Internet Cultures – Not an Oxymoron

Kathy Bowrey, *Law and Internet Cultures* (2005)

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'Heady', 'fast and furious',[1] 'magical, exhilarating and frightening'.[2] Such are the descriptions of current times for those engaged in the study of law and the Internet. And they are not inapt: in the last several years, commentators have struggled to keep up with the flood of developments. We have seen the re-writing of Australian digital copyright law in response to the Free Trade Agreement with the United States[3] and lawsuits over the liability of P2P software providers for infringing uses of their software.[4] No less than two reviews of Australian privacy legislation have been conducted, both of which recommended some updating and reconsideration.[5] Debates continue over the role of Internet Service Providers in surveillance and law enforcement. The future of Internet 'governance' is in dispute within the auspices of the World Summit on the Information Society.[6] We have witnessed the rise and rise of open source software, and its sister phenomenon of Creative Commons or 'alternative' licensing.[7] And most recently, copyright law has been challenged through the launch of several efforts to make the Internet a source of deeper, and richer, information, through the digitisation of the world's literary heritage.[8]

In such an atmosphere, and in an area of scholarship often influenced by US academic entrepreneurs, there is a strong temptation to engage in rhetoric and

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1 Justin Hughes, 'Of World Music and Sovereign States, Professors and the Formation of Legal Norms' (2003) 335 *Loy U Chi L J* 155 at 155.

2 Lawrence Solum, 'The Future of Copyright' (2005) 83 *Tex L Rev* 1137 at 1138.

3 Australia-US Free Trade Agreement (Washington, 18 May 2004) [2005] ATS 1, implemented via the *US Free Trade Agreement Implementation Act* 2004 (Cth) and the later *Copyright Legislation Amendment Act* 2004 (Cth). On this treaty, see Chris Arup, 'The United States-Australia Free Trade Agreement: The Intellectual Property Chapter' (2004) 15 *AIPJ* 205.

4 In the US, this litigation has gone all the way to the Supreme Court: *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd* 125 Sct 2764 (2005). In Australia, 2005 has seen a decision in litigation against the companies behind KaZaA: *Universal Music Australia Pty Ltd v Sharman License Holdings* (2005) 65 IPR 289. There has also been litigation in the Netherlands.

5 Senate Legal and Constitutional Committee, *The Real Big Brother: Inquiry into the Privacy Act* 1988 (June 2005) at <http://www.aph.gov.au/senate/committee/legcon_ctte/privacy/report/> (1 Nov 2005); Privacy Commissioner, *Getting In On the Act: The Review of the Private Sector Provisions of the Privacy Act 1988* (May 2005).

6 'Breaking America's Grip on the Net' *Guardian* (6 Oct 2005) at <http://technology.guardian.co.uk/weekly/story/0,16376,1585288,00.html> (1 Nov 2005).

7 For a general description, see Andres Guadamuz, Jordan Hatcher & Charlotte Waelde, *The Common Information Environment and Creative Commons*, 10 October 2005 at <http://www.common-info.org.uk/docs/CC-Report.pdf> (1 Nov 2005).

'idea-slinging'.[9] At times, it seems that the scholarly tradition of reflective scholarship may be sidelined in the rush to be the first to comment, or the first with the new big idea.[10] This tendency is sometimes exacerbated by the pressure to be part of the active policy debate – to comment *now*, to make a difference *now,* as the technological and political decisions are being made. As Hughes has put it:

> [T]here is a sense with the Internet that our decisions are fraught with unforeseen consequences and path dependency – that we are making choices now that we are unlikely to turn back no matter how suboptimal the situations become.[11]

In this scholarly context, *Law and Internet Cultures,* by Associate Professor Kathy Bowrey from the University of New South Wales Law Faculty, is a very different piece of work – and the more valuable for being so. Where other commentators proudly proclaim that they 'don't want to plunge you into a complex argument, buttressed with references to obscure French theorists – however natural that is for the weird sort we academics have become',[12] Bowrey is unashamedly – refreshingly – scholarly and theoretical. The tone of the book is deeply imbued with a sense of cultural theory, Foucaultian ideas,[13] and many other perspectives. As a result, this book steps beyond the constantly self-referential, faddish, even giddy world of Internet Law Scholarship. It brings to the debate something of the academic tradition of inquiry and reflection, and highlights the relevance of insights from other disciplines.[14]

I expected no less. Kathy Bowrey has long brought to the intellectual debate about law an awareness of the importance of considering a range of perspectives. Her writing on copyright, in particular, has illuminated its historical, political and cultural aspects.[15] She has demanded our recognition that copyright is about more

8 Two rival consortia are, at the time of writing, seeking to digitize the world's books: Google Print and the Google Print Library Project, an initiative launched in December 2004 (see a description at <http://print.google.com/googleprint/library.html>) and the Open Content Alliance, an initiative of Yahoo! and a group of Universities, archives and technology providers (see their website at <http://www.opencontentalliance.org/>).

9 Solum, above n2 at 1138.

10 A number of people have commented on this, including Hughes, above n1, and Kathy Bowrey herself: 'Can we afford to think about copyright in a global marketplace?', working paper available at <http://www.copyright.bbk.ac.uk/contents/publications/workingpapers.shtml>, to be published in Fiona Macmillan (ed), *New Directions in Copyright Law, Volume 2* (Edward Elgar Press, forthcoming). An anecdote illustrates: two days after the decision in *Universal Music Australia Pty Ltd v Cooper* (2005) 65 IPR 409 was handed down (on copyright infringement and linking), a colleague rang a number of IP/IT journals to see if they were interested in a case note. Most already had one planned.

11 Hughes, above n1 at 155.

12 Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (2004) at 13.

13 For example, Kathy Bowrey, *Law and Internet Cultures* (2005) at 16 (citing Foucault).

14 Usefully, too, the 'other disciplines' go beyond the economic, which has been the strongest interdisciplinary influence on US literature in this area: see, for example, the work of Professors Robert Merges and Mark Lemley. Other disciplines have, to date, made less impact.

than the simplistic, utilitarian, cost-benefit model that appears to be a standard description in government reports. Bowrey, among others in the Australian academic field,[16] has pointed to the intellectual impoverishment that such a view of copyright represents.

In *Law and Internet Cultures* she has applied this valuable approach to the whole field of Internet Law Scholarship. If there is a criticism of the way that Bowrey handles the theoretical framework in this particular book, it is that it is, perhaps, a little teasing. There is something of the dance of the seven veils about the way that Bowrey references, and reveals snippets—yet not quite enough—of her theoretical framework, potentially leaving the reader somewhat unsatisfied, and even frustrated. Nevertheless, frustration can have good effects - perhaps it will lead lawyers to explore the less-often-read territory of critical and cultural theory.

But *Law and Internet Cultures* does more than simply highlight the relevance of other disciplines, although such a contribution would be valuable in itself. It also offers a more nuanced view of what this thing called 'Internet Law' is, and introduces the concept of Internet Cultures. These concepts, defined in her first two chapters, are worthy of exploration.

1. Beyond the Dichotomy – Bowrey's Internet Law

Ever since the earliest writings in Internet Law Scholarship, commentators have tended towards one of two opposing views. One the one hand, we have what you might call the Orwellian vision: that formal Law, in partnership with Technology will tend towards the 'perfect control' of the citizenry, whether by public or private entities. 'Code is Law', Lawrence Lessig proposed back in 1999: technology (or the 'Code' of the Internet) regulates, and law can *use* technology to regulate.[17] This basic 'Code is Law' idea has been discussed, refined, developed and

15 See, for example, Kathy Bowrey, 'Who's Writing Copyright's History' [1996] *18(6) EIPR* 322 (exploring different accounts of the history of copyright from a range of theoretical perspectives); Kathy Bowrey, 'The Outer Limits of Copyright Law – Where Law Meets Philosophy and Culture' (2001) 12 *Law and Critique* 75; Kathy Bowrey & Matthew Rimmer, 'Rip, Mix, Burn: The Politics of Peer to Peer and Copyright Law' (2002) 7(8) *First Monday*, at <http://www.firstmonday.org/issues/issue7_8/bowrey/index.html> (2 Nov 2005).

16 Other commentators include Professor Brad Sherman, see for example, with Alain Strowel (eds), *Of Authors and Origins: Essays on Copyright Law* (1994), and Brad Sherman & Lionel Bentley, *The Making of Modern Intellectual Property Law: The British Experience, 1760–1911.* Another commentator who has highlighted other perspectives is for example, Patricia Loughlan, 'Copyright Law, Free Speech and Self-Fulfillment' (2002) 24 *Syd L Rev* 427.

17 Lawrence Lessig, *Code and Other Laws of Cyberspace* (1999). Of course, Lessig was not *advocating* this form of regulation as such: on the contrary, in *Code* he takes care to criticise 'indirect' regulation. Rather, he argued, we must be aware of the potential, and ensure that democratic and constitutional values are brought to bear on the development of the regulatory architecture that is Internet technology. Similar ideas are found in Joel Reidenberg's writings, although he refers to it as 'Lex Informatica': Joel Reidenberg, 'Lex Informatica: The Formulation of Information Policy Rules Through Technology' (1998) 76 *Tex L Rev* 553. See also David Lindsay, 'What is Cyberlaw?' (2003) 53 *Telecommunications Journal of Australia* at 45.

critiqued, but it remains influential in current debates. In copyright law, for example, the fear of 'digital lock-up' through a combination of technology and law continues to surface in current discussion of anti-circumvention law.[18] It can also be seen in debates about privacy law, reflected in fears regarding the digital potential for omnipresent surveillance and data collection, facilitated by privacy laws that are insufficiently protective of individual rights.

At the other extreme (and of course, my description goes to extremes, though commentators range along a spectrum), is the theme of relative technological powerlessness or futility, which can be traced to two sources. The first is captured in the famous John Gilmore quote:

> The Internet interprets censorship as damage and routes around it.[19]

Insert any other form of legal regulation for censorship here and you have roughly the idea: technological innovation is such that any attempt to regulate it, or regulate behaviour through it, can be 'hacked' or avoided. A very similar idea repeatedly reared its head when courts recently held that Peer-to-Peer software providers could be liable for their users' copyright infringement.[20] As soon as the court decisions were handed down, commentators were pointing out that most users had moved their file-sharing activities to newer forms of the software.

Another kind of powerlessness pervades debates particularly outside the United States. Hughes may be correct in his argument that choices are being made now that will affect technological development and our 'technological freedoms' for years to come.[21] However, local Australian commentary often highlights those decisions are being made not by our government, or even Australian private entities, but *elsewhere*: in other, more powerful countries, particularly the United States,[22] and in technical standard-setting forums where civil society groups are not present.[23]

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18 See generally the review by the House of Representatives Legal and Constitutional Affairs Committee, *Inquiry into Technological Protection Measures Exceptions*, announced 25 August 2005. For a general description of the issues, see Ian Kerr, Alana Marushat & Christian Tacit, 'Technical Protection Measures: Tilting at Copyright's Windmill' (2002–2003) 34 *Ottawa L Rev* at 6.

19 Quote from speech by John Gilmore, 'Electronic Frontiers Foundation' at the Second Conference on Computers, Privacy, and Freedom, as quoted in James Boyle, 'Foucault in Cyberspace: Surveillance, Sovereignty and Hard-wired Censors' (1997) 66 *U Cin L Rev* 177, 178 (noting there are many versions of the quote, but this is broadly consistent with the original).

20 See judgments cited above n.

21 Quote above n11 and accompanying text.

22 A sense exacerbated, of course, in Australia by the Free Trade Agreement, in which the IP chapter is modelled on US law: above n3.

23 For example, we have seen recent controversy over the 'Digital Video Broadcasting Project', described by the Electronic Frontiers Foundation as 'a little-noticed standards body … crafting a new regime of restrictions that will shape the future of television': Electronic Frontiers Foundation, 'Europe's Broadcast Flag: The Digital Video Broadcasting' Project Content Protection and Copy Management: A Stealth Attack on Consumer Rights and Competition', 29 September 2005.

As a teacher of Internet Law, I often see debates in class divide between those who fear too much control, and those who are confident that law is futile here. The dichotomy makes for an easy debate, but one that is ultimately cynical and unsatisfying. Not only does the discussion degenerate to technical issues that are a matter of conjecture, but, convenient as such dichotomies may be, they conflict with our intuitive sense of the way things *actually work*. We *know* that both the early cyber-libertarians and cyber-cynics were wrong, and we *know* that the future is neither one of perfect control, nor of powerlessness.

Finally, in *Law and Internet Cultures,* we have a well-researched book which grounds the discussion in reality and gets beyond these simple dichotomies. Bowrey challenges the concept that the relationship between Law and Technology is a simple, bilateral power relationship (Law directs Code, or Code routes around Law).[24] Internet Law, as Bowrey states:

> is diffuse and rarely autonomous. It moves with the technological flows, and is thereby quite globally pervasive. It is intersected by the more familiar laws and courts of nation states, but these do not stand alone. Formal laws take technological controls and global realities into account, albeit in different and diverse ways. What this means is, that in relation to the internet, the idea of law changes, depending upon the context and the nature and concerns of the relevant decision-making community. In this regard it is the definition of the relevant internet community and their cultures that helps to focus and refine the relevant meaning for law.'[25]

Bowrey here recognises the basic 'Lessigian' insight that 'Code is Law', and, like much Internet Law scholarship, emphasises the importance of decision-making about technology. Bowrey's emphasis is on the communities and cultures created online – the *Internet Cultures* of Bowrey's title. It is these communities that create the technical and social environment on which formal law must operate – and constrain what ends formal Law, or even 'Law + technology', can achieve.

2. Law Talkin' Dudes: Internet Cultures

Since Internet Cultures are, in Bowrey's conception, law-talkers, law-makers and law-influencers, identifying just who they are is critical to her argument. This is easier said than done, of course: 'culture' as a concept is notoriously amorphous and uncertain. Bowrey hangs her hat on two features as differentiating her 'Internet Cultures' or communities. The first is that they mediate, affect, and even create the understanding and experience of the Internet for others. They hold some power to

24 To be fair to Lessig, it would be a gross simplification of his views to suggest that he thought that Code and Law were the only important regulators – on the contrary, he, too recognises the regulating force of factors like markets and 'norms'. But Lessig 'privileges' law – discussing how law can *use* these regulators or influence them to achieve certain ends (although this is more true of *Code,* above n17, than it is of more recent writings like *Free Culture,* above n12) Bowrey avoids this simplicity, by exploring not just how law can achieve its regulatory ends on culture, but also, how cultures affect what law can (realistically) do.

25 Bowrey, above n13 at 20

affect the experienced Internet – they are influential people exercising significant control. Various groups fulfil this role in different contexts: engineers, programmers, multinationals, cyberactivists, consumers, lawyers, courts.[26] Secondly, these groups have a *shared consciousness* about their power and their role: they have actively addressed questions of social and/or legal responsibility, or confronted real 'legal questions' online. They actively talk about, and develop understandings of their relationship to formal law. As such, they are not mere 'regulated subjects' of law, but active creators of legal understandings.

So Bowrey chooses groups, or communities, who have the power to influence the technology of the Internet, and some active understanding of how formal Law might impact on their power. She then explores how the histories, experiences, and understandings of these communities influence *how* these actors exercise their technological and institutional powers.[27] The consensus-based decision-making history of the Internet Engineering Task Force, for example, influences how they formulate their policies regarding use patented technology in new Internet standards.[28] How they respond changes the environment in which more formal legal regulation operates: had the IETF decided to demand 'patent-free standards', a different environment for patents would have emerged.

A benefit of Bowrey's approach is that by focusing on actors other than lawmakers, she significantly fills out the picture of the environment in which law operates. Lawyers being lawyers, much of the legal scholarship gives nuanced readings of how politicians, or lawyers, or courts react, but treats 'programmers' and others as if they were either 'regulated subjects', responding simply to legal command, or alternatively some strange, rather monolithic group whose motivations and processes are unknown. Bowrey's study sheds light on how the subjects of Internet-related laws understand legal command, and perhaps more importantly, how they might react to it.

3. Law and Internet Stories

Having defined both 'Internet Law' and 'Internet Cultures', Bowrey turns, in the following four chapters, to particular key communities of actors. It is here that the discussion becomes somewhat less theoretical and more free-wheeling – more like the kinds of Internet Law scholarship we are familiar with, where stories form a central part.[29] The chapters themselves are focused around particular legal questions or legal issues online, in a way that roughly mirrors the ordinary 'Internet Law' courses as they have so far been taught.

26 Bowrey, above n13 at 23–24.

27 Bowrey is not the first to use 'stories' in Internet Law. The most famous purveyor of 'stories' is, of course, Professor Lawrence Lessig (see Lessig, above n12). Lessig's stories, however, are rhetoric, designed to persuade: Solum, above n2. Bowrey's stories are objects of analysis and evidence of lawmaking and law-influencing behaviour by Internet communities.

28 Explored in Bowrey, above n13 at 73–79.

29 See generally Solum, above n2 (describing Lessig's use of stories).

Chapter 3 is concerned with matters at the heart of Internet creation and governance. In particular, it considers the role of engineering communities, especially in the form of the IETF, a body that determines standards for the basic technological 'architecture' of the Internet. Chapter 4 turns to another programming community: the Free and Open Source (FOSS) community. Here, Bowrey explores how these communities use a legal form, licences, to 'create' and maintain their communities of code-producers. She draws attention to the contrast between the way lawyers understand such licences, and how they are seen in programming communities. In Chapter 5, there is an interesting transition to another actor who sees law as largely 'instrumental': Microsoft. Bowrey explores the culture around (or perhaps, against) Microsoft, but particularly, the way that law interacts with this multinational: how Microsoft sees law and how formal law struggles to control the behaviour of the company in the context of the Antitrust litigation. Finally, in Chapter 6 Bowrey discusses that most controversial of topics – digital 'copyright piracy' – and the cultures and impassioned rhetoric that pervades the digital copyright debate. All these stories are familiar to students in Internet Law courses and scholars in the area – but rarely are the motivations and discussions of the communities and actors explored in such depth.

In the tradition of critical scholarship, formal Law in Bowrey's stories features in a number of different roles, depending on the situation and the community whose perspective is being considered. Law is, at different places in the book, the exercise of sovereign power, a tool, an unwelcome intrusion, or part of popular culture and rhetoric. So, for example, for the IETF, formal Law in the form of patents is treated by the IETF in a relatively deferential way. Within the open source community, formal Law [please check all references to law for consistency], in the guise of open source licences, becomes a tool for community formation and maintenance. For Microsoft, too, Law is a 'tool', but in the context of the Antitrust litigation, Law was also 'rhetoric' – branding the company as transgressor was an important part of the process when the court's practical ability to regulate was limited. In the digital piracy 'story', formal Law is the subject of rhetoric and of popular culture as the rules become a battleground. By revealing how different communities see formal Law, and how their own experiences and history affects that understanding, Bowrey highlights that law for these communities is not necessarily the same as the formal Law that we, as lawyers, understand.

Another insight that emerges from Bowrey's stories (or perhaps, Bowrey's retelling of communal stories) is that cultures of communities that interact with law strongly affect what law can achieve, and how. In the digital piracy context, for example, the strict letter of the Law states that copyright owners have the right to control every use of copyright material. However, the ability to enforce such a model is limited as a result of the history of technology and the marketing of new products:

> We have been sold on a story of a clean, seamless aesthetic – one that facilitates integration and coordination of appliances and lifestyle. As consumers of that fantasy, we place limitations on … the ability of law to sell us a structure of 'control'. The longstanding practice of technology marketing has confirmed

> consumer expectations of sleeker, faster, enhanced products. This story will frustrate the establishment of a different culture based on technological regulation and control.[30]

Since Bowrey's text is mostly about the stories that her Internet Cultures tell, her own opinions of the way law is developing emerge only occasionally. And sometimes they are there with less than fulsome justification. Take, for example, Creative Commons licensing, which Bowrey criticises as 'over-juridification' – in short, too much law.[31] Alternative arguments can be made that Creative Commons licensing, like open source licensing as described in Chapter 4, has aims that are more normative, even rhetorical rather than legal – a view entirely consistent with the shifting identity of law reflected throughout *Law and Internet Cultures*. A reader interested in the issues may find themselves frustrated by the absence of Bowrey's own concluded views or detailed argument. Like the references to theory in the first two chapters, there is something of the 'tease' going on here: ideas, criticisms, interpretations are suggested without being fully explored. It can be frustrating, but on the other hand, it is also thought provoking. That may not be such a bad thing.

Whereas through most of the book we see Bowrey as theorist, in the final chapter we see Bowrey's 'suggestions for activists'. The question she poses is whether it is possible for individuals, cyber-activists, and non-government organisations to change the course of the information society – is there, in other words, the potential to influence information policy? If so, it seems, the potential lies in working in *all* the legal 'spaces' the book identifies: formal legal processes, but also through culture, and communication networks that are arising online and that influence what regulation is possible. These prescriptions are, perhaps, a little vague, but necessarily so: the point is that Bowrey has identified many spaces where law is 'being talked about', and has shown, through earlier chapters, that these conversations 'matter'. This is a useful reminder to lawyers used to focusing on legislatures and courts. If we want to achieve change, Bowrey reminds us, we need to look for influence in these other arenas also.

4. Conclusion

I have learned much from reading *Law and Internet Cultures*. The book is interesting, thought-provoking, and a very valuable addition to this field of scholarship. It takes the reader beyond simplistic dichotomies and models, to how the law really operates in the decentralised, challenging space that is the Internet. The book is thick with ideas and perspectives – both those which Bowrey expresses, and those which the writing will suggest to the reflective reader. It is not an easy read to the non-theoretically minded: the first two chapters, which set out the framework, require particularly close attention. Do not read the book expecting a clear framework or a clear set of answers. Read it, perhaps, in a quiet place. But definitely read it.

30 Id at 143.

31 Id at 166–168.