

INTERNET AND DEMOCRATIC STABILITY: THE LEGAL CHALLENGE TO FACE THE THREAT

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There are few political scientists who would deny that access to current and reliable information, by as many citizens as possible, is one of the most important ingredients to maintaining and protecting a free and democratic society. There are few others who would refute that the Internet, whether used as a personal communication medium, as a research tool, or as the backbone of data communications that underpins vast segments of our economy, is crucial to the social and economic fabric of democratic society. Therefore, when one considers which aspects of the relationship between the Internet and democracy are the most important and challenging, our dependence on information reliability, data integrity, authenticity, and media dependability stands out.

As both a political institution and as a social and economic way of life, our democracy stands on the shoulders of a network of infrastructures that we depend and rely upon. Generally, as those infrastructures emerged at various intervals of our history, our political and legal systems adapted to recognize their importance and the role they play in enabling our democratic society. Through a series of laws, regulations, regulatory bodies, and various arrays of public policy initiatives (perhaps driven by funding decisions of some sort), those infrastructures are secured and protected in the public interest in ways that ensure their essential contributions to our political economy.

In fact, it is difficult to think of an infrastructural component of a free and democratic society that is not insulated from abuse, corruption, and erosion by highly defined laws and regulations, international agreements or treaties, the supervision by expert regulatory bodies, and by law enforcement agencies that monitor compliance. Whether it is our financial infrastructure (banking and securities), or infrastructures that are related to telecommunications, transportation, education, health care, agriculture and food safety, or even our own labour force, our political and legal leadership in most, if not all, cases has done an acceptable job of assessing the relationship between the needs of a free and democratic society and the dependence of our society on the infrastructures that support it. In essence, at some point along the infrastructure development curve, those who act in the public interest must step back and question the vulnerability of our democratic society if a particular infrastructure were to be threatened or compromised, whether safe food, safe roads, well-tested and effective drugs, the ability of civil defence personnel to communicate by cell phone in a time of crisis, the integrity of financial markets, or even to the effectiveness of our education system.

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In the case of the Internet, consider how it directly affects, facilitates, and supports billions of dollars a year of Canada's gross domestic product. Is the Internet now any less important to protecting the integrity of our democracy than the postal and rail systems were 100 years ago, the road systems were 85 years ago, the banking system was 70 years ago, or the capital markets and medical care delivery systems are today? Even though the Internet is, without question, a crucial social and economic pillar of our free and democratic society, we have not yet recognized that it has passed the "tool of convenience" stage in the evolution of all great infrastructure pillars. While pundits debate whether the Internet "should be regulated" – for example, the extent to which the Internet should be exempt from certain domestic laws, like domestic cultural industry ownership laws – those deliberations are being rapidly eclipsed by the realities of our democracy's absolute dependence on the integrity, reliability, authenticity, and efficiency of the Internet. In a very real and practical sense, the success of the Internet as a backbone medium for our society and the degree to which it is inextricably interconnected with many other economic and social institutions that, in their own rights, are pillars of democracy, have rendered such Internet regulation debates anachronistic at best and irrelevant at least.

The fact is, despite the pundits' refrain, the Internet is now at that critical juncture in the evolution of all great and contributing infrastructures where it has become so important to the nature and quality of our free and democratic society that it, like all of its infrastructure siblings, requires the support and protection of legal and regulatory measures to protect the attributes that made it an integral ingredient of our democracy. Just because the naysayers haven't studied history it doesn't mean that they are right. Think of the owners of automobiles who wrote editorial after editorial about how licensing drivers and cars would sound the death knell for the automotive industry, and how ending their "freedom on the road" would cripple that emerging industry (sound familiar?). And don't forget about all of those thousands of pundits who predicted that the regulation of banks, and even the creation of the Securities and Exchange Commission (SEC) in the U.S., would hamper or debilitate the operation of capital markets into the Stone Age. Despite whatever vital infrastructure was protected by regulation, there was always a familiar chorus at the commencement of the regulatory initiative by some of the brightest minds in the world at that time: "the subject matter of the regulation was too vast and complex to regulate and too difficult to monitor and supervise". Look at the emergence of any of the vital infrastructures that have contributed and still contribute to our democracy, and you will see a consistent and repetitive pattern of emergence, adoption, reliance, dependence, and then realization of vulnerability that led directly to the laws, regulations, and public policy initiatives that are necessary to protect the integrity of that infrastructure.

When protecting the emerging infrastructures of a free and democratic society, the difficulty is always timing. The problem is how to secure the required legal and regulatory protections when lawmakers refuse to heed the call of, say, Law Journal writers in time to prevent permanent harm from being caused to that infrastructure. In the case of regulating the railways, it took years of horribly abusive monopolies

that suppressed the national economy before law makers said, “enough is enough”. In the case of bank regulation, it took the trauma of the 1930’s depression. The abuses of securities frauds and capital market manipulation (most often because of unequal access to information – again, sound familiar?) ultimately led to the formation of the SEC and the creation of similar bodies around the world. Does the regulation of the Internet face a similar pattern?

So far, legal analysis on the topic of “Have our laws and legal system kept pace with the Internet and digital economy?” has exclusively focused on topics like consumer protection, misappropriation of intellectual property (music, video, or otherwise) or intermediary liability. Notwithstanding the importance of that work to some segments of our economy, in my view, those issues do not go anywhere near the heart of the Internet’s ability to contribute to a free and democratic society. For that analysis, we must consider which fundamental attributes of the Internet are embedded into our social and economic fabric, and then ask exactly what threatens those specific attributes.

Frankly, I am not one who generally sounds “the sky is falling” threats, nor do I overreact to hypothetical scenarios – except when my three-year-old is climbing up something high to jump off – but a colleague of mine, who is one of Canada’s leading lawyers in the field of cyber-liable and reputation management, recently pointed out to me the tremendous cost to the economy that results each year from misinformation, online corporate espionage (including hacking and cyber attacks), cyber-crime, and informational warfare. Reflecting on his perspective, I considered the hundreds of thousands of people in Canada who depend upon the Internet for its reliability, integrity, authenticity, and their ability to efficiently transact business and to communicate. When one realizes how essential and important the Internet is to our society, including as the backbone for a significant percentage of our nation’s GDP, it becomes much easier to appreciate the Internet’s risks and vulnerability. It is difficult to think of a comparable circumstance in our history where politicians would not have moved swiftly and decisively to protect an equivalent infrastructure from compromise, abuse, and attack. The protection of our democratic self-interest demands that we examine the extent to which we rely and depend upon the Internet for our free and democratic existence and the extent to which our laws, regulations, and public policies address the threats it faces.

For lawmakers, lawyers, and legal academics, the degree to which the Internet’s role in our political economy has out-paced our ability to truly insulate and protect it from abuse, compromise, and attack is a far more pressing legal issue than the failure of our legal system to transcend industrial notions of reprography as a tenant of economic value. Although many writers have now beaten to death the issue of how our industrially-based legal system anachronistically and myopically reflects the industrial value of reprography – I wrote an article on that very topic twelve years ago in the inaugural issue of the American Lawyer Media’s *IP Worldwide* magazine – almost no attention is being paid to the more profound legal and regulatory gaps which leave the integrity and entire operation of the Internet exposed. Perhaps a poignant illustration of this conspicuous gap, and the threats that our democratic society faces, is illustrated by the President of the United States’

alleged authorization of the National Security Agency to monitor domestic communications. Regardless of one's political views, I am certain that most of the brightest and most experienced legal minds who would offer their advice to the President on either the merits or impediments to such monitoring would express the strong common opinion that the Internet is not adequately regulated and legally protected from threats to its integrity. Ask any intelligence professional, law enforcement officer, experienced politician, expert on cyber-crime, or legal professional working in a related field, if our laws adequately address the real threats that the abuse of the Internet poses to our free and democratic society – child pornography, terrorist threats of information attack, corporate and foreign government espionage, and money laundering by both drug cartels and internationally organized prostitution networks. Don't misunderstand, the protection of copyright over the Internet has an important place in our consideration of law reform; but, when considering the extent to which our laws and regulations are wholly deficient in their ability to address the most profound and devastating threats posed to our national security and democratic freedom, I think we have to immediately rebalance our perspective and priorities. When it comes to law reform, let's spend far less time harassing music labels for engineering their music formats and more time considering the legal and regulatory reforms that are necessary to protect our free and democratic society.

The very real threat of informational warfare and criminal manipulation of the Internet is nothing new; however, there has been relatively little professional debate and consideration of this issue in Canada. While mainstream academics and professionals around the world are devoting considerable effort and resources to consider the legal and regulatory issues related to the protection and management of the Internet, too many pundits in this country still argue that the Internet should be a regulatory "free port". The Internet is now important enough to our society and our democracy that it demands immediate and profound public policy consideration far beyond issues related to copyright reform. As one of the many pillars of our democratic freedom, a comprehensive evaluation of how the Internet should be managed, protected, and regulated is now, in fact, a matter of urgent democratic protection. Like motor vehicle drivers who were forced to become licensed operators identified by license plates, at some point the public good and society's need for fair protection must be balanced against anonymity and unaccountability.