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ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

SECOND SYMPOSIUM ON TRANSBORDER DATA FLOWS

LONDON, 30 NOVEMBER 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 since Magna Carta 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 from our meeting place. 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, I wish to throw down a gauntlet of my own. If I were pretentious, I would call it the second gauntlet of Westminster.

If the OECD is to earn its place in the sociology of informatics and TBDF issues, it will have to throw off its bureaucratic, technocratic and business-oriented self image — at least partly. I believe that the proceedings of this symposium will demonstrate the accuracy of that remark. The bias of the formal presentations and participants listed is strongly — one might say overwhelmingly — from the viewpoint 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. Only in the last session will we get closer to these perspectives. It is then that the voice of the lawyers will be heard in the land.

THE 'RULES OF THE ROAD'

It is quite unsafe to conclude from the relatively muted municipal debates on these topics 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. They include:

- . the issue of small country self-interest and national policies against large country commercial advantage — as Mr Utsumi of Japan puts it in his paper, '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. Obviously this issue has vital legal and social implications.

It is interesting to observe the ambivalence of commentators about these issues:

- . some suggest that existing law is coping and that new legal frameworks could be harmful;
- . yet in the same breath such people often claim that new legal protections for, say, intellectual property are needed;
- . 'rules of the road' are said to be needed. 'Regulations' are 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. Future symposia on these important topics should, in my view, be aimed at facilitating such a clash of perspectives.

In the last session, which I will chair, we will turn to an overburdened program which addresses the 'rules of the road'. Every serious observer agrees that TBDF necessitates some legal changes. But what are they and what questions should they deal with? To answer this question, I must state my thesis. It is a simple one. Whilst the technology brings overwhelming and obvious benefits, it also brings problems. It is urgent that we tackle those problems. The OECD is the body of Western countries which dominate world data traffic. It has the opportunity, the skills and the responsibility to

provide leadership to home governments in the perplexing social and human questions resulting from the linking of computers by telecommunications. That is why I attach so much importance to the refinement of the OECD's methodology in developing procedures by which it can help home governments to tackle the sociology of informatics.

OECD PRIVACY GUIDELINES

In fact, the OECD has already accepted a leading role. In 1980 it endorsed guidelines on the protection of individual privacy in the context of transborder movement of personal data. These guidelines included certain 'basic rules' for the protection of privacy:

- . limiting the unnecessary collection of personal data;
- . limiting the use of data collected for one purpose, then being used for other purposes;
- . limiting the storage of such data; and
- . upholding the normal right of the individual to have access to computerised data about himself — and to correct the record if it is wrong or irrelevant.

Many OECD countries already have laws which uphold these, and other basic rights. But Australia, the United Kingdom and other countries are still developing their data protection laws. In Australia a major report of the Law Reform Commission will be tabled in Parliament next week. The report proposes new laws for better protection of privacy. In the field of information privacy, I give nothing away in saying that we, like others before, will draw heavily on the OECD guidelines. This is as it should be. Not only does the OECD provide a relevant and informed body to pool expertise concerning the many and varied problems here. By providing non-coercive rules which can guide domestic law-making, it can seize an opportunity to reduce the Babel that will result if each country goes it alone. In the world of instantaneous transborder data flows (TBDF) the very notion of State sovereignty needs review. We must act together or laws for the protection of our citizens can be quite readily circumvented, frustrated or ignored. This could be done by the simple device of storing data beyond the jurisdiction or at least beyond the effective power of any one jurisdiction. Universal, instantaneous information technology adds urgency to the need to develop international law and to harmonise local laws:

- . the technological people realise this — simply because they must get the linkages that make the systems work;

- . Treasury officials begin to realise this — because the spectre of protectionist lawmaking is already with us : laws ostensibly for human rights but aimed also to protect hi-tech local industry;
- . but who is working on the wide range of social issues that together may affect profoundly the shape of our societies in the 21st century? The answer is, I am afraid, very few outside the small dedicated band of part-time OECD cognoscenti, many of them in this room.

FUTURE PRIVACY ISSUES

The OECD Privacy Guidelines were only the beginning of the consideration of privacy issues raised by TBDF:

- . What of developments beyond guidelines? Of enforceable rules that permit a citizen in Britain to enforce protection of his data privacy in say, Australia? Ultimately without such remedies, will principles and guidelines amount to much when stacked up against the dynamics of computations?
- . What of the protection of the privacy or confidentiality of legal persons?
- . Should codes of ethics be developed? Would they control the conduct of data personnel more effectively than the remote prospect of legal redress?
- . Will privatisation and deregulation of public sector telecommunications authorities — with their privacy protective traditions of secrecy — endanger individual privacy?
- . Will the right of access to data — central to the OECD guidelines and most domestic privacy laws — flourish into a right to handle terminals and to interrogate them about one's own personal data? As the data profile becomes more critical for the lives of future citizens and as document copies become less common, it seems likely to me that citizens will demand a right to handle the equipment, and the software will need to be programmed accordingly.

OTHER SOCIAL ISSUES

Furthermore, privacy itself is just the first issue to be considered. Others wait in the wings for international attention:

- Harmonisation of freedom of information laws is necessary as illustrated by the recent case reported in Norway. There, interrogation of a US computer under that country's Freedom of Information Act, secured instantaneously, data which in Norway was, in law, a State secret.
- The vulnerability of the wired society was studied a few years ago in Sweden. But who is looking at the implications for the international community of heavy dependence on vitally important data, control over which may be beyond the power of a particular country?
- Crime, at least at common law, is strictly local. Courts are typically confined to punishing crime in their own territory. But informatics brings a world in which antisocial conduct may be initiated in one jurisdiction transmitted over and switched in many others and result in harm in still another. How will our legal systems and police forces cope with problems of this kind?

I have listed only a few of the complex questions that come in the train of the remarkable and beneficial developments of transborder data flows. Still others may be touched upon in the closing session:

- the development of a new principle for resolving the choice of legal regime in transactions having instantaneous connexion with many lands;
- the implications for copyright law will be dealt with in an important paper by Mr Erik Tersmeden of Sweden;
- the liability for loss and insurance against computer error; and
- the impact on our courts — such as in the formal proof of computer evidence;
- the implications of deregulation of communications services for the traditional protections afforded by government or private monopolies to perceived social values;
- the need to simplify and rationalise customs, procedures and regulations.

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 question that is posed for us is — what role, if any, does the 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 should be asked as you listen to the presentations of the speakers on the social and legal issues to be discussed in this symposium. Some of them may also be relevant, by analogy, to the economic and

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 for which the 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 the OECD's 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? One paper 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? One prepared paper suggests 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 policy 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-coercive rules? Finally, should we be thinking of lower level legal regulation : guidelines and persuasive rules of conduct rather than coercive legal rules? At the least would this be an appropriate start in the long haul to a coherent body of law on TBDF?

THREE LESSONS FOR THE SOCIOLOGY OF INFORMATICS

In closing, I want to advance a few simple propositions for your consideration:

- . The first is that the social problems presented by informatics are many and difficult. There needs to be a heightened sense of the urgency of tackling them. We need a new Luther of Jurisprudence to guide the law into the technological age. Law-making tends to move at a snail's pace. If the Rule of Law is to survive in our countries as more than a political cliche we will need lawyers and legal institutions as imaginative as the technologists.
- . Secondly, there needs to be a heightened awareness amongst the technologists themselves of the importance of these issues. Unless there is such a realisation, there will surely be a social backlash as citizens come to realise that their rights can be put at nought by TBDF and that local laws are incompetent or just plain silent when their vital interests are at stake.
- . Thirdly, I return to my principal point. If the OECD is to earn its place as a leader in the sociology of informatics, it must mend its own ways:

- .. it should throw off — at least partially — its bureaucratic-technocratic self-image — and frankly face the fact that the OECD countries must address the social and human rights implications of the new information technology. Nothing could be more dangerous or more beguiling than to ignore them because they are elusive and hard issues;
- .. the OECD must show a heightened concern about the implications of informatics for developing countries; and
- .. it should be more open and less secretive in its operations. When we are gathered — in this holy place — to talk about free flow of data we should, like the clerics, practise what we preach. I cannot for the life of me see why this whole symposium is not open to the press and public. Our free communities — which are vitally interested in all of the issues we will be discussing — have a right, indeed a need, to be consulted and informed.

Faced by the social and legal problems of informatics, I will find it difficult to lead my flock out of 'CLERGY AYE' or 'CLERGY NO'.** At this stage the best advice I can give is to exit by the 'AYE' door. But keep — if it is possible here — a Jesuitical mental reservation. And also keep your fingers crossed, that the law-makers and the people's representatives, so close at hand, can keep pace with the technological revolution that is embracing us all.

** This is a reference to the markings above the doors of the meeting room of the Anglican Synod, where the symposium took place.