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Demand for Information Services: A Time Allocation Approach to User Fees Nancy V. DeWath.....	51
Online Communication Using Satellite, Video, and Computers Peter Simmons.....	54
Intermediary Searchers' Satisfaction with the Results of Their Searches Carol Hansen Fenichel.....	58
Beyond Descriptive Statistics: A Methodology for Evaluating Online Searcher Performance James W. Bourg.....	61
<b>DESIGNING FOR RETRIEVAL AND AUTOMATED PROCESSING</b>	
Evaluation of Library Retrieval Software Carol Tenopir.....	64
Use of an Interactive Package for the Design of Interactive Display Screens Provides Control by Non-Programmers Christine L. Borgman.....	68
3RIP-COM: Integrating Information Retrieval and Computerized Conferencing Mats G. Lindquist.....	71
ISI's Online Serials Control System Theresa H. Rosen and Ira-Joel Sartorius.....	74
Development of a Personalized Information Retrieval System by Using APL Programming Language Kimio Hosono.....	77
Justifying an Automated Library System: A Case Study Mary Nash and Sandra Hession.....	80
An Intelligent Terminal for Access to Heterogeneous Chemical Information Systems Aren J. Horowitz, Donald E. Eastlake III, and David Low.....	83
<b>EVALUATING LIBRARY AND INFORMATION SERVICES</b>	
Evaluating a Computer-Based Information Service Paul H. Addison and Lawrence A. Woods.....	86
A Comparison of Two Current Awareness Methods Kathryn Chaloner and Ann de Klerk.....	90
Evaluation of NOAA Library and Information Services Elizabeth J. Yeates, James R. Stear, and Salvatore L. Costabile.....	94
<b>TEXT AND DATA STORAGE AND TRANSMISSION</b>	
Compression Techniques for Document Storage and Transmission George R. Thoma.....	97
Microfilm vs. Optical Disc as Storage Medium for Document Retrieval and Dissemination Surachai Suthasinekul.....	100
Text Storage and Display via Videodisc Peter B. Schipma and David S. Becker.....	103
The Policy Implications of the Use of Cable Television for Data Transmission Eileen M. Trauth, Denise M. Trauth, and John L. Huffman.....	106
<b>PROVIDING HEALTH-CARE INFORMATION</b>	
Policy Implications of Health Information Sharing Marta L. Dosa and Bissy K. Genova.....	109
Providing Information to Health-Care Professionals via Telecommunications John R. Kues.....	112
Rapid Information Transmission System for State Health Departments Jean F. Duff.....	115

# THE POLICY IMPLICATIONS OF THE USE OF CABLE TELEVISION FOR DATA TRANSMISSION

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**Abstract.** During the 1970's the applications of cable television technology gradually moved from exclusive focus on amplification and retransmission of broadcast signals to transmission of original television programming, such as the offerings on pay TV. During the 1980's the technological potential is available for cable television to shift from this emphasis on dissemination of television programming to an emphasis on transmission of data. The purpose of this paper is to explore the policy implications that derive from these new information dissemination purposes. Through an examination of case law and FCC rules, this paper explores the meaning of the terms "reasonably ancillary" and "common carrier" to determine the form in which the regulation of data transmission via CATV might take.

## INTRODUCTION

The electronic transmission of information has traditionally been divided into two categories: broadcasting and data transmission. In light of recent technological innovations, however, the distinction between the two is becoming less pronounced to the point that it is sometimes impossible to distinguish one from the other. Due to the fact that the United States' regulatory framework is based upon the existence of a distinction, the new uses of new information dissemination technology have and will continue to bring up grave issues of policy. Some of the policy implications of the use of a traditional broadcasting technology, cable television, for data transmission will be addressed in this paper.

### THE TECHNOLOGY OF INFORMATION DISSEMINATION

Traditionally, cable television is used to enhance broadcasting through the retransmission of telecasts to remote areas. Lately, however, there have been experimental installations in which CATV operators are involved in data transmission as well. An example is Warner Communications' cable system, QUBE, which has been operational in Columbus, Ohio since 1978. Using coaxial cables, QUBE, has been designed to provide two-way communication between the station and the viewer. The communication from the station to the viewer is a traditional broadcast or "cablecast"; the response from the viewer would be classified as data transmission. The typical cable structure is supplemented by a small terminal in the home that performs both channel selection and the transmission of audience response data. In addition to this type of transmission, the QUBE system also allows for the data transmission necessary in home security and fire alarm systems.

Another technology for information dissemination that calls into question the current policy framework is called "teletext" -- the generic term for systems of electronic document delivery. Its current media include the broadcast spectrum and the telephone network. The pioneering work has occurred in Great Britain. Two of the systems there utilize the broadcast spectrum (CEEFAQ and ORACLE). The third makes

use of the existing telephone network (PRESTEL). This latter system is also available in parts of the United States under the name VIEWDATA. Basic to these systems are a number of databases that can be accessed and read on one's home television screen. Because teletext is a form of data transmission that involves broadcasting technology it is included in the present consideration. An additional reason for doing so is that there is nothing, technologically, that precludes the use of CATV for the provision of this service.

Two other technologies that can be brought to bear on this policy arena are fiber optics and satellites. They both serve to enhance the data transmission potential and thus exacerbate the policy issues. Fiber optics can increase the amount of the data transmitted and the quality of the signal containing it. The potential of satellites to effectively shrink the distances between message origination and destination has already been evidenced for both broadcast and data transmission purposes.

Given the above types and possible uses of communication technology, we can now begin to explore the policy implications that derive from them.

### THE POLICY ISSUES

When the United States Supreme Court expanded the jurisdiction of the FCC to include CATV in 1968 with its ruling in *U.S. v. Southwestern Cable* (1), it did so because cable was deemed to be "reasonably ancillary" to broadcasting and thus susceptible to regulation: "There is no need here to determine in detail the limits of the Commission's authority to regulate CATV. It is enough to emphasize that the authority which we recognize today under § 152 (A) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." (2) (Emphasis added)

Following this grant of authority over cable television, the FCC issued its first set

of rules governing CATV in 1972, Cable Television Report and Order, (3) in which the Commission attempted to formulate "a cable program designed to allow for fulfillment of the technological promise of cable and, at the same time, to maintain the existing structure of broadcast television." (4) This two-pronged goal led the Commission to implement in 1972 a number of provisions, first, limiting the signals which could be imported into a market by a cablecaster, and second, requiring the cable system to make certain programming options available to its subscribers.

The 1972 rules were immediately challenged in United States v. Midwest Video Corp. (5) In this case the Supreme Court discussed the "reasonably ancillary" concept and upheld the FCC's ruling but could not articulate a majority opinion. The plurality opinion found the authority in Southwestern Cable to regulate CATV "with a view not merely to protect but to promote the objective for which the Commission had been assigned jurisdiction over broadcasting." (6) One of the more intriguing aspects of the 1972 rules was the requirement that public access channels be made available to anyone who wished to use them. (7)

These rules were again challenged in 1979 in FCC v. Midwest Video Corp. (8) On review, the high Court held that the mandatory access regulations exceeded legal bounds for two reasons. The first is because "the regulations were not reasonably ancillary to the Commission's jurisdiction over broadcasting, a jurisdictional condition established by past decisions of this Court." (9) The second rationale articulated by the Court for holding the rules invalid is that the rules "amounted to an attempt to impose common-carrier obligations on cable operators and thus ran counter to the statutory command that broadcasters themselves may not be treated as common carriers." (10) (It must be noted, however, that although broadcasters and cablecasters cannot be treated as common carriers, the FCC does have jurisdiction over common carriers in general, for example, the telephone companies.)

Having considered the history of CATV regulation, it would seem that if data communication is to fall under FCC authority, it could be regulated in a manner analogous to the way in which cable television is presently treated. This supposition is based upon two facts: in some areas data communication already is being distributed via cable and is under FCC jurisdiction over CATV; second, even if data transmission occurs via satellite, microwave, or telephone lines, it remains "ancillary" under the United States v. Southwestern rule, to over-the-air broadcasting and thus susceptible to FCC regulation.

In the wake of Midwest Video II, the FCC does retain the legal authority to regulate cable television; however, future regulation must respect two principles: first, the FCC must interpret "reasonably ancillary" in such a way that it does not impose regulations on cablecasters which it does not also impose on

broadcasters; and second, it may not limit the editorial discretion of the cable operator by requiring that he/she perform common carrier services.

However, the "public interest, convenience and necessity" standard of the Communications Act of 1934, made applicable to CATV in Southwestern Cable does allow the FCC to control some aspects of programming. Through a plethora of litigation, (11) the federal courts have arrived at the position that while the FCC may not control the content of broadcast messages, it may require programming in certain categories. This requirement is not viewed as a violation of the editorial discretion principle and fosters such regulations as the Fairness Doctrine and the Personal Attack Rules. Thus under public interest standard, the data communicator could be forced to comply with the same policy guidelines that broadcasters must meet such as the equal time rule, community ascertainment and the Prime Time Access Rules.

But is it likely that these regulations will be imposed intact upon those involved in data transmission? The only case to shed light on this question was adjudicated by the FCC in 1970. (12) This case resulted in part from a request by the American Newspaper Publishers Association that the FCC make clear its position regarding facsimile transmission of a newspaper via cable. In stating that the Fairness Doctrine and Equal Time Rule do not apply "to the distribution of printed newspapers to their subscribers by way of cable," (13) the FCC stated that: "The point is that we have no intention of regulating the print medium when it is distributed in facsimile by cable, but we do hold that the publication of a newspaper by a party does not put it in a different position from other persons when it sponsors or arranges for the presentation of a CATV origination which does not constitute the distribution of its newspaper." (14)

What emerges from the above statement is the position that different uses of the various communications media will be treated differently. Data communication via CATV for the transmission of a newspaper is not subject to the Fairness Doctrine, et al; however, data communicators using cable for the transmission of other textual materials may fall under the same regulatory strictures to which cable operators are subject.

This differences-in-the-medium approach is consistent with the regulatory posture of the Congressional communications subcommittees. Following the recent failed attempts to rewrite the Communications Act, Congress is presently considering proposals to deregulate radio. The proposed deregulation is a response to the notion that instead of applying all regulation equally to all electronic media (as was the approach when television was developed), various regulations should be applied, and the application should be handled differently, depending upon the unique aspects of the medium. Thus, for example, since radio is largely a

local medium and television is largely a national medium, the two should be treated differently; since scarcity of public resources is a factor in over-the-air television but not with cable television, the two should be treated differently; and since traditional CATV presents pictures which may be intellectually intrusive and readily accessible to children and data transmission presents words which must be consciously read, the two uses should also be treated differently. (15)

#### CONCLUSION

In conclusion, it can be repeated that the FCC retains regulatory authority over the use of CATV for data transmission no matter which way one argues. The specific policy question, then, is whether this use of cable technology will fall under the domain of broadcasting- or common carrier-type communication. An argument for the former derives from the fact that the technology involved, cable, has been traditionally regulated in this way. In support of the latter, it can be noted that the use made of that technology in this context is more akin to common carrier activity.

It is the viewpoint of these authors that resolving the policy issues requires that several distinctions be made. On the first level, it must be recognized that each medium for communication brings along its own unique qualities that should be taken into account. As such, the attempt to regulate one by complete analogy to another is not always appropriate. (This point was made during the hearings on Senate Bill 611 (16).) Thus, a differences-in-the-medium posture is recommended.

At the second level, a distinction between the different uses of the same technology should be made. Specifically, cable television, insofar as its functions in a capacity "reasonable ancillary" to broadcasting, ought to be regulated as it currently is. However, when the use of CATV is for data transmission new distinctions are required.

A finer distinction needs to be made at this point regarding the circumstances under which the data is transmitted. If the cable operator, in transmitting the data exercises "editorial discretion" regarding what is to be sent, then it seems reasonable that a form of control similar to that in existence for traditional CATV would be appropriate. Systems such as VIEWDATA and QUBE are seen as falling into this category. But for uses in which the cable operator merely provides the technical means whereby data is communicated, it seems that a common carrier perspective would be more appropriate. Thus, FCC regulations should be consistent with the policies governing other common carriers. The FCC took a hesitant step in this direction in July 1979 when in the Second Computer Inquiry (17) the agency adopted a tentative decision and notice of further rule making establishing a structure under which new and innovative computer services can be offered on a competitive basis by cable companies.

The perspectives presented in this paper

and the conclusions drawn from them have support in the telecommunications policy arena already: "Some government planners see cable (as) eventually divided into at least two regulatory slots: (the) common carrier with channels for lease to other programmers, (or the) cable franchiser himself programming only few channels for such services as pay cable and ancillary services (security, information retrieval, etc.) (The) notion is that divided regulation will evolve during (the) next decade." (18)

#### REFERENCES

- (1) 392 U.S. 157 (1968).
- (2) Id. at 178.
- (3) 36 FCC 2d 143 (1972).
- (4) Id. at 147.
- (5) 406 U.S. 649 (1972).
- (6) Id. at 667.
- (7) Harvey L. Zuckman and Martin J. Graynes, Mass Communication Law (St. Paul, Minn., West Publishing Co., 1977).
- (8) 440 U.S. 689 (1979). This case is referred to as Midwest Video II.
- (9) Id. at 695.
- (10) Id. at 695.
- (11) See, for example, NBC v. U.S., 319 U.S. 190 (1943); National Association of Television Producers and Distributors v. FCC, 516 F. 2d 526 (1975); Writers Guild of America, Inc. v. FCC, 423 F. Supp. 1064 (1976).
- (12) 23 FCC 2d 825 (1970).
- (13) Id. at 829.
- (14) Id. at 829-30.
- (15) See FCC v. Pacifica Foundation, 438 U.S. 726 (1978) for a discussion of the intrusive nature of over-the-air broadcasting and also of its unique accessibility to children.
- (16) 125 Congressional Record p. 2501, 2502 (1979).
- (17) 45 RR 2d 1485 (July 2, 1979).
- (18) "Closed Circuit" 49 Broadcasting 9 (March 24, 1980).