

# **Attack of the killer acronyms: The Future of IT Law**

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## **Abstract**

This paper looks at the field of Information Technology Law field and its reliance on buzzwords, jargon and acronyms that tend to alienate serious discussion about some of the deeper socio-legal issues involved. It is often easy to become confused by the terminology and the technology, which has led to some non-issues receiving too much interest (the Y2K bug for example), and some valuable and worthy topics being almost ignored. Some writers and researchers may be tempted to neglect the field because of lack of understanding of the technology, which may eventually lead to the end of the IT Law as a serious field of research.

This paper will attempt to reignite the jurisprudential debate about the future of IT Law research, teaching and practice. This will be done by looking at the possible trends emerging from the literature.

## **1. Introduction**

Are you confused by IT and IP law? Are you confused by B2B, B2C and C2C? Or perhaps it is all a second language to you. You may think EDI is DOA. If so, you may probably use P2P to download MP3s, and you may even rip them into a CD using a CDR or a CD-RW despite the RIAA. Or are you one of those people who pay attention to IPRs? Perhaps you like DVDs, and copy them with your new DVD-R. Perhaps you are scared to do it, but you are concerned about the MPIAA enforcing CSS, as they did with DeCSS. Then there is the whole problem of DRM, ECMS and IPLs, something that GNU, EFF and the FSF do not like. There is also the entire stink with SCO, IBM and the GPL, even though some people like BSD better.

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It has always been difficult to keep up with IT advances, and many people cannot tell their SSL from their USB, or their ISO from their OSI. Of course, all machines have RAM, HDD and a CPU, but few now have a SCSI, although most laptops still sport their PCMCIA. Yet, with LAN and WAN one can never tell, so if you are using WI-FI better get a VPN ASAP.

BTW, there is a problem with sorting out all the legislation. There is DP within the EU, which has generated a lot of problems with the US and the FTC. The UK's IC is trying to tackle UEM, SMS and MMS; but we are still not clear if it covers DFID as well. This brings us to the issue of the WWW and HTML, DHTML, XML and XrML, and how pages can be coded with PHP, MySQL, ASP, and even WYSIWYG editors such as FP. As far as legislation goes, we have the DPA, FSMA and the CDPA, while in the US they have the DMCA, UETA, UCITA, COPA and the UCC. Not to mention international treaties and organisations, where we can count the WTO, UNCITRAL, TRIPs, UCC, WIPO, EPC, UPOV, OECD, FTAA, NAFTA and CAFTA. And we have not even started to mention the WSIS and WIPO. Then there is all of the angst about the use and misuse of URLs and iLTDs, and there we have ICANN, IANA and the UDRP. And if you want to continue listing, why not look at IAHC, NSI, ISOC, IRTF, IETF, IDNB and even the IAB.

And does anybody remember Y2K?

Confused yet?

## **2. What is IT Law anyway?**

### **2.1 Marking the field**

The interaction between law and technology is not a new subject. The term Jurimetrics was first coined in 1949 to define those legal problems that arise from the relationship between the law and new technologies.<sup>1</sup> However, the birth of the discussion about the specific interaction between information technology (IT) and the law is much more recent. Computer Law is a relatively recent specialist classification of the law that has its origin in the concerns about the perceived threat to privacy from the rapid and automated processing of data by computers in the 1970s.<sup>2</sup> In fact, the first piece of legislation that

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<sup>1</sup> Loevinger, Lee. "Jurimetrics. The Next Step Forward", *Minnesota Law Review* 33 (1949).

<sup>2</sup> However, the first law journal article in the subject is much earlier than that. See: Freed, Roy, "A Lawyer's Guide Through the Computer Maze", *The Practical Lawyer* (November 1960).

dealt directly and exclusively with computers is the 1970 Data Protection Act from the German state of Hesse.<sup>3</sup> The term “Computer Law” was first used by Professor Colin Tapper back in 1973,<sup>4</sup> and his book dealt with information storage and retrieval systems.

Even considering the relative youth of the field, it must be remarked that the area has been through some considerable changes as to the core subjects that are covered by it. The initial term “computers and law” evolved to favour the more inclusive “information technology law”. In the United States, the term that is preferred nowadays is “Cyberlaw”. Saxby offers a useful set of definitions:

*“The expression ‘computer law’ is itself severally defined, being more established in the United States as a collective term for the legal issues generated by the onset of computerization. Elsewhere the expression ‘information technology law’ has been used in the same focus. There is, also, the parallel development of ‘informatics law’ concerned more with the application of digital technology to the analysis and understanding of law and legal reasoning. Other writers meanwhile identify ‘information law’ centering on information as a commodity worthy of its own systematic analysis.”<sup>5</sup>*

Regardless of the term used, it has been understood that in the broadest possible sense, IT Law covers all sorts of interaction between the law and information technologies. This has proven to be a tricky delimitation, as the boundaries of what is covered by information technology keep expanding to include almost all fields of human endeavour. Hence, the specialised academic outputs (including monographs, courses, journals and conferences) have historically covered a very wide variety of subjects – ranging from highly technical topics like legal knowledge systems; to socio-legal subjects like the digital divide.

Arguably, the large number of subjects that have been covered as information technology law at one point or another may suggest a lack of focus in the field and a lack of a strong theoretical delimitation of its core subjects.<sup>6</sup> It is difficult to assign a specific cause for this lack of focus, but it could be argued that IT Law may be suffering from the lack of adequate definitions from the very start. From reading the above definition, it would seem

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<sup>3</sup> Lloyd, Ian. *Information Technology Law*, 3<sup>rd</sup> Edition, London: Butterworths (2000).

<sup>4</sup> Tapper, Colin. *Computers and the law*, London: Weidenfeld & Nicolson (1973).

<sup>5</sup> Saxby, Steven. “A Jurisprudence for Information Technology Law”, 2(1) *International Journal of Law and Information Technology* (1994). @: <<http://europa.eu.int/ISPO/legal/en/access/saxby/ch1/ch1.html>>

<sup>6</sup> For example, contrast the table of contents in two of the most widely used textbooks on the subject in the UK: Reed, Chris and Angel, John. *Computer Law*, 5<sup>th</sup> ed, Oxford: Oxford University Press (2003); and Lloyd, *Information Technology Law*, op cit.

that anything goes as far as subjects are concerned, an approach that has been almost entirely pragmatic and not theoretical. If we define IT Law as the interaction between the law and whatever new technological development in the field of computers, then we will be doomed to have to cover every single invention in the field of information technology that has even the slightest legal interest. This phenomenon can result in the temptation to look at any sort of computer innovation to find a new “legal implication” that has not been dealt with before.<sup>7</sup>

One of the end results of the marked lack of a comprehensive theoretical approach is that the field has to suffer the view from the rest of the legal community as one of those made-up subdivisions, particularly because the law often suffers from the continuous division and sub-division of legal categories, something that could be called the “Law of the Horse” phenomenon.<sup>8</sup> This term is credited to Judge Easterbrook in the United States, who complained that there is a tendency to have specialist subjects that claim to deal with the legal implications of any human activity, including horses.<sup>9</sup>

Nevertheless, there can be little doubt that there is a very practical need to have a specialised area of the law that deals with some of the very important legal questions that arise from the implementation of new technologies, particularly if some of these issues have never been dealt with before. In an excellent paper about the future of IT Law,<sup>10</sup> Professor Napier made a strong case to respond to the detractors of the existence of a separate field of law called “Information Technology Law”, arguing that it had already been established by practice, and that it was producing a sizeable number of publications dedicated solely to this new category of the law. He then went on to list a number of issues that he considered were the sole realm of IT Law, including software protection, data protection and the dematerialisation of documents. A similar job was performed by Professor Lessig in his defence of Cyberlaw, where he identified privacy, freedom of speech and internet regulation as areas of the law where Cyberlaw had made unique and

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<sup>7</sup> Something to which the author admits of being guilty as well, see: Guadamuz, Andres. "eBay Law: The legal implications of the C2C electronic commerce model" 19(6) *Computer Law & Security Report* 468 (2003).

<sup>8</sup> For an animated debate about the Law of the Horse and Cyberlaw, see: Easterbrook, Frank H. “Cyberspace and the Law of the Horse”, 1996 *University of Chicago Legal Forum* 207; and Lessig, Lawrence. “The Law of the Horse: What Cyberlaw Might Teach”, 113 *Harvard Law Review* 501 (1999).

<sup>9</sup> This can also be referred to as the “Law of Skiing”. Credit for this term must go to Andrew Charlesworth, who was the first person to point to me about the existence of such thing as the Law of Skiing.

<sup>10</sup> Napier, Brian, “The Future of Information Technology Law”, 51(1) *Cambridge Law Journal* 46 (1992).

valuable contributions to these subjects, and were different than the approach to these subjects encountered in other legal fields.<sup>11</sup>

These debates demonstrate how vital it is for IT Law to be able to establish a useful delimitation of subjects, and just how counterproductive it is to deal with every single aspect of information technology. IT Law should specialise in some specific areas because it is almost certain that some areas of the law are already absorbing information technology and making it their own. For example, Competition Law is perfectly capable of studying Microsoft's anti-trust suit; and Commercial Law should already be comfortable with electronic payments systems because almost all payment systems nowadays involve information technology.

Conversely, IT Law has matured sufficiently to be able to claim that there are a number of core subjects that are now typically "IT Law". Historically, Computer Law was very interested in more practical issues such as artificial intelligence, computerised legal education and legal practice. This may have been caused by the marked lack of regulation in the 1980s and early 90's. With the increase in regulation and legislation in recent years, more substantive subjects have emerged to fill the gaps; and one could attempt to identify a number of emerging sub-categories that should be the subject of study of IT Law:

- a) Practical uses of IT: artificial intelligence, legal knowledge systems, autonomous agents, legal education and legal practice.<sup>12</sup>
- b) Privacy: surveillance, anonymity, data protection, freedom of information and cryptography.
- c) E-commerce: e-business; financial services; contracts and electronic payment systems.
- d) Intellectual property: software IP, databases, domain names, licences, digital rights management.
- e) Socio-legal: digital divide, social inclusion, censorship, free speech, e-democracy.
- d) Regulation: e-governance, international treaties and policy.
- e) Crime: fraud, child pornography, hacking, rights infringement.

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<sup>11</sup> Lessig, "The Law of the Horse: What Cyberlaw Might Teach", op cit.

<sup>12</sup> Although it could be argued that legal practice is in itself a separate subject.

This classification is useful, but it may require some fine-tuning. For example, it has become evident in recent years that the field of artificial intelligence is becoming a separate subject of study.<sup>13</sup> There is also an entirely new subject called Legal Informatics, which deals with the applications of informatics in the field of law, which furthers the possible confusion of those who are unaware of the distinctions between all of these new sub-categories.<sup>14</sup> This delimitation has been solved in other languages, for example, Spanish-speaking countries use two separate fields called “Derecho Informático” and “Informática Jurídica”.<sup>15</sup> The first term is used to define all of those subjects with emphasis on the Law, and the second one is those subjects where the emphasis is in information technology (such as Artificial Intelligence).

It is also important to note that this classification could also apply to what some prefer to call “Internet Law” or “Cyberlaw”. Perhaps another renaming is in order, with both the European Union and the United Nations pushing towards the use of the term “Information Society” to describe the internet, it is possible that the term “Information Society Law” is not far in the future.<sup>16</sup>

Nevertheless, a proper delimitation of the subject should be aware that the law does not always follow technological developments. In a damning attack against the field of Internet Law, Joseph Sommer argued that Cyberlaw was a misnomer, that there was no such thing and that there could never be such an area of the law. He stated that:

*“First, a technological label does not stick to most fields of law. Legal categories do not break naturally on technological fault lines. Although “cyberlaw” is a possible category, it is not a particularly appropriate one. Just as librarians do not classify books by their associated color, lawyers should not classify fields of law by their associated technologies.”<sup>17</sup>*

Wise words undoubtedly, which prompts us to double the call for a strict delimitation of subjects in order to survive as a separate legal field.

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<sup>13</sup> This new subject could be called Artificial Intelligence and the Law, which covers areas such as autonomous agents and some expert legal systems, and already has its own journals and conferences. See for example the journal *Artificial Intelligence and Law*, and the International Conference on Artificial Intelligence and Law (ICAAIL).

<sup>14</sup> Such as the storage and the automatic retrieval of sources of law, the automation in law offices and judicial administration and all the other use of the computers in law. See: Binazzi, Simona et al. "IT Law: an advanced documentation system in legal informatics", 1 *Journal of Information, Law & Technology* (1999). @: <[http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1999\\_1/idg/binazzi/](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1999_1/idg/binazzi/)>. See also: Bankowski, Zenon, White, Ian. and Hahn, Ulrike (eds) *Informatics and the foundations of legal reasoning*, Dordrecht: Kluwer Academic Publishers, 1995.

<sup>15</sup> For more on this subject, see: Galindo, Fernando *Derecho e Informática*, Madrid: Editorial Dykinson (1998).

<sup>16</sup> Or the present, the University of Alicante already offers a module called just that. See: <<http://www.uaipit.com/>>

<sup>17</sup> Sommer, Joseph H. “Against Cyberlaw”, 15(3) *Berkeley Technology Law Journal* (2000).

## 2.2 Glorifying the medium

In an editorial found in one of the first issues of the Computer Law and Security Report (CLSR) back in 1985, there is an initial statement that sets the tone for the debate about the role of IT Law in later years. The editor expressed:

*“Over the years there have been piecemeal pragmatic attempts to formulate a law of information, but the lawmakers have singularly failed to understand the significance of the commodity and its ‘value’ in the post-industrial society. They have not fully recognised that the fact that information has been snatched from the medium renders many of our laws unenforceable.”*<sup>18</sup>

This paragraph expresses one of the most widely held views shared by those who have pushed the development of Information Technology Law forward; this view is that the medium plays a vital role in shaping the law – from the legal practice to the regulation of technological advances. It is assumed that there is something clearly novel in the realm of computers, bits of information and electronic media that the law cannot precisely cope with. For those who propose that the technology changes everything,<sup>19</sup> new technologies require new methods of solving legal problems, new ways of thinking, a new type of legislation and a new theoretical framework to solve many of the “gaps” in legislation. While this may be accurate in many instances, it is important to listen to opposing views. For example, Professor Ray Goode, the prominent English Law expert, sounds a cautionary word about glorifying the medium and believing that it immediately changes everything. He says:

*“In debates concerning the legal implications of an electronic business environment there is an unfortunate tendency to over-emphasise the technology and to assume that it automatically changes everything so far as legal relationships are concerned. This is a myth that I am anxious to dispel. (...) [It] is necessary to ask why if the message is broadly the same, its legal significance should be affected by the medium through which it is sent (...) What then, is so special about the medium? Why should electronic transmissions necessitate different rules of law?”*<sup>20</sup>

Another cautionary word is given by Edwin Greenbaum<sup>21</sup> in his critique of Susskind’s *The Future of Law*. In this review, Greenbaum criticises the pessimistic brush with which Susskind paints the legal profession. He notes that there appears to be an assumption that

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<sup>18</sup> Saxby, Steven. “Editorial”, 1 (2) *CLSR* 1 (1985).

<sup>19</sup> An example of this is: Susskind, Richard, *The Future of Law*, Oxford: Oxford University Press (1996).

<sup>20</sup> Goode, Roy M. *Commercial law in the next millennium: The Hamlyn lectures*, London: Sweet & Maxwell (1998).

<sup>21</sup> Greenbaum, Edwin H. “Is the medium the message? A discussion of Susskind’s ‘The future of Law’”, 6(2) *International Journal of the Legal Profession* 197 (1999).

the law is slow to react, a profession that is “*static and predictable*”,<sup>22</sup> while he claims that the law is much more adaptable than that. This view of the law as a static profession tends to be repeated in a considerable number of papers from IT Lawyers, and it is one of the greatest sources of criticism from its opponents. Lemley for example argues that “*Whether or not the common law naturally tends towards efficiency over time, as some have suggested, it’s arguably doing a pretty good job of adapting existing law to the new and uncertain circumstances of the Net.*”<sup>23</sup>

This substantial contradiction about the very nature of IT law does not appear to be near a resolution. For those who live at the edge of technological advance, the speed of reaction from the legal profession is always too slow. For those who are not so enamoured with the technology, innovations may look like fads. Nevertheless, it is curious that critics of IT Law appear to concentrate their attacks against the field in what is nothing more than a straw man argument. It may be true that some IT Lawyers are too willing to point out the relative slowness with which the law has reacted to the appearance of some technologies, particularly the internet,<sup>24</sup> but this feature is not a characteristic of the field of IT Law. On the contrary, there are enough commentators who do not believe that the law should always react to new technologies, as it is much easier to get the trends wrong.<sup>25</sup>

There is then a substantial debate about the need to apply separate rules to new technologies, a debate made more relevant with the emergence and popularisation of the internet. It is precisely the astounding speed of the development of cyberspace what has prompted different authors to add a new dimension to the field of information technology and the law. Some argued that the internet was a medium so novel, so vast and so unique that it should be unregulated altogether, and that transactions conducted on the internet are very different to transactions conducted in real life.<sup>26</sup> The maximum expression of this sceptical view of the internet as an independent and unregulated body has its best proponent in John Perry Balow, one of the founders of the Electronic Frontiers Foundation (EFF). Talking about the interaction between government regulation and

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<sup>22</sup> Ibid, p.202.

<sup>23</sup> Lemley, Mark, “The Law and Economics of Internet Norms”, 73 *Chicago-Kent Law Review* 1257 (1998).

<sup>24</sup> See for example, Athanasekou, Eve. “Copyright in Cyberspace”, 13th *BILETA Conference*, Dublin (March 1998). @: <<http://www.bileta.ac.uk/98papers/athenas.html>>

<sup>25</sup> See for example, Guadamuz, Andres, “PayPal: the legal status of C2C payment systems”, 20(4) *Computer Law & Security Report* 294 (2004).

<sup>26</sup> See: Post, David. “Against “Against Cyberanarchy”, 17 *Berkeley Technology Law Journal* 1365 (2002). See also: Cameron, Euan. & Hegarty, Caitriona, “Never Mind the Quality, Feel the Width: a Sceptical View of Legal Interference with Cyberspace”, 10 *International Review of Law Computers and Technology* 79 (1996).

Cyberspace, he goes so far as to state that “*Your legal concepts of property, expression, identity, movement, and context do not apply to us. They are all based on matter, and there is no matter here.*”<sup>27</sup> Several commentators have been evidently sceptical about the view that the internet could remain unregulated and that the medium is so different that it requires a new set of rules. Boyle for example, is certain that cyberspace can be regulated by different means. In direct criticism to what he calls the “libertarian techno-optimists”, he states that “*the idea that the technological changes of the digital revolution are always outside the control of the state seems unproven. In fact, the state is working very hard to design its commands into the very technologies that, collectively are supposed to spell its demise.*”<sup>28</sup>

There are no clear answers to the deeper regulatory questions involved, and there is also little clue as to the main criticisms about the validity of the existence of IT Law as a separate field of law. One could perfectly assume a conciliatory approach. While it is clear that existing law can cope with some new technological developments, this is not always the case, and it is apparent that some innovations in the digital domain may take the law entirely by surprise.<sup>29</sup> This would then require the existence of a field of law that is better in tune with technological innovation, which would serve as enough justification for the existence of IT Law.

### **2.3 What has IT Law ever done for us?**

Talking against Cyberlaw as a separate field of law, Judge Easterbrook argued that law schools should only teach courses that “*could illuminate the entire law*”.<sup>30</sup> By uttering this criticism, it was clear that he did not consider that IT Law fulfilled this requirement. Therefore, in order to be considered seriously by the legal community, IT Law should demonstrate a unique and valuable contribution towards legal theory; otherwise it would simply become an area of specialist research directed towards legal practitioners dealing with the information society.

The emphasis of IT Law towards practice and black-letter description of the law is perhaps one of the most visible characteristics of the subject. It has already been remarked

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<sup>27</sup> Barlow, John P. *A Declaration of the Independence of Cyberspace*, (1996) @: <<http://www.eff.org/~barlow/Declaration-Final.html>>

<sup>28</sup> Boyle, James. "Foucault in Cyberspace: Surveillance, Sovereignty, and Hard-Wired Censors", 66 *University of Cincinnati Law Review* 177 (1997).

<sup>29</sup> For example, one must remember that Lord Hamilton famously ruled that the internet was a cable programme. See: *Shetland Times Ltd. v. Dr. Jonathan Wills and Another* (1996) S.C.L.R. 160.

<sup>30</sup> Easterbrook, “Cyberspace and the Law of the Horse”, op cit, p.207.

that the origins of IT Law can be found in empirical subjects geared towards the application of information technologies for legal education and practice, a trend that continues to this day.<sup>31</sup> In fact, an interesting research published in 1996<sup>32</sup> found that the increase in specialised legal practice in the field of Computer Law in England was the direct cause for the formation of this new field of study – a development that was initiated by the information technology industry’s interest in the subject, and not by any particular academic or theoretical recognition of the subject.

It would be easy to assume that the main use of IT Law is to provide a descriptive explanation of information technologies for practitioners that do not have the time, the technical inclination or the knowledge to explore the legal implications on their own. If we see IT Law in this light, then one could perfectly say that it is nothing more than a “Technology for Dummies” subject, doomed to explain digital signatures to lawyers who cannot understand anything about cryptography. It is then vital to strengthen the theory without forgetting that there will always be room for a pragmatic black-letter approach in order to assist the practitioner and educational sides.

So, what has IT Law done to provide original and unique theoretical approaches to the study of the law? Plenty.

One of the most important and cited works in IT Law in the UK is Richard Susskind’s *The Future of the Law* (and its revised version *Transforming the Law*).<sup>33</sup> Although the book can initially be viewed as a prediction of how information technology will shape the legal profession in the future,<sup>34</sup> the work offers a valuable theoretical study about the state of legal practice, and tries to explain which technological trends should be adopted to counter some of the most negative problems envisioned. Perhaps one of the most important points made by Susskind is the fact that he sees the legal profession as entirely reactive instead of proactive.<sup>35</sup> This point is vital for policy-making, and presents a real shift in the way in which the legal profession has been dealing with technological

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<sup>31</sup> For example, see: Leith, Philip and Hoey, Amanda L. *The Computerised Lawyer: A Guide to the Use of Computers in the Legal Profession*, London: Springer-Verlag (1997).

<sup>32</sup> Lewis, Philip, “Lawyers for High Technology Industries in an International and European Context: Report of Research Results”, 5(1) *Law Technology Journal* (1996). @: <<http://www.law.warwick.ac.uk/lj/5-1b.html>>

<sup>33</sup> Susskind, Richard. *The Future of Law*, Oxford: Oxford University Press (1996); and Susskind, R, *Transforming the Law*, Oxford: Oxford University Press (2003).

<sup>34</sup> An interesting criticism on this area is: Alldridge Peter. “Anoraks among the Suits and Jeans: Computers, Law and the Legal Academy”, 2 *Journal of Information, Law and Technology* (1997). @: <[http://elj.warwick.ac.uk/jilt/wip/97\\_2aldr/](http://elj.warwick.ac.uk/jilt/wip/97_2aldr/)>

<sup>35</sup> Susskind, *The Future of Law*, op cit, pp.23-27.

innovations for centuries. It has been common for law to react to new technologies and adapt existing regulation to accommodate the innovations within the existing legal framework.<sup>36</sup> According to Susskind, the solution to this problem is for the law to become proactive by using IT tools in order to provide updated legal solutions to an increasingly demanding public.<sup>37</sup> One could offer an initial criticism about proactively looking for solutions to problems that have not yet materialised, and it is that by being proactive you may get things completely wrong. The short history of IT Law is filled with these attempts at being proactive, efforts that got it completely and spectacularly wrong.<sup>38</sup>

Another paradigm in IT Law, and perhaps the single most important contribution to legal theory coming from this area, is Lessig's *Code*.<sup>39</sup> Lessig presents one of the most groundbreaking and original works about the interaction between the law and information technology, regardless whether one agrees with him or not.<sup>40</sup> Lessig states that the code making up digital spaces and domains (such as software and the internet) will eventually shape the way in which these digital domains will be regulated, because it acts as an unbreakable constitutional norm that shapes the application of the law. In short, the architectural layers that make up cyberspace, the "Code", dictates what is possible and not. This work has taken the IT Law field by storm and has shaped some of the most important theoretical debates in recent years. While many agree with Lessig's view of the code as the basic shaping legal architecture in cyberspace, others are not so convinced.<sup>41</sup> Nevertheless, with *Code*, IT Law has given legal theory a unique look at the law, albeit a technological deterministic one; a theory that can be applied to many other fields of law because it exposes that the law may be constrained by certain architectural technological features.

There are many other efforts to provide a solid theoretical work to IT Law from legal academics.<sup>42</sup> But perhaps one of the most interesting features of the field is that some of

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<sup>36</sup> An excellent example is copyright law, which has been constantly modified to accommodate new technologies, such as photographs, phonograms, motion pictures, computers and the internet.

<sup>37</sup> Susskind, *The Future of Law*, op cit, pp.207-219.

<sup>38</sup> For example, take a look at the second issue of the 1999 volume of the *Journal of Information Technology Law*, dedicated entirely to the Millennium Bug: <<http://elj.warwick.ac.uk/jilt/99-2/>>

<sup>39</sup> Lessig, Lawrence, *Code and Other Laws of Cyberspace*, New York: Basic Books (1999).

<sup>40</sup> And there are many out there who hate him with passion. A Google search of "Greg Aharonian" and "Lessig" should produce some interesting debates. See also: <<http://www.lewrockwell.com/orig/kinsella7.html>>

<sup>41</sup> For an interesting rebuttal of Lessig, see: Post, David. "What Larry Doesn't Get: Code, Law, and Liberty in Cyberspace", 52 *Stanford Law Review* 1439 (2000). @: <<http://www.temple.edu/lawschool/dpost/Code.html>>

<sup>42</sup> An excellent collection of several essays on the Jurisprudence of IT Law can be found in: Bellia, Patricia; Schiff Berman, Paul and Post, David (eds) *Cyberlaw: Problems of Policy and Jurisprudence in the Information Age*, St. Paul, MN: Thomson-West (2003).

the most cited, exciting and thought-provoking works in this area have been written by non-lawyers. In the area of software protection, two interesting works stand out: Eric Raymond's *The Cathedral and the Bazaar*,<sup>43</sup> and Richard Stallman's *Why Software should be free*.<sup>44</sup> These two writers have had tremendous influence in the field of software development (they are both self-proclaimed hackers), and they have spearheaded the Free and Open Source movements, which have tremendous legal implications, changing how we perceive some justifications for the existence of intellectual property. Then there is the aforementioned John Perry Barlow, former lyricist of Grateful Dead turned cyber-libertarian, with his influential essay *The Economy of Ideas*,<sup>45</sup> an excellent look at the economy of information on the internet, and its possible implications for intellectual property. Other works by journalists, such as Wendy Grossman's *Net.Wars*<sup>46</sup> and Michael Lewis' *The Future Just Happened*,<sup>47</sup> have offered a refreshing look at the internet and some of its wider social implications, including many legal and theoretical issues previously unexplored by legal experts.

Why should the field of IT Law be so different in this regard? Why should legal experts take notice of what non-specialists have to say? The answer may be that the technical nature of the field lends itself to analysis by those who understand the technology, and it may also be attributed to the fact that even now, large sectors of the legal profession tend to harbour some technophobic tendencies. Nevertheless, there are problems with relying too much in the technical side of the subject. These will be discussed in the next section.

### **3. Chronicle of a Death Foretold**

#### **3.1 The Rise of Techno-babble**

The field of information technology has become a highly specialised area of the law. This specialisation allows legal practitioners and academics to concentrate in some technical subjects that are constantly changing and evolving. One must only imagine the advances in information technology that we have witnessed in the last ten years to

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<sup>43</sup> Raymond, Eric. "The Cathedral and the Bazaar", 3(3) *First Monday* (1998). @: <[http://www.firstmonday.dk/issues/issue3\\_3/raymond/](http://www.firstmonday.dk/issues/issue3_3/raymond/)>

<sup>44</sup> Stallman, Richard. "Why Software should be free", *Computers, Ethics and Society Values*; Johnson, Deborah G. and Nissenbaum, Helen F. eds; Englewood Cliffs, NJ: Prentice-Hall (1995) pp.286-291.

<sup>45</sup> Barlow, John. P. "The Economy of Ideas: Selling Wine without Bottles on the Global Net", *Wired*, 2.03, (1994). @: <<http://www.wired.com/wired/archive/2.03/economy.ideas.html>>

<sup>46</sup> Grossman, Wendy, *Net.wars*, New York: New York University Press (1997).

<sup>47</sup> Lewis, Michael. *The Future Just Happened*, London: Hodder & Stoughton (2001).

understand just how rapid are the advances in the field. With such an evolving subject, specialisation must be welcomed. Or should it?

One of the problems of narrower specialisation in any field is that it is often possible that the literature dealing with the subject will become incomprehensible not only to the general public, but to others within the same broad area that are not specialists. This may eventually result in the creation of an area of research where a few specialists know the minutiae of the subject, but ideas become stale because of lack of interest from the wider community. This is the danger of continuing specialisation, first expressed by Spanish philosopher Ortega y Gasset when he described specialisation as a form of barbarism.<sup>48</sup> He warned that specialists were barbarians, with a narrow view of the world because of the very limited focus of their studies, becoming oblivious to anything else. Specialisation should then be welcomed with caution if it becomes incomprehensible to others, and IT Law is an area of study where specialisation is highly appreciated, mostly because there is a tendency by academics to dismiss the technological aspect of the subject as the realm of techno-geeks and anoraks.

When dealing with technical subjects, one should always be mindful of the possibility that the law will be lost in all of the technology. Journal articles in IT Law are becoming increasingly packed with incomprehensible sentences and crammed with acronyms that make any reading a tortured exercise, even for those familiar with many of the neologisms used.<sup>49</sup> More often than not, one is faced with sentences like this one:

*“Not only is ICANN making regulatory decisions for the whole DNS, but the structure of the contracts set up by the DoC make ICANN into the regulator of the registries and even the registrars. In particular, ICANN is now NSI's regulator; in particular amendment to the DoC-NSI agreement states that NSI recognises ICANN as NewCo.”<sup>50</sup>*

It is precisely the concern about the excessive use of technological jargon that has initiated the present article, as it is the author's opinion that this is what may be preventing those who are not proficient with the technology from participating in the field. After all, jargon and techno-babble tire those who are not familiar with it, as expressed by Jon Dovey *“Each onslaught of hyperactive technobabble becomes more*

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<sup>48</sup> Ortega y Gasset, Jorge. *La rebelión de las masas*, Madrid: Editorial Tecnos, (1930).

<sup>49</sup> Something to which the author is not immune. See: Guadamuz, Andres. “Trouble with Prime Numbers: DeCSS, DVD and the Protection of Proprietary Encryption Tools”, 3 *Journal of Information, Law and Technology* (2002) @: <<http://elj.warwick.ac.uk/jilt/02-3/guadamuz.html>>

<sup>50</sup> The author shall remain nameless, but I also submit, without comment: Gigante, Alexander. “Blackhole in Cyberspace: The Legal Void in the Internet”, 15 *John Marshall Journal of Computer & Information Law* 413 (1997).

*tedious than the last, until we become just plain bored.*”<sup>51</sup> IT Law then must avoid becoming an acronym minefield, hiding behind techno-babble, but devoid of theory.

Another concern for IT Law is the apparent lack of any sort of scepticism about technology – the subject is dominated by technophiles with little or no interest in looking at information technology with a critical eye. Most authors in IT Law tend to refer to the new technologies in increasingly superlative terms, particularly when talking about the internet. There appears to be no shortage of articles that start by saying “The internet has changed everything”, and it is common to read about the internet referred to with adjectives such as “monumental”, “spectacular”, and “amazing”; or in the words of Jessica Litman “*The Internet has been hailed as the most revolutionary social development since the printing press.*”<sup>52</sup> Brave words indeed, but perhaps a generous dose of cynicism is required when talking about technology. It could be true that we are in the midst of a monumental, spectacular and amazing revolution to society prompted by new technologies; but it is always good to remember that many of these superlative words have been used to describe other technological inventions, and that many of the heralded changes are really not that new. In the words of Christopher May, “*When we strip away the shiny new products and services which are available to us in ever increasing quantities, much about the world has not changed.*”<sup>53</sup>

Another worthwhile warning against the extreme technophile leanings in IT Law comes in the shape of the danger of the lack of perspective surrounding the discussion of new technologies. When legal writers browse through new technological development in the world of computers and the internet, it is easy to mistake a passing trend or a relatively unimportant technological advance and dress it up as “the next big thing” in IT Law, something that requires immediate response from academics and regulators. An excellent example of this is the recent implementation of the Electronic Money Institutions European Directive,<sup>54</sup> where the European Union decided to regulate the emerging field of electronic money, even though at the time of drafting and voting, there was not even one single electronic money scheme in operation. On the contrary, since its implementation it has become evident that electronic money as envisioned by

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<sup>51</sup> Dovey, Jon. (ed) *Fractal Dreams : New Media in Social Context*, London: Lawrence & Wishart (1996), p.11.

<sup>52</sup> Litman, Jessica. *Digital Copyright*, Amherst, New York: Prometheus Books (2001), p.12.

<sup>53</sup> May, Christopher. *The Information Society: A Sceptical View*, Cambridge: Polity Press (2002), p.2.

<sup>54</sup> Directive 2000/46/EC of the European Parliament and of the Council of 18 September 2000 on the taking up, pursuit of and prudential supervision of the business of electronic money institutions. O.J.E.C. L275/39, 27/10/2002.

the European Commission is not going anywhere in the near future – yet another example of regulators attempting to guess where the technology is going to go next.

As mentioned earlier, Computer Law has its share of failed predictions, but this is typical of any attempt to predict technological advances. We often read about failed predictions regarding the subject of computing and the internet – in 1943, the president of IBM famously said that the world only needed five computers; and Bill Gates said in 1981 that 640k memory should be enough for any computer.<sup>55</sup> IT Law commentators need to keep this in mind when presented with the temptation of making predictions about the legal implications of new advances, and perhaps appropriate caveats should be put in place.

#### **4.2. It is the end of IT Law as we know it, and I feel fine**

Despite all of the above warnings about the dangers of relying too much in acronyms, jargon and techno-babble, IT lawyers are presented with an interesting conundrum if they follow this advice and become less technically oriented. If IT Law abandons the technology and embraces only the legal aspects of the subject, what will be its use as a separate field of study? It could be possible that the widening of the field of study to include theorists and legal experts that do not understand the technology could have immense beneficial effects to the field. However, this inclusiveness would probably spell out the end of IT Law because experts and specialists would become irrelevant, and the subjects would simply be annexed to other existing areas of the law.

However, even the opposite scenario could spell out the end of IT Law. Some of the conflicts between the proponents of IT Law and its detractors appear to originate from the general unfamiliarity (and even downright loathing) of the legal profession with information technology, a fear that is fuelled by the reliance in jargon and techno-speak from those who understand the technology. This dichotomy has prompted Orin Kerr to propose that there are two perspectives when looking at the subject of Cyberlaw.<sup>56</sup> The first is an internal view of the law that is adopted by those commentators who understand the technology and believe that it presents a new virtual environment. The second view is an external perspective, adopted by those who see technology – in particular cyberspace – as just another tool, nothing more than a collection of wires and

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<sup>55</sup> Kirksey, Kirk. “The Future of Personal Computing: Who's Transforming Whom?” *Technology*, May 2003. @: <<http://thetechmag.com/index.php/news/main/917/event=view>>

<sup>56</sup> Kerr, Orrin. “The Problem of Perspective in Internet Law”, 91 *Georgetown Law Journal* 357 (2003).

cables.<sup>57</sup> Kerr concludes that these two perspectives of Cyberlaw will eventually become blurred, as more people understand the underlying technologies involved.<sup>58</sup> But when we apply this scenario to information technologies in general and not only to the narrow field of cyberspace, and if technologies become more widespread, one could argue that the need for IT Law may simply disappear, as there will be no more necessity to have specialists. This would have the same result as the first scenario because if all legal academics understand the technologies, then IT Law subjects would be assimilated by existing fields of law.

According to these two possible scenarios, the eventual assimilation of IT Law seems inevitable. Electronic contracts will be studied solely within Contract Law, online payment systems will be a subject covered by Commercial Law, domain name disputes will be studied in Intellectual Property, and hacking will be studied in Criminal Law. However, this is a rather pessimistic and reductionist view of the law, as one could apply the same reductionism to other fields of the law – for example, some aspects of Family Law are studied in Contract and Tort Law courses, yet Family Law still remains. It is perfectly feasible that some traditional IT Law subjects can be assimilated by other areas of the law without spelling the end of Computer Law. However, one must be aware that full assimilation of an IT Law subject can happen. This happens because the main reason for the existence of the specialised study of information technologies is the perceived uniqueness of the technology involved, which would mean that as the technological novelty expires, it will not be dealt with by IT Law commentators. For example, there seems to be a marked decrease in the number of computer crime papers in the major IT Law conferences and journals for the last four years.<sup>59</sup> This seems to indicate that there are some subjects that may be losing their status as pure IT Law subjects.

But perhaps the future does not lie with assimilation, but it may be that IT Law will simply suffer from further devolution and specialisation to tackle down the subjects in much more detail than the behemoth subject called Computer Law. Instead of Information Technology Law, we will have further specialist areas developing such as

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<sup>57</sup> Ibid, pp.359-360.

<sup>58</sup> Ibid, p.405.

<sup>59</sup> This has been done looking at the papers in the *Journal of Information, Law and Technology*; *International Journal of Law and Information Technology*; *Computer Law & Security Report*, *International Review of Law Computers and Technology*; and the *British and Irish Law and Education Technology Association*.

Internet Law, Privacy Law and E-Commerce Law, all of which are already recognised as proper sub-categories in their own right.<sup>60</sup>

Then again, the future may reside in the creation of a much wider field which studies the interaction between technology and the law, not only information technology. The use of the term Technology and the Law is a trend that is gaining momentum, with an increasing number of publications dedicated to the wider study of the legal implications of new technologies in the widest sense of the word.<sup>61</sup> This field would still cover computer related issues, but it would also deal with subjects like bioethics, genetics, pharmaceuticals and nanotechnology.

## 5. Conclusion

The main objective of this paper has been to resurrect the jurisprudential debate about IT Law in this side of the Atlantic, as many of the questions presented here have been healthily debated in the United States in the last few years with regards to what is known as Cyberlaw, as evidenced by some of the works cited here by Lessig, Boyle and Lemley. The debate has been centred on the viability of such a specialised field of legal research, which has prompted to a revision of the theoretical underpinnings of the field of IT Law and has prompted specialists to rise to the challenge and answer some of the difficult questions posed. Of particular interest for those interested in continuing the debate should be the problem of classification and delimitation of the subject of Computer Law. There appears to be considerable consensus about some of the core subjects that should be covered by IT Law. However, there must be a clear delimitation of subjects. IT Law should not cover every single interaction between the law and computers, as this will only detract from the subject.

The other objective has been to provide a word of advice to newcomers in the field about some of the most annoying trends one can encounter when dealing with information technology issues in the legal domain, which include the extreme reliance on techno-speak that detracts from some more detailed analysis of the legal issues at stake.

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<sup>60</sup> If one measures subjects by journals, there are the *Journal of Internet Law*, the *International Journal of Electronic Commerce Law & Practice*, and the *Privacy Journal*.

<sup>61</sup> This can be seen in publications such as *SCRIPT-ed* <<http://www.script-ed.org>>; The *Harvard Journal of Law and Technology* <<http://jolt.law.harvard.edu/>>; *IDEA* <<http://www.idea.piercelaw.edu/>>; and *Yale Journal of Law & Technology* <<http://research.yale.edu/lawmeme/yjolt/>>

The author feels that there should be a widening of the theoretical debate about the subject. IT Law must become a mature subject; it must leave behind the mere description of the latest EU directives and the superficial analysis of the possible implications of the latest Cyberlaw case coming from the United States. It is not the role of the author to set the agenda of this theoretical debate, but a look at some of the existing works that have been exploring some deeper theoretical issues may prove to be an example of where the subject may be heading. Lessig has provided a good starting point to the issue of regulation of cyberspace. Susskind has given IT lawyers an excellent starting point about the role of computers and the internet to the legal practitioners of the future. More should be written about the implications of technological change for policy makers, particularly about proactiveness of legislators when dealing with complex technical questions. There are some interesting implications about the role of information technology in the new economy, and therefore about the level of legal intervention in this field. Then there are many social implications already being explored in other subjects that cry out for the intervention of legal researchers. These include the role of virtual communities to the democratic rule, the subject of e-government, the preponderance of a global digital divide, just to name a few.

Playing the prediction game is difficult. The trends and speculation described in this article are only some initial musings about the possibilities presented to such a rich and interesting field of study. As we become more familiar with information technology and its role in society, the role for IT Law becomes clearer. There is still room to explore the legal implications of new technologies. There is still room to describe and explain new legislation and cases. But IT lawyers should also be at the forefront of the deeper policy and theoretical discussion about the implications of those new technologies.

It is quite possible that all of the speculation about the future survival of IT Law that has been offered here may prove futile, and the field of study will survive all of its critics and detractors and will continue to be one of the most interesting and vibrant areas of the law. As often happens with speculation, only the future will tell.