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## Introduction: Key Issues in Telecommunications Reform

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From its early days until at least 1996, the first impulse of U.S. telecommunications policy has always been, "Protect Incumbents." At the turn of the last century, after two decades of robust competition between Bell Telephone and rival telephone companies, the U.S. Department of Justice, in 1914, accepted Bell's arguments in favor of telephone monopoly and abandoned antitrust enforcement against Bell in return for Bell's submission to government regulation.<sup>1</sup> Rather than mandating interconnection among competitors, the government adopted a course that allowed a single firm to dominate the provision of telephone service.<sup>2</sup> Likewise, following enactment of the Federal Radio Act of 1927, a new Federal Radio Commission decided (a) not to expand the amount of spectrum available to radio broadcast, and (b) to reassign broadcast frequencies across the country under criteria that favored existing commercial broadcasters.<sup>3</sup> After television came along, the renamed Federal Communications Commission ("FCC") adopted a geographical pattern of station assignments that limited the number of plausibly viable television networks to three.<sup>4</sup> With the advent of cable television, the FCC stepped in during the late 1960s to regulate in a way that would reduce cable's perceived threat to incumbent over-the-air broadcasting.<sup>5</sup> Much of the same story follows the advent of satellite.<sup>6</sup> In the 1990s, the FCC and Congress decided to compel a national transition to digital broadcasting and limited the first round of digital broadcast licenses to existing broadcasters.<sup>7</sup> In

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<sup>1</sup> STUART M. BENJAMIN ET AL., *TELECOMMUNICATIONS LAW AND POLICY* 697-701 (Carolina Academic Press 2d ed. 2006).

<sup>2</sup> *Id.* at 701.

<sup>3</sup> *Id.* at 24.

<sup>4</sup> Bruce M. Owen, *Structural Approaches to the Problem of Television Network Economic Dominance*, 1979 DUKE L.J. 191, 211-14 (1979) (explaining how FCC's pattern of VHS licensing decisions made no more than three over-the-air television networks initially viable).

<sup>5</sup> See *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

<sup>6</sup> See *Satellite Home Viewer Act of 1988*, Pub. L. No. 100-667, 102 Stat. 3949 (1988) (permitting satellite providers to transmit signals from distant network broadcast stations only to households unserved by any local affiliate of the same network), codified at 17 U.S.C. § 119, as amended by the *Satellite Home Viewer Improvement Act of 1999*, Pub. L. 106-113, 113 Stat. 1501 (1999), and the *Satellite Home Viewer Extension and Reauthorization Act of 2004*, Pub. L. 108-447, 118 Stat. 2809 (2004).

<sup>7</sup> Ellen P. Goodman, *Digital Television and the Allure of Auctions: The Birth and Stillbirth of DTV Legislation*, 49 FED. COMM. L.J. 517, 532 (1997).

sum, the telecommunications innovation we have enjoyed has arrived substantially in spite of, not because of, our public policy.

With the enactment of the Telecommunications Act of 1996, it appeared as if Congress and the FCC might sing a new song, at least with regard to telephony. An entirely new statutory framework was created, for telephony that was intended to encourage unprecedented competition in the provision of telephone service. Incumbent operators of local telephone networks were forced to share their local loops with independent carriers as a precondition for incumbent entry into long distance markets.<sup>8</sup> With the explosion of a whole new telecom sector – namely, Internet service – the FCC also shaped a scheme of so-called reciprocal compensation that generated enormous revenues for, and thus helped to underwrite startup “internet service providers” or ISPs.<sup>9</sup> It appeared that hundreds – or thousands – of entrepreneurial flowers might bloom.

On the mass media side, however, the old tune of incumbent protection was still playing. Decisions to lift ownership caps for radio licensees led to profound concentration in the radio market.<sup>10</sup> Lifting cross-ownership limits put many newspaper, television, and radio outlets in the hands of the same firms.<sup>11</sup> Relaxing the cable-broadcast cross-ownership rules put ninety percent of the top fifty cable stations into the hands of the same companies that own the major television networks.<sup>12</sup> Not surprisingly Americans are now getting less variety in programming and less locally oriented programming over their radios.<sup>13</sup>

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<sup>8</sup> Communications Act of 1934, 47 U.S.C. § 251 (2000).

<sup>9</sup> *In re Access Charge Reform*, 12 F.C.C.R. 15982 (1997) (first report and order).

<sup>10</sup> COMMON CAUSE, *THE FALLOUT FROM THE TELECOMMUNICATIONS ACT OF 1996: UNINTENDED CONSEQUENCES AND LESSONS LEARNED 10-11* (2005), available at [http://www.commoncause.org/atf/cf/{FB3C17E2-CDD1-4DF6-92BE-BD4429893665}/FALLOUT\\_FROM\\_THE\\_TELECOMM\\_ACT\\_5-9-05.PDF](http://www.commoncause.org/atf/cf/{FB3C17E2-CDD1-4DF6-92BE-BD4429893665}/FALLOUT_FROM_THE_TELECOMM_ACT_5-9-05.PDF).

<sup>11</sup> *Id.* at 5.

<sup>12</sup> *Id.*

<sup>13</sup> FCC, *Do Local Owners Deliver More Localism? Some Evidence From Local Broadcast News* (FCC Working Paper, 2004), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-267448A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-267448A1.pdf) (concluding that local ownership results in additional local news coverage); PETER DI COLA, *Do Radio Companies Offer More Variety When They Exceed the Local Ownership Cap?*, in *Does Bigger Media Equal Better Media? Four Academic Studies of Media Ownership in the United States* 38-49, (Benton Foundation 2006) (concluding that large radio groups offer a narrower and less balanced range of formats than smaller radio groups).

The FCC, prodded in part by the courts, decided to eliminate rules that limited the capacity of the already dominant television networks to own syndication rights in their programming.<sup>14</sup> A judicial opinion by Judge Richard Posner explained why this ought to be a boon for the independent production companies that the old rules were designed to protect.<sup>15</sup> In the real world, elimination of these rules has devastated the independent television production industry;<sup>16</sup> every major network now is integrated with one or more production studios under common ownership.<sup>17</sup> The big seem to get bigger, the independent tend to disappear.

Against this background, it seemed possible that the 109th Congress would significantly revamp the statutory framework for telecommunications regulation – again, largely in favor of the newly consolidated telephone industry.<sup>18</sup> A key impetus for the measure was the desire to ease the way for telephone companies to get into the business of delivering video programming.<sup>19</sup> In June 2006, the Senate Commerce Committee approved proposed legislation that would

<sup>14</sup> See Evaluation of the Syndication and Financial Interest Rules, 8 F.C.C.R. 3282 (second report and order) (1993).

<sup>15</sup> *Schurz Commc'ns, Inc. v. FCC*, 982 F.2d 1043 (7th Cir. 1992) (vacating the financial interest and syndication rules as “arbitrary” and “capricious”).

<sup>16</sup> “To get a flavor of how consolidated the industry has become, consider this: In 1990, the major broadcast networks - ABC, CBS, NBC, and Fox - fully or partially owned just 12.5 percent of the new series they aired. By 2000, it was 56.3 percent. Just two years later, it had surged to 77.5 percent.” Ted Turner, *My Beef With Big Media*, WASH. MONTHLY, July/Aug. 2004, available at <http://www.washingtonmonthly.com/features/2004/0407.turner.html>.

<sup>17</sup> The Disney-ABC Television Corporate Group includes the ABC television network and Touchstone Television, Walt Disney Television Animation, Buena Vista Worldwide Television and Walt Disney Television International, as production and syndication arms. General Electric owns NBC Television and NBC Universal. See Disney-ABC Television Group Fact Sheet, <http://www.disneyabctv.com/division/pdf/ABCTelevision.pdf> (last visited Mar. 2, 2007). CBS Corporation owns CBS Television and CBS Paramount Television. See CBS Corporation, Our Company, [http://www.cbcorporation.com/our\\_company/index.php](http://www.cbcorporation.com/our_company/index.php) (last visited Mar. 2, 2007). News Corporation owns the Fox broadcast network, as well as Twentieth Century Fox Television, its production studio. See News Corporation, [www.newscorporation.com](http://www.newscorporation.com) (last visited Mar. 2, 2007). The CW network is a joint venture of CBS and Warner Bros., a subdivision of Time-Warner.

<sup>18</sup> Bara Vaida, *Clashing High-Tech Titans*, NAT'L J., Sept. 24, 2005, at 2918, 2919 (“The heavily regulated Bells are looking to Congress and the FCC, as well as to state leaders, for regulatory relief in their effort to gain a competitive edge.”).

<sup>19</sup> David Nather, *GOP Sees Best Bet in Stuffed Agenda*, CONG. Q. WKLY REP., Sept. 4, 2006, at 2300, 2321.

streamline video franchising procedures, clarify the regulatory status of Internet telephony, reform the universal service fund, and authorize municipal broadband systems, among other measures.<sup>20</sup>

A casual observer might be forgiven for thinking that, throughout the legislative debates, the public interest was well represented by a wide array of grass roots groups bringing diverse perspectives to bear. After all, members of Congress were hearing from organizations with such inspiring names as Consumers for Cable Choice, the New Millennium Research Council, MyWireless.org, Hands Off the Internet, TV4US, and The Future . . . Faster. In truth, many of these organizations, including the ones just named, were just “astroturf,” industry-funded *faux* mouthpiece organizations masquerading as grass roots politics. AT&T alone provides substantial support to Consumers for Cable Choice, the New Millennium Research Council, Hands Off the Internet, and TV4US.<sup>21</sup>

Until just a few months prior to this writing, it seemed as if non-incumbent points of view were being drowned out. Seemingly overnight, however, an unexpected coalition of public interest groups, including MoveOn.org and the Christian Coalition — backed by some powerhouse Internet companies, such as Google and Amazon — found a new issue with which to slow down the march towards more incumbent protection.<sup>22</sup> They began to organize around the issue of “net neutrality,” that is, whether ISPs should be able to offer “tier pricing” to content providers and web services who want priority in delivering their “products” to Internet end-users.<sup>23</sup> The ISPs, themselves now frequently owned by the old media powerhouses, argue that generating revenues through tier pricing is necessary to finance the infrastructure investments that will provide America with the next generation of broadband communications.<sup>24</sup> Proponents of

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<sup>20</sup> *Id.*

<sup>21</sup> COMMON CAUSE, WOLVES IN SHEEP’S CLOTHING: TELECOM INDUSTRY FRONT GROUPS AND ASTROTURF 5, 13 (2006); COMMON CAUSE, WOLVES IN SHEEP’S CLOTHING, PART II: MORE TELECOM INDUSTRY FRONT GROUPS AND ASTROTURF 5, 7 (2006).

<sup>22</sup> Drew Clark, *Tangled Net*, NAT’L J., July 8, 2006, at 29, 32; Adam Cohen, *Editorial Observer: Why the Democratic Ethic of the World Wide Web May Be About to End*, N.Y. TIMES, May 28, 2006, at 9.

<sup>23</sup> *Id.*; see also Angele A. Gilroy, Cong. Research Serv., *Net Neutrality: Background and Issues* (2006), available at <http://www.fas.org/sgp/crs/misc/RS22444.pdf>.

<sup>24</sup> DAVID P. MCCLURE, U.S. INTERNET INDUST. ASS’N, NETWORK NEUTRALITY AND TIERED BROADBAND SERVICES 14 (2006), available at <http://instituteforliberty.org/IFC/NN-USIIA-02052006.pdf>.

net neutrality, however, respond that tier pricing will give a market advantage to heavily capitalized incumbent firms, and discourage innovation by smaller entrepreneurs.<sup>25</sup> During the summer of 2006, the “net neutrality” movement picked up steam, including rallies in twenty-five cities around the United States.<sup>26</sup> As the 109th Congress neared its end, the prospects for any immediate compromise that would clear the way for significant new telecommunications legislation disappeared.<sup>27</sup>

In terms of America’s national interests, it would be hard to overstate what is at stake in the current policy struggle. The lack of a national broadband strategy has led to a deadening of real competition, with profound economic costs for both households and businesses. Many households have access to only one broadband provider, and nearly one-tenth have none.<sup>28</sup> According to FCC Commissioner Michael Copps, things are “just as bad” for businesses: “[t]he telecom merger spree has left many office buildings with a single provider – leading to annual estimated overcharges of \$8 billion.”<sup>29</sup>

The stakes are also political and cultural. An America whose communications infrastructure – including print, telephony, broadcast, cable, satellite, and the Internet – is controlled by a relatively few giant firms will simply not be the same as an America in which control is decentralized. Fewer startups will succeed. The range of new cultural “products” will be narrower. The opportunities for individuals and groups to innovate for both private and public good will be reduced. The quality of our democratic life will be impoverished.

Resisting centralization will be tough. For many Americans the trajectory of change in the world of communications is likely to seem positive no matter who is in charge. Opportunities for self-expression and the acquisition of information will be somewhat greater tomorrow than they are today. However, the hegemony of the most powerful companies will be greater, and the opportunities for the rest of us will not expand to anything near their full potential. Furthermore, the public policy stakes for most people are easily obscured by the

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<sup>25</sup> Lawrence Lessig, *In Support of Net Neutrality*, 3 ISJLP 185 (2007).

<sup>26</sup> Anne Broache, *Net Neutrality Fans Rally in 25 Cities*, CNET NEWS.COM, Aug. 31, 2006, [http://news.com.com/Net+neutrality+fans+rally+in+25+cities/2100-1028\\_3-6111489.html](http://news.com.com/Net+neutrality+fans+rally+in+25+cities/2100-1028_3-6111489.html).

<sup>27</sup> Nather, *supra* note 19, at 2321.

<sup>28</sup> Michael J. Copps, *America's Internet Disconnect*, WASH. POST, Nov. 8, 2006, at A27.

<sup>29</sup> *Id.*

technical aspects of the telecommunications debate. Most Americans – perhaps most American legislators – have little idea what “net neutrality,” “universal service,” “open access,” and so on actually mean. Finally, in terms of understanding the implications for American democracy, we seem stuck with a discourse about free speech that is hopelessly inadequate. Our First Amendment jurisprudence remains oblivious to the skyrocketing media-driven costs of political campaigns and the power of media conglomerates over our political and cultural discourse. The spontaneous on-air utterance of a single vulgar word can subject a broadcaster to substantial administrative fines,<sup>30</sup> but a broadcaster’s failure to represent fairly competing political positions on matters of public controversy is beyond the FCC’s reach<sup>31</sup> – even if that broadcaster happens to control two television networks, five major cable networks, one of America’s largest film studios, and one of its largest circulation daily newspapers, among other media entities.<sup>32</sup>

In this environment, the need is compelling to engage both expert researchers and the public at large in genuine deliberation about telecommunications and our national future. We are pleased, in this issue of *I/S: A Journal of Law and Policy for the Information Society* (“I/S”), to present both scholarly research and expert advocacy that casts important new light on some of the most important questions now facing telecom policy makers, both in the United States and abroad.

Two preliminary thoughts are in order. First, *I/S* is committed to providing an important avenue for first-rate analysis, irrespective of discipline or policy orientation. It will readily be perceived that the authors in this issue probably disagree with one another on a variety of points, and some would certainly disagree with the thrust of this brief introductory essay. In short, when it comes to selecting manuscripts,

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<sup>30</sup> Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, 19 F.C.C.R. 4975 (2004) (holding that NBC violated 18 U.S.C. § 1464 by broadcasting Bono’s exclamation that the award to him of a Golden Globe was “really, really fucking brilliant”).

<sup>31</sup> Complaint of Syracuse Peace Council, 2 F.C.C.R. 5043 (1987) (repealing the Fairness Doctrine), *aff’d*, *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

<sup>32</sup> Among the more prominent media entities owned by News Corporation are the Fox Television Stations and MyNetworkTV, the Fox Movie Channel, Fox Sports Channel, Fox News Channel, FX, and National Geographic, 20th Century Fox, and the New York Post. See News Corporation, *supra* note 17.

there is no *I/S* editorial line to toe, other than one of quality. Our objective is to offer a spectrum of different points of view, all skillfully presented. Second, it is our policy to accept not only research articles in conventional academic form, but also less formal commentaries. We especially welcome statements of position by notable expert participants in public debates and short essays that may contribute to intellectual discussion even in a relatively brief, less fully developed form. The commentaries in this issue qualify under both of these criteria.

The five research articles in the current issue focus on some of the most contentious topics in telecom reform: video distribution and broadband penetration, municipal broadband, media concentration, and universal service. In *The Impact of Video Service Regulation on the Construction of Broadband Networks to Low-Income Households*,<sup>33</sup> George S. Ford, Thomas M. Koutsky, and Lawrence J. Spiwak argue that easing the barriers to the sale of video along with voice and broadband Internet service will have a socially significant positive externality – it will promote the deployment of advanced communications networks in low-income areas. Using census data and a computer simulation of network deployment under varying conditions, they seek to demonstrate that those firms allowed to offer video service will build out to reach low-income households to a substantially greater degree than firms that can offer only broadband Internet access or broadband plus telephony. The analysis suggests how the high demand for video among low income households can be used as a lever for overcoming a race and income divide in terms of household broadband availability.

*Rationalizing the Municipal Broadband Debate*<sup>34</sup> by Michael J. Santorelli looks at another and increasingly popular strategy for accelerating broadband deployment, namely, municipal involvement in the building, ownership, or management of broadband networks. Santorelli identifies potential difficulties with either legislative preemption of such municipal involvement or a full-fledged municipal takeover of responsibility for network construction and operation. Although he tends to see markets as adequate to meet community needs, Santorelli sets forth a framework of principles for evaluating when public-private partnerships in the provision of broadband service might usefully accelerate broadband availability.

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<sup>33</sup> George S. Ford, Thomas M. Koutsky & Lawrence J. Spiwak, *The Impact of Video Service Regulation on the Construction of Broadband Networks to Low-Income Households*, 3 ISJLP 13 (2007).

<sup>34</sup> Michael J. Santorelli, *Rationalizing the Municipal Broadband Debate*, 3 ISJLP 43 (2007).



The concentration of media ownership is the focus of *Media Diversity and Substitutability: Problems with the FCC's Diversity Index*.<sup>35</sup> Adam Marcus argues against the trend of allowing increased concentration in the radio broadcast industry because of supposed competition from the Internet. He argues that the Internet is not a robust substitute for radio, and cannot be expected to offset the loss in local news and responsiveness to local needs that result from the concentration of broadcast media. Broadcast media are generally affected by a market imperfection, namely, that the market for broadcasters is advertisers, not the general public. Hence, he argues a return to a broadcaster trusteeship model is needed to restore broadcaster accountability to the American people.

The policy issues preoccupying U.S. decision makers are hardly limited to the United States alone. A clear example is "universal service," a concept subject to a variety of definitions, but which has historically embodied an aspiration to make affordable telephone service available to everyone, regardless of income or location. When telephony is a monopoly service, it is possible to pursue universal service through a system of subsidies in which higher-income customers and lower-cost services help underwrite the cost of lower-income customers and higher-cost services. Competition makes such a strategy untenable, and, since the breakup of the old AT&T, the United States has wrestled with how best to reconceptualize and finance our universal service objectives.<sup>36</sup>

Two of the articles that follow illuminate the complexity of universal service policy with perspectives from two very different international contexts. In *The New Concept of Universal Service in a Digital Networked Communications Environment*,<sup>37</sup> Mira Burri Nenova re-theorizes universal service as a human rights imperative in a world in which communications and information networks are best understood as public goods. The immediate target of her rethinking is the European Union, which of necessity must develop an approach to universal service obligations that makes sense for all of European society. In sharp contrast, Jun Xia illuminates the enormous complexity of achieving universal service in its most basic form for

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<sup>35</sup> Adam Marcus, *Media Diversity and Substitutability: Problems with the FCC's Diversity Index*, 3 ISJLP 83 (2007).

<sup>36</sup> JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, *DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE* 333-355 (MIT Press 2005).

<sup>37</sup> Mira Burri Nenova, *The New Concept of Universal Service in a Digital Networked Communications Environment*, 3 ISJLP 117 (2007).

the people of China. As documented in *Towards a Sustainable Institutional Arrangement for USOs in China: Current Status, Support Mechanisms, and Regulatory Governance*,<sup>38</sup> the Chinese government's ongoing substantial role in telecommunications service provision does not necessarily simplify the challenge of arriving at a sound universal service strategy given the mix of public and private entities involved in telephone service and the scope of unmet needs, especially in rural areas.

On the subject of net neutrality, which sunk some legislators' hopes in 2006 for a comprehensive telecommunications bill, we present two deeply contrasting commentaries. *Net Neutrality* is a republication of Professor Lawrence Lessig's influential February 2006 testimony to the Senate Committee on Commerce, Science, and Transportation, propounding mandatory net neutrality as a necessary measure to maximize the Internet's potential to generate innovation at the "edge" of networks.<sup>39</sup> Deeply opposed to this view, Randolph J. May argues, in *Net Neutrality Mandates: Neutering the First Amendment in the Digital Age*,<sup>40</sup> that neutrality rules would operate as speech restrictions, potentially infringing on the constitutional rights of Internet service providers. May recognizes that such mandates might be analogized to common carrier rules that have long been upheld, but believes that the constraint on ISP autonomy cannot be justified given what he takes to be unprecedented citizen access to the channels of communication.

As the FCC and a new Congress gear up for a fresh foray into telecommunications reform, we trust that this issue of *I/S* will enrich ongoing debates about critical issues. Whether the animating theme can shift from "Protect incumbents," to "Promote innovation," is very much at stake.

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<sup>38</sup> Jun Xia, *Towards a Sustainable Institutional Arrangement for USOs in China: Current Status, Support Mechanisms, and Regulatory Governance*, 3 ISJLP 147 (2007).

<sup>39</sup> Lessig, *supra* note 25.

<sup>40</sup> Randolph J. May, *Net Neutrality Mandates: Neutering the First Amendment in the Digital Age*, 3 ISJLP 197 (2007).