Viveca Bergstedt Sten[*]
The IT-practitioner's World

1 Introduction

Consider this. Is there really anything to imply that there is a new legal field worth the name of IT-law? Isn't this simply a trademark invented by lawyers to describe all the services performed in response to demands from the information society – albeit in a new format? Or is there merit to the idea that the 21st century has brought with it a legal discipline distinct enough from other legal areas to deserve independent recognition and specialised practitioners?

In a world where the finer points of law have been the subject of analysis and debate for decades, the concept of IT-law would be considered a mere baby – all but newborn – compared to the senior citizens of general civil law. To illustrate the foregoing, let us take a closer look at the matters requiring the attention of someone practising "IT-law", and in doing so, perhaps arrive at a conclusion – is there or is there not anything out there deserving the epithet of IT-law?

2 The scope of "IT-law"

In Sweden, the "IT field" in its broadest sense is characterised by a notable dearth of court cases and literature compared to most other legal fields. In many instances, there are so few rulings that guidance has to be sought from other countries where similar matters – albeit based on national law – have been adjudicated.

There is a distinct international flavour surrounding IT-practitioners which is also very much influenced by our dominant neighbour in the West. The American software industry, whose anxiety, or perhaps paranoia (as the case may be), regarding unauthorised use of software, has helped form the basis for the legal framework surrounding many of these products, has impacted heavily. Although comparing the Swedish legal tradition and its American counterpart is like comparing apples to pears, the American influence in Sweden is tangible and growing. Like a weed quietly finding its way into a bed of roses, the American legal tradition of complex, detailed contracts spelling out exact boundaries for use and crying out for impossible damages, is unobtrusively being adopted in Sweden. Through the medium of American licence agreements fed to Swedish customers through subsidiaries, franchise agreements, license rights, and over-ambitious lawyers equipped with the latest small print imported from the west, the Swedish IT industry seems content enough to do business deals moulded in legal clay vastly different from Sweden's own.

Let us examine some issues that would allegedly fall within the scope of IT-law.

All questions relating to the Personal Data Act (1998:204) and other matters pertaining to the capturing of personal data – including the construction and mining of databases and any ensuing use and transfer of their contents – would typically spring to mind. Regulation of information handling may be thought of as state-of-the-art IT-law in its purest

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[*] *Viveca Bergstedt Sten* is a member of the IT Law Observatory. See presentation in Annex 1.

form, but this could merely stem from the fact that the legal environment must mirror the effects of technical development to protect personal privacy as time goes by. Rather than allowing legislation on information processing to be considered as IT-law merely because the processing is performed by obvious IT devices such as computers and servers, this could easily be viewed as yet another area where the individual is enabled to enjoy his privacy by appropriate legislative measures in the same tradition as the expansion of the 1949 Freedom of the Press Act to cover new media, for example.

The Swedes, who harbour a deep respect for matters organised and streamlined, have developed a number of standardised IT agreements, addressing such matters as *system deliveries, IT consulting services, support and maintenance and outsourcing of IT services*[1]. In some cases these agreements have been drafted by the supplier side only. In some cases they have been negotiated or at least reviewed by both sides prior to public release. Although these standard agreements are widely used by both sellers and buyers, including their lawyers, and are often referred to as IT-agreements, they hardly constitute proof of the concept of IT-law. On the contrary, interpretation and understanding of these agreements normally calls for a lawyer with a good grasp of general contractual principles, i.e. somebody who understands the principles of entering into, being bound by, and terminating a contract. The fact that the object of these contracts – IT equipment and services – has come to label the same, does not in itself provide any evidence of a new legal repertoire.

Typically, an IT-practitioner would also come into close contact with matters such as *software development, customised systems and system integration agreements* as well as *on-line services, electronic commerce (including internet marketing), telecommunication services and computerised crime,* all of which are distinguished by their focus on services rather than goods, and more often than not by their obvious lack of physical form. There are also contracts for services performed by IT-consultants and the question of ultimate ownership to the intellectual property rights created compared to work products developed by employees. However, these matters are, at the risk of repeating myself, much more typical of contractual law, marketing law, labour law, and criminal law etc., etc. than anything else.

Then we have the issues of intellectual property rights that will appear in almost every instance. There are the complex matters of *proprietary rights* to all tangible and intangible work products that are being produced every day of the week in this age. Many, many hours are also spent in commercial negotiations when lawyers try to find a common ground to agree on matters such as *recognition of ownership, agreement on joint use, regulation of future development, global marketing rights, potential licensing, franchising rights, publication rights* etc., etc., etc.

The dot.com industry further expanded the legal horizon by bringing into focus the great importance attached to *domain names*. Without going into too much detail, it is clear that the domain name issue, and of course its underlying relationship to the regulations surrounding *trade marks*, is a key legal issue to anybody working in this setting. However, the area of intellectual property rights has hardly seen the light of day in the context of the information society, although, admittedly, the recent technical developments which will allow any ten-year-old to download the long-awaited Harry Potter movie from the Web five days after its world premiere, have certainly highlighted the need for appropriate and speedy legal action.

In conclusion, there seems to be little hard evidence that there is indeed any such thing as IT-law. It would seem more appropriate to use the term as a general heading for a number of legal areas that become involved. Legal areas which have been brought together by the fact that the object that triggered the need for legal expertise is composed of intangible electronic

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[1] Avtal 96, Utveckling –92, ABDAKA -96, Drifttjänster-99 etc.

data flowing at lightning speed and calling for different legal analysis and opinions at different intervals. Thus, it would seem that the centre of legal attention is an IT-object, but the legislation involved is not.

3 The IT-practitioner

If it is difficult to find enough of reason for designating "IT-law" as a legal field in its own right, is there some common ground that will serve as a denominator for "IT- practitioners", those legal fellows who work with the legal aspects of IT-related matters on a daily basis?

Perhaps IT-practitioners may be characterised by the interest they take in a new and unexplored field that presents its own challenges in terms of technical complexity, terminology, and legal impact. Although this would seem to also require some technical understanding and insight into electronic devices and their operating principles far beyond the interest of a typical lawyer, the IT-practitioners are probably better identified by their apparent appetite for working at the legal frontier and affinity for an innovative industry in a very dynamic environment. But maybe there is also a genuine desire to leave a legal footprint somewhere in cyberspace?

How do IT-practitioners practise? To begin with, she (or he, please interpret the further use of "she" as the simplification it is) probably needs to fine-tune her communication skills more than most lawyers, since an integral part of her work involves acting as a go-between and interpreter between the technical staff and the legal requirements. Although the comparison may be less than flattering, the IT-lawyer could be likened to a legal transformer or even a processing filter, i.e. somebody who eases the communication between the legal world and the information world.

Does this distinguish her from other lawyers with other legal specialities? This might very well be the case, as the information technology society seems to require more of its appointed legal counsel than most. Not content to remain bystanders, the citizens of the electronic world expect their lawyers to take an active part in their business, involve themselves in the task at hand and develop an understanding of their products. Many times, a client will not only ask for legal advice relating to a contract, but will also expect the IT-lawyer to provide an insight into his needs; guidance is required in more respects than traditional drafting and negotiations: the lawyer must also assist in defining what the client wants, how he should go about obtaining it, and what the contract is actually about. This is an environment where buyers are frequently unsophisticated in terms of insight and professional assessment of their own corporate needs. This is probably explained by the fact that although IT-products are purchased by most if not all companies today, the buyers are usually active in different industries altogether. Buying IT-products and services does not constitute the bread-and-butter of most buyers; the products are necessary, but not necessarily understood or even desired. Hence the feeling of operating on unfamiliar territory. Hence the increased need to rely on experienced lawyers.

What other interesting distinctive features might we find in the IT-practitioner? That the IT-lawyer must be curious as a cat, interested in technical solutions, more service-minded than most, and certainly be able to switch effortlessly between legal lingo and technical mumbo-jumbo. It probably helps if she has a hands-on personality and does not mind having to do a great deal of client handholding as well. To sum it up – here is somebody who has to be very adept at "out of the box thinking" and able to function in the most real of real-time environments.

4 Experiences of “Internet law”

If we hesitate to award the concept of IT-law a status of its own, is there something called “cyber law” available to IT-practitioners?

The explosion of the dot.com industry in the late nineties served to illustrate a crucial point to lawyers working with the expanding Internet industry. There was no such thing as “cyber law” reaching across the national borders of the member countries of the EU. Here was an area that did not emerge as a homogeneous legal field, even though its late “coming of age” could have been a model example of how to create European legal harmonisation.

When the many Internet ventures rushed to establish themselves across Europe a few years ago, legal advice was much in demand in respect of the planned launches on the European market. What every company, (especially those involved in “business-to-consumer” operations) interested in establishing itself across Europe discovered, was that substantial amounts had to be spent on obtaining legal advice to ensure that a site was in compliance with the legal framework of each country. From a practical viewpoint, this meant that for each country launched, local legal advice had to be obtained primarily with regard to three areas: reviewing and commenting on the legality of the business model itself, reviewing all offers made to the public by the company, and scrutinising the text on the site. In particular, this meant that local expertise had to be sought in respect of at least contractual law, marketing law, personal privacy/processing of customer data, and consumer legislation (if applicable).

For each country, appropriate legal counsel had to be contacted and briefed about the company and its business model, before proceeding to review the matters at hand, which further increased the costs. The fact that consumer legislation could differ substantially from country to country also added to the complexity, as it was difficult to determine to what extent local legislation would be considered if an individual agreement between the company and a consumer were to become subject to interpretation or dispute. To illustrate, in many countries an agreement will not only be construed on the merits of its actual text and content, but will also be analysed with a view to the relevant legislation that may impact on the interpretation.

The national implementation of EC directives further complicated matters, as there were substantial variations in the ensuing national laws. In the matter of the Distance Contracts Directive (97/7/EC), different countries chose to embellish the open return period and added more time than the directive laid down. Consequently, it was not possible for a company to implement a single, uniform open return policy, as the conditions had to conform to the preferences of the individual countries. Another example relates to the Data Protection Directive (95/46/EC), whose implementation was severely delayed in many countries. As it was also implemented in different ways in various countries, this meant that each country had to be analysed individually. Furthermore, local legislation would add layers of regulations, which had to be considered. Take Denmark for example, where the law on payment instruments has provisions of a far-reaching character in relation to the processing of personal data in connection with payments made through the use of credit cards. This meant that, even if a company followed the appropriate EU directives closely, it still had to make sure that the law on payment instruments were observed when certain data was processed or it would run the risk of finding itself in conflict with Danish legislation.

Consequently, those companies wishing to take advantage of the simplicity built into e-commerce through the use of a single medium – the Internet – found (somewhat to their surprise) that there was no hope of relying on an equivalent legal model to simplify matters. On the contrary, in not one single instance was it possible to take a business model, have it translated and adapted to relevant EC directives and then put it to commercial use without further ado. As a side remark, it is worth noting than in comparison with the relative ease of

launching a cross border e-commerce business in the United States, the present situation in Europe and the legal divergences offer a considerable disadvantage to any European e-commerce venture aiming at establishing itself in Europe.

As reality dawned on the lawyers advising Internet companies, the conclusion became evident. There was little point in discussing any concept of cyber law, as it hardly existed, let alone could be used to facilitate business for commercial ventures using the technique of the Internet. As for the legal matters that needed to be analysed in connection with these enterprises, they turned out to be cloaked in the habits of marketing laws, competition laws, consumer legislation, and many other legal fields, which on a daily basis would be referred to as traditional commercial and consumer legislation.

Summing up, there seems to be little in the way of either IT-law or cyber law to provide tailored IT-legislation or even legal harmonisation to constitute a new legal field set to join the ranks of other established areas such as tort law, commercial law or building law, just to mention a few. However, this should not deflect from the fact that there remain many legal matters relative to IT and electronic services and products that require the attention of IT-practitioners, but also scholars reaching into cyberspace. In the world of the Internet anything is possible, but clear legal structures evade those who choose to practise law within it.