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Law in a Digital World

Ethan M. Katsh

New York: Oxford University Press, 1995, 294 pp.

Reviewed by David Muddle†

Law in a Digital World stands at the cross-roads of the history of technology, media studies, communications theory, and the law. As a lay person's guide to the impact of the new media on the law, it is an engaging read which invites consideration and debate. At times poetic and other times overwrought, *Law in a Digital World* weaves many disparate elements into a generally readable and highly interesting tale of what lurks in the not-so-distant future. While Ethan Katsh's work tends toward an overt techno-enthusiast's optimism for the brave new electronic world, a simple connection is made between law and communication technologies: if the law has been shaped by the print culture, embodied in modes of legal writing, researching, storing, and representation, then how likely is it that the new media (which operates on completely different norms) will *displace* more traditional methods and institutions of the law?

There are several key themes to Katsh's work but his principal thesis is: change is linked to our use of new information technologies. These new information technologies are particularly relevant to law because law is oriented around information and communication. Whatever definition one gives to the law—whether it is considered a profession, or a method of resolving disputes, or a process to bring about justice, or a facade to protect the status quo, or a means to secure rights and regulate behaviour—it is always concerned with information.¹

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¹ E. M. Katsh, *Law in a Digital World* (New York: Oxford University Press, 1995) at 6-7.

One might easily argue that any group that wields some modicum of power in civil society is always concerned with information. But Katsh is convinced that the law (its institutions, central doctrines, and language) has been shaped by the prevalent communication medium it utilizes. Whether this is truer of law than other institutions is beside the point; the strength of this book lies in its analysis of the broader implications of digital technology on civil life. These broader implications are evident in the overarching theme of the book—that digital technology fundamentally changes, indeed transforms, spatial and temporal conceptions.

Seemingly obvious on the surface, Katsh takes this starting point and argues convincingly that nothing less than a revolution is taking place in the way we perceive and process our external environment. Physical, or geographic space has largely been conquered by the convergence of telephone, fibre optics, digital switching, the computer and so forth. It is not the collapse of distance as a hindrance to communication that Katsh is particularly interested in; what he focuses on is *how* information is being communicated.

The demise of physical distance in communication does not just make a lawyer's job more efficient. Digital communication also changes the informational space within which lawyers work and interact. Katsh argues real change will occur in the places (best understood as a relationship) between the user and the sources of law, colleagues and the edifices of law.

Katsh gives several examples. Consider a law library; normally it is a specific place judged by its *number* of holdings, symbolized by the book, a place of individual interaction with primarily textual sources, a place of quiet thought, scholarship, and reflection. Now consider the emerging on-line informational spaces. Databases like WESTLAW allow quick and up-to-date searches on the latest legal developments. Networks around the world connect people debating and discussing issues of direct relevance to the law. These people, many of them non-lawyers, have now found access to a wealth of information.

Katsh also mentions the elite on-line chat/research/professional development group for lawyers called Lexis Counsel Connect. Such places are dynamic and fluid, with information constantly flowing,

transforming and being copied. This cybernetic space is more interactive and dynamic than the permanence and individuality of the law library. Data is not static and permanent like a legal text. He argues that as more and more people interact in cyberspace, a true transformation will take place.

Katsh argues that these changes, and many others, will break down the old boundaries in the law. Relationships will change between the public, the legal profession, and the courts as more information becomes readily available. The legal profession will see its own boundaries change as the old borders that demarcated it—legal education, intermediaries to the courts, and independence from government influence—slowly transmogrify because of new communications mediums. As well, Katsh expects a substantial change in the law itself. Copyright law currently uses print culture terminology in an era where computer networks *communicate* by copying information. Privacy is another area of law where many already suspect that communication technologies will bring a raft of new questions and problems.

Katsh, less conventionally, explores the possibility of the new media transforming contract law. He sees it happening already with the emergence of do-it-yourself software that permits tax preparation, will and estate planning and so forth. Lawyers already have sophisticated programs available to prepare documents that use an array of previously created contractual arrangements. Katsh believes that new forms of contracts will lead to changing expectations as contracts will not be static and fixed at one point in time like paper documents. He believes emerging digital contracts will provide for effective monitoring and fluidity of contractual obligations.

Katsh never suggests that the print medium is going extinct or that law offices will become paperless. Rather, he continuously asserts that the new media will *displace* rather than *replace* the printed word. Consider the following example: when the television was invented, many predicted that it spelled the end for radio; after all, why listen to a radio when you could have sight *and* sound? But television did not relegate the radio to the dustbin of history. Rather, it displaced the radio from the centre of every sitting room.

Another point Katsh emphasizes throughout the book is that the increasing digitization of information will make a great deal of

information more readily available. However, unlike the print culture, the goal in the digital era should not be to *possess* as much as one can, but rather to have *access* to information. In an interesting passage, Katsh notes:

The rule-oriented adversary model of conflict resolution tends to enhance and encourage a treasure-hunting mode in which the treasure, whether money or some other tangible object, is necessarily diminished as it passes through the lawyer's hands.

The digital lawyer may continue to be a seeker of treasures, but treasures in the future will increasingly be in the form of information and knowledge, in relationships for sharing and exploiting information, in opportunities to gain access to and use information that are part of the conflict or that come out of the resolution of the conflict.²

Value added information becomes the top commodity in an information-rich environment. As Paul Saffo, a noted writer on technological issues, says:

It is not the content but context that will matter most a decade or so from now. The scarce resource will not be stuff, but point of view. . . . The future belongs to neither the conduit or content players, but those who control the filtering, searching, and sense-making tools we will rely on to navigate through cyberspace.³

The key for the coming "digital lawyer" is to understand digital communication and to effectively use the increased access to information.

Law in a Digital World is provocative because it challenges those studying or practicing law to take a long, hard look at what is occurring around us. That is the single greatest achievement of Katsh's work. While one might choose to debate him over the effects of digital communication, he nonetheless turns the reader's thoughts from the *possibility* of such things and the changing

² *Supra* note 1 at 188.

³ P. Saffo, "It's the Context Stupid" *Wired* (March 1994) at 74-5.

dynamic of offer and acceptance in digital communication, to what it means to “seal-the-deal” when there are no signatures or witnesses. Though the book sometimes seems to lose its focus and can be redundant, Katsh’s logic and arguments are lucid, carefully researched and generally well written.

Where *Law in a Digital World* shows weakness is in its methodological choice. Katsh principal method of assessing the impact of the new media on the law is to compare and contrast current observations with events that occurred during the age of the printing press. The press and computer are juxtaposed, the book and electronic file contrasted and the printed word and emerging forms of multimedia compared. It appears to be a sound methodology; the problem arises that this can only work at a certain level without a more in-depth study of cognition, perception and reasoning. It is one thing to say that the book is fixed, permanent and static, while electronic information is fluid, malleable and dynamic. The book holds finite information; theoretically networks can hold infinite amounts of information. It would be counter-intuitive to assume that this would not lead to changes in the way we access and deal with information. But Katsh never goes beyond that point; he simply states that the new technology will be revolutionary and that technology might change certain things. Greg Ip, on the other hand, argues that nothing revolutionary has happened yet:

[W]hile virtual offices, video-conferencing, or on-line access to corporate filings in Washington may be more glamorous, they only enable business to do more efficiently what they’ve done before. Truly revolutionary technology offers people products and ways of organizing their lives that are not possible without it.⁴

Katsh is clearly a techno-enthusiast who believes digital communication can have a positive impact on civilization. He believes our march towards full-fledged digital communication is inevitable and well under way. However, to create information networks that most effectively meet our needs, he argues we must

⁴ G. Ip, “Revolution Number 5: The Information Highway” (September 1994) *Policy Options* at 7.

first recognize the power and capacity of digital communications. He suggests we can, and should, shape the development of networks along lines that make sense to us and, over time, laws will be adopted to reflect new digital realities.

A difficulty with the book is Katsh's failure to account for not only the knowledge gap between our expertise and grasp of digital communication, but also the gap between what is available and what is yet to come. As Ip points out, so far these tools are rudimentary and considered to be just that—tools. Communications technology is useful for making certain functions easier, such as research or writing a brief. But the brave new world Katsh envisions is simply not the current reality. Hence, the connection he draws between the new media and the sweeping changes he foresees in legal institutions, relationships and practice is weakened.

More interesting is Katsh's examination of changes in the language of communication. Oral culture was based on a story telling tradition to transmit information; print culture uses linear, textual sources to fill the same function. Multimedia communication represents a new frontier in how we transmit information, according to Katsh. As evidence he cites such examples as hypermedia, which is non-linear and web-like in its operation, or the increasing use of video and sound functions in computer presentations. Katsh urges the legal profession to become fluent in these emerging communications devices. Whether these are transformative developments in communication is open to debate. In the court room, for example, the tools for making the presentation may change, but rhetoric and the ability to make persuasive arguments does not.

Finally, Katsh does not seem to seriously consider ethical questions. The fact there is little control over the exploding availability of information presents huge conundrums, especially within the legal sphere. For instance, the independence of the legal profession has long been a major pillar of the law. With the wide spread introduction of digital technology non-lawyers (i.e. banks, insurance companies, etc.) and the wider public can by-pass legal professionals who have traditionally been the gateway to the courts. This raises ethical questions for the lawyer: is a legal education necessary? Should non-lawyers have more authority?

Overall, *Law in a Digital World*, is a satisfying book. It raises many questions and provides some insightful answers. Katsh attempts, and succeeds, in writing a book for the person not familiar with the norms of the legal profession. There is no doubt this book will spark debate, particularly over the perceived importance, or lack thereof, of new communications technology to the law. While there are certain areas of the book that are of concern it is still a valuable and enjoyable read, especially for those wishing to orient themselves to emerging technology issues.