Communications Regulation--Introduction

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Introduction

Lionel Van Deerlin†

In the summer of 1979, the editors of Business Week magazine predicted that communications would become one of the “super-industries” of tomorrow.1 Although some observers may disagree with this conclusion, even the skeptical must concede that tomorrow’s communications industry has the potential to alter dramatically this nation’s political, economic, and social fabric.

The term “communications” serves as a generous umbrella sheltering radio, television, satellites, “CB,” telephony, telegraphy, cable television, publishing, and “telematic” technologies. The student Comments presented here focus on three of today’s most familiar communications systems: broadcasting, telephony, and that industry hybrid, cable television.

Although dealing with different technologies, the authors share much in common. First, they recognize that the communications industry functions within several legal contexts—contexts which often overlap and sometimes conflict. The Communications Act of 1934 provides the principal legal framework, establishing discrete regulatory schemes for communication by wire (telephony) and by radio (broadcasting).

The Act regards the telephone industry as a “natural monopoly” to be overseen by the Federal Communications Commission. Within this framework, telephone common carriers have had to obtain FCC approval to start, extend, cut back, or withdraw interstate service. Tariff filings, stating the rates, terms, and conditions of such service, also are mandatory.

Unlike common carriers that must transmit messages regardless of their content, broadcasters function as public trustees, licensed by the FCC expressly to select programming that best serves “the public interest, convenience, and necessity.” In its Southwestern Cable2 decision, the Supreme Court held that the FCC has the implied authority to reg-

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ULATE CABLE TELEVISION TO THE EXTENT THAT IT PROVIDES SERVICES WHICH ARE ANCILLARY TO CONVENTIONAL BROADCASTING.


IT IS DIFFICULT TO OVERESTIMATE THE IMPORTANCE OF THIS LEGAL FRAMEWORK, PARTICULARLY THE 1934 ACT, IN SHAPING THE COMMUNICATIONS INDUSTRY OF TODAY. HOWEVER, THE COMMUNICATIONS INDUSTRY OF TOMORROW COULD BE EQUALLY AFFECTED BY AT LEAST TWO OTHER FACTORS: AN EXPANDING MARKETPLACE AND RAPIDLY CHANGING TECHNOLOGY. TOM HUTTON'S DISCUSSION OF THE PROPOSED Deregulation OF DOMESTIC COMMON CARRIER TELECOMMUNICATIONS, AS WELL AS GILLIS HELLER'S VIEWS ON REGULATORY VERSUS PROPERTY RIGHTS SOLUTIONS FOR THE CABLE TELEVISION PROBLEM, OFFER PERCEPTIVE ANALYSES OF THE ECONOMIC INCENTIVES AND MARKETPLACE CIRCUMSTANCES THAT ALREADY ARE INJECTING NEW COMPETITION INTO THE INDUSTRY. DAVID COYNE'S THE FUTURE OF CONTENT REGULATION IN BROADCASTING IS ESPECIALLY SENSITIVE TO THE POLICY OPTIONS CREATED BY INDIVIDUAL TECHNOLOGIES.

THUS, THE AUTHORS RECOGNIZE THAT REMARKABLY RAPID TECHNOLOGICAL ADVANCES ARE A SECOND IMPORTANT CHARACTERISTIC OF THE COMMUNICATIONS INDUSTRY. THESE ADVANCES HAVE SIGNIFICANT IMPLICATIONS FOR A DEVELOPING MARKETPLACE AND GENERAL POLICY. FOR EXAMPLE, 1979 SAW THE INTRODUCTION OF ONE HOUSE AND TWO SENATE BILLS WHICH WOULD HAVE CREATED COMPETITIVE MARKETS IN SUBSTANTIAL PARTS OF THE TELECOMMUNICATIONS INDUSTRY. EACH OF THOSE BILLS WAS INTRODUCED IN MARCH. BY THE SUMMER OF 1980, THEY HAD BEEN REPLACED BY SIMILAR, BUT REFINED, LEGISLATIVE EFFORTS. THESE ACTIONS WERE COMPLEMENTED IN APRIL 1980 BY THE FCC'S

decision in *Second Computer Inquiry*,\(^8\) which resembles the broad outlines of the House legislation in many respects. Hutton has provided a detailed analysis of the concepts underlying all of these deregulation proposals.

Gillis Heller's call for reform of cable television's copyright obligations is especially urgent in light of other recent developments. Certain provisions of the 1976 Copyright Act assume continued FCC regulation of the terms under which cable systems can import broadcast signals from distant cities for retransmission to cable customers.\(^9\) Yet in October 1980, the FCC decided to abolish its "distant signal" rules as well as its "syndicated exclusivity" rules, which required cable systems to delete programming at the request of local broadcasters who had purchased exclusive rights to it.\(^10\) If the FCC's decision becomes effective,\(^11\) the copyright scheme will thus have its foundation pulled out from under it.

My remarks on Hutton's and Heller's contributions suggest the third characteristic shared by all of the student Comments: a recognition of the need for fundamental revision of communications policy. Although each of the authors provides a thorough discussion of appropriate statutes and judicial interpretations, they offer far more than strict legal analyses. Indeed, the Comments may be regarded as policy analyses, advocating specific reform. To evaluate those proposals, one must review the authors' identification of the problems to be solved and the assumptions underlying those identifications.

In his contribution, Coyne considers one of the most vexing problems of communications policy—the ongoing tension between first amendment rights of the public and those of the broadcaster or cable system operator. The Supreme Court found in *CBS v. Democratic National Committee*\(^12\) and *FCC v. Midwest Video Corp.*\(^13\) that neither broadcasters nor cable operators are obliged to provide direct public access to their facilities. Rather, broadcasters (or cable operators who choose to originate programming) must comply with the Fairness Doctrine, an amendment to the 1934 Act which requires licensees first to cover controversial issues of public importance and, second, to present opposing points of view on such issues.\(^14\)

When the Supreme Court upheld the Fairness Doctrine in *Red

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8. 77 F.C.C.2d 384 (1980).
Lion Broadcasting Co. v. FCC,15 it sought to strike a balance between the right of the broadcaster to speak and the right of the public to hear and to speak via the media under certain articulated circumstances. However, like so many industry observers before him, David Coyne argues that the Fairness Doctrine serves no one. The doctrine provides a convenient rationale for excluding the public from direct access, while its requirement of "balanced" coverage has a chilling effect on the broadcaster, often resulting in timid or bland coverage of news and public affairs.16

Coyne acknowledges that the broadcasting spectrum is a limited resource which creates a corresponding scarcity of programming outlets.17 The Fairness Doctrine and other provisions of the 1934 Communications Act represent the legal response to such technological constraints. However, these statutory restrictions will no longer be appropriate when technological constraints are overcome, promising an abundance of program outlets and a diversity of speech. The marketplace of ideas that the Supreme Court discussed in Red Lion18 is a broad concept encompassing far more than the Fairness Doctrine or "public access" regulation. A multiplicity of voices heard through a multiplicity of media is the best long-term solution to the first amendment problem posed by modern communications technology. Thus, Coyne correctly urges achieving a rich diversity of speech by increasing the number of voices through new stations and by strict enforcement of cross-ownership restraints. In short, Coyne implies that technological progress could render the Fairness Doctrine obsolete.19

Indeed, existing law might even hamper progress toward the abundance and diversity of speech promised by technological progress. For example, FCC regulation stunted the development of cable television for years.20 Only since the elimination of some of those FCC rules has cable started to grow. For instance, although the Commission's public access requirements for cable were overturned by the Supreme Court,21 the availability of access channels has become a vital bargaining chip in the cable franchising process underway in cities across the country. In an effort to win lucrative local franchises, cable operators now offer

17. Content Regulation, supra note 5, at 577.
18. 395 U.S. at 390.
19. Content Regulation, supra note 5, at 565.
far more than the four access channels the FCC attempted to mandate. Consequently, residents of many major metropolitan areas can anticipate sophisticated access opportunities in the near future.

Government regulation traditionally is a substitute or corrective for marketplace deficiencies. But the facts suggest that today's cable marketplace is far from deficient. Marketplace competition is providing the public with access to cable systems far more effectively than government regulation could. How meaningful those access opportunities prove to be will—and should—depend upon the resources that individual communities are willing to invest in community access.

Cable alone will not create abundance. Video discs, cassettes, and direct satellite-to-home broadcasting systems loom on the not-too-distant horizon.22 In addition, the FCC is taking steps to increase the number of conventional broadcast outlets. The Commission already has proposed new channel spacing standards that could add approximately one hundred new AM radio stations.23 It is also considering plans for new VHF stations24 and has initiated a rulemaking procedure to create low-power “mini” television systems that could be a boon to isolated rural areas that neither the cable operators nor traditional broadcasters have cared to serve.25

As promising as these developments are, the brightest hope for public access lies in the merging of telecommunications and information technologies. As consumers begin to link their home television receivers with coaxial cable or telephone wire, the opportunity for storing, retrieving, and communicating all types of messages will become as common as use of the telephone is today. Public access rules for today's broadcasting stations or cable systems will then be as outmoded as traffic rules for horsedrawn carriages. Therefore, policymakers and policy analysts must create a climate to nurture the growth of new information technologies while ensuring that these technologies will not be controlled by a few entities.

The primary role of federal policy in an era of telecommunications abundance must be to foster marketplace competition. However, the division of policymaking authority among the Congress, the courts, and several regulatory bodies can frustrate that goal. Too often policies conflict, leading to marketplace conditions that discourage or even prevent fair competition.

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The present Copyright Act is a case in point. As I noted earlier, the Copyright Act assumes that the FCC will regulate cable television's retransmission of broadcast signals. Accordingly, the law requires cable operators to pay a compulsory license fee based on a formula involving the number of distant signals carried and a fixed percentage of the operator's revenue. The Act creates the Copyright Royalty Tribunal (CRT) to distribute the fees among broadcasters, producers, syndicators, and other copyright claimants. The law does not specify a distribution formula, however, leaving that task to the claimants, with CRT supervision.

Although cable operators began paying compulsory license fees in 1978, the CRT did not approve a distribution formula until September 1980. 1979 fees have yet to be disbursed. Meanwhile, the FCC has abolished the very regulations upon which this whole scheme is based.

Three criticisms can be made of the cable copyright situation. First, it is one more example of unnecessary bureaucratic regulation. Second, it gives a competitive advantage to cable television operators, who pay only a fraction of what broadcasters do for programming rights. Third, the scheme robs program producers of control over their own product.

Heller makes a convincing argument that the property rights of program producers and of broadcasters who have purchased rights to that programming will not be protected until cable television operators assume full copyright liability. His argument raises even more important questions, however: Whether the federal government should be in the business of setting rates for one programming outlet and not for others; whether it should be setting rates at all; and whether it should be performing traditional marketplace functions.

Once, cable television was merely a "giant antenna," serving primarily to improve viewers' reception of local broadcast signals. With the development of satellite technology, cable systems now import signals from distant broadcast stations more cheaply than they could with microwave technology. They also carry first-run movies.

26. See Cable Television, supra note 4, at 545-47.
27. See note 9 and accompanying text supra.
31. Cable Television, supra note 4, at 545-47.
sporting events, and programming unavailable anywhere else. Cable television has become a new source of alternative programming. Why, then, should cable systems not compete with broadcasters and other media for such programming?

In the wake of the FCC's recent deregulatory steps, Congress will soon have to amend the cable provision of the Copyright Act. Congress could simply adjust the compulsory license fee or empower the CRT to do so. But it could also acknowledge the property rights of program producers, recognize that cable television is one of the most viable competitors in the new communications marketplace, and remove the government from the marketplace.

Full copyright liability would do more than protect the property rights of program producers. Deprived of comparatively inexpensive programming picked up from distant broadcast stations, cable operators would, for the first time, have an economic incentive to originate more new programming for viewers. Thus, Congress should heed those economists who have long held that full, fair competition is the best method for providing more products at lower prices to the public.32

New telecommunications services will not replace the old; they will be integrated into existing market structures. Thus, cable television is not a substitute for, but a competitor of, public and commercial broadcasting. Video discs, cassettes, and direct satellite-to-home broadcast service will provide still more competition. Similarly, entrepreneurs offering low-cost, long-distance telephone service or high-speed data transmission facilities will have to enter markets already dominated by AT&T.

This last example illustrates another concern. Given the monopolistic and oligopolistic positions and strength of existing telephonic and broadcasting companies, deregulation that simply creates easy market entry will not suffice. Policymakers must take additional steps to ensure full and fair competition. Such steps are especially important now, as telecommunications makes the transition from an industry of few technologies and companies to one of many competing technologies offered by an increasing number of companies. The problems of ensuring full, fair competition are especially difficult with respect to the telephone industry—an industry long dominated by AT&T, the world's largest utility. To propose industry competition, as both the Congress33 and the FCC34 have done, one must consider how the industry evolved,

33. See notes 6-7 supra.
34. Second Computer Inquiry, 77 F.C.C.2d 384 (1980) (only two companies, AT&T and General Telephone, were ordered to establish separate subsidiaries observing “maximum separa-
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the impact of AT&T on a competitive marketplace, and the role played by the antitrust laws in preserving that marketplace.

Tom Hutton describes the structure of the telephone industry and its current regulation, as well as the new information and telecommunications technologies that are spurring structural and regulatory changes. Hutton then considers deregulation of the industry, analyzing such issues as regulatory jurisdiction, access fees for interconnection to local telephone company facilities, rate deaveraging, data processing deregulation and, perhaps most significantly, Bell corporate structure.  

In the Senate and House, respectively, S. 2827 and H.R. 6121 would require a vertical split in AT&T if the company is to enter new competitive markets. While the Bell System would continue to provide basic telephone service on a regulated basis, pending legislation would require it to establish a separate subsidiary for such unregulated activities as the sale of telephone switchboards and other terminal equipment as well as for data processing and enhanced telecommunications services. To ensure that AT&T does not engage in cross-subsidization, predatory pricing or other anticompetitive practices, the separate subsidiary would have to develop independent research, manufacturing, and marketing facilities. Thus, it could not draw on the resources of Bell Labs and Western Electric.

To prevent any one corporation from exercising undue control over information, the legislation approved by the House Commerce Committee would prohibit AT&T from offering broadcast, cable, newspaper, or other news media services on an unregulated basis. In effect, AT&T would be allowed to operate as the mere transmitter of information; it could not exercise any editorial control over the information sent on its lines. Moreover, it would have to make its lines available to all customers at the same rates, conditions, and terms. By insisting on wide ownership and control of communications media, Congress can insure that the policy problems grounded in a scarcity of broadcast frequencies will not return to haunt an era of telecommunications abundance.

These structural proposals are simple in concept, if not execution. Acknowledging the need for a transition period, the House legislation imposes an eight-year deadline on AT&T to complete its reorganiza-
tion. Moreover, it empowers the FCC to supervise the transition and enforce the separate subsidiary requirements. This last provision is especially important to protect Bell’s competitors.\footnote{Id. \S 219.} Structural proposals like those outlined above are prospective; they seek to prevent anticompetitive practices. The antitrust laws provide a remedy should anticompetitive abuses occur. In \textit{The Application of Antitrust Law to Telecommunications},\footnote{Comment, \textit{The Application of Antitrust Law to Telecommunications}, 69 CALIF. L. REV. 497 (1981).} Gail Hillebrand suggests that the 1934 Act contemplates concurrent jurisdiction, with both Congress and the courts able to enforce procompetitive policies. In her discussion of the doctrine of primary jurisdiction, Hillebrand recognizes that the FCC and the courts can operate in a complementary fashion. That is, the courts can defer to the judgment of the expert agency on complicated communications policy matters, while reserving the right to apply traditional remedies in cases of abuse.\footnote{Id. at 524-26.}

In a deregulated environment, the rationale for primary jurisdiction would be eliminated in most cases, while application of the antitrust laws would become more critical than it is under the 1934 Act.\footnote{Hillebrand suggests that FCC procompetitive market policies argue in favor of nonimmunity for the telephonic industry. \textit{Id.} at 502, 526.} But it is doubtful that judicial imposition of antitrust law alone will be sufficient for tomorrow’s marketplace.

Taking its lead from Congress, the FCC has begun to substitute structural reforms for traditional regulation.\footnote{See note 8 and accompanying text \textit{supra}.} Although this approach might result in sound communications policy, the Commission’s assertion of collateral authority may hinder the courts’ application of antitrust law. It could, for instance, replace a healthy interaction between the agency and the courts with a running controversy about the nature and extent of the restructuring required to protect against anticompetitive behavior.

Having spent five years studying such questions,\footnote{HOUSE SUBCOMM. ON COMMUNICATIONS OF THE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94TH CONG., 1ST SESS., \textit{Fundamental Changes Needed to Achieve Effective Regulation of Communications Common Carriers} 15 (Subcomm. Print 1975).} Congress should resolve the dilemma by clarifying both the powers of the Commission and the structure of the industry. Hillebrand, like her colleagues, has intelligently wrestled with some very complex and difficult questions—questions on which policymakers, analysts, and legal scholars will continue to focus as competition in the American telecommunications industry becomes the rule rather than the exception.