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Necessary Knowledge For Communications Policy: Information Inequalities and Commercial Data Access and Usage in the Policymaking Process

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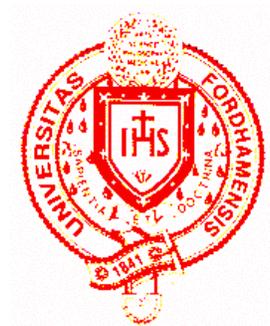
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WORKING PAPER

**NECESSARY KNOWLEDGE FOR
COMMUNICATIONS POLICY: INFORMATION
INEQUALITIES AND COMMERCIAL DATA ACCESS
AND USAGE IN THE POLICYMAKING PROCESS**

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August, 2006

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Abstract

Communications policymaking increasingly relies upon large-scale databases manufactured and marketed by commercial organizations. Data providers such as BIA Research, Nielsen Media Research, and Arbitron play a vitally important role in aggregating the data that policymakers, policy analysts, and policy advocates rely upon in policy deliberations. In many ways, these data providers supplement the limited data gathering capacity of government bodies such as the FCC and NTIA and thereby help to bring a greater quantity of relevant data to bear on policy issues than would otherwise be possible. Indeed, these data are utilized extensively by stakeholders with an interest in policy outcomes to conduct and submit studies that policymakers rely upon in their deliberations (often in lieu of conducting such research on their own).

One unfortunate byproduct of this situation, however, is that, to the increasing extent that the data relied upon in policymaking, policy analysis, and policy advocacy are provided by commercial organizations, substantial inequalities in access to these data inevitably arise. Specifically, significant actors in the policymaking process, such as academic researchers and public interest organizations, lack the financial resources of communications firms and industry associations to gain access to the data that are vital to conducting thorough, reliable, and persuasive policy research. Policymakers themselves often find their research objectives inhibited by the enormous expense associated with the relevant large-scale commercial datasets, and thus find themselves increasingly reliant upon the analyses conducted by those stakeholder groups with the resources necessary to gain access to such data. As a result of these information asymmetries, policy decision-making is likely to suffer, as the research inputs inevitably fail to reflect the full range of considerations across the full range of interested stakeholders. This paper illustrates these issues via a case study of the FCC's 2003 media ownership proceeding and offers suggestions for how the existing disparities in access to policy-relevant data might be addressed.

Necessary knowledge for communications policy: Information inequalities and commercial data access and usage in the policymaking process

Introduction

The communications policymaking process is becoming increasingly research-driven.¹ As has been seen across all policy sectors, policymakers increasingly rely upon both internally- and externally-generated empirical studies in the formulation of, and justification for, specific policy decisions.² This has proven to be a controversial trend, both within and beyond communications policymaking, as debates have arisen about the appropriate role, usage, and capabilities of empirical research in policymaking.³ Regardless of these disputes, it is safe to say that both the demand for – and utilization of – research have become more pronounced in communications policymaking. Consequently, stakeholders seeking to have an impact on policy outcomes find themselves increasingly reliant upon research to effectively support their policy arguments.⁴

One aspect of this trend that has been neglected, however, involves the increased importance of data generated by large-scale commercial data providers to policymaking and policy analysis. That is, market, audience, and content data gathered and aggregated by commercial organizations such as Nielsen Media Research,⁵ BIA Research,⁶ Arbitron,⁷ and Kagan Research⁸ play an increasingly prominent role in

¹ See Philip M. Napoli, *The Broadening of the Media Policy Research Agenda*. White Paper, Social Science Research Council, 4-8, available at <http://www.ssrc.org/programs/media/publications/PhilipNapoli.1.Final.doc>. (last visited June 6, 2006) (arguing that the media policy research agenda is broadening beyond economic/technological issues to account for political and cultural issues as well).

² See *infra* notes 12-60 and accompanying text.

³ See *infra* notes 23-26 and 46-50 and accompanying text.

⁴ See *infra* notes 51-60 and accompanying text.

⁵ Nielsen Media Research is the primary provider of national and local television audience ratings in the United States and in many other countries around the world. Clients include broadcast and cable networks, advertisers, local stations and cable systems. Nielsen also provides Internet audience data through its Nielsen NetRatings affiliates. See website at <http://www.nielsenmediaresearch.com> (last accessed June 6, 2006).

⁶ BIA Research provides financial, ownership, and market data for the broadcast television, radio and newspaper industries in the U.S. Clients include financial institutions, investors, and media organizations. See website at <http://www.bia.com> (last accessed June 6, 2006).

⁷ Arbitron is the primary provider of national and local radio audience ratings in the United States. Clients include radio stations, networks, and advertisers. See website at <http://www.arbitron.com> (last accessed June 6, 2006).

⁸ Kagan Research provides financial data, industry forecasts, and sector-specific newsletters for the cable, broadcast television, wireless, and motion picture industries. Clients include financial institutions, investors, and media organizations. See website at <http://www.kagan.com> (last accessed June 6, 2006).

the research submitted to – and conducted by – the FCC. These data providers often are the sole source of specific information that is central to developing portraits of media markets, audience behavior, or content availability,⁹ and are at the core policy decision-making, policy analysis, and policy advocacy. However, these data sources also are often enormously expensive and are thus difficult to access. And, in some instances, the access terms can be very prohibitive – in ways that can undermine the effective dissemination of the research.

This paper considers the implications of the prominence of commercial data in the communications policymaking process. Specifically, this paper considers the kinds of imbalances in policy advocacy and policy decision-making that may be created by unequal access to these important data sources by the various stakeholders involved in the policymaking process. Drawing upon theoretical and empirical work related to information asymmetries and knowledge utilization, this paper argues that the contemporary communications policymaking environment is one in which the disparity in resources across various stakeholder groups is amplified by the associated imbalances in access to the commercial data sources that are increasingly central to policy decision-making and to persuasive policy advocacy. This paper therefore proposes a number of solutions to correct this imbalance and thereby reduce the information asymmetries that characterize contemporary communications policy analysis and policy advocacy.

The first section of this paper provides background on the policymaking process and the role of research in this process, drawing upon the growing body of literature focusing on knowledge utilization in policymaking. This section documents the increasingly empirical orientation that has characterized policymaking as a whole and communications policymaking in particular. This section also documents the increased importance of external policy analysts (i.e., scholars, advocates, industry associations, think

⁹ For an analysis of the economics of ratings firms, see Harold Furchtgott-Roth, Robert W. Hahn, and Anne Layne-Farrar, *Regulating the Raters: The Law and Economics of Ratings Firms 2* (2006) AEI-Brookings Join Center for Regulatory Studies Working Paper 06-02 (on file with author) (“most ratings firms operate in highly concentrated markets”).

tanks) and their research to policy decision-making. This section then situates these trends within the concept of information asymmetries and their impact on policy decision-making.

The second section explores the privatization of the data that feeds into contemporary policy analysis. This section documents trends across policymaking and database construction in general, as well as within the specific context of communications policymaking. This section includes a case study of the FCC's 2003 media ownership decision¹⁰ in order to illustrate the prominence that commercial data sources can play in communications policymaking and policy analysis, as well as the complications that can arise from this reliance upon such sources. This section documents the range of commercial data sources used both by the FCC and by those filing comments/analyses cited by the Commission in connection with its June, 2003 Report and Order.¹¹

The third section considers the normative arguments in favor of granting broader access to data sources to policy researchers. This section outlines the social benefits associated with expanded data access, as well as the dangers and costs associated with a policymaking environment in which substantial data access disparities exist.

The fourth section offers a set of recommendations for developing expanded data access for policy researchers. This section explores possible mechanisms for enhancing the role of the government in data gathering, as well as mechanisms for developing greater access to commercial data sources for policy researchers in ways that balance the financial imperatives of commercial data providers (whose adequate financial incentives are essential to the continued generation of these data sources) with the public interest considerations regarding the effective operation of the policymaking process. The concluding section summarizes the key arguments presented in this paper and offers suggestions for further research.

Research and Policymaking

¹⁰ Federal Communications Commission, 2002 Biennial Regulatory Review, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd. 13620 (2003).

¹¹ *Id.*

Regulatory decision-making inevitably involves the blending of empirical findings with normative judgments.¹² This, however, is a challenging balance to strike,¹³ and one that requires an integration of value judgments and logical calculations.¹⁴ Nonetheless, many observers of the policymaking process have identified a continued trend toward a greater reliance upon empirical research, as part of a greater “rationalization” of policy decision-making.¹⁵ Albaek describes the introduction of evaluation and policy research into U.S. policymaking in the 1960s and 1970s as “one of the most comprehensive attempts so far to allow research to make its original, relevant contribution to changing society for the better.”¹⁶

There have been a number of explanations for this development. Some argue that it is a purely needs-driven phenomenon. As the National Research Council has noted, “As the economy grows more complex and the population becomes more diverse, increasingly detailed data and data analyses are required for policies to match well with economic and demographic realities. This is true not only for policy making, but also for policy assessment and evaluation.”¹⁷ Others take a more critical stance, seeing this trend as a mechanism for marginalizing the citizenry in the policymaking process as well as

¹² Stephanie Tai, *Three Asymmetries of Informed Environmental Decisionmaking*, 78 TEMP. L. REV. 659, 666 (2005). See also Paul Sabatier, *The Acquisition and Utilization of Technical Information by Administrative Agencies*, 23 ADMIN. SCI. QUARTERLY 396, 397 (1978) (“No policy decision can be based solely on technical information. Normative elements invariably enter, whether the value choices come from the statute, the personal philosophies of administrative officials, or their efforts to balance the preferences of competing constituencies”).

¹³ GIANDOMENICO MAJONE, EVIDENCE, ARGUMENTS, AND PERSUASION IN THE POLICY PROCESS, 5 (1989) (“how can one separate the scientific from the political and value components of policy issues that encompass both?”).

¹⁴ *Id.* (“Since to say anything of importance in public policy requires value judgments . . . artificial separation between values and rational capacities is a threat to all notions of public deliberation and defensible policy choices. . . facts and values are . . . intertwined in policy-making”).

¹⁵ DEBORAH STONE, POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING, 7 (2002) (describing the “rationality project” that she sees “at the core of American political culture since the beginning”). See also BRUCE BIMBER, THE POLITCS OF EXPERTISE IN CONGRESS: THE RISE AND FALL OF THE OFFICE OF TECHNOLOGY ASSESSMENT, xi (1996) (noting that “the possibility of isolating objective truths from human values, and the ability to capture what is most important about public life with science, shapes both experts’ attempts to inform policy-making and scholars’ struggles to define methodology for understanding political action”); Kurt Finsterbusch & Mary R. Hamilton, *The Rationalization of Social Science Research in Policy Studies*, 19 INT’L. J. OF COMP. SOCIOLOGY 58 (1978) (“Social scientists are becoming increasingly involved in policy research”). See generally, Thomas O. McGarity, *Reinventing Rationality: The Role of Regulatory Analysis in the Federal Bureaucracy* (1991).

¹⁶ Erik Albaek, *Between Knowledge and Power: Utilization of Social Science in Public Policymaking*, 28 POLICY SCIENCES 79, 81 (1995).

¹⁷ NATIONAL RESEARCH COUNCIL, EXPANDING ACCESS TO RESEARCH DATA: RECONCILING RISKS AND OPPORTUNITIES, 17, (2005).

marginalizing the role of value judgments in policy decision-making.¹⁸ Regardless of the reason, this trend certainly can be described as a self-sustaining process, one in which the initial influx of empirically-minded personnel into policymaking bodies creates internal motivations for empirical analysis, which in turn furthers the staffing of these bodies with similarly-oriented personnel.¹⁹

These broad trends certainly characterize communications policymaking, where a stronger emphasis on research-driven policymaking developed within the Federal Communications Commission in the 1970s and 1980s,²⁰ and the personnel make-up of the FCC shifted accordingly.²¹ In 1973, the Commission introduced its own internal research and planning enterprise, the Office of Plans and Policy, so that the agency would be better equipped with the data and analyses it deemed necessary to guide its decision-making.²²

A common concern raised about this trend, however, involves the extent to which it represent legitimate efforts to bring greater objectivity and analysis to policy decision-making; or, rather, that research and analysis have been primarily utilized in support of pre-determined policy outcomes. From this latter perspective “research is used as ‘political ammunition,’”²³ serving a “legitimation” function in the realms of policymaking and policy advocacy.²⁴ Sabatier summarizes this position well when he notes

¹⁸ See, e.g., PETER DELEON, *DEMOCRACY AND THE POLICY SCIENCES* (1997); D. Torgerson, *Between Knowledge and Politics: Three Faces of Policy Analysis*. 19 *POLICY SCIENCES* 33 (1986).

¹⁹ Sabatier, *supra* note 12 (“employees who are scientists or members of a profession with a tradition of empirical research also create significant internal pressures for technical analysis because of their training, their desire for esteem from their professional peers, and the enjoyment and sense of personal competence such research provides”).

²⁰ As was characteristic across policymaking sectors, economics was the primary discipline around which this greater empirical orientation in policymaking was organized. See ROBERT CORN-REVERE, *ECONOMICS AND MEDIA REGULATION*. IN *MEDIA ECONOMICS: THEORY AND PRACTICE*, 71, 83 (1993) (describing the FCC’s move away from an “intuitive model” of policymaking and the agency’s “newly discovered interest in the collection of economic data and analysis”). See Philip M. Napoli, *The Unique Nature of Communications Regulation: Evidence and Implications for Communications Policy Analysis*. 43 *J. BROADCASTING & ELECTRONIC MEDIA* 656 (1999), for a discussion of the implications of this trend for communication policymaking

²¹ WENMOUTH W. WILLIAMS, JR., *THE IMPACT OF COMMISSIONER BACKGROUND ON FCC DECISIONS*. IN *MEDIA AND PUBLIC POLICY*, 43 (M. Spitzer, Ed., 1993).

²² See Philip M. Napoli, *Government Assessment of FCC Performance: Recurring Patterns and Implications for Recent Reform Efforts*. 22 *TELECOM. POLICY* 409, 417 (1998). The Office of Plans and Policy was renamed the Office of Strategic Planning and Policy Analysis in 2003, at which point it was both expanded and restructured. See Federal Communications Commission, *Name Change of the Office of Plans and Policy*, at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-231048A1.pdf (March 5, 2003).

²³ See Albaek, *supra* note 16 at 85.

²⁴ James M. Rogers, *Surrendering the Ideal of Disinterestedness in the Policy Research Process: A Cautionary Note*. 2 *KNOWLEDGE IN SOCIETY* 6, 12 (1989).

that “it is quite likely that administrative agencies devote a considerable portion of their resources to the acquisition of technical information but that this information is often utilized to legitimate, rather than to influence, policy decisions.”²⁵ The credibility of the research inevitably gets called into question from this standpoint, as policymakers who are not, in fact, seeking decision-making guidance from empirical research, but rather are seeking studies that support specific pre-determined policy outcomes, may not engage in appropriate scrutiny in either the commissioning or the assessment of individual pieces of research.²⁶

However, others argue that this kind of political utilization of research and analysis is perfectly in keeping with principles of democratic deliberation, and that the notion of a truly objective and rational policymaking process is an ideal type that never has, and never will, characterize the realities of policymaking.²⁷ Rather, policy analysis is better considered as a form of argument.²⁸ According to Rogers, “It seems that the policy research community is gradually coming to accept the politicization of knowledge utilization.”²⁹ As a result, policy researchers have become more comfortable with politicized uses of their work and even more willing to consciously and directly employ their research expertise in more overtly political manners.³⁰ Similarly, analysts of the policymaking process have come to

²⁵ Sabatier, *supra* note 12, at 396.

²⁶ Wendy E. Wagner, *The “Bad Science” Fiction: Reclaiming the Debate over the Role of Science in Public Health and Environmental Regulation*. 66 LAW & CONTEMP. PROB. 63, 79 (2003) (“Agencies might have numerous reasons to rely on weak or valueless studies to support regulations. For example, either low-level staff or micro-managing, high-level administrators with political objectives might have both incentive and opportunity to commission or combine studies that lead to a predetermined result. Malaise and inattention might also cause agency staff to include in their analyses studies that are not sufficiently scrutinized”).

²⁷ MAJONE, *supra* note 13, at 12-20, (discussing “decisionism”: the model of a completely rational and objective approach to policy analysis that fails to provide a “realistic view of the uses of knowledge and analysis in policy deliberation”). *See also* Randall L. Calvert, *The Value of Biased Information: A Rational Choice Model of Political Advice*. 47 J. OF POLITICS 530, 531 (1985) (presenting a theoretical model illustrating the value and utility of biased information and selectively consulting information sources according to particular biases for policymakers).

²⁸ MAJONE, *supra* note 13, at 7. (“The job of analysts consist in large part of producing evidence and arguments to be used in the course of public debate. . . . The arguments analysts produce may be more or less technical, more or less sophisticated, but they must persuade if they are to be taken seriously in the forums of public deliberation”).

²⁹ Rogers, *supra* note 24.

³⁰ *Id.* at 8 (1989) (characterizing uses of analysis as “strategic behavioral responses” in the policymaking and policy advocacy processes).

understand that politics and analysis can not be completely divorced.³¹ The key, however, is that both rational and political approaches to the policymaking process involve substantial reliance upon research and analysis, albeit for different purposes.³²

Not surprisingly, to the extent that there has developed a strong impetus for tighter linkages between research and policymaking,³³ there also has developed a substantial body of literature examining if and how research is, in fact being used.³⁴ While the conclusions within this body of literature are wide-ranging, most relevant to this study are the findings that research can impact policymaking in a variety of ways, and that this impact can be both direct and indirect.³⁵ Indeed, one of the greatest challenges in the field of knowledge utilization research involves effectively capturing the variety of ways in which the use of a particular piece of research might take place.³⁶ In some (perhaps rare) instances, the relationship between research and decision-outcome may be very direct, with a particular study directly influencing a specific policy decision. In other instances, utilization of research may take place at a more abstract level, impacting which issues policymakers choose to focus their attention on, or perhaps influencing how a

³¹ Bob L. Johnson, Jr., *The Politics of Research-Information Use in the Education Policy Arena*. 13 EDUCATIONAL POLICY 23, 25 (1999) (“In short, post-Great Society policy frameworks reflect an increased sensitivity to the political nature and use of research information in the policy-making process”).

³² See MAJONE, *supra* note 13 at 33 (“it is wrong to assume that the only legitimate use of analysis is to assist the policymaker in discovering a solution to a problem. Policymakers need retrospective (postdecision) analysis as least as much as they need prospective (or predecision) analysis, and probably more. . . . As long as rationality is defined as choosing the best means to a given end, it is natural to consider retrospective justificatory arguments as being outside the pale of professional analysis – ‘mere rhetoric,’ propaganda, or rationalization. However, this instrumental view is not an adequate characterization of the role of reason in human affairs”).

³³ See Daniel Breslau, *The Political Power of Research Methods: Knowledge Regimes in U.S. Labor-Market Policy*. 26 THEORY & SOCIETY 869 (1997), for an example of the frequent calls for stronger linkages between research and policymaking, (“social science research rarely has a discernible effect on policy decisions” at 870); See also Jan Hutjes, *Policy Research: Between the Accumulation and Implementation of Knowledge*. 4 KNOWLEDGE & POLICY 10 (1991); James M. Rogers, *Social Science Disciplines and Policy Research: The Case of Political Science*. 9 POLICY STUDIES REVIEW 13 (1989). For examples that focus specifically on the communications policy context, see Philip M. Napoli and Nancy Gillis, *Reassessing the Potential Contribution of Communications Research to Communications Policy: The Case of Media Ownership* (in press) J. OF BROADCASTING & ELECTRONIC MEDIA xx (2006); Napoli, *supra* note 20; STEVEN S. WILDMAN, TOWARD A BETTER INTEGRATION OF MEDIA ECONOMICS AND MEDIA COMPETITION POLICY. IN A COMMUNICATIONS CORNUCOPIA 573 (1998).

³⁴ See, e.g., Albaek, *supra* note 16; Janice M. Beyer & Harrison M. Trice, *The Utilization Process: A Conceptual Framework and Synthesis of Empirical Findings*, 27 ADMIN. SCI. QUARTERLY 591 (1982); Rejean Landry, Moktar Lamari, & Nabil Amara, *The Extent and Determinants of Utilization of University Research in Government Agencies*. 63 PUB. ADMIN. REV. 192 (2003); Cheol H. Oh & Robert F. Rich, *Explaining Use of Information in Public Policymaking*. 9 KNOWLEDGE & POLICY 3 (1996); Sabatier, *supra* note 12.

³⁵ David J. Webber, *The Distribution and Use of Policy Knowledge in the Policy Process*. 4 KNOWLEDGE & POLICY 6 (1991), for a detailed discussion of the various uses of research in the policymaking process.

³⁶ See Landry, Lamari, & Amara, *supra* note 34 at 202.

particular policy issue is framed.³⁷ There may be a variety of stages in the decision-making process in which research may have an impact.³⁸ Indeed, when a somewhat broader notion of the “use” of research is employed, the apparent role of research in the policymaking process increases considerably.³⁹

Thus, as this review is meant to suggest, regardless of how research is used (or misused) in the policymaking process, its potential for influence has grown.⁴⁰ As a result, those interested in the extent to which the mechanisms of the policymaking process reflect and serve the full range of relevant policy considerations need to consider the dynamics surrounding the generation of policy-relevant research.

External Stakeholders and Policy Research

One key element of these dynamics involves the extent to which external stakeholders are serving an increasingly important research function in the policymaking process. Many observers of the policymaking process suggest that the role of external analysts and researchers is becoming more prominent and more influential.⁴¹ There are normative reasons for this kind of outsourcing of the analytical work that informs policymaking. According to the National Research Council, because the scope of research by governmental agencies is often narrowly focused, “data access by other researchers is necessary to ensure that alternative methodologies and uses are fully explored to advance social science knowledge and the design and evaluation of public policies.”⁴² The separation between researchers and

³⁷ See, e.g., Carol H. Weiss, *Research for Policy's Sake: The Enlightenment Function of Social Research*. 3 POLICY ANALYSIS 531, 533-34 (1977) (“The major use of social research in public policymaking may not be problem solving Research use appears to be a much more diffuse and circuitous process. Evidence suggests that government officials use research less to arrive at solutions than to orient themselves to problems. They use research to help them think about issues and define the problematics of a situation, to gain new ideas and new perspectives. They use research to help formulate problems and to set the agenda for future policy actions. And much of this use is not deliberate, direct, and targeted, but a result of long-term percolation of social science concepts, theories, and findings into the climate of informed opinion”). Weiss labels this phenomenon the “enlightenment model of research.”

³⁸ See Landry, Lamari, & Amara, *supra* note 34 at 194. The authors identify six stages of knowledge utilization: Reception; cognition, discussion, reference, effort, and influence, each ultimately reflecting different ways that research can be incorporated into the policymaking process.

³⁹ *Id.* at 202 (discussing when employing multiple stages of knowledge utilization into the research design, “findings suggest that university research is used more extensively than is commonly assumed”).

⁴⁰ See Oh & Rich, *supra* note 34 at 3 (“Whether policy processes are perceived as political or scientific activities, decision makers often face the necessity of using information in making complicated and dynamic decisions”).

⁴¹ See Bimber, *supra* note 15 at 1 (“The numbers of these external experts [performing policy analysis] have increased dramatically in recent decades . . . forming what has been called the ‘fifth branch’ of government”).

⁴² NATIONAL RESEARCH COUNCIL, *supra* note 17 at 38.

policymakers is further explored by Weiss, who notes that “Researchers are not expected to participate as decision makers. In the public policy sphere, their task has generally been to illuminate the consequences of alternatives in order that people in positions of authority can know what they will get and what they will give up when they select a particular course.”⁴³ Academic researchers often are identified as playing a particularly important role in this process, serving as the “second community” in the knowledge utilization process that provides research to policy decision-makers (the “first community”).⁴⁴ Within the context of communications policymaking, Bauer, et al. found that while some research and ideas are generated within policy-making institutions, “most originates from outside and needs to be introduced to policy-making and further processed by policy-makers.”⁴⁵ Findings such as these highlight the importance of maintaining both the quantity and quality of external research, as policymakers are becoming increasingly dependent upon this research in the formulation of their policy priorities and in their choice of policy solutions.

There are, of course, dangers inherent in such a system as well. Perhaps the most obvious, and most compelling, involves the possibility of biased analyses being injected into the policy process by stakeholders with a vested interest in a specific outcome. Such concerns become particularly acute in light of frequent observations that such external analyses do not necessarily receive sufficient scrutiny before they are used in policy formation.⁴⁶ Indeed, numerous criticisms have been leveled over the years

⁴³ Carl H. Weiss, *Policy Research as Advocacy: Pro and Con*, 4 KNOWLEDGE & POLICY 37, 38 (1991).

⁴⁴ See DANIEL COHN, JUMPING INTO THE POLITICAL FRAY: ACADEMICS AND POLICY-MAKING. INSTITUTE FOR RESEARCH ON PUBLIC POLICY, 3 (2006).

⁴⁵ Johannes M. Bauer, Sungjoong Kim, Steven S. Wildman, and Bella Mody, Making U.S. Telecommunications Policy: Who Participates and Who is Heard? The Role of Research and Ideas. White Paper, Quello Center, Michigan State University, 8 (2006), for further analysis of how stakeholders influence communications policymaking. See John M. De Figueiredo & Emerson H. Tiller, *The Structure and Conduct of Corporate Lobbying: How Firms Lobby the Federal Communications Commission*, 10 J. OF ECON. & MANAGEMENT STRATEGY 91 (2001).

⁴⁶ Linda R. Cohen & Robert W. Hahn, *Science and Regulation: A Solution to Concerns Over Public Access to Scientific Data*, 285 SCIENCE 535 (1999) (“At present, analyses used in policy-making are rarely checked carefully before big regulations are put in place”). See also Wagner, *supra* note 26 at 67 (“Problems with the quality of science underlying regulations arise if an agency weights these low-quality studies too heavily or ignores or gives insufficient credence to high quality research”).

against the use of “junk science” in policy decision-making.⁴⁷ Wagner and Michaels argue that policy concerns over the objectivity and quality of scientific research used in policymaking have misguidedly emphasized publicly financed research, to the neglect of external, privately funded and conducted research.⁴⁸ They document the various mechanisms that frequently are employed by private stakeholders to intentionally bias the privately-funded research that frequently is injected into – and relied upon in – the policymaking process, such that private research appears to be far more suspect than the publicly-funded research that has been the focus of regulatory attention.⁴⁹ The authors therefore recommend that the exact same regulatory oversight mechanisms that currently are applied to publicly funded research be applied to privately funded research.⁵⁰

What has been described, then, is a somewhat paradoxical situation: one in which policymakers increasingly rely upon research in their work, but at the same time are ceding more of this research function to external stakeholders. In a policymaking environment that is increasingly research-driven, and in which outside stakeholders are expected to make the bulk of the substantial analytical contributions to the policymaking process, any stakeholder group’s ability to effectively advocate for specific policy outcomes is becoming increasingly tied to that group’s ability to conduct or commission relevant research. The mindset of policymakers is often heavily weighted in favor of arguments based upon empirical data. As has been noted within the context of environmental regulation, “comments not framed as ‘scientific input’ often remain ignored.”⁵¹ This is often equally true in communications policy contexts. In 2003, then-FCC Chairman Michael Powell noted, in response to an overwhelming tide of

⁴⁷ Wagner, *supra* note 26, at 79, (“Agencies might have numerous reasons to rely on weak or valueless studies to support regulations. For example, either low-level staff or micro-managing, high-level administrators with political objectives might have both incentive and opportunity to commission or combine studies that lead to a predetermined result. Malaise and inattention might also cause agency staff to include in their analyses studies that are not sufficiently scrutinized”).

⁴⁸ Wendy Wagner & David Michaels, *Equal Treatment for Regulatory Science: Extending the Controls Governing the Quality of Public Research to Private Research*. 30 AM. J. OF LAW & MEDICINE 119, 120 (2004) (“to the extent that there is a problem with regulatory science . . . the ‘sound science’ reforms miss the target by taking aim at public, rather than private, science”).

⁴⁹ *Id.* at 122-128 (describing tactics such as the falsification of data and research findings, ends-oriented biases in research design and reporting, and the suppression of adverse results).

⁵⁰ *Id.* at 148 (“we recommend that whatever oversight is given to public research (and the appropriate level is certainly open to question) should also be applied to private research”).

⁵¹ See Tai, *supra*, note 12 at 666.

public comment against the relaxation of the FCC's media ownership rules,⁵² that such comments should not be considered as evidence as, according to Powell, "they tend to be at a very generalized level."⁵³

Information Asymmetries and Policy Research

It is within these dynamics that concerns about information asymmetries derived from inequitable data access arise. A number of researchers across a variety of disciplines have explored the concept of information asymmetries in relation to the policymaking process.⁵⁴ In some instances, the role of research has been a focal point for such analyses. Tai, for instance, in an analysis of environmental regulation, identifies asymmetries in participants' abilities to proffer information to agencies and to process and understand information they receive from agencies as a key factor that can lead to "interest-group domination by parties better able to generate, receive, and process information."⁵⁵

The institutional dynamics of the policymaking process in many ways inherently favor large, well-resourced commercial interests over those of citizens or public interest advocates. As Tai notes (again, within the context of environmental regulation), "the complexities of participation may require significant resources to generate substantive public comments . . ."⁵⁶ A key element of "substantive" public comments increasingly involves empirical research. Meaningful participation in the policymaking

⁵² Future of Music Coalition, Citizens Urge FCC to Retain Current Media Ownership Rules: FCC Public Record Shows Overwhelming Opposition to Relaxation of Ownership Caps. (documenting that over 99 percent of individuals and organizations filing comments in the FCC's proceeding opposed relaxation of the Commission's media ownership rules), available at <http://www.futureofmusic.org/news/PRFCCdocket.cfm> (May 14, 2003).

⁵³ See Ann C. Bulkern, FCC Gets an Earful From Colorado, *Denver Post*, Mar. 23, 2003 at K-01, for an analysis of the public comments that generally supports Powell's conclusions that the public comments "did not seriously address the specific economic, legal and policy questions asked by the Commission,"; Michael A. McGregor, *When the "Public Interest" is not what Interests the Public*, 11 COMM. L. & POL'Y 207, 222 (2006). See David Docherty & Michael Tracy, *Scholarship as Silence*, 43 J. OF COMMUNICATION 230, 234 (1993) for similar observations within the British context ("It was quite clear that in order to engage with public policy debates we would have to play a numbers game. Clever thinking, elegant essays, treatises on history, disquisitions on philosophy, values and culture were important but not enough if we were to be taken seriously by those with power over policy").

⁵⁴ See, e.g., Jeffrey S. Banks & Barry R. Weingast, *The Political Control of Bureaucracies under Asymmetric Information*, 36 AM. J. OF POLITICAL SCIENCE 509 (1992); Otto Keck, *The Information Dilemma: Private Information as a Cause of Transaction Failure in Markets, Regulation, Hierarchy, and Politics*, 31 J. OF CONFLICT RESOLUTION 139 (1987); Susanne Lohmann, *An Information Rationale for the Power of Special Interests*, 92 AM. POLITICAL SCIENCE REV. 809 (1998); Tai, *supra* note 12 at 666.

⁵⁵ See Tai, *supra* note 12 at 666. See also D. Nelkin, *Scientific Knowledge, Public Policy, and Democracy: A Review Essay*, 1 KNOWLEDGE: CREATION, DIFFUSION, UTILIZATION 106, 118 (1979) ("Scientific knowledge, like land, labor, and capital is a resource – indeed a commodity – and the ability to manipulate and control this resource has profound implications for the distribution of political power in democratic societies").

⁵⁶ *Supra* note 51, at 666.

process therefore often requires the generation, or commissioning, of social science-based studies. Of course, “Well-funded and organized entities, such as industries . . . can more easily afford to generate these studies than the lay public,”⁵⁷ or, for that matter, the public interest organizations that often serve as surrogates for the public in many policy debates, or the scholarly community. Ultimately, “There is little doubt that unequal resources produces an imbalanced pool of analytic input.”⁵⁸ Such imbalances likely impact the integrity of the policymaking process whether the process as conceptualized as a primarily scientific or primarily political process,⁵⁹ to the extent that the policy arguments of some stakeholders (those with research to support their arguments) likely receive substantially greater consideration by policymakers than the policy arguments of other stakeholders (those without supporting research).⁶⁰

Privatization of Data

What has been described thus far, then, is a policymaking environment in which empirical research is increasingly influential in the policymaking process, in which a large portion of that research responsibility has been ceded to external stakeholders, and in which the resource differences between these stakeholder groups are substantial – all of which suggests a policy process that is highly unbalanced, purely from a research-generating capacity, in favor of certain stakeholder groups. The purpose of this section is to illustrate how such imbalances may be compounded by another defining characteristic of the contemporary policymaking/policy analysis landscape (particularly in relation to communications policy)

⁵⁷ *Id.*

⁵⁸ See Rogers, *supra* note 24 at 14 (noting that “Unequal resources and uneven representation take on added importance when the focus is on the partisan use of analysis. Inequality of resources becomes especially noteworthy when the cost of producing policy analysis ranges from hundreds of thousands to millions of dollars.”)

⁵⁹ See Keck, *supra* note 54 at 157 (“The theory of the information dilemma . . . proposes that a good deal of regulatory failure can be explained without recourse to any government failure or imperfection of the political system. Government may be truly motivated by the public interest and may be as perfect as perfect may be; if in regulatory policymaking it relies on the regulated firms for information in order to assess the impact of changes in regulation on public welfare, it may nevertheless produce regulatory outcomes that are suboptimal from the point of view of the public at large, suboptimal from the point of view of the regulated firms, and suboptimal from the point of view of total utility”). See also Sandra Braman, *Facing Out: Researchers and Policy-makers*. In SANDRA BRAMAN (ED.), COMMUNICATION RESEARCHERS AND POLICY-MAKING 221, 223 (2003) (“The Federal Communications Commission (FCC) conducts research on its own and solicits input from scholars regarding policy options, but too often relies almost exclusively upon data provided by corporations in the industries being regulated”).

⁶⁰ See Johnson, Jr., *supra* note 31 at 34 (1999) (“The amount and quality of information possessed by arena participants on any given issue and the skill with which they make use of this information are thus important variables in the policy arena”).

– the increased privatization and commercialization of the core data necessary for rigorous policy analyses.

Embedded within the broader trend of the privatization of many aspects of governmental authority⁶¹ is the more specific issue of the privatization of the data gathering mechanisms that feed into policy decision-making. Across a variety of fields, there has been a trend towards the commodification of data and information that previously was treated as a public good.⁶² A recent *Washington Post* article illustrated the extent to which national security policymaking is becoming increasingly reliant upon data obtained from private vendors.⁶³ Greenbaum details the decreasing role that the U.S. government has played in the generation of databases over the past thirty years, noting that in 1977 government-sponsored databases accounted for 56% of the American market, but that by 2002 this number had fallen to 6%.⁶⁴ Reasons for this phenomenon are both economic and political, with rising database production costs coupled with mounting governmental costs in other areas accounting for the economic pressure; and lobbying from industry groups eager to fill – and profit from – the voids left when government agencies withdraw from data collection accounting for the political pressure.⁶⁵ It is worth noting, however, that “This significant loss of government capital in the industry still paralleled a phenomenal increase in

⁶¹ See generally, Alasdair Roberts, *Structural Pluralism and the Right to Information*. 51 U. TORONTO L. J. 243 (2001).

⁶² J.H. Reichman & Paul F Uhlir, *Database Protection at the Crossroads: Recent Developments and their Impact on Science and Technology*, 14 BERKELEY TECH. L.J. 793, 796, 809-810 (1999) (noting budgetary cuts for government funded data collection and the privatization of much raw data production.); J.H. Reichman & Paul F. Uhlir, *The Public Domain: A Contractually Reconstructed Research Commons for Scientific Data in a Highly Protectionist Intellectual Property Environment*, 66 LAW & CONTEMP. PROB. 315, 351, 368 (2003) (“The private sector generates an ever-increasing amount of scientific data that are indispensable to academic research. . . . During the last ten years, there has been a marked tendency to shift the production of science-relevant databases from the public to the private sector”), for an historical perspective on the issues of database access and database protection that arise from this privatization process. See Paula Baron, *Back to the Future: Learning form the Past in the Database Debate*. 62 OHIO ST. L.J. 879 (2001).

⁶³ Arshad Mohammed & Sara Kehaulani Goo, *Government Increasingly Turning to Data Mining*. WASHINGTON POST, June 15, 2006, at D3, (“As federal agencies delve into the vast commercial market for consumer information, such as buying habits and financial records, they are tapping into data that would be difficult for the government to accumulate but that has become a booming business for private companies. Industry executives, analysts and watchdog groups say the federal government has significantly increased what it spends to buy personal data from the private sector They expect the sums to keep rising far into the future”).

⁶⁴ Dov S. Greenbaum, *The Database Debate: In Support of an Inequitable Solution*, 13 ALB. L.J. SCI. & TECH. 431, 480 (2003).

⁶⁵ See Reichman & Uhlir, *supra* note 62 (2003) at 368-369 (“The budgetary pressures on the government are both structural and political in nature”).

growth of the industry, indicating that the degree of private investment has more than made up for the government's pullback."⁶⁶ The financial incentives for government agencies to move out of the data collection enterprise can, of course, be substantial, as funds can be freed up for other activities.⁶⁷ The danger that arises, however, involves how the terms of access available to other users of the data change as the data move from public to private hands.⁶⁸

As these data move to private hands, researchers increasingly find themselves at the mercy of the often prohibitive pricing platforms and often very restrictive licensing conditions of the commercial data providers.⁶⁹ And there are, at this point, no regulations or policies directed at specifying access parameters or price ceilings that commercial data providers must abide by when their data are sought for policy-relevant research. As Reichman and Uhler argue, "The lack of any restraints on licensing, especially on sole-source data providers, adds to the dangers inherent in the creation of a strong exclusive property right in collections of data. . . . Without a concomitant duty to deal fairly and reasonably with public-interest users, these combined powers could lead to high prices for data and to the imposition of harsh and oppressive terms concerning both access and subsequent uses of data that would especially disadvantage academic researchers."⁷⁰ The ultimate danger of such scenario, of course, is a "chilling effect on data-intensive research."⁷¹

⁶⁶ See Greenbaum, *supra* note 64 at 480-481.

⁶⁷ Charles Brill, *Legal Protection of Collections of Facts*, 1998 COMP. L. REV. & TECH. J. 1, 48 (1998) ("By promising the government agency free, or reduced cost access to the database, a database provider may convince the government agency to cease publishing the information, thereby allowing the government agency to spend its resources on other projects").

⁶⁸ *Id.* ("the monopoly power granted to the database publisher may allow the database provider to price the database service beyond the means of some users of the information").

⁶⁹ Tomas A. Lipinski, *The Commodification of Information and the Extension of Proprietary Rights into the Public Domain: Recent Legal (Case and Other) Developments in the United States*, 22 J. BUS. ETHICS 63, 71 (1999) ("An information owner may also 'negotiate' for enforceable rights (contract or license) which may in essence remove any public domain rights such as fair use from the user. Here an individual user is forced between choosing either to not have access to the information (through foregone purchases) or having access to information but on the conditions imposed by the seller (information owner)").

⁷⁰ See Reichman & Uhler, *supra* note 62 (1999), at 814-815.

⁷¹ *Id.* at 819.

Recently, we have seen efforts to enhance the control that database providers have over the usage of the information they provide. For instance, the Collections of Information Antipiracy Act⁷² was an effort that, had it passed, would have prevented an individual from extracting, or using in commerce, a substantial portion of the information contained in a database compiled by another party, even if the information contained within the database was factual in nature (facts generally not being copyrightable), so as to harm the actual or potential market for the product.⁷³ Although the Act included language that granted permission to individuals to extract data for nonprofit, educational, scientific, or research purposes in a manner that did not harm directly the actual or potential market for the product, Pollack points out the glaring loophole in such apparently permissive language: “Scientific databases are used largely by scientists and educators. A scientist who uses a scientific database for free is, therefore, hurting the database’s market.”⁷⁴ Similarly, Reichman and Uhler warn that “Especially serious problems seem likely to arise when the public research community becomes the target market for the commercial data supplier, and there is a resulting tension between freedom of contract and the needs and capabilities of the nonprofit research sector. In principle, one expects that a supplier will not price itself out of the market. In practice, some science publishers have adopted exorbitant pricing strategies that do limit scientists’ abilities to access and use their products.”⁷⁵ Consequently, those under-resourced providers of external policy analysis (scholars, public interest/advocacy organizations) find themselves at a tremendous disadvantage in terms of their ability to provide relevant information and analysis to policymakers. And policymakers – and their decision-making – then suffer as well.

⁷² H.R. 2652, 105th Congress (1998).

⁷³ Comparable legislation already has been passed by the European Union (European Union Database Directive). See Mark Schneider, *The European Union Database Directive*, 13 BERKELEY TECH. L.J. 551, 558 (1998).

⁷⁴ Malla Pollack, *The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment*, 17 CARDOZO ARTS & ENT. L.J. 47, 117 (1999).

⁷⁵ See Reichman & Uhler, *supra* note 62 (2003), at 460. The logic of this sort of apparent irrationality in pricing may be that the research community ultimately represents such a small revenue source for these data providers that whatever miniscule risks of sale to a policy researcher carries in terms of harming other revenue streams may be sufficient to overcome any willingness to price the product more accessibly to the research community. The extent to which the commercial data providers in the media sector have begun to consider the research community as a distinct market is illustrated by the recent appearance of data providers such as Nielsen Media Research at exhibit booths at academic association meetings such as the annual Broadcast Education Association conference.

Concerns such as these do, of course, need to be weighed against the economic imperatives facing commercial data providers. The collection and aggregation of the type of data used in policymaking are incredibly expensive. And, to the extent that this sector has become privatized, sufficient financial incentives need to be in place to encourage the continued creation of such databases, absent a return to greater government involvement in the collection and dissemination of policy-relevant data.⁷⁶ Ultimately, then, the somewhat paradoxical situation is one in which “Although society has a strong interest in encouraging the creation of valuable databases, society also has an opposing interest in open access to the factual information comprising the databases. Therefore, society’s grant of protection to database compilers attempts to strike a balance between the rights of the database producers to profit from their own labor and society’s interest in access to the information.”⁷⁷ According to many analyses, the balance may currently be tilted in favor of the commercial database vendors.⁷⁸

This trend towards the privatization of policy-relevant data, and the tensions between the interests of the data providers and the interests of the policy analysis communities, have been particularly pronounced in the area of communications policy. The deregulatory trend of the past 30 years has been characterized in communications policy by a continued withdrawing by the FCC from gathering various forms of standardized data from the organizations under its regulatory authority.⁷⁹ Thus, for instance, broadcast license renewal requests, which once required the submission of a substantial amount of information regarding licensee performance, now take the form of a simple “postcard renewal,” in which

⁷⁶ See Charles R. McManis, *Database Protection in the Digital Information Age*, 7 ROGER WILLIAMS U. L. REV. 7, 23 (“The compilation of a database requires substantial investment.”)

⁷⁷ See Brill, *supra* note 67 at 3.

⁷⁸ Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 BERKELEY TECH. L.J. 535, 600 (2000) (arguing that legislative efforts to protect commercial database providers are based upon insufficient evidence of the threat, or reality, of significant piracy). See *supra* note 62, at 460.

⁷⁹ John Dunbar, *A Penchant for Secrecy: Why is the FCC so Determined to Keep Key Data from the Public?* Center for Public Integrity 1 (2003), available at <http://www.openairwaves.org/telecom/report.aspx?aid=18> (last accessed June 6, 2006) (quoting Andrew Schwartzman of the Media Access Project: “When the agency deregulates, and stops collecting data, they say we’re going to rely on marketplace forces and public complaints to make us aware of problems.” However, the lack of available data “takes away the means of members of the public to do that monitoring”).

little, if any, substantive information is gathered from the licensee.⁸⁰ The Commission used to gather detailed employment data in connection with its Equal Employment Opportunity rules, but the scaling back of these rules has been accompanied by a scaling back of the quantity and quality of the employment data the Commission gathers.⁸¹ The Commission used to gather cable system subscriber data, but stopped gathering such data after an initiative to deregulate the cable industry was implemented in the 1990s.⁸² An earlier deregulatory period led the FCC to cease gathering financial statements from broadcasters.⁸³

Access to such data must now be obtained from a growing array of commercial data providers. Industry financial and ownership information, for example, is now provided primarily by an organization called BIA Research,⁸⁴ which aggregates television, radio station, and newspaper revenue, market, ownership, and ratings/circulation data into a large, comprehensive database that even the FCC relies upon heavily for its own analyses.⁸⁵ Similar information for the cable industry, which the FCC used to obtain regularly, now is gathered and supplied primarily by Kagan Research.⁸⁶ Today, in order to obtain the kind of information about television station programming practices that used to be gathered by the FCC in its license renewal process, researchers must consult television program schedule databases supplied commercially by organizations such as Tribune Media Services.⁸⁷ Reflecting these trends, a report by the Center for Public Integrity noted that its efforts to construct a database of media companies was repeatedly hampered by the lack of relevant publicly available data, and that very little of the relevant

⁸⁰ See Revision of Applications for Renewals of License of Commercial and Non-Commercial AM, FM, and Television Licensees, 49 Rad. Reg. 2d (P & F) 740, 741 (1981).

⁸¹ Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, Second Notice of Proposed Rulemaking, 16 FCC Rcd 22843, 22858 (Dec. 21, 2001).

⁸² *Supra* note 79. (noting that incomplete cable system subscriber data were found in the FCC's Cable Operations and Licensing System database due to the fact that "the FCC stopped collecting it after 'deregulation' of the industry in 1994").

⁸³ James G. Webster, *The Role of Audience Ratings in Communications Policy*. 12 COMM. & THE LAW 59, 63 (1990) ("the FCC stopped collecting financial statements from broadcasters several years ago").

⁸⁴ See <http://www.bia.com> (Last visited June 30th, 2006).

⁸⁵ Federal Communications Commission, 2002 Biennial Regulatory Review, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd. 13620, par. 274 (2003) ("The Commission traditionally has relied on BIA's Media Access Pro database to obtain information about particular Arbitron Metros").

⁸⁶ See <http://www.kagan.com> (Last visited June 30th, 2006).

⁸⁷ See <http://tms.tribune.com> (Last visited June 30th, 2006).

data resided with the FCC.⁸⁸ These examples support Media Access Project's Harold Feld's observation that "Self-generated and self-directed research . . . accounts for a vanishingly small amount of FCC data."⁸⁹

There are, of course, other data sources, such as the audience ratings data provided by firms such as Nielsen (for television)⁹⁰ and Arbitron (for radio)⁹¹ that traditionally have been commercially generated. These data sources, too, are becoming increasingly central to contemporary communications policy analysis,⁹² particularly in light of the trend toward economically-oriented analyses described above, as well as the recent trend toward better integrating analyses of audience behavior and media usage into the policy decision-making process.⁹³ And thus, while the government has never been involved in the creation of such data, such data are becoming increasingly important in the analyses that policymakers conduct and rely upon.⁹⁴

Obtaining the relevant data from the private sector can often prove difficult, with price being the primary impediment. One might argue that since databases are public goods,⁹⁵ the sellers of these

⁸⁸ *Supra* note 79. ("When the Center for Public Integrity was constructing its database of media companies, staff researchers were repeatedly referred by FCC staff to private companies for basic information on ownership, audience reach and cable subscribers. Getting market share information, which is key when reviewing whether broadcasters are within existing FCC regulations that limit the number of households that any one owner can reach, was all but impossible without going outside the agency").

⁸⁹ Harold Feld, *FCC Practices Regarding Gathering Data, Processing Data, and Presenting Data: An Advocate's Perspective*. In P.M. Napoli (Ed.) *Media Diversity and Localism: Meaning, Metrics, and the Public Interest Conference Report* 87, 88 (2004) at

<http://www.fordham.edu/images/Undergraduate/communications/conferencereport.pdf> (Last visited June 30th, 2006). Feld goes on to note that "The FCC rarely compels the production of data on an industry-wide basis."

⁹⁰ See <http://www.nielsenmediaresearch.com> (Last visited June 30th, 2006).

⁹¹ See <http://www.arbitron.com> (Last visited June 30th, 2006).

⁹² *Supra* note 83 at 60-66 (1990).

⁹³ See Napoli & Gillis, *supra* note 34 (illustrating a "broadening analytical perspective" within the context of media ownership that accounts for issues such as "how citizens use different media technologies to obtain information; if/how media content varies in accordance with variations in market and ownership conditions; what factors contribute to biased or ideologically slanted news content; and what criteria should be employed in defining an information source and the magnitude of its impact"). See also Marc Raboy, Bram Dov Abramson, Serge Proulx, & Roxanne Welters, *Media Policy, Audiences, and Social Demand: Research at the Interface of Policy Studies and Audience Studies*. 2 TELEVISION & NEW MEDIA 95, 96 (2001) (urging a "closer dialogue between scholars working in what ought to be see as related areas of communication research: policy studies and audience studies").

⁹⁴ *Supra* note 83 at 60-66 (1990), for a discussion, for example, of the range of policy questions that can be investigated via the use of ratings data.

⁹⁵ The term "public goods" in this case refers to goods that are "characterized by their nonrival and nonexcludable properties. The former means it costs nothing to provide the good to another person once someone has produced it,

databases would be willing and able to make the data available to under-resourced groups (such as scholars or public interest/advocacy organizations) at a dramatically reduced price.⁹⁶ In reality, these data providers often do just that, though these dramatically reduced prices often can still be substantial by scholarly and/or non-profit standards. Also related to this issue is the dynamics of the subsidization of data access. That is, most communications-related commercial databases are funded primarily by clients from within these industries.⁹⁷ Should these database providers then make their data available to the scholarly and/or public interest/advocacy communities at a dramatically reduced rate, these providers are vulnerable to criticism from their primary constituency. Specifically, the database provider's major client list may take issue with their substantial subscription payments being used to essentially help subsidize much less expensive data access for other constituencies – constituencies that ultimately may use the data to produce research highly critical of these very same communications firms.⁹⁸ Thus, there are more than basic pricing issues to be navigated by commercial database providers who produce information relevant to communications policymaking and policy advocacy.

In sum, the concurrent trends of the increased need for robust empirical analysis in order to meaningfully participate in the policy process and the increased privatization of much of the data necessary for such analyses, create a situation in which the resource imbalances that characterize the stakeholder dynamics in the policymaking process can become magnified and contribute to even greater imbalances in terms of the analyses that different stakeholder groups are able to bring to bear on individual policy issues.

Case Study: Media Ownership

that is, it tends to have zero marginal cost. The latter means that once such a good has been produced, the producer cannot exclude others from benefiting from it." *See* Reichman & Uhler, *supra* note 62 (2003) at 362.

⁹⁶ *Supra* note 83 at 68 (1990) (discussing specifically ratings data: "Like other kinds of information, ratings are a 'public good.' That is, the cost of producing ratings is largely independent of the number of people who consume them. Because policy makers engage in secondary analysis of data that were collected for another purpose, the ratings service can, in theory, price the data very inexpensively").

⁹⁷ PHILIP M. NAPOLI, AUDIENCE ECONOMICS 27 (2003). (discussing within the context of audience data, "Media organizations influence the structure and behavior of measurement firms because, like advertisers, the media industries are major clients of audience measurement firms").

⁹⁸ *See supra* note 83 at 69 (referencing specifically ratings data: "Indeed, there is no guarantee that the ratings companies will agree to provide data at all. They may fear offending an established client or being drawn into legal battle if their data are used in a proceeding").

As has been argued, the situation in communications policy regarding the centrality of privately generated databases to effective policy analysis is particularly pronounced. Commercial databases ranging from television and radio audience ratings, to industry financial information, to newspaper circulation figures, provide the bases for the kinds of analyses that are at the core of many communications policy decisions. This section illustrates this point via a case study of the FCC's highly publicized, and highly controversial, media ownership proceeding.⁹⁹ In this proceeding, the FCC voted to relax a number of restrictions on the common ownership of media outlets.¹⁰⁰

This proceeding also was characterized by the relatively rare phenomenon in which the FCC commissioned twelve empirical studies in advance of its June, 2003 decision, which were conducted both by internal staff members and by outside scholars and commercial organizations.¹⁰¹ This proceeding is also particularly illustrative in light of the controversies that arose in the wake of the Commission's release of these twelve studies. Specifically, the issue of commercial, proprietary data and the appropriate level of access that should be provided to such data in policymaking contexts came to the forefront of the media ownership proceeding. In October of 2002, the FCC released its twelve studies addressing various dimensions of the media ownership issue.¹⁰² These studies were part of what FCC Chairman Michael Powell declared "the most comprehensive look at media ownership ever undertaken by the FCC,"¹⁰³ and ultimately figured prominently in the Commission's eventual decision on the media ownership proceeding.¹⁰⁴ When external stakeholders such as scholars and public interest advocates sought to verify

⁹⁹ Federal Communications Commission, 2002 Biennial Regulatory Review, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd. 13620 (2003).

¹⁰⁰ Federal Communications Commission, 2002 Biennial Regulatory Review, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd. 13620 (2003). (relaxing rules limiting common ownership of television stations and newspapers within individual markets, as well as rules limiting multiple television station ownership within and across media markets).

¹⁰¹ Federal Communications Commission, News Release: FCC Releases Twelve Studies on the Current Media Marketplace (October 1, 2002), at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A1.txt (Last visited June 15, 2006).

¹⁰² *Id.* See also, all twelve studies are accessible at: <http://www.fcc.gov/ownership/studies.html> (Last visited June 30, 2006).

¹⁰³ *Supra* note 101.

¹⁰⁴ Federal Communications Commission, 2002 Biennial Regulatory Review, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd. 13620 (2003).

the claims of these studies via reanalysis of their underlying data, their requests were initially denied.¹⁰⁵ Under substantial pressure,¹⁰⁶ the FCC eventually relented, though only marginally. Data for eight of the twelve studies were made available on-line in November of 2002¹⁰⁷ Also in November of 2002, the Commission released a Protective Order¹⁰⁸ that granted limited access to the underlying data for the remaining four studies under highly restricted terms. These limitations on access were enforced due to the proprietary nature of the commercial data underlying these four studies.¹⁰⁹ Those seeking to review the data for these four studies were required to sign a Declaration promising to abide by the terms of the Protective Order. Access to the data would be limited to on-site access at FCC headquarters.¹¹⁰ No removal or copying of the data were permitted,¹¹¹ though reviewing parties were permitted to conduct their own analyses with the data.¹¹² Of course, conducting such analyses on-site, under the time

¹⁰⁵ *Supra* note 79 at 1 (2003) at <http://www.openairwaves.org/telecom/report.aspx?aid=18> (last accessed June 6, 2006) (“The FCC’s reliance on non-government, private data is so ingrained that when public interest groups asked for access to data underlying a series of media ownership reports . . . the FCC relented only after issuing a quasi-judicial ‘protective order’ meant to keep the information secret”).

¹⁰⁶ Eric Alterman, *Think Again: Falling Upward at the CPB* 1 (April 21, 2005) (describing efforts of public interest groups to gain access to the underlying data for the media ownership studies), available at <http://www.americanprogress.org/site/pp.asp?c=biJRJ8OVF&b=569645> (Last visited July 6, 2006)

¹⁰⁷ Federal Communications Commission, Public Notice, FCC’s Media Bureau Adopts Procedures for Public Access to Data Underlying Media Ownership Studies and Extends Comment Deadlines for 2002 Biennial Regulatory Review of Commission’s Media Ownership Rules (November 5, 2002) at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-02-2980A1.pdf (Last visited July 6th, 2006).

¹⁰⁸ Federal Communications Commission, Protective Order (November 5, 2002), at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-02-2981A1.pdf (Last visited July 6th, 2006).

¹⁰⁹ *Id.* (“This order establishes procedures for review by interested parties of the proprietary underlying data for four of those twelve studies”). See also, Federal Communications Commission, Public Notice, FCC’s Media Bureau Adopts Procedures for Public Access to Data Underlying Media Ownership Studies and Extends Comment Deadlines for 2002 Biennial Regulatory Review of Commission’s Media Ownership Rules (November 5, 2002), at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-02-2980A1.pdf (Last visited July 6th, 2006) (“For four of those . . . studies, the authors created data sets using proprietary information licensed to the author and/or the author’s employer for purposes excluding public dissemination”). The four studies at issue were: C. Anthony Bush, *On the Substitutability of Local Newspaper, Radio and Broadcast Television Advertising in Local Business Sales* (2002); George Williams and Scott Roberts, *Radio Industry Review 2002: Trends in Ownership, Format, and Finance* (2002); Keith Brown and George Williams, *Consolidation and Advertising Prices in Local Radio Markets* (2002); and Joel Waldfoegel, *Consumer Substitutability Among Media* (2002), at <http://www.fcc.gov/ownership/studies.html> (Last visited June 30, 2006).

¹¹⁰ *Supra* note 108 (“The Data Sets shall be maintained by the Commission for inspection at its headquarters consistent with the terms of this Protective Order”).

¹¹¹ *Supra* note 108 (“Authorized representatives may not remove Data Sets, or copies thereof, from agency headquarters”).

¹¹² *Supra* note 108 (“Reviewing parties may use information derived from the Data Sets to conduct their own analyses. Moreover, any such calculations or other analyses performed by the Reviewing Party using information derived from the Data Sets that do not reveal protected information shall not be considered part of the Data Set. However, a Reviewing Party’s calculations, analyses or other derivative materials, the contents or outcomes of which

limitations imposed on access to the data would prove quite difficult; and thus, this arrangement hardly represents an ideal solution to the issue of access to the commercial data used in policy decision-making. It is worth noting that the Commission did offer, as an alternative, that “Outside parties also may obtain licenses from any or all licensors of the underlying data to evaluate the results of the studies and/or develop other studies that will contribute to the record in the proceeding.”¹¹³

Given these circumstances, the media ownership proceeding probably can not be considered representative of the role that commercial data play in communications policymaking. Rather, it represents an extreme scenario that illustrates the degree to which commercial data sources can factor into the communications policymaking process. To illustrate this extreme, the media ownership Report and Order was analyzed as follows. First, all references in the Report and Order were analyzed to determine whether they referenced a specific study. Referenced studies submitted to the FCC as part of formal comments filed with the Commission, as well as studies (published or unpublished) referenced directly by the FCC were included in the analysis. Next, these studies were obtained, and their methodologies analyzed, to determine which, if any, commercial data sources were utilized in the analysis. Studies submitted as part of formal comments were obtained via retrieval of the comments through the Electronic Comments Filing System (ECFS) available on the FCC’s home page.¹¹⁴ Finally, all of the references in the Report and Order also were analyzed to determine which, if any, commercial data sources (such as industry statistical sources, or ratings reports), were referenced by the FCC directly in the Report and Order, independent of their use in any particular study. These efforts were undertaken simply to provide a thorough catalog of the range of commercial data sources that can have a bearing on a particular communications policy issue. In addition, each data source was associated with the appropriate category(ies) of stakeholder group(s) – FCC, industry, academic, or public interest organization –

do reveal protected information, shall be used and treated by the Reviewing Party in the same fashion as the underlying Data Sets used in such calculations, analyses and derivative materials under the terms of this Order”).

¹¹³ *Supra* note 107.

¹¹⁴ *See* http://gulfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi (Last visited July 6, 2006).

depending upon which of these stakeholder groups utilized the data source. The results of this analysis are presented in Table 1.

Insert Table 1 About Here

As Table 1 illustrates, 40 different commercial data sources were utilized in the analyses that contributed to the FCC's media ownership decision. These sources ranged from large scale databases (such as BIA and Nielsen data), to annual industry directories (such as the *Broadcasting & Cable Yearbook*), to a wide array of industry financial reports (such as those provided by Kagan Research on the cable industry). The FCC Media Ownership Working Group's Study #1, *A Comparison of Media Outlets and Ownership for Ten Selected Markets, 1960, 1980, 2000*, alone utilized six different commercial data sources, including the BIA Master Access Pro database, along with five different commercially published directories of television, cable, and print outlet information.¹¹⁵ Note that these results likely under-represent the range of commercial data sources used in relation to this policy issue, as only those sources that were cited directly by the FCC in the Report and Order, or that were part of studies cited directly in the Report and Order were included in the analysis. Data sources utilized in any studies submitted to – but not referenced by – the FCC would not be reflected in Table 1.

Of perhaps equal interest is the information contained on the right side of the table, which identifies which stakeholders in the process utilized the data. As the table indicates, by far the most common users of the relevant commercial data sources were the FCC and industry stakeholders (utilizing 24 and 23, respectively, of the 40 data sources listed in the Table 1). As was noted previously, the extent to which the Commission engaged in its own research in conjunction with this proceeding was somewhat uncharacteristic, which may account for the impressively wide array of data sources the agency itself drew upon in connection with this proceeding. Much less common was data usage by either public

¹¹⁵ Scott Roberts, Jane Frenette, and Dione Stearns, *A Comparison of Media Outlets and Owners for Ten Selected Markets: 1960, 1980, 2000*, 5 (2002) (See Appendix listing data sources), at <http://www.fcc.gov/ownership/studies.html> (Last visited June 30, 2006).

interest organizations or academic researchers, with cited public interest filers utilizing four different commercial data sources and academic researchers utilizing seven. As this combination of results thus indicates, not only did a wide array of commercial data sources figure very prominently in the analyses relevant to the media ownership decision, but utilization of these data sources appears to have been very unequally distributed across the various stakeholder groups, with the public interest and scholarly research communities exhibiting far less usage of these sources. The imbalance exhibited in these findings may simply be a result of the FCC more frequently citing the comments of industry stakeholders than the work of academic or public interest researchers, though the literature on the role of research in the policymaking process discussed previously would suggest that such a tendency would itself be a function of policymakers' preference for relying upon the submissions of stakeholders who engage in empirical analysis.¹¹⁶

The Need for Improved Access to Commercial Data Sources for Policy Researchers

The extent of the commercialization of policy-relevant data contributes to an analytical imbalance that strikes at the core of the functioning of a representative democracy and the role of information in the democratic process. There are a wide range of benefits that arise from a policymaking environment in which access to the relevant data is widely distributed. Arzberger, et al. provide perhaps one of the most thorough catalogs of the social and economic benefits of expansive data access for researchers:

Open access to, and sharing of, data reinforces open scientific inquiry, encourages diversity of analysis and opinion, promotes new research, makes possible the testing of new or alternative hypotheses and methods of analysis, supports studies on data collection methods and measurement, facilitates the education of new researchers, enables the exploration of topics not envisioned by the initial investigators, and permits the creation of new data sets when data from multiple sources are combined.¹¹⁷

¹¹⁶ See *supra* notes 41-50 and accompanying text.

¹¹⁷ P Arzberger, et al. *Promoting Access to Public Research Data for Scientific, Economic, and Social Development*. 3 *Data Science Journal* 135, 139 (2004).

As Nobel Laureate Joshua Ledberg has argued, “Data are the building blocks of knowledge and the seeds of discovery. . . . They are also the foundation of sensible public policy in our democracy.”¹¹⁸

Consequently, the greater the diversity of sources of analysis that have the ability to meaningfully participate in the policymaking process, the greater the likelihood that the information that ultimately guides, and is utilized by, decision-makers will reflect the full range of policy options, considerations, and concerns. Ultimately, as the National Research Council has noted, “The benefits of providing wider access to microdata for researchers and policy analysts are better informed public policies.”¹¹⁹

Conversely, there are substantial dangers associated with a policy environment in which access to the data that fuels policy analysis and guides policy decision-making is limited. Specifically, legitimate concerns regarding public confidence in its policymakers arise from any policymaking process that relies upon data and analysis that can not be subjected fully to public scrutiny and reassessment. Thus, “Public access to data ensures greater transparency, which lends legitimacy to the regulatory process.

Transparency is a valuable aspect of public decision-making in a democracy.”¹²⁰ To the extent that the privatization of data undermines this transparency, public confidence in its policy decision-makers suffers. Feld addresses this issue within the specific context of communications policymaking, noting that “no one has a monopoly on wisdom. Scholars and advocates have a right and responsibility to verify the FCC’s research – an impossibility if the FCC cannot release the underlying data.”¹²¹

In the end, from a purely normative perspective, it seems fairly clear that in a well-functioning democracy public policy should be made with publicly available data. For there to be increasingly privileged and unequal access to the raw data that guide policy decisions represents a significant failing in the construction of our policymaking process and, consequently, a significant roadblock to effective public policymaking and public confidence in policy decisions.

¹¹⁸ Collection of Information Act: Hearing on H.R. 354 before the Subcomm. On Courts and Intellectual Prop. Of the House Comm. On the Judiciary, 106th Cong. (1999) (statement of Joshua Ledberg, Nobel laureate, on behalf of NAS, NAE, IOM and the American Association for the Advancement of Science), available at <http://www.house.gov/judiciary/106-lede.htm>.

¹¹⁹ NATIONAL RESEARCH COUNCIL, *supra* note 17 at 1.

¹²⁰ Cohen & Hahn, *supra* note 46 at 536.

¹²¹ *See supra* note 89.

Recommendations

In light of the multi-faceted problem outlined up to this point, this section develops a set of possible paths for improving access to data that are used in communications policymaking and policy analysis. It is worth noting that, to this point, to the extent that policies have addressed issues of access to data used in policymaking, they have focused on data gathered with public funds,¹²² on the quality of research conducted with publicly funded data,¹²³ or, on the issue of privacy and confidentiality concerns associated with the dissemination of data gathered from individual citizens.¹²⁴ Yet, as this paper has demonstrated, private data are perhaps more central to contemporary communications policymaking today than are public data, yet little, if anything, has been done to address the access imbalances created by this situation and their implications for policymaking.

Ideally, of course, a reversal of the trends toward greater privatization of data and reduced government involvement in the data gathering process would be the most direct solution to the information asymmetry that currently affects communications policymaking. Legislation requiring that the Federal Communications Commission actively engage in a specific set of data gathering activities, mandating that all such data be made available to the public in a timely and user-friendly fashion, and providing the necessary increase in the Commission's budget so that it could adequately engage in these activities, would significantly address the problems outlined in this paper. Or, perhaps a separate government agency devoted specifically to data gathering related to communications and information

¹²² The Data Access Act, was passed as a rider to the Omnibus Appropriations Act for the Fiscal Year 1999, Pub. L. No. 105-277, 112 Stat. 2681-495 (1998). This Act requires that the data needed to validate a federally funded study be made available to requesting parties through the Freedom of Information Act. This Act is also referred to as the Shelby Amendment, after sponsoring Senator Richard Shelby. *See also* Richard Shelby, *Accountability and Transparency: Public Access to Federally Funded Research Data*, 37 HARVARD JOURNAL ON LEGISLATION, 369 (2000).

¹²³ The Data Quality Act, which was passed as a rider to an appropriations bill, section 515 of the Treasury and General Government Appropriations Rider for Fiscal Year 2001, Pub. L. No. 106-554, 114 Stat. 2763A-153-55 (2001), provides mechanisms for interested parties to file complaints about the quality of regulatory science by requiring federal agencies to develop formal procedures for ensuring the quality, objectivity, and integrity of the information that they disseminate. Thus, like the Data Quality Act, it too focuses on publicly funded data and research. Studies produced by external stakeholders, or that are part of public filings are not covered under the Act.

¹²⁴ *See, e.g.*, NATIONAL RESEARCH COUNCIL, *supra* note 17.

policy could be developed,¹²⁵ or such responsibilities placed within the purview of another existing government entity such as the National Telecommunications and Information Administration (which already conducts some significant data gathering).

Such an approach would be particularly desirable in that it would allow for a better tailoring of the data being gathered to the nature of the policy issues generally requiring attention. This would stand in stark contrast to the contemporary situation, in which data gathered to serve entirely different needs (i.e., the needs of communications firms, investors, and advertisers) are essentially “repurposed”¹²⁶ to address policy questions. As Hesmondhalgh and Pratt have noted, although cultural industries (such as media and communications) produce substantial amounts of data to facilitate their operations, there remains a concern with the “fitness for purpose,” of such data for research purposes, as “Such data are functional for market making; but not for an understanding that will provide an evidence base for policy making or intellectual inquiry.”¹²⁷

As a reflection of this perspective, we can consider something as simple as the fact that, today, the FCC assesses the media system along geographical parameters established and measured by commercial audience measurement firms.¹²⁸ Thus, media markets as defined by Nielsen and Arbitron become the FCC’s units of analysis. There are, of course, many reasons why adhering to the market parameters utilized within the regulated industries is useful – particularly in relation to economic policy

¹²⁵ See Richard A. Peterson, *The Role of Research in Developing Cultural Policy*. 13 J. ARTS MGT. & LAW 190, 191-192 (1983), for a similar proposal – but one that focuses on cultural policy, (proposing an agency to facilitate academic and private-sector research on cultural policy issues via the establishment of a data archive and the regular collection of information at both the national and local levels. This agency would serve only a data-gathering function, as opposed to being involved in analysis or policymaking.).

¹²⁶ Repurposing refers to the practice in which content/information produced for one market is later re-used or resold in additional markets. Repurposing takes advantage of the public good nature of media/information products in that content is sold multiple times without additional production costs being incurred. See NICHOLAS NEGROPONTE, BEING DIGITAL 63 (1995) (“Repurposing goes hand in hand with the birth of any new medium. Film reused plays, radio resold performances, and TV recycled movies”).

¹²⁷ David Hesmondhalgh and Andy C. Pratt, *Cultural Industries and Cultural Policy*. 11 INT’L J. CULTURAL POLICY 10 (2005).

¹²⁸ Federal Communications Commission, 2002 Biennial Regulatory Review, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd. 13620 (2003) par. 274: The Commission notes, “we will rely on the Arbitron Metro Survey Area [Arbitron Metro] as the presumptive market.” In addition, in par. 280, the Commission notes that it “traditionally has relied on BIA’s Media Access Pro database to obtain information about particular Arbitron Metros.” See also David M. Hunsaker: *Duopoly Wars: Analysis and Case Studies of the FCC’s Radio Contour Overlap Rules*, 2 COMMLAW CONSPPECTUS 21 (1994).

questions involving market competition. However, when we think more broadly about the mandate for communications policymaking – particularly in relation to the role of our media system in the democratic process – the fact that no systematic data are gathered that organize media outlets along political jurisdictions is quite unfortunate.¹²⁹

The importance of such an approach is illustrated by the fact that some highly regarded communications policy research in recent years that has examined the relationship between media sources, media content, and citizen engagement in the political process, was only able to be conducted after the difficult and laborious process of roughly aligning political participation data (which are gathered and reported according to political jurisdictions) with media source and content data that are gathered and reported according to market definitions.¹³⁰ To the extent that policymakers should concern themselves with the political functions of the media outlets they regulate, it is surprising that neither they, nor the broader research community, has access to systematic data that map our media system according to local political parameters.

Along related lines, intensive usage and detailed scrutiny of the primary source of media market, ownership, and financial data utilized by the FCC and many other stakeholders in the policymaking process – the BIA Media Access Pro nation-wide database of television stations, radio stations, and

¹²⁹ For a thorough critique of the weaknesses of Arbitron data as a tool for communications policymaking and policy analysis, see David Gunzerath, *An Analysis of the Proposed Use of Arbitron Data to Define Radio Markets*, Comments of the National Association of Broadcasters in MM Docket 00-244, Attachment B (Feb. 26, 2001) at 17-18 (“Arbitron’s radio audience reports are specifically designed as a means through which buyers and sellers can reach agreement on the relative value of radio airtime in the commercial marketplace. . . . But the application of Arbitron data to other, unrelated purposes – such as defining radio markets and determining levels of competition and diversity that exist within them – uses this information in ways for which it is poorly suited.”)

¹³⁰ See, e.g., Felix Oberholzer-Gee and Joel Waldfogel, *Media Markets and Localism: Does Local News en Espanol Boost Hispanic Voter Turnout* (2006) (unpublished working paper); Felix Oberholzer-Gee and Joel Waldfogel, *Strength in Numbers: Group Size and Political Mobilization* *J. Law & Econ.* (2005); Lisa George and Joel Waldfogel, *Does the New York Times Spread Ignorance and Apathy?* (unpublished working paper). This series of studies demonstrates the extent to which access to local information sources positively affects political participation – a finding with dramatic implications for media policies related to the principle of localism. Conducting such research requires aligning media market data with voting behavior data. See also Scott Althaus and Todd Trautman, *The Impact of Television Market Size on Voter Turnout* (2004) (unpublished manuscript, paper presented at the annual meeting of the American Association for Public Opinion Research, 4) (“Our analysis of turnout draws upon aggregate voting data at the sub-county level for nearly every area in the continental United States, over four election cycles. We join data on the boundaries of television markets provided by Nielsen Media Research with turnout and demographic data from the Record of American Democracy Project, which assembled comprehensive voting data for every precinct in the continental United States over the years 1984, 1986, 1988, and 1990”).

newspapers – reveals that many minority-targeted and foreign-language newspapers are not included in the database.¹³¹ Similarly, the standardized ratings reports generated by Arbitron for the radio industry somewhat selectively report minority audience compositions for individual stations; limiting such reporting only to those markets in which there is a substantial minority population.¹³² Regardless of the reasons for these omissions (no doubt they are a reflection of the economics of database generation and a reflection of the allocation of demand priorities of the primary users of the databases), the end result is an inaccurate, incomplete portrait of the media system. The nature of omissions such as these undermines analyses related to vital communications policy issues such as the diversity of information sources available in media markets and the extent to which minority interests and concerns are being served at the local level.¹³³

These examples are meant to illustrate how data gathering freed of market imperatives could potentially better serve communications policymaking and policy analysis. Certainly publicly-funded data gathering brings with it its own set of potential pitfalls, but the purely commercially-driven data infrastructure towards which we are migrating raises the possibility of increased disconnects between policy questions and the information available to answer those questions – above and beyond the access disparity issue which has been the focus of this paper.

Absent – or perhaps best, in addition to – progress on the governmental data gathering front, efforts must also be made to enhance researchers’ access to relevant commercial data sources. In pursuing such options, it seems reasonable to explore more effective mechanisms for balancing the needs

¹³¹ Mark Lloyd, et al., *Measuring Local Media Diversity*, 8 (Unpublished working paper. On file with author). This research project utilized BIA data to analyze the diversity of sources across different media available in individual media markets, but in so doing, “found that the BIA database did not adequately identify the ethnic media in the analyzed markets.”

¹³² Philip M. Napoli, *Audience Valuation and Minority Media: An Analysis of the Determinants of the Value of Radio Audiences*, 46 J. BROADCASTING & ELEC. MEDIA 169, 174 (2002) (“It is important to note that Arbitron does not report ethnic composition for stations in all of the markets that it measures, but only in those markets where there is a significant minority population; nor does the company provide data on ethnic groups other than African Americans or Hispanics in any of its markets”). In addition, nearly half of all radio stations in the United States are not located within Arbitron-defined markets, further complicating the use of Arbitron data for certain types of analyses. See Gunzerath, *supra* note 129 at 8 (“However, it is vital to recognize that approximately 50 percent of all U.S. radio stations are not located in an Arbitron market”) (emphasis in original).

¹³³ See PHILIP M. NAPOLI, FOUNDATIONS OF COMMUNICATIONS POLICY, 125-152, 203-224 (2001), for a discussion of the media policy principles of diversity and localism.

of researchers and commercial database vendors in a manner that recognizes the substantial public interest in policy research.¹³⁴

One possible approach would involve the creation of a consortium of academic and public interest policy researchers to collectively negotiate terms that could facilitate greater access to the relevant data sources than is currently taking place. Such a proposal would no doubt require not only substantial financial resources (be they from the academic/public interest organizations, or from external funders), but also a commitment on the part of the commercial data providers to make their data available under terms and conditions that meaningfully reflect how the broader public interest is served by such access. It does seem safe to say that none of the commercial database providers whose products are used in the communications policymaking process consider the policy research community the primary, secondary, or even tertiary market for their products. If that were the case, these data products likely would not exist, as the policy research community is far too small, and its resources far too limited, to meaningfully support the creation of these data sets. To the extent, then, that the policy research community represents a largely negligible part of the revenue stream for most commercial data providers, this may encourage some flexibility in terms of how this community, when dealt with as a collective, is treated by the data providers. Of course, such an access model would need to rigorously protect the existing revenue streams of the commercial data providers and ensure that the access provided to the (relatively small) policy research community did not create opportunities for other customer bases to gain access to the data. It seems perfectly realistic that such a balance could be struck.

At the very least, such an initiative could work towards establishing greater formalization and transparency in relation to the institutional rules and policies surrounding data access and usage. There often is a very ad hoc nature to the processes of gaining access to the relevant data sources.¹³⁵ Pricing typically varies substantially in relation the resources of the potential purchaser, and in relation to how the

¹³⁴ See Greenbaum, *supra* note 64 at 431 (2003) (“copyright law . . . ought to favor the advancement of science over unsubstantiated suspicions of the commercial database vendors,” p. 435).

¹³⁵ *Supra* note 116 at 141 (“To reach the necessary transparency in the tasks and responsibilities of those involved, terms of access to and use of data that rest on tacit agreements should be made explicit and formalized. A systematic and institutionalized approach is needed to help address operating characteristics of data access”).

data ultimately are to be used. Access terms can similarly vary from data provider to data provider, and from client to client. These tendencies are, in many ways, inevitable byproducts of the business models surrounding public goods, where the substantial opportunities to engage in price discrimination are essential to the viability of public good production.¹³⁶ Nonetheless, to the extent that some more formalization and transparency in transactions can be developed for situations in which the primary use of the data is for policy analysis, then improvement to the imbalances in data access that currently exist in the policy analysis playing field could be achieved.

Also toward these ends, policy researchers should engage in a concerted effort to compile and study the non-confidential components of model standard licensing agreements in an effort to establish a broader understanding of standard access terms, to identify exemplary approaches, and to facilitate better-informed negotiations in those instances when data access is being sought.¹³⁷ This too could help contribute to reducing the extremely ad hoc nature of how policy researchers typically engage with commercial data providers.

A final possible mechanism for improving the current situation might be legislation that specifies that once a data source is utilized in any study filed with a regulatory agency, the underlying data for that research must be publicly available for reanalysis, regardless of whether the underlying data come from public or private data sources. Whether the responsibility for negotiating contractual terms with the data providers that allow for such access should reside with the government agency or the filing organization is a question that would need to be answered. Or, perhaps such legislation could be directed specifically at the data providers. Efforts in this vein reflect the notion that public policy should be made with publicly available data and work toward evening the analytical playing field. However, one drawback of

¹³⁶ See BRUCE M. OWEN AND STEVEN S. WILDMAN, VIDEO ECONOMICS, 23-24 (1992) (“Even a monopoly producer of a public good from which free riders can be easily excluded may need to practice price discrimination among its customers”). Within the context of data, this often results in there being no clear “fixed” price. Rather, pricing becomes quite flexible in accordance with the nature of the presumed usage of the data as well as the perceived level of demand (and resources) of the potential purchaser.

¹³⁷ See *supra* note 116 at 148, for a similar suggestion within the specific context of access to publicly-funded data, (“Consider conducting or coordinating a study to compile model licensing agreements and templates for access to and sharing of publicly funded data”).

such a solution is that it is primarily reactive in its orientation, allowing only for broader access to data *in response* to particular pieces of research. This, of course, places the less well resourced policy researchers (e.g., scholars, public interest organizations) in a perpetual reactive, as opposed to pro-active, position in the policy process, and thus may not sufficiently truly level the playing field. Another potential drawback is a possible “chilling effect” on access to data, as data providers may completely withhold their data from policy researchers of all types in lieu of having the data subsequently become widely available to a broader user base.

Conclusion

This paper has argued that a confluence of circumstances: the growing centrality of empirical research to public policymaking; the increased reliance of policymakers on externally-conducted research; and the increased privatization of the key data utilized in policy analysis, all contribute to a growing imbalance that can undermine effective and representative communications policymaking. This paper has documented the centrality of commercial data sources to communications policymaking and policy analysis and has presented arguments in favor of efforts to reduce the current imbalances in data access that characterize the contemporary communications policymaking and policy analysis environment. Finally, this paper has offered a series of suggestions for reducing this imbalance and providing more equitable access to the data source that are central to communications policy research. Future research should explore more extensively the legal issues surrounding access to commercial data sources within policymaking contexts, particularly in terms of possible relationships to government in the sunshine laws, the Administrative Procedures Act, copyright law, and fair use considerations.

Table 1: Commercial Data Sources Used in Media Ownership Policy Analysis and Users

| Data Source | Industry | FCC | Pub. Int. | Academic |
|---|----------|-----|-----------|----------|
| <u>Databases</u> | | | | |
| BIA Media Access Pro | X | X | X | X |
| Bear Stearns | X | | | |
| Adams Media Research | X | | | |
| Arbitron Radio Market Reports | X | | | X |
| CNW Marketing Research Surveys | | X | | |
| Duncan's American Radio | | X | | X |
| Morgan Stanley | X | | | |
| Newspaper Advertising Source | X | X | | X |
| Nielsen Media Research | | | | |
| Nielsen Station Index | X | X | X | |
| Nielsen Television Index | X | | | |
| Viewers in Profile | X | | | |
| Scarborough Research: Primenext Multimarket Data | | X | | |
| Service Quality Analytics Data (SQAD) | | X | | X |
| Standard & Poor's Compustat | | X | | |
| Standard Rate & Data Service | X | | | |
| UBS Warburg | X | | | |
| Vickers Stock Research | | | | X |
| VoiceTrak | X | | | |
| <u>Industry Directories</u> | | | | |
| Ayer Directory of Publications | | X | | |
| Broadcasting & Cable Yearbook | X | X | X | |
| Burrelle's Media Directory | | X | | |
| CBEMA Industry Marketing Data Book | | | | X |
| Editor & Publisher International Yearbook | X | | | |
| Television & Cable Factbook | X | X | | |
| Warren Cable & Station Coverage Atlas | | X | | |
| <u>Trade Publications/Reports</u> | | | | |
| Cable Television Advertising Bureau: Cable TV Facts | X | | | |
| Radio and Records Magazine | | X | X | |
| Kagan Research | | | | |
| Broadband Cable Financial Databook | | X | | |
| Cable Operator Revenues | | X | | |
| Cable TV Financial Databook | X | X | | |
| Cable TV Investor | | X | | |
| Economics of Basic Cable Networks | | X | | |
| Economics of TV Programming | X | | | |
| Media Index | X | | | |
| State of DBS | | X | | |
| Media Dynamics TV Dimensions | | X | | |
| Myers Reports | X | | | |
| National Association of Broadcasters TV Financial Report | X | X | | |
| Nielsen Media Research Report on Television | X | X | | |
| Veronis Suhler Stevenson Communications Industry Forecast | X | X | | |