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DIGITAL ENLIGHTENMENT
FORUM

SYMPOSIUM LUXEMBOURG

18-19 JUNE 2012

DINNER ADDRESS

THE TEN COMMANDMENTS OF
LUXEMBOURG

The Hon. Michael Kirby AC CMG

Australia

DIGITAL ENLIGHTENMENT FORUM
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ABBAYE DE NEUMÜNSTER/HOTEL CRAVAT
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[INTRODUCTION DELETED]

PRAISE AND APPRECIATION

I have been attending conferences on the legal and social aspects of information systems over the past 35 years, ever since the Australian Law Reform Commission (which I then chaired) became involved in the drafting of Australia's privacy protection laws¹. Over the years, I have had the privilege of working with my friend, Professor Masao Horibe (Japan). I am proud to share with him appointment as a patron of the Digital Enlightenment Forum.

We have been fortunate in the guidance at this meeting of George Metakides, President of the Forum. He knew that those of us who had come from far away would thirst for information on the historical *Abbaye* in which we were meeting. He told us a little about its history. He situated our endeavours in the context of the European theories of human enlightenment. His warm and generous personality got us off to a splendid start.

* A Patron of Digital Enlightenment Forum (2012 -). Formerly Chairman of the OECD Expert Group on Transborder Data Flows and the Protection of Privacy (1978-80) and on Security of Information System (1991-92). Justice of the High Court of Australia (1996-2009). President of the International Commission of Jurists (1995-8). Member of the Advisory Board of EPIC, Washington, D.C. (2010-).

¹ *Privacy Act 1988* (Aust.); *Telecommunications (Interception) Amendment Act 1987* (Aust.). The OECD Guidelines have been influential throughout the world. See G. Greenleaf, "76 Global Data Privacy Laws" in *Privacy Laws and Business: Data Collection and Privacy Information Worldwide* (Special Report) 2 September 2011, 1.

We were also privileged to have the presence of the Minister for Communications and Media of Luxembourg, (M. Francois Biltgen), the Vice-President of the European Commission (Ms Viviane Reding) and the Director, D.G. Connect, within the European Commission (M. Mario Campolargo). Their presence was a signal recognition, from high officials, national and regional, of the significance of the topic we were tackling. And of the potential of the Forum to provide value added to the many voices that are now being raised, relevant to digital policy. The objective of our Forum must be to offer a distinctive voice. Having regard to the participants in this meeting, it must be expected that such a voice will search for enlightenment, not merely more data. And will do so with the benefit of the participation of many experts who are accomplished in the technologies that must be understood before the social, legal and other problems can be tackled and solutions can be explored.

It is necessary to thank the Secretary-General of the Forum, Jacques Bus (Netherlands), for his painstaking work in assembling this meeting and securing participation at a high level of such an interesting mixture of expertise and interests. With a minimum of fuss, and smooth organisation, the Secretary-General has brought us together from close at hand and far away, to address issues vital to the future of human society, having regard to the impact on it of the fast changing technology of informatics. This technology challenges the attempts of national governments, and even international agencies, to propound rules and guidelines² that will remain relevant and effective, notwithstanding the many radical changes in the technology that require constant revision of human norms³

I would praise the Secretary-General for many things. However, above all, he and his co-editors deserve praise for the *Digital Enlightenment Year Book 2012*⁴. With typical efficiency, he procured the publication of the first issue of the *Year Book* just days before this meeting assembled. It is an astonishing work of great variety, expertise and even readability. The Secretary-General, co-editors and all those who have worked on the *Year Book* deserve our praise and thanks. Planning should

² For example, Organisation for Economic Co-operation and Development (OECD), *Guidelines on Transborder Data Flows and the Protection of Privacy*, OECD, Paris, 1980.

³ M.D. Kirby, "The History, Achievement and Future of the 1980 OECD Guidelines on Privacy" in J. Buss *et al* (eds.), *Digital Enlightenment Year Book 2012*, 83.

⁴ J. Buss, M. Crompton, Mirielle Hilderbrandt and G. Metakides, *Digital Enlightenment Year Book 2012*, IOS, Amsterdam, 2012.

commence at once for the next issue of the *Year Book*. It may be hoped that it will contain a transcript version of some of the outstanding presentations given at this session of the Forum.

I would like to single out two officers who have been careful and attentive to our needs. I refer to Ariane Dänzer and Peter Apps. Their excellent work on administrative arrangements has been outstanding. Anyone who has ever organised an international conference will know the inherent difficulties and the blessing it is to have officers of such quality and efficiency.

We have also been fortunate in the venue of this Forum at the Abbaye de Neumünster. And to be welcomed at Hotel Cravat, Luxembourg for this dinner by the family of the owner, in a warm and generous way.

Above all, we have been beneficiaries of the company and insights of each other. Those of us who are Anglophone, have once again, taken advantage of our temporary predominance as an international language of communication. The Anglophones need to pause and reflect upon the burden that is cast upon those who, over two days, have had to work, think and express complex ideas in a language other than their mother tongue. I want to record our thanks to all those who have, with good humour, skill and perceptiveness, spoken to us in our language. All too often this is taken for granted. But I ask my fellow English speakers to join me in an expression of gratitude to everyone who uncomplainingly expressed themselves in this Forum in English. [applause].

TEN COMMANDMENTS OF LUXEMBOURG

Having displayed a sweetness of gratitude, uncharacteristic of judges and former judges, I now turn, in my remaining observations, to reveal my true nature. I have a number of suggestions for future meetings of the Forum that I will express for the consideration of the President, Secretary-General and those who will have the responsibility of planning the future of the organisation. As there are 10 such suggestions, I will call them (without blasphemy I trust) Ten Commandments.

Like those revealed to Moses, I do not doubt that several will be honoured in the breach rather than the observance:

1. *Women:* In future meetings, it would be desirable that every effort should be made to invite more women to participate. I realise that gender alone does not deliver expertise. I appreciate that the principal keynote address was given by a woman, Vice-President Reding. I also noticed the outstanding contributions to our dialogue of women, both in the *Year Book* and in the conference sessions.

Nonetheless, women have numbered about one fifth of the session participants. In Australia, when I attend conferences of the internet industry, I notice the same overwhelming predominance of males. It makes me reflect on whether there is something in the science, engineering or mathematics of the discipline of digital technology that tends to attract males rather than females. If so, this could be a negative feature. Sometimes it is women who will be more perceptive and alert to social implications including of technology. In future meetings of the Forum there should be more women's voices. In the first panel, for example, there were no female participants. Although this was later corrected in subsequent panels, it was not a good look.

In my life in the law in Australia, I have witnessed a profound change in the composition of the judiciary and legal profession over the course of my career. It seems likely that this will also be true of informatics. Especially should this be so in an organisation dedicated to enlightenment. Particular effort should be made to increase the participation of women

2. *Civil Society:* We have been privileged to have representatives of civil society at this Forum. In particular, Peter Halpin (U.S.A.) has been energetic in speaking up for users of technology, as have a number of academic participants, including Professor Mirielle Hildebrandt (Netherlands). Several members of the audience insisted that what was better for business was not necessarily better for consumers. In the search for enlightenment, we might

do well to have more voices lifted in recounting the perceptions of ordinary users of the technology.

Mr Malcolm Crompton (Australia) rightly warned us that it would be rare in this world for individuals to get something for nothing. Commonsense would tell them that there was likely to be a trade-off for digital arrangements that afford them access to extensive services. Just the same, many of those who engage with those services today are young people who are likely to have a somewhat naive trust in the providers. It is important for the Forum to hear their voices.

3. *Civil Libertarians*: Because freedoms of expression and access to information are important human rights, it must be expected that they will have many advocates in the context of the new digital technology. Nevertheless, there is value in hearing of the other fundamental human rights that are upheld in international instruments. These include protection of privacy, protection from damage to reputation and of family life⁵.

I hate to appear self-interested. However, lawyers also have an important role to play in expressing the principles of universal human rights. In Europe, those principles are under constant scrutiny before the European Court of Human Rights, in universities and elsewhere. In all countries, they are under regular consideration by national courts and protective officials. The issues before the Forum are not wholly technical. Whilst the technology is obviously important, it cannot be given the last word. Other expertise is essential if the Forum is to arrive at enlightenment.

4. *Year Books*: It would be desirable, as it seems to me, if the next *Year Book of the Digital Enlightenment Forum* were to contain more voices expressed from the stand point of constructive critics of the balances being struck in respect of privacy protection, security, freedom of information and so forth. All of us

⁵ Universal Declaration of Human Rights (Art. 18- *Freedom of Conscience*), Art. 19 (*Freedom of Opinion and Expression*); International Covenant on Civil and Political Rights, Art. 17 (*Privacy, Family, Home or Correspondence*); Art. 18 (*Freedom of Thought, Conscience and Religion*); Art. 19 (*Freedom of Expression and of Media*).

know that critics and questioners exist. For example, in news media, many serious commentators have expressed criticisms of the adjustments of Facebook to its privacy settings, in ways that may be seen as protecting Facebook's commercial interests whilst potentially being deleterious to the privacy interests of subscribers⁶. Well known and expert commentators, speaking at international conferences, have joined in apparently rational and authentic criticisms that need to be taken into account in making sense of privacy issues in the context of contemporary technology⁷.

I have no doubt that Erika Mann, with her substantial experience in politics and public life, would be more than capable of expressing the view point of Facebook, in response to any comments or criticisms. Experience in courts and tribunals teach us that, out of the dialectic of controversy will often emerge wisdom and enlightenment. That dialectic is necessary both in future meetings of the Forum and in future editions of the *Year Book*.

5. *Futurologists*: My own experience, chairing the OECD Expert Group on Privacy (1978-80), taught me the speed with which technological change can challenge well intended (and even previously well-informed) expressions of normative principles and ethical rules. Thus, the "Use Limitation Principle", which was an essential ingredient in the *OECD Privacy Guidelines* of 1980,⁸ was appropriate to the information technology as it existed at that time. The advent of search engines, with their great practical utility, but often using personal data supplied much earlier in different circumstances for different

⁶ L.G. Crovitz, "Privacy Matters Set True Worth of Facebook Future", *The Australian*, 22 May 2012, 6 (from *The Wall Street Journal*). R. Falkenrath "Google Must Remember Our Right to be Forgotten", *Financial Times* 16 February 2012, 12. N. Perloth and N. Bilton, "U.S. Spotlight is on Apps That Take Users Data Without Their Consent", *International Herald Tribune*, 17 February 2012, 17.

⁷ Danah Boyd, "Making Sense of Privacy and Publicity" SXSW Conference, 13 March 2010: [HTTP://www.danah.org/papers/talks/2010/SXSW2010.HTML](http://www.danah.org/papers/talks/2010/SXSW2010.HTML)

⁸ The "Use Limitation Principle" is the 4th principle in Part Two (Basic Principles of National Application) contained in the *OECD Privacy Guidelines*, above n.2. It states: "Personal data should not be disclosed, made available or otherwise used for purposes other than those specified in accordance with paragraph 9, except: (1) with the consent of the data subject; or (2) by the authority of law. The reference to paragraph 9 is to the "Purpose Specification Principle" This states: "The purposes for which personal data are collected should be specified no later than at the time of data collection and the subsequent use limited to the fulfilment of those purposes or such others as are not incompatible with those purposes and as are specified on each occasion of change of purpose".

purposes, obliges some adjustment in the principles. The OECD is itself now undertaking a revision of the 1980 principles.

This instance demonstrates that nothing can be written in stone. Least of all when technology of much utility is rushing ahead at a great pace. That is why it is essential, if enlightenment is to be attained, to have voices that speculate on the possible developments of technology. Both in future meetings and in future editions of the *Year Book*, we will need more contributions of the kind given to us by John Clippinger (MIT Media Lab, USA) on likely developments in artificial intelligence. Even in the general media, commentators are beginning to ask whether animate, but increasingly powerful computers, may not enjoy a legal or constitutional right of free speech, now or at some stage in the future⁹. Opinions such as this may be viewed, at first, as science fiction. Or infotainment. However, many scientific developments, including in the field of informatics, have grown out of imaginative speculations addressed to current technology that give birth to future technology more quickly than was expected.

6. *Young Participants*: Growing out of this last comment is the need for more young participants. They will inherit the world of informatics as it is developing. It is their interest in privacy, reputation, security and access to information that needs to be defended and protected, both by the technology itself and by treaties, laws, guidelines and policies. Although there have been some younger participants at this meeting, the high expertise of the speakers has generally meant that the voices of youth have been muted. We need to encourage their participation because clearly they are a legitimate voice.

At least some commentators suggest, for example, that notions of privacy are changing as young people release to social networks highly intimate personal data that once they would have withheld from all but their closest intimates. If there are changing attitudes to privacy, for instance, it is essential that we should know of them and adjust to them. Or, alternatively, that we should

⁹ Tim Wu "Free Speech For Computers? *International Herald Tribune*, 21 June 2012, 8.

oblige social networks and other media to protect the right of users to retrieve such data (so far as possible) following second thoughts.

7. *Cosmopolitan*: It is inevitable, and natural, that the Digital Enlightenment Forum, with its seat in this part of Europe, should have a priority focus on European concerns, with a necessary acknowledgement of the importance of North America for the operation of those concerns. I accept the difficulties and expense of securing the attendance of non-Europeans who have to travel inter-continental distances. I acknowledge the presence of a number of participants, including from China, Japan and Australia. However, a recent visit to Nigeria, on the way to this Forum, demonstrated to me the pervasive influence of mobile phones, lap-top computers, social networks and the internet. The future of the technology lies increasingly in countries such as Nigeria, Brazil, China, India, and South Africa.

Recent political events have demonstrated the potency of Facebook, Twitter and other media in the unfolding of the 'Arab Spring'. To the extent that this is practically feasible, it would be highly desirable to secure participation from such countries. And to obtain voices that express the perspectives on the subjects of the Forum, of different communities: Poor people, the old, the disempowered, minorities. Their voices do not always tend to be heard in the councils of the OECD, Europe and North America. Yet they are human beings, with basic rights which a just international order will seek to be aware of to reflect and safeguard. How we secure their voices is uncertain. But their voices are essential to a true human enlightenment. And to recognition that many people are overwhelmed by the choices that they appear to be given. This, in itself, is disempowering, not only in developing countries but to many in the developed world as well.

8. *Big Players*: It is highly desirable in future meetings of the Forum that every effort should be made to secure the participation of the big players in the technology, so that their voices and perspectives will be heard. But also so that they can enlighten others concerning likely future directions and current policy, in a way that other players cannot. A tricky question is presented, to

the extent that the large players participate (and even contribute to the support of their own critics and social supervisors). In many organisations with which I am associated, particularly those based in North America, it is obligatory for participants to disclose any interest, of a financial or other kind, that might affect the perceived integrity and independence of any viewpoints they express. Some consideration will need to be addressed to this problem.

International civil society organisations and non-governmental organisations play an important role in keeping the big players up to the mark and in criticising their technology and policies, where criticism is considered necessary. In principle, it would seem to me, it is important to have non-governmental organisations such as Privacy International (in London) and EPIC (in Washington) linked in an appropriate way to the Forum. Such links might be created through shared personnel. But they may also need to be institutional.

9. *Scepticism of Trust*: The word “trust” was frequently expressed during the Forum debates. This is often stated to be the prerequisite policy of the successful operations of big players. They must win the “trust” of their consumers and customers. However, “trust” is a weasel word. It has a tendency to lull those, by and to whom it is used, into a potential feeling of endearment and to silence criticism. This will not necessarily be healthy. The Digital Enlightenment Forum will be useful insofar as it questions appeals to “trust” and scrutinises conduct against the high duties that are expected of those in a position of trust. Accountability, transparency and scrutiny may be a more reliable pathway to enlightenment than an overly trusting notion of trust. Hostility will not be the appropriate posture. But scepticism is commonly the proper standpoint to adopt towards power of every kind in democratic societies¹⁰.

11. *Civilisation*: Picking up on a theme expressed by President George Matakides, it could be desirable in future meetings of the Forum to have some

¹⁰ M.D. Kirby, “Dialectics and Law” (1963) 39 *Archiv für Rechts-und Social Philosophie* 91.

event on occasion that reminds all participants that they are human beings first and technologists or societal experts second. Someone, for example, who would take us on a walking tour of local symbols of earlier enlightenment. Or talk on the history of this Abbaye de Neumünster. Including the role of the tax havens for digital technology. Or tell us of the history, society and economy of Luxembourg. Or an item that permits even a small window to local culture. A musical item. A cello recital. A singer or three. Accidentally, I wandered into the courtyard of the Abbaye, a beautiful place. I found that, its only stated fame, according to the signs displayed, was that it was the space set aside for smokers. Particularly those who have come from far away, some glimpse of the local civilisation would be cherished, if only because it would reassure participants that the journey has been worthwhile and that they had not awoken to find themselves in a place whose Anglophonia deceived them into thinking it was Bloomington, Indiana or Wagga Wagga, Australia.

WHEN FAR FROM HERE

Weeks hence when we have all returned to our busy lives, and to our home towns and daily avocations, our minds will suddenly present to us images of the Abbaye. In our heads we will hear the bells of a nearby tower ringing the Angelus. Or we will hear the bird cries, echoing in the valley. We will remember our colleagues at this Forum. Our minds will reflect upon the dazzling technology of the age we are so fortunate to live in. Keeping the human values of privacy, access to information, free speech and security are worthy challenges to us. They constitute an important potential role for this Forum. We, who have been privileged to gather together in this space, owe it to the wider world to continue our dialogue. And to give it a practical cutting edge, so that it will contribute to the work of our governments and of the United Nations, OECD, European Union, APEC and the Council of Europe. Not just another meeting. Not just an academic discourse. A serious reflection on some of

the deepest human values that need to be rediscovered and given voice in an age of extraordinary technological change¹¹.

¹¹ Cf. Graeme Laurie, Shawn Harmon and Fabian Arzuaga, “Foresighting Futures: Law, New Technologies, and the Challenge of Regulating for Uncertainty” (2012) 4 *Law, Innovation and Technology* 1