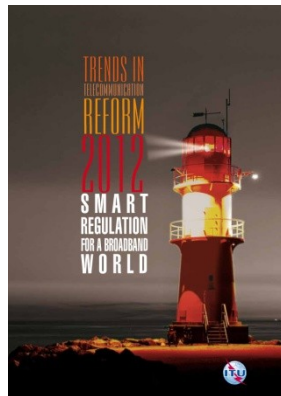


# GLOBAL INDUSTRY LEADERS' FORUM 2011 Discussion Paper

## *Confronting The Social Media Regulatory Challenge*



### *Work in progress, for discussion purposes*

Comments are welcome!

Please send your comments on this paper at: [gsr@itu.int](mailto:gsr@itu.int) by 7 October 2011.

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# 1 CONFRONTING THE SOCIAL MEDIA REGULATORY CHALLENGE

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Social media has emerged in recent years as an essential tool for hundreds of millions of Internet users worldwide. From status updates to photos to voice communication, many rely on social media services such as Facebook, Twitter, LinkedIn, and Google Plus as a key source for online social interaction, news gathering, creative sharing, and advocacy. Indeed, for a growing number of Internet users, social media and the Internet are virtually synonymous, since most of their “online time” is spent interacting in a social media environment.

The popularity of social media has been driven by several factors that blend networks, technology, and social desire. First, widespread broadband connectivity has enabled social media platforms such as Facebook to incorporate data heavy features such as video, audio, and photography. By allowing users to share more than just text, social networks have replicated many offline social interactions and provided a convenient entry point for many online users. Second, the growth of mobile Internet services allows users to stay current with their social networks while on the go. This facilitates real-time updates, instant uploads of photographs and videos, and layers in geo-location services that combine online activities with offline presence. Third, the availability of smartphones that can effectively harness the social media experience in a handheld, wireless environment has provided the tools users need for a robust social media experience. Finally, the Internet has always fostered communications and social interaction, but new social networks make it easier than ever to connect with friends, family, or others with similar interests.

The popularity of social media raises a host of legal and technical issues. Social media is closely connected to the growth of cloud computing with virtually all data – personal or otherwise – stored in computer server farms in undisclosed locations. This cloud computing model offers new efficiencies for service providers and conveniences for users, yet is also raises legal questions about the impact of cross-border data flows and environmental questions given voracious appetite of

cloud computing for energy. Closely linked to cloud computing and social media are questions about jurisdiction, leading to the return of one of the most fundamental question associated with the Internet – whose law applies?

For telecom and information communication technology (ICT) regulators, social media must be considered from several perspectives. First, the landscape must be better understood so that its importance can be properly assessed for policy purposes. Second, the regulatory community must consider both how it can use social media to service its stakeholders and meet its public mandate as well as assess whether social media raises specific new regulatory or policy challenges that should be addressed. In other words, regulators find themselves in a challenging position of having to understand a rapidly changing online environment while simultaneously becoming active users of that environment in order to remain publicly relevant and engaged. Moreover, as the policy concerns associated with social media mushroom in importance, they may be asked to set guidelines or new rules that establish a policy framework for the use of social media by others.

This discussion paper seeks to address all three of these perspectives. It begins with an introduction to social media by identifying the major players, its growth, the business opportunities it creates, and how it is currently being used. The second and third parts focus specifically on the role of social media within the regulatory environment, highlighting how regulators have increasingly embraced social media to interact more effectively with interested parties and how stakeholders are using it to advance policy positions. The fourth part examines some of the key legal and policy issues raised by social media and how regulators around the world have addressed them. The paper concludes by forecasting what may lie ahead for the ICT regulatory community from a social media perspective.

## 1.1 Social Media Background

There are thousands of social media networks ranging from enormous, all-purpose sites such as Facebook with a user base larger than most countries to smaller, subject-specific networks that cover every issue or interest imaginable.<sup>1</sup> While there are differences between general and specialized social media sites, most incorporate common characteristics that involve community building, such as sharing information, likes and dislikes, photographs, videos, and online spaces for interaction.

Social media extends beyond strict social networking, however. Twitter is among the most popular social networks, yet it is limited to sending 140 character messages to “followers.” YouTube, the world’s most popular video websites, receives over 48 hours of video every minute, creating the largest source of video content in history.<sup>2</sup>

### 1.1.1 Facebook

Facebook describes itself as “a social utility that helps people communicate more efficiently with their friends, family and coworker.”<sup>3</sup> Facebook users post information about themselves, their interests, and their activities including news clippings, photos, and videos. Facebook launched in February 2004 as a social network site for Harvard University. The site allowed users to chat, post photos and comments, as well as connect with fellow students with common interests through online groups. The site quickly grew, first to other universities and later to high schools. Facebook opened to the general public in September 2006. At the time, the service had approximately nine million registered users, all within the education system.<sup>4</sup>

In less than five years, Facebook has grown to over 750 million active users worldwide.<sup>5</sup> The average Facebook user has 130 friends, is connected to 80 community pages, groups and events, and creates 90 pieces of content each month. More than 30 billion pieces of content, including web links, news stories, blog posts, notes, and photo albums, are shared each month on Facebook.<sup>6</sup> Over 70 percent of Facebook users reside outside the United States.

Facebook is frequently accessed through mobile devices such as smartphones. There are more than 250 million active users currently accessing Facebook through their mobile devices.<sup>7</sup>

The Facebook “ecosystem” has led to enormous economic activity and innovation. Entrepreneurs and developers from more than 190 countries build with Facebook Platform with users installing 20 million applications every day. More than 2.5 million websites have integrated with Facebook, including over 80 of comScore's U.S. Top 100 websites and over half of comScore's Global Top 100 websites.<sup>8</sup>

### 1.1.2 Twitter

Twitter describes itself as a “real-time information network” that connects users to the latest information they find interesting. Information is disseminated by “tweets”, which are short messages of up to 140 characters in length. Tweets can include a short burst of information, a comment, or feature a hyperlink to an article, photo or video.

The public can follow discussion on Twitter by either subscribing to the tweets of particular user (called “following” the user) or use a search query to track discussion on any topic. While the public can access tweets through the Twitter.com website, many software programs and third party services enable access to Twitter discussion without requiring a visit the site through the World Wide Web.

Twitter has grown to over 200 million users since its launch in July 2006.<sup>9</sup> It is adding 460,000 new users every day.<sup>10</sup> Users send over 200 million tweets daily.<sup>11</sup> In the United States, 38 percent of users access Twitter from their mobile devices.<sup>12</sup> There is significant economic activity surrounding Twitter as well with more than one million registered Twitter apps connecting to the service.

### 1.1.3 LinkedIn

LinkedIn is the second largest social network in the United States, having surpassed MySpace earlier this year. Unlike Facebook, whose origins lie in the academic world, LinkedIn has positioned itself as a more professional-oriented social network, with curriculum vitae and past business connections, a focal point.

The site has approximately 120 million users, about half of whom reside in the United States. Other large LinkedIn countries include India, the United Kingdom, and Brazil. The site is currently growing fastest in Latin America and Africa. In its last financial quarter, the site received 7.1 billion page views.

LinkedIn has embraced both third party developers and mobile applications. In April 2011, LinkedIn opened up full access to the LinkedIn platform to developers. A number of new plug-ins were introduced, including the LinkedIn Share Button, which more than 100,000 publishers are now using to drive traffic to their sites. LinkedIn now has more than 30,000 developers using its APIs. The site is available on major smartphone platforms and its mobile page views have increased approximately 400% year-over-year.<sup>13</sup>

#### 1.1.4 Other Social Media Sites

While Facebook and LinkedIn attract much of the social media attention, many other general purpose social media sites enjoy large user bases. The most recent entrant is Google Plus, which launched in June 2011 and quickly amassed tens of millions of users.<sup>14</sup> Other sites with sizable user bases include:

- QQ (China)
- Vkontakte (Russia)
- Mixi (Japan)
- Orkut (Brazil, India, and Paraguay)
- Hi5 (Colombia, Ecuador, Peru)
- Friendster (Philippines)
- Iwiw (Hungary)
- Cyworld (Republic of Korea)
- Hyves (the Netherlands)
- Nasza-klasa (Poland)
- Lidé (Czech Republic)
- One (Lithuania)
- Draugiem (Latvia)
- Wretch (Taiwan, China)
- Zing (Vietnam)
- Skyrock (France, Belgium, Senegal)
- Studiverzeichnis (Germany, Austria)

The result is that with the notable exceptions of Facebook, Twitter, and LinkedIn, there is a stronger “localized” component to social networking than is often appreciated.<sup>15</sup> Unlike the global Internet, which enables virtually the entire world to connect, social networks have created very large, localized communities with far more limited international interaction.

## 1.2 How Regulators Are Using Social Media

The emergence of social media has forced governments and regulatory agencies to shed

conventional, low-risk communication strategies in favour of approaches that incorporate social media into a core part of their communications mandate. For stakeholders, media, or others interested in the regulatory process, communications via social media tools such as Facebook and Twitter has become the defacto standard. Regulators that shy away from social media run the risk of failing to deliver their information quickly and authoritatively to interested parties. Moreover, given the close connection between technology and ICT regulators, the question could arise of whether the absence of a social media communications strategy could attract some negative attention, with critics labeling the regulator as “resisting change” or “out-of-touch”, raising questions about their competence to address issues involving emerging technology or Internet issues.

Given the similarities with conventional press releases, several regulators maintain active Twitter accounts that are used to disseminate information to interested followers. Regulators with Twitter accounts include the Australia Communications and Media Authority (ACMA), the Communications Commission of Kenya (CCK), the Telecommunication Authority of Bahrain, the U.S. Federal Communications Commission (FCC), the Canadian Radio-television and Telecommunications Commission (CRTC), the Malta Communications Authority (MCA), the United Kingdom’s OFCOM.

The Twitter usage of these entities varies. While some use Twitter primarily as a secondary venue for press releases, others use it for more interactive purposes. For example, the FCC Twitter account actively forwards interesting content (“retweeting”), promotes agency developments, and encourages public participation in contests and other activities. The FCC account has over 435,000 followers, the largest of any telecom regulatory agency in the world.

Some regulators have also incorporated Twitter use into live hearings. In July 2011, the CRTC in Canada conducted a two-week hearing on wholesale Internet access. The Commission used Twitter to provide its hundreds of followers with near-instant access to document submissions as they occurred. Moreover, Commission officials followed the Twitter feed discussing the hearing and responding to real-time queries regarding agenda, speakers, Internet video streams, and access to documentation. Given its bilingual mandate, the CRTC posts tweets in both English and French.



The Telecommunication Regulatory Authority of the kingdom of Bahrain launched its Twitter presence in April 2011 as part of an initiative to promote openness and transparency. The TRA noted “the usage of social media such as Twitter is growing tremendously as it is complemented by the affordability of the broadband services in Bahrain. The online community has become a popular new media for people’s communications and TRA understands the importance of adopting the new technology to interact with both online and offline individuals.”<sup>16</sup> The TRA Twitter presence quickly garnered hundreds of followers.

Facebook has also developed into an important social media tool for telecom regulators. Australia’s ACMA uses its Facebook page on a daily basis to update

users on upcoming events and to advise the public on how it can take advantage of consumer protections, such as the national do-not-call list. The ACMA Facebook page is open to the public, so that others can post questions or comments on its Facebook wall. The page is also integrated into offline ACMA access, providing information on customer call centres and office opening hours.

The Communications Commission of Kenya uses its Facebook page in much the same way. The page includes posts to recent press releases, YouTube videos, and photos. As an open page, it also gives visitors the ability to post their questions directly to the Commission.





The use of video and photos is not limited to Facebook. Youtube has also emerged as a popular service for regulators with a public education mandate. For example, the UK's Ofcom maintains a large YouTube page with dozens of videos providing guidance on how

the public can file complaints or exercise consumer rights. The featured videos also include press conferences and public presentations. The page was launched in 2006 and its videos have received nearly 150,000 views.



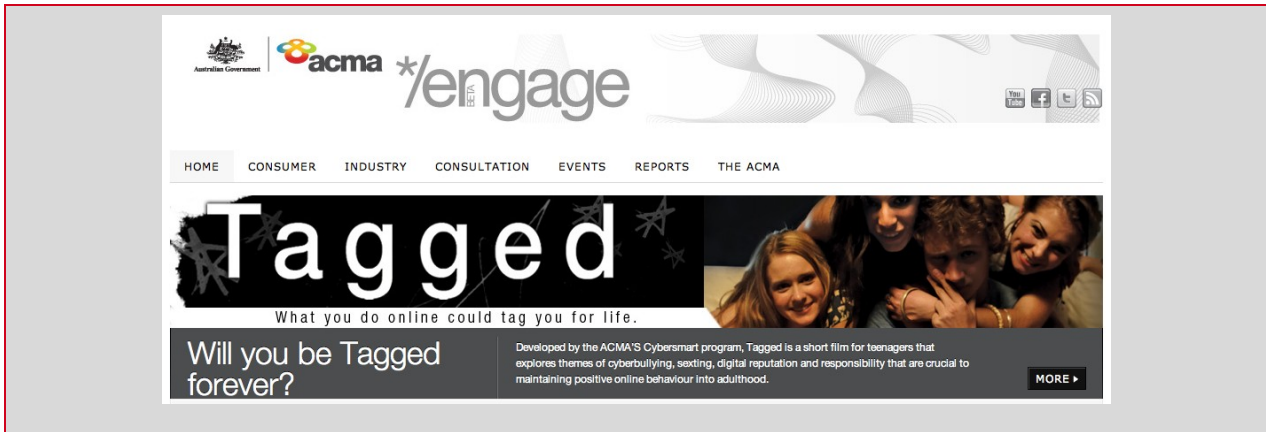


Several regulators also make use of Flickr to post a steady stream of photographs. For example, the FCC page draws from Commission meetings and public events.

The use of these services supplement increasingly robust regulator websites that frequently incorporate

social media widgets and functionality. In addition to conventional regulatory documents and agency information, regulator sites now often include less formal blogs and microsites designed specifically to engage with the public.





### 1.3 *How Social Media is Used By Stakeholders To Influence Regulators*

Regulators are not alone in making growing use of social media. Many stakeholders now turn to social media in an effort to influence public opinion, engage in digital advocacy, and promote their preferred regulatory outcome. The potential for social media to play a key role from an advocacy perspective has been widely touted in recent years. From major political events in the Arab States to modest telecom policy issues, stakeholders on all sides have used social media as a mechanism to galvanize popular support.

From a grassroots perspective, some of the best known groups include Free Press, a U.S. national, nonpartisan, nonprofit organization working to reform

the media. Formed in 2002, Free Press has grown into the largest media reform organization in the United States, with nearly half a million activists and members and a large full-time staff.<sup>17</sup> Its activist tools include a presence on Facebook, Flickr, MySpace, Twitter and YouTube

While Free Press is an example of a large grassroots organization, there are many smaller groups who use social media to “punch above their weight.” In France, La Quadrature du Net (Squaring the Net) has emerged as a vocal opponent of European Union telecom reform as well as international intellectual property enforcement efforts such as the Anti-Counterfeiting Trade Agreement. Although small in size – the organization has only a handful of staff – it has been able to influence the political and regulatory process by leveraging the Internet to encourage widespread participation and political advocacy.

#### **Box 1: Key Issues for Regulators Considering a Social Media Strategy**

1. Which social media sites are most important in your jurisdiction?
2. Are there regulatory requirements or restrictions that may limit your social media participation? Are other government or quasi-governmental organizations in your country using social media?
3. Have you identified a specific person or department responsible for maintaining your social media presence?
4. What language(s) will you use?
5. Is your organization positioned to respond rapidly to emerging issues?
6. Have you considered frequency of postings? Tone (formal vs. informal)? Interactivity (broadcast only or interactive)?
7. Have you established benchmarks for success including number of postings, followers, and broader impact?
8. Is your social media strategy consistent with your organizational communication strategy?

Canada experienced something similar in 2011. Open Media, a virtually unknown group just a few years ago, played a crucial role in stirring public sentiment on consumer telecom issues such as net neutrality and usage based billing. Usage based billing took the political world by storm in Canada in early 2011 when over 450,000 Canadians signed an Open Media petition calling for an end to the common practice.<sup>18</sup> The petition was widely promoted on Facebook, Twitter, and other social media. After the Canadian government indicated that it would order CRTC to reconsider its decision to allow large Internet providers such as Bell to implement UBB when it sells wholesale access to independent ISPs, the CRTC announced that it would delay implementing the decision for at least 60 days so it could review it on the merits.<sup>19</sup> The Commission followed up with an oral hearing in July 2011.<sup>20</sup>

The use of social media is not limited to grassroots or smaller organization. In 2009, Canadians witnessed a massive media campaign over whether over-the-air television stations should be entitled to per-subscriber fee from cable and satellite companies. Once the issue was before the CRTC, both sides actively used social media to influence public opinion, including developing specific advocacy websites, Facebook pages, and Twitter feeds.

As the recent events in Tunisia and Egypt demonstrate, the use of social media is obviously not limited to regulatory issues. Yet for telecom and ICT regulators, the importance of social media as a tool for interacting with stakeholders and for staying abreast of policy positions and developments is essential. Complicating the challenge are the regulatory questions posed by social media, the issue to which this discussion paper now turns.

## **1.4 Legal Issues Raised By Social Media**

While regulators must consider how they use social media (and how their stakeholders use it), they are increasingly asked to address substantive policy and regulatory responses to the challenges posed by social media. The legal issues associated with social media track more generally the issues posed by the Internet – regulatory questions, privacy, free speech, advertising,

and financial regulation. This part examines some of the legal issues posed by social media with specific focus on regulatory matters.

### **1.4.1 Telecom Regulation**

Social media is not strictly telecom, though social networking services frequently incorporate telecom functionality into their services. For example, Facebook recently announced an agreement with Skype that allows its users to effortlessly shift to voice discussion with friends on their Facebook network. Similarly, Google+ builds in the Google Voice product so that connected users can easily conduct voice or video chats from within the social network environment.

Some telecom regulators have established guidelines for the use of social media. For example, the Bahrain Telecommunications Regulatory Authority (TRA) has established guidelines for social media use. Users are to refrain from posting, forwarding or re Tweeting messages that are untrue, or of an extreme nature, violent or pornographic. The TRA's motivation behind the policy is to incorporate standards typically found within the journalism profession to social media. It notes that reputable journalism operates under a code of ethics (verification of content, protects viewers from images of extreme nature) but this is not the case with social media broadcasting.<sup>21</sup>

The use of guidelines or standards, rather than rulemaking or legislative guidelines, may be a preferable approach given the rapidly changing social media environment. Educating the public on both the benefit and risks associated with social media is an area where telecom and ICT regulators may have a role to play.

Many regulators have taken steps to block access to social media sites in response to domestic developments or concerns with activities on the social network. In many instances, these blocking measures have been temporary, serving as a response to particular incident or piece of content. Examples are provided in the Box 2 below.

**Box 2: Examples of temporary blocking measures taken in selected countries**

On May 19, 2010, the Pakistan Telecommunication Authority (PTA) blocked Facebook in accordance with a Pakistani high court order. The block lasted two weeks. The block was ordered in response to “Draw Mohammed Day”, a contest initiated by a group on Facebook. Facebook responded by making the page inaccessible in certain countries including Pakistan, and the court ordered the PTA to restore access to Facebook.<sup>22</sup>

In May 2010, the Bangladesh Telecommunication Regulatory Commission (BTRC) announced that it would temporarily block access to Facebook due to “obnoxious images”, including depictions of Mohammed and several of the country's political officials, and pornographic links. The block was similarly initiated as a response to “Draw Mohammed Day”.<sup>23</sup>

In 2008, the UAE Telecommunications Regulatory Authority (TRA) established rules restricting sections of social networking sites Facebook and Myspace that encourage dating. Other sections remained accessible.<sup>24</sup>

The Uganda Communications Commission directed ISPs to temporarily block communication on social networking sites including Facebook and Twitter in April, 2011 in response to growing unrest.<sup>25</sup>

In March 2011, Twitter was blocked in Cameroon in an effort to prevent the opposition from engaging in Twitter activism.<sup>26</sup>

Twitter was blocked in January 2011 in Egypt in an effort to stop protesters from using the site to organize and to get information out to the public.<sup>27</sup>

**1.4.2 Privacy and Data Protection**

No legal issue is as closely associated with social networks as privacy and data protection. Longstanding privacy norms are being increasingly challenged by the massive popularity of social networks that encourage users to share information that in a previous generation would have never been made publicly available for all the world to see. Moreover, rapid technological change and the continuous evolution of online sites and services create enormous difficulty for regulators unaccustomed to moving at Internet speed.

At the 2010 Data Protection Commissioners Conference, delegates were told about recent studies in the United States and New Zealand that both found that people want it all: robust, interactive social networks and privacy protection.<sup>28</sup> Experts pointed to two explanations to reconcile the desire to be openly online and maintain privacy. First, they noted that online social networks are merely social spaces that replicate what we commonly do offline, such as chatting with friends, gossiping with co-workers, and connecting with family.

In the offline world, these activities rarely raise privacy concerns since sharing photos or discussing recent activities is not perceived to be a privacy issue.

Once those activities move online, the privacy implications can become dramatically different.

Bringing offline social activities to the online environment raise a host of issues, including the notion of “collapsed context.” In the offline world, we interact with many different groups, such as friends, family, and co-workers, with conversations and information sharing that differs for each. In online social networks, the context for those different conversations is collapsed into a single space. Moreover, the information from online social networks never disappears and the context for a photograph, video or conversation from years earlier is often lost.

Second, privacy experts argued that social media companies make it too difficult for users to protect their privacy by establishing open privacy settings as the default. Facebook and other social media sites give users the ability to adjust those settings, yet the default settings have steadily pushed users toward greater openness, leaving hundreds of millions of users with the open privacy settings that Facebook selected for them.

The ongoing interest in privacy reinforce the view that there is still a role for regulation and the law, though privacy and data protection laws vary by

country. Although it will invariably lag behind the rapid pace of technology, it is important for companies to understand the legal limits on collecting, using and disclosing personal information and for users to know that the law stands ready to assist them if those rules are violated.

The best known social network privacy enforcement action occurred in Canada, where the Privacy Commissioner of Canada conducted a lengthy investigation into Facebook's privacy practices in 2008-2009. The Commissioner ruled against Facebook on several counts. For example, the Commissioner identified several concerns about third-party applications including a lack of information about third-party apps, the availability of too much personal information to third party developers without Facebook monitoring, inadequate disclosure to users about what is being disclosed, lack of consent, and lack of control over personal information with third-party developers.

The Canadian commissioner also raised concerns with account deactivation, where the account is effectively retained but inaccessible to the public. The Commissioner noted that "the longer an account remains deactivated and the information in it unused, the more difficult it is to argue that retention of the user's personal information is reasonable for the social networking purposes for which it was collected." Further, the Commissioner expressed concern that the difference between deactivation and deletion is insufficiently clear.

The Canadian case is not the only one to address Facebook-related privacy concerns. In the Republic of Korea, the Korea Communications Commission (KCC) requested increasing privacy measures from Facebook. If personal information is provided to a third party, Facebook needs to notify users of the purpose and the period in which the details will be used. Facebook was also asked to submit documentation on how it uses personal information for customized advertising and whether it's complying with measures to protect personal information.

In 2010, the German Data Protection Authority required Facebook to modify its Friend Finder application. Facebook agreed to inform users that, if they upload their electronic address books to Friend Finder, Facebook will store the information contained in such address books, and may use this information to generate email solicitations to join Facebook. Facebook also agreed to include a clearly-displayed opt-out link in

its unsolicited email messages, and will no longer include photographs from user profiles in such email messages.<sup>29</sup>

Google has also been the target of privacy enforcement. In 2011, the U.S. Federal Trade Commission (FTC) forced Google to implement a comprehensive privacy program and independent privacy audits for 20 years to protect consumers after Google's social networking site Buzz violated the FTC Act. This marked the first time an FTC settlement order required a company to implement a comprehensive privacy program to protect the privacy of consumers' information.<sup>30</sup>

In fact, the Google Buzz incident led to a global consortium of privacy and data protection commissioners engaging in co-ordinated action. In April 2010, ten privacy and data protection commissioners – led by Canadian Privacy Commissioner Jennifer Stoddart – released a public letter to Google CEO Eric Schmidt, expressing concern that the Internet giant was forgetting its privacy responsibilities.

The letter, also signed by the heads of privacy agencies from France, Germany, Ireland, Israel, Italy, the Netherlands, New Zealand, Spain and the United Kingdom, focused on the recent introduction of Google Buzz, a service that offered new social media capabilities.

It attracted the wrath of users and privacy advocates after Google automatically assigned users a network of "followers" from among people with whom they corresponded most often on Gmail. Google quickly altered the offending features, but the damage was clearly done, as privacy commissioners from around the world used the incident as the basis for a shot across the company's bow.

The joint effort may represent a major step toward the globalization of privacy enforcement. The difficulties associated with cross-border privacy enforcement has long been viewed as a particularly thorny issue in a world where data moves effortlessly across borders and private companies retain massive databases containing a myriad of personal information.

In fact, the most recent G8 statement from May 2011 on freedom and democracy, specifically identified the importance of privacy and data protection and the need to consider common approaches to the issue.<sup>31</sup>

*“The effective protection of personal data and individual privacy on the Internet is essential to earn users' trust. It is a matter for all stakeholders: the users who need to be better aware of their responsibility when placing personal data on the Internet, the service providers who store and process this data, and governments and regulators who must ensure the effectiveness of this protection. We encourage the development of common approaches taking into account national legal frameworks, based on fundamental rights and that protect personal data, whilst allowing the legal transfer of data.”*

The European Union has attempted to address the issue by establishing restrictions on the export of data, requiring that data transfers be limited to those countries with “adequate” privacy protections. Canada has adopted a different approach, eschewing restrictions on data exports but holding organizations accountable for the data they collect, regardless of its location.

Despite efforts to assure the public that these regulatory systems offered effective privacy protections, the reality has been that privacy rules are purely domestic creatures that end at the border. The joint letter signals a new approach to privacy enforcement, one based on greater cooperation and mutual recognition of common privacy principles.

In 2011, the FTC also reached a settlement with Twitter following privacy breaches. Twitter is barred for 20 years from misrepresenting to consumers the extent to which it protects the security, privacy, and confidentiality of nonpublic consumer information, including the measures it takes to prevent unauthorized access to nonpublic information. Twitter must establish an information security program to protect the security, privacy, confidentiality, and integrity of nonpublic consumer information. The program will be assessed by an independent third-party auditor every other year for 10 years. Twitter is required to maintain and report its privacy practices and policies. Each violation of the order may result in a civil penalty of up to USD16,000.<sup>32</sup>

Cloud computing also plays an important role in the privacy implications of social media. Cloud computing has already woven its way into the fabric of the Internet as Web-based applications allow users to word process, create presentations, and manipulate data spreadsheets online, Internet-based data backup services offer the chance to store mirror images of our computer hard drives, and every day hundreds of

millions of people use Internet services such as web-based email, photo sharing sites, or Facebook applications where the significant computing power resides elsewhere (in the “cloud” of the Internet). Social media services are interwoven with the cloud – all use cloud computing to store the billions of photographs, videos, and status updates.

Critics argue that the benefits of cloud computing - greater computing efficiencies and the accessibility of data and applications from anywhere - are offset by the privacy implications of lost control over our personal data. Countries with privacy law frameworks applicable regardless of the technology can import accountability requirements to cloud providers. So long as the data is collected or stored within the jurisdiction, privacy regulators can apply their laws over their operations.

In fact, more changes to privacy laws may be forthcoming. The European Commission is currently reviewing its Data Protection Framework and will update privacy rules to comply with the rise of social media.<sup>33</sup> The Commission intends to introduce new laws to give users greater control over their data on the Internet. Companies operating online will be required to comply with EU privacy laws, regardless of their location.

Social networking site users will have a legal “right to be forgotten” – a right to “withdraw their consent to data processing” and have their data permanently removed from websites, or to stop their data from being processed. All traces of information, including photographs, comments, and user profiles, would be permanently removed from the social network, as well as from any company storage. The “privacy by default” rule will reverse the current operating framework (privacy settings will be switched on and users would have to manually change them).

### 1.4.3 Free Speech

With hundreds of millions of people worldwide using social networks to express themselves, the link to free speech rules is readily apparent. As discussed above, some regulators have been called upon to order the blocking of social media websites in response to offending content. For example, in 2007, Thailand blocked access to YouTube in response to a video insulting the King. YouTube declined to remove the video after it was requested to do so, and Thailand responded by blocking access to the site.<sup>34</sup>

In January 2007, ISPs were ordered by a Brazilian court to shut down national access to YouTube until YouTube would remove a video of a Brazilian celebrity engaging in an intimate relation on a public beach. The court reversed the ruling the following day, and requested only access to the offending video be blocked until it would be removed.<sup>35</sup>

Blocking access to online content sometimes arises due to intellectual property concerns. In April 2009, Germany blocked access to music videos released by record companies on YouTube. YouTube and GEMA, the German organization that collects performers' and composers' royalties were unable to reach a new deal

regarding pay per use fees. GEMA was seeking a rise in fees from 1 cent to 12 cents per use. GEMA also accused YouTube of trying to conceal how many viewers viewed particular clips.<sup>36</sup>

The issue of blocking content is a sensitive one, since it may pit competing social and legal values that are difficult to reconcile. Given the critical role it plays in communication, culture, and commerce, most people now recognize the importance of Internet access. A recent report for the United Nations Human Rights Council takes Internet access a step further, however, characterizing it as a human right.

### **Box 3: Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression**

The report, written by Frank La Rue, the U.N. Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (an internationally regarded human rights expert who was once nominated for the Nobel Peace Prize), took the political world by storm when it was released in June 2011.<sup>37</sup>

The report explored the need to ensure that citizens have Internet connectivity and the rules associated with that access. As a result, it was highly critical of policies that block access to content, threaten to cut off Internet access due to allegations of copyright infringement, and fail to safeguard online privacy.

It noted "any restriction to the right to freedom of expression must meet the strict criteria under international human rights law. A restriction on the right of individuals to express themselves through the Internet can take various forms, from technical measures to prevent access to certain content, such as blocking and filtering, to inadequate guarantees of the right to privacy and protection of personal data, which inhibit the dissemination of opinions and information."

Given this starting point, the report is very critical of government policies around the world. It highlights arbitrary blocking of content in some regions and the imprisonment of bloggers in a number of countries. It notes that many countries have imposed liability on Internet providers if they do not filter, remove or block content generated by users that is deemed illegal. Others have imposed notice-and-takedown policies that often lead to the removal of content from the Internet and which are "subject to abuse by both State and private actors."

The report is also very critical of so-called graduated response policies that can result in people being cut-off from the Internet based on claims of infringement. It concludes that "cutting off users from Internet access, regardless of the justification provided, including on the grounds of violating intellectual property rights law, to be disproportionate and thus a violation of article 19, paragraph 3, of the International Covenant on Civil and Political Rights."

The link between privacy and freedom of expression is also discussed, as the report notes that governments increasingly use social networks to track individuals and access private conversations. It cites the obligation of governments to adopt effective privacy and data protection laws, including rights of access to personal information and safeguards for anonymous speech.

While the report adopts a critical tone, many governments were quick to laud it and "call on all states to ensure strong protection of freedom of expression online in accordance with international human rights law." The government response acknowledged the need for free flow of information online and that cutting off users from access to the Internet is generally not a proportionate sanction.



Government support for the report is consistent with the most recent G8 statement from May 2011 on freedom and democracy discussed above.<sup>38</sup> The statement prioritized Internet access, proclaiming “all over the world, the Internet has become essential to our societies, economies and their growth.” The statement continued:

*“The Internet has become the public arena for our time, a lever of economic development and an instrument for political liberty and emancipation. Freedom of opinion, expression, information, assembly and association must be safeguarded on the Internet as elsewhere. Arbitrary or indiscriminate censorship or restrictions on access to the Internet are inconsistent with States’ international obligations and are clearly unacceptable. Furthermore, they impede economic and social growth.”*

#### 1.4.4 Advertising and Marketing

Given their popularity, social media sites have emerged as popular forum for advertising and marketing. The challenge for regulators has been to determine how to adapt conventional advertising and marketing regulations to an online environment that poses significant new jurisdictional challenges. While the issue is new, some telecom and ICT and other regulators have crafted rules designed to account for social media.

For example, as of March 1, 2011 the United Kingdom’s Advertising Standards Agency (ASA) rules apply to online marketing messages including on social networking sites such as Facebook and Twitter feeds.<sup>39</sup> Expansion of regulatory powers of the ASA followed rising complaints in recent years regarding online marketing. Until ASA’s powers were expanded, it could not act to respond to online complaints.

Regulators may also be called upon to enforce anti-spam laws that increasingly involve social media based spam. In Canada, the Electronic Commerce Protection Act, which looks to the CRTC for much of its enforcement, impacts electronic communication practices including those which occur through social media applications. The Act prohibits the delivery of commercial electronic messages to an electronic address unless prior consent has been obtained from the recipient and the message is in the prescribed form.

The Canadian legislation creates an “opt-in” system whereby prior consent must be obtained from the

recipient in order to deliver a commercial electronic message, as opposed to the U.S. approach of an “opt-out” system where the sender can send the message without prior consent, subject to the recipient being able to “opt-out”. As a result the onus is on the sender to demonstrate consent was received prior to sending a commercial electronic message.<sup>40</sup>

In the United States, courts have held that Facebook posts (including walls and news feeds) are subject to CANSPAM Act. The ruling puts marketers on notice that their communications within online social networks may need to comply with the Act’s requirements, however how to comply poses challenges, given that the Act predates the rise of social media and focuses on concepts that apply more easily to email messages than to tweets.<sup>41</sup>

#### 1.4.5 Securities and Financial Regulation

Closely associated with advertising and marketing, securities and financial regulation is directly affected by the rising popularity of social media. Although securities and financial regulators operate in a different world from telecom and ICT regulators, there is significant overlap with respect to regulation of information communication. Indeed, securities and financial regulators are frequently at the forefront of establishing guidelines and rules on information disclosure practices that may have important parallels with telecom and ICT regulation.

Several securities regulators have taken note of the importance of social media and established new guidelines or rules specifically targeting the issue. Earlier this year, the Securities Exchange Board of India (SEBI) started a software-based monitoring of discussions on social networking sites including Facebook and Twitter.<sup>42</sup>

Canadian regulators have moved beyond monitoring online discussion. The Investment Industry Regulatory Organization of Canada Member Regulation Notice MR0281 states that all methods used to communicate including Facebook, Twitter, blogs, and chat rooms, are subject to the IIROC Dealer Member Rules. These rules include recordkeeping, suitability and supervisory requirements.<sup>43</sup>

In the United States, the Financial Industry Regulatory Authority established a Social Networking Task Force to study and provide guidance on how to ensure investor protection in 2010. FINRA rules

governing communication with public apply to social media sites sponsored by firms & registered representatives.<sup>44</sup> Securities and Exchange Commission and FINRA rules require firms to keep records of all communications related to broker-dealer's business done over social media (Rules 17a-3 and 17a-4 under the Securities Exchange Act of 1934 and NASD Rule 3110). If a firm recommends a security through social media, the requirements of NASD Rule 2310 regarding suitability are triggered. Firms must supervise interactive electronic communications under NASD Rule 3010 to ensure content requirements of FINRA's communications rules are not violated.

The courts have also been asked to address this issue. On February 10, 2011, the Federal Court of Australia held that a company and its sole director were responsible for statements made by third parties on the company's Facebook site. The Australian Competition & Consumer Commission pursued an action against Allergy Pathway including for misleading third party posts on the company's Facebook page.

The company was not responsible for the initial third party posts, however it became liable once it discovered the posts and took no action to remove them and to stop the content from being communicated to the public.<sup>45</sup>

#### 1.4.6 Election Regulation

Several election regulators have grappled with questions involving the use of social media during election campaigns contrary to established regulations. The importance of social media as part of the political process has become a common story around the world. During the 2010 Brazilian presidential election, all three presidential candidates actively used Twitter, leading to tens of thousands of daily tweets on the election by the general public.<sup>46</sup> In Ecuador, the President used Twitter to declare a national state of emergency.<sup>47</sup> In the Republic of Korea, social media, including Facebook and Twitter, was credited with having a direct influence on that country's 2010 election.<sup>48</sup>

Potential issues include using social media for advertising purposes contrary to statutory limits or the use of social media to disclose election results earlier than permitted by law. For example, in May 2009, the Mexican Federal Electoral Institute (FEI) ordered YouTube to remove a video defaming an incumbent senatorial candidate during his re-election campaign.<sup>49</sup> In Canada, Elections Canada has stated that s.329 of the Canada Elections Act prohibits transmitting election results when the polls remain open in parts of

the country and that the restrictions apply in all media, including broadcasting, the Internet and social media. The specific provision in question was challenged and upheld by a split Supreme Court of Canada. Two leading Canadian broadcasters have initiated a constitutional challenge to the validity of s.329.

#### 1.4.7 Access

The popularity of social media also raises many questions about access. Regulators may be asked to consider whether social media sites offer sufficient accessibility to those with disabilities or who are sight impaired. The Swedish Post and Telecom Agency (PTS) funded a survey on social media and disability. The survey results show that all social media networks have accessibility problems. The PTS is concerned that the increased use of social media by governmental bodies to disseminate information to citizens will lead to inequality in access to information for persons with disabilities. The PTS does not recommend using social media sites from a disability perspective.<sup>50</sup>

Access to social media sites such as Facebook in the workplace has emerged as a major legal issue. For example, in the United States several courts have been asked to consider whether employees that access social networking sites in violation of corporate policy may be in breach of the Computer Fraud and Abuse Act (CFAA).

In *United States v. Nosaj*, the Ninth Circuit held that "an employee 'exceeds authorized access' under s. 1030 when he or she violates the employee's computer access restrictions - including use restrictions." (i.e. social networking use restrictions).<sup>51</sup>

In *Lee v. PMSI*,<sup>52</sup> a federal district court in Florida dismissed a CFAA claim because the employee's alleged excessive use of the company computers to access Facebook was not alleged to have caused damage to the company's computers. The Court held that lack of productivity due to an employee accessing Facebook does not constitute damage to a computer as required by the CFAA. However, employers may have a CFAA claim by alleging that the employee infected the company's computer(s) with a virus that is traceable to Facebook or another social networking site. As a result of *Lee v PMSI*, an employer with a clear policy that prohibits use of company computers to access social networking sites for personal business may be able to state a claim under the CFAA that the computer system was damaged by a computer virus which resulted in a loss of at least US\$5,000 in value, and that company data was compromised.<sup>53</sup>

**Box 4: Key Questions for Regulators:**

1. Is your legislative framework technology neutral such that it applies to the online environment, particularly online social networks? Does your regulatory mandate touch on online issues?
2. Social media networks often involve elements of both telecom and broadcast. Is the regulatory agency responsible for both? Is the legislative framework consistent?
3. Advertising and marketing legal issues are a key part of the social media environment. Do these fall under your mandate?
4. Do the leading social media networks maintain a physical presence in your jurisdiction? If not, do you anticipate problems with enforcing potential rulings?
5. Have you considered developing best practices or general guidelines for social media use?
6. Have you developed public education programs to enhance public awareness and comfort with Internet use?
7. Is there scope to work with other national regulators or agencies to develop consistent national strategies on social media use and regulation?
8. Do you work with global counterparts to address social media legal and policy issues such as privacy and data protection?

## 1.5 *What Lies Ahead*

The emergence of social media as a powerful tool for communication, culture, and political advocacy shows no signs of abating. While regulators and regulatory agencies spent the 2000s thinking about their presence on the Internet including websites, email lists, and RSS feeds, today the focus is shifting to social media. For many stakeholders, a website is no longer enough. In this decade, there is a growing expectation that breaking news will be made available via Twitter, that consumer-facing information will be broadcast in both text and video format on YouTube, and that regulators will maintain an active Facebook page, complete with updated information and scope for public interaction.

Social media brings many potential benefits, including reaching a broader audience, developing trust and confidence of the public, and shifting toward less formal, but more informative interactions. Yet social media brings with it significant new challenges.

For those regulators seeking to establish a social media presence, it requires consistent attention, since outdated pages or infrequent activity may cause more harm than good. Given the many social media sites, it requires a strategic focus, as no organization can maintain a robust presence on all sites (nor is there a need to do so). In some jurisdictions, language issues may arise as regulators must consider whether to post in all official languages, as may be required by law. Perhaps most challenging, however, is the shift toward

the more informal, interactive, and timely social media environment that may represent a significant change from conventional, risk-averse public communications strategies.

Given the growing use of social media by stakeholders aiming to influence the regulatory process, regulators must also consider whether – if at all – to engage with stakeholders in the social media environment. Interacting with the general public in consumer-oriented spaces provides obvious benefits of increased public satisfaction and confidence. Interacting with stakeholders may have the opposite effect.

Even more challenging are the substantive issues raised by social media. This discussion points to many emerging legal and policy challenges including telecom regulation, privacy, free speech, advertising and marketing, securities regulation, electoral law, and access. Many of these issues may fall within the purview of national telecom and broadcast regulators who will be asked to consider whether existing legal frameworks can be effectively adapted to the social media environment.

Jurisdictional challenges create an added complexity to the social media policy issues since sites and services that are frequently located outside the jurisdiction. While enforcement is certainly possible – the privacy-related actions against Facebook in Canada and Germany provide evidence of that – applying domestic laws to a foreign social media entity is

invariably complicated and fraught with difficulties. Moreover, jurisdictional differences may also result in conflicts of laws as competing legal frameworks may be inconsistent with one another.

social networking, voice, e-mail, text messaging, and a wide range of content. With well over one billion social network users, they represent a crucial part of the Internet ecosystem and one that requires a forward-looking strategy from regulators worldwide.

Social networking platforms have the potential to become integrated communication platforms that offer

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  - <sup>18</sup> StopTheMeter.ca, Half a Million Canadians Against Telecom Price Gouging, [www.stophemeter.ca](http://www.stophemeter.ca).
  - <sup>19</sup> See e.g., Laura Payton, "Use-based billing court hurt economy: Clement", CBC News, <http://www.cbc.ca/news/politics/story/2011/03/01/clement-talks-ubb.html>.
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