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LEGAL CHALLENGES IN THE DIGITAL ENVIRONMENT

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The Jurisprudential Issues

• Uniqueness of the digital environment / cyberspace
• How should we address the legal issues that arise?
• 3 options:
  – New cyberspace law
  – Middle path (evolutionary development)
  – Using existing laws (the ‘law of the horse’)

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Cyberspace is a unique and novel environment that cries out for a new set of rules tailored specifically for it. The Internet should be governed in a manner suited to its particular history, customs and technological capabilities. Adherents of this school of thought vehemently oppose attempts to apply conventional models of regulation to the Internet.
Option 2

- Some commentators adopt a ‘middle-path’ and argue that the law of cyberspace should evolve slowly through a careful application of common law principles, with particular attention paid to the aspects of cyberspace that make transactions in cyberspace unique.
Option 3

- The last category of commentators share the opinion that existing legal principles are adequate in dealing with issues relating to transactions conducted in cyberspace
- The ‘law of the horse’ analogy
Inadequacy of Existing Law

- Existing law tailored to regulate world of hard copy
- Leads to undesirable or even ridiculous results when applied to the digital medium
- Example 1: Legality of ‘hyperlinks’: *Shetland Times v Wills*
- Example 2: Legality of ‘transient copies’: recourse to implied licence reasoning & legislation in some jurisdictions
Inadequacy of Existing Law (con’t)

- Example 3: Formality requirements for some types of contracts in certain jurisdictions
- Example 4: Digital communications / transactions ignore political and jurisdictional boundaries: difficulty of regulation and deciding what country’s laws should apply (private international law issues)
Inadequacy of Existing Law (con’t)

- Advanced computer technology undermines the assumptions of older categories of the law
- Eg., interactive networked hyperlinked media eviscerates the idea of authorship, and with it one of the fundamental concepts of copyright law
Inadequacy of Existing Law (con't)

- Advanced computer technology conflates distinctions that made much sense under older regimes
- Blurring of distinctions between public and private, the telephone and mail, the written and spoken word, broadcasting and point-to-point communications, and between the publication, consumption, and distribution of information
Inadequacy of Existing Law (con’t)

- Increased automation, with a concomitant reduction in the role of effective human oversight, creates difficulties in the assignment of liability or legal blame.
- We had a relatively coherent and congruent set of assumptions about the way the physical world works: due to the rapid and highly uneven pace of technological change, we do not have the same understanding of the digital environment.
Inadequacy of Existing Law (con’t)

- It is not apt to apply the traditional, territorial and geographical conception of community in the physical world to cyberspace, where an alternative ‘experiential’ conception of community seems to exist
What Can Be Done?

- Multilateral treaties
- Regulation by non-governmental bodies
- Self-regulation by Internet users (e.g., Netiquette and the upholding of norms such as open participation, consensus-building, a prioritization of freedom of speech and grassroots organization that have become identifiable with the Internet)
- International law of cyberspace akin to law applicable to the high seas?
Overview of the Legal Issues Raised in the Digital Era

- Jurisdiction and other private international law issues
- Intellectual property and liability issues
- Authentication
- Hand-written signatures and writing
- Evidence
- Crime and crime prevention
- Data protection and privacy
Protecting Content in an On-line Environment

• Inadequacy of traditional means of protection:
  – growth in Internet usage
  – ‘free use’ culture
  – world wide operation of the Internet reduces effectiveness of traditional methods of law enforcement
  – ease of copying, altering and disseminating material in digital format
  – delivery of services/material entirely online
Content Management Strategy

- Right to use the content in the manner desired (management of inputs)
- Protecting that information so that others will not profit from it (management of outputs)
- Practical strategies
Harmonization of Copyright Laws

- Berne Convention for the Protection of Literary and Artistic Works
- Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)
Multimedia Products

- The nature and problem of multimedia products
- Whether the underlying components are subject to copyright?
- Is there going to be substantial reproduction of the component?
- Does the proposed use of the component fall within package of exclusive rights held by copyright owner?
Multimedia Products (con’t)

- Does the applicable legislation allow the component to be used without the copyright owner’s consent?
- Who is the owner of copyright in the component, and what consents or authorizations are needed to use the component?
Position of Employees

- Was content created prior to commencement of employee’s employment?
- Does the employment contract waive the employer’s statutory right to copyright in the content?
- Is the creation of the content within the scope of the employee’s employment?
- Are the moral rights of the employee being affected?
Independent Contractors

Assignment? What can be assigned?

Licence? Preferably:

- world-wide
- irrevocable
- non-exclusive
- transferable
- perpetual; and
- defined clearly in respect of permitted use
Moral Rights

- Current trend
- Importance of moral rights in context of multimedia development:
  - large number of authors and so developer may be less willing to attribute authorship to all authors
  - ease of distorting or mutilating digital content
Hyperlinking

• To avoid need for identifying copyright owner and obtain authorization?
• Implied licence?
• Scope of implied licence - does it extend to ‘deep’ hyperlinking and framing?

• *Shetland Times v Wills and Zetnews Ltd*
• *Ticketmaster v Microsoft*
Hyperlinking (con’t)

- *The Washington Post Co & Ors v Total News Inc & Ors*

- Tentative conclusion from the 3 cases:
  - Hyperlinking to a home page (‘surface’ hyperlinking) is permissible unless specifically prohibited by the Web site owner
  - Implied licence probably does not extend to ‘deep’ hyperlinking or ‘framing’
Use of Disclaimers

- 'No warranty is given concerning the accuracy of the information contained in this site'
- 'This web site / product owner dissociates itself from and bears no responsibility for material contained in external sites which are linked to this site'
Management of Outputs

- Interception of data and encryption
- Unauthorised use by end-users
- Conditions of use
- Use of copyright notices
- Copyright registration
- Inherent protections
- Technical protections
- Electronic Copyright Management Systems (eg., IMPRIMATUR)?