

# The Emergent Global Information Policy Regime

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## Introduction: The Processes of Emergence

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Just as diverse strands of economic thought dealing with information, communication, and culture have come together in the economics of information, so many different types of law and regulation can now be referred to under the umbrella term of ‘information policy’. One of the first bodies of theory to be used to analyse information policy at the global level, and one of the most useful, has been regime theory. Developed by scholars of international relations, a subfield of political science, regime theory offers a theoretical and conceptual framework for dealing with regulatory systems that include informal as well as – or instead of – formal bodies of law. Regime theory provides a way of operationalising the insight that code and culture are as important to de facto law and regulation as are matters of state.

For reasons elaborated upon in Chapter 2, regime theory is particularly apt for analysis of information policy. While there are extensive literatures on each of the strands of which this regime is comprised, such as e-commerce and intellectual property rights, this volume provides a foundation for looking across the landscape for the shared features that characterise the regime overall. Doing so is necessary in order to fully understand developments in response to different policy problems as well as the precessive effects of interactions of policy decisions in each area with each other. It enables a shift in analytical scale to an order of granularity that makes it possible to see the shape of overarching trends. Because the global information policy regime is still developing, only some of its features are both consensually agreed upon and explicit, while others are implicit and still others remain sites of struggle. In order to develop a framework through which to understand the complex and multiple causal processes determining those features,

the chapters of this book focus on the very processes of regime formation themselves.

Regime formation is an example of what Brian Kahin describes in Chapter 3 as codification, the process through which knowledge and the social practices in which it is embedded become consensually accepted and reified into the infrastructures of institutions, technologies, and the law. Codification involves the translation of tacit knowledge into explicit knowledge in order to maximise its use and reuse through structuring and systematization. Elements of codification are familiar to students of regimes: a common vocabulary, shared values and goals, predictable procedures, transparency of the legal and regulatory environment, and consistency across geopolitical boundaries. The speed with which digital information has become codified around the internet, the intensity of its codification, and the way in which the internet has influenced codification in other realms illuminates the relationship between codification and infrastructure and makes it possible to view codification processes across realms synoptically. Kahin's chapter thus draws attention to broad sociological processes that underlie the various types of decision-making important to the formation of the global information policy regime.

Because so much about our informational environment is qualitatively new, it is tempting to think that the nature of institutions and legal systems for that environment must also be new. Certainly many have suggested that the development of a system of global governance for the internet via Internet Corporation for Assigned Names and Numbers (ICANN) is without historical precedent, but Milton Mueller and Dale Thompson point out in Chapter 4 that there are many parallels with the processes by which a governance system for the earlier global communication technology of satellites was developed. Both involved technologies with global reach incubated in the US military and then diffused as a result of privatisation, the formation of new international organisations, negotiations between the public and private sectors, and a combination of traditional and innovative approaches to policy-making and implementation. While the current role of ICANN in the global information policy regime is controversial, the comparison with early INTELSAT history suggests that the effort to avoid governmental influence is likely to fail, even private sector governance will become even more governmental in nature, and the regime that results will not necessarily be liberal. One implication of this analysis is that formal processes of government remain critical to the formation of the global information policy regime even in their absence, and even when

they fail. Another is that the study of legacy law remains valuable – even necessary – as law and politics evolve in response to changing conditions.

There are differences among regime theorists as to whether the focused exercise of power on the part of nation-states or the diffuse development of epistemic communities matter more to the shaping of regime features, but J. P. Singh in Chapter 5 adds business strategy as a third force. While the conditions under which global businesses operate are indeed changing, the uncertainty generated by this situation is extreme enough that – as would be suggested by complex adaptive systems theory – often businesses revert to past habits as a means of negotiating the turbulence. Territoriality (dominance of national markets) and exclusion (a preference for serving the needs of large institutional telecommunications network users such as governments and transnational corporations) are two traditional policy principles that currently provide a drag upon the speed of change in the area of global information policy and thus provide support for those who predict that new regime features will only serve to reinforce existing political and economic relationships.

Assertion of regional preferences, however, may serve additional purposes beyond reconfirming territoriality. Dorothee Heisenberg and Marie-Hélène Fandel in Chapter 6 introduce regional competition for the hegemonic role in regime formation as another process affecting the ways in which the global information policy regime is being shaped. They argue that had the European Union not asserted itself in the area of data privacy, there would have been no genuine policy alternatives available to the global community. Further, a focus on the territorial assertions of nation-states or regions elides the complexities of interactions between domestic and international decision-making as they occur at the interface of national governments. Identifying areas in which there is disagreement within dominant nation-states – often occurring as a result of differences between the goals of business and those of government – may as a result be a means by which weaker nations may effectively exert influence on the shape of the emergent global information policy regime.

Another process with enormous impact on the formation of the global information policy regime is a restructuring of property rights in the information economy. As D. Linda Garcia explains in Chapter 7, the technological change that has resulted in a networked information infrastructure created enough opportunities for economic gain combined with uncertainty regarding the allocation of resources and distribution

of wealth that it is causing a change in the nature of the very system of property rights. Just how property rights will ultimately be structured in the network environment is still, however, a matter of intense conflict. Four case studies – passage of the Telecommunications Act of 1996, implementation of that act, the evolution of network peering arrangements, and the open source software movement – demonstrate the range of alternative types of arrangements being explored, the types of new and incumbent players involved in the struggle, and the tactics being employed.

The elite decision-making processes of formal inter-governmental institutions of course remain important to the emergent global information policy regime. Inevitably, however, such processes are affected by, and provide a venue for, the informal processes of epistemic community formation and change. The disjuncture between the two types of processes means that attempts to structure formal decision-making in such a way that there is effective representation of the interests of developing as well as developed countries – and the values of social welfare as well as those of profit and efficiency – may still fail in the face of the power of the epistemic community. In Chapter 8 Derrick Cogburn points out that governments from countries in the developing world have been among the most active proponents for orienting the global information policy regime around social rather than economic goals but have so far been unable to meaningfully affect the outcomes of pertinent international conferences. Using a typology of stages of elite conference planning, convening, and follow-up, each with distinct modes of involvement, Cogburn argues that it is the failure of those from the developing world to effectively participate in knowledge transfer and the constructivist processes of knowledge formation that account for the relative inattention to social concerns in the course of information policy regime formation.

Legal innovations are creating a contract-based system of governance for the internet, demonstrating the widening scope for private sector decision-making among the processes by which the global information policy regime is being formed. In Chapter 9, Hans Klein examines how the private organisation of the Internet Corporation for Assigned Names and Numbers (ICANN) as a ‘chosen instrument’ of US policy has been able to use control over technical decision-making for critical aspects of the internet to develop a foundation for a complete regulatory system. This system, still highly contested and not yet fully developed is, however, at odds with national governments in significant ways. Klein argues that if ICANN is permitted to expand upon its regulatory functions,

issues of legitimacy, representation, equity, and fairness must also then be addressed.

The centrality of private sector decision-making in the internet environment in turn provides a tool by which governments can extend their regulatory range within the emerging global information policy regime. The existence of internet service providers (ISPs) as gatekeepers for internet content and internet-reliant activities has inspired the additional legal innovation – first used by repressive governments such as those of Saudi Arabia and China that tried to stem the free flow of information – of requiring ISPs to serve as regulatory agents of the nation-state. In Chapter 10, Jonathan Zittrain analyses the appearance in US law of a requirement that ISPs use their control over access to the internet to regulate its use as a medium for pornography, often historically the subject of regulatory experiments later extended to many other types of content. The Digital Millennium Copyright Act (DMCA) already treats ISPs as regulatory agents of the state in the area of intellectual property rights, and ISP terms of service and acceptable use agreements on their own extend the domain of control over internet content and behaviours even further through contractual means. Similar moves can be found in the laws of other nation-states, and the success of US legal practices in the international market for legal forms suggests this trend is likely to be significant among the processes by which the global information policy regime is being formed.

A final type of process that has had a surprising and unprecedented amount of influence on the emergent global information policy regime is individual decision-making. There was not room in this collection for full-chapter treatment of this regime formation process, but Klein's discussion of the extraordinary impact of Jon Postel on the regulatory structure of the internet provides a striking historical example. As a graduate student Postel was asked to develop an addressing system for the then-nascent internet; as the system grew, he retained that responsibility until the addressing structure he devised became a matter of global policy. In another example, the Real-Time Blackhole List, created by 'private sheriff' Paul Vixie as one of several efforts to reduce the amount of unwanted e-mail, offers a list of unwelcome e-mail addresses to which service providers can subscribe. Network administrators can, without the knowledge of either their users or of users of the target e-mail addresses, delete all e-mail coming from designated sites. While reducing spam in general might receive wide approval, unwelcome e-mail addresses might be identified on the basis of political preference, too-canny shoppers, or simply by being associated with others identified

as unwelcome within a large institutional setting such as a university. In effect, the Real-Time Blackhole List provides a privately-run and highly effective censorship system, referred to by Zittrain as the 'internet death threat'. This type of individual activity represents a new generation of policy tools used by private parties able to enter the regulatory vacuum with fewer legal and technical barriers to action than faced by their public counterparts. As with the governance functions of a private organisation like ICANN, regulatory actions of individuals also raise questions about the circumstances under which a private entity serving a policy function on the internet ought to be treated as a public entity and subjected to the limits – including public oversight – placed upon such entities.

As a group, the authors in this collection focus on a wide variety of specific policy issues to demonstrate their arguments regarding the processes of regime formation. Kahin uses the example of patent law, Mueller and Thompson compare the early history of the satellite and internet sub-regimes, Singh looks at telecommunications regulation, Heisenberg and Fandel examine data privacy, Garcia explores several different infrastructure-related property rights questions, Cogburn looks at decision-making for e-commerce, Klein reviews internet regulation, and Zittrain examines content controls, beginning with pornography. Each of these involves a sub-regime that contributes to and manifests the emergent global information policy regime. Across these sub-regimes, shared features become visible:

- *What you see is not all that you will get.* Several of the regime formation processes discussed in this book are setting up policy environments not yet fully actualised. ICANN can go much further in exerting control over non-technical aspects of internet use, for example, and there are many additional ways in which nation-states can use ISPs as regulatory agents. As is happening with the domestic information environment within the US, in some cases concerns that are relatively extreme in nature (e.g., the pornography discussed in Zittrain's chapter here) justify a transformation in regulatory stance that can then be applied to quite other types of content or behaviours once use of the policy tool or principle has been accepted. This suggests that nascent trends for the global information policy regime should be a matter of interest to the general public and not just specialists.

- *Key regime features are not always visible.* Some elements of the emergent information regime are quite visible, as in the emphasis on

transparency or global debates over treatment of e-commerce transactions. Often, however, such features are symptoms and not causes; they are fragmentary manifestations of underlying shifts in the fundamental structuring of social relations that are much more difficult to identify. The restructuring of property rights, for example, is well underway but little discussed, often hidden behind specific legal or regulatory problems as they surface within the precedential lenses of legacy law.

- *Policy isn't just about the global information infrastructure – it helps create that infrastructure.* Infrastructure architecture and policy are developing interactively. Despite utopian claims to the contrary, it is precisely the technological features of the internet that make regulation possible and it is technological change that is catalysing regime features such as the restructuring of property rights. Thus while policy-making certainly affects the paths along which the infrastructure develops, those paths in turn also drive policy change. Some regime features require technological innovation in order to be fully implemented – or resisted. Acknowledging interactions between technological and legal development does not require technological determinism. Rather, as Singh puts it (see Chapter 5), a 'technologically contextual' position is taken in this book that acknowledges the mutually constitutive interactions between technology and society and the particular importance of technological innovation for political and legal change during this period.

- *Social processes must be 'unbundled' for analytical and policy treatment.* One of the striking features of the 'informatised' environment is that many products and processes previously seen as indivisible wholes are now being 'unbundled' for economic, legal and institutional purposes. Different types of telephone service, for example, have been unbundled from each other since the 'divestiture' of AT&T early in the 1980s, and today vendors of digital libraries often unbundle various features of scholarly journals (e.g., citation, table of contents, abstract, full text, and links to references) for separate sale. So, too, social processes that are the subject of information policy must be unbundled for analytical and regulatory treatment today. Thus Singh argues that changes in corporate form do not necessarily equate with new business strategies, and Klein illuminates the ways in which internet domain names are not unitary entities but, in fact, bundles of different types of rights and responsibilities that could and perhaps ought to be unbundled for policy treatment. Garcia models the way in which such unbundling can



make it conceptually possible to identify large-scale structural processes otherwise invisible from the ground.

- *Despite claims to the contrary, nation-states remain important.* Nation-states are key to the regime formation processes described in this book, though not always directly. The United States continues to hover over ICANN and could reassert its power globally through that forum, and the governments of European nation-states continue to affect the global regime via the European Union and through aggressive application of national content constraints on globally distributed information. Shifts in the nature of property rights and other codification processes are backed by the authority of the nation-state. Nation-states are extending their effective reach through the use of private sector entities as regulatory extensions. The ability of the nation-state to wield its heft has clearly become easier since the reassertion of national security as a dominant regime value post-9/11.

- *All nation-states are not created equal.* At the moment there are three classes of nation-states from the perspective of their relative impact on the nature of the emergent global information policy regime. The US stands alone in the degree to which it has been playing a hegemonic role. As the nations in the European Union (EU) increasingly act in a federated manner, however, EU positions are becoming more important; global discouragement and dissatisfaction over US military activities and the extremity of policy shifts – often dealing with information – since 9/11 may ultimately enhance the ability of the EU to effectively counter the US. Or it may not; at the time of writing it is still impossible to foresee the outcome of current US actions and reactions to them. The third group of nation-states from the perspective of impact on the emergent global information policy regime is comprised of developing countries. This group has offered two types of inputs into information regime formation processes. On the progressive side, they have been active proponents of placing issues of social welfare at the top of the value hierarchy governing decision-making. On the conservative side, some developing countries have put in place policy innovations that are described by many as repressive. Unfortunately, as the chapters by Cogburn and Zittrain in this volume respectively illustrate, progressive inputs from the developing world in the form of principles and norms have had little effect on the emergent regime, while repressive innovations in concrete policy tools by developing countries are having greater impact.

- *More than has been the case in other examples of regime formation, non-state actors are also playing significant roles.* Corporations in the private sector are clearly the most important among the non-state actors in information policy regime formation processes. They play a number of roles – as lobbyists for the dominance of particular values, venues in which decision-making of structural effect takes place, creators of entities such as ICANN that fill public sector regulatory vacuums, and regulatory agents of the state. Indeed, much of the story revealed in these studies of regime formation processes is about negotiations between the public and private sectors. Other non-state entities are also involved: traditional types of international organisations such as the World Intellectual Property Organisation (WIPO) and the World Trade Organisation (WTO), widely discussed elsewhere, do continue to serve as venues – often providing the detail of sub-regimes – through which the overarching regime operates. While there is a growing literature on the role of non-governmental organisations (NGOs) in international affairs, however, the only example of successful influence on the emergent global information policy regime mentioned by the authors collected here is in the area of data privacy. And the technological features of the internet make it possible for single individuals to function as de facto regulators.

- *The legal infrastructure itself is expanding as a result of the emergence of the global information policy regime.* Just as one of the changes wrought by the transition from an industrial to an information economy was expansion of the economy through commodification of informational processes (see the chapters by Braman and Garcia), so the legal infrastructure is expanding. There are several ways in which this is coming about: It is deepening through private regulation and use of private sector entities as agents of the state, and broadening on an ad hoc basis, and becoming enriched with the challenge of contextual rebalancing and recalibration. Even private sector entities take on governmental features over time – only without the requirements of equity and fairness applied to formal legal systems.

- *The emergent global information policy regime presents challenges to the very nature of governance.* There are at least four ways in which the processes of regime formation and the features of the emergent regime are diverging from traditional practices of governance. (1) Several different definitions of citizenship are in play; in addition to defining citizenship in traditional geopolitical terms, the current approach to data privacy suggests the role of citizen may be played by personal data alone, and

the governance approach being used by ICANN suggests the notion of defining citizenship in shareholder terms. (2) The techniques that accomplish governance by contract replace traditional notions of political allegiance and compliance with the norms and principles of the law with a series of flow-down commitments. (3) Traditional notions of representation in decision-making of constitutional importance are being replaced by representation according to the level of financial commitment by stakeholders; even government interests in particular policy positions can be described as those of shareholder/owners. (4) Ownership of regime governance mechanisms itself, discussed here in the case of ICANN but also exemplified by control over such things as international negotiation fora and financial markets, is a matter of contestation.

- *The role of procedural constraints upon decision-makers is declining in the processes of information policy regime formation.* There is a several hundred year history of development of procedural constraints upon the potentially unbridled decision-making of those in power – including checks and balances put in place within government, representation of views of those governed in decision-making, due process, and decision-making transparency – that is being reversed. Corporate actors of course operate under far fewer responsibilities to constituents and process than is the case of democratic governments and thus can move not only more freely but also more speedily. Individual actors such as those who enact the ‘internet death penalty’ have even fewer constraints. Even within government, the drastic increase in presidential power in the US relative to that of Congress, the judiciary, or the citizenry, also manifests the increase in unconstrained decision-making on matters of information policy.

- *Since no policy stands alone in either implementation or effect, analysis of the information regime must take policy precession into account.* While any single policy issue is detail-ridden and must be examined in depth in order to achieve a resolution, in order to fully comprehend even one issue each must be contextualised within the broader context of issues with which it interacts. The concept of policy precession refers to those interactions – the effects of laws about data privacy, for example, revolve on an axis affected by laws regarding surveillance, and decisions regarding jurisdiction for e-commerce purposes revolve on an axis affected by how an informational citizen is defined. In-depth analyses of single policy issues remain fundamentally important to an understanding of the processes by which the global information policy regime is coming into being and the features being put into place. Complete

analysis, however, requires two additional steps: examination of the precession among policy issues and investigation of the effects of such precession across the entire policy domain.

- *While these processes interact, however, they do not necessarily proceed at the same rates of change.* One of the important reasons for unbundling analysis of the social processes that are the subject of information policy is that different facets of such processes often unfold at different rates. The time differentials across the social processes involved are themselves the source of many of the tensions that need attention from policy-makers. As Garcia and Singh suggest in more detail in this volume, change in the formal legal system may fail if change in corresponding forms of infrastructure lags behind.

- *There are both continuities and discontinuities with the past.* While the contemporary situation is often described as qualitatively new, parallels can be drawn between regime formation and implementation processes of the emergent global information policy regime and those of related regimes, such as those of the wired telecommunications network and of satellites, in the past. Legal innovations are appearing, but many traditional types of policy tools and approaches remain in use. Whether the governance techniques in play are innovative or traditional, it currently appears that economic and political relations of the past will be reproduced in the global information policy environment of the future.

The fact that regime theory has utility for analysing the emergent global information policy regime does not mean that understanding that regime is easy. Multiple processes interact in the course of regime formation, involving a wide range of types of players, and many of these have not historically been the subject of policy analysis. As Kahin reminds us, regime formation is only one among the many codification processes underway as a result of, and manifested in, information infrastructure, content, practices, and institutions. While it may be the fancy of many that policies are always the result of intention, Mueller and Thompson make clear that policy can also result from sheer chance and inadequacy in the face of complexity. This book is devoted to providing conceptual tools and empirical evidence for use in analysis of the processes by which the global information policy regime is emerging. It is only with clear and comprehensive analysis based on empirical detail that a regime can be built that adequately attends to the range of values of importance in the building, regulation, and use of the global information infrastructure and the content it carries.