

355

COMMITTEE FOR INFORMATION, COMPUTER AND COMMUNICATIONS POLICY

1ST SESSION, PARIS, 27 SEPTEMBER, 1982

LEGAL ASPECTS OF INFORMATION TECHNOLOGY: A SUMMARY

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission.
Formerly Chairman of the Expert Group on Trans Border Data Barriers
and the Protection of Privacy

The opinions expressed in this paper are those of the author and do not necessarily reflect those of the Organisation or the Australian Government.

INFORMATICS LAW: OF PROFITS AND PROPHETS

The Hon. Mr. Justice M.D. Kirby, Australia

RESUME

This is a summary of the full paper prepared for the First Session of the Committee for Information, Computer and Communications Policy. That paper 'Legal Aspects of Information Technology' (ICCP (82) 4) goes into much more detail. The purpose of this Summary is, essentially, to make three simple points:

- * First, the international character of the new information technology presents many novel problems for the law and creates a new urgency to find harmonious and compatible solutions. This point will be illustrated with a number of examples.
- * Secondly, though the OECD has tended in the past not to get deeply involved in legal matters (because they were considered domestic and idiosyncratic to the jurisdictions of the Member countries) the time is right for change. Many legal problems are now common. Many are presented by the new information technology. And unless common solutions can be offered, the diseconomies of the development of differing local laws applying to a universal technology, will be daunting.
- * Thirdly, the new information technology creates an important opportunity and challenge for the OECD, for this new Committee and for the informatics industry itself.

Ultimately what links our countries together in the OECD, goes beyond economic and technological interests. The links include:

- * a respect for stable and orderly laws and institutions.
- * a respect for the individual human being in society, and
- * adherence to the principle of the rule of law.

These links provide the warrant for a heightened interest by the OECD and this new Committee in the legal developments that come in the train of informatics.

Differing views are expressed about the urgency of tackling the legal problems. But it seems to me that time is not on the side of the easy solution of legal problems. The earlier guidelines can be offered, around which domestic laws may cluster, the better. It is precisely in work such as this (the development of Guidelines on complex issues) that the OECD can fulfil its most creative and influential role. There is obvious merit, where the technology is extremely dynamic, diverse, ubiquitous, powerful and difficult or impossible to control unilaterally and where the multi-faceted problems are so complex as to discourage even the most intrepid local administrator, for the OECD to offer help. Even in so peculiar and local a discipline as the law, the very technology itself creates the urgency to develop compatible laws around internationally identified guidelines. More rigorous and effective international instruments (such as treaties) may follow. But if guidelines can reduce, by their early availability, idiosyncratic and incompatible domestic legislation, that will itself be a significant contribution to the harmonisation of laws. It will make the later possible adoption of enforceable treaties, easier and more likely.

PRIVACY PROTECTION

OECD Guidelines. It is convenient to begin the consideration of substantive legal concerns with privacy protection because this has been a sustained interest of the OECD for more than a decade. The Privacy Guidelines were adopted by the Council in October 1980. So far, only three Members have not signed them, namely Australia, Canada and Ireland. Australia's federal constitution, under which privacy (though not telecommunications) is basically a State matter, chiefly explains the delay there. But I can say without hesitation that the development of Australia's privacy and freedom of information laws is strongly influenced by the OECD Guidelines. In Canada, too, there have been important developments. In July 1982 a Bill enacting the Access to Information Act and the Privacy Act became law. The latter adopts, as the Australian Freedom of Information Act 1982 does, the key 'individual participation principle' of the OECD Guidelines. In the case of Ireland, it has been suggested that a change of administration may have delayed endorsement of the OECD Guidelines. The OECD Guidelines fulfil the useful task of stating the guiding principles. Furthermore, let it be candidly said, they provide an impetus to action by the power of persuasion of good international opinion.

Towards enforceable rules. During the preparation of the Guidelines, and in particular when the attention of the Expert Group was turned to the principles of international application, the point was frequently made, particularly by France, that guidelines, however beneficial as an educative and persuasive

force, will not have self-executing authority in a court of law. We are still a long way short of unilateral or mutually enforceable international principles, let alone an international neutral tribunal to which parties with a transborder dispute about automated personal data can have access. The development of such an international remedy will, if enforceability, actionability and justiciability are to be contemplated, depend upon a further step in the movement towards enforceable international law.

Future Privacy Issues. The literature shows that certain matters stand out as issues for future consideration in the privacy protection debate including here in the OECD:

- * Legal Persons: The extent to which privacy protection should extend to legal, as distinct from natural persons. To what extent is it apt to talk of the human rights of a statutory creation, such as a corporation, or of an association, club, partnership or small business? Obviously, this issue has political, economic and other implications.
- * Code of Ethics: A significant development reported by the Secretariat is the decision of the Council of Europe at a recent meeting to initiate work on the development of a clear code of ethics for computer professionals.
- * Privatisation: In a number of Member countries consideration is being given to the privatisation of telecommunications and a relaxation of the former government monopoly. In the past, the government monopoly and domestic secrecy laws may have contributed, in practice, to the protection of the privacy and confidentiality of information passing through the telecommunications system. Will this change with growing private involvement?
- * Model Contracts: In order to define legal rights and duties in the event of a dispute, there is likely to be an increasingly urgent move towards the inclusion of standard contractual terms in informatics dealings with an international element.
- * Enhancing access: The right to handle terminals and other technical equipment is now being dealt with, as is the anonymity of the citizen when asserting his right to access public documents.

FREEDOM OF INFORMATION

Currency of democracy. A second substantive issue is freedom of access to government information. Information has been described as the currency of

democracy. The sword of democracy, it is said, is blunted by the indifferent voter who is ignorant about what is going on in his country. Translating these fine principles into enforceable legal rights is not always easy; but much progress has been made in Member countries in the past decade. In the past weeks Federal FOI laws have been enacted in Australia and Canada. Progress in other countries seems slower.

Future Issues. It is likely that a number of future developments in this area will need to be watched:

- * Documents and data: The rapid transfer of information to computerised format will increase the urgency and importance of considering 'the principle of granting the public a right sometimes to use the equipment'. This consideration will give rise to new needs:
 - ** to prevent unreasonable or excessively expensive access;
 - ** to present access to data which is legitimately secret, confidential, private or otherwise not accessible.

- * FOI interaction: Then there is the issue of the interrelationship of differing FOI laws. A Norwegian social researcher who published certain findings on NATO defence arrangements which were contained in documents restricted under Norwegian law was convicted of espionage in Norway. The documents had been retrieved on-line pursuant to the United States Freedom of Information Act. The moral is that the new information technology is likely to hasten the influence of openness of administration under FOI laws, for the simple reason that it is rendered so much more difficult to contain the haemorrhage of freely available information once its disclosure is permitted in one place.

- * Data ownership: Questions have arisen concerning a proposed legal principle of ownership of information or 'data ownership'. Proponents of data ownership assert that to enforce effective control over the flow of information which now proliferates about all corporations and individuals, ultimate legal control over that information may be necessary. But whether legal 'ownership' as such is attributed to the data subject may be less important than that enforceable legal rights should be defined which effectively protect the interests of the data subject in information circulating about himself.

* Private sector: So far, FOI has been overwhelmingly a public sector debate. It seems probable to me that the principles of accountability will in time go further, into the private sector corporation, encouraged by the dynamic of the new information technology itself.

VULNERABILITY, UNEMPLOYMENT AND CRIME

Vulnerability. Just as Sweden led the way with FOI and privacy (data protection and data security) laws, now it is providing a stimulus to Member countries and to the Organisation with its detailed consideration of the greater vulnerability of the 'wired society'. In part, the problems are of such a nature that new laws will be required. The special balance struck in Member countries of the OECD between law enforcement and individual liberties will come under challenge as a result of the perceived risks that will arise from the dependence on the new technology.

Unemployment. A linked concern is the effect of any persistent unemployment or dislocation on law observance, domestic tranquility and peaceful government. There is no doubt that the advent of new information technology has promoted fears of loss of employment in aggregate and loss of employment to 'data rich' countries in particular. In virtually every Member country there is a realisation of the erosion of respect for institutions, including the law, that could attend endemic high levels of unemployment, unless these could in turn be addressed in a constructive way. The increase in petty crime that accompanies high levels of unemployment, the despair of people, especially young people, surrounded by wealth they cannot hope to attain, and the special problems of dealing with more people dependent on social security benefits are just some of the features that accompany serious and prolonged economic downturn. When the downturn is accompanied by structural change and rapid technological change displacing employment, the potential for widespread unlawfulness and erosion of authority is very considerable indeed.

Computer crime and fraud. One aspect of the greater vulnerability of the wired society is its greater susceptibility to damaging anti-social conduct, such as computer terrorism and computer crime. There are many issues here for the law and its personnel in Member countries.

** Crime is strictly defined: The manipulation of information technology to steal money from a bank or property from an owner may not come within the present definition of 'theft' contained in domestic law. 'Theft' normally involves taking away goods. But now no goods need be taken.

** Crime is local: A complication that emerges from a ubiquitous and international technology in its application to crime is the general

principle, recognised in international law, that crime is local. Domestic courts are normally confined to punishing criminal offences which occur in their own territorial boundaries or which have some other relevant connection with that territory. Where crimes are constituted of a number of elements, some of which may take place outside domestic jurisdiction by reason of access to international data communications, reform may be needed to ensure that the legitimate jurisdiction of local courts is not improperly frustrated.

** New crimes/personnel are needed: Jan Freese (Sweden) has proposed such a new concept in the notion of punishable 'data trespass'. But even assuming that the definition of new crimes and the complication of the international elements of information crimes could be satisfactorily overcome, it is clear that serious problems exist in recognising, detecting, proving and punishing such crimes. Some initiatives are being taken by Interpol to train police in the new problems of policing the world information society. But the potential of the computer criminal to evade detection and capture, let alone trial and conviction, is enhanced by the ubiquity and universality of some of the more vulnerable information systems, such as those dealing with banking, insurance and credit information. If effective and highly skilled policing is to be developed, it seems likely that international co-operation in policing will have to be strengthened and enhanced, if only to reflect the international character of the vulnerable object of new international crime.

CONFLICTS, SOVEREIGNTY AND PROTECTIONISM

Private international law. The sudden development of a new technology with the features of the new information technology presents novel challenges to private international law. The problems identified in connection with personal data are perhaps more acute in relation to the rapidly growing numbers of information transactions of a commercial character having nothing to do with personal data but perhaps more likely to give rise to legal disputes. The doubts and uncertainties about the forum, applicable law and remedies available are potentially multiplied many times over where a transaction has an international component. This is because of the diffusion and coincidence of the potential international components in a transaction utilising the new information technology. When an electronic message is generated in country A, switched in countries B and C, transits countries E, F, G and H, processed in countries I and J, stored in country K and involves entities residing in yet other countries, it is clear that present rules on choice of and conflict of law are inadequate.

How is a regime to be developed for the technology which is so rapidly penetrating all of our countries? How will we authoritatively and finally determine the problems of forum? Until binding conventions are developed, there is a distinct danger that municipal courts will go their different directions.

Sovereignty. The issue of sovereignty and informatics is complex and, from the legal point of view, has a number of aspects. Peter Robinson of Canada has written most usefully on this subject. One aspect, is linked to the issue of vulnerability. It is raised by recent freezing of Iranian and Argentinian assets. In the past, seizure of enemy assets was a personal tragedy and a national inconvenience. But it did not hold the same potential for widespread disruption that would arise if a country had effective control over the storage, processing or transit of data vital to an enemy. Concern about this potential for political or economic 'leverage' is not entirely theoretical. As is well known Brazil, perhaps more than any other country, has designed a full set of policies to control TBDF.

INTELLECTUAL PROPERTY, BUSINESS LAW, LIABILITY AND INSURANCE

Intellectual property law. I turn briefly to the impact of informatics on business law. Traditionally, intellectual property law developed around protections which attached to the medium rather than the content. It was not possible to patent or copyright an abstract idea. The problem posed by informatics technology is that data (and therefore information) have now been 'liberated' from physical objects representing the data. Because intellectual property law has traditionally attached itself to physical objects, representing information, the information itself has only been indirectly regulated. This approach is no longer apt for the new 'liberated' world of informatics. The difficulties are aggravated by the phenomenon of TBDF, by which information produced in one country may be reproduced in ephemeral form in another. Unless some new arrangements can be made, recompense to the original author may be readily and entirely avoided.

Business law. Of special relevance to business law will be the developments in telecommunications by which business contracts are effected. Already international transmission of contracts, bills of exchange, bills of lading, airway bills, letters of credit are occurring. Today's merchants work in a world of complex statutory laws governing anti-trust, taxation obligations, banking and foreign exchange regulation, rules governing relations with administrative authorities, foreign investment limitations and so on. Instantaneous contracts may not always permit adequate time for advice on the complex range of laws that affect and may even destroy the contract, once made.

Liability for loss and error. The occurrence of computer error is not great when compared to the enormous dependence on information technology nowadays. Yet potentially error might be catastrophic and could affect very large numbers of users. Errors can arise out of human factors (such as defective programming, inattentive keying of data, wilful inclusion (or deletion) of data. It can also be the result of defects in computer hardware (a failed valve, loss of power, etc.) or loss or interference during transmission. These problems, difficult enough within a single jurisdiction with a single system of laws, become almost intolerable, where, by reason of TBDF, multiple jurisdictions with their differing legal rules may become involved.

Insurance against computer loss. To some extent, current insurance policies will already provide indemnity for errors arising out of information technology and TBDF. For example, an airline disaster caused by incorrect plotting of a flight path using a computer and TBDF may give rise to claims against the airline which is indemnified under its accident liability policy. But the need for the development of liability insurance specific to worldwide computer systems is yet to be fully explored. It does seem likely, on the analogy of airline insurance, that something will be needed. The losses when they occur are likely to be large and sometimes disastrous. The provision of a common insurance fund may be fairer to all who are using the system. It may be desirable because of the prohibitive costs and uncertainties in legal disputes having an international component, because of the use of TBDF.

EVIDENCE LAW AND LEGAL PROFESSION

Changes in information technology directly impact the law of evidence in many Member countries and will influence the development of the legal profession in all of them. The acceptance into evidence in courts of law of computer and computer generated testimony creates new problems which need to be addressed, whatever the legal system. These matters are identified in my full paper. How should we respond to all these legal problems?

Evidence law. Especially in systems of law which adhere to the common law tradition, there is a need significantly to modify the laws of evidence to permit more readily the admissibility in court of computer evidence and computer generated evidence without proof in every case of its original creation.

Lawyers and the judiciary. The new information technology brings good and bad news for the legal profession itself in all our countries. The good news involves the improvement in access to legal data, including the potential of readier access to overseas legal material

by TBDF. One New Zealand commentator has suggested that an urgent obligation of lawyers is to simplify old precedents before they are immortalised and mass produced through word processor technology and transmitted widely through telecommunications. The bad news may not be universal. But it certainly affects a number of countries including Australia where the staple activity of the domestic legal profession is concerned with land title transfers. The implications of the technological development for the loss of this activity and so far the widespread distribution and reasonable prosperity of the legal profession needs to be watched.

INSTITUTIONAL RESPONSES

National and international. The need for the allocation of adequate resources to allow a comprehensive and vigorous attack by home governments on the multitude of issues posed by informatics and TBDF is manifest. At the international level, this Organisation and this Committee can provide the kind of assistance it has already offered in respect of privacy laws. OECD Guidelines can help to:

- * harmonise rules as they are developed at home;
- * inform Member countries of the standards being adopted elsewhere; and
- * avoid the conflicts of laws that will all too readily otherwise spring up, through ignorance of, or indifference to the desirability of harmonious and compatible legislation.

A realisation of this adds legitimacy to the increasing interest being shown by the OECD to legal concerns. I can see this as a growth activity of this new Committee. But the obligation also lies elsewhere.

Industry response: A proposal. Whilst acknowledging that the world information industry is not in the Santa Claus business (and indeed is not without problems of its own), I express again the hope of a greater realisation on the part of the industry of the responsibility it must share for the solution of the social and legal problems that attend its technological successes. It is in the industry's self interest to help our societies and governments to absorb and cope with the social and legal implications of the technology it is so successfully introducing throughout the world. The modesty of the present investment which this prosperous, adventurous and fast developing industry makes for the study of the social, economic and political concerns of world wide dimension is such as fairly to attract criticism or even derision! The multiplication of the problems of the new information order impose obligations, if only in self defence, upon the informatics industry. It is presenting the problems, many of them common, to governments and societies around the world but overwhelmingly within the Member countries of this

Organisation. An international centre for the study of the legal and social implications of informatics should be created, isolated from the industry sources of its funds, yet guaranteed of a flow of funds for a sufficient period of time to assure stability and to attract suitable appointments of the highest calibre. It should not be unrealistic to expect such a prosperous industry to provide funds for such an Institute of Informatics and Society. The investment would be miniscule by comparison with the income and profits of the industry. It could be seen as a minor cost, a kind of insurance premium, to guarantee that those who present the problems play a more active part than they have in the past, in helping our societies to provide the solutions. An institute captive of the industry, would command no respect. But the need to devote a tiny fraction of the profits being made, and properly made, from the remarkable advance of new information technology is beyond serious debate. Such an institute could address, particularly the international problems, some only of which have been identified by me. Continued reliance on the often unaided labours of hard pressed itinerant national experts, meeting intermittently and often without full research and empirical backup, is just not good enough. It is not worthy of such an efficient, dynamic and professional technology.

OF PROFITS AND PROPHETS

We are, I believe, at an historic moment in the world legal order. A dynamic international technology is pressing forward the urgent need for the development of an effective, new international legal regime. It is important that the new legal regime should be developed in a coherent way and one which does not unduly impede the economies and efficiencies of the technology. This new Committee has a central role to play in these developments. Its Members will need the gift of prophesy. I express the hope that the legal concerns which I have mentioned will not be lost in the headier and more familiar consideration of economic, social and technological concerns. What will it profit our societies if they advance remorselessly down the road of technology but lose respect for the law and their institutions and adherence to the rule of law?

I shall stop here. Judges do tend to go on because normally they cannot be stopped. One judge in Australia, asked to speak like this went on for half an hour, an hour, two hours passed and finally at three hours he stopped. 'Goodness gracious, I am sorry for going on like this. But you see, I did not bring my watch and there is no clock in this room', he said. From the back of the hall, probably from a technologist, came the laconic comment 'There is a calendar on the wall behind you!'.

Well, there is a calendar on the wall of this new Committee. And its agenda is addressed not only to the technologists, economists and administrators of our countries. It is also addressed to the lawyers and lawmakers. And above all to our citizens.