

2000

Symposium: Software as a Commodity: International Licensing of Intellectual Property

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Recommended Citation

26 *Brook. J. Int'l L.* 3 (2000-2001)

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INTRODUCTION

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It is altogether fitting that Brooklyn Law School's first symposium of the new millennium¹ addresses new and exciting legal issues relating to that aspect of the economy that will most clearly differentiate the new era from its predecessors. It is almost a cliché by this point to observe that the information economy evidences a dramatic transformation of American life, but the cliché has attained that status because of its essential truth. Just as the early nineteenth century agricultural economy gave way to a later, more urbanized economy emphasizing the sale of goods, and that economy eventually metamorphosized into the late twentieth century service economy, the information economy appears to be supplanting its predecessors.

The term "information economy," of course, encompasses not just the use of information to enable us to make better goods or to perform services more efficiently or effectively but, rather, refers to the development of information as a product in its own right. Such information can be in relatively raw form, as in a database, or it can be a complex set of instructions such as a computer program. In any event, information is no longer merely a tool, it is now a commodity. And this commodity is now the subject of a rapidly increasing number of commercial transactions.

In a phenomenon not unprecedented in American law, these transactions have developed more quickly than the legal system has formulated principles to govern them. This is not to say that there is no law governing information transactions. Rather, existing law that was developed in the context of very different transactions is being forced into service to govern and

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1. While purists may legitimately claim that the new millennium will not begin until January 1, 2001, I adopt for these purposes the popular convention that the millennium began on the first day of 2000.

regulate this new economy. Yet, those legal principles, developed as they were in very different circumstances for very different transactions, may not fit the new transactions well. Thus, the legal system will have to play "catch-up" until it formulates principles more closely tailored to the new transactions.

A major difference between this economic transformation and its predecessors, though, is that the current transformation not only involves a change in *what* is being sold but also in *how* it is being sold. The ability to transmit information halfway around the world at an expense not materially different from the cost of transmitting it halfway across town is enabling this new economy to be one that is truly international in scope. Domestic law, though, however well-crafted, cannot fully resolve issues arising out of transactions that cross national borders. Thus, the challenge facing the legal system is not only to devise rules that work in the context of domestic transactions within the domestic legal culture of the relevant nation but also to develop doctrines to deal with the likelihood that many of the transactions will touch more than one nation and, perhaps, more than one type of legal culture.

We are honored to present, in this symposium, contributions to the development of the new rules governing the new international information economy, from three prominent scholars. Professor Raymond T. Nimmer, the Reporter for the Uniform Computer Information Transactions Act (UCITA)—promulgated by the National Conference of Commissioners on Uniform State Laws and recommended by it for enactment as the domestic law of information transfers—expounds on the rules needed for international transactions from the perspective of his unique experiences. Professor François Dessemontet, a noted authority on European information law, provides a necessary comparative law perspective to this inquiry. Finally, Professor Kathleen Patchel, a noted authority on the development of American commercial law, provides critical analyses of choice of law issues that arise when different legal principles govern in the various countries to which an international transaction bears some relation.