

PROCEEDINGS

From Conduit to Content: The Emergence of Information Policy and Law

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Welcoming Remarks and Statement of the Issues

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I would like to welcome you to our forum, *From Conduit to Content: The Emergence of Information Policy and Law*. Information is a key component of today's political, social, and economic life. Depending on whose, if any, statistics you believe, information services and products account for either the largest or the second largest sector of the U.S. economy, someplace between 10 and 12 percent of the gross domestic product.

We are all familiar with the National Information Infrastructure's (NII) *Agenda for Action's* opening words: "Information is one of the nation's most critical economic resources In an era of global markets and global competition, the technologies to create and manipulate, manage and use information are of strategic importance to the United States."(1) As that quote suggests, and as the G-7 leaders reminded us only last weekend, the importance of information is certainly not limited to the United States. The International Telecommunications Union has estimated that by the end

of the decade global telecommunications and information and entertainment programming together will account for a \$3.5 trillion sector. It is already the world's largest single economic sector. Even this figure, however, does not represent the full importance of information and, therefore, the real significance of information in the world today. Anne Branscomb, who is on the panel with me this morning, has written that, "Information is the lifeblood that sustains political, social and business decisions."(2)

Certainly, noncommunications businesses rely as much on information services and products as do telephone companies and computer manufacturers, broadcasters, and software makers. During the 1980s, for example, the Commerce Department reports that U.S. businesses alone invested more than \$1 trillion in information technologies. And the Vice-President and the Secretary of Commerce have crisscrossed the country saying that between one-half and two-thirds of the U.S. work force is in an information-based job. This explosion in information technologies, services, and businesses has been called an "information revolution." It has occasioned literally thousands of conferences, articles, on-line discussion groups, new words, new phrases, and new metaphors to capture the change that seems to be enveloping us.

Much of the attention paid to this revolution has certainly focused on its impact on government operations, all the way

from the claims of the Vice-President's National Performance Review to the new congressional Internet presence. But there has been comparatively little attention focused on the impact of these changes on the law-making and the policy-making activities of the government concerning information itself.

In 1934, Congress created the Federal Communications Commission (FCC or Commission) and provided it with a simple mandate, "to make available, so far as possible, to all of the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges."⁽³⁾ To help it in this task, Congress gave the Commission these very helpful directions: Those regulations were to be guided by public convenience, interest, or necessity. We can argue about the extent to which Congress made the right choices in 1934 and the extent to which the FCC has fulfilled that mandate since then. But the simple fact is that today, sixty-one years later, Congress and the nation face a wider range of issues, concerning a larger range of industries and interests, that come within the jurisdiction of a broader array of government entities.

Just consider what *PC Week* magazine called the "virtual alphabet soup" of government agencies with jurisdiction over some facet of information.⁽⁴⁾ Take the Information Infrastructure Task Force (IITF or Task Force) for example. The Task Force itself and many of its key components are chaired by officials from the Department of Commerce, joined by their colleagues from the Office of Management and Budget, the Department of the Treasury, the Advanced Research Projects Agency, and the Department of Health and Human Services. Other seats are held by the Departments of Agriculture, Education, Energy, Housing and Urban Development, Interior, Justice, State, Veterans Affairs, the CIA, the EPA, the Federal Trade Commission, the General Services Administration, the National Economic Council, the National Science Foundation, the White House Office of Science and Technology Policy, and we have not even mentioned the Vice-President, the Clinton Administration's principal spokesperson on communications and information issues. Then we turn to Congress and its committees and agencies, and the federal courts. Then we could look at state, local, and multinational agencies.

In the face of the issues and the variety of agencies that deal with them, the hypothesis we examine today is the following: That the legal and regulatory issues posed by the creation, manipulation, storage, transmission, and use of information are many and complex; that the information is governed by a widely disparate and often outdated set of laws and regulations that deal with intellectual property, privacy, free expression, international trade, antitrust laws, government investment in and provision of information, and dozens of other areas of law and policy; that these regulations are promulgated and enforced by a wide variety of agencies and policymakers and affect an extraordinary diversity of information users and providers in an increasingly global market.

Yet the 1934 Act itself remains substantially unchanged, and the process of government policy making concerning information, while certainly supplemented by the IITF, has undergone little revision to face the demands of the "information revolution." Now, the hypothesis may be incorrect. It may be exaggerated. The variety and substance of the issues may not be novel. The agencies may not be newcomers. The breadth of industries affected may not have expanded at all or expanded as much. The economic importance of the industries, the sectors that information regulations and policies affect, may not be nearly so significant as I have suggested.

These are certainly the issues that we will be discussing today. During the first panel we will consider what features of information are important, vis-à-vis government policy making, and whether or not those features benefit from a regulatory response. Is their importance really new? Is it simply newly recognized, or is it just a myth?

In the second panel, we will ask: How has and should the government respond to these issues? For example, should the FCC be expanded? Should it be abolished? Should it be combined with the Copyright, Patent, and Trademark Offices? Should we create a data-protection registrar or perhaps a White House Office of Information? Is the government's role diminished, or should it be, in light of the power, proliferation, and diversity of new information technologies and services?

This last inquiry, I believe, is extremely important in light of the Administration's apparent interest in new regulatory mandates, whether we are talking about privacy, intellectual property, or universal service. Not one of the Task Force bodies, at least to my knowledge, has looked at the information issue and determined that new regulations, new restrictions, or new laws are unnecessary. And not one of the Task Force working groups, subgroups, or advisory

committees is charged with examining the role of the First Amendment and its constitutional commitment to realizing the benefits of expression without government regulation.

The expansion from 1934 to today, from communications to information policy making, from conduit to content poses tremendous challenges. At minimum, as Henry Geller has written,⁽⁵⁾ if we are to face those challenges, the Information Age demands that we put our policy house in order, and it is precisely that important process that we address today.

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(1)The National Information Infrastructure: Agenda for Action, 58 Fed. Reg. 49,025

(1993).

(2)Anne W. Branscomb, *Global Governance of Global Networks: A Survey of Transborder Data Flow in Transition*, 36 Vand. L. Rev. 985, 987 (1983).

(3)Communications Act of 1934, Pub. L. No. 416, 48 Stat. 562 (codified as amended in scattered sections of 47 U.S.C.).

(4)Kimberly Patch, *Government Sets NII Rules: Agencies Shape Policy; Standards;*

National Information Infrastructure, PC Wk., Dec. 13, 1993, at 141.

(5)*See generally* Henry Geller, 1995-2005: Regulatory Reform for Principal

Electronic Media (1994). Mr. Geller is a Markle Foundation Fellow. He is the former General Counsel of the FCC, and the former, and first, Assistant Secretary of Commerce and Director of the National Telecommunications and Information Administration.