The Electronic Medium - Some thoughts

Lord Hamilton
Senator of the College of Justice

I begin with a short lesson in geography and history. The Shetland Islands lie at a latitude of between about 60° and 61° north of the Equator. They are the most northerly part of the United Kingdom. It is a place of fishermen and of small farmers, with an oil terminal and other oil related businesses providing a more recent economic dimension. The Shetlanders are in the main descended from Norsemen who, sailing from Scandinavia, occupied those islands between the 8th and 9th centuries. Only in 1472 were the islands annexed to the Kingdom of Scotland. Even to this day the Shetlanders regard mainland Scots, and even more so other Britons, as in the nature of foreigners. While astute in business matters they would not, I think, claim to be at the centre of European commercial affairs.

Yet it was on those islands that in 1996 a dispute arose with worldwide potential implications for the Internet. The dispute was between the proprietor of a newspaper on the one hand and the proprietor of a news reporting agency on the other. Each had established a web site on the Internet. The newspaper web site was arranged with a front page on which were inserted the headlines which appeared over various news items in the published newspaper. A caller to that web site could, by clicking on to one of those headlines, bring up on his screen the text of the news item to which the headline related. The newspaper proprietor intended to obtain revenue from his web site by selling to other commercial bodies advertising space on that front page - the object being that persons interested in viewing those news items should first pass through the front page where the advertising material appeared. The proprietor of the news agency had a different idea. He began reproducing on his own web site, among other items, the headlines which from time to time appeared on the front page of the newspaper web site. A caller to the news agency web site could as a result, by clicking on to any of those headlines, gain direct access to the relative text in the newspaper - that is, without passing first through the newspaper front page where the advertising space was to be found.

The newspaper proprietor was not pleased. He raised an action in the Court of Session in Edinburgh with a view to stopping the news agency's activities. The general legal basis for the action was alleged infringement of copyright. The particular grounds were two-fold - first, it was argued that the headlines were literary works, that the newspaper proprietor was the owner of copyright in those headlines and that the reproduction of them by the news agency on its web site was an infringement of that copyright; secondly, it was argued that there was infringement of the copyright protection given under UK law to cable programmes - a protection originally introduced in the context of cable television.

When the case first came before the Court there was argument about whether or not an interim order should be granted in advance of the case being fully heard. The Court decided that the newspaper proprietor had presented an arguable case and an order was granted stopping the news agency's activities in the meantime - without prejudice to what might be decided at a later stage after technical evidence and fuller argument had been heard. The case, I understand, caused wide interest internationally and, in some quarters, not a little concern particularly in respect of freedom of access to material on the Internet. In the event, however, just before the final hearing began, the parties compromised the case. Accordingly, the Court did not require to hear and decide the more complex technical and legal issues which had been identified between the initial and the fuller hearings. The Shetland case is not unique. An action with similar features was raised some time ago in California against the Microsoft Corporation. There the plaintiff was a company selling tickets for entertainment events through a web site.

I mention the Shetland case for a number of reasons. First, it illustrates how widely, geographically and in subject matter, the Internet is affecting and is likely to affect business activity. Secondly, it illustrates how our legal concepts require to be reconsidered and possibly reformulated against that new technology which is electronic communication generally and the Internet in particular. The case involved an attempt to apply legal provisions which had been designed, primarily at least, for cable television to a means of communication which, we may assume, was unknown in its present form to those who framed the law concerning cable programmes. Thirdly (and I shall return to this later) it

raises in the field of copyright interesting legal questions about access to and use of literary, artistic and other protected materials through the Internet.

In the session this afternoon we are concerned with commerce conducted electronically. Fundamental to commerce is the law of contract - the process by which persons (natural or corporate) can, by the force of agreement, acquire rights and become subject to obligations. It is, accordingly, essential to any successful commercial environment that there be an established system whereby agreements can be recognised as valid contracts and can accordingly be enforced as such.

In some jurisdictions (such as those of Scotland and of England) it is generally thought to be of the essence of any contractual relationship that there has been communication between or among the parties to it. Under French law the legal approach to contract making may, I believe, in some respects be different from the British approach. Yet, if we are to have a viable international system of contracting electronically, it may be necessary to consider the technical nature of electronic communication (including, particularly in relation to consumers, communication by the Internet) with a view to evolving common rules concerning contract making. Of potential importance, for example, may be where (geographically) the contract was made and when (in point of time) it was made. Where a contract is made may, at least in some systems of law, still be material to issues of jurisdiction or to applicable law. When a contract is treated as being made may affect whether or not an offer was effectively accepted; it may also affect questions of priority of competing contractual rights. Though some of those problems may be addressed in the Vienna Convention, not all countries have ratified that Convention and it deals only with the international sale of goods.

In the days when parties made their bargains face to face or their bargains were made by notaries on their behalf in a similar fashion, it may not have been very difficult to identify where and when the bargain was made - when the parties shook each other by the hand or, perhaps in France, when each kissed the other on both cheeks. The general rule (in Scotland and in England) was, and is, that the contract is made at the place where and at the time when an unqualified acceptance is received by the person making an offer (whether that is the first offer or a counter-offer made in the course of the negotiations). But the introduction in the 19th century of a public postal service provided a new dimension. That involved the entrusting of the communications to a third party. The result was that (in Scotland and in England) a new rule was evolved, commonly referred to as the "posting rule" - under which, where communication was by post, a bargain was held to be made where and when the acceptor put his unqualified acceptance into the hands of the postal service, i.e. at a stage when the other party had as yet no knowledge that his offer was being accepted. In the USA a slightly modified version of this rule has been evolved.

The posting rule was regarded as an exception to the general rule and was said to be justified by commercial expediency in cases where there was bound to be a substantial interval between the time when the letter of acceptance was sent and the time when it was received. In the early part of the 20th century this rule was extended to communication by telegraph.

But technology did not stop there. By the middle of the 20th century businessmen were communicating by telex and a rule required to be established in relation to that form of communication. In 1955 the English Court of Appeal decided, after consideration of the relevant technical mechanisms, that communication by telex was effectively instantaneous communication and that accordingly the general rule and not the posting rule should apply. Thus, the contract was made where (and when) the accepting telex was received - in that case in London.

That decision and the principle underlying it was approved by the House of Lords in a case heard in 1982, almost 30 years afterwards. But it is of interest for present purposes to notice the qualifications which were then attached to that approval. Lord Wilberforce (a very distinguished English judge in the House of Lords) referring to the rule laid down for telexes in the 1955 case said this:-

> *"I would accept it as a general rule. Where the condition of simultaneity is met, and where it appears to be within the mutual intention of the parties that contractual exchanges should take place in this way, I think it a sound rule, but not necessarily a universal rule. Since 1955 the use of telex communication has been greatly expanded, and there are many variants on it. The senders and recipients may not be the principals to the contemplated contract. They may be servants or agents with limited authority. The message may not reach, or be intended to reach, the designated recipient immediately; messages may be sent out of office hours, or at night, with the intention, or on the assumption, that they will be read at a later time. There may be some error or default at the recipient's end which prevents receipt at the time contemplated and believed in by the sender. The message may have been sent and/or received through machines operated by third persons. And many other*

> *variations may occur. No universal rule can cover all such cases. They must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgment where the risks should lie ..."*

Thus in other cases involving telexes, where there is not instantaneous communication between principals, the legal results may, according to this approach, be different.

So what of electronic communications? In the case of electronic mail directly between two computers it may be thought that the analogy with telex communication is close, so that the general rule should apply - though it will be relevant to bear in mind the qualifications which Lord Wilberforce referred to in relation to communications sent out of hours or designed to be read at a later time. Questions may also arise in that context whether as a matter of law computers can make contracts and, if so, in what circumstances. When one turns to communications on the Internet, the situation, although perhaps on the face of it simple, is in fact potentially complex. Communications may pass through a common server, may pass through a multiplicity of different servers in one jurisdiction or may pass through a commercial network with servers in different jurisdictions. There is also "the virtual market place" where the consumer seeks to acquire goods or services through a market place server on the Internet. The market place server may send out information to some or all of the potential vendors' web sites and information may be transmitted back to it from one or more of them and transmissions made from there back to the consumer. If a bargain is ultimately made between the consumer and one of the vendors, where and when is it made? How are we to know where and when it was made?

I do not have answers to those questions. I raise them only to encourage thought on the matter. It may be that French jurisprudence has the answers but, even if it has, it will be prudent to remember that in the context of international commerce other jurisdictions (including those of the UK and of the USA) may be struggling to find solutions. Of course it may be possible to resolve some or all of these potential problems by making express provision in the contract; but there will be occasions when such provision is omitted or where the validity of its incorporation is challenged. It will accordingly be desirable to have an international consensus about them.

I return to the matter of copyright with which I opened. Under UK law it is an infringement of copyright to copy a protected work; and copying under that law includes storing the work in any medium by electronic means. Thus, subject to certain exceptions, the storage on your computer of your favourite poems or other works of literature (in so far as still protected material) is an infringement of copyright. In this context it is interesting to note two French litigations reported last year in the World Intellectual Property Report - the information I have about them may now be somewhat out of date.

The litigations concerned use of "Cente Mille Milliards de Poèmes" by Raymond Queneau. As the more literary among you will know, this work is a collection of ten sonnets, each composed of fourteen verses. At the time of publication, the author and his publishers advertised that readers could mix and match the verses in a nearly unlimited fashion, allowing for the eventual composition of one hundred trillion poems. More recently, a M. Leroy, an enterprising gentleman at the Sorbonne, established a web site which enabled visitors to it to use a word scrambling programme to create an apparently infinite number of new poems from Queneau's original text and to copy those poems at will. The author's literary heir and the publishers then brought proceedings for illegal use of copyrighted material. The action was successful, the essential ruling being that web sites were public not private domains and that the freedom to make "private copies" did not in the circumstances apply. Interestingly, in another parallel case raised in respect of the same literary work, the action was unsuccessful. There M. Queneau's poetry was apparently used to test a computer programme. The results of the test were again stored on a web site but were intended to be accessible only to a restricted group of researchers. The Court ruled (apparently because the web site was intended to be so restricted) that there had been no infringement of copyright laws.

I suspect there will be developments in this field. No doubt some authors will wish to make to their work available on the Internet but at the same time wish to ensure that every user is recorded and makes payment for the privilege. We await developments.

Of course the above supposes that one wishes to read literature on a computer screen or even on hard copy made by a computer printer. Some of us actually like to handle a book. Some of us may even remember with nostalgia struggling with a paper knife to open the uncut leaves of many a book printed in France. We should not allow the computer age or the Internet to deny us such pleasures.