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FOREWORD

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We embarked on our venture as authors of the articles in this issue with no assurance that there would be a "there" there at the end of the road. Although we knew that we had selected substantive topics of practical significance, we purposely eschewed any attempt to reach a consensus on what, if any, common threads might emerge from the broad, general theme—"Technology and Commercial Law." Even if it turned out that there is no "there" there, at least we would have generated some interesting articles and had some fun along the way.[1]

Professor LoPucki's article[2] addresses the system for public notice filing under Uniform Commercial Code ("UCC") article 9 ("Secured Transactions"). It is a story of technological potential unrealized. The essential attributes of the article 9 filing system[3] were conceived and designed in the 1940s, before the dawn of the computer age, and it never has been fully revised to take account of modern information technology. The result, LoPucki argues, is that the some 4,200 separate filing systems[4] that constitute the article 9 filing system and its environs have become a "crumbling

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The other authors and Professor Melvin G. Shimm, of the Duke University School of Law, who collaborated in the editing of this symposium, join me in thanking Carlyle C. Ring, Esq., of the Virginia bar, for originally proposing an issue of this journal devoted to technology and commercial law. We also wish to thank Theresa A. Newman Glover, General Editor, *Law and Contemporary Problems*, for her valuable editorial assistance.

1. Originally we contemplated that this issue would include six articles. Unfortunately, two articles that were promised to us—one dealing with the payments system and one dealing with, *inter alia*, electronic data interchange—were not forthcoming. The four of us persevered nonetheless, producing an issue that is thinner than originally planned but, we hope, just as interesting.

2. Lynn M. LoPucki, *Computerization of the Article 9 Filing System: Thoughts on Building the Electronic Highway*, 55 L & Contemp Probs 5 (Summer 1992).

3. Actually, there are as many systems as there are jurisdictions that have adopted article 9 of the UCC—all of the states, the District of Columbia, and a few others. Also, within each jurisdiction there may be many local (county, for example) systems.

4. This estimate includes the various local filing systems as well as statewide systems.

infrastructure of the information age." For example, in this system, computerization has reached only as far as the index. Many kinds of filings remain effective even though they cannot be found in a search. But even diligent filers cannot always achieve or maintain effective filings. The processes for filing and searching also are unreasonably complex.

Though the problems of this sprawling system are on their face "legal" problems, LoPucki demonstrates that the great bulk of them are capable of a technological solution. Even when they are solved through effective computerization of the system, he predicts that it will become apparent that the article 9 filing system is not a system at all, but merely a fragment of one. The system lacks much of the information needed to tell users what they want to know: whether the collateral is free of liens.

In his article,[5] Professor Kozolchyk explores an area where it appears that the technological potential may well be achievable. He explores the world of paperless letters of credit and a world, perhaps just around the corner, where paperless documents routinely are submitted in compliance with the conditions to payment under paperless letters of credit. Currently, paperless letter-of-credit transactions occur in large volume on a worldwide scale. Kozolchyk points out that despite this volume and scope, the "rules of traffic" and formal requirements have yet to be established by a legislative, administrative, or judicial source. For example, no positive law exists as to the time when an issuing bank's paperless promise of payment or reimbursement of another bank becomes irrevocably binding on the issuing bank, as to the formalities of the "operative credit instrument" (including the need for a writing and a signature), or as to interbank liability for negligent, delayed, or fraudulent transmissions. The only rules in existence have been promulgated by SWIFT, an electronic banking communications network.[6]

Professor Kozolchyk argues that the basic principles for developing a normative framework for letters of credit should emanate from the applicable environment (that is, either paper-based or electronic, such as SWIFT) and not merely from the presence of a beneficiary (a party common to both paper- and nonpaper-based transactions).[7] Imbedded in Kozolchyk's exposition is the notion that the world of paperless promises concerning letters of credit, communicated through modern information technology, calls for rules that are different from those applicable to paper letters of credit.

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5. Boris Kozolchyk, *The Paperless Letter of Credit and Related Documents of Title*, 55 L & Contemp Probs 39 (Summer 1992).

6. SWIFT is a network for inter-bank communications among its member banks. Despite this context, Professor Kozolchyk explains that SWIFT's rules often collide with rules intended for paper-based documentary credits, such as those found in the Uniform Customs and Practices for Documentary Credits.

7. Professor Kozolchyk also explains that there is a similar need to establish an appropriate boundary between funds transfers governed by UCC article 4A and prepayments and reimbursement payments in connection with letter-of-credit transactions.

Professor Nimmer's article[8] develops the premise that information and data have become commercial properties subject to commercial contract and other exchanges. Under that premise, the article examines various property rights issues relating to data as a form of commercial property, including problems developed under copyright, trade secret, criminal, and privacy law. Professor Nimmer also examines selected issues that reflect concerns about liability in the handling of data as a subject of commerce.

Finally, in my article,[9] I develop a taxonomy of the characteristics of information technology that interact with those who must create, administer, and interpret commercial law. I assess these applications in the context of a concrete example—a proposal for changing securities market clearance and settlement operations. The discussion reveals some special characteristics of the intersection between information technology and the creation, administration, and interpretation of law. In effect, there is a "there" there in the abstraction "technology and commercial law." I conclude that legal technicians, engineers, and theorists could benefit from a more purposeful and deliberate approach toward the attributes of information technology. I also acknowledge that many of the problems illustrated by the applications of information technology in the securities clearing and settlement environment are no different from those encountered in approaching any aspect of law reform or social policy. Stated otherwise, the more things change, the more they stay the same. That said, I shall leave further generalizations to the readers of these articles and to those who would build on them in the future.

8. Raymond T. Nimmer & Patricia Ann Krauthaus, *Information As a Commodity: New Imperatives of Commercial Law*, 55 L & Contemp Probs 103 (Summer 1992).

9. Charles W. Mooney, Jr., *Property, Credit, and Regulation Meet Information Technology: Clearance and Settlement in the Securities Markets*, 55 L & Contemp Probs 131 (Summer 1992).