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Book review: *Collisions in the Digital Paradigm*

David Harvey

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*Reviewed by Laurence Diver**



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David Harvey¹ is both a practising and an academic lawyer. Prior to becoming director of the Centre for ICT Law at the University of Auckland, he was for several decades a litigator and a District Court Judge in New Zealand. Harvey's experience of legal, and especially courtroom, practice, is evident throughout *Collisions in the Digital Paradigm*, a book with a textbook-like quality and flowing prose that is lucid and concise. *Collisions* includes a wealth of caselaw at numerous levels of seniority and from numerous jurisdictions, including Harvey's own New Zealand, the United States, the United Kingdom, and the European Union. Not just a practitioner but also clearly an enthusiastic student of the field, Harvey cites plenty of relevant academic and grey literature to flesh out the debates that have characterised this field of research for the past several decades. He covers numerous historical, contemporary, and interdisciplinary discussions, moving between the philosophical and the practical with ease, but without ever losing the practical edge necessary to inform real-world legal practice. *Collisions* will thus be a valuable resource for both the practitioner and the student of technology law.

It is clear that despite Harvey's career in practice he is no Luddite and does not suffer from the aversion to change associated with the profession. Indeed, a constant thread of warning runs throughout the book: legal practitioners at all levels must come properly to understand the technologies they are dealing with, and must avoid the temptation to lapse into the language of analogy and "functional equivalence" as a means of preserving the relevance of outmoded theories and practices. Indeed, echoing the spirit of the book's title, perhaps 'warning' is an appropriate summary of the book's message – rather than providing manifold speculative solutions to the challenges facing the legal

¹ Not to be confused with the City University of New York (CUNY)-based anthropologist and geographer of the same name.

profession in its approach and adaptation to technological change, *Collisions* aims to prepare the profession for what is and might be to come. As the conclusion notes,

[t]his book has been about problems – problems that occur when rules and legal doctrine that were developed and have their foundation in one communications paradigm encounter a new one. (p. 347)

After the introductory chapter, Chapter 2 ('The Analytical Framework') sets out a taxonomy of 13 'digital qualities' which are the sites of the collisions referred to in the book's title. Harvey's methodology is derived from the historical narrative of the printing press developed by Elizabeth Eisenstein in her *The Printing Press as an Agent of Change* (as well as his own *The Law Emprynted and Englysshed: The Printing Press as an Agent of Change in Law and Legal Culture 1475-1642* (Oxford: Hart, 2015)), which charts seven qualities of print which have impacted the development of human society.²

Several times throughout the work Harvey references Marshall McLuhan's famous aphorism "the medium is the message", his argument being that the fundamental changes heralded by the digital paradigm are changing not only the substance of the 'message', but also how it is interpreted and reasoned with: "I suggest that the agency [of digital systems] is perhaps more powerful than that of the printing press, simply because the qualities that underlie digital

² Cambridge: Cambridge University Press, 1979. Harvey is not the first technology law scholar to have drawn an analogy with Eisenstein's work; in *Smart Technologies and the End(s) of Law* (Cheltenham: Edward Elgar, 2015), Mireille Hildebrandt also adapts Eisenstein's methodology to identify the historically-significant affordances of information and communication technologies. For a review of Hildebrandt's book, see Matthew Jewell, "Book Review: Smart Technologies and the End(s) of Law" (2016) 13:2 *SCRIPTed* 215, available at <https://script-ed.org/?p=3143>.

systems and that acts (sic) as enablers of behaviour are more powerful than those of print.” (p. 373).

Curiously, although the taxonomy Harvey develops represents a useful classification of the unique characteristics of the digital paradigm, it is not until the book’s conclusion that he draws an explicit connection between it and the themes developed in the intervening chapters. To that extent, the reader might be left wondering, at least until the latter stages of the book, how the framework is to be applied.

Nevertheless, despite this slight structural quirk, the taxonomy provides a lucid and analytically helpful addition to the literature that will aid the reader in comprehending the implications of the digital paradigm. Harvey’s digital qualities are grouped into three classes – environmental, technical, and user-associated. The environmental qualities are societal and economic (the state of ongoing disruption and “permissionless innovation”). The technical qualities are about the nature and capacities of digital systems themselves (the “delinearisation” of information, informational persistence, mutability of information, volume and storage capacity, exponential dissemination, “non-coherence” of digital information, and format obsolescence). The user-associated qualities are availability, searchability, and retrievability of information (the ‘always-on’ nature of the Internet, and its inherent indexability), and participation and interactivity.

Having identified these points of potential ‘collision’, in Chapter 3 (‘The Transition to the Digital Paradigm – Analogies and Functional Equivalence’) Harvey further develops the historical aspect of his framework, before discussing the legal profession’s tendency to use analogy and ‘functional equivalence’ as a means of avoiding what he sees as the “paradigmatically different” characteristics of contemporary (and future) communications technologies. Citing caselaw from a range of jurisdictions and fields, including intermediary

and contributory liability, fraud, evidence, and defamation, Harvey argues that the courts have been too restrained in their engagement with the *sui generis* aspects of the technologies they are presented with, retreating instead to the relative safety of analogy and functional equivalence with perhaps too much ease (or, at least, with insufficient regard for the potentially negative implications of such forms of analysis).

Chapter 4 ('Aspects of Internet Governance') reiterates Harvey's central argument that governance of the digital paradigm requires "an understanding of the nature of the technology and the practicality of regulating a distributed communications network" (p. 86). As with several of the book's other chapters, he opens with a historical perspective, discussing first political initiatives such as the Internet Governance Forum and then technical initiatives such as the Internet Engineering Task Force (IETF), the Internet Architecture Board, and the Internet Corporation for Assigned Names and Numbers (ICANN). Harvey's fondness for taxonomy is again in evidence when he sets out a classification of five models of Internet governance: cyber-libertarianism, transnational NGO governance (his preferred model), code/architecture/layer theory, national government (what he terms 'digital realism'), and market regulation. In each he signposts the leading scholars and publications without overwhelming the reader with the minutiae of those (not insubstantial) debates.

Chapter 5 ('The Property Problem') takes a legal theoretical turn, focusing on the 'collision' between data as digital artefact and orthodox concepts of tangible property centring around exclusive possession. Although Harvey's analysis majors on the New Zealand Supreme Court case of *Dixon v R*³ and its forebears, the debate is of course a fundamental one, and his detailed treatment

³ [2015] NZSC 147.

covers (in)tangibility, information-as-property vis-à-vis theft, ownership of media as opposed to content, and the increasingly important topic of 'cyberproperty', including virtual assets and post-mortem ownership and succession.

In Chapter 6 ('Recorded Law – The Twilight of Precedent in the Digital Age') Harvey returns strongly to the theme of the digital-as-medium, tracing the development of the doctrine of *stare decisis* and its reliance on written text, and ultimately the introduction of formalised law reports. He argues that whereas the practice of law has over the past five centuries become settled around the printed word, we are now entering a new phase in which digital technologies will have an impact on the development of law that is as fundamental as that occasioned by the printing press. Again, Harvey's progressivism is evident:

The law traditionally looks back to precedent but the digital environment means that the depth of field is shorter, focused upon what is closer while infinity becomes a blur (p. 166)

For him, the legal embrace of technology is not only a normative ideal; the combination of changes in access to justice and increasingly restricted public funding mean that it may become necessary as more litigants are forced to represent themselves.

From the philosophical projections presented in Chapter 6, Harvey shifts the focus in Chapters 7 ('Digital Information – The Nature of the Document and E-Discovery') and 8 ('Evidence, Trials, Courts and Technology') away from the digital paradigm as the subject of legal conflict to it being the facilitator of legal practice. He discusses the rules in various jurisdictions around e-discovery, noting how courts are slowly beginning to acknowledge and mandate more sophisticated forms of document discovery, particularly in complex litigation involving vast bodies of documents. The discussion covers keyword search

methodologies and the rules and caselaw in several jurisdictions around the various technology assisted review approaches, and will bring the practitioner up to date in both the state of the art in e-discovery and its adoption around the world. In light of both the abundance of potentially-relevant information available online, and increasingly constrained resources to invest in traditional manual discovery, Harvey argues that the legal profession as at a crossroads with respect to its receptivity to technical tools (p. 208). Indeed, nowhere is this more true than in the “high theatre” of the law, the courtroom, where what he calls the fallacies of orality and physical presence militate against the introduction of technologies that could increase efficiency whilst reducing cost and human error. As ‘digital natives’ increasingly make up the population at large, and thus too the composition of juries and the legal profession itself, the non-receptiveness of trial practitioners to technologies that are normalised in everyday life will begin to stretch credibility. Harvey sketches some possible developments, from the fairly mundane (video conferencing) to the comparatively exotic (3D rendering and even printing of crime scenes), before moving onto the question of online dispute resolution as a prototype for a more comprehensively technologized reimagining of the litigation process. This chapter will challenge the criminal defence lawyer, who Harvey describes as “that most conservative of the lawyer classes” (p. 210), but this is perhaps to be welcomed.

Chapter 9 (‘Social Media’) continues the theme of litigation, although the perspective returns to the external critique of technology adopted in the earlier chapters. Here Harvey discusses the problem of “the Googling Juror”, and of social media as a platform for the occasionally intemperate exchange which can have arguably disproportionate effects (Harvey outlines the “Twitter joke” case, *Chambers v DPP* [2012] EWHC 2157 (QB) as an example).

Chapter 10 turns towards the privacy debate and the so-called ‘right to be forgotten’. Harvey surveys the main theories and scholars of privacy before

discussion the nature of privacy in the social media age, including some astute observations on how privacy norms have shifted between generations according to the backdrops against which they originally developed (state totalitarianism versus maximal individualism). His discussion of the 'right to be forgotten' is influenced by the work of Viktor Mayer-Schönberger and covers in detail the *Google Spain* decision (CJEU Case C-131/12 (2014)) and the debate it has generated. Harvey expresses scepticism about the 'right', and its purported enshrinement in Article 17 of the forthcoming General Data Protection Regulation, suggesting that:

As a lawyer/technologist, I see *Google Spain* as a clog on progress that may slow the development and promise of information systems that depend upon a reliable search facility to locate information... the propositions that underlie *Google Spain* and the application of law in this area amounts (sic) to a real and significant collision in the Digital Paradigm. (p. 308)

As mentioned above, the book's conclusion rekindles the connection to the taxonomy of digital qualities developed in Chapter 2, giving *Collisions* a pleasing roundedness and operating as a useful summary of each of the themes developed earlier in the text. For this reason, the conclusion operates to an extent as an introduction; for the practitioner or student who is unfamiliar with the field it offers an excellent precis of each of the topics dealt with in greater detail in the earlier chapters, and in some ways it is a sensible place to continue reading after the second chapter, in order to identify those topics that are of greatest interest. At any rate, Harvey's appreciation for the balance between breadth and depth marks out *Collisions* as an excellent resource for students and practitioners seeking to gain an understanding of the main points of contention around technology, both as a discrete field of law and as a disruptor of litigation practice.