THE INTERNET REVOLUTION

Raymond Shih Ray Ku†

I. INTRODUCTION

I am honored to write this essay on the state of Internet law to commemorate the twentieth anniversary of the Santa Clara Computer and High Technology Law Journal. It is fitting and appropriate that an entire section of this special issue is devoted to addressing the legal and policy challenges posed by a technology that did not exist at the time the journal was founded. Throughout history technological innovation has played and continues to play a major role in the development of law, most often by creating what Justice Cardozo described as the interstices or the space between existing legal rules and decisions.[1] Correspondingly, law's response influences what technologies are developed and how they are used. The importance of a forum for exploring and discussing these issues cannot be overstated.

When this journal was founded, society was struggling with the then emerging technology of the VCR. A year later, in 1984, the Supreme Court paved the way for a product that is now ubiquitous, one that has provided the public with a valuable means for obtaining and experiencing information and created new markets and generated great wealth for the consumer electronic and entertainment industries.[2] Today, we are struggling with the social, political, and legal implications of a world increasingly interlinked and mediated by computer technology, and lawmakers are constantly struggling with the legal implications of this new technology.[3] In this context, the

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† Professor of Law and Associate Director, Center for Law, Technology and the Arts, Case Western Reserve University School of Law.

1. *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 114, 129 (Yale University Press 1921).

2. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

3. Elsewhere I have argued for the importance of studying Internet or Cyberspace law as its own subject matter because it represents the study of the regulation of information in a world interlinked and mediated by computer networks. *See* RAYMOND S. R. KU, et al., CYBERSPACE LAW: CASES AND MATERIALS (Aspen Law & Business 2002) at 5-15.

history of the VCR is more than an example of the integral relationship between law and technology; it is a cautionary tale as well. While it appears in hindsight that the Supreme Court reached the "correct" decision regarding the VCR, at the time, the great weight of scholarly authority was to the contrary.[4] So how does one evaluate Internet law when one recognizes that no one, let alone lawyers, is prescient and capable of accurately predicting the impact of new technologies?[5] In other words, how does one evaluate the state of Internet law while the revolution is still occurring?

To engage in this analysis, this essay draws upon the framework for social revolutions provided by Crane Brinton as a means for making some preliminary judgments about the current state of Internet law and for providing guidance going forward.[6] Doing so does not suggest that one can simply map Brinton's anatomy of revolution directly onto Internet law. There are limitations to the metaphor and its application to what may be described as a technological and legal rather than socio-political revolution. Rather, recognition of the dynamics of revolution provided by Brinton's fever metaphor and outline of the evolution of revolution are useful measures for evaluating the state of the law even though if the fit is not perfect or universal. Moreover, unlike Brinton, I do not claim to describe without evaluating. In this context, I do not believe that such detachment is useful let alone possible. The choice of the framework as well as the examples to which it is applied reflects both conscious as well as sub-conscious biases and normative judgments. Nonetheless, this analogy with political revolution is proposed in the hopes of facilitating a dialogue on the state of Internet law including whether such a discussion is both possible and meaningful.

II. THE ANATOMY OF REVOLUTION

In his seminal contribution to the study of revolution, Crane Brinton analogized socio-political revolutions to fevers. According to Brinton, revolutions like fevers could be divided roughly into three stages.[7] The first stage involves the initial onset of the illness

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4. *See, e.g.,* Wendy J. Gordon*, Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors,* 82 COLUM. L. REV. 1600 (1982).

5. *Cf.* Frank H Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. Chi. Legal F. 207 (arguing that "Beliefs lawyers hold about computers, and predictions they make about new technology, are highly likely to be false.") *at* http://www.law.upenn.edu/law619/f2001/week15/future_of_ecommerce.html

6. CRANE BRINTON, THE ANATOMY OF REVOLUTION *passim* (1965).

7. *Id.* at 16-17.

including the conditions that made the system susceptible to the illness. The second stage is the fever itself, which "works up, not regularly but with advances and retreats, to a crisis, frequently accompanied by delirium. . . ."[8] According to Brinton, this stage culminates in a reign of terror and virtue after extremists seize power. The final stage involves convalescence including the breaking of the fever and is "usually marked by a relapse or two."[9] In providing this structure, Brinton was not attempting to provide a universal blueprint for revolution. Rather he was searching for commonalities in four specific "successful" revolutions: the English, French, Russian, and, to a lesser extent, American revolutions.[10] All of these revolutions already shared certain similarities in that each was made "in the name of freedom, were all directed against the tyranny of the few and toward the rule of the many."[11]

> In choosing the metaphor of pathology, Brinton was aware that the metaphor might be perceived as an implicitly negative view of revolution. After all: "[N]obody wants a fever. The very word is full of unpleasant suggestions. Our use of terms borrowed from pathology is likely, at the very least, to arouse in many readers sentiments which bar further understanding. We seem to be damning revolutions by comparing them with a disease."[12]

According to Brinton, however, this was not his intent.[13] He desired to maintain some form of scientific detachment – "to describe without evaluating."[14] While recognizing the negative implications of the metaphor and framework, Brinton was quick to point out the positive aspects of the fever metaphor as well. While it is often a condition we want to avoid, we are often better off having survived a fever. "To develop the metaphor, the fever burns up the wicked germs, as the revolution destroys wicked people and harmful and useless institutions."[15] Consequently, the metaphor should not influence whether one considers the fever as a positive/desirable or negative/undesirable force. That conclusion will be made based upon one's judgment of the underlying goals of the revolution.

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8. *Id.* at 17
9. *Id.* at 17.
10. *See Id.* at 21.
11. BRINTON, *supra* note 6 at 240.
12. *Id.* at 18.
13. *See Id.* at 18.
14. *Id.* at 20.
15. *Id.* at 18.

The same is true for Brinton's corresponding description of the course of each revolutionary fever. According to Brinton, all of the revolutions considered in his analysis, "are begun in hope and moderation, all reach a crisis in a reign of terror, and all end in something like a dictatorship . . ."[16] Much like the metaphor, what one thinks of this course will depend upon one's perspective on the underlying value of the revolution. One might consider the course of the fever or the path from moderate to extremist to reactionary as society returning to a desirable equilibrium point with or without assimilating changes brought about by the revolution. Or, one might consider these illustrations of revolutions in which the promise of the revolutions was ultimately undermined.

For the purposes of this essay, the relevant revolution is not technological that is the innovations in technology that fall under the broad heading of the Internet. Rather, advances in technology represent only the first stage of revolution—the necessary pre-condition and onset of illness for the fever that follows. After all, this essay is concerned with the state of the law rather than the state of technology. Accordingly, one may make a preliminary evaluation of the state of the law by asking descriptively whether we are at the onset of illness, undergoing the fever, or convalescing. In terms of analyzing a revolution in the law, the first stage would entail the recognition of a problem posed by advances in technology. The second would be exemplified by uncertainty in the formulation and application of legal rules and principles to the problem. The third stage could then be characterized by the settling of legal rules and expectations. Similarly, one may ask the related question of whether the law is responding to technological change and is in the process of, or already returned to a state of equilibrium after incorporating or rejecting changes promised by the revolution. Finally, how one evaluates the resulting descriptive conclusions or what one might prescribe going forward will depend upon one's normative evaluation of and commitment to the promise of the revolution.

III. THE INTERNET REVOLUTION

In light of the pervasiveness of Internet technologies and the diversity of legal subjects, it should come as no surprise that the current diagnosis is decidedly mixed. In some areas of law, we appear to be convalescing. In others, we are in the middle of the

16. BRINTON, *supra* note 6 at 24. Brinton distinguished the American Revolution from the others because he concluded it did not experience a corresponding reign of terror.

fever, and in some ways, we are still in the first stage of identifying whether a problem even exists. To illustrate this point, the following discusses two examples of the state of Internet law at the micro-level: personal jurisdiction over websites and copyright liability for file sharing as well as the macro-level question of whether it makes sense to even speak in terms of the law of the Internet or Cyberspace.

The case of personal jurisdiction over activities occurring in cyberspace is arguably one area of law in which the revolution appears to have played itself out. Considering that online activities including websites, bulletin boards, and chat rooms appear to occur both nowhere and everywhere, it is not surprising that the problem of what jurisdiction or jurisdictions may legitimately regulate such activities was evident almost immediately. During the second stage or the fever, positions on this question covered the entire spectrum. Some concluded that websites were subject to jurisdiction in any jurisdiction in which they appeared.[17] Still others argued that not only was it illegitimate for local authorities to regulate activities that occur in cyberspace, it was not practically possible.[18] And, in a moment of delirium, it was suggested that whether local authorities may exercise jurisdiction over a controversy stemming from online activities should be resolved along a sliding scale based upon the interactivity of online conduct.[19] Today, it would appear that we are in a period of convalescence. A consensus is developing among courts that accessibility and interactivity either alone or together are insufficient to support jurisdiction in a forum. Instead, more and more courts are choosing to evaluate online activities in the same manner that other activities are judged by examining whether defendants specifically direct their activities towards the forum.[20] In other words, the fact that it is foreseeable or that a defendant was aware that a passive or interactive website may be accessed in a particular forum alone is insufficient to support jurisdiction.

In contrast, the controversy over the legitimacy of Internet file sharing appears to be in the second stage of revolution. Revisiting Brinton's words, we appear to be working up, "not regularly but with

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17. *See, e.g.,* Inset Systems, Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996).

18. *See, e.g.,* David R. Johnson & David Post, *Law and Borders: The Rise of Law in Cyberspace,* 48 STAN. L. REV. 1367 (1996).

19. *See, e.g.,* Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F. Supp. 2d. 1119, 1124 (W.D. Pa. 1997).

20. *See, e.g.,* ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 712 (4th Cir. 2002).

advances and retreats, to a crisis, frequently accompanied by delirium. . . ."[21] While online services such as Napster and KaZaA popularized file sharing, the legal system is in the preliminary stages of grappling with the question of whether the individuals sharing these files are violating copyright law. While copyright holders have experienced some success in litigation against Napster[22] and some similar services,[23] they suffered a serious defeat in a suit against the most popular and successful heir to the peer-to-peer market.[24] Likewise, while the recording industry recently filed lawsuits against hundreds of individual file sharers with some of these suits being settled,[25] the fundamental question of whether file sharing is fair use remains unresolved.[26] If the almost unending stream of lawsuits, the ongoing efforts of the Recording Industry Association of America to subpoena the identities of individual file sharers from Internet service providers, and the persistence of file sharing are any indications, we are in a crisis. Whether file sharers or copyright owners are the ones suffering from delirium is an altogether different question.

Finally, one area of Internet law that is arguably only in the first state of revolution is the more general problem of whether it is useful to treat Internet law as a coherent subject. In the words of Judge Easterbrook, does the study of Internet law "illuminate the entire law," or should students merely study Internet questions as they arise in Torts, Contracts, and Property.[27] Ironically, while this was one of the earliest questions raised, thanks to Judge Easterbrook, we are still only beginning to explore it and its implications. By connecting the study of Internet law to the study of the limits of law as a regulator and the techniques for escaping those limits, Lawrence Lessig has provided perhaps the most thoughtful and developed response to

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21. BRINTON, *supra* note 6 at 17.

22. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

23. In re Aimster Copyright Ligitation, 252 F. Supp.2d 634 (N.D. Ill. 2002).

24. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd, 259 F. Supp.2d 1029.

25. *See, e.g.,* Amy Harmon and John Schwartz, Music File Sharers Keep Sharing, N. Y. TIMES, Sep. 19, 2003, at 1; John Schwartz, Recording Industry Warns 204 Before Suing on Swapping, N. Y. TIMES , Oct. 18, 2003, at B1.

26. *Compare* Jane Ginsburg, *Copyright and Control over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613 (2001) (arguing that it is appropriate to grant copyright owners' control over new markets for their works such as file sharing) *with* Raymond Shih Ray Ku, *Consumers and Creative Destruction: Fair Use Beyond Market Failure,* 18 BERK. TECH. L. J. 539 (2003) (arguing that file sharing is consistent with the fair use doctrine).

27. Easterbrook, *supra* note 5 at 207.

date.[28] In a far less developed and more limited way, I have suggested Cyberspace law represents the study of the regulation of information as the law evolves from models of regulation based upon physicality and the economics of the printing press to one governing the creation and dissemination of information across computer networks in which that information is both abundant and easily manipulated.[29] Still others, including this author, have at times left this question open for students to evaluate even as they study the subject.[30] Nonetheless, until more research has been done, I, for one, will withhold final judgment on whether there is a there, there, and what precisely that may be.

IV. CONCLUSION

It should be readily apparent that this essay is not a complete or exhaustive survey of the state of Internet law. Instead, it suggests a framework for conducting such a survey and provides some illustrations of how that framework may be applied. In large measure this process is descriptive, and does not discuss the normative questions raised in the development of Internet law, nor does it evaluate the state of the law in light of those normative considerations. For example, this essay suggests that the question of Internet jurisdiction appears to be in third stage of revolution. This description does not claim that the developing consensus in that area is "right," only that it exists. In particular, there are many normative concerns raised by commentators like David Johnson and David Post that have not been addressed. Similarly, while much of the doctrinal uncertainty regarding the ownership of Internet domain names has been resolved due to scholarship on the subject exemplified by the fine article from Gayle Weiswasser, [31] following this essay, as well as Congress' passing of the Anti-Cybersquatting Consumer Protection Act of 1999,[32] and ICANN's[33] adoption of the Uniform Domain Names Dispute Resolution Policy, this does not mean that these rules

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28. *See generally,* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (Basic Books 1999); Lawrence Lessig, *The Law of the Horse, What Cyberlaw Might Teach,* 113 HARV. L. REV. 501 (1999).

29. KU, *supra* note 3 at 14-15

30. *See, e.g.*, *Id.*; BELLIA, ET. AL., CYBERLAW: PROBLEMS OF POLICY AND JURISPRUDENCE IN THE INFORMATION AGE at 12-13 (Thomson West 2003).

31. Gayle Weiswasser, *Domain Names, the Internet, and Trademarks: Infringement in Cyberspace*, 13 SANTA CLARA COMPUTER & HIGH TECH. L.J. 137 (1997).

32. Codified as 15 U.S.C.S. § 1125(d) (2003).

33. ICANN stands for the Internet Corporation for Assigned Names and Numbers.

are not subject to criticism of, among other things, the legitimacy of the process that spawned them. A stable order is not necessarily a just order. When one considers Brinton's observation that his sample of democratic revolutions all began in hope and ended in dictatorship, those who see the promise of a legal revolution ushered in by the Internet should be vigilant of efforts to co-opt or derail the revolution and skeptical of stability.