

INTRODUCTION

LAW AND INFORMATIONAL (POST) MODERNITY

Associate Professor Brian Fitzgerald¹ and Michael Head (Editor)

Nineteen ninety-nine (1999) sees the close of a remarkable decade and century. For believers in the so-called progress narrative the world has spun even faster and more spectacularly in the advancing stages of modernity known as the twentieth century.² For those who take a more critical view or are perhaps more cynical of change and progress and the increasing simulation³ embedded in human existence the twentieth century and its final decade have only served to further commodify life.⁴ The challenge is no clearer contextualised than in this time of informationalism wherein the underlying elements of modernity are questioned.⁵

As we exit the twentieth century we are in the midst of the information revolution - one of the most significant changes of human kind - in which the creation and distribution of intellectual⁶ and data⁷ capital in

¹ Head of School of Law and Justice, Southern Cross University Law School.

² F Fukuyama, "The End of History?" *The National Interest* 16 (Summer 1989): 3-18; S *End of History and The Last Man* (Penguin, 1992) xi-xiii.

³ Jean Baudrillard, *Simulacra and Simulation* (1981) (trans. by Sheila F Glaser, Ann Arbor, Michigan University Press 1994); B Fitzgerald, "Life in Cyberspace: A Simulating Experience" [1997] 3 *Computer and Telecommunications Law Review (CTLR)* 136.

⁴ G Hearn, T Mandeville, D Anthony, *The Communication Superhighway: Social and Economic Change in the Digital Age*, Allen and Unwin, Sydney, 1998; T Jordan, *Cyberpower: The Culture and Politics of Cyberspace and the Internet*, Routledge, London UK, 1999; S Turkle, *The Second Self: Computers and the Human Spirit*, Simon and Schuster, NY, 1984; F Block, *Post-Industrial Possibilities: A Critique of Economic Discourse*, UCLA Press, LA, 1990.

⁵ A Giddens, *The Consequences of Modernity*, Polity Press, Cambridge, 1990.

⁶ N Imparato, *Capital for Our Time: the economic legal and management changes of intellectual capital*, Hoover Institution Press, Stanford California, 1999; Nolan and Bradley,

the form of digitised informational products have become core to economic and cultural existence.⁸ At the centre of this period of informational (post) modernity⁹ is computer technology (creation) and the international network known as the Internet (distribution). These new technologies with their capacity for instant worldwide communication of digitised information challenge us (especially as lawyers) to fundamentally reconsider notions of property, time, space and physicality. Their power also asks us to examine issues of equity, openness and access to the information superhighway.¹⁰ While the new information networks promise so much in terms of democratic revitalisation, the pervasive and invasive capacity of the new technologies and the continuing convergence of distribution and communication networks demands that we remain vigilant in our watch over the integrity of the process of storing, receiving and transmitting data.¹¹

The relentless and pervasive globalisation of economic life also combines with the vast and accelerating impact of digital technology to provide fundamental challenges to the law and legal theory and indeed to the nation-state system as a whole.¹² Many old legal forms and concepts, and the entire national framework within which they have been developed for several centuries, are becoming increasingly anachronistic or unable to adequately meet the needs of global society.¹³ Computer and digital technology has immense potential to uplift the living standards of all, yet within the present social order it tends instead to produce growing social inequality.

"Capturing Value in the Network Era" in Nolan and Bradley (eds.) *Sense and Respond: Capturing Value in the Network Era*, HBSP Boston MA, 1998.

⁷ B Fitzgerald, and L Gamertsfelder, "Protecting Informational Products through Unjust Enrichment Law" [1998] *European Intellectual Property Review* 244

⁸ L Thurow "Needed: A New System of Intellectual Property Rights" (1997) *Harvard Business Review* 95 at 96; L Thurow, *Building Wealth: New Rules for Individuals Companies and Countries in the Knowledge-Based Economy*, Harper Collins, NY, 1999; M. Castells, *Information Age: Economy, Culture and Society*, Volumes 1-3, Blackwell Publishing, Oxford, 1996.

⁹ F Webster, *Theories of Information Society*, Routledge, London, 1995.

¹⁰ *USA v Microsoft Corporation* available at <http://www.usdoj.gov/atr/cases/f3800/msjudgex.htm> (5.11.99)

¹¹ A Fitzgerald, B Fitzgerald, C Cifuentes and P Cook (eds), *Going Digital 2000: Legal Issues for Electronic Commerce Software and the Internet*, Prospect Publishing Sydney, 2000.

¹² G Teubner (ed.), *Global Law Without a State*, Dartmouth UK, 1997.

¹³ Consider for example the issues of jurisdiction: *Macquarie Bank Limited & Anor v Berg* [1999] NSWSC 526

<http://www.austlii.edu.au/au/cases/nsw/supreme_ct/1999/526.html>

It is therefore fitting that this first special theme edition of the *Macarthur Law Review* should deal with some of the many acute issues raised by the Internet.

Digital Frontiers: Law and the Internet contains a series of essays that consider important aspects of the way this new non-territorial transnational digital environment will affect or inform the legal system. It is a vital contribution to the development of law and understanding for the information age.

In the opening article, Olujoke Akindemowo, now a leading figure in the field, reviews the developing genre of information technology law and examines its contribution toward Internet regulation.

Aaron Upcroft explores the already highly contentious and litigated area of trademarks as domain names. His survey poses the question whether law or other forms of regulation are best suited to resolving the conflicts that have arisen.

Brian Fitzgerald and Emma Sheehan augment this analysis in a commentary on the theoretical underpinning of trademark dilution. Again the tension between open access to information and private property is apparent.

Leif Gamertsfelder has written a thought-provoking article on the possibilities for the Internet to be a catalyst for an expansion of Commonwealth Constitutional powers. Liong Lim examines a variety of civil and criminal law approaches to liability for breaches in data security. From a government perspective, Paul Ryan surveys the role that law enforcement and revenue agencies can play in developing e-commerce facilities.

This edition includes a forum on the vexed issue of censorship and the Internet. Peter Chen reviews the history of Australian government attempts to control Internet content, then examines the international context and speculates on the future. Rita Shackel argues for more effective means to combat child pornography on the World Wide Web.

Marci Hamilton, an eminent American commentator, has contributed a topical note on the United States and international experience with legislative schemes to provide *sui generis* protection for databases.

Two book reviews are included. The first appraises Olujoke Akindemowo's *Information Technology Law in Australia*. The second examines the Internet and practical legal training.

In sum, we believe that this edition demonstrates a commitment to this emerging area of law and presents timely contributions from a new generation of scholars, including academics, practitioners and public officers.