

6. The 1990s: The Net, Convergence and Rights

In the 1990s, digital technology became the focal point of institutional change in communications and information. As a non-territorial medium and the vehicle for convergence of communication industries and media content, the Internet in particular was a disruptive force in policy and law. As the Internet altered institutional patterns, a new generation of advocacy groups came to dominate congressional testimony, and the mode of advocacy shifted notably. With the emergence of concepts of “cyber-rights,” CIP activism begins to come into its own as a movement.

A key factor in energizing and sustaining cyber-activism has been advances in theory and ideas. Legal scholars such as Lawrence Lessig, Pamela Samuelson, Michael Froomkin, Yochai Benkler, Jessica Litman, Jonathan Weinberg, Julie Cohen, James Boyle and Ethan Katsh, to name only a few, created a new, cumulative literature on the relationship between digital/Internet technology and legal rights. Originally focused on privacy, the new school of thought cut its teeth on intellectual property battles (see Section 6.4 below). This body of work, emanating from elite U.S. law schools, developed independently of the cultural and sociological critiques of the mass media and as such was largely untainted by Marxism or the “critical cultural theory” of the Frankfurt School. It was, rather, a form of liberal institutionalism. Its adherents shared a perception that the transition to a digitized technological environment required the redefinition of basic legal and institutional constructs, and that this change created both dangers and opportunities. In works like *Code* (1999) and *The Future of Ideas* (2001), Lessig in particular reached for an integrated analytical framework and ideology – something akin to the “environmentalism of the Net” heralded by James Boyle. The framework proved to be applicable to a broad variety of CIP issues, from copyright to telecommunications infrastructure regulation to radio spectrum management. The intellectual community of which Lessig can be considered the most prominent “star” was the 1990s counterpart to the law and economics school of the 1960s and 1970s (in fact, Lessig and Benkler both occasionally cite the work of Coase). Whereas the first provided the critique of regulation and the political-economy framework for telecommunications liberalization and deregulation in the 1980s and 1990s, the new school addressed the relationship between information technology, law, and institutions in a way that gave some coherence to the efforts of the new generation of public interest advocates.

Whatever the role of intellectual developments, digital info-communications provoked a flurry of major institutional changes in the mid-late 1990s: liberalization of cryptography; the Communications Assistance for Law Enforcement Act; the Telecommunications Act of 1996; a World Intellectual Property Organization treaty that proved to be the forerunner of the controversial Digital Millennium Copyright Act of 1998; various efforts to censor or manage Internet content; the creation of ICANN. The changes are noteworthy for their increasingly transnational scope.

Our data runs to the end of 2002, so we treat the early years of the new millennium as continuous with the 1990s. The chapter begins (Section 6.1) with an overview of the organizational ecology during that period, documenting the major change in the composition of the population of public interest groups. Section 6.2 describes the privacy-oriented activism of the early 1990s, noting that it provided the crucible for the formation of a culture and political ethic for the online activism of the

1990s and beyond. Section 6.3 discusses public interest advocacy around the 1996 Telecommunications Act, including the reaction to the Communications Decency Act. Section 6.4 discusses advocacy and activism around intellectual property rights, showing how this issue provides the connective tissue tying together many of the public interest issues of the digital era. Section 6.5 looks at ICANN and the World Summit on the Information Society, indicators of the growing importance of transnational advocacy. Section 6.6 examines the strengths and weaknesses of the recent activism and advocacy around media concentration and touches on some spectrum issues. A concluding Section discusses whether Internet and computers have produced new organizational forms of activism.

6.1 The Organizational Ecology of the 1990s

The 1990s produced a major change in the composition of the organizational population devoted to advocacy in CIP. This occurred at the same time as a massive increase in the number of congressional hearings on CIP issues. We can also detect a significant change in the pattern of participation in the hearings among the leading advocacy organizations.

Table 6.1 (located at the end of this chapter) shows all the activist organizations that were founded and disbanded between the years 1990 and 2002, inclusive. Fifty-one (51) organizations formed during those years, and sixty-one (61) died. The 1990s saw the founding of the Association for Progressive Communications (1990), Electronic Frontiers Foundation (1990), Center for Media Education (1990), Electronic Privacy Information Center (1994), and Center for Democracy and Technology (1995), all of which survive to the present. Organizations founded in the 1990s that did not survive include the Voters Telecommunication Watch, Digital Future Coalition, and Internet Free Expression Alliance.

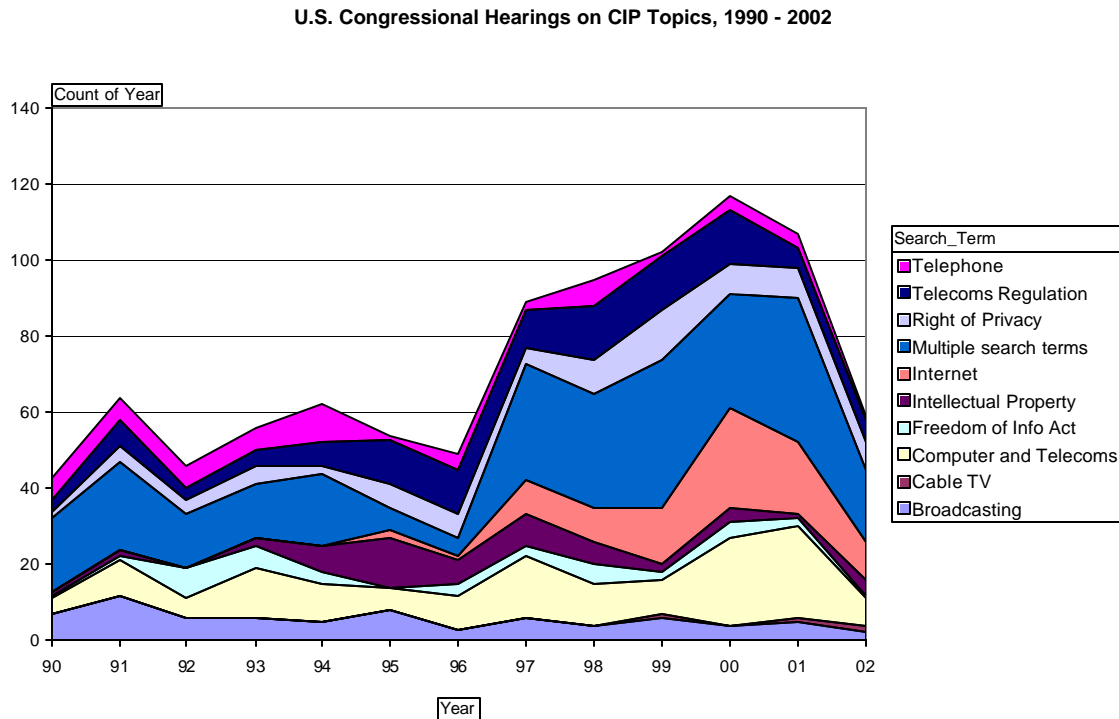
With a large number of organizational deaths in 1992-3, 1996-97, and 2000-01, we see not only a decline in population density but also a pronounced shift in its composition. Mass media oriented organizations trying to influence content, especially those focused on pornography or an ethnic constituency, declined. Notable disbandments include Action for Children's Television (1993), the venerable National Association for Better Broadcasting (1997), Tipper Gore's Parents Music Resource Center (2000), and many other pro-decency and anti-pornography organizations.

Content-mode advocacy declines from 50% of the organizational observations in the 1980s to 44% in the 1990s. It declines even further, to 33%, during the first three years of the 2000s. Rights-based advocacy rises from 23% of the organizational observations in the 1980s to 29% in the 1990s; it then continues to grow in the 2000s until it matches content, with 33% of the observations. Organizations employing multiple modes of CIP advocacy rises to its largest level ever, 11%. The combination is usually economics and rights. The digital era is thus characterized by a greater focus on rights-oriented advocacy and by a more integrated approach to advocacy. This assertion will be demonstrated in more concrete terms in the narrative below.

Congressional activity, measured in terms of hearings, reached a frenetic peak in the late 1990s and early 2000s. (Figure 6.1) For five consecutive years, the annual number of hearings related to CIP issues hovered around or over 100. Of all the social movement-related topics, only environmental issues in the early 1990s can match this level of congressional activity. Reflecting the convergence

of technologies, industries and media, multiple search terms were used by the Congressional Information Service to classify a growing number of the congressional hearings. In other words, a hearing that was classified as “computers and telecommunications” might also be classified as “Internet,” and/or “right of privacy.”

Figure 6.1



New rights-oriented groups such as EPIC, CDT, and EFF significantly altered the pattern of congressional testimony by U.S. advocacy groups. Prior to the 1990s, the ACLU dominated public interest group testimony on CIP issues. No other public interest organization came close to its share of testimony slots. Suddenly, in the 1990s, the ACLU’s percentage drops to 6%, and four other organizations (CDT, EPIC, and consumer organizations) have parity with it. This does not mean that ACLU testified less frequently or was less effective as an organization. Rather, the overall quantity of testimony on CIP issues increased so much that there was room for several other organizations, and instead of one dominant organization we have a group with roughly equal shares. In particular, CDT and EPIC emerge alongside ACLU as leading rights-oriented organizations in terms of Congressional testimony.¹ Also, both the Consumers Union and the Consumers Federation of America rise to the top five of public interest groups testifying on CIP issues, whereas before they accounted for a smaller (but noticeable) percentage of CIP testimony by public interest organizations. The new prominence of consumer organizations indicates the increasing importance of CIP issues to the general public, the growing prominence of economic issues and modes of advocacy in CIP, and the decision by consumer organizations to invest

¹ It is worth noting that CDT’s Director Jerry Berman was affiliated with the ACLU prior to moving first to EFF and then to CDT. CDT’s politics, which are more centrist and emphasize closer ties to business groups, might be related to its lead in the overall percentage of testimony slots in the 2000s.

resources in policy areas where the industry was divided and they could play balance of power politics.

Table 6.2 Specific Organizations' Percentage of Total CIP-related Congressional Testimony by Public Interest Organizations, by Decade.

1980s	
Organization	% of p.i. testimony
American Civil Liberties Union	14.70%
Consumer Federation of America	5.78%
Public Citizen	4.34%
Reporters Committee for Freedom of the Press	2.89%
Media Access Project	2.41%
American Association of Retired Persons	2.41%
Common Cause	2.17%
National Black Media Coalition	1.93%
Action for Children's Television	1.93%
United Church of Christ	1.69%
Organization for Use of the Telephone	1.69%
Telecommunications Research and Action Center	1.69%
Consumers Union	1.45%

1990s	
Organization	% of p.i. testimony
American Civil Liberties Union	6.33%
Center for Democracy and Technology	5.84%
Consumers Union	5.60%
Consumer Federation of America	5.11%
National Consumers League	4.14%
Electronic Frontier Foundation	2.68%
Electronic Privacy Information Center	2.68%
Computer Professionals for Social Responsibility	2.43%
Citizens for a Sound Economy	2.43%
American Association of Retired Persons	2.19%
Media Access Project	1.95%

2000s	
Organization	% of p.i. testimony
Center for Democracy and Technology	11.84%
Consumers Union	9.87%
American Civil Liberties Union	7.24%
Electronic Privacy Information Center	7.24%
U.S. Public Interest Research Group	3.95%
Americans for Tax Reform	3.29%
National Center for Missing and Exploited Children	2.63%
Citizens for a Sound Economy	1.97%
Progress & Freedom Foundation	1.97%
National Law Center for Children and Families	1.97%
Consumer Federation of America	1.32%
American Association of Retired Persons	1.32%
Public Citizen	1.32%
Common Cause	1.32%

6.2 The Crucible: Privacy and Crypto

Privacy issues have always provided an important, long-term area of overlap between Net activists and the traditional civil liberties and civil rights movements. During the late 1960s and 1970s, civil liberties, civil rights, and peace organizations, angered and frightened by governmental abuses of spying powers, came to oppose electronic surveillance and data collection by the growing national security state.² The early Net activists, on the other hand, came into conflict with the security apparatus of the state not as antiwar or civil rights activists, but as technologists who were cracking open a long-term governmental monopoly on advanced encryption techniques.

The encryption issue was more than just a question of de-controlling a powerful technology. It evolved into a radical assessment of the problem of identity in cyberspace, and the relationship between the individual and the state online. Encryption, coupled with David Chaum's invention of blind digital signatures and non-traceable anonymous cash, was thought to possess "the potential to make cyberspace into an identity-free zone." (Levy, 2001, 223) This potential formed the basis for a movement variously known as "cryptoanarchy," "cryptoactivism," or "cypherpunks."³ The origins of that movement are usually traced to a September 1992 invitation-only meeting called by Eric Hughes, Tim May and John Gilmore in Berkeley, California. The gathering, in a playful swipe at CPSR, was dubbed "Cryptology Amateurs for Social Irresponsibility" (Levy, 2001)

The formation of EFF followed a similar pattern of confrontation with the state. John Perry Barlow, a lyricist for the Grateful Dead and regular participant in discussions on the WELL (Whole Earth 'Lectronic Link, one of the earliest online communities based in San Francisco), became concerned about the efforts of law enforcement agencies to crack down on computer crime. Barlow had links to the hacker community, which led the FBI to question him about the theft of proprietary software by a hacker group. Barlow was amazed and frightened by the FBI's ignorance of computer technology and its consequent inability to distinguish pranks from truly threatening criminal activity.⁴ This led to the formation of EFF. EFF began its life as an activist group by making a grant to CPSR's "Computing and Civil Liberties Project," run by Marc Rotenberg.⁵ It then began to build up its own litigation and lobbying staff, including Jerry Berman, formerly of the ACLU.

6.2.1 The Lotus Marketplace Episode

An early test of net activism's political potential came in the spring of 1990, and the galvanizing issue involved privacy. The Lotus Corporation had just announced a database product called Marketplace, a CD-ROM that contained information about 120 million American households. A community described as "computer specialists, academics, and privacy experts" by Gurak (1997, 27) mounted a campaign against the product. Called the "first online action" by Gurak, the

² To the activists focused on broadcasting, of course, privacy was perceived as a separate, largely unrelated issue and those organizations do not appear in Congressional testimony regarding privacy rights in the 1970s.

³ For the "manifesto" of the crypto anarchists, see <http://www.activism.net/cypherpunk/crypto-anarchy.html>. May's manifesto dates back to 1988. A more developed sense of the relationship between technology and privacy rights can be found in Eric Hughes' Cypherpunk Manifesto <http://www.activism.net/cypherpunk/manifesto.html>.

⁴ Barlow's own account of EFF's formation can be found here: http://www.eff.org/Misc/EFF/history_eff

⁵ CPSR's Computing and Civil Liberties project began in 1985 after President Reagan, at the behest of the National Security Administration, attempted to restrict access to government computer systems through the creation of a new classification authority.

campaign saw Usenet newsgroups and email listservs debate the privacy implications of the product and organize online petitions and email campaigns. Involved were Marc Rotenberg, then associated with CPSR, Mitch Kapor, the ACLU, and the Privacy Times, indicating that the “privacy community” was already fairly well defined by November 1990. Although the target was small and its outcome was isolated rather than institutional, the campaign against Lotus Marketplace was successful: the company withdrew the product in January 1991 due to the protests.

Compared to many routine activities today the privacy implications of Marketplace seem tame. Gurak’s analysis of the episode highlights some of the rhetorical excesses of the anti-Marketplace action and implicitly suggests that the Marketplace product was pursued more as a potent symbolic object of concerns about privacy than as a major threat to it *per se*. Of course, all social movements work in this way, seizing opportunistically on flashpoints that will motivate their base and attempting (hopefully) to steer that social energy into the right channels.

6.2.2 The Crypto War

A far more significant battle ensued in 1993, pitting net activists against the U.S. Government’s national security and law enforcement apparatus. The Computer Security Act of 1987 had authorized NIST, a civilian agency, to develop a new standard for computer encryption. NIST, however, proved to be pliant to the demands of the National Security Administration and developed an encryption standard with a backdoor for government surveillance. The standard, known as the Escrowed Encryption Standard and more popularly as “the Clipper chip,” was released by President Clinton on April 16, 1993. Clipper posed one of the most fundamental of policy issues: the contradictions between the individual’s right to secure, private communication and the state’s desire to protect national security and enhance law enforcement by maintaining a systematic surveillance capability. Clipper provided a way for the U.S. government to break the encryption of any message. In order to make this possible the government had to insert itself into the center of the encryption process as the escrow holder of private keys capable of unlocking any encrypted communication. The government had ceased attempting to suppress encryption technology outright, but was now insisting on holding on to rights to access encrypted communications.

The “clipper chip” program galvanized nearly all elements of the technical community, moderate and radical. Clipper was debated on Usenet newsgroups, via email, email discussion lists, and FTP sites. CPSR criticized NSA’s role in the development of the standard, noting that it had “largely ignored” a public advisory group. The anti-Clipper activists relied heavily on the Freedom of Information Act to make this case. EFF fostered public commentary, as 225 of 298 comments received by NIST and published in the Federal register were forwarded to it by EFF from emails received by the advocacy organization. Equally important, the crypto activists were able to enter into a powerful alliance with business software users and producers, who saw the controls as an obstacle to commerce. Clipper had negative implications for foreign trade as well as civil liberties, for if the U.S. government imposed a backdoor to all digital equipment manufactured in the U.S., what foreign citizens and companies would purchase U.S. products? The Digital Privacy and Security Working Group, a coalition of communication and computer companies and consumer and privacy advocates, was formed in May 1993, less than a month after Clipper announced.

A large number of established net activists have some link to the anti-Clipper movement. For example, the annual Computers, Freedom and Privacy conferences were initiated as a forum for the discussion and debate of the crypto issue. The Clipper standard was ultimately withdrawn, and cryptography was opened to commercial and public use. Giving some idea of the size of the mobilized community, in 2000 RSA's annual crypto conference attracted over 10,000 people to celebrate the victory of crypto deregulation.

6.2.3. EFF, Computer Crime, CALEA

The Communications Assistance for Law Enforcement Act (CALEA), commonly known as the "Digital Telephony bill," was a battle between the FBI and the privacy community roughly contemporaneous with the Clipper-chip episode. It was an attempt by the FBI to require telecommunication companies to modify their equipment to make digital communications easier to wiretap. It was proposed under the Clinton administration based on recommendations made during the first Bush administration. The opposition to this bill reproduced, but in a weaker form, the industry-civil liberties coalition that was successful in opposing Clipper. CALEA was enacted in 1994, however, and its interpretation and implementation since have diminished privacy rights seriously. CALEA led to a famous split between EFF's inside-Washington and outside-Washington participants.⁶ EFF's grass roots felt that their opposition to CALEA had been undermined by an insider deal made by the Washington staff. EFF fired its DC-based executive director and moved its headquarters to San Francisco, while the Washington-based camp, led by Jerry Berman, became the core of Center for Democracy and Technology. Tensions between these two camps persist to this day.

6.3. The 1996 Telecommunications Act and CDA

When the Clinton administration arrived in January 1993 it began to promote the concept of a "National Information Infrastructure" or "information superhighway." Around the same time, lobbying by the remnants of the Bell system to modify the terms of the AT&T divestiture agreement compelled action on a sweeping revision of the 1934 Communications Act. The conjunction of major legislative reform and a Democratic Presidency focused on communications infrastructure issues created a signal political opportunity.

The DC-based communication-information activist groups responded to this opportunity adroitly. Led by the Center for Media Education, the Association for Research Libraries and the Washington Office of CPSR, they formed an informal association known as the Telecommunications Policy Roundtable (TPR). The opportunity presented was different from that created by the WLBT lawsuits nearly three decades earlier. The citizen-based petition to deny had given media activists a direct form of leverage over broadcaster conduct. In the early 1990s, in contrast, the influence of the advocacy groups came from formulating principles and setting policy agendas, and hoping that legislators would carry their ideas into the new law.

⁶ See <http://www.interesting-people.org/archives/interesting-people/199412/msg00053.html>

The TPR eventually combined 40 public interest groups around a set of “public interest principles.”⁷ According to Drake (1997, 180) the following agenda was successfully inserted into the legislative process:

- Open Platform service (switched, end-to-end digital telecom service regulated as common carrier
- Universal service. Promote access to advanced services, schools and libraries added to list of subsidized services.
- Preferential “advanced services” rates for government agencies, non-profit educational institutions, health care, public libraries, public museums, public broadcasters, and charitable organizations.
- Restrictions on the RBOCs’ ability to participate in information services and electronic publishing markets and their ability to buy or operate traditional cable systems within their telephone service area; requirements to offer unbundled access to information service providers.
- FCC was required to examine costs and benefits of requiring open interface standards for cable TV set top boxes, and to promote ownership diversity.
- FCC and NTIA were to study policies promoting civic participation in the NII.
- Resource reservations were to be built into the infrastructure; e.g., there should be a 5% capacity set aside for “public spaces” in telecom networks. (Originally, the groups had called for a 20% set aside.)

Drake believes that while the public interest groups got significant concepts and language into the initial drafts, all changed after the November 1994 election, which gave Republicans control of the House and Senate. The final statute was a “bipartisan compromise on liberalization with a few pro-competitive and consumer safeguards added in.” (1997, 191) While the power shift in Congress pushed back on the advocates’ agenda, they did have significant impact on the final outcome. In particular, the 1996 Act contained expansive new universal service requirements to fund networking in schools and libraries.

The TPR and participation in the 1996 Telecom Act began the process of reorienting DC-based activist groups away from the traditional focus on mass media content and toward infrastructure regulation issues. The TPR as a coalition included both traditional media activist groups and the newer Internet- and privacy-oriented public interest groups, such as the Electronic Frontiers Foundation (although the inclusion of EFF did not take place without some friction).⁸ The groups

⁷ “Renewing the Commitment to a Public Interest Telecommunications Policy,” Telecommunications Policy Roundtable, September 1, 1993.

⁸ The initial announcement of the Roundtable (posted to the com-priv newsgroup) suggested “that EFF’s work on infrastructure policy issues over the last year was narrow and lacking in vision.” Email from Daniel Weitzner, EFF, to Dave Farber’s “Interesting People” listserv, July 22, 1993. EFF joined the TPR in late July 1993.

involved in the TPR used Internet listservs and Usenet groups to disseminate their ideas and mobilize their supporters. Yet, once again, they had little impact on the overall economic structure of the telecommunications industry.

The 1996 Act when passed contained the ill-fated Communications Decency Act and the V-chip requirement.⁹ In general, the proliferation of information sources on the Internet led to domestic and international conflicts over censorship and content regulation. This seemingly traditional communications policy issue, however, took on a radical, institution-bending cast because of the Internet's non-territorial and individualized architecture of distribution. In the public discourse on CDA, opponents of the law made a point of differentiating Internet communications from broadcasting. To control Internet content would have required new institutional mechanisms (e.g., accurate age identification on a global basis, and exposing publishers in one jurisdiction to the laws of a remote jurisdiction) with more far-reaching effects than magazine or film censorship.

The CDA's passage as part of the 1996 Telecommunications Act galvanized the Net activist community like no other issue has before or since. Small enough to be readily mobilized and large enough to make its presence felt, the online population spontaneously generated a major campaign. EFF formed a widely followed Blue Ribbon Campaign wherein managers of web sites would post a blue ribbon graphic indicating their support for free speech. Voters Telecommunications Watch mobilized voters and ran a campaign to "Turn the Web Black." The law's constitutionality was challenged by two parties, the ACLU and a coalition of nearly 40 organizations organized as the Citizens Internet Empowerment Coalition (CIEC). The CIEC coalition included the American Library Association, America Online, and Microsoft as well as public interest groups.

When the law was ruled unconstitutional, its disappointed supporters appealed to gender and class divisions. "We know the online community overwhelmingly opposed the CDA, but only 10 percent of the country is online and they're mostly male and mostly upper-class," said Cathleen Cleaver, director of legal studies for the Family Research Council. "They've had complete freedom online and they just don't want to burden themselves by changing their ways to protect children."¹⁰

6.4 Intellectual Property Rights

Cyber-rights truly came of age as a political tendency when it was forced to confront the ultimate institutional problem: the definition of property rights to digital resources. Debates over ownership of personal information are implicit in the computer privacy debate; data about oneself becomes alienable and can be collected, stored and processed by third parties, leading to questions about who "owns" it and the terms and conditions of its usage. But the most dramatic rights conflicts occurred (and are occurring) in relation to intellectual property rights (IPR). This includes not only the highly publicized battles over online sharing of copyrighted entertainment content, but also the movement against software patents, the open source movement, and the battles over trademarks and Internet domain names.

As Internet activities undermined the exclusivity of copyrighted music, images and text, the intellectual property community mobilized and sought stronger, globalized IPR protection mechanisms. A great deal of Net activism in the late 1990s defines itself in opposition to the policy

⁹ The V-chip was opposed by ACLU but not by the other activist groups.

¹⁰ Art Kramer, Cox News Service, "Coalition Cheers Court Victory over Decency Act," June 18, 1996.

agenda of the frightened yet militant and politically powerful IPR interests. This conflict cuts across a wide variety of CIP issues. Efforts to strengthen digital IPR often lead to proposals to heavily regulate various aspects of the communications-information infrastructure and to incursions on personal privacy. Moreover, the IPR battle turns the politics of the 1980s and early 1990s on its head, with many business interests allying with governmental law enforcement interests and abandoning ideas of “deregulation” and seeking more governmental controls over infrastructure, equipment and conduct.

Early in this struggle, for example, major copyright holders attempted to argue that the digital copies made routinely in the transmission of data over the Internet constituted infringements. (Casey, 2000) The Digital Future Coalition brought together public interest groups with Internet Service Providers concerned about the paralysis of basic Internet functions that would occur if strong, literalistic notions of copyright protection were applied to it. By taking its agenda to Geneva and seeking a global treaty, the U.S. government internationalized the struggle to define new property rights for the digital environment. (Samuelson, 1997)

IPR emerged as central because in digital systems intellectual property, freedom of expression and privacy are closely related. Content producers want to be rewarded for their efforts and thus have an incentive to track uses and users. They also have an incentive to erect technological barriers that give them the ability to exclude non-paying users. While private barriers to cultural appropriation and fair use can be legitimate, when joined to the power of the state they can become oppressive and self-defeatingly restrictive – the classic example being the Motion Picture Association of America’s attempt to ban the video cassette recorder in the mid-1980s. When IPR protections are extended too far, they can not only limit free expression, but also undermine privacy by building up an enforcement and surveillance apparatus that can be abused. They are at their worst when they are combined with governmental standard-setting and regulatory powers to become “hardwired” into the design of consumer devices and public infrastructure.

The linkage of governmental regulatory powers to IPR-related surveillance and enforcement is becoming increasingly common. One current example is ICANN’s domain name registration regulations, which require registries to reserve names for trademark holders, subject registrants to privacy-eroding rules about disclosure of contact data, and require registrants to subject themselves to a dispute resolution system biased toward trademark owners (for a discussion of activism and advocacy around those issues, see Section 6.5 below). Another example is the “broadcast flag” standards under development at the FCC, which seek to require digital broadcast receivers to contain tracking devices for detection and enforcement of content rights.

At its most sophisticated, IPR resistance constitutes a recognition that the definition of property rights has distributional consequences, and the activists strive to ensure that the institutionalization of digital property rights cultivates a robust public domain, respects and enhances the rights of end users, individuals, and consumers, and does not constitute regulation designed to unjustly transfer wealth to major corporate holders of IPR (e.g., by indefinite extensions of copyright terms). In its less sophisticated and ultimately less viable manifestations, IPR resistance constitutes a rejection of information property per se – a kind of “info-communism” that caricatures and recapitulates the failed communisms of the 20th century. Both tendencies are present in the underlying social movement activity.

Leading advocacy organizations around intellectual property include EFF, which has defended individuals prosecuted for violating some of the anti-circumvention provisions of the DMCA and resisted the Recording Industry Association of America's attempts to prosecute individual users for downloading music files. Public Knowledge has tried to mobilize opposition to the Federal Communications Commission's "broadcast flag" standards. Lessig joined with Eric Eldred, a noncommercial Internet publisher of public domain texts and derivative works, and others, to mount an unsuccessful Supreme Court challenge to the Copyright Term Extension Act. Consumer Project on Technology has played a major role in the international arena, working to moderate the application of drug patents and participating in negotiations at WIPO on the status of IPR protection for webcasting.¹¹

A related issue concerns proprietary rights over software. This includes both software patent resistance and the "open-source" issue. These are distinct policy issues but both engage around the concept of information property rights and draw upon the software developer/Internet culture's support for open standards and information sharing. Open source can be considered a type of social movement among information technology professionals and computer programmers. Like environmentalism, it began as an aesthetic and ethical stance but succeeded in making a strong practical case as well. (Wheeler, 2003) The GNU/Linux operating system has begun to be taken seriously by major industry actors; e.g., IBM and Hewlett-Packard announced sales of Linux computers to federal agencies in 2002. Like the environmental movement, open source activism combines those who are motivated by cultural and ideological stances as well as those who see open source alternatives as a pragmatic way of getting better software and minimizing the depredations of a Microsoft's dominance. The incursions of open source software into the consumer market are small and are likely to remain so, but in larger-scale educational, business and government information systems it has had an appreciable impact.

Some of the legal scholars mentioned earlier have developed critiques of software patents (e.g., Marc Lemley and Julie Cohen). The League for Programming Freedom, Richard Stallman, EFF founder Mitch Kapur and others in the free software community have opposed patents since the early 1990s at least.

Microsoft is to the information economy of the 2000's what the Bell System was to the information economy of the 1970's and 80's. It dominates a strategically critical industry, giving itself the power to set de facto standards and influence vertically related industries. Resistance to Microsoft's dominance of the software industry has involved using both traditional antitrust and regulatory tools and the slow but steady cultivation of open source alternatives. In the antitrust battles, public interest groups have played a less than central role, taking sides in industry conflicts (as was the case during the AT&T breakup and the restructuring of the telecommunications industry). The basic policy alternatives have been defined primarily by inter- and intra-industry economic conflicts of interest, and both sides (Microsoft as well as its opponents) occasionally enlist economists and public interest groups to weigh in.

¹¹ See <http://cptech.org/ip/wipo/wipo-casting.html>. CPT coordinated the participation of EFF, Public Knowledge, Union for the Public Domain, IP Justice, and European Digital Rights in the WIPO process.

6.5 ICANN and WSIS

The Internet's non-territorial architecture has heightened the importance of international institutions, at a time when global liberalization of the telecommunications industry was already making communications and information industries and policies more integrated and interdependent. Two developments at the turn of the century signal the growing importance of transnational advocacy and activism in the CIP domain.

6.5.1 ICANN and global democracy

The Internet Corporation for Assigned Names and Numbers (ICANN) was incorporated in 1998. Ostensibly a private corporation, it was invoked by a U.S. Department of Commerce White Paper as part of an attempt to “privatize” the administration of the Internet's name and address infrastructure, which had been operated by U.S. government contractors. ICANN as an institution deals with the core issues of the digital economy: intellectual property and free expression, in the form of domain name – trademark disputes; privacy, in the form of its WHOIS database that links Internet identities to personal information about domain name registrants; and competition policy, in its regulation of registry and registrar businesses.

In some respects, ICANN's roots are in “civil society.” The Internet Society, the Internet Engineering Task Force, education and research networking organizations, and the informal series of meetings known as the International Forum on the White Paper (IFWP), all of which played major roles in ICANN's background or creation, were civil society organizations and/or largely composed of such organizations. By relying on private sector governance and adding some democratic and representative accountability mechanisms, ICANN had the potential to constitute a revolutionary innovation in international organization. Its organizational form constituted a threat both to the hegemony of nation-states and their international intergovernmental organizations. That potential, however, was systematically undermined and eventually destroyed by the management clique that seized control of the organization at its inception. (See Mueller, 2002)

ICANN's original organizational structure provided two formal channels for participation by individuals, civil society interests and advocacy groups:

- The Noncommercial Users Constituency (NCUC)
- The At-large membership

The Noncommercial Constituency (NCUC) is one of six constituencies that make up ICANN's Generic Names Supporting Organization. Along with the other constituencies, it participates in the nomination and election of 3 ICANN Board members and develops policies about domain names. It was originally formed by a tense combination of the Internet Society and the Association for Computing Machinery's Internet Governance Project and the Syracuse University Convergence Center. CDT, ACLU, the Markle Foundation, EPIC, Media Access Project, Asian NGOs such as Glacom and Networkers Against Surveillance (Japan), Peacenet and Jinbonet (Korea), various UNDP Sustainable Development Networking Program national chapters, all are or have been involved at one point or another.

Under the original plan for ICANN the At-large membership was empowered to elect 9 (just under half) of the Board members. Individuals would have the right to become members of ICANN and acquired voting rights in these elections. Just as the legal precedent giving citizens “standing” in

broadcast license renewal challenges created a political opportunity that mobilized public interest groups, so ICANN's commitment to a democratic membership and representation led to widespread participation in ICANN in its early days. In the first, experimental at-large election, the two most powerful Internet regions – North America and Europe, which accounted for about 75 percent of the world's internet infrastructure – elected board members who were critical of ICANN's management. Indeed, the North American electee, Karl Auerbach, a technical veteran, was perhaps the most prominent and persistent critic of ICANN in the United States. (See NAIS, 2001, 156, for an account of the elections and a case for continued elections)

In February 2002, ICANN's CEO, Stuart Lynn, argued that its governance model was “not working” and called for sweeping “reforms.” The reforms eventually passed represented a reversion to an insulated and self-selecting board. It completely eliminated its prior commitment to a membership and relied instead on a Nominating Committee selected by the Board and the councils of the SOs. The At-large was demoted to an Advisory Committee that appoints several people to the Nominating Committee and holds nonvoting positions on various Councils and tasks forces. It is administered by a full-time, paid staff person whose loyalties are to ICANN management rather than to public representation.

By firmly closing what had been a relatively open channel for public participation in an international organization, ICANN's “Evolution and Reform” process led to some demobilization of public interest groups within ICANN. However, a newly revived Noncommercial Constituency is still available as an autonomous channel for civil society participation, and on the GNSO Council frequently holds the swing votes on various policy matters due to conflicts of interest among the business user constituencies and the domain name supply industry constituencies. Moreover, the decision by WSIS to create a UN Working Group on Internet governance (see below) has sparked renewed interest in civil society participation in ICANN.

6.5.2 World Summit on the Information Society (WSIS)

The WSIS is a UN summit administered by the International Telecommunication Union. It consists of a series of meetings designed to produce a Draft Declaration of Principles and a Draft Plan of Action. The official goal of WSIS – to develop and implement a “worldwide vision for the information society” some 20 years after the information society has developed, under the auspices of an international organization that has no policy making authority and controls no significant taxing authority, technology or capital – may sound comical to those with a sense of how the global information economy works. However, WSIS is intensely interesting because of the civil society outreach aspect. As part of the ITU's and UN's attempt to make themselves more relevant, WSIS drew a significant number of civil society activists focused on CIP into its processes. Many civil society participants were disappointed with the results of Phase 1 of the Summit, which inevitably reflected the views of governments much more than their own. Nevertheless, WSIS offered a unique opportunity to assemble transnational advocacy groups involved in information and communication policy from around the world, where they can become acquainted, develop working relationships, and perhaps come closer to an agreed-on set of principles or policies.

More interesting yet, the international legitimacy controversies swirling around ICANN provoked the Summit into authorizing the UN Secretary-General to create a working group on Internet

governance. The UN Working Group creates a new arena for transnational advocacy, and provides a forum for airing fundamental issues about global governance related to CIP.

6.6 Media Concentration

A widespread campaign against media concentration by citizens groups and industry interests in 2003 succeeded in blocking changes in FCC ownership rules proposed by the FCC Chair.

Late in 2002 the Federal Communications Commission undertook a comprehensive review of its broadcast ownership rules. Ownership limits applied to broadcasting stations had been progressively liberalized since the 1980s, but took their most dramatic steps in 1991, and in 1996 with the passage of the new Telecommunications Act. The primary purpose of the 2002 proceeding was to respond to court decisions that the ownership limits already in place were arbitrary and had not been justified by the record. The FCC proposed new rules in 2003 that took incremental steps toward further relaxation of the broadcast ownership limits, allowing more stations to be owned by the same company and more cross ownership between broadcasting and other media, subject to the calculations of a “diversity index.”

A good summary of public opposition to the FCC proposal can be found in *The Media Policy Action Directory*.¹² The opposition was greatly strengthened by the role of local activists and the ability of the movement to move beyond DC-based advocacy. Democratic FCC Commissioners who opposed the rule changes (Copp and Adelstein) got the FCC to hold regional public hearings on media concentration. The hearings created a political opportunity for public mobilization which was seized upon by local groups such as Media Tank and Prometheus Radio in Philadelphia, Media Alliance in San Francisco and CMA in Seattle. Hearings were held in New York, Seattle, Austin, Durham, Phoenix, Chicago, Burlington, San Francisco, Los Angeles, Philadelphia, Marin County, Detroit and Atlanta. The events attracted around 600 people in San Francisco, 300 in Seattle, 600 in Atlanta. There were large crowds in most of the other locales, sometimes standing room only, with people standing outside for hours waiting to get in or participate.

National advocacy groups also played a role. Media Access Project, which had been researching, agitating, and developing policy proposals around media ownership since the 1970s, joined with Prometheus Radio in a legal challenge to the ruling. The Center for Digital Democracy distributed funds received from a foundation to local organizations at the site of the hearings.¹³ Support for the anti-FCC campaign also included conservative groups such as the National Rifle Association and Parents Television Council. In the end, the FCC received tens of thousands of letters opposing the rule changes and the advocates succeeded, via demonstrations, petitions, and vocal participation in the hearings, in pushing the issue into the public agenda for a sustained period of time. Although the FCC voted to adopt the rule changes in June 2003, the campaign against them was so effective that the Congress quickly and overwhelmingly voted to block them.

¹² Center for International Media Action, *The Media Policy Action Directory: A Resource for Advocates and Organizers. First Edition – Organizations Urging FCC Limits on Media Ownership*. http://www.mediaactioncenter.org/directory_onscreen.pdf

¹³ B. Butler, S. Matani, L. Nutter, G. Spilka, C. Borgman-Arboleda, A. Dichter. “Strengths, Challenges, and Collaboration: Advocacy groups organizing together on media ownership and beyond.” Report and Reflections from the Fall, 2003 Media Diversity Convening, Philadelphia, PA. February 18, 2004.

The coalition assembled by the anti-media concentration forces in many ways reproduces the one that succeeded in briefly re-regulating cable television in the early 1990s. It combines liberal consumer groups and media activists with strategically placed industry groups (advertisers, content producers and some smaller broadcasters) that have strong economic interests in continued media ownership limits. It was also able to draw on conservative groups' dissatisfaction with the media.

The key weakness of the media concentration opponents is that they have not articulated an alternative economic structure or set of regulations, institutions and policies capable of addressing what they see as the problem. The campaign was waged largely as a defense of existing ownership restrictions. For many grass-roots activists, opposition to the ownership changes was rooted in an anti-capitalist critique of “big corporations” that provided little substantive policy guidance. As of now, there is no theoretical bridge linking concepts of “diversity” or opposition to media consolidation to specific legal and regulatory prescriptions shaping industry structure. Opponents of further concentration, for example, have difficulty explaining why 45% of the national market is “too much” and 35% is acceptable. In the absence of theoretically-grounded ideas and specific proposals for institutional change, further relaxation of broadcast ownership limits (and the further integration of broadcasting businesses into the wider digital media marketplace) is likely to continue as public mobilization, always ephemeral and difficult to sustain, dies down.

Moreover, despite the temporary alliance of convenience, the right wingers who sent letters to the FCC asking it to oppose “big media” because they think it has a liberal bias are hardly compatible with the long term agenda of liberal groups, who believe that big media are harbingers of corporate capitalism. Indeed, one negative side effect of the media concentration battle has been a new “decency” campaign by regulators that has cast a chill on broadcast expression. In 2003-4, the FCC received 350,000 complaints about “indecent” in programming, hundreds of times more than its norm. Michael Copps, the FCC Commissioner who led the charge against the proposed ownership rules, has explicitly linked his support for stringent “decency” regulation to the anti-concentration campaign, noting that competition for ratings is what drives the trend toward edgy content.

Another recent policy issue, unlicensed spectrum, is too current to cover adequately in this report, but needs to be connected to the narrative because of its importance. Policy developments around radio spectrum have failed to attract the same level of public interest and engagement but have, paradoxically, had more positive results. The difference, we think, is that in spectrum policy advocates have had something concrete to advocate. Armed with notions of an unlicensed spectrum “commons,”¹⁴ and specific technical and legal concepts of how to create such a commons (e.g., Werbach, 2004), advocates have in the past two years pushed for opening up more spectrum for unlicensed public use, and for re-allocations of spectrum away from the control of traditional broadcasters (where much of it lies fallow).

6.7 Postscript on New Organizational Forms

At the convening held to discuss the first draft of this report, some participants objected to the report's initial conclusion that “net activism has not yet developed its own distinctive

¹⁴ See <http://cyberlaw.stanford.edu/spectrum/>

organizational form for political activism.” Their objections, however, may have been based on a misunderstanding of what was being asserted. The email listservs and slashdot-style interactive web sites are most definitely new forms of *communication* and *community-building*. And there is no doubt that online activists are using the tools of the Internet with skill and creativity. But we still do not see a new kind of institutionalized interface with the political, governmental, or legal structures that would give these tools traction in creating institutional change. Or to put it more precisely, the political structure has not adjusted to online interaction in a way that creates new political opportunities. There are no structural changes analogous to those that gave rise to the public interest organization in the 1960s and ‘70s. What we see now are hybrids of new technology and old organizational forms. Web sites and the Internet are used to raise money to support traditional electoral campaigns, for example; or traditional public interest groups use the Internet to generate activity and mobilize their membership. But we do not see a new form interaction between citizen groups and their government. The ability to testify and lobby in person in Washington is still far more important than anything that happens online, and the online activity must still be converted into traditional modes of activity. Of course, to say that existing public interest organizations organized around digital issues do not yet constitute a new organizational form does not detract from their importance and value at all. It is simply to state a sociological and political fact.

In order to qualify as a new organizational form, the political structure would have to change itself in ways that open new channels of influence for virtual communities and online activists. Those new channels would have to *alter the status* of online communication and communicators vis-à-vis the political system; giving them, for example, a status comparable to DC-based lobbyists or voters. But in many ways, we see the opposite occurring. For a brief period politicians opened themselves up to email from their constituents. As a result, they were inundated with an unmanageable torrent of messages. They have responded by closing that channel or radically discounting it.¹⁵ This does not mean that the Internet and online activism won’t eventually produce institutional changes comparable to the structural changes of the 1960s; it simply means that those changes haven’t occurred yet. We do not know what form they will take when they do occur. Indeed, the lack of wholesale institutional adjustment at this point is not surprising. Digital communications and the Internet really are radical technologies, and radical changes don’t happen easily. Computer communications can generate so much information and so much communicative activity that traditional political institutions will take a long time to adjust to them. To incorporate the full potential of online activism would require structural changes in political organization, changes that would threaten existing political equilibria. Even liberal groups, for example, are leery of attempts to computerize voting machines. The idea of “e-government,” at the current time, is just a pallid concept that refers to the implementation of information systems by governmental agencies to increase the speed and efficiency of their *existing* processes. Full integration of Internet and telecommunication into the governance structure will mean much more than that; it will change the processes to take full advantage of online capabilities.

¹⁵ See the revealing report by Kathy Goldschmidt, “Email Overload in Congress: Managing a Communications Crisis,” Online Issue Brief, Congress Online Project. Washington, DC: Congressional Management Foundation. (2004). <http://www.congressonlineproject.org/email.html> “Growing numbers of citizens are frustrated by what they perceive to be Congress’ lack of responsiveness to e-mail. At the same time, Congress is frustrated by what it perceives to be e-citizens’ lack of understanding of how Congress works and the constraints under which it must operate. ...Until now, rather than enhancing democracy - as so many hoped - e-mail has heightened tensions and public disgruntlement with Congress.

Table 6.1 Advocacy Groups Formed, 1990-2002

Foundings	Deaths
1990-91	
Anti-Censorship and Deception Union	First Amendment Research Institute
Association for Progressive Communications	Concerned Citizens for Universal Service
Center for the Study of Commercialism	
Electronic Frontier Foundation	
National Anxiety Center	
National Campaign for Freedom of Expression	
Rock the Vote	
American Satellite Television Alliance	
Center for Media Education	
Computer Users for Social Responsibility	
National Association to Protect Individual Rights	
1992-93	
Center for Civic Networking	Council for Children's Television and Media
Gap Media Project	Action for Children's Television
United States Privacy Council	Crusade for Decency
People Against Telephone Terrorism and Harassment	Women Against Violence Against Women
Progress and Freedom Foundation	Media Action Coalition
	Telecommunications Consumer Coalition
	World Institute of Black Communications
	Public Interest Video Network
	Women's Media Project
	Media Forum
	Citizen's Against Pornography
1994-95	
Electronic Privacy Information Center	Alliance to End Repression
Voters Telecomm Watch	Scholars and Citizens for Freedom of Information
Center for Democracy and Technology	First Amendment Press
Consumer Project on Technology	Fairness in Media
Families Against Internet Censorship	Committee on Israeli Censorship
Feminists for Free Expression	
Mainstream Media Project	
National Public Radio Election Project	
Privacy Global Resource Center	
VTW Center for Internet Education	
About Face	
Digital Future Coalition	
CryptoRights Foundation	
1996-97	
U.S. Internet Council	National Association for Better Broadcasting
Peacefire	Americans of Italian Descent
NetAction	National Friends of Public Broadcasting
Domain Name Rights Coalition	Black Citizens for a Fair Media
CypherNet	Synanon Committee for a Responsible American Press
Global Internet Liberty Campaign	Media Action Research Center
Internet Free Expression Alliance	First Amendment Congress
National Organization for Non-Enumeration	Media Network
Coalition Against Unsolicited Email (CAUCE)	Women Against Pornography
The Censorware Project	American Israeli Civil Liberties Coalition
	First Amendment Consumer and Trade Society
	Feminists Fighting Pornography
	Institute for Media Analysis
	Reference Point Foundation

Center for the Study of Commercialism

Foundings	Deaths
1996-97, continued	
	American Satellite Television Alliance People Against Telephone Terrorism and Harassment National Public Radio Election Project Privacy Global Resource Center
1998-99	
Mediachannel.org Commercial Alert Citizens for Independent Public Broadcasting People for Better TV Prometheus Radio Project	Telecommunications and Telephone Association American-Arab Relations Committee Americans for Decency Free Press Association Citizens for Media Responsibility Without Law Radio Association Defending Airwave Rights Strategies for Media Literacy Always Causing Legal Unrest National Campaign for Freedom of Expression Digital Future Coalition
2000-01	
Online Policy Group Creative Commons Chilling Effects Center for Digital Democracy SpamCon Foundation	Polish-American Guardian Society Foundation to Improve Television National Black Media Coalition DC Feminists Against Pornography American-Arab Anti-Discrimination Committee Alternative to the New York Times Committee Foundation for Moral Restoration National Coalition Against Pornography Coalition on Government Information Parents Music Resource Center Americans for Constitutional Freedom Alliance Against Fraud in Telemarketing Domain Name Rights Coalition Internet Free Expression Alliance
2002	
ACME Coalition Public Knowledge	Voters Telecommunication Watch

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