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Introduction: Borderless Electronic Commerce Symposium

JANE K. WINN*

The paradox is well known: the information economy is global, but regulation of activity in global information markets is still local. Has this problem become like the weather—something everyone talks about, but no one can do anything about? The papers in this symposium issue look at different legal issues raised by borderless electronic commerce to see just what is being done. They look in particular to traditional sources of international law to see how well those institutions are meeting the challenges of global information markets.

The notion that the Internet created “cyberspace,” which seemed to be a sort of new “territory,” once had quite a bit of currency. Building on that metaphor, it seemed that the conflict between global electronic commerce and local law might be resolved by recognizing cyberspace as a new autonomous jurisdiction and source of law. This idea has now been eclipsed by the recognition that the Internet will inevitably encroach on the interests of existing sovereigns and that those sovereigns cannot be prevented from responding in very conventional ways. The focus of the discussion of cross-border electronic commerce issues has changed from the novelty and apparent separateness of cyberspace to the importance of promoting rational responses from national governments, and harmonization of individual national responses.

Although it once seemed to some observers that the novelty of the Internet would call forth a new kind of response from national governments, it is now becoming clear that many of the challenges posed by Internet commerce strongly resemble traditional issues of cross-border trade. Notwithstanding the familiarity of some of the problems, however, a consensus has not yet emerged on how those problems should be tackled. As a result, it seems likely that the divergence in national approaches to the regulation of cross-border electronic commerce is now more pronounced than it was only a few years ago. Until harmonization makes greater progress, businesses wishing to compete in global markets

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will have no alternative to making hard choices: stick to doing business as usual with reference only to local law while hoping to evade detection by foreign regulators or being drawn into litigation in a hostile or remote forum; internalize the costs of compliance with incompatible regulations while hoping those costs can be passed on to customers; or stand on the sidelines while hoping the costs of compliance with applicable law in global markets will eventually come closer to the costs of compliance with local law.

From the point of view of businesses wishing to engage in cross-border electronic commerce, it seems clear that the confusion over appropriate legal standards is likely to get worse before it gets better. The papers in this symposium issue show, however, that progress is being made in some areas. One theme that emerges from these papers is that legal institutions are adapting to meet the challenges of borderless electronic commerce, albeit at a pace far slower than innovations are unfolding in the marketplace. While the glacial pace of law reform might seem to be an impediment to the development of electronic commerce, it is possible that ill-considered law reform will create even greater impediments. There has been major legislation in many countries in the areas such as data privacy and electronic signatures, but it will not be clear for some time if enforcement of those laws is even feasible or, if feasible, will produce the intended results. On the other hand, the *laissez faire* approach taken in the United States may create problems just as severe as hasty or ill-considered legislation if the lack of regulation permits a limited number of interested parties to lay claim to new value created by Internet markets.

Another theme that emerges from several papers is that the lack of a global standard for online identification and security in communications is a major obstacle to the expansion of cross-border Internet commerce. The papers on letters of credit, export regulations, GUIDEC, electronic records and signatures, data protection, and UNCITRAL projects all address the question of how the law should respond to the risks imposed on transacting parties by the lack of a reliable system for online identities and communication security. While there may be widespread recognition of the magnitude of the problem, there is no consensus yet on how the problem should be solved and what role traditional legal institutions should play in solving it. It is hardly surprising that the United States' position favors a market-led response to the problem while outside the United States there is much more interest in regulatory responses.

James Barnes and Professor James Byrne discuss how one of the mainstays of international trade, the letter of credit, is evolving to permit more efficient processing of trade finance through the adoption of new technologies. Barnes and Byrne point out that while letters of credit may well be the earliest type of contract to be formed on a regular basis using electronic communications media, the documents of title that are an essential element of most cross-border letter of credit transactions have proven more difficult to convert to electronic form. Barnes and Byrne note that many organizations that have traditionally been sources of law in letter of credit transactions, such as the International Chamber of Commerce, are working on revising their existing rules in order to better accommodate electronic commerce. In addition, many technology vendors are competing to establish new global standards for electronic letters of credit and documents of title technologies.

Stewart Baker, Peter Lichtenbaum, Maury Shenk, and Matthew Yeo look at the effectiveness of the World Trade Organization (WTO) in defining the standards that should apply to trade in "e-products," that is, content-based products that were formerly delivered in tangible form but now can be delivered in electronic form via the Internet. This paper considers whether e-products should be considered subject to the rules of the General

Agreement on Tariffs and Trade, services subject to the rules of the General Agreement on Trade in Services, or something else; what the implications of new taxation rules for trade in e-products proposed by the EU and other countries may be; and what impact the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights may have on these transactions. The authors note legal theory seems unlikely to provide any clear answers to the issues raised by trade in e-products. In light of the important economic implications of any resolution of these issues, a negotiated political settlement of these issues therefore seems most appropriate.

Dr. Joanna Benjamin analyzes the surprising lack of certainty and clarity in laws governing rights in financial assets that are traded in electronic form in global financial markets. This paper divides the legal risks attributable to the computerization of cross-border transfers in securities into two categories: (1) those due to policy considerations that override certainty, such as the rights of unsecured creditors or of victims of fraud; and (2) those due to the persistence of anachronisms that are ill-suited to modern market conditions. The kind of uncertainty Dr. Benjamin identifies was greatly diminished in U.S. markets when Uniform Commercial Code Article 8 was revised in 1994. While some other countries, such as Belgium and Luxembourg, have enacted similar laws, many other countries have not yet revised their laws in this area.

Professor Peter Fitzgerald looks at the difficulty of complying with export control regulations in a world without global standards for secure authentication of identities in electronic commerce. A customer placing orders over a website may be blacklisted by the U.S. Commerce Department's Bureau of Export Administration, the U.S. State Department's Office of Defense Trade Control, or the U.S. Treasury Department's Office of Foreign Assets Controls. Notwithstanding the fact that there is not yet a statutory obligation to check transactions against the U.S. government's blacklists, commercial website operators that do not do so run the risk of substantial administrative, civil, and criminal penalties if they engage in impermissible transactions.

Professor William Fox studies the General Usage for International Digitally Ensured Commerce (GUIDEC), promulgated by the International Chamber of Commerce in Paris to promote greater acceptance of digital signatures in cross-border electronic commerce. The inspiration for the project was the hugely successful Uniform Customs and Practices that have standardized letter of credit practice in international trade. By contrast, it is not clear that GUIDEC will have the same sort of influence, largely because digital signatures have not yet achieved the acceptance in the marketplace that their promoters expected them to enjoy. The GUIDEC is based on a technology-specific approach to electronic contracting that has been rejected in recent U.S. legislation such as the Uniform Electronic Transactions Act and the Electronic Signatures in Global and National Commerce Act, and in the UNCITRAL Model Law on Electronic Commerce.

Christopher Kuner looks beyond the recently concluded U.S.-EU agreement establishing a safe harbor designed to assure the protection of privacy of personal information about EU citizens while minimizing the risk to U.S. organizations of enforcement action taken by various European data protection agencies. He notes a shift by EU authorities away from an exclusive focus on enforcement directed at data controllers and toward a broader effort to promote the use of privacy-enhancing technologies that are emerging in the discussion regarding the Telecommunications Data Protection Directive. He also notes the trend in the EU toward expansive interpretations of existing data protection laws that impose enforcement obligations on data protection agencies that are simply not feasible.

Implausible claims of jurisdiction to enforce national privacy laws that create unmanageable obligations on foreign businesses operating over the Internet are likely to reduce rather than increase efforts at compliance.

Professor Christopher Reed considers the problem of using electronic records and signatures in lieu of traditional paper documents and manual signatures in international transactions. He surveys the current state of the law in this area, and reviews some practical strategies that are used by businesses engaged in cross-border electronic commerce to manage the risks created by the lack of a strong, universally accepted system of online identities in Internet commerce. He notes that many electronic signature and record laws tie the validity of an electronic signature to a certification of identity, although this approach was rejected in recent U.S. legislation.

Renaud Sorieul, José Angelo Estrella-Faria, and Jennifer Clift comment on the current efforts of UNCITRAL to harmonize commercial law in order to facilitate cross-border electronic commerce. The 1992 Model Law on International Credit Transfers and the 1996 Model Law on Electronic Commerce have both been very influential in promoting the harmonization of the law in important areas of cross-border electronic commerce; work is underway on a Model Law on Electronic Signatures. UNCITRAL is now working to define additional areas of cross-border electronic commerce where its efforts might help. New initiatives may soon be authorized in the areas of electronic documents of title, electronic contracting, jurisdiction and choice of law, and dispute resolution.

This symposium issue on the legal challenges raised by borderless electronic commerce is an unusual collection of very timely, pragmatic, and well-informed papers. By collecting the work of so many experts in diverse fields, this collection of papers constitutes a unique resource for practicing attorneys working to identify and respond to the challenges faced by their clients wishing to leverage the global reach of the Internet to expand their market opportunities.