce attorneys moderated the Symposium sessions,¹ and offered substantive comments when introducing their session and led question and answer discussions following speaker presentations.

The Symposium was co-sponsored by the Roger Williams University Law Review and the Roger Williams University School of Law Portuguese-American Comparative Center. The Roundtable,

1. The session moderators were Jonathan Band, Washington, D.C., office of Morrison & Foerster L.L.P.; Wayne D. Bennett of Bingham Dana LLP in Boston, Massachusetts; Jerry Cohen from the Boston, Massachusetts, office of Tillinghast Licht Perkins Cohen & Smith L.L.P.; and Marc S. Friedman of the Roseland, New Jersey, office of Goodwin Proctor LLP and President of the Computer Law Association.

which I moderated, was sponsored by the newly established Center. The informality of the latter provided a rare opportunity for a direct, sustained and lively exchange of views among leading scholars and lawyers brought together from quite distant places and from diverse cultures and legal systems. Together, the Symposium and Roundtable experiences happily reminded their participants that diversity of human experience, culture and critical thought persists within our networked information society even as nations seek increasing harmonization of intellectual property and contract law important to economic activity, research and discourse in a network environment.

Symposium presentations were made in four separate sessions: Digital Electronic Database Protection, Technology in Electronic Commerce, Electronic Commerce Transactions, and Information and Electronic Commerce Horizons. Four of the important papers presented at the Symposium are published in this issue of the *Law Review*. Unexpected circumstances made it impossible for two of the speakers to submit expanded versions of their presentation, but the program itself was nonetheless greatly enriched by the formal remarks of Professor Peter A. Jaszi and Dr. Antônio de Macedo Vitorino and their engagement in discussion and participation in the Roundtable. Professor Jaszi² addressed the extension of digital content provider control over access to and use of information content under the Digital Millennium Copyright Act and digital content use licensing. Dr. Vitorino³ spoke on doing business over the Internet. He demonstrated the importance of businesses and legal counsel being aware of and conversant with contract, intellectual property, data protection and other laws of countries in which users and customers are located rather than assuming that only the familiar law of a company's own jurisdiction governs its transactions in the Internet environment.

2. Peter A. Jaszi is Professor of Law at American University Washington College of Law. Professor Jaszi is the Director of the Glusko-Samuelson Intellectual Property Law Clinic, a project of the American University Washington College of Law Program on Intellectual Property and the Public Interest.

3. Antônio de Macedo Vitorino is a Senior Partner in the Lisbon, Portugal law firm Macedo Vitorino & Associates and Assistant Professor, University of Lisbon Faculty of Law. Dr. Vitorino, in his law practice, specializes in competition, securities, intellectual property and commercial transactions law with particular emphasis on emerging issues concerning the digital electronic environment. He is a Founding Member and Director of the Portuguese Intellectual Property Law Association.

Professor Brian Fitzgerald, Dean of Southern Cross University School of Law and Justice in Lismore, Australia, authored and presented the article titled *Digital Property: The Ultimate Boundary?* Dean Fitzgerald is a leading scholar and authority on Australian intellectual property and Internet law, and often participates in international dialogue as a speaker and author of articles published in international journals. His presentation and article weigh the role and limits of law in transforming information and information products into economic value, wealth and industries in the digital environment. Dean Fitzgerald seeks to harmonize public and private interests in information, and to address the challenge of regulating in such a way as to promote and secure a return to new investment without sacrifice of access to and use of knowledge by private individuals, researchers and other businesses. He brought to the Symposium and this issue of the Law Review the perspective of a scholar from a nation that is a very significant but not a dominant producer and exporter of digital works.

Charles R. McManis, Professor of Law at Washington University School of Law in St. Louis, is a leading scholar and public voice on copyright, contract and protection of computer software and other digital information products. Although he has published important works on United States law, he also has taught and studied intellectual property law in Asia and made international and comparative aspects of intellectual property law a particular focus of his scholarship. Professor McManis's presentation and article, *Database Protection in the Digital Information Age*, brings to his topic a depth of study and a grasp of policy and legal issues that has made his previous writing on national and international intellectual property law issues essential reading for contemporary scholars and policy makers. Professor McManis's particular concern in his article is with the two principal, and competing, proposals for United States database protection legislation. He informs his readers with a preliminary examination of the European Community's creation of *sui generis* database extraction and reutilization rights as an adjunct to the very limited database protection available under copyright law. Professor McManis then thoughtfully and insightfully addresses whether and to what extent United States legislation is required in order to satisfy the international reciprocity provision in the European Community Database Directive, market considerations and legal considerations in a

manner that equally speaks to scholars, lawyers and public policy decision makers.

Professor Amelia H. Boss, the Charles Klein Professor of Law and Government at Temple University, presented and has written *Taking UCITA on the Road: What Lessons Have We Learned?*. Professor Boss is a member of the Council of the American Law Institute (ALI), chairs the Business Law Section of the American Bar Association and serves as a United States Delegate to United Nations Commission on International Trade Law (UNCITRAL) on electronic commerce issues. She was an ALI member of the Drafting Committee for a Proposed Article 2B of the Uniform Commercial Code (now the Uniform Computer Information Transactions Act, or UCITA) and is an ALI member of the Drafting Committee to revise Articles 1, 2 and 2A of the Uniform Commercial Code. It should be clear from this impressive, yet selective, review of Professor Boss's experience that there is no person better qualified to address the need for new contract law rules, the approach and particulars of the UCITA, and how UCITA compares with other modern commercial contract law statutes. The dimensions in which she does so in her article include contract law theory, choice between general and particularistic statutory expression of rules, soundness of policy choices reflected in certain rules and suitability of the uniform law for export as a model for digital information product and services transactions legislation.

Among scholars with whom I have had occasion to disagree on important information technology copyright and contract law issues over the last half-dozen years, Professor Maureen Anne O'Rourke of Boston University School of Law is one for whom I have greatest regard. Her critical, creative, insightful and rigorous thought challenges others to likewise extend themselves as participants in critical thinking and dialogue rather than a dogmatic contest. Although a relatively new member of the academic cadre, she is a recipient of Boston University's prized Metcalf Award for outstanding teaching and her writings are widely regarded as "must" reading. Professor O'Rourke closed the Symposium and writes on this issue in *What the Future Holds: Policy Choices in the Global E-Marketplace*. What greater incentive can I give the reader to spend time with her article than to say that Professor O'Rourke's presentation held the Symposium audience in

place even though it was the Friday afternoon closing presentation in a long, full-day program?

As experienced and as viewed in retrospect, the full day Symposium and half-day Roundtable programs were remarkable for the ease in which academics and lawyer-scholars from very different legal and cultural backgrounds found common purpose and genuine camaraderie, and an enjoyment in sharing that with Roger Williams University law students and faculty. As the organizer and convener of the programs, I wish to express my gratitude to professional colleagues and personal friends who accepted my invitation to participate in the programs as moderators and as speakers. Writing this introduction also provides me a forum to express my gratitude for a personally quite special benefit and satisfaction, the privilege of meeting, and becoming friends as well as professional colleagues, of a most distinguished group of scholars from abroad: Professor Doutour José de Oliveira Ascensão, Dean Brian Fitzgerald, Dr. Manual Lopes Rocha and Dr. Antônio de Macedo Vitorino.

Finally, though not least, I speak for all who participated in the Symposium and Roundtable in closing this introduction by expressing gratitude to others who made the event and publication of this Symposium Issue notable in the young life of this law school. We are especially grateful to the Luso-American Development Foundation and its President, Dr. Rui Chancerelle de Machete for program and financial support, the Law Review and its members for their work in editing and publishing the papers in this Symposium Issue, and Dr. Manuel Duarte de Oliveira of the Luso-American Development Foundation for his liaison assistance in Portugal. Most especially, I speak for all in recognizing my colleague, and at time the Dean, Professor Harvey Rishikof for his encouragement, unstinting support, and spirited hospitality that made our distinguished guests' visits to the University and the School of Law so congenial and memorable.