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ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

SECOND SYMPOSIUM ON TRANSBORDER DATA FLOWS

LONDON, 2 DECEMBER 1983

THE SECOND GAUNTLET OF WESTMINSTER

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The Hon Justice M D Kirby CMG
Chairman of the Australian Law Reform Commission

SIMON DE MONTFORT & THE SOCIOLOGY OF INFORMATICS

In 1264 a dispute broke out not far from here following a certain trans border data flow (TBDF).

News had reached England of the unpopular efforts of King Henry III to purchase Sicily for his son Edward. The barons rebelled. A Norman nobleman, Simon de Montfort, led the barons in rebellion against King Henry, who was deposed. It was the first assertion by the English of the right to limit the power of the Crown. The challenge by de Montfort was delivered when he rode on horseback into Westminster Abbey — just across the yard. He threw down his gauntlet — literally on the floor of the Abbey where so much English history is written.

Australians are a somewhat rebellious lot. Remembering the brave Simon, on Wednesday, I threw down my gauntlet. If I were pretentious, I would call it the second gauntlet of Westminster.

You will recall that I said that if the OECD were to earn its place in the sociology of informatics and TBDF issues, it would have to throw off its bureaucratic, technocratic and business-oriented self image — at least partly. The proceedings of the past two days demonstrate the accuracy of that remark. The bias of formal presentations has been strongly — one might say overwhelmingly — from the perspective of the bureaucrat, the technocrat and the supplier of data services. Perhaps it is beyond the traditions and inclinations of the OECD to provide the provocation of a strong consumer voice, the perspective of sociologists and the appeals of advocates of human rights. However, in this last session we get closer to these issues. For now the voice of the lawyers will be heard in the land.

AN UNSAFE CONCLUSION

It would be quite unsafe to conclude from the debates of the past two days that there are not, and will not be, major legal and social problems arising from TBDF. Some, like good wine, seem to be laid down for the future:

- . the issue of small country self-interest and national policies against large country commercial advantage — as Mr Utsumi put it — 'the egoism of the strong' in combat with 'protectionism of the weak';
- . the issue of industrial relations following the unemployment or dislocations caused by the 'efficiencies' made possible by TBDF and subsequent rationalisation. Mr McClelland warned us of this in emphatic terms.

Mr Weiss, in a telling phrase yesterday, quoted Thomas Mann's warning that ideas can only compete in the market place of ideas if there is a market place. What I am suggesting is that our market place of ideas may not have been an entirely representative or comprehensive one — at least so far as the need for laws on TBDF is concerned.

It was interesting to observe the ambivalence of the number of speakers yesterday about this issue:

- . for BIAC it was said that existing law was coping and new legal frameworks could be harmful;
- . yet in the same breath it was claimed that new legal protections for intellectual property were needed;
- . 'rules of the road' were said to be needed. As Mr Landin of Ericsson's put it, 'regulations' were needed — but not direct or indirect restrictions on TBDF. Regulations are legal rules that we like. Restrictions are legal rules that we do not like.

I suspect that the dispassionate would be rather sceptical about the balance and composition of our meeting. As a judge I have learned the value of the clash of ideas fought out by vigorous advocates. Any future symposia should be aimed at facilitating more successfully such a clash of perspectives.

THE 'RULES OF THE ROAD'?

Now we turn to an overburdened session which addresses the 'rules of the road'. Everyone agrees that TBDF necessitates some legal changes. In my opening remarks on Wednesday, I gave a few hints of what was to come in this session:

- . We will look at copyright law — in an important paper by Mr E Tersmeden of Sweden.
- . We will look again at aspects of privacy protection and ask whether the OECD Guidelines go far enough. Should they be clarified or revised : an issue raised by inference in the paper of Mr Helge Seip of Norway. Mr J Rutgers of Philips, Netherlands, tackles the question of the protection of the privacy or the confidentiality of legal persons.
- . We will examine aspects of legal liability under current legal principles — at least in some Member states. Dr Francis Gurry of Australia will examine the implications of defamation, privacy, confidence and negligence laws for data liability in the context of TBDF.
- . Other legal issues of a highly practical kind will be raised. Mr Tedson Meyers, a senior lawyer in the United States, will examine the implications of deregulation of communications services for the traditional protections afforded to monopoly or oligopoly common carriers. Is it 'back to the Jungle of the Common Law?' he will ask.
- . M Etienne Dreyfus, Chairman of the Expert Group of the Economic Commission for Europe, will address the need for rationalisation and simplification of the customs procedures and paperwork in Europe — and by inference throughout the OECD.

You will see that these are not nebulous ethical questions. They are hard legal issues of a highly practical and urgent kind. They are with us now. The ultimate issue that is posed for us is — what role, if any, does OECD have in the examination of these issues in the years ahead?

TEN QUESTIONS — TOWARDS A ROLE FOR OECD?

I want to suggest ten questions that you should be asking yourselves as you listen to the presentations of the speakers in this last session:

1. Information law? The first is : is there an overall viable concept of 'information law' into which the various specific issues I have foreshadowed can be collected? Can we simply draft new laws to meet specific problems in a piecemeal way in all of our countries — unco-ordinated and in ignorance of developments elsewhere?

2. A shopping list? If it is premature to articulate a concept of TBDF law, as such, is there, nonetheless, a 'shopping list' of immediately available practical problems which can be identified and which OECD is a useful forum or the useful forum in which to tackle them?
3. Agenda priorities? If we have such a 'shopping list' — whether it is copyright for the protection of property rights, extension of privacy protection or whatever — what should be the priorities on that agenda?
4. Philosophy? What are the underlying values which should determine both the identification of OECD legal tasks and the way in which those tasks are to be tackled?
5. Costs and benefits? What approach should be taken to cost benefit analysis in the legal regulation of TBDF? Are there some identified wrongs or problems which, in the nature of TBDF technology, are just too difficult or expensive to regulate?
6. Other international agencies? How should OECD relate to the many other international organisations, public and private, that have now entered the TBDF field? Mr Coombe's written paper contains a list of startling size — a cacophony of acronyms : UNESCO, UNCITRAL, WIPO, INTUG, GATT etc. Mr Tersmeden will mention UNESCO and WIPO. Mr Bergsten will describe relevant work of UNCITRAL. Mr Dreyfus will outline the work of ECE. We can all agree that duplication should be avoided. But does OECD have a role to monitor legal developments, co-ordinate Member countries' responses or offer informed consideration from the perspective of the main data countries?
7. OECD institutions? If OECD is to enter the legal field what institutional methodology will be needed? Mr Coombe recommends a legal committee — But how and where would such a committee operate in the Byzantine world of OECD administration?
8. OECD methodology? Does the methodology of OECD need to be changed if it is to tackle legal questions having an ethical or expert content? Mr Coombe will rightly suggest consulting and involving the private sector. But should not the unions, the consumers, the users and others also be involved in some appropriate way? Should discussion be more open? More balanced? More provocative?

9. More guidelines? Is there a role for the OECD to pre-empt incompatible national lawmaking by entering the field of data law and formulating broad principles for the guidance of home governments -- if only on the 'rules of the road'? Regulation, of course. Not restrictions!

10. Non-coersive rules? Finally, should we be thinking of lower level legal regulation : guidelines and persuasive rules of conduct rather than coersive legal rules? At the least would this be an appropriate start in the long haul to a coherent body of law on TBDF?

GREAT EXPECTATIONS

These and other questions will be tackled in this last session. Many observers of the OECD scene, who have great expectations of this uniquely useful international organisation, will be watching this closing part of the symposium with special interest.