FROM WRITTEN RECORD TO MEMORY IN THE LAW OF WILLS

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Are last wishes, when they take shape as wills, thoughts or things? Both the Common law and the Civil law contemplate wills as formalistic juridical acts which depend on compliance with certain prescribed rules of form for their existence. Last wishes recorded in computer memory do not appear to meet these requirements, although legislative initiatives in Quebec and in certain Common law provinces which allow courts to dispense with formalities may allow judges to validate paperless wills. Using the Quebec experience as a point of departure, the author asks whether from the perspective of requisite formalities the electronic will embodies anything more substantial than mere thoughts. If last wishes recorded digitally are to be admitted to probate, can wills still be contemplated as solemn acts?

Les dernières volontés, quand elles sont consacrées dans un testament, sont-elles de l'ordre des pensées ou des choses? La Common law et le droit civil définissent le testament comme un acte juridique formaliste dont l'existence dépend du respect de certaines exigences de forme. Or, les dernières volontés inscrites sur support informatique ne semblent pas se conformer à ces formalités. Toutefois, d'aucuns prétendent que le pouvoir discrétionnaire accordé aux tribunaux par des dispositions législatives au Québec et dans certaines provinces de Common law pourrait permettre au juges de reconnaître la validité de testaments n'ayant aucun support papier. À partir de l'expérience québécoise, l'auteur pose la question à savoir si le testament électronique est le reflet de quelque chose qui serait plus substantielle que la simple pensée. Si les dernières volontés informatisées sont admises à la vérification, peut-on encore qualifier le testament d'acte solonnel?

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To be sure, last wishes that are mere musings, those voiced as casual sentiment or even intoned as resolute desire are not the same as directions enveloped in the solemnity of "This is My Last Will and Testament ... ". Understanding the relationship between metaphysical and physical expressions of testamentary intention has long bedeviled the law of wills and, not surprisingly, the cyber-age has brought the problem of distinguishing the will as thought and the will as thing into a new dimension. While the lexicon reserved for those who record their intimate thoughts digitally is not out-of-step with the ordinary language of testation, it was probably inevitable that the (apparently) intangible computer "documents", "files" and "text" would crash when confronted with the (apparently) hard-copy legislative requirements established for the formal validity of wills.

At first blush, the explanation seems plain enough: if, in some fashion, the last "will" of a testator might be said to exist beyond the instrument that records it, traditionally the Common law and the Civil law have both been shy to recognize testamentary wishes that do not find their way into paper of some description. But for the historical curiosity of the nuncupative will and the privileges accorded to certain seafaring and military testators, the law has regarded the writing requirement as partaking of the essence of the will, as a juridical act[1] rather than, as is sometimes thought, a mere technique for bringing last wishes into evidence. The terrain of testamentary formalities and of formalism generally is rich for comparisons[2] and while the Common lawyer might express the thought less colourfully than the Civilian, he or she would no doubt understand the sentiment underlying the age-old maxim that "form gives life to the act."[3] Today, however, the "computer will" — to use a nonsense tag — invites us to re-imagine testamentary paper in both legal traditions, encompassing as it does realities found variously on floppy and hard-disks, as well as ideas flashing across electronic screens with no obvious means of support. All of these do seem more substantial, to

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[1] See J.E. Roy "Dispositions verbales" (1905) 7 R. du N. 310 at p. 311 for an argument that verbal testamentary dispositions can be sustained as supporting "natural obligations" in Civil Law. By way of a parallel, one might compare aspects of the law of testamentary promise in Common law in which enforceability also turns on the law of obligations more than the law of wills: see generally G.H.L. Fridman, "Annotation" (1980) 6 E.T.R. 105.

[2] Rich but bumpy, if one considers errors in transposition between the Common law and the Civil law sometimes made by the most eminent jurists: *cf.* Raymond Saleilles, "Des formes du testament olographe : l'article 970 du Code civil français et le §2231 du Code civil allemand" (1903) R.T.D.C. 587 at 597, who wrote that "[l]e testament olographe est à peu près le seul connu en Angleterre" when that form was unknown to English law. See also A. Horion, "Des conditions de validité du testament olographe dans les principales législations européennes" (1910) 37 Clunet 460 at 461.

[3] *Forma in esse acta* might be said to ground the traditional view, arising in both legal traditions on the basis of different historical considerations, that compliance with rules of form is required for a will to come into being. For a venerable statement in the Common law, see *Windham* v. *Chetwynd* (1757) 97 E.R. 377 at p. 381 in which Lord Mansfield both acknowledged "formality" as the governing principle and warned that it may be a "snare". For a famous exposition in Civilian language, see L. Josserand, "La désolennisation des testaments" 1932 D. (Chronique) 73 who saw a snare in antiformalism. Josserand's odd mix of traditionalism for law and non-conformism in politics must be read against its lesser-known reply, Henri Lalou, "La 'solennisation' des actes sous seing privé ou des exigences abusives du 'bon pour'" 1933 D. (Chronique) 33, and its heated counter-reply, Louis Josserand, "Libéralisme et verbalisme" 1933 D. (Chronique) 65.

different degrees, than mere thoughts or utterances, but less so than conventional testamentary instruments.

Can a computer diskette (with or without the "print-out" of the information recorded on it) satisfy the formalities imposed either by a wills statute along the English model, or in a civil code in the French Civilian tradition? This very question was posed and answered in the affirmative in the case *Re Rioux*,[4] a Quebec case that should interest all estates experts, whether Civilians or Common lawyers, given the similar requirements for formal validity of wills in Canada's two official legal traditions that are at work within their distinctive regimes for probate.[5] Moreover, *Rioux* is of especial interest for jurisdictions such as Manitoba, Saskatchewan and Prince Edward Island, in which judges enjoy discretionary powers to validate otherwise defective testamentary instruments, and for which courts might well look to Quebec's new article 714 C.C.[6] and to cases decided thereunder for guidance.[7]

The presence or absence of a substantial compliance provision should not obscure the challenge that computerized wills pose to the idea that the will depends on rules of form for its very existence. The problem is to discover, when faced with the transition from scripted to digitalized last wishes, whether the will can or should still be measured as a formalistic juridical act. As the medium for the expression of legal ideas continues its move from written record to computer memory, to turn medievalist M.T. Clancy's brilliant thesis for the uses of literacy on its head, important information is once again

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[4] C.S. Rimouski, 100-14-000210-962 (3 December 1996), (1998) Estates and Trusts Reports (2d) [forthcoming] (Superior Court): page references hereinafter are to the text of the unreported judgment.

[5] For a rare but welcome example of comparative analysis of the law relating to formalities in wills, see S. J. Sokol, *Mistakes in Wills in Canada* (Scarborough: Carswell, 1995), at c. 4. A previous comparative effort by Quebec notary J. Sirois, *De la forme des testaments* (Montreal: Wilson & Lafleur, 1907) offers a panoramic tour of the law of Canadian provinces and "other English colonies" in a few short pages. The same book devotes comparable space to formalities in ancient Egypt.

[6] Comparable in general terms to the *Wills Act*, R.S.M. 1988, c.W150, s. 23 [hereinafter *Manitoba Act*]; s. 35.1 of the Saskatchewan *Wills Act*, R.S.S. 1978, c.W-14, s. 35.1 [hereinafter *Saskatchewan Act*]; the *Probate Act*, R.S.P.E.I., 1988, c. P-21, s. 70. In Quebec, the substantial compliance provision was enacted by S.Q. 1991, c. 64 and came into force in 1994. Article 714 C.C. provides as follows:

Le testament olographe ou devant témoins qui ne satisfait pas pleinement aux conditions requises par sa forme vaut néanmoins s'il y satisfait pour l'essentiel et s'il contient de façon certaine et non équivoque les dernières volontés du défunt.	A holograph will or a will made in the presence of witnesses that does not meet all the requirements of that form is valid nevertheless if it meets the essential requirements thereof and if it unquestionably and unequivocally contains the last wishes of the deceased

[7] For a longer consideration of Article 714 C.C. which draws comparisons with Common law initiatives, see N. Kasirer, "The 'Judicial Will' Architecturally Considered" (1996) 99 R. du N. 3.

"held in the memory alone and not in script of any sort."[8] The latter-day shift in the expression of legal ideas, which to his immense credit Clancy saw fit to connect to his own work,[9] means that many of law's institutions that were first imagined as bits of paper have to be reconfigured and reconsidered. This is the case for certain instruments of conveyancing, for gifts in some instances and, of course, for paper wills. The comments formulated by one insightful observer of the French law of successions frame the issue well: "the writing is required not to prove the last wishes of the deceased but to give them force of law."[10] But is the computerized will a writing? More fundamentally, does the computerized will signal that formalities today are *ad probationem* rather than *ad solemnitatem* requirements — designed to prove the will rather than to establish it — to recall the classical distinction drawn in the Civil law of liberalities?

The discussion of the virtual will in *Rioux* is thus helpful both from the perspective of traditional requirements for holograph wills, as well as for its consideration of the doctrine of substantial compliance in present-day estate litigation. In *Rioux*, the police found a note near the body of Jacqueline Rioux, a woman who had committed suicide. The note directed them to an envelope containing what plainly were some things she had gathered together in contemplation of her death. In it were some personal papers, an indication that she wanted to be buried in a certain white dress, and a computer diskette marked, in French, "this is my will/Jacqueline Rioux/1 February 1996". When the diskette was later fed into a computer, it was found to contain only one file in which information had been recorded, or perhaps modified for the last time and then saved to memory, on April 16, 1996 at 10:25 a.m. When printed out, the file revealed itself to be a will (or at least an unsigned testamentary instrument) bearing the date of February 1, 1996. Is this a will, holograph or otherwise? The Court decided that it did not meet the established requirements in article 726 of the Civil Code and, as a first order task, it would be useful to identify what precisely was lacking in the computerized will from amongst the formalities set forth for a valid holograph will.(I) If not valid according to the ordinary rules, could the defective "document" — we shall call it that presumptively for present purposes — be saved by article 714? Here the Court decided to allow the motion for probate, inviting us to consider next how the computer will can be said to satisfy the alternate criteria for validity found in "substantial compliance" rules (II).

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[8] See M.T. Clancy, *From Memory to Written Record* (London: Edward Arnold, 1979) at 3, who was, of course, referring to human and not computer memory. Clancy argued that growth in the uses of literacy in England between 1066 and 1307 is indicated by, and was a consequence of, the production and retention of records for ordinary secular business on an unprecedented scale. This entailed, for law, a shift in emphasis from unwritten custom to written law in formal legal sources.

[9] Clancy asked at the end of his preface whether "non-literate forms of communication like television and of electronic and photographic systems of storing and retrieving information may teach the historian to put his books and documents into perspective" (*ibid.* at 8). Is the virtual will part of a shift from written record back to memory?

[10] J.-P. Waymel, *Les formes du testament olographe et le maintien de ces formes jusqu'au décès du testateur* (Paris: Éditions Montchrestien, 1966) at 19 (translation).

I. THE DISKETTE AS A HOLOGRAPH WILL

Similar although not identical to its counterparts elsewhere in Canada, article 726 C.C. recognizes the holograph will as a minimally formalistic juridical act.[11] The Quebec Civil Code joins the Ontario *Succession Law Reform Act* and other provincial wills statutes in erecting the unattested signature and personal writing requirements as the sole conditions for validity for what are often imprecisely styled as "informal" wills.[12] The traditional view has been that notwithstanding its apparent informality, the holograph will is not a private writing in the evidentiary sense, but a truly solemn act in that law prescribes formalities upon which its existence depends.[13] Indeed, the legislative recognition of the holograph testamentary instrument both inside and outside Quebec is premised in large part upon a widespread understanding, shared even by non-professionals working alone, of the inherent solemnity of will-making.

Anxious, perhaps, to turn to the lively judicial consideration of the substantial compliance rule, the Court in *Rioux* was quick to conclude that the computer will failed to meet the ordinary requirements for a holograph will. One might have expected more robust arguments attacking the diskette-will in the circumstances, on both the signature and the personal writing counts, had the will been contested.[14] The Court was in fact rather perfunctory in its reasons for deciding that the diskette and the text printed therefrom did not constitute a holograph will under article 726 C.C.[15] As a result, the presiding clerk missed the opportunity to test the elasticity of the ordinary rules of form, thereby discounting a considerable though uneven judicial tradition in Quebec for overlooking harmless defects prior to the advent of the saving provision in article 714 C.C.[16]

In respect of the classical features of the holograph will, it would seem that the signature requirement was not viewed, on its own, as a stumbling block for the Court

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[11] Art. 713 C.C. provides that where the rules of form are not met a will, including a holograph will, is a not valid. Interestingly, art. 726 states explicitly that the signature and personal writing requirements are the only formalities for validity, perhaps to close debate on the need to date wills (still formally required in French law at art. 970 *C.civ.* but regularly overlooked by the French courts).

[12] Art. 726 C.C. provides that "[a] holograph will shall be written entirely by the testator and signed by him without the use of any mechanical process." By way of comparison, s. 6 of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s.6, directs that "[a] testator may make a valid will wholly by his or her own handwriting and signature, without formality, and without the presence, attestation or signature of a witness."

[13] For a rich but forgotten restatement of this view of French law, see M. Girault, *Les particularités du testament olographe* (Paris: Éditions Clarteistes, 1931) at 6.

[14] The issue arose in the context of an application for probate which, being uncontested, fell to the clerk of the Superior Court (art. 863, *Code of Civil Procedure,* R.S.Q., c. C-25). In this case the clerk was Normand Michaud, who has a special expertise in the matter.

[15] The Court stated that "[à] première vue, le document présenté pour vérification ne satisfait pas ces conditions de forme," although it was not specified whether the will failed as a holograph will because it contained at least some material that was unsigned, or because it was written by mechanical means, or both: *supra* note 4 at 3.

[16] On the interpretative tradition of substantial compliance prior to art. 714, see G.S. Challies, "Conditions de validité du testament au Québec et en France" (1960) 20 R. du B. 373 at 385.

in *Rioux*. Aligning himself with an established line of cases[17] for which there is a plain analogue in the Common law provinces,[18] Mr. Michaud considered that the signature on the plastic diskette was acceptable for the purposes of article 726 even though it was, to say the least, "off the record".[19] In the course of comments directed at article 714 in the final paragraphs of his reasons for judgment, clerk Michaud suggested that the circumstances in *Rioux* were similar to instances in which a testator places an unsigned will in an envelope and then signs the envelope. Indeed in Quebec and elsewhere this kind of reasoning has been resorted to in order to save wills, even in the absence of substantial compliance provisions, in cases where the signature was appositioned on an envelope by the testator "as signature to and in authentication of the will."[20] These remarks are most important, even as *obiter dicta*, given that computerized wills necessarily lack the critical element of the hand-written signature, at least as it is conventionally represented to the human eye.

Was this generosity in respect of the signature requirement appropriate in *Rioux*? Is a signed sticker on the front of a diskette the same as a signature on an envelope? Certainly courts have been shy to accept a signature off the paper as a sufficient formal expression of assent to contents without a sense that the signature was necessarily connected to the paper itself.[21] However accomplished would-be beneficiaries may be at steaming-open mail, the guarantee provided by a removable sticker on a diskette is obviously not as reliable as that associated with a sealed envelope with a will trapped inside. But more generally, it is disappointing that the decision as to the sufficiency of the signature on the diskette in *Rioux* does not benefit from an explicit consideration of the purposes of the signature requirement, or an explanation as to how these purposes are met on the facts of the case.

Rules of formal validity are established by the legislature as a means to an end, as it has often been said, and it is the rational connection between the required formality and its often unstated purpose that commands judicial fastidiousness in respect of compliance with legislative directives. The signature is of, course, a way to identify the testator, but it is also a means of securing against fraud as well as a technique for

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[17] In a relatively early comment, Quebec wills expert Henri Turgeon noted that these cases rested on the premise that the signature was sufficient to sustain a will where the envelope and the paper were inseparable on the facts ("l'enveloppe faisant corps avec lui"). See H. Turgeon "Jurisprudence" (1936) 38 R. du N. 329.

[18] For a discussion of the principle in Common law Canada, including some conflicting authorities, see *Re Wagner* (1959) 20 D.L.R. (2d) 770, 29 W.W.R. 34 (Sask. Surr. Ct).

[19] The Court stated "[o]n peut aisément assimiler cette disquette à une enveloppe signée par le testateur": *supra* note 4 at 9. In actual fact, the Court cited two unreported cases, *Perrault* v. *Chamberland*,(23 November 1995) C.S. Montmagny 300-14-000039-946 and *Noreau* v. *Noreau* (21 November 1995) 500-14-001918-952 C.S. Mtl., in which cases the signed envelope problem was dealt with — arguably unnecessarily — by recourse to discretion under art. 714 C.C.

[20] As stated by McDermid C.C.J. in the Ontario case of *Re Riva*, (1978), 3 E.T.R. 307 at 325 (Ont. Surr. Ct.) where a mark on the back page of the will, made with the intention of executing the document as last will and testament, was interpreted as "at the end of the will" for the purposes of applicable legislation.

[21] In his treatise on successions, Germain Brière alluded to the necessity and sufficiency of a "lien matériel et intellectuel" between the signature and the content of the will: *Traité de droit civil: Les successions*, 2d ed. (Cowansville: Éditions Yvon Blais, 1994) at para. 421.

"cautioning" the testator as to the solemnity of the will-making event.[22] It may be argued that traditionally judges have felt entitled to bend the rules of form through statutory interpretation when form no longer follows function: *i.e.* when the compliance or non-compliance with the formality does not necessarily assure the evidentiary, protective, channeling or cautionary objectives of the legislature on the facts at issue.[23] Consequently, a failure to sign a will at the end where such formality is made obligatory might not deter a court from finding a will to be valid when circumstances reveal the purpose of that requirement to be met on another basis. In those cases, the "end of the will" is merely relocated on (or even off) the paper by a trick of judicial interpretation. But when so doing, courts generally look for relief elsewhere. Thus in instances where the statutory directive demands that the signature be at the end of the will, a signed envelope is typically only acceptable if the court can infer that it was produced as the last act of the testator, usually requiring that the envelope be sealed beforehand, so that evidentiary and protective guarantees are respected.[24]

While the rule concerning the placement of the signature in the new Civil Code apparently does not apply to holograph instruments,[25] there is no doubt that the signature continues to represent assent to the whole of the substance of intention; that it protects against intermeddling by outsiders; that it identifies testators and that it cautions them as to the significance of the will as a juridical act. Implicit in the finding by Mr. Michaud as to the acceptability of the signature on the sticker is, at a minimum, his acceptance that it constitutes an assent to the dispositions in the will. Article 726 may not require the testator's mark at the end of the instrument, but it does not dispense with the need for an established connection between the paper that purports to convey last wishes and the signature as an expression of acceptance thereof. As reported, the case leaves the reader with little or no sense as to why the Court felt entitled to consider the signature as speaking to the dispositions of property contained in the computer file found on the diskette. It is of course possible that the signature sought to express assent to the contents of the diskette as of February 1, the date found on the sticker. However, the date on which the computer file was logged to memory, according to the recording device encoded in the software, was April 16. Even assuming that it was the testatrix who altered the information contained on the diskette, at best we have the equivalent of

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[22] See generally J. Langbein, "Substantial Compliance with the Wills Act" (1975) 88 Harv. L. Rev. 489 who recast functionalist justifications for rules of form for wills initially formulated for the law of contract by Lon Fuller, "Consideration and Form" (1941) 41 Colum. L. Rev. 799. A measure of the influence of Professor Langbein's work in this regard is the extent to which law reform agencies, particularly in Canada and Australia, have relied on his ideas for substantial compliance: for references see Kasirer, *supra* note 7 at para. 8.

[23] The Fuller-Langbein arguments were skillfully rehearsed for Common law in Canada in W. C. Morton, "Substantial Compliance: Where There's a Will There's a Way" (1986-88) 8 Est. & Tr. Q. 142 and reviewed, for Quebec, in Kasirer, *supra* note 7.

[24] For a Quebec case decided under the former Code which is broadly comparable to *Re Riva*, *supra* note 20, see *Larose* v. *Eidt*, [1945] C.S. 276 at 278 where the "last attesting act" principle was also adopted.

[25] Art. 727 C.C. requires that a will made in the presence of witnesses be signed at the end. The notarial will must be signed "after being read", although the placement of the signature is not mentioned in the Code. No such specifications are made for the holograph will; indeed art. 726 para. 2 C.C., which provides that the holograph will is subject to no other formal requirements, would appear to exclude even an application by analogy of the rules relating to the other species of instrument in this regard.

a signed will, dated February 1, with an unsigned codicil prepared later, of unknown substantive dimension. (We do not, of course, know how much of the February 1st file remained after the re-recording to memory on April 16th).

There were some signs that the testatrix made changes to her will on the later date. Ms Rioux had recorded in her diary on April 16 that she had made a will on diskette. According to Mr. Michaud, the testatrix "probably" began drafting a will, or perhaps completed a will, on February 1st and "modified" it for the last time on April 16th. Is this probability — itself identified by unclear means — enough to meet the guarantees usually provided by a signature in respect of the identity of the author of the will and assent to changes thereto, as well as to stave off the threat of intermeddling by some testamentary "hacker"?

More serious, perhaps, is the weak cautionary guarantee provided by the evidence in the circumstances. In the absence of the signature of April 16th, we have little to establish that the testatrix was alive to the solemnity of codicil-making; the intensely private record in the diary is all that would suggest that she was prepared to represent the changes (whatever they were) as part of her last will and testament. (Diaries are, of course, often a mixture of fiction and non-fiction and most diarists do not write for the public record.) More serious still is the very plausible doubt one might entertain as to whether she assented to the final text of the will as recorded on the diskette at all. An unsigned will may reflect far more than a defect of form; sometimes — nay, generally, — there is no signature because there is no assent. This raises the very real question, to which the Court pays little heed, as to whether the April 16th "document" represented last wishes in substance as well as in form.

The writing requirement in article 726 posed a second hurdle to the formal validity of the diskette as a holograph will in *Rioux*. The Quebec Code is worded differently from certain Canadian wills statutes in that it does not allude to "handwriting" but, instead, sets a prohibition against writing by "any mechanical process (in French «un moyen technique»). Prompted, one might suspect, by the spectre of a few discredited cases which validated typewritten wills,[26] as well as an inclination to use language allowing for testamentary dexterity involving body parts other than hands,[27] the Quebec legislature codified Supreme Court of Canada jurisprudence and took one last noble stand against the technological revolution.[28] While the legislature may face legitimate

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[26] See H. Turgeon, "Jurisprudence" (1931) 33 R. du N. 280 at 281 who invoked, as a principal basis for refusing type-written holograph wills, the difficulty in properly identifying the testator. He later extended this to "[le] sens commun" (34 R. du N. 186). The best-known Quebec case validating a typed will as a holographic instrument, *Aird et vir* (1905) 28 C.S. 235, is interesting in that it reads like a precocious substantial compliance case: Mathieu J. expressed his satisfaction that the typed document reflected the last wishes of the deceased and respected essentials of formalities for holograph wills in the Civil Code.

[27] "Footwriting" and "mouthwriting" are explicitly included in para. 2(a) of the *Saskatchewan Act, supra* note 6, as are "other kinds of writing", which latter expression some computer-literate judge may take as an open invitation to extrapolate. But what of *ejusdem generis*?

[28] *Jacques* v. *Allain-Robitaille* [1978] 2 S.C.R. at 905, 3 E.T.R. 243, in which the Court refused to apply the definition of a "writing" in art. 17(12) C.C.L.C. to interpret the words "wholly written...by the testator" in art. 850 C.C.L.C. The Court stated, without explanation, that a typewritten letter does not meet the "essential requirements" for holograph wills at 904-5.

criticisms for its choice to impose the non-mechanical writing requirement,[29] article 726 leaves no apparent room for the argument that an instrument typed on a computer is truly a holograph will. But if the Code does have the merit of having taken an unequivocal stand on this point,[30] the Minister of Justice's explanation for the rule in article 726, which he rooted in some underexplored value of "sécurité juridique", is hardly convincing.[31] Not only have Quebec courts demonstrated a long-standing degree of openness to fragile writings as ephemeral as computer records,[32] but leading computer law experts have already argued, from the perspectives of identification and protection against intermeddling, that in many instances technology provides more impressive evidentiary guarantees than does personal writing.[33]

It may be the cautionary dimension of this formality that remains the most meaningful justification for personal, non-mechanical writings, as well as the best explanation for the Minister's comments (on the generous assumption that to caution may also be said to partake of "sécurité juridique"). By imposing the personal writing requirement for holograph instruments, the legislature imparts a further quality of solemnity or ritual to wills made either in the absence of witnesses or in non-authentic form which encourages the testator to seize upon the seriousness of the moment. Perhaps it is too obvious to say that the computer falls into the category of prohibited "mechanical means", but it may be noted that no such statement is made in *Rioux* nor is the importance of this failing explained. More significant, however, is the missed opportunity to state whether the Court was in possession of a "writing" of some other description, a consideration of central importance — or is it? — under Quebec's substantial compliance rule.

II. COMPUTER WILLS AND SUBSTANTIAL COMPLIANCE

While the digitalized materials submitted for probate in *Rioux* were indeed validated, this was not done by an impatient judge stretching the ordinary requirements for holograph wills in order to keep up with new technology. The side-stepping of those rules was undertaken at the invitation of the legislature. Some may hold out the hope,

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[29] In her useful review of developments in Common law Canada, W. J. Sweatman raised the argument that the justification for the personal writing requirement is no longer obvious in the computer age: "Holograph Testamentary Instruments: Where are We?" (1995) 15 Est. & Tr. Q. 176 at 185.

[30] In the English text, art. 726 C.C. prohibits "mechanical means" whereas the chosen expression in French ("moyen technique") is arguably broader.

[31] See *Commentaires du Ministre de la Justice: Le Code civil du Québec*, t. 1 (Quebec City: Pub. du Québec) 432 in which inability to identify the testator on the basis of typedscript is cited as justification for the formality (ignoring the additional cautionary function of writing a will by hand).

[32] For a short note on the validity of holograph wills composed in pencil based on a century-old unreported case, see L.-P. Sirois, "Testament olographe" (1901) 3 R. du N. 341. See also "Testament olographe - écriture au crayon" (1908) 10 R. du N. 255. The well-known English case of the egg-shell will was recounted for a Quebec audience in Lex [pseudonym], "A travers le droit: jurisprudence étrangère" (1927) 25 R. du N. 315 at 317.

[33] S. Handa & M. Branchaud, "Re-evaluating Proposals for a Public Key Infrastructure" (1996) Law/Technology 1 at 4. The argument in this excellent paper is made in respect of the digital signature as a possible substitute for the ordinary personal mark. I am most grateful to Mr. Handa for his discussion of this issue with me.

in Ontario and other jurisdictions in which no substantial compliance rules are on the books, that courts will recast formal requirements to fit the electronic age on their own initiative.[34] In Quebec, however, article 714 already pushes judges to use their imagination where defective testamentary paper meets "essential" requirements of form and express last wishes "unquestionably" and "unequivocally". Even so, article 714 is not a wide-open door: the rule of substantial compliance appears to apply only to failed attempts to make attested or holograph wills and not indiscriminately to all types of testamentary instruments or testamentary puffery.[35]

This poses an evident problem insofar as the computer will may not qualify, by virtue of its non-paper incarnation, if recognizable paper is seen as inherent to attempted wills before witnesses or holograph wills. Where, as in the case of *Rioux*, a computer record is construed as an attempted holograph will, three informalities stand in the way of validation under article 714. First, the instrument is mechanically-produced as opposed to made by a more direct form of human activity. Second, most computer records, perforce, cannot be signed in the conventional manner. (These two informalities mean that a computerized will meets neither of the two requirements identified for a valid holograph will under article 726.) Third, if the substantial compliance application must proceed on the basis of a "writing", it is an open question whether a computer record has the qualities of visibility and materiality generally identified as necessary to meet this requirement. Whether it be by tendering a diskette for probate or by lugging a hard-drive before a surrogate court judge, the person seeking verification of a computerized testamentary instrument forces the central question raised by the law of substantial compliance: is the defective instrument that is saved through judicial discretion still to be considered as a formalistic juridical act? It is not altogether clear, in Quebec or in other substantial compliance jurisdictions, just what is required beyond reliable evidence of last wishes for a failed holograph will to be considered valid at probate and the computer will allows us to confront this issue.

As to whether a mechanically-produced computer record can amount to a holograph will application under article 714, the outcome in *Rioux* would suggest this is indeed possible. The Court said little as to how it came to this conclusion. If the personal writing requirement is essential for holograph wills under article 726, one might well imagine that a mechanically-produced "deed" would be viewed as failing to meet the "essential requirements" of the holograph form under the substantial compliance rule. In the event that the testators' own handwriting is considered a requirement for all article 714 petitions other than failed wills before witnesses, courts will likely refuse consideration of computer wills without bothering to inquire whether the functions of the handwriting formality have been met on another basis. Yet reading articles 714 and 726 together as imposing personal writing as essential to all holograph applications is not an altogether unequivocal or unquestionable supposition, to invoke the heavy burden

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[34] Some observers, however, are so pessimistic about the courts' ability to avoid the pitfalls of formalism that they advocate legislative reform as the only solution: see D.C. Simmonds, "Succession Law Reform in Ontario: An Old Cat Needs a New Kick" (1991) 10 Est. & Tr R. 297 at 303.

[35] The terms of art. 714 C.C. make it plain, for example, that judicial discretion does not apply to notarial wills. In any event, the specific requirement that notarial deeds be written on "paper complying in format and quality with standards established by regulation" in subs. 35(1) of the *Notarial Act*, R.S.Q., c. N-2 effectively preclude non-paper computerized "writings".

that article 714 itself imposes on its readers. While some leading authors have taken this position that personal writing is necessary in all such cases,[36] courts have already decided otherwise, seeing the personal writing feature as non-essential when other facts have invited them to be convinced of the certainty of last wishes.[37] However difficult it is to imagine computer-generated text as complying substantially with rules of form for handwritten deeds, it would be senseless to refuse all applications under article 714 where the personal writing requirement is not met. Whether a formality is "essential" or not must be established with a view to the facts of a given case and in light of the principle that formalities are means to ends and not ends unto themselves. The personal writing requirement is thus essential when the important functions it assures — evidentiary, protective, and cautionary, to name just these — are not met on another basis. This requires a case-by-case consideration of whether the absence of personal writing is fatal to applications under article 714.[38]

Yet if a personal writing may not itself be essential, it would seem that the very terms of article 714 suggest that *something* must exist beyond unwritten evidence of last wishes. The Code requires a measure of compliance distinct from the evidence of last wishes: "essential requirements" is a separate exigency from proof of intention for substantive compliance under article 714. In this sense, the Quebec rule is similar to statutory directives elsewhere which have been interpreted, to the chagrin of some by-standers,[39] as requiring some minimalistic formal compliance with ordinary rules for validity.[40] This is critical to understanding the limited manner in which article 714 has upset (or, more to the point, has left standing) the formalistic calculus for validity in Quebec.

Does this leave the computerized will as a salvageable holograph will? By its very nature, the computerized will is both mechanically written and unsigned by hand. This would seem to defy the only two formal requirements imposed by the Civil Code for holograph wills: essential or not, the computerized will evinces a complete absence of compliance and leaves no apparent room for the application of article 714. The situation may be different in other provinces, such as Saskatchewan, where courts have

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[36] See Brière, *supra* note 21 at para. 441.

[37] In *Mercier* v. *Mercier-Charron*, [1995] R.J.Q. 1446, 10 E.T.R. (2d) 15, for example, the Superior Court validated a holographic instrument pursuant to art. 714 C.C. that was drafted by the sister of the testator but signed by the latter. This case was commented critically by a leading Quebec observer who felt the Court failed to recognize the essential character of the holographic writing requirement: R. Comtois, "Vérification d'un 'testament olographe' qui n'a d'olographe que la signature du testateur" (1996) 98 R. du N. 257 at 260.

[38] This argument is fully developed in Kasirer, *supra* note 7.

[39] See J. Langbein, "Excusing Harmless Error in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law" (1987) 87 Colum. L. Rev. 1 at 44 who was critical of courts that ruled some compliance in a precondition to validity.

[40] See, as a leading authority from Common law Canada, *Langseth Estate* v. *Gardiner*, [1991] 1 W.W.R. 481, (39) E.T.R. 217 (Man. C.A.), in which the majority of the Manitoba Court of Appeal insisted that some adherence to formalities, in addition to other proof of last wishes, was required under the substantial compliance rule in that province. The *Manitoba Act, supra* note 6, was subsequently amended by *The Wills Amendment Act*, S.M. 1995, c. 12 to give courts the power to validate a document that failed to comply with "any or all of the formal requirements imposed by this Act." Insofar as this change allows documents which fail to comply with formalities in all respects to be validated, the *Manitoba Act* may be seen as varying from the model chosen for article 714 C.C.

not insisted on any minimal compliance with formalities before measuring the evidence of last wishes.[41] But importantly, even Saskatchewan and other anti-formalist jurisdictions may be thought of as imposing a writing requirement as a threshold to be crossed before judicial discretion as to the probative weight of last wishes can be exercised.[42] There seems no avoiding the issue as to whether the digitalized computer record is a "writing" for the purposes of the validity of wills.

Beyond the issue as to whether the computer will fails under article 714 for mechanical penmanship, the broader question as to whether it fits a notional "writing" requirement for such applications must be addressed. The discussion in *Rioux* is not fulsome in this regard, but it is instructive as to possible judicial approaches to how data on a computer record stands up against the "paper" or "writing" requirement in the modern law of wills. The Court never formally stated that a "writing" is a necessary threshold under article 714, nor did it say that a diskette or other non-paper digitalized instrument constitutes a viable attempt at a holograph will that thereby qualifies for consideration under the saving provision. But remarkably, Mr. Michaud seemed to assume first, that a paper-writing was necessary without exploring the justifications for or alternatives to this position and, second, that the diskette on its own did not suffice on this score. This would seem to be the sole explanation for his insistence that the print-out accompany the diskette through probate.[43] The print-out, which itself was made by relatives of the deceased as they planned their application for probate, was not offered up as a mere record or even as best evidence of a testamentary instrument which existed on some other plane, but as text that was inherently testamentary in nature. The Court in *Rioux* decided in the final analysis that the diskette together with the paper print-out of its contents constituted the "will" of Jacqueline Rioux.

Herein lies the makings of a minor sensation in the history of successions law: the paper print-out in *Rioux* must be the first testamentary instrument to be probated which did not exist at the time of death of the testator![44]

A careful study of the reasons for judgment reveals something of a mixed message as to just how palpable a computerized will must be. "I have no doubt," wrote Mr. Michaud, "that the diskette presented in Court and the printed copy of the only document it contained genuinely constitute the will of the deceased."[45] Does he mean "will" in the physical or the metaphysical sense? His use of the French word "testament" might be thought of as suggesting the former but, later, Mr. Michaud

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[41] See *Re Bunn Estate*, (1992) 100 Sask. R. 231, 45 E.T.R. 254 (Sask. C.A.) aff'g (1991), 41 E.T.R. 100 (Surr. Ct.). But, of course, even the most liberal substantial compliance rules cannot, as was said recently by the Manitoba Court of Appeal, "make a will out of a document which was never intended by the deceased to have testamentary effect": *George* v. *Daily*, [1997] 3 W.W.R. 379, 15 E.T.R. (2d) 1 at 19.

[42] See s. 35.1 of the *Saskatchewan Act*, *supra* note 6, which refers to a "document or any writing on a document" upon which the application must proceed.

[43] Beyond the flimsy procedural explanation, provided by art. 890 C.C.P., which obliges the probated will to be deposited in the office of the court to enable the clerk to make certified copies for interested persons. Even the present author knows how to copy material recorded on a computer diskette.

[44] But, on the long-standing practice in the Civil law of accepting wills (mistakenly) dated posterior to death, see [J.-Édmond Roy], "Testament olographe" (1902) 4 R. du N. 447.

[45] "...[J]e n'ai aucun doute que la diskette présentée et la copie imprimée du seul document qu'elle contient constituent bel et bien le testament de la défunte": *supra* note 4 at 8.

remarks that he had the "utmost conviction, if not to say the certainty, that the computer diskette and the printed document constitute unquestionably and unequivocally the last wishes of the late Jacqueline Rioux."[46] These "last wishes" (in French «dernières volontés») — connected to the same expression in article 714 — are of course thoughts rather than deeds (in the paper sense). The sands shift again in the formal disposition at the end of the reasons for judgment: the Court ordered probated the will of the late Jacqueline Rioux "contained on a computer diskette, the printed version of which bears the date of 1 February 1996 and is annexed to the present judgment."[47] We are left guessing: does the diskette constitute the will, or is it the print-out, or is it some combination of the two?

The meaningful issue as to whether "writing" is required under article 714 and if a computer record can meet that exigency deserves careful study and in fairness to the various actors involved in the *Rioux* case, it is perhaps not in uncontested probate proceedings that this study can best be undertaken. Indeed the answers to these questions hold part of the key to the much larger problem as to how article 714 should be understood against the Civilian tradition of formalism for liberalities. Postponing consideration as to whether a computer record can amount to writing, one might start by asking what is the legislative basis for requiring writing at all under article 714. Two hypotheses should be canvassed: first, a "writing" may be an inherent threshold requirement to all applications under article 714; and second, a "writing" may be one of the "essential requirements" alluded to in the new legislative rule.

Article 714 shies away from the word, but a "writing" is explicitly alluded to in other substantial compliance rules,[48] and is likely an intended threshold requirement if we allow ourselves to infer the point from the Minister of Justice's official commentary.[49] The fact that the word was omitted from the final text of the Code thereby setting it apart from the Manitoba and Saskatchewan rules, may well be more a quirk of legislative drafting than some master plan to give life to testamentary wishes not reduced to writing in any form whatsoever.[50] Let us assume — as did the Court in *Rioux* — that writing is a necessary formality for all applications under article 714. Do computerized last wishes not otherwise rduced to paper qualify?

Generally, the term "writing" is understood to depend on visibility in Quebec and, in the context of general legislative definitions, visibility may possibly imply materiality

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[46] "...[J]'ai l'ultime conviction, pour ne pas dire la certitude, que la diskette informatique et le document imprimé constituent de façon certaine et non équivoque, les dernières volontés de la défunte, Jacqueline Rioux": *ibid.* note 4 at 9.

[47] "...[L]e tribunal...déclare avoir vérifié le testament de feu Jacqueline Rioux contenu sur une diskette d'ordinateur et dont la version imprimée porte la date du 1er février 1996 et qui est annexée au présent jugement": *supra* note 4 at 10.

[48] See, *e.g.*, subs. 45(2), *Indian Act*, R.S.C. 1985, c. I-5 which requires a "written instrument" (in French "document écrit").

[49] See Minister of Justice, *Commentaires du ministre de la Justice: Le Code civil du Québec*, t. 1 (Quebec City: Pub. du Québec, 1993) at 426 which explains art. 714 C.C. by reference to an "écrit".

[50] Compare the initial formulation in art. 750, *Act to reform the Civil Code for the Law of persons, successions and property*, S.Q. 1987, c. 18 (not proclaimed in force) which explicitly referred to a "writing" («écrit»).

as well.[51] But the language of the new Civil Code in other contexts is certainly not plain in this regard and there are few textual arguments that necessarily preclude the communication of "writings" and the like that are recorded electronically.[52] The attitude of courts in article 714 cases decided to date does reflect a sense that visible and material writing is a threshold requirement, although it is not yet clear whether predilection for paper is grounded in a sense of the inherent formalism of wills or is a matter of reflex.[53]

While relevant to a general understanding of the weight to be accorded to digitally recorded information, legislative[54] and other injunctions[55] pertaining to the admissibility of such computerized "documents" into evidence raise an issue distinct from that bearing upon the existence of the will. Where the law of evidence contains a rule allowing for proof of the content of a juridical act on a computer system, it is an unlikely basis for establishing the very existence of the juridical act itself where the law prescribes that such existence depends on adherence to rules of form.[56] The application of rules of form to the computerized will, as we have seen, turns on its quality as a formalistic act rather than its admissibility as evidence to prove an existing act. A useful analogy may be made to the probate of lost wills through parol evidence. Proof of the

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[51] See s.58(21), *Interpretation Act*, R.S.Q., c. I-16, which, by reference to "what is printed, painted, engraved, lithographed or otherwise traced or copied," suggests visibility and, although less unequivocally so, materiality too.

[52] See, *e.g.*, the "writing" (in French an «écrit») requirement for the residential lease (art. 1895 C.C.); the "memorandum" («note d'information») requirement for the sale of certain residential immovables (art. 1787 C.C.); and the "copy...in writing" («copie...écrite») and "document" («document...écrit») requirements in insurance (art. 2400 C.C.), although in all of these cases one might be inclined to mount a policy argument that the relevant document be in the most accessible form to protect the notionally weaker contracting party. Compare, as an example of necessary paper-materiality for a writing, the case of immovable hypothecs which must be notarial acts *en minute* (art. 2693 C.C. and ss. 34-41, *Notarial Act*, R.S.Q. c. N-2).

[53] Typically this has been done unthinkingly given that visibility or materiality have not been at issue: see, *e.g.*, *Duguay* v. *Grenier*, [1995] R.J.Q. 2603 at 2605 (Sup. Ct.) and *Robitaille* v. *Gagnon*, [1995] R.J.Q. 156 at 160 (Sup. Ct.), which referred to an "écrit" and a "document" respectively.

[54] Interestingly, arts 2837-9 C.C., enacted as new law at the same time as art. 714 by S.Q. 1991, c.64, provide for a regime for admissibility of digitalized records into evidence. It may be noted that the Government of Canada has published a study in which the understanding of a "writing" be explicitly broadened for evidentiary purposes to accommodate electronic technology: see Department of Justice (Information Technology Security Strategy Legal Issues Working Group), *A Survey of Legal Issues Relating to the Security of Electronic Information*, chap. 9 ("Electronic Records, Digital Signatures and Evidence"), http://canada.justice.gc.ca/commerce/toc_en.html (10 Oct. 1997).

[55] For a useful review of judicial attitudes in the United States, see S.A. Kurzban, "Authentication of Computer-Generated Evidence in United States Federal Courts" (1995) 35 IDEA 437 at 448 ff. For European Law, see I. de Lamberterie, "La valeur probatoire des documents informatiques dans les pays de la C.E.E." (1992) 3 R.I.D.C. 641.

[56] This limits the use, in our view, that can be made of art. 2837 C.C. which relates only to the admissibility of a document reproducing data entered on a computer system to make proof of the content of a juridical act. For an argument invoking this rule to substantiate the position that computerized records constitute a "writing" generally, however, see D. Masse, "Le cadre juridique en droit civil québécois des transactions sur l'inforoute" (1997) 42 McGill L.J. 403 at 427-33.

content of a missing will does not, of course, mean that legislative formalities connected to the making of the will itself need not be observed.[57]

Other areas of law, beyond the law of evidence, have been forced to confront the distinction between the incorporeal legal idea and its corporeal expression. The requirement that works be fixed in some material form before they can be subject to copyright protection in intellectual property circles, for example, partakes of some of the same considerations concerning the appropriate place for formalism in private law generally.[58] A more precise an analogy can be made with the adaptation of exigencies of form in the law of gifts in the Civil law. Non-paper surrogate techniques for ordinary formalities have developed in the shadow of the legislative requirement that gifts be executed, on pain of nullity, as notarial acts *en minute*.[59] Notwithstanding exceptions and apparent exceptions to principle arising through characterizations of gifts as manual,[60] disguised,[61] or indirect,[62] this liberality remains a formalistic juridical act under article 1824 C.C. The rigour with which formalities apply depends to some extent on the context of these transactions but, in principle, formalities continue to be relevant for determining what constitutes a gift in law.[63] As in the case for wills, exploring how digital transactions affect the work of notaries in respect of their role in bringing gifts into existence for their clients looms large — or should loom large — as they rethink the ordinary business of their profession in this new age.[64]

Most immediately relevant, on the other hand, is the wealth of scholarly commentary advocating that instruments of electronic commerce be made or interpreted

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[57] The distinction between observance of formalities for establishing the initial existence of a lost will and proof of its contents was made plain by the Supreme Court in the Common law case of *Lefebvre* v. *Major*, [1930] S.C.R. 252 and, for Quebec, in *Langlais* v. *Langlais*, [1952] 1 S.C.R. 28.

[58] See, for a most useful comparative study drawing on one author's bijurical (and trilingual!) legal culture, Y. Gendreau, "The Criterion of Fixation in Copyright Law" (1994) 159 Rev. int. dr. aut. 110 esp. at 115-37 (written in English, French and Spanish).

[59] For a careful overview of the fading importance of the requirement that *inter vivos* gifts be made in notarial form in French law (art. 931 C. civ.), see Jean-François Montredon, *La désolennisation des libéralités* (Paris: L.G.D.J., 1989) esp. paras 13. Mr. Montredon connects this phenomenon of antiformalism with a parallel development for gifts *mortis causa*, including those in wills.

[60] The leading study in Quebec law is P. Ciotola, *Le don manuel en droit québécois*, (LL.D. thesis, Université de Montréal, 1973) [unpublished] esp. at 223.

[61] See H. Méau-Lautour, *La donation déguisée en droit civil français* (Paris: L.G.D.J., 1985), part II. In his substantial preface to this work, noted French Civilian Pierre Raynaud connected formalism in disguised gifts to what has become known elsewhere as the channelling function ("la catégorisation de l'acte qui l'insère dans l'ordre juridique et en justifie sa validité") at 16.

[62] For an especially imaginative argument on the ever-expanding character of the category, see J. É. Billette, *Donations et testaments*, tome 1 (Montreal, 1933) at paras 347ff.

[63] One may well ask, however, whether the formal recognition of the informal character of indirect and disguised gifts (art. 1811 C.C.) is part of a new invitation to recast the category of liberalities: see J. E. C. Brierley, "The Gratuitous Trust: A New Liberality in Quebec Law", *Mélanges presented by McGill Colleagues to Paul-André Crépeau* (Cowansville: Éd. Yvon Blais, 1997) 119 at 124-5, 135-8, 141, 145.

[64] An early call to technological arms is found in Jean-Guy Cardinal, "La pratique moderne du notariat" (1958) 60 R. du N. 335 at 337.

to meet formalities imposed for certain commercial transactions.[65] Scholars and practitioners have argued that computer records can constitute "writing" for the purposes of the *Statute of Frauds* and its latter-day equivalents, invoking functionalist arguments familiar to those who have argued for substantial compliance for wills in other contexts.[66] Beyond the *Statute of Frauds*, Civilians have also made the case for the validity of commercial transactions where formalism is required on other bases.[67] In December of 1996, an important international initiative brought the issue of formalism in electronic commerce to the fore.[68] Indeed the UNCITRAL Model Law on Electronic Commerce proposes a new criterion for defining "writing" that fixes on "accessibility" of information for subsequent reference[69] rather than, as is current in most Canadian jurisdictions, an interpretative definition that depends on "visibility".[70] None of this solves the issue as to whether a diskette will is "writing" for the purposes of article 714, if writing is indeed a necessity for such applications. Yet however tangential the context of electronic commerce is to that of wills as unilateral gratuitous acts, the issue is well-framed and, as prescient law reformers in British Columbia saw some time ago,[71] it may well be possible to argue that a computerized will substantially complies with the writing requirement without amending the rules now in the books.

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[65] See generally, R. Nimmer & P. Krauthouse, "Electronic Commerce: New Paradigms in Information Law" [1995] 31 Idaho L. Rev. 937 at 943ff. For a perspective informed by a sensitivity to Quebec legal issues, see S. Parisien & P. Trudel, *L'identification et la certification dans le commerce électronique* (Cowansville: Éd. Yvon Blais, 1996).

[66] See, as examples taken from a growing literature, N. S. Bender, "Digital commerce and the Utah Digital Signature Act", http://www.library.law.miami.edu/~bender/ internt.html esp. paras 59-75 and, for its enthusiasms, R. Nimmer, "Electronic Contracting: Legal Issues" (1996) 14 John Marshall J. Computer & Info. Law 211 at 225-9.

[67] These issues are canvassed generally in P. Trudel, G. Lefebvre & S. Parisien, *La preuve de la signature dans l'échange des documents informatisés au Québec* (Quebec City: Pub. du Québec, 1993). See also: D. Moreno & C. de La Villegeorges, "Pour un contrat-type de commerce électronique" J.C.P.1997.Act. 2, and, for its bibliographical sources in continental Civil law, M. Jaccard, *La conclusion de contrats par ordinateur: aspects juridiques de l'échange de données informatisées (E.D.I.)* (Berne: Ed. Stämpfli, 1996) esp. part II.

[68] The United Nations Commission on International Trade Law [hereinafter *UNCITRAL*] proposed a "Model Law on Electronic Commerce" on Dec. 16, 1996 which provides, at art. 5, that "[i]nformation shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message." The full text of the Model Law with an introductory note by Harold S. Berman is reproduced in (1997) 36 I. L. M. 197. An especially fine review of international initiatives, informed by a rich understanding of the "cadre intellectual habituel" created by a paper-driven understanding of legal formalism (at 383) see E. A. Caprioli & R. Sorieul, "Le commerce international électronique: vers l'émergence de règles juridiques transnationales" (1997) Clunet 323 esp. 380 *et seq.*

[69] *UNCITRAL, ibid.* art. 6(1) provides that "where the law requires information to be in writing, that requirement is met by a data message if information contained therein is accessible so as to be used for subsequent reference." "Data message" is defined at art. 2(a) to include, for example, information "stored by electronic means".

[70] See, *e.g.*, s. 29, *Interpretation Act*, R.S.O. 1990, c.I.11, s. 29 ("writing", in French «écrit»). Visibility is typically criterion invoked to explain the term "writing" in wills legislation, as was done in the leading Ontario case of *Murray* v. *Riddel*, (1927) 3 D.L.R. 1036 (C.A.).

[71] The point was raised although, by their own admission, not fully confronted by B.C. law reformers: see Law Reform Commission of British Columbia, *Report on the Making and Revocation of Wills* (Victoria: Ministry of the Attorney General, 1981) at 46 and 51-52.

This said, those jurisdictions now contemplating enactment of such schemes should consider explicit wording to bring computerized wills more plainly into the picture. Statutory definitions in other contexts are increasingly sensitive to computer records where circumstances have provoked legislatures into confronting virtual writings.[72]

The inquiry as to what amounts to a writing for wills must necessarily proceed on the basis of the purposes of that formalistic requirement. If section 3 of the Ontario Act provides that "a will is valid only when it is in writing"[73] and if the Quebec Code hints strongly to the same effect,[74] it is because the formal exigency is designed to play a functional role in the probate procedure as a means of verifying — in the fullest sense of the word — the will. Within the traditional parameters of visible and material text, courts have been generous in interpreting the writing requirement where the evidentiary, channelling and cautionary protection offered in the circumstances justified an understanding extending beyond the standard parchment.[75] The functional calculus should logically proceed on the same basis in the context of the discretion provided by substantial compliance rules except, of course, if a paper-writing requirement is explicitly established as a threshold to the exercise of that discretion. Even where documentary thresholds have been established with the avowed intention of excluding oral wills, the "writing" or "document" precondition itself is often open to be interpreted to accommodate computer documents where that is appropriate.[76] Each statute has its own way of evoking the writing requirement[77] but, once the rule of form is identified, the question to ask is "does form follows function on the facts of the case?"

The writing or documentary requirement has been described as the non-negotiable formality by the leading expert in the field who fixed on the importance of a permanent record of testamentary intention.[78] Certainly, permanence is a more reliable and visible guarantee against fraud and of the testator's identity. More seriously, permanence and materiality (in the paper sense) are not functional equivalents and while computer memory is fragile (as the facts in *Rioux* suggest), so too is paper (it being easier to throw

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[72] See *e.g.*, *Access to Information Act*, R.S.C. 1985, c. A-1, s. 3, which provides for a definition "regardless of physical form or characteristics" in another context. This and other statutory definitions are discussed in Department of Justice (Canada), *supra* note 54.

[73] *Succession Law Reform Act*, R.S.O. 1990, c. S.26., s. 3. The word "writing" is used as a noun in, *e.g.*, subs. 7(1).

[74] See articles 704, 712, 716, 726, 727 C.C. for the basis of a compelling textual argument that the will is a writing.

[75] See discussion of this issue and cases cited, for the Common law, in R. Hull & M. Cullity, *Macdonell, Sheard and Hull on Probate Practice*, 3rd ed. (Carswell: Toronto, 1981) at 50-1.

[76] The New South Wales Law Reform Commission recommended a documentary threshold to exclude oral wills, but did not fully consider whether a computer text was a "document": *Community Law Reform Program: Wills Execution and Revocation* (Sydney: New South Wales, 1986) at 73. Note however that the Commission took pains to disqualify videotaped wills at 46.

[77] In its recommendations, the Manitoba Law Reform Commission retained the word "document" but did not explore its possible interpretation beyond typewritten or printed text for holograph wills: *Report on "The Wills Act" and the Doctrine of Substantial Compliance* (Report #43) (Winnipeg: Law Reform Commission, 1980) at 9-10 and 30.

[78] Langbein, *supra* note 39 at 52 argued that a writing is indispensable since "failing to give permanence to the terms of your will is not harmless." In this sense even Langbein, the most vocal and prolific scholarly proponent of broad judicial dispensing powers, can be considered something of a formalist, at least in the Civilian sense.

a scripted will into the fireplace than even your average lap-top). Whatever one's views as to the acceptability of computerized wills, it seems traditional reliance on "visibility" to define "writings" is worth rethinking. Frankly, visibility is not a particularly helpful criterion for the purposes of identifying the reasoning behind the writing requirement. The ability to see the will with the human eye, unassisted by technology, may help courts to fit the writing into the testamentary "channel" in a small way but it does little in itself to facilitate evidentiary problems or to discourage fraud, for example.

The problem presented by the signature requirement for computerized wills is at once similar and dissimilar to that of "writing". Substantial compliance does not obviate the need for assent to a will — a requirement of substantive law relating to the existence of *animus testandi* — for which the signature might be viewed as a mere representation. In some jurisdictions, the close relationship between assent as a matter of substantive law and the signature as a formalistic requirement has resulted in substantial compliance rules that take no chances.[79] In other circumstances, some have argued, often on the basis of rather fantastical hypotheticals, that a person may assent to a will validly but, for some harmless reason, fail to affix his or her signature to the document as representation of such assent.[80] In at least one recent Quebec case, a substantial compliance rule has been invoked to validate an unsigned holograph instrument, although the outcry of scholarly opinion which this case generated may diminish its persuasive authority.[81] For the computerized will, importance is first given to the issue that material consigned to a diskette, to the hard-drive, or even to electronic mail, cannot be signed in the conventional sense. Perhaps Mr. Michaud's enthusiasm for the signed sticker on the diskette can be explained by the apparent impossibility of a pen mark on Ms Rioux's otherwise compelling expression of last wishes.

Far more challenging is the issue presented by "electronic" or "digital" signatures that can be generated quite easily with existing technology. While the manner and form of "dig-sigs" vary considerably, the general premise is that a testator at work at his or her own keyboard may produce a personal mark of assent to a computerized will that is every bit as reliable in form and substance as that generated by human penmanship.[82] In fact, experts have already argued that such signatures are in many circumstances more reliable than conventional signatures as measures of identity or as guarantees against fraud. Certainly the inherently variable character of the human-mark has vexed courts and, however exacting a science graphology may be, any advances in this aspect

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[79] See, *e.g.*, *Indian Act*, R.S.C. 1985, c. I-5, subs. 45(2), which explicitly requires a signature in advance of a decision to dispense with formalities.

[80] The idea that one might assent to a will but not sign it because of a freak accident or an oversight moved one law reform agency to recommend that the signature be considered non-essential for substantial compliance (whereas it had recommended that a "document" was a necessary threshold): New South Wales Law Reform Commission, *supra* note 76 at 73.

[81] See *Re Morin* (1995), 9 E.T.R. (2d) 222 (Que. Sup. Ct.) and, among its critics, J. Martineau, "Le carnet du praticien" (1996) 97 R. du N. 273.

[82] The technological dimension of creating digital signatures, involving a mix of computer science and applied mathematics called cryptography, is happily not beyond the understanding of all lawyers. For better explanations than those of the present author, see Bender, *supra* note 66 and Handa & Blanchard, *supra* note 33.

of the law of evidence would be welcome.[83] Signatures assure other functions, as we have seen, but one might well imagine that even the cautionary role might be guaranteed by a computer signature where this became part of the ritual of will-making. The facts in *Rioux* may not have justified an excursis by the Court into the finery of "public key" and "private key" dig-sigs, but this is sure to arise in future litigation.

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Formalism is part of the deep culture of the Civil law and, not surprisingly, opinions have always been divided on what has come to be called "substantial compliance" in the law of wills, both its judicial and legislative guises. There have always been voices denouncing "senseless formalism", encouraging judges and others to choose substance over form,[84] just as there have been those who stoutly defend the virtues of literal compliance.[85] But rare are those who call for a complete abandonment of the idea that rules of form have a meaningful place in sustaining a system premised on the freedom of willing. In fact, the best critiques of this ancient value seek to anchor "désolennisation" in what one keen observer described as "formalisme causé" rather than "formalisme abstrait".[86]

Against this background, the move to digital documentation need not be contemplated as a total assault on long-standing and legitimate principles, but might be analyzed less threateningly as merely a transition from paper to "electronic formalism".[87] The problem is, of course, that the emergence of the computerized will, on the one hand, and the elaboration of the doctrine of substantial compliance, on the other, have not happened in tandem. An uncontested probate case (*Rioux*) and article 714 C.C. have inadvertently — though predictably — brought them together for the first time with less than satisfactory results. Unsigned (except for the tag on the plastic diskette) and paperless (except for the *post mortem* print-out), the probated computerized will in *Rioux* might be said to defy the idea of the will as a formalistic juridical act as it is described in articles 704, 712, 713 and 726 C.C. Not surprisingly, Quebec's leading estate experts have lamented that substantial compliance has

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[83] In one moment of lunatic pleading, a Quebec court entertained arguments that because the signature on a will was too identical to other specimens of the deceased's handiwork, it had to be a forgery: *Jansen* v. *Leduc*, [1945] B.R. 640 at 642.

[84] Consider the following plea against formalism, inviting judges to measure formalities against real-life needs: "...l'application du brocart *summun jus summa injuria* peut donner des résultats inattendus. Les tribunaux ne manquent certes pas à leur mission en s'écartant d'un formalisme trop sévère et en cherchant à faire coïncider les règles posées par le législateur avec les besoins de la vie": H. Turgeon, "Jurisprudence" (1942) 45 R. du N. 224 at 225.

[85] A reasoned injunction for courts to understand the solemn character of wills notwithstanding their anti-formalistic sensibilities is found in R. Comtois, "Le testament authentique est-il encore un acte formaliste?" (1966) 69 R. du N. 193 which included an oblique call for legislative intervention in matters of substantial compliance at 195.

[86] Philippe Rémy sought to recast legitimate anti-formalist sentiment along these lines in a comment on the apparent abandonment of the date formality for holograph wills by France's highest court: note under *Cass. civ. 1re*, 4 Feb. 1981, J.C.P.II.19715.

[87] The case is made in the commercial context by Caprioli & Sorieul, *supra* note 68 at 380ff.

mistakenly served to wrench the will from the category of solemn acts[88] and *Rioux* has already been the particular target of criticism.[89] What place remains for formalities if, as Mr. Michaud decided, last wishes can be established unequivocally and technology identifies the testator and secures against fraud better than pen and paper? When probated, computerized last wishes appear not only to test the scope of the doctrine of substantial compliance, but they also threaten the traditional definition of the will.

Civilians who cling to a fear of what one imaginative will-watcher called "naked intention"[90] should take solace in the fact that, at least on its face, article 714 itself does not remove the will from the catalogue of formalistic juridical acts. Evocative of a famous speech by the great Common law probate judge Francis Jeune,[91] article 714 consecrates formalism in a reduced dimension through its insistence that essential requirements be met alongside proof of last wishes before defective testamentary paper can be validated. But the computerized will challenges this wisdom from a new angle. The diskette on which last wishes are consigned is not, of course, "naked intention". But it is so frail as against the ordinary materialism of testamentary instruments (don't press "DELETE"!) that one might be forgiven for allying it with nuncupative nothings.

Assuming that conventional definitions of writings as visible, touchable entities and of signatures as inky, human marks persist, the computerized will may indeed require rethinking of "substantial compliance" legislative language. Certainly *Rioux* does not, on its own, provide sufficient judicial sleight-of-hand for the assimilation of computer records to testamentary paper and, while one awaits the generalized use of dig-sigs in estates practice, unsigned diskettes and computer screens loom large. And whither virtual witnesses? Estates lawyers will not be left behind in the digital revolution[92] and the unique relationship between form and substance in wills (to some extent the medium is the message for this formalistic juridical act) requires them to do more than equip their offices with expensive machinery. Yet in a field where formalism continues to

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[88] See, *e.g.*, from the perspective of a notary, the spirited revival of Josserand's thesis (at least stripped of some of its anti-capitalistic rhetoric) in R. Comtois, "La «désolennisation» du testament" (1995) 97 R. du N. 408. Voicing his preoccupations as an experienced advocate in estate litigation, Michael McAuley forcefully defended formalism as a guarantee of freedom of testation in "Forced Heirship Redux: A Review of Common Approaches and Values in Civil Law Jurisdictions" (1997) 43 Loyola L. Rev. 53 at 70.

[89] See P. Ciotola, "La vérification d'un testament sur disquette ou l'art de mettre le formalisme testamentaire à la corbeille informatique" (1997) Vol. 6 No. 4 Entr'acte 10 at column 6.

[90] The warning of the inherent frailty of "la volonté toute nue" (Josserand *supra* note 3) was taken up with vigour by Montredon, *supra* note 59 at 173 in the context of a bold defence of the writing requirement in French law.

[91] In *Re Peverett*, [1902] P. 205 at 206-7, Jeune P. wrote that "the Court will not allow a matter of form to stand in the way if the *essential elements* of execution have been fulfilled" [emphasis added].

[92] Some American lawyers rejoice in the change: see, *e.g.*, R. Shumaker, "Hi-Tech Estate Planning: Trusts and Estates Meet Cyberspace" (1995) 134 (Oct.) Tr. & Est. Q. 28. The less technologically inclined, such as the present author who imposed this writing assignment on himself as necessary medicine, can take solace in that we are in the fine company of a great legal sociologist who wrote "...je ne résiste pas mieux que les autres juristes à la tentation si naturelle de tenir pour ennuyeuses, voire dangereuses, toutes les nouveautés postérieures à mon dernier examen de droit": J. Carbonnier, "Préface" in *Droit et informatique. L'hermine et la puce* (Paris: Masson, 1992) at p. v.

hold its own, few lawyers have inquired as to how technology threatens to undermine so basic a concept as the will itself.[93]

One can well imagine (or, for the less technologically imaginative among us, we can at least *anticipate)* that mechanical means will adequately meet the evidentiary and protective purposes of the traditional formalities and that the time will soon come when courts recognize this "channel" for the expression of testamentary intention. Yet it is harder to guess at how the requisite solemnity in will-making can be accommodated by the increasingly friendly keyboards, printers and software available to testators both plugged-in and *branchés*. Solemnity and ritual are of the essence of will-making as a social convention — some Quebec jurists have even allied will-making with spiritual experience[94] — so that will-making 'made easy' is, frankly, not will-making. The cautionary function is already hard to measure for the holograph will given the private character of the latter and the absence of open declaration by the testator that the act contains the expression of his or her last wishes.[95]

Some have remarked that holograph wills are covered in the requisite solemnity through the personal effort associated with making them, suggesting that the physical fact of drafting itself partakes a necessary custom.[96] The ritual that surrounds their coming into being is part of what gives these wills their sobering force according to one astute sociologist,[97] and it is an open question whether this solemnity can emerge from a keyboard in the same way. The most serious criticism that can be made of *Rioux* is that, however plain the identity of the testatrix and the absence of fraud, it was by no means clear that the diskette and its sticker were invested with Jacqueline Rioux's solemn sense that they represented her last will and testament. From this perspective, Ms Rioux's decision to store the diskette with other "documents" relating to her planned demise takes on special importance. Certainly new habits develop with new approaches to literacy — often as fast as instant computer custom — and doubtless fresh rituals will emerge in connection with the preparation of homemade wills in new technological settings. In this sense, the move to electronic communication in law may bring about, as Clancy observed for the medieval period, a realignment of the relevant sources of law. At the very least, attention needs to be directed as to how testamentary solemnity

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[93] One must credit Canada's leading probate scholar, the late Thomas Feeney of the University of Ottawa, for anticipating how the computer promised to upset traditional rules of form: see T. Feeney, *The Canadian Law of Wills*, vol. 1 (Toronto: Butterworths, 1987) at 66.

[94] Presented in cartoon-like dimensions by one country notary who saw will-making as an opportunity for a "réconciliation finale de la conscience avec le Créateur". He continued, "Si dans la vie un acte notarié devait être écrit à genoux comme pour prendre Dieu à témoin de la doctrine des intentions et de la justice de l'acte, c'est bien le testament": E. Pouliot, "Le testament notarié" (1929) 32 R. du N. 129 at 133.

[95] As is required for notarial wills and wills before witnesses by articles 717 and 727 C.C.

[96] See M. Grimaldi, "Les dernières volontés" in *Droit civil, procédure, linguistique juridique: Écrits en hommage à Gérard Cornu* (Paris: P.U.F., 1994) 177 at 191 who argued that when solemnity is apparent, French courts show a "*favor testamenti*" that moves them to validate imperfect wills. This occurs in the absence of a general substantial compliance rule in the French Code.

[97] In a brilliant sociological study of successoral practices in France, Anne Gotman wrote of holograph wills, "Rédigés dans un style pseudo-juridique, ces documents, toujours solennels pour leur auteur, peuvent aussi revêtir une forme infiniment personnelle. Mais qu'ils soient calligraphiés ou griffonés, ... ils n'en ont pas moins la force de l'écrit et dans ces circonstances, de la relique": *Hériter* (Paris: P.U.F., 1988) at 145.

is sustained in this changed and changing environment. As the world of literacy comes full circle, from memory to written record to (digital) memory again, the computerized will requires us to confront the mystery inherent in will-making as a profoundly human act.